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Article

Reproduction Reconceived

Courtney Megan Cahill<sup>†</sup>

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## INTRODUCTION

A single woman uses an anonymous sperm donor to have a child. She spends hours poring over his file at the sperm bank, learning intimate details like his favorite color and his grandmother's medical history. She becomes pregnant with this donor and gives birth to a baby boy; the donor is not the boy's father. By contrast, a different single woman has a one-night stand with a man whom she met only hours before; she barely remembers his eye color, let alone his name. She, too, becomes pregnant with this man and gives birth to a baby girl; the man is the girl's father.

A married couple uses a fertility specialist to facilitate conception through alternative insemination. The husband, a chronic liar and adulterer, provides the specialist with a vial of semen; the specialist inseminates the wife without first testing the semen for communicable diseases like HIV. By contrast, a single woman contacts a man who decides to advertise over the Internet free alternative insemination services; they become very close friends, sharing life histories and intimate personal information. They pursue alternative insemination, but are dismayed to discover that the government requires donations between certain partners who are not "sexually intimate" to be tested for communicable diseases like HIV.<sup>1</sup> The testing is cost-

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1. See 21 C.F.R. § 1271.90(a)(2) (2012) (exempting from the Food and

ly, so the man discontinues his services and the woman instead contacts a sperm bank, buying semen that carries a hefty price tag—\$800.00 a vial—in large part because of the government's mandatory testing requirements for procreative partners who are not "sexually intimate."

A same-sex couple falls in love with an anonymous donor from a sperm bank; the couple intends to purchase vials of his semen within the year. To the couple's disappointment, the government passes a law banning anonymous sperm donation in order to protect children's right to know their genetic progenitors. The donor, who desires anonymity, retires from the bank's donor program, forcing the couple to choose a less desirable open donor. By contrast, a single woman has a child after a one-night stand. When the child is eight years old she asks her mother about her "father"; the woman tells her daughter that she lacks any identifying information, including a name, about him.

Some of these vignettes, like the first two, reflect laws that apply today in most jurisdictions. Others, like the third, are emblematic of proposed regulations of alternative reproduction that several commentators, conservative and progressive alike, support.<sup>2</sup> All of them reflect and perpetuate this Article's subject of critique: reproductive binarism, the belief that sexual and alternative reproduction are essentially different in fact and therefore deserve different treatment in law.

Reproductive binarism governs large swathes of intimate and family life, from paternity determinations<sup>3</sup> to the federal regulation of gamete providers<sup>4</sup> to the myriad proposed regulations of alternative reproduction that have surfaced in recent years.<sup>5</sup> Reproductive binarism sustained marriage discrimina-

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Drug Administration's mandatory testing requirements for human reproductive cells or tissue semen donations between "sexually intimate partner[s]" but requiring testing for donations between non-intimate partners).

2. Progressive scholars have relied on reproductive binarism to justify limits on alternative reproduction, see *infra* Part I.C., as have former opponents of same-sex marriage. See Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, 49 U.C. DAVIS L. REV. 183, 228 (2015) [hereinafter Cahill, *Oedipus Hex*].

3. See *infra* Part I.A.

4. See *infra* Part I.B.

5. For these proposed regulations of alternative reproduction, see *infra* Part I.C. Many of these proposals and their potentially burdensome effects on non-traditional procreators are also examined in Courtney Megan Cahill, *Obergefell and the "New" Reproduction*, MINN. L. REV. HEADNOTES (2016); Ca-

tion against same-sex couples for nearly fifty years, until the Supreme Court finally rejected it as unconstitutional in *Obergefell v. Hodges*.<sup>6</sup> It touches everyone and disciplines many: men, whether gay or straight; women, whether straight or lesbian; heterosexual couples; same-sex couples; sperm donors, both anonymous and known; transgender and cisgender individuals; sexuals and asexuals.<sup>7</sup> Reproductive binarism conflicts with existing and emerging constitutional values like procreative intentionality and familial autonomy and is predicated on a cramped vision of sex and intimacy. Moreover, it is stubborn, persisting in many domains even as it is jettisoned in others, and enjoys nearly universal support, uniting critics of non-traditional families with those families' allies. Conception "the old-fashioned way, through sexual intercourse" is just different from alternative reproduction, a traditionalist commentator argues.<sup>8</sup> Sex and alternative insemination "are, in fact, different, and different enough to satisfy any level of constitutional scrutiny,"<sup>9</sup> echoes a progressive family law scholar.

This Article challenges reproductive binarism on factual and constitutional grounds and considers how the law might—and why it should—operationalize a unitary system of reproductive regulation based on procreative intent rather than procreative mechanics. The product of the very law that rendered alternative reproduction licit,<sup>10</sup> the law's sex/non-sex distinction is factually questionable because it obscures the basic similarities that exist among all forms of procreation. But as this Article argues, the law's reproductive binary is also constitutionally

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hill, *Oedipus Hex*, *supra* note 2, at 192–99; Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1195–1230 (2016).

6. 135 S. Ct. 2584 (2015) (rejecting the procreation rationale for marriage prohibitions). The sex/non-sex binary's role in sustaining marriage discrimination against same-sex couples will be discussed at greater length below. See *infra* Part III.A.2, Part IV.

7. For a rich discussion of the pervasive, and often privileged, status of sex in American legal culture and the burdens that "compulsory sexuality" places on asexuals, see Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303 (2014).

8. Elizabeth Marquardt, *One Parent or Five: A Global Look at Today's New Intentional Families*, COMM'N ON PARENTHOOD'S FUTURE: INST. FOR AM. VALUES 1, 23 (2011), [http://americanvalues.org/catalog/pdfs/one\\_parent\\_or\\_five.pdf](http://americanvalues.org/catalog/pdfs/one_parent_or_five.pdf).

9. Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1106 (2014) [hereinafter Cahn, *Do Tell!*].

10. Part II argues at greater length that the legalization of alternative insemination in the 1970s is partly responsible for the law's sex/non-sex binary. See *infra* Part II.C.

deficient, particularly in light of constitutional norms relating to intimate and family life.

The law's sex/non-sex binary is a product of the belief that the Constitution protects—if it protects any form at all—sexual but not alternative procreation.<sup>11</sup> That assumption, in turn, is a product of sex exceptionalism and “intimacy essentialism.”<sup>12</sup> The law generally treats sex as unique, different not just in degree but also in kind from other species of conduct, and the law of reproduction is no different.<sup>13</sup> Moreover, the law essentializes intimacy by assuming that it is—and ought to be—non-commercial, private, and dyadic rather than commercial, public, and polyadic. Reproductive binarism reflects and replicates those same assumptions.<sup>14</sup>

Reproductive binarism is also a product of history. Before alternative insemination became legally recognized in the United States in the 1960s and 1970s,<sup>15</sup> courts, commentators, doctors, and patients conceptualized it in sexual terms. Either

11. See *infra* notes 133–37 and accompanying text.

12. This Article borrows these terms from Adrienne Davis, who explains opposition to polygamy, in part, on “intimacy essentialism.” Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2033 (2010).

13. See *infra* Part II.B.1.

14. For a discussion of how intimacy essentialism—specifically, the belief that intimacy and commerce are distinctive domains—shapes contemporary legal norms surrounding alternative procreation, see Martha M. Ertman, *Unexpected Links Between Baby Markets and Intergenerational Justice*, 8 L. & ETHICS OF HUM. RTS. 271, 274–79 (2014) [hereinafter Ertman, *Unexpected Links*]; Martha M. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003) [hereinafter Ertman, *What's Wrong with a Parenthood Market?*].

15. Before the 1960s, alternative insemination by donor was treated just like sex: the donor was a legal father (even if he contracted out of legal parenthood *ex ante*), the woman, if married, was treated as an adulterer, and the child as illegitimate. See, e.g., *Doornbos v. Doornbos*, 23 U.S.L.W. 2308 (Ill. Super. Ct. 1954) (holding that a married woman inseminated with donor semen had committed adultery and that the child conceived with that donor was illegitimate), *appeal dismissed*, 139 N.E.2d 844 (1956). Starting in the 1960s and continuing into the 1970s, states started to legally recognize alternative insemination by donor by treating the husband, not the donor, as the legal father of any child that resulted from alternative insemination. See, e.g., *People v. Sorensen*, 437 P.2d 495 (1968). In 1973, the National Conference of Commissioners on Uniform State Laws codified the trend in the states toward legal recognition of alternative insemination by donor by adopting a Uniform Parentage Act that “expressly approved donor artificial insemination (at least by married couples), designating the husband as the (only) father.” HENRY T. GREELY, *THE END OF SEX AND THE FUTURE OF HUMAN REPRODUCTION* 47 (2016).

they called it “adultery by doctor”<sup>16</sup> and deemed the resulting children “illegitimate,”<sup>17</sup> or they followed certain protocols whose aim it was to sexualize the procedure.<sup>18</sup> Eventually, however, legislators and regulators legitimized alternative insemination by de-sexualizing it and by drawing a clear distinction between sexual life creation and commercial/medical life creation. Reproductive binarism could very well be the living artifact of that legal and cultural shift.<sup>19</sup>

Simply because the law’s sex/non-sex binary can be explained, however, does not mean that it is beyond critique. Reproductive binarism is factually inaccurate, obscuring the basic similarities that exist between sexual and alternative reproduction. Sexual and alternative reproduction are categories that overlap with each other—in some cases perfectly so. Reproduction the “old-fashioned way” can be non-intimate, planned, and assisted in ways ordinarily associated with “assisted” reproduction, and “assisted” reproduction can be intimate and unpredictable in ways typically associated with sexual reproduction. In some instances, sexual and alternative reproduction *are the same thing*.<sup>20</sup>

Consider the first vignette above. Scholars who hew to a sex/non-sex distinction assume that sexual and alternative reproduction warrant different legal treatment in part because one is intimate and the other less so. But that all depends on what one means by “intimate,” as there is greater “closeness” in some ways between the non-sexual procreators in that story than there is between those of the sexual variety. This Article argues that the factors on which scholars rely to justify a dual system of reproductive regulation—intimacy, familiarity, sex, deliberation, control, predictability, and naturalness—are ultimately insufficient to sustain that system, not only because they are vague and imprecise, but also because they could just as easily describe one form of procreation as another.

Even if sexual and alternative reproduction were formally distinct, the law’s sex/non-sex binary would still raise concern as a matter of constitutional law. Neither the text of the Con-

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16. Kara W. Swanson, *Adultery by Doctor: Artificial Insemination, 1890-1945*, 87 CHI.-KENT L. REV. 591, 593 (2012).

17. *Id.* at 621.

18. Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1050 (2002).

19. See *infra* Part II.C.

20. See *infra* Part III.B.

stitution, nor constitutional history nor doctrine, supports different legal treatment of sexual and alternative reproduction, particularly different treatment that is predicated on sex exceptionalism and intimacy essentialism. To the contrary, constitutional norms relating to sex, marriage, procreation, and family formation favor—indeed, mandate—similar treatment of procreation regardless of the form that it assumes.<sup>21</sup>

Recent gay rights jurisprudence is notable in this regard, including marriage equality jurisprudence. That jurisprudence decenters the privileged status that heterosexual intercourse has long enjoyed in the law and champions the intentional parenthood that alternative reproduction often makes possible.<sup>22</sup> This Article draws from that jurisprudence to highlight the normative and constitutional deficiencies of regulating the practice of alternative reproduction in ways that undercut procreative intent and that discipline individuals' attempts to "establish" a family.<sup>23</sup> More radical still, this Article uses that jurisprudence to force the question of whether the law can ever treat procreation differently depending on the acts that facilitate it. It not only asks how marriage equality might constrain emerging proposals to regulate the practice of alternative reproduction, but also confronts an even bigger issue: whether the sex/non-sex binary that disciplines kinship creation for everyone is sustainable.

Parts I and II of this Article are descriptive in scope. Part I examines the law's reproductive binary as it exists in judicial decisions, state and federal legislation, and academic commentary, while Part II offers conceptual and historical reasons for it. Parts III and IV, which move from the descriptive to the argumentative, critique the law's sex/non-sex distinction on factual and constitutional grounds. Part III demonstrates that sexual and alternative reproduction are overlapping categories with common attributes; in so doing, this Part destabilizes the position that sexual and alternative reproduction occupy the extreme ends of a single reproductive continuum, and illustrates that in some cases, sexual and alternative reproduction are, in fact, the same thing. Part IV contends that reproductive

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21. See *infra* Part IV.

22. See *infra* Part IV.D.

23. *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir. 2014) (holding that "the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws").



binarism, unsupported by either constitutional text or history, is in tension with existing and emerging constitutional norms relating to sex, marriage, procreation, and family formation. Part V reflects on what the law might look like in the absence of the sex/non-sex binary; it offers a unitary model of reproductive regulation grounded in intent (rather than form) and anticipates (and responds to) possible objections to that model.

## I. REPRODUCTIVE BINARISM AND THE LAW

From paternity determinations to the federal regulation of sperm banks to proposed regulations of alternative reproduction, the overwhelming trend in the law is to treat sexual procreation differently than its alternative counterpart—often on the assumption that intimacy exists in the first context but not in the latter. Sections A–C consider each of those bodies of law. Some important exceptions to this general trend of differential treatment exist, however, and Section D briefly considers them.

### A. STATE REGULATION OF PATERNITY

A sex/non-sex binary drives paternity determinations in American jurisdictions where the question has been addressed.<sup>24</sup> States vary significantly with respect to who constitutes a donor or a father when individuals or couples use either known or anonymous donors to conceive children through alternative reproductive means.<sup>25</sup> States vary not at all, however, with respect to the legal status of donors who help unmarried women to conceive through a sexual act: in all states, that donor is a father, regardless of the intentions of the parties and

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24. See Lauren Gill, *Who's Your Daddy?: Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1738 n.153 (2013) (listing these jurisdictions).

25. Some states still follow the Uniform Parentage Act (UPA) of 1973, which provides that donors are not legal fathers if they provide semen to a physician for inseminating a married woman who is not the donor's wife. See UNIF. PARENTAGE ACT § 5(b) (1973); Gill, *supra* note 24, at 1738 & n.151. Other states follow the revised Uniform Parentage Act of 2000 (amended in 2002), which provides that no donor will be considered a parent of any child that results from his donation, regardless of the marital status of the recipient and regardless of whether the insemination involved a physician. See UNIF. PARENTAGE ACT § 702 (2000) (amended 2002); Gill, *supra* note 24, at 1738 & n.152. Comments to the amended UPA clarify that the married woman requirement "is not realistic in light of present ART practices and the constitutional protections of the procreative rights of unmarried as well as married women." UNIF. PARENTAGE ACT § 702 cmt. (2000) (amended 2002).

regardless of whether or not a written non-paternity contract existed between them.<sup>26</sup>

Subsection 1 examines the reproductive binary that drives state paternity determinations of sexual inseminators. Subsection 2 examines the reproductive binary that drives state paternity determinations of alternative inseminators. Subsection 2 demonstrates that reproductive binarism has influenced even the regulatory approach to alternative insemination, with more intimate donations tending to result in fatherhood and less intimate donations tending to avoid that legal status.<sup>27</sup>

### 1. Sexual Insemination

No court has ever recognized a waiver of paternity where an unmarried woman intentionally conceives a child with a man through sexual intercourse.<sup>28</sup> For instance, in *Straub v. B.M.T.*, the Indiana Supreme Court refused to uphold a written pre-conception contract between a man and a woman who agreed to conceive a child through sexual intercourse rather than through alternative insemination.<sup>29</sup> In addition to rejecting the legal possibility of “artificial insemination by inter-

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26. See generally Katharine K. Baker, *Bargaining or Biology?: The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POLY 1, 22–23 (2004) [hereinafter Baker, *Bargaining*]; Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 701 (2008) [hereinafter Baker, *Bionormativity*] (stating that American law has “never allowed men and women to agree to waive parental status before or after the intercourse that led to conception”). The revised UPA makes clear that the term “donor” applies only to assisted reproduction and therefore does not include someone who helps to create a child through sexual intercourse. See UNIF. PARENTAGE ACT § 701 (2000) (“This [article] does not apply to the birth of a child conceived by means of sexual intercourse”).

27. It is important to highlight at the outset that more intimate donations (including sexual donations) tend to result in fatherhood *if* the recipient female is unmarried. If she is married to a man other than the donor, then the marital presumption of parenthood may trump the law’s tendency to impose fatherhood in sexual/intimate donation settings. For cases where the marital presumption trumped the sexual conception paternity rule, see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion); *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012).

28. Of course, the fact that no court has ever found non-paternity in a situation involving sexual conception between a man and an unmarried woman does not mean that such sexual insemination cases do not exist. Donor insemination by intercourse has been discussed in the media. See *infra* note 259. In addition, Quebec, unlike the United States, recognizes sexual sperm donation, but gives the sperm donor one year from the birth of any child to change his mind and assert legal paternity. See *infra* note 262 and accompanying text.

29. 645 N.E.2d 597 (Ind. 1994).

course,”<sup>30</sup> the court reasoned that pre-conception contracts predicated on sex violated public policy because “sexual intercourse as consideration is itself against public policy.”<sup>31</sup> In addition, the *Straub* court found that the agreement at issue in that case failed to adhere to the requisite formalities that sometimes apply in the alternative insemination context,<sup>32</sup> including the “physician involvement” requirement that obtains in some states<sup>33</sup> as well as under the 1973 Uniform Parentage Act.<sup>34</sup>

Similarly, in *Kesler v. Weniger*,<sup>35</sup> a trial court in Pennsylvania refused to uphold an alleged oral agreement between a woman and a man, the latter of whom agreed to inseminate the former sexually on condition that he would not have any legal obligations with respect to any child or children that might result. Like the *Straub* court, the *Weniger* court “decline[d] to recognize a category of ‘artificial insemination by intercourse,’”<sup>36</sup> reasoning that child support “cannot be bargained away before conception any more than it can be bargained away after birth.”<sup>37</sup>

Other courts have similarly drawn an explicit sex/non-sex distinction when discussing when a donor becomes a father, reasoning that where “conception [takes] place by intercourse, there [is] no question that the ‘donor’ [is] the father.”<sup>38</sup> For these courts, the notion that sexual intercourse results in paternity is so obvious as to defy explanation. As the Supreme Court of Pennsylvania recently remarked, the “distinction between reproduction via sexual intercourse and the non-sexual clinical options for conception”<sup>39</sup>—two “extremes of an increasingly complicated continuum,” in the court’s words<sup>40</sup>—is a matter of

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30. *Id.* at 601.

31. *Id.*

32. *Id.*

33. *Id.* at 601 n.10.

34. UNIF. PARENTAGE ACT § 5(b) (1973).

35. 744 A.2d 794 (Pa. Super. Ct. 2000).

36. *Id.* at 796.

37. *Id.*

38. *C.M. v. C.C.*, 377 A.2d 821, 824 (N.J. Super. 1977); see also *Estes v. Albers*, 504 N.W.2d 607, 609 (S.D. 1993) (rejecting the argument that a man was a sperm donor to a woman with whom he conceived a biological child “naturally” rather than “artificially”).

39. *Ferguson v. McKiernan*, 940 A.2d 1236, 1245 (Pa. 2007) (upholding oral agreement between mother and donor that relinquished the latter’s rights and responsibilities over any children that resulted from in vitro fertilization with the donor’s sperm).

40. *Id.* at 1246.

simple “commonsense.”<sup>41</sup> This distinction was on clear display in *In re Paternity of M.F.*,<sup>42</sup> a 2010 Indiana paternity case which held that a man could be the legal father of a child whom he *sexually conceived* with the biological mother but not of a different child whom he *alternatively conceived* with that same person.<sup>43</sup>

The law’s treatment of the status of men who sexually conceive with unmarried women *by design* tracks its treatment of the status of men who sexually conceive with unmarried women *by accident*: the latter cohort, as the law in every state makes clear, cannot avoid the obligations of fatherhood, even if the legal mother agrees to a waiver of paternity.<sup>44</sup> In addition, the law’s treatment of “insemination by intercourse” tracks its treatment of men who become fathers as the result of an underlying sexual act to which they never consented, as when a pregnancy results from statutory rape of a male by a female<sup>45</sup> or from non-consensual sex between two adults.<sup>46</sup> It also tracks the law’s treatment of men whose sperm is “misappropriated” by women and used by them to self-inseminate (without the

41. *Id.* at 1245.

42. *In re Paternity of M.F.*, 938 N.E.2d 1256 (Ind. Ct. App. 2010).

43. The *In re Paternity of M.F.* court found non-paternity with respect to the child whom the man conceived through alternative insemination for three reasons. First, the man and the woman, despite a prior sexual relationship (or at least encounter) that led to the conception and birth of the woman’s other child, had conceived the second child through alternative, not sexual, means. *Id.* at 1260. Second, the man and the woman had a Donor Agreement, prepared by an attorney, that “reflect[ed] the parties’ careful consideration of the implications of such an agreement and a thorough understanding of its meaning and import.” *Id.* at 1261. Third, the man and the woman used a physician in the alternative insemination process. *See id.* at 1260.

44. *See Baker, Bionormativity*, *supra* note 26 at 701 (stating that American law has “never allowed men and women to agree to waive parental status before or after the intercourse that led to conception”).

45. *See, e.g., L.M.E. v. A.R.S.*, 680 N.W.2d 902 (Mich. Ct. App. 2004); *Cty of San Luis Obispo v. Nathaniel J.*, 50 Cal. App. 4th 842 (Cal. Ct. App. 1996); *Kansas ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993); *Mercer Cty. Dep’t of Soc. Servs. ex rel. Imogene T. v. Alf M.*, 589 N.Y.S.2d 288, 289 (N.Y. Fam. Ct. 1992).

46. *See, e.g., State v. Daniel G.H. (In re Paternity of Derek S.H.)*, No. 01-0473, 2002 WL 265006 (Wis. Ct. App. Feb. 26, 2002) (imposing paternity on a man even though he was the alleged victim of non-consensual sexual intercourse); *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996) (imposing paternity on a man whose fatherhood resulted from an act of sexual intercourse in which he allegedly engaged while unconscious on the ground “[t]he child is an innocent party, and . . . any wrongful conduct on the part of the mother should not alter the father’s duty to provide support for the child”).

men's consent) following an act of consensual oral sex or who were misled about the woman's use of contraception or ability to conceive.<sup>47</sup> Conception between men and unmarried women that is the product of some sexual act, it turns out, whether consensual or not and whether by design or not, results in paternity. As one court put it, "some sort of sexual contact" between unmarried women and unwilling men that results in conception is enough to justify the imposition of paternity on those men.<sup>48</sup>

At first blush, it appears that courts' refusal to recognize paternity waivers in sexual insemination cases between unmarried women and men originates in a desire to steer those individuals into units that resemble the traditional, nuclear family (mother, father, and children) and to guarantee that children have two parents to financially support them.<sup>49</sup> But if re-creating the traditional family were the law's paramount concern, then why do most states recognize non-paternity in a

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47. See *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. Feb. 22, 2005) (rejecting a man's claims of fraudulent misrepresentation and conversion against a woman with whom he had consensual oral sex and who allegedly used his semen without his consent to be inseminated); *Wallis v. Smith*, 22 P.3d 682 (N.M. Ct. App. 2001) (rejecting a man's claims of fraud, breach of contract, conversion, and prima facie tort against a woman who falsely claimed she was using contraception and became pregnant); *State v. Frisard*, 694 So. 2d 1032, 1035-36 (La. Ct. App. 1997) (imposing paternity on a man whose semen was allegedly used without his consent to inseminate a woman with whom he had consensual oral sex); *Moorman v. Walker*, 773 P.2d 887, 888-89 (Wash. Ct. App. 1989) (rejecting a man's misrepresentation claim against a woman who allegedly claimed she was infertile and became pregnant); *In re L. Pamela P. v. Frank S.*, 449 N.E.2d 713, 713-15 (N.Y. 1983) (imposing paternity on a man notwithstanding the lower court's finding that the mother intentionally deceived the father as to her use of contraception).

