

# WHAT'S WRONG WITH A PARENTHOOD MARKET?

## A NEW AND IMPROVED THEORY OF COMMODIFICATION

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*Common sense tells us that parenthood is not and should not be for sale. Yet people routinely acquire parental rights and responsibilities for a price through adoption and reproductive technologies. Some commentators contend that these parenthood markets are the logical consequence of legal economic rhetoric, which, they assert, does not account for power disparities, nor the importance of alleviating them. Focusing on alternative insemination, this Article contends that a relatively unregulated parenthood market is beneficial because it facilitates formation of families on the basis of intent and function rather than biology and heterosexuality. Scholarly discourse on commodifying parenthood has overlooked these benefits, focusing only on dangers concerning eugenics, access, anonymity, and the objectification of children. This Article aims to correct this shortcoming in commodification theory, proposing an antiessentialist theory of commodification that accounts for both the benefits and dangers of the parenthood market. It concludes that thinking about commodification in a new way, one that recognizes the importance of particular contexts, allows us to think about privatization in general more coherently.*

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## INTRODUCTION

Most people believe parenthood should not be bought and sold.<sup>1</sup> A quarter century ago, Richard Posner and Elisabeth Landes defended, against a strong consensus, the economic efficiency of paying for babies in adoption.<sup>2</sup> Outraged readers decried their analysis, suggesting it epitomized the bloodless approach to human affairs that, they argued, fatally flawed legal economics.<sup>3</sup> But using a baby as a club to beat commodification over the head is misguided. Contrary to Margaret Jane Radin's claim that "[c]onceiving of any child in market rhetoric wrongs personhood,"<sup>4</sup> a parenthood market, in some circumstances, can be a good thing.<sup>5</sup> Specifically, the sale of

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1. Notable exceptions might be the sellers, buyers, transporters, and other intermediaries in the sale of mostly female babies in rural China due to poverty and laws restricting family size. Elisabeth Rosenthal, *Bias for Boys Leads to Sale of Baby Girls in China*, N.Y. TIMES, July 20, 2003, at A6.

2. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEG. STUD. 323 *passim* (1978).

3. See, e.g., ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 172 (1993) (contending that commercial surrogacy undermines women's autonomy and dignity as well as parental love); MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS 137-40 (1996) (critiquing the treatment of babies as market commodities). *But see* Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1219 n.8 (2002) (cautioning against condemning all legal economics based on Landes & Posner, *supra* note 2).

4. RADIN, *supra* note 3, at 139.

5. Terminology is important in this discussion. I use "parenthood market" to mean a transfer of parental rights and responsibilities for a price. Posner and Landes used the phrases "market in adoption" and "free market in babies." See Landes & Posner, *supra* note 2, at 324. But Posner later altered his terminology, suggesting that the transaction is better described as the sale of parental rights. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 167-70 (5th ed. 1998) [hereinafter POSNER, ECONOMIC ANALYSIS OF LAW]; RICHARD A. POSNER, SEX AND REASON 410 (1992) [hereinafter POSNER, SEX AND REASON]. He also has clarified that he "did not advocate a free market in babies." See Richard A. Posner, *Mischaracterized Views*, 69 JUDICATURE 321, 321 (1986) [hereinafter Posner, *Mischaracterized Views*]. Instead, he advocates a market that is regulated "less stringently than is done today." See Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 72 (1987) [hereinafter Posner, *The Regulation of the Market in Adoptions*]. Other scholarship, in contrast, uses the term "baby selling." See, e.g., RADIN, *supra* note 3, at 139. Not surprisingly, defenders of the market use the term "parenthood market" while detractors use the term "baby selling" to amplify their point. Defenders contend, as I do, at least in the case of alternative insemination, that parents are obtaining rights and obligations, while detractors see babies as objects being transferred for a price like inanimate objects or farm animals. I find the former analysis more persuasive because adoption and reproductive technologies do not allow parents to do anything they want with the children. Moreover, children will grow up and, while many remain closely associated with their families, most also achieve an

parental rights through the alternative insemination market facilitates the formation of families based on intention and function rather than biology and heterosexuality. Consequently, people who believe that same-sex couples and single parents can and do form families should reconsider their assumption that a parenthood market is always contrary to human flourishing.<sup>6</sup>

Yet dangers of the parenthood market, such as concerns relating to eugenics, access, paternal anonymity, and objectification exist alongside its potential benefits.<sup>7</sup> Curiously, in the face of these plural meanings, legal scholarship tends to be either sharply skeptical or enthusiastic about commodification, rather than measured.<sup>8</sup> Thus the sale of parental rights and obligations is an ideal case to illuminate the incomplete state of commodification theory. If selling parenthood, the quintessential instance of contested commodification, has both positive and negative aspects, we need to retheorize commodification to account for that range. This Article's contribution to this effort is to articulate both the positive and negative effects of the alternative

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autonomy that is inconsistent with being owned. Throughout this discussion, it is important to remember that there are multiple parenthood markets, and that there is a difference between an outright sale of a baby (i.e., on the black market) and the sale of biological components of a baby (namely, gametes). However, the two both involve a monetary transaction through which one acquires parental rights and obligations. Because they are distinguishable, they can be regulated differently, as are, for example, markets for medical and recreational marijuana. A central premise of this Article is that the contextualized approach discussed in Part V *infra* can account for differences between the regulation of gamete transfers and other sales of parenthood.

6. The phrase "human flourishing" echoes Margaret Jane Radin's language in her canonical critique of commodification. See RADIN, *supra* note 3, at 64. Radin defines human flourishing based on philosopher Martha Nussbaum's list of ten limits and capabilities that define our humanness: mortality; the human body; pleasure and pain; cognitive capability; practical reason; early infant development; affiliation; relatedness to other species and to nature; humor and play; and separateness. *Id.* at 67. This list is then elaborated into "circumstances necessary to be able to live a good human life." *Id.* at 67–68. For example, human flourishing relating to mortality means:

"[b]eing able to live to the end of a complete human life, as far as possible; not dying prematurely, or before one's life is so reduced as to be not worth living," while human flourishing relating to the body means "[b]eing able to have good health; to be adequately nourished; to have adequate shelter; having opportunities for sexual satisfaction; being able to move from place to place."

*Id.* (quoting Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 222 (1992)). Differences of opinion exist, of course, as to whether same-sex couples and single parents should be able to form families. See, e.g., DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 171–84 (1995) (asserting the superiority of families with married, heterosexual parents).

7. See *infra* Part III.

8. For discussion of the poles of commodification literature in legal discourse, see *infra* Parts IV.A and IV.B.

insemination market and to suggest that a highly contextualized approach to commodification, such as the one taken by sociologist Viviana Zelizer, accounts for these mixed valences better than other approaches.<sup>9</sup>

If the market for parental rights has positive elements, in addition to its familiar downsides, then other, less controversial, markets may also have multivalent meanings. Currently, one rarely reads a defense of commodification per se in legal literature because the term itself carries such negative connotations that only commodification skeptics tend to use it.<sup>10</sup> This Article seeks to relieve the term commodification of some of its baggage and, in doing so, to encourage a more precise discussion of what marketization means in various contexts. In short, I address a question that existing commodification literature has largely ignored, namely the affirmative good that marginalized people may enjoy through markets, both literal and rhetorical.<sup>11</sup> It is possible to enthusiastically embrace the benefits of commodification in particular circumstances without retreating to a bloodless, indeed merciless, legal economics that does not (and perhaps cannot) account for power disparities, nor the importance of alleviating them.

This Article begins by describing ways in which parental rights are already commodified through adoption and reproductive technologies such as surrogacy, in vitro fertilization (“IVF”), and alternative insemination (“AI”). In focusing on reproductive technologies, in particular alternative insemination, the Article explores transactions that have clear positive import and pose

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9. See *infra* Parts IV.C., IV.D. For an elaboration on the benefits of bringing interdisciplinary analysis to family law, see generally Lee E. Teitelbaum, *Rays of Light: Other Disciplines and Family Law*, 1 J.L. & FAM. STUD. 1 (1999).

10. Compare RADIN, *supra* note 3 (critiquing the treatment of babies as market commodities), with POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 5 (advocating less regulation in the market for parental rights). For a discussion of the tendency of commodification skeptics to use the term “commodification,” see Carol M. Rose, *Whither Commodification*, in *RETHINKING COMMODIFICATION: READINGS IN LAW AND CULTURE* (Martha M. Ertman & Joan C. Williams eds., forthcoming 2004).

11. One scholar has argued for the progressive potential of contractualization in reproductive technologies. See Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 302 (1990). For other examples of progressive writing that recognizes important links between the market and human flourishing, see generally LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* (1998); Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, in *SEX AND SOCIAL JUSTICE* 276 (1999); Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999); and Katharine Silbaugh, *Commodification of Women’s Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997).

relatively little danger to human flourishing, unlike, say, selling a baby through the online auction eBay.<sup>12</sup> Adoption and reproductive technologies reveal a gap between the rhetoric condemning the sale of parenthood and people's actual practices. The blanket condemnation of the parenthood market as a species of slavery simply does not comport with the way we live and regulate these transactions.<sup>13</sup>

Part II elaborates on this point, describing in some detail the transactions involved in buying and selling sperm for alternative insemination. It illustrates how the market for male gametes operates as a relatively free market, "an economic activity in which buyers and sellers come together and the forces of supply and demand affect prices."<sup>14</sup>

One could respond to this analysis by determining to decommodify adoption and reproductive technology transactions to bring rhetoric condemning baby selling in line with legal and social

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12. It is hard to see how supporting such a sale could be consistent with human flourishing. In any case, eBay's regulation would prevent it. See eBay, *Human Parts and Remains*, at <http://pages.ebay.com/help/community/png-remains.html> (providing that "[h]umans, the human body or any human body parts may not be listed on eBay") (last visited Nov. 3, 2003) (on file with the North Carolina Law Review). Interestingly, this prohibition is broader than the position taken in this Article, in that eBay formally prohibits sellers from listing sperm or eggs. See *id.*

13. The specter of slavery is always in the background of discussions about the parenthood market and baby selling. Slavery and baby selling are not mutually exclusive. Babies were among the black people enslaved and treated as commodities in the United States, and children are among the chief targets, along with women, of contemporary slave traders. Barbara Crosette, *What It Takes to Stop Slavery*, N.Y. TIMES, Apr. 22, 2001, at E4. But even assuming that we can think of the transfer of parental rights and obligations as baby selling, see *supra* note 5, commodification skeptic Margaret Jane Radin points out that it can be misleading to think about baby selling or the parenthood market as slavery:

Selling a baby, whose personal development requires care taking, to people who want to act as the caretakers, is not the same thing as selling a baby or an adult to people who want to act as only as users of her capacities. Moreover, if the reason for our aversion to baby-selling is that we believe it is like slavery, then it is unclear why we do not prohibit baby-giving (release of a child for adoption) on the ground that enslavement is not permitted even without consideration.

See RADIN, *supra* note 3, at 138–39. Posner also critiques the analogy between slavery and other forms of commodification. See Posner, *The Regulation of the Market in Adoptions*, *supra* note 5, at 70. (critiquing the analogy between slavery and other forms of commodification and noting that we "resist this type of argument" regarding military conscription).

14. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 712 (10th ed. 1993) (defining "market"); see also POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 5, at 11 (defining market as a "voluntary exchange," in which "resources are shifted to those uses in which the value to consumers, as measured by their willingness to pay, is highest"). Posner also states that "when resources are being used where their value is highest . . . we may say that they are being employed efficiently." *Id.*

practices.<sup>15</sup> Because of the considerable benefits of marketizing parental rights and obligations, at least in the alternative insemination context as discussed in Part III, I reject the anti-commodification approach. Part III also discusses the negative effects of the market, demonstrating the need for a new and improved theory of commodification that can accommodate both benefits and drawbacks of commodifying parenthood in various contexts.

Part IV describes ways that the existing literature on the parenthood market inadequately accounts for its contributions to human flourishing and then explores one theory that might account for multiple the meanings of markets. I then explain my theory of commodification, which combines the best of Posner, Radin, and Zelizer. Zelizer's work, which challenges conventional wisdom by documenting ways that monetary exchanges are common, indeed constitutive, elements of intimate relationships,<sup>16</sup> will be new to many legal academics. Using literary theorist Diana Fuss's interpretation of essentialism,<sup>17</sup> Part V contends that Zelizer's perspective could ground contextualized inquiries into particular effects of commodification in particular situations, providing a new and improved theory of commodification.

## I. DESCRIBING PARENTHOOD MARKETS

Academic hand wringing about whether selling parenthood would be a good thing implies that we do not already buy and sell it. But the practice is alive and well in various guises, direct and indirect.<sup>18</sup> People routinely exchange funds to obtain parental rights and obligations through adoption and reproductive technologies. Thus, there is a functioning market.<sup>19</sup> In the case of reproductive

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15. For an example of this approach, see generally Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation of Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257 (2002).

16. See VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985) [hereinafter ZELIZER, PRICING THE PRICELESS CHILD]; VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY (1994) [hereinafter ZELIZER, THE SOCIAL MEANING OF MONEY]; Viviana A. Zelizer, *The Purchase of Intimacy*, 25 L. & SOC. INQUIRY 817 (2000) [hereinafter Zelizer, *The Purchase of Intimacy*].

17. DIANA FUSS, ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE 2 (1989).

18. Landes & Posner, *supra* note 2, at 324 (“[I]n practice, as we shall see, there is a considerable amount of baby selling.”); see also *id.* at 331 (describing adoption agencies as “nominally nonprofit”); Posner, *The Regulation of the Market in Adoptions*, *supra* note 5, at 60 (describing the legal and black markets for adoption).

19. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 14, at 712.

technologies, especially in vitro fertilization and alternative insemination, this market is a relatively free market, operating as it does largely unhampered by legal regulation.<sup>20</sup> At least in the case of alternative insemination, I will argue in Part III, the very fact that this market operates as a free market furthers human flourishing by allowing gay and single people to become parents.<sup>21</sup>

### A. Adoption

Adoption is an accepted part of legal and social life, and it involves both monetary exchanges and linguistic mechanisms that mask these exchanges. While statutory prohibitions formally criminalize the sale of parenthood, adoptive parents routinely pay for parental rights and obligations, and agencies reimburse gestational mothers for their expenses.<sup>22</sup> Moreover, agencies and other participants in adoption get paid for their services in tendering children to adoptive parents.<sup>23</sup> The fact of payment, therefore, does

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(defining “market” as “the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices”).

20. *Id.* at 465.

21. Facilitating this kind of family formation is positive both because parenthood is an important component of personhood and citizenship for many people and because irrational prejudice has barred gay and single people from being parents. RADIN, *supra* note 3, at 152–53 (describing how parenthood can enhance human flourishing); 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, 463–64 (1990). Expanding people’s options and countering invidious discrimination, generally speaking, furthers human flourishing. The only principled reason one could oppose these things is if gay people are inadequate parents. But empirical research demonstrates that children of gay and single parents fare as well as children of heterosexuals. See Raymond W. Chan et al., *Psychological Adjustment Among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 CHILD DEV. 443, 453–54 (1998) (documenting that children of single and lesbian parents are as well adjusted as children of heterosexual couples, and that the most significant factors affecting behavioral problems in children were parental stress and conflict); Judith Stacey & Timothy J. Biblarz, (*How Does the Sexual Orientation of Parents Matter?*), 66 AM. SOC. REV. 159, 167, 168–71 (2001) (reviewing twenty-one studies and concluding that the sole distinctions between children of gays and those with straight parents are instances of gender atypicality, such as girls aspiring to be doctors rather than nurses, and boys being less promiscuous). For a general defense of equality, see MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY xiv (1983) (seeking “to describe a society where no social good serves or can serve as a means of domination”).

22. See Kristine Cordier Karnezis, Annotation, *Criminal Liability of One Arranging for Adoption of Child Through Other Than Licensed Child Placement Agency (“Baby Broker Acts”)*, 3 A.L.R. 4th 468, 470 (1981).

23. We speak, for example, of adoptive parents paying “overhead” to agencies, and of agencies or the intended parents in surrogacy arrangements paying gestating mothers for their legal, medical, and other expenses. See NAT’L ADOPTION INFO. CLEARINGHOUSE, U.S. DEPT’ OF HEALTH & HUMAN SERVICES, COST OF ADOPTING, at



not distinguish legitimate adoption from criminal baby-selling.<sup>24</sup> Instead, the social context of the payment marks one transaction as baby-selling and another as adoption, one as black market and the other legitimate. The transaction's meaning is determined by who makes and receives the payment, as well as the amount. The payment designates legitimate reimbursement of expenses if the person paying the gestational mother is a licensed adoption agency and the payment is not too high.<sup>25</sup> Conversely, the payment designates the transaction as prohibited baby-selling if the person paying is not a licensed adoption agency or if the payment reimburses the gestational mother for her physical, emotional, and other risks and costs of pregnancy and delivery.<sup>26</sup> Thus, we see that the payments themselves do not

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[http://naic.acf.hhs.gov/pubs/s\\_cost.cfm#private](http://naic.acf.hhs.gov/pubs/s_cost.cfm#private) (last visited Nov. 3, 2003) [hereinafter NAT'L ADOPTION INFO. CLEARINGHOUSE] (describing fees charged by licensed private adoption agencies for counseling, home studies, birth expenses, post-placement supervision, and the agency's operating expenses) (on file with the North Carolina Law Review); *see also* Kingsley v. State, 744 S.W.2d 191, 193 (Tex. App. 1987) (holding an attorney liable for violating baby broker statute since the attorney's payments to a pregnant woman for such items as cosmetics and cigarettes clearly were not "legal or medical expenses" within exception to statute proscribing sale or purchase of a child). In international adoptions, first world agencies and adoptive parents make "donations" of thousands of dollars to third world orphanages and facilitators, but not to birth parents. This fact has caused sufficient discomfort that some Colombian adoption homes are attempting to arrange for the donations to be paid on an annual basis to dissociate the payment from particular children. Barbara Yngvesson, *Placing the "Gift Child" in Transnational Adoption*, 36 LAW & SOC'Y. REV. 227, 245-46 (2002). In China, international adoption brings in \$3,000 per child in mandatory orphanage donations, and another \$1,000 to \$2,000 in other payments by adoptive parents. Kay Johnson, *Politics of International and Domestic Adoption in China*, 36 LAW & SOC'Y. REV. 379, 388 (2002).

