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ARTICLES

FROM RIGHT TO WRONG: A CRITIQUE OF THE 2000 UNIFORM PARENTAGE ACT

Mary Patricia Byrn¹

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I. INTRODUCTION

In 1973, the National Conference of Commissioners on Uniform State Laws (the Conference)² proposed a Uniform Parentage Act (UPA) that radically changed how parentage was

2. The Conference was founded in 1891 with the goal of reconciling inconsistent state laws with the American federalist system of government. Often composed of many of the nation's foremost legal authorities, the Conference meets annually to craft uniform laws that are proposed to state legislatures for approval. See WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE

determined in the United States.³ Prior to 1973, the parentage laws of most states failed to identify two legal parents for thousands of children merely because their parents were not married.⁴ These “illegitimate”⁵ children were considered “a child of no one”⁶ under the law and were denied the significant emotional, financial, and legal benefits of having two legal parents.⁷ By the early 1970s, however, the Conference recognized that such treatment of children was becoming scientifically, socially, and legally untenable and took the “revolutionary”⁸ step of promulgating an act that identified two legal parents for both marital and nonmarital children.⁹ This choice, though radical at the time, demonstrated the progressive thinking of the Conference and led to similar changes in the parentage laws of every state in the country.¹⁰

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 3-5, 165-77 (1991).

3. UNIF. PARENTAGE ACT (1973), 9B U.L.A. 377 (2001 & Supp. 2006).

4. See HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971) [hereinafter KRAUSE, *ILLEGITIMACY*].

5. Illegitimacy is defined as “[t]he state or condition of a child born outside a lawful marriage.” BLACK’S LAW DICTIONARY 328 (2nd ed. 2001). Though “illegitimate” and other terms such as “bastard” have been used to describe children born to unwed parents, for the purposes of this paper, the word “nonmarital” will be used throughout. For a helpful explanation of illegitimacy further defined, see KRAUSE, *ILLEGITIMACY*, *supra* note 4, at 10-19.

6. Nonmarital children were considered to be *filius nullius*, or a child of no one. WILLIAM BLACKSTONE, 1 COMMENTARIES *459.

7. See Olga V. Kotlyarevskaya & Sara B. Poster, *Separation Anxiety Among California Courts: Addressing the Confusion Over Same-Sex Partners’ Parentage Claims*, 10 U.C. DAVIS J. JUV. L. & POL’Y 153, 156 (2006) (listing many of the benefits denied to nonmarital children, such as the ability to file wrongful death claims based on their father’s death, to inherit from their fathers, to receive federal benefits through their fathers, and the ability to take their father’s last name); see also Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 477 n.4 (1967) [hereinafter Krause, *Equal Protection*] (“The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undeniable evidence of contramoral forces; in short, a problem . . .”).

8. UNIF. PARENTAGE ACT prefatory note (1973), 9B U.L.A. 378 (2001) (stating that when work on the 1973 UPA began “the notion of substantive legal equality of children regardless of the marital status of their parents seemed revolutionary”).

9. UNIF. PARENTAGE ACT § 2, 9B U.L.A. 390 (1973). The Conference had made earlier attempts to address this issue, but those model acts covered limited ground in this area and received limited acceptance by the states. See, e.g., UNIF. ILLEGITIMACY ACT, 9 U.L.A. 389 (1942) (adopted in seven states); UNIF. ACT ON BLOOD TESTS TO DETERMINE PATERNITY, 9 U.L.A. 110 (1957) (adopted in nine states); UNIF. ACT ON PATERNITY, 9C U.L.A. 1 (2001) (adopted in four states).

10. See UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. at 5 (Supp. 2006) (“As of December, 2000, UPA (1973) was in effect in 19 states stretch-

In 2000, the Conference promulgated a new Uniform Parentage Act that includes broad provisions for determining parentage of children conceived through assisted reproductive technologies (ART).¹¹ Unlike the 1973 UPA, which identified two legal parents for all children conceived through sexual intercourse, the 2000 UPA does not identify two legal parents for all children conceived via ART. Instead, the 2000 UPA leaves the thousands of children conceived via ART and born to same-sex couples in the emotionally, financially, and legally vulnerable position of having only one legal parent.¹² Moreover, the Conference made this choice despite the fact that the same scientific, social, and legal arguments that convinced the Conference to recognize both parents of nonmarital children in the 1973 UPA existed in support of recognizing both parents of children conceived through ART and born to same-sex couples in the 2000 UPA. When faced with these arguments in 1973, the Conference made a bold – and ultimately overwhelmingly successful – choice. In 2000, however, the Conference made a short-sighted decision and proffered an act that fails to address the needs of

ing from Delaware to California; in addition, many other states have enacted significant portions of it.”) See also Mary Louise Fellows, *A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195, 201 (1998) (stating that the UPA “has been a model for many state laws”).

11. See UNIF. PARENTAGE ACT (2000), 9B U.L.A. 295 (2001); UNIF. PARENTAGE ACT arts. 7, 8 (amended 2002), 9B U.L.A. at 46-56 (Supp. 2006). Article 7 covers children conceived “by means of assisted reproduction.” *Id.* § 701 at 49. The UPA defines “assisted reproduction” as “a method of causing pregnancy other than sexual intercourse.” *Id.* § 102 at 9. Article 8 deals with gestational agreements between intended parents and a gestational, also sometimes referred to as a surrogate, mother. *Id.* § 801 at 56. The states that have adopted the 2000 UPA are Delaware, DEL. CODE ANN. tit. 13C, §§ 8-101 to 8-904 (2003); North Dakota, N.D. CENT. CODE §§ DCC 14-20-01 to 14-20-66 (2005); Oklahoma, OKLA. STAT. tit. 10, § 7700-103; Texas, TEX. FAM. CODE ANN. §§ 160.001 to 160.763 (Vernon 2001); Utah, UTAH CODE ANN. §§ 78-45g-101 to 78-45g-902 (West 2005); Washington, WASH. REV. CODE ANN. §§ 26.26.011 to 26.26.913 (West 2002); and Wyoming, WYO. STAT. ANN. §§ 14-2-401 to 14-2-907 (2003).

12. See *infra* notes 318-53 and accompanying text for a discussion of the increasing number of children being conceived through ART and born to same-sex couples. These children may actually be in an even more vulnerable position than nonmarital children would be today. Data from Census 2000 suggests that same-sex couples with children have fewer economic resources compared to different-sex couples. See R. BRADLEY SEARS ET AL., THE WILLIAMS PROJECT ON SEXUAL ORIENTATION LAW AND PUBLIC POLICY, SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN THE UNITED STATES: DATA FROM CENSUS 2000 14 (2005), <http://www.law.ucla.edu/williamsinstitute/publications/Policy-Census-index.html> (stating that the household income, rate of home ownership, and level of education is lower for same-sex couples raising children than for different-sex couples raising children).

courts and states facing parentage determinations for these children throughout the country.¹³

Part II of this article briefly tracks the history of parentage laws in the United States and outlines the ART provisions in the 2000 UPA. This section demonstrates how the 2000 UPA systematically denies children conceived via ART and born to same-sex couples the benefits of having two legal parents. Part III compares the scientific advances in genetic testing that allowed courts to identify a child's genetic father and the parallel scientific advances in ART that have allowed increasing numbers of same-sex couples to have children. The 1973 Conference recognized that scientific advances lead to changes in the law — a connection the 2000 Conference failed to make. Part IV compares the impact of the civil rights and gay rights movements on parentage determinations. In the 1960s, the civil rights movement propelled society toward recognizing the inherent worth and equality of every human being, an ideal embodied in the 1973 UPA. Similarly, since 1970, the gay rights movement has been a driving force behind American society's increasing social acceptance and legal recognition of gays and lesbians and their children. The 2000 Conference, however, failed to embrace this developing ideal. Part V analyzes the role Supreme Court precedent played in necessitating changes to the 1973 UPA, and the relevant Supreme Court precedent which should have compelled the Conference to recognize children of same-sex parents in the 2000 UPA. Finally, Part VI discusses an influential law review article written in 1966 that ultimately convinced the Conference to legally recognize both parents of nonmarital children in the UPA.¹⁴ The same five

13. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004); *Antonucci v. Frances-Cameron*, No. FA 98042047S, 1999 WL 130356 (Conn. Super. Ct. Mar. 3, 1999); *Chambers v. Chambers*, No. CN00-09493, 2002 WL 1940145 (Del. Fam. Ct. Feb. 5, 2002); *Wakeman v. Dixon*, 921 So. 2d 669 (Fla. Dist. Ct. App. 2006); *In re Adoption of A.W.*, 796 N.E.2d 729 (Ill. App. Ct. 2003); *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *Smith v. Brown*, 718 N.E.2d 844 (Mass. 1999); *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000); *In re Parentage of Robinson*, 890 A.2d 1036 (N.J. Super. Ct. Ch. Div. 2005); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992); *Janis C. v. Christine T.*, 742 N.Y.S.2d 381 (N.Y. App. Div. 2002); *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002); *L.S.K. v. H.A.N.* 813 A.2d 872 (Pa. Super. Ct. 2002); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005); *Coons-Andersen v. Andersen*, 104 S.W.3d 630 (Tex. App. 2003); *Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

14. See UNIF. PARENTAGE ACT prefatory note (1973), 9B U.L.A. 378 (2001) (stating that the 1973 UPA had its "genesis" in this law review article).

arguments proffered in that article apply with equal force to children conceived through ART and born to same-sex couples. In 1973, the Conference had the courage to heed these arguments, and in so doing promulgated a prophetic and influential parentage act. In 2000, the Conference balked, proposing a parentage act that ignores the needs of thousands of children and their parents.

II. WHAT THE 1973 CONFERENCE GOT RIGHT AND THE 2000 CONFERENCE GOT WRONG

At common law, because the vast majority of children were conceived through sexual intercourse, the laws determining parentage were based on having a biological connection to the child. Therefore, if the child's parents were married, the law provided that the birth mother was the child's legal mother and her husband was the legal father.¹⁵ If the child's parents were not married, however, the child was considered "illegitimate" and the law recognized only the birth mother as a legal parent, depriving the child of the benefits of having two legal parents and the father the benefits of a legal, and often emotional, relationship with his child.¹⁶

In 1973, the Conference made a radical departure from the common law and promulgated a UPA that identified two legal parents for all children conceived through sexual intercourse, regardless of their parents' marital status.¹⁷ Under the 1973 Act, if the child's parents are married, the woman who gave birth to the child is the legal mother, and her husband is presumed to be the legal father, just as at common law.¹⁸ If the child's parents are not married, the birth mother is still the legal mother, but legal paternity can be established in a number of ways, including by the father filing an acknowledgment of paternity or by "receiv[ing] the child into his home and openly hold[ing] out the

15. See Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562-66 (2000) (describing the foundations and evolution of paternity determinations at common law). The mother's husband was "presumed" to be the child's father. This "marital presumption of paternity" was very strong and could only be rebutted if the husband could prove he did not have access to his wife during the time period that the child could have been conceived. *Id.* at 562-63.

16. *Id.* at 553.

17. UNIF. PARENTAGE ACT § 2, 9B U.L.A. 390 (1973).

18. *Id.* § 3 at 391.

child as his natural child.”¹⁹ As such, the 1973 UPA extends the parent-child relationship to both parents of children conceived through sexual intercourse.

In the 2000 UPA, the core provisions that determine parentage of children conceived through sexual intercourse changed very little from those in the 1973 UPA.²⁰ The provisions determining parentage of children conceived through ART, however, changed dramatically. The 2000 Conference, recognizing that the use of assisted reproductive technologies had become “common-place,”²¹ added two new provisions to determine parentage of children conceived through ART.²² These new provisions base determinations of parentage of ART children on intent.²³

19. *Id.* § 4(a)(4) at 394.

20. The Conference did add new sections pertaining to the voluntary acknowledgement of paternity and the use of paternity registries. *See, e.g.*, UNIF. PARENTAGE ACT arts. 3, 4 (2000), 9B U.L.A. 321, 323-27 (2001).

21. UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. 6 (Supp. 2006).

22. UNIF. PARENTAGE ACT arts. 7, 8 (amended 2002), 9B U.L.A. 49-56 (Supp. 2006). In the 1973 UPA, the Conference included only one narrow provision regarding children conceived through ART. According to that provision, if a husband consents to his wife being artificially inseminated with donor semen by a licensed physician, the woman would be determined to be the child’s legal mother and her husband the legal father. UNIF. PARENTAGE ACT § 5 (1973), 9B U.L.A. 407-08.

Articles 7 and 8 are based on the Uniform Status of Children of Assisted Conception Act (USCACA), which the Conference promulgated in 1988. 9C U.L.A. 363 (2001). USCACA was adopted by only two states, and the 2000 Act “relegates to history all of the earlier uniform acts dealing with parentage” including the 1973 UPA and the 1988 USCACA. UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. 6 (Supp. 2005). In the prefatory note to USCACA the Conference discussed the developments in ART and the need to determine the status of these children who “without guile or fault, but because of accident of birth . . . have been deprived of certain basic rights.” 9C U.L.A. at 364.

23. Since conception via ART most often involves a third-party who is genetically related to or physically connected with the child, such as a sperm donor, egg donor, and/or surrogate mother, the new ART provisions do not base parentage on having a genetic or biological relationship with the child. Instead, the 2000 UPA bases parentage of ART children on intent. That is, the two people who, at the time of conception, intended to raise the child are determined to be the child’s legal parents. UNIF. PARENTAGE ACT §§ 703, 801 (amended 2002), 9B U.L.A. 50, 56 (Supp. 2006). Some think that parentage determinations in the ART context should be based on the best interests of the child. This test, however, creates too much instability for the children and their families. Waiting months after the child is born to determine which adults – the intended parents, the donors, and/or the surrogate – are in the child’s best interest leaves the newborn child in limbo. The intent test, on the other hand, allows for parentage determinations to be made at birth, similar to when children are conceived through sexual intercourse. For a discussion of the development and application of the intent test in ART cases, see Susan Frelich Apleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. Rev. 227, 294 (2006); Janet L. Dolgin, *The “Intent” of Re-*

When the 2000 UPA was originally promulgated, the ART provisions were drafted to apply only if the intended parents were married.²⁴ For example, Article 7 provided that if a husband consented to his wife's assisted reproduction, then he would be the father of any resulting child.²⁵ Similarly, Article 8 provided that the intended parents of a child conceived pursuant to a gestational agreement must be married.²⁶ The American Bar Association objected to the wording of these provisions on the ground that they did not treat children of married and unmarried parents equally.²⁷ Calling the equal treatment of children the "hallmark" of the 1973 UPA,²⁸ the Conference amended the 2000 UPA in 2002, and changed the language in Articles 7 and 8 from "husband and wife" to "man and woman."²⁹

production: Reproductive Technologies and the Parent-Child Bond, 26 CONN. L. REV. 1261 (1994); Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2004); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990). Additionally, Article 7 clearly states that a donor is not a parent of a child conceived via ART. UNIF. PARENTAGE ACT §702 (amended 2002), 9B U.L.A. 49 (Supp. 2005).

24. See UNIF. PARENTAGE ACT §§ 703, 801 (2000), 9B U.L.A. 356, 362 (2001).

25. *Id.* § 703 at 356.

26. See *id.* § 801(b) at 362.

27. See UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. 6 (Supp. 2005). Professor Joan Heifetz Hollinger was a key figure in the negotiations between the American Bar Association and the Conference over the husband/wife language used in the 2000 UPA. Interestingly, Hollinger also noted the unequal treatment of children of same-sex couples as well: "By providing no way for children born to same-sex couples to have two legal parents [except through adoption . . .], the new UPA raises serious concerns about the best interests and equal protection of these children." Joan Heifetz Hollinger, *Concerns About the NCCUSL Revised Uniform Parentage Act (UPA) of 2000*, AMERICAN ASSOCIATION OF AMERICAN LAW SCHOOLS, (2001) (course synopsis for ALS Workshop on Defining the Family in the Millenium), available at <http://www.aals.org/profdev/family/hollinger.html>. See also Mark David Agrast, *Report of the Chair 2002-2003*, ABA SEC. OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, Aug. 2003, at 18-19 (describing Hollinger's role in the UPA negotiations).

28. UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. 6 (Supp. 2005). The "equal treatment" of children is, no doubt, an overstatement. The 1973 UPA, for example, does not include clear provisions for determining parentage of children of gays and lesbians. In addition, it can be argued that maintaining any legal conception of legitimacy and illegitimacy is *per se* unequal. See, e.g., Patricia Tenoso & Aleta Wallach, *Book Review*, 19 UCLA L. REV. 845 (1972) (reviewing HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971), and arguing that because the Act does not "confer legitimate status upon all children by virtue of the fact of birth" it perpetuates two unequal classes of children).

29. See UNIF. PARENTAGE ACT §§ 703, 801(b) (amended 2002), 9B U.L.A. 50, 56 (Supp. 2005).

These amendments to the 2000 UPA, however, did not result in the equal treatment of *all* children conceived via ART. Instead, the 2000 UPA denies children conceived via ART and born to same-sex couples the benefits of having two legal parents. For example, although a lesbian who gives birth to a child conceived through ART with the intent of raising the child would be the child's legal mother, Article 7 would not recognize her partner who also intended to raise the child as a legal parent. Similarly, Article 8 would not recognize both members of a lesbian or gay couple who intended to raise a child born to a surrogate mother as the child's legal parents.³⁰ As a result, the 2000 UPA fails to extend a parent-child relationship to both parents of all children conceived via ART.³¹

III. HOW SCIENCE MAKES PARENTS

In the late 1960s, scientific developments in genetic testing presented the opportunity to identify a child's genetic parents. The 1973 Conference recognized the impact of this developing science on paternity determinations of nonmarital children and drafted a progressive act that recognized both genetic parents of children conceived through sexual intercourse. In the 1980s and 1990s, vast developments in reproductive technology created new opportunities for people to form families. Despite its recognition of ART generally, however, the 2000 Conference neglected to recognize both intended parents of all ART children.

30. It is important to note that one of the intended parents of a same-sex couple could be recognized as a legal parent if he or she had a genetic relationship to the child. That is, if his sperm or her egg was used to conceive the child.

31. This decision is even more curious in light of the Uniform Adoption Act promulgated in 1994, which allows for adoption of a child by the parent's same-sex partner. UNIF. ADOPTION ACT § 4-102(b), 9 U.L.A. 11, 105 (1999) (providing that a court may allow an individual who is not the legal spouse of the custodial parent to file a petition, with the consent of the custodial parent, to adopt the child). In addition, the American Law Institute recognized gay and lesbian partnerships and parentage in 2000. PRINCIPLES OF THE LAW OF FAM. DISSOLUTION §§ 2.03 (defining parent by estoppel and de facto parent), 6.03 (defining domestic partnership for same- and opposite-sex couples). *See also* RESTATEMENT (THIRD) OF PROPERTY §§ 2.2 cmt. g (adopting the ALI's finding as to domestic partnership for the purposes of intestacy), 2.5 cmt. l (treating a child conceived via ART "as part of the family of the parent or parents who treat the child as their own and raise the child, one or both of whom might not be the child's genetic parent").

A. Genetic Testing

At common law, if a married woman gave birth to a child, she was assumed to be the genetic mother and her husband was presumed to be the genetic father.³² When a child was born outside of marriage, however, doubt was raised as to the identity of the genetic father.³³ Therefore, as rudimentary blood tests were developed, courts began to allow men accused of fathering nonmarital children to proffer evidence of blood tests to disprove their paternity.³⁴

By the late 1960s, however, blood tests became accurate enough to be used not only to disprove paternity, but also to prove paternity by positively identifying a child's genetic father.³⁵ Whereas in 1956, test results could distinguish only 100,000 people by their unique "genetic fingerprints," by 1968, new subtests and typing schemes allowed for more than 50,000,000 people to be differentiated.³⁶ In other words, in 1956 a "false" match be-

32. Only on rare occasions was this presumption rebutted, such as when the husband could prove lack of access to his wife or offered convincing evidence of impotency. In other words, if the husband could show that he could not possibly be the child's genetic father. See Appleton, *supra* note 23, at 232-34; Heather Faust, *Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of Presumption of Legitimacy and Paternity by Estoppel on the Admissibility of Blood Tests to Determine Paternity*, 100 DICK. L. REV. 963, 963 (1995); Glennon, *supra* note 15, at 562.

