2010

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Pregnant Man?: A Conversation

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PROLOGUE

Darren Rosenblum

I'm a law professor who works on gender, sexuality, and culture in the international and comparative context. That's my head working. In "real" life, my partner, Howard, and I have been engaged in having a baby together for several years, a project that came to fruition with the birth of our daughter Melina. Of course, such a project evokes intensely complex feelings and thoughts. Beyond a simple transposition of the personal onto the political, I feel so fortunate to have engaged in myriad conversations with a variety of friends and colleagues who think much more carefully about the family and different aspects of race, class, gender, and sexuality than I do. Fascinating conversations also arose with people who work in the less clearly related fields of administrative law, law and economics, public international law, international commercial law, and law and psychology. These conversations have reshaped my understanding of the boundaries among self, family, and society, and have given me a faith in our profession that, despite the hierarchies and occasional pettiness, we law professors are a warm and supportive bunch. As Howard and I awaited the birth of our child, I wrote down some of my thoughts on these conversations to memorialize them so that others could share them. Scholarship abounds on parenting and families: surrogacy, in-vitro

fertilization and other reproductive technologies, gay parenting, the economics of families, and so on—studies which can and did inform our process. I wrote this short essay in the middle of our gestational surrogate's pregnancy to remind myself of the many amazing theoretical discussions I've had over the past couple of years as my partner and I worked to become parents.

At first, I was far too reluctant to attach to the fetus as if it were our baby, so much so that we referred to it as "Cletus the Fetus," and then, at the suggestion of a friend (who noted that "Cletus" was a boy's name), as "Cledith or Cletus" during the pregnancy. Now that I'm sitting five feet from our daughter Melina, I feel safer opening this chapter of our lives to others.

Pregnant Man?

I'm pregnant. No, I can't say that—a person with a uterus is pregnant. But I'm expecting. Even that sounds strange for a man to say. Howard and I began this process a few years ago when we first met with an agency that helps (mostly gay) couples have children through gestational surrogacy (GS). In GS, the doctor "harvests" one woman's eggs, then has them fertilized and implanted in another woman. This is the more common form of surrogacy because the woman giving birth has no biological link to the baby and tends to be far less interested in keeping the baby, not to mention that she has limited legal rights. Through this process, there have been so many choices and dilemmas that we have faced.

A. Gestational Surrogacy v. Adoption

The first question to answer is: why surrogacy? Initially, it was more my preference than Howard's. Surrogacy and adoption require determination, ingenuity, and resources, especially for LGBT couples.[1] Perhaps it's the control queen in me, but the thought of relying on others' emotions about the intensely emotional issue of procreation for my own procreation posed a major threat: I focused on the risk that legally, the mother may change her mind in many domestic adoptions. Meeting people who had been tormented by attaching to a child and then giving him or her back to the mother a few weeks later terrified me. Friends pursuing foreign adoption waited for years to find that international relations prevented their getting a child.

1. *See* LAURA BENKOV, REINVENTING THE FAMILY 131 (1994); *see, e.g.*, Carlos A. Ball, *The Immorality of Statutory Restrictions on Adoptions by Lesbians and Gay Men*, 38 LOY. U. CHI. L.J. 378 (2007); Nicole M. Shkedi, Comment, *When Harry Met* Lawrence*: Allowing Gays and Lesbians To Adopt*, 35 SETON HALL L. REV. 873 (2005).

Dan Savage's *The Kid* illustrates some of the complications of adoption for LGBT couples.[2] In that book, Savage, a leading commentator on sexuality and relationships, recounts his process of adopting a boy from a young homeless woman. Several dramas confront Savage and his partner as they attempt to adopt; the most dramatic is the question of whether Melissa, who is carrying the child, will actually give up the child once he's born. In the recent telling of the story, an off-Broadway musical, the audience emitted an audible sigh of relief when Dan and his partner leave with the boy.[3] The anxiety the couple went through in that story was one that I feared too deeply, and the great likelihood of keeping a baby born through GS gave me security.

I tend to believe nurture outweighs nature. So it surprised me to notice my own attention and even delight in seeing kids with their parents and noting similarities and differences in phenotype. I then became aware of how incessant remarks on such concerns are, even when the basis for comparison is nonexistent (such as with adoption or stepparents). I discovered a curiosity to experience this connection, but immediately suspected heteronormative mimicry. For now, choosing surrogacy was more about not falling into presumed roles—that gay men's children are adopted and that LGBT families are not only "alternative" for having two parents of the same sex, but also for having kids who were adopted.[4] Nearly everyone we told we were going to have kids asked how we'd adopt.[5] Sharing our planned surrogacy was one way to resist this social presumption's predetermination of my family's shape.

Surrogacy poses its own complications, both legal and ethical. Its legality varies from state to state and the market is more or less fluid depending on the jurisdiction[6]—a challenge for all who decide to utilize reproductive technology. LGBT people have few options to assist them in building their families. Surrogacy in particular requires jumping through several hoops, many of which involve significant capital. Some try to do this as free agents, assembling the necessary carrier and donor and incurring the risks of searching for, hiring, and managing a series of actors to create a baby. Each of these individuals likely will require at least a lawyer and a psychologist for assessment and treatment

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2. DAN SAVAGE, THE KID: WHAT HAPPENED AFTER MY BOYFRIEND AND I DECIDED TO GO GET PREGNANT (2000). Its production as an off-Broadway musical is one of the first to focus on gay parenthood. Michael Zam, *The Kid* (Scott Elliott dir., at The Acorn, New York, N.Y., May 19, 2010).

3. *Id.*

4. Indeed, the relative invisibility of gay parenting in popular culture has shifted since my writing this: a white gay couple adopts an Asian baby girl on the popular situation comedy *Modern Family* (ABC television broadcast Sept. 23, 2009).

5. Even after Melina's birth, people remark with surprise that Melina might look like one of us, presuming that she came into our life by adoption and that it was a mere fortuity that she might resemble one of us.

6. *See* Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449 (2009); *Surrogacy*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/parenting/surrogacy/surrogacy_laws.asp (last visited Dec. 9, 2010).

purposes. Additional professional services may be required to foster the relationships among the parties. Or one may hire an agency that, to some extent, homogenizes the process, managing the individuals involved. Either way, with surrogacy, the process leading up to the pregnancy can be a plodding one. After several recommendations and a meeting at an LGBT Community Center forum on gay biological parenting, we chose to work with an agency, Circle Surrogacy, based in Boston ("Circle").

Although some fear surrogacy means exploitation of the surrogate, initially a relative volunteered to carry the baby, so we felt that it was not an issue. Friends and colleagues warned us about this kind of arrangement, but we engaged in an extensive conversation to ensure everyone's comfort at the start. Then, after that route began to appear much more complicated, we put ourselves in the queue for an agency-provided surrogate. When we were on the waiting list, we met a couple that lived in the Middle East with a doctor in Cyprus coordinating the egg donor from Romania and the carrier in India. At first blush, as an International Business Transactions teacher, globalization's ingenuity struck me. I then feared how such great national, cultural, and legal distances raised the exploitation risk factor. Were we patronizing a baby factory? How would one know the surrogate had really chosen to do this?

When we first met with our surrogate, Beth, she shared with us her own path. She has a well-paid job and a life full of responsibilities met, including two amazing sons. She told us that a family member wanted to have a child but couldn't, and she was going to carry the baby instead. After that person changed her mind, Beth still wanted to help another family's development. Is money Beth's primary motivation, as some colleagues insist? I don't think so. Beth has enthused over every detail and shared every turn with us gleefully, snapping photos of herself in the bathroom during the day so we can see how pregnant she is, or sending us little videos of kicks viewed from the outside. She seems to enjoy identifying herself as a surrogate—when she first began showing a stranger remarked, "Oh you're pregnant, congratulations!" and Beth answered, "Thank you, but it's not mine," confounding the commentator. She was as thrilled to help us as we were to have her carry our baby. There is a contract, and money is exchanged, but this is a labor of love.

B. Egg Shopping

The creepy online shopping feel of our egg provider[7] search was challenging. It felt strange at first, but we stuck with it—we conversed about our criteria, and then reviewed photos and stats of various providers. Our

7. Thanks to Kim Mutcherson for this term—I had been using "egg donor" without contemplating the presumption in the term that the eggs had been "donated," when in fact they were sold.

primary factors were intelligence and health. We had a minor preference for someone attractive, on the tall side, and with light eyes. But then we came across more than a few challenging choices. Intelligence of course is at best difficult to ascertain from a profile—in our graduate studies at respectable universities, we each knew many who were well-educated but not bright and the reverse. This was going to be a slightly informed guess, and we came across a tall, attractive provider with a great undergraduate affiliation. And she was black.

This drew some fairly careful thought. Was selecting a white provider giving into whiteness as an ideology? At first I thought yes, it was. I felt this way even more clearly after a white law professor asked me, "Why pay all that money for a black kid when you can adopt?"

I then thought that the white liberal solution, to go the other way and hire the black egg provider, would not solve the dilemma—any fork in this road will be racialized in some way. To get some context for the decision, I spoke with friends. Several commented on challenges they'd heard about for white parents with a mixed race child or a child of color. These friends (straight, if it matters) said that the child would have issues aplenty with two gay parents, and that adding racial difference might make the child even more of an outsider. Howard and I also reflected on a white gay couple on the documentary *Rosie's Family Cruise* who had a black child and had trouble crossing borders, with officials alleging the men were trafficking the child.[8] I imagined us, two white guys, grilled by border agents about what we were doing with this differently-raced child. Of course in my mind I look more like a big queen than a child trafficker, but I imagined all kinds of trauma every time we travel. This convinced us—we moved on. We first chose a partly-Native American provider, but she disappeared, and then we went with a white provider. Sometimes I think less of myself for perpetuating or at least falling into presumptions about whiteness. But I'm also learning that having a child involves problematic choices that can reconfigure, complicate, and even upend theoretical commitments.

8. ALL ABOARD! ROSIE'S FAMILY CRUISE (HBO Home Video 2006); *see* R FAMILY VACATIONS, http://www.rfamilyvacations.com (last visited Dec. 9, 2010).

C. *Meet Your "Baby Mama"*[9]

That was early in 2008. A few months later, we were matched with a potential carrier (that's the informal trade terminology, and yes it reduces what this amazing woman is doing to something like a UPS worker). We went to Oklahoma, a part of the country I had never had reason to visit. As gregarious as I can be with friends in Paris or Tokyo or shopkeepers in Marrakech or Rio, I was super nervous about getting along with people I feared would be very different from me. For the trip I left my bronzer, concealer, and mascara on my vanity and instead packed my dullest clothes. We went not just to Oklahoma but to Lawton, a town with a smoky casino where we played blackjack with a one-armed cigar smoker and several cowboy types in a town whose main employer was a military base on which the potential surrogate and her husband lived (there was even an outdoor military museum outside their front door). We got along well, and went back to New York ready. The contracts were prepared, but just as we were about to sign, she emailed us that she had injured herself and would not be able to move forward. Another delay weighed on us heavily. I cried and moped for a couple of days. The agency's people assured us they'd do their best to find someone else. Within three days, we were matched with someone else and planning another trip to, yes, Oklahoma.

This time to Oklahoma City. Nervous again. Would we get along? How do we make this work? Howard, as always, kept me on track. Beth was, from the very first moment, warm and sincere as well as implicitly nonconformist. The meeting was smooth as cheesecake and by the end of the day we were stroking one of their pet rats and on the floor, playing Twister with her then 9-year-old twin boys.

Time passed. I had a minor meltdown when my Skadden-trained mind[10] contemplated an agreement governed by Oklahoma law, but the agency assured me it was the best option. Beth came to New York, stayed in Times Square, and met with the fertility clinic doctors and staff, and we all stopped for pizza at Arthur Avenue in the Bronx before dropping her off at LaGuardia. We were good to go. I contemplated switching to boxers as the carrier and the egg provider began taking the hormones.

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9. BABY MAMA (Universal Pictures 2008). Although this is a contested, racialized term, I use it in part to point out the lack of effective informal ways to refer to a surrogate. During the course of the pregnancy, the movie came out and we were tempted to suggest seeing it with Beth, but then thought it would be uncomfortable. We were glad we skipped it because the portrayal of surrogates is unsurprisingly vapid and it would have been awkward. In retrospect, Beth could have handled that and much more.

10. In particular, while practicing international arbitration at Skadden, Arps, Slate, Meagher & Flom LLP, choice of law decisions were always viewed as critical; accepting a jurisdiction I knew to be unfriendly required me to subjugate my lawyer mind to my surrogacy-consumer mind.

D. Retrieval, Orgasm, and Fertilization in Connecticut

At a conference a few months later, I met another law professor who had tried surrogacy. He told me that their surrogate decided to abort at twenty weeks because she had fallen in love.

I was terrified, but the next morning, I got a Facebook message from the egg provider that she was ready.[11] It was time. The next day we went to the clinic. In sequence, we each masturbated in a clinical room, which we had done before for testing purposes. The room was filled with mostly straight porn. We hung out and waited and then met the egg provider and her boyfriend. She was lovely and sweet even in her drugged state. She also had the good sense to wear mascara even for this procedure (this appealed to my inner drag queen).

We left. Each day, we received a report replete with numbers. Forty-three eggs. Thirty million sperm. Twenty-two eggs fertilized by one's sperm, twenty-one by the other's. Eleven three-day embryos. On the night of the fourth day, we had cocktails and sushi with our surrogate and her sister, indulging in soon-to-be forbidden fruit. On the fifth day, we went to the clinic, where nine five-day embryos awaited. The doctor showed us live video of the two most developed ones (one from each of us) and then implanted them. Our surrogate was quite simply a trooper. Not one complaint or even a glance that any of this was difficult, although we knew it was. We hung out with her and her sister a few more days in New York and then they went home.

We waited.

The definitive test is ten days afterward. Our carrier asked us a few days before if we wanted to know if she were to take an at-home test. We said no. A few days later, we heard the good news and we both wept.

Weeks went by. We stayed quiet, except to our closest family and friends. We stayed in close contact (often via Facebook) with Beth, deepening our relationship.

Twelve weeks came, and we hesitated—this was the end of the first trimester. Debate aplenty, followed by another week of secret-keeping.

Then, as we got ready to go to Oklahoma for the twenty-week ultrasound, my thoughts were again all about gender. Not that they weren't before but now it was more concrete. Did we want to find out the baby's sex? We decided not to, for so many reasons. First, we thought it didn't matter. The test only reveals genitalia, and we knew that we could have a girl who's a boy or a boy who's a girl.[12] Another piece of it is that we didn't want to attach too much to a fetus

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11. Although we met the egg provider, I have not approached her with regard to whether she'd be comfortable having this discussed in public, so I've excluded her name.

12. Either way, I decided that my only preference was for a non-sporty child since I dislike sports, but this is not gender-related at all.

that may not be born—there's some Jewish superstition in there.[13] Few things in life are a real surprise. As we found out, the first question everyone posed after finding out about a pregnancy is the sex of the baby, as if it matters. As if one were supposed to have a preference for one sex. If we had been pregnant ourselves, we definitely would have worn the "I don't want to know" t-shirt. Beth followed our lead and did not find out, so Melina's birth held at least that surprise.

E. Mother/Father/Parent

Am I a pregnant man? Feminists have said to me, "I hate it when men say they're pregnant." Clearly, I'm not actually pregnant, but I'm kind of pregnant the way gay people used to say that a committed couple was "married" and gay men would refer to a "husband," even though no marriage could have been performed. The difference, of course, is that a man cannot have a baby for biological reasons, while a gay couple could not marry for legal ones.

Yet there was that pregnant man. Of course I'm referring to the transman Thomas Beatie who became pregnant and was very out about it.[14] I salute him for subverting popular presumptions about gender and parenting; his coming out in part inspired me to share my own process. Unlike the transman who's really pregnant, obviously I am not, even though sometimes I feel as if I were. I seem to be eating for two, and am nervous and full of anticipation.[15]

But when I tell people about the pregnancy, they say, "How exciting—you're going to be a father!" and I look around to see whom they're addressing. I don't feel like I'm about to become a father. I feel like I'm about to become a mother. I feel like Harvey Fierstein's Arnold Beckoff in *Torch Song Trilogy*,[16] who adopts a teenage boy. Arnold, a Brooklyn Jew who works as a drag queen named "Virginia Ham," was perhaps the first media image of a gay parent I saw in 1989. Perhaps Harvey's tale inspired me, even as a young queen, to

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13. The superstition, which perhaps isn't solely a Jewish one, is that if you know the sex then you'll name the baby and attach to the baby—in a way taking for granted the birth before it occurs. For this reason, many Jews do not have baby showers prior to the birth. *See, e.g.*, Adam Katz-Stone, *Jews and Baby Showers: Are They Okay?*, JEWISH FED'NS. N. AM., http://www.jewishfederations.org/page.aspx?id=907 (last visited Dec. 9, 2010). Indeed, we didn't buy anything and allowed our families to buy certain things only if they were not kept in our apartment. After Melina's birth, our families swooped in and set up her room while we were in Oklahoma.