48. *Frisard*, 694 So. 2d at 1036.

49. In *Straub*, for instance, the court analogized the sexual insemination contract at issue there, where a man attempted to contract out of paternity before having sex, to situations where fathers have attempted to contract out of child support obligations after a child has come into being. *Straub v. B.M.T.*, 645 N.E.2d 597, 599 (Ind. 1994). As the court remarked: "Neither parent has the right to contract away . . . support benefits. The right to the support lies exclusively with the child." *Id.* Similarly, in *Weniger* the court dismissed the sexual donor's contention that his "role" was "merely that of a man obliging a friend with donations of sperm," declaring that "the right to support is a right of the child, not the mother or father. It cannot be bargained away before conception any more than it can be bargained away after birth." *Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. Ct. 2000). On the surface, then, the courts in both of these cases appeared more concerned with channeling individuals into traditional—and financially stable—family units than with the procreative mechanics that were at issue in each of them.

large number of non-sexual donation cases involving men and single women? “[I]mmunity from child support obligations is never available in cases of sexual conception,” Susan Frelich Appleton writes, but often available in cases of alternative conception.<sup>50</sup>

In addition, ensuring that children are financially supported by two parents is not always the principal driver of paternity rules. Consider in this regard cases where courts have permitted men to disestablish paternity when their wives become pregnant through sexual conception with another man but *not* when those wives become pregnant through non-sexual conception with anonymous sperm—even when those husbands have been raising children for years and where financial support from a “new” father is uncertain. In one such case, a court suggested that if a married woman effectively cheats on her husband with a syringe—by being artificially inseminated without his consent—then he will still be the father of the child if he consents *ex post*.<sup>51</sup>

If, however, a married woman cheats on her husband through coitus, then her husband will never be the father of a child that results, even if he consents *ex post* by assuming the duties of fatherhood and *even if financial support is not forthcoming from the child’s “natural” father*.<sup>52</sup>

That case and at least one other like it<sup>53</sup> suggest that the mode of conception, beyond a desire to protect the financial in-

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50. Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation*, 49 FAM. L.Q. 93, 108–09 (2015).

51. See *Dews v. Dews*, 632 A.2d 1160, 1169 (D.C. 1993) (reasoning that “[t]he manner of conception is significant for estoppel purposes”). The father in *Dews* had assumed the responsibilities of parenthood over the child in question for ten years before attempting to disclaim paternity and thereby avoid a child support obligation. *Id.* at 1164–66. Moreover, the husband knew the entire time that his son was not biologically related to him. *Id.* Nevertheless, the court concluded, the doctrine of estoppel could not be raised by the husband’s wife in order to defeat his non-paternity claim because of the *manner* in which conception occurred: coitally rather than artificially. *Id.* at 1168.

52. As the court stated in a footnote: “We emphasize . . . that the availability or unavailability of other resources [for the child] cannot affect the rights of Mr. Dews or of other husbands in his situation.” *Id.* at 1169 n.12.

53. The *Dews* court’s logic has been echoed by other courts in analogous contexts. See *In re Marriage of Adams*, 701 N.E.2d 1131, 1133 (Ill. App. 1998) (reasoning that courts ought to distinguish between “artificial insemination and insemination by another man” when determining whether a man ought to be estopped from denying paternity and rejecting a mother’s estoppel claim

terests of children, is driving determinations of fatherhood in at least some contested paternity cases, regardless of the marital status of the mother. Recall also *In re Paternity of M.F.*,<sup>54</sup> the Indiana Court of Appeals paternity case discussed above. There, a sexually conceived child was protected through child support from the legal father whereas a child alternatively conceived with the sperm of *that same man* (and living in the same household as the other child) was not.<sup>55</sup>

Like these decisions, the Uniform Parentage Act (UPA) draws a clear distinction between sexual and non-sexual donations. The UPA was originally passed in 1973 by the National Conference of Commissioners on Uniform State Laws (Conference) to provide a uniform parentage law for children born to married and unmarried persons; the Conference has amended the UPA twice since that time. Article 1 of the current UPA defines "donor" as someone who "produces eggs or sperm used for assisted reproduction"<sup>56</sup> and defines "assisted reproduction" as "a method of causing pregnancy *other than sexual intercourse*."<sup>57</sup> In addition, Article 7 of the Act, which deals with children of "assisted reproduction," provides that "[t]his [article] does not apply to the birth of a child conceived by means of sexual intercourse."<sup>58</sup> The Comment section for Article 7 explains that "a child conceived by sexual intercourse is not covered by this article, *irrespective of the alleged intent of the parties*."<sup>59</sup> As with decisional law, a dividing line between paternity and non-paternity for the UPA is sex.

## 2. Alternative Insemination

Not unlike the role that it plays in the legal regulation of sexual insemination, reproductive binarism also informs, at least historically and to some extent today, the question of paternity in the alternative insemination context. To be sure, state variation exists on the question of when an alternative inseminator constitutes a father and when he remains a donor. That said, a look at these regimes suggests that even within

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because the child in question, whom the mother's husband raised for ten years, was the result of a sexual affair rather than of alternative conception).

54. 938 N.E.2d 1236 (Ind. Ct. App. 2010).

55. See *supra* note 43 and accompanying text.

56. UNIF. PARENTAGE ACT (2002) § 102(8).

57. *Id.* § 102(4) (emphasis added).

58. *Id.* § 701.

59. *Id.* (emphasis added).

this spectrum of possibilities there exists a binary of sorts: in some states more intimate donations result in paternity and less intimate donations avoid that legal status.

Of the states that have a statute addressing alternative insemination, some, like Oklahoma and Georgia, make it illegal to engage in that method of conception without a physician's assistance.<sup>60</sup> Others, like the 1973 UPA,<sup>61</sup> require the presence of an intermediary—either a physician or a licensed sperm bank—in order for a donor to avoid paternity.<sup>62</sup> Jurisdictions that require physician assistance appear to be motivated, at least in part, by reproductive binarism and its distinctions between intimate (sexual) and non-intimate (alternative) reproduction.

For instance, in *Kansas ex rel. J.L.S. v. W.M.*,<sup>63</sup> a court imposed paternity on a man who helped a woman and her female partner to become parents through alternative insemination but without physician assistance, as Kansas parentage law requires in order for donors to remain donors.<sup>64</sup> Notwithstanding the fact that the mother and the donor had a written agreement waiving paternity, the court imposed paternity on the do-

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60. GA. CODE ANN. § 43-34-37 (2016); OKLA. STAT. ANN. tit. 10, § 553 (West 2012).

61. See UNIF. PARENTAGE ACT § 5 (1973) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived." (emphasis added)).

62. See, e.g., ALASKA STAT. ANN. § 25.20.045 (West 2012); CAL. FAM. CODE § 7613(b) (West 2012); KAN. STAT. ANN. § 23-2208(f) (2015); MINN. STAT. ANN. § 257.56 (West 2012). While California's Parentage Act requires a third-party intermediary (doctor, surgeon, or licensed sperm bank) in order for a donor to avoid paternity, the Act allows donors and donees who fail to use physician assistance to contract out of paternity either orally or in writing. See CAL. FAM. CODE § 7613(b)(2). Some of these states follow the 1973 UPA rather than the revised UPA, which discarded the physician assistance requirement as well as the requirement that the recipient of donor sperm be married. The revised UPA did not, however, discard the requirement that the donation be "assisted" rather than "sexual" in order for the donor to avoid legal paternity. See *supra* notes 25–26.

63. Case No. 12D-2686 (Kan. Dist. Ct. Shawnee Cnty., Jan 22, 2014), <http://www.shawneecourt.org/DocumentCenter/View/468>.

64. See KAN. STAT. ANN. § 23-2208(f) (2015) ("The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman." (emphasis added)).



nor—over the objection of all the parties involved<sup>65</sup>—because he and the mother failed to satisfy the physician assistance requirement. Reading Kansas parentage law strictly, the *W.M.* court reasoned that Kansas decided to “limit the application of the donor non-paternity provision to instances in which semen is provided to a licensed physician.”<sup>66</sup> For that reason, the court concluded, the donor was a father, with all of the rights and responsibilities that status entails.<sup>67</sup>

The *W.M.* court relied in large part on a prior California decision, *Jhordan C. v. Mary K.*,<sup>68</sup> where a court applied a law similar to the Kansas parentage statute—but which has since been repealed and replaced with a different parentage statute—to impose paternity on a donor who was seeking it.<sup>69</sup> Like the law at issue in *V.M.*, the law at issue in *Jhordan C.* required donors to use physician intermediaries in order to maintain their donor status.<sup>70</sup> Because the donor at issue there provided semen to an unmarried woman and her “close [female] friend”<sup>71</sup> without using a physician intermediary, the court held that he was a father rather than a donor.<sup>72</sup>

Reproductive binarism appears to play a role in these cases and in the laws on which they rest. More intimate donations (without physician assistance) result in legal paternity, whereas less intimate donations (with physician assistance) do not. While neither of the above-mentioned cases explicitly says so, it could be that Kansas (and formerly California) requires third-

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65. The state in *W.M.* was suing the donor after the child's mother had applied to the state for financial assistance. *W.M.*, Case No. 12D-2686, at 2–5. By the time the *W.M.* decision was handed down, the mother and her by then former partner had submitted a parenting plan that included provisions for private financial support of the child. *Id.* The mother's former partner had not adopted the child in question, but intervened in the action to establish her legal right to the child. *W.M.* was therefore *not* a case where the court imposed paternity simply in order to ensure dual financial support of a child. *Id.* at 6.

66. *Id.* at 9.

67. *See id.*

68. 179 Cal. App. 3d 386 (Ct. App. 1986).

69. The law at issue in *Jhordan C.*, CAL. CIV. CODE § 7005(b), was repealed in 2005 and replaced by the law that currently governs assisted reproduction. CAL. FAM. CODE § 7613(b) (West 2012). The old law absolutely required physician assistance of some kind in order for donors to avoid paternity in situations involving unmarried women. The new law also imposes paternity in the absence of physician assistance, but allows the parties to contract around that rule either orally or in writing. *See supra* note 62.

70. *See Jhordan C.*, 179 Cal. App. 3d at 391–92.

71. *See id.* at 388.

72. *See id.* at 397.

party assistance in the assisted reproductive context in order to render assisted conception sufficiently non-intimate to distinguish it from sexual conception. Under this view, physician assistance quite literally de-familiarizes the mechanics of conception—as well as the donor who helps to facilitate it.<sup>73</sup> As Part II argues, the history behind the physician assistance requirement supports this theory, as states, like the 1973 UPA, implemented the requirement in the 1970s in an effort to draw a clear distinction between intimate/sexual life creation and non-intimate/non-sexual life creation.<sup>74</sup>

To be sure, there could be other reasons aside from reproductive binarism for states like California and Kansas to have these requirements. One reason, the *Jhordan C.* court speculated, “relates to health: a physician can obtain a complete medical history of the donor (which may be of crucial importance to the child during his or her lifetime) and screen the donor for any hereditary or communicable diseases.”<sup>75</sup> The second reason relates to clarifying the intentions of the parties. “The presence of a professional third party such as a physician,” the *Jhordan C.* court explained, “can serve to create a formal, documented structure for the donor-recipient relationship, without which, as this case illustrates, misunderstandings between the parties regarding the nature of their relationship and the donor’s relationship to the child would be more likely to occur.”<sup>76</sup>

But a closer look at both *Jhordan C.* and *W.M.* casts doubt on these rationales. The law at issue in *Jhordan C.* effectively required physician assistance for unmarried women only, as a separate provision—the paternal presumption—made it impos-

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73. It is important to note that reproductive binarism does not characterize all states’ approach to paternity determinations in the alternative reproductive setting. For example, while some states require physician assistance either for alternative insemination to be legal or for a donor to remain a donor, many states, like the contemporary UPA, have dispensed with the requirement entirely. As Appleton observes, the physician assistance requirement has started “to fade.” Appleton, *supra* note 50, at 113. Thus, even as reproductive binarism undoubtedly plays a role in the law of sexual donation, and appears to play a role in the law of alternative reproduction in some states, its influence over the legal regulation of alternative reproduction is not universal. That said, it is important to scrutinize the motivations behind even past manifestations of reproductive binarism in order to better grasp what might be animating its contemporary forms.

74. See *infra* Part II.C.

75. *Jhordan C.*, 179 Cal. App. 3d at 393.

76. *Id.*

sible for a donor to gain legal paternity if he failed to use a physician in the alternative insemination process with a *married* woman.<sup>77</sup> If California were principally concerned with health and safety, then presumably the physician assistance requirement would have applied across the board. Similarly, the parties in *W.M.* had a written agreement memorializing their intent; indeed, they had the kind of “formal, documented structure for the donor-recipient relationship”<sup>78</sup> that *Jhordan C.* speculated was the reason *for* a physician requirement. Even so, the *W.M.* court still found that the donor was a father rather than a donor simply because he and the donee did not satisfy the physician assistance requirement.

The under-inclusiveness of these rationales as applied in these cases suggests that reproductive binarism and its presumptions about intimacy is (or in California’s case, was) motivating jurisdictions to impose the physician assistance requirement. Other states attempt to ‘de-familiarize’ assisted conception in even stranger ways. In *Bruce v. Boardwine*,<sup>79</sup> a Virginia court last year held that a man was a father rather than a donor simply because a woman used a turkey baster rather than a medical instrument to get pregnant with his semen. The narrow issue before the *Boardwine* court was a question of statutory interpretation: whether turkey baster insemination qualified as “assisted conception” under Virginia law, which treats men who facilitate conception through “intervening medical technology” as donors rather than fathers.<sup>80</sup> According to that law, “intervening medical technology” includes “but is not limited to, conventional medical and surgical treatment as well as noncoital reproductive technology such as artificial insemination by donor.”<sup>81</sup>

Ruling in favor of the man, who was seeking paternity, the *Boardwine* court reasoned that “[a]n ordinary kitchen implement used at home is simply not analogous to the medical technologies that are listed in [Virginia’s assisted conception statute], nor does it constitute a ‘reproductive’ technology under

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77. *Id.* at 395. The donee in *Jhordan C.* argued—unsuccessfully—that California’s alternative insemination law violated the Federal Equal Protection Clause by making an impermissible distinction between married and unmarried women. *See id.*

78. *Id.* at 393.

79. 64 Va. App. 623 (2015).

80. *See id.* at 629.

81. *Id.*

the plain meaning of the term.”<sup>82</sup> For a man to retain donor status in Virginia, then, he must inseminate a woman with a qualifying “medical instrument” rather than with an “ordinary” domestic appliance like a turkey baster. Unlike Kansas and other states, Virginia does not require men and women to use a human intermediary in order to avoid paternity. But like Kansas and other states, it does require them to de-familiarize assisted conception in some way in order to achieve the same result.

## B. FEDERAL REGULATION OF SEMEN PROVIDERS

Federal regulation of semen providers reflects and reproduces a procreative binary that privileges sexual reproduction and relies on a narrow view of what sexual reproduction means. According to 21 C.F.R. § 1271, which sets forth the United States Food and Drug Administration (FDA) regulations that apply to establishments, like gamete banks, that manufacture human cells, tissues, and cellular and tissue-based products, an “establishment” that “manufactures” human products like (and including) semen is subject to extensive—and expensive—testing requirements, including testing for communicable diseases like HIV and cytomegalovirus.<sup>83</sup> Section 1271 exempts from these requirements donations that will be transferred to a “sexually intimate partner,” or “SIP,” of the semen donor.<sup>84</sup> So, for example, if a man provides semen to a fertility provider—a qualifying “establishment”—in order to inseminate his wife with medical assistance, then the provider need not test the man’s donation, as that donation will be transferred to a presumed SIP, the man’s wife.

Although Section 1271 nowhere defines the term “SIP,”<sup>85</sup> the FDA has recently applied it in a way that suggests that its exclusive meaning is a woman who is in a monogamous relationship with a man that involves sexual intercourse. In 2010, the FDA applied Section 1271’s requirements to Trent Arsenault, a private sperm donor from San Francisco who had been donating semen to women since 2006 without the help of a sperm bank or fertility doctor, and on an uncompensated ba-

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82. *Id.* at 631.

83. 21 C.F.R. § 1271 (2012).

84. *Id.* § 1271.15(e).

85. See Amber D. Abbasi, *The Curious Case of Trent Arsenault: Questioning FDA Regulatory Authority over Private Sperm Donation*, 22 ANNALS HEALTH L. 1, 37 (2013).

sis.<sup>86</sup> Mr. Arsenault, whose donations led to at least twenty-five conceptions and eighteen live births, advertised his services on the Internet through the website [trentdonor.org](http://trentdonor.org).<sup>87</sup> While Mr. Arsenault was not a sexual sperm donor—he offered the individuals who procured his services in-person pickup of his semen at his house—he argued that he and his clients constituted “sexually intimate partners” who qualified for the statutory exemption for SIPs.<sup>88</sup>

In 2012, the FDA Commissioner disagreed. Upholding a previous FDA “Order to Cease Manufacture” of semen that was directed at Mr. Arsenault, the Commissioner refused to accept Mr. Arsenault’s “expanded definition of the term ‘sexually intimate partner,’” arguing that to do so would undermine “the protections offered by the donor eligibility requirements.”<sup>89</sup> Under the Commissioner’s view, sexually intimate partners—presumably monogamous couples engaged in traditional heterosexual intercourse, where the threat of sexually communicable disease is ostensibly low—did not need such “protections” because their intimacy ensured transparency in matters pertaining to sexual health;<sup>90</sup> those engaged in less intimate donation

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86. U.S. Food & Drug Admin., FDA Form 483 Inspectional Observations Report (Sept. 20, 2010), <http://trentdonor.org/trentdonor/d/21520-2/FDA-Form-483-Inspection-Observations-TrentDonor-20-Sep-2010-5-Pages.pdf> [hereinafter FDA Form 483].

87. See Abbasi, *supra* note 85, at 17–20. Mr. Arsenault’s website may be accessed at <http://www.trentdonor.org> (last visited Nov. 3, 2016).

88. See Letter from Trent Arsenault to Barbara Cassens and Mary Marlarkey, Dirs., FDA (Nov. 1, 2010), <http://trentdonor.org/sites/g2sites/trentdonor/d/21459-4/trentdonor-fda-form-483-response-doc-01-nov-2010.pdf>. Mr. Arsenault has elsewhere referred to himself as a “donorsexual.” David Moye, *Trent Arsenault, “Donorsexual” Virgin Father of 14 Kids, Answers Your Questions*, HUFFINGTON POST (Feb. 3, 2012), [http://www.huffingtonpost.com/2012/02/03/trent-arsenault-donorsexual-sperm-donor-video\\_n\\_1251595.html](http://www.huffingtonpost.com/2012/02/03/trent-arsenault-donorsexual-sperm-donor-video_n_1251595.html).

89. Center for Biologics Evaluation & Research, Memorandum in Support of CBER’s Motion to Deny Hearing Request and for Administrative Summary Judgment 15, (Feb. 7, 2011), <http://trentdonor.com/sites/g2sites/trentdonor/d/21703-2/trentdonor-fda-motion-to-deny-hearing-07feb2010.pdf>.

90. But the FDA assumes too much. Sexually intimate partners often lie about their past and current sexual relations. A 2015 survey conducted by the polling company YouGov found that twenty-one percent of men surveyed and nineteen percent of women surveyed admitted that they had cheated; seven percent of persons surveyed preferred not to respond. *Sorting Through the Numbers on Infidelity*, NAT’L PUB. RADIO (July 26, 2015), <http://www.npr.org/2015/07/26/426434619/sorting-through-the-numbers-on-infidelity>. In addition, sexually intimate partners often are unaware of the communicable diseases that they carry—diseases like Creutzfeldt-Jakob disease, which the FDA lists as one of the diseases for which non-sexually-intimate donors are tested. See FDA Form 483, *supra* note 86, at 2. The human manifestation of “mad cow”

settings, however, did. In effect, the Commissioner found that Mr. Arsenault, a private sperm donor, was more like a commercial sperm bank than an individual in a relationship that sufficiently approximated traditional sexual intercourse to qualify for the exemption.

Mr. Arsenault has not challenged the agency's decision.<sup>91</sup> One of his donees, however, has—unsuccessfully.<sup>92</sup> In *Doe v. Hamburg*, a case filed in the federal district court for the Northern District of California, the donee argued that the government's refusal to apply the SIP exemption to her and Mr. Arsenault's relationship violated her constitutional rights to privacy and autonomy.<sup>93</sup> Her attorney, Amber Abbasi, has argued in both court filings and a law review article that the FDA's refusal to view private, non-coital sperm donation as "sexually intimate" suggests that the FDA is using its regulatory power to "impos[e] its particular set of beliefs about the true meaning of a procreative relationship"<sup>94</sup> and to privilege a "subset of sexually intimate relationships"<sup>95</sup>: the relationships of a "monogamous couple that regularly engage in sexual intercourse and do not take part in individual activities that could lead to asymmetrical exposure."<sup>96</sup> In so doing, Abbasi maintains, the FDA regulations inflict myriad constitutional harms on alternative procreators, including "serious harms to individual autonomy."<sup>97</sup>

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disease, Creutzfeldt-Jakob Disease is a rare, degenerative brain disorder of which its carriers are unaware until they are either tested or become symptomatic. See Creutzfeldt-Jakob Disease, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/creutzfeldt-jakob-disease/basics/definition/con-20028005> (last visited Nov. 3, 2016).

91. See *Doe v. Hamburg*, No. C-12-3412EMC, 2013 WL 3783749, at \*4 (N.D. Cal. July 16, 2013) (stating that "[t]here is nothing in the record to indicate that Mr. Arsenault has since challenged the Commissioner's decision"); Moye, *supra* note 88.

92. See *Hamburg*, 2013 WL 3783749, at \*1.

93. See *id.* at \*4.

94. Abbasi, *supra* note 85, at 28; see also Jacqueline M. Acker, *The Case for an Unregulated Private Sperm Donation Market*, 20 UCLA WOMEN'S L.J. 1, 32 (2013).