33. The fear that women would accuse men falsely of fathering their children led to rules of evidence as well as laws that protected putative fathers. See Fellows, *supra* note 10, at 196. See also Note, *The Rights of Illegitimates under Federal Statutes*, 76 HARV. L. REV. 337, 354-55 (1962) (discussing the inclusion of anti-fraud provisions in inheritance laws to protect men wrongly charged as fathers).

34. See Steuart Henderson Britt, *Blood-Grouping Tests and the Law: The Problem of "Cultural Lag"*, 21 MINN. L. REV. 671, 680 (1937). Blood tests were used to refute paternity in two ways. First, if a component found in the child's blood was one that could not have come from the mother, it must have been in the alleged father's blood, or that person was not the genetic father. Second, if the father had a component in his blood that all of his offspring would necessarily possess, and the child in question did not have it, the alleged father could not be the genetic father. See Faust, *supra* note 32, at 966.

35. Although the American Medical Association advocated the use of blood tests to prove paternity as early as the 1950s, American judges were reluctant to accept such evidence. KRAUSE, *ILLEGITIMACY*, *supra* note 4, at 129-30. In 1952, the Conference promulgated the Uniform Blood Tests to Determine Paternity Act, which recommended the use of genetic tests not only to acquit the falsely accused, but to positively establish paternity. This act, however, was not widely adopted. UNIF. PARENTAGE ACT (1973), 9B U.L.A. 377 (2001).

36. KRAUSE, *ILLEGITIMACY*, *supra* note 4, at 123-24. In just twelve years, the tests grew approximately 500 times more accurate. See also LEON N. SUSSMAN, *PATERNITY TESTING BY BLOOD GROUPING* xi (2d ed. 1976) (describing the rapid expansion of blood testing between 1956 and 1976); OFFICE OF CHILD SUPPORT

tween an alleged father and a child had a 1 in 100,000 chance of occurring, but by 1968, such an error had only a 1 in 50,000,000 chance of occurring. Despite the improved tests, however, courts were reluctant to allow evidence of the tests to be used to prove paternity.³⁷ The 1973 Conference, however, recognized the significant impact these scientific advances could have in paternity determinations. As such, and despite the fact that genetic testing had not yet been perfected,³⁸ the 1973 Conference led the country in embracing this technology and ushered in a whole new era of equality for nonmarital children conceived through sexual intercourse and their families.

B. *Assisted Reproductive Technology*

Given its scientific awareness in 1973, it is surprising that the 2000 Conference chose to disregard the full implications of extensive and ongoing advances in ART. This is especially surprising given that the 2000 Conference acknowledged that scientific advances, such as the “thousands of children . . . born in the United States each year as a result of ART,” were cause for significant revision to the UPA.³⁹

Assisted reproductive technology, as defined in the 2000 UPA, refers to medical techniques which are used to conceive a child apart from sexual intercourse.⁴⁰ This includes artificial in-

ENFORCEMENT, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, BLOOD TESTING TO ESTABLISH PATERNITY 5 (1977) (memorandum to state child support agencies describing improved blood matching processes and enhanced accuracy with the introduction of the HLA system).

37. See KRAUSE, *ILLEGITIMACY*, *supra* note 4, at 123 (noting that American courts were slow to recognize the increasing accuracy of blood tests). By 1976, blood testing was used not only for determining paternity, but also in kidnapping cases, immigration and citizenship claims, and crime scene investigations. See SUSSMAN, *supra* note 36, at 6.

38. The addition of the HLA system to exclusionary testing allowed for 99.85% accuracy by 1992. See E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 25 (1993).

39. UNIF. PARENTAGE ACT art. 7, (amended 2002), 9B U.L.A. 49 (Supp. 2005). Though ART statistics were collected as early as 1989 by the Society for Assisted Reproductive Technology (SART), mandatory reporting was not required by law until 1992, and the CDC did not collect ART data until 1996. Laura A. Schieve et al., *Live-Birth Rates and Multiple-Birth Risk Using In Vitro Fertilization*, 282 J. AM. MED. ASSOC. 1832, 1833 (1999). Some centers may not submit the mandatory report and others report faulty data, making the annual survey an undercount of ART cycles performed in the United States. *Id.*

40. *Id.* at 9.

semination (AI),⁴¹ in vitro fertilization (IVF),⁴² and surrogacy.⁴³ AI is the oldest, simplest, and most common form of ART.⁴⁴ Widely used in the United States since the 1950s, by 1979 estimates suggested that between 6,000 and 10,000 children conceived via AI were born each year.⁴⁵ As technology for freezing and storing sperm advanced and sperm banks became more popular, the use of AI increased further.⁴⁶ By 1996, an estimated 170,000 women underwent AI each year, resulting in 65,000 births annually.⁴⁷

In vitro fertilization was first used successfully in the United States in 1981,⁴⁸ and by 1996, 65,863 IVF cycles were performed each year, resulting in the birth of 21,196 children.⁴⁹ By 2000, these numbers increased to 99,989 IVF cycles and 35,345 children.⁵⁰ Moreover, the IVF success rate increased from five per-

41. Artificial insemination is the process of injecting sperm into the female genital tract using a syringe. See generally ROBERT BLANK AND JANNA C. MERRICK, *HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS* 86 (1995).

42. In vitro fertilization is the procedure by which a woman's eggs are removed from her ovaries and fertilized outside the body. The resulting embryos are then transferred into a woman's uterus. *Id.* at 87.

43. Traditional surrogacy typically consists of artificial insemination of a woman. A traditional surrogate, therefore, is the genetic mother of the child. Gestational surrogacy typically involves IVF in which an embryo is transferred to the surrogate's uterus. A gestational surrogate, therefore, is typically not genetically related to the child. *Id.* at 109-10.

44. *Id.* at 86.

45. See Martin Curie-Cohen et al., *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 588 (1979).

46. See Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1094 (2002) (noting that the increasing popularity of AI was directly linked to the availability of sperm banks). In 1988, the number of births achieved using frozen sperm was estimated at over 30,000. By 1995, over 400 hospital-based cryobanks were in existence as well as an unknown, but growing number of commercial sperm banks. See BLANK, *supra* note 41, at 94.

47. See Karin Mika & Bonnie Hurst, *One Way to Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 996 (1996).

48. See Robert W. Rebar & Alan H. DeCherney, *Assisted Reproductive Technology in the United States*, 350 NEW ENG. J. MED. 1603, 1603 (2004). See Gary Frishman & Andrew Blazar, *The History of Assisted Reproductive Technology and Its Future*, 80 R.I. MED. & HEALTH 393, 394 (1997), for a history of the use and development of IVF in the United States.

49. *Assisted Reproductive Technology in the United States*, 71 FERTILITY & STERILITY 798, 798 (1999).

50. *Assisted Reproductive Technology in the United States*, 81 FERTILITY & STERILITY 1207, 1207 (2004).

cent in the mid-1980s to fifty percent in 2006,⁵¹ and the cost of IVF decreased substantially over the last decade.⁵² Such a dramatic increase in the success rate and decrease in the cost has led to a significant rise in the demand for IVF treatments. In 2003, the Center for Disease Control (CDC) estimated that IVF accounts for more than one percent of total live births in the United States, or nearly 50,000 children each year.⁵³

The increase in availability and affordability of AI and IVF has also led to an increase in the use of surrogacy.⁵⁴ The first known surrogacy contract in the United States was executed in 1976⁵⁵ and, by the 1980s, surrogacy had become a popular practice in many states.⁵⁶ Although there are no definitive statistics on the use of surrogacy, in 1988, the New York State Task Force on Life and the Law estimated that there had been between 750 and 1,000 contracted surrogacy births nationwide.⁵⁷ In 1993, the

51. Rebecca Vesely, *You've Come a Long Way, 'Test Tube' Baby*, OAKLAND TRIB., June 11, 2006, available at http://www.findarticles.com/p/articles/mi_qn4176/is_20060611/ai_n16476758/print.

52. In 1997, costs per delivery ranged from a low of \$39,000 to a high of nearly ten times that figure. Frishman, *supra* note 48, at 396. As of 2005, however, the average cost was estimated at \$12,400 per cycle. Sarah A. Weber, *Dismantling the Dictated Moral Code: Modifying Louisiana's In Vitro Fertilization Statutes to Protect Patients' Procreative Liberty*, 51 LOY. L. REV. 549, 555 n.23 (2005) (citing the CDC's online fact sheet).

53. CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 13 (2005). Due to the need to follow-up on pregnancies and synthesize reports received from hundreds of clinics, there is a lag time of almost two years between collection of data and publication. Thus, 2003 is the most recent year for which the CDC has finalized IVF data. *Id.* at 4-5.

54. See Bernstein, *supra* note 46, at 1108. See also Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 560 (1999) (noting greater societal awareness of surrogacy in the wake of general advances in reproductive technology).

55. See Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 608 (2003) (explaining the history and current practices of surrogacy arrangements); Keith J. Hey, *Assisted Conception and Surrogacy - Unfinished Business*, 26 J. MARSHALL L. REV. 775, 787 (1993) (referring to the first surrogacy contract executed in Michigan in 1976).

56. See Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 128 (1986). See also Behm, *supra* note 54, at 562 (discussing the growing popularity of surrogacy agreements across the United States from 1976 to the mid-1980s).

57. N.Y. STATE TASK FORCE ON LIFE & THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 25 (1988). The Task Force, formed by Governor Mario Cuomo to address public policy issues related to ad-

Center for Surrogate Parenting reported that there had been approximately 4,000 surrogate births since the late 1970s,⁵⁸ and in 2000, the CDC reported 1,210 attempted gestational surrogacy arrangements, twice the number attempted just three years earlier.⁵⁹

The 2000 Conference recognized that the dramatic increase in use of AI, IVF, and surrogacy since 1973, warranted new laws aimed at determining parentage of ART children. The Conference failed to acknowledge, however, that it is not only infertile couples and single men and women who are using ART to create families, but lesbian and gay couples who are also taking advantage of the scientific advancements in reproductive technology to have children.⁶⁰ Rather than leading the country in recognizing the impact of scientific advances on family law as the 1973 Conference did, the 2000 Conference shied away from reality, leaving thousands of children conceived via ART emotionally, financially, and legally vulnerable.

IV. SOCIAL MOVEMENTS AND FAMILY LAW

The 1973 UPA and the 2000 UPA were drafted not only after significant scientific advancements had occurred, but also in the wake of successful social movements in this country. The civil rights movement and the gay rights movement were motivated by a desire to remove the social stigma inflicted on subordinated groups and to eliminate laws that perpetuated those stigmas. While the 1973 Conference recognized the impact the civil rights movement had on removing stigmas perpetuated by family law when it drafted the 1973 UPA, the 2000 Conference failed to acknowledge that the gains made by the gay rights

vancements in medical technology, was prompted to research surrogate parenting in depth when the New York State Legislature had four surrogacy-related bills pending in the spring of 1987. *Id.* at i.

Other estimates at that time suggested that between 1,000 and 2,000 surrogate births had taken place in the previous decade. See APRIL MARTIN, *THE LESBIAN AND GAY PARENTING HANDBOOK: CREATING AND RAISING OUR FAMILIES* 103 (1993). It is impossible to know how many surrogate births have occurred, so estimates are sometimes incompatible. This number likely conflicts with the prior statistic because the Task Force only looked at contracted surrogacy births, whereas Martin includes *all* births via surrogate mothers. *Id.*

58. BLANK, *supra* note 41, at 110.

59. David P. Hamilton, *She's Having Our Baby: Surrogacy Is on the Rise as In-Vitro Improves*, WALL ST. J., Feb. 4, 2003, at D1.

60. See *infra* Part VI.A for a discussion of the increasing number of gays and lesbians using ART to form families.

movement created the need for similar changes in family law as well.

A. *The Civil Rights Movement*

A study of the origins of the 1973 UPA cannot be separated from the socio-political context of the civil rights movement. Although the civil rights movement began with a very precise goal – “the full and equal participation of black people in American institutions”⁶¹ – it came to stand for the full and equal treatment of *all* individuals in American society.⁶² By the late 1960s, the victories of the civil rights movement had unleashed a rights revolution in this country in which several subordinated groups, including nonmarital children and their families, began demanding equal rights. In addition, once society acknowledged the connection between poverty and discrimination, illegitimacy became a platform issue of the civil rights movement.

1. The Rights Revolution

The modern struggle for equal rights for African Americans dates back to the beginning of the 20th Century.⁶³ Although the Reconstruction Amendments promised a new way of life for African Americans,⁶⁴ state laws ensured that African Americans re-

61. RHODA LOIS BLUMBERG, *CIVIL RIGHTS: THE 1960s FREEDOM STRUGGLE* 2 (1984). See also SEAN DENNIS CASHMAN, *AFRICAN-AMERICANS AND THE QUEST FOR CIVIL RIGHTS, 1900-1990*, at 4 (1991) (stating that the precise meaning of civil rights in the beginning of the civil rights movement was “the political, social, and economic rights of African-American citizens to vote and to enjoy equality of opportunity in education, employment, and housing”); MARK NEWMAN, *THE CIVIL RIGHTS MOVEMENT* 1 (2004) (“The movement sought to secure equality under the law and to enable African Americans to enjoy equal access to and an equitable share in education, economic prosperity and political life, while fostering within them an assured sense of self-worth.”).

62. See, e.g., LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 63 (1990) (suggesting that due, in part, to the gains of the civil rights movement, civil rights came to stand for “the uniqueness of the individual, the right of everyone to be judged and valued solely on his or her own merits as a person, rather than as a member of some ascriptive group”).

63. See NEWMAN, *supra* note 61, at 2-3 (explaining that some historians date the origin of the civil rights movement to the 1930s and 1940s). However, see SANFORD WEXLER, *THE CIVIL RIGHTS MOVEMENT: AN EYEWITNESS HISTORY* 5 (1993) for the proposition that the civil rights movement began as early as the 1880s.

64. See PETER B. LEVY, *THE CIVIL RIGHTS MOVEMENT* 81-82 (1998) (noting that slavery was abolished by the Thirteenth Amendment, while the Fourteenth Amendment established due process and equal protection guarantees, and the right to vote regardless of race was granted by the Fifteenth Amendment). See also WALDO E. MARTIN JR., *BROWN V. BOARD OF EDUCATION: A BRIEF HISTORY WITH*

mained segregated, disenfranchised, and uneducated.⁶⁵ By the middle of the Century, however, due to increased participation in, and organization of, the civil rights movement, along with the international ire directed at the racist policies of Nazi Germany, it became increasingly difficult for the United States to maintain its racist policies.⁶⁶

By the 1950s, the civil rights movement was focusing much of its energy on achieving racial equality through litigation, and achieved its biggest victory in 1954.⁶⁷ In the monumental case of *Brown v. Board of Education*, a unanimous Supreme Court held that segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment.⁶⁸ Although *Brown* gave

DOCUMENTS 4 (1998) (describing the Reconstruction amendments as an "effort to rectify the disparity between the racist oppression of blacks and the American creed of freedom, justice, and equality for all").

65. See LEVY, *supra* note 64, at 4, 83, 87 (explaining how blacks had lower incomes, higher rates of poverty, less access to education and struggled against poll taxes, grandfather clauses, and literacy tests to vote); NEWMAN, *supra* note 61, at 13 (explaining the movements in the South to prevent lynching); WEXLER, *supra* note 63, at 9 (recounting the NAACP movement against a "surge of racially motivated, unpunished and uninvestigated lynching in the Southern states").

66. The growing concentration of African-Americans in Northern cities between 1900 and 1950, led to a dramatic increase in participation in the civil rights movement and the founding of such influential organizations as the NAACP, the Urban League, the Nation of Islam, and the Congress for Racial Equality (CORE). See NEWMAN, *supra* note 61, at 10, 115 (noting that well over two million African-Americans moved to northern cities between 1890 and 1950, leading to the dramatic increase in participation in organizations); CASHMAN, *supra* note 61, at 11 (discussing the founding of the influential civil rights organizations of the NAACP, the Urban League, the Nation of Islam, and the Congress for Racial Equality (CORE)). In addition, the impact of World War II, coupled with the United States' desire to assume international leadership in the Cold War, made the segregation and discrimination suffered by African-Americans in the United States an international embarrassment. See *id.* at 72 (discussing the comparison of "segregation of African-Americans in the United States with Hitler's persecution of the Jews in the Third Reich"); JOHN D'EMILIO, THE CIVIL RIGHTS STRUGGLE: LEADERS IN PROFILE 4 (1979) [hereinafter D'EMILIO, STRUGGLE] ("The country's racial policies proved as embarrassing in the Cold War as they did during wartime.") See also LEVY, *supra* note 64, at 46-47 (explaining that the Soviets frequently used discrimination in the U.S. "as a propaganda weapon to embarrass the United States"); MARTIN, *supra* note 64, at 6 ("The growing cold war between the Soviet Union and the United States highlighted the blatant contradiction between the American creed and the reality of America's treatment of its black citizens.").

67. See MARTIN, *supra* note 64, at 7 ("legal battles were part and parcel of the collective struggle of African Americans"); NEWMAN, *supra* note 61, at 33 ("[The NAACP] achieved a series of court victories against racial discrimination that culminated in [*Brown*] . . .").

68. 347 U.S. 483 (1954). The *Brown* decision was a watershed moment in American law. Not only did *Brown* overturn the Supreme Court's previous endorsement of racial segregation in *Plessy v. Ferguson*, 163 U.S. 537 (1896), but it

new hope and energy to the civil rights movement,⁶⁹ to many whites, it was a blatant act of judicial activism that reduced the Constitution to “a mere scrap of paper.”⁷⁰ Opinion polls showed that 80 percent of Southern whites disagreed with the decision,⁷¹ and nineteen Senators and one hundred congressmen from eleven states published “The Southern Manifesto” urging resistance to *Brown*’s implementation “by any lawful means.”⁷²

In spite of this strong resistance, participation in the civil rights movement grew and the movement coalesced into a truly national crusade. Boycotts,⁷³ sit-ins,⁷⁴ Freedom Rides,⁷⁵ and the

reignited the national debate as to the judiciary’s role in interpreting the constitution and effecting social change. See Laurence C. Nolan, “*Unwed Children*” and their Parents before the United States Supreme Court from Levy to Michael H.: *Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 3-4 (1999). See also LEVY, *supra* note 64, at 8 (quoting the *Cincinnati Enquirer* as saying that the Supreme Court in *Brown* had “acted as a conscience of the American nation”). For a detailed discussion of the impact of *Brown* in desegregating schools in St. Louis, Missouri, see GERALD W. HEANEY & SUSAN UCHITELLE, UNENDING STRUGGLE: THE LONG ROAD TO AN EQUAL EDUCATION IN ST. LOUIS (2004).

69. LEVY, *supra* note 64, at 8 (“[*Brown*] gave blacks new hope, setting much of the agenda for the following years.”) See also CASHMAN, *supra* note 61, at 118 (“*Brown* heightened the aspirations and expectations of Afro-Americans as nothing ever had before.” (quoting Harvard Sitkoff, author of *A NEW DEAL FOR BLACKS* (1978))).

70. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF Brown v. Board of Education* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 710 (1975). Georgia’s Governor Herman Talmadge stated that the Supreme Court “had blatantly ignored all law and precedent and usurped from the Congress and the people the power to amend the Constitution.” *Id.*

71. CASHMAN, *supra* note 61, at 118. See also D’EMILIO, *STRUGGLE*, *supra* note 66, at 9 (“White supremacists rallied their forces and launched a movement of ‘massive resistance’ against the *Brown* decision.”).

72. LEVY, *supra* note 64, at 9. See also CASHMAN, *supra* note 61, at 120 (“[w]hite Citizens Councils flourished and sharpened the conflict over race relations”); MARTIN, *supra* note 64, at 220 (quoting The Southern Manifesto, authored in part by Senators Strom Thurmond and Harry Byrd, “[w]e regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power”); NEWMAN, *supra* note 61, at 51 (discussing the impact of Citizens Councils and its mission to preserve the Jim Crow South).

73. In 1955, Rosa Parks refused to move to the back of the bus, sparking a year-long bus boycott in Montgomery, Alabama. See LEVY, *supra* note 64, at 9-10. See also D’EMILIO, *STRUGGLE*, *supra* note 66, at 12 (explaining how the boycotts helped encourage action by the President and Congress to further civil rights); Constance Baker Motley, *The Historical Setting of Brown and its Impact on the Supreme Court’s Decision*, 61 FORDHAM L. REV. 9, 16 (1992) (calling the boycott a “grass-roots anti-segregation revolt”).

74. See, e.g., BLUMBERG, *supra* note 61, at 65-66 (describing the lunch counter sit-in at Woolworth’s in Greensboro that inspired sit-ins throughout the country); NEWMAN, *supra* note 61, at 64 (explaining the widespread use of sit-ins and their effectiveness).