14. Aina Hunter, *Pregnant Man, Baby 3: Thomas Beatie Gives Birth to Baby Boy*, CBS NEWS (Aug. 3, 2010), http://www.cbsnews.com/8301-504763_162-20012474-10391704.html.

15. Indeed, recent studies show men with pregnant wives tend to gain weight during the wife's pregnancy. Lisa Belkin, *Men Gain Weight During Pregnancy*, MOTHERLODE BLOG, N.Y. TIMES (June 2, 2009), http://parenting.blogs.nytimes.com/2009/06/02/men-who-swell-with-pregnancy/?scp=1&sq=men%20weight%20gain%20pregnancy&st=cse.

16. TORCH SONG TRILOGY (New Line Cinema 1988).

think about eventually becoming a parent.[17] I especially enjoyed that his son called him "Ma," even though it was with some sarcasm.

In fact, Howard and I discussed the mother/father question with a knowledgeable source, our friend's six-year-old boy (who, adorably, when told Howard and I would marry, asked if he could be the flower boy). We told him we were going to have a child and he asked what the child would call us. He thought and thought, and I suggested that I could be "mom." All the little kids who know us as a couple, the ones too young to self-censor, say I'm the mom. He said that he thought it would be confusing because I'm a boy. I imagined our kid telling schoolmates about his mom, who then shows up in a big fur coat and stubble, again like Harvey Fierstein in *Torch Song Trilogy* (he shows up to his teenage son's school principal's office in huge bunny slippers). Probably it would be a good idea to avoid that embarrassment. So I've given up being called "mom." We're going with "papi" because that feels comfortable since I lived in Puerto Rico and plan to speak with Melina in Spanish so she'll be bilingual. There, "papi" means something between "dude," "guy," and "man," so it feels more informal than other terms.

A colleague of mine said to me the other day, "Oh you're going to be a great mother. And father. Don't you think we all have some of each in us?" It was the sweetest comment not only because I can be both. As we know from *Gender Trouble*[18] that all gender is a performance, parents can shift from mothering to fathering and back. It was also sweet because it reflected that the colleague understood where I was with regard to the gendered nature of parenting.

The invisibility of "parent" has come to infuriate me. The person who congratulates me could say, "How exciting, you're going to be a parent!" and people could comment, "Are you excited to become a parent?" But somehow that term is used in a formal sense but not a real sense. Because I have a penis, society wills me into becoming a father. Parenting seems to be experienced as an almost entirely gendered phenomenon. I feel like I'm forced to become a father—a man—when I feel like a person and/or a parent-to-be.

F. Conclusion/ Homonormative Parenting?

Sometimes I resent the facility with which bioparents conceive. They have sex. It's a pleasurable moment. There are no contracts or labs or agencies and at most very few forms. Straight people get off AND simultaneously conceive. It's a wild concept.

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17. Indeed, shortly before I came out, I remember my grandparents inviting me to see the play *Torch Song Trilogy* with them, and I remember saying no (at age thirteen) to avoid their thinking that I was gay myself. HARVEY FIERSTEIN, TORCH SONG TRILOGY (1982).

18. JUDITH BUTLER, GENDER TROUBLE (1990).

And because copulation leads to conception, it often happens carelessly, in the careless ways that most people sometimes have sex. It could be after a drunken stupor, as in the film *Knocked Up*,[19] or after a tryst, or within a married heterosexual couple, as dominant religions require. They have dinner, they wash up and go to bed and have a quickie and just like that, a baby. For queers (ok, for me, having come out in the early 1980s) used to having sex with the fear of disease but not procreation, it seems like a bizarre result to the grinding Eros of lovemaking.

Sometimes I think about this complex process. We've had to ask and answer really taxing questions like: 1) why and how badly do we want a child; 2) what would we do with a multiple birth; 3) how can we trust this [birth parent, agency, government official, egg provider, surrogate, lawyer, doctor, psychologist, social worker, etc.] to do what's best for us and for our potential child; 4) do we have the resources, both financial and psychological, to go through with this process? I know that my answers to these questions were exercises in practical ethics, decisions made in context, with reasoning full of blemishes. I hope the choices I made are ones with which I can live. My fantasy is that the fact of having to make these choices may lead me (and many LGBT parents) to better (more deliberate and mindful) parenting.[20] More likely than a policy implication, this story runs in my head to reassure myself that, with all these complex decisions and shifts in my being, in the end I'm going to be a great mom.

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BABY-MAKING AND MEANING-MAKING: THE TWO TRIANGLES OF REPRODUCTIVE TECHNOLOGY

Noa Ben-Asher

Darren, Howard, and Melina's inspiring birth-story provides much food for thought. In the short response that follows, I offer two triangles that I find helpful in thinking about the range of fascinating issues raised by Darren's rich narrative and the responses to it. The first triangle, which I call the *baby-making* triangle, contains the three separate and independent components

19. KNOCKED UP (Universal Pictures 2007).

20. My goal is not, I should note, to support arguments such as those by Judge Smith of the New York Court of Appeals who, in *Hernandez v. Robles*, argued that because heterosexual families were more likely to be formed by accident, they were more fragile and therefore more in need of the support of the institution of marriage. 855 N.E.2d 1, 7 (N.Y. 2006).

involved today in the making of babies: (1) sperm, (2) egg, and (3) gestation. The second triangle, which I call the *meaning-making* triangle, contains three separate yet related discourses currently utilized to understand baby-making markets: (1) technological progress, (2) medical-scientific cure, and (3) ethics/morality. The first triangle deals with *how babies* are (or can be) made, and the second deals with *what meaning* is assigned to baby-making. I focus here on a connection between these two triangles that helps resolve the paradoxical legal regulation of the first triangle in the contemporary United States.

At present, the three components of the baby-making triangle are all available for purchase to some extent. Relatively free markets exist for sperm and eggs, and in the last few years gestational surrogacy agreements have received growing legal recognition in a number of states.[21] But what's striking and confusing in a closer look at the baby-making triangle is that individuals or couples can enter into enforceable agreements for *any two of the components of the triangle—but not all three.* In other words, you can buy *any* two of the three baby-making components (sperm, egg, and gestational surrogacy), as long as you provide the third component. I call this "the 2-1 condition." For example, Darren and Howard entered potentially binding agreements for egg selling and gestational surrogacy, but they would not have been able to do so had they not provided a genetic link to Melina (sperm). They purchased two prongs of the triangle, and provided the third. Likewise, many female same-sex couples have children today by providing two different components, gestation and eggs and acquiring the third (sperm). But a "third party" cannot acquire sperm, egg, and a gestational surrogate to create a child. Nor can a corporation or the government do that. This is the legal situation today because gestational surrogacy statutes that set up the validity of gestational surrogacy agreements require that the intended parents be either fully or partially genetically linked to the future child.[22]

How can we explain this 2-1 condition of the baby-making triangle? I suggest that the second triangle helps decipher the first. The meaning-making triangle explains the current 2-1 condition of the baby-making triangle. Darren's text helps us see how. First, with regard to technology, my point is simple. Technology today exists that can allow third party individuals (or the state) to enter baby-making markets by creating children with whom there is no

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21. For further discussion of the relationships between these components, see Noa Ben-Asher, *The Curing Law: On the Legal Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885 (2009).

22. *See, e.g.*, Gestational Surrogacy Contract, FLA. STAT. § 742.15 (2008); Gestational Surrogacy Act, 750 ILL. COMP. STAT. 47/20(b)(1) (2008) (requiring that "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"); NEV. REV. STAT. ANN. § 126.045 (2008) (allowing only married couples to enter an 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"); Uniform Status of Children of Assisted Conception Act, N.D. CENT. CODE § 14-18-01 (2008).

biological or genetic connection whatsoever. However, this theoretical availability has not translated into legal availability because it is curbed by the two remaining prongs of the second triangle: medical cure and ethics/morality. These two latter meaning-making regimes have significantly contributed to the consequent 2-1 regulation of the baby-making triangle.

The idea of reproductive technologies as a medical cure for infertility has historically been a critical condition for the legal recognition of various reproductive technologies.[23] Assisted-reproductive practices (such as sperm selling, egg selling, and gestational surrogacy) that have been understood by medical and legal authorities as "cures for infertility" have eventually attained legal recognition. These technologies are now available in relatively free markets even without explicit cure justifications. Nonetheless we see in the 2-1 condition that the logic of cure continues to operate sub rosa. As long as one of the three prongs is provided by the intended parent or parents, the agreement is potentially enforceable; thus, the one (or more) components provided by the intended parent allows lawmakers, consciously or not, and rationally or not, to view the intended parent or parents as somehow "cured" by the legal transaction. As long as you provide *something* biological or genetic, you are "cured."

Darren is a "pregnant man" in the sense that his reproductive capacity is completed (rather than replaced) by the baby-making markets. In the discursive choice of "pregnant man" and being "kind of"[24] pregnant, the purchase of eggs and gestation facilitates Darren's "kind of" pregnancy." Had Darren purchased third party sperm on the internet, and combined it with the purchased surrogacy and egg, would he still refer to himself as "kind of" pregnant? Even if so, his pregnancy would receive no legal recognition, and his surrogacy agreement would not be enforceable.

The final crucial factor in the 2-1 regulation of baby-making markets is the ethical/moral debates about baby-making markets, especially with regards to surrogacy.[25] The ethical/moral concerns surrounding surrogacy are apparent throughout "Pregnant Man?" Are surrogacy agreements exploitative? Should the law protect women from reproductive labor of this sort? Darren's text faces these difficult ethical/moral questions by explaining that money was not the surrogate carrier's primary motivation. "There is a contract," Darren writes, "and money is exchanged, but this is a labor of love."[26] In Darren's text, the potentially exploitative labor of surrogacy loses at least part of its ethical weight when it is understood as a "labor of love." By analogy, the anxiety

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23. *See* Ben-Asher, *supra* note 21.

24. Rosenblum, *supra* text preceding note 14.

25. *See, e.g.*, MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS (2001).

26. Rosenblum, *supra* text preceding note 7.

about exploitation can explain the 2-1 regulation of surrogacy markets. That is, there is possibly *less* legislative and judicial anxiety about gestational surrogacy arrangements when the intended parent or parents are *also* genetically involved in the future child.[27] The genetic contribution of the intended parent or parents seems to lessen the ethical/moral concern about gestational surrogacy. In contrast, a person who hires a surrogate to carry a future child to whom the intended parent is not genetically related, may seem, at least in the current legal regime, more ethically problematic.

In the Epilogue, Darren provocatively suggests that "[w]e should delink biology from parenting."[28] With this final thought Darren invites us to imagine a new world where all three prongs of the baby-making triangle can be purchased by a third unrelated party, possibly even by the state. How will this world affect the web of dependence and tensions between families and the state? From the state's perspective, once the state as a third party can create children on its own, it may no longer depend on biological parenting for its own continuation. In this unlikely, futuristic scenario, the family might no longer be the core, necessary unit for the continuation of society. Children could be produced and raised by the state. Corporations (like the state) might also become interested third parties with possible interests ranging from financial gain to altruistic assistance in the making of children. And from the perspective of individual participants, it seems that undoing the link between biology and parenting may invite more individual participants into the market and offer even more roads to parenthood than are available today. I congratulate Darren for pushing us to use our imagination, for urging that we unsex parenting, and for bravely becoming the mother that he dreamed of being.

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AMAZON OR ETANA?

Mary Anne Case

I can't help but read "Pregnant Man?" through the lenses of my own personal and scholarly preoccupations, framed by my own set of pop culture

27. This can also explain the difference between the friendly treatment of the intended mother in *Johnson v. Calvert* and the hostile treatment of the intended mother in *Baby M.* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (enforcing a gestational surrogacy agreement against gestational surrogate); *In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988) (holding that a full surrogacy agreement is unenforceable because it conflicts with public policy and statutory law of New Jersey).

28. Rosenblum, *infra* text following note 224.

references. With characteristic theatricality, you, Darren, begin off-Broadway, with the musical version of Dan Savage's *The Kid*,[29] and move uptown and back in time to Harvey Fierstein's *Torch Song Trilogy*,[30] staying within a gay male frame of reference.

I'll start, uncharacteristically, with a much more low-brow, mainstream, chick flicky cultural reference, to the Tina Fey movie, *Baby Mama*.[31] When you first asked me to contribute to this conversation, I was beginning to explore the possible applications of Ronald Coase's theory of the firm to the family,[32] putting in an explicitly Coasian context some of my prior work on the new reproductive technologies[33] and on analogies between marriage and business corporations.[34] Just as one is now generally free, as Coase observes, to structure one's business affairs in corporate or partnership form, as a franchise operation, or as a sole proprietor through a series of individual, isolated market transactions, so both law and society now offer a variety of ways to structure one's personal life: the provision of sex and of care (for example, elder and child care) and the production of children can each now be outsourced or internalized within a legally recognized family structure, as the Sigourney Weaver character Chafee Bicknell, proprietor of an upscale surrogacy business,[35] explains to the potential client played by Tina Fey in *Baby Mama*:

> I started this business because I saw a growth market. We don't do our own taxes anymore. We don't program our computers. We outsource. And what is surrogacy if not outsourcing? . . . Let me ask you a question. Do you plan on hiring a nanny? . . . How is this any different? A nanny is someone you trust to take care of your baby after it's born. A surrogate mother is someone you trust to take care of your baby before it's born. Either way it's your baby.[36]

Although films like *Baby Mama* suggest that outsourcing aspects of the production of children is something new, I think it is important to remember that the Mom-and-Pop production of children is no more universal a model

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29. SAVAGE, *supra* note 2.

30. FIERSTEIN, *supra* note 17.

31. BABY MAMA, *supra* note 9.

32. *See, e.g.*, Mary Anne Case, *Coase's Theory of the Firm and the Family* (unpublished manuscript on file with author) (applying the theory of the firm set out in works such as R.H. COASE, THE FIRM, THE MARKET, AND THE LAW (1988) to the legal organization of the family, domestic relations, care work, and sexual and reproductive activity).

33. *See, e.g.*, Mary Anne Case, *Markets and Motives*, Flash Video: Remarks at Law and Inequality Symposium: Contested Contours in Assisted Reproduction (Apr. 10, 2009), *available at* http://law.umn.edu/lawineq/agenda.html.

34. *See, e.g.*, Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1776-81 (2005).

35. In Chaffee Bicknell's very name is a lesson in theory of the firm and the family: "I thought Chaffee and Bicknell were two different people," says the potential client. What gives the outward impression of a partnership turns out to be a sole proprietorship, but one whose proprietor's own name may stem from the American WASP tradition of announcing the merger of two families by giving children their mother's maiden name as a first name. BABY MAMA, *supra* note 9.

36. *Id.*

than is the Mom-and-Pop business enterprise. Defenders of the so-called traditional family model tend to overlook not only the polygamy of the Old Testament patriarchs, but also biblical surrogacy arrangements such as that of Jacob with Rachel and her maid Bilhah and with Leah and her maid Zilpah, which produced the progenitors of four of the twelve tribes of Israel.[37] Of course, the surrogacy arrangements in Genesis, like the use of slave wet nurses and mammies in the pre-Civil War American South, were not technically outsourcing, but keeping the production of children within the family firm—slavery, like marriage, was one of the domestic relations.

For several reasons, therefore, the sentence that leapt out at me on my first read of your reflections was: "Although some fear surrogacy means exploitation of the surrogate, initially a relative volunteered to carry the baby, so we felt that it was not an issue."[38]

Another of my scholarly preoccupations in recent years has been what I call the "pets or meat" problematic, the question of "whether and when commingling commodification with affection can be more problematic than naked commodification."[39] It is now well understood that describing a nanny or other paid domestic worker as "one of the family" does not solve but may hide or even exacerbate problems of exploitation.[40] It should be equally well understood that family members themselves, even those who "volunteer" to perform services for others within the family out of love or loyalty or sense of duty rather than for monetary compensation, are at risk of exploitation that also can be hidden and potentially exacerbated precisely when the transaction is removed from the realm of naked commodification, of clear exchange. As I have argued in objecting to the assumption that if unregulated financial payment may lead to the exploitation of surrogates and egg donors[41] the problem is solved when compensation is banned or kept artificially low, exploitation—indeed coercion—in a non-monetary context may be much harder to resist; it may be much easier in a free market for the provider of a

37. *See Genesis* 30:1-13 (describing how Rachel, while she was barren, and Leah, when she had stopped childbearing, each encouraged her husband Jacob to have sex with one of her maids, with the sons that resulted being viewed as the sons of Jacob and Rachel or Leah, respectively).

