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The Curing Law: On the Legal Evolution of Baby-Making Markets

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THE CURING LAW:

ON THE LEGAL EVOLUTION OF BABY-MAKING MARKETS

Noa Ben-Asher[†]

How has morality shaped current baby-making markets? What bargaining conditions have been set for individuals seeking to participate in those markets? The article offers a new paradigm to examine the legal regulation of reproductive technologies. The main argument is that a paradigm of cure has shaped historical and current legal baby-making markets. Namely, reproductive technologies that have historically been understood as forms of cure (such as sperm donations and egg donations) have developed into market commodities, while others (such as full surrogacy) which have not been understood as cure, have not. The article examines and critiques the cure paradigm. Specifically, the article challenges one current manifestation of the cure paradigm: the legal distinction between “full surrogacy” (where a surrogate impregnated using her own ova) and “gestational surrogacy” (where an embryo is created in vitro and then transferred into the surrogate’s uterus). Gestational surrogacy has been established by many state courts and legislatures as a legitimate form of curing female infertility, while full surrogacy has generally been either prohibited or deemed unenforceable. This distinction is problematized in this article not only because it is based on contestable values, but also because it has produced serious market failures that have effectively excluded many potential participants from entering the baby-making markets. Thus, the article argues that it is time to reevaluate the cure paradigm, and that the first step in this reevaluation involves the legalization of full surrogacy by state courts and legislators.

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INTRODUCTION

How has morality shaped current baby-making markets?¹ What bargaining conditions have been set for individuals seeking to participate in those markets? The main argument of this article is that a paradigm of ‘cure for infertility’ has shaped historical and current legal baby-making markets. The morality *in* the baby-making markets is not the

¹ I take the term baby-making from Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67 (2007).

same as the morality of the baby-making markets. The latter has engaged what has come to be known as the commodification debates.² The former is what this article attempts to decipher. The relationship between morality and the baby-making markets offered here is as follows. Reproductive technologies that have historically been understood as forms of cure (sperm/egg donations and gestational surrogacy) have developed into market commodities, while others which have not been understood as such (full surrogacy for example), have not.

If cure is the gateway to baby-making markets, we must critically assess how law makers have so far interpreted its meanings. Judicial and legislative authorities have formulated two main understandings of cure: male and female. Curing male infertility has historically involved the purchase of sperm from a donor to replace the missing paternal sperm, whereas curing female infertility has entailed actual participation of the “infertile” female body either through gestation (with donated eggs) or by providing her own eggs (to a gestational surrogate). These two types of medical and legal understandings of cure have determined which reproductive technologies enter the baby-making markets and which do not. Reproductive technologies that have not been legally and medically understood as

² See, e.g., RETHINKING COMMODIFICATION (Martha M. Ertman & Joan Williams, eds. New York University Press 2005); Margaret Jane Radin, *Contested Commodities* (1996); Elizabeth Anderson, *Is Women’s Labor a Commodity?* 19 *Phil & Pub. Aff.* 71 (1990); Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 *VA. L. REV.* 2305 (1995) (concluding that the analogy to baby-selling “only strengthens the conclusion that surrogacy transactions should be legal.”); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 *J. Legal Stud.* 323 (1978) (urging the enforcement of baby-selling agreements); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 *J. CONTEMP. HEALTH L. & POL’Y* 21 (1989) (arguing in favor of surrogacy contract enforcement).

curing infertility have not been legitimized, and their access to the market was consequently blocked. The most salient example of this today is full surrogacy.

The immediate legal implication of this critique of the cure paradigm is that full surrogacy should be legalized. The term “full surrogacy” here refers to bargains in which a surrogate is impregnated using her own ova (typically with the sperm of the intended parent). In contrast, the term “gestational surrogacy” refers to bargains where an embryo is created *in vitro* (typically using the ova and sperm of the intended parents) and then transferred into the surrogate’s uterus.³ Full surrogacy is a low-cost, low-tech procedure that involves the simple injection of sperm into the uterus of the potential surrogate, while In Vitro Fertilization (IVF) is fancy, costly, and medically intrusive. Gestational surrogacy, especially since the well-known case of *Johnson v. Calvert* (1993) has been established by many state courts and legislatures as a legitimate form of curing female infertility,⁴ while full surrogacy, especially since the famous case of *Baby M* (1988) has generally been either prohibited or deemed unenforceable.⁵ This distinction is problematized here not only because it is based on contestable values, but also because it has produced serious market failures that have effectively excluded many potential

³ To this day, most cases and literature refer to what I call full surrogacy as “traditional surrogacy.” Ironically, it is the “traditional” surrogacy that has been since the 1980s the most controversial. To avoid confusion, the term full surrogacy, especially in relationship to its legitimate sibling, “gestational surrogacy,” probably better captures the nature of the bargain in question.

⁴ *Johnson v. Calvert*, 5 Cal. 4th 84 (Cal.1993) (enforcing a gestational surrogacy agreement against gestational surrogate).

⁵ *In re Baby M*, 109 N.J. 396, 411 (N.J. 1988) (holding that full surrogacy agreement is unenforceable because it conflicts with public policy and statutory law of New Jersey).

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participants from entering the baby-making markets. Given its harsh market consequences and contestable moral grounds, the article argues that it is time to re-evaluate the cure paradigm, and that the first step in this re-evaluation involves the legalization of full surrogacy by state courts and legislators.

The article proceeds in three Parts. Part I describes the emergence of the cure paradigm in medical and legal regulation of reproductive technologies. Focusing on the historical moment of the legalization of donor sperm insemination, this part shows how traditional moral objections to donor insemination that defined it as an act of adultery were dismissed by courts and legislators in favor of a new modern scientific understanding of donor insemination as cure.

Part II traces the development of the existing legal distinction between full and gestational surrogacy, demonstrating that the distinction is a clear manifestation of the cure paradigm. Full surrogacy has not been understood by courts and legislators as a cure treatment, but as maternal replacement of the intended mother by the full surrogate. Consequently, in family law the full surrogate will in most cases be considered the legal and natural mother, and in contract law, a full surrogate agreement will rarely be enforced against the full surrogate because it is perceived as an agreement either to sell a child, or to give the child up for adoption. But what is it that makes the gestational surrogate a “carrier” and the full surrogate a “legal and natural mother?” Notably, while the reader’s intuition here that genetics is the key to justify the distinction is partially confirmed by statutory and case law, the article shows that in egg donations the genetic provider is not considered the legal mother of the child. Legal maternity of the egg recipient (the intended

mother) is almost always legally established. So it is not just genetics or just gestation that is at stake here. It is the cure paradigm in action and its moral assumption that females must somehow physically participate in baby-making in order for cure to have taken place.

Part III reveals the tremendous impact that the cure paradigm has had on baby-making markets. Specifically, the full-gestational surrogacy distinction has produced critical market failures. As conspicuously captured in a California Court of Appeals decision, "...[C]ouples who cannot afford in-vitro fertilization and embryo implantation, or who resort to traditional surrogacy [full surrogacy] because the woman does not have eggs suitable for in vitro fertilization, have no assurance their intentions will be honored in a court of law. For them and the child, biology is destiny."⁶ Indeed, Part III shows that the cure paradigm has significantly raised the bargaining costs not only for heterosexual couples who cannot afford in vitro fertilization (or who do not have eggs suitable for IVF) but for all individuals and couples who do not fit neatly within the legally presumed cure paradigm.

I. THE MEDICALIZED CURE PARADIGM

The cure paradigm emerged around mid-century as a legitimizing platform for donor sperm insemination. Until then, donor insemination was legally understood as adultery. This shift in the legal understanding of reproductive technologies involved a transition from state regulation based on ideas of traditional morality (such as religion,

⁶ In re Marriage of Moschetta, 25 Cal. App. 4th 1218, 1235 (Cal. Ct. App.1994).

adultery, paternal bloodline protection, etc.), to state regulation based on modern-scientific ideas (such as cure, eugenics and social responsibility). It is this shift from traditional morality to scientific-medical morality, the article argues, that enabled the flourishing of the market for sperm. Although by today we have a fully developed market for sperm, it is critical for us to trace this shift for the sake of better regulation of current and future baby-making markets.

A. Moral and Legal Condemnation of Donor Insemination

Donor sperm insemination was historically perceived by courts and legal commentators as an act of adultery on the part of wife. As articulated in *Gursky v. Gursky*, “heterologous artificial insemination by a third party donor, with or without consent of the husband, constitutes adultery on the part of the mother, and that a child, so conceived is not a child born in wedlock and is, therefore, illegitimate.”⁷ One of the main consequences of classifying donor insemination as adultery was illegitimacy of the child born of donor insemination. Thus, in *Gursky v. Gursky*, for example, a New York court, upon separation of husband and wife, ruled that there was no issue of the marriage because a child conceived through donor insemination was not the husband’s biological child.⁸ Likewise, in *Abajian v. Dennett*, a New York court ruled that an ex-wife wishing to deny her ex-

⁷ *Gursky v. Gursky*, 242 N.Y.S.2d 406 at 411 (N.Y. Sup. Ct. 1963) (citing *Doornbos v. Doornbos*, No. 54 S. 14981 (N.Y. Sup. Ct. (1954))).

⁸ The court emphasized the limited scope of *Strnad v. Strnad*, 78 N.Y.S.2d 390 (N.Y. Sup. Ct. 1948), which held that children born of donor insemination are legitimate. *Gursky v. Gursky*, 242 N.Y.S.2d at 410-411 (“the view expressed by the court in that case, that such a child was not an illegitimate child, is supported by no legal precedent.”).

husband visitation or custody was estopped from asserting that her pregnancy was a result of donor insemination because “to stigmatize them as children of an unknown father by means of artificial insemination of the mother is no more...than an attempt to make these innocents out as children of bastardy. And where a parent attempts such means, the law will still the lips of such a parent.”⁹ The court “stilled the lips” of a mother who wished to say the truth about the conception of her children because this truth would change the status of her children, from “innocents,” whose father is the mother’s husband to “children of bastardy,” whose father is the sperm donor.

This judicial language of stigma and bastardy reflects a widespread moral condemnation of donor insemination that was shared by various legal commentators, courts, medical experts, and religious authorities in the US, Britain and Canada around mid-century. The American public was also polled in 1950s by social scientists who reported negative social attitudes to donor insemination.¹⁰ It was commonly thought that

⁹ *Abajian v. Dennett*, 184 N.Y.S.2d 178, 183 (N.Y. Sup. Ct. 1958) (emphasis added). Some courts, however, were less clear regarding the adulterous nature of the procedure. For example, in the first (unreported) case in the United States involving artificial insemination, *Hoch v. Hoch*, the court opined that donor insemination is insufficient evidence for adultery. *See Rice, A.I.D - An Heir of Controversy*, 34 NOTRE DAME L. REV. 510, 514; *See also Strnad v. Strnad*, 78 N.Y.S.2d at 392 (“indeed, logically and realistically, the situation is no different than that pertaining in the case of a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties.”).

¹⁰ *See, e.g.*, Glenn M. Vernon & Jack A. Boadway, *Attitudes Toward Artificial Insemination and Some Variables Associated Therewith*, 21 MARRIAGE & FAM. LIVING 43 (1959) (finding relatively little acceptance of donor insemination among college students, and that males evidenced greater acceptance of donor insemination than did the females); Joseph H. Greenberg, *Social Variables in Acceptance or Rejection of Artificial Insemination*, 16 AM. SOCIOLOGICAL REV. 86 (1951) (finding that the identity of the donor appears to determine social attitudes concerning artificial

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couples who are “involuntarily sterile may better satisfy their parental urge by adopting a child.”¹¹ As for others, “marriage is their solution rather than artificial insemination.”¹² In Britain, a committee on donor insemination concluded that although the practice is to be strongly discouraged, it should not be declared criminal or be regulated by law because “it falls within the category of actions known to students of jurisprudence as ‘liberties’ which while not prohibited by law will receive no kind of support or encouragement from the law.”¹³

In essence, the moral unease with donor insemination had to do with its being a crime against the husband and the institution of the family that “should be condemned because it is contrary to the accepted standards of adultery and legitimacy.”¹⁴ Specifically, donor insemination was considered a moral threat to the husband and the family for three interrelated reasons. First, it was believed that the introduction of foreign sperm would weaken the existing social order that is “built on the nucleus of the family growing from the marriage of one man and one woman for life to the exclusion of all others.”¹⁵ Second,

insemination. While less than 10% rejected artificial insemination using the sperm of the husband, close to 50% rejected donor insemination).

¹¹ J.P.G., *Artificial Insemination versus Adoption*, 34 VA. L. REV. 822, 829 (1948).

¹² *Id.* at 828.

¹³ See Report on the Departmental Committee on Human Artificial Insemination, 24 MOD. L. REV. 158, 162 (1961).

¹⁴ J.P.G., *supra* note 11, at 824.

¹⁵ The Catholic Church for example, ruled out the legitimacy of donor insemination on three occasions in 1949, 1951, and 1956, claiming that it reduces marriage and the conjugal act to a mere organic function, thus turning the family into nothing more than a “biological laboratory.” See Pius XII, *Allocution: Artificial Insemination* (Sept. 29, 1949), in 3 THE CANON LAW DIGEST: OFFICIALLY PUBLISHED DOCUMENTS AFFECTING THE CODE OF CANON LAW 1942-53, at 432-33

donor insemination was seen as a direct threat to the husband's bloodline.¹⁶ Third, it was thought that that the "increasing production of children by means of artificial insemination from unknown donor enhances the possibilities of incestuous marriages and incestuous relationships."¹⁷ In *The Enforcement of Morality*, H.L.A Hart mentions that "speakers in the House of Lords urged that the practice should be prohibited by criminal law and Lord Denning indeed claimed that if the facts [regarding wife donor insemination] were concealed from the husband the practice was already illegal as a form of criminal conspiracy."¹⁸

(T. Lincoln Bouscaren ed., 1953); Pius XII, Allocution: Artificial Insemination Condemned (Oct. 29, 1951), in 3 THE CANON LAW DIGEST: OFFICIALLY PUBLISHED DOCUMENTS AFFECTING THE CODE OF CANON LAW 1942-53, at 434 (T. Lincoln Bouscaren ed., 1953). See also J.P.G., *supra* note 11, at 824 (claiming that donor insemination would weaken the existing social order that is "built on the nucleus of the family growing from the marriage of one man and one woman for life to the exclusion of all others.").