March on Washington⁷⁶ kept the quest for racial equality at the center of America's social agenda⁷⁷ and, within a decade of the *Brown* decision, the United States Congress passed the Civil Rights Act of 1964⁷⁸ and the Voting Rights Act of 1965,⁷⁹ effectively putting an end to de jure segregation.⁸⁰

The enormous legal victories of the civil rights movement impacted more than just race relations in this country.⁸¹ The Su-

75. See CASHMAN, *supra* note 61, at 151 (describing the strategy of the Freedom Rides "to break customary racism by acts of integrated defiance"); LEVY, *supra* note 64, at 16 (noting the original intent of the Freedom Riders was to test the Supreme Court's decision in *Boynton*, which called for integration in interstate transportation); NEWMAN, *supra* note 61, at 79-80 (explaining how the Freedom Rides led to the end of segregation in the transportation field).

76. See WEXLER, *supra* note 63, at 178 (describing the March on Washington in 1963, as "a mass protest on the nation's capital for fair treatment and equal opportunity for blacks"). See also LEVY, *supra* note 64, at 22-23 (noting the march drew a crowd of over 200,000 people and is remembered for Dr. Martin Luther King's "I Have a Dream" speech).

77. See *id.* at 10, 23 (describing the success of the civil rights movement "in spite of arrests, bomb threats, KKK marches and cross burnings" and the 1963 bombing of a Birmingham church); MARTIN, *supra* note 64, at 37-38 (explaining the lynching of Emmet Till, a young man who was lynched in August 1955, for "allegedly whistling at a white woman").

78. See generally CASHMAN, *supra* note 61, at 166 (explaining how the Civil Rights Act outlawed discrimination in hotels, hospitals, theaters and restaurants and gave the Attorney General the power to enforce this desegregation); LEVY, *supra* note 64, at 24 (describing the Civil Rights Act as prohibiting racial discrimination in employment and public accommodations, as well as facilitating school integration by giving more authority to the federal government).

79. See CASHMAN, *supra* note 61, at 192 ("The Voting Rights Act of 1965 allowed direct federal action to enable African-American citizens to register to vote and to vote. . . . Furthermore, the act suspended literacy tests and similar qualifying devices and provided penalties for criminal interference with voting rights.").

80. See D'EMILIO, STRUGGLE, *supra* note 66, at 17 (describing how the Civil Rights Act, the Voting Rights Act, and the civil rights movement in general had "sounded the death knell for the Jim Crow system of segregation and legally enforced racial discrimination").

81. *Brown*'s overarching "principles of citizenship, anti-discrimination, equal opportunity, morality, and equal protection of the law for subordinated persons," supported recognizing not only the rights of blacks, but the equal rights of all citizens. Nolan, *supra* note 68, at 5 (explaining the impact of *Brown* beyond race discrimination, including the legal rights of children of unwed parents). See also MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, at 40 (1993) [hereinafter DAVIS, BRUTAL NEED] (describing how the civil rights movement helped inspire the demand for rights by welfare recipients); JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 3 (2002) (noting that the recognition of the individual right to be free from discrimination was occurring not only in America, but on the international front as well; also describing how, in the decade between *Brown* and the civil rights legislation of the mid-1960s, several African countries declared independence from colonial rule and the United Nations adopted several conventions and covenants on human rights).

preme Court's declaration that the discrimination experienced by black children in segregated schools violated the Equal Protection Clause sounded a clarion call to many subordinated groups. By the mid-1960s, America was in the middle of a "rights revolution" in which "[m]illions of ordinary people . . . discovered their own voices and demanded fair treatment and personal dignity."⁸² Women, people with disabilities, the poor, gays and lesbians, and families of nonmarital children, to name only a few groups, began forming national movements of their own and turning to the courts to demand equal treatment under the law.⁸³

2. Poverty, Discrimination, and Nonmarital Children

After the civil rights movement succeeded in bringing an end to de jure segregation, the movement shifted its attention to eliminating de facto segregation experienced by most African Americans as a lack of economic opportunity.⁸⁴ In 1965, in a speech given at Howard University, President Lyndon B. Johnson called the legislative victories of the civil rights movement "the end of the beginning" and stated that the "next and more

82. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 300 (1990) (noting that the legacy of the "rights revolution" of the 1960's was the development of a "rights consciousness"). See also SKRENTNY, *supra* note 81, at 2 (discussing the "minority rights revolution" that occurred between 1965 and 1975).

83. See DAVIS, *BRUTAL NEED*, *supra* note 81, at 1 (noting the welfare rights movement was inspired by the civil rights movement and adopted its characteristic legal activism to advance the cause); MARTIN, *supra* note 64, at 34 (describing how *Brown* helped encourage social movements for women, gays and lesbians, and people with disabilities).

84. See D'EMILIO, *STRUGGLE*, *supra* note 66, at 20 (describing how the civil rights movement in the early 1970s was becoming centered around economic inequality). See LEE RAINWATER & WILLIAM L. YANCEY, *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 11, 15 (1967) (noting that although the decade between *Brown* and the Civil Rights Act of 1964, saw the end of the legal foundations of racism in America, by 1965 it was clear that "the passing of the civil rights bills did not solve the problem of discrimination in American society"). In 1964, for example, despite gains in civil rights, more African-Americans were unemployed than in 1954, and the relative income of African-Americans had not increased in a decade. *Id.* at 11. See also CASHMAN, *supra* note 61, at 169 ("[i]n the mid-1960s poverty and its victims received more attention in journals, books, and Congress than they had since the worst days of the Great Depression"); LEVY, *supra* note 64, at 35 ("[T]he civil rights movement made the nation more aware of the persistence of poverty among large segments of the African American population, rooted, according to many, in the history of racism and race relations in the United States.").

profound stage of the battle for civil rights” was for all Americans to be able to walk through the gates of opportunity.⁸⁵

At this same time, politicians involved in Johnson’s “war on poverty,”⁸⁶ such as then Assistant Secretary of Labor Daniel Patrick Moynihan, and legal scholars, such as Harry D. Krause, began documenting the connection between poverty and illegitimacy, especially among African American children.⁸⁷ In his 1965 report entitled, *The Negro Family: The Case for National Action*, Moynihan pointed to the breakdown of the African American family and the high rate of nonmarital births and female-headed households as an impediment to African Americans achieving true equality.⁸⁸ Furthermore, in his book, *Illegitimacy: Law and Social Policy*, Krause clearly documented

85. President Lyndon B. Johnson, To Fulfill These Rights: Remarks of the President at Howard University (June 4, 1965), reprinted in RAINWATER & YANCEY, *supra* note 84, at 127-30 (voicing concern for, not only the “widening gulf” between blacks and whites in unemployment, income, and infant mortality, but also the role of the “breakdown of the Negro family structure” in exacerbating poverty among African-Americans). See also CASHMAN, *supra* note 61, at 180 (“Lyndon Johnson’s reform program was known as the Great Society. . . . His theme was that it was time for the United States to be concerned about equality of life for all American citizens and not just about the quantity of affluence for a privileged few. The very notion of providing liberty and abundance for all citizens was somewhat radical in itself because such statements made by the president to this end implied that they did not exist already.”).

86. In his State-of-the-Union address in January 1964, President Lyndon B. Johnson declared a “war on poverty.” WAR ON POVERTY 1 (Louise Lander ed. 1967). The war on poverty included several federally funded programs including Volunteers in Service to America (VISTA), the Job Corps, and Head Start as well as loan programs for farmers and businesses and financial aid for college students. CASHMAN, *supra* note 61, at 170.

87. See OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 47 (1965), reprinted in RAINWATER & YANCEY, *supra* note 84, at 51-55; KRAUSE, ILLEGITIMACY, *supra* note 4. See also Davis, *supra* note 81, at 107-08 (“[the] association between illegitimacy and race [had] been clearly drawn in the public mind for some time”); JAMES T. PATTERSON, AMERICA’S STRUGGLE AGAINST POVERTY, 1900-1985 104 (1981) (discussing the scholarly work in the 1950s and 1960s, showing the correlation between illegitimacy and poverty).

88. RAINWATER & YANCEY, *supra* note 84, at 51-55. In the report, then Assistant Secretary of Labor Daniel Patrick Moynihan argued that “[a]t the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family.” OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 5 (1965), reprinted in RAINWATER & YANCEY, *supra* note 84, at 41. Moynihan’s report was criticized by a number of civil rights leaders. *Id.* at 3-5, 7. See also THE FUTURE OF THE FAMILY xvi-xvii (Daniel P. Moynihan et al. eds., 2004) (discussing the reaction to his report); PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 75 (1990) (arguing that Moynihan made a faulty presumption when he asserted that blacks were not fitting into the correct family structure; rather than adapting to the patriarchy of white culture, the female-

the role that illegitimacy, especially among African Americans, played in fostering poverty in America.⁸⁹

Recognizing that illegitimacy was, in part, a race issue, civil rights leaders made illegitimacy one of their platform issues.⁹⁰ In 1968, fourteen years after *Brown*, several African American litigants and their attorneys who had trained during the civil rights movement went back to court, this time arguing that the legal distinction between marital and nonmarital children violated the Equal Protection Clause.⁹¹ It took twenty years and more than two dozen cases,⁹² but eventually the legal distinction based on illegitimacy, and the poverty it created, was brought to end, in large part, by applying the new-found power of the Equal Protection Clause as enunciated in *Brown*.⁹³

The end of the legal distinction based on illegitimacy owes much to the civil rights movement. Although discrimination based on illegitimacy had been a part of the law in this country for hundreds of years, the 1973 Conference recognized that society had changed and that laws that perpetuated racism, classism, and social stigma – such as the laws discriminating against nonmarital children – could no longer be justified.

headed African American families were derogatorily termed “matriarchal,” and considered less valuable than the nuclear family model).

89. KRAUSE, *ILLEGITIMACY*, *supra* note 4, at 257-67 (arguing that the laws that discriminated on the basis of illegitimacy most often affected black children and their families).

90. See RICKIE SOLINGER, *WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE Roe v. Wade 75* (1992) (stating that due to the civil rights movement’s challenges to biological determinism and the reshaping of the professional response to black illegitimacy, many black communities made the treatment of illegitimacy part of their larger agenda for self-determination).

91. See Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 *RUTGERS L. REV.* 73, 91 (2003) [hereinafter Davis, *Male Coverture*] (describing how civil rights lawyers started fighting discrimination against nonmarital children in the 1960’s).

92. See *infra* Part V.A. for a discussion of these cases. The first case challenged a Louisiana statute that prohibited nonmarital children from filing a wrongful death claim. See *Levy v. La.*, 391 U.S. 68 (1968). In Krause’s amicus curiae brief filed in that case, he argued that 95.8% of all persons affected by the statute were black. KRAUSE, *ILLEGITIMACY*, *supra* note 4, at 259-60 (“For all practical purposes this means that the criterion of *illegitimacy* as used under the Louisiana Wrongful Death Act is synonymous with a *racial* classification.”).

93. See, e.g., Davis, *Male Coverture*, *supra* note 91, at 90-91, 107 (“[T]raditional civil rights groups took up the issue of illegitimacy and framed it principally as an issue of discrimination against children.”) See also DAVIS, *BRUTAL NEED*, *supra* note 81, at 2 (“[The] civil rights movement provided activist poverty lawyers with a ready model for using litigation to change legal and social structures that marginalized a segment of society.”).

B. *The Gay Rights Movement*

The 1973 Conference promulgated a Uniform Parentage Act that embodied the lessons of the civil rights movement, a movement that, just a few years before, had radically changed how the country viewed discrimination. Between 1973 and 2000, several other social movements applied the principles of the civil rights movement and emerged as major challengers to American institutions and assumptions. One such movement was on behalf of gays and lesbians. Unlike the 1973 Conference, however, the 2000 Conference failed to acknowledge the significant impact of the gay rights movement on society and to embody those lessons in the 2000 UPA.

1. The Beginnings of the Gay Rights Movement

Prior to the gay rights movement, homosexuality was viewed in the United States as a sin, a sickness, or a crime.⁹⁴ As a result, most homosexuals attempted to keep their sexuality a secret and their relationships hidden.⁹⁵ If discovered, homosexuals faced significant threats including dismissal from work,⁹⁶ involuntary commitment,⁹⁷ arrest,⁹⁸ and forfeiture of their children.⁹⁹ Homosexual activity was illegal in the form of sodomy statutes in most

94. See generally JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* 57 (1983) [hereinafter D'EMILIO, *SEXUAL POLITICS*].

95. *Id.* at 112-14. Even the *Mattachine Review*, an early homophile publication, counseled gays and lesbians to assimilate into heterosexual society, advising lesbians to adhere to traditional standards of feminine dress, and suggested that one of the benefits of gay bars was that keeping bar patrons segregated would allow them to "offend the least number of heterosexuals." *Id.*

96. *Id.* at 120-21. After the Mattachine Society's convention was held in Denver, police raided the home of Bill Matson, the chapter's librarian. As a result, Matson lost his job at a local hospital and served 60 days in jail. Afterward, he was unable to find work in Denver and had to leave the city. *Id.*

97. See THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT 35 (Barry D. Adam et al. eds., 1999) [hereinafter GLOBAL EMERGENCE]. In mental institutions, homosexuals were frequently subjected to various "treatments," including electroshock and aversion therapy. *Id.*

98. See JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 319 (2001). In Florida alone in 1972, at least 85 people were serving sentences of up to 20 years for sodomy. *Id.*

99. See Patricia M. Logue, *The Rights of Lesbian and Gay Parents and their Children*, 18 J. AM. ACAD. MATRIM. LAW 95, 105 (2002) (referring to divorce proceedings in which the non-gay parent is awarded custody to save the child from anticipated teasing and difficulty that might accompany having an openly gay caretaker).

states,¹⁰⁰ and police frequently entrapped gay men, raided gay bars, and searched the homes of suspected homosexuals.¹⁰¹ The FBI infiltrated meetings of the few gay and lesbian organizations that existed, and reported the names of members to the federal government.¹⁰² Similarly, postal workers recorded the names of people receiving gay-oriented material and disclosed them to the individuals' employers.¹⁰³ Moreover, in 1950, at the height of the "Red Scare" and McCarthyism, President Eisenhower signed an executive order making homosexuality a disqualification from government service.¹⁰⁴

The fear of being persecuted for being gay or affiliating with a gay organization kept the gay rights movement from gaining membership or momentum throughout the 1950s and 1960s.¹⁰⁵ In 1969, however, a riot broke out at the Stonewall Inn, a gay bar in New York's Greenwich Village.¹⁰⁶ Additional demonstrations quickly spread across the city and the nation, and led to the founding of the Gay Liberation Front, a group dedicated to challenging the dominant paradigm of heterosexuality.¹⁰⁷ As such, the Stonewall riots dramatically accelerated the gay rights movement which, by the time the 2000 UPA was drafted, had brought

100. See Jennifer Naeger, *And Then There Were None: The Repeal of Sodomy Laws after Lawrence v. Texas and its Effect on the Custody and Visitation Rights of Gay and Lesbian Parents*, 78 ST. JOHN'S L. REV. 397, 401 (2004). Until the late 1980s, most states had statutes forbidding sodomy. Illinois was the first state to abolish its sodomy laws in 1961, but progress was slow, and when *Bowers v. Hardwick* reached the Supreme Court in 1986, a bare majority – twenty-six states – had followed. *Id.*

101. See BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* 59 (1987). Police zealously searched for evidence of lewd behavior or pornography. In response to the raids, many gay bars developed elaborate security and screening procedures: if police appeared, lights would go up to alert patrons to "act straight" until the danger passed. *Id.*

102. See D'EMILIO, *SEXUAL POLITICS*, *supra* note 94, at 124.

103. *Id.*

104. *Id.* at 42-43. The Senate justified the exclusion on the grounds that homosexuals "lacked the emotional stability of normal persons" and had "weakened moral fiber;" the report stated that "one homosexual can pollute an entire government office" by enticing heterosexuals into acts of perversion. *Id.*

105. *Id.* at 110.

106. *Id.* at 232. Shortly before midnight on June 27th, police raided the bar and attempted to detain its mostly gay clientele. The patrons, angered by other recent police raids of gay bars, fought back, first pelting police with coins and later using parking meters as battering rams to gain reentry to the bar. Later in the night, the bar went up in flames. Rioting continued throughout the night and into the next day. *Id.*

107. See ADAM, *supra* note 101, at 84.

about unprecedented visibility, social acceptance, and legal recognition of gays and lesbians in American society.

2. Increasing Visibility of Gays and Lesbians

In the years immediately following the Stonewall riots, membership in gay rights organizations exploded from fifty gay and lesbian organizations prior to the riots, to over 800 just four years later.¹⁰⁸ In 1973, the same year the Conference promulgated its revolutionary 1973 UPA, several significant gay rights organizations were founded. The National Gay and Lesbian Task Force, an organization dedicated to lobbying for change in government policies involving gays and lesbians, was founded in 1973.¹⁰⁹ The Task Force was responsible for several significant policy changes, including the 1975 ruling that reversed the 1950 ban on government service by gays and lesbians.¹¹⁰ Also in 1973, Parents and Friends of Lesbians and Gays (PFLAG) formed,¹¹¹ and has since grown to 200,000 members and 500 affiliates in the United States.¹¹² Lambda Legal Defense and Education Fund, an advocacy group similar to the ACLU and the first organization to work in the legal system on behalf of gays and lesbians, was also founded in 1973, and has argued or filed amicus briefs in hundreds of state and federal discrimination cases.¹¹³ Seven

108. D'EMILIO, *SEXUAL POLITICS*, *supra* note 94, at 238. By the end of the 1970s, the number had risen into the thousands. *Id.*

109. JOHN D'EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY* 231 (1992).

110. National Gay and Lesbian Task Force, *Over Three Decades of Fighting for Freedom, Justice and Equality*, <http://www.thetaskforce.org/aboutus/history.cfm> (last visited Sept. 26, 2006). The NGLTF also released the first-ever study of private-sector workplace discrimination against gays and lesbians; successfully sued the state of Oklahoma, overturning a law banning gay teachers from discussing gay rights; and has organized national responses to anti-gay legislation and events, including Colorado's Amendment 2, Cracker Barrel's policy of firing gay employees for "failing to comply with normal heterosexual values," and the Supreme Court's announcement of its decision in *Bowers v. Hardwick*. In addition, the NGLTF was instrumental in raising awareness of AIDS and securing funding for AIDS research. *Id.*

111. PFLAG.org, *History Snapshot*, <http://www.pflag.org/History.history.0.html> (last visited Aug. 13, 2006). PFLAG was formed after Jeanne Manford marched in New York's Gay Pride Parade with a banner expressing support for her gay son. Manford's son, Mortie, had been beaten at a gay rights rally two months before the parade while police stood by and did nothing. *Id.*

112. *Id.*

113. *See, e.g.,* Nancy D. Polikoff, et al. *Thomas S. v. Robin Y.: Brief Amicus Curiae of the National Center for Lesbian Rights; Lambda Legal Defense and Education Fund; Gay and Lesbian Advocates and Defenders; Center Kids; and Gay and Lesbian Parents Coalition International in Support of Respondent-Appellee*, 22 N.Y.U. REV.

years later, in 1980, the Human Rights Campaign, another gay advocacy group, was founded,¹¹⁴ and, with almost 600,000 members, has grown into one of the most influential political action committees in Washington.¹¹⁵

Groups with narrower goals and constituencies have also formed throughout the country, reflecting the size and diversity of the gay and lesbian community. Children of Lesbians and Gays Everywhere specifically serves children with gay parents;¹¹⁶ the Log Cabin Republicans represent politically conservative gays and lesbians;¹¹⁷ the Gay, Lesbian, and Straight Education Network advocates for safe schools for gay and lesbian students;¹¹⁸ and the Gay and Lesbian Alliance Against Defamation

L. & SOC. CHANGE 213 (1996) (filed in the case of *Thomas S. v. Robin Y.*, 599 N.Y.S. 2d 377 (N.Y. Fam. Ct. 1993)) [hereinafter Polikoff, *Amicus Curiae*]; Lambda Legal argued the Hawaii Supreme Court case that, but for a subsequent voter initiative, would have paved the way for gay marriage in that state, and has worked with many states and cities in adopting anti-discrimination policies and domestic partnership benefits. Lambda Legal also successfully argued cases that ruled that discrimination against people with AIDS is illegal, granted equal rights to gays and lesbians seeking adoption, and struck down sodomy laws in New York, Montana, Georgia, and Tennessee. LAMBDA LEGAL, HIGHLIGHTS IN LAMBDA LEGAL'S 30 YEARS OF LEADERSHIP (2006), <http://www.lambdalegal.org/cgi-bin/iowa/documents/record2.html?record=1208>.