38. Rosenblum, *supra* text following note 6.

39. Mary Anne Case, *Pets or Meat?*, 80 CHI.-KENT L. REV 1129, 1129 (2005) (exploring this problematic over a variety of subject areas and occupations, including child-care, egg donation, domestic service, pink collar clerical work, and prostitution).

40. *Id.* at 1132-39.

41. *See, e.g., id.* at 1139 n.39; Case, *supra* note 33, at 32:39. My views here are doubtless shaped by my personal experience with family care work. See Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1754 n.5 (2001), which describes some difficulties with being the legal guardian of a mentally ill mother.

service for hire to decline work because the terms and conditions are unsuitable than for a family "volunteer" to do so.[42]

To illustrate, I'll use a more upscale cinematic reference, to the 1999 film festival favorite *Chutney Popcorn*,[43] whose lesbian heroine Reena volunteers to be the surrogate for her conventionally married, infertile sister, in part as an effort to be seen as useful by her South Asian Hindu immigrant family of origin. When her sister backs out after Reena has become pregnant with her sister's husband's sperm, Reena and her white girlfriend find themselves "accidentally" reproducing, facing the unexpected prospect of welcoming into their lives a baby intentionally conceived for other parents. In another context, I might use the plot of *Chutney Popcorn* to question the assumption of New York's Judge Robert Smith that same-sex couples have less need of marriage rights because they "can become parents by adoption, or by artificial insemination or other technological marvels, but they do not become parents as a result of accident or impulse."[44] In this conversation, I want instead to compare and contrast its fictional surrogacy arrangement with the one you and Howard and Beth entered into.

In the film, Reena's first attempt at insemination takes place in a purely clinical setting, with a health care provider inserting the sperm.[45] Subsequent attempts, though, are shown undertaken at home with her partner wielding a turkey baster—one begins with an attempt at clinical sterility, but ends in passionate sex; after another, Reena tells her partner an orgasm will aid conception and the partner reluctantly, almost clinically, and ultimately unsuccessfully, attempts to give her one.[46] Thus, even though the baby Reena and her partner are trying to make is not at the time of conception intended as their baby, the process of making it still involves their coupling in all senses of the word. My sense is that real life lesbians creating their own real life baby are also likely, if at all possible, to make the act of conception, not just the planning of it, a process they engage in as a couple.[47]

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42. Please don't misunderstand. I am not suggesting that, under the particular circumstances in which your own relative volunteered, there was coercion or the possibility of exploitation involved. *See* Rosenblum, *supra* text following note 6. I am only questioning what appears to be your reflexive formulation of exploitation and family volunteerism as mutually exclusive.

43. CHUTNEY POPCORN (First Look International 1999).

44. Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) (holding there was a rational basis under New York law to limit marriage to opposite sex couples).

45. CHUTNEY POPCORN, *supra* note 43.

46. *Id.*

47. At the risk of looking like the Republican senators at the Clarence Thomas-Anita Hill hearings, who acknowledged using citations from Lexis to supply knowledge of porn stars like Long Dong Silver, I'll rely on a reported lesbian child custody case to support this proposition. *See, e.g.*, H.M. v. E.T., 930 N.E.2d 206, 207 (N.Y. 2010) (noting, in a case in which H.M. seeks child support from E.T. for the resulting child, that "E.T. performed the procedure by which H.M. was inseminated").

By contrast, even though you say you and your "partner, Howard . . . have been engaged in having a baby together for several years,"[48] Melina doesn't seem to be the result of your coupling even to the extent she could have been. By this, I'm not disputing that having a baby is a shared enterprise for you and Howard, nor am I invidiously comparing the number of times you use the first-person singular and the first-person plural in your description of how Melina came to be. I am instead evincing what some might call a prurient interest in exactly what went on—and what might have gone on—in that "clinical room" in which half of Melina's chromosomes were deposited. As you describe the process,

> [W]e went to the clinic. In sequence, we each masturbated in a clinical room, which we had done before for testing purposes. The room was filled with mostly straight porn. We hung out and waited and then met the egg provider and her boyfriend. . . . We left.[49]

You later express envy of "the facility with which bioparents conceive. They have sex. It's a pleasurable moment. There are no contracts or labs or agencies and at most very few forms. Straight people get off AND simultaneously conceive."[50]

Of course, these days some bioparents conceive in a test tube after substantial uncomfortable medical procedures. More importantly, it's not "straight people," just straight men, who can be assured of "getting off" when they conceive a child: the medieval myth about female orgasm being necessary to human conception to the contrary notwithstanding,[51] a much higher percentage of straight women become pregnant as a result of intercourse than report achieving orgasm through it.[52]

By contrast, you and Howard both did inevitably "get off," although in a pleasure killing clinical setting, as a part of the process of conceiving Melina. Yet you seem to have each done so alone, "in sequence" and in isolation. Why not together? I'm not demanding simultaneous orgasm here—not only is this something bioparents rarely achieve, I understand that your plans required that your sperm be kept separate, not commingled. But did the clinical setting really preclude your each getting the other off "[i]n sequence," thereby bringing a shared sex act and the process of together making a baby into far closer

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48. Rosenblum, *supra* text following note xii.

49. Rosenblum, *supra* text following note 11.

50. Rosenblum, *supra* text preceding note 19.

51. On the bright side, this myth may have encouraged men interested in progeny to devote energy and attention to ensuring their partner's pleasure; on the dark side, it made matters even worse for pregnant rape victims. *See* THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 161 (1992).

52. *See, e.g.*, SHERE HITE, THE HITE REPORT 184 (2003) (estimating that only about thirty percent of surveyed women reported being able to regularly achieve orgasm through intercourse); *cf. Infertility*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 2, 2009), http://www.cdc.gov/nchs/fastats/fertile.htm (stating that 11.8% of women between the ages of fifteen and forty-four have impaired fecundity).

proximity? I imagine (perhaps I'm wrong) that masturbating each other to orgasm is far closer to ordinary eroticism for the two of you than squirting sperm into a vagina is for the lesbian couples[53] who nevertheless manage to incorporate eroticism and romance into this act of making a baby together. Yes, the lesbians can ordinarily do it in the privacy of their homes, but gay male sex has a history of thriving in far more public and less promising venues than an enclosed room in a clinic. I'm led to wonder what role in your choice to each go it alone at the clinic was played by the fact that you and Howard were not fully cooperating, but still competing to contribute your genetic material to your child.[54]

This brings me to my final and most highbrow cultural reference, which I'll use to frame your story in light of yet another scholarly preoccupation, one we share, which is the desirability of expanding legal frameworks such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to take account, not only of women, but also of gender.[55] Knowing that you wanted to be seen as a mother to your child, I began to think of you as an Amazon, at least in the etymological sense—"Amazon" allegedly derives from the Greek for breastless,[56] and you acknowledge at least this "biological reality (even if Melina did not—she frequently tried to feed off [y]our hairy chests)."[57] As a "non-sporty"[58] male you were in some respects the direct opposite of an Amazon, but, like the Amazons, you were bending gender; also like them you were conceiving your child in an unconventional way and then proposing to raise her while combining childrearing with a conventionally masculine career path.

Recently, I've become focused on learning more of how it came to pass that the Vatican developed a strong allergy to the English word "gender,"[59] which Pope Benedict XVI associates with a destruction of human nature he likened in dangerousness to the destruction of the natural ecology of the rainforest.[60] For the Vatican, support for homosexuality and the new

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53. When Reena's girlfriend in *Chutney Popcorn* accedes to her request to try to make her come immediately after insemination, she uses her hand because she claims that an aversion to the smell of sperm makes oral sex out of the question. *See* CHUTNEY POPCORN, *supra* note 43.

54. Why was it you "contemplated switching to boxers," if not to maximize your chances for victory in this competition? Rosenblum, *supra* text following note 10.

55. *See* Darren Rosenblum, *Unsex CEDAW or What's Wrong with Women's Rights*, COLUM. J. GENDER & L. (forthcoming 2010).

56. Although Amazons were said to cut off one breast to facilitate shooting a bow, ancient visual images of them typically showed them with intact breasts. *See, e.g.*, *Amazon*, DICTIONARY OF THE CLASSICAL ART RESEARCH CENTRE, BEAZLEY ARCHIVE, http://www.beazley.ox.ac.uk/dictionary/Dict/ASP/dictionarybody.asp?name=Amazon.htm (last visited Dec. 9, 2010).

57. Rosenblum, *infra* text accompanying note 223.

58. Rosenblum, *supra* note 12.

59. *See, e.g.*, Mary Anne Case, *What Feminists Have To Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1207-09 (2010).

60. *See* Pope Benedict XVI, Address of His Holiness Benedict XVI to the Members of the Roman Curia for the Traditional Exchange of Christmas Greetings (Dec. 22, 2008), *available at* http://www

reproductive technologies, together with the abandonment of fixed sex roles and traditional family forms, are all wrapped up in an ideology of "gender" which it has set its face against in contexts including the formulation of international law.[61] And for Vatican ideologues like French Lacanian psychoanalyst priest Tony Anatrella, the Amazons are emblematic of what we have to fear from the ideology of gender. As Vincent Aucante wrote in the introduction to an anthology of objections to same-sex marriage and parenting edited by Anatrella:

> [A]ccording to some interpreters, the "father" and the "mother" are indeed necessary for the child to develop psychologically and affectively, but these will be functions that can be fulfilled by third parties who need not necessarily be [a child's] natural parents. The supposed distance between biological parents and the role filled by the "father" and the "mother" seems to have grown in the last few years as a result of the development of biotechnologies, technical progress which today allows each woman and each man who wishes to obtain a child to do so, whether he [or she] lives alone or in a couple, whether his [or her] spouse is of the opposite sex or not. The sexual revolution of the 1960s prepared the way for this transformation, especially by banalizing abortion. The fact that the father is excluded from the decision to abort, which is the woman's alone, has reinforced both the crisis in paternity and pressure on the familial model. Will the myth of Etana finally be replaced with that of the community of amazons? Already manifest ethical drift presents the risk of commodifying the human body, making of it simply merchandise, in particular reducing the child to no more than an object of gratification: throughout the whole world women offer their wombs for rent to gestate fetuses now sold to the highest bidder on the net. In short, the theory of *gender* tends to impose itself more and more, and with it looms a cohort of evils that put human dignity in peril.[62]

I like the idea of your being the Vatican's worst nightmare, Darren, and of your instantiating the ideology of gender, and I suspect you will like the idea of belonging to the community of Amazons, fierce but feminine. But when I looked up the details of the myth of Etana, which Aucante seems to prefer to that of the Amazons, I saw, perversely, a queer reflection of your narrative in

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.vatican.va/holy_father/benedict_xvi/speeches/2008/december/documents/hf_ben-xvi_spe_20081222_curia-romana_en.html.

61. *See generally* DALE O'LEARY, THE GENDER AGENDA (1997) (describing from a Catholic perspective the process by which the Vatican and other religious participants opposed the feminist use of the term "gender" at the 1994 International Conference on Population and Development in Cairo and the 1995 Fourth World Conference on Women in Beijing).

62. Vincent Aucante, *Foreword*, LA TENTATION DE CAPOUE: ANTHROPOLOGIE DU MARIAGE ET DE LA FILIATION 7-8 (Tony Anatrella ed., 2008) (translation from the French by Mary Anne Case) (citing to TONY ANATRELLA, LA DIFFERENCE INTERDITE 55-56 (1998) and TONY ANATRELLA, EPOUX, HEUREUX ÉPOUX (2004)). The part of the Amazon myth Aucante is focused on appears to be the Amazons' habit of coupling with men only long enough to conceive, then keeping any resulting girl children while sending the boys back to their fathers.

"Pregnant Man?" I also understand why a celibate male priesthood prefers Etana to the Amazons. His is the myth of patriarchy, not of feminist gender bending, but not of sexual complementarity either. He flies up to the heavens on an eagle's wings to retrieve, with the help of the goddess Ishtar, the plant of birth.[63] It's not even clear Etana has a wife when he goes on his quest,[64] only that, after returning, he is reported to have descendants. This gives you more in common with Etana than either you or the Vatican might wish. Like Etana you are not a pregnant Amazon, but a man prepared to venture bravely on eagle's wings to the ends of the earth—to distant, dangerous Oklahoma, if necessary—if you can return with the gift of birth.

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LAW'S NATURE

Elizabeth F. Emens

Rosenblum has given us a terrifically provocative short essay. He successfully engages that tricky art of drawing questions and critiques from the thinking inspired by personal experience. Kudos to him for sharing that thinking with the rest of us and beginning this conversation.

Many of his points inspire reflection. I want to focus my brief remarks on a paragraph toward the end, where he revisits the title of the essay:

> Am I a pregnant man? Feminists have said to me, "I hate it when men say they're pregnant." Clearly, I'm not actually pregnant, but I'm kind of pregnant the way gay people used to say that a committed couple was "married" and gay men would refer to a "husband," even though no marriage could have been performed. The difference, of course, is that a man cannot have a baby for biological reasons, while a gay couple could not marry for legal ones.[65]

This is a fascinating passage.

Rosenblum tells us that calling a man like him pregnant is like calling a gay couple married, back when marriage was universally restricted to different sex couples. As he remarks, the notable difference between the scenarios is biological impossibility (or improbability) as opposed to legal impossibility.

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63. *See id.* at 7.

64. Aucante's account of the Sumerian sources suggests that only after his quest did Etana take a wife, *id.* at 7, but some versions of the myth suggest his wife was pregnant yet unable to deliver. *See Etana Epic*, ENCYCLOPÆDIA BRITANNICA (2010), *available at* http://www.britannica.com/EBchecked/topic/193803/Etana-Epic.

65. Rosenblum, *supra* text preceding note 14.

What Rosenblum thus does with his analogy between the pregnant man and gay marriage (before gay marriage) is to collapse the distinction between the biological and the legal.

One question I'd love to ask is whether Rosenblum thinks it's fair to say he was any more pregnant—while his baby was *in utero* with a surrogate—than men whose wives are pregnant with babies they would parent together. When the mother-to-be isn't pregnant with what will be her own baby (and did not make a genetic contribution), does it get the father-to-be any closer to being pregnant?

That aside, what I want to write about here is the nature of the analogy Rosenblum draws and its significance. His collapsing of the distinction between the laws of nature and the laws of society can be understood in at least two ways, depending on the direction of the collapse. First, and more apparently I think, biology may be collapsed into law. That is, biology is just as constructed as law. Rosenblum could mean this in the relatively trivial sense that both are creatures of language, so to call him a "pregnant man" is like referring to "gay marriage" before gay marriage, in that they both succeed or fail depending on linguistic uptake in the relevant context.

But he could also be making the stronger claim that there is no more underlying reality to biology than to law. By this, he might mean any of at least three things: (1) The biological situation (that only a woman can get pregnant) is no harder to change than the legal situation (that only a man and a woman can marry); this is a rejection of the common assumption that I have elsewhere called "immutable nature," that is, the idea that nature cannot be changed.[66] (2) The biological situation (no pregnant men) deserves to stay the same no more than the legal situation (no gay marriage)—a rejection of the assumption of "normative nature," which is the idea that nature shouldn't be changed.[67] (3) Or, the biological situation (no pregnant men) is no less society's problem than the legal situation (no gay marriage); this is contrary to the common belief in "guiltless nature," the idea that whatever is natural does not need to be changed because it isn't society's fault.[68] These three assumptions are so pervasive that, to the extent Rosenblum rejects them, he does something radical indeed. I return to this point in conclusion.

Second, and less obviously, Rosenblum's analogy may collapse law into biology. That is, he may be asserting that law's effects are as real, have as much significance, as those of biology. This point of course overlaps with the first, about biology collapsing into law. But the thrust is different. Here the

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66. *See* Elizabeth Emens, *Against Nature*, NOMOS: EVOLUTION AND MORALITY 3 (forthcoming 2011) (defining "immutable nature," "normative nature," and "guiltless nature").