95. Abbasi, *supra* note 85, at 27.

96. *Id.*

97. *Id.* at 28. Abbasi's right to procreate claim posits that constitutional protection for procreation is no less robust when life creation is "noncoital or collaborative." *Id.* at 34 (citing John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 429 (1982) [hereinafter Robertson, *Procreative Liberty*]). Her equal protection ar

In July 2013, the *Hamburg* court dismissed Jane Doe's complaint by invoking the logic of reproductive binarism and its belief in the essential difference—in this case, the essential constitutional difference—between intimate sexual reproduction and non-intimate commercial reproduction. The court dismissed the case on prudential standing grounds, finding that “Ms. Doe asserts no independent rights personal to her.”<sup>98</sup> Rather, the court continued, her rights were merely “derivative of Mr. Arsenault's.” The court dismissed as “specious” the plaintiff's contention that “she has broader rights independent of Mr. Arsenault's which are violated, such as her general right to procreate.”<sup>99</sup> “Ms. Doe is not impeded from exercising any general constitutional right to procreate or even a more specific right (if it exists) to procreate via artificial insemination,”<sup>100</sup> the court declared. To the contrary, it said, “[t]he only thing Ms. Doe is deprived of is the right to have Mr. Arsenault's child specifically through a ‘commercial’ (*i.e.*, nonintimate) relationship.”<sup>101</sup>

### C. PROPOSED REGULATIONS OF ALTERNATIVE REPRODUCTION

Reproductive binarism informs numerous proposed regulations of alternative reproduction offered by conservative and progressive commentators alike. Dov Fox, for instance, argues that the government ought to discourage gamete banks from arranging donors on their websites in race-based ways—by, for instance, making it easy for users to filter donors based on their racial or ethnic background<sup>102</sup>—by imposing a sin tax or a

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gument posits that there is no reasonable basis for distinguishing between “artificial insemination” and “natural insemination,” the latter of which enjoys complete shelter from the FDA's regulatory gaze. Complaint for Declaratory and Injunctive Relief at 15, *Doe v. Hamburg*, No. C-12-3412EMC, 2013 WL 3783749 (N.D. Cal. July 16, 2013). Finally, the First Amendment argument posits that “[b]y refusing to accept an expanded definition of sexually intimate partnership, the FDA has violated the First Amendment rights of intimate association of Ms. Doe, other similarly situated women, and willing male donors with whom they have chosen to conceive children via artificial insemination.” *Id.* at 15–16.

98. *Doe v. Hamburg*, No. C-12-3412EMC, 2013 WL 3783749, at \*8 (N.D. Cal. July 16, 2013).

99. *Id.* at \*7.

100. *Id.*

101. *Id.*

102. For an example of this practice, see *Donor Search*, CAL. CRYOBANK, <https://cryobank.com/Search> (California Cryobank website) (last visited Nov. 3, 2016).

commercial advertising ban on banks that engage in that “pernicious social practice[.]”<sup>103</sup> Similarly, Naomi Cahn, David Blankenhorn and others support laws eliminating gamete donor anonymity in order, among other reasons, to reduce the possibility of “accidental incest” between donor-conceived kin.<sup>104</sup> Cahn also advocates mandatory caps on gamete donation that would limit the number of families to whom a donor may donate his or her gametes,<sup>105</sup> as well as the establishment of special birth certificates for donor-conceived children that reveal the biological origins of their conception.<sup>106</sup>

In addition, several commentators support regulating the practices of fertility providers no less than the practices of gamete banks. Some call for limiting the number of eggs that can be harvested from, and implanted in, a woman during any single in vitro fertilization (IVF) cycle.<sup>107</sup> At least one other,

103. Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1846 (2009) [hereinafter Fox, *Racial Classification*]; see also Dov Fox, *Race Sorting in Family Formation*, 49 FAM. L.Q. 55 (2015) (criticizing this practice); Dov Fox, *Choosing Your Child's Race*, 22 HASTINGS WOMEN'S L.J. 3 (2011) [hereinafter Fox, *Choosing Your Child's Race*] (same).

104. See, e.g., DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995); NAOMI CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES 129 (2013) [hereinafter CAHN, THE NEW KINSHIP]; DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006); Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 413 (2012) [hereinafter Cahn, *The New Kinship*]; Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 904 (2000) [hereinafter Garrison, *Law Making for Baby Making*]; David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/23/opinion/how/-my-view-on-gay-marriage-changed.html>. For a critique of the “accidental incest” argument in favor of greater regulation of alternative reproduction, see Cahill, *Oedipus Hex*, *supra* note 2, *passim*.

105. CAHN, THE NEW KINSHIP, *supra* note 104, at 160–61.

106. See Cahn, *Do Tell!*, *supra* note 9, at 1104–05. In Cahn's view, these reforms are necessary in order to prevent accidental incest between donor-conceived children, respect donor-conceived children's right to know the identity of their genetic progenitors, alleviate the transmission of hereditary diseases from donors to the offspring of unsuspecting donees, and respect the donor-conceived community's desire for familial connection. See generally CAHN, THE NEW KINSHIP, *supra* note 104, *passim*.

107. See, e.g., Michele Goodwin, *A View from the Cradle: Tort Law and the Private Regulation of Assisted Reproduction*, 59 EMORY L.J. 1039 (2010); Naomi R. Cahn & Jennifer M. Collins, *Eight Is Enough*, 103 NW. U. L. REV. COLLOQUY 501 (2009); Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623 (2008). Multiple egg extractions risk not just the health of the patient, these commentators argue, but also the health of her eventual offspring, who are exposed to a “plethora of medical problems” associated with



Michele Goodwin, supports the private regulation of alternative reproduction through the expansion of tort law.<sup>108</sup> Goodwin maintains that the law ought to regulate “reckless reproduction” no less than it regulates “reckless driving.”<sup>109</sup> “When vile externalities arise [from ART], including forcing children to cope with irreversible disabilities that result from the odious manipulation of reproductive specialists or the narcissistic choices of their parents,” Goodwin argues, “there must be a mechanism for addressing them.”<sup>110</sup> That mechanism, she contends, is tort. “Much in the same way that the law recognizes personal injury causes of action arising from the use of technology, such as cars, trains, and planes, so too should the law recognize personal injury actions in biotechnology and in ART in particular,” she writes.<sup>111</sup>

Many, if not most, of these proposals for regulatory reform rest on reproductive binarism and its narrow conception of sex and intimacy. For instance, in justifying why the government ought to penalize race-conscious gamete banks but not race-conscious dating websites—of which there are many<sup>112</sup>—Dov Fox draws a clear distinction between “intimate” romantic affiliation (which dating websites are intended to facilitate) and “transactional” alternative reproduction. He says:

Autonomy interests are implicated differently in assisted reproduction . . . than they are in sexual reproduction or romantic dating. The exchange of money for genetic material provides the means to produce a child—a profoundly intimate act to which the donor contributes one-half of the necessary raw materials. But the relationship between the people who directly engage in that procreative act is characterized less by intimacy than anonymity. What is present in the romantic matching context that is missing in the reproductive matching context is meaningful interface between the parties on either side of the

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high-order births, including “low birthweight, . . . cerebral palsy, other disabilities, and death.” Goodwin, *supra*, at 1052; see also *id.* at 1058 (discussing complications from general anesthesia); *id.* at 1059–60 (discussing risks of ovarian damage and ovarian cancer); Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1643 (2008) (recommending limits on embryo transplants).

108. See Goodwin, *supra* note 107, at 1043 (proposing a “paradigm shift” that considers “the viability of tort law to address the private and costly harms resulting from negligent application of ART”).

109. *Id.* at 1054.

110. *Id.* at 1071.

111. *Id.* at 1089.

112. For a discussion of these websites and their explicit racial preferences, see Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Love and Sex*, 122 HARV. L. REV. 1307, 1322 (2009).

exchange. Prospective parents and sperm donors transact at arm's length through a corporate broker who does not ordinarily permit either party even to learn the name of the other, let alone to have interpersonal contact. The market in donor insemination mediates reproduction to eliminate the intimacy that both typifies the relationship between consensual procreative partners, and also grounds the associational autonomy interests at stake in the act of procreation. Dating website [sic] deal in the union of people; sperm banks deal in the union of gametes.<sup>113</sup>

Fox's distinction between intimate romantic affiliation and transactional alternative reproduction typifies the foundational assumptions that underlie many of the proposed regulations discussed earlier.<sup>114</sup> For instance, in response to the anticipated criticism that her proposals for "donor-conceived" birth certificates treat "donor-conceived children differently from children created through sexual reproduction," Cahn writes that "[t]he reality is that they are, in fact, different, and different enough to satisfy any level of constitutional scrutiny."<sup>115</sup> While "[e]ven children conceived through a one-night stand involve a sexual encounter," she continues, "donor-conceived children require the involvement of someone outside the family, a third party who is not within the protected sphere of sexually intimate conduct."<sup>116</sup>

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113. Fox, *Racial Classification*, *supra* note 103, at 1882–83 (footnotes omitted); see also Fox, *Choosing Your Child's Race*, *supra* note 103, at 10–11 (discussing why racially limited dating websites are markedly distinct from racially limited sperm banks).

114. In a forthcoming article on the tort of reproductive negligence, Professor Fox appraises the differences between sexual and alternative reproduction in less stark terms. Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. (forthcoming 2017) (on file with the *Columbia Law Review*). For instance, when suggesting that constitutional protection for procreation might not necessarily act as a bar to recovery for reproductive negligence by third-party providers of a variety of reproductive services, Fox says: "Constitutionally protected interests in romantic intimacy may also lose *some* of their purchase when procreation moves from bedroom to laboratory, as do interests in bodily integrity in the absence of physical harm or unconsented touch." *Id.* (emphasis added). Under this view, "romantic intimacy interests" are attenuated, but not eliminated, when procreation moves from bedroom to doctor's office. *Id.*

115. Cahn, *Do Tell*, *supra* note 9, at 1106.

116. *Id.* Elsewhere in that article, Cahn distinguishes between "donor conception" and traditional conception not only by giving the former a different name—"donor conception"—but also, like Fox, by juxtaposing the presumed intimacy of sexual conception against the presumed non-intimacy of alternative reproduction. *Id.* In "donor-conception cases," Cahn argues, "[a]t least one legal parent (and there may only be one) has made a deliberate choice to use a third party, unlike in other types of biologically-formed families, *when children are created through intimate acts*." *Id.* at 1117 (emphasis added).

Similarly, Blankenhorn and his colleagues at the Institute for American Values<sup>117</sup> posit a factual distinction between alternative reproduction—and the “intentional parenthood” that it helps to facilitate—and reproduction “the old-fashioned way,”<sup>118</sup> as does Goodwin, who rests her proposals for invigorating tort law to cover a broader field of alternative reproductive technology cases on an explicit distinction between alternative and traditional procreation. While conceding that parents generally “do not owe children a promise of perfection,”<sup>119</sup> Goodwin argues that parents who turn to reproductive technologies might be penalized for their actions in a way that “natural” procreators cannot (or should not) be. She says: “[T]he key question here is the distinction between natural reproduction and clinical or assisted reproduction, *which are distinctly different*.”<sup>120</sup>

As with the regulations discussed above, these proposed regulations of alternative reproduction flow from three interrelated assumptions. First, they assume that sexual procreation and alternative reproduction involve factually distinct life-creating mechanisms. Second, they assume that “natural” life creation is intimate in a way that “commercial” life creation is not. Third, they assume that these differences regarding mechanics and intimacy justify different legal treatment of traditional and alternative reproduction, as well as the imposition of burdensome restrictions on alternative procreators.

#### D. EXCEPTIONS TO REPRODUCTIVE BINARISM IN THE LAW

Exceptions exist with all general trends, and that is no less the case with the legal treatment of sexual and alternative reproduction. This Section briefly considers instances where

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117. The Institute for American Values (IAV) is a public policy think tank that aims to “renew civil society and end the culture wars” based, in part, on the most pressing social issues of a given time. INST. FOR AM. VALUES, <http://www.americanvalues.org/about> (last visited Nov. 3, 2016). Founded (and led) by David Blankenhorn, a former opponent of same-sex marriage and the “star witness” for Proposition 8’s proponents in the federal trial over that amendment’s constitutionality, the IAV is critical of non-traditional parenthood for the same reasons that it once opposed same-sex marriage, namely because it disrupts biological, dual-gender parenting. Frank Rich, *Two Weddings, a Divorce, and ‘Glee,’* N.Y. TIMES (June 12, 2010), <http://www.nytimes.com/2010/06/13/opinion/13rich.html>.

118. MARQUARDT, *supra* note 8, at 23.

119. Goodwin, *supra* note 107, at 1091–92.

120. *Id.* (emphasis added).

courts and commentators have treated sexual and alternative reproduction the same (or have advocated the equal treatment of them), thereby resisting the general legal trend of treating procreation differently depending on the manner in which it occurs.

Some courts have treated sexual and alternative reproduction similarly in a line of prisoner reproduction cases, which have held that the state does not violate a prisoner's right to procreate by denying him permission to procreate with his wife, either through sex or alternative insemination.<sup>121</sup> A few scholars have also treated alternative and sexual reproduction similarly, at least in some respects. John Robertson, for instance, has argued that the constitutional right to procreate ought to extend to a range of alternative reproductive technologies, including in vitro fertilization, alternative insemination, and surrogacy.<sup>122</sup> The infertile, no less than the fertile, he maintains, have an "interest in genetic continuity, in gestating and giving birth, and in rearing the offspring."<sup>123</sup> Insofar as the right to bear and rear children protects those interests, Robertson contends, it makes little sense to withhold that right from one kind of procreation but extend it to another.<sup>124</sup>

Like Robertson, other scholars support parity of treatment in some respects between sexual and alternative insemination,

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121. See, e.g., *Gerber v. Hickman*, 291 F.3d 617, 621 (9th Cir. 2002) (situating alternative insemination on the same plane as other constitutionally protected forms of intimate association, like sexual intercourse, that are "necessarily" curtailed in prison); *Goodwin v. Turner*, 702 F. Supp. 1452, 1455 (W.D. Mo. 1988) (placing artificial insemination alongside other "intimate relationships [that] are severely infringed upon by the nature of incarceration").

122. See, e.g., JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994); John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490, 1505 (2008) [hereinafter Robertson, *Assisting Reproduction*]; Robertson, *Procreative Liberty*, *supra* note 97, *passim*.

123. Robertson, *Procreative Liberty*, *supra* note 97, at 428.

124. See, e.g., Robertson, *Assisting Reproduction*, *supra* note 122, at 1505 (stating that "[o]ur developing conceptions of procreative liberty should extend protection to gay and lesbian individuals and couples" because they "have the same interests in having children that heterosexuals do, and can use ARTs to achieve that goal" (emphasis added)); see also Lawrence Wu, *Family Planning Through Human Cloning: Is There a Fundamental Right?*, 98 COLUM. L. REV. 1461, 1487 (1998) (arguing that "[i]dentifying a 'coital' couple's and a 'noncoital' couple's procreative intent clarifies the similarities of the interests involved, because upon close inspection, nothing materially differentiates the content of one couple's intent from another, except the absence of sex to achieve procreation" (emphasis added)).

although not for all of the reasons advanced here. Susan Frelich Appleton, for instance, asks: “[W]hat reasons require categorical rejection of a clear written, [sic] agreement of nonparentage in [sexual conception] cases—like the contracts courts accept for [alternative insemination]?”<sup>125</sup> Similarly, Nancy Polikoff supports identical treatment of families “regardless of the method of conception.”<sup>126</sup> These scholars, however, represent “a minority view.”<sup>127</sup> “The much louder call,” Martha Ertman writes, “is for states to meddle in [alternative] parenthood”<sup>128</sup> but not necessarily in its traditional version.

Finally, until the 1960s, law and society treated alternative insemination and sexual procreation analogously. An American legal system reluctant to legitimize donor insemination rejected it by conceptualizing it in illicit sexual terms—as “adultery by doctor”<sup>129</sup>—and by characterizing its resulting offspring as “illegitimate.”<sup>130</sup> Even users of alternative insemination viewed it during this time through a sexual lens, partly in order to naturalize the procedure and thereby alleviate their discomfort with the idea of severing the link between sex and procreation.<sup>131</sup> The historical conflation of alternative insemination and sexual intercourse is explained in greater detail below.

## E. SUMMARY

This Part has surveyed the extent of the law’s dual system of reproductive regulation. In addition to revealing the breadth

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125. Appleton, *supra* note 50, at 113; see also MARTHA M. ERTMAN, LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES 59 (2015) (arguing that “family law should honor people’s choices to make whatever family arrangements they choose, as long as health and safety are protected”); I. Glenn Cohen, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 GEO. L.J. 431, 445 (2012) (criticizing Naomi Cahn’s regulatory proposals for implicitly conceding “that reproduction through [reproductive] technologies is a ‘lower status’ kind of reproduction, worthy of less protection”).

126. Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Sperm Donors Are Not Fathers*, 2 GEO. J. GENDER & L. 57, 59 (2000). Polikoff argues that the law ought to “provide a mechanism, for both children conceived coitally and those conceived through donor insemination, facilitating recognition of the mother-child unit as a family without a father, the same status accorded the family of a single woman who adopts a child.” *Id.*

127. ERTMAN, *supra* note 125, at 60.

128. *Id.*

129. Swanson, *supra* note 16, at 593.

130. *Id.* at 621.

131. See *infra* Part II.C.

of reproductive binarism in the law, Part I has shown how reproductive binarism is an equal-opportunity discipliner, imposing burdens on alternative procreators from which sexual procreators are exempt *and vice versa*. For instance, the supposed intimacy that renders contractual bargaining unreliable in the sexual conception context protects it from excessive governmental regulation. By contrast, the supposed lack of intimacy that renders contractual bargaining reliable in the alternative conception context exposes it to significant governmental meddling and interference.<sup>132</sup> Parts III and IV will return to the relative hardships that reproductive binarism imposes on alternative as well as sexual procreators, and to the factual and constitutional reasons why those hardships ought to provoke our skepticism.

## II. REPRODUCTIVE BINARISM EXPLAINED

Part I demonstrated the pervasive influence of reproductive binarism on family law and on the law of alternative reproduction. Part II now offers possible explanations for reproductive binarism, including constitutional, conceptual, and historical explanations.

### A. CONSTITUTIONAL EXPLANATION

Reproductive binarism, particularly as it burdens alternative procreators, is in large part a product of the belief that alternative reproduction merits less constitutional protection than sexual conception. Scholars who support alternative reproductive regulation often justify their proposals by centering on the constitutional status of procreation in general and alternative reproduction in particular. They variously contend that *Skinner v. Oklahoma*,<sup>133</sup> the Supreme Court's "right to procreate" case that struck down a mandatory sterilization law on equal protection grounds,<sup>134</sup> "says little about the importance or

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132. See Appleton, *supra* note 50, at 93–94 (discussing the burdens and freedoms that the law selectively applies to sexual and alternative reproduction).

133. 316 U.S. 535 (1942).

134. Because *Skinner* struck down Oklahoma's involuntary sterilization law on equal protection rather than on due process grounds, some—though by no means all—scholars argue that it at most establishes an equality right in procreative matters. See, e.g., Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1462 (2008). In Rao's view, *Skinner* stands for the proposition that the state cannot

value of reproduction or the right to reproduce,"<sup>135</sup> says nothing about whether that right includes alternative reproduction,<sup>136</sup> and at most prohibits the government from regulating alternative reproductive technologies in unequal ways—not from regulating alternative reproductive technologies for everyone.<sup>137</sup>

The constitutional explanation for reproductive binarism offers only partial explanatory power. It explains why some scholars are willing to tolerate regulation of one form of reproduction and not similar regulations of another, but fails to provide any insight as to why they believe that alternative reproduction is constitutionally inferior in the first place. To understand the deeper logic of reproductive binarism (and the constitutional arguments that support it) we must turn elsewhere: to the conceptual and historical reasons for the nearly habitual belief that alternative and sexual conception are factually distinct, and therefore deserving of different constitutional and regulatory treatment.

## B. CONCEPTUAL EXPLANATIONS

### 1. Sex Exceptionalism

Reproductive binarism reflects and replicates sex exceptionalism: the belief that sex, defined in traditional heterosexual terms, is unique in a way that merits different, and often privileged, legal treatment. From the regulation of marriage and intimate agreements to the punishment of sex work,

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single out particular groups (like gays and lesbians) when regulating alternative reproduction, but may regulate alternative reproduction for everyone. Other scholars read *Skinner* as establishing a more expansive liberty right. See Robertson, *Assisting Reproduction*, *supra* note 122, at 1493 (arguing that "[a]lthough [*Skinner*] couched its decision in the language of equality . . . the rhetoric of a liberty right to reproduce . . . explains the frequency with which the case is now cited").

135. Goodwin, *supra* note 107, at 1089.

136. See, e.g., Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 424 (2012) ("As a constitutional matter, the parameters of a procreative right concerning assisted reproduction are less than clear."); Fox, *Racial Classification*, *supra* note 103, at 1882 (observing that "[t]he Supreme Court has not considered whether autonomy or privacy rights encompass decisions involving the use of assisted reproductive technologies"); Cass R. Sunstein, *Is There a Constitutional Right To Clone?*, 53 HASTINGS L.J. 987, 993–94 (2002).

137. See, e.g., Rao, *supra* note 134, at 1460 ("[T]he government could prohibit use of a particular reproductive technology across the board for everyone; however, once the state permits use in some contexts, it should not be able to forbid use of the same technology in other contexts. Hence, all persons must possess an *equal* right, even if no one retains an *absolute* right, to use ARTs.").

sexual assault, and sex offenders, the law, like society generally, treats sex and sexual conduct as different in kind from other varieties of conduct. Indeed, “[e]ven language itself holds sex in high esteem: The phrase ‘make love’ stands in for ‘have sex,’ as if it’s the only true way to express love,”<sup>138</sup> a self-identified asexual writes. Sex exceptionalism travels across multiple legal domains and comprises two related aspects: (1) sex as different/unique; and (2) sex as special/privileged.

*a. Sex as Different/Unique*

The first aspect of sex exceptionalism—the belief that sex is different or unique—guides family law’s treatment of marriage, and, in some cases, of non-marital intimate relationships. While sex is not a requirement to enter into a marriage, it is a basis for terminating one: one spouse’s inability or unwillingness to engage in sex, specifically and narrowly defined,<sup>139</sup> with the other spouse is grounds for annulment in most jurisdictions;<sup>140</sup> in some jurisdictions, it is grounds for divorce.<sup>141</sup> As one commentator notes, “The validity of marriage is . . . contingent upon the capacity of both partners to engage in complete sexual intercourse,”<sup>142</sup> and marriages might be annulled for failure to consummate, regardless of whether fraudulent intent not to consummate at the outset of marriage was present.<sup>143</sup> Indeed, “[t]he desire, or at least initial willingness, of both parties to engage in sexual intercourse is considered so basic to marriage”<sup>144</sup> that courts will refuse even to honor pre-marital agreements that limit sexual intercourse during marriage,<sup>145</sup> or

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138. Kim Kaletsky, *Asexual and Happy*, N.Y. TIMES (July 2, 2015), [http://www.nytimes.com/2015/07/05/fashion/asexual-and-happy.html?\\_r=0](http://www.nytimes.com/2015/07/05/fashion/asexual-and-happy.html?_r=0).

139. See, e.g., *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976) (holding that a marriage between a man and a transgender woman who had gender confirmation surgery was valid in New Jersey because the surgery rendered her able to satisfy the essence of marriage with her husband: heterosexual coitus); Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1099 (2002) (observing that “courts have been quite narrow and excruciatingly precise in describing exactly what is meant by sexual capacity with respect to its consequence: the ability of the husband to fully penetrate his wife without pain” (footnote omitted)).

140. Borten, *supra* note 139, at 1100–03.

141. *Id.* at 1122–23.

142. *Id.* at 1100; see also Emens, *supra* note 7, at 351.

143. Borten, *supra* note 139, at 1104–08.

144. *Id.* at 1103.