114. See BENNETT L. SINGER, *GAY & LESBIAN STATS: A POCKET GUIDE OF FACTS AND FIGURES* 14 (1994).

115. See HRC.org, Our Mission Statement, http://www.hrc.org/Template.cfm?Section=About_HRC (last visited Oct. 21, 2006). HRC is now one of the fifty largest political action committees in the country. *Id.* In 2004, HRC donated \$1.8 million to national campaigns, and ninety percent of the candidates HRC supported were elected. The Human Rights Campaign & The Human Rights Campaign Foundation, *Working for Gay, Lesbian, Bisexual and Transgender Equality*, http://www.hrc.org/Content/NavigationMenu/About_HRC/What_We_Do_HRC.htm (last visited Aug. 13, 2006).

116. COLAGE.org: Children of Lesbians and Gays Everywhere, <http://www.colage.org/> (last visited Aug. 13, 2006).

117. See Richard Tafel, *Caught Between Worlds: Gay Republicans Step Out*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 115, 130 (John D'Emilio et al. eds., 2000) (recounting the history and challenges faced by the Log Cabin Republicans). Gay republican groups first formed in the late 1970s to fight the anti-gay Briggs Initiative in California, which would have banned gays and lesbians from becoming public school teachers. *Id.* The Log Cabin Republicans were formally founded in 1990, when these clubs and others around the country consolidated into one umbrella organization, and are now a key player on legislative issues involving gay rights. *Id.*

118. GLSEN.org, History, <http://www.glsen.org/cgi-bin/iowa/all/about/history/index.html> (last visited Aug. 13, 2006). GLSEN was first founded as a local teachers' group in 1990, and became a national organization in 1995. *Id.* GLSEN sponsors the National Day of Silence, observed by close to 2,000,000 students, staff, and faculty at 3,029 high school and college campuses, on which students take a vow of silence in recognition of the silencing of gays and lesbians. *Id.*

monitors depictions of gays and lesbians in the media.¹¹⁹ The rapid growth of gay rights groups is especially evident among younger generations. In 1973, having an organization in an American high school representing gay and lesbian students would have led to a public outcry,¹²⁰ but by the time the 2000 UPA was drafted, there were 100 Gay-Straight Alliance clubs (GSAs) in U.S. high schools, and today there are at least 3,000, with almost one in every ten high schools having a GSA on campus.¹²¹

Not only have gays and lesbians increased their visibility by forming organizations, but they have also become a more open and visible presence in everyday life. The 2000 Census reported that gay and lesbian couples live in ninety-nine percent of U.S. counties, and that gay and lesbian couples raising children are present in ninety-six percent of U.S. counties.¹²² In addition, several major cities have established "gay districts," including the West Village and Chelsea in New York City,¹²³ Castro Street in San Francisco, and "Boys' Town" in Chicago.¹²⁴ Gay men and lesbians have formed gay choruses, newspapers, restaurants, film festivals, and savings and loan associations in their

119. GLAAD.org, Our Mission, <http://www.glaad.org/about/history.php> (last visited Aug. 13, 2006). GLAAD seeks to ensure "fair, accurate, and inclusive representation" in news coverage, television, and movies. *Id.*

120. See ALAN YANG, NATIONAL GAY AND LESBIAN TASK FORCE, FROM WRONGS TO RIGHTS: 1973 - 1999: PUBLIC OPINION ON GAY & LESBIAN AMERICANS MOVES TOWARD EQUALITY 10 (1999), http://www.thetaskforce.org/reports_and_research/wrongs_rights. In the late 1970s, only a quarter of Americans approved of hiring gay and lesbian elementary school teachers. By 1996, a majority favored hiring gays and lesbians to teach in both elementary (fifty-five percent) and high school (sixty percent). *Id.*

121. John Cloud, *The Battle Over Gay Teens*, TIME, Oct. 10, 2005, at 42.

122. James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 J. AM. ACAD. OF PEDIATRICS 329, 351 (2006). These figures are likely to be an undercount, since the 2000 Census only counted same-gender unmarried partners; it did not include questions about sexual orientation, and did not count single gay or lesbian persons or non-cohabitating gay and lesbian couples. *Id.* at 350. Analysis of the 2000 Census also shows that one in five lesbian households and one in twenty gay male households had at least one child age seventeen or younger in the household. JUDITH BRADFORD ET AL., NATIONAL GAY AND LESBIAN TASK FORCE, THE 2000 CENSUS AND SAME-SEX HOUSEHOLDS: A USERS' GUIDE 26 (2002), <http://www.thetaskforce.org/downloads/census/CensusFull.pdf>.

123. Darren Rosenblum, *Overcoming "Stigmas": Lesbian and Gay Districts and Black Electoral Empowerment*, 39 HOW. L. J. 149, 172 (1995) (describing the electoral benefits and consequences of drawing district lines according to statistical prevalence of gays and lesbians in a particular neighborhood).

124. GLOBAL EMERGENCE, *supra* note 97, at 65.

hometowns,¹²⁵ and the distinctive rainbow flag, signifying both gay pride and acceptance, flies outside gay-friendly businesses and residences across the country.¹²⁶ Today, all major U.S. cities, and an increasing number of smaller ones, have Gay Pride Festivals,¹²⁷ with New York City's celebration alone drawing 750,000 participants annually.¹²⁸

The increasing visibility of gays and lesbians is also powerfully demonstrated by their portrayal in the movies and on television. In 1934, the depiction of homosexuality in a major motion picture was forbidden,¹²⁹ and throughout the 1960s, homosexual characters were portrayed as suicidal, deeply disturbed, or downright evil.¹³⁰ Likewise, early television representations of gay characters relied heavily on stereotypes,¹³¹ and gay men in particular were depicted as inherently promiscuous and incapable of forming functional relationships.¹³² By the 1990s, however, several TV shows began casting gay characters in a more positive and realistic light. Top-rated shows such as *Frasier*, *Roseanne*, *Melrose Place*, *Spin City*,¹³³ and MTV's *The Real World*¹³⁴ featured recurring gay characters. In 1997, comedian

125. *Id.* at 42.

126. *Id.*

127. See Peter Johnson, Diversity Center, Gay, Lesbian, Bisexual and Transgender (GLBT) Pride Month, <http://www.ediversitycenter.net/glbtp.php> (last visited Aug. 13, 2006). Smaller cities with Pride festivals include La Crosse, WI, Harrisburg, PA, Cedar Rapids, IA, and Duluth, MI. See Global Pride 2006, <http://www.gay.com/pride/calendar> (last visited Aug. 13, 2006).

128. SINGER, *supra* note 114, at 15.

129. See D'EMILIO, *SEXUAL POLITICS*, *supra* note 94, at 138.

130. *Id.* at 137-39. In the early 1960s, *The Children's Hour* featured a tortured lesbian schoolteacher who committed suicide, the lesbian madam in *Walk on the Wild Side* was sinister and amoral, and the depiction of the gay bar scene in *Advise and Consent* was as a "demonic netherworld filled with leering, half-crazed men." *Id.*

131. See generally Kylo-Patrick R. Hart, *We're Here, We're Queer – And We're Better Than You: The Representational Superiority of Gay Men to Heterosexuals on Queer Eye for the Straight Guy*, 12 J. MEN'S STUD. 241 (2004) (arguing that *Queer Eye for the Straight Guy*, rather than relying on stereotypes of gay men, portrays them as inherently superior to heterosexual men, thus offering by far the most positive depiction of gay men on television to date). Former CNN correspondent Edward Alwood describes the typical gay male TV character in the 1960s and 70s, as a "limp-wristed effeminate drag queen who walked with a swish and talked in a high-pitched voice." *Id.* at 243.

132. *Id.*

133. *Id.* at 244.

134. Drew Juber, *Another Look at Pedro Zamora's Life and Death*, THE ATLANTA J. & CONST., Dec. 1, 1994, at D11. Pedro Zamora, a gay male cast member with AIDS, died of the disease before the full season aired. *Id.*

Ellen DeGeneres came out on her show *Ellen*, making her the first lesbian main character on television,¹³⁵ and *Will and Grace*, which debuted in 1997, and featured two gay main characters, won numerous awards.¹³⁶ In 1993, the movie *Philadelphia*, a story about an attorney who was fired for being gay, won Tom Hanks both a Golden Globe and an Oscar for best actor,¹³⁷ and in 2006, *Brokeback Mountain* and *Capote*, which featured gay main characters portrayed frankly and honestly, were both nominated for Best Picture.¹³⁸

3. Increasing Acceptance of Gays and Lesbians

The increasing visibility of gays and lesbians has led to widespread social acceptance of homosexuals in today's society. In 1973, the American Psychiatric Association removed homosexuality from its list of mental disorders,¹³⁹ and today, the vast majority of mental health practitioners view homosexuality as a normal variant of human sexuality.¹⁴⁰ In addition, corporate America, typically the most conservative sector of public life, has

135. See Richard Cohen, Op-Ed., *Gays: The Attitude of '63*, WASH. POST, Oct. 21, 1997, at A19.

136. *Will and Grace* won fourteen Emmys, twenty-four Golden Globe Awards, fourteen Screen Actors Guild Awards, and six People's Choice Awards during its eight-year run. See Walt Belcher, *Seven Byes for Seven Favorites*, TAMPA TRIB., May 5, 2006, at Bay Life 1.

137. See Bill Ervolino, *An AIDS Anniversary: 25 Years in the Arts*, SEATTLE TIMES, June 25, 2006, at K6 (describing the history of AIDS as portrayed onstage and onscreen).

138. See Shawn Macomber, *The Passion of Brokeback Mountain*, AM. SPECTATOR, Mar. 17, 2006, http://www.spectator.org/dsp_article.asp?art_id=9548. The two films won four Oscars between them. See Academy of Motion Picture Arts and Sciences: 78th Academy Awards Nominees & Winners, <http://www.oscars.org/78academyawards/nomswins.html> (last visited Sept. 26, 2006).

139. See Mary Paquette, *A More Civil Union*, 37 PERSPECTIVES IN PSYCHIATRIC CARE 39 (2001). Prior to 1973, the DSM-III contained the specific diagnosis of "ego-dystonic homosexuality" and psychiatric literature was replete with "treatments" to change the sexual orientation of gays and lesbians. See generally Kenneth J. Zucker, *The Politics and Science of "Reparative Therapy"*, 32 ARCHIVES OF SEXUAL BEHAV. 399 (2003). The next edition of the DSM (DSM III-R) contained a diagnosis of "sexual orientation disturbance" for persons disturbed by, in conflict with, or wishing to change their sexual orientation; the DSM IV, published only a year later, did not contain any reference to homosexuality as a mental disorder. See Paquette, *supra*, at 39.

140. See Zucker, *supra* note 139, at 399. Contemporary treatments for homosexuality are more affirming, seeking to help the individual adapt to, rather than alter, his or her sexual orientation. A scholarly journal, the Journal of Gay and Lesbian Psychotherapy, now exists specifically to address gay and lesbian therapeutic issues. *Id.*

made significant strides in accepting gays and lesbians.¹⁴¹ As the 2000 UPA was being drafted, more than half of Fortune 500 companies prohibited discrimination in the workplace on the basis of sexual orientation,¹⁴² and in 2003, Wal-Mart, the country's largest private employer, became the ninth of the top ten largest Fortune 500 companies to adopt such a policy.¹⁴³ In addition, many companies now extend benefits to gay and lesbian employees and their partners. In 1992, Levi-Strauss became the first Fortune 500 company to offer domestic partnership benefits to its employees.¹⁴⁴ Eight years later, when the 2000 UPA was drafted, almost a quarter of the Fortune 500 companies, and almost 8,000 smaller companies, offered some measure of domestic partnership benefits.¹⁴⁵ In addition, ninety state and local governments, and 104 colleges and universities, provided domestic partnership benefits in 2000.¹⁴⁶ To bolster these advances, watchdog groups have formed to monitor and report on individual employers.¹⁴⁷ Principally due to the heightened social consciousness of a large number of both gay and straight consumers regarding gay rights issues, companies take these ratings seriously, and find that an

141. See SAMIR LUTHER, HUMAN RIGHTS CAMPAIGN, DOMESTIC PARTNER BENEFITS: EMPLOYER TRENDS AND BENEFITS EQUIVALENCY FOR THE GLBT FAMILY 2 (March 2006), www.hrc.org/workplace/dpbsearch.

142. Sharon Pian Chan, *Foundation Gets GE to Ban Bias Against Gays*, SEATTLE TIMES, Mar. 23, 2000, at C1 (reporting on the status of gays and lesbians in corporate anti-discrimination policies as of 2000, when GE decided to add sexual orientation to its policy).

143. Greg Giuffrida, *Gays Now Included in Wal-Mart Anti-Bias Policy*, CHI. SUN-TIMES, July 3, 2003, at 48. Exxon is the only company among Fortune 500's ten largest that allows discrimination on the basis of sexual orientation. *Id.*

144. Stephanie Armour, *More Companies Offer Benefits to Domestic Partners*, USA TODAY, June 29, 2006, at 1B (describing the rise and current state of domestic partnership benefits in American companies). Today almost half of the Fortune 500 companies provide domestic partner benefits, and eleven cities around the country and the entire state of California have "equal benefits ordinances" requiring companies contracting with the government to provide domestic partnership benefits. Luther, *supra* note 141, at 1-2.

145. HRC, *2005 Annual Report: 25 Years of Progress*, at 5 (2005), available at http://www.hrc.org/Content/ContentGroups/Publications1/Annual_Reports/hrc_book_final_web_a.pdf [hereinafter HRC, *2005 Annual Report*].

146. See *More Companies Offering Same-Sex Partner Benefits*, N.Y. TIMES, Sept. 26, 2000, at C2; Jamie Smith Hopkins, *Community College Weighs Benefits for Domestic Partners*, BALTIMORE SUN, May 25, 2000, at 3B.

147. See Karen Springen & Anetta Miller, *Doing the Right Thing*, NEWSWEEK, Jan. 7, 1991, at 42 (asserting that companies are becoming more responsive to social issues as consumers become more socially aware). A Roper poll found that a majority of Americans would pay ten percent more for a socially responsible product, and two-thirds are concerned about the social policies of the companies from which they buy, including policies concerning gays and lesbians. *Id.*

unfavorable rating can result in a significant decrease in customer goodwill and revenue.¹⁴⁸ As a result, the number of companies earning high scores from these organizations has skyrocketed.¹⁴⁹

The increasing acceptance of gays and lesbians is also apparent in the political arena. When the 1973 UPA was drafted, there were no openly gay elected officials.¹⁵⁰ Today, however, 352 open gays and lesbians hold elected positions,¹⁵¹ including three U.S. Congressional seats.¹⁵² President Bill Clinton appointed a record number of open gays and lesbians to powerful positions, including Assistant Secretary for Fair Housing and Equal Opportunity,¹⁵³ Director of the CIA,¹⁵⁴ and, in 1999, the country's first gay ambassador.¹⁵⁵ President George W. Bush continued the trend, appointing several gay men to his administration.¹⁵⁶

Gays and lesbians have also gained significant political clout, becoming a highly courted political group. In 1990, President George H.W. Bush invited gay rights leaders to the signing of the Hate Crimes Statistics Act, which included protection based on

148. HRC, *2005 Annual Report*, *supra* note 145.

149. *Id.* Over 100 companies earned a one hundred percent positive rating from the Human Rights Campaign in 2005, seven times more than earned that distinction just three years earlier. *Id.*

150. *See* ADAM, *supra* note 101, at 130. Elaine Nobel was the first, elected to the Massachusetts House of Representatives in 1974. *Id.*

151. *See* Press Release, Gay and Lesbian Victory Fund, Three Gay Legislators Ascend to Leadership Positions This Week (Jan. 5, 2006), <http://www.victoryfund.org/index.php?src=news&prid=100&category=News%20Releases>. Approximately half of these serve at the state or local government level. *Id.*

152. Rep. Tammy Baldwin (D-WI), Rep. Barney Frank (D-MA), and Rep. Jim Kolbe (R-AZ) have all openly declared their homosexuality. Karen Matthews, *Parades Mark Watershed Event for Gay Rights—Some Say Attitudes Have Dramatically Changed Since 1969 Stonewall Riot*, MILWAUKEE J. SENTINEL, June 27, 1999, at A8.

153. *See* Edward Epstein, *Bush's Gay Nominees Draw Little Opposition; S.F. Appointee Sails Through*, S.F. CHRON., Dec. 29, 2002, at A1 (reporting on the acrimonious reception of gay Clinton nominees in the early 1990s and the uncontroversial reaction to recent Bush gay nominees a decade later). Roberta Achtenberg was appointed to this post in the Office of Housing and Urban Development in 1993. *Id.*

154. *Senate Panel Clears Clinton CIA Nominee*, USA TODAY, Feb. 4, 1993, at 4A. James Woolsey was appointed the 16th Director of the CIA in 1993, making him the highest ranking openly gay official at the time. *Id.*

155. *See Pink Power*, GUARDIAN (London), Dec. 6, 1999, at 3 (chronicling the timeline of advances of gays and lesbians in political office). James Hormel was named emissary to Luxembourg in 1999. *Id.*

156. Epstein, *supra* note 153. Scott Evertz was named the White House AIDS Czar in 2001, a post created in 1994, by President Clinton. *Id.* In 2002, Bush nominated six more gay men to various posts, including appointing Arthur Collingsworth to a position on the National Security Education Board that would play a key role in the war on terror. *Id.*

sexual orientation.¹⁵⁷ In 1992, Bill Clinton became the first Presidential candidate to appeal directly to gay and lesbian voters,¹⁵⁸ and his 1993 meeting with the heads of several gay and lesbian organizations marked the first time in history a sitting president met with gay rights leaders.¹⁵⁹ Today, the Democratic Party includes a gay rights plank in its party platform, stating unequivocally that “we support full inclusion of gay and lesbian families in the life of our nation and seek equal responsibilities, benefits, and protections for these families.”¹⁶⁰

4. Increasing Recognition of Gays and Lesbians

Along with the increasing visibility and acceptance of gays and lesbians in American society has come increased recognition of their civil rights. When the 1973 UPA was drafted, none of the states protected gays and lesbians from discrimination;¹⁶¹ but by the time the 2000 UPA was written, twelve states and the District of Columbia prohibited employment discrimination on the basis of sexual orientation.¹⁶² The increase in the number of cities and counties with such prohibitions is even more striking, rising almost tenfold from sixteen in 1980, to 116 in 2000.¹⁶³ Additionally, thirty-one states and the District of Columbia have enacted hate crimes legislation that enhance penalties for crimes motivated by sexual orientation or gender identity.¹⁶⁴

157. HRC, *2005 Annual Report*, *supra* note 145, at 15.

158. See MARK HERTZOG, *THE LAVENDER VOTE: LESBIANS, GAY MEN, AND BISEXUALS IN AMERICAN ELECTORAL POLITICS* 4 (1996).

159. HRC, *2005 Annual Report*, *supra* note 145, at 19.

160. Democratic National Committee, *Strong at Home, Respected in the World—The 2004 Democratic National Platform for America*, as approved by the 2004 Democratic National Convention, 2004, at 42, available at http://www.democrats.org/a/p/the_2004_democr.html.

161. Note, *The Americans with Disabilities Act: Great Progress, Greater Potential*, 109 HARV. L. REV. 1625, 1626 (1996). Wisconsin was the first state to ban discrimination on the basis of sexual orientation, passing a general gay rights law in 1982. *Id.*

162. See Nan D. Hunter, *Sexuality and Civil Rights: Reimagining Anti-Discrimination Laws*, 17 N.Y.L. SCH. J. HUM. RTS. 565, 566 (2000). California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin have enacted such laws. *Id.*

163. Kelly Yamanouchi, *Gays Gain in Partner Benefits; S.F. Law Influential Nationwide, Study Says*, S.F. CHRON., Sept. 26, 2000, at C2 (reporting the results of a survey finding that San Francisco's city ordinance requiring all contractors doing business with the city to offer domestic partnership benefits prompted many businesses to offer these benefits nationwide).