67. *Id.* A weaker version of immutable nature is the claim that, even if nature is not impossible to change, it is at least harder to change than culture. *Id.*

68. *Id.*

emphasis is on the potency of law, rather than the fragility of biology. This point calls to mind the conceptual move of the social model of disability.[69]

The *social model* of disability is a counterpoint to the so-called *medical model*. Whereas the medical model emphasizes impairment as the biologically determined, highly individualized basis of disability, the social model locates disability in the interaction between individual impairment and the social environment. Or, as the talented writer and activist Simi Linton, who uses a wheelchair, puts it to her students, "If I want to go to vote or use the library, and these places are inaccessible, do I need a doctor or a lawyer?"[70] Linton thus dramatizes the way that legal obstacles can be as—or more—importantly limiting than biological obstacles.[71] Likewise, through his analogy between pregnant men and gay marriage, Rosenblum points our minds in a similar direction, showing us how law can create as significant an obstacle as biology.

I close with a question for Rosenblum: He tells us that he's "kind of pregnant";[72] why the "kind of"? Rather cutely, he plays with our assumption that you can't be just a little bit pregnant. This is a challenge to common sense that others have made, pointing, for instance, to the position of women undergoing *in vitro* fertilization after transfer but before they have a positive pregnancy test indicating that implantation has occurred.[73] These women might be said to be a little bit—or kind of—pregnant.

I want to propose a reading of Rosenblum in response to my question. Perhaps Rosenblum says "kind of" because he's not willing to make the categorical claim that there is no difference between law and biology, between society and nature. He's willing to go far towards breaking down that distinction, but not to abandon it entirely. In the mouths of some, my interpretation would be a criticism. Some might say this shows Rosenblum isn't willing to go far enough. I disagree.

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69. *See, e.g.*, MICHAEL OLIVER, UNDERSTANDING DISABILITY 30-42 (1996); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 428-33 (2000); Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251, 1255-68 (2007).

70. SIMI LINTON, MY BODY POLITIC: A MEMOIR 120 (2006).

71. This also calls to mind debates, particularly in Australia, over whether state subsidies should be available for so-called social infertility (i.e., on account of relationship status) as well as for so-called medical infertility. *See, e.g.*, Tami Dower, *Redefining Family: Should Lesbians Have Access to Assisted Reproduction?*, 25 MELB. U. L. REV. 466, 468 n.11 (2001).

72. Rosenblum, *supra* text preceding note 14.

73. *See, e.g.*, Donna Fish, *Yes, You Can Be Just 'A Little Bit Pregnant'!*, HUFFINGTON POST (Oct. 10, 2008), http://www.huffingtonpost.com/donna-fish/yes-you-can-be-just-a-lit_b_133615.html. One might also think of the notion, rarely discussed in sex ed classes, of the "chemical pregnancy"—the term commonly used for conception accompanied by problems, such as implantation in the fallopian tubes rather than in the uterus, sufficient to predict a very early miscarriage. For women trying to get pregnant, a chemical pregnancy can lead to initial pregnancy test results that seem ambiguous—with doctors saying that hormone levels have risen some (but not a lot) in the direction of a pregnancy, so that they need to retest hormone levels in a few days to find out if the women is *really pregnant* or if it's *just a chemical pregnancy*—and thus to a temporary feeling of being kind of pregnant. *See* Courtney A. Schreiber et al., *A Little Bit Pregnant: Modeling How the Accurate Detection of Pregnancy Can Improve HIV Prevention Trials*, 169 AM. J. EPIDEMIOLOGY 515, 516 (2009).

If I read Rosenblum correctly, then his move here bears a further similarity to the social model of disability. In most articulations, the social model continues to speak the language of impairment; it does not reject impairment entirely, but it redirects our attention from the medical nature of impairment to the social nature of impairment's relation to the outer world.[74] In so doing, it does not make the claim, implausible to most, that biological difference is meaningless. Rather, it renders that difference relatively meaningless by shifting our focus to the ways society generates that meaning. The social model therefore offers us a way out of the back and forth struggle to claim nature *or* nurture, and rests our gaze on the significant operation of meaning making. This move, I believe, is part of the force of the social model in the disability context.[75] Perhaps, by offering himself as "kind of pregnant," Rosenblum offers us a similarly forceful social model of pregnancy.

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UNSEXING PREGNANCY?

Vivian M. Gutierrez and Berta E. Hernández-Truyol

Dear Darren,

First of all we want to send our most heartfelt congratulations to you and Howard for the addition of lovely and loved Melina to your family. She is beautiful and healthy and such a joy. All the planning, the waiting, the fears, the anxieties . . . it is behind you. Now a life with a different family configuration lies ahead . . . with all its joys and challenges. The responsibility of a child is daunting even if welcomed. We look forward to our families sharing many fun times and interesting (as well as scary) conversations as our children grow.

Now on this "Pregnant Man?" piece dear, it raises three fundamental issues: 1) the relationship between sex and gender; 2) the unpacking of the meaning of family; and 3) the decoupling of pregnancy from sex.

We are all familiar with the sex/gender dichotomy—the biology/sociology struggle. This sex/gender thing, of course, is a both/and, not an either/or proposition. We all have a sex and we all have a gender, though they do not always line up along the patriarchy's say so; nor are they as linear as the normativity enforcers would have you believe. You so poignantly emphasized

74. *See, e.g.*, Samaha, *supra* note 69, at 1255 (observing that "the social model redirects attention to the environment surrounding an impaired individual").

75. *See* Elizabeth Emens, Disability's Force (unpublished manuscript) (on file with author).

in your piece not wanting to know the sex of the child you were awaiting (superstition aside) because you well knew that you could have a boy-girl or a girl-boy. That still does not negate the reality of biology, which is where the pregnant man idea is problematic . . . as opposed to a pregnant male-identified woman, or a pregnant FTM transman—the norm—and image-challenging pictures we all saw. But even in that last example, the pregnant "man" had a uterus—female biology. And that is perhaps at the crux of what we want to say: pregnancy is so hugely biology—uterus, lactation.

First, let us indulge in a small aside. Having gone to college in the 1970s and 1980s, we have to confess a frustration at the persistence of gendered expectations, demands, and identifications. Perhaps you share these frustrations as your consternation at the absence of parent (derived, interestingly, from *parere*, which means to beget) would suggest. Disclosing (and true to) our feminist world view, we (still) like the concept of androgyny (from androgynous: *andros*—man; *gyne*—woman) which suggests we have a little of each. We take issue with the predesignation of particular traits or inclinations with a certain sex—we are all individuals of a certain sex, we all have certain gender proclivities, and those two things do not always align with normative expectations.

In this way, and with the pregnant man idea, the *Geduldig v. Aiello*[76] Supreme Court constitutional holding is even more disjointing. Remember that case? It is the one in which the Court held that failure to offer pregnancy services under an insurance policy was an acceptable practice that did not constitute sex discrimination. The Court reasoned that there were two groups—pregnant persons and non-pregnant persons—and that because the latter was comprised of both men and women, no possible sex discrimination could exist.

Two years after *Geduldig*, the Supreme Court ruled on a sex discrimination challenge to the pregnancy exclusion in another insurance policy, this time in the context of Title VII. In *General Electric v. Gilbert*, the Supreme Court essentially reiterated its *Geduldig* holding that pregnancy is not sex-based.[77] This time, however, Congress reversed the Court quickly and effectively by

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76. In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Supreme Court held that denying insurance benefits for lost work due to a normal pregnancy did not violate the Equal Protection Clause on the basis of sex. In that case, an insurance program in California listed pregnancy as a disability for which there would be no compensation. The majority opinion asserted that even though only women were affected by the pregnancy exclusion, the classification at issue was pregnant persons and non-pregnant persons; since women are in both groups, the classification was not sex-based.

77. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Supreme Court held that employers could exclude conditions related to pregnancy from employee sickness and accident benefits plans. The Court relied on *Geduldig* to interpret Title VII. Because pregnancy is "voluntarily undertaken and desired," it is not a sex-based classification. Congress corrected these rulings with the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2006), which amended Title VII to prohibit employers from treating pregnancy differently from other conditions, and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006), which provides additional employment protections for pregnant women.

passing an amendment to Title VII—the Pregnancy Discrimination Act[78]—which provides that, in fact, pregnancy is sex-based! Nonetheless, the *Geduldig* ruling stands as a matter of constitutional interpretation.

It also is interesting that pregnancy, that one thing that only women (defined biologically) can do, is the source of such angst. Under what legal or logical paradigm does it make sense to call the ability to create life a *disability*? This negative designation unveils the real gendered nature of the supposedly gender neutral norm. This unique ability to create life is transmogrified into a *dis*ability simply because men cannot do it.

Given this unique capability of women to become pregnant, how does the concept of a pregnant man fit? When a couple first learns they are going to have the child they have been wanting, they might say "we are pregnant." But when the morning sickness sets in, when the baby is kicking, when the litany of things that happen only to a pregnant woman happen to the pregnant woman, and mostly when it is time to give birth, there is only one person who is pregnant—and that is the pregnant woman.

Let us share Vivian's (the birth mom) perspective from her pregnancy:

> *The urine test is positive. I am pregnant. Quickly the hormones increase. Estrogen and progesterone elevate by leaps and bounds. I start to feel more tired than usual. I feel nauseous. I need to eat all day to avoid puking. My breasts are getting bigger and sore. I can't fit into my jeans. I get to know all the bathrooms on my daily routine because I am peeing so often. The hormonal surge also changes the way I feel. Pregnancy: it is a powerful, intense, spiritual, emotional time. I feel especially sensitive to my own feelings, to the feelings of others, to the world. I cry more easily. I am more in touch with my intuition and more vulnerable. I need quiet reflection to tune into my baby, into my feelings.*
>
> *As I move past the first trimester and the hormones are stabilizing, I settle into the pregnancy. I enjoy my growing panza (belly). I enjoy feeling the baby move. I enjoy connecting to my baby as I dream and think about life with a child. I am very mindful of what I eat in order to have a healthy pregnancy and a healthy baby. It is indeed a very special time—my body is changing drastically and my life is changing as we plan for life as three instead of two.*

All of these experiences are unique to the pregnant woman.

As expecting parents we worry about the possibility of miscarriage, later about the likelihood of malformations and genetic defects, about the birth and possible complications. But there is only one parent who is pregnant and shows it. A pregnant woman has a big belly and a moving baby within to constantly remind her of these worries. And then there is the birth, the unbelievable physical sensation of feeling a real—spiritual and physical—being move

78. Pregnancy Discrimination Act of 1978, *supra* note 77.

through one's body. And the work, the emotional and physical work to birth that baby. To run a marathon is easy in comparison. Once the baby is born, life will never be the same.

Who is pregnant? A woman is pregnant. A person/parent with a female reproductive system is pregnant, regardless of how that person presents socially or legally. Partners/parents are expecting a baby. They share in the exhilaration, in the joys and challenges of the pregnancy. However, there is no way that one who is not pregnant can physically feel what the pregnant woman feels. Pregnancy is woman power. If you are male-identified and perform as a man who is pregnant, how awesome is it that you have a female reproductive system that gives you the gift of pregnancy. You disrupt social norms, social balance, and social expectations with presentation, but you conform to womanhood by having a uterus.

And when the baby is born and the real work of parenting, mothering, fathering begins, why does is it matter who was pregnant? Once the baby is born, it is evident who the baby's parents are: those who care for that precious and vulnerable new life; those who are committed to the raising of this special being. The important thing is that the baby is loved and welcomed.

The fact that only the pregnant woman is pregnant seems to answer the first issue of the relationship between sex and gender *vis-à-vis* pregnancy. But it takes us to the second unresolved issue of the relationship of that pregnancy to family. Up to now we have addressed pregnancy implicitly in the context of a couple, both of whom intend to parent the child. Yet, this is a location in which surrogacy really puts a twist into the concepts of pregnancy and family. None of the definitions of pregnancy that we've seen requires any relationship—genetic or social—between the pregnant person and the embryo. To be sure, there is a physical relationship as the embryo is inside the woman. So one could ask, is the woman "pregnant" who carries an embryo that is not genetically connected to her and that she will carry to term with the express purpose of giving the baby away to another person or couple? Is the purpose of the condition now relevant to thinking about who is pregnant or what is pregnancy?

Above we noted that what really matters is that the baby is loved. But it is important that a baby is loved in utero also. Babies feel and hear in utero. Babies know the voices they hear in utero. Regardless of whether there is a genetic link between the baby and the pregnant woman carrying the baby, the baby feels what the pregnant woman feels. The developing baby is sensitive; she will react to stimulation and sounds. Babies become attuned to the pregnant woman's voice, movement, touch.[79] Adoptive parents and surrogates need to be sensitive to these realities.

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79. THOMAS VERNY & PAMELA WEINTRAUB, NURTURING THE UNBORN CHILD 119-21 (1991).

Again, in thinking about surrogacy, we need to return to the biology/sociology dichotomy, which clearly needs to be deconstructed in favor of some continuum that reflects today's complicated realities. If we turn to sociology alone, we spark the problematic womb for hire debate, which harkens back to modern forms of slavery. Such views of surrogacy are underscored by the statistics in which it appears that the race and class of the surrogate differ from the race and class of those who become parents thanks to surrogacy arrangements.[80] Even within feminist communities there are debates about surrogacy,[81] with some fearing that poor women of color will be exploited, much as slaves were, as their wombs become but part of the "free" market.[82] And the question of consent—that "labor of love"[83]—is there; but so is the not insubstantial payment that the surrogate receives. Yet, by all definitions, the surrogate is pregnant, even if hers is a womb for hire.

The pregnancy conversation can become even more complicated. There are instances of intersex people with XY chromosomes, meaning genetically male, who develop female bodies with a uterus in which an implanted embryo can develop.[84] Similarly, as you comment, we have seen the case of a female-to-male transgender person who kept his ovaries and uterus giving birth—a genetically and biologically female person whose gender identity and appearance are that of a pregnant man.[85] Indeed, he has now given birth twice.[86]

These alternative performances of pregnancy certainly interrogate the very meaning of what pregnancy is. Yet one always returns to the reality that the meaning of pregnancy is only the pregnant woman, physically speaking, a person who possesses a female reproductive system, whose hormones rage, who gets morning sickness, who gets a beautiful panza (belly), who has to deal with the panza, and who births.

Underlying all this also is the unpacking of the meaning of family. The surrogate, for example, while clearly pregnant, is in no way the mom—not socially, not genetically. Thomas Beatie became pregnant and gave birth twice,

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80. Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935 (1995-96); Barbara Katz Rothman, *Cheap Labor: Sex, Class, Race—and "Surrogacy,"* 25 SOC'Y 21 (1988).

81. *See, e.g.*, APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES 1041-1166 (D. Kelly Weisberg ed., 1996).

82. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY 276-79 (1997).

83. Rosenblum, *supra* text preceding note 7.

84. Vaman Khadilkar, *Endocrine Problems in the Neonatal Period*, PEDIATRIC ONCALL, http://www.pediatriconcall.com/fordoctor/Conference_abstracts/Endocrine_problems_in_neonatal_period.asp (last updated Feb. 15, 2006).

85. Thomas Beattie, *Labor of Love: Is Society Ready for This Pregnant Husband?*, ADVOCATE, Apr. 8, 2008, at 24, *available at* http://www.advocate.com/society/commentary/Labor_of_Love/.

86. James Orr et al., *'Pregnant man' Gives Birth to Baby Girl*, GUARDIAN.CO.UK (July 4, 2008), http://www.guardian.co.uk/world/2008/jul/04/usa.gender; Sophie Tedmanson, *'Pregnant man' Thomas Beatie Gives Birth for Second Time*, TIMES ONLINE (June 10, 2009), http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6468144.ece.

but is he the dad? The mom? Well, his pregnancies were the result of artificial insemination; he used his own eggs, gave birth, and he is legally a man.[87] He seems to be both.

Children such as ours have two moms or two dads. In our cases, the child is biologically half of one of us, the other half a donated seed. That means that one of us lacks a biological connection to our child. Yet we love, we feed, we feel, we cry, we lose sleep, we laugh, we nurture. It is not a different kind of love; it is an excitingly possible family—one that loudly and proudly speaks its name.

Finally, we just want to say kudos to the way you so brilliantly engage the decoupling (yes, dear, pun intended—we just could not resist) of pregnancy from sex—both the noun and the verb. On the noun, the gender-bending pregnant man idea and image undo the normative expectations of what pregnancy and pregnant persons look like—even when that pregnant person is not going to be a parent to the baby she's carrying. Maybe this is the undoing of *Geduldig*[88]—a rejection of protection of one sex and not the other because they are so blended—and that would be a good thing.