¹⁶ See *Orford v. Orford*, 49 Ont. L. R. 15 (1921) (as cited in J.P.G., *supra* note 11, at 825) (the essence of the donor insemination offense was not in the immoral act of sexual intercourse, but in the "voluntary surrender by the guilty person of the reproductive powers or faculties to one other than the husband or wife."). See also J.P.G., *supra* note 11, at 826 (explaining that the precise offense was introducing into the family of the husband a false stream of blood.). See also Schatkin, *Artificial Insemination and Illegitimacy*, 11 HUM. FERTILITY 14 (1946); Editorial, 112 J. AM. MED. ASS'N 1832 (1939). Other legal commentators at the time insisted that donor insemination is not adultery because there is no act of sexual intercourse. See, e.g., *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, YALE L. J. 457, 464 (1949) (noting that "the initial selection depends primarily on whether the judge feels more moral indignation against the evils of sterility than against the encroachment by science on the legal reserves of family life.").

¹⁷ See, e.g., Ploscowe, *The Place of Law in Medico-Moral Problems: A Legal View II*, 31 N.Y.U. L. REV. 1238, 1243 ("the incest taboo is one of the strongest in our society. There can be little doubt that the increasing production of children by means of artificial insemination from unknown donor enhances the possibilities of incestuous marriages and incestuous relationships."); Kardiman, *Artificial Insemination in the Talmud*, 2 HEBREW MED. J. 258-260 (1950) ("the donor might unwittingly marry his own daughter.").

¹⁸ H.L.A. HART, *The Enforcement of Morality*, in THE MORALITY OF CRIMINAL LAW: TWO LECTURES 31, 42 (1964) (discussing a recent divorce action where a judge ruled that artificial insemination of wife by donor sperm *did not* constitute adultery.).

B. The De-Sexualized Cure Paradigm

The proposal to criminalize donor insemination in Britain was rejected, leading H.L.A Hart to the conclusion that “today the conversion of deviation from accepted morality into criminal offences is not as easy as it once was.”¹⁹ From today’s perspective we can see that it is not only that around mid-century the deviation of sperm donation was not criminalized--it was converted into a new moral good. From a moral deviation, donor insemination was transformed into a social-legal good. Morality is standing on its head.

How did this flip happen? By the 1950s, many medical fertility experts and physicians supported the proposition that donor insemination should be legitimized because it was a cure.²⁰ This medical framework desexualized the previous understanding of donor insemination. Donor insemination was now understood as a medical act of fertilization to cure the disease of infertility.²¹ This was manifested not only in the language but also in the physical re-location of the donor insemination procedure. In the 1930s some medical practitioners, operating under the assumption that a woman must be sexually aroused for the sake of the upward movement of sperm, thought that intercourse must precede the

¹⁹ *Id.* at 42 (the Feversham Committee, appointed following this debate rejected the proposal to criminalize the practice.).

²⁰ See Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1079 (2002) (demonstrating how historically the medical profession mediated between the restraints imposed by legal uncertainty and the use of the technology).

²¹ *Id.*

procedure, and thus performed the process in the couple's bedroom.²² In contrast, by the 1950s, medical literature detached the link between the appropriate timing for insemination and the woman's orgasm.²³ It was no longer thought that a woman can only become pregnant following her sexual arousal. The physician no longer had to perform the procedure in the bedroom, and it was moved to the physician's office.²⁴

The promise of eugenics also appealed to some supporters of sperm donations. In medical and legal literature of the 1950s-1970s, donor insemination was explicitly celebrated as offering mankind a perfect eugenic opportunity.²⁵ Some believed that "the highly endowed have a genetic duty to bear large families in order to perpetuate a 'better man.'"²⁶ The legitimization of artificial insemination was seen as a first and necessary step

²² *Id.* at fn100.

²³ *Id.* at 1075. (citing SCHELLEN, *ARTIFICIAL INSEMINATION IN THE HUMANS* 8-9 (1957); Abner I. Weisman, *The Medical Viewpoint*, 7 SYRACUSE L. REV. 96, 99 (1955)).

²⁴ *Id.* at 1075.

²⁵ See, e.g., *Eugenic Artificial insemination: A cure for Mediocrity?* 94 HARV. L. REV. 1850, 1850 (1981) (claiming that in the United States as of 1980, "eugenics is by no means dead"); George P. Smith, *Through a Test Tube Darkly*, 67 MICH. L. REV. 127, 147 fn. 107 (1968) (defining eugenics as "a science that deals with the improvement of hereditary qualities in a series of generations of a race or a breed especially by social control of human mating and reproduction- race improvement."); Crow, *Mechanisms and Trends in Human Evolution*, 90 DAEDALUS 416, 429 (1961); Gorney, *The New Biology and the Future of Man*, 15 UCLA L. REV. 273, 280 (1968); Muller, *Should we Weaken or Strengthen our genetic Heritage?* 90 DAEDALUS 432, 439-42 (1961); Vukowich, *The Dawning of a Brave New World- Legal Ethical, and Social Issues of Eugenics*, U. ILL. L. F. 189, 222-25 (1971).

²⁶ Smith, *Id.* at 147 (citing Muller, *Human Evolution by Voluntary Choice of Germ Plasm*, 134 SCIENCE 643 (1961))

towards “controlled breeding.”²⁷ As noted by a legal commentator, “medicine has included in its ground rules provisions capable of producing eugenically superior children in better homes more than is true in most instances where the child is biologically related to its mother’s spouse.”²⁸ Indeed, according to this legal commentator, scientists have so far been successful in this task, since there were no reported instances of “biologically inferior” children born via the technology.²⁹

This shift in morality from adultery to cure also involved a shift in authority. Physicians were granted the absolute authority to choose donor sperm, many times turning to doctors or medical students for sperm. Some were in fact alarmed that physicians were using medical technology to reproduce their own kind.³⁰ This type of self breeding echoed the ideology of euteleogenesis, an envisioned system of donor insemination that would use

²⁷ See Smith, *supra* note 25, at 149-150 (“man is the last to breed selectively; rather than allow variant experimentation in this sensitive realm, he must devise appropriate procedures by which to isolate and perpetuate the most desirable human characteristics.”).

²⁸ *Artificial Insemination: A Parvenu Intrudes on Ancient Law*, *supra* note 16, at 466 (“a variety of reports indicate the generally superior home conditions which medical screening provides children born via artificial insemination.”).

²⁹ *Id.* at fn 38.

³⁰ See George J. Annas, *Artificial Insemination: Beyond the Best Interests of the Donor*, LAW & THE LIFE SCIENCES, HASTINGS CENTER REPORT (vol. 9), 14-15+43, at 14 (1979). (“There can be little debate that physicians in all of these situations are making eugenic decisions- selecting what they consider “superior” genes for AID [donor insemination]. In general they have chosen to reproduce themselves (or those in their profession), and this is what sociobiologists would probably have predicted. While this should not be surprising, it should be a cause for concern.”)

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the sperm of genetically superior males,³¹ so that “the services of a prize male can be vastly multiplied and carried over wide areas.”³²

³¹ Herbert Brewer, *Euteleogenesis*, 27 EUGENICS REV. 121, 123 (1935).

³² *Eugenic Artificial insemination: A cure for Mediocrity?* *supra* note 25, at 1855 (citing A. SCHEINFELD, YOUR HEREDITY AND ENVIRONMENT 662 (1965)).

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This transition in societal values is demonstrated in the following summary chart.

Summary Chart: Mid-Century Donor Insemination Debates

	Attitude to Donor Insemination	Justifications	Consequent Status of Donor	Consequent Status of Sperm Donation
Religious-Traditional views	Rejection	Weakening of nuclear family, adulterous termination of paternal bloodline; incest	Parent	Adultery
Medical-Scientific-Liberal Views	Endorsement	Cure; happy marriages; Eugenics	Legal Stranger	Cure for Infertility

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In addition to this gradual change in social-medical and legal attitudes to donor insemination, by the 1960s the legal classification of donor insemination as adultery posed another very concrete problem for courts: child support. If the husband is a legal stranger to the child, and the donor is in many cases anonymous, who is responsible for supporting the child? Although it still classified donor insemination as adultery, the *Gursky* court identified the problem of child support, and to overcome it, distinguished support from legitimacy, holding that “while the court is constrained to hold that the defendant wife’s child is not the legitimate issue of the plaintiff husband, it does not follow that the husband is thereby free of obligation to furnish support for the child.”³³ Thus, “in the instant case the husband is liable for the support of the child here involved, whether on the basis of an implied contract to support or by reason of application of the doctrine of equitable estoppel.”³⁴

It is important to see that from *Abajian* (1958) to *Gursky* (1963) there is a conceptual and terminological shift in the assessment of donor insemination. While in both cases donor insemination was still understood as adultery, language of sexual virtue and traditional morality in *Abajian* shifts to language of social duty and responsibility for child support in *Gursky*. While in *Abajian*, the court focused on stigma, shame, innocence and bastardy, in *Gursky* the court based its decision on the husband’s social obligation of child support. This shift is also embodied in the legal party who is the target of estoppel. While

³³ *Gursky v. Gursky*, 242 N.Y.S.2d at 411.

³⁴ *Id.* at 12.

estoppel in *Abajian* was used to silence the wife (from relying on the adulterous nature of donor insemination to deny her ex-husband's custody or visitation), in *Gursky* it was utilized to silence the husband (from relying on the adulterous nature of donor insemination to deny his own obligation to support the child).

This conceptual transition from sexual virtue and stigma to cure and social responsibility was finalized in 1968 by the Supreme Court of California in *People v. Sorensen*.³⁵ The *Sorensen* court dismissed the adultery paradigm as “patently absurd.” Interestingly, in this case a new potential criminal identity emerged: that of a husband who fails to support *his* child born of donor insemination. The *Sorensen* court had to determine whether “the husband of a woman, who with his consent was artificially inseminated with semen of a third-party donor, guilty of the crime of failing to support a child who is the product of such insemination, in violation of section 270 of the Penal Code?”³⁶ The court concluded that the husband is indeed guilty.³⁷

The *Sorensen* court abandoned the adultery framework altogether by challenging its logic step by step:

Adultery is defined as ‘the voluntary sexual intercourse of a married person with a person other than the offender’s husband or wife.’ (Civ. Code § 93) It has been suggested that the doctor and wife commit adultery by the process of

³⁵ *People v. Sorensen*, 68 Cal. 2d 280 (Cal. 1968).

³⁶ *Id.* at 283

³⁷ *Id.* at 283-284 (“the law is that defendant is the lawful father of the child born to his wife, which child was conceived by artificial insemination to which he consented, and his conduct carries with it an obligation of support with the meaning of *section 270 of the Penal Code*”).

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artificial insemination (citation omitted). Since the doctor may be a woman, or the husband himself may administer the insemination by a syringe, this is patently absurd; to consider it an act of adultery with the donor, who at the time of insemination may be a thousand miles away or may even be dead, is equally absurd.³⁸

Given the definition of adultery as voluntary sex, various adulterous scenes were offered and dismissed by the court. First, the court raised the scene of insemination of the wife by the husband himself using a syringe. The notion of absurdity here comes from the latter part of the adultery definition—“with a person other than the offender’s husband or wife.” Because the husband cannot at the same time act as himself and as a person other than himself, this adulterous scene makes no sense. Second, the court sketches an adulterous sex scene of a female doctor with a female patient, which it then dismisses. It seems that (in 1968) the very idea of woman to woman sex seems ridiculous to the court. A third adulterous scene takes place between the wife and the donor who may be a thousand miles away or even dead.

The court moved to a new understanding of the procedure. It is a contract to cure infertility that carries with it a heavy social responsibility. When a man, “because of his inability to procreate,” consents to his wife’s artificial insemination, he “knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport.”³⁹ No longer perceived as sexual adultery, donor insemination is now a

³⁸ *Id.* at 289.

³⁹ *Id.* at 285.

purchase of a donor's sperm, in order to cure male infertility. Or as put by the court, a man who "unable to accomplish his objective of creating a child by using his own semen, purchases semen from a donor and uses it to inseminate his wife to achieve his purpose."⁴⁰

The donor was no longer perceived as selling a child to the couple. He is instead "some other male" whose sperm is "utilized" for the conception of the wife.⁴¹ The *Sorensen* court concluded that "within the meaning of section 270 of the Penal Code, defendant is the lawful father of the child conceived through artificial insemination and born during his marriage to the child's mother."⁴² Thus a new potential criminal liability emerged: the non-paying husband of a wife inseminated via donor insemination.

Focusing on the 'best interest' of the child, the court emphasized that "no valid public purpose is served by stigmatizing an artificially conceived child as illegitimate,"⁴³ and that "the intent of the Legislature obviously was to include every child, legitimate or illegitimate, born or unborn, and enforce the obligation of support against the person who

⁴⁰ *Id.* at 286.

⁴¹ *Id.* at 289 ("nor are we persuaded that the concept of legitimacy demands that the child be the actual offspring of the husband of the mother and if semen of some other male is utilized the resulting child is illegitimate.").

⁴² *Id.* Notably, the problem that the New York *Gursky* court encountered when applying the adultery framework could not be solved here through the doctrines of implied contract and equitable estoppel. *Sorensen* was a criminal case, not a divorce action, and the husband had to be declared legal father, convicted and punished for failing to support his child *or* acquitted as a legal stranger to the child. The court chose the former and no longer viewed itself as "constrained" as the *Gursky* court by the adultery framework.