164. HRC, *2005 Annual Report*, *supra* note 145, at 27.

Striking changes have also occurred in the recognition of gay and lesbian families. In 1973, most courts held that gays and lesbians were *per se* unfit to be parents.¹⁶⁵ As a result, many gays and lesbians were denied custody of their children after a divorce and were prohibited from adopting.¹⁶⁶ By 2000, however, most courts applied the best interests of the child standard to custody determinations involving both heterosexual and homosexual parents.¹⁶⁷ Similarly, only Florida statutorily prohibits gays and lesbians from adopting children,¹⁶⁸ and similar bans introduced in other states have been defeated.¹⁶⁹ Perhaps even more significant, twenty-four states and the District of Columbia have granted second-parent adoptions allowing gays and lesbians to adopt their partners' biological or previously adopted child.¹⁷⁰

In addition, the idea that same-sex couples deserve equal marriage rights has been gaining credence.¹⁷¹ The Hawaii Supreme Court ruled in 1993, that restrictions on same-sex marriage warranted strict scrutiny.¹⁷² In response to a similar ruling by the Vermont Supreme Court, in 2000 the Vermont legislature adopted a statutory scheme authorizing civil unions.¹⁷³ In 2001,

165. See Benjamin C. Morgan, *Adopting Lawrence: Lawrence v. Texas and Discriminatory Adoption Laws*, 53 EMORY L.J. 1491, 1494 (2004).

166. *Id.* at 1495.

167. *Id.* at 1497-98.

168. See Heather J. Langemak, *The "Best Interest of the Child": Is a Categorical Ban on Homosexual Adoption an Appropriate Means to this End?*, 83 MARQ. L. REV. 825, 829 (2000).

169. *Id.* at 830-32. In the late 1990s, legislators in Alabama, South Carolina, Michigan, Indiana, Arkansas, Oklahoma, and Texas failed in their attempts to amend their states' adoption statutes to preclude homosexuals from adopting. *Id.*

170. NAT'L CTR. FOR LESBIAN RTS., ADOPTION BY LESBIAN, GAY AND BISEXUAL PARENTS: AN OVERVIEW OF CURRENT LAW 7 (2004), <http://www.nclrights.org/publications/pubs/adptn0204.pdf>.

171. *Why A Marriage Amendment is Necessary*, Report of Senate Republican Policy Committee, March 28, 2006, available at http://rpc.senate.gov/_files/Mar2806MarriageAmendSD.pdf (suggesting that widespread legal challenges to existing marriage statutes will lead to a "redefinition" of marriage across the country). In twenty-two states, gays and lesbians have mounted legal challenges to statutes excluding same-sex couples from full marriage rights. *Id.*

172. *Baehr v. Lewin*, 852 P.2d 44, 82 (Haw. 1993). Hawaii passed an amendment to the state constitution banning gay marriage, making the result in *Baehr* moot. See Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355, 411 (2006).

173. See Jason Parish & Joy Haynes, *Same-Sex Marriage and Domestic Partnerships*, 5 GEO. J. GENDER & L. 545, 549 (2004). In *Baker v. State*, 744 A.2d 864 (Vt. 2000), the Vermont Supreme Court found that denying marriage rights to same-sex couples violated the state constitution, but suspended its judgment to let the legislature address the issue, which it did by creating the civil union law. *Id.*

the Massachusetts Supreme Court found that anything less than full civil marriage rights for same-sex couples violated the state's constitution¹⁷⁴ and, in 2006, a unanimous New Jersey Supreme Court ruled that gay and lesbian couples are entitled to the same legal rights and benefits as married heterosexual couples.¹⁷⁵ Today, California, Connecticut, Hawaii, Maine, Massachusetts, New Jersey, Vermont, and the District of Columbia have some form of recognition and benefits for same-sex couples.¹⁷⁶ As a result, one in five Americans now live in a state granting either domestic partnerships or full marriage rights to same-sex couples.¹⁷⁷

5. Resistance to the Gay Rights Movement

The gay rights movement has brought about dramatic changes in the visibility, acceptance, and recognition of gays and lesbians. Similar to the opposition to the civil rights movement, however, the increased social stature of gays and lesbians has not been without resistance.¹⁷⁸ Throughout the 1990s, religious conservatives placed anti-gay initiatives on ballots in several cities and states,¹⁷⁹ and by 1995, thirty-five states had introduced affirmatively anti-gay legislation.¹⁸⁰ Colorado's Amendment 2, for example, mandated that no jurisdiction in the state could pass ordinances banning discrimination against gays and lesbians.¹⁸¹ Although the Amendment passed in Colorado, it was found unconstitutional by the United States Supreme Court.¹⁸² Other,

174. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 958 (Mass. 2003).

175. See David W. Chen, *New Jersey Court Backs Full Rights for Gay Couples*, N.Y. TIMES, Oct. 26, 2006, at A1. The court left it to the state legislature to determine whether the new legal arrangements between gay and lesbian couples would be called marriages, civil unions, or something else. *Id.*

176. Luther, *supra* note 141, at 5. However, the federal Defense of Marriage Act (DOMA) states that same-sex partnerships recognized in these states are not subject to the Full Faith and Credit Clause of the U.S. Constitution, and are not required to be honored by other states.

177. See Christopher J. Wilson & Timothy L. Jones, Internal Revenue Bulletin, Notice 2006-22: 2006 Calendar Year Resident Population Estimates (on file with the author).

178. See Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath*, 14 WM. & MARY BILL RTS. J. 1 (comparing the resistance to *Brown* to the resistance to same-sex marriage).

179. Mary Bernstein, *Identities and Politics: Toward a Historical Understanding of the Lesbian and Gay Movement*, 26 SOC. SCI. HIST. 531, 564 (2002).

180. URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY & LESBIAN LIBERATION* 8 (1995).

181. See *Romer v. Evans*, 517 U.S. 620, 624 (1996).

182. *Id.* at 626.

narrower statutes, however, are currently on the books in many states.¹⁸³

In addition, violent attacks motivated by the victim's sexual orientation are on the rise, as is the severity of the attacks.¹⁸⁴ Four states passed laws in the early 1990s requiring public school teachers to stress that homosexuality is unacceptable and unhealthy,¹⁸⁵ and other school districts discourage teachers from speaking positively about homosexuality or forbid them from mentioning homosexuality at all.¹⁸⁶ The military has also been slow to fully incorporate gays and lesbians into its ranks. Although the military has retreated from its absolute ban on gays and lesbians, its "Don't Ask, Don't Tell" policy allows the military to discharge gays and lesbians that disclose their sexual orientation or history.¹⁸⁷

Resistance to the gay rights movement, however, has focused mostly on gay marriage. In response to the Supreme Court of Hawaii's finding that denial of marriage rights to same-sex couples was unconstitutional, the federal government enacted the Defense of Marriage Act (DOMA) in 1996.¹⁸⁸ DOMA defines marriage for the purpose of all federal laws as the union of one man and one woman.¹⁸⁹ Within ten years, forty-two states had followed suit, passing similar legislation known as "mini-

183. Pawelski, *supra* note 122, at 352-56. In 1995, Utah and South Dakota introduced anti-gay marriage bills; Montana, South Carolina, Oklahoma, and Washington attempted to limit gay adoptions; and Montana passed a bill requiring all persons convicted under the state sodomy law to register their location with the state for the rest of their lives. This law, however, was quickly repealed. VAID, *supra* note 180.

184. See Aklilu Dunlap, *The Bellows of Dying Elephants: Gay-, Lesbian-, and Bisexual-Proactive Hate Crimes Statutes after R.A.V. v. City of St. Paul*, 12 LAW & INEQ. J. 205, 208 (1993). Dunlap notes that "drive-by slurs and egg-tossing have given way with more frequency to nail-studded baseball bats and switchblades." *Id.* at 209.

185. Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1603 (1994). Alabama, Arizona, Texas, and Utah have such laws. *Id.* at 1604.

186. *Id.* The Senate passed a similar, national initiative in 1994, which withheld federal funds from any school that "encouraged or supported homosexuality" as a positive lifestyle. This bill was made moot, however, by a subsequent bill withholding federal money from schools that promoted sexual activity of any kind. Katherine Q. Seelye, *Senate Back Cuts for Schools That Endorse Homosexuality*, N.Y. TIMES, Aug. 2, 1994, at A16.

187. Martin Meehan, *Why We Should Repeal Don't Ask, Don't Tell*, BOSTON GLOBE, Apr. 27, 2006, at A13. Seventy percent of Americans supported hiring gays and lesbians for the armed forces in 1999. YANG, *supra* note 120, at 12.

188. DEFENSE OF MARRIAGE ACT, 28 U.S.C. §1738C (1996).

189. *Id.*

DOMAs.”¹⁹⁰ In addition, twenty-seven states have amended their constitutions to ban gay marriage.¹⁹¹ Furthermore, President George W. Bush and many members of Congress have endorsed an amendment to the U.S. Constitution that would bar all states from recognizing gay marriage,¹⁹² though the majority of American voters do not support such a measure.¹⁹³

6. The Future of the Gay Rights Movement

In spite of this backlash, however, the gay rights movement has marched steadily forward, winning more and more support. Public opinion data between the 1970s and 2000 show a growing consensus in favor of gay and lesbian rights.¹⁹⁴ In 2000, polls showed that a majority of Americans said that they had friends or close acquaintances who were gay,¹⁹⁵ and that they believed homosexuality was not a sin.¹⁹⁶ Between 1978 and 1999, the number of people who said they could support an openly gay person for President more than doubled, to 60 percent,¹⁹⁷ and in

190. Pawelski, *supra* note 122, at 352. Hawaii was one of these states, rendering the Hawaii Supreme Court’s decision in *Baehr v. Lewin* moot. Marcus, *supra* note 172, at 411.

191. See Monica Davey, *Liberals Find Rays of Hope on Ballot Measures*, N.Y. TIMES, Nov. 9, 2006, at P16. Eleven of the twenty-seven amendments were approved by voters in the 2004 election cycle, the year after the Massachusetts Supreme Court’s decision in *Goodridge*. Marcus, *supra* note 172, at 412.

192. See Ball, *supra* note 178. The federal marriage amendment was proposed only a few days after the Massachusetts Supreme Court declared withholding full marriage rights from same-sex couples to be a violation of the state constitution. *Id.* at 9.

193. See National Gay and Lesbian Task Force, *Recent National Polls on Same-Sex Marriage and Civil Unions*, Feb. 11, 2004 (on file with author). Only 47% of Americans support a constitutional amendment barring same-sex marriage. *Id.* Furthermore, the issue of gay marriage may not be quite the battle politicians suggest; almost 75% of likely voters believe that the proposed amendment is being used as a “political football,” and only 3% say that banning gay marriage is a priority issue in their decision whom to vote for. National Gay and Lesbian Task Force, *Recent National Polls on Same-Sex Marriage and Civil Unions*, Feb. 27, 2004 (on file with author).

194. See YANG, *supra* note 120, at 24-25.

195. Eric Zorn, *One Thing Polls Show Accurately: Changed Minds*, CHI. TRIB., Nov. 9, 2004, at C1 (citing a study by the conservative American Enterprise Institute). Public opinion data finds that merely having a gay acquaintance, friend, or family member is associated with increased tolerance for gays and lesbians and increased support for equal rights. YANG, *supra* note 120, at 18.

196. Edward Helmore, *College Football Hero Corey Johnson Came Out and No One was Outraged: In America, Gay is the New Straight*, OBSERVER (London), Apr. 30, 2000, at 26.

197. Zorn, *supra* note 195. Only twenty-six percent said they could support a gay presidential candidate in 1978. *Id.*

1999, 83 percent of Americans supported equality in job opportunities for gays and lesbians.¹⁹⁸ A majority of Americans now support equal employment rights for gays and lesbians including for teachers,¹⁹⁹ doctors, and clergy members.²⁰⁰

Americans are also far more supportive of the idea of allowing gays and lesbians to form families. While in 1977, only fourteen percent of Americans favored allowing same-sex couples to adopt, today a plurality supports gay adoption.²⁰¹ Emphatic majorities feel that gay men and lesbians should be entitled to inheritance rights and Social Security survivor benefits when their partner dies.²⁰² Furthermore, a majority supports either full marriage rights or "civil unions," which would grant marriage-like rights to same-sex couples²⁰³ and, while still a minority, the number of persons in favor of allowing same-sex couples to marry on the exact same terms as heterosexual couples is increasing.²⁰⁴ Moreover, polls suggest that the trend towards legal recognition of same-sex couples is more pronounced among younger people. While only twenty-eight per-

198. YANG, *supra* note 120, at 10. This figure is up from fifty-six percent in 1977. *Id.* at 14.

199. *Id.* at 10.

200. Public support for employment rights for gay and lesbian doctors rose from forty-four to seventy-five percent between 1977 and 1999; during the same period, employment rights for gay and lesbian clergy rose from thirty-six percent to fifty-four percent. *Id.* at 11.

201. See Carolyn Lochhead, *Bush Rallies the Right on Same-Sex Marriage: Amendment for Ban Probably Will Fail, Supporters Concede*, S.F. CHRON., June 6, 2006, at A1. Forty-nine percent of Americans support allowing gays and lesbians to adopt; forty-eight percent oppose the idea. *Id.*

202. National Gay and Lesbian Task Force, *Recent National Polls on Same-Sex Marriage & Civil Unions*, Mar. 20, 2004 (on file with author). Seventy-three percent believe that same-sex couples should be entitled to inheritance rights, and sixty-eight percent endorse Social Security survivor benefits. *Id.*

203. Richard Morin & Claudia Deane, *Poll Finds Growing Support for Gay Civil Unions*, WASH. POST, Mar. 10, 2004, at A6. Support for civil unions was at fifty-one percent in 2004. *Id.* Fifty-six percent of Americans favor either full marriage rights or civil unions. See also Susan J. Becker, *Many are Chilled but Few are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U.J. GENDER SOC. POL'Y & L. 177, 186 (2006).

204. See Wyatt Buchanan, *Poll Finds U.S. Warming to Gay Marriage*, S.F. CHRON., March 23, 2006, at A5. A recent Pew poll found support for same-sex marriage had steadily increased from twenty-seven percent in 1996 to thirty-nine percent in 2006. *But see* JOSHUA K. BAKER, *iMAPP POLICY BRIEF, SAME SEX MARRIAGE: RECENT TRENDS IN PUBLIC OPINION 2* (Apr. 29, 2005) available at <http://www.marriage Debate.com/pdf/iMAPP.2005opinionupdate.pdf> (finding an increase in support for a constitutional amendment defining marriage, from forty-nine to fifty-seven percent).

cent of Americans favor full marriage equality for same-sex couples, among eighteen to twenty-nine year-olds the figure jumps to forty-three percent,²⁰⁵ and among high school students a full two-thirds support gay marriage.²⁰⁶

Since 1969, the gay rights movement has flourished, winning recognition and rights on par with those won for African-Americans during the civil rights movement. While the drafters of the 1973 UPA caught the rising tide of civil rights, however, the 2000 Conference chose to look the other way when it came to the drastically changed status of gays and lesbians and their children.

V. WHEN THE SUPREME COURT SPEAKS, THE CONFERENCE SHOULD LISTEN

When drafting uniform legislation, the Conference should consider how courts throughout the country are handling family law issues, especially the United States Supreme Court.²⁰⁷ By 1973, for example, the United States Supreme Court had decided a handful of cases regarding the legal distinction between marital and nonmarital children. Although the holdings in those cases were contradictory, and the Court was unclear as to the doctrinal framework being applied, the 1973 Conference drafted a UPA that was in line with the spirit and direction of those cases. Similarly, by the time the 2000 UPA was drafted, the Supreme Court had issued several opinions impacting the determination of parentage of children conceived via ART and born to same-sex couples. Although the Supreme Court was again unclear as to the analytical framework it was applying, these decisions suggested the direction jurisprudence was headed in this area. Unlike in 1973, however, in 2000, the Conference failed to promulgate a UPA in line with this developing jurisprudence.

205. Buchanan, *supra* note 204.

206. *Random Samples*, DETROIT FREE PRESS, Aug. 30, 2001, at 9A; Elizabeth Mehren, *The Times Poll: Acceptance of Gays Rises Among New Generation*, L.A. TIMES, Apr. 11, 2004, at A1. Similarly, support for gay adoption is higher among younger Americans. *Id.* Fifty-six percent of the youngest respondents were in favor of allowing gays and lesbians to adopt. *Id.* The poll showed such a profound gap in attitudes between older and younger Americans that Gary Gates, a demographer, noted that "many of these issues are simply not going to be issues any longer." *Id.*

207. Although family law is typically left to the states, matters such as the equal protection of nonmarital children have required the Supreme Court's "comprehensive incursion" into this area in order to uphold constitutional principles. Johan Meeusen, *Judicial Disapproval of Discrimination Against Illegitimate Children: A Comparative Study of Developments in Europe and the United States*, 43 AM. J. COMP. L. 119, 120-21 (1995).

A. *Nonmarital Children*

Between 1968 and 1989, the Supreme Court eliminated as unconstitutional most of the legal distinctions between marital and nonmarital children.²⁰⁸ It took more than thirty cases to do so, however, and the path was neither straight nor clear for most of the journey.²⁰⁹ Even as late as 1980, the Court's jurisprudence in this area was described as "a particularly outstanding example of the Court's failure to develop, articulate, and apply a coherent set of principles to guide its decision-making process."²¹⁰ Even so, quite early in the development of this line of cases, the 1973 Conference promulgated a UPA that extended the parent-child relationship to every child conceived via sexual intercourse and their parents, a position that was well beyond what the Supreme Court had dictated at that time.

Beginning in 1968, fourteen years after the Supreme Court applied the Equal Protection Clause to laws discriminating against black children in *Brown v. Board of Education*, the Court began considering the constitutionality of the legal distinction between marital and nonmarital children.²¹¹ In *Levy v. Louisiana*, five children were denied the right to recover under a Louisiana wrongful death statute based solely on the fact that their parents were not married.²¹² The Supreme Court invalidated the statute on equal protection grounds, stating that it would "not hesitate . . . to strike down an invidious classification even though it had

208. See Nolan, *supra* note 68, at 1.

209. See Meeusen, *supra* note 207, at 120; Aleta Wallach & Patricia Teneso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act*, 23 U. KAN. L. REV. 23, 31 (1974) ("The United States Supreme Court has steered an unsteady course in terms of both result and doctrine in its pronouncements concerning the rights of children born outside of marriage and of their parents."). For a discussion of the cases, see HARRY D. KRAUSE, *CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE* 119-88 (1981).

210. Earl M. Maltz, *Illegitimacy and Equal Protection*, 1980 ARIZ. ST. L. J. 831, 831 (1980) (stating that the most consistent feature of the illegitimacy cases beginning with *Levy* is their "inconsistency in approach and emphasis").

211. See Meeusen, *supra* note 207, at 120; Nolan, *supra* note 68, at 10 n.50 (noting that the Supreme Court had decided cases regarding the rights of nonmarital children as early as 1820, but that *Levy* was the first undertaken on equal protection grounds).

212. 391 U.S. 68, 70 (1968). In upholding the denial, the Court of Appeals stated that the legal distinction between marital and nonmarital children was properly "based on morals and general welfare because it discourages bringing children into the world out of wedlock." *Id.* (citing *Levy v. State*, 192 So.2d 193, 195 (La. App. 4 Cir. 1966)).

history and tradition on its side.”²¹³ Despite this strong language, the Court failed to articulate a clear statement as to the standard of review that ought to be applied to classifications based on illegitimacy under the Equal Protection Clause.²¹⁴

In the Court’s next case addressing illegitimacy, *Labine v. Vincent*, a split Court refused to apply the rationale of *Levy* to a Louisiana statute that prevented a nonmarital child from inheriting from her father through intestate succession.²¹⁵ Although the Court was again unclear as to the exact standard of review that should be applied in illegitimacy cases,²¹⁶ the Court stated that, “*Levy* did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate offspring.”²¹⁷ The majority opinion also suggested that it was proper to base classifications based on birth status on social mores describing marital children as “socially sanctioned” and “legally recognized” and nonmarital children as “illicit and beyond

213. *Levy*, 391 U.S. at 71 (citations omitted). In a companion case, the Court held on similar grounds that a mother could bring a wrongful death action for the death of her nonmarital son. *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

214. See Meeusen, *supra* note 207, at 120 (“Case commentators thoroughly disagreed about the scrutiny employed by the Court in *Levy*.”) See also Constance G. Clark, Case Note, *Trimble v. Gordon: Expanding the Illegitimate’s Right to Inherit*, 32 ARK. L. REV. 120, 121-22 (1978) (discussing the illegitimacy cases heard by the Supreme Court between 1968 and 1978 and noting how they had moved from the traditional modes of equal protection analysis – rational basis and strict scrutiny – to develop a much more flexible, though highly unpredictable, middle scrutiny) [hereinafter Case Note]; Homer H. Clark, Jr., *Constitutional Protection of the Illegitimate Child?*, 12 U. CAL. DAVIS L. REV. 383, 397 (1979) (suggesting that it is hard to discern what stance the Court had taken, but that it might be viewed as a “middle position” somewhere between a strict scrutiny maximum and rational basis minimum). Despite the uncertainty in these decisions, it was suggested that *Levy* and *Glonn* “provide[d] a basis from which all the major legal disadvantages suffered by reason of illegitimacy [could] be challenged successfully.” John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glonn v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 2 (1969).