24. Payments to transfer parental rights and responsibilities have varied greatly over time. In the nineteenth century, unmarried mothers and other birth parents had to pay "baby farmers" between \$10 and \$50 to take a child off their hands. ZELIZER, PRICING THE PRICELESS CHILD, *supra* note 16, at 169-70, 174. During this era, Zelizer contends, adoption was "instrumental," based on the value of children for the work they could do for their families. *See id.* at 170. By 1930, however, child labor laws and educational reforms deprived the child of that value, replacing the child's economic value with a notion of the priceless child. *Id.* This "sentimentalization" of adoption in the early twentieth century reversed the direction of adoption payments, so that adoptive parents began to pay for children rather than receive payment for taking them off someone else's hands. The new rendering of children as worthless and priceless "led paradoxically to a greater commercialization and monetization of child life." *Id.* at 201. By the late 1940s, black market babies cost \$5,000, compared to \$1,000 in the 1930s, and negative worth in the decades prior to the turn of the century. *Id.* at 199.

25. Improper payments would give profit to the mother rather than professionals such as doctors, nurses, and lawyers. *See* Kingsley v. State, 744 S.W. 2d 191, 193 (Tex. App. 1987); *see also* *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (condemning \$10,000 payment to surrogate mother, with only incidental attention to broker fees and no mention of doctor or attorney's fees being problematic).

26. *Id.* Landes and Posner articulate these maternal costs as follows:

(1) the opportunity costs of the natural mother's time during the period of

determine the meaning of the transaction as a valid adoption or an instance of prohibited baby-selling.

A review of prices paid by adoptive parents illustrates the current commodification of parental rights. The price of a domestic private adoption can range between \$4,000 and \$30,000, compared to \$7,000 and \$30,000 for an international adoption.<sup>27</sup> Children who are racial minorities, such as African-American children, are sometimes cheaper to adopt than white children, a differential that seems to turn more on supply and demand than on agencies expending more money to place white children.<sup>28</sup> The price of adopting various children, like price in other markets, is one factor influencing people to adopt one baby rather than another.<sup>29</sup>

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pregnancy or hospitalization when she is precluded from working, over and above her maintenance costs, (2) any pain or other disutility of the pregnancy and delivery to her, [and] (3) any value which she attaches to keeping the child rather than putting it up for adoption.

Landes & Posner, *supra* note 2, at 337. In addition, Landes and Posner would allow legal payments to cover “the costs of search of the middleman—usually an obstetrician or lawyer—in locating and bringing together the supplier and demander.” *See id.* As of the time that Landes and Posner wrote their article, gestational mothers could not be legally paid more than \$3,000 for carrying the child and surrendering parental rights, whereas the black market for babies was higher, between \$9,000 and \$40,000. *See id.* at 338.

27. Additional costs include travel, pre-placement foster care, and the child’s pre-placement medical care. JEAN NELSON ERICHSON & HEINO R. ERICHSON, HOW TO ADOPT INTERNATIONALLY: A GUIDE FOR AGENCY-DIRECTED AND INDEPENDENT ADOPTIONS 42 (2003); NAT’L ADOPTION INFO. CLEARINGHOUSE, *supra* note 23. These costs can be offset by federal and state tax benefits and military adoption benefits. *Id.* at 43. According to one source, an American adopting a Russian child pays between \$13,000 and \$25,000, including travel costs, to do so. Lee Hockstader & Marylou Tousignant, *Bringing Home Twice the Joy*, WASH. POST, Oct. 23, 1994, at A1.

28. Patricia J. Williams, *In Search of Pharaoh’s Daughter*, in THE ROOSTERS EGG 213, 223 (1995) (reporting that adoptive parents in one agency paid half the standard fee to adopt “older, black and other handicapped children”); *see also* Lynne Kelleher, *Exposed: From Russia to India, Babies for Sale at a Price to Childless*, MIRROR, Nov. 16, 1998, at 4 (noting that the price for adopting children differs among various countries, costing \$15,000 for Guatemalan children, \$13,900 for Russian children, and \$8,000 for Ethiopian children); NAT’L ADOPTION INFO. CLEARINGHOUSE, *supra* note 23 (explaining that public agencies, which place only children with special needs, charge between zero and \$2,500 for each adoption, considerably less than the \$4,000 to \$30,000 charged by private agencies).

29. Like the alternative insemination market, the commodification of parental rights in adoption has mixed meanings. Some white American parents’ reluctance to adopt African-American babies, for example, reflects anti-black racism in the United States. International adoptions, moreover, are regressive in that they depend on vast economic inequalities between first world and developing countries, exploiting that differential in many ways rather than alleviating it. Sara Corbett, *Where Do Babies Come From?*, N.Y. TIMES June 16, 2002, § 6 (Magazine), at 42 (describing cases where Americans who thought they were adopting Cambodian orphans, in fact participated in a system where brokers bribed, coerced, or lied to impoverished birth mothers to induce them to relinquish the children). However, the increasingly common pattern of white Americans

### B. Reproductive Technologies

Like adoption, reproductive technologies such as surrogacy, in vitro fertilization, and alternative insemination involve the exchange of money for parenthood. In surrogacy, an intended parent (or couple) pays a woman to conceive and/or gestate the child. IVF involves intended parents paying medical professionals to combine gametes (sometimes purchased from third parties) outside the body and then implant the resulting embryo in the uterus. AI similarly involves payment for sperm, and, like the others, often involves payment for medical services such as intrauterine insemination.

A surrogate's fee typically ranges from about \$10,000 to \$20,000, in addition to payment for her expenses, though the parties may negotiate some other fee.<sup>30</sup> Due to the *Baby M*<sup>31</sup> case, surrogacy has received more media and legal attention than other reproductive

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adopting children from Asian and Latin American countries (often because it is less expensive and quicker than adopting a white American child) is also positive in that it expands our understanding of family beyond biology and racial limitations, and provides homes for children who might otherwise languish in orphanages. National Council for Adoption, Facts on Adoption, at <http://www.nca-usa.org/adoptioncontent.html> (last visited Nov. 3, 2003) (noting a three-fold increase in Americans adopting foreign-born children, from 6,536 in 1992 to 19,237 in 2001) (on file with the North Carolina Law Review). Moreover, as with reproductive technologies, single, often heterosexual women, lesbian couples, and gay men frequently become parents by this route, a pattern that has led some countries to stem the tide by explicitly banning gay people from adopting. See, e.g., OFFICE OF CHILDREN'S ISSUES, U.S. STATE DEP'T, INTERNATIONAL ADOPTION—CHINA, at [http://travel.state.gov/adoption\\_china.html](http://travel.state.gov/adoption_china.html) (last visited Nov. 3, 2003) (noting the Chinese Ministry of Civil Affairs's policy that "adoption applications from homosexual families are not acceptable") (on file with the North Carolina Law Review).

30. LYNDY BECK FENWICK, PRIVATE CHOICES, PUBLIC CONSEQUENCES: REPRODUCTIVE TECHNOLOGY AND THE NEW ETHICS OF CONCEPTION, PREGNANCY, AND FAMILY 230–33 (1998). Presenting an early version of this Article, I met a law student who had been a surrogate mother for a gay male couple a few years earlier. She gave me a copy of the ten-page contract setting out the terms of their agreement and consented to my publishing its terms, explaining that she thought people should know about surrogacy arrangements that remain cordial, as opposed to the contentious ones that get media and legal attention. The contract provides that the father will pay for ovulation kits and home pregnancy tests, medical tests and procedures not covered by the mother's insurance, maternity clothes (up to \$750), mileage and housing for the mother's pregnancy-related trips, the difference between disability benefits and any lost salary should the mother be confined to bed rest, reasonable attorney's fees for the mother's termination of parental rights, and a \$10,000 surrogacy fee (payable in monthly increments during the pregnancy, with the last \$3,000 made in \$1,000 payments in the seventh, eighth, and ninth months of pregnancy). Surrogacy Agreement (on file with the North Carolina Law Review). Television anchor Joan Lunden recently publicized her own surrogacy arrangement in order to let people know that some surrogacy arrangements proceed without acrimony. Jill Smolowe & Natasha Stoyneff, *Teaming with Love*, PEOPLE, Mar. 10, 2003, at 88.

31. 537 A.2d 1227 (N.J. 1988).

technologies and thus is more highly regulated than either in vitro fertilization or alternative insemination. Almost half the states have statutes regulating surrogacy arrangements, and most of these ban commercial surrogacy contracts.<sup>32</sup>

Like adoption, commodification of parenthood through surrogacy is only selectively controversial. New York, for example, forbids payments to the gestational/genetic mother in surrogacy arrangements.<sup>33</sup> But, as is the case with adoption, both law and culture allow professionals such as doctors and lawyers to receive monetary compensation<sup>34</sup> and sometimes allow the broker of the surrogacy arrangement to get paid as well.<sup>35</sup> Each of these intermediaries spends a few hours working for their money, yet the mother spends a minimum of nine months,<sup>36</sup> is on task twenty-four hours a day altering her nutrition and other behaviors, risking physical injury, undergoing profound emotional and hormonal changes, and also enduring extraordinary physical pain and hardship while giving birth. In both adoption and surrogacy, despite the fact that it is the birth mother doing the most work in the transaction—indeed the most dangerous, life-altering work—public policy paradoxically forbids only her from receiving payment. This non-commodification of a mother's labor carries the same retrograde dangers that Katharine Silbaugh has highlighted in relation to homemaking labor: work done only or mainly by women is deprived of remuneration.<sup>37</sup> Legal economists might describe this situation as a market failure,<sup>38</sup> while ethicists or laypeople might simply call it unfair.<sup>39</sup>

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32. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 851 (2000).

33. N.Y. DOM. REL. LAW § 123(1) (Consol. 1999).

34. Lawyers can be criminally liable for placing children for adoption for a fee, or even without charging a fee, if they are not acting on behalf of licensed placement agencies. Karnezis, *supra* note 22, at 472–77. However, they are not, of course, liable for receiving money for performing legal services in connection with an adoption.

35. Compare W. VA. CODE § 48-22-803 (2003) (allowing “fees and expenses” in surrogacy agreement), with KY. REV. STAT. ANN. § 199.590 (Michie 2003) (prohibiting payment to broker in surrogacy arrangement but allowing payments to “child-placing” agencies and lawyers for “the legitimate practice of law”).

36. In most cases, the term of performance is longer, given that she has to chart her menstrual cycles prior to insemination and likely inseminates for several cycles before conceiving.

37. Silbaugh, *supra* note 11, at 82–83.

38. See POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 5, at 401.

39. Like other markets for parental rights, surrogacy has mixed societal effects. On the negative side, it can discount women's contributions to gestation and childbirth. On the positive side, it can decouple biological from social parenthood and further women's citizenship by recognizing their capacity to contract. For an extended articulation of the

Two other reproductive technologies, IVF and AI, involve the commodification of gametes and medical services, rather than fully formed babies. Although this difference is important, there are similarities among the reproductive technologies as each represents a different market for parenthood. This analysis reveals not only the routine commodification of parenthood, but also how it is commodified differently in different markets, underlining the necessity for a theory that accounts for these differences.

IVF costs between \$6,200 and \$11,850 per attempt, with a total cost per delivery of between \$44,000 and \$211,000.<sup>40</sup> A major element of this cost can be the purchase of eggs, which is necessary when the gestating mother's own eggs are not conducive to forming an embryo. Egg donors are better paid than sperm donors.<sup>41</sup>

Of course, the various markets for parenthood differ from one another. The market for IVF differs in many respects from AI in large part because of the different processes for obtaining eggs and obtaining sperm. Women have a finite number of eggs, while sperm is continuously replenished.<sup>42</sup> Moreover, extracting eggs requires a surgical procedure, which involves risk, discomfort, and expense that far exceed those for separating sperm from a man's body. These consequences can be understood in economic terms. Because of these considerations, the supply of eggs for donation is smaller than the supply of sperm, creating a higher price for eggs than for sperm. The necessity for the intensive involvement of medical professionals (extracting eggs, combining eggs and sperm outside of the uterus, then implanting the fertilized preembryo) in turn increases the price of IVF. Economically, this increased price means that fewer women will have access to the IVF market than to the alternative insemination market. As discussed below in Part III, this accessibility

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positive implications of reproductive contracts, see Schultz, *supra* note 11, *passim*.

40. Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1030 (1996); University of Utah Center for Reproductive Medicine Fee Schedule, May 1, 2002 (listing price for in vitro fertilization as \$6,400, and in vitro fertilization with a donated egg as \$11,850) (on file with the North Carolina Law Review).

41. Egg donors receive between \$750 and \$3,500 per completed cycle according to a 1992 survey, compared to \$35 to \$50 received by sperm donors per donation. NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 255-56 (1998). For examples of high-end egg prices, see Shanley, *supra* note 15, at 257-58 (noting newspaper ads at elite colleges promising \$25,000 payments to blue-eyed, blonde egg donors and \$50,000 to athletic egg donors with a minimum 1400 SAT score).

42. See HENRY GRAY, GRAY'S ANATOMY 124-25 (Churchill Livingstone ed., 38th ed. 1995).

differential is a downside of the IVF market.<sup>43</sup>

Alternative insemination, like adoption and other reproductive technologies, involves the exchange of money for parenthood. Sperm banks pay donors about \$60 for each donation, and the donors agree to provide regular donations over a period of time.<sup>44</sup> Once a certain number of women conceive, usually between four and ten, the banks retire the donor.<sup>45</sup> Prospective mothers pay between \$120 and \$275 for a vial, depending on the sperm bank and whether the sample is suitable for intrauterine insemination.<sup>46</sup> More than one vial may be required for each insemination, and most women inseminate for months before conceiving. Moreover, the sperm must often be shipped via overnight carrier from the cryobank in liquid nitrogen.<sup>47</sup> Additional costs include a registration fee that some banks charge, tests to ensure the recipient's health, and doctor's visits for

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43. Like the other markets for parental rights, IVF has additional mixed implications. On one hand, it suffers the same eugenic dangers as the alternative insemination market. *See infra* notes 113–29 and accompanying text. On the other hand, it furthers intent-based parenthood. More importantly, since older women are more likely to need IVF than younger ones, IVF allows many women to pursue demanding careers prior to having children. One suspects that opposition to reproductive technologies, such as that expressed by the Catholic church, is due at least in part to a commitment to encouraging women to become mothers early in life, thus making motherhood women's primary job, and leaving wage-labor and the public sphere to men. However, one could argue that retaining the structure of the work place tailored to suit "ideal workers" without significant parenting or other dependent care responsibilities is also problematic in comparison to a program designed to structure wage labor to accommodate family care responsibilities. JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 64–113 (2000).

44. At Pacific Reproductive Services, a sperm bank with offices in San Francisco and Pasadena, donors are paid between \$60 and \$80 per donation and contribute, on average, once weekly over a minimum one-year period. Pacific Reproductive Services, *Becoming a Sperm Donor*, at <http://www.hellobaby.com/becomingspermdonor.html> (last visited Nov. 3, 2003) (on file with the North Carolina Law Review). This sperm bank pays more if donors are willing to be identified than if they remain anonymous. E-mail from Representative, Pacific Reproductive Services, to Martha M. Ertman, Professor of Law, University of Utah (Sept. 18, 2003, 2:55PM PST) (on file with the North Carolina Law Review).

45. RACHEL PEPPER, *THE ULTIMATE GUIDE TO PREGNANCY FOR LESBIANS* 45 (1999).

46. NEW YORK STATE TASK FORCE, *supra* note 41, at 255; California Cryobank, Inc., *Service & Fee Schedule* (March 2003), [http://www.cryobank.com/fees\\_ds.cfm?page=9](http://www.cryobank.com/fees_ds.cfm?page=9) (on file with the North Carolina Law Review).

47. Another option for shipping sperm without freezing it is to suspend it in a medium to keep it warm for twenty-four hours before shipping it via overnight delivery. This product, aptly called Over Nite Male, costs \$25 per shipment. University of Illinois at Chicago, University Andrology Laboratory, *Overnight Male Kit*, at <http://www.uic.edu/com/mcsr/androlab/Overnite.htm> (last visited Nov. 3, 2003) (on file with the North Carolina Law Review).

insemination.<sup>48</sup> All told, alternative insemination can cost between \$500 and \$1000 for the first insemination and between \$300 and \$700 for each subsequent insemination.<sup>49</sup>

Seventy to seventy-five percent of women get pregnant using alternative insemination within six tries, a rate that is considerably higher than for IVF.<sup>50</sup> Thus, assuming pregnancy on the sixth insemination and the possibility of conception at home rather than in a doctor's office, a woman may acquire parental rights through alternative insemination for between \$1,000 and \$4,500 (plus shipping costs of between \$72 and \$600).<sup>51</sup> Part II identifies what precisely is being bought by buyers (sperm banks and prospective mothers) and sold by sellers (donors and sperm banks).

## II. THE ALTERNATIVE INSEMINATION MARKET

The alternative insemination market is unique among the methods described above for obtaining parenthood for a price in that AI is a literal market<sup>52</sup> and a relatively free, open market.<sup>53</sup> The free market aspects of alternative insemination transactions play a crucial role in making this branch of the parenthood market particularly beneficial to marginalized groups.

Markets, by definition, exist where supply and demand determine prices for the transfer of goods and services.<sup>54</sup> Banks and recipients demand sperm, and donors and banks supply it. Suppliers (donors and sperm banks) transfer sperm on the condition of donor

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48. These expenses may be covered partially or fully by health insurance, or paid for entirely by the recipient. PEPPER, *supra* note 45, at 48–51 (noting the one-time \$150 registration fee, health tests for up to \$600, \$150 for each semen sample, \$150 for intrauterine insemination and \$100 or more for intracervical insemination).