⁴³ *Id.* at 288.

could be determined to be the lawful parent.”⁴⁴ The *Sorensen* court offered the following theory of punishment:

Rather than punishment of the neglectful parent, the principal statutory objectives are to secure support of the child and to protect the public from the burden of supporting a child who has a parent able to support him. *Section 270d of the Penal Code* provides that if a fine is imposed on a convicted defendant, the court shall direct its payment in whole or in part to the wife of the defendant or guardian of the child, except that if the child is receiving public assistance the fine imposed or funds collected from the defendant shall be paid to the county department [...]⁴⁵

Although convicted, it seems important for the court here to stress that defendant husband is not being punished for a crime. Instead, a social obligation is enforced upon him. Shame, stigma, bastardy and “stilled lips,” no longer take center stage. There is now an inherent social obligation from the father toward the child, the mother and society at large which the statute seeks to “insure and facilitate [...] where necessary.”⁴⁶ Therefore, the fine paid by the convicted father is directed to the wife or the legal guardian.

The *Sorensen* understanding of donor insemination as purchase for cure was adopted by later cases across the nation, and by the Uniform Parentage Act (UPA), as first promulgated in 1973, which provided that with the husband’s consent, donor insemination is legal, and that the donor shall not be perceived as the legal father.⁴⁷ In 1968 Georgia was

⁴⁴ *Id.* at 284-285.

⁴⁵ *Id.* at 287.

⁴⁶ *Id.*

⁴⁷ Unif. Parentage Act 5 (repealed 2000), 9B U.L.A. 407 (2001).

the first state to legitimize donor insemination by a statute providing a conclusive presumption of legitimacy when a child is born through donor insemination performed with the written consent of both husband and wife, and permitting only licensed physicians to perform the procedure?⁴⁸ In the following decade, many states followed with similar statutes.⁴⁹

1. Transgender Fathers as the Exception to Presumed Paternity

Today the fatherhood of most but not all males is presumed when their female partner is fertilized through donor insemination. Kierkegaard tells us something about the importance of exceptions. “The exception,” says Kierkegaard “explains the general and itself. It reveals everything more clearly as does the general. Endless talk about the general becomes boring; there are exceptions. If they cannot be explained, then the general also cannot be explained. The difficulty is usually not noticed because the general is not thought about with passion but with comfortable superficiality. The exception, on the other hand, thinks the general with intense passion.”⁵⁰ Kierkegaard’s call transmitted to legal theory through Carl Schmidt, reminds us that the moral claim underlying the leading

⁴⁸ Ga. Code Ann. 74-9904 (Supp 1968).

⁴⁹ By the end of the 1970s at least fifteen states had statutes regulating donor insemination. All provided that the resulting child was the natural child of the recipient's husband if the husband consented to the procedure. Five states required that the consent be filed with a state agency and six states, either directly or by implication, limited the practice of donor insemination to physicians. By 1981, this number had grown to twenty-three states, and by 1985 twenty-eight states had donor insemination statutes. Nine of the statutes were modeled after the UPA. *See* Bernstein, *supra* note 20, at 1090-1091.

⁵⁰ CARL SCHMITT, *Definition of Sovereignty*, in *POLITICAL THEOLOGY* 5, 15 (George Schwab trans., University of Chicago Press 1985) (1922) (quoting from Kierkegaard, *Repetition*).

paradigm of this paper, i.e. that it is good to cure infertility is boring, and hardly noticeable. Not because it is false, but because it is thought about with “comfortable superficiality.” It is when we come to the exception that intense legal passion appears. To understand what cure for infertility is we must ask where it does not apply.

Female to Male (FTM) transgender individuals lack sperm not due to infertility but because they were not born male. This claim for paternity is a digression from the gender based heterosexual paradigm that assumes the male born individuals should become fathers (but not mothers) and that female born individuals should become mothers (but not fathers). The cure logic, as we saw in *Sorenson*, was historically set up to cure infertile *husbands* in the context of marriage,⁵¹ later extended to male co-habitants, and to same sex partners who have been obliged to pay child support⁵² and granted parental rights.⁵³

⁵¹ Today some states still specifically ban the use of artificial insemination by all but married couples. *See, e.g.*, Okla. Stat. tit. 10, 553 (1998). Other states adopted the 1973 UPA without later revision, thus limiting statutory coverage to married couples while not specifically prohibiting donor insemination to others. *See, e.g.*, Ala. Code 26-17-21 (1992); Minn. Stat. 257.56 (2000); Mo. Rev. Stat. 210.824 (2000); Mont. Code Ann. 40-6-106(2) (2001); Nev. Rev. Stat. 126.061(2) (1989); Va. Code Ann. 20-158(3) (West 2000); Va. Code Ann. 32.1-257(D) (West 2000). Some states have enacted provisions that refer only to married couples. Ala. Code 26-17-21; Alaska Stat. 25.20.045 (2000); Fla. Stat. 742.11(1) (2001); Ga. Code Ann. 19-7-21 (1999); Md. Code Ann., Est. & Trusts 1-206 (LexisNexis 2001); Mass. Gen. Laws Ann. ch. 46, 4B (West 2005); Mich. Comp. Laws Ann. 333.2824(6) (West 1997); Minn. Stat. 257.56; Mo. Rev. Stat. 210.824; Mont. Code Ann. 40-6-106 (2001); Neb. Rev. Stat. 126-061 (1989); N.Y. Dom. Rel. Law 73 (McKinney 1999); N.C. Gen. Stat. 49A-1 (1999); N.D. Cent. Code 14-18-03 (1997); Okla. Stat. tit. 10, 551-553 (1998); Tenn. Code Ann. 68-3-306 (1996).

⁵² *See, e.g.*, In re Parentage of A.B., 837 N.E.2d 965 (Ind. 2005) (reversing the trial court’s dismissal of the partner’s complaint and remanding the case to the trial court for further proceedings to determine as to children’s best interest in these circumstances); *Chambers v. Chambers*, 2005 Del. Fam. Ct. LEXIS 1 (Fam. Ct. Del. 2005) (construing statutory law in light of children’s best interests, and clarifying that Delaware recognized de facto parenthood for certain

Recently, some courts have taken the additional step of applying a gender neutral interpretation of donor insemination statutes to oblige a same sex partner to pay child support,⁵⁴ and to recognize legal parenthood of same sex partners.⁵⁵

purposes where a five-factor test was satisfied); *L. S. K. v. H. A. N.*, 813 A.2d 872 (Sup. Ct. Penn. 2002) (holding that in the absence of legislative action, court was obliged to apply equitable rules in the children's best interest. Since the partner had claimed the rights of a parent, she was equitably estopped from denying responsibilities of support incurred under Pa. Cons. Stat. § 4321).

⁵³ See, e.g., *In re Parentage of L.B. Sue Ellen*, 155 Wn. 2d 679 (Wash. 2005) (although former partner was not a biological or adoptive parent, she had standing under Washington law to petition the courts for a determination of co-parentage with regard to the child, based on common law theories of parenthood, but the former partner did not have standing to assert rights to visitation with the child because she is not a parent under the statute); *In re Custody of H.S.H.-K.*, 193 Wis. 2d 659-63 (Wis. 1995) (under Wisconsin law, the biological mother's former female partner lacked standing to petition for custody or visitation, but the legislature did not intend to preempt the equitable power of the court so as to preclude a remedy outside of the statutory scheme.); *E.N.O. v. L.L.M.*, 429 Mass. 824, 828-30 (Mass. 1999) (equity jurisdiction governed resolution of the issue despite lack of statutory authority, and the best interests of the child require that the child's de-facto parent be allowed visitation with the child); *Clifford K. v. Paul S.*, 217 W.Va. 625 (Sup. Ct. App. W. VA 2005) (same sex parent had standing to pursue custody of the child under the "unusual or extraordinary" case section of *W. Va. Code Sec 48-9-103 (b)*, because the parent raised the child from birth and had a strong maternal bond with him).

⁵⁴ *Elisa B. v. Superior Court*, 37 Cal. 4th 108 (CA. 2005) (applying a gender neutral reading California statutory law to conclude that a child can have "two parents both of whom are women," and that the former same-sex partner who agreed to raise children with the birth-mother, supported the birth-mother's artificial insemination using an anonymous sperm donor, received the children into her home and held them out as her own, was a parent and had an obligation to support the children.).

⁵⁵ *In re Parentage of the Child of Kimberly Robinson*, 383 N.J. Super 165 (Sup. Ct. NJ. 2005) (granting a same sex couple's request to declare the non-biologically related partner the second parent of a child conceived through artificial insemination, and concluding that it could not discern any state interest that would preclude the partner from the protection of the statute); *Charisma R. v. Kristina S*, 140 Cal. App. 4th 301 (CA. 2006) (reversing a trial court finding that former same-sex partner lacked standing to bring action under the UPA); *Kristine H v. Lisa*, 37 Cal. 4th 156 (CA. 2005) (ruling that a biological mother is estopped from challenging the validity of a stipulated judgment recognizing her same sex partner's parenthood because under the California family Code a child can have two mothers and permitting a mother to attack the judgment's validity would have been unfair to the child and the second mother.).

However, in the few cases addressing a sperm transaction where the sperm lacking party was a transgender FTM man, courts have recognized paternity only as a punitive matter, but never as a matter of parental rights (to custody or visitation). While an FTM transgender man has been obliged to pay child support for a child conceived through donor insemination,⁵⁶ similarly situated others were denied parental rights.⁵⁷ In these cases we see the indirect impact of the cure paradigm on the legal claims of transgender fathers. The impact here is indirect (and thus more crucial) because it is the female partners and not the actual transgender men who are fertilized by the bargained for sperm.

When courts have come to determine parental rights and duties of TG fathers, they have narrowly interpreted statutes and contracts to apply to husbands and male co-habitants but not to transgender fathers. For example, in *In re Marriage of Simmons*, where a transgender man married a woman, and a child was conceived through donor insemination,⁵⁸ an Illinois appellate court denied all of the father's claims for legal rights with the child because "all the physicians testified that there were other surgeries which had to be done on petitioner before he could be considered completely sexually

⁵⁶ *In the Matter of Karin T.*, 127 Misc. 2d 14 (N.Y. Fam. Ct. 1985) (obliging transgender father to support children born of donor insemination during his marriage).

⁵⁷ *In re Marriage of Simmons*, 355 Ill. App. 3d 942 (Ill. App. Ct. 2005) (ruling that because same-sex marriages are invalid under 750 Ill. Comp. Stat. Ann. 5/201 (2002) and the impediment of being female was never removed, the father could not claim status as a husband, and that this inability to prove status as either a "man" or a "husband" likewise deprived him of standing under either the Illinois Parentage Act, 750 Ill. Comp. Stat. Ann. 40/1 et seq. (2002), or the Parentage Act of 1984, 750 Ill. Comp. Stat. Ann. 45/1 et seq. (2002)).

⁵⁸ *Id.* (plaintiff was diagnosed as a transsexual man in his late teens and began taking testosterone when he was 21 years old).

reassigned.”⁵⁹ The transgender man, the court tells us, is not cured from his ‘infertility’ (as a male who cannot produce sperm) because he is not yet fully cured from his Gender Identity Disorder (GID).⁶⁰ The court rejected the plaintiff’s contract based argument (of consenting to raise the child born through donor insemination), stressing that the agreement that he signed as a ‘husband’ is invalid.⁶¹ Similarly, in *Kantaras v. Kantaras*, a Florida appellate court determined that because Florida statutes governing marriage do not

⁵⁹ *Id.* at 948. (female to male transition surgeries include “vaginectomy, reduction mammoplasty, metoidioplasty, scrotoplasty, urethroplasty, and phalloplasty [...] and because he “still possesses all of his female genitalia,” plaintiff is legally female). Notably, the court applied here a very narrow definition of sex, ignoring other sex determining factors such as chosen sex, hormonal sex, overall outer appearance, internal organs, etc.

⁶⁰ The diagnostic criteria for Gender Identity Disorder (GID), according to TASK FORCE ON DSM-IV, AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 537-38 (4th ed. 1994) is as following: "A. A strong and persistent cross gender identification (not merely a desire for any perceived cultural advantages of being the other sex). B. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex. C. The disturbance is not concurrent with a physical intersex condition. D. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning." For further analysis of the problematic role of Gender Identity Disorder in the regulation of transgender and Intersex individuals *see* Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 20 HARV. J.L. & GENDER 51 (2006); Noa Ben-Asher, *Paradoxes of Health and Equality: When a Boy Becomes a Girl*, 16 YALE J.L. & FEMINISM 275 (2004).

⁶¹ The child’s claim as a third-party beneficiary to the contract was also rejected by the court, based on the invalidity of the contract. *Id.* at 955. In addition, petitioner’s reliance on the Illinois Parentage Act which creates a presumption of parenthood under which a child born from donor insemination to two married parents retains his right with both even if the marriage is subsequently held invalid also failed. *Id.* at 952 (“that section which confers a presumption of a “man” to be the natural father of a child even after a marriage has been declared invalid, is based on the premise that the parties who are involved are a man and a woman. As we have previously determined, petitioner is not a man within the meaning of the statute, and that, therefore, the statute does not apply.”).

authorize a postoperative transsexual “to marry in the reassigned sex,” the marriage is void, and a court order granting him primary custody was reversed.⁶²

The transgender exception illustrates an important characteristic of cure as a moral value that will later reappear in the female reproductive markets as well: the value of medical cure carries other values and assumptions with it. It not only carries them, but it also naturalizes them. In this case, the naturalized value is that only male born individuals are potential fathers to donor inseminated wives. Others bear the heavy burden of providing medical scientific proof that their transition from female to male has satisfied medical guidelines, and that they now properly fit within the medically framed male/female, father/mother binaries. I will return to this.