215. *Labine v. Vincent*, 401 U.S. 532 (1971); Clark, *supra* note 214, at 385 (“In 1971 the Supreme Court held the most important form of discrimination against illegitimate children, discrimination respecting their rights of inheritance, not to violate the equal protection clause.”) The major reason why the rationale of *Levy* was not applied in *Labine* was a change in the composition of the Court – Warren and Fortas, who supported the *Levy* majority, were replaced by Burger and Blackmun who joined the *Levy* dissenters and created an opposing majority. See Meeusen, *supra* note 207, at 123.

216. See Maltz, *supra* note 210, at 834.

217. *Labine*, 401 U.S. at 536. It has been suggested that these two cases are not truly distinguishable such that if *Levy* was right, *Labine* was wrong and vice versa. See Meeusen, *supra* note 207, at 123.

the recognition of the law.”²¹⁸ In his dissent, Justice Brennan strongly disagreed with the majority’s acceptance of the legal distinction based on social norms. Calling the state’s discrimination “clear and obvious,” Justice Brennan suggested that the majority opinion sought to “uphold the untenable and discredited moral prejudice of bygone centuries which vindictively punished not only the illegitimates’ parents, but also the hapless, and innocent, children.”²¹⁹

One year later, in April of 1972, the Supreme Court decided *Weber v. Aetna Casualty & Surety Company*, the next case in this line.²²⁰ In that case, the Court returned to the reasoning of *Levy* and attacked laws that try to control social behavior at the cost of children:

The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as unjust – way of deterring the parent.²²¹

At the time the Conference drafted the 1973 UPA, it seemed clear that some “invidious classifications” involving “innocent children” were unconstitutional, but the Court was, as of that time, unclear as to which ones and on what basis. Despite this uncertainty, in the summer of 1973, the Conference promulgated a UPA that eliminated the legal distinction between marital and

218. *Labine*, 401 U.S. at 538.

219. *Id.* at 547, 541. Justice Brennan faulted the majority for not recognizing that the central issue of the case was that the law punished innocent children for the transgressions of their parents. *Id.* at 557-59. Such laws, stated Brennan, have “no place in our system of government which has as one of its basic tenets equal protection for all.” *Id.* at 559 (quoting *In re Estate of Jensen*, 162 N.W.2d 861, 878 (N.D. 1968)).

220. 406 U.S. 164 (1972) (holding that a Louisiana statute that prevented unacknowledged nonmarital children from recovering worker’s compensation on an equal basis as marital children violated the Equal Protection Clause). The Court held that *Levy* controlled and limited *Labine* based on the deference typically given to states in regulating inheritance. *Id.* at 170.

221. *Id.* at 175. See also Wallach & Tenoso, *supra* note 209, at 48-49 (discussing Powell’s failed attempt to formulate a universal equal protection inquiry in *Weber* and how it created ongoing uncertainty regarding the proper standard of review).

nonmarital children in parentage determinations and cited Supreme Court precedent as justification.²²²

B. *Children of Gays and Lesbians*

The United States Supreme Court has yet to hear a case directly addressing the rights of children with gay and lesbian parents. By 2000, however, the Conference had several Supreme Court decisions to consider when deciding whether to extend the parent-child relationship to children conceived via ART and born to same-sex couples in the 2000 UPA. Not only did the Supreme Court continue to invalidate statutes that punished innocent children for the conduct of their parents throughout the 1970s and 1980s, but the Court also began invalidating statutes that targeted socially and politically unpopular groups.

1. Innocent Children

Throughout the rest of the 1970s and much of the 1980s, the Supreme Court continued to hear cases challenging laws that discriminated against nonmarital children and, over and over again, the Court returned to its holding, so clearly articulated in *Weber*, that it is a violation of the Equal Protection Clause to implement laws that punish children for the conduct of their parents.²²³ Moreover, the Court's disdain for such laws led to the development of an intermediate level of scrutiny under the Equal Protection Clause to be applied to invidious distinctions targeting children.

222. UNIF. PARENTAGE ACT prefatory note (1973), 9B U.L.A. 378 (2001). Time has shown that the 1973 UPA was not only successful, it was ultimately correct. Between 1974 and 1989, the Court continued to strike down statutes that treated marital and nonmarital children differently and ultimately all but overruled its holding in *Labine*. See Case Note, *supra* note 214, at 127-28.

223. See, e.g., *Jimenez v. Weinberger*, 417 U.S. 628 (1974) (invalidating a section of the Social Security Act that prohibited some illegitimate children from receiving benefits). The *Jimenez* Court specifically passed on determining the standard of review of such discriminatory statutes, relying strictly on the holding in *Weber*: "Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth." *Id.* at 632 (quoting *Weber*, 406 U.S. at 176). See also *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (acknowledging that review of a classification based on birth status must begin with *Weber*'s holding that "visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical and unjust,'" but holding that the Social Security provision at issue did not violate the Equal Protection Clause (quoting *Weber*, 406 U.S. at 175)).

In 1977, the Supreme Court finally spoke specifically about the standard of review to be applied to distinctions based on illegitimacy in *Trimble v. Gordon*.²²⁴ In that case, the Court held that, although classifications based on birth status do not warrant the application of strict scrutiny under the Equal Protection Clause, the scrutiny to be applied "is not a toothless one."²²⁵ Quickly showing that this heightened level of scrutiny would go beyond traditional rational basis review, the Court rejected the state's proffered interest in promoting legitimate family relationships²²⁶ and invalidated a probate statute that deprived a nonmarital child from inheriting from her father through intestate succession. Finding that the "the Equal Protection Clause requires more than the mere incantation of a proper state purpose," the Court stated that "we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."²²⁷ Ten years later, writing for a unanimous court in *Clark v. Jeter*, Justice O'Connor explicitly held that classifications based on illegitimacy should receive intermediate scrutiny under the Equal Protection Clause, which requires a statute to be "substantially related to an important governmental objective."²²⁸

In 1982, applying the rationale of the illegitimacy cases, as well as a heightened level of scrutiny much like the one described in *Clark*, the Court invalidated another statute that punished children for the conduct of their parents. In this case, however, it was not nonmarital children that were targeted by the legislation, but children of illegal immigrants residing in the United States. In *Plyler v. Doe*, the Court held that laws withholding state funds from local school districts for the education of children not "legally admitted" into the United States violated the Equal Protection Clause.²²⁹ The Court acknowledged that adults who enter the country illegally must "be prepared to bear the consequences" of their "own unlawful conduct," but held that their children cannot be subject to consequences for their parents'

224. 430 U.S. 762 (1977).

225. *Id.* at 767.

226. *Id.* at 768.

227. *Id.* at 769.

228. 486 U.S. 456, 461 (1988).

229. 457 U.S. 202, 205 (1982). The court required the statute to further a "substantial goal." *Id.* at 224.

choices over which they have no control.²³⁰ The children, according to the Court, “‘can affect neither their parents’ conduct nor their own status’”²³¹ and penalizing them “‘is an ineffectual – as well as unjust – way of deterring the parent.’”²³² The Court also focused on the emotional and financial impact the law had on the children. Describing the statute as imposing a “lifetime of hardship” and a stigma that will “mark [the children] for the rest of their lives,”²³³ the Court held that a statute that deprives children of “social, economic, intellectual, and psychological well-being”²³⁴ violates the Equal Protection Clause.²³⁵

2. Socially and Politically Unpopular Groups

The Supreme Court has also applied heightened scrutiny to laws discriminating against socially and politically unpopular groups. In *Department of Agriculture v. Moreno*, the Supreme Court struck down an amendment to the food stamp program that provided benefits only to households that included groups of related individuals.²³⁶ Although the court implied it was applying rational basis review, the Court considered the legislative history of the amendment and found that it was “intended to prevent so called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”²³⁷ As a result, the Court invalidated the amendment stating that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”²³⁸

In 1985, in *City of Cleburne v. Cleburne Living Center*, the Supreme Court applied this same “rational basis with teeth re-

230. *Id.* at 220.

231. *Id.* at 220 (quoting *Trimble*, 430 U.S. at 770).

232. *Id.* at 220 (quoting *Weber*, 406 U.S. at 175).

233. *Id.* at 223.

234. *Plyler*, 457 U.S. at 222.

235. In his dissent in *Plyler*, Chief Justice Burger asserted that the majority’s reliance on the illegitimacy cases was “grossly misleading” because the statute at issue did not “thrust any disabilities upon appellees due to their ‘status at birth.’” *Id.* at 246. In other words, the appellees status was based on their illegal presence in the United States, not their birth status. The current parentage laws, however, do discriminate against children conceived via ART and born to same-sex couples based on their status at birth.

236. 413 U.S. 528 (1973).

237. *Id.* at 534.

238. *Id.*

view" to a decision by a city council denying a permit for a group home for people with developmental disabilities.²³⁹ Finding that the law cannot give effect to private biases,²⁴⁰ the Court struck down the city's decision holding that "requiring the permit in this case appears to us to rest on irrational prejudices."²⁴¹ According to the Court, legislation based on "vague undifferentiated fears" of a socially unpopular group will not pass even rational basis review.²⁴²

In 1996, the Court held in *Romer v. Evans* that an amendment to the Colorado constitution prohibiting any law that banned discrimination based on sexual orientation violated the Equal Protection Clause.²⁴³ Again applying heightened scrutiny under rational basis review,²⁴⁴ the Court held that the statute was "at once too narrow and too broad" because it "identifies persons by a single trait and then denies them protection across the board."²⁴⁵ Calling the amendment "a classification of persons undertaken for its own sake,"²⁴⁶ the Court found that it was "inexplicable by anything but animus toward [gays and lesbians]."²⁴⁷

3. What's *Hardwick* Got to Do with It?

In 1986, roughly half-way between the drafting of the 1973 UPA and the 2000 UPA, the United States Supreme Court held in *Bowers v. Hardwick* that the Due Process Clause of the Fourteenth Amendment did not "confer a fundamental right upon homosexuals to engage in sodomy."²⁴⁸ *Hardwick* was still good law when the 2000 UPA was drafted and may have been considered relevant by some members of the Conference when deciding whether to include children with gay and lesbian parents. If so, their reliance on *Hardwick* was misplaced. Even with *Hardwick* on the books, the 2000 Conference should have recognized

239. 473 U.S. 432 (1985).

240. *Id.* at 448 ("[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect" (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984))).

241. *Id.* at 450.

242. *Id.* at 449.

243. 517 U.S. 620 (1986).

244. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

245. *Id.*

246. *Id.* at 635.

247. *Id.* at 632.

248. 478 U.S. 186, 190 (1986).

that even the *Hardwick* ruling was not enough to justify punishing innocent children for the conduct of their parents. Moreover, the overwhelming disapproval of *Hardwick* was “almost unheard-of in our system,”²⁴⁹ and the opinion was “subjected to a level of academic, popular, and judicial scrutiny that virtually no Supreme Court opinion could survive.”²⁵⁰ Furthermore, by 2000, the number of states that still had sodomy laws had dropped to eighteen, and even the Georgia sodomy statute that was at issue in *Hardwick* had been invalidated by the Georgia Supreme Court two years earlier.²⁵¹

To the extent *Bowers* did play a role in the Conference’s decision, that reasoning is no longer valid in light of the Court’s 2003 decision in *Lawrence v. Texas*,²⁵² in which the Court ruled that sodomy laws were unconstitutional and overruled *Bowers v. Hardwick*. Desiring to “address whether *Bowers* itself has continuing validity” the Court reviewed Texas’ sodomy law under the Due Process Clause²⁵³ and, in overruling *Hardwick*, stated that “*Bowers* was not correct when it was decided, and it is not correct today.”²⁵⁴ The Court discussed how sodomy laws demean and stigmatize gay people, a group the Court believes deserves “respect.”²⁵⁵ Despite acknowledging that, for many people, their condemnation of gays and lesbians is “deep and profound” and “shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family,” the Court questioned whether “the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.” The Court answered in the negative: “‘Our obligation is to define the liberty of all, not to mandate our own moral code.’”²⁵⁶

This developing jurisprudence reveals a Supreme Court that disdains laws that target innocent children, is intolerant of laws that are based on animus toward a socially or politically unpopu-

249. William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1022 (2004).

250. *Id.* at 1036. “*Hardwick* generated more universal negative comment than any other decision upholding a statute in the Court’s history.” *Id.* at n.53.

251. See MURDOCH & PRICE, *supra* note 98, at 344.

252. 539 U.S. 558 (2003).

253. *Id.* at 575.

254. *Id.* at 578.

255. Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1124 (citing *Lawrence*, 539 U.S. at 570-75).

256. *Lawrence*, 539 U.S. at 571 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

lar group, and is increasingly mindful of gay and lesbian rights. Rather than move with the Supreme Court, as the 1973 Conference did, however, the 2000 Conference has chosen to stand still while society and the Supreme Court passes them by.

VI. AN INFLUENTIAL LAW REVIEW ARTICLE – NOT AN OXYMORON

The 1973 Conference considered not only scientific advances, social movements, and legal precedent relevant to the issue of illegitimacy, but also considered scholarly writings. In 1966, a Professor at the University of Illinois Law School, Harry D. Krause, published a law review article entitled *Bringing the Bastard into the Great Society – A Proposed Uniform Act on Legitimacy* in which he gave five reasons why the classification based on illegitimacy should be abandoned.²⁵⁷ Krause's article was so influential that the 1973 Conference appointed him reporter to the drafting committee for the 1973 UPA and credited his article as the "genesis" of the Act.²⁵⁸

Krause's five arguments as to why the legal distinction between marital and nonmarital children was no longer scientifically, socially, or legally tenable were: a) the number of nonmarital births was steadily increasing;²⁵⁹ b) failing to legally

257. 44 TEX. L. REV. 829 (1966) [hereinafter Krause, *Great Society*]. Krause was one of the preeminent scholars on illegitimacy. See, e.g., Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 835 (1997) (listing Krause's accomplishments, including four major books and almost twenty-five law review articles addressing parent-child relationships under the law). Krause elaborated on these five arguments in *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967), a book entitled *Illegitimacy: Law and Social Policy*, and amicus briefs in *Levy v. Louisiana* and *Labine v. Vincent*. See Davis, *Male Coverture*, *supra* note 91, at 93-94.

258. UNIF. PARENTAGE ACT prefatory note (1973), 9B U.L.A. 378 (2001). See also Lynne Marie Kohm, *Marriage and the Intact Family: The Significance of Michael H. v. Gerald D.*, 22 WHITTIER L. REV. 327, 337 n.39 (2000) (crediting Krause with "fueling the beginning of the movement toward clarification and refinement of the rights of illegitimate children and their fathers, as his article proposed the first draft of what was eventually titled the UPA"); Wardle, *supra* note 257, at 835 (describing Krause's book on illegitimacy as the "definitive analysis of the subject" and the "academic powder keg than helped fuel a legal revolution").

259. The number of nonmarital births increased from 3.8% to 4.7% of all live births in the period from 1940 to 1957. In real numbers, these percentages amounted to 89,500 nonmarital births in 1940, and 201,700 in 1957. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *ILLEGITIMACY AND ITS IMPACT OF THE AID TO DEPENDENT CHILDREN PROGRAM* 5, 6 (1960). By 1960, the number of nonmarital births had reached six percent of all live births and, by 1970, the number of nonmarital births had risen to roughly twelve percent. Davis, *Male Coverture*, *supra*

recognize both parents of nonmarital children deprived those children of an “even start in life”;²⁶⁰ c) the distinction between marital and nonmarital children was based on outdated religious and moral prejudice;²⁶¹ d) although some progressive states and judges attempted to abolish the distinction, a “consensus” had not emerged and conflicts of law had become common;²⁶² and e) proposed uniform legislation had failed to address the issue fully.²⁶³ These same five arguments apply with equal force to children conceived via ART and born to same-sex couples.

A. *The Number of Children Conceived via ART and Born to Same-Sex Couples is Steadily Increasing*

The 1980s witnessed the beginning of what many have called the Gayby Boom.²⁶⁴ While gays and lesbians had been raising children from previous heterosexual relationships for decades,²⁶⁵

note 91, at 109. See also KRAUSE, *ILLEGITIMACY*, *supra* note 4, at 8 (for additional figures relating to the sharp increase in illegitimacy throughout the 1960s).

260. Krause, *Great Society*, *supra* note 257, at 830. Krause pointed to gaps in emotional and financial support for nonmarital children such as lack of inheritance; bars to custody, visitation, and adoption; and non-access to federal welfare benefits. Krause, *Equal Protection*, *supra* note 7, at 478-82.

261. Krause, *Great Society*, *supra* note 257, at 830 (“[T]he traditional status of the illegitimate does not rest on a fair and impartial adjustment of the conflicting interests involved, but springs from ancient prejudice based on religious and moral taboos that properly are losing their taboo status.”).

262. *Id.* at 830 (“There is no one American law of legitimacy. Differences in the fifty state legal systems and, for specific areas, federal law, are very pronounced and range from highly progressive to very traditional approaches.”)

263. Krause mentioned several previous uniform acts that had failed to adequately address the issue of illegitimacy. *Id.* at 831 n.9.

264. See Sue Anne Pressley & Nancy Andrews, *For Gay Couples, the Nursery Becomes the New Frontier*, WASH. POST, Dec. 20, 1992, at A1 (“Beginning in the 1980s, a growing number of gay men and lesbians have created – through adoption, artificial insemination and surrogate motherhood – the families they always wanted but thought they might have to forgo. It is a trend, evident both here and elsewhere in the country, that even has a nickname, ‘the gay-by boom.’”) See also Gina Kolata, *Lesbian Partners Find the Means to Be Parents*, N.Y. TIMES, Jan. 30, 1989, at A13 (quoting a San Francisco lawyer specializing in gay and lesbian issues who says she receives nearly four times the number of inquiries regarding parental rights compared to a few years ago, that her workshops consistently draw as many as 5,000 people, and that about forty percent of the recipients of sperm from the feminist Sperm Bank of Northern California are lesbians – twice as many as when it opened in 1982).

265. See Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 189 (1995) (“Historically, lesbians and gay men have had children through a heterosexual, marital relationship, prior to becoming involved in a primarily homosexual relationship.”).

the emergence of ART and the freedom and acceptance experienced by gays and lesbians due to the gay rights movement allowed increasing numbers of gay and lesbian couples to form families within the context of their relationships.²⁶⁶ In 1984, the New York Times covered one of the first lawsuits addressing parentage of a child by two lesbians²⁶⁷ and, in 1989, reported on the increasing use of AI by lesbians to form families.²⁶⁸ In 1992, the Chicago Tribune published an article discussing the many features of the Gayby Boom including the founding of organizations for gay and lesbian parents, the increase in the number of lesbians being served by sperm banks, and the sell-out crowds at seminars on gay and lesbian parenting,²⁶⁹ and in 1993, the New York Times ran a story on the front page discussing the increasing visibility of gay and lesbian parents throughout the country and the numerous legal issues they faced.²⁷⁰

This "Gayby Boom" has continued to flourish in the Twenty-first Century.²⁷¹ In 2003, for example, over 2,500 families participated in programs run by the New York Gay and Lesbian Community Center, and a Los Angeles gay and lesbian family services program grew from forty to 1,000 families in just two

266. As psychologist April Martin put it, "the 1980s have witnessed the emergence of an entirely new family structure, unparalleled in human history. For the first time ever in any society we know about, gay people in large numbers are setting out consciously, deliberately, proudly, openly, to bear and adopt children." Polikoff, *Amicus Curiae*, *supra* note 113, at 219 (quoting April Martin); E. Donald Shapiro & Lisa Schultz, *Single-Sex Families: The Impact of Birth Innovations upon Traditional Family Notions*, 24 J. FAM. L. 271, 278-81 (1985) (discussing the reality that lesbian and gay couples are having children and will continue to do so in increasing numbers and the need for courts and legislatures to provide mechanisms to determine parentage of these children).