145. See, e.g., *Favrot v. Barnes*, 332 So. 2d 873 (La. Ct. App. 1976).



that delay consummation for some time after marriage,<sup>146</sup> on the ground that such agreements interfere with the marriage contract's sexual essence.<sup>147</sup>

As with remaining in (or entering into) marital and cohabitant relationships, family law treats sex as different/unique in its posture toward cohabitant, or "Marvin," agreements, which courts tend to uphold unless they are predicated on sex.<sup>148</sup> "The law of contracts, in principle at least, prides itself on not looking inside the 'black box' of consideration—leaving it to parties to place their own valuations on particular deals,"<sup>149</sup> Emens writes. "Sex is one notable exception to that general principle."<sup>150</sup>

Sex exceptionalism emerges in criminal law no less than it does in family law. Some criminal incest prohibitions single out not just sex between certain family members, but a remarkably narrow definition of sex: penetrative sex between opposite-sex persons.<sup>151</sup> Criminal adultery statutes in some jurisdictions do the same, defining the crime of adultery as not just sexual in-

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146. *Mirizio v. Mirizio*, 150 N.E. 605 (N.Y. 1926).

147. For a more detailed discussion of these and other cases that consider married couples' attempts to contract around marriage's sexual default rules, see Borten, *supra* note 139, at 1106. As with marriage, sex is a defining attribute of domestic partnerships; thus, some jurisdictions require sex in order to grant legal recognition to a domestic partnership. Emens, *supra* note 7, at 353 (noting that some domestic partnership regimes "appear to require sexual consummation").

148. *Marvin v. Marvin*, 557 P.2d 106, 114 (Cal. 1976) (en banc) (holding that cohabitation contracts were valid in California "unless expressly and inseparably based upon an illicit consideration of sexual services" (emphasis added)).

149. Emens, *supra* note 7, at 356.

150. *Id.* Speaking to the potential effects that sex exceptionalism might have on asexuals, Emens continues: "[T]reating sex as special under law may do more than reflect the assumptions of a sexual society; rather, special legal treatment for sex may reinforce the specialness of sex as a cultural matter." *Id.*

151. For instance, Florida's criminal incest statute provides that "[w]hoever knowingly marries or has sexual intercourse with a person to whom he or she is related by lineal consanguinity, or a brother, sister, uncle, aunt, nephew, or niece, commits incest, which constitutes a felony of the third degree." FLA. STAT. ANN. § 826.04 (West 2016). Florida defines "sexual intercourse," in turn, as "the penetration of the female sex organ by the male sex organ, however slight; emission of semen is not required." *Id.*; see also *Carnes v. State*, 725 So. 2d 417, 418 (Fla. Dist. Ct. App. 1999) (per curiam) (stating that "[t]he obvious purpose of the incest statute is to address the evil of sexual intercourse between persons who are related to each other within specific degrees" (emphasis added)).

tercourse but heterosexual coitus specifically.<sup>152</sup> In addition, the criminal laws in nearly every jurisdiction prohibit sex work<sup>153</sup> but allow equally “demeaning,” “intense,” and “tiring” work, such as plucking chickens.<sup>154</sup> They also “assign[] harsher penalties to unwanted [sexual] touching and other [sexual] interaction than non-sexual versions of those same interactions would trigger.”<sup>155</sup> Finally, sex offenses—broadly conceived—inspire singular disgust. “No other crime invokes such negative public perceptions,”<sup>156</sup> sociologists write.

#### b. Sex as Special/Privileged

The second aspect of sex exceptionalism—the belief that sex ought to be privileged—flows directly from the first aspect. Sexual harassment law exhibits this aspect of sex exceptionalism by over-protecting individuals from certain sexual conduct and under-protecting them from non-sexual forms of discrimination.<sup>157</sup> Family law does so as well by assuming that sex—unlike other conduct, like procreation—is essential to the marital relation. Before the advent of no-fault divorce, which made unilateral exit from marriage relatively easy, unilateral exit through annulment was permitted for those who

152. See *In re Blanchflower*, 434 A.2d 1010, 1012 (N.H. 2003) (holding that under New Hampshire’s criminal adultery statute, “adultery” excludes all non-coital sex acts”).

153. Danielle Augustson & Alyssa George, *Prostitution and Sex Work*, 16 GEO. J. GENDER & L. 229, 232 (2015) (observing that “[p]rostitution is illegal in every state, with certain exceptions in Nevada and, until November 2009, in Rhode Island” (footnote omitted)).

154. Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 700–02 (1998).

155. Emens, *supra* note 7, at 356–57. While some commentators argue that “the basic concept of rape as an independent and exceedingly heinous crime is a form of paternalism, inseparable from antiquated notions of female chastity and delicacy,” others maintain that the conventional view that “rape is a uniquely devastating type of assault still seems to be valid.” David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 433 (2000).

156. James F. Quinn et al., *Societal Reaction to Sex Offenders: A Review of the Origins and Results of the Myths Surrounding Their Crimes and Treatment Amenability*, 25 DEVIANT BEHAVIOR 215, 217 (2004); see also Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventative Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969 (2011).

157. For sexual harassment law’s simultaneous under-protection/over-protection problem, see Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2065 (2003) (“[T]he same focus on sexual conduct that has led courts to ignore . . . larger patterns of sexism and discrimination is also leading companies to prohibit a broad range of relatively harmless sexual conduct, even when that conduct does not threaten gender equality on the job.”).

experienced sexual dissatisfaction. Such exit was not necessarily permitted, though, for those who experienced other species of discontent.<sup>158</sup>

*c. Reproductive Binarism and Sex Exceptionalism*

Sex exceptionalism underlies the sex/non-sex binary as well as the laws, actual and proposed, that flow from it. For instance, the belief that sexual reproduction is both different from and better than alternative reproduction animated laws that excluded same-sex couples from marriage until just recently.<sup>159</sup>

That same belief continues to animate the dominant legal approach to alternative reproduction. Paternity laws treat sexual and alternative procreation differently by imposing fatherhood after sex but not necessarily after alternative insemination, and the FDA privileges sex by exempting donations between “sexually intimate partners,” narrowly conceived, from its mandatory testing requirements. Similarly, all of the proposed regulations considered earlier assume essential differences between sexual and alternative reproduction, one presumptively intimate and the other presumptively non-intimate, and privilege sexual conception by suggesting that it ought to be entitled to greater constitutional protection—and lesser state interference—than alternative reproduction.<sup>160</sup>

2. Intimacy Essentialism

Reproductive binarism also reflects and replicates intimacy essentialism. Co-extensive with sex exceptionalism, intimacy essentialism is the belief that intimacy is—and ought to be—

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158. See Borten, *supra* note 139, at 1104–08.

159. As one version of the now-discredited procreation rationale for exclusionary marriage laws asserted: “[I]ndividual adults are naturally incomplete with respect to one biological function: sexual reproduction. In coitus, but not in other forms of sexual contact, a man and a woman’s bodies coordinate by way of their sexual organs for the common biological purpose of reproduction.” Sherif Girgis et al., *What Is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 254 (2010); see also Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 302 (1995) (arguing that individuals who engage in sexual acts other than traditional sexual coitus “treat their bodies . . . as means or instruments in ways that damage their personal (and interpersonal) integrity” (footnote omitted)).

160. See, e.g., Fox, *Racial Classification*, *supra* note 103, at 1882 (arguing that “[a]utonomy interests are implicated differently in assisted reproduction . . . than they are in sexual reproduction or romantic dating”).

non-commercial, private, and dyadic rather than commercial, public, and polyadic.<sup>161</sup> Resting on a narrow and particularized conception of both “intimacy” and “commerce,” intimacy essentialism is the artifact of a Victorian ideology that viewed family and markets as incompatible “separate spheres.”<sup>162</sup> Intimacy essentialism informs countless legal debates, from those surrounding the criminal prohibition of sex work<sup>163</sup> and polygamy<sup>164</sup> to those surrounding the sale of body parts,<sup>165</sup> and it drives large swathes of family law.<sup>166</sup> Even as it obscures the significant overlap that exists between family and markets,<sup>167</sup> intimacy essentialism remains one of family law’s most deeply rooted canons.

Just as intimacy essentialism persists in family law more generally, so too does it “linger[] on”<sup>168</sup> in the legal treatment of alternative reproduction, from bioethical and legal debates over gamete donor compensation and the moral status of surrogacy agreements to judicial resolution of embryo disputes.<sup>169</sup> It also persists in judicial, legislative, and scholarly treatment of the

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161. Intimacy essentialism is also the belief that certain forms of intimacy—namely sexual intimacy—are superior to other forms, like emotional intimacy. To the extent that that aspect of intimacy essentialism is a by-product of sex exceptionalism, it was addressed above and will not be revisited here (at least directly).

162. See Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 180 (2013) (arguing that separate spheres were “rooted in the protection of the marital relationship from the debasing influences of the market”).

163. See MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 276–85 (1999); Emens, *supra* note 7, at 354; Nussbaum, *supra* note 154.

164. See Davis, *supra* note 12, at 2033–35.

165. See generally Meredith M. Render, *The Law of the Body*, 62 EMORY L.J. 549 (2013) (discussing the need for a property framework to explain the legal status of the human body).

166. See Emens, *supra* note 7, at 355–56.

167. See generally Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001) (explaining the commonalities between business and family structures).

168. Matsumura, *supra* note 162.

169. See MARGARET JANE RADIN, CONTESTED COMMODITIES 140–48 (1996); Kimberly D. Krawiec, *A Woman’s Worth*, 80 N.C. L. REV. 1739, 1756–65 (2010) (discussing legal debates over compensated egg donation); Matsumura, *supra* note 162, at 181–83 (discussing the “separate spheres” logic on which courts rely when refusing to enforce embryo agreements between intimates); Douglas NeJaime, *The Nature of Parenthood* 38 (unpublished manuscript) (on file with author) (arguing that states that “proscribe only compensated surrogacy” follow “an approach [that] discipline[s] a woman who transgresses ‘separate spheres’ ideology when she converts the private domain of the home into the public sphere of the market”).

issues covered so far in this Article. Recall the *Doe v. Hamburg* court's statement that the FDA regulations at issue in that case did not deprive the plaintiff-donee of "any general constitutional right to procreate" because she was procreating through what the court viewed as commercial means.<sup>170</sup> "The only thing Ms. Doe is deprived of," the court declared, "is the right to have Mr. Arsenault's child specifically through a 'commercial' (i.e., nonintimate) relationship."<sup>171</sup> Reminiscent of the judicial rhetoric of an earlier era, the *Hamburg* court's reasoning betokens an ideology of "separate spheres" and furthers the belief that commerce and intimacy are radically distinct.<sup>172</sup> Under this view, *intimacy connotes something other than commerce*, and vice versa.

In addition, intimacy essentialism and its ideology of "separate spheres" animate paternity determinations in most states as well as recent proposals to regulate alternative reproduction. States rely on intimacy essentialism when finding that reproduction that is more intimate, familiar, and private tends to result in familial status, whereas reproduction that is less intimate, familiar, and private tends to avoid it.<sup>173</sup> Fox also relies on intimacy essentialism when he differentiates between commercial dating sites and commercial gamete banks, the latter of which "mediate[] the practice of reproduction to eliminate the intimacy—and with it the relational autonomy interests—that characterize the connection between consensual sexual partners."<sup>174</sup> Cahn does as well when she argues that alternative reproduction can be regulated because it "require[s] the involvement of someone outside the family, a third party who is not within the protected sphere of sexually intimate conduct."<sup>175</sup>

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170. *Doe v. Hamburg*, Case No. 12D-2686, 2013 WL 3783749, at \*6 (N.D. Cal. July 16, 2013).

171. *Id.* at \*6–7.

172. *See id.*

173. *See supra* Part I.A.

174. Fox, *Choosing Your Child's Race*, *supra* note 103, at 11; *See also* Fox, *Racial Classification*, *supra* note 103, at 1883.

175. Cahn, *Do Tell!*, *supra* note 9 at 1106. Intimacy essentialism is also reflected in the argument that alternative reproduction can be subject to governmental regulation because it is more "public" than "private" sexual reproduction. *See* Michael H. Shapiro, *I Want a Girl (Boy) Just Like the Girl (Boy) that Married Dear Old Dad (Mom): Cloning Lives*, 9 S. CAL. INTERDISC. L.J. 1, 71 (1999) (stating that under one view the so-called "public" aspect of alternative reproduction renders it susceptible to regulation because "[w]e often regard market transactions involving 'commodities'—products or services—as having strong 'public' aspects subject to governmental regulation that is easily

## C. HISTORICAL EXPLANATION

As suggested earlier, reproductive binarism could be the living artifact of the legal and cultural transformation of alternative insemination from an illicit to a licit activity.<sup>176</sup> Until the 1970s, alternative insemination was conceptualized in sexual terms, with courts and commentators likening it to adultery<sup>177</sup> and deeming the resulting children "illegitimate."<sup>178</sup> Indeed, even the medical establishment followed certain protocols to "sexualize" alternative insemination.<sup>179</sup>

For instance, prior to the procedure doctors insisted that women engage in sexual intercourse in order "to achieve artificial procreation in conditions that resemble[d] conception through sexual intercourse."<sup>180</sup> They also sexualized and naturalized the "artificial" process by having the husband administer the syringe<sup>181</sup> and by using anesthesia, a pain blocker that "was not a necessary component of this simple, unpainful procedure."<sup>182</sup> "The connection between sex and procreation was apparently so deeply embedded in social morality that there was a need to purposefully insert an element of sex into the artificial procedure," Gaia Bernstein writes.<sup>183</sup> "Rendering the wife unconscious served both the purpose of controlling her sexuality while another men's [sic] sperm was injected and of sparing her from fully facing the artificiality of the act,"<sup>184</sup> she continues.

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justified as against constitutional claims of right"); see also Garrison, *Law Making for Baby Making*, *supra* note 104, at 849–50 (discussing judicial and legislative responses to legal issues surrounding IVF); Rao, *supra* note 134, at 1473 (arguing that "the government may regulate ARTs so long as they involve embryos or fetuses that are viable or *outside* a woman's body" (emphasis added)).

176. See Swanson, *supra* note 16, at 594.

177. On this question, see Swanson, *supra* note 16, at 618 (observing that under some courts' reasoning, "the married mother of a donor child was guilty of adultery, and perhaps the donor was as well. Maybe it was the doctor who committed adultery, as he injected the sperm. If he was not a direct party to adultery, perhaps the doctor's involvement might fit under the legal definition of conspiracy to commit a crime").

178. *Id.*

179. Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1064 (2002).

180. *Id.*

181. *Id.* at 1050.

182. *Id.* at 1058.

183. *Id.* at 1050.

184. *Id.* at 1058.

The 1960s and 1970s witnessed important legal developments that led to the legitimization—and simultaneous desexualization—of alternative insemination.<sup>185</sup> The advent and legalization of the pill, which was “the peak of the process of the removal of reproduction from sex,” also “affected the parallel revolution of the removal of sex from reproduction.”<sup>186</sup> Similarly, a landmark decision from the California Supreme Court in 1968, *People v. Sorensen*,<sup>187</sup> held that it was “patently absurd . . . to consider [alternative insemination] adultery.”<sup>188</sup> Finally, in 1973, the Uniform Parentage Act (UPA) legitimized alternative insemination when performed by a doctor on a married woman,<sup>189</sup> and “[b]y the end of the 1970s at least fifteen states had statutes regulating [alternative insemination] and specifically mentioning [alternative insemination by donor].”<sup>190</sup>

In legitimizing alternative insemination, regulators and commentators simultaneously de-sexualized it. Like the UPA, states that passed alternative insemination statutes made clear that the legality of the procedure depended on whether a third-party intermediary—specifically, a doctor—participated in life creation.<sup>191</sup> As Kara Swanson explains: “The participation of a doctor did the cultural work of transforming what some considered a variation of adultery into a treatment for infertility, that is, ‘sin into therapy.’”<sup>192</sup>

The separation of alternative insemination and sex continued into the 1990s and 2000s, which witnessed the proliferation of the “artificial insemination by intercourse” argument considered in Part I.<sup>193</sup> In rejecting that argument, courts “refus[ed] to equate the [sexual insemination] situation with that of a donor through [alternative insemination].”<sup>194</sup> That refusal, Bernstein contends, “points to the limits of [alternative insemination’s] acceptance—[alternative insemination] has not to this day achieved equal standing with sexual intercourse.”<sup>195</sup>

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185. *Id.* at 1084–85.

186. *Id.*

187. *People v. Sorensen*, 437 P.2d 495, 501 (Cal. 1968).

188. *Id.*

189. UNIF. PARENTAGE ACT § 5(b) (1973).

190. Bernstein, *supra* note 179, at 1090.

191. *See id.*

192. KARA W. SWANSON, *BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA* 225 (2014).

193. Bernstein, *supra* note 180, at 1091.

194. *Id.*

195. *Id.* at 1091–92.

Bernstein is right to suggest that the judicial rejection of the “artificial insemination by intercourse” argument indicates that alternative reproduction has not “achieved equal standing with sexual intercourse.” But the reverse is also true, namely that sexual intercourse has not “achieved equal standing” with alternative insemination. As explored in Part I, reproductive binarism burdens—albeit in different ways—sexual and alternative reproduction. Just as alternative reproduction is saddled with regulations and requirements from which sexual intercourse is largely, if not completely, exempt, so too is sexual procreation burdened with requirements from which alternative procreation is largely, if not completely, exempt.<sup>196</sup>

It is therefore more accurate to say that the disaggregation of sexual intercourse and alternative insemination has resulted in a situation where the law treats sexual and alternative insemination differently on the presumption that the two are factually distinct. Often this different treatment—the very definition of reproductive binarism—burdens alternative procreation. But sometimes it burdens sexual reproduction as well.

### III. CHALLENGING THE BINARY: FACTUAL INACCURACIES

This Article now moves from Part I and II’s descriptive and explanatory account of the law’s sex/non-sex binary to Part III and IV’s interrogation of it. Part III begins that challenge by arguing that sexual and alternative reproduction are more formally similar than the sex/non-sex binary assumes. Section A demonstrates that sexual and alternative reproduction are categories that share a number of common attributes. Section B demonstrates that in some instances sexual and alternative reproduction *are the same thing*. The objective of this Part is two-fold: first, to show that the factors on which the law relies to justify a dual system of reproductive regulation could just as easily describe one form of procreation as another; and second, to argue that those factors are ultimately insufficient to sustain that dual system because they are vague, imprecise, and susceptible to inconsistent applications.

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196. See Appleton, *supra* note 50, at 93–94.



#### A. SIMILARITIES BETWEEN SEXUAL AND ALTERNATIVE REPRODUCTION

Commentators who support a dual system of reproductive regulation argue that alternative and sexual reproduction differ in essential ways that are (or ought to be) legally relevant. First, they argue that alternative reproduction requires outside, third-party assistance and is likely to involve anonymous interactions between strangers. Second, they argue that alternative reproduction is commercial and therefore presumptively non-intimate. Cahn invokes these characteristics when she writes that unlike sexually conceived children, "donor-conceived children require the involvement of someone outside the family, a third party who is not within the protected sphere of sexually intimate conduct."<sup>197</sup> Fox does as well when he argues that "[a]utonomy interests are implicated differently in assisted reproduction . . . than they are in sexual reproduction or romantic dating."<sup>198</sup> Unlike the "romantic matching context," Fox maintains, alternative reproduction "is characterized less by intimacy than anonymity."<sup>199</sup>

Even scholars who support private ordering in alternative reproductive matters tend to assume that alternative reproduction "unbundles" procreation and intimacy in novel ways that distinguish it from sexual reproduction.<sup>200</sup> For instance, Marjorie Shultz supports intent-based parenthood, but argues that it ought to be limited to "artificial or assisted reproduction."<sup>201</sup> In justifying procreative intentionality for assisted but not for sexual reproduction, Shultz adverts to intimacy: whereas "ordinary procreation" involves sexual relationships between intimates (for whom intent-based parenthood through contract is

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197. Cahn, *Do Tell!*, *supra* note 9 at 1106.

198. Fox, *Racial Classification*, *supra* note 103, at 1882.

199. *Id.* at 1883.

200. See Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 299-300 (stating that "because processes that *previously were bundled* can now be separated, procreation can be depersonalized: biological reproduction can be separated from the social and physical context of interpersonal intimacy" (emphasis added)); *id.* at 311 (stating that reproductive technology offers the possibility that "procreation can be separated from sexual intimacy"). Professor Shultz's arguments assume that alternative reproduction introduces a novel aspect into reproduction generally: the separation of procreation and "interpersonal intimacy." *Id.* at 315.

201. *Id.* at 323-24.

unsuitable, in Shultz's view),<sup>202</sup> alternative reproduction involves "deliberative" and planned interactions between "non-intimates" (for whom intent-based parenthood through contract is entirely appropriate).<sup>203</sup>

A moment's reflection reveals the problems with Shultz's and others' use of sex as a proxy for conventional understandings of non-commerciality, privacy and intimacy. Reproduction the "old-fashioned way" can be assisted and non-intimate in ways ordinarily associated with "assisted" reproduction, as Subsection 1 argues. Moreover, "assisted" reproduction can be intimate and unpredictable in ways typically associated with sexual reproduction, as Subsection 2 reveals.

### 1. Assisted, Non-Intimate Sexual Reproduction

Sexual reproduction is no less "assisted" than "assisted" reproduction. Indeed, the very phrase "assisted reproduction"<sup>204</sup> obscures the basic fact that all human reproduction is "assisted" in some way, as parthenogenesis, like Athena springing from Zeus' head or Typhon issuing from Hera, is humanly impossible.<sup>205</sup> Considered from the point of view of the right holder—the individual who desires to procreate—all procreation requires "assistance." Proposals to regulate alternative reproduction that are predicated, either in whole or in part, on

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202. See *id.* at 325.

203. See *id.* at 324.

204. Most commentators refer to alternative reproduction as "assisted reproduction" rather than the less inaccurate "alternative reproduction." See, e.g., Cahn, *Do Tell!*, *supra* note 9, at 1080 (referencing "assisted reproductive technology"); Fox, *Racial Classification*, *supra* note 103 (referencing "assisted reproduction"); Goodwin, *supra* note 107, at 1042 (referring to "assisted reproductive technology"); Robertson, *supra* note 122, *passim* (referencing "assisted reproduction"). But see Ertman, *What's Wrong with a Parenthood Market?*, *supra* note 14, at 80 (using "alternative insemination" rather than "assisted insemination").

205. The goddess Athena is often cited as an example of male parthenogenesis, as she sprung from Zeus' head. However, it is more accurate to say that Athena is an example of female parthenogenesis, as she was originally conceived by Metis, Zeus' first wife, with no assistance. Angry with Metis for being pregnant with a child allegedly more powerful than him, Zeus consumed Metis—and, along with her, the unborn Athena. Months later, Zeus "gave birth" to Athena when the latter sprung from his head. While Hesiod's *Theogony* reports that Typhon was the son of Gaia (Earth) and Tartarus, the later *Homeric Hymn to Apollo* explains Typhon's conception in parthenogenetic terms. Angry at her husband for birthing Athena by himself, Hera prayed to Gaia to give her a son; Hera become pregnant with Typhon after slapping the ground. See HESIOD, *THEOGONY* (Richard S. Caldwell trans., 1987); HOMERIC HYMNS (Sarah Ruden trans., 2005).

the belief that third-party assistance renders procreative conduct more susceptible to state regulation fail to recognize that the difference between “third-party” and “second-party” reproduction is one of degree (if even that), not one of kind.<sup>206</sup>

More specifically, though, sexual reproduction often requires the *kind* of assistance—commercial, “third-party” assistance—that people ordinarily associate with alternative reproduction. For example, surveys suggest that a not insignificant number of individuals are thinking of someone else while having sex and are doing so in order to have sex.<sup>207</sup> In addition, whole industries exist—sex aid pharmaceuticals, pornography, sex toys, sex therapy—for the purpose of facilitating sexual desire and sexual intercourse.<sup>208</sup> To the extent that procreation is the by-product, whether intentional or not, of that intercourse, it cannot be said that alternative reproduction is radically different than sexual procreation because of the third-party assistance and commerce that it involves. All of the above-mentioned industries illuminate the commercial character of sexual reproduction, as well as the role that third-party intermediaries often play in facilitating it. As such, arguments to regulate alternative reproduction on the ground that it involves

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206. That is, the phrase “third-party” reproduction conceals the fact that much of the time reproduction with donated gametic materials—the conventional definition of “third-party” reproduction—occurs, like sex, between just two parties: a sperm donor and a single woman. Julie Shapiro observes that “the term ‘third-party’ [reproduction] can be a little misleading [because] [w]hen a single woman uses sperm from a sperm bank to have a child, she’s the first party and the provider of the sperm is a third party and there isn’t any second party.” Julie Shapiro, *What Should the Rules Be: Thoughts About Third-Party Reproduction*, WORDPRESS (Nov. 17, 2011), <https://julieshapiro.wordpress.com/2011/11/17/what-should-the-rules-be-thoughts-about-third-party-reproduction>. Alternatively, one could think about the single woman as the “first party” and the sperm donor as the “second party.” According to the California Cryobank, one of the nation’s largest sperm banks, single women comprise thirty percent of its business and that figure is projected to be “more than 60 percent . . . in 20 years.” Carlos Frías, *Single Women Who Choose Artificial Insemination Can Learn A Lot About Their Sperm Partner*, PALMBEACHPOST.COM (Aug. 25, 2015), <http://www.palmbeachpost.com/news/lifestyles/health/single-women-who-choose-artificial-insemination-ca/nL9Wt>.