2. *Sperm Markets*

The legal adoption of the cure paradigm has laid the platform for an open and free market for sperm. The past four decades, since the *Sorensen* decision, have seen a rapid development of a market for sperm. Professor Martha Ertman has observed that today the donor insemination market is a “literal market and a relatively free, open market,” in which

⁶² *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004) (“the question of whether a post-operative transsexual is authorized to marry a member of their birth sex is a matter for the Florida legislature and not the Florida courts to decide. Until the Florida legislature recognizes sex re-assignment procedures and amends the marriage statutes to clarify the marital rights of a postoperative transsexual person, we must adhere to the common meaning of the statutory terms and invalidate any marriage that is not between persons of the opposite sex determined by the biological sex at birth.”). The appellate court remanded to the trial court to determine the legal status of the children, and the parties eventually reached a shared custody agreement. <http://www.cnn.com/2005/LAW/06/16/ctv.transsexual.custody/index.html>.

“[b]anks and recipients demand sperm, and donors and banks supply it,” and that “lack of regulation and a relatively low price for the gametes means that it is both an open market in which a large number of people can participate, and a free market that flourishes because of its comparative freedom from regulation.”⁶³

Indeed, commercial sperm banks appeared in the fertility landscape since the 1970s, when the first for-profit bank opened its doors in Minnesota.⁶⁴ The market for sperm was small at first and served almost entirely men who could not inseminate their wives through regular intercourse. For them, the sperm bank was a non-market operation. It did not take long however, to identify an additional demand for sperm. By 1980, seventeen sperm banks across the nation were offering more than one hundred thousand sperm samples for sale.⁶⁵ That year, those banks supplied sperm at roughly \$66 per specimen, resulting in the birth of twenty thousand babies.⁶⁶ Donors were typically young professionals chosen by the banks based on their physical and genetic characteristics. In 1980, the sperm bank for “Repository for Germinal Choice” was set up to collect sperm from Nobel Prize winners

⁶³ Martha Ertman, *What's wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C.L. REV. 1, 15-16 (2003) (questioning the assumption that privatization only benefits powerful players at the expense of everyone else, and proposing a new and improved theory of commodification that accounts for multiple valances of commodification in any particular context).

⁶⁴ DEBORA L. SPAR, *THE BABY BUSINESS* 35 (2006).

⁶⁵ *Id.* at 36 (citing Anne Taylor Fleming, *New Frontiers in Conception*, N.Y. TIMES, July 20, 1980, at 14).

⁶⁶ *Id.*

and Olympic athletes.⁶⁷ By 1999, there were more than one hundred sperm banks in the United States,⁶⁸ and in 2000, the wall street Journal estimated the global market for sperm exports to be worth anywhere between \$50 million and \$100 million per year.⁶⁹ Today, sperm customers in the United States want to know as much as possible about the donors,⁷⁰ who are typically sought by the banks through promotional material scattered around college campuses. Firms usually provide customers with information such as hobbies, family history, favorite foods, and handwriting samples.⁷¹

In the transition of donor insemination from immoral adultery to moral and legitimate cure, four significant things happened. First, the moral and legal condemnation of donor insemination was replaced by its legitimization as ‘cure for infertility.’ By the late 1960s, medical and social authorities offered an emergency supply of meaning that shaped a new legal understanding of donor insemination as legitimate cure. With the idea

⁶⁷ See, e.g., Eugenic Artificial insemination: A cure for Mediocrity? *supra* note 25, at 1850 (citing A Bank for Nobel Sperm, 27 SCIENCE 1326 (1980)); Breeding for IQ’s- a Plan under fire, U.S. NEWS & WORLD REP., Mar. 24, 1980, at 49; Superkids? A Sperm Bank for Nobelists, TIME MAGAZINE, Mar. 10, 1980, at 49).

⁶⁸ SPAR, *supra* note 64, at 37-8 (noting that today the business of sperm banking, “tends to be dominated by a small number of relatively large firms, each armed with a sizable donor base, highly specific technical expertise, and an inherent interest in expansion.”).

⁶⁹ *Id.* at 38 (citing Pascal Zachary, *Family Planning: Welcome to the Global Sperm Trade*, WALL STREET JOURNAL, January 6, 2000, at B1).

⁷⁰ SPAR, *supra* note 64, at 37. In addition, federal regulation requires that all sperm must be kept in storage for a period of at least six months, in which the donor is tested for HIV, hepatitis and other sexually transmitted diseases. 21 C.F.R. § 1271.86 (2008).

⁷¹ *Id.* at 39.

of cure, the procedure became legitimate, legal— it had legs.⁷² Second, social responsibility of fathers was (along with ‘curing’ them), a leading justification in the legalization of donor insemination. As we saw in *Sorenson*, the infertile man was not only seen as cured by the sperm transaction, he was also held socially responsible for the child to whose birth he consented. In this new governance of the family, family law and criminal law joined forces to cure the family from male infertility (family law), and protect it from male irresponsibility (criminal law). The husband was no longer protected from the “adulterous” act of donor insemination. In a way, from the head of the family to whom the wife owes fidelity and bloodline protection, the husband had turned into a debtor of the child, the mother and the state.⁷³ Third, sperm was no longer understood as a necessary

⁷² The understanding of sperm donation as cure for infertility is still manifested in contemporary medical literature. A recent ASRM (American Society for Reproductive Medicine) publication indicates that “currently, therapeutic donor insemination is appropriate when the male partner has severe abnormalities in the semen parameters.” American Society for Reproductive Medicine, *Third Party Reproduction: A Guide for Patients (Sperm, egg, and embryo donation and surrogacy)*, at 9 (2006) (available on <http://www.asrm.org>, last visited Mar. 15, 2007) (hereinafter: “ASRM Guide for Patients”).

⁷³ This decline in the legal status of the patriarch has also been addressed in Professor Duncan Kennedy’s recent mapping of two overlapping periods of legal institutional and conceptual change in the West: *Classical Legal Thought* (CLT) between 1850 and 1914, and *Socially Oriented Legal Thought*, between 1900 and 1968. DUNCAN KENNEDY, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL* 19 (David Trubek & Alvaro Santos, eds., 2006). In the period of Classical Legal Thought, according to Kennedy the issue of “household” was conceived through the distinction, within private law, between the law of obligations and family law. In this “early modern” system of family law, “the patriarch was legally obliged to support his wife and minor children, entitled to their obedience, which he could enforce through moderate physical punishment, had arbitrary power with respect to many aspects of their welfare and property, and was protected against sexual and economic interference by third parties.” *Id.* at 32. In the second globalization of legal thought (1900-1968), individualism and will theory came under critique, giving rise to the idea of “the social.” Under the globalization of the social, the family became an institution *whose function is*

signifier of paternity. As the status of fatherhood was gradually becoming an issue of consent and social responsibility, the paternal body was detached from the material process of reproduction.⁷⁴ Fourth, and this is where we stand today, a market for sperm emerged.

crucial for the social as a whole. Id. at 51. No longer a private matter under the control of the patriarch, “every aspect of family life had, given social interdependence, far reaching consequences for all other social functions.” *Id.*

⁷⁴ The Supreme Court unwed father jurisprudence in the second half of the century also echoes this transition in the status of the father. *See, e.g.,* Michael .H v. Gerald D., 491 U.S. 110 (1989) (holding constitutional a statute preventing biological father or child from challenging presumptive fatherhood of mother’s husband); *Lehr v. Robertson*, 483 U.S. 248 (1983) (holding that despite his having neither notice nor hearing, an unwed biological father’s rights to object to termination of his parental rights through adoption of his child by the mother’s new husband had been sufficiently protected by New York law).

II. THE LEGAL EVOLUTION OF EGG AND GESTATION MARKETS

The prior Part has demonstrated how a curing law, in the case of male infertility, had replaced prior legal-moral condemnation of sperm donations, resulting in the full commodification of sperm. In contrast, the main argument of this Part is that in the context of female infertility, a curing legal regime has in fact created a paradoxical regulation of bargains for female reproduction: gestational surrogacy and egg donations are fully commodified as legitimate curing treatments for infertility, while the use of full surrogacy is not. Section A focuses on the legally prevalent moral condemnation of full surrogacy (in which the surrogate is genetically related to the child), while section B demonstrates how “gestational surrogacy” (in which the surrogate is *not* genetically related to the child) and egg donations have been carved out of the realm of immorality, and are gradually regulated as legitimate treatments for female infertility—resulting in markets for eggs and gestational surrogacy.

A. *Moral and Legal Condemnation of Full Surrogacy*

While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a ‘surrogate’ mother illegal, perhaps criminal, and potentially degrading to women. (In re Baby M).⁷⁵

The implications of the legalization of donor insemination for full surrogacy were profound. While in the past the main way for surrogates to be impregnated was by sexual

⁷⁵ In re Baby M, 109 N.J. at 411.

intercourse with the prospective father, now sex was removed, and men could impregnate surrogates without ever having to see them. This made surrogacy more attractive than in the past, enhancing both the demand for and the supply of surrogate mothers.⁷⁶

In 1976, Noel Keane, an attorney from Michigan was one of the first to recognize the potential of this market and act on it.⁷⁷ Professed to have been moved by religion and compassion, Keane sided with “the people who want to create life.”⁷⁸ After placing an ad in a local college paper for a childless couple seeking the services of a surrogate, Keane received much media attention.⁷⁹ Applications from potential surrogates began to appear.⁸⁰ By the early 1980s, Keane was described as “the undisputed father of surrogate motherhood.”⁸¹ However, after realizing that the strict Michigan laws on baby-selling could become an obstacle for him, he unsuccessfully sought altruistic women who would agree to become surrogates at no fee.⁸² Eventually, Keane found a state with fewer restrictions on surrogacy: Florida. Understanding the potential of this market, small competitors appeared in California and Kentucky.⁸³ A market for full surrogacy was on the way.

⁷⁶ See, e.g., SPAR, *supra* note 64, at 74; Sanger, *supra* note 1, at 81-88.

⁷⁷ For further discussion of Keane and the role of intermediaries in the market for full surrogacy, see Sanger, *Id.*

⁷⁸ *Id.* at 83 (citing NOEL P. KEANE & DENNIN L. BREO, THE SURROGATE MOTHER 256 (1981))

⁷⁹ *Id.* at 83-84.

⁸⁰ *Id.*

⁸¹ *Id.* at fn 74 (citing James S. Kunen, Childless Couples Seeking Surrogate Mothers Call Michigan Lawyer Noel Keane—He Delivers, TIME, Mar 30, 1987, at 1987)

⁸² SPAR, *supra* note 64, at 76.

⁸³ *Id.* at 76-77.

Then morality arrived at the scene. By the 1980s full surrogacy was viewed as “the most controversial of the alternative reproductive technologies”⁸⁴ because it was understood by many as a commodification of women and babies. This condemnation was advanced, as we will see, in feminist (though not all feminist), medical, and legal settings. Two main concepts of harm were understood as morally problematic, the first having to do with the harm to potential surrogates, and the second having to do with the commodification of children. *First*, as the practice of surrogacy was gaining attention, some feminists expressed the concern that surrogacy may perpetuate male dominance over and objectification of women.⁸⁵ This exploitation, located on class and gender lines, may cause, as Margaret Jane Radin has emphasized, “even further oppression of poor or ignorant women, which must be weighed against a possible step toward their liberation through economic gain...”⁸⁶ Choice to enter a surrogacy agreement, according to Radin, may be ‘an ironic self deception,’ because “[s]urrogates may feel they are fulfilling their womanhood by producing babies for someone else, although they may actually be

⁸⁴ See, e.g., Patricia Donovan, *New Reproductive Technologies: Some Legal Dilemmas*, 18 FAMILY PLANNING PERSPECTIVES 57, 59 (1986); Patricia A. Avery, *Surrogate Mothers: Center of a New Storm*, U.S. NEWS WORLD REP., June 6, 1983, at 76; Otto Freidrich, *A Legal, Moral and Social Nightmare*, TIME MAGAZINE, Sept. 10, 1984, at 54; Jay Matthews, *Surrogate Motherhood Becoming an American Growth Industry*, WASH. POST, Jan. 24, 1983, at A2.

⁸⁵ See, e.g., G. Corea, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS 272-324 (1985); Wikler, *Society's Response to the New Reproductive Technologies: The Feminist Perspective*, 59 S. CAL. L. REV. 1043, 1046-47 (1986).

⁸⁶ Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1930 (1987) (arguing that “market-inalienability is an important normative category for our society. Economic analysis and traditional liberal pluralism have failed to recognize and correctly understand its significance because of the market orientation of their premises.”).

reinforcing oppressive gender roles.”⁸⁷ The second danger of commodification is that of a “capitalist baby industry,” which, “with all of its accompanying paraphernalia,” would lead to a society in which none of us, “even those who did not produce infants for sale, [can] avoid subconsciously measuring the dollar value of our children [...]” and in which “our children [cannot] avoid being preoccupied with their own dollar value [...]”⁸⁸

Many medical experts were also morally disturbed by full surrogacy. In contrast with sperm donation for male infertility, many fertility experts found (full) surrogacy ethically problematic.⁸⁹ From a technology standpoint, the identical technology used in donor insemination was not supported by fertility experts for the use of full surrogacy.⁹⁰ The *American Medical Association* concluded in 1983 that surrogacy does not represent a satisfactory alternative for prospective parents,⁹¹ and in 1986 the *Ethics Committee of the American Fertility Association* recommended greater scrutiny of full surrogacy.⁹² The view that the practice of surrogacy is not a cure for infertility was made explicit by many

⁸⁷ *Id.* at 1930.

⁸⁸ *Id.* at 1926. See also Holder, *Surrogate Motherhood: Babies for Fun and Profit*, 12 *LAW, MED & HEALTHCARE* 115 (1984) (arguing that baby-selling violates the Thirteenth Amendment).