49. PEPPER, *supra* note 45, at 51.

50. NEW YORK STATE TASK FORCE *supra* note 41, at 76, 78 (noting a live birth rate for twenty-four to thirty-four percent of embryo transfers). Frozen sperm, which is the product bought from sperm banks most often, reduces the alternative insemination pregnancy rates. *Id.*

51. PEPPER, *supra* note 45, at 51. I have included a lower range to account for the fact that many women inseminate at home, saving the expense of doctor's office visits. For a discussion of ways that health insurance covers alternative insemination by women with male partners more frequently than the same procedures for lesbians, see Laurie A. Rompala, Note, *Abandoned Equity and the Best Interests of the Child: Why Illinois Courts Must Recognize Same-Sex Parents Seeking Visitation*, 76 CHI.-KENT L. REV. 1933, 1938 n.25 (2001).

52. In literal markets, both buyers and sellers commonly see themselves as such. However, as discussed below, the overt market language in alternative insemination is tempered by the designation of sperm sellers as "donors."

53. Adoption and surrogacy, in contrast, are more highly regulated than alternative insemination and IVF. See *supra* notes 22–36 and accompanying text.

54. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 14, at 712.

anonymity and indemnity for any injury or illness.<sup>55</sup> Buyers (sperm banks and prospective mothers), in turn, demand medical and social information about the donor, further protections against disease transmission, and anonymity.<sup>56</sup> All of these factors are necessary for the smooth functioning of the alternative insemination market. Moreover, lack of regulation and a relatively low price for the gametes means that it is both an open market in which a large number of people can participate, and a free market that flourishes because of its comparative freedom from regulation. Taken together, these factors illustrate how the alternative insemination market makes positive contributions to both law and society.<sup>57</sup> Of course, this relative lack of regulation also has potential drawbacks, including the lack of government oversight that could provide quality control and the lack of subsidies that could broaden the range of people who have access to parenthood through reproductive technologies.<sup>58</sup>

*A. Buyers and Sellers Exchange Money for Male Gametes*

Alternative insemination generally involves at least two separate transactions. The sperm bank first purchases sperm from a donor and subsequently sells the sperm to a woman who uses it to become a mother. Both transactions (which I will refer to as the bank/donor and bank/recipient transactions) involve the exchange of money for goods and services. While the transactions differ in important respects,<sup>59</sup> both transactions commodify gametes, and in doing so commodify parental rights and responsibilities.

Before discussing the intricacies of bank/donor and bank/recipient transactions, the terms used to describe the parties in these transactions merit attention. This terminology reflects the fact that alternative insemination transactions include both market and

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55. See *infra* notes 74–83 and accompanying text.

56. See *infra* notes 68–83 and accompanying text.

57. See *infra* notes 155–93 and accompanying text.

58. See Robin Marantz Henig, *Pandora's Baby*, SCI. AM., June 2003, at 62, 65.

59. The bank/donor transaction is mostly a sale of goods, while the bank/recipient transaction is sale of both goods and services. This difference would, in ordinary circumstances, dictate that the sale from donors to banks would be governed by Article 2 of the Uniform Commercial Code (“UCC”), while the sale from banks to recipients would be governed by the common law of contracts, on the grounds that the sale of goods is not the “pre-dominant purpose” in the donor/recipient transaction. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-1 (5th ed. 2000). But both are governed by the common law of contracts as supplemented by blood shield statutes. See, e.g., COLO. REV. STAT. §§ 4-2-102 and 13-22-104 (2002) (limiting the scope of UCC Article 2 to exclude the “donation, with or without consideration, of human tissue or blood).



non-market elements. Sellers of both sperm and eggs are called donors in legal doctrine and popular speech,<sup>60</sup> yet these sellers are generally paid for their gametes. The language is likely borrowed from blood donation rhetoric, which refers to those giving up their blood as donors regardless of whether they receive money.<sup>61</sup> In both contexts, the terminology masks economic elements of a transaction by suggesting that the people giving up their body parts are doing so out of altruism rather than economic self-interest.<sup>62</sup> The economic nature of the transaction is more transparent in the term used to describe the intermediaries in alternative insemination transactions: “sperm banks.” A bank is commonly understood to be “an establishment for the custody, loan, exchange, or issue of money.”<sup>63</sup>

Using this terminology in bank/donor transactions, the bank pays the donor for deposits and in bank/recipient transactions, the recipient pays to withdraw sperm from the bank.<sup>64</sup> Bank/recipient transactions differ from bank/donor transactions, as bank/recipient transactions involve both goods and services.<sup>65</sup> In fact, the services provide much of the value of the transaction to the prospective mother. They include the provision of information about the characteristics of the donor, as well as guarantees of safety in the form

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60. See, e.g., UNIF. PARENTAGE ACT § 702, 9B. U.L.A. 355 (2000) (referring to males who provide sperm and women who provide eggs for assisted reproduction as “donors”).

61. RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 11 (1971).

62. One commentator substitutes the term “provider” for “donor” to further her goal of decommodifying the gametes. See Shanley, *supra* note 15, at 258–59. Interestingly, the sale of sperm is largely uncontroversial, while egg sales have generated considerable debate. Compare Silbaugh, *supra* note 11, at 106 (noting the “dull response” to sperm sales), with Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 107–11 (citing the public controversy over commodification of human oocytes), and *Report Suggests Limits on Pay for Egg Donors*, N.Y. TIMES, Aug. 5, 2000, at A9 (noting a report released by the American Society for Reproductive Medicine concluding that payments for eggs over \$5,000 “requires justification” and payments over \$10,000 “is inappropriate”). One commentator objects to commodifying sperm only when gay and single people are buyers, finding it unproblematic when married heterosexuals are the buyers. See BLANKENHORN, *supra* note 6, at 171–72, 178 (critiquing the “Sperm Father” as one whose “fatherhood can be bought and sold as a commercial product” and defending the use of donor sperm by “married couples experiencing fertility problems,” as “ethically and socially separate” from single and gay parents purchasing sperm).

63. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 14, at 90.

64. NEW YORK STATE TASK FORCE, *supra* note 41, at 255.

65. In the bank/donor transaction, the donor, in addition to providing sperm, arguably provides services such as stimulating himself, abstaining from sex for several days prior to donating, and refraining from activities that could infect him with HIV or another toxin. However, these services seem at most incidental to the main object of the contract, namely the sale of goods.

of both medical and social safeguards. The medical safeguard involves banks screening donors to minimize the likelihood of conveying disease or disability. The social safeguard, in contrast, involves the provision by banks of both contractual and practical donor anonymity to protect the integrity of the new family that the recipient intends to create.<sup>66</sup>

The bank's provision of goods and services begins with the careful screening of potential donors. According to its promotional literature, California Cryobank, one of the largest sperm banks in the country, accepts fewer than five percent of the men who apply to be donors.<sup>67</sup> The application process takes three months and involves extensive medical tests as well as interviews about family background and behaviors that could result in transmission of disease.<sup>68</sup> In addition, the banks test donors' blood in the application process, every three months, and upon "retirement" from the program, for diseases such as HIV, syphilis, and hepatitis, as well as genetic disorders such as Tay-Sachs disease, sickle cell disease, and cystic fibrosis.<sup>69</sup>

Also, sperm banks provide information about many other donor characteristics, including ethnicity, hair color, hair texture, eye color, height, weight, blood type, skin tone, years of education, occupation or major in college, and, in many cases, baby pictures and audio tapes of the donor's voice.<sup>70</sup> At least one sperm bank matches photos of the mother's partner with prospective donors to increase the likelihood that the child will look like its other social/legal parent.<sup>71</sup> Banks also

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66. The donor, of course, also benefits from this anonymity in that he is unlikely to bear economic or emotional responsibility for a child created through alternative insemination. As a practical matter, however, it seems that a recipient could locate the donor based on the extensive information in donor profiles, while a donor would have to get the bank to disclose the recipient's name and address.

67. CALIFORNIA CRYOBANK, INC., WHEN YOU SUCCEED, WE SUCCEED (promotional brochure), available at <http://www.cryobank.com/pdf/fds.pdf>, at 2 (last visited Nov. 3, 2003) (on file with the North Carolina Law Review).

68. *Id.* at 3-4. The California Cryobank states in its promotional brochure:

At the initial interview, the donor is required to provide information on his current health status, his personal and family medical history, and other important screening factors. During this interview, not only are his answers evaluated, but his attitude, demeanor, and the manner in which he provides the information are also considered.

*Id.*

69. NEW YORK STATE TASK FORCE, *supra* note 41, at 251 (1998).

70. CALIFORNIA CRYOBANK, *supra* note 67, at 5; California Cryobank, Inc., Donor Catalog, at <http://www.cryobank.com/speccat.cfm?toppage=2> (last visited Nov. 3, 2003) (on file with the North Carolina Law Review). Audiotapes and baby pictures both cost \$25, with a \$5 discount if you order them online. California Cryobank, *supra* note 46.

71. CALIFORNIA CRYOBANK, *supra* note 67, at 7.

provide short profiles, often free of charge, and longer, multigenerational profiles of the donor's social and medical history, for a nominal fee.<sup>72</sup> Women wanting particular donor characteristics may use a sperm bank that recruits those donors, such as the Rainbow Sperm Bank, which, unlike many other banks, provides sperm from gay men.<sup>73</sup>

In addition to selling this medical and character trait information, the banks sell anonymity, the freedom to become a parent with little risk that the biological father will interfere with the intended family. Anonymity is crucial because family law often links biology to parental rights and responsibilities.<sup>74</sup> Anonymity allows a donor to donate without risk that the donation will result in the financial or social responsibilities of fatherhood and allows a recipient to conceive without the risk of unwanted intervention in the family by a stranger.<sup>75</sup> The value of this aspect of the transaction is demonstrated by the fact that while some donors contractually agree at the time of donation to have contact with the child or provide medical information that may become relevant, this agreement is generally to have contact once the child reaches majority, when the family unit is less vulnerable to intrusion.<sup>76</sup>

Both legal doctrine and the structure of the alternative insemination market contribute to anonymity in sperm sales. Doctrinally, statutory and contract law provide anonymity for donors, and, in some circumstances, for recipients. Structurally, technological innovations (such as medical testing, the world wide web, overnight delivery services, and liquid nitrogen to preserve frozen sperm) have facilitated a large, national market, in which geographic and social

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72. *Id.* at 5; California Cryobank, *supra* note 46 (listing a \$15 fee for a long donor profile, with a \$5 discount if ordered online).

73. See Rainbow Flag Health Services, A Known Donor Sperm Bank, at <http://www.gayspermbank.com> (last visited Aug. 25, 2003) (describing the bank's practices of actively recruiting gay and bisexual sperm donors and of facilitating contact between the donors and recipients) (on file with the North Carolina Law Review).

74. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 188 (2d ed. 1988).

75. See Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 305, 325-26 (John D'Emilio et al. eds., 2000); see also Ellen Lewin, *Wives, Mothers, and Lesbians: Rethinking Resistance in the U.S.*, in *PRAGMATIC WOMEN AND BODY POLITICS* 168-70 (Margaret Lock & Patricia A. Kaufer eds., 1998) (describing four lesbians' alternative insemination strategies, all of which involved assuring donor anonymity to protect their new families).

76. For an example of such an "openness policy," an agreement of the sperm bank to make "all reasonable efforts" to supply information if all parties consent after the child turns eighteen, see CALIFORNIA CRYOBANK, *supra* note 67, at 6.

distance between donors and recipients provide further anonymity.<sup>77</sup>

On a doctrinal level, statutes often terminate the donor's rights and responsibilities regarding the child. The 1973 Uniform Parentage Act ("UPA"), for example, provides a measure of anonymity for both donors and recipients in alternative insemination transactions by severing the parental rights and responsibilities of a sperm donor when a physician is involved in the insemination.<sup>78</sup> While this provision applies only where the recipient is married to someone other than the donor, at least two states have extended these protections to unmarried women.<sup>79</sup> The 2000 UPA further increases anonymity protections by removing the physician and marriage requirements, providing that "[a] donor is not a parent of a child conceived by means of assisted reproduction."<sup>80</sup> Thus, the 2000 UPA makes it easier for women, who are either single or partnered with women, to have children without being vulnerable to a donor's fatherhood claims and also provides donors with increased security from being held financially or otherwise responsible for the child.

Contract law provides an additional basis for anonymity.<sup>81</sup> Sperm bank contracts routinely provide for this anonymity.<sup>82</sup> As California Cryobank's ("CCB") contract with its recipients ("Client") provides:

Representations of Client: . . . Client agrees that client shall not now, or at anytime [sic] require nor expect CCB to obtain or

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77. The market is also international, as indicated by the section of California Cryobank's web page that lists information on donor samples that can be used in Canada. California Cryobank, Inc., Donor Catalog Index, at <http://www.cryobank.com/catalog/index.cfm> (last visited Nov. 3, 2003) (on file with the North Carolina Law Review).

78. UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 408 (1973). The Uniform Parentage Act ("UPA") was promulgated in 1973 and revised in 2000; the 1973 version or its equivalent is in force in nearly half the states. Garrison, *supra* note 32, at 883. Texas and Washington have adopted the 2000 UPA. See TEX. FAM. CODE ANN. §§ 160.001 to 821 (Vernon 2001); WASH. REV. CODE §§ 26.26.011 to 26.26.913 (2002).

79. UNIF. PARENTAGE ACT § 5(b) cmt. (noting that Colorado and Wyoming sever donor rights when women are inseminated with physician involvement, regardless of whether they are married). Despite this clear language, at least one court has refused to interpret the statute to protect recipients from donor intervention. *In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (en banc) (holding statute inapplicable when unmarried recipient allowed the donor to be involved with the birth and to see the child afterwards).

80. UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (2000).

81. Some courts, however, might not enforce contracts providing for donor anonymity. See, e.g., *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 879 (Cal. App. 2000) (compelling donor's deposition and production of documents relevant to whether the sperm bank knew that the donor had a family history of kidney disease).

82. Linda Villarosa, *Once-Invisible Sperm Donors Get to Meet the Family*, N.Y. TIMES, May 21, 2002, at F5 (noting that "most of the country's 150 sperm banks offer only anonymous donors," but "[a]bout a dozen . . . offer what is called donor identification release").

divulge to Client the name of any Donor, nor any other identifying information contained in the files of CCB. Client also agrees not to seek this information from any other source. . . . It is the intention of the parties that the identity of the donor and Client shall be and forever remain anonymous. CCB has an Openness Policy that allows requests for additional donor information from the adult child. Information, other than updated medical information, is provided only if there is mutual consent between the donor and adult child.<sup>83</sup>

As described below, this anonymity has positive effects, facilitating the formation of family units based on intent rather than biology alone. Consistent with an antiessentialist theory of commodification, it also has negative effects, namely preventing a child from knowing his or her biological father and reducing emotional or financial support from the biological father.

### *B. Alternative Insemination as a Free, Open Market*

Free markets are described as such because they are free from regulation, allowing unrestrained competition to determine prices. Open markets are those in which “anyone, or at least a large number of persons, can buy or sell.”<sup>84</sup> As a general matter, markets are largely governed by private law, which tends to defer to parties’ intent rather than judgments based on public response to particular arrangements.<sup>85</sup> For example, corporate law, through the business judgment rule, requires courts to refrain from meddling in business matters.<sup>86</sup> Similarly, commercial law generally allows parties to tailor their arrangements, as long as the terms are not “manifestly unreasonable” or unconscionable.<sup>87</sup> Public law, such as constitutional or administrative law, in contrast, generally articulates public judgments rather than leaving people to private ordering.<sup>88</sup>

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83. Frozen Donor Semen Specimen Agreement of California Cryobank, Inc. (on file with the North Carolina Law Review).

84. ALAN R. BROMBERG & LEWIS D. LOWENFELS, 4 SECURITIES FRAUD AND COMMODITIES FRAUD § 8.6 (1998).

85. Richard A. Posner, *Ask, Tell*, NEW REPUBLIC, Oct. 11, 1999, at 52, 53 (book review).

86. FRANKLIN A. GEVURTZ, CORPORATION LAW § 4.1.2 (2000) (noting the business judgment rule’s rationale that “courts should exercise restraint in holding directors liable for (or otherwise second guessing) business decisions that produce poor results or with which reasonable minds might disagree”). *But see* Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 121 (2003) (contending that corporate law is animated by a concern for minority shareholders, in addition to the conventionally understood principle of profit maximization and private ordering).

87. U.C.C. §§ 1-302, 2-302 (2003).

88. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (striking down racial

Compared to other markets, the alternative insemination market is a relatively free market as it is subject to very limited legal regulation through statute or administrative rule.<sup>89</sup> While some commentators think that public law should interfere with the operation of this market,<sup>90</sup> I think that the private law nature of alternative inseminations, on balance, furthers human flourishing because statutory regulations would likely reflect majoritarian bias against single parents and gay people.<sup>91</sup> One important factor contributing to the positive implications of alternative insemination is that it is open to a wide range of people. Legal regulation might well limit access, both by banning certain people from participating in the market (such as single women or gay people),<sup>92</sup> and by imposing requirements that could result in price increases that would practically exclude many people from parenthood.<sup>93</sup> On the other hand, regulation could increase access by subsidizing assisted reproduction, and improve the quality of services by dictating minimum standards for obtaining, storing, and shipping samples, as well as the actual insemination.<sup>94</sup>

Domestic relations are an amalgam of status and contract and as

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segregation in public schools as unconstitutional).

89. Garrison, *supra* note 32, at 838 (“[L]aws governing the use of AI and IVF are largely nonexistent.”). Markets that are more highly regulated include the markets for housing and employment. RADIN, *supra* note 3, at 108.

90. See, e.g., Garrison, *supra* note 32, at 852, 877, 896–920 (asserting that the United States should move toward increased regulation); Shanley, *supra* note 15, at 273–75 (arguing that public policy should prohibit donor anonymity and payment for gametes).

91. The Federal Drug Agency, for example, considered preventing gay men from donating sperm. Peter Freiberg, *FDA May Develop Strict Rules on Gay Sperm Donations*, WASH. BLADE, May 21, 1999, <http://www.aegis.com/news/wb/1999/WB990505.html> (on file with the North Carolina Law Review).