207. See, e.g., Harold Leitenberg & Kris Henning, *Sexual Fantasy*, 117 PSYCH. BULL. 469, 481 (1995). See generally *The American Sex Survey: A Peek Beneath the Sheets*, ABC NEWS (Oct. 21, 2004), <http://abcnews.go.com/images/Politics/959a1AmericanSexSurvey.pdf> (providing statistics on Americans’ sex lives).

208. See generally DAGMAR HERZOG, *SEX IN CRISIS: THE NEW SEXUAL REVOLUTION AND THE FUTURE OF AMERICAN POLITICS* (2008) (discussing the Christian right’s influence on sexuality).

commercial, “third-party” assistance overlook the fact that sexual reproduction often *is* commercial, “third-party” reproduction.

Second, just as sexual reproduction often requires third-party assistance, so too can it result from deliberate, non-intimate, mechanistic, and anonymous interactions—the very qualities that ostensibly render alternative reproduction susceptible to regulation. Not all sex, procreative or not, is intimate and carefree (indeed, one need only think here of rape); nor is it all non-anonymous. Some people, in fact, desire artful, non-intimate, anonymous sex,<sup>209</sup> and for many people sex that is artful and controlled *is* intimate sex.<sup>210</sup> “Our culture is all too ready to think that sex involves no skill and is simply ‘natural,’” Martha Nussbaum writes. Such a view is “surely false and is not even seriously entertained by many cultures,”<sup>211</sup> she continues.

In addition, for many couples trying to sexually conceive (and particularly for those who struggle with a diagnosis of infertility), sex is likely to bear many of the characteristics routinely associated with alternative reproduction: control, non-intimacy, and artificiality.<sup>212</sup> Such couples, according to some studies, frequently experience a decrease in intimacy not only in their sexual relations but also in their overall emotional and physical relationship.<sup>213</sup> These couples often remark upon—and complain about—the programmed character of their sex lives, which, once spontaneous, become obsessively timed to accom-

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209. See, e.g., Nussbaum, *supra* note 154, at 703 n.24 (“Certainly nonintimacy is involved in many noncommercial sexual relationships and is sometimes desired as such.”).

210. See generally ROBIN BAUER, *QUEER BDSM INTIMACIES: CRITICAL CONSENT AND PUSHING BOUNDARIES* (2014) (surveying the intimacies created by BDSM practitioners).

211. Nussbaum, *supra* note 154, at 704.

212. See generally Sarah Elizabeth Richards, *When Sex Becomes a Chore*, SLATE (Apr. 12, 2010), [http://www.slate.com/articles/double\\_x/doublex\\_health/2010/04/when\\_sex\\_becomes\\_a\\_chore.html](http://www.slate.com/articles/double_x/doublex_health/2010/04/when_sex_becomes_a_chore.html) (discussing how infertility negatively impacts couples’ sex lives).

213. See, e.g., Andrea Mechanick Braverman, *Psychosocial Aspects of Infertility: Sexual Dysfunction*, 1266 ADVANCES FERTILITY & REPROD. MED. 270, 273 (2004); Leah S. Millheiser et al., *Is Infertility a Risk Factor for Female Sexual Dysfunction? A Case-Control Study*, 94 FERTILITY & STERILITY 2022, 2023 (2010) (reporting findings that forty percent of patients with a diagnosis of infertility exhibited sexual dysfunction, compared to twenty-five percent of patients without such a diagnosis); Manoj Monga et al., *Impact of Infertility on Quality of Life, Marital Adjustment, and Sexual Function*, 63 UROLOGY 126 (2004).

moderate ovulation cycles and peak fertility days. For example, Professor Shultz writes that, "management of sexual relations according to menstrual cycle or temperature charts could turn an intensely personal form of communication into a purely instrumental activity."<sup>214</sup> Studies also indicate that divorce rates are significantly higher among those couples who fail to conceive after undergoing fertility treatments.<sup>215</sup>

These studies confirm what ought to be common wisdom, namely that intimacy—at least as that term is used in arguments favoring alternative reproductive regulation—is not guaranteed for any couple that is trying to conceive, whether sexually or through alternative means. The fact that sexually conceived children are at least sometimes, if not often, created under conditions of apparent non-intimacy<sup>216</sup> weakens the claim that sexual, unlike alternative, procreation merits privacy protection because it sits within the "protected sphere of sexually intimate conduct."<sup>217</sup> The same characteristic so often invoked to justify why alternative reproduction can be regulated—non-intimacy—can just as easily apply to sexual procreation.

On this point, consider *Steven S. v. Deborah D.*, which found that a donor was not a father because conception occurred "artificially" and with physician assistance.<sup>218</sup> There, a man who helped a woman become pregnant and eventually give birth to a son sued her to establish paternity over the child. Steven and Deborah first attempted to conceive "artificially" with physician assistance, which is required under California law for a man to avoid paternity.<sup>219</sup> Following a miscarriage and

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214. Shultz, *supra* note 200, at 304–05.

215. Shannon Firth, *Study: Infertile Couples 3 Times More Likely To Divorce*, U.S. NEWS (Jan. 30, 2014), <http://www.usnews.com/news/articles/2014/01/31/study-infertile-couples-3-times-more-likely-to-divorce>.

216. To be clear, this Article is not suggesting that deliberately procreative sex is invariably non-intimate. Rather, it is simply recognizing that procreative sex might (and often does) bear the very characteristics—control, deliberation, and forethought—that commentators use to distinguish between "intimate" procreative sex and "non-intimate" alternative reproduction. For the view that planned sexual reproduction can sometimes *increase* intimacy in a relationship, see KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD*, 166–68, 210–13 (1984).

217. Cahn, *Do Tell!*, *supra* note 9 at 1106 (emphasis added).

218. 127 Cal. App. 4th 319 (2005).

219. *See id.* at 326 (citing CAL. FAM. CODE § 7613(b)(2)). Under California's donor insemination statutes, donors who use physician assistance can still become fathers if they contract *into* paternity prior to conception, just as donors

several subsequent attempts—all unsuccessful—to conceive with “third-party” assistance, Steven and Deborah started to engage in “sexual intercourse in an attempt to impregnate Deborah.”<sup>220</sup> No more successful conceiving sexually, however, Deborah again turned to “third-party” assistance by attempting to conceive through “artificial” insemination with Steven’s semen.<sup>221</sup> Deborah eventually became pregnant and gave birth to a baby boy. Shortly thereafter, Steven sued for paternal rights,<sup>222</sup> but lost because of the manner in which conception occurred: “artificially” rather than sexually, and with physician assistance.<sup>223</sup>

Most relevant here is the *Steven S.* court’s descriptions of alternative and sexual reproduction as each occurred between Steven and Deborah. The court describes the parties’ act of alternative conception in language suggestive of intimacy: “[Steven] accompanied [Deborah] to the insemination with [Steven’s] sperm and *held her hand* during the procedure.”<sup>224</sup> By contrast, it recounts their sexual insemination in mechanistic terms suggestive of “artificial” reproduction: “[A]fter the initial impregnation failed,” the court writes, “the parties engaged in sexual intercourse in an attempt to impregnate Deborah.”<sup>225</sup>

*Steven S.* unsettles unexamined assumptions regarding the intrinsic nature of sexual and alternative reproduction—assumptions that presume a certain kind of intimacy in one setting but not in the other. As with the vignettes with which this Article began, sometimes “artificial” reproduction involves a human touch—literally, in the case of *Steven S.* And sometimes sexual reproduction is “purely instrumental,”<sup>226</sup> a form of sexual congress that is no less artful—and perhaps even more so—than “artificial” reproduction.

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who do not use physician assistance can avoid paternity if they contract out of it prior to conception. CAL. FAM. CODE §§ 7613(b)(2)(A), (C).

220. *Steven S.*, 127 Cal. App. 4th at 324.

221. *Id.* at 323.

222. *See id.*

223. *Id.* at 327–28.

224. *Id.* at 323 (emphasis added).

225. *Id.* at 324.

226. Shultz, *supra* note 200, at 304–05.

## 2. Intimate and Unplanned Alternative Reproduction

### a. *Intimate Alternative Reproduction*

Intimacy characterizes alternative reproduction as often as it does sexual reproduction. As for examples of “intimate” alternative reproduction from the donee’s point of view, the process of finding (and choosing) a donor (or reproductive partner) is an intimate act that has been analogized to the process of finding a romantic partner.<sup>227</sup> One of the women who conceived children with the semen of Trent Arsenault argued that she became “sexually intimate” with Mr. Arsenault in the process of getting to know him, even though she did not have sexual intercourse with him.<sup>228</sup> Similarly, individuals who access the social networks that unite people who desire to reproduce and co-parent together outside of a traditional intimate relationship<sup>229</sup>—networks like PollenTree.com, Coparents.com, Co-ParentMatch.com, MyAlternativeFamily.com, and Modamily.com<sup>230</sup>—describe the process of finding a co-parent in terms reminiscent of romance. “[J]ust like in any relationship,” one user of these networks remarks, “there needed to be a spark”<sup>231</sup>

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227. See, e.g., Steve Dilbeck, *Sperm Donors Wanted, Only High-Caliber Jocks Need Apply*, L.A. DAILY NEWS (Aug. 26, 2008), <http://www.dailynews.com/article/ZZ/20080826/NEWS/808269908> (summarizing the remarks of the California Cryobank’s founder that “any single woman who is out dating for a husband, or looking for a genetic source for her child, does the same thing” as a woman looking for a sperm donor).

228. First Amended Complaint for Declaratory and Injunctive Relief at 5, Doe v. FDA, No. C12-03412(EMC) (N.D. Cal. Jan. 11, 2013) [http://causeofaction.org/assets/uploads/2013/01/ECF-No-33\\_First-Amended-Complaint.pdf](http://causeofaction.org/assets/uploads/2013/01/ECF-No-33_First-Amended-Complaint.pdf). (“Prior to their first act of conception, Mr. Arsenault and Ms. Doe formed an *intimate* bond and close friendship over the course of numerous conversations. Mr. Arsenault revealed many *intimate*, personal details of his life to Ms. Doe and discussed with Ms. Doe his medical history, his health, and his views on the role of a father who helps a woman in a same-sex relationship conceive a child and start a family with her partner.” (emphasis added)); see also Abbasi, *supra* note 85, at 38 (“[S]exually intimate relationships can involve a broad range of physical and emotional intimacies, only some of which are contained within the [sexually intimate partner] definition advanced by the FDA.”).

229. See Alana Semuels, *Sperm Donor, Life Partner*, THE ATLANTIC (Dec. 8, 2014), <http://www.theatlantic.com/business/archive/2014/12/sperm-donor-life-partner/383421>.

230. Indeed, these co-parenting networks mimic romantic sexual networks, like Match.com, in the language that they use (“match”) to describe the process of finding a reproductive partner.

231. Abby Ellin, *Making a Child, Minus the Couple*, N.Y. TIMES (Feb. 8, 2013), <http://www.nytimes.com/2013/02/10/fashion/seeking-to-reproduce>

between him and his parenting mate. He describes his relationship with the woman with whom he chose to reproduce and parent as one where “electricity was palpable from the start.”<sup>232</sup>

Intimacy marks not just the donee’s search for a reproductive partner, but also her receipt of another person’s gametes.<sup>233</sup> Whether through alternative insemination or in vitro fertilization, receiving the gametes of another person into the body is a profoundly intimate act that involves the joining of bodies—not unlike sex, in fact, save for the body parts that are being joined.<sup>234</sup>

Finally, alternative reproduction might involve emotionally and physically intimate relations between the donee and her doctor or sexual interactions between the donee and her partner, if any. Romantic partners of the donee often help the doctor administer the syringe, which, recall, was a way for married couples to naturalize alternative insemination during the relatively early days of its use.<sup>235</sup> Others inseminate the donee at home with either a syringe, a turkey baster—the same turkey baster that effectively converts assisted conception into sexual conception in Virginia—or a device like the Semenette, which, as described by its creator, is a “novelty sex toy with specifically designed inner tubing embedded inside with an attached pump intended for people to be able to mimic intercourse and ejaculation.”<sup>236</sup> The Semenette’s inventor, Stephanie Berman, has remarked that she wanted to design a sex toy that doubled as an insemination device in order to conceive a child with her wife in a way that would allow her to “feel[] connected and involved”

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-without-a-romantic-partnership.html?pagewanted=all&\_r=2&.

232. *Id.*

233. This Article uses the pronoun “her” to describe most recipients of alternative insemination, but recognizes that some recipients are transgender men. See generally Laura Nixon, *The Right To (Trans)Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People*, 20 WM. & MARY J. WOMEN & L. 73 (2014) (exploring ways to include transgender people in the discussion about reproductive rights).

234. See also Matsumura, *supra* note 162, at 162 n.18 (using the term “intimate” to describe “agreements dealing with matters typically associated with intimacy, like sexual reproduction, even if they are made between people at arms’ length, e.g., surrogacy contracts”).

235. See Bernstein, *supra* note 180, at 1049–50.

236. Kira Brekke, *Introducing the Semenette, a New Sex Toy that Aims To Help Lesbian Couples Conceive a Baby*, HUFFINGTON POST (Mar. 28, 2015), [http://www.huffingtonpost.com/2015/03/28/sex-toy-lesbians-baby\\_n\\_6957758.html](http://www.huffingtonpost.com/2015/03/28/sex-toy-lesbians-baby_n_6957758.html).



and “to really feel like [she] had [a] bond in conceiving [her] daughter.”<sup>237</sup> As a recent *Slate* piece reports, lesbian couples like Berman and her partner are increasingly opting for these more “intimate” and “romantic” do-it-yourself inseminations.<sup>238</sup>

As for examples of “intimate” alternative insemination from the donor’s point of view, sperm donors may very well experience intimacy upon donating semen—despite the FDA’s assumption that sperm donation is not an “intimate” activity,<sup>239</sup> even when it occurs within the privacy of one’s home. Donors engage in intimate self-expression when reading the pornography supplied by sperm banks and using it to create semen through masturbation.<sup>240</sup> This is the same pornography, it bears mention, that receives constitutional protection in part because it “satisf[ies] intellectual and emotional needs,” according to the Supreme Court.<sup>241</sup>

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237. *Id.*

238. Jillian Keenan, *Beyond the Turkey Baster*, SLATE (Aug. 26, 2013), [http://www.slate.com/articles/double\\_x/doublex/2013/08/intrauterine\\_insemination\\_at\\_home\\_midwives\\_are\\_performing\\_iuis\\_without\\_formal.html](http://www.slate.com/articles/double_x/doublex/2013/08/intrauterine_insemination_at_home_midwives_are_performing_iuis_without_formal.html).

239. See *supra* notes 85, 88 and accompanying text (discussing the FDA’s refusal to grant non-sexual sperm donations between non-anonymous partners the mandatory testing exemption that it grants to “sexually intimate partners” under 21 C.F.R. Part 1271).

240. It is also worth noting that for some donors the donation process involves warmth, fun, intimacy, and human connection—making it look less like the transactional process sometimes conjured by those who describe gamete donation in purely commercial and institutionalized terms. Some male donors, for instance, gain pleasure from their work, as shown by sociologist Rene Almeling in her observational study of gamete providers and consumers. RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* 105 (2011). Demystifying an industry that is often conceptualized in purely “artificial” terms, Almeling reveals that at least one third of the sperm donors whom she interviewed said that “donation was pleasurable or fun, as it entailed an approved moment of looking at pornography and having an orgasm.” *Id.* Almeling’s work on egg donation similarly debunks common images of that practice as painful and unpleasant. See *id.* at 108 (stating that “egg donors describe the injections and egg retrieval in much less onerous terms than do infertile women because being paid thousands of dollars and not trying to become pregnant results in a different embodied experience of IVF”). Indeed, Almeling’s research on the “embodied experience” of gamete donation challenges the dominant conception of alternative reproduction as a world populated by corporate brokers and their arm’s length transactions. See *id.* at 8 (arguing that gamete donors’ physical experience of gamete donation is shaped by factors independent of the actual physical donation process); Rene Almeling & Iris Willey, *Same Medicine, Different Reasons: Comparing Women’s Bodily Experience of Producing Eggs for Pregnancy or for Profit* (2015) (unpublished manuscript) (on file with author) (testing and reporting results confirming the “embodiment” phenomenon in the context of egg donation).

241. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

These examples of “intimate” alternative reproduction from both the donee and the donor’s point of view suggest that alternative reproduction is as intimate as sexual reproduction from a qualitative as well as a quantitative perspective. In fact, in many cases there might even be more intimacy “to go around,” so to speak, in the alternative reproductive context than in the sexual reproductive context. The intimacy of alternative reproduction travels along multiple pathways and diverse distributional channels, uniting donor, donee, romantic partner, doctor, and sperm bank personnel, among others. Even if face-to-face “interface” does not exist between donor and donee, and even if the “interface” between donor and donee implicates commerce,<sup>242</sup> meaningful connection often does exist between and among all of the players involved in this distributional web. Some scholars assume that “meaningful interface” is absent in alternative reproduction—thereby rendering it susceptible to the state’s regulatory ambition,<sup>243</sup> but also more reliable from a contractual perspective<sup>244</sup>—because it does not involve certain body parts uniting with others in a single moment of heterosexual coitus or because it involves multiple players engaged in presumptively commercial activity. That assumption, however, privileges a narrow and dyadic conception of human intimacy over the more expansive and polyadic forms of connection and human flourishing that alternative reproduction often makes possible.<sup>245</sup>

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242. For a view challenging the dominant conception of commercial contracts as unnatural (and therefore presumptively non-intimate), see Martha M. Ertman, *Private Ordering Under the ALI Principles: As Natural as Status*, in *RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS OF THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF LAW OF FAMILY DISSOLUTION* 284, 285–86 (Mary Ann Glendon & Robin Wilson eds., 2006).

243. See, e.g., Fox, *Racial Classification*, *supra* note 103, at 1883.

244. Shultz, *supra* note 200, at 324 (“[T]he time, effort, emotion and money expended; and the involvement of non-intimates . . . mean that the intentions of those involved [in alternative reproduction] are more likely to be deliberative, explicit and bargained-for than is[] the case in most situations of ordinary coital reproduction.”).

245. Adrienne Davis makes a similar point with respect to opposition to polygamy, part of which, she argues, derives from a discomfort with “multiple players” in a marital or relational context. See Davis, *supra* note 12, at 2037 (“Essentialist claims that dyadicism is ‘good’ and polyfidelity is ‘bad’ naturalizes dyadic marriage as a static institution with an intrinsic set of ‘idealized’ traits, obscuring it as a product of political and legal struggle and reform”); see also Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure* 52 *STAN. L. REV.* 353 (2000) (arguing that opposition to bisexuality stems, in part, from a discomfort with the “excess” or “surfeit” that it represents).

Indeed, even the Supreme Court has explicitly recognized that intimacy often exists in clinical settings like the doctor's office. "[T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing," the *Paris Adult Theatre v. Slaton* Court observed, "is not just concerned with a particular place, but with a protected intimate relationship."<sup>246</sup> "Such protected privacy," the Court continued, "extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved."<sup>247</sup> As far back as 1973, then, when *Paris Adult Theatre* was decided, the Court recognized that intimacy—including procreative intimacy—was a capacious concept that applied to certain relationships and places (doctor/patient, doctor's office) no less than it did to others (sexual partners, bedroom).<sup>248</sup>

*b. Unplanned Alternative Reproduction*

Just as it can be intimate, alternative reproduction can also be unplanned—another attribute typically associated only with sexual procreation, even if the reality behind it, as Subsection 1 showed, often suggests otherwise. The dominant conception of alternative reproduction is one of control, planning, and deliberation. Objections to alternative reproduction for trying to replace the randomness of sexual procreation with eugenic perfection rest on this conception,<sup>249</sup> as did laws that excluded same-sex couples from marriage for being "too good" at procreation.<sup>250</sup>

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246. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13 (1973).

247. *Id.*

248. As the *Paris Adult Theatre* Court observed, the Supreme Court had already implicitly recognized in *Roe v. Wade*, decided just five months before *Paris Adult Theatre*, that the Constitution protects procreative intimacy between doctor and patient no less than it protects procreative intimacy between married persons. *Id.* at 66 n.13 (citing *Roe v. Wade*, 410 U.S. 113 (1973), for the proposition that constitutional privacy "extends to the doctor's office").

249. See, e.g., MICHAEL J. SANDEL, *THE CASE AGAINST PERFECTION* 45 (2007) (arguing against "bioengineering and genetic enhancement" in part because "we do not choose our children. Their qualities are unpredictable, and even the most conscientious parents cannot be held wholly responsible for the kind of child they have"); Fox, *Racial Classification*, *supra* note 103, at 1884 (arguing that the law ought to discourage gamete banks from making race salient in donor selection in part because "it seems unfitting for the affective ties parents have for their future child to be conditional on the child's being born with whatever qualities—ingenuity, athleticism, or their own racial features—parents happen to prefer").

250. Kenji Yoshino, *Too Good for Marriage*, N.Y. TIMES (July 14, 2006), [http://www.nytimes.com/2006/07/14/opinion/14yoshino.html?\\_r=0](http://www.nytimes.com/2006/07/14/opinion/14yoshino.html?_r=0) (discussing

More specifically, starting in the 2000s, several courts started to uphold laws prohibiting same-sex marriage by advertent to states' legitimate interest in "responsible procreation." The responsible procreation rationale theorized that same-sex couples did not need marriage because their procreation, if any, was planned and predictable—unlike the procreation of opposite-sex couples, which, on this view, was often unplanned and chaotic.<sup>251</sup> In one court's words: "[Alternative reproduction] require[s] a great deal of foresight and planning. 'Natural' procreation, on the other hand, may occur . . . with no foresight or planning."<sup>252</sup> This justification for exclusionary marriage laws conceptualized heterosexual procreation as an (often) "accidental" consequence of sex and marriage as the normatively necessary institutional response to that accident. On this telling, same-sex couples did not need marriage because their procreation was never accidental, always planned.