⁸⁹ Notably, some medical practitioners and experts did support the practice of surrogacy, advancing rhetoric of cure similar to that of the donor insemination context. See, e.g., Leonard J. Weber, *Social Responsibility Demands Treating All Patients in Need*, 68 (2) *HEALTH PROGRESS* 38 (1987).

⁹⁰ Bernstein, *supra* note 20, at 1117-1118 (“the application of AI [artificial insemination] technology to surrogacy, has, thus at large, not significantly benefited from previous acceptance of the technology and was not assisted, as was the case with AID [artificial insemination by donor], from mobilization by the medical profession.”).

⁹¹ Bernstein, *supra* note 20, at 1115-1116 (citing American Medical Association, Proceedings of the House of Delegates, 127 (Dec. 4-7, 1983)).

⁹² Bernstein, *supra* note 20, at 1115 (citing The Ethics Committee of the American Fertility Society, *Ethical Considerations of Assisted Reproductive Technologies*, 62 *FERTILITY AND STERILITY*, 19s, 67s-77s (Supp 1994)).

fertility experts who emphasized that surrogacy is “neither curative nor palliative” and does not restore function”⁹³

Full surrogacy was disturbing to many not only because it risks exploitation but because it offends certain feminist ideas about motherhood, which have marked in various feminist traditions *the* sphere of the feminine. Specifically, motherhood has come to signify in some strands of legal feminism a location of ethical difference between feminine and masculine values.⁹⁴ Thus, as Professor Katherine Franke has observed, “for much of first and second wave legal feminism, issues of gender collapse quite quickly into the normative significance of our roles as mothers [...] the centrality, presumption, and inevitability of our responsibility for children remain a starting point for many, if not most, legal feminists.”⁹⁵ The feminist moral opposition to full surrogacy, although challenged both inside and outside feminism,⁹⁶ belongs in the larger context of a power of feminism

⁹³ Bernstein, *supra* note 20, at 1116 (citing John La Puma et al., *Surrogacy and Shakespeare: The Merchant's Contract Revisited*, 160(1) AM. J. OBSTETRICS & GYNECOLOGY 59, 61 (1989)).

⁹⁴ See, e.g., MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 5 (1995) (“what is necessary in order to confront the hegemony of the sexual-natural family is an equally powerful cultural symbol. The most vivid and shared image of connection is the Mother/Child dyad. This is the prototypical nurturing unit, a fitting substitute for the Husband/Wife dyad that forms the basic unit of the sexual family. I propose the Mother/Child as the substitute core of the basic family paradigm.”); ROBIN WEST, *CARING FOR JUSTICE* (1997); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

⁹⁵ Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 183 (2001).

⁹⁶ For critique of moral objection to surrogacy from feminist perspective see, e.g., Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 Wis. L. Rev. 297, 323 (1990) (arguing that the principle of private intention must be given substantial deference and legal force, and that determining legal parenthood on the basis on intentional agreements has the potential to create more gender neutral avenues to

that emerged in the second half of the century, which Professor Janet Halley has called “governance feminism.”⁹⁷ In the surrogacy debates, we find feminist ideas about the normative significance of our roles as mothers speaking from within ethics committees, legal briefs, court decisions, fertility expert opinions, and the media. By the 1980s feminism as an ethical realm was well inside the governance of reproduction.⁹⁸

It is important to see here that in the surrogacy debates of the 1980s morality took a form different from that of the earlier debates of the 1940-60s on sperm donations. In the legitimization of donor insemination, religious moral principles regarding reproduction

parenthood.). For critique of moral objection to surrogacy from economic perspective *see, e.g.*, RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 247 (1999) (arguing that “given the benefits of the contracts to the signatories, the pragmatist judge would probably enforce such contracts regardless of what moral philosophers have to say about the issue.”); Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2330-34 (1995) (concluding that the analogy to baby-selling “only strengthens the conclusion that surrogacy transactions should be legal.”); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (urging the enforcement of baby-selling agreements); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL’Y 21 (1989) (arguing in favor of surrogacy contract enforcement). For critique of moral objection to surrogacy from rights perspective *see, e.g.*, JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 99 (1994); John Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J (1996) (concluding that “although ART’s are unlikely to affect or change prevailing notions of family, they can nevertheless be seen as part of a larger set of developments affecting the autonomy of individuals to shape families and childrearing units to their needs.” *Id.* at 932).

⁹⁷ Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 Harv. J.L. & Gender 335, 340 (2006) (defining governance feminism as “the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power. It takes many forms, and some parts of feminism participate more effectively than others’ some are not players at all.”).

⁹⁸ It is important to clarify here that this feminist regulatory power, is not necessarily (though it sometimes is) voiced by what one may identify as a feminist speaker.

(aiming to protect patriarchal bloodline and privilege) were ejected from the realm of law in favor of a modern medical- scientific cure approach and a legal concern with male financial responsibility. This was shortly followed, as we will soon see, by a general legal acceptance of moral condemnation of full surrogacy. Namely, new moral principles regarding reproduction were emerging within the realm of the law in the shape of feminist ethics.

This genealogy of legal morals of reproduction also involved a genealogy of crimes. The new crime of baby-selling (the full surrogacy crime to be discussed later at length) appeared within a decade after the crime of “artificial insemination” as a form of adultery disappeared.⁹⁹ This transition in morality of reproductive technologies also named new victims and criminals. The new victims of full surrogacy, as identified by the *Baby M* court are “the child is sold without regard for whether the purchasers will be suitable parents” and “the natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime.”¹⁰⁰ In contrast, the old victim of artificial insemination (as adultery) was the male patriarch.¹⁰¹ By the late 1960s

⁹⁹ Interestingly, these crimes repeat a similar logic of marital infidelity. A close look at the crime of baby-selling reveals a repetition of the structure of the crime of adultery. The old paradigm for artificial insemination was adultery. Adultery meant replacement--when the sperm of a donor was utilized by a married woman, she had allegedly replaced her husband with another man. Today this same structure repeats. The woman who is hired as a full surrogate by an individual or a couple is the legal mother of the child conceived, while the infertile female party is considered a legal stranger to the child. The full surrogate is seen as a permanent replacement for the infertile female partner--and the logic of adultery is manifested all over again.

¹⁰⁰ In re: Baby M, 109 N.J. at 425.

¹⁰¹ See Part I (discussing moral objections to donor insemination)

religious and traditional ideas of good and evil were considered archaic and no longer acceptable in the legal governance of reproduction. In contrast, by the early 1980s ethical feminist ideas regarding the value of motherhood and the nature of danger were inside the legal governance of reproduction. Possible meanings of this evolution remain to be explored elsewhere.

The moral condemnation of full surrogacy has generally shaped legal approaches to full surrogacy from the early 1980s until this day. In the well known case of *Baby M*, adopting anti-commodification moral concerns with surrogacy, the Supreme Court of New Jersey used strong condoning language to invalidate a paid full surrogacy agreement as “illegal, perhaps criminal and potentially degrading to women.”¹⁰² The court explicitly refused the term “surrogate,” insisting that Mary Beth Whitehead is the one and only “natural” and legal mother of the child,¹⁰³ thus characterizing the surrogacy agreement as one where the “natural mother” is “forever separated from her child.”¹⁰⁴ Mrs. Stern was granted no parental rights or duties.¹⁰⁵ The full surrogacy contract was held to violate baby-selling and adoption statutes as well as the public policy of New Jersey.¹⁰⁶

¹⁰² In re: Baby M, 109 N.J at 411.

¹⁰³ *Id.* at 411 (“the contract providing for this is called a ‘surrogacy contract,’ the natural mother inappropriately called the “surrogate mother.”).

¹⁰⁴ *Id.* at 410 (emphasis added).

¹⁰⁵ *Id.* at 413 (“her anxiety appears to have exceeded the actual risk, which current medical authorities assess as minimal.”).

¹⁰⁶ *Id.* at 411. In 1981, ruling on one of the first constitutional challenges to governmental limitations on surrogacy arrangements, a Michigan appellate court upheld surrogacy restrictions, because “in effect, the plaintiff’s contractual agreement discloses a desire to use the adoption code to change the legal status of the child...we do not perceive this goal as within the realm of

The *Baby M* decision only solidified commonly held views on full surrogacy. A few years earlier, in July of 1984, after a deliberation of two years, a committee appointed by the British government (receiving much attention in the United States) completed its inquiry into the legal, social and ethical implications of new developments in infertility treatments.¹⁰⁷ The sixteen member committee was headed by Mary Warnock, a distinguished moral philosopher, and was composed of theologians, philosophers, philanthropists, scientists, lawyers, social workers and doctors. The fact that a moral philosopher headed the committee is yet another indication that surrogacy was understood as a question of morality. The committee strongly condemned the practice of surrogacy for profit, recommending that such agreements should be made unenforceable and that agencies that arrange such agreements should be made criminally liable because “even in compelling medical circumstances, the danger of exploitation of one human being for another” outweighs the interests and potential benefits of the parties.¹⁰⁸

fundamental interests protected by the right to privacy from reasonable governmental regulation.” *Doe v. Kelley*, 106 Mich. App. 169, 174 (Mich. Ct. App. 1981).

¹⁰⁷ See, e.g., Jacqueline Priest, *The Report of the Warnock Committee on Human Fertilisation and Embryology*, 48 MOD. L. REV.73 (1985); Sylvia Law, *Embryos and Ethics: Report of the Committee of Inquiry into Human Fertilisation and Embryology* 17 FAM. PLANNING PERSPECTIVES 140-144 (1985) (Book Review) (critiquing the Warnock committee for neglecting difficult and moral questions, such as who work as a surrogate is inherently more exploitative than scrubbing floors or working with toxic chemicals, and whether criminalization of surrogacy is any more likely than the protective labor laws of the 1930’s to provide real protection).

¹⁰⁸ Report of the Committee of Inquiry into Human Fertilisation and Embryology, HER MAJESTY’S STATIONARY OFFICE, at 46 (London 1984) (emphasis added). However, the committee approved the practice of egg donation through in vitro fertilization (IVF) carried out under the supervision of licensed medical practitioners. In that procedure egg is collected from a consenting donor, then fertilized in vitro, and transferred into the uterus of the infertile woman. The committee equated

What followed *Baby M* and the *Warnock Report* was a legal trend of restrictions on full surrogacy agreements. Some states did this by adopting statutes that explicitly defined only full surrogacy (but not gestational surrogacy) agreements as void and unenforceable.¹⁰⁹ Other states defined the restrictions broadly to cover *both* gestational and full surrogacy agreements, either turning on compensation,¹¹⁰ or not.¹¹¹ Following the *Baby M* decision, some courts in states with no surrogacy statutes have viewed full surrogacy agreements as unenforceable (void or voidable) and conflicting with adoption or baby-selling laws.¹¹² Echoing feminist ethical accounts of exploited motherhood, most

this with the legitimate practice of fertilization by sperm donation performed by a licensed physician.

¹⁰⁹ NEB. REV. STAT. § 25-21,200 (2007) (only full surrogacy agreements void and unenforceable); LA. REV. STAT. ANN. § 9:2713 (2007) (only full surrogacy agreements null, void and unenforceable); KY. REV. STAT. ANN. § 199.590 (2007) (full surrogacy contract void if compensation is involved). *But see* Surrogate Parenting Associates, Inc. v. Commonwealth, 704 S.W.2d 209 (KY 1986) (surrogate parenting contracts are voidable, rather than illegal and void).

¹¹⁰ WASH. REV. CODE ANN. § 26.26.240 (2007) (gross misdemeanor if compensation is involved); VA. CODE ANN. § 20-156 to 165 (2007) (any agreement for payment of compensation is void and unenforceable, but married couple with infertile wife can effectively contract for both types of surrogacy if no payment is involved); MICH. COMP. LAWS § 722.855 (2007) (both types of agreements are void, unenforceable as against public policy if involving compensation); N.H. REV. STAT. ANN. § 168-B:1-32 (2007) (limiting fees to pregnancy related expenses, lost wages, insurance, Attorney's fees and court costs, and setting infertility of intended mother as a condition for enforceable agreement).

¹¹¹ N.Y. DOM REL. LAW § 121-123 (2007) (both types of agreements violates public policy, void and unenforceable regardless of compensation); IND. CODE ANN. §§ 31-20-1-1 to 3 (2007) (agreement void as against public policy regardless of compensation); ARIZ. REV. STAT. ANN. § 25-218 (2007) (both types of surrogacy contracts prohibited regardless of compensation). *But see* Soos v. Superior Court, 182 Ariz. 470 (Ct. App. 1994) (fundamental liberty interest affected and equal protection violated by statute); D.C. CODE ANN. §§ 16-401(4) to 402 (2007) (both types of surrogacy are prohibited and unenforceable regardless of compensation, with a civil penalty or up to \$10,000 OR imprisonment up to a year or both).

¹¹² *See e.g.*, R.R. v. M.H., 426 Mass. 501, 509 (MA 1998) (holding that full surrogacy agreement is unenforceable because no private agreement regarding custody or adoption can be conclusive until

courts took the position that a commitment to be a full surrogate was substantially different from a commitment to provide sperm because a surrogate supplies a ‘life in being,’ she “protects, nourishes, and delivers a human child capable of survival,” whereas a sperm provider gives “merely a gamete.”¹¹³ Only a few courts rejected the distinction between sperm and surrogacy bargains, stressing that because both sperm and full surrogacy bargains are designed to cure the infertile party, they are therefore legitimate and desirable.¹¹⁴

a judge ruling on custody decides based on the best interest of the child); *Decker v. Decker*, 2001 Ohio 2279 (Ohio Ct. App. 2001) (holding that the fact that birth mother may have signed a unilateral statement relinquishing custody, does not constitute a contract); *In re Marriage of Moschetta*, 25 Cal. App. 4th at 1231 (declining to enforce a full surrogacy contract because “to do so would mean we would have to ignore both the analysis used by our Supreme Court in *Johnson v. Calvert*, and the adoption statute that requires a formal consent to a child’s adoption by his or her birth-mother). *But cf.* *In the matter of Adoption of Baby A*, 128 Ore. App. 450 (Or. Ct. App. 1994) (where evidence showed that birth-mother would have entered contract without compensation, and did not seek to withdraw her consent to adoption, trial court refusal to grant adoption was reversed despite the fact that surrogate was compensated in violation of statute.”).