92. Countries that regulate alternative insemination tend to ban gay people, and often single women, from conceiving this way. Nancy D. Polikoff, *Recognizing Partners But Not Parents/Recognizing Parents But Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 728 (2000); Garrison, *supra* note 32, at 905. Some commentators think that these exclusions are justifiable because many heterosexuals disapprove of gay parents. See *infra* notes 173–84. For further discussion of this element of Garrison’s work, see *infra* notes 143–45 and accompanying text.

93. See Robert H. Frank & Cass R. Sunstein, *Cost-Benefit Analysis and Relative Position*, 68 U. CHI. L. REV. 323, 348 (2001).

94. See Henig, *supra* note 58, at 65 (describing how, because of government capture by anti-abortion influences, the federal government “has never sponsored a single research grant for human IVF,” creating a “funding vacuum, into which rushed entrepreneurial scientists supported by private money). Henig indicates that “these free agents did essentially whatever they wanted and whatever the market would bear, turning IVF into a cowboy science driven by the marketplace and undertaken without guidance.” *Id.*

such are regulated by a mix of public and private law.<sup>95</sup> On the public side, state (and sometimes federal) law determines which kinds of adult pairings constitute marriage and whether particular people have parental rights and responsibilities. On the private side, social norms and constitutional doctrine protect the privacy of the family unit,<sup>96</sup> and courts routinely enforce many contracts relating to family matters.<sup>97</sup> Especially relevant to the present discussion is the fact that courts increasingly recognize contracts among adults regarding the extent of parental rights and responsibilities, both in cases of known sperm donors and lesbian couples<sup>98</sup> and in open adoptions.<sup>99</sup> Generally, however, contracts affecting children are not enforceable in the way that most other contracts are enforceable, primarily because the State has an interest in safeguarding the best interests of children that trumps the parties' intentions.<sup>100</sup>

One way to see the always contingent, often largely rhetorical difference between public law and private law is that public law tends to turn on majoritarian morality. Most states ban same-sex marriage, for example, because a majority of Americans apparently find it morally problematic.<sup>101</sup> However, even states that affirmatively ban

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95. While some commentators see family law as becoming increasingly privatized, others see the privatization as partial, with marriage being increasingly privatized and parent/child relations being increasingly a matter of public concern. Compare Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1531-67 (1992) (highlighting the dangers of privatizing family law that are often concealed by neutral rhetoric), with Garrison, *supra* note 32, at 889 (viewing marriage as a personal matter and children as a public concern). See also JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* 12, 176-212 (1997) (discussing the contractual rhetoric employed by courts in reproductive technology cases).

96. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65-67 (2000) (striking down a broad visitation statute as applied to grandparents).

97. See CLARK, *supra* note 74, at 755; see also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 993-95 (1979) (detailing the courts' treatment of parental agreements and pointing out that courts rarely overturn such agreements).

98. See, e.g., *LaChapelle v. Mitten*, 607 N.W.2d 151, 160-65 (Minn. Ct. App. 2000) (recognizing parental rights and obligations of sperm donor, biological mother, and non-biological mother).

99. See, e.g., *Groves v. Clark*, 920 P.2d 981, 985 (Mont. 1996) (holding an agreement for post-adoption visitation by birth parent enforceable if it is in the best interests of the child).

100. See, e.g., UNIF. PREMARITAL AGREEMENT ACT § 3(b), 9C U.L.A. 43 (2001) (providing that child support "may not be adversely affected by a premarital agreement").

101. One state's highest court recognized same-sex marriage as this Article went to press. See *Goodridge v. Dept. of Public Health*, \_\_\_ N.E.2d \_\_\_, \_\_\_ (Mass. 2003), available at 2003 WL 22701313, at\*2. The decision garnered national attention, leading some commentators to predict that it could influence the 2004 presidential election. See, e.g., Adam Nagourney, *A Thorny Issue for 2004 Race*, N.Y. TIMES, Nov. 19, 2003, at A1. To date, states have charted a course between moral disapproval of same-sex sexuality and

same-sex marriage are willing to enforce contractual arrangements that mimic parts of marriage (such as alimony payments when the relationship ends).<sup>102</sup> Contractualization, which constitutes the heart of market rhetoric,<sup>103</sup> insulates socially marginal transactions from the bias in majoritarian morality. This privacy offers a safe haven for single parents, people in same-sex relationships, and others to order their lives relatively free from the constraints imposed by the lowest common denominator of public opinion.

A number of aspects of alternative insemination make it a particularly striking example of how privatization opens up possibilities for marginalized people to skirt the majoritarian moral bias of public law. First, both technologies and deregulation open the market to a wide range of people. The technologies mean that recipients in isolated areas can obtain sperm.<sup>104</sup> As of 1993, more than 400 sperm banks provided specimens to more than 80,000 women each year, resulting in more than 30,000 pregnancies.<sup>105</sup> The number of banks, coupled with technological innovations, reflects a high supply of sperm, which translates to a relatively low price for this method of becoming a parent. The low price, in turn, makes alternative insemination a technology that most middle class women

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gay people's rights to liberty and equality. While Vermont recognizes a parallel status to marriage for same-sex partners, calling these affiliations civil unions, see VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002), this recognition came on the heels of Hawaii's refusal to extend the right to marry to same-sex couples. David B. Cruz, "Just Don't Call it Marriage": *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 927 (2001). Moreover, more than half of the states and the federal government ban same-sex marriage in statutes commonly known as Defense of Marriage Acts ("DOMA"). See U.S.C. § 1738(c) (2002). President Bush recently voiced moral opposition to same sex marriage, stating "I am mindful that we are all sinners," but "I believe marriage is between a man and a woman, and I believe we ought to codify that." Neil A. Lewis, *Bush Backs Bid to Block Gays from Marrying*, N.Y. TIMES, July 31, 2003, at A1.

102. See, e.g., *Posik v. Layton*, 695 So. 2d 759, 761 (Fla. Dist. Ct. App. 1997) (enforcing a cohabitation agreement between two women despite Florida's ban on same-sex marriage).

103. See RADIN, *supra* note 3, at 111 ("[C]ontract is a linchpin of the commodified conceptual scheme.").

104. These technologies include information transmission via the World Wide Web and overnight delivery in liquid nitrogen or other sperm-preserving material.

105. Karen M. Ginsberg, Note, *FDA Approved? A Critique of the Artificial Insemination Industry in the United States*, 30 U. MICH. J.L. REFORM 823, 826 (1997); see also OFFICE OF TECH. ASSESSMENT, U.S. CONG., BACKGROUND PAPER, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES, SUMMARY OF A 1987 SURVEY 3 (1988) [hereinafter OFFICE OF TECH. ASSESSMENT] (reporting the results of a 1987 survey by the U.S. Congress Office of Technological Assessment, concluding that during 1986 and 1987, 172,000 women were alternatively inseminated, resulting in 65,000 births (30,000 of which were accomplished using donor semen)).



can afford (unlike, for example, IVF or adoption). Moreover, access is facilitated by the possibility of insemination at the recipient's home. While some banks require a physician to authorize the sperm sale, at least one large bank refers clients to doctors, and will also send the sperm to the recipient's home once the doctor signs the appropriate form.<sup>106</sup>

Market forces thus make sperm available to many middle class people who otherwise might not become parents, since most American sperm banks no longer discriminate against single or gay women.<sup>107</sup> One indication of the significance of accessibility for single women and lesbian couples is data suggesting during a twelve-month period between 1986 and 1987, 4,000 single women requested alternative insemination.<sup>108</sup> Additionally, one California sperm bank estimated that forty percent of its AI clients are single lesbians.<sup>109</sup> Not surprisingly, increasing numbers of births are to single women because of increased incidence of alternative insemination, social changes relating to women's growing economic independence, and the gains of the gay rights movement.<sup>110</sup> These new families, who

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106. The physician referral form required by California Cryobank is very short, providing only that the physician certify that:

I am referring [patient's name] to the California Cryobank, Inc. to obtain semen specimens for an assisted reproduction procedure. I have informed her of the risks and limitations of her assisted reproduction procedure. I authorize her to obtain specimens directly from the Cryobank, or to telephone delivery orders to my office as needed.

California Cryobank, Inc., Authorization for Release of Semen, *available at* <http://www.cryobank.com/pdf/patient.pdf>, at A1 (last visited Nov. 3, 2003) (on file with the North Carolina Law Review). The bank also provides physician referrals upon request, further facilitating access by a wide variety of purchasers, in rural, as well as urban, areas. <http://www.spermbank.com/spbanknonphyd.cfm?toppage=1&topsub=1> (last visited Mar. 12, 2001).

107. See Polikoff, *supra* note 75, at 317 (describing how, in 1982, Feminist Women's Health Center opened a sperm bank that provided frozen semen and shipped it anywhere in the country without discriminating on the basis of sexual orientation); Lisa Belkin, *Pregnant with Complications*, N.Y. TIMES, Oct. 26, 1997, § 6, at 34 (describing Pacific Fertility's policy not to discriminate on the basis of marital status and sexual orientation, among other things).

108. OFFICE OF TECH. ASSESSMENT, *supra* note 105, at 4.

109. E. Donald Shapiro & Lisa Schultz, *Single-Sex Families: The Impact of Birth Innovations upon Traditional Family Notions*, 24 J. FAM. L. 271, 278 (1986). Another commentator suggests that 3,000 children a year are born as a result of sperm bank sales. See BLANKENHORN, *supra* note 6, at 180.

110. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1996, at 79 tbl.98 (1997), at <http://www.census.gov/prod/www/statistical-abstract-us.html> (providing data from the 1970s); see also BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at 80 tbl.100, at <http://www.census.gov/prod/www/statistical-abstract-us.html> (reporting that in 1970, 10.7% of U.S. births were to unmarried women,

form significant segments of many communities, are changing the way we understand family, both legally and socially.<sup>111</sup> But the marketization of AI has other meanings as well, as discussed in the next Part.

### III. MIXED VALENCES OF THE ALTERNATIVE INSEMINATION MARKET

Considerable scholarly and popular commentary has focused on the dangers of marketizing parenthood.<sup>112</sup> This Part catalogues some evidence that supports this position and then identifies other ways in which the marketization of parental rights can further equality and human flourishing in ways that much of the commodification literature has not yet acknowledged.

#### A. *Negative Implications of the Alternative Insemination Market*

At least four aspects of the AI market could be described as negative. First, the donor selection process appears to be highly racialized, raising eugenic concerns. Second, poor women lack access to the market. Third, anonymity may deprive some children of the opportunity to know their biological fathers and also deprive them of potential financial support. Fourth and finally, a parenthood market might harm children by treating them like chattel. I address these concerns in turn below, concluding that while they are serious, especially with respect to objectification, they do not justify a blanket condemnation of the AI market, either because they are not unique to the AI market, or because addressing the concern would itself trigger other negative effects.

#### 1. Eugenic Concerns

The marketization of particular characteristics, such as race (especially whiteness as evidenced by archetypally white features such as blue eyes and blonde hair), a university education, and height, suggests that people who have these characteristics are more valuable

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compared to 32.2% in 1995).

111. For an extended argument that gay families reflect, and affect, social changes, see generally JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* (1996).

112. See, e.g., BLANKENHORN, *supra* note 6, at 171–72 (warning of dangers should anyone other than heterosexual, married couples be allowed to buy parental rights); RADIN, *supra* note 3, at 136–40 (asserting that babies and their characteristics should not become commodities); Shanley, *supra* note 15 at 271–73 (asserting that buying and selling gametes undermines personal dignity).

than other people.<sup>113</sup> The property value of whiteness is part and parcel of the legacy of white supremacy.<sup>114</sup> While sperm is not priced on the basis of race, the alternative insemination market does seem to be racialized in other ways.<sup>115</sup> For example, while the California Cryobank promotional materials feature photos of adults and children who look Asian, African-American, and Hispanic as well as Caucasian, more of the models appear to be white.<sup>116</sup> This focus on white donors and recipients buying and selling sperm is borne out in the inventory and selection process.

The California Cryobank's May 2001 Donor Catalog lists donors in sections based on the donor's race.<sup>117</sup> At the top of each page is an italicized message explaining that the specimens listed below are from a particular racial group and further that they are stored and shipped with clear racial markings. The message at the top of the pages listing Caucasian donors, for example, states that specimens donated by Caucasian donors are stored in vials with "*WHITE caps and are shipped in WHITE canes.*" Similarly, the catalog notifies sperm buyers at the top of the sections listing Black/African-American donors and Asian donors that these specimens, respectively, are stored in vials with "*BLACK caps and are shipped in BLACK canes*" and with "*YELLOW caps and are shipped in YELLOW canes.*"<sup>118</sup> Further, the inventory of donors is mostly Caucasian (68%), with some Asian (17%), some with mixed race or "unique" racial designations (11%), and a handful of Black/African-American donors

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113. Shanley, *supra* note 15, at 272.

114. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 *passim* (1993).

115. Well-publicized disputes between recipients and sperm banks often reflect the racial significance of the reproductive technologies market. See, e.g., Sarah Lyall, *Whites Have Black Twins in In-Vitro Mix-Up*, N.Y. TIMES, July 9, 2002, at A10 (describing a 2002 British case, as well as a 1999 New York case, in which a white woman gave birth to "twins," one white and one black, and a 1993 Dutch case in which a woman gave birth to twins with different skin color due to the hospital mixing sperm from the woman's white husband with that of a black man).

116. Of course, if white people represent a majority of the general population, one would expect promotional materials to reflect that prevalence.

117. The categories listed are: Caucasian; mixed race or "unique ancestries such as American Indian, East Indian or Mexican"; "Black/African American"; and Asian. California Cryobank, *supra* note 77. While, the "unique ancestry" of being descended from Mexicans is included with mixed-raced donors, no other Hispanic ethnicities are listed in the racial classification, and three of the Caucasian donors are listed as being partly of Spanish or Portuguese descent, suggesting that Hispanic donors are listed in both "white" and "red" racial/ethnic categories.

118. *Id.* at 1-7. The Catalog similarly notifies buyers that donors of mixed race or "unique ancestries" are stored in vials with "*RED caps and are shipped in RED canes.*" *Id.*

(4%).<sup>119</sup> The general population, in contrast, is 75% Caucasian, 4% Asian, 3% mixed race and American Indian and Alaska Native, and 12.3% black/African-American.<sup>120</sup> Most striking in this large sperm bank's inventory is the over-representation of Asian donors and under-representation of African-American donors.<sup>121</sup>

While the seeming paucity of donors of color (especially Black/African-American) would give many people pause, further investigation indicates that the California Cryobank's inventory does not appear to be tailored to maximize replication of an Aryan ideal. A review of the Catalog's other racialized designations of donors, such as hair color and eye color, suggests that recipients do not select donors who conform to a blonde, blue-eyed ideal. Of the 115 Caucasian donors listed, only 10% are blonde, and 23% are listed as having blue eyes.<sup>122</sup> Only 5% of the 115 Caucasian donors are listed as being both blonde-haired and blue-eyed.<sup>123</sup>

Of course, the above analysis does not demonstrate anything about the nature of the sperm market generally. The California Cryobank Catalog may differ from other sperm banks' inventories.<sup>124</sup>

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119. *Id.* The 168 donors listed in the Catalog fall into the following racial categories: 115 Caucasian; twenty-eight Asian; eighteen mixed race or "unique" racial designations; and seven Black/African-American donors.

120. U.S. DEP'T OF COMM., PROFILES OF DEMOGRAPHIC CHARACTERISTICS, 2000 CENSUS OF POPULATION AND HOUSING 1 (2000).

121. California's population includes more Asians than the general American population. Compare U.S. CENSUS BUREAU, CALIFORNIA 2000: SUMMARY POPULATION AND HOUSING CHARACTERISTICS tbl.3 (2002) (documenting that Asians are 10.9% of California's total population), <http://www.census.gov/census2000/states/ca.html> (last visited Nov. 22, 2003) (on file with the North Carolina Law Review), with U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA, tbl. 1 (2001), at <http://www.census.gov/population/cen2000/phc-tl/tab01.xls> (last visited Sept. 24, 2003) (documenting that Asians are 3.6% of the U.S.'s total population) (on file with the North Carolina Law Review). However, this insight does not account for CCB's underrepresentation of African-Americans.

122. California Cryobank, *supra* note 77. Eleven donors are listed as having blonde hair, and twenty-seven are listed as blue-eyed. While it is difficult to get reliable information on the prevalence of hair color, a hair color company, Clairol, estimates that 19% of American females are naturally blonde. Kristi Turnquist, *Oh, Lighten Up! More and More People are Dyeing To Be Blondes*, OREGONIAN, July 13, 2000, at E01.

123. California Cryobank, *supra* note 77. Six Caucasian donors are listed as blue-eyed blondes.

124. A review of four sperm banks with online catalogs did reveal similar racial compositions of donors. These banks, located in Fairfax, Virginia, Boston, Massachusetts, Columbus, Ohio, and San Francisco, California have donors that are, on average, 82.1% Caucasian, 6.4% Asian, 5.9% of mixed ancestry, 4.2% Latino or Hispanic, and 3.9% African American. Fairfax Cryobank, Inc., Donor Catalog, at <http://www.fairfaxcryobank.com/cryo/shoppingcart/search.cfm> (last visited Nov. 19, 2003) (donor catalog of Fairfax Cryobank); <https://secure.necryogenic.com/catalog/browse.asp> (donor list of New England Cryogenic Center); Cryobiology, Donor List, Donor Catalog, available at

Moreover, the analyzed inventory may differ from other months. My review does not analyze other racialized categories in the catalog, such as hair texture, skin tone, or other characteristics that could trigger eugenic concerns, such as the listing of each donor's educational achievements, occupation, or major.<sup>125</sup> Additionally, while the catalog lists whether a particular donor's sperm has resulted in pregnancy, it does not reveal the popularity of particular specimens. These questions, and others, would merit an empirical study. Even with these limitations, however, this brief discussion does give a sense of some eugenic aspects of the alternative insemination market. The next question is whether law or culture might have a response to the apparent racial disparity in available sperm.