Even as it undercut the stereotype of sexual minorities as dissolute sexual actors,<sup>253</sup> the responsible procreation argument perpetuated the stereotype of gays and lesbians as a moneyed class for whom legal protections, like marriage, were unnecessary.<sup>254</sup> It also perpetuated another misconception: that alternative reproduction was deliberate and planned in ways that distinguished it from chaotic and unplanned sexual procreation. This misconception was particularly injurious, as it constituted the primary justificatory basis for many states' exclusionary marriage laws for years.

The responsible procreation rationale was only half right. It captured the reality that same-sex couples "plan" to have a child when undertaking alternative reproduction, unlike opposite-sex couples, whose sex sometimes results in "unplanned" pregnancies. It failed to capture, however, the reality that same-sex couples do not necessarily "plan" for all of the consequences of that reproduction. As with sex, unpredictable events

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and critiquing the "responsible procreation" rationale for exclusionary marriage laws).

251. See *infra* note 298 and accompanying text.

252. *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005).

253. See Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83, 89 (2013); Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 LOY. L.A. L. REV. 781, 789–90 (2012).

254. On this stereotype and its role in shoring up the responsible procreation rationale, see Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 443–44 (2007) [hereinafter Cahill, *The Genuine Article*].

might follow from alternative reproduction. A woman might be alternatively inseminated with semen from a donor other than the one whom she chose; a “mix-up” of this kind was the subject of a recent (unsuccessful) lawsuit against a sperm bank in Illinois.<sup>255</sup> Or, a donor who is not screened by a bank for a particular genetic condition might transmit that condition to a child, which has happened in some cases.<sup>256</sup> While alternative reproduction might involve “a great deal of foresight and planning,”<sup>257</sup> no reproduction is perfect, and mistakes or “accidents” can result from alternative reproduction just as they can result from sex.

The responsible procreation rationale and the “planned”/“unplanned” reproductive binary on which it rested has faded into oblivion, rejected by courts, including the Supreme Court, as incorrect, farcical even.<sup>258</sup> But its erroneous assumptions about sexual and alternative reproduction persist in the law’s dual system of reproductive regulation. Paradigms of “nature” and “artifice” continue to influence—and distort—legal understandings of sexual and alternative reproduction, even as the lived experience of those who engage in those methods of life creation suggests a more complicated picture.

#### B. PERFECT IDENTITY BETWEEN SEXUAL AND ALTERNATIVE REPRODUCTION

Sometimes, sexual and alternative reproduction share similar *traits*: intimacy and non-intimacy, planning and chance. Other times, sexual and alternative reproduction *are exactly the same thing*. Consider the growing practice of “one-night

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255. Abby Phillip, *White Woman Accidentally Inseminated with Black Man’s Sperm Loses Legal Battle*, WASH. POST (Sept. 5, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/05/white-woman-accidentally-impregnated-with-black-mans-sperm-loses-legal-battle> (discussing the story of Jennifer Cramblett, who lost her wrongful birth lawsuit against the sperm bank that mistakenly gave her fertility specialist sperm from the wrong donor).

256. Denise Grady, *As the Use of Donor Sperm Increases, Secrecy Can Be a Health Hazard*, N.Y. TIMES (June 6, 2006), <http://www.nytimes.com/2006/06/06/health/06opin.html?pagewanted=1&r=1> (discussing the story of an anonymous donor who “passed a serious gene defect to five” of the children conceived from his sperm).

257. *Morrison*, 821 N.E.2d at 24.

258. See *Baskin v. Bogan*, 766 F.3d 648, 662 (7th Cir. 2014) (dismissing the responsible procreation rationale as completely nonsensical). The demise of the responsible procreation rationale is discussed at greater length *infra* Part IV.B.

stand" or "natural" inseminations, where a man donates his sperm by sexually inseminating a woman for free.<sup>259</sup> Natural insemination is an attractive procreative option for some women because it provides them with the opportunity to avoid third-party brokers, like sperm banks and fertility providers, which might discriminate on the basis of sexual orientation, marital status, or both;<sup>260</sup> it also allows them to use fresh semen, which some believe maximizes the chances for conception.<sup>261</sup> In at least one jurisdiction, Québec, Canada, natural insemination is a formally recognized method of alternative conception. Under the Québec law, a man can donate sperm sexually to a woman and remain a "donor."<sup>262</sup> While no American jurisdiction recognizes a similar category of "artificial insemination by intercourse," as Part I revealed, some scholars have expressed varying degrees of support for it.<sup>263</sup>

The men and women who enter into natural insemination agreements regard the sexual aspect of the donation as irrelevant to the legal status of the child that results from it. Unlike courts, which maintain strict legal distinctions between sexual

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259. For media coverage of this phenomenon, see Elizabeth Picciuto, *Have Sperm, Will Travel: The 'Natural Inseminators' Helping Women Avoid the Sperm Bank*, DAILY BEAST (Nov. 29, 2014), <http://www.thedailybeast.com/articles/2014/11/29/have-sperm-will-travel-the-natural-inseminators-helping-women-avoid-the-sperm-bank.html>; Jeff Schneider, Muriel Pearson, & Alexa Valiente, *Meet the Men Having Sex with Strangers To Help Them Have Babies*, ABC NEWS (Nov. 13, 2014), <http://abcnews.go.com/Lifestyle/meet-men-sex-strangers-babies/story?id=26870643>.

260. See *N. Coast Women's Care Med. Grp., Inc. v. San Diego Sup. Ct.*, 189 P.3d 959 (Cal. 2008) (finding that the First Amendment of the United States Constitution did not bar a woman's lawsuit against her fertility provider for discriminating against her on the basis of sexual orientation in violation of a state public accommodations statute); Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 45 (2008) (discussing legislative proposals to restrict alternative reproductive technologies to certain groups like married women but observing that such proposals have so far failed to garner enough support).

261. See Picciuto, *supra* note 259.

262. Civil Code of Québec, S.Q. 1991, c 64, art 538.2 (Can.). The law, however, allows the man to establish paternity within one year of the child's birth. See *id.* Should this occur, the man "will displace the biological mother's partner"—if any—"as the child's other legal parent." Nicholas Bala & Christine Ashbourne, *The Widening Concept of "Parent" in Canada: Step-Parents, Same-Sex Partners, & Parents by ART*, 20 J. GENDER, SOC. POL'Y & L. 525, 542 (2012).

263. See Appleton, *supra* note 50, at 111 (suggesting that the law might consider this practice); Polikoff, *supra* note 126, at 59 (supporting this practice).

and alternative insemination,<sup>264</sup> the parties to natural insemination agreements prefer instead to conceptualize sex as merely one among many legally equivalent life-creating mechanisms. In this sense, natural insemination throws into relief the volatility of a binary that was never completely stable to begin with but that has grown even less so over time.

### C. SUMMARY

Different treatment of sexual and alternative reproduction is predicated on an incoherent factual assumption: that sexual and alternative reproduction are different in fact, therefore meriting different treatment in law. As this Part has shown, rather than assuming that sexual and alternative reproduction occupy the “extreme” ends of a single reproductive continuum, as the *Ferguson v. McKiernan* court suggested,<sup>265</sup> it is more accurate to say that sexual and alternative reproduction exist on their own continuum, one which is defined by “natural” and “artificial” extremes. For instance, sexual reproduction can be natural, uncontrolled, and unpredictable, or it can be artful, controlled, and planned. Similarly, alternative reproduction can bear the presumed hallmarks of natural sex—uncontrolled and intimate—or it can be more artful and controlled. Remapping the law’s reproductive binary in this way illuminates the qualitative similarities between sexual and alternative reproduction and complicates the law’s dual system of procreative regulation. It shows that the factors on which the law relies to justify a dual system of reproductive regulation—intimacy, familiarity, sex, deliberation, control, predictability, and naturalness—could just as easily describe one form of procreation as another.

In addition, remapping the binary in this way not only reveals the many similarities between, and in some cases perfect overlap of, sexual and alternative reproduction; it also suggests the deficiencies of basing reproductive regulation on factors—like intimacy—that are vague, imprecise, and easily susceptible to conflicting applications. For instance, under California law Mr. Arsenault is a father because he did not use a doctor in the insemination process; as such, his procreative activity was intimate in a way that excluded it from the class of procreative

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264. See *supra* notes 42, 43, 51, 252, and accompanying text.

265. *Ferguson v. McKiernan*, 940 A.2d 1236, 1246 (Pa. 2007) (describing sexual and alternative reproduction as two “extremes” on a reproductive continuum).

acts protected by California's alternative insemination statute. Under federal law, however, Mr. Arsenault is a *de facto* sperm bank because his relationships with his procreative donees were not intimate enough for him to receive the FDA testing exemption for sexually intimate partners. If under state law Mr. Arsenault's acts were too intimate, under federal law they were insufficiently so. Intimacy, it appears, simply cannot do the work that it must to sustain the sex/non-sex binary because no one can reliably define what intimacy does and does not mean.

#### IV. CHALLENGING THE BINARY: CONSTITUTIONAL DEFICIENCIES

Even if sexual and alternative reproduction were formally distinct, and even if the law's sex/non-sex binary were not predicated on vague and imprecise factors like intimacy, that binary would still raise concern as a matter of constitutional law. The Supreme Court's landmark marriage equality decision in *Obergefell v. Hodges*<sup>266</sup> suggests that alternative reproduction is a fundamental right, thereby challenging those who argue that the state can regulate alternative reproduction because it lacks robust constitutional protection. In addition, the Court's existing and emerging jurisprudence on sexual privacy and family formation suggests that procreation is constitutionally significant not because of *how* it occurs—sexually or alternatively—but rather because of *what* it effectuates: family formation and intentional parenthood. As such, that jurisprudence calls into question the sex/non-sex binary and sex exceptionalism more generally; it also casts doubt on the law's privileging of form over intent, and of one form of intimacy over another, in reproductive matters.

##### A. ALTERNATIVE REPRODUCTION AS A FUNDAMENTAL RIGHT

Many, if not most, of the proposed regulations of alternative reproduction discussed in Part I rest either explicitly or implicitly on the "premise" that "reproduction through [reproductive] technologies is a 'lower status' kind of reproduction, worthy of less protection."<sup>267</sup> *Obergefell* destabilizes that prem-

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266. 135 S. Ct. 2584 (2015).

267. Cohen, *supra* note 125, at 445; see also Mary Patricia Byrn & Rebecca Ireland, *Anonymously Provided Sperm and the Constitution*, 23 COLUM. J. GENDER & L. 1, 20 (2012).



ise not only by suggesting that procreation is a fundamental right—as opposed to a more modest equality right—but also by laying the foundation for protecting alternative reproduction under that right.

The Constitution makes no reference to a procreative right, let alone to a sexually procreative right. Constitutional text alone, then, does not mandate different treatment of sexual and alternative conception; nor does that text contemplate the privileged status often assigned to the former in contemporary discussions about alternative reproductive regulation.

In addition, neither the history surrounding, nor the text of, the case that purportedly established the fundamental right to procreate, *Skinner v. Oklahoma*,<sup>268</sup> supports the argument that only sexual procreation receives fundamental right status. *Skinner* nowhere mentions sexual procreation specifically; instead, it refers to procreation in more general terms, stating: “Marriage and procreation are fundamental to the very existence and survival of the race.”<sup>269</sup> Furthermore, when *Skinner* acknowledged the constitutional importance of procreation in 1942, alternative insemination was not just available but also used on a “widescale basis.”<sup>270</sup>

Finally, Supreme Court doctrine nowhere suggests that procreation merits constitutional protection only if it results from sexual intercourse.<sup>271</sup>

268. 316 U.S. 535 (1942) (striking down Oklahoma’s mandatory sterilization law under the federal Equal Protection Clause). For the view that *Skinner* established a fundamental right to procreate under the Fourteenth Amendment, see Wu, *supra* note 124, at 1475 (“The strongest precedent for establishing a fundamental right to procreate is *Skinner*.”). Not all scholars endorse that view; they instead argue that *Skinner* at most establishes a more modest equality right in procreative matters. See *infra* notes 272, 285, and accompanying text.

269. *Skinner*, 316 U.S. at 541. For the view that *Skinner* forged a right to procreate in the shadow of sexual procreation specifically, see Ariela R. Dubler, *Sexing Skinner: History and the Politics of the Right To Marry*, 110 COLUM. L. REV. 1348, 1359 (2010) (reading *Skinner* not just as a case about the dangers of totalitarianism and forced sterilization, but also “as a case about the larger phenomenon of disentangling sex from reproduction and the social anxieties raised by that separation”).

270. John Lawrence Hill, *What Does It Mean To Be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 353 (1991).

271. The Supreme Court has never applied *Skinner* to a case about alternative reproduction, nor has it ever had the occasion to do so. See *id.* at 367. As Dubler shows, *Skinner* “languished in relative obscurity” for decades after it was decided. Dubler, *supra* note 269, at 1370. When it was finally cited—first by Justice Harlan in his 1961 *Poe v. Ullman* dissent, 367 U.S. 497, 543

To the contrary, the Court's recent decision in *Obergefell* indicates that the Constitution protects not just procreation but alternative procreation specifically as a fundamental right. *Obergefell* provides critical guidance on two procreation-specific questions that have remained unanswered since *Skinner*. The first is whether procreation is a fundamental right under the Due Process Clause or a more limited equality right. The second is whether the constitutional right to procreate includes the right to reproduce through alternative means.

As for the first issue, *Obergefell* suggests that procreation is a fundamental liberty right rather than a more modest equality right, as some scholars who support alternative reproductive regulation have argued.<sup>272</sup> As it does with the right to marry, which before *Obergefell* was grounded in equality rather than exclusively in liberty,<sup>273</sup> *Obergefell* discusses procreation in

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(1961) (Harlan, J., dissenting), and four years later by Justice Douglas, *Skinner*'s author, in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)—it was subtly transformed from a case about (marital) procreation into one about marital privacy and the importance of extending constitutional protection to spouses' decisions *not* to reproduce. By 1967, when the Court cited *Skinner* in support of a constitutional right to marry in *Loving v. Virginia*, 388 U.S. 1, 12 (1967), "*Skinner*'s transformation into a due process case about the right to marry was complete." Dubler, *supra* note 269, at 1373; see also Hill, *supra* note 270, at 366 ("*Skinner* has been incorporated unofficially into substantive due process analysis as part of the privacy right elaborated years later in *Griswold v. Connecticut* and its progeny").

272. See, e.g., Rao, *supra* note 134, at 1475 (arguing that *Skinner* does not "embod[y] a fundamental right to reproductive autonomy" and that its "equal protection language is no accident; to the contrary, it reveals the Supreme Court's longstanding concern for reproductive equality"); Goodwin, *supra* note 107, at 1089 (arguing that *Skinner* "says little about the importance or value of reproduction or the right to reproduce"). Not all scholars agree with these more constrained readings of *Skinner*. See Robertson, *Assisting Reproduction*, *supra* note 122, at 1493 (arguing that "[a]lthough [*Skinner*] couched its decision in the language of equality . . . the rhetoric of a liberty right to reproduce . . . explains the frequency with which the case is now cited"); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1019 (1979).

273. Prior right to marry cases, including *Loving v. Virginia* and *Zablocki v. Redhail*, either interwove equality and liberty or rested exclusively on the Equal Protection Clause, leading some commentators to suggest that those cases at most established that the Constitution guarantees "equal access" to marriage, not that marriage is a fundamental right. See, e.g., Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right To Marry*, 158 U. PA. L. REV. 1375 (2010); Cass R. Sunstein, *The Right To Marry*, 26 CARDOZO L. REV. 2081, 2083 (2005) (suggesting that the state could abolish marriage without violating due process). *Obergefell*, by contrast, is a persistent meditation on the marriage "right." Even as it clearly observes the equality dimension of marriage, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603–05 (2015), *Obergefell* in-

fundamental rights terms. “[I]n *Skinner v. Oklahoma ex rel. Williamson*,” the majority states, “the Court invalidated *under both principles* [liberty and equality] a law that allowed sterilization of habitual criminals.”<sup>274</sup> Like the marriage right, the procreative right derives from the “independent principles” that animate due process and equal protection.<sup>275</sup> Moreover, like the marriage right, the procreative right involves “both” liberty “and” equality.<sup>276</sup> Given that *Obergefell* refers to marriage and procreation as “related rights” that compose a “unified whole,”<sup>277</sup> it is not implausible to conclude that *Obergefell* provides an opening for what some scholars see lacking in *Skinner*: a robust articulation of procreation’s *substantive* constitutional dimension.<sup>278</sup>

If that is correct, then *Obergefell* unsettles arguments in favor of alternative reproductive regulation that flow from reproductive binarism—specifically, arguments that assume that *Skinner* protects, if anything, a more constrained equality right in procreative decision-making rather than a more expansive liberty right to reproduce.<sup>279</sup> In a world where procreation is not

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sists that “[t]he Due Process Clause and the Equal Protection Clause . . . set forth *independent principles*,” *id.* at 2603 (emphasis added), and that “[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, *too*, from that Amendment’s guarantee of the equal protection of the laws,” *id.* at 2602 (emphasis added). The majority’s use of the adverbial “too” suggests that marriage is protected as a matter of substantive due process as well as equal protection. For a discussion of *Obergefell*’s conceptualization of marriage in pure liberty terms, see Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 168 (2015).

274. *Obergefell*, 135 S. Ct. at 2604 (emphasis added).

275. *Id.*

276. *Id.*

277. *Id.* at 2600.

278. In this sense, *Obergefell* conceptualizes procreation in terms reminiscent of *Meyer v. Nebraska*, a pre-*Skinner* case that similarly described behavior *related to* procreation—raising a family—in terms of liberty rather than of equality. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the term “liberty” under the Fourteenth Amendment “denotes not merely freedom from bodily restraint but also the right of the individual to contract, . . . to marry, establish a home and bring up children . . .”). *Obergefell* also conceptualizes procreation in terms reminiscent of *Paris Adult Theatre I v. Slaton*, a post-*Skinner* case that described procreation *specifically* in terms of liberty. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973) (stating that the “right to privacy guaranteed by the Fourteenth Amendment . . . encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, *procreation*, and child rearing” (emphasis added)).

279. See *supra* notes 133–37 and accompanying text.

protected under substantive due process, reproductive regulation that burdens all alternative procreators is of little constitutional moment. But in a world where procreation is a fundamental right, reproductive regulation that burdens any alternative procreator raises serious constitutional concern.

As for the second issue, *Obergefell* establishes a strong basis for arguing that the Constitution protects alternative reproduction no less vigorously than it does sexual reproduction.<sup>280</sup> *Obergefell* states that non-traditional practices, like same-sex marriage, may qualify for fundamental right status under the Due Process Clause, notwithstanding the Court's earlier insistence in *Washington v. Glucksberg* that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"<sup>281</sup> Justice Kennedy's majority opinion openly rejects *Glucksberg*'s approach with respect to some fundamental rights, including those relating to "marriage and intimacy," and refuses to define rights "by who exercised them in the past."<sup>282</sup> "[R]ights come not from ancient sources alone," the majority avers. "They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."<sup>283</sup>

In rejecting the traditional approach to determining rights like marriage, *Obergefell* lays the foundation for establishing

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280. To be sure, the Supreme Court arguably laid the groundwork for conceptualizing alternative procreation as a fundamental liberty right in *Paris Adult Theatre v. Slaton*, where the Court not only recognized that the right to privacy protected procreation, but also suggested that privacy (and therefore, by implication, procreation) did not depend on any particular, localized conception of intimacy in order to receive robust constitutional protection. See *Paris Adult Theatre*, 413 U.S. at 66 n.13 (stating that "the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship" and that "[s]uch protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved"). The Supreme Court thus provided support even before *Obergefell* for the proposition that the Constitution protects (alternative) procreative relations between doctor and patient no less robustly than it protects (sexually) procreative relations between spouses or unmarried sexual partners.

281. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (plurality opinion)).

282. *Obergefell*, 135 S. Ct. at 2602.

283. *Id.*; see also Yoshino, *supra* note 273, at 162 (stating that "[a]fter *Obergefell*, it will be much harder to invoke *Glucksberg* as binding precedent" on the question of history's role in determining fundamental rights).

constitutional parity between (traditional) sexual reproduction and (non-traditional) alternative reproduction. If marriage and procreation are “related rights,” as *Obergefell* says,<sup>284</sup> and if the traditional approach for determining rights under the Due Process Clause does not apply to marriage, then it follows that the traditional approach for determining rights probably does not apply to procreation, either.<sup>285</sup> If that is correct, then *Obergefell* complicates reproductive regulation that flows from a belief that alternative procreation is different from—and constitutionally inferior to—that of the conventional sexual variety.

#### B. THE DEVOLUTION OF SEX EXCEPTIONALISM

Much of the actual and proposed reproductive regulation considered in Part I reflects a belief that sexual and alternative reproduction are fundamentally distinct because one involves sex and the other does not. Sexual and alternative reproduction “are, in fact, different, and different enough to satisfy any level of constitutional scrutiny,” Cahn writes.<sup>286</sup> “[N]atural reproduction” and “clinical or assisted reproduction . . . are distinctly different,”<sup>287</sup> Michele Goodwin asserts.

The foundational assumption that underlies these statements—that sex is unique and therefore merits different, and often privileged, treatment—is factually misguided, as Part IV demonstrated. But according to Supreme Court jurisprudence on sex, marriage, and procreation, it is also constitutionally deficient, as that jurisprudence suggests that the constitutional rights to sexual autonomy, marriage, and even procreation do not—and cannot—turn on the question of whether one engages in sex, narrowly and traditionally defined.

Consider the Court’s decision in *Lawrence v. Texas*, which established a right to sexual privacy that includes same-sex couples.<sup>288</sup> *Lawrence* found that criminal sodomy laws violated a constitutionally protected right to non-coital, non-procreative conduct.<sup>289</sup> The Court there asserts that the Fourteenth Amendment prohibits the state from “defin[ing] the meaning of

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284. *Obergefell*, 135 S. Ct. at 2600.

285. Some scholars have suggested that *Skinner* does not establish a broad right to procreate but rather is concerned with equality. See Rao, *supra* note 134, at 1475.

286. Cahn, *Do Tell!*, *supra* note 9, at 1106.

287. Goodwin, *supra* note 107, at 1091–92.

288. 539 U.S. 558 (2003).

289. See *id.*

[a sexual] relationship *or to set its boundaries*”<sup>290</sup>—prohibits it, that is, from codifying a particular vision of sex and intimacy in the law.<sup>291</sup> Where the *Bowers v. Hardwick* Court took offense at the mere suggestion that “homosexual activity” existed on the same constitutional plane as “family, marriage, [and] procreation,”<sup>292</sup> *Lawrence* makes clear that the Constitution does not require sex to *look* a certain way—does not require that it involve the union of specified body parts and specified sexes—in order to receive constitutional protection. It repudiates the *Bowers* Court’s requirement that sex amount to gender-specific coitus in order to merit fundamental right status,<sup>293</sup> and suggests that coitus was not a constitutional requirement even in 1986: “*Bowers* was not correct when it was decided, and it is not correct today.”<sup>294</sup>

Where *Lawrence* indicates that heterosexual coitus is no longer a necessary condition to enjoy the right to sexual autonomy, *Obergefell* indicates that heterosexual coitus is no longer a necessary condition to enjoy the right to marry—nor even, perhaps, the right to procreate. *Obergefell* explicitly rejects sex exceptionalism in marriage by repudiating the procreation rationale for exclusionary marriage regimes. That rationale had different iterations over the years, evolving from a procreation as “propagation of the species” justification to the more recent “responsible procreation” rationale discussed earlier. Each of the procreation rationale’s versions, however, was driven by sex exceptionalism and the sex/non-sex binary foregrounded by this Article. When *Baker v. Nelson*, the first case to consider the constitutionality of a same-sex marriage prohibition, upheld that prohibition in 1971 by adverting to the procreation as “propagation of the species” rationale,<sup>295</sup> and throughout the

290. *Id.* at 567 (emphasis added).