¹¹³ *In the Matter of the Adoption of Paul*, 146 Misc. 2d at 384 (N.Y. Sup. 1990) (holding that a full surrogacy contract is void because under the clear language of the statutes governing adoption and the policy of the state, it provided for the sale of the child, or at the very least the sale of a mother’s right to her child); *See also* *In re Baby M*, 109 N.J. at 449-450 (holding that a sperm donor cannot be equated with a surrogate mother, even if the only difference was the amount of time necessary to provide sperm for artificial insemination and that necessary for a nine month pregnancy); *R.R. v. M.H.*, 426 Mass. at 509 (full surrogacy “presents different considerations from surrogate fatherhood because surrogate motherhood is never anonymous and her commitment and contribution is unavoidably greater than that of a sperm donor.”).

¹¹⁴ *See, e.g.* *In re Baby Girl*, 505 N.Y.S2d 813, 817 (N.Y. Sup. 1986) (holding that a full surrogacy agreement is not void but voidable, because “the *problem is caused* by the wife’s *infertility*. The *problem is solved* by artificial insemination. The process is not biologically different from the reverse situation where the husband is infertile and the wife conceives by artificial insemination.”); *Surrogate Parenting Associates, Inc. v. Commonwealth*, 704 S.W.2d at 212 (KY 1986) (equating sperm donations to full surrogacy, and holding that full surrogacy agreements do not fall within statutory prohibitions against baby-selling and holding that surrogate parenting organization’s activities were not within the statutory prohibition against purchasing a child for the purpose of adoption). Notably while these decisions rejected the baby-selling paradigm (criminal law), they

Overall, given the raging debates and the strict legal response to full surrogacy, that market in the 1980s remained relatively small. There were only about thirty commercial surrogacy agencies by 1988, making about one hundred matches a year.¹¹⁵ By the mid-1980s however, a new scientific development, known as IVF (in vitro fertilization) revolutionized the baby-making process by splitting conception into two separate components: genetics and gestation.

B. The Exceptions of Egg Donations and Gestational Surrogacy as Cure

While the moral condemnation of full surrogacy translated in some instances into criminal prohibitions on full surrogacy, this was hardly a vast criminal legislation. Far more interesting here is the conversion from moral deviation to legal good. This conversion happened when the IVF (in vitro fertilization) development radicalized the female infertility market by splitting gestation from genetics, and that this happened because the technology responded to contemporary moral conceptions of what motherhood entails.

The first “test tube baby” was born in 1978 in England. By the spring of 1983, about one hundred and fifty babies had been conceived in vitro, but success rates for IVF

nonetheless insisted that the surrogate *is the legal mother* (family law) and thus left with the option to perform or renege as the agreements are *voidable* (contract law). For further discussion of choice of law in the case of Baby M see Carol Sanger, *Great Contracts Cases: (Baby) M is For Many Things: Why I start with M*, 44 ST. LOUIS L.J. 1443, 1448-1450 (2000).

¹¹⁵ SPAR, *supra* note 64, at 78.

were still slim.¹¹⁶ Between the years 1995 to 1998, there was a 37 percent increase in the number of in vitro procedures performed in the US, from about 59,000 to about 81,000. The number of fertility clinics also grew from 281 to 360.¹¹⁷ Consequently, this article shows how despite lack of uniform regulation, over the past two decades legal approaches have generally favored egg donations and gestational surrogacy as legitimate and desirable cure for female infertility.

1. Egg Markets

IVF enabled the retrieval of eggs from donors and implantation in intended mothers who could gestate a pregnancy but could not produce viable eggs. In medical expert literature and patient guidelines, egg donations have been understood as a legitimate curing treatment for infertility.¹¹⁸ For example, in August of 2000, the ethics committee of the ASRM (American Society for Reproductive Medicine) published its ethical approval of financial incentives for egg donations, noting that “although potential harm must be acknowledged and addressed, financial incentives may be defended on ethical grounds.”¹¹⁹

¹¹⁶ *Id.* at 28.

¹¹⁷ *Id.* at 29

¹¹⁸ *See, e.g.*, ASRM Guide for Patients, *supra* note 72, at 4.

¹¹⁹ The Ethics Committee of the American Society for Reproduction Medicine, *Financial Incentives in Recruitment of Oocyte Donors*, 74 FERTILITY & STERILITY 216, 218 (2000). (“First, providing financial incentives increases the number of oocyte donors, which in turn allows more infertile persons to have children. Second, the provision of financial or in-kind benefits does not necessarily discourage altruistic motivations [...] Third, financial incentives may be defended on grounds that the advance the ethical goal of fairness to donors. From this perspective, women who agree to provide oocytes to others ought to be given the opportunity to benefit from their action.”).

Likewise, the legal status of egg donations has generally been equated to that of sperm donations as legitimate cure for infertility. Since the early 2000's, some states have enacted egg donation statutes to reflect this medical and legal reality. In Kentucky, for example, egg donations are explicitly named as an exception to the statutory prohibition of full surrogacy arrangements.¹²⁰ Likewise, a Colorado statute provides that “if, under the supervision of a licensed physician and with the consent of her husband, a wife consents to assisted reproduction with an egg donated by another woman, to conceive a child for herself, not as a surrogate, the wife is treated in law as if she were the natural mother of a child thereby conceived.”¹²¹ In the past decade, Virginia, Texas, Florida, and Oklahoma have enacted statutes that clarify that egg donation is a legitimate curing infertility treatment, and that an egg (or sperm) donor is *not* the parent of a child conceived through assisted conception.¹²²

¹²⁰ KY. REV. STAT. ANN. §199.590 (2) (2007) (“this section shall not be construed to prohibit in vitro fertilization. For purposes of this section, “in vitro fertilization” means the process by which an egg is removed from a woman, and fertilized in a receptacle by the sperm of the husband of the woman in whose womb the fertilized egg will thereafter be implanted).

¹²¹ COLO. REV. STAT. § 19-4-106 (1) (2007)

¹²² VA. CODE ANN. §20-158 (3) (“a donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother”), §20-156 (“donor means an individual, other than a surrogate, who contributes the sperm or egg used in assisted conception”.); TEX. FAM. CODE ANN. § 160.702 (2007) (“a donor is not a parent of a child conceived by means of assisted reproduction”), §160.102 (“donor means an individual who provides eggs or sperm to a licensed physician to be used for assisted reproduction, regardless of whether the eggs or sperm are provided for consideration.”); FLA. STAT. §742.14 (2007) (“the donor of any egg, sperm, or preembryo, other than the commissioning couple...shall relinquish all maternal or paternal rights and obligations with respect to the donation of the resulting children. Only reasonable compensation directly related to the donation of eggs, sperm, and preembryos shall be permitted.”); OKLA. STAT. tit.10 §554 (2007) (any child or children born as a result of a heterologous oocyte

The Curing Law

A similar cure approach to egg donations has been expressed by courts in parental disputes where upon separation, fathers sought declarations of sole paternity and full custody alleging that their wife, inseminated through the process of egg donation, had no genetic relationship to the child. This claim has so far been denied by state courts, and despite lack of genetic connection to the child, the birth-giver has been recognized as the natural and legal mother. In *McDonald v. McDonald*, for example, a New York appellate court explicitly used the language of cure, stressing that, “because the wife was unable to conceive naturally, she conceived through a process known as “in vitro” fertilization...”¹²³ The court characterized this case as a “true ‘egg donation’ situation, in which “the wife, who is the gestational mother, is the natural mother of the children...”¹²⁴ The Supreme Court of Tennessee faced a similar custody and support dispute regarding a triplet born of egg donation to an unmarried couple.¹²⁵ Narrating cure, the court held that the birth-giver is the legal mother, because “the egg donor is a surrogate insofar as she provides eggs in place of and on behalf of another woman who cannot produce viable eggs.”¹²⁶ The egg

donation shall be considered for all legal intents and purposes, the same as a naturally conceived legitimate child of the husband and wife which consent to and receive an oocyte pursuant to the use of the technique of heterologous oocyte donation.”).

¹²³ *McDonald v. McDonald*, 196 A.D.2d 7, 9 (N.Y. App. Div. 1994).

¹²⁴ *Id.* at 12.

¹²⁵ *In re CKG*, 173 S.W.3d 714 (Tenn. 2005).

¹²⁶ *Id.* at 15.

donor, in other words, *cures the woman* who cannot produce viable eggs, but is not considered a legal mother.¹²⁷

2. *Gestational Surrogacy Markets*

For gestational surrogacy agreements, the IVF procedure offered the promising potential of strengthening the legal claim of the intended mother to the child, while weakening the legal claim of the surrogate. Indeed, gestational surrogacy is largely understood today as a legal and legitimate form of curing infertility. Two interrelated characteristics have shaped the status of gestational surrogacy as a curing exception to the legally problematic full surrogacy agreement. First, medical necessity of the intended mother has often been set as a condition for a valid gestational surrogacy agreement. Second, a valid gestational surrogacy agreement usually requires genetic contribution of at least one of the intended parents. Accordingly, a terminological distinction appeared between “gestational carrier” and “surrogate mother.” The term “gestational carrier” has been designated to a woman who carries the genetic child of “another,” while the term “surrogate” or “surrogate mother” has been designated to a woman who carries a child of “her own” with the intention of giving “her” child up to another via adoption.

¹²⁷ *But see* K.M. v. E.G, 37 Cal. 4th 130 (CA. 2005) (holding that an egg donor who donated an egg *to her same sex partner* is the genetic mother of the child who has two legal mothers because this is not a ‘true’ egg donation situation.).

“Medical necessity” as a condition of cure has shaped most current approaches to Gestational Surrogacy. In *Johnson v. Calvert*, decided by the Supreme Court of California in 1993, the cure logic was set up in the court’s reading of the facts of the case:

Mark and Crispina Calvert are a married couple who desired to have a child. Crispina was *forced to undergo a hysterectomy* in 1984. Her ovaries remained capable of producing eggs, however, and the couple eventually considered surrogacy. In 1989 Anna Johnson heard about Crispina’s *plight* from a coworker and offered to serve as a surrogate for the Calverts.¹²⁸

This is the story of a married couple who (1) desires to have children; (2) is unable to procreate “naturally” due to a medical problem and; (3) cured by medical science with the service of a “gestational carrier.” Based on this narrative of cure, the court held that the infertile intended mother who provided the eggs is the legal mother of this child.¹²⁹ The court clarified that the gestational surrogacy agreement does not constitute a pre-birth waiver of her parental rights because gestational surrogacy is not subject to the adoption statutes. Accordingly, “payments to [the surrogate] under the contract were meant to compensate her for her services in gestating the fetus and undergoing the labor, rather than for giving up “parental” rights to the child.”¹³⁰

¹²⁸ *Johnson v. Calvert*, 5 Cal. 4th at 87 (emphasis added).

¹²⁹ *Id.* at 93 (“although the Act [the UPA] recognizes both genetic consanguinity and giving birth as means of establishing mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.”).

¹³⁰ *Id.* at 96 (the court rejected the gestational carrier’s claim that her relationship with the child is constitutionally protected, holding that “a woman who enters into a gestational surrogacy

These conditions of medical necessity and genetic contribution have been repeated since *Calvert* by numerous courts and legislators. In *JR v. Utah*, for example, a Utah court struck as unconstitutional a general statutory prohibition on all kinds of surrogacy, when “unable for medical reasons to have children on their own,” a couple who hired a woman to “serve as a gestational carrier surrogate for a child to be conceived *in vitro* by [the couple].”¹³¹ The court held that by deeming the gestational carrier to be the legal mother of the children, the conflicting statute unduly burdened the couple’s fundamental liberty interests in conceiving and raising children without unwarranted government interference.¹³² In a similar constitutional challenge, an Arizona appellate court has held that a state surrogacy statute violated the equal protection clause of the 14th Amendment, where the statute in question allowed a biological father to prove paternity, but did not allow any means for the genetic mother, who had provided her eggs, to prove maternity.¹³³

In line with this growing legal understanding of gestational surrogacy as cure, the New Jersey Superior court has permitted genetic parents to be named in a birth certificate, characterizing the gestational surrogacy arrangement as one that “permits a woman who is incapable of carrying a baby to term to have a child who is genetically related to her,” and that “unlike surrogate motherhood [full surrogacy] gives the wife of an infertile couple the

arrangement is not exercising her own rights to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own.” *Id.* at 100).

¹³¹ *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1270 (D. Utah 2003).

¹³² *Id.* at 1296.

¹³³ *Soos v. Super. Ct.*, 897 P.2d 1356, 1360 (Ariz. Ct. App. 1994).

opportunity to be biologically related to the baby and ensures that the woman who gives birth is not genetically related to the child.”¹³⁴ A California appellate court, interpreting *Calvert*, has also affirmed that “in traditional surrogacy [full surrogacy] the so called ‘surrogate’ mother is not only the woman who gave birth to the child, but the child’s genetic mother as well. She is, without doubt, the “natural” parent of the child, as is the father.”¹³⁵ Similarly differentiating gestational and full surrogacy, in *Culliton v. Beth Israel*, the Supreme Court of Massachusetts ruled that adoption laws do not apply in cases of gestational surrogacy, characterizing the gestational surrogate (in contrast with a full surrogate) as a carrier and *not* a mother:

In such an arrangement [full surrogacy], the surrogate is both the genetic mother of the child and the mother who carries the child through pregnancy and delivery. The child is thus, undisputedly, “her” child to be surrendered for adoption. Here where it is undisputed that plaintiffs were not donating an embryo or embryos to the gestational carrier, and that the twins have no genetic relation to the gestational carrier, the concerns are different from those at issue in *R.R. v. M.H.*¹³⁶

The condition of medical necessity of the intended mother is also determinative in infertility medical literature. The ASRM has recently defined gestational surrogacy as a

¹³⁴ *A.H.W. v. G.H.B.*, 339 N.J. Super. 495, 497-498 (2000) (issuing an order permitting petitioner biological parents’ names to be placed on the birth certificate during the two day window between expiration of the statutory waiting period and the deadline for filing the certificate).