The verb form of sex is more intriguing. We do not have to worry about birth control. However, that also means that if we want to procreate, we have to be very mindful and be willing and able to spend a lot of time, emotion, energy, and, yes, money to do so. Getting off and getting pregnant by that same act is such an intriguing idea. But the carelessness of just getting off and ending up with an unplanned and often unwanted baby is discomfiting. The babies in our lives are so lucky to have been carefully planned, so intensely wanted, so completely loved. It makes you wonder what's getting off got to do with it. That is pleasure; this is life—a life that, of course, also joyously includes pleasure.

And before we forget, our little guy has seriously started asking for twins—he wants a brother and a sister. Isn't it awesome that he sees such a desire as perfectly logical? That we would grow our family is normal. To him, having two moms is normal. That of course explains why to him there is absolutely nothing awkward with your being "Mom."

Do you remember when you and Howard were awaiting Melina's birth and you visited us in Florida? We were on our way to lunch—you and Nikolai were in the back seat—and we were chatting about what the baby would call you. Before getting deeply into the conversation we turned and asked Nikolai, who at that time was four years old, "What do you think the baby should call

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87. Orr, *supra* note 86; *Pregnant Man Thomas Beatie Expecting THIRD Child*, HUFFINGTON POST (Apr. 12, 2010), http://www.huffingtonpost.com/2010/02/10/pregnant-man-thomas-beati_n_457478.html

88. Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that discrimination on the basis of pregnancy does not constitute discrimination on the basis of sex).

Darren?" Without skipping a beat he answered, "Mami." We just love that—of course you should be mami . . . stubble and all.

Love,

Berta and Vivian

* * *

FRIENDS OF THE PREGNANT MAN

Lisa C. Ikemoto*

When Darren told me that he and Howard were expecting, I felt joy. I felt as friends do—happiness for them, a sense of rightness in my world, and a sense of entitlement based on friendship to claim those feelings. It is also true that the sense of rightness I claim arises from my scholarly and political views. In my work, I evaluate biotechnology use and reproductive technology use, in particular, from a reproductive justice perspective.[89] From that perspective, I see Darren and Howard's use of Assisted Reproductive Technology (ART) to become parents as liberatory. To the extent it has become an established practice, that use challenges pernicious norms long used to define family, mother, father, and love.

The Pregnant Man and the Dream of Family

The fertility industry casts ART as the dream of creating family. The resulting family formation narrative focuses our attention on the emotional content of that dream and on particular success stories. My response to Darren's initial news and later, to Melina's birth, fits nicely within that aspect of the family formation narrative, albeit with a progressive twist. For the most part, the family formation narrative has placed the two-parent, heterosexual, marriage-based family at its center. More specifically, the normative ART family has been predominantly white and economically privileged. But niches have formed, permitting and encouraging LGBT, single, and multiple-parent

* Thank you to Darren for including me in the conversation. Additional thanks to Jennifer Shih for her impressive research assistance.

89. ASIAN CMTYS. FOR REPROD. JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 2 (2005), *available at* http://reproductivejustice.org/assets/docs/ACRJ-A-New-Vision.pdf.

family formation. While Darren and Howard's ART use is still a niche use, and the normative center still holds, they do not stand alone.

By focusing attention on the personal and intimate aspects of ART use, the family formation narrative deflects attention from two other key aspects of ART use: its commercial nature, and its ideological links to other reproductive technologies.[90] ART use forms the basis of a multi-billion dollar industry.[91] The most visible transaction, the doctor-patient relationship, forms the core of a wide-ranging industry. Indeed, entrepreneurial doctors have played a key role in building the industry. ART use has also created a profitable market sector for the pharmaceutical industry. In addition, there are sperm banks, egg banks, embryo banks, lawyers, egg brokers, embryo brokers, surrogacy brokers, embryology laboratories, genetic testing laboratories, reproductive tourism agencies, and of course the "third parties"—the women and men who provide gametes and gestational services for others' use.[92] Contracts govern these relationships. And while caring and good intentions may motivate individuals like Beth, the fertility industry operates mostly for profit, in a substantially unregulated setting. Darren's account of finding a surrogate acknowledges the role of contract and law. Certainly contract and payment also have resulted from Darren and Howard's "egg shopping." The role of law is less clear. According to the New York State Department of Health, the law governing key aspects of third party egg transfers is unclear:

> Although the clear intent is for the recipient to become the legal parent, this is a fairly new area of law and one that most state laws do not address specifically. A program cannot guarantee that this legal understanding will hold up in court (if a dispute arises) or that current laws will stay the same.[93]

The family formation narrative directs us to consider the ART user's individual choices, rather than how the industry offers those choices. Darren's narrative nominally acknowledges that egg shopping and egg selling are mutually-constituting activities. He mentions the "creepy online shopping feel" of the egg provider search.[94] What remains implicit is that egg shopping occurs only after egg brokers have solicited young women to provide eggs for money. Then the brokers market the egg providers, often, as Darren and Howard

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90. ARTs are also linked to and part of the broader biotechnology industry. *See, e.g.*, Lisa C. Ikemoto, *Eggs as Capital: Human Egg Procurement in the Fertility Industry and the Stem Cell Research Enterprise*, 34 SIGNS: J. WOMEN IN CULTURE & SOC'Y 763 (2009).

91. DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 32-33 (2006).

92. *See generally id.* (describing all aspects of the ART markets); Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 L. & INEQUALITY 277 (2009) (outlining how reproductive tourism affects family formation and markets across borders).

93. N.Y. STATE TASK FORCE ON LIFE & THE LAW, THINKING OF BECOMING AN EGG DONOR? 21 (2009), *available at* http://www.nyhealth.gov/publications/1127.pdf.

94. Rosenblum, *supra* text accompanying note 7.

experienced, through the internet. Darren also mentions the criteria he and Howard considered. He might not have discovered or revealed that egg prices tend to correlate with SAT scores,[95] or that many gamete brokers also market the physical attractiveness of those who provide gametes for others' use. California Cryobank, for example, sells sperm provided by celebrity look-a-likes.[96] Gamete brokerage is, perhaps, the Las Vegas of the fertility industry. While the fertility industry uses these marketing tactics openly and widely, the family formation narrative makes the use of brokers and third parties just a necessary path to the dream of family.

Much, if not most, of the discourse about ART use seems premised on the notion that ART use and the issues it raises are ahistorical or so novel that we should evaluate ART as separate and apart from other technologies, even other reproductive technologies. Darren's use of "Pregnant Man" and my characterization of the "Pregnant Man" as liberatory reinforces the novelty claim. Those assertions are, I believe, useful. But it is also important to challenge the novelty claim. A strong critique of how the purveyance and selection of gametes and embryos normalizes eugenic assumptions, notions of racial purity, and disability discrimination is already forming. Darren's frank reflection on how he and Howard chose an egg provider acknowledges that critique.

Examining another ART figure shows how the ideological roots of older reproductive technologies shape our understanding of ART use. I will refer to that discourse as "Octomom." "Octomom" refers to the public discourse that formed shortly after Kaiser Hospital in Bellflower, California announced that the first surviving octuplets had been born.[97]

"Octomom"

Kaiser Hospital held a press conference on January 26, 2009 to announce the live birth of octuplets. The resulting media coverage framed the story as a medical miracle. Many guessed that ART use explained the octuplets' conception. Given the central family formation narrative, many probably assumed the octuplets had married, economically privileged parents. At that time, the only hard facts available were about the medical team, the babies'

95. Aaron D. Levine, *Self-Regulation, Compensation and the Ethical Recruitment of Oocyte Donors*, 40.2 HASTINGS CTR. REP. 25, 32 (2010).

96. *See* CAL. CRYOBANK, http://www.cryobank.com/Donor-Search/Look-A-Likes/ (last visited Dec. 9, 2010).

97. *See* Jeff Gottlieb & Sam Quinones, *The Eighth Baby Was a Surprise*, L.A. TIMES, Jan. 27, 2009, at A2.

birth weights, and the fact that the eighth baby was a surprise.[98] The uplifting tone of the story seemed to offset the gloomy news about the economic climate.

Within hours, the first of the blame stories emerged. It started looking like a story about technology run amuck. On January 27 and 28, media coverage quoted medical experts who had been asked to speculate about whether ART was used and if so, which one. Initially, experts assumed that the high order multiple birth resulted from ovarian stimulation drugs, also known as infertility drugs.[99] The octuplets' birth became an example of the dangers of infertility drugs. However, a few days later, when the octuplets' grandmother, Angela Suleman, told the press that in vitro fertilization had been used, public and professional criticism of fertility doctors and fertility clinics began.[100]

By Friday, January 30, the framing shifted from medical miracle to the mother's social status. By then, the media had Nadya Suleman's name. By the end of that day, the public knew that Nadya Suleman was not married, lived with her parents in a small house, and had six other young children.[101] Within this thread, Nadya Suleman became the iconic "welfare mother"—low income, too fertile, a burden to society.[102] Reports at this time stated that she had filed for bankruptcy; later reports clarified that it had been her mother, in fact, who had done so and that the case had been dismissed.[103] This framing persisted over time. Anger, even hatred, characterized the tone and content of much of the discourse. The anger was premised on assumptions that Nadya Suleman's decisions would cost taxpayers a great deal of money. So, within a few days, the story of the octuplets' birth changed from an uplifting escape from the gloomy economic forecast to the root cause of everyone else's economic hardship.[104]

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98. *See California: Second Set of Octuplets Born*, N.Y. TIMES, Jan. 27, 2009, at A23; Gottlieb & Quinones, *supra* note 97.

99. *See, e.g.*, Shari Roan & Jeff Gottlieb, *Octuplets Rattle Fertility Experts*, L.A. TIMES, Jan. 28, 2009, at A1.

100. *See, e.g.*, Lisa Belkin, *Update on the Octuplets*, MOTHERLODE BLOG, N.Y. TIMES (Jan. 30, 2009), http://parenting.blogs.nytimes.com/2009/01/30/update-on-the-octuplets/; Bonnie Rochman, *Octuplets Fallout: Should Fertility Doctors Set Limits?*, TIME (Feb. 2, 2009), http://www.time.com/time/health/article/0,8599,1876232,00.html. One of the most interesting aspects of this discourse is that it unequivocally places ART use within the context of the fertility industry and highlights its commercial nature. Earlier public furors over ART use—surrogacy cases, embryo mix-up cases, for example—have tended to locate ART use within the narrower locus of a particular family or doctor-patient relationship. In the Octomom discourse, the call for regulation has called attention to the failure of self-regulation within the industry.

101. *See* Belkin, *supra* note 100; Kimi Yoshino & Jessica Garrison, *Family in Octuplets Cases Had Financial Woes*, L.A. NOW BLOG, L.A. TIMES (Jan. 30, 2009, 3:39 PM), http://latimesblogs.latimes.com/lanow/2009/01/family-in-octup.html.

102. *See* Debra J. Saunders, *Dysfunctional Familymaking*, SFGATE.COM (Feb. 8, 2009), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/08/INRC15MOCA.DTL.

103. *See, e.g.*, Thomas Watkins & Lauran Neergaard, *Make That 14: Octuplet Mom Already Had 6 Kids*, USA TODAY (Jan. 30, 2009), http://www.usatoday.com/news/nation/2009-01-30-octuplets-family_N.htm.

104. *See* Peggy Noonan, Opinion, *Is 'Octomom' America's Future?*, WALL ST. J., Feb. 13, 2009, at A13, *available at* http://online.wsj.com/articles/SB123447506782479249.html.

A related framing followed closely on the heels of Nadya Suleman as welfare mother. In her initial statements to the press, Angela Suleman described her daughter as "obsessed with children."[105] That statement seems to have triggered the most personalized characterizations of Nadya Suleman. Initially, this thread did not characterize her as an archetypal bad mother, but as a freak and a media hound. "Octomom" and "serial mom" became commonly used referents for Nadya Suleman.[106] Over time, the welfare mother and Octomom threads joined—bound, apparently, by her lack of a spouse, her many children, and her presumed lack of financial means and moral character.

At least two messages have emerged from "Octomom," one explicit and one implicit. An explicit call for regulation of the fertility industry emerged.[107] The resulting public discussion about regulation has split into divergent calls for regulation using a consumer protection approach and for social regulation. The consumer protection approach would address health and safety risks of ART use.[108] The social regulation approach would limit access to ART based on social status. It baldly states that those like Nadya Suleman should not be using ART. This approach follows logically from the welfare mother and serial mother threads of "Octomom," which suggest that these are the women who should not be mothers. Historically, in the United States, the women deemed unsuitable for motherhood were women who transgressed social norms; who were politically marginal by virtue of their poverty, race, immigration status, or disability; and who were perceived as "too fertile."[109] Time after time in U.S. history, legislators, health care providers, social workers, and others have used reproductive technologies, including sterilization and contraception, to impose social control on those deemed unsuitable.[110] "Octomom" labeled Nadya Suleman as one in need of control.

It is tempting to position "Octomom" as Darren's opposite and as a story that makes the "Pregnant Man" so obviously a desirable parent. But given social conservatives' opposition to same-sex marriage and the ways in which

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105. Jessica Garrison & Kimi Yoshino, *Hoping for "Just One More Girl,"* L.A. TIMES, Jan. 31, 2009, at B1, *available at* http://articles.latimes.com/2009/jan/31/local/me-octuplets31.

106. *See* Tim Rutten, Opinion, *Children Born of Excess*, L.A. TIMES, Feb. 11, 2009, at A23.

107. *See, e.g.*, Julie Mack, *California Octuplet Case Cries Out for Tighter Regulation of Fertility Industry*, MLIVE.COM (Feb. 11, 2009), http://www.mlive.com/opinion/kalamazoo/index.ssf/2009/02/california_octuplet_case_cries.html.

108. "Octomom" highlighted the dangers of transferring multiple embryos to the woman's body in the IVF process, including the probability of multiple pregnancy and the resulting health risks to the woman and the fetuses she carries. One type of health and safety regulation would limit the number of embryos transferred in IVF based on existing medical guidelines.

109. *See* Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007 (1996).

110. *See* BETSY HARTMANN, REPRODUCTIVE RIGHTS AND WRONGS (1995); PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES (2008); RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE (1992); ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA (2005).

they have linked marriage, childbearing, and gender roles,[111] the call for social regulation undoubtedly includes a ban on the "Pregnant Man." "Octomom," then, contains a direct threat to the liberatory aspects of Darren and Howard's ART use. That threat has long roots.

The Ghosts in the Machine

Perhaps what makes ART use distinctive is the role of persons who provide sperm, eggs, and pregnancy for others' use. The fertility industry is the center of the doctor-patient relationship, which in turn positions the sperm, egg, and pregnancy providers as third parties. While I congratulate Darren and Howard, my general concern about the role of third parties in ART use also troubles my response to their good news.

For the most part, third parties have remained ciphers in ART discourses. We know of them through the principal parties. Darren's account gives us a glimpse of Beth, the surrogate. The family formation narrative uses "donors" to refer to women and men who provide gametes.[112] Most gamete providers receive payment, so the use of "donors" muddies understanding of their role.[113] Public discourse focused on Nadya Suleman and her fertility doctor even when a man identified himself as a former boyfriend and said he donated his sperm for her use. The media mentioned him,[114] but maintained its focus on her.

Third parties, then, remain abstractions. In the absence of subjectivity and voice, we can invest them with meaning at will. The family formation narrative imbues these figures with appealing motivation—altruism. For me, the third parties have become the locus of concern about the effects of commercialization—the risks of coercion, exploitation, and commodification, and the ways in which longstanding ideologies inform who become the principals and who become the third parties.

In the meantime, I can feel joy in Melina's birth and Darren's new role as Mami and yet worry about how we all got here. Like Darren, I am learning about problematic choices that can complicate and even upend theoretical commitments.

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111. *See, e.g.*, Melissa Murray, *Marriage Rights and Parental Rights: Parents, the States, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 393-97 (2009).

112. *See* N.Y. STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 93.

113. *Id.*

114. *See* Chris Cuomo, Jonann Brady & Russell Goldman, *Possible Octuplet Dad Gave Sperm Because He Was in Love with Suleman*, ABC NEWS (Feb. 23, 2009), http://abcnews.go.com/GMA/WomensHealth/story?id=6935810&page=1.