291. *But see* Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 829 (2010) (arguing that “the *Lawrence* model for protecting sexual conduct is problematic not only because it channels gay sex into one marriage-like form, but also because it channels all sex into such a form”).

292. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

293. The *Lawrence* Court criticized the *Bowers v. Hardwick* Court’s obsessive focus on the mechanics of the sex act at issue there, reasoning that the intimate relationship, not the conduct that a relationship might entail, is the proper focus of a constitutional inquiry. *Lawrence*, 539 U.S. at 567.

294. *Id.* at 578.

295. 191 N.W.2d 185 (Minn. 1971) (rejecting a federal constitutional challenge to Minnesota’s opposite-sex marriage requirement).

heyday of that rationale over the next few decades,<sup>296</sup> same-sex couples *were* “propagating the species” through alternative rather than sexual means.<sup>297</sup> When the procreation rationale eventually morphed into its “responsible procreation” version,

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296. See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. App. 1974) (denying a marriage license to two men on the ground that “marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race . . . [and] it is apparent that no same-sex couple offers the possibility of the birth of children by their union”); *Hatcher v. Hatcher*, 580 S.W.2d 475, 483 (Ark. 1979) (observing that “[m]arriage is an important institution that is fundamental to our very existence and survival”); *Adams v. Howerton*, 673 F.2d 1036, 1043 (9th Cir. 1982) (observing that same-sex marriage restrictions were constitutional because “homosexual marriages never produce offspring”); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1971).

297. See Bernstein, *supra* note 179, at 1060 (identifying a “shift in the 1940’s [sic] to popular use” of alternative insemination). Courts and legislators in several states, including Minnesota, had been wrestling with issues surrounding alternative insemination for years before *Baker* was decided, and by 1973 the Uniform Law Commissioners had codified the trend toward legalization of alternative insemination through the passage of the Uniform Parentage Act. See Bernstein, *supra* note 179, at 1069 n.125 (stating that “[s]everal bills were also introduced in Minnesota in 1949” and that these bills “would have made AI unlawful but would have legitimized the children”); Arthur A. Levisohn, *Dilemma in Parenthood: Socio-Legal Aspects of Human Artificial Insemination*, 4 J. FORENSIC MED. 147, 166 (1957). Other states considered similar bills around the same time. See SWANSON, *supra* note 192, at 216 (discussing alternative insemination bills pending in Ohio and Minnesota); George P. Smith, II, *Through a Test Tube Darkly: Artificial Insemination and the Law*, 67 MICH. L. REV. 127, 143 (1968) (referring to alternative insemination bills pending in Indiana, New York, Virginia and Wisconsin between 1948 and 1950). In addition, by the 1980s, as courts continued to justify same-sex marriage exclusions on the ground that same-sex couples could not fulfill marriage’s central goal of helping to propagate the species, commercial “sperm banks had become a common feature of the fertility landscape, with over 400 clinics in operation,” Gill, *supra* note 24, at 1721, and the commercial gamete market began to cater to lesbian women in particular, with the country’s first lesbian-owned sperm bank, Pacific Reproductive Services, opening for business in California in 1984. SWANSON, *supra* note 192, at 227 (observing a 1970s “movement by women without male partners to take charge of their reproduction through artificial insemination”); NeJaime, *supra* note 5, at 1197 (chronicling the “lesbian baby boom” of the 1980s and 1990s); *Why a Lesbian-Owned Bank Is a Positive Choice for Any Woman*, PAC. REPRO. SERVS., [https://www.pacrepro.com/index.php?main\\_page=why\\_prs](https://www.pacrepro.com/index.php?main_page=why_prs) (last visited Nov. 3, 2016). Alternative reproduction did not emerge as an *explicit* theme in marriage equality jurisprudence until the 1995 decision *Dean v. D.C.*, which located the origins of the right to marry in sexual coitus specifically when it stated: “Although we recognize that gay and lesbian couples can and do have children through adoption, surrogacy, and artificial insemination . . . we cannot overlook the fact that the Supreme Court has deemed marriage a fundamental right substantially because of its relationship to procreation.” 653 A.2d 307, 333 (D.C. 1995).

which posited a distinction between the “accidental” procreation of “natural” procreators (for whom marriage was necessary) and the “planned” procreation of “artificial” procreators (for whom marriage was superfluous),<sup>298</sup> courts’ reliance on the sex/non-sex binary was more explicit. Either way, though, same-sex couples were denied the ability to marry for half a century because of the *manner* in which they procreated rather than because of their inability *to* procreate. Put differently, sex exceptionalism and a sex/non-sex binary justified—and drove—exclusionary marriage regimes from the earliest days of constitutional litigation surrounding them.

Like so many of the marriage equality decisions that preceded it,<sup>299</sup> *Obergefell* repudiates both sex exceptionalism and the sex/non-sex binary by rejecting all versions of the procreation rationale for same-sex marriage prohibitions. *Obergefell* barely pauses to consider that rationale in its various incarna-

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298. See *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. App. 2005); see also *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (Daughtrey, J., dissenting) (summarizing and criticizing the responsible procreation rationale); *Hernandez v. Robles*, 794 N.Y.S.2d 579, 599 (Sup. Ct. 2005), *rev’d*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005), *aff’d*, 855 N.E.2d 1 (N.Y. 2006); *Standhardt v. Superior Court*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003). The responsible procreation rationale had two variations. One version projected same-sex marriage in a positive light because of same-sex couples’ superior form of procreation. This was the version of responsible procreation that first appeared in *Standhardt v. Superior Court*. The other version projected same-sex marriage in a negative light because of its putative power to disrupt and diminish social norms surrounding marriage. According to it, same-sex marriage, by devaluing the inherent worth of traditional marriage, disincentivized opposite-sex couples to enter into that relationship and incentivized them instead to procreate—irresponsibly—outside of it. For decisions that rested on this second version of responsible procreation, see *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1016 (D. Nev. 2012), *rev’d sub nom.*, *Latta v. Otter*, 771 F.3d 456, 471 (9th Cir. 2014). Both versions denied same-sex couples the legal ability to marry because of their inability to procreate in a certain manner—through sexual rather than alternative means—rather than because of their inability to procreate at all.

299. See, e.g., *Latta*, 771 F.3d at 471 (rejecting all forms of the procreation rationale and stating that Idaho’s responsible procreation argument “runs off the rails” in claiming that “marriage’s stabilizing and unifying force is unnecessary for same-sex couples, because they always choose to conceive or adopt a child”); *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014) (stating that it was “wholly illogical” to think that same-sex marriage would affect opposite-sex couples’ procreative decision-making); *Baskin v. Bogan*, 766 F.3d 648, 662 (7th Cir. 2014) (rejecting responsible procreation as non-sensical); *Bostic v. Schaefer*, 760 F.3d 352, 385 (4th Cir. 2014) (rejecting all iterations of the procreation rationale); *Windsor v. United States*, 699 F.3d 169, 188 (2d Cir. 2012), *aff’d*, 133 S. Ct. 2675 (2013); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 999–1000 (N.D. Cal. 2010), *aff’d sub nom.*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).



tions, as if to highlight its feebleness through near disregard. In response to the states' reliance on procreation as "propagation of the species," the Court simply notes that "[a]n ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State."<sup>300</sup> Later, the Court dismisses the states' invocation of responsible procreation—the fear that same-sex marriage will “lead[] to fewer opposite-sex marriages” because it “severs the connection between natural procreation and marriage”<sup>301</sup>—as both “counterintuitive” and “unrealistic.”<sup>302</sup> In repudiating the procreation rationale, *Obergefell* indicates that the Constitution protects a fundamental right to marry that *does not discriminate with respect to the mechanics of procreation*. While strongly signaling that procreation might require marriage as a matter of social norms,<sup>303</sup> *Obergefell* rejects the inverse of that argument, namely that marriage requires sexual procreation specifically as a matter of constitutional law.

Where *Lawrence* thus rejects sex exceptionalism with respect to the right to sex, *Obergefell* rejects it with respect to the right to marry. Even more, *Obergefell* and marriage equality more generally might be read to reject sex exceptionalism with respect to the right to procreate. As discussed earlier, *Obergefell* more than once describes marriage and procreation as “related rights” that compose a “unified whole.”<sup>304</sup> If sex exceptionalism and the sex/non-sex binary cannot satisfy infringements on the right to marry, then it follows that they likely cannot satisfy infringements on the “related” right to procreate, either.

By establishing that heterosexual intercourse and conventional understandings of intimacy are not the sine qua non of sexual, marital, familial, and perhaps even procreative autonomy, *Lawrence* and *Obergefell* destabilize the panoply of existing and proposed regimes that rely on sex exceptionalism and its narrow conception of sex and intimacy.<sup>305</sup> Those regimes jus-

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300. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

301. *Id.* at 2606–07.

302. *Id.* at 2607.

303. *Id.* at 2600 (stating that the children of unmarried same-sex couples “suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life,” and justifying, in part, the Court’s decision to extend the marriage right to same-sex couples on their children’s “suffer[ing]” and “humiliation”).

304. *Id.*

305. For the argument that *Lawrence* places constitutional limits around

tify different treatment of sexual and alternative reproduction by adverting to perceived differences between “intimate” heterosexual reproduction and “non-intimate” alternative reproduction—differences that *Lawrence* and *Obergefell* say are irrelevant when determining the scope of fundamental rights relating to intimate and family life. In addition, those regimes rely on and reinforce the same sex/non-sex binary that *Lawrence* and *Obergefell* clearly reject.

### C. FAMILIAL DISESTABLISHMENT

The law’s sex/non-sex binary disciplines non-traditional family formation. As such, it conflicts with the trend away from sex exceptionalism in constitutional law, as the previous Section demonstrated. It also conflicts with a cognate jurisprudential trend: the trend toward familial disestablishment.

During the 1960s and 1970s, Supreme Court landmarks like *Griswold v. Connecticut*,<sup>306</sup> *Eisenstadt v. Baird*,<sup>307</sup> *Roe v. Wade*,<sup>308</sup> and *Moore v. City of East Cleveland*<sup>309</sup> disestablished social and familial norms privileging the traditional family, defined as the sexually procreative nuclear family. More recently, gay rights jurisprudence has broadened the reach of the principles animating those early cases. *Lawrence* extended *Griswold* and *Eisenstadt*’s interrelated values of relational privacy and non-procreative sex to non-coital sex between same-sex partners. Marriage equality jurisprudence extended those same values to same-sex marriage and non-traditional family formation.

More specifically, marriage equality jurisprudence stands not just for the relatively narrow proposition that the Constitu-

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governmental regulation of procreative conduct, see Abbasi, *supra* note 85, at 39; Katheryn D. Katz, *Lawrence v. Texas: A Case for Cautious Optimism Regarding Procreative Liberty*, 25 WOMEN’S RTS. L. REP. 249, 253 (2004).

306. 381 U.S. 479, 485–86 (1965) (holding that the Fourteenth Amendment’s Due Process Clause protects a right to marital privacy that prohibits the government from criminalizing married persons’ use of contraception).

307. 405 U.S. 438, 453 (1972) (holding that the Fourteenth Amendment’s Equal Protection Clause prohibits the government from treating single persons and married persons differently with respect to their decisions to use contraception).

308. 410 U.S. 113 (1973) (holding that the Fourteenth Amendment’s Due Process Clause prohibits the government from infringing on a woman’s right to decide whether or not to terminate a pregnancy).

309. 431 U.S. 494, 498 (1977) (plurality opinion) (holding that the Fourteenth Amendment’s Due Process Clause prohibits the state from passing restrictive housing laws that “slic[e] deeply into the [biological] family itself”).

tion protects a fundamental right to marry that includes same-sex marriage, but also for the broader principle that the Constitution prohibits the state from establishing a particular vision of kinship to which its citizens must conform.<sup>310</sup> In *Kitchen v. Herbert*,<sup>311</sup> the Court of Appeals for the Tenth Circuit embraced the familial disestablishment principle when it held that exclusionary marriage laws violated an individual's constitutionally guaranteed rights to marry and "establish" the kind of "family" she desired.<sup>312</sup> In *Obergefell*, the Supreme Court embraced that principle when it recognized the vigorous protection that the Fourteenth Amendment extends to "choices concerning . . . family relationships."<sup>313</sup> Far from protecting just same-sex marriage, then, the marriage equality precedent safeguards familial choice and association, "cast[ing] serious doubt . . . on specific efforts to limit opportunities for same-sex couples to form families."<sup>314</sup> That precedent furthers a trend "toward a thinner form of establishment, if not disestablishment," in the law of marriage as well as in the law of the family writ large.<sup>315</sup>

Familial disestablishment jurisprudence unsettles the actual and proposed reproductive regulation considered in Part I, including the judicial and legislative refusal to view sex as just another form of alternative reproduction. The law declines to recognize a category of "artificial insemination by intercourse,"<sup>316</sup> reasoning that the "distinction between reproduction

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310. For the argument that contemporary marriage equality jurisprudence stands for an expansive right to familial self-definition, see Cahill, *Oedipus Hex*, *supra* note 2, at 246–49; Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014); NeJaime, *supra* note 5, at 1231 (arguing that "marriage equality may facilitate, rather than disrupt, the new model of parenthood built in earlier nonmarital work").

311. 755 F.3d 1193 (10th Cir. 2014).

312. *Id.* at 1199 (holding that "the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws").

313. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015). The Court's decision in *United States v. Windsor* paved the way for the constitutional parity that *Obergefell* establishes between same-sex and opposite-sex families with regard to familial choice. See *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (criticizing the Defense of Marriage Act in part because it "makes it even more difficult for the children [of same-sex couples] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives" (emphasis added)).

314. NeJaime, *supra* note 5, at 1255.

315. Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1270 (2010).

316. *Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. Ct. 2000).

via sexual intercourse and the non-sexual clinical options for conception" is "commonsense."<sup>317</sup> In so doing, it uses sex as a proxy for intimacy, thereby establishing an idealized vision of sex. Moreover, it imposes biological fatherhood in situations where it is unwanted, thereby establishing an idealized vision of biological, dual-gender parenthood.<sup>318</sup>

In addition, familial disestablishment jurisprudence upsets regulatory regimes that rely on the sex/non-sex binary to establish the traditional family. Some of those regimes use the sex/non-sex binary to entrench the traditional nuclear family for overtly ideological reasons. For example, David Blankenhorn asserts a distinction between procreation the "old-fashioned way" and procreation the "intentional" way in order to justify alternative reproductive regulation that privileges biology over other forms of connection and affiliation.<sup>319</sup> Others use that binary in more subtle ways to channel individuals into thinking about the family according to a traditional paradigm of it. For example, Cahn invokes the binary to justify the regulation of alternative reproduction—by eliminating sperm donor anonymity,<sup>320</sup> for instance, and by requiring sperm donors to register with a sperm donor registry<sup>321</sup>—in ways that force those who rely on sperm donors to conceptualize them in familial terms.<sup>322</sup> Whether transparently ideological or not, all of these regimes are in serious tension with constitutional law's interrelated values of familial autonomy and disestablishment. Not only do they frustrate individuals' efforts "to establish" the

317. *Ferguson v. McKiernan*, 940 A.2d 1236, 1245 (Pa. 2007).

318. See Polikoff, *supra* note 126, at 59, 62 (urging the law to move "towards [allowing] . . . all women to raise a child without a legal father," should they so desire, and arguing that forced paternity in cases where women do not want it reinforces the message that "children's families will be incomplete without a man").

319. Marquardt, *supra* note 8, at 23. For a longer discussion of how alternative reproduction has become the new resting place for Blankenhorn's longstanding anxiety over non-traditional family formation, see Cahill, *Oedipus Hex*, *supra* note 2, *passim*.

320. For the argument that anonymous gamete donation could lead to accidental incest, see Naomi Cahn, *Accidental Incest: Drawing the Line – or the Curtain? – for Reproductive Technology*, 32 HARV. J.L. & GENDER 59 (2009).

321. For the argument that the federal government ought to establish national gamete donor registries, see Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 203–06 (2009); Cahn, *The New Kinship*, *supra* note 104, at 6.

322. For an elaboration of how Cahn's (and others') arguments favoring greater regulation of alternative reproduction raise familial establishment concerns, see Cahill, *Oedipus Hex*, *supra* note 2, at 226–37.

family that they want, but they also simultaneously reinforce and solidify a normative conception of kinship.

#### D. PROCREATIVE INTENTIONALITY AND PURPOSEFUL PARENTHOOD

Reproductive binarism privileges the manner of procreation over the intentions of the procreative parties. As such, it frustrates constitutional norms favoring intention as the foundation of parental and familial rights. For more than fifty years, constitutional law has recognized the values of private ordering and procreative intentionality in shaping rights relating to privacy, procreation, and the family.<sup>323</sup> Recent constitutional decisions on marriage and the family endorse and reaffirm those same values.

In an article on the synergistic relationship between family law and marriage equality jurisprudence,<sup>324</sup> Douglas NeJaime argues that *Obergefell* vindicates the “intentional parenthood principle” that emerged from family law advocacy on behalf of intentional—and often non-biological—parents starting in the 1990s.<sup>325</sup> Contesting the view that marriage equality represents a dramatic departure from that advocacy,<sup>326</sup> NeJaime contends that “marriage equality was partly enabled by—and in turn enables—intentional and functional concepts of parenthood forged in earlier *nonmarital* [family law] advocacy.”<sup>327</sup> Under this view, marriage equality reflects, channels, and solidifies the model of intentional procreation and parenthood that mate-

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323. See Shultz, *supra* note 200, at 327–28, 327 n.82 (stating that “[o]ur society generally favors the fulfillment of individual purposes and the amplification of individual choice. . . . Our political and cultural traditions emphasize individual liberty, particularly in central arenas of personal life, such as reproduction,” and citing *Skinner*, *Griswold*, and *Roe* in support of that proposition).

324. NeJaime, *supra* note 5.

325. *Id.* at 1200, 1249. Family law’s emphasis on intention as the basis for legal rights, rather than on traditional indicia of legal parenthood like biology, gender, and marriage, has been widely observed and amply documented. See, e.g., Ian Ayres, *Empire or Residue: Competing Visions of the Contractual Canon*, 26 FLA. ST. U.L. REV. 897 (1999); Ertman, *supra* note 167, at 81–82; Hill, *supra* note 270, at 386 (“[D]efending an ‘intentionalist’ account of the right of procreation . . .”); Robertson, *Procreative Liberty*, *supra* note 97, at 429; Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443; Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002).

326. See NeJaime, *supra* note 5, at 1231–36 (summarizing these arguments).

327. *Id.* at 1236.

rialized over decades of LGBT family law work.<sup>328</sup> Like the body of family law that paved its way, marriage equality prioritizes function and intent over traditional indicia of parenthood like biology, sexual orientation, and even marriage itself.

By valuing procreative form over procreative intent, reproductive binarism undermines constitutional law's prioritizing of private ordering in procreative and familial affairs. Laws that regulate the practices of alternative reproduction, including mandatory non-anonymity laws and mandatory donor registries, frustrate procreative and familial intent by imposing a particular image of family—biological paternity—on those who might want to define family in less-traditional ways. Judicial decisions that void sexual insemination contracts on public policy grounds do so as well, privileging as they do reproductive acts over reproductive intentions.

## V. REPRODUCTION BY INTENT

What would the law look like in a world where legal relationships and reproductive practices did not turn so heavily on a factually incoherent and constitutionally questionable sex/non-sex binary? The primary objectives of this Article have been to illuminate the pervasive presence of that binary in the law and to challenge it from a factual/formal and constitutional perspective. For that reason, this Part only briefly—and tentatively—answers the question posed above.

Section A proposes a unitary model of reproductive regulation grounded in intent and argues that that model ought to guide the regulation of sexual and alternative reproduction alike. The current approach to reproductive regulation centers on criteria—like intimacy, sex, deliberation, control, chance, artfulness, and naturalness—that are vague, equivocal, and misleading; they are also normatively undesirable and constitutionally questionable in light of existing and emerging constitutional norms relating to sex, marriage, procreation, and family formation. A new model that better comports with those norms is needed, and Section A offers one. Section B anticipates and responds to objections to the model put forth in Section A.

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328. According to NeJaime, marriage equality has also enabled intentional parenthood in some states, like Florida and Iowa, where courts have invoked the marriage equality precedent in support of intentional same-sex family formation. *See id.* at 1246–47, 1256–58 (discussing Iowa and Florida, respectively).

### A. TOWARD AN INTENT-BASED MODEL OF REPRODUCTION

This Article favors a unitary system of reproductive regulation that turns on intent rather than on procreative mechanics and on unreliable (and constitutionally questionable) criteria like sex and intimacy. Other scholars support similar treatment of sexual and alternative reproduction, although not for all of the reasons and in the ways identified here.<sup>329</sup> For some, the similarities between sexual and alternative reproduction militate in favor of less state intervention in alternative reproduction. For others, those similarities support greater, not lesser, regulation of it.

For instance, arguing that “like cases” ought to receive “like treatment,”<sup>330</sup> Marsha Garrison proposes that the law prohibit anonymous sperm donation in cases involving women who are not married to someone with whom they intend to raise a child that results from that donation. Such women would include single women and perhaps also lesbian couples, whether married or not.<sup>331</sup> “[O]utside the [alternative insemination by

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329. See, e.g., ERTMAN, *supra* note 125, at xiv–xv (discussing similarities between “Plan A” and “Plan B” parenthood in terms of procreative intention); Appleton, *supra* note 50, at 111 (asking whether parentage law’s “sex/no sex dividing line” warrants reconsideration in light of the “natural insemination” movement and of the growing number of non-traditional procreators who seek to create family through alternative means); NeJaime, *supra* note 5, at 1253 (stating that marriage equality “presents a challenge to family law regulations that continue to draw distinctions between families formed by different-sex and same-sex couples”); Polikoff, *supra* note 126, at 59 (supporting the creation of families through sexual and non-sexual means); Robertson, *Procreative Liberty*, *supra* note 97, at 428 (favoring parity of treatment between sexual and alternative reproduction because of the similar interests involved in each). None of these commentators situates, as this Article does, different treatment of sexual and alternative reproduction within the larger context of the law’s sex/non-sex binary. Nor does any consider why maintaining that binary—in all of the ways that the law does—makes little sense as a factual matter and is likely unconstitutional in light of existing and emerging constitutional norms relating to sex, marriage, procreation, and family formation.

330. Garrison, *Law Making for Baby Making*, *supra* note 104, at 879. Garrison posits that “[t]he law has never cared whether sperm and ovum met in a fallopian tube or in the uterus; there is no obvious reason why it should care if sperm and ovum meet in a petri dish. What matters are the relational interests that ultimately result.” *Id.* at 880.