267. Polikoff, *Amicus Curiae*, *supra* note 113, at 223 (citing *Lesbian's Custody Fight on Coast Raises Novel Issues in Family Law*, N.Y. TIMES, Sept. 9, 1984, at A44; *Woman Wins Right to Visits To Child of Lesbian Ex-Lover*, N.Y. TIMES, Nov. 23, 1984, at A27).

268. *Id.* (citing Gina Kolata, *Lesbian Partners Find the Means to Be Parents*, N.Y. TIMES, Jan. 30, 1989, at A13).

269. See Jean Latz Griffin, *The Gay Baby Boom*, CHI. TRIB., Sept. 3, 1992, at C1. See also Polikoff, *Amicus Curiae*, *supra* note 113, at 222-23 (discussing resources that exist for gays and lesbians wanting to raise children including videos, books, legal manuals, conferences, workshops, and support groups); Pressley, *supra* note 264, at A1 (listing similar indicators).

270. Griffin, *supra* note 269 (citing Susan Chira, *Gay Parents Become Increasingly Visible*, N.Y. TIMES, Sept. 30, 1993, at A1).

271. Maya Bell, *'Gayby Boom' Shows No Sign of Slowing More Gays and Lesbians Than Ever Are Becoming Parents*, ORLANDO SENTINEL, Sept. 28, 2003, at A1 (quoting April Martin saying that what was a "sizeable boom" in the 1990s has today become a "groundswell").

years.²⁷² The last twenty-five years has also seen a continuous surge in the number of children's books portraying gay and lesbian families²⁷³ and books on gay and lesbian parenting being published.²⁷⁴ Similarly, by 2003, the bimonthly gay and lesbian parenting magazine, *And Baby*, was distributing 85,000 copies of each issue.²⁷⁵

Although evidence of the Gayby Boom is easy to find, statistics are harder to come by. The exact number of gays and lesbians in the United States is unknown, as is the number of children conceived through ART, so it is impossible to accurately state how many gays and lesbians have had children using ART.²⁷⁶ The United States Department of Health and Human Services estimated that there were 300,000 to 500,000 gay and lesbian biological parents in 1976, and that by 1990 between 6,000,000 and 14,000,000 children had a gay or lesbian parent.²⁷⁷ In 1992, the American Bar Association estimated that about four million gay men and lesbians were raising 8,000,000 to 10,000,000 children²⁷⁸ and, by 2006, various estimates suggest that between 1,000,000 and 14,000,000 children are being raised by gay or lesbian parents in the United States.²⁷⁹

272. See Eils Lotozo, *Gay and Lesbian Parents Fueling a 'Gayby Boom' As More Same-sex Couples Begin Families, Services for Them Expand*, PHILADELPHIA INQUIRER, June 29, 2003, at A1.

273. For example, *Jenny Lives with Eric and Martin* (1983), *Heather has Two Mommies* (1989), *Daddy's Roommate* (1991), *One Dad, Two Dads, Brown Dad, Blue Dads* (1994), *My Two Uncles* (1995), *Who's in a Family?* (1997), and *King and King* (2002) are listed on the Children's Literature Web Guide – Internet Resources Related to Books for Children and Young Adults, <http://www.armory.com/~web/gaybooks.html> (last visited Aug. 13, 2006).

274. See Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1054 n.166 (1996) (listing titles such as *Lesbian Parenting: Living With Pride & Prejudice*, *The Male Couple's Guide: Finding a Man, Making a Home, Building a Life*, *The Lesbian and Gay Parenting Handbook: Creating and Raising Our Families*, *Considering Parenthood*, and *Lesbian and Gay Families: Redefining Parenting in America*).

275. *Id.*

276. Joyce Kauffman, *Ignoring Children's Needs is True Immorality*, BOSTON GLOBE, Mar. 14, 2006, at A15 (“[O]ver the past 20 years, thousands of lesbians and gay men have brought children into their lives through biology, surrogacy, and adoption.”).

277. See NAT'L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP'T OF HEALTH & HUMAN SERV., GAY AND LESBIAN ADOPTIVE PARENTS: RESOURCES FOR PROFESSIONALS AND PARENTS 1 (2000), available at http://naic.acf.hhs.gov/pubs/f_gay/index.cfm.

278. Griffin, *supra* note 269, at C1.

279. See, e.g., Dahlia Lithwick, *Why Courts Are Adopting Gay Parenting*, WASH. POST, Mar. 12, 2006, at B2 (estimating that between six and fourteen million chil-

The 2000 Census also provides some useful information. Of the nearly 600,000 same-sex couples counted in the 2000 Census, thirty-four percent of the lesbian couples and twenty-two percent of the gay male couples reported living with at least one child under the age of eighteen.²⁸⁰ Based on these numbers, the percentage of lesbian couples raising children is not significantly lower than the percentage of married opposite-sex couples raising children (forty-six percent) or of unmarried opposite-sex couples raising children (forty-three percent).²⁸¹ The number of gays and lesbians counted in the 2000 Census, however, under represents the actual gay and lesbian population in the United States, and it is difficult to predict how the percentages of gay and lesbian parents would change if all the gays and lesbians in the United States were included in the Census.²⁸² None of these estimates, however, differentiate between children born during previous heterosexual relationships, adopted and foster children, and children conceived via ART.

Somewhat better estimates of the number of gays and lesbians having children via ART can be found by looking at gays and lesbians separately. Throughout the 1980s, the number of single women using AI steadily increased, and many of those women were lesbians. In 1980, it was estimated that ten percent of women conceiving children through AI were lesbian,²⁸³ and in 1988, the United States Office of Technology reported that of the 4,000 single women that requested AI in 1987, twenty-five percent of

dren are being raised by gay and lesbians parents); JASON CIANCOTTO & SEAN CAHILL, NAT'L GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, EDUCATION POLICY: ISSUES AFFECTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH 20 (2003), available at <http://www.thetaskforce.org/downloads/EducationPolicy.pdf> (estimating that between one and nine million children under the age of twenty are being raised by gay or lesbian parents); Kauffman, *supra* note 276, at A15 (estimating that six to ten million children are being raised by lesbians and gay men in the United States).

280. CIANCOTTO & CAHILL, *supra* note 279, at 20.

281. *Id.*

282. See SEARS, *supra* note 12, at 3-11 (discussing reasons why Census 2000 represents an undercount of gays and lesbians in the United States); M.V. LEE BADGETT & MARC A. ROGERS, INSTITUTE FOR GAY AND LESBIAN STRATEGIC STUDIES, LEFT OUT OF THE COUNT: MISSING SAME-SEX COUPLES IN CENSUS 2000 1 (2003), available at <http://www.iglss.org/pubs/highlights/highlights.html>.

283. Bernstein, *supra* note 46, at 1098 (citing Ann Taylor Flemming, *New Frontiers in Conception*, N.Y. TIMES, July 20, 1980, §6 (Magazine), at 14); Daniel Wikler & Norma J. Wikler, *Turkey-baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK Q. 5 (1991).

them were lesbians.²⁸⁴ In 1990, the Director of the National Center for Lesbian Rights estimated that 5,000 to 10,000 lesbians had given birth to children within a lesbian family,²⁸⁵ and in 1993, a San Francisco clinic estimated that it served more than 100 lesbians per month.²⁸⁶ Though helpful, these estimates almost certainly under represent the number of lesbians using AI to conceive children, and do not reflect the number of lesbians conceiving children through other reproductive technologies.²⁸⁷

Gay male couples have also sought to become parents using ART through surrogacy.²⁸⁸ In 1988, the Congressional Office of Technology Assessment reported that “[s]urrogate motherhood is an infrequent but increasingly popular arrangement used by infertile couples, singles and homosexuals” to form families.²⁸⁹ In the past decade, the number of gay men using surrogacy has no doubt increased.²⁹⁰ Growing Generations, an agency that arranges surrogacy exclusively for gays and lesbians,²⁹¹ was founded in 1996 and has managed over 600 cases,²⁹² and facilitated the birth of more than 400 babies.²⁹³ In fact, as more gay men have turned to surrogacy to have a family, surrogate

284. Bernstein, *supra* note 46, at 1098 (citing U.S. OFFICE OF TECH. ASSESSMENT, *ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES: SUMMARY OF A 1987 SURVEY: BACKGROUND PAPER 23* (1988)).

285. Jean Seligmann, *Variation on a Theme*, NEWSWEEK, Special Ed., Winter/Spring 1990, at 39.

286. William A. Henry III, *Gay Parents: Under Fire and on the Rise*, TIME, Sept. 20, 1993 at 66.

287. Justyn Lezin, *(Mis)conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN'S L.J. 185, 193 (2003) (discussing the fact that many lesbians that use AI to conceive are not counted because they do it themselves at home); Wikler, *supra* note 283, at 5, 6 (“Although the number of women who have performed self-insemination can only be estimated, it is surely greater than those involved in surrogacy, in vitro fertilization, and surrogate embryo transfer combined.”)

288. See Ginia Bellafante, *Surrogate Mothers' New Niche: Bearing Babies for Gay Couples*, N.Y. TIMES, May 27, 2005, at A1; Steve Rothaus, *Ties For Two: More Gay Men Are Celebrating Father's Day as They Join the Baby Boom*, MIAMI HERALD, June 17, 2006, at E1.

289. U.S. OFFICE OF TECH. ASSESSMENT, *INFERTILITY: MEDICAL AND SOCIAL CHOICES 26* (1988).

290. MARTIN, *supra* note 57, at 103; Hollandsworth, *supra* note 265, at 200-01; see generally Jerry J. Bigner & Frederick W. Bozett, *Parenting by Gay Fathers*, 14 MARRIAGE AND FAMILY REV. 155 (1989).

291. See Stephen Smith, *A Growing Trend, in FERTILITY RACE PART SIX: TWO MEN AND A BABY* (1997), available at http://news.minnesota.publicradio.org/features/199711/20_smiths_fertility/part6/section3.shtml.

292. Growing Generations, Home Page <http://www.growinggenerations.com> (last visited Aug. 13, 2006).

293. *Id.*

mothers have begun to seek out gay couples over traditional families.²⁹⁴ The president of Circle Surrogacy, a for-profit Boston agency, noted that in stark contrast to the difficulty he had finding surrogates for gay men ten years ago, today four out of five potential surrogates tell him they would be willing to work with gay couples and half prefer it.²⁹⁵

Recognizing that the sheer number of nonmarital children being born was cause enough to end the vulnerability inflicted upon these children by the parentage laws, the 1973 Conference promulgated a bold act that realistically addressed the needs of a changing society. The number of children being conceived via ART and born to same-sex couples is also on the rise and will continue to increase in the future. Ignoring this reality, as the 2000 Conference did, has resulted in a new UPA that fails to address the needs of our still changing society.

B. *Failing to Legally Recognize Both Parents of Children Conceived via ART and Born to Same-Sex Couples Deprives those Children an Even Start in Life*

In *Equal Protection for the Illegitimate*, Krause described illegitimacy as a "second-class way of life, imposed not only by the fact of birth outside a family, but by law as well."²⁹⁶ Krause argued that depriving nonmarital children of the benefits of child support; inheritance; custody, visitation, and adoption; and state and federal benefits such as worker's compensation, veteran's benefits, and social security rendered them unnecessarily vulnerable and more likely to need welfare benefits from the state.²⁹⁷ Krause argued that there was no legitimate reason why the law should excuse a man responsible for bringing a child into the world from any financial obligation to the child merely because he was not married to the child's mother.²⁹⁸ The 1973 Conference agreed and drafted an act that holds fathers financially re-

294. See Bellafante, *supra* note 288, at A1.

295. *Id.* Some reasons offered for this preference are that surrogates find that gay men are willing to be more involved in the pregnancy and are more open to developing a relationship with the gestational mother.

296. Krause, *Equal Protection*, *supra* note 7, at 477 (emphasis in original) (internal footnotes omitted).

297. *Id.* at 478-82. For a further discussion of the many disabilities resulting from the illegitimacy laws, such as increased infant mortality, lack of financial support, and social stigma, see JENNY TEICHMAN, *ILLEGITIMACY: A PHILOSOPHICAL EXAMINATION* (1982).

298. Krause, *Great Society*, *supra* note 257, at 830.

sponsible for all of their children, regardless of whether the father had, or even wanted to have, an on-going relationship with that child. In stark contrast, the 2000 UPA leaves children of same-sex couples vulnerable, in spite of the fact that, in the vast majority of cases, the non-biological parent is willing to accept legal and financial responsibility for the child.

Courts across the country have already faced dozens of cases in which, without the benefit of two legal parents, children of same-sex couples have become dependent on the state. In 1991, in *Nancy S. v. Michele G.*, a California Court of Appeal denied parentage rights to the non-biological mother of two children.²⁹⁹ Six years later the biological mother died in a car accident, and the minor child was placed in social services, despite repeatedly telling authorities that he had a living parent.³⁰⁰ It was not until social services realized that no one else was willing to care for the child that they allowed the non-biological mother to become the legal guardian.³⁰¹ In *Elisa B. v. Superior Court*, after the biological mother of two children applied for welfare benefits, El Dorado County filed an action to establish that the non-biological mother was obligated to pay child support for the children born to her former partner by artificial insemination.³⁰² Relying on precedent that included *Nancy S. v. Michele G.*, the Court of Appeal held that the non-biological mother had no financial responsibility for the children that she intended to raise and did raise as her own for several years.³⁰³ The Supreme Court of California, however, reversed. Drawing an analogy between this case and prior cases in which courts have held that biological fathers are

299. 228 Cal.App.3d 831 (Cal. Ct. App. 1991).

300. See Elaine Herscher, *Family Circle for Nancy Springer, a 1991 Court Case Over Custody of Her Children Was a Victory. But the Precedent-Setting Legal Decision Nearly Destroyed Her Family Six Years Later. Here is What Happened After the Lawyers Went Home*, S.F. CHRON., Aug. 29, 1999, at 1.

301. *Id.* It is estimated that the landmark holding in *Nancy S. v. Michele G.* – denying parentage rights to a child’s non-biological lesbian mother – has likely kept hundreds of lesbians from maintaining relationships with their intended children. *Id.* See also Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 527, 532 (1990) (discussing three cases in which third parties related to the biological mother asserted parentage rights over those of the non-biological lesbian mother after the biological mother died resulting in extended litigation and the children’s placement in unfamiliar, transitional environments for significant periods of time).

302. 117 P.3d 660 (Cal. 2005).

303. *Maria B. v. Superior Court*, 13 Cal.Rptr.3d 494 (Cal. Ct. App. 2004).

financially responsible for their children,³⁰⁴ the Court stated that the California Legislature sanctions paternity determinations for this very reason – that, whenever possible, two parents are better than one. Courts in other states have faced similar claims for child support of children conceived via ART and born to same-sex couples. Without an adequate statutory framework, however, not all courts have held the non-biological mother financially responsible for the children she helped bring into the world.³⁰⁵ The 2000 UPA provides a similarly inadequate statutory framework for addressing these issues.

C. *The Treatment of Children Conceived via ART and Born to Same-sex Couples in the 2000 UPA is Based on Outdated Religious and Moral Prejudice*

In his 1966 article, Krause argued that the treatment of nonmarital children sprang “from ancient prejudice based on religious and moral taboos” that were no longer applicable to modern society and called for a “new approach, based on rational criteria.”³⁰⁶ In his 1967 article, Krause criticized the religious and moral justifications for the illegitimacy laws in greater detail.

Krause first explored the justification that the illegitimacy laws discouraged promiscuity. Krause acknowledged that, based

304. *Elisa B.*, 117 P.3d at 660.

305. Courts have attempted to enforce child support obligations of same-sex parents under various existing legal frameworks such as breach of promise, enforceability of contract, and equitable estoppel. Results have been mixed. *See State ex rel. D.R.M.*, 34 P.3d 887 (Wash. Ct. App. 2001) (holding that a common-law action for breach of promise could not be used to impose a support obligation on a same-sex partner after the mother had blocked the partner's attempt to adopt the child); *Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (N.Y. Fam. Ct. 1985) (ruling that an agreement signed by a same-sex partner, acknowledging the children as her heirs and waiving the right to disclaim the children, was enforceable); *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004) (declining to enforce an implied contract and determining that no specific promise to provide support had been made); *Chambers v. Chambers*, No. CN00-09493, 2002 WL 1940145 (Del. Fam. Ct. Feb. 5, 2002) (finding that all elements of equitable estoppel had been met, and that a mother's former partner was foreclosed from denying her obligation to support a child conceived and born during the parties' relationship); *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. Ct. 2002) (holding that a mother's former partner was obliged to pay child support for the five children born during their relationship, particularly since a trial court had awarded partial physical custody of the children to the former partner); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (stating that a former same-sex partner was entitled to prove that she was eligible for parental visitation rights in relation to the children born during her relationship with their mother, and that the former partner was also subject to child-support obligations).

306. Krause, *Great Society*, *supra* note 257, at 830.

on society's view that sexual intercourse outside of marriage was undesirable, a legislature could properly pass a law that sought to discourage "illicit" intercourse."³⁰⁷ Krause questioned, however, whether punishing children in order to "evoke guilt feelings" in the child's parents was legally proper. "To ask the question," concluded Krause, "is to answer it."³⁰⁸ Krause also pointed to the reality that the illegitimacy laws clearly had little impact on the adults' sexual behavior as the number of nonmarital children being born was steadily increasing. To the extent that the treatment of children conceived via ART and born to same-sex couples in the 2000 UPA is an attempt to discourage gays and lesbians from having children, these same arguments apply. Not only is punishing children in the hope that it will discourage gay and lesbian adults from having children legally improper, it is not working. Gays and lesbians are having children via ART, and, by all accounts, will continue to do so in increasing numbers.³⁰⁹

Krause next addressed the justification that the illegitimacy laws were properly tailored to encourage the stability of families.³¹⁰ Krause again recognized that states have a legitimate interest in stabilizing families, but argued that if a "state wishes to discourage casual unions, it should do so directly, as, for example, by laws punishing fornication or providing incentive for marriage, rather than by placing at a disadvantage a group that cannot prevent the mischief against which the law is directed."³¹¹ This same argument can be made on behalf of children being raised by gays and lesbians. If society wants to discourage gays and lesbians from having children, it should pass laws directed at the parents' behavior and not at the children. This, however, seems unlikely as no state prohibits gays and lesbians from being

307. Krause, *Equal Protection*, *supra* note 7, at 492. See also SOLINGER, *supra* note 90, at 148 ("The public and private treatment of an unwed mother between 1945 and 1965 was clearly structured by society's disapproval of women who violated female norms of sexual purity and obedience.").

308. Krause, *Equal Protection*, *supra* note 7, at 492.

309. See *supra* Part VI.A. for a discussion of the increasing number of children conceived via ART and born to same-sex couples.

310. See Krause, *Equal Protection*, *supra* note 7, at 492. "The family protection argument basically is that giving the bastard the rights of a legitimate child would discourage marriage, since no advantage would remain to be derived from marriage." *Id.* at 493. See also Nolan, *supra* note 68, at 7 ("Traditionally, the most significant policy reasons given for treating the illegitimate child so harshly were to promote morality and marriage, to discourage promiscuity, to protect the marital family unit, and to punish the immorality of the parent.").

311. Krause, *Equal Protection*, *supra* note 7, at 493.

parents or from utilizing ART, and would face serious constitutional challenges if it attempted to do so.³¹² Moreover, many states have chosen to endorse parenting by gays and lesbians by sanctioning adoption by homosexuals and by allowing non-biological parents to adopt their partners' children.³¹³

Krause also argued that the profound changes in society's concept of family and marriage made the legal distinction based on illegitimacy no longer relevant.³¹⁴ By the time the 1973 UPA was drafted, the traditional family ideal of a working father, stay-at-home mother, and their biological children was becoming obsolete.³¹⁵ The divorce rate was on the rise and would climb to nearly 50 percent during the 1970s and 1980s,³¹⁶ the women's movement brought about drastic changes in the role of women both at home and in the workplace,³¹⁷ and the "sexual revolution" of the 1960s and 1970s, along with significant Supreme Court precedent, led to the widespread use of contraceptives and

312. The Supreme Court has already held that laws criminalizing homosexual sex are unconstitutional. See *Lawrence v. Texas*, 539 U.S. 558 (2003). It has also explained that individuals have a fundamental right to produce offspring. See *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). See also JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 36 (1994) discussing the equal protection analysis in *Skinner* as well the Court's emphasis on the right to procreation as a "basic civil right").