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ALL IN THE FAMILY

Angela Onwuachi-Willig and Jacob Willig-Onwuachi

Introduction

Your essay "Pregnant Man?" highlights many significant issues concerning the intersection of law, gender, sexuality, race, class, and family. In an earlier article *A House Divided: The Invisibility of the Multiracial Family*,[115] we explored many of these issues as they relate to multiracial families, including our own. Specifically, we, a black female-white male married couple, analyzed the language in housing discrimination statutes to demonstrate how law and society function together to frame the normative ideal of family as heterosexual and monoracial. Our article examined the daily social privileges of monoracial, heterosexual couples as a means of revealing the invisibility of interracial marriages and families within our society and analyzed how this invisibility is both reflected in and reinforced by the language of housing discrimination statutes. We followed a framework introduced by Peggy McIntosh, outlining unearned and unacknowledged privileges of heterosexual couples and their families; we then used Kimberlé Crenshaw's theory of intersectionality to explain how multiracial couples and families may experience societal benefits and disadvantages differently based on various intersections of identity categories. Our analysis of housing discrimination statutes demonstrated how the assumption that plaintiffs will be monoracial, heterosexual couples fails to fully address the harms to interracial, heterosexual couples that experience discrimination in housing and rental searches because of their interraciality—their race-mixing—as opposed to any person's individual race. In other words, it revealed how societal norms about who constitutes a family have been codified in a manner that ultimately denies legal recognition of all the harms of discrimination for certain couples and families.[116]

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115. Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231 (2009).

116. As we noted in our article, *id.* at 233 n.10, we did not directly focus on LGBT families because sexual orientation is not recognized as a protected class in most housing discrimination statutes, leaving LGBT, monoracial families completely unprotected and LGBT, multiracial families vulnerable at even more intersections. Our focus in our article was to unpack assumptions about groups that were

In reading your essay, "Pregnant Man?", we were struck by how your experiences and considerations in adding Melina to your family exposed these mutually reinforcing roles that law and society play in defining the normative family. Your thoughts and experience easily add one more piece of evidence to support contentions we made in our article.

Your essay is replete with examples of how family law serves as the means for identifying the intimate relationships that will be facilitated by government and how society works to reinforce those legal norms. As you show, law and society build on each other and match each other in substance and practice. In particular, you first reveal how the ideal of family as centered around a heterosexual couple is used to enforce and reinforce the expected roles of men and women, not just in terms of their places in intimate relationships but also with respect to parenting. Second, you expose the racial hierarchies among even those families that fit this ideal in terms of racial constitution and sexuality.

A. "Optimal" Mothers (and Fathers)

In examining the intersection of sex, sexuality, and the law, you show how family law—in particular, adoption law—shapes the image of the American family as formed around an intimate, heterosexual couple. First, as your entire essay reveals, the law's construction of particular roles for men and women in families with children worked to define how you named yourself in relation to Melina, with you ultimately deciding to call yourself "papi" even though you really felt like you were "about to become a mother."[117] Your struggles in naming and defining yourself in relation to Melina reminded us of *Lofton v. Secretary of the Department of Children and Family Services*,[118] where the Eleventh Circuit Court of Appeals more or less declared that the roles for men and women as parents in families are inflexible and announced its belief that the optimal way for children of both sexes to learn how to be a woman or man is to observe interactions and life between a man and a woman who are intimately involved with each other. In *Lofton*, the Eleventh Circuit held that a Florida statute banning gays and lesbians from adopting did not violate either the Equal Protection Clause or the Due Process Clause. In so doing, the court accepted as legitimate the state of Florida's interests in preserving the supposedly clear and fixed roles for men and women as parents through a

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viewed as already fully protected by the law, even as that lack of protection may relate to only expressive harms.

117. *See* Rosenblum, *supra* text following note 15.

118. 358 F.3d 804 (11th Cir. 2004).

statute designed to prevent families like your "necessarily motherless"[119] family from raising and teaching Melina how to be a woman. The court wrote:

> Florida argues that the statute is rationally related to Florida's interest in furthering the best interests of adopted children by placing them in families with married mothers and fathers. Such homes, Florida asserts, provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal childhood development and socialization. In particular, Florida emphasizes a vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling. Florida argues that disallowing adoption into homosexual households, which are necessarily motherless or fatherless and lack the stability that comes with marriage, is a rational means of furthering Florida's interest in promoting adoption by marital families.[120]

As the Florida statute[121] and the *Lofton* case demonstrate, the law in many contexts shapes and defines what is established as a "real" or "true" family—a family with a mother and a father. It also shapes who can be considered a mother or father. *Lofton* suggests that a mother can be only a person who was biologically born a woman, who in turn is supposed to model for a little girl what it means to be a woman, and a father can be only a person who was biologically born a man, who in turn is obligated to model for a little boy what it means to be a man.

Such social prejudices provide the foundation for resistance to families that are, by their nature, "motherless" or "fatherless": families that are headed by LGBT persons, especially those headed by men. Wrapped up in this understanding is the notion that you, a man who loves another man and, thus, a man who is not a "real" man, could never be a father. Also wrapped up in this understanding is the idea that no man, including you and Howard, can "mother" (and that no mother can "father"). As one of our white, heterosexual male friends experienced when he sought to adopt a child as a single man, people are skeptical in general about the intentions of men who want to adopt. People often wonder, "Why would a man want children absent a woman?" Our friend had no luck in his efforts to adopt a child as a single man. At best, some viewed him as crazy because men simply do not "mother." At worst, some viewed him as deviant—as a pedophile who wanted to adopt his victims in order to violate them in his own private home. That this avenue of adopting children as a single male, which comes with its own difficulties, is often the only way in which gay male couples can adopt speaks volumes about the strong and powerfully exclusionary roles of law and society in defining legitimate families.

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119. *Id.* at 819.

120. *Id.* at 818-19.

121. FLA. STAT. § 63.042(3) (2002), *invalidated by In re* Adoption of X.X.G., No. 3D08-3044, 2010 Fla. App. LEXIS 14014 (Fla. Ct. App. Sept. 22, 2010).

This reality in itself automatically excludes LGBT families from societal conceptions of "real families." In our society, the presumption for LBGT families is that such families are an alternative for families with two parents of the opposite sex and, in particular, are an alternative for adopted kids.

Against this backdrop, we applauded your decision to challenge this "social presumption's predetermination of [your] family[]"[122] by pursuing a biologically-related baby through surrogacy. After all, such a decision could only work to disrupt the notion of the "normal" or even "ideal" family. But we still wondered why you decided to accept this particular challenge versus others,[123] because as you detail, surrogacy contracts and arrangements, although they can be risky for any couple, are especially worrisome for gay male couples. For example, varying laws from state to state made it even more difficult for you and Howard to trust that your rights under any contract would be recognized, resulting in your "minor meltdown when [your] Skadden-trained mind contemplated an agreement governed by Oklahoma law."[124]

Likewise, your own reluctance as you travelled to Oklahoma to meet the surrogate for Melina, Beth, highlighted the social stigmas that attach to the notion of gay parents. As a general matter, it is hard for us, as your friends, to imagine that you—"gregarious . . . with friends in Paris or Tokyo or shopkeepers in Marrakech or Rio"—would be "super nervous about getting along with people [you] feared would be very different . . . ."[125] In our eyes, you could make anybody in any context fall in love with you. But reading about your worry in meeting Beth in Oklahoma reinforced for us just how much social stigma and prejudice can turn what should be simple meetings into frightening encounters. We very much understood the apprehension.

B. Racial Constitutions

Most of all, given our previous work, we were drawn to your story about how racial norms worked to design the final image of your family. Even as you and Howard were able to avoid legal obstacles in ultimately giving birth to Melina, social norms as well as the lingering effects of past legal definitions of blackness shaped the racial constitution of your family.

Certain of those influences were seemingly (though not actually) small, but powerfully revealing in their racism and identification of a monoracial family as the ideal, such as the question by your friend, another law professor: "Why pay all that money for a black kid when you can adopt?"[126] For example, your

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122. *See id.* text following note 5.
123. *See* Onwuachi-Willig & Willig-Onwuachi, *infra* Part B, Racial Constitutions.
124. Rosenblum, *supra* text accompanying note 10 (citations omitted).
125. *Id.* text following note 9.
126. *Id.* text following note 7 (paragraph beginning "This drew some . . . .").

friend's question exposed the power of the one-drop rule in our society. As you explain in "Pregnant Man?," biological connections between parents and children take on an importance of their own in our society. Yet, simply because your first, preferred egg donor could have been black, your friend discounted the biological connection that a child born through surrogacy would have to either you or Howard. In his eyes, one drop of black blood marked your potential child with the black donor as "just another black child," one who could be adopted for a cheaper price, as opposed to your or Howard's biologically related, biracial child, which, because of the costs of surrogacy, would come at a higher price. In other words, the child could only truly be yours and Howard's and worth the cost if she were white; if your child could not be purely white, why expend too many resources on adding her to your family? Such comments by your friend expose the continuing and dangerous effects of racial identity laws and cases that drew sharp lines between white and non-white. These lines not only continue to make it difficult for multiracial individuals to define themselves according to their personal preferences, just as you could not freely define yourself as a mother as you wished to do;[127] they also persist in forcing multiracial families, including LGBT multiracial families, to fight to be families or at least be recognized as families.

Additionally, your friend's question about your possibly spending "all that money" on a black baby highlights the hierarchy of societal value placed on even monoracial, heterosexual couples and on black children in general. Your friend's comments reminded Angela of the 1980s Cabbage Patch Doll craze along with a joke from a white classmate about the costs of the black Cabbage Patch Dolls, which he claimed were five dollars cheaper than the white ones. That classmate remarked that the cheaper cost was why he bought a black Cabbage Patch Doll. In today's version of a different story about costs and dolls, it is the black Barbie that gets marked down half-price while the white Barbie remains at full price at Wal-Mart.[128] Your friend's statement similarly reveals the generally lower value placed on black children and ultimately their families. As Professor Heather Dalmage has highlighted in her book *Tripping on the Color Line: Black-White Multiracial Families in a Racially Divided World*, nowhere are these values more telling than in the adoption arena, where there are "race-related price tags placed on children available for adoption."[129] For example, "in 1990 a U.S. agency published a price list for adoption: white

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127. Angela Onwuachi-Willig, *A Beautiful Lie: Exploring* Rhinelander v. Rhinelander *as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CAL. L. REV. 2393, 2451-54 (2007).

128. Steve Parker, *Walmart Discounts Black Barbie Doll, Leaves White Version Full-Price*, STLTODAY.COM (Mar. 10, 2010), http://www.stltoday.com/news/local/columns/conversation-about-race/article_3a6112a3-02c1-53da-bf1e-19faa50cdc07.html.

129. HEATHER M. DALMAGE, TRIPPING ON THE COLOR LINE: BLACK-WHITE MULTIRACIAL FAMILIES IN A RACIALLY DIVIDED WORLD 156-57 (2000).

children cost $7,500, biracial children $3,800, and black children $2,200."[130] As Professor Barbara Fedders contends, adoption agencies that use such race-based pricing—"set[ting] lower fees for black children than for white ones"—not only "send a message that black children are less valuable than white" but also "reinforce[] the notion of whiteness as a property *right*."[131]

Other influences on your decision of an egg donor exposed broader insights into the microaggressions and macroaggressions faced by white gay parents with children of color. Like you, our initial reaction was one of hope that you and Howard would push the boundaries of race and family by selecting your preferred minority donor—"a tall, attractive provider with a great undergraduate affiliation."[132] Just as your decision to use a surrogate worked to challenge the accepted notion of LGBT parents as an alternative to opposite-sex parents, we wanted your choice of an egg donor to challenge the normative ideal of family as monoracial. However, your reflection on the white gay couple on *Rosie's Family Cruise* that was accused of trafficking as they tried to bring their differently raced child across the border was extremely powerful.[133] While we question your other friend's idea that racial difference would make the child of gay parents even "more" of an outsider, we could not deny the fear that such encounters during travel would surely and repeatedly invoke in your lives.

The *Rosie's Family Cruise* story reminded us of very recent experiences that we, a black-white heterosexual couple, had while traveling with our own biracial children and another family, a black-white lesbian couple, Catherine Smith and Jennifer Holladay, and their monoracial, black child, Zoe, to the Caribbean. Our very presence as a group of travelers destabilized the normative familial images of other people we encountered on the plane or at our resort. People stared (and stared hard, too) at us, not knowing quite how to understand us, but still all the while understanding us as connected to each other somehow.

As a group, we discussed the possibility that other resort guests viewed us all as part of a polygamist family—Jacob with his three wives and mocha children.[134] If our group was, for any reason, separated into smaller groups, it generated greater confusion among our fellow travelers. If we, Jacob and Angela, were ever together alone with Jennifer, who is white, and the kids, people often assumed that Jacob and Jennifer were married and that Angela was a friend with her children, resisting the notion of an interracial family at all. Or they saw Jacob and Jennifer together as a married couple and Angela as a nanny for their black children, resisting the notion that a multiracial family,

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130. *Id.* at 157 (citing RITA J. SIMON ET AL., THE CASE FOR TRANSRACIAL ADOPTION (1994)).

131. Barbara Fedders, *Race and Market Values in Domestic Infant Adoption*, 88 N.C. L. REV. 1687, 1712 (2010).

132. Rosenblum, *supra* text following note 7.

133. *Id.* text accompanying note 8.

134. Our children and the daughter of Catherine and Jennifer all have a similar skin tone.

just as you note earlier about LGBT families, could be created through any means other than adoption. At times, the presence of our kids threw them off, given how much more they look like Angela, but Jennifer and Angela joked that it was likely easier for others to conclude that Jennifer was like a slaveowner's wife who turned a blind eye to her husband's sexual exploits—often rape—rather than accept the image of our actual multiracial family. If we, Jacob and Angela, were together alone with Catherine, who is black, people just stared. Nothing in their minds could reconcile that combination. There was no conceivable explanation to them because such explanations would have required them either to see and accept a lesbian couple, Angela and Catherine, or accept one of us as Jacob's partner and the children as products of such unions.

More striking, however, were Catherine, Jennifer, and their daughter Zoe's experiences in having their family explicitly and consistently disregarded by both law and society on the island. Before our actual trip, we, Jacob and Angela, worried often about potential prejudice against our friends, especially in light of news articles about violent homophobia in the Caribbean. There was no such violence, though—at least physically. Yet, Catherine and Jennifer encountered constant mental and emotional violence in the failed acknowledgement of their family. Our heterosexuality and thus our legal union allowed us to come through immigration as a family—together with our kids, even though we did not fit the monoracial ideal. However, because Catherine and Jennifer's civil union was not recognized as lawful, they had to separate their family physically to get through immigration—Jennifer and Zoe approaching the official for their review and with legal adoption papers of Zoe by Jennifer, followed by Catherine as an individual. Only in one instance did someone break the social norms of heterosexuality and family. An immigration official told Jennifer as she approached with Zoe, "Your whole family can come up here. Go ahead and bring your whole family up." Our gratefulness as a group for this official's willingness to acknowledge the Smith-Holladay family makes perfect sense, but upon reflection, especially based on your essay, it also is sad. Forced reliance on others' willingness to break with social norms and thus the law provides no comfort. Uneasiness always exists.

Hopes aside, we see why you and Howard would not want to have to engage in such reliance. After all, as experience reveals, it is a privilege to be able to keep it all in the family.

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WHAT'S LOVE GOT TO DO WITH IT?

Kimberly Mutcherson

Commercial surrogacy arrangements make me nervous on multiple levels. As a person who has been pregnant twice and has successfully given birth to two children, I find it impossible to imagine carrying a child to term only to pass her on to others to raise and love. On a less personal level, I worry about the potential for surrogacy arrangements to go terribly wrong. Intended parents can change their minds about becoming actual parents; a surrogate can change her mind about continuing a pregnancy or handing over a child after she is born; a pregnancy can end in miscarriage or a child can be born with congenital anomalies. Contracting parties can squabble over money or over the conduct of the surrogate or intended parents. When a business transaction involves such intimacy, disaster seems to loom, and our courts and legislatures do not quite seem to know what to do when more than two people are involved in creating a child. Economic transactions involving the creation of children demand serious care and ample opportunities for reflection for all involved.

My own inability to imagine myself as a surrogate and fears of disaster aside, I also have concerns related to surrogacy that are political and ethical so that even in those circumstances, probably the majority,[135] in which surrogacy arrangements do not go horribly awry, they still give me pause. As explained by Dorothy Roberts, following in the footsteps of many feminist academics:

> Commercial surrogacy can be seen as liberating when liberation is measured by the individual's freedom and ability to buy and sell products and labor on the market. But women's wombs and pregnancy are not ordinary products or labor. Like children, organs, or sexual

135. There is a paucity of data available about how many surrogacy arrangements take place in the United States each year. For an account of why the data is so poor, see MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA (2010), *available at* http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf. It is almost certainly fair and accurate to say that over a thousand surrogate births take place annually in the United States. *Id.* at 4; *see also* LIZA MUNDY, EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING MEN, WOMEN, AND THE WORLD 130 (2007). The fact that family courts around the country are not seeing a steady influx of custody disputes involving the children born of surrogacy arrangements suggests to me that most of these arrangements end as intended with the surrogate mother relinquishing the child to be raised by the intended parents.