Intent is a preliminary consideration. It could be that sperm banks screen donors for racial characteristics based on perceived or actual higher demand for Caucasian, blonde, and/or blue-eyed donors. It is also possible that fewer African American men seek to donate sperm, though it seems unlikely that those men would be so thinly represented in the donor pool, and also that Latino men would be virtually absent in a California donor pool. Although a social norm against discrimination might challenge banks' racial screening, it seems unlikely that racial screening would run afoul of legal rules. Only if the donors are characterized as employees, rather than independent contractors, could the banks be liable for engaging in employment discrimination on the basis of race.<sup>126</sup>

This analysis changes little when we consider the possibility that recipients, rather than banks, are discriminating on racial grounds in selecting Caucasian donors over donors of color. At least as a legal matter, women should be able to select the race of their child without state intervention.<sup>127</sup> Still, as a normative, cultural matter, some

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<http://www.cryobio.com/DonorList.pdf> (last visited Nov. 19, 2003) (donor catalog of Cryobiology); Pacific Reproductive Services, Donor Catalog, at <http://helloworld.com/dc090103.pdf> (last visited Nov. 13, 2003) (donor catalog of Pacific Reproductive Services). Precise comparisons are made difficult by the fact that the exact percentages for each bank change daily based on the donations received.

125. California Cryobank, *supra* note 77.

126. *See, e.g.*, 42 U.S.C. § 2000e-2 (1994) (prohibiting employers from engaging in employment discrimination based on race and other characteristics); *Anyan v. N. Y. Life Ins. Co.*, 192 F. Supp. 2d 228, 237 (S.D.N.Y. 2002) (holding that employment discrimination laws do not protect independent contractors). Given the independence of sperm donors and the limited time spent donating, these donors seem more likely to be independent contractors than employees.

127. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that state law cannot interfere in custody arrangements on the ground that a white woman's interracial

people might object when white women choose to have white babies through alternative insemination, in a market that monetizes whiteness and other characteristics as superior.<sup>128</sup>

But if we condemn would-be mothers for selecting donors who, they believe, will transmit what they deem to be socially optimal genes to their children, then we could ask the same question of both men and women who select their partners on similar grounds. If we scrutinize white single mothers' selection of white sperm donors, we should also critique white men who choose to marry white women or Harvard graduates who prefer to marry others who attended elite colleges. If this level of meddling seems ridiculous, it is hard to see how it is appropriate when the insemination occurs technologically rather than coitally.<sup>129</sup>

Moreover, while the concerns about sperm banks discriminating against donors of color are serious, the pricing of parental rights based on the child's race or other characteristics is not unique to alternative insemination, nor even reproductive technologies generally. As already discussed, the adoption market already differentiates fees based on children's characteristics.<sup>130</sup>

## 2. Access Concerns

A second negative element of the alternative insemination market is that many people do not have access to the market. As with other markets, buyers must have money to purchase the goods and services proffered by sellers. While most middle class women can

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relationship might be hard on her children); *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (holding a state's criminal ban on interracial marriage unconstitutional).

128. Shanley, *supra* note 15, at 265–66, 272; *see also* Ikemoto, *supra* note 40, at 1030. For an example of conservative rhetoric in private law regulation of alternative insemination, see Anita M. Hodgson, *The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination*, 26 IND. L. REV. 357, 360 (1983) (proposing a cause of action in warranty for sperm bank mistakes that result in a biracial rather than a Caucasian child or inadequately screen for genetic or communicable disease, reasoning that “there is a need for increased moral accountability and legal liability where [a sperm bank’s] economizing results in the creation of low-cost, low-quality human offspring”).

129. For an extended argument that coital and alternative reproduction should be governed by the same parentage rules see Garrison, *supra* note 32 at 902–13. On the other hand, one could argue that coital and alternative reproduction are sufficiently different as to merit different regulation. The point of using an anonymous donor is that the mother does not have to live with him, making it less important that the biological parents have things in common (such as comparable education). However, since the biological mother may want racial, ethnic, or educational commonality between the child and either herself or her partner (or both), this distinction may remain irrelevant for regulatory purposes.

130. *See supra* note 28.

afford the \$1,000 to \$4,500 or so that alternative insemination may cost, working class and poor women are left out.<sup>131</sup> This class-based concern has racial implications, since Americans of color tend to have lower incomes and less access to wealth than white Americans.<sup>132</sup> Thus, assuming that mothers tend to select donors of their own race, if African-American women had more access to alternative insemination, then more African-American donors would be listed in the catalog, since African-American women have higher rates of infertility than white women.<sup>133</sup>

Like eugenic concerns, problems of access are not unique to the alternative insemination market. Working class and poor people have more limited access to all kinds of goods and services, from basic needs like housing to luxuries like beach vacations. Moreover the alternative insemination market is less exclusive than other markets for parental rights. As described above, adoption can cost between \$4,000 and \$30,000,<sup>134</sup> surrogacy fees alone can cost between \$10,000 and \$20,000,<sup>135</sup> and in vitro fertilization can cost between \$44,000 and \$211,000,<sup>136</sup> while alternative insemination can cost as little as \$1,000 to \$4,500.<sup>137</sup> Finally, as also discussed earlier, international adoption depends upon systemic economic inequalities between first world adoptive parents and birth parents in the developing world. The undeniable economic inequalities of the alternative insemination market shrink in significance when compared to larger, global inequalities.

To say the AI market should be terminated because poor and working class people cannot access it would be to punish middle class users of alternative insemination simply for being middle class and either single or gay. Specifically, a concrete good (extending

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131. Of course, a woman who cannot afford this fee might have difficulty affording the cost of raising a child, since parents, on average, will spend \$169,921 to raise a child born in 2001 over the next seventeen years. ERICHSON & ERICHSON, *supra* note 27, at 42 (noting U.S. Department of Agriculture estimate).

132. MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 101-02 (1995) (noting that African-Americans' income, on average, is 59% that of whites, and that African-American families, on average, have only 18% of the wealth enjoyed by the average white family).

133. CENTER FOR DISEASE CONTROL, *INFERTILITY—UNITED STATES, 1982*, at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00000519.htm> (last visited Nov. 3, 2003) (noting that despite higher rates of infertility among African-American women, these women are less likely than white women to use reproductive technologies) (on file with the North Carolina Law Review).

134. *See supra* note 27 and accompanying text.

135. *See supra* note 30 and accompanying text.

136. *See supra* note 40 and accompanying text.

137. *See supra* note 51 and accompanying text.

parenthood to people otherwise excluded from that life experience) would be snuffed out to serve an end that is so grand (wealth redistribution) as to be aspirational rather than practical. Those concerned about economic equality could champion proposals to increase global economic equities rather than single out politically unpopular groups (single and gay people) who manage to use the market to access some rights routinely kept for the heterosexual, married majority.<sup>138</sup>

### 3. Anonymity Concerns

An additional element of the AI market that is vulnerable to criticism concerns the interest of children. Donor anonymity deprives children of the opportunity to know and enjoy the financial support of biological fathers. Moreover, it deprives donors of the possibility of knowing their biological children.

The prevalence of adopted children tracking down their birth parents illustrates the importance that some people place on knowing their genetic parents.<sup>139</sup> However, not all adoptees seek this connection, and those who succeed in reconnecting with their birth families sometimes find that the fantasy of the perfect family was just that, a fantasy.<sup>140</sup> Moreover, many children of divorced or single mothers have little or no contact with their genetic fathers. Given these considerations, it seems unfairly burdensome to impose a standard of two-biological-parent families for children conceived through AI that is not imposed on parents who conceive coitally.<sup>141</sup>

Children, especially poor children, undoubtedly need additional financial support.<sup>142</sup> This concern is the foundation of Marsha Garrison's recent proposal to deny donor anonymity when single and gay women obtain donor sperm.<sup>143</sup> However, data suggest that

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138. See RADIN, *supra* note 3, at 125 (“[I]f neither commodification nor noncommodification can satisfy our aspirations for a society exhibiting equal respect for persons—then we must rethink the larger social context in which this dilemma is embedded. We must think about wealth and power distribution.”).

139. See Garrison, *supra* note 32, at 891.

140. The recent documentary DAUGHTER FROM DANANG (Gail Dolgin, 2002) eloquently tells this story through one young American woman's journey to reunite with her birth mother and siblings in Vietnam.

141. Garrison, *supra* note 32.

142. See JULIE A. NICE & LOUISE G. TRUBECK, CASES AND MATERIALS ON POVERTY LAW: THEORY AND PRACTICE 5 (1999 Supp.) (noting that “[c]hildren constitute only 26% of the general population, but 40% of all poor people”).

143. Garrison, *supra* note 32, at 72. She is not alone in urging public bodies to ban donor anonymity. See, e.g., Shanley, *supra* note 15, at 266–70 (arguing that the genetic information is important in the formation of individual identity).



poverty is a paramount factor in the struggles facing the children of single parents.<sup>144</sup> As just discussed, most poor women could not afford to enter the alternative insemination market. Moreover, requiring male presence to define a family is highly problematic.<sup>145</sup>

The issue of whether a donor's human flourishing might be compromised by anonymity can be addressed quite quickly. Donors, unlike the children, are adults capable of making binding decisions. Donors apparently make their donations free of any kind of coercion, and could seek to have children that they know if they so desired. Indeed, donor forms often indicate that the donor prefers to stay anonymous because he does not know how a child produced through alternative insemination with a stranger would affect arrangements he anticipates making down the road with a future partner or child.<sup>146</sup> This analysis, however, does not alleviate the one remaining concern, perhaps most serious among those addressed here, that the children themselves would be rendered commodities by the parenthood market.

#### 4. Objectification Concerns

Importantly, purchasing gametes to conceive a child could cause the child to feel that he or she has been purchased like a new car. Radin claims that “[c]onceiving of any child in market rhetoric harms personhood.”<sup>147</sup> This statement asks us to consider whether the parenthood market, as manifested through adoption and reproductive technologies, treats children like chattel, thus harming their personhood. It is possible to have a market in parenthood, but maintain linguistic mechanisms that mask that reality in order to reassure ourselves and the children that they are different from Corvettes.

However, this analysis suggests a monolithic market in which all transactions are interchangeable. Even transactions conventionally understood in market terms, such as insurance, car sales, and housing are governed by different rules that reflect the different contexts. Ambiguities in insurance contracts, for example, are construed

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144. Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J. L. & POL'Y 5, 36–38 (1996).

145. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 145–46 (1995). *But see* BLANKENHORN, *supra* note 6, at 222–25 (arguing that male presence is crucial to families).

146. California Cryobank, Donor Questionnaire (on file with the North Carolina Law Review).

147. RADIN, *supra* note 3, at 139.

against insurers.<sup>148</sup> For their part, car buyers enjoy the implied warranty of merchantability as well as protection in their contractual relationships with financing institutions.<sup>149</sup> Tenants, in turn, are protected by the implied warranty of habitability.<sup>150</sup> The market for parental rights is just one more market with its own unique rules.

Becoming a parent invokes a raft of obligations quite different from those entailed in car ownership. Legally speaking, parents are obliged to, among other things, feed, clothe, shelter and educate their child, keep the child out of wage labor, and refrain from discipline that rises to the level of abuse.<sup>151</sup> From an ethical standpoint, parents have the duty to help the child develop a healthy sense of self, become an independent adult, and learn how to be a good citizen.<sup>152</sup> While a car owner is obliged to maintain insurance and refrain from using the car to sell illegal drugs, that owner is also free to destroy the car if she chooses, or run it into the ground through lack of maintenance. Parents are obviously not free to do the same.

In sum, while one might want to guard against language and transactions that treat children as chattel, the mere existence of a market in parenthood does not pose that particular danger. If it did, wage labor would be akin to chattel slavery.<sup>153</sup> Indeed, wage labor is the opposite of slavery, an insight that shows how slavery is problematic as an instance of both *over*-commodification (treating people as things for exchange) and *under*-commodification (refusing to pay people for their labor).<sup>154</sup> In both labor and parenthood markets, the market's character depends on the obligations and rights built into it. The mere fact of market rhetoric's presence (or absence), or money changing hands, does not provide us with this crucial information.

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148. E.g., ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW* 629 (student ed. 1988) (explaining the doctrines of interpreting insurance contracts).

149. U.C.C. §§ 2-314, 9-610 to 16 (2000).

150. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970) (holding that the warranty of habitability is implied by operation of law).

151. CLARK, *supra* note 74, at 353.

152. See Linda C. McClaine, *Care as a Public Virtue: Linking Responsibility, Resources, and Republicanism*, 76 CHI-KENT L. REV. 1673, 1679, 1690-91 (2001) (explaining the role of families as seedbeds of civic virtue).

153. Transferring something for a price does not allow the transferee to do whatever she wants with it. A worker transfers her promise to work in return for wages, and legal doctrine prevents the employer from endangering the employee through, for example, unsafe conditions. See 29 U.S.C.A. §§ 651-78 (2003). If the employer were not so constrained, wage labor would look more like slavery.

154. For an extended discussion of the way contract labor became to be seen as the opposite of slavery, see generally AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT* (1998).

*B. Positive Implications of the Alternative Insemination Market*

While the market for parenthood has negative effects, it also has positive ones. These positive components of the AI market are both practical and theoretical. Practically, the availability of alternative insemination through a free market facilitates formation of new family forms on the basis of intent rather than biology. As such, it furthers human flourishing by allowing people to become parents who might not otherwise be able to do so. On a theoretical level, marketizing alternative insemination has at least two implications. First, and most importantly, it undermines naturalized models of intimate affiliation that contribute to gender, sexuality, and race hierarchies. Second, the alternative insemination market inverts power relations, since it involves women, often single and/or lesbian, buying intimate parts of male bodies. As such, it presents a scenario not addressed in most anti-commodification literature, which tends to focus on the harms suffered by poor people when they are forced to sell something precious to them.

1. Practical Benefits

The practical effect of new family structures is profound. While it is difficult, if not impossible, to estimate the number of new families that exist by virtue of AI, one can look to increases in single motherhood recorded by the Census<sup>155</sup> and social science data to note the increasing numbers of children born to gay couples and single gay people.<sup>156</sup> These families take various forms, including two same-sex parents, a gay male couple and a lesbian couple coparenting, a lesbian and a gay man coparenting, a single lesbian (or heterosexual woman) coparenting with a gay male couple, a heterosexual woman coparenting with a gay man, and a lesbian or bisexual woman coparenting with a heterosexual man.<sup>157</sup>

The increasing prevalence of these new families is positive in several ways. First, as parenthood is an important social and personal experience, opening that option to previously excluded individuals facilitates human flourishing for those people and thus for society as a whole. Moreover, the importance of parenthood as a social responsibility means that people who can now become parents can

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155. See *supra* note 110 and accompanying text.

156. See, e.g., Polikoff, *supra* note 75, at 326.

157. PEPPER, *supra* note 45, at 40. One Los Angeles agency matches prospective gay fathers with surrogate mothers. Polikoff, *supra* note 75 at 326 (describing a range of gay families).

become recognized as fuller citizens in the process.<sup>158</sup> Of course, people should be recognized as citizens whether or not they are parents.<sup>159</sup> But as a matter of equality, whether or not parenthood is properly considered a marker of citizenship, everyone should have access to it if some people have access to it. Finally, these new families undermine the traditional family, a form that is central to both gender and sexual orientation subordination.<sup>160</sup>

Arguably, the very heart of feminism is a critique of the traditional family, specifically the way that authority rests with men generally and fathers in particular. Thus, not surprisingly, feminists use the term patriarchy to describe (and thus lay the foundation for contesting) a system of male social control.<sup>161</sup> Equally unsurprising is the fact that social conservatives often invoke what they call “traditional family values” to defend measures that maintain male superiority over women, and heterosexual dominance over gay people.<sup>162</sup>

Consistent with the antiessentialist theme of this Article, however, the phrase “family values” can have multiple meanings. Gay parents have argued that they personify family values, contrary to the claims of their conservative detractors.<sup>163</sup> At least one feminist uses the term “family values” to describe a legal/social regime in which homemakers are remunerated for their contributions to family wealth and employment law facilitates part-time employment to allow

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158. For an extended discussion of how obligations, as well as rights, are crucial to full citizenship, see generally LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998).

159. An extreme example of the claim that parenthood is linked to citizenship is the proposal that people with children should get extra votes. Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children? Toward a Conversational Understanding of American Democracy*, 94 *NW. U. L. REV.* 503 *passim* (2000). For an excellent discussion of the issue of whether children are a public good such that parents should enjoy special rights and subsidies, see Mary Anne Case, *How High the Apple Pie*, 76 *CHI-KENT L. REV.* 1753, 1775 (2001).

160. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 33–69 (1997); Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *THE LESBIAN AND GAY STUDIES READER* 227, 232–34 (Abelove et al. eds., 1993).

161. See Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 *U. CHI. LEGAL F.* 21, 24 (1999).

162. BLANKENHORN, *supra* note 6, at 101–02; STACEY, *supra* note 111, at 3–5, 53–54. Of course, some gay people and heterosexual women are social conservatives, such as the Log Cabin Republicans, or Conservative Women of America. It is beyond the scope of this Article to decode these complex patterns, other than to point out that their existence seems to support antiessentialist theory. For further discussion of conservative women, see generally ANDREA DWORKIN, *RIGHT WING WOMEN* (1982).

163. PHYLLIS BURKE, *FAMILY VALUES: TWO MOMS AND THEIR SON* (1993) (describing and defending a family with gay parents).

primary caretakers to engage in wage labor.<sup>164</sup> Moreover, some feminists question whether the focus on reproduction in gay partnerships has the unintended negative consequence of relegating women to traditional roles of taking care of others at the expense of their own individuality.<sup>165</sup> Thus, while the emergence of new family forms undoubtedly changes cultural assumptions about affiliation and power relationships, it does so in fractured ways that carry multiple meanings.<sup>166</sup>

One important effect of new family forms is that they increase agency for women and gay people generally by undermining patriarchal understandings of family. As these new families live their lives, interacting with schools, neighbors, employers, employees, and other families, the social definition of what counts as a family inevitably evolves. To the chagrin of some social conservatives, family begins to mean the group that people choose rather than one ordained by nature or a divine authority.<sup>167</sup>

The market is a key player in this transformation. If public law was the sole determinant of who could become a parent through alternative insemination or other reproductive technologies, then many gay people would likely be excluded from that opportunity. While American law leaves AI to the market, other countries regulate it, generally excluding gay people from becoming parents through AI.<sup>168</sup> Importantly, many of these bans allow opposite-sex unmarried couples to use reproductive technologies, revealing majoritarian bias against gay people as parents even in countries that

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164. See WILLIAMS, *supra* note 43 at 199–200.