¹³⁵ *In re Marriage of Moschetta*, 25 Cal. App. 4th at 1222.

¹³⁶ *Culliton v. Beth Israel*, 435 Mass. 285, 290-291 (MA 2001) (entering a judgment declaring the intended genetic parents to be a child’s parents, and ordering hospital to identify them as the legal parents on the birth certificate); *See also* *Arredondo v. Nodelman*, 163 Misc. 2d 757 (N.Y. Sup. Ct. 1994) (granting an uncontested post-birth petition of genetic parents of children born pursuant to gestational carrier arrangement to declare genetic mother the legal mother of donor insemination children and to order issuance of new birth records so to reflect).

“treatment option available to women with certain clearly defined medical problems, usually an absent uterus, to help them have their own genetic children.”¹³⁷ The initial indication (qualification) for gestational surrogacy is “a woman who has normally functioning ovaries but who lacks a uterus.”¹³⁸ The lack of uterus is understood as cured by the IVF treatment through the use of the “gestational carrier.” Through this form of medical cure the infertile woman accomplishes her genetic motherhood. Consequently, as in *Calvert*, the surrogate is treated as a “gestational carrier” with no genetic link to the fetus, and is thus less controversial “both legally and psychologically.”¹³⁹ The justifying logic here is that the IVF procedure medically enables a ‘genetic link’ to a child as an infertility treatment that cures the infertile female body with the uterus of another.

This status of gestational surrogacy as an exception has recently been made explicit by various state courts and legislators. Most recently, the Court of Appeals of Minnesota has held that “because there is no Minnesota legislative or judicial pronouncement that prohibits such agreements, we conclude that GSAs [Gestational Surrogacy Agreements] do not violate any articulated public policy of this state.”¹⁴⁰ Likewise, under the Illinois

¹³⁷ Peter Brindsen, *Gestational Surrogacy*, European Society of Human Reproduction and Embryology: Human Reproduction Update Vol. 9, 483, 483 (2003) (emphasis added).

¹³⁸ ASRM Guide for Patients, *supra* note 72, at 13. See also Brindsen, *Id.* at 489 (“the indications for treatment by gestational surrogacy are limited to a small number of women, most of whom have no uterus, suffer from recurrent abortion, or who have certain medical conditions, which would threaten their lives if they were to become pregnant.”).

¹³⁹ ASRM Guide for Patients, *supra* note 72, at 3 (“[T]he gestational surrogate has no genetic link to the fetus she is carrying. Traditional surrogacy arrangements often are perceived as controversial with the potential to be complicated both legally and psychologically.”) (emphasis in text).

¹⁴⁰ *P.G.M v. J.M.A.*, 2007 Minn. App. LEXIS 1189, at *18 (Minn. Ct. App. 2007).

“Gestational Surrogacy” Act (effective as of 2005), intended parents satisfy the requirements of the Act if they meet all the following requirements at the time that the agreement was executed: “(1) he, she, or they contribute at least one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term; (2) he she, or they have a medical need for the gestational surrogacy as evidenced by a qualified physician’s affidavit attached to the gestational surrogacy contract and as required by the Illinois Parentage Act of 1984” (3) he, she, or they have completed a mental health evaluation...”¹⁴¹ The act confirms the status of gestational surrogacy as an exception to the prohibited full surrogacy by clarifying “except as provided in this Act, the woman who gives birth to a child is presumed to be the mother of that child for purposes of State law.”¹⁴² Medical necessity and genetic contribution are also critical conditions in the Florida gestational surrogacy statute, which requires that “the commissioning couple” shall enter into a contract with a gestational surrogate only when, within reasonable medical certainty as determined by a physician licensed [...] (a) the commissioning mother cannot physically gestate a pregnancy to term; (b) the gestation will cause a risk to the physical health of the commissioning mother; or (c) the gestation will cause a risk to the health of the fetus.”¹⁴³ The statute also requires that the gestational surrogate will become pregnant “without the

¹⁴¹ §750 ILL. COMP. STAT. 47/20 (2007) (“Gestational Surrogacy Act”) (emphasis added).

¹⁴² *Id.* at 47/15.

¹⁴³ FLA. STAT. § 742.15 (2007) (“Gestational Surrogacy Contract”) (emphasis added).

use of an egg from her body,”¹⁴⁴ and that the child be conceived “by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents.”¹⁴⁵

North Dakota also recently changed its surrogacy statute (2005) to explicitly carve out the “gestational carrier” exception, setting an even stricter standard of genetic contribution of egg and sperm of both intended parents.¹⁴⁶ Reflecting the logic of cure, the statute defines a “surrogate” as “an adult woman who enters into an agreement to bear a child conceived through assisted conception for intended parents,”¹⁴⁷ in contrast with a “gestational carrier” who is “an adult woman who enters into an agreement to have an embryo implanted in her and bear the resulting child for intended parents, where the embryo is conceived by using the egg and sperm of the intended parents.”¹⁴⁸ The statute reaffirms that in contrast with “gestational carrier” agreements where “a child born to a gestational carrier is a child of the intended parents for all purposes and is not the child of the gestational carrier,”¹⁴⁹ “any agreement in which a woman agrees to become *a* surrogate [...] is void.”¹⁵⁰ A similar full genetic contribution requirement is found in the Nevada Statute, which specifically allows married couples to enter a gestational surrogacy

¹⁴⁴ *Id.* at § 742.13 (5).

¹⁴⁵ *Id.* at § 742.13 (2) (emphasis added).

¹⁴⁶ N.D. CENT. CODE § 14-18-01 (2007).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at § 14-18-08

¹⁵⁰ *Id.* at § 14-18-05

agreement for a “pregnancy resulting when an egg and sperm from the intended parents are placed in a surrogate through the intervention of medical technology.”¹⁵¹

Medical necessity is also a prerequisite in the Texas statutory scheme (enacted in 2003), which provides that “a court may validate a gestational surrogacy agreement only if it finds that [...] (2) the medical evidence provided shows that the intended mother is unable to carry a pregnancy to term and give birth to the child or is unable to carry the pregnancy to term and give birth to a child without unreasonable risk to her physical or mental health or to the health of the unborn child.”¹⁵² The statute also requires that “the gestational mother’s eggs may not be used in the assisted reproduction procedure,”¹⁵³ and that the eggs must instead be retrieved from an intended parent or a donor.¹⁵⁴ In addition, the intended parents must be married to each other.¹⁵⁵ Likewise, in 2005 the Utah legislature repealed its broad prohibition on surrogacy contracts for profit,¹⁵⁶ responding to the holding in *J.R v. Utah*, that it unduly burdened a couple’s fundamental liberty interests by conclusively deeming the gestational carrier to be the mother of the children for legal purpose, to the exclusion of the couples rights to conceive and raise “their own

¹⁵¹ NEV. REV. STAT. ANN. § 126.045 (2007) (the statute also provides that “it is unlawful to pay or offer to pay money or anything of value to a surrogate expect for the medical and necessary living expenses related to the birth of the child as specified in the contract.”).

¹⁵² TEX. FAM. CODE. ANN. § 160.756 (b)(2) (2007)

¹⁵³ *Id.* at §160.754 (c)

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at §160.754 (b)

¹⁵⁶ UTAH CODE ANN. § 78-45g-801 (2007).

children.”¹⁵⁷ A consequent new legislation, entitled “Parentage under Validated Gestational Agreement” directs that “upon birth of a child to a “gestational mother” a tribunal shall issue an order directing the issuance of birth certificates naming the intended parents as parents of the child, and in cases of dispute, “order genetic testing to determine the parentage of the child.”¹⁵⁸

The value of genetic parenthood, emphasized in every one of these legal validations of gestational surrogacy, deserves close attention. The genetic contribution component reflects the rising social-legal evaluation of genetic reproduction as a legally protected interest. This is significant especially given the heated debates raised by its predecessor, full surrogacy. Has the genetic linkage between the intended mother and the child converted the immoral full surrogacy into a legal good? It seems that this is the case.

The main moral concerns in the objection to full surrogacy (commodification of women and children) were in no way relieved with gestational surrogacy. Gestational “carriers” today are indeed mostly lower income black women. In fact, as put by Deborah Grayson, “gestational surrogacy invites the singling out of black women for exploitation not only because a disproportionate number of black women are poor and might possibly turn to leasing their wombs as a means of income, but also because it is incorrectly assumed that black women’s skin color can be read as a visual sign of their lack of genetic

¹⁵⁷ J.R. v. Utah, 261 F. Supp 2d 1268.

¹⁵⁸ UTAH CODE ANN. § 78-45g-807 (2007).

relation to the children they would bear for the white couples who seek to hire them.”¹⁵⁹

Nonetheless, such moral concerns currently do not seem to interfere with the growing legal acceptance of gestational surrogacy as legitimate cure. Children born of gestational surrogacy are de-facto legally viewed as authentic autobiographies of their genetic providers, while full surrogacy has remained in the realm of immorality.

Consequently, as in the legitimization of sperm donations, the legal acceptance of IVF procedures as cure for female infertility has opened up the possibility of markets for gestational surrogacy and egg donations. With the carving out of the gestational surrogacy exception, it is today commonly accepted that gestational surrogates are and should be monetarily compensated. Although gestational surrogacy remains a small piece of the infertility market,¹⁶⁰ as of 2004, gestation surrogate compensation was between \$30,000 and \$120,000.¹⁶¹ In addition, today we find a well developed commercial market for eggs in the US. By 1997, 78% of the 335 assisted reproduction programs reporting to the ASRM stated that they offered egg donation services for compensation.¹⁶² By 1999, some IVF programs offered as much as \$5,000 per retrieval,¹⁶³ and by 2004, most large fertility centers offered their own “in-house” egg programs with a catalog of potential donors and

¹⁵⁹ Deborah R. Grayson, *Mediating Intimacy: Black surrogate Mothers and the Law*, 24 *CRITICAL INQUIRY* 540 (1998).

¹⁶⁰ In 2001 there were only 571 reported surrogacy agreements in the US. SPAR, *supra* note 64, at 94.

¹⁶¹ *Id.* at 92.

¹⁶² *Id.* at 216.

¹⁶³ *Id.* Much higher sums, \$50,000 or more have been offered in print and internet ads placed by individuals and couple seeking eggs from women with specific physical characteristics and intellectual abilities. *Id.*

prices that typically ranges between \$3,000 and \$8,000.¹⁶⁴ Centers recruit donors using discreet ads in local newspapers and in University campuses, providing their potential clients physical and social descriptions of the egg providers.¹⁶⁵ Due to the fact that commercial selling of eggs remains illegal in most other industrialized countries, US firms have risen to the top of the global egg trade.¹⁶⁶

III. BARGAINING IN THE SHADOW OF THE CURE PARADIGM

Robert Mnookin and Lewis Kornhauser have observed that “[i]ndividuals in wide variety of contexts bargain in the shadow of the law.”¹⁶⁷ We should accordingly consider how “rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs... *outside* the courtroom.”¹⁶⁸ In our case, the cure paradigm used in courts and by legislators has created certain market conditions where “the preferences of the parties, the entitlements created by law, transaction costs, attitudes toward risk, and strategic behavior substantially affect the negotiated outcomes.”¹⁶⁹

¹⁶⁴ SPAR, *supra* note 64, at 45.

¹⁶⁵ *Id.* (“at the center for egg donation, for example, clients from around the world searched an online database of donors, complete with name, SAT scores and glossy photos of both the donor and her own family... although the center’s Beverly Hills location led to an apparent cluster of blond and blue eyed eggs, it also offered harder to find types, including Jewish, red-headed, and South Asian prospects.”).

¹⁶⁶ *Id.*, at 46 (“at the center for egg donations, 30 percent of the business in 2003 came from abroad, and the number was steadily rising.”).

¹⁶⁷ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1978).

¹⁶⁸ *Id.* at 951 (emphasis in text).

¹⁶⁹ *Id.* at 997.

The most important impact of the cure paradigm highlighted throughout this article is that the reproductive technology of full surrogacy is legally understood as *replacement* of the intended mother *rather than cure* for her infertility. Full surrogacy has been legally marginalized because the intended mother does not provide her genes or carry the pregnancy. This classification of full surrogacy as maternal replacement is not a medico-legal reality but a moral position pursued by law-makers. While Part I has revealed how in the legalization of sperm donor insemination the cure paradigm has effectively de-linked biology from paternity, Part II has underscored the moral reproductive demand that if a woman wants to bargain for the production of a child, her actual infertile female body is to be (if possible) physically present and cannot be left untreated by medical science. She must also be in medical need of reproductive assistance. The infertile woman who (can, but) does not provide an egg or a uterus, is currently legally understood as not cured, and her bargain will not be enforced against a full surrogate who had “replaced” her.