> intimacy, women's reproductive capacities should not be bartered in the market.[136]

Given that I do not call for a ban on surrogacy or seek close regulation of the practice, I obviously do not totally agree with Roberts's assertion that this type of labor should not be allowed. It is not my place, nor the place of the government, to decide how an individual woman will use her reproductive capacity especially by telling her that she cannot use it for profit.[137] But in acceding to reproductive capacity as an entity that can rightfully be sold, I do not deny that this is a unique market with unique goods. Women's wombs are more akin to organs than to cars so it is not proper to simply map market principles onto these transactions. We need a hyperconscious eye that places appropriate value on the service being offered, watches for deplorable employment practices, provides redress for those who might suffer in the transaction, and recognizes that this is a market in which the ethical and moral questions are real, important, and inescapable.

I am going to focus my critique on two issues: surrogacy as exploitation and surrogacy as subjugation. It is inevitable that contracts involving the exchange of substantial sums of money for reproductive labor raise the specter of exploitation of women with limited financial resources and the commodification of women's bodies and women's labor.[138] Many scholars object to surrogacy contracts as a form of baby selling[139] and an example of patriarchy disguised as empowerment.[140] In contrast to these concerns, you write that as far as you could tell, the process of being a surrogate, for your

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136. ROBERTS, *supra* note 82, at 277-78.

137. Other feminist commentators agree with me that a ban on such exchanges is not necessary or appropriate. Laura Purdy has concluded, "In sum, there seems to be no reason to think that there is anything necessarily wrong with surrogate mothering, even the paid variety. Furthermore, some objections to it depend on values and assumptions that have been the chief building blocks of women's inequality." LAURA PURDY, SURROGATE MOTHERING: EXPLOITATION OR EMPOWERMENT, *reprinted in* REPRODUCING PERSONS 195 (1996). In a similar vein, Bonnie Steinbock writes:

> There are many reasons to be extremely cautious of surrogacy. I cannot imagine becoming a surrogate, nor would I advise anyone else to enter into a contract so fraught with peril. But the fact that a practice is risky, foolish, or even morally distasteful is not sufficient reason to outlaw it.

Bonnie Steinbock, *Surrogate Motherhood as Prenatal Adoption*, 16 LAW, MED. & HEALTHCARE 44, 50 (1988).

138. In contrast to Purdy and Steinbock, Barbara Katz Rothman sees commercial surrogacy as a tool of patriarchy. She writes, "Women are not, and must not be thought of as, incubators, bearing the children of others—not the children of men and not the children of other women. Every woman is the mother of the child she bears, regardless of the source of the sperm, and regardless of the source of the egg." Barbara Katz Rothman, *Motherhood: Beyond Patriarchy*, 13 NOVA L. REV. 481, 486 (1989).

139. The court in *Baby M* specifically equated commercial surrogacy with "baby-bartering" in making its determination that the surrogacy contract in that case violated public policy. *In re* Baby M, 537 A.2d 1227, 1241 (N.J. 1988).

140. *See* Rothman, *supra* note 138. In a scathing discussion of surrogacy contracts, Katha Pollitt wrote: "Regulation might make contract motherhood less haphazard, but there is no way it can be made anything other than what it is: an inherently unequal relationship involving the sale of a woman's body and a child." Katha Pollitt, *The Strange Case of Baby M.*, NATION, May 23, 1987.

surrogate, Beth, was a "labor of love."[141] As I read that part of your piece, I felt as if you were claiming that this truth, and I'm willing to concede the truth of it, promises that the relationship among you, Howard, and the woman who literally labored to give you the gift of a genetic tie to your child was free of exploitation. Of course this requires us to have a shared view of exploitation and a common understanding of how one human being may exploit another. Your "labor of love"[142] characterization only works if we view the world in particular ways that I'm not sure serve the interests of women.

In its most benign sense, to exploit means simply to make productive use of something, and certainly it is the case that you and Howard made productive use of Beth no matter how much delight she took in her role. In its more negative sense, as I imagine you use the term, it is about taking advantage of someone and, even if the person so taken advantage of enjoys the experience, it can be said that in a world in which access to economic power is routinely denied to many women as a result of circumstances frequently far beyond their control,[143] offering large sums of money in exchange for reproductive labor cannot help but exploit women. This does not at all depend upon your relationship with your surrogate, her feelings about the exchange, or the dollar amount that you paid her. Rather, it is about a larger societal failure to provide equal opportunity such that a type of work that rewards women for performing a traditional and highly gendered function can be seen as taking advantage of a system that unfairly accrues to the benefit of those with a measure of societal privilege.

Available data suggest that few, if any, surrogates' day jobs pay as well as the careers of the people who will hire them to carry their babies.[144] A typical

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141. Rosenblum, *supra* text preceding note 7.

142. *Id.*

143. There has been some movement in the gender wage gap, but, with some exceptions, women still tend to make less money than men:

> The ratio of women's and men's median annual earnings, was 77.0 for full-time, year-round workers in 2009, essentially unchanged from 77.1 in 2008. (This means the gender wage gap for full-time year-round workers is now 22.9 percent.) This is below the peak of 77.8 percent in 2007. . . . An alternative measure of the wage gap, the ratio of women's to men's median weekly earnings for full-time workers—was 80.2 in 2009, which is essentially flat since the historical high of 81.0 in 2005. . . . Progress in closing the gender earnings gap has slowed considerably since the early 1990s, as measured by both data series.

INST. FOR WOMEN'S POL'Y RES., FACT SHEET: THE GENDER WAGE GAP: 2009 (2010), *available at* http://www.iwpr.org/pdf/C350.pdf.

144. As fertility doctor Dr. Vicken Sahakian said, "Most surrogates are—you know, they need the money; they're at home, with four kids—of a lower socio-economic class." MUNDY, *supra* note 135 at 133. A 1988 report from the Office of Technology Assessment indicated that women who agree to work as surrogates were between twenty-six and twenty-eight years old, and the vast majority were married and white. Hilde Lindemann Nelson, *Scrutinizing Surrogacy*, *in* ISSUES IN REPRODUCTIVE TECHNOLOGY–AN ANTHOLOGY 299 (Helen Bequaert Holmes ed. 1992). On the whole, these women were "not especially well educated" with fewer than 35% ever having attended college and 4% with some graduate school attendance. *Id.* These women were not poor, which is unsurprising given that most intended parents and most agencies will not work with women whose financial circumstances suggest desperation and, perhaps, inadequate insurance and sub-standard health.

surrogacy arrangement can cost between $100,000 and $150,000,[145] a number that immediately places most of the population in the category of those who cannot afford to hire a surrogate. A surrogate's fee in the United States is somewhere around $20,000-$25,000.[146] Without even considering the time that it takes to actually become pregnant, a well-paid surrogate makes substantially less than minimum wage for the 24-hour a day, 9-month long job that she performs. If one really wants to save money on the transaction, a surrogate can be hired in India, a country that has created a thriving business in surrogacy for foreigners, where the total cost of surrogacy services runs around $25,000 and the individual surrogate will, as a consequence, take home much less money for her work though that money will be substantially more meaningful to her given the economic climate in which she lives.[147] For some individuals, the lower price tag and ability to skirt local anti-surrogacy laws make India a viable option, an option that makes even more stark the line between those who hire and those who are hired in the surrogacy market.[148] When you think about purchasing bargain surrogacy services in India, the sense of women being put to good use, like service animals, is harder to shake, and casting aside those concerns with talk of labors of love is substantially more difficult. Whether in India or Indiana, the irony is that the supposed economic boon for women actually fits quite well within a structure in which "women's work" is undervalued and underpaid. While the lump sum may be substantial, the actual payment does not justly compensate the surrogate for the work she provides, and the alleged satisfaction of completing a successful pregnancy, fulfilling some primal need or urge to make babies, and engaging in a labor of love, does not necessarily make the exchange an even one. As one critic of surrogacy arrangements wrote: "Emphasis on women's selfless gift giving masks the complex social and political construction of women's altruism. It is always women who are called upon to be reproductive gift givers."[149]

The class differential between surrogates and those who hire them is present in many surrogacy narratives. Those with lower incomes are far less often patients in the fertility industry than they are providers of gametes or

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145. MUNDY, *supra* note 135, at 129; Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2008, at 44. Ali and Kelley write that the "cost to the intended parents, including medical and legal bills, runs from $40,000 to $120,000." Mundy supports the $100,000-$150,000 figure.

146. MUNDY, *supra* note 135, at 133.

147. Henry Chu, *Wombs for Rent, Cheap*, L.A. TIMES, Apr. 19, 2006, at A1 (describing one Indian surrogate's $5,000 fee); Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9 (describing the bourgeoning business of surrogate motherhood in India where total costs for the procedure hover around $25,000, "roughly a third of the typical price in the United States").

148. Debora Spar imagines an increasingly robust market for surrogacy tourism in years to come in which the hired surrogates will be young, will already have children, and "will almost certainly be poorer than those who contract for their services." SPAR, *supra* note 91, at 87 (internal citation omitted).

149. JANICE G. RAYMOND, WOMEN AS WOMBS 41 (1993).

substitute wombs.[150] The lesson many of us draw from surrogacy narratives is that in America, and indeed around the world on our globalized planet, money can buy anything—even a woman's womb and the baby that it nurtures. As I re-read that sentence it sounds harsh and accusatory, but I do not (exactly) mean it to be. What I mean to suggest is that we are in a world in which the line separating consumer products from precious human goods has become porous. In such a world, women participating as service providers, surrogates, in these markets cannot always make the best bargains for themselves because the proverbial deck of cards is stacked against them before the bargaining begins. This lack of parity is inherent in a system where money makes the rules.

Having made one point about exploitation, I want to also make a point about subjugation or surrogacy as a means of control and governance of women's bodies. Surrogacy contracts can be littered with terms that are appalling in their reach into the life of the surrogate. Parties may contract around issues of what doctors the surrogate will see, her willingness to follow all doctor's orders or get an abortion if requested by the intended parents, the need to refrain from conduct that creates even small risks to a growing fetus, and a smaller final payment if an infant is stillborn.[151] Contracts aside, intended parents might make requests about what cleaning products a surrogate may use or what level of sexual intimacy she may have with her husband. Even beyond issues of literal exercises of control, there is something off-putting about the ways in which women who act as surrogate mothers are placed in this difficult metaphorical bind that asks them to assume a very traditional, highly gendered role as giver of life while committing an act that deeply violates societal precepts about the relationship between women and their offspring. It has been documented that intended parents do not like to hire surrogates who appear too mercenary.[152] In other words, if a surrogate admits that she is doing it for the money, she can be fairly certain that she won't be hired for this particular job.

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150. Though the popular vision of those who need fertility treatment is that of a white middle- or upper-class couple, most likely heterosexual, there is some evidence that infertility disproportionately strikes the poor and people of color for a variety of reasons including inadequate access to healthcare. Liza Mundy, *A Special Kind of Poverty*, WASH. POST MAG., Apr. 20, 2003, at W8. While it may be the case that most consumers of fertility treatments are white and have significant access to money, this should not be confused with the data on who actually needs access to assistance in order to become pregnant.

151. SPAR, *supra* note 91, at 80.

152. On its website, the American Surrogacy Center includes a brief summary of a study conducted to assess the motivations of potential surrogate mothers. One of the reasons for rejecting potential surrogates was a finding that the women were "overly motivated by the fee." Betsy P. Aigen, *Motivations of Surrogate Mothers—Parenthood, Altruism and Self-Actualization (a three year study)*, AM. SURROGACY CTR, INC. (Feb. 21, 2005), http://www.surrogacy.com/Articles/news_view.asp?ID=42. On its website, the Center for Surrogate Parenting informs potential surrogate mothers that they "[m]ust be financially secure. Since money should not be a major motivating factor in deciding to become a surrogate mother, anyone on welfare or receiving state assistance . . . is excluded from our program." *Typical Surrogate Mom Profile*, CTR. FOR SURROGATE PARENTING, INC., http://www.creatingfamilies.com/SM/SM_Info.aspx?Type=131 (last visited Dec. 9, 2010).

And yet, this is a job. It is an economic transaction with significant financial benefit for the women who are willing to become pregnant and carry a child to term for the benefit of others. If this had not been a "labor of love,"[153] if Beth had indicated a deep desire for a particular luxury item or a need to pay off a debt or a desire to go on a nice vacation, why would this have diminished the transaction, the goal of which, after all, was a child to add to your family? Even as surrogacy becomes more of an option for those with the financial resources required to access it, women who play the role have to be übermothers—women who love to be pregnant, who love family, who have no greater desire than to see others parent—even as they commit an act that has long been considered anathema—giving away a baby.[154] For men, in contrast, participation in the babymaking industry has long been accepted as a quick and easy way to make money.[155] Certainly the time commitment and bodily risk to which a surrogate subjects herself justify the paycheck that she earns for her work, but why must she also eschew financial motives? By asking her to be a surrogate for love and not money, I fear that we are reinforcing notions of women as people who feel rather than think and who lack the ability to make calculated and difficult decisions about their financial futures. For me, Beth could be a woman who participated in a labor of love because the money was good and that does not diminish what she did or make her less of a good person for having done it. The contradictions inherent in the way that we configure surrogacy make my head hurt most of all because I can't imagine a foreseeable future in which the structural inequalities that make surrogacy a viable and lucrative employment option for some women will dissipate. Of course, I also didn't believe that I would see a black president in my lifetime, so perhaps all bets are off on the timing of the end of gender oppression. In fact, in our globalized world, I worry that the inequality gap will only widen and more and more women will fall into it.

I find it difficult to imagine a real world commercial surrogacy arrangement in which there is no exploitation of the surrogate or in which the palpable sense of transferring control over her body into the hands of paying customers vanishes. This does not mean that these arrangements are so morally suspect as to make them unconscionable. The basic structure of our economic system rests on gaping inequalities between those who have and those who will never have no matter how hard they work. So the relationships upon which commercial surrogacy arrangements rest are unique only for the intimate acts

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153. Rosenblum, *supra* text preceding note 7.

154. There are stacks of books on the complex evolution of the status of mother as an ideal and as practiced in this country. *See, e.g.*, ANN DALLY, INVENTING MOTHERHOOD (1982); MOTHERHOOD: A FEMINIST PERSPECTIVE (Ellen Cole & Jane Price Knowles eds., 1990).

155. Kim Krawiec, *Sunny Samaritans and Egomaniacs*, 72 LAW & CONTEMP. PROBS. 59, 71 ("Unlike egg donors, who are presumed to donate reproductive material out of altruism, sperm donors are assumed to donate primarily, if not solely, for profit opportunity.").

of pregnancy and childbirth that they involve. This means that they warrant special concern, but not because they are different in substance from other unequal economic transactions.

In the end calculus, what I care about most in your story is the fact that you and Howard added a beautiful child to your family. I have no doubt about the tremendous gratitude that you have for Beth and what she did and the care you showed her. Even so, though, I worry about how to understand and protect the interests of those women for whom acting as a surrogate is simply labor and those for whom love is a part of it, too. Women should have access to a wide variety of economic opportunities, and I recognize that surrogacy is a lucrative opportunity for those women brave enough or, at least in some cases, desperate enough to offer their bodies in this way, but I worry about them and want the best for them. I want their work to be well paid and well respected. I want them to be protected as workers, and I do not want love to obscure the power differentials between them and those who hire them.

* * *

COMMENTS ON PREGNANT MAN

Peter Siegelman

When Darren asked me to comment on his piece, I suspect he was not asking for my ordinary human reaction, which of course was wildly enthusiastic, but for my professional reaction as an economist. Though not everyone will believe it, the two roles are actually compatible.[156] All economists are human beings; and economics itself is paying increasing attention to the significant role of emotions and other non-rational considerations in decision making.[157]

My analytic reaction is to see Darren and Howard and Melina's story in the light of the great English historian Sir Henry Maine's comment that "the movement of the progressive societies has hitherto been from Status to Contract."[158] I've always loved that remark because it manages to condense so much into so few words. The end of feudalism, the growth of capitalism, the

156. *See* DEIRDRE MCCLOSKEY, HOW TO BE HUMAN—THOUGH AN ECONOMIST (2000).