165. See Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COL. L. REV. 181, 184–85 (2001).

166. For further discussion of the ways in which lesbian motherhood constitutes both resistance and assimilation, see Lewin, *supra* note 75, at 164, 167.

167. For a discussion of how gay families provide a roadmap of what families will look like in the future, see STACEY, *supra* note 111, at 15, 105–44. For a critique of those families, see BLANKENHORN, *supra* note 6, at 171–84. To the extent that social conservatives contend that extending family will cause the category to erode until it lacks all meaning, these arguments could be made about female military service or any other instance when social rights and obligations are expanded in the name of equality.

168. For a review of European countries' legislative bans on lesbians becoming parents through alternative insemination, see Polikoff, *supra* note 92, at 719–26 (noting on the ban on lesbians using reproductive technologies in Denmark, Norway, Sweden, Iceland, Germany, and France); see also Garrison, *supra* note 32, at 905 (noting that most legislatures outside the United States have banned women with female partners from using AI or IVF). While the U.K. does allow single women to use sperm banks, *id.* at 905, that right is qualified by a requirement that a “woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father).” *Id.*

recognize them as partners.<sup>169</sup> While some jurisdictions, such as Holland, allow lesbian couples to alternatively inseminate,<sup>170</sup> this rule excludes single lesbians from becoming parents through AI. The majoritarian moral bias of this regulation turns on its genesis in a public decision-making process. Since European health care is socialized,<sup>171</sup> public bodies decide who has access to services such as AI. In the United States, in contrast, privatized health care leaves access issues to the market. As long as lesbians can purchase AI in the U.S. system, they may become parents by this method.

Which is not to say that universal health care would be a bad thing, only that “universal” might well be a misnomer. Just as the market excludes those who cannot pay, public subsidies exclude those lacking the political power to demand rules to protect them.<sup>172</sup> These constituents, often minorities of one kind or another, are subject to majoritarian bias that deems some people morally superior and thus entitled to subsidies. We often ignore this relationship, overestimating the reach of subsidies while undervaluing the benefits of the market.

Not all commentators agree that private decision-making is appropriate to determine who can become a parent. Marsha Garrison, for example, has argued that legislation should regulate reproductive technologies and further, that the guiding principles determining this legislation should mirror general beliefs regarding who is an appropriate parent.<sup>173</sup> Contending the State may “prefer ‘desirable’ to ‘undesirable’ parental relationships,”<sup>174</sup> Garrison cites survey data indicating most Americans believe that “children need

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169. Polikoff, *supra* note 92, at 726 (noting that in France, only married couples or opposite-sex couples who have cohabited for two years have access to donor insemination).

170. *Id.* at 724.

171. Paul Starr, *The Ideological War Over Health Care*, N.Y. TIMES, Feb. 4, 1992, at A21.

172. See Steve Patten, *Democraticizing the Institutions of Policy-Making: Democratic Consultation and Participatory Administration*, J. CAN. STUD., Jan. 2001, at 221.

173. See, e.g., Garrison, *supra* note 32, at 882, 893–94 (listing policy goals courts and legislatures have relied upon in assigning parental status); see also BLANKENHORN, *supra* note 6, at 179 (decrying states’ “laissez-faire” approach to alternative insemination). Another commentator suggests national regulation of alternative insemination. See Ginsberg, *supra* note 105, at 838–50. Such regulation, like those in European countries, might well ban single women and lesbians from using alternative insemination, as the federal government, when given the chance to legislate on family, tends to give special rights to opposite-sex couples and to penalize unmarried women. For examples of federal legislation that is hostile to gay and single people, see Defense of Marriage Act, 28 U.S.C. § 1738(c) (2002) and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1612 (2002).

174. Garrison, *supra* note 32, at 896.

'both a father and a mother' and that children are better off in a two-parent household"<sup>175</sup> to support her proposal that sperm donors have full parental status unless the recipient is married to a man.<sup>176</sup> While she apparently would accept a ban on gay people using reproductive technologies, and even lauds the "effectiveness" of such a ban in increasing the odds of adult male presence in families,<sup>177</sup> she suggests that a ban on unmarried heterosexuals using reproductive technologies would not survive constitutional scrutiny.<sup>178</sup> In arguing that heterosexual couples, married or unmarried, should have rights that same-sex couples are denied, Garrison's analysis runs aground.<sup>179</sup>

Garrison, in relying on majoritarian beliefs that some families are superior to others, participates in a legal tradition of using family law to express "contemporary beliefs and values."<sup>180</sup> Miscegenation laws used to serve this function by criminalizing interracial marriage to express support for white supremacy,<sup>181</sup> and legal doctrines preventing nonmarital children from inheriting through intestacy statutes similarly expressed disapproval for nonmarital sexuality.<sup>182</sup> These majoritarian rules were struck down by venerable Supreme Court cases.<sup>183</sup> Similarly, one could argue that Garrison's bias against same-

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175. *Id.* at 894.

176. *Id.* at 902 ("[S]ingle women who use AID [alternative insemination by donor] should be similarly foreclosed from blocking paternity claims by and against sperm donors.") By "single women," Garrison apparently means anyone not married to a man, which of course includes lesbian couples. *See id.* at 910 ("Single AID users are undeniably a sympathetic group. Some are women who would like to marry . . . but have failed to find a mate . . . others are lesbian women who wish to share parenting responsibilities with a female partner."). Moreover, Garrison seems to suggest that the lesbian partners of biological mothers are not really parents, as indicated by her use of scare quotes to discuss them. *Id.* at 903 ("[T]wo parent care should also be encouraged when a single woman conceives using AID. . . . Women who conceive using AID may 'replace' the absent father with other male figures or even a second 'mother.'").

177. Garrison, *supra* note 32, at 911 n.340 (explaining that the biological mother's lesbian partner could satisfy a two-parent AID requirement in states recognizing two parents of the same sex, but where the state bans gay people from adopting "consistency would require disallowing a gay partner under the AID statute" (citations omitted)).

178. *Id.* at 911 n.341 ("If the state cannot legitimately deny access to a means of avoiding pregnancy based on marital status, it seems to follow that the state cannot deny access to a means of achieving pregnancy based on marital status.").

179. Interestingly, Garrison claims that her approach has "the benefit of neutrality." *See id.* at 920. Positing that opposite-sex relationships are superior to same-sex ones hardly seems neutral.

180. *Id.* at 842.

181. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

182. *See, e.g., Labine v. Vincent*, 401 U.S. 532, 538 (1971) (distinguishing between the interests of marital children and non-marital children for intestacy purposes, describing the latter as "illicit and beyond the recognition of the law.").

183. *See Trimble v. Gordon*, 430 U.S. 762 (1977); *Loving v. Virginia*, 388 U.S. 1 (1967).

sex couples is constitutionally infirm.<sup>184</sup>

## 2. Theoretical Benefits

In addition to these practical, positive effects, the alternative insemination market has positive theoretical implications. Most important is that these new family forms, made possible by webs of contracts and a relatively free market, supplement our notions of family as natural with notions of family as intentional or functional. In short, alternative insemination, and reproductive technologies generally, contribute to the replacement of status-based understandings of family with contractual models.<sup>185</sup>

Radin, though primarily suspicious of marketization of parental rights, recognizes the progressive nature of the move away from biological definitions of family and toward new kinds of relationships between parents and between parents and children.<sup>186</sup> However, she also points out that surrogacy, when a married man contracts with a

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184. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that Colorado's constitutional amendment, which prevented gay people from obtaining protection against discrimination under state law, was inexplicable by anything but animus toward the class it affected and thus lacked a rational relationship to legitimate state interests); see also *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). In *Lawrence*, the Court held that the Texas sodomy statute was unconstitutional on the grounds that the case involved:

two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

*Id.* at 2484.

185. This shift mirrors other progressive changes in American law and culture. In the nineteenth century American South, for example, the rigid household hierarchy of white men over white women and children, as well as African American men, women and children, changed only with a shift in the underlying paradigm from status to contract. See PETER W. BARDAGLIO, *RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX & THE LAW IN THE NINETEENTH CENTURY SOUTH* xii, 118–19 (1995). One example of this shift is in the view of married women's rights to contract and own property. Prior to the mid-nineteenth century, married women lacked the capacity to contract on their own behalf, as the doctrine of coverture deemed both husband and wife to be one person, namely the husband. Reva B. Siegel, *Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 *YALE L.J.* 1073, 1082 (1994) (documenting the alteration of coverture through Married Women's Property Acts). But by the end of the century, most states enacted married women's property acts, which altered this rule and entitled married women to contract. While courts narrowly construed these statutes to minimize wives' financial independence, the statutes nevertheless signaled a change in understanding of marriage from status to contract. This change contributed to the social change necessary for women to achieve suffrage, as the right to contract implicates a right to participate in public affairs and thus act as citizens. *Id.* at 1180–81.

186. RADIN, *supra* note 3, at 150.



surrogate mother, intending for his wife to raise the child, buttresses sexism by giving priority to the male genetic line.<sup>187</sup>

Her analysis reveals that, unsurprisingly, contract is not essentially progressive. After the Civil War, for example, former slaves contracted to provide labor on farms in the south, binding themselves to labor arrangements that resembled slavery in many ways.<sup>188</sup> Recognizing the mixed meaning of contract merely echoes this Article's major premise: an antiessentialist theory of commodification is necessary to understand when contractualization serves particular ends.

A second important theoretical implication of the alternative insemination market also has antiessentialist components. Most scholarship on commodification assumes that women and other socially marginalized people will be the sellers of contested commodities, while men or other socially powerful people will be the buyers. But the alternative insemination market defies this generalization, inverting feminist concerns with the commodification of sex and reproduction. Feminists have articulated concerns that surrogacy harms women by tempting poor women to sell something precious they would not otherwise sell.<sup>189</sup> Similarly, anti-prostitution and anti-pornography feminists contend that both the actual sellers and women generally are harmed when women sell their bodies for male sexual gratification.<sup>190</sup> In each instance, the feminist concern is that poor women will be objectified by selling intimate parts of themselves out of economic necessity. In the alternative insemination context, in contrast, men are the sellers and women are the buyers. Men sell an intimate part of themselves, generated in an act that remains sexual even in the sterile environs of a doctor's office,<sup>191</sup> to

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187. *Id.* at 142–44. Women, in general, do the vast majority of childcare and homemaking. ARLIE RUSSELL HOCHCHILD & ANNE MACHUNG, *THE SECOND SHIFT* 8 (1989). Radin accurately characterizes this kind of surrogacy arrangement as “oppressive” not only because the wife will do most of the work raising the child, but also in that it treats “women—their reproductive capacities, attributes, and genes—[as] fungible in carrying on the male genetic line.” RADIN, *supra* note 3, at 142.

188. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 164–70 (1988). See generally STANLEY, *supra* note 154, at 36–38 (describing how the Freedman's Bureau used the regime of contract to bind former slaves to work in arrangements closely mirroring actual slavery).

189. RADIN, *supra* note 3, at 142, 149–51 (reviewing feminist arguments for and against surrogacy); Nancy Ehrenreich, *Surrogacy as Resistance? The Misplaced Focus on Choice in the Surrogacy and Abortion Funding Contexts*, 41 DEPAUL L. REV. 1369, 1381 (1992).

190. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 127–31 (1987) (explaining how pornography teaches and imposes male dominance).

191. Insemination clinics often provide pornography for men to peruse while they stimulate themselves. Laura Shanner, *The Right to Procreate: When Rights Claims Have*

women. While the gametes are objectified, rendered commodities that are exchanged for value,<sup>192</sup> so are the men, or at least the proceeds of their desire. Women, for a change, are the subjects in the transaction, rather than the objects.<sup>193</sup>

In sum, the alternative insemination market has both emancipatory and retrograde aspects. While the positive effects outweigh the negative ones, largely because most of the concerns about the market for parental rights are generalizable to markets generally, concerns about eugenics, access, anonymity, and objectification remain. What also remains is the need for a theory that accounts for this range of positive and negative effects.

#### IV. THEORETICAL GROUNDING FOR A MULTIVALENT VIEW OF MARKETS

To date, legal economist Richard Posner and pragmatist feminist Margaret Radin have defined the terms of the debate on the sale of parental rights. A new disciplinary view, building on the work of scholars who propose a middle ground between legal economic glorification of the market and progressive distrust of marketization,<sup>194</sup> offers new ways to further this often stalled either-or discussion.<sup>195</sup>

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*Gone Wrong*, 40 MCGILL L.J. 823, 852 (1995).

192. Marx defines commodity as “an object outside us, a thing that by its properties satisfies human wants of some sort or another.” MARX’S CAPITAL: A STUDENT EDITION 3 (C.J. Arthur ed., 1992). He goes on to explain that “[a] given commodity, e.g. a quarter of wheat, is exchanged for x blacking, y silk, or z gold, etc.—in short, for other commodities.” *Id.* at 4.

193. For a canonical feminist critique of the exchange of women between men, see Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157 (Rayna R. Reitner ed., 1975). For further discussion of why women tend to have less property than men, and thus may be more likely to be sellers than buyers of contested commodities, see generally Carol M. Rose, *Women and Property: Gaining and Losing Ground*, 78 VA. L. REV. 421 (1992).

194. See *infra* Part IV.C.–D.

195. Other literature splits the difference between uncritical embrace and staunch skepticism of commodification. See, e.g., MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 48–57, 177–87 (1993) (weighing the benefits and dangers of surrogacy contracts). Indeed, while Radin persuasively takes a “pragmatic view,” contending that “the likelihood that pervasive use of market rhetoric will result in literal markets must be evaluated contextually,” and also says that “many things can be usefully understood as incompletely commodified—neither fully commodified nor fully removed from the market,” she declines to endorse the incomplete commodification of parental rights. See RADIN, *supra* note 3, at 14, 20, 134–35. However, her pluralist understanding could yield the opposite conclusion. See, e.g., Silbaugh, *supra* note 11, at 83–84 (using Radin’s pluralist analysis to defend commodification of household labor).

A. *Posner's Defense of the Parenthood Market*

Landes and Posner set the terms of the discourse with their controversial 1978 article *The Economics of the Baby Shortage*,<sup>196</sup> which elicited an extraordinary response. More than 140 law journal articles cite it,<sup>197</sup> often as an example of the dangers of legal economic rhetoric.<sup>198</sup> While Posner has since clarified that he does not propose a free market in adoption, he continues to defend the economic efficiency of monetary exchanges in adoption.<sup>199</sup> Interestingly, while he and Landes make some bracing comments in the article about the relative quality of babies based on race and heritable traits, their actual proposal for a parenthood market is quite modest.

Landes and Posner make economic arguments about supply and demand, contending that price regulation has created a shortage of healthy white infants available for adoption and a glut of other children in foster care.<sup>200</sup> Having purported to prove through a series of formulas the inefficiency of legal regulations limiting the prices paid for children, they consider possible objections to expanding the market for babies, concluding that most of the dangers of a free market are associated with the black market that already exists. Furthermore, they determine that these problems might be alleviated by decreasing price regulation of independent adoption agencies.<sup>201</sup> Accordingly, they propose that adoption agencies, which typically charge a fee to adoptive parents based on the parents' income, use the surplus from higher-income parents to pay pregnant women considering abortion to instead carry the children to term and put them up for adoption.<sup>202</sup>

It may be a reflection of the success of legal economics' colonization of legal discourse that the bottom line of Landes and Posner's analysis seems relatively unremarkable. What may also explain the great controversy surrounding their proposal is the way they discuss it, rather than the idea itself. They compare the

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196. Landes & Posner, *supra* note 2.

197. Westlaw Search, Journals and Law Reviews Database, conducted Nov. 15, 2003 (on file with the North Carolina Law Review).

198. See, e.g., RADIN, *supra* note 3, at 4 (citing Posner as the most extreme advocate of law and economics).

199. Posner, *The Regulation of the Market in Adoptions*, *supra* note 5, at 63–64 (advocating a market in parental rights, but restricting it by limiting the market to infants so that older children could not be sold and by retaining child abuse laws).

200. Landes & Posner, *supra* note 2, at 324–339.

201. *Id.* at 339–47.

202. *Id.* at 347–48. Posner restated and defended this proposal in *The Regulation of the Market in Adoptions*, *supra* note 5, at 63–64.

“thousands of children in foster care” to “unsold inventory stored in a warehouse,”<sup>203</sup> argue for natural parents to be paid something “approaching the free-market value of the child,”<sup>204</sup> and finally, most startling, opine on the relative quality of children. They refer, for example, to a “*quality-adjusted price*” for children, suggesting that “[w]ere baby prices quoted as prices of soybean futures are quoted, a racial ranking of these prices would be evident, with white baby prices higher than nonwhite baby prices.”<sup>205</sup>

The rhetoric in Landes and Posner’s 1978 article amply demonstrates the dangers of hardline (sometimes called Chicago School)<sup>206</sup> legal economic rhetoric, particularly the way it quickly slides into racialized, eugenic reasoning.<sup>207</sup> Many people understandably take umbrage at the idea of a published price list designating white babies as more valuable than babies of color.<sup>208</sup>

### B. Radin’s Critique of the Parenthood Market

Margaret Jane Radin has presented the most compelling

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203. Landes & Posner, *supra* note 2, at 327. Posner later clarified that this analogy is for “heuristic purposes only.” See Posner, *The Regulation of the Market in Adoptions*, *supra* note 5, at 64.

204. Landes & Posner, *supra* note 2, at 328.

205. *Id.* at 341, 344. Posner continues to focus on white married couples who would rather adopt, he suggests, healthy white infants, but substitute “nonwhite and handicapped” children because of inefficiencies in the adoption market. See Posner, *The Regulation of the Market in Adoptions*, *supra* note 5, at 65. Landes and Posner similarly suggest that adoptive parents “would presumably be willing to pay more for a child whose health and genealogy were guaranteed in a legally enforceable instrument than they are willing to pay under the present system where the entire risk of any deviation from expected quality falls on them.” *Id.* at 341. Still, it is worth noting that Posner has since qualified the proposal to limit buyers’ remedies in baby selling, contending that baby buyers should not be able to reject goods that do not conform to their expectations (as buyers of ordinary goods are entitled to do), nor should adoptive parents be entitled to specific enforcement of an adoption contract if the birth mother has a change of heart. See *id.* at 67; see also *supra* note 199 (discussing other limitations Posner would impose on a parenthood market).