313. See *supra* notes 180-83 and accompanying text.

314. See Krause, *Equal Protection*, *supra* note 7, at 493-94.

315. As early as 1960, the U.S. Department of Health, Education, and Welfare began to acknowledge changing family roles when it noted that the family had shifted from a "patriarchal" to a "companionship" unit. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *supra* note 36, at 18 (noting that families were no longer the nerve-center of life activities such as "work, education, religion, recreation, and security," that parents were becoming less authoritative and wives and children were being given more decision-making power, and household chores were being shared in a more democratic way).

316. See Kris Franklin, "A Family Like Any Other Family:" *Alternative Methods of Defining Family in Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1043 (1990-91). See also David G. Richardson, *Family Rights for Unmarried Couples*, 2 KAN. J. L. & PUB. POL'Y 117, 118 (1993) (showing that almost one half of all marriages ended in divorce and that the average length of a marriage was seven years in the 1990s).

317. A primary driving factor of women beginning to question their "proper place" was author Betty Friedan's *The Feminine Mystique* published in 1963. Friedan's book uncovered many of the difficulties and injustices of domesticity. By 1966, the National Organization for Women was founded and the women's rights movement was on its way. See JOHN C. McWILLIAMS, *GUIDES TO HISTORIC EVENTS OF THE TWENTIETH CENTURY: THE 1960S CULTURAL REVOLUTION* 9 (2000).

granted women greater power over their procreative choices.³¹⁸ These changes led to tremendous shifts in the make-up of American families, which today includes increasing numbers of unmarried couples,³¹⁹ step-families,³²⁰ women choosing to conceive and raise children alone,³²¹ and gay and lesbian families.³²²

Unable to conjure an appropriate legislative purpose for the illegitimacy distinction, Krause concluded that there was no rational purpose for the law.³²³ Instead, Krause suggested that the “long continued acceptance of this legislatively enforced inequality between legitimate and illegitimate children may rest on much the same ground as did the inferior position of women, Negroes, and other classes through the centuries – prejudice.”³²⁴ Similar prejudice is levied against families headed by gays and lesbians in spite of the fact that it has been concluded by numerous professional groups and in many research studies that having gay parents is not detrimental to a child’s mental health or social functioning.³²⁵ The American Academy of Pediatrics, the American Academy of Family Physicians, the Child Welfare League of America, the National Association of Social Workers, and the

318. See Franklin, *supra* note 316, at 1042; *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating Connecticut law banning the use of contraceptives by anyone, including married couples); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (expanding *Griswold* to unmarried persons); *Roe v. Wade*, 410 U.S. 113 (1973) (holding a Texas anti-abortion law unconstitutional based on the right to privacy).

319. Whereas in 1970, there were only 523,000 unmarried-couple households registered with the Census Bureau, in 2000, there were 5.5 million unmarried-couple households. See TAVIA SIMMONS & MARTIN O’CONNELL, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 1 (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>; Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 30 (2000).

320. Based on the Census, it was estimated that in 1987, there were 4.3 million stepfamilies, or “remarried famil[ies] with a child under eighteen years of age who is the biological child of one of the parents and was born before the remarriage occurred.” Gary, *supra* note 319, at 29. This is probably an undercount, which is why it was also suggested that one out of every three Americans is likely a member of a stepfamily. *Id.* at 30.

321. See Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN’S STUD. 173, 174 (1996) (discussing the increase in “single mothers by choice”); Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES, Mar. 19, 2006, § 6 (Magazine) at 46.

322. See *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (“[The] demographic changes of the past century make it difficult to speak of an average American family.”).

323. See Krause, *Equal Protection*, *supra* note 7, at 498.

324. *Id.*

325. See generally Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 224 (2005).

American Psychological Association have all recognized that gay and lesbian parents are “just as good” as heterosexual parents, and that “children thrive in gay- and lesbian-headed families.”³²⁶ Furthermore, the American Psychological Association concluded in July of 2004, that “[t]here is no scientific basis for concluding that lesbian mothers or gay fathers are unfit parents on the basis of their sexual orientation.”³²⁷

The 1973 Conference was able to see through the social taboo surrounding illegitimacy and the laws' misguided attempts to direct adult behavior by punishing children. The 2000 Conference, however, accepted misinformed social prejudice and promulgated an act that unjustifiably punishes children in an effort to direct their parents behavior.

D. *Although Some Progressive States and Judges have Recognized both Parents of Children Conceived via ART and Born to Same-Sex Couples, a Consensus has not Emerged and Conflicts of Law have become Common*

Krause described the state of illegitimacy law in 1967 as “an uncertain mixture of old English common law tempered with occasional flashes of modern thought,” and argued that the “limited, narrow statutes which [were] directed at only selected aspects of illegitimacy” were leading to unacceptable conflicts of law both between and within jurisdictions.³²⁸ A distinct lack of uniformity has also emerged between states and courts as to the parentage of children conceived via ART and born to same-sex couples. At one end of the spectrum are courts that have refused to grant standing to non-biological parents in custody disputes

326. See Lithwick, *supra* note 279, at B2. One APA publication reports that “not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents.” CIANCOTTO & CAHILL, *supra* note 279, at 21.

327. William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE OF CHILD. 97, 102 (2005). The statement goes on to say that “[o]n the contrary, results of research suggest that lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children Overall, results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents.”

328. Krause, *Great Society*, *supra* note 257, at 831 (“broad statutory solutions seem indispensable”).

with their former same-sex partners.³²⁹ On the other end of the spectrum are courts that have granted non-biological parents full parental rights,³³⁰ along with state legislatures that have legally recognized same-sex unions and, thereby, formalized the relationships between same-sex partners and their children.³³¹

The legal difficulties created by this broad spectrum are well illustrated by the case of *Miller-Jenkins v. Miller-Jenkins*.³³² In 2000, Lisa and Janet Miller-Jenkins traveled from their home state of Virginia to Vermont to enter a civil union. Two years later, Lisa gave birth to a daughter, IMJ, through artificial insemination. When IMJ was four months old, the family moved to Vermont where the couple eventually separated. Lisa, the biological mother, moved for dissolution of the civil union in Vermont, as well as a determination of parental rights. The Vermont family court determined that both Lisa and Janet were legal parents of IMJ. In 2004, Lisa filed another claim, this time asking a Virginia court to grant her sole custody of IMJ. The Virginia court did so under the rationale that Janet's only claim to parentage was based on the couple's civil union, which is not recognized

329. Illinois denied standing to a non-biological parent in *In re C.B.L.*, 723 N.E.2d 316, 320-21 (Ill. App. 1999), because the child custody law had no provisions for non-traditional relationships. Florida held that a non-biological parent did not have standing as a *de facto* parent even though she participated in the decision to have a child, as well as the birth and upbringing of the child for three years. See *Music v. Rachford*, 654 So.2d 1234 (Fla. Dist. Ct. App. 1995). Tennessee also denied standing to parties it defined as "a nonparent who is not and has not been married to either of the children's parents, but who previously maintained an intimate relationship with such a parent and who previously provided care and support to the children." *In re Thompson*, 11 S.W.3d 913, 923 (Tenn. Ct. App. 1999).

330. *Elisa B. v. Superior Court* established that a man or woman can qualify as a parent under the 1973 UPA if he or she "receives the child into his [or her] home and openly holds out the child as his [or her] natural child." 117 P.3d at 667 (citing section 7611, subdivision (d) of the California UPA). Although this provision of the 1973 UPA was intended to apply only to fathers, the California Supreme Court held that it applies to women as well, and thus granted full rights and responsibilities to a non-biological mother. *Id.* The Indiana Court of Appeals also granted full rights to a non-biological parent in *In re A.B.*, 818 N.E. 2d 126 (Ind. Ct. App. 2004), holding "that when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child." New Jersey courts have gone so far as to grant a prebirth order declaring a non-biological parent to be a co-parent following the birth of the child. See *In re Parentage of Robinson*, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005).

331. California, Connecticut, Hawaii, Maine, Massachusetts, New Jersey, Vermont, and the District of Columbia have some form of recognition and benefits for same-sex couples. See *Luther*, *supra* note 141, at 5.

332. Nos. 2004-443, 2005-030, 2006 WL 2192715 (Vt. Aug. 4, 2006).

in Virginia. Both decisions were appealed. The Vermont Supreme Court unanimously held that Vermont had jurisdiction over the matter and that the Vermont court's finding that both Janet and Lisa are legal parents of IMJ must endure.³³³ The Virginia Court of Appeals agreed, but not until after Lisa had denied Janet access to their daughter for more than two years.³³⁴

A comparable dispute between Florida and Colorado arose in the case of *Hayes v. Mohr*, although not in an ART context.³³⁵ While Hayes and Mohr were in a long-term, lesbian relationship, Mohr adopted two children. The couple then filed a petition for joint parentage, which a Colorado court granted, thereby recognizing both Hayes and Mohr as legal parents of the children. After moving to Florida, the couple separated, and Mohr sought to deny Hayes any access to the children. Hayes filed suit in Florida seeking enforcement of the Colorado order and Mohr moved for dismissal on the ground that the Colorado order was invalid. The Florida court agreed with Mohr and dismissed the case, disregarding the parentage order issued by the Colorado court.³³⁶

Conflicts of law have also arisen between courts in the same jurisdiction. In 2005, the California Supreme Court consolidated the cases of *Elisa B. v. Superior Court*,³³⁷ *Kristine H. v. Lisa R.*,³³⁸ and *K.M. v. E.G.*³³⁹ Although all three cases dealt with the determination of parentage of children conceived via ART and born to same-sex couples, the lower courts had issued incongruous rulings under California's version of the 1973 UPA.³⁴⁰ Such

333. *Id.* ¶ 2. See also Leah C. Battaglioli, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 CATH. U. L. REV. 1235, 1257-60 (2005).

334. See Christina Nuckols, *Virginia Appeals Court: Vermont has Say in Lesbian Custody Battle*, VIRGINIAN-PILOT, Nov. 29, 2006, at 1. Attorneys for Lisa said that they intend to appeal the case to the Virginia Supreme Court and, ultimately, the United States Supreme Court if necessary. *Id.*

335. See National Center for Lesbian Rights, NCLR's Docket, http://www.nclrights.org/cases/hayes_v_mohr.htm (last visited Aug. 13, 2006).

336. *Id.*

337. 117 P.3d 660 (Cal. 2005).

338. *Id.*

339. 117 P.3d 673 (Cal. 2005).

340. In *Elisa B.*, the Superior Court found the non-biological parent to be a legal parent and thus responsible for child support. The Court of Appeal reversed, however, holding that the non-biological parent was not a parent and thus had no such responsibilities. The California Supreme Court reversed again, thus reinstating the responsibilities of the non-biological parent. *Elisa B.*, 117 P.3d at 664, 670. The Superior Court in *Kristine H.* granted a judgment of joint parentage to a same-sex couple prior to the birth of their child. After separating, the biological parent filed a motion to have the joint parentage order declared void, which the Superior Court

inconsistent judicial rulings have also occurred in New Jersey, where courts have both denied and granted legal parentage to non-biological same-sex couples,³⁴¹ and in Wisconsin, where the state supreme court denied standing to the former partner of an adoptive parent in 1991,³⁴² and then four years later, applying the same law, reversed its holding and held that non-biological parents can be granted standing and awarded custody.³⁴³

In an effort to fill in the gaps created by the inadequate statutory framework for determining parentage of ART children, courts in various states have looked to multiple doctrines in order to resolve these cases. For example, the doctrine of *in loco parentis* was stated as the justification for granting standing to the non-biological parent in Pennsylvania,³⁴⁴ whereas a Washington court used the doctrine of *de facto* parentage to grant standing³⁴⁵ and a Massachusetts court used the *de facto* parent categorization to grant visitation to the non-biological parent.³⁴⁶ In 2005, California expanded its interpretation of the term “parent” to include non-biological same-sex parents, though noting that the UPA’s definition is not as expansive,³⁴⁷ and then in 2006

denied. The Court of Appeal reversed, thereby voiding the parentage order. The California Supreme Court reversed again, holding that the non-biological mother was a legal parent on estoppel grounds. See Kristine H., 117 at 690. In the case of *K.M.*, K.M. was the genetic parent, having donated her ova to her then-partner, E.G., who was the gestational parent, having carried and delivered the child. The genetic parent filed a motion for parental relations with the Superior Court, which was denied. The Court of Appeal affirmed, comparing K.M. with a sperm donor under the UPA as having relinquished her rights to the child. The Supreme Court reversed, holding that K.M. was in a relationship with E.G. and not equivalent to a sperm donor, thus entitling her to parental rights. See *K.M.*, 117 P.3d at 673.

341. *Compare* *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) *cert. denied*, 531 U.S. 926 (2000) (holding that separated same-sex couples can have joint custody, but refusing to grant legal parentage to non-biological parent who was present for and participated in the planning and birth) *with In re* Parentage of Robinson, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005) (granting joint parentage to same-sex couple who planned and produced a child through ART).

342. *In re* Interest of Z.J.H., 471 N.W.2d 202 (Wis. 1991), *rev’d*, 533 N.W.2d 419 (Wis. 1995).

343. See *In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995).

344. See *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001).

345. See *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (non-biological parent requesting coparentage rights denied standing by the Superior Court under the UPA). The Court of Appeals reversed in part, noting that while the UPA did not allow for a parentage action, the common law did so based on the doctrine of *de facto* parentage. The Washington Supreme Court agreed, ruling that the non-biological parent had standing to assert rights as a co-parent. *Id.*

346. See *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999).

347. See *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005).

went so far as to broaden its interpretation of the UPA.³⁴⁸ Without clear guidance from legislatures, courts are left to their own devices to handle these cases leading to incongruent and conflicting results both within and across state lines. As an Indiana court stated, “[u]ntil the legislature enters this arena . . . we are left to fashion the common law to define, declare, and protect the rights of these children.”³⁴⁹

Since 1973, courts have stitched together a patchwork of decisions applying varied interpretations of the UPA and multiple equitable doctrines to determine the parentage of children conceived via ART and born to same-sex couples. These inconsistent rulings have led to conflicts both within and between jurisdictions. The 2000 UPA should have provided the states with a uniform solution to address these difficult and important cases, rather than promulgate another act that fails to give courts the guidance they need.

E. *Proposed Uniform Legislation has Failed to Address the Issue Fully*

Prior to promulgating the 1973 UPA, the Conference made a handful of less than satisfactory attempts to improve the legal status of nonmarital children in the United States,³⁵⁰ including the Uniform Illegitimacy Act, which was later withdrawn, the Uniform Blood Tests to Determine Paternity Act, which, as of June 1973, was adopted in only nine states, and the Uniform Act on Paternity,³⁵¹ which was enacted in only six states.³⁵² Consequently, the 1973 Conference decided to take a more drastic and comprehensive approach – resulting in the highly successful 1973 UPA.

In 1988, the Conference promulgated the Uniform Status of Children of Assisted Conception Act. This act failed to fully address the needs of children conceived through ART – including children born to same-sex couples – and was adopted in only two states.³⁵³ Although the 2000 UPA is a dramatic improvement over previous uniform legislation, it by no means matches the

348. See *Charisma R. v. Kristina S.*, 140 Cal.App.4th 301 (2006).

349. See *In re Parentage of A.B.*, 818 N.E.2d 126 (Ind. App. 2004).

350. See Mary Kay Kisthardt, *Of Fatherhood, Families, and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 589 (1991).

351. *Id.*

352. UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. 5 (Supp. 2005).

353. See UNIF. PARENTAGE ACT, 9C U.L.A. 363 (2001).

comprehensive approach of the 1973 UPA. Whereas the 1973 UPA addressed parentage determination of every child conceived via sexual intercourse, the 2000 UPA addresses parentage determinations of only some of the children conceived via ART.

When one looks at decisions made under the 2000 UPA, it becomes clear that it, much like the 1973 UPA, operates in an inconsistent, non-comprehensive, and unsatisfactory manner in cases dealing with children conceived via ART and born to same-sex couples. For example, in the state of Washington, where both Article 7 and Article 8 have been adopted,³⁵⁴ recent precedent declared that a non-biological lesbian partner was not a parent under the 2000 UPA.³⁵⁵ In *In re Parentage of L.B.*, both the Superior Court and the Court of Appeals said that the Washington UPA did not provide a method for determining coparentage of the appellant who had assisted in her partner's insemination, participated in the pregnancy and birth, and provided much of the child's care during her first six years.³⁵⁶ When the case came before the Washington Supreme Court, the appellant did not assign error to the part of the holding declaring that the Washington UPA did not apply,³⁵⁷ however, the court did state that while the "UPA undeniably provides a statutory, and the most common, avenue by which courts adjudicate a person a parent in this state. . . [it] did not contemplate nor address every conceivable family constellation and in this court the parties agree that our statutory parentage determinations, under the UPA, fail to directly address this dispute."³⁵⁸ The court went on to hold that the non-biological mother had standing to assert parental right under the doctrine of *de facto* parentage.

In *Chambers v. Chambers*, an unpublished Delaware case based upon similar facts as the *L.B.* case, the Family Court ruled in favor of a biological mother who petitioned for child support from her former domestic partner.³⁵⁹ Though the petition was

354. See WASH. REV. CODE ANN. §§ 26.26.011 to 26.26.913 (West 2002).

355. See *In re Parentage of L.B.*, 89 P.3d 271, 279 (Wash. App. 2004) (stating that the Legislature was aware that same-sex domestic partners could accomplish pregnancy and thus the second-parent was left out not by oversight, but deliberate choice, and that the Legislature must have intended to commend these types of cases to the common law).

356. *Id.* at 274-75.

357. *In re Parentage of L.B.*, 122 P.3d 161, 166 (Wash. 2005).

358. *Id.* n.5.

359. See No. CN99-09493, 00-09295, 2005 WL 645220 (Del. Fam. Ct. Jan. 12, 2005).

not brought under the 2000 UPA, the court looked to the act because "parent" was not defined under the Delaware Child Support Statute at issue.³⁶⁰ The court noted that the definition of parent in the 2000 UPA did not include the non-biological mother of the child, but held that "'parent' must be construed according to its common and approved usage, and in a case of first impression such as this, the Court must examine the policy behind the existing law."³⁶¹ In the end, the non-biological mother was found to be a *de facto* parent and, thereby, required to pay child support.³⁶²

In New Jersey, the Superior Court recently applied the AI provision of the 1973 UPA to a same-sex couple and held that the non-biological mother was a legal parent.³⁶³ The court referred to the new UPA stating that "[a]s the scientific boundaries of conception and fertilization have expanded, so has the definition of parent as recognized by [the Conference] when it issued revisions in 2000 and 2002."³⁶⁴ The court went on to say that the Conference "may not have contemplated same-gender parents in its expanded definition of family, but it did understand that dynamic times dictated law sensitive to the advances of science and to evolving family structures."³⁶⁵

Though case law based upon the 2000 UPA is scarce, it is clear from the few cases discussed above that parentage of ART children born to same-sex couples is left ambiguous and will certainly be construed in conflicting ways. The cases, however, also display the trend towards finding a way, whether under the UPA or some other doctrine, to recognize the rights of both parents of children conceived via ART and born to same-sex couples. Unlike in 1973, however, the states are not being led by a comprehensive and forward-looking UPA, but instead have to fashion equitable remedies in spite of the 2000 UPA.

VII. CONCLUSION

In 1973, the National Conference of Commissioners on Uniform State Laws promulgated a parentage act that ushered in

360. *Id.* at *3.

361. *Id.*

362. *Id.* at *4-7.

363. *See In re Parentage of Robinson*, 890 A.2d 1036, 1041 (N.J. Super. Ct. Ch. Div. 2005).

364. *Id.*

365. *Id.*

profound changes in how parentage is determined. Based on advancements in scientific technology, changing social norms, Supreme Court precedent, and sound legal arguments, the 1973 Conference led the nation in creating legal equality for children regardless of the marital status of their parents. The country was, no doubt, already heading down this same path, but the Conference provided the final, prophetic shove.

Rather than follow its successful predecessor, the 2000 Conference chose to be a drag on the tides of change in family law. Despite advancements in scientific technology, changing social norms, Supreme Court precedent, and sound legal arguments, all of which call for equal treatment of children conceived via ART and born to same-sex couples, the 2000 Conference promulgated a parentage act that clearly and deliberately excludes these children and their parents. Where the 1973 Conference got it right, the 2000 Conference got it wrong and this time, rather than the UPA leading the country, it will be left behind.