The legal classification of full surrogacy as replacement *and not cure* has had crippling effects on the formation of a free market for full surrogacy. This is not to say that there is no market for full surrogacy. As Professor Carol Sanger has recently pointed out, the Sterns and the Whiteheads entered the surrogacy agreement in *Baby M* precisely because there was already an existing market for surrogacy in the 1980s.¹⁷⁰ However, this

¹⁷⁰ This market, according to Sanger, emerged in the 1980s as a result of four distinct factors: cultural attitudes towards parenthood and motherhood, the state of reproductive technologies, the absence of controlling law, and entrepreneurial intervention of intermediaries. Sanger, *supra* note 1, at 72.

tightly regulated market from the 1980s until today, is linked with the social-legal understanding of full surrogacy as an ethically problematic bargain for maternal replacement, and *not* as a cure treatment. Accordingly, the full surrogacy market in the 1980s remained relatively small, with only about thirty commercial surrogacy agencies by 1988, making about one hundred matches a year.¹⁷¹

And while the market for full surrogacy has effectively diminished, egg donations and gestational surrogacy, which have been legalized as legitimate curing treatments for infertility, are very costly. The average cost for a cycle of IVF in the US was \$12,400 in 2003.¹⁷² Eggs cost more than sperm (\$4,500 versus \$300 on average), and as mentioned above, gestational surrogates are compensated between \$30,000 and \$120,000.¹⁷³

Consequently, many potential buyers in the baby-making markets cannot afford to enter those markets. The demand is here, and the supply is as well, but “the price of this supply is too high for many potential buyers, leaving supply and demand to meet at a point well below their potential.”¹⁷⁴ Notably, the price constraint can theoretically be solved by folding fertility treatment into the national health system,¹⁷⁵ or by mandating insurance coverage.¹⁷⁶ But diverting the costs to the state or insurance policies will not change the

¹⁷¹ SPAR, *supra* note 64, at 78.

¹⁷² *Id.* at 29.

¹⁷³ *Id.* at 92. According to the ASRM, however, the average is around \$20,000. Highlights from the 62nd Annual meeting American Society for Reproductive Medicine.

¹⁷⁴ SPAR., *supra* note 64, at 30.

¹⁷⁵ Such is the case in the Danes and Israel. *Id.* at 30.

¹⁷⁶ As in the case of fourteen US states. *See id.* .

underlying legal and moral assumption that it is only these procedures that really cure infertile women.

Thus a direct consequence of the cure paradigm is that it has made surrogacy affordable only for affluent individuals or couples. Gestational Surrogacy involves the costly high-tech IVF technology, while full surrogacy is a low-tech (or no-tech) arrangement. Since the early 1990s, couples and individuals have been advised to pursue gestational surrogacy in order to avoid the legal complexities of full surrogacy.¹⁷⁷ Current medical guidelines and fertility expert literature direct couples and individuals to the legally safe procedures of gestational surrogacy and egg donations.¹⁷⁸ Those medical procedures involving IVF (egg donations and gestational surrogacy) are significantly more *expensive* than the fairly simple procedure of sperm fertilization involved in full surrogacy. As noted in *In re Marriage of Moschetta* by a California court of appeals:

Infertile couples who can afford the high-tech solution of in vitro fertilization and embryo implantation in another

¹⁷⁷ Focusing on the role of the “middle man” in bargains for surrogacy, Carol Sanger has recently observed that as a consequence of the negative treatment of monetary compensation in cases of full surrogacy, brokers (middle men) had to go elsewhere in order to profit from such bargains, and that is what they did. Brokers transitioned to jurisdictions that permitted surrogacy, or to those in legal limbo. Thus, “couples can now choose from an array of surrogacy options. They can stay close to home if the local market satisfies, or they can forum shop in the global market of reproductive tourism.” Sanger, *supra* note 1, at 95-96.

¹⁷⁸ ASRM Guide for Patients, *supra* note 72, at 3 (“Third Party Reproduction also includes traditional *surrogacy* and *gestational carrier* arrangements... [T]he gestational surrogate has no genetic link to the fetus she is carrying. Traditional surrogacy arrangements often are perceived as controversial with the potential to be complicated both legally and psychologically. Despite the requirement for *in vitro fertilization* (IVF) to create embryos, the utilization of a gestational surrogate, legally, is a lower risk procedure and is the more common approach conducted in the United States.”).

woman's womb can be reasonably assured of being judged as the legal parents of the child, even if the surrogate reneges on her agreement. Couples who cannot afford in-vitro fertilization and embryo implantation, or who resort to traditional surrogacy because the woman does not have eggs suitable for in vitro fertilization, have no assurance their intentions will be honored in a court of law. For them and the child, biology is destiny."¹⁷⁹

Assuming a heterosexual infertile couple, the *Moschetta* court problematizes the impact of the full-gestational surrogacy on "[heterosexual] couples who cannot afford in-vitro fertilization and embryo implantation, or who resort to traditional surrogacy because the woman does not have eggs suitable for in vitro fertilization." These couples bargain in the shadow of the cure paradigm for reproductive technologies with no legal certainty. For them and the child, says the court, "biology is destiny."

The "biology is destiny" diagnosis has proved even more critical for men bargaining in the baby-making market today seeking to create motherless families. Review of current legal disputes reveals that the cure logic and its manifestation, the gestational-full surrogacy distinction, create even more complicated and costly bargaining conditions for males seeking to create motherless families. Motherless families are clearly a digression from the cure model revealed in this paper, in which egg and gestation supposedly cure infertile women. The case of single and gay men seeking to create families through the baby-making markets currently exemplifies how complicated bargaining in the shadow of the cure paradigm has become.

¹⁷⁹ In re Marriage of Moschetta, 25 Cal. App. 4th at 1235

Far from serving as a friendly facilitator for “formation of families based on intention and function rather than biology and heterosexuality,”¹⁸⁰ a hope expressed by Professor Ertman, the market, tailored by the cure paradigm, drives single men and same-sex male couples to costly and very complex bargains to satisfy their desire to create families. The complexity of these bargains involves two interrelated price increasing parameters: (1) the legalized separation of maternal labor into gestation and genetics, and (2) forum shopping. First, given the status of full surrogacy, men cannot just hire full surrogates to bear their children. The current state of the law (based on the cure paradigm) requires the separate and much more costly purchase of eggs and gestation (from two different sources) so that no potential woman will have a legal maternity claim over the child. Second, the costs of these bargains increase dramatically because they often involve forum shopping for jurisdictions, such as Illinois, with clear statutory guidelines on egg donations and gestational surrogacy. As Professor Carol Sanger has observed, “couples can now choose from an array of surrogacy options. They can stay close to home if the local market satisfies, or they can forum shop in the global market of reproductive tourism.”¹⁸¹

Such reproductive tourism took place in *P.G.M v. J.M.A.*, where the Minnesota Supreme Court enforced a gestational agreement in a paternity dispute between a gay male from New York and a gestational surrogate from Minnesota. The child was conceived

¹⁸⁰ Ertman, *supra* note 63, at 4 (emphasis added).

¹⁸¹ Sanger, *supra* note 1, at 95-96.

using the Plaintiff's sperm and a donor egg, and the sides agreed to be governed by Illinois law.¹⁸² Ruling in favor of Plaintiff intended father, the Supreme Court of Minnesota affirmed that the agreement was correctly enforced by the lower court because "GSA's [gestational surrogacy agreements] do not violate any articulated public policy of this state,"¹⁸³ and that under Illinois law, "there is clear and convincing evidence rebutting the presumption that [gestational surrogate] is the child's mother."¹⁸⁴ Similarly, in *J.F. v. D.B.*, a man bargained separately with women from two different states for eggs and gestation. Ruling in a paternity dispute between the gestational surrogate and the intended father, the Supreme Court of Ohio held that "no public policy is violated when a gestational surrogacy contract is entered into, even when one of the provisions requires the gestational surrogate not to assert parental rights regarding children she bears that are of another woman's artificially inseminated eggs."¹⁸⁵ In *In re: Roberto d. B.*, in a joint petition of an intended genetic father and a gestational carrier asking to issue accurate birth certificates that did not list the gestational carrier as mother of the born twins, the Court of Appeals of Maryland held that in this case "a third party [the gestational surrogate] desires to relinquish parental rights not assert them. There is simply no contest over parental rights. There is no issue of unfitness on the part of the father...accordingly the implication of the trial court that the

¹⁸² P.G.M v. J.M.A, 2007 Minn. App. LEXIS 1189, at *18

¹⁸³ *Id.* at 18.

¹⁸⁴ *Id.* at 21.

¹⁸⁵ *J.F. v. D.B.*, 16 Ohio St. 3d 363, *6 (Ohio 2007).

BIC [Best Interest of the Child] standard should be used in the case sub judice is inappropriate...”¹⁸⁶

Although all three cases were decided in favor of the males bargaining for motherless families, significantly the dissenting opinions in two of these cases reveal extreme legal anxiety with this transgression from the female cure paradigm. In *J.F. v. D.B.*, the dissent passionately resisted this deviation from the cure paradigm, viewing such a bargain as against the public policy of Ohio because “it would be necessary to legally declare that the children do not have a mother. Such a position is untenable.”¹⁸⁷ This contract, declared the dissent, “is no less than a contract for the creation of a child [...] this court should not be the unwitting instrument to opening the door of this state to such unregulated commercial enterprise.”¹⁸⁸ The dissent in *In Re Roberto d. B.*, characterized the decision not to list the gestational carrier as a mother on the child’s birth-certificate as “in essence, stating that it is good public policy for the people of this State to permit the manufacturing of children who have no mother- even at the moment of birth.” Thus, “there is to be no mother- just a Petri dish.”¹⁸⁹

¹⁸⁶ *In re Roberto d. B.*, 399 Md. 267, 292-293 (Md. Ct. App. 2007).

¹⁸⁷ *J.F. v. D.B.*, 2007 Ohio at *14-18.

¹⁸⁸ *Id.* at *17.

¹⁸⁹ *In re Roberto d. B.*, 399 Md. at 301.

CONCLUSIONS: REEVALUATING THE CURE PARADIGM

Whether we like it or not, “there is a flourishing market for both children and their component parts. Eggs are being sold; sperm is being sold; wombs and genes and orphans are being sold; and many individuals are profiting handsomely in the process.”¹⁹⁰

Bracketing for a moment the question whether this market is a good or a bad thing, this article has posed two questions. First, how and which moral values have shaped current markets for eggs, sperm and gestational surrogacy? Second, how have these moral values influenced the bargaining conditions of market participants?

The main claim of the article is that there is an inherent relationship between current baby-making markets and the legal paradigm of cure. Parts I and II reveal the historical and current dependency of the sperm, egg, and gestational surrogacy markets on the cure paradigm. It was the cure paradigm that set all these three markets (sperm, egg and gestation) in action. In contrast, full surrogacy, the one technology that that did not develop into a full-fledged free market, conspicuously lacks legal and medical narrations of cure. This calls for careful analysis of what ‘cure’ has meant in the medical and legal regulation of reproductive technologies. As any other value used to regulate human behavior under the name of medical-scientific objectivity, the article approaches the cure paradigm with caution.

¹⁹⁰ SPAR, *supra* note 64, at xv.

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The cure paradigm has in fact naturalized other less visible values. In the case of male infertility, as evident in Part I, courts and legislators followed medical experts in recognizing sperm donations as moral and legal, only when (but not before) another value was at stake: male social responsibility for support of the offspring. Even then, female to male transgender individuals have been marginalized. Statutory presumptions of paternity addressing males whose female partners are inseminated by donor sperm have not been applied to transgender female to male (FTM) individuals. In the case of female infertility, Part II illustrates that the current regulatory trends require intended mothers to provide their own uterus or eggs. Thus, today male infertility can be cured without any physical participation in the reproductive process. Female infertility however, can typically be cured under the condition of physical participation in the reproductive process either through gestation (in cases of egg donations) or genetic contribution (in cases of gestational surrogacy). The underlying moral-values here are that men should support children and women should bear them. Far from its objective-scientific appearance, the cure paradigm is exceedingly gendered.

Given its harsh market consequences and contestable moral grounds, it is time to re-evaluate the cure paradigm. Such an endeavor would involve the formation of a new paradigm for regulating baby-making markets. Instead of regulating reproductive technologies as medical treatment for individual infertility, this new paradigm will examine the end result—the family that will be created. Namely, bargains and markets for all reproductive technologies should be viewed as what they really are- bargains and markets to create families of choice.

At the more immediate level, the full-gestational surrogacy distinction deserves a serious and responsible re-thinking by legislators and judges. While Part II has revealed that the distinction reflects a medical-social-legal reality in which genetic parenthood and female participation in child bearing have become superior moral values, Part III has underscored how by channeling market participants to gestational surrogacy but not to full surrogacy, the distinction also produces serious market failures. Specifically, by blocking the full surrogacy option, lower-income heterosexual couples are de-facto left out of the baby-making markets, and gay males (who cannot provide their own eggs or uterus) are effectively routed to the costly IVF procedures and to forum shopping. Therefore, a shift of paradigm from cure to families of choice, may involve the legitimization of full surrogacy.

The legitimization of full surrogacy seems promising both on the demand and on the supply side of baby-making markets. On the demand side, it would invite more participants into the market by dramatically cutting the costs of the process. Full surrogacy is a low-cost, low-tech procedure that involves the simple injection of sperm into the uterus of the potential surrogate, while IVF is fancy, costly, and medically intrusive. A full legitimization of full surrogacy would enable single males and gay and heterosexual couples to bargain with one surrogate (rather than an egg donor and a gestational surrogate) in their home jurisdiction, thus dramatically reducing the costs of the bargain. On the supply end, a legitimization of full surrogacy can potentially result in higher compensation for surrogates because market participants will no longer have to bear the high costs of

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IVF. Medical experts and technologies as costly middle-entities would potentially be removed from the bargain.

Thus, without undermining our legal and medical faith in the progress promised by *in vitro fertilization*, this claim for the legitimization of full surrogacy also serves as a reminder that “to believe in progress is not to believe that progress has already taken place. That would be no belief.”¹⁹¹

¹⁹¹ Walter Benjamin, *Franz Kafka: On the Tenth Anniversary of His Death*, in *ILLUMINATIONS: ESSAYS AND REFLECTION* 111,130 (Hannah Arendt Ed., Harry Zohn Trans., Schocken Books 1968).