206. Some scholars distinguish this Chicago School legal economic approach from what is increasingly called the New Chicago School. See generally Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998) (outlining the difference between the old and new Chicago School’s economic thought).

207. Posner’s 1987 clarification of the 1978 article addresses this concern, acknowledging the “remote” possibility of “an entrepreneur in the baby market trying to breed a race of *Übermenschen* who would command premium prices[, and that] the external effects of such an endeavor could be very harmful, and would provide an appropriate basis for governmental regulation.” Posner, *The Regulation of the Market in Adoptions*, *supra* note 5, at 68.

208. See, e.g., Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913, 914–20 (1994) (calling a system valuing white babies at higher prices than black babies a “house of horrors”).

challenge to universal commodification.<sup>209</sup> The danger posed by the parenthood market is reflected by its pride of place in her influential book *Contested Commodities*,<sup>210</sup> in which she expresses concern about both literal and rhetorical markets.<sup>211</sup> The danger of literal markets in contested commodities, according to Radin, is that they compromise human flourishing:

In universal commodification, personal attributes, relationships, and philosophical and moral commitments are monetizable and alienable from the self. . . . a better view of personhood should understand many kinds of particulars—one’s politics, work, religion, family, love, sexuality, friendships, altruism, experiences, wisdom, moral commitments, character, and personal attributes—as integral to the self. To understand any of these as monetizable or completely detached from the person . . . is to do violence to our deepest understanding of what it is to be human.<sup>212</sup>

The danger of using market rhetoric to describe transactions where no money changes hands, according to Radin, is that such rhetoric might lead to literal markets in contested commodities:

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209. Jane B. Baron, *The Expressive Transparency of Property*, 102 COL. L. REV. 208, 224 (2002); Marjorie M. Schultz, *Questioning Commodification*, 85 CAL. L. REV. 1841, 1841 (1997) (reviewing RADIN, *supra* note 3).

210. RADIN, *supra* note 3. While she discusses the market in organs and other human body parts, she focuses on baby selling and prostitution as “nodal cases” of contested commodification. *See id.* at 131. Slavery is also a concern in commodification discussions, *see id.* at 44–45, but more as an analytical tool to distinguish impermissible commodifications from permissible ones as no one argues for its legitimation. Even Posner, widely acknowledged as the foremost champion of legal economic analysis, stops short of claiming that slavery is economically efficient. Posner, *The Regulation of the Market in Adoptions*, *supra* note 5 at 343 (recognizing that adoption agencies screen out people who want children to abuse or make slaves of them and suggesting that statutes criminalizing abuse and neglect would remain applicable to babies adopted in a free market). It is worth noting, however, that Posner has also critiqued the blanket moral condemnation of slavery, contending:

It is provincial to say that ‘we are right about slavery, for example, and the Greeks were wrong,’ so different was slavery in the ancient world from racial enslavement, as practiced for example, in the United States. . . . To call infanticide or slavery presumptively bad would be almost as provincial as to condemn them without qualification.

Richard A. Posner, *The Problematics of Moral Legal Theory*, 111 HARV. L. REV. 1637, 1650 (1998).

211. RADIN, *supra* note 3, at 12–13.

212. *Id.* at 56; *see also* ANDERSON, *supra* note 3, at 168 (stating that surrogacy “commodifies both women’s labor and children in ways that undermine the autonomy and dignity of women and the love parents owe to children”); RADIN, *supra* note 3, at 100–10 (“Commercial friendship is a contradiction in terms, as is commercial love. If opportunities for noncommercial friendship and love were not available, we would not be human.”).

The reason people are troubled by ‘mere’ market rhetoric, when applied in ways they think inappropriate, is that they think it will be contagious and will lead to literal commodification. . . . They think that if enough people conceive of children in market rhetoric and advocate that we exchange children for money, then literal buying and selling of children will result.<sup>213</sup>

Moreover, Radin argues, market rhetoric might deprive us of other ways of understanding human experience and thus of the conceptual tools to see anything wrong with baby-selling.<sup>214</sup> But, despite her clear skepticism about commodification, Radin stops short of advocating the removal of sex and other contested commodities from the market.<sup>215</sup>

A crucial, and often overlooked, component of Radin’s theory is her acknowledgment that the world is more complex than the polar opposites of universal commodification and market-inalienability. Rejecting these extremes, she embraces a pragmatic view that evaluates, context by context, the likelihood that market rhetoric will create literal markets.<sup>216</sup> She calls this danger of slippage from rhetorical to literal markets the domino theory<sup>217</sup> and questions whether particular markets, such as the parenthood market, create the danger of complete commodification of children.<sup>218</sup> If market understandings can coexist with non-market understandings, she suggests, “incomplete commodification—a partial market-inalienability—can sometimes reflect the conflicted state of affairs in the way we understand an interaction.”<sup>219</sup>

While Radin is willing to support incomplete commodification of

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213. RADIN, *supra* note 3, at 13.

214. *Id.* at 13–14 (“If market rhetoric took over the world [so] that there was no other way available to us to conceive of children, then there would be no reason left to avoid trading them as commodities. . . . [I]n that world we might no longer have the conceptual tools to be worried about it.”).

215. *Id.* at 104, 134–36 (advocating “incomplete commodification” of sexual services and advocating a range of commodification for various contexts).

216. *Id.*

217. *Id.* at 99–100 (describing the domino theory “that there is a slippery slope leading from toleration of any sales of something to an exclusive market regime for that thing; and there is a further slippery slope from a market regime for some things to a market regime encompassing everything people value”).

218. *Id.* at 104 (“For each case of contested commodification I believe we should look and see how powerful the market conceptualization is in context. We should consider whether under some circumstances market understandings and nonmarket understandings can stably coexist, either as contested concepts or as internally conflicted (plural) meanings.”).

219. *Id.*

sex,<sup>220</sup> she finds the risks of literal markets too high to treat the parenthood market in a similar fashion.<sup>221</sup> Beginning with the now-familiar contention that “[c]onceiving of any child in market rhetoric wrongs personhood,”<sup>222</sup> she articulates several reasons that establish why market-inalienability may be the best policy regarding surrogacy.<sup>223</sup> But she also recognizes the hardship that noncommodification would visit on surrogates caught in the double-bind of needing money and not being able to sell gestational services.<sup>224</sup> After considering the dangers of both commodification and noncommodification, Radin stops short of supporting incomplete commodification of parental rights and obligations.<sup>225</sup>

Despite its pluralistic, pragmatic foundation, Radin’s view of market rhetoric presents it more as a danger to be monitored, than as a neutral discourse that could either facilitate or hinder human flourishing. In her discussion of baby selling, for example, Radin tends to focus on the ways that commodification could be an antidote to a bad situation, such as poverty, rather than ways that it could be an affirmative good.<sup>226</sup> Her focus is explained by the fact that much of the literature questioning commodification has focused on marginalized people<sup>227</sup> as sellers of sex, babies, or organs, who sell because they have no other ready source of income.<sup>228</sup> Such conventional wisdom, however, overlooks the possibility that commodification is, in some circumstances, an affirmative good for marginalized people, and further that sometimes the sellers are socially dominant while the buyers are the marginalized ones. As addressed in Part III, alternative insemination is one of those circumstances, demonstrating that we need to rethink our assumptions of how commodification and power relations intersect.<sup>229</sup>

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220. *See id.* at 134–36.

221. *Id.* at 138.

222. *Id.* at 139.

223. *See id.* at 149. Radin describes feminist opposition to marketization of parental rights as contending that: “in this nonideal world of ours, treating women like anonymous fungible breeders objectifies them and recreates subordination, and that in our culture of materialist fungible objects, children who know they have been bought will have difficulty forming a Kantian self-conception.” *Id.*

224. *Id.* at 145.

225. *Id.* at 147 (“We should be aware that the case for incomplete commodification is much more uneasy for surrogacy than for prostitution.”).

226. *See, e.g., id.* at 123–25 (discussing how marginalized people are often forced to sell sex, babies, or organs because they need the money to survive).

227. Poor people and women are frequently the chief beneficiaries of commodification skeptics’ concern. ANDERSON, *supra* note 3, at 81; RADIN, *supra* note 3, at 131–53.

228. RADIN, *supra* note 3, at 125.

229. *See supra* notes 112–93 and accompanying text.

### C. *Splitting the Baby*

This Article attempts to build on Posner's and Radin's approaches by incorporating Zelizer's analysis and poststructuralist antiessentialist theory to provide a new and improved theory of commodification that can better account for the way that market mechanisms can simultaneously empower marginalized people and collude with power disparities. Antiessentialism<sup>230</sup> is particularly helpful in supplementing existing commodification theory, as scholars have critiqued elements of both Radin's<sup>231</sup> and Posner's<sup>232</sup> approaches as essentialist. Katharine Silbaugh, for example, after making this charge against both of them, marshals the strengths of both to craft a new approach to commodifying household labor.<sup>233</sup> In so doing, she applies both Radin's premise that plural meanings are possible and

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230. Essentialism, in this tradition, is a "belief in true essence—that which is most irreducible, unchanging, and therefore constitutive of a given person or thing." FUSS, *supra* note 17, at 2. For example,

essentialism can be located in appeal to a pure or original femininity, a female essence, outside the boundaries of the social and thereby untainted (though perhaps repressed) by a patriarchal order. It can also be read in the accounts of universal female oppression, the assumption of a totalizing symbolic system which subjugates all women everywhere, throughout history and across cultures.

*Id.*

Antiessentialism contests this unitary view, replacing it with one that is "pluralistic, contextual, dialogic, anti-hierarchical, conscious, [and] questioning," looking to see "who is present, who is speaking, who benefits, [and] who has set priorities. NANCY E. DOWD & MICHELLE S. JACOBS, *FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER* 9, 12 (2003).

231. *See, e.g.*, John A. Robertson, *Human Flourishing and the Limits on Markets*, 95 MICH. L. REV. 2139, 2143, 2149 (1997) (noting Radin's reliance on Martha Nussbaum's "Aristotelian essentialism" to identify what makes people fully human and concluding that "there may be no inherent answer to what is essential for human flourishing"); Schultz, *supra* note 209, at 1859 (contesting the understanding of life as sacred and the market as profane on the grounds that women can benefit from commodification if it offers them an entry into market participation); Silbaugh, *supra* note 11, at 96 (contending that "neither an economic nor an emotional understanding of non-market activities is intrinsic to the activities themselves").

232. *See, e.g.*, Silbaugh, *supra* note 11, at 90–91 (describing the "relentless essentialism" of much economic literature, citing Posner's work among other economists such as Gary Becker); Robin West, *Sex, Reason and a Taste for the Absurd*, 81 GEO. L.J. 2413, 2449 (1993) (reviewing POSNER, *SEX AND REASON*, *supra* note 5).

233. *See* Silbaugh, *supra* note 11. Silbaugh both critiques Radin's (and other anticommodification commentators') suspicion of commodification for its unintended conservative effects, and embraces Radin's contention that transactions can have plural meanings (market and non-market). In the same spirit, she both critiques legal economics' totalizing tendency to reduce all experience to economics, and embraces Posner's (and Becker's) insight that the household is the place of production as well as consumption. *Id.* at 91–94. By characterizing homemaking labor as done for love rather than for money, Silbaugh argues that anticommodification theorists inadvertently contribute to the economic marginalization of many women. *Id.* at 83–84.



the economic premise that household labor produces value to suggest that progressives should be as concerned about non-commodification in some contexts, such as home labor, as they are about over-commodification in others.<sup>234</sup> While Silbaugh notes Zelizer's work,<sup>235</sup> she does not connect it to an antiessentialist approach.

This Article fills that gap by demonstrating how market mechanisms are multifaceted, both facilitating and hampering human flourishing.<sup>236</sup> While Silbaugh makes an antiessentialist claim that economic analysis could help homemakers as sellers of domestic services, I consider how the market for sperm similarly benefits marginalized people acting as *buyers* (women—in particular single women and lesbian couples).<sup>237</sup> This intervention offers both a new context in which to explore the meaning of commodification (alternative insemination) and a new relation of the parties (women as buyers rather than sellers). In the alternative insemination market, men sell their sperm, often to single women and lesbian couples, enabling those women to form families without a patriarch present. Of course, the buyers of sperm, largely middle class and white, are also powerful in relation to other members of society.<sup>238</sup> This recognition further undermines the essentialist thesis that sellers are all-powerful and buyers are entirely victims. In short, a full understanding of commodification requires acknowledging ways it is both conducive and dangerous to human flourishing.

Whether beneficial or harmful, commodification is deeply embedded in intimacy, a phenomenon I have written about elsewhere.<sup>239</sup> For example, love, parenthood, and romance are already partially commodified in both legal doctrine and popular culture.<sup>240</sup> We exchange birthday, Christmas, and Chanukah presents

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234. *See id.* at 96 (critiquing Radin's hierarchy among models and revealing some of the negative aspects of non-market understandings).

235. *See id.* at 96–97.

236. For other works offering a multivalent view of markets, see sources cited *supra* note 11.

237. By single women, I mean women who are not coupled with either men or women.

238. Shanley, *supra* note 15, at 262.

239. *See* Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 41–46 (1998) [hereinafter Ertman, *Commercializing Marriage*]; Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1135–1154 (1996); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 99–131 (2001); Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215, 1228–53 (1998).

240. RADIN, *supra* note 3, at 20 (acknowledging that things can be “incompletely commodified—neither fully commodified nor fully removed from the market”); ZELIZER,

with romantic intimates as well as with children. Indeed, to many people, the failure or refusal to share money with intimates signals a lack of commitment.<sup>241</sup> At the extreme, the State might terminate the rights of parents who fail or refuse to pay for their children's food, clothing, shelter, and health care.<sup>242</sup> Zelizer's ground-breaking work extensively documents this overlap between money and intimacy, and provides a theoretical framework for understanding the range of ways in which they interact.

*D. Zelizer's Differentiated Ties Approach to Commodification*

Zelizer critiques two models for understanding the exchange of money in intimate relationships, models she dubs "Hostile Worlds" and "Nothing But."<sup>243</sup> Adherents to the Hostile Worlds view of commodification see such a "profound contradiction" between intimate social relations and monetary transfers that "any contact between the two spheres inevitably leads to moral contamination."<sup>244</sup> Mary Lyndon Shanley's recent proposal that the State ban payment for any gametes epitomizes this approach.<sup>245</sup> She makes a general claim that we do not own our gametes because we are stewards for past and future generations,<sup>246</sup> and critiques a regulatory scheme that treats people as "individuals who are free to commodify their genetic traits, consulting only their own immediate interests and values."<sup>247</sup> Building on this critique of liberal individualism, her argument to ban payment for gametes draws a stark distinction between exchanges

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THE SOCIAL MEANING OF MONEY, *supra* note 16; Silbaugh, *supra* note 11, at 83.

241. For a popular fictional portrayal of this pattern, see AMY TAN, *THE JOY LUCK CLUB* 150, 157, 160 (1989) (describing in less than flattering terms a husband who insists on maintaining strict financial separation).

242. CLARK, *supra* note 74, at 899, 901. Termination, however, will only be ordered in extraordinary cases where a parent is not meeting a child's most basic needs, such as the need for food and medical care. *Id.* at 353.

243. Zelizer, *The Purchase of Intimacy*, *supra* note 16, at 817.

244. *Id.* at 818. Works that Zelizer cites as illustrative of Hostile Worlds thinking about commodification include ANDERSON, *supra* note 3, and WALZER, *supra* note 21. See Zelizer, *The Purchase of Intimacy*, *supra* note 16, at 823, 835.

245. Shanley, *supra* note 15, at 271-73. Shanley is in good company in embracing Hostile Worlds. See AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.03 at 107-08 (2003) [hereinafter *ALI PRINCIPLES 2003*] (defining a de facto parent as someone who has lived with a child for at least two years, "for reasons primarily other than financial compensation," and, with the legal parent's agreement, provided the majority of caretaking functions for the child); *Id.* at c(ii), illus.19 (describing how any financial compensation for child care precludes de facto parenthood, including state compensation to foster parents).

246. Shanley, *supra* note 15, at 272-73.

247. *Id.* at 265.

and gifts: “The gift of life should be just that, a gift.”<sup>248</sup> Yet this distinction blurs upon close examination. Her gift morphs into exchange, as she would allow “inconvenience allowances” to promote gamete transfers.<sup>249</sup> The slippage is not surprising since, as Carol Rose has observed, gifts and exchanges routinely “melt together,” a process in which the “unilateral aspects of gift transfers blur into the reciprocal aspects of exchange transfers, and vice versa.”<sup>250</sup> Despite the intuitive appeal of a stark separation between money and love, as both Zelizer and Rose demonstrate, the Hostile Worlds view is inadequate because it simply does not reflect the world in which we live.<sup>251</sup>

Having demonstrated the inadequacy of the Hostile Worlds approach, Zelizer next demonstrates the weaknesses of what she calls Nothing But approaches to commodification. These arguments contend that intimate relations involving monetary exchanges are nothing but: (1) rational exchanges, indistinguishable from markets; (2) expression of cultural values; or (3) coercion.<sup>252</sup>

Zelizer suggests these Nothing But approaches fail to explain the variable degrees of commensurability that people experience as they live their lives.<sup>253</sup> While Hostile Worlds views money and love as mutually exclusive (complete incommensurability), she explains, the Nothing But approaches see everything as commensurable, as soon as we see the basis for commensurability: market, culture, or power.<sup>254</sup>

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248. *Id.* at 273 (internal quotation marks omitted).

249. *Id.* at 275–76. This allowance would pay donors for time and discomfort, but not for the gametes themselves. *Id.*

250. Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 296 (1992).