331. See *id.* at 896–97 (supporting anonymous donation in cases involving married women and their husbands, so long as their husbands consent); *id.* at 903 (opposing anonymous donation in cases involving single women). Because Garrison wrote her article before same-sex marriage was legally recognized in any U.S. jurisdiction, it is hard to say whether she would support anonymous donation in cases involving women married to other women, where the “parental presumption” might apply. On the application of the presumption in that

donor] context,” she says, “our legal system grants no parent, male or female, the right to be a sole parent.”<sup>332</sup> “[T]here is no obvious reason why paternity laws should mandate different results when women conceive using [alternative insemination by donor] and when women conceive sexually.”<sup>333</sup>

Like Garrison, this Article contends that sexual and alternative reproduction are alike in ways that demand “like treatment.” Unlike Garrison, however, it does not favor importing the rules that currently govern sexual conception—including the universal rules that disallow paternity waivers—into the alternative reproductive context in order to achieve that result. Moving toward a unitary system of reproductive regulation in this way is ill-advised for two reasons.

First, applying the rules of sexual conception to alternative reproduction, thereby not only *eliminating* sperm donor anonymity but also *mandating paternity* for sperm donors who donate to unmarried women, will never achieve the parity that Garrison imagines. To the contrary, such a regime will significantly curtail the reproductive autonomy of alternative procreators in ways, and for reasons, that are normatively undesirable.

To see why that is so, consider that the law cannot force an unmarried woman who conceives with a man sexually to reveal that man’s identity; Garrison herself acknowledges as much: “[C]ontemporary family law strongly encourages unmarried women to establish the paternity of their children, *but does not mandate it*.”<sup>334</sup> A not insignificant percentage of unmarried women either cannot, or do not want to, identify their child’s father, as evidenced by studies on the number of unmarried women—a group that accounted for nearly forty-one percent of all live births in 2013<sup>335</sup>—who do not seek child support from

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context, see Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006); NeJaime, *supra* note 5, at 1240–49. At times Garrison appears to reject anonymous donation even for single women who plan to raise a child with an unmarried female partner. Garrison, *Law Making for Baby Making*, *supra* note 104, at 910. At other times, however, Garrison suggests that she would support anonymous donation for lesbians, so long as they are married and can satisfy family law’s two-parent ideal. *See id.* at 911 n.340.

332. Garrison, *Law Making for Baby Making*, *supra* note 104, at 906.

333. *Id.* at 903.

334. *Id.* at 911 (emphasis added).

335. Joyce A. Martin et al., *Births: Final Data for 2013*, NAT’L VITAL STAT. REP., Jan. 15, 2015, at 2 [http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64\\_01.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf).



the father, even in cases where federal law requires them to do so.<sup>336</sup> While known paternity might exist in most sexual conception cases, it does not exist in some of them.

*Mandating* legal paternity—and not just non-anonymity—in the alternative insemination context, therefore, would not establish parity between alternative reproduction and sexual conception *as the latter actually exists*. Rather, doing so would curtail the reproductive autonomy of alternative procreators in order to achieve parity between alternative reproduction and sexual conception *as the latter should ideally exist*, according to some.<sup>337</sup>

A second reason why Garrison's recommendation is ill-advised relates to the law's shift toward intent-based parent-

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336. See, e.g., SHARON HAYS, *FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM* 79–82 (2003) (discussing unmarried women's reluctance or inability to identify their child's father, even though federal law requires them to do so in order to receive government support); Garrison, *Law Making for Baby Making*, *supra* note 104, at 911–12.

337. See Ertman, *What's Wrong with a Parenthood Market?*, *supra* note 14, at 32 (arguing that “it seems unfairly burdensome to impose a standard of two-biological-parent families for children conceived through [alternative insemination] that is not imposed on parents who conceive coitally”). In this sense, Garrison's proposal to require paternity in a large subset of alternative reproduction cases represents a normatively and constitutionally problematic example of what I have elsewhere termed “regulating at the margins.” See Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 43 (2012). Regulating at the margins occurs, I argue, when the law uses a marginal kinship practice like same-sex marriage or alternative reproduction as an occasion to imagine what the ideal family ought to look like for everyone. *Id.* at 57. The procreation rationale for exclusionary marriage laws was a problematic—and, according to the Supreme Court in *Obergefell v. Hodges*, unconstitutional—example of “regulating at the margins” because it subjected same-sex couples to a normative ideal, procreative marriage, from which opposite-sex couples were completely exempt. 135 S. Ct. 2584, 2606–07 (2015) (rejecting the procreation rationale for exclusionary marriage laws). As with same-sex marriage prohibitions, laws that require paternity—or simply eliminate gamete donor anonymity—for all donor-conceived persons are a constitutionally deficient example of regulating at the margins, as such laws impose a normative ideal on alternative procreators that cannot be universally imposed on sexual procreators. See Courtney Megan Cahill, *Universalizing Anonymity Anxiety*, J.L. & BIOSCIENCES (forthcoming 2016) (discussing proposals to eliminate gamete donor anonymity as constitutionally problematic attempts to regulate all procreation “at the margins”). Garrison herself recognizes that her proposal selectively targets alternative procreators in this manner. See Garrison, *Law Making for Baby Making*, *supra* note 104, at 912 (observing that “[i]t is true that public policy tolerates unmarried women's failure to establish the paternity of sexually conceived children largely because it is powerless to do anything about it. [Alternative insemination by donor] offers a context in which dual parenting could far more reliably be enforced” (emphasis added)).

hood. As Martha Ertman observes in her critique of Garrison's proposal, Garrison appears to favor the conventional nuclear family and "majoritarian beliefs"<sup>338</sup> rather than private ordering and intent as guiding principles for family law.<sup>339</sup> Indeed, Garrison's antidote to reproductive binarism perpetuates many of the problems of reproductive binarism discussed earlier, including its tendency to undermine the norms and values that have emerged from the law's engagement with the family and its radical transformation over the last several decades—norms and values like procreative freedom, sexual disestablishment, familial disestablishment, familial pluralism, and procreative/parental intentionality.

This Article argues that intent, rather than majoritarian values or reproductive mechanics, ought to serve as the law's principal guide when operationalizing a unitary system of reproductive regulation. Even as this Article recognizes that sexual and alternative reproduction are formally similar in ways that demand equal treatment, it also argues that intent ought ultimately to guide the regulation of all reproduction, regardless of the form that it assumes.

A unitary system of reproductive regulation grounded in intent would render many of the proposed regulations of alternative reproduction considered earlier legally questionable. If alternative procreators are subject to regulations that abolish a key industry norm—anonymity—then there is little reason to exempt sexual procreators from those same regulations.<sup>340</sup> Similarly, a unitary system of reproductive regulation would cast doubt on proposals to punish gamete banks for organizing donors in race-salient ways—by, for instance, permitting users of those banks' websites to easily filter (and therefore eliminate) prospective donors on the basis of their race.<sup>341</sup> "If we scrutinize white single mothers' selection of white sperm donors, we should also critique white men who choose to marry white women," Ertman writes. "If this level of meddling seems ridicu-

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338. Ertman, *What's Wrong with a Parenthood Market?*, *supra* note 14, at 38–39 (including Garrison among commentators who do not "agree that private decision-making is appropriate to determine who can become a parent").

339. *Id.*

340. For an elaboration of this argument, see Cahill, *Oedipus Hex*, *supra* note 2, at 211–12; *see also* Cohen, *supra* note 125, at 443.

341. *See* Fox, *Racial Classification*, *supra* note 103, at 1852–55 (discussing race-conscious donor catalogs).

lous, it is hard to see how it is appropriate when the insemination occurs technologically rather than coitally.<sup>342</sup>

In addition, a unitary system of reproductive regulation would require re-evaluating actual regulations of alternative reproduction, including FDA regulations that exempt donations between "sexually intimate" partners from its mandatory testing requirements. Such regulations rest on criteria, like sex and intimacy, which are an unstable and constitutionally questionable basis for reproductive regulation. If the law exempts sexually intimate partners from mandatory testing—as it does, whether they are procreating through alternative or sexual means—then it ought also to exempt procreative partners who are "intimate" in other ways, like Trent Arsenault and the women who sought his services.

Finally, a unitary system of reproductive regulation would necessitate a second look at the law's deeply rooted public policy against sexual conception agreements and at the continued statutory refusal to define sex as a form of assisted reproduction. If the law permits paternity waivers in the alternative reproductive context, then it ought to permit them as well in the sexual reproductive context, at least where the parties have a duly executed contract to that effect. The judicial and legislative repudiation of a category of "artificial insemination by intercourse" fails to comport with the lived experience of sexual and alternative reproduction—as well as with the constitutional law that protects both. It fails to reflect the reality that sexual and alternative reproduction are similar in essential ways, and that the latter takes place under conditions of intimacy at least as often as the former does not. Moreover, it fails to comport with the disestablishment and autonomy norms that constitutional law robustly protects.

#### B. ANTICIPATED OBJECTIONS

This Section briefly anticipates—and responds to—three objections to the regulatory scheme envisioned above: (1) objections relating to health and safety; (2) objections relating to sexual conception contracts; and (3) objections relating to unintended consequences on paternity.

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342. Ertman, *What's Wrong with a Parenthood Market?*, *supra* note 14, at 30.

## 1. Objections Relating to Health and Safety

One objection to moving toward a more unitary system of reproductive regulation relates to health and safety: failure to regulate alternative reproduction by imposing caps on donation and eliminating anonymous donation could lead to health epidemics—should a single donor with a deleterious condition pass it on to hundreds of progeny—as well as to “accidental incest” between unsuspecting donor-conceived children.<sup>343</sup> No less concerning are the consequences of expanding the FDA’s definition of “sexually intimate” partners to encompass a larger swath of procreative partners who do not conform to the government’s normative view of sexual intimacy—and who therefore can evade the FDA’s mandatory testing requirements for a host of transmissible diseases.

These objections are empirically weak—how likely is it that donor-conceived children will “commit” accidental incest?<sup>344</sup>—but they also fail to reckon with the fact that the risk of any of those misfortunes happening is significantly greater in the sexual reproductive context than it is in the one which regulators are targeting.<sup>345</sup> This is not to say that gamete banks cannot impose their own caps on donation—some of them do<sup>346</sup>—or prohibit anonymous donation in order to avoid the above-mentioned threats should they see a need to. Rather, it is simply to point out the problems with the argument that governmental regulation of one form of reproduction (alternative) is absolutely required in order to avert the same evils to which another *unregulated* form of reproduction (sexual) could also lead.

## 2. Objections Relating to Sexual Conception Contracts

A second objection to the unitary system that this Article envisions relates to sexual conception contracts, and their supposed untrustworthiness and moral unsavoriness. Some might argue that public policy militates against legal recognition of such contracts, which is the status quo today, for good reason:

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343. See CAHN, *THE NEW KINSHIP*, *supra* note 104, at 117; Cahn, *supra* note 320, *passim*.

344. See Cahill, *Oedipus Hex*, *supra* note 2, at 208.

345. See *id.* at 211–12.

346. See, e.g., *Cryobank Regulations and Statistics*, NW CRYOBANK, <https://www.nwcryobank.com/cryobank-regulations-and-statistics> (last visited Nov. 3, 2016) (establishing a limit of twenty-five family units, or “children from the same donor living in the same home,” per donor).

contractual intent is unreliable when a contract involves sex, parents cannot bargain away their children's support, and contracts whose consideration is sex are morally distasteful and invariably void. Each of these objections fails as a persuasive argument against legal recognition of sexual conception contracts and paternity waivers.

*a. Contractual Intent Is Unreliable in Sexual Agreements*

The argument that contractual intent is unreliable when the contract involves sex assumes that persons who enter into sexual conception contracts are "intimates" in an "ongoing relationship[]." <sup>347</sup> Many of the people who participate in the natural insemination "movement," however, might be near (or complete) strangers. <sup>348</sup> In addition, the argument that consent can never be adequately guaranteed when an agreement involves sex reflects the questionable logic of sex exceptionalism. That logic contemplates contractual autonomy in most other domains but not in the sexual domain, thereby giving the state, rather than the parties themselves, the power "to place [its] valuation[] on particular deals." <sup>349</sup> Finally, on a more practical level, that argument overlooks the possibility that the state could require the parties to a sexual conception agreement to follow certain formalities in order to validate it. For instance, jurisdictions might require both parties to be represented by counsel when entering into sexual conception agreements, as many do in the context of prenuptial, surrogacy, and embryo agreements. <sup>350</sup> "Foremost" among the reasons why the Indiana court in *In re Paternity of M.F.* upheld the donor insemination agreement at issue there was the fact that it was "prepared by an attorney." <sup>351</sup> Such agreements could also be subject to periodic review, as prenuptial agreements often are.

*b. Parents Cannot Bargain Away the Rights of Their Children*

The argument that sexual conception agreements are void because parents cannot bargain away the rights of their chil-

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347. Shultz, *supra* note 200, at 324.

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

349. Emens, *supra* note 7, at 356.

350. See, e.g., *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) (stating that if "[e]xplicit agreements avoid costly litigation in business transactions. . . . They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable").

351. *In re Paternity of M.F.*, 938 N.E.2d 1256, 1261 (Ind. Ct. App. 2010).

dren, financial or otherwise, confuses two sets of cases: one where men attempt to contract out of paternity *before* sex and one where men attempt to contract out of child support obligations *after* a child has come into being. Men who enter into sexual conception contracts belong to the first, not the second, category, even as courts often casually confuse the boundaries between the two.<sup>352</sup> Indeed, the whole point of a sexual conception contract is to allow men to *avoid paternity in the first place*, not to *opt out of paternity, already established*.

In addition, the argument that the law ought to prohibit sexual conception agreements because they leave a child with only one source of financial support is both over-inclusive and under-inclusive. It is over-inclusive because, in some cases, two persons might be the intended parents of a child who is sexually conceived with a third party. It is under-inclusive because the law in many jurisdictions does not prohibit single women from conceiving with a donor who waives paternity.<sup>353</sup>

Finally, the argument that sexual conception contracts wrongfully absolve sexual conceivers of their financial responsibilities assumes that forced fatherhood, whether a man intentionally or accidentally conceives, is a worthy objective. Some philosophers and sociologists disagree, questioning whether the law ought to impose paternal obligations on men who do not want them. They argue that coerced paternity fails to respect autonomy by forcing a relationship and its attendant responsibilities on a person who wishes to avoid that status.<sup>354</sup> It could also lead “to painful ‘disestablishment’ battles that are unlikely to be in the best interest of the child”<sup>355</sup> and to “violence or threats of violence against a mother . . . when child support orders are enforced against” unwilling men.<sup>356</sup> Even if we reject

352. See *Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. Ct. 2000) (analogizing the sexual insemination contract at issue in that case to situations where fathers have attempted to contract out of child support obligations after a child has come into being and refusing to uphold the contract for that reason); *Straub v. B.M.T.*, 645 N.E.2d 597, 599–600 (Ind. 1994) (same).

353. See Appleton, *supra* note 50, at 99–101.

354. See, e.g., Elizabeth Brake, *Fatherhood and Child Support: Do Men Have a Right To Choose?*, 22 J. APPLIED PHIL. 55 *passim* (2005); Laurie Shrage, *Is Forced Fatherhood Fair?*, N.Y. TIMES: OPINIONATOR (June 12, 2013), [http://opinionator.blogs.nytimes.com/2013/06/12/is-forced-fatherhood-fair/?\\_r=0](http://opinionator.blogs.nytimes.com/2013/06/12/is-forced-fatherhood-fair/?_r=0).

355. Shrage, *supra* note 354.

356. *Id.*; see also HAYS, *supra* note 336, at 82 (documenting instances where women applying for financial assistance did not want to reveal a possi-

the extreme result of these positions—non-paternity for accidental fathers—it is harder to reject non-paternity in the case of the man who contracts out of parenthood *ex ante*. If we worry about autonomy violations when the law imposes paternity on men who become fathers by accident, then we ought to worry about them significantly more when the law imposes paternity on men who contract out of paternity before sex.

*c. The Law Disfavors Sexual Consideration*

The argument that sexual conception contracts are void because “sexual intercourse as consideration is itself against public policy”<sup>357</sup> assumes that sex is the consideration underlying the agreement. But consideration for an agreement to exchange sperm through sexual coitus in return for a waiver of parental rights (and responsibilities) is the sperm (and concomitant waiver of paternity), not the sex act that transmits the sperm. Indeed, even if sex *were* part of the consideration, the law generally permits severing of the sexual aspects of a contract from its non-sexual terms. In *Marvin v. Marvin*, the California Supreme Court held that cohabitation contracts were valid in California “unless expressly and *inseparably* based upon an illicit consideration of sexual services.”<sup>358</sup> In other words, *Marvin* permits “sever[ing] ‘meretricious’ (or sexual) consideration from other contract terms,”<sup>359</sup> which is possible in the context of sexual conception agreements. Finally, even if severing were not possible in the sexual conception setting, one could argue that the law’s refusal to recognize sexual consideration in this setting represents yet another problematic example of sex exceptionalism and the law’s “distaste for sex.”<sup>360</sup>

3. Objections Relating to Unintended Consequences on Paternity

A final objection to a unitary system of reproductive regulation based on intent relates to its unintended consequences on paternity. Years ago, conservative commentators worried that “no strings attached” sperm donation would have a negative effect on fatherhood by reducing men to reproductive mate-

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ble father’s name, as federal law requires, in part because of a fear of violence against them).

357. *Straub v. B.M.T.*, 645 N.E.2d 597, 601 (Ind. 1994).

358. *Marvin v. Marvin*, 557 P.2d 106, 114 (Cal. 1976) (en banc).

359. *Appleton*, *supra* note 50, at 114.

360. *Id.*

rial and thereby making all fathers seem dispensable.<sup>361</sup> Under this view, anonymous sperm donation (the marginal case) would have the unintended consequence of creating irresponsible fathers more generally (the general case).<sup>362</sup>

One response to this fear is that there is simply no evidence that sperm donation—or alternative reproduction generally—has devalued parenthood for everyone. In fact, this objection is reminiscent of one version of the procreation rationale rejected by the Supreme Court in *Obergefell*, namely the argument that same-sex marriage would devalue marital parenthood for heterosexual couples and thereby disincentivize them from entering that institution.<sup>363</sup> The same-sex marriage “parade of horrors” never materialized. Quite the opposite: after Massachusetts recognized same-sex marriage in 2003,<sup>364</sup> marriage rates increased, not decreased, in that state,<sup>365</sup> and divorce rates were lowest in states that recognized same-sex marriage before *Obergefell*.<sup>366</sup>

In addition, were the law to recognize sexual conception agreements, it is unlikely that a sizeable percentage of people would opt into them. The Centers for Disease Control estimates that less than two percent of all live births in the United States in 2013 were attributable to alternative reproductive technology, which includes, but is not limited to, alternative insemination.<sup>367</sup> Figures on natural insemination as a form of alternative

361. See, e.g., BLANKENHORN, *supra* note 104, at 16 (arguing that “fatherhood as anonymous insemination” is contributing to “decultured paternity,” which “necessarily fractures any coherent social understanding of fatherhood”).

362. *Id.* at 184 (arguing that sperm fatherhood is a “means of paternal suicide: the collaboration of the male in the eradication of his fatherhood”).

363. See, e.g., Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1016 (D. Nev. 2012), *rev’d sub nom.*, Latta v. Otter, 771 F.3d 456, 471 (9th Cir. 2014).

364. Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (finding that same-sex marriage was constitutionally required under Massachusetts’ constitution).

365. Carlos Maza, *10 Years Later, Horror Stories About Marriage Equality in Massachusetts Haven’t Come True*, EQUALITYMATTERS (Nov. 19, 2013), <http://equalitymatters.org/blog/201311190003>.

366. See Nate Silver, *Divorce Rates Higher in States with Gay Marriage Bans*, FIVETHIRTYEIGHT (Jan. 12, 2010), <http://fivethirtyeight.com/features/divorce-rates-appear-higher-in-states>.

367. NAT’L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION, 2013 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 7 (2015), [https://www.cdc.gov/art/pdf/2013-report/art\\_2013\\_national\\_summary\\_report.pdf](https://www.cdc.gov/art/pdf/2013-report/art_2013_national_summary_report.pdf). These figures are likely not perfect, as the Centers for Disease Control and Prevention (CDC) does not impose any robust sanctions



reproduction do not exist, but the actual numbers are likely to be significantly lower than two percent. Less—significantly less—than two percent is unlikely to have a sizeable enough impact on social norms around parenthood and fatherhood to shift those institutions in undesirable ways.

### CONCLUSION

The law's sex/non-sex binary is an equal opportunity regulator, affecting everyone and disciplining many: gays no less than straights, singles no less than the partnered, the fertile no less than the infertile. It reaches into the most private of domains—procreation and family formation—and governs relationships that ordinarily receive vigorous constitutional protection. It is persistent and commands popular support: while no longer a valid basis for marriage discrimination against same-sex couples, reproductive binarism has emerged as a major player for both conservatives and progressives in debates over whether, why, and to what extent the law ought to regulate the practices of alternative reproduction and non-traditional family formation. Finally, its scope is vast, if at times invisible, affecting everything from paternity determinations to the regulation of gamete banks under federal law. Indeed, few questions are more important when approaching an issue of reproductive regulation than whether the subject of that regulation does, or does not, involve sex in some way—however remote.

Notwithstanding its power to regulate intimate relationships far and wide, the sustainability of the sex/non-sex binary is uncertain. Barely a year into its life, *Obergefell v. Hodges* has prompted scholars to consider the larger implications of a marriage equality precedent on alternative reproduction and on family law more generally. Tantalizing in this regard is Douglas NeJaime's suggestion that "marriage equality [may produce] more pluralistic family law" for all families by "accelerat[ing] the slippage between marital and nonmarital

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on clinics that do not provide data to the CDC showing IVF success rates, even as the CDC has technically "required" clinics to provide that information since 1992, when Congress passed the only federal "statute dealing specifically with assisted reproduction, the Fertility Clinic Success Rate and Certification Act." GREELY, *supra* note 15, at 154–55. The only "sanction" imposed on non-reporting clinics is a published report by the CDC listing "the names of the scofflaws," which, according to the CDC's 2012 report, the most recent report available, amounts to thirty clinics nationwide. *Id.* at 155.

parentage” in ways that “yield more robust recognition for *some* unmarried parents.”<sup>368</sup>

NeJaime’s “slippage” metaphor invites reflection on whether marriage equality will also accelerate other kinds of slippages, including the one between sexual and alternative reproduction foregrounded by this Article. As a factual matter, slippage between those two so-called “extremes”<sup>369</sup> is already occurring—and has been for some time now—given the growing similarities between sexual and alternative reproduction. Sexual reproduction is always “assisted,” alternative reproduction is occasionally sexual, and sexual and alternative reproduction are sometimes *the same thing*. The “slippage” that this Article anticipates—and advocates—is therefore not one of fact but rather one of law: the slippage between sexual and alternative reproductive *regulation*.

This Article has built a case for why legal slippage between those two variables is normatively desirable: the law’s current system of reproductive regulation is grounded in criteria, like intimacy, that are vague, imprecise, and just as easily applicable to one form of reproduction as to another. It has also argued that regulatory slippage is likely inevitable: existing and emerging constitutional norms surrounding sex, intimacy, marriage and procreation ought to make it harder for the law to maintain a sex/non-sex binary that turns on sex exceptionalism and intimacy essentialism. What that slippage will, or could, look like in practical terms remains to be seen. This Article has offered one possibility, but its primary purpose has been to stimulate critical engagement with a binary that no longer comports with the lived reality of procreation as it exists for many people, or with the law that increasingly protects it.

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368. NeJaime, *supra* note 5, at 1253.

369. *Ferguson v. McKiernan*, 940 A.2d 1236, 1246 (Pa. 2007) (describing sexual and alternative reproduction as two “extremes” on a reproductive continuum).

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