251. Three cases illustrate the way that legal doctrine routinely recognizes monetary transfers in intimate relationships and often defines those relationships. Zelizer, *The Purchase of Intimacy*, *supra* note 16, at 827–33. In *United States v. Harris*, for example, the Seventh Circuit evaluated the relationship between twin sisters and a wealthy widower to determine whether the transfers (of over half a million dollars) should be taxed as income or as gifts. 942 F.2d 1125, 1127 (7th Cir. 1991). The court held that the transfers were gifts, reasoning that “a person is entitled to treat cash and property received from a lover as gifts, as long as the relationship consists of something more than specific payments for specific sessions of sex.” *Id.* at 1133–34. Similarly, a 1924 case from the Supreme Court of Vermont held that a housekeeper-turned-lover was entitled to payment for her housekeeping services after the relationship ended, and an 1898 Texas Court of Civil Appeals case recognized a husband’s claim of \$5,000 for loss of his wife’s sexual services (known, of course, as loss of consortium). See Zelizer, *The Purchase of Intimacy*, *supra* note 16, at 830–33 (discussing *Stewart v. Waterman*, 123 A. 524 (Vt. 1924) and *City of Dallas v. Jones*, 54 S.W. 606 (Tex. App. 1898)).

252. Zelizer, *The Purchase of Intimacy*, *supra* note 16, at 818.

253. *Id.* at 817–19.

254. *Id.* at 826.

Posner and Landes's approach to the parenthood market falls into the Nothing But camp, contending that the market for adoption is nothing but a market like any other. The critique of Posner's work shows the weakness of this approach. Many, even most, scholars do not see parenthood and cash as completely commensurable.<sup>255</sup> Zelizer offers a view she calls Differentiated Ties to fill this gap, contending that her approach, unlike the Hostile Worlds or Nothing But approaches, accounts for degrees of commensurability.<sup>256</sup>

Zelizer describes Differentiated Ties with reference to the specifics of how people mark their relationships with particular forms of payments.<sup>257</sup> In a sexual context, she suggests that money can have different social meanings in different contexts: "[r]ather like forms of clothing, styles of speech, choices of location, and kinds of meals, forms of payment mark the character and range of the social relationship people are currently enacting."<sup>258</sup>

The theory developed in this Article builds on Zelizer's nuanced view of the complexity of the overlap between monetary exchanges and intimate affiliation.<sup>259</sup> Monetary exchanges, rather than tainting intimacy, constitute an important part of intimacy. For example, one indication that a social engagement is a date is the act of treating, one person picking up the bill for both. But picking up the bill may also

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255. See, e.g., ANDERSON, *supra* note 3, at 172; RADIN, *supra* note 3, at 139–40; Williams, *supra* note 28, at 223.

256. Zelizer, *The Purchase of Intimacy*, *supra* note 16, at 819.

257. See *id.* at 826 (“[P]eople incessantly match different forms of payment to their various intimate relations. What is more, they take great care to mark boundaries between social relations and their corresponding forms of payments.”).

258. *Id.* at 842. Three examples of these gradations illustrate her point. First, poor women in the United States mark different relationships with men based on particularized monetary transfers (such as the difference between customers for prostitution and live-in boyfriends who contribute to household expenses in return for companionship, sex, and a place to stay). *Id.* at 817–18. Second, Brazilian *travestis* (men who cross-dress and sleep with men) define their relationships through transfers to and from four different types of men. *Id.* *Maridos*, or boyfriends, are men whom the *travestis* support while *boyzinhos* are adolescent boys to whom the *travestis* give small gifts in exchange for sex. *Id.* *Vicios*, or vices, in contrast, are handsome men with whom *travestis* have sex for free while *clientes* are men who pay *travestis* for sex and are fair game for theft or trickery. *Id.* Finally, a little closer to home for middle-class Americans, is the practice of treating that arose with the advent of commercial amusements at the turn of the twentieth century. *Id.* at 821–22. Upon industrialization, courtship rituals emerged in which working-class young women obtained gifts, financial help, and access to entertainment from a fiancé, steady, or casual acquaintance in exchange for a variety of sexual favors, from flirting to sexual intercourse. *Id.* at 822. Contemporary daters will recognize the importance of negotiating the meaning of accepting gifts and cash from a date, steady, or cohabitant. Receiving a ticket to the movies or a bouquet flowers from a sweetie, for example, has a different meaning than purchasing these things with one's own money.

259. See *supra* note 16 and accompanying text.

reflect hierarchy, as when the boss takes his assistant out to lunch for Secretary's Day. Moreover, important milestones in a romantic relationship are marked by financial transfers, such as designating the beloved as beneficiary of a life insurance policy or individual retirement account, signifying an engagement with a diamond ring, merging some or all finances in joint bank accounts and spending money on a wedding.<sup>260</sup> But relatives who are not romantic intimates also interlock finances in various ways. These examples show that financial sharing is not unique to sexual relationships and that the mere presence of monetary exchanges does not tell us everything we need to know. Consequently, rather than default into commodification skepticism or enthusiasm, we should ask how to best channel market models and mechanisms to serve the normative goal of enhanced human flourishing.

In addition to this normative slant, the theory set forth in this Article adds a poststructuralist theoretical insight to further elaborate on Zelizer's Differentiated Ties approach. Because essentialism means different things in different contexts, it is worth defining here.

#### V. A NEW AND IMPROVED THEORY OF COMMODIFICATION: AN AMALGAMATION OF POSNER, RADIN, ZELIZER, AND ANTI-ESSENTIALISM

The new and improved theory of commodification put forth in this Article combines the best of Posner's, Radin's, and Zelizer's analyses with antiessentialist theory. It embraces Posner's insight that contract analysis allows us to think about intimate affiliation in new ways, and Radin's recognition that commodification can have plural meanings. It leaves behind, however, the essentialism in both commodification enthusiasm and commodification skepticism. In doing so, it accounts for the full range of consequences of commodification.

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260. The importance of these expenditures is revealed by the fact that the average amount Americans spend on weddings, according to one survey, is \$22,360, leading to credit difficulties for many recently married couples and their parents. Jennifer Bayot, *For Richer or Poorer, to Our Visa Card Limit*, N.Y. TIMES, July 13, 2003, at A1. Similarly, the American Law Institute's recently published *Principles of the Law of Family Dissolution* recognizes the social significance of monetary exchanges by making financial sharing a key component in defining what kinds of relationships are domestic partnerships. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (Tentative Draft No. 4, 2000). Eight of the thirteen factors that define a domestic partnership under the Principles are financial (explicitly or implicitly). See *id.*

A. *An Antiessentialist Understanding of Antiessentialism*

A fundamental job of poststructuralist thought is to critique essentialism,<sup>261</sup> replacing that approach with social constructionism. Constructionists contend that essence is itself historically produced and demonstrate that categories we tend to view as self-evident such as “man” or “woman” are actually the products of complex discursive practices.<sup>262</sup> In short, the essentialist “holds that the natural is *repressed* by the social, [while] the constructionist maintains that the natural is *produced* by the social.”<sup>263</sup>

While constructionism is often associated with the political left, and essentialism is generally decried by progressives as retrograde, the very division of thought into two types, essentialist or constructionist, conservative or progressive, is itself an exercise in essentialism as it relies on understanding arguments as purely one thing or another. Once we recognize the possibility of essentializing ideas (as opposed to the more common discussion of essentializing groups of people), it becomes clear that just as essentialism is not essentially conservative, constructionism is not inherently progressive. Both progressive and conservative arguments can be essentialist.<sup>264</sup>

This Article arguably falls into the trap of essentialism by dubbing certain effects of commodification as positive or negative. Literary theorist Diana Fuss addresses this issue by contending that “in and of itself, essentialism is neither good nor bad, progressive nor reactionary, beneficial nor dangerous.”<sup>265</sup> Specifically, she argues that deconstructionism relies on essentialism “in its determination to replace essence.”<sup>266</sup> In doing so, Fuss argues, constructionism does not put essence to rest, but rather “simply raises the discussion to a more sophisticated level, leaps the analysis up to another higher

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261. OXFORD ENGLISH DICTIONARY (2d ed. 1997) (defining post-structuralism as “an extension and critique of structuralism . . . which rejects structuralist claims to objectivity and comprehensiveness, typically emphasizing instead the instability and plurality of meaning, and frequently using the techniques of deconstruction to reveal unquestioned assumptions and inconsistencies in literary and philosophical language”); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1113 (2002) (describing poststructuralist avoidance of essentialism).

262. FUSS, *supra* note 17, at 2.

263. *Id.* at 3.

264. For a critique of the feminist approaches of Catharine MacKinnon and Robin West as essentialist, see generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). For a critique of Richard Posner’s work as essentialist, see West, *supra* note 232, at 2449 (reviewing POSNER, *SEX AND REASON*, *supra* note 5).

265. FUSS, *supra* note 17, at xi.

266. *Id.* at 13.

register, above all, keeps the sign of essence in play, even if (indeed *because*) it is continually held under erasure.<sup>267</sup> Thus, rather than abandoning the antiessentialism critique, Fuss proposes that constructionists recognize the power of antiessentialism by resisting the impulse to essentialize the natural:

We need to beware of the tendency to ‘naturalize’ the category of the natural, to see this category, too, as obvious and immediately perceptible *as such*. . . . To insist that essentialism is always and everywhere reactionary is, for the constructionist, to buy into essentialism in the very act of making the charge; *it is to act as if essentialism has an essence*.<sup>268</sup>

Under this analysis, the questions are not whether something is essentialist, but rather “if this text is essentialist, *what motivates its deployment?* How does the sign ‘essence’ circulate in various contemporary critical debates? Where, how, and why is it invoked? What are its political and textual effects?”<sup>269</sup> This Article takes up Fuss’s challenge, questioning the conventional wisdom that the parenthood market inhibits human flourishing, and suggesting that commodifying parental rights holds both danger and promise. It is different things simultaneously, requiring an antiessentialist theory to understand its complexity.

### *B. Applying the Antiessentialist Theory of Commodification*

In this light, Zelizer’s Differentiated Ties approach to commodification can be seen as antiessentialist. Where Radin seems to see more danger than promise in applying market models to sex and children, Zelizer takes a broader view, uncovering the ways that exchanges of money in sexual and other intimate relationships can also foster connection. Three hypothetical situations highlight a range of monetary exchanges related to parental rights and obligations. Added to the example of alternative insemination elaborated above, this analysis suggests the ability of Differentiated Ties to account for a range of parenthood markets.

#### 1. Paying for Sperm

As discussed above, would-be mothers can cut off paternal rights by acquiring sperm through market mechanisms rather than coitally. One form donor-recipient agreement provides that the recipient will

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267. *Id.* at 20–21.

268. *Id.* at 21.

269. *Id.* at xi.

pay a set sum to the donor each time he makes a semen donation, that the donor will not claim parental rights, and that the recipient will not hold the donor legally, financially, or emotionally responsible for any offspring resulting from the insemination.<sup>270</sup> The overt marketization of the procedure, both by the recipient paying the donor, and by paying a doctor to perform the procedure, signals that the donor intends to sell his parental rights to the recipient. This mechanism might reflect what Zelizer calls Hostile Worlds understandings (suggesting that payment for sperm marks the transaction as one between arms-length actors rather than intimates), but also illustrates her Differentiated Ties approach.

In addition to separating the recipient and donor, the payment could bring the recipient and her partner closer if the partner made the payment. In this view, the partner paying for sperm could signify her monetary and emotional investment in the new family being created, illustrating how the payment has different meaning depending on the person making and receiving it and her relationship to the other people involved in the transaction.

## 2. Paying Third Parties for Childcare

A second way parenthood might be commodified involves payment for childcare by non-intimates, as when a parent hires a babysitter. This payment, like the recipient paying for sperm

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270. PEPPER, *supra* note 45, at 200–01. The sample language provides:

6. Each party acknowledges and agrees that DONOR is providing his semen for the purpose of said artificial inseminations, and does so with clear understanding that he will not demand, request, or compel any guardianship, custody, or visitation rights with any child(ren) resulting from the artificial insemination procedure. Further, donor acknowledges that he fully understood that he would have no parental rights whatsoever with said child(ren).

7. Each party acknowledges and agrees that RECIPIENT, through this AGREEMENT, has relinquished any and all rights that she might otherwise have to hold DONOR legally, financially, or emotionally responsible for any child(ren) that results from the artificial insemination procedure . . . .

. . . .

10. Each party acknowledges and agrees that the use of a licensed physician to receive the semen donation, as well as the execution of this AGREEMENT, were specifically chosen to avoid any finding that the DONOR is the legal father of the child(ren) pursuant to [name and section number of state statute if applicable]. Consistent with that purpose, each party has executed this AGREEMENT with the purpose of clarifying her or his intent to release and relinquish any and all rights she or he may have to bring suit to establish the paternity of any child(ren) conceived through the procedure of artificial insemination.

*Id.*



discussed above, serves the social function of signaling that the parties do not intend that the caretaking will give rise to parental rights or responsibilities on the part of the caregiver. If, in contrast, a relative cared for a child regularly, and without pay, that relative might have standing to seek visitation or other parental rights should the legal parent change those arrangements.<sup>271</sup> The American Law Institute's Principles of the Law of Family Dissolution ("ALI Principles") adopt this analysis in its definition of a de facto parent as one who is not a legal parent, and cares for a child, but does so for love, rather than for remuneration.<sup>272</sup>

Similar to paying for sperm, the distinction flows from a Hostile Worlds set of assumptions, but has Differentiated Ties implications. Suppose a lesbian couple has a child and lives in a jurisdiction that does not allow the non-biological mother to be the other legal parent. Further, suppose that the non-biological mother is the child's primary caretaker. The non-biological mother could establish parental rights as a de facto parent as long as the biological mother was not directly paying her for those services. Indeed, the payments likely would be indirect, in the form of the biological mother sharing her salary and other employment benefits (i.e., health insurance) with the non-biological mother. Thus, the nature of the relationship between the parent and the caretaker tells us more than the mere fact of money or something else of value changing hands.

### 3. Paying Partners for Childcare and Homemaking

Another kind of contract for childcare suggests that these contracts can have multiple meanings, underlining the antiessentialist thrust of this Article. Suppose the lesbian couple just described enters into a contractual arrangement in which they seek to protect the non-biological mother's contributions to family wealth through her household labor (and lost opportunity costs). The agreement provides that, if they separate, the primary wage-earning partner will share 30% of her salary with the primary homemaking partner until the child reaches eighteen, or half of the duration of their partnership (whichever is longer).<sup>273</sup>

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271. See, e.g., *Jackson v. Tangreen*, 18 P.3d 100, 103–04 (Ariz. App. 2000) (authorizing grandparent visitation after *Troxel v. Granville*, 530 U.S. 57 (2000)), *cert. denied*, 534 U.S. 953 (2001).

272. ALI PRINCIPLES 2003, *supra* note 245, § 2.03.

273. I have written elsewhere suggesting that legal doctrine should recognize such an agreement when marriages end. See Ertman, *Commercializing Marriage*, *supra* note 239 at 22–23.

Now suppose the partners break up. If the biological mother wants to defeat the non-biological mother's claims of custody or visitation, she could cite the agreement between them to argue there was an employment relationship rather than a familial one. However, the very existence of the agreement reveals that they modeled their partnership on a traditional heterosexual marriage, where one person is the primary wage-earner and the other is the primary homemaker. A Hostile Worlds analysis would likely favor the biological mother, erasing the intent of the parties to cobble together an economically interdependent unit. Nothing But approaches similarly could not account for the mix of romance and finance in this couple's arrangement. But Differentiated Ties could account for the way that this contract was intended to cultivate intimacy by encouraging the nonbiological mother to invest in the family (foregoing her own wage-earning capacity), and also by fostering a close tie between the nonbiological mother and the child. Paying partners for childcare and homemaking, like the previous examples of contractualized parenthood, illustrates that Hostile Worlds and Nothing But approaches only go so far in explaining commodification. While it may not answer all questions regarding a parenthood market, Differentiated Ties supplemented with antiessentialist theory best accounts for the range of meanings in that market and perhaps other markets as well.

#### CONCLUSION

Many people wince at the mention of privatization,<sup>274</sup> assuming that market mechanisms benefit powerful players at the expense of everyone else. This Article questions this assumption, using the alternative insemination market to illustrate some weaknesses in contemporary commodification theory and propose a new and improved theory of commodification that, rather than being sharply skeptical or enthusiastic, accounts for multiple valences of commodification in any particular context. While others have ably described the dangers of the parenthood market,<sup>275</sup> no one, to my knowledge, has charted its positive implications. In particular, the alternative insemination market facilitates the formation of new

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274. See, e.g., Regina Austin, "Not Just For the Fun of It": *Governmental Restraints on Black Leisure, Social Inequality and the Privatization of Public Space*, 71 S. CAL. L. REV. 667, 674-75 (1998) (discussing privatization of public spaces and attendant racial discrimination).

275. See sources cited *supra* note 3 and accompanying text.

families, often headed by single women or gay people.<sup>276</sup> As such, it supplements naturalized understandings of family with ones based on the ways that intimate associations actually function. Moreover, it extends parenthood, widely viewed as an important component of citizenship<sup>277</sup> to a class of people formerly excluded from that status. Were public law to decide whether single women and gay people should be able to form families, more often than not, it would deny that opportunity on the ground of majoritarian moral bias against these groups.<sup>278</sup>

However, the market for parental rights also has drawbacks, such as concerns related to eugenics, access, paternal anonymity, and objectification. Recognizing that we need a theoretical approach that accommodates multiple meanings of the commodification of parental rights, I suggest that Zelizer's Differentiated Ties approach to marketization might be able to do the antiessentialist work required of such a theory. If this exercise in deciding what is wrong (and right) about the parenthood market opens up new possibilities for mining market mechanisms, a new generation of legal scholarship could result. At the very least, we might get a fuller articulation of what is wrong with selling parental rights and obligations (and legal economic rhetoric generally) than what we have now, namely something better than conclusory claims that rely on negative connotations of the term "commodification" instead of identifying precise dangers of the market.

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276. *See supra* note 21

277. *See supra* notes 158–62 and accompanying text.

278. *See, e.g.*, Defense of Marriage Act, 28 U.S.C. § 1738(c) (2002) (allowing states to give no effect to any public act, record, or judicial proceeding relating to same sex marriages).