157. For a discussion of this literature, see Anne C. Dailey & Peter Siegelman, *Predictions and Nudges: What Behavioral Economics Has To Offer the Humanities and Vice-Versa*, 21 YALE J.L. & HUM. 341 (2009) (reviewing DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008) and RICHARD THALER & CASS SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008)).

158. HENRY S. MAINE, ANCIENT LAW 141 (Dorset Press 1986) (1861).

effect of market relations on social relations (and vice versa)—all are captured in that pithy description of how anonymous markets based on freedom of contract have increasingly supplanted social position as the source of (and constraint on) human possibility.

Darren's essay makes it clear that Maine's insight, despite its brilliance, isn't the last word on the relationship between status and contract. Maine's view was that markets undermined or supplanted identity-based relationships: serfs were bound to the land because of who they were; "free" laborers could contract with any employer who would have them, and so on.[159] Maine was right that status matters much less—and wealth/contract much more—than long ago. But one of the most important statuses many people still do attain is that of parent. And Darren's essay demonstrates that he was able to take up the status of parent (or, as he prefers, "mother") only by virtue of a contractual, market-based relationship between him (and his partner) and the woman who acted as their gestational surrogate. Darren couldn't have assumed the status of mother in the absence of the legal and economic infrastructure that made contracting for surrogacy possible. Contract has made status possible, rather than supplanting it.

I lack the sociological or historical wisdom to construct a general theory of the relationship between status and contract. However, it seems obvious that there are many other examples—albeit less vivid ones—of this kind of symbiotic relationship between status and contract. Lawyers or doctors, for example, have a kind of status-like relationship in relation to the rest of society. There are certain things they, and only they, are permitted to do by virtue of their professional identities: appearing in court or prescribing drugs, for example. And there are things others can do that they cannot: for example, doctors are widely considered to be barred, by virtue of the Hippocratic oath, from administering the death penalty.[160] At the same time, however, the status of doctor or lawyer is only possible because of the underlying contractual arrangements in which these professions are embedded. Doctors and lawyers charge for their services, and that contract-based compensation is what enables the professions to exist at all.

In sum, markets can both undermine and create status. Given that this is so, the lesson I draw from Darren's essay is that we face the interesting task of figuring out how to use markets to expand the kinds of status relationships we find valuable (including the possibility for gay men to become parents). At the same time, we need to work to prevent the use of markets for the ossification (or creation) of invidious status distinctions such as racial or other forms of

159. *Id.*

160. *See, e.g.*, Council on Ethical and Judicial Affairs, *Policy E-2.06 Capital Punishment*, AM. MED. ASS'N (2000), http://www.ama-assn.org/ama1/pub/upload/mm/369/e206capitalpunish.pdf.

discrimination.[161] Neither of these will be easy to accomplish, but Darren's example gives me some hope that we can creatively use the best of both status and contract to build a more humane future.

* * *

MUTUAL EXPLOITATION, A RESPONSE

Beth Jones

While this essay and the follow-up discussions present a vast array of topics and ideas, the most fascinating to me is the topic of exploitation. The obvious assumption is the possibility of exploitation by the intended parents towards the surrogate. However, the reverse is just as easily possible and likely much more prevalent than people realize. In fact, the process may work best when there is mutual exploitation, to a degree. Let me back up. From my perspective, I've known for years that I didn't want to raise another child. I have known since I was pregnant with my twins that two kids were all I would ever want. Unfortunately, that pregnancy was a hard one. I had complications many people have never known exist. Forty-five percent chance of survival one week, five percent the next. At nineteen years old, the pregnancy was a trial for which I was not prepared, culminating in the terrifying concept of labor. The best experience that I took away from my pregnancy—aside from the wonderful end result, of course—was survival.

Nine years later, I was more experienced and a lot less fearful. Motivations and altruisms aside, let me be completely selfish for a moment. Becoming a surrogate provided a way for me to experience a planned pregnancy at a time in my life when I could enjoy the experience. There would be no lifelong commitment to raising another child, and it was one of the rare chances so few people receive to do something over. Yes, there was the risk of twins, but so what? If I could survive it as a terrified nineteen-year-old, I could certainly handle it in my late twenties. Luckily for me, the experience was absolutely ideal. I had amazing people doting on me constantly, and I had the enjoyable

161. Gary Becker's widely influential, albeit also widely challenged, theory of employment discrimination fits Maine's paradigm perfectly. *See* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (1957). In Becker's theory, discrimination is caused by distaste on the part of white employers for associating with black workers, even though the latter are assumed to be as productive as white workers. This is a classic status relationship, based on identity rather than economic productivity. Becker's model also predicts that market forces should eliminate this kind of discrimination, however, because employers who refuse to hire productive workers at low wages will forego profits and be subject to market discipline. Sadly, this has not proven to be the case.

pregnancy I had previously missed. It was a spiritual experience to be able to help create a life for two people who so desired a child, and I got to play the nurturing role, singing and talking to the little one growing inside me, doing all the things I wish I had done (or had been able to do) in my previous pregnancy. On top of all of this, I was compensated, and after it all, my life went back to being my life. So I can say, with absolute certainty, that any construed exploitation done "against" me was equally matched. Given the benignity of the exploitation, it seems incredibly mutually beneficial.

Outside of the surrogacy bubble, friends, family and perfect strangers all felt the obligation to provide "constructive criticism" regarding my surrogacy choices. One moment they'd say, "How can you give your baby away?" only to be followed by, "So how much are you getting?" For some people, no amount of explaining the concept of gestational surrogacy would convince them that it is not, in any way, my baby, and to take the child would be more akin to kidnapping than "keeping your baby." One example I have used when people start in that direction is comparing surrogacy to housing a foreign exchange student. No one questions families that have exchange students. A student will travel halfway around the world, and be completely dependent upon total strangers to be their surrogate family for up to a year at a time, yet no one expects a permanent parental bond with the kid. I care for Melina the same way I care for my nieces and nephews, and probably how I would care for a foreign exchange student. While there is much love involved, I would never decide that someone else's child was more rightfully mine than theirs, especially based on nothing more than spending one-on-one time with them.

As I started the process of becoming a surrogate, I took it almost as my personal mission to educate those around me. I spent time and energy with each interested person, explaining the process, my standpoint, and any confusing points they might bring up. There was probably a lot of naïveté in my perceptions of others. As I eventually learned, not everyone wants to see the positive, rational side of things. I had to learn, based largely on initial reaction, when to simply say I was a surrogate and when it was okay to explain the finer points. This helped me to avoid wasting my time explaining things while the other person silently waited for a moment to say, "Ah-ha!" and proclaim whatever it was they'd convinced themselves of from the beginning. Thankfully, the drama-seekers were a very small minority. With few exceptions, I was completely supported by family, friends, and co-workers throughout the pregnancy. In fact, I still get requests for updates from co-workers largely distanced from my day-to-day work activity. While I could have been more private about the surrogacy, it was too exciting an experience to keep it to myself. I can't say I'd make the same choices again, but I thoroughly enjoyed going over the process however many hundreds of times I repeated it. It was a way for me to fully grasp what was going on with and

within my body, and it helped solidify the process for myself and undoubtedly for many of those around me.

My family's reactions were probably the most varied, from my unsurprised sisters to my unconvinced grandmother. I was cautioned by some to hide the fact that I was helping two gay dads, while others found that to be the best selling point. I chose to be open about all of the basic details, though, and had to remind some of the more sheltered of the bunch that when they see "gay" on Jerry Springer, it is not the most accurate depiction. I am very lucky to have the relationships I have within my family. While everyone doesn't agree with the beliefs or life choices of one another, there is never any doubt that the love and support remains.

Also, an excellent point was made about subjugation, and the roles of surrogates. Surrogates can't be too motherly, too shrewd, too opinionated, or too distant. I've witnessed many surrogates agonize over contract decisions while constantly feeling they must explain their intentions at every turn. There is a fear of being seen as motivated by money, yet there is also the fear of being seen as too loving, too attached. Do you offer to breastfeed to encourage lactation, or will they think you want to steal their baby? Do you request specific fees for specific procedures, or will they think it's a way to "nickel and dime" them? It is unreal—and unfortunate—how heavily some surrogates agonize over each and every decision. While I am not much of a worrier, even I had my moments of hesitation and conflict for the sake of perception. I found it necessary to stop repeatedly in the process and analyze things from an imagined distanced perspective. What did the procedure involve? How would the choice impact my life? The practice helped me to stay centered and grounded, and not get carried away in one direction or another. I found a strange comfort in how thorough the standard contract was, though. If I had twins, would I need more recovery time? If my embryo transfer was cancelled, did I expect to be compensated for taking the full cycle of hormones? If I was put on bed rest, would a housekeeping expense or paid time off be more appropriate? While it brought up so many scenarios I had yet to envision, it was reassuring to know someone had thought of these details already.

Finally, the topic of conception. I will admit that I tend to stay in my own world. The things that affect me and those around me interest me, and many other things fall by the wayside. Presumably because I have a uterus and experience with heterosexual sex, conception from copulation is as basic to me as 2+2=4. In fact, the idea that conception from copulation could be foreign to someone gave me pause. It is almost surreal to imagine the conferred and inferred emotions and ideas surrounding sex with the conception factor removed. For those not wanting to get pregnant, there is the removal of constant fear of failed contraception. For the rigidly religious, sex is an activity no longer excused as a means to an end. But for those wanting to conceive,

conception can be a cold process of choices and decisions, lacking passion and spontaneity, and remembered but maybe not cherished the way the intermingling of two people can be reflected upon later, as the starting point to a life. I suddenly feel like the spoiled child, so often bemoaning my inconveniences instead of realizing how fortunate I am. Then again, I think the two processes can very easily be selfish vs. selfless. When my children were conceived, we weren't thinking about conception. There were no plans to conceive or not to conceive. We were simply enjoying ourselves like so many couples do. Conception resulted, but neither of us can pinpoint the day. There is no definite record, no moment memorialized as "that moment." By definition, that is completely selfish conception. My thoughts were on myself and my partner, not on what we might create. In surrogacy, it is the opposite. There isn't passionate reckless abandon; there is planning and there are huge financial, emotional, and practical decisions to be made. When the moment finally arrives, all thoughts are on the life being created and the possibilities ahead, not on you. Maybe I am overanalyzing, but traditional conception seems more enjoyable in the moment, while conception through surrogacy provides a more lasting, traceable timeline for later reminiscing. It is only with this experience—followed by the time to reflect and analyze the process—that I am able to change my perspective to view the situation from each side. I feel honored to be one of the very few people to experience both traditional pregnancy and gestational surrogacy.

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EPILOGUE AND RESPONSE

Darren Rosenblum

I finished writing my initial contribution to "Pregnant Man?" on the plane to Oklahoma for Melina's birth. That morning, Howard woke up very early and saw that Beth's Facebook status reported that she was in the hospital. The nurses said they might induce Beth that day because of her pre-eclampsia symptoms. Within an hour, we were in a cab to the airport, and we arrived at Beth's hospital room by 4 pm. We hung out with her for a few hours and just after 8 pm, the doctor told Beth the birth would not happen until morning and the nurse wrote, "Rest tonight, baby tomorrow," on the white board inside her room. As I was putting on my pajamas in the hotel room, we received a call from Beth's ex-husband that the labor had begun in earnest—Beth's screams shot across the hospital room through the phone and filled the hotel room. We

rushed back just before the doctor arrived, and within five minutes, Melina burst out. We spent much of the night and the next day gazing at our daughter until the hospital released her. The following night we all went to dinner—Beth, her sons, her mother, her ex-husband (the boys' father), the two of us, and Melina—all connected by Melina's new life.

She slept from the car ride to the Oklahoma City airport until we arrived home in Manhattan. When Melina was six days old, we took her on the subway to the doctor, and within a month, Melina, Howard, and I were already at a conference with some of the contributors to this Essay.[162] She has been with us for just over one incredible year, full of rough nights and joyful giggles. Every marker of her development has been glorious—she now grins with pride while accomplishing her latest feat of walking. We are so fortunate to have such a good-natured baby, and to have a baby at all.

In this Epilogue and Response I hope to at least briefly engage some of the intellectual richness voiced by my interlocutors. One thing remains as my perspective changes: it is a luxury to interact with this amazing group of scholars and friends in order to understand my experience more fully in the context of theoretical paradigms of identity, equality, and markets. These responses confirm for me that the legal academy can be a profession in which people support each others' humanity and engage the many intellectual dimensions of our life choices through honest curiosity. These conversations are but a few of the many I had in the course of having Melina, but they represent a breadth of opinion and experience that has helped me to understand the world and my place in it differently. Most instrumental in this process is Beth, who has taught me so much at every step of the pregnancy and beyond. I am amazed at the good fortune Howard and I had to have such a wise, brilliant, and joyful person enter our lives. Sharing this story involves opening up not only my own life, but also those of Howard, Beth, and Melina. By publishing this conversation, I hope that my humanizing the stakes will help to advance some of the debates over surrogacy.

Our simultaneously amazing and quotidian set of experiences over Melina's first year situates my response to my interlocutors. Although the themes of the comments range across a large spectrum involving family law, law and economics, gender and sexuality theory, critical race theory, and others, I have divided the comments into two areas: markets and identity.

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162. Family Law Summer Workshop, Harvard Law School (July 2009).

A. Markets

1. Contracts

Markets play a central role in our experience, as several of my commentators point out. Peter alerts us to how contracts and markets can both undermine and create status. Indeed, thanks to a set of contracts, it is possible for me to parent. This is a point central to my thinking as a contracts professor—it surfaces directly when I cover *Baby M.*[163] In teaching it I have used anonymous polling to determine whether the students agree with the outcome of *Baby M.* I have taught it without "coming out" about my process, and each time, approximately half of the students agree with the decision. Strangely, this result pleases me; if half of the students disagree with the legality of the contracts by which Melina was born, perhaps I have fostered some critical thinking.

I also struggle with the role of contracts in this process due to the limited extent that the law intervenes—only occasionally to prevent the enforcement of contracts that disfavor the weak.[164] This unconscionability doctrine, however, only attempts to counteract the most extreme market abuses,[165] leaving open the question addressed by both Lisa and Kim: whether law should more assertively protect society's weakest parties in these sensitive markets of eggs and wombs.[166]

2. "Choice" and Exploitation

Whether and how to parent are choices.[167] For those who do so beyond ordinary copulation, markets pop up to fill those needs. As Mary Anne notes,

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163. *In re* Baby M, 537 A.2d 1227 (N.J. 1988). Thanks to Carol Sanger's careful editing, this case is easily taught. E. ALLEN FARNSWORTH, WILLIAM F. YOUNG, CAROL SANGER ET AL., CONTRACTS 575 (7th ed. 2008).

164. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Jones v. Star Credit Corp., 298 N.Y.S.2d 264 (Spec. Term 1969).

165. E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28, at 308 (Aspen Law & Business 3d ed. 1999).

166. *See* Ikemoto, *supra* text accompanying notes 107-111; Onwuachi-Willig & Willig-Onwuachi, *supra* text accompanying notes 117-125.

167. I also want to note that the choice to have a child is a choice as well—one that should not entitle one to excuses. Late one night, about five months after I graduated from law school, I was at the office and a female senior associate complained about being there so late. She noted that some colleagues with kids had gone home much earlier and lamented to me that they had an effective excuse to avoid work, whereas she did not. Having a child is a choice just like not having a child, and she felt the partners should respect her private life just as much as they respected that of our colleagues with children. This colleague got a receptive audience from a twenty-six-year-old me. I am trying to continue to give such perspectives a good reception, but it is challenging when parenting is such an all-encompassing experience in a society without an extensive social support network. The exigencies are certainly more difficult to avoid than cancelling theater tickets. But to be fair to my former colleague

referencing *Baby Mama*, just as there is a market to outsource parenting (via nannies and babysitters), there is a market to outsource bearing children.[168] Indeed, at one point shortly after Melina's birth, Beth characterized her work as "babysitting for nine months." As is voiced in *Baby Mama*: money can buy anything, and our economic status is a reason that we have been able to create this family.[169] Working class families usually cannot afford the legal contracts to ensure their parental rights, much less services like Beth's "babysitting."

Given these economic realities, it is no surprise that it is the market that defines the choices of what "outsourcing" may be purchased.[170] Our "choice" to go ahead with this form of surrogacy depended entirely on what options the market provided. But this is, without a doubt, a market in something more sensitive than widgets. Recently while a Catalan television reporter interviewed Howard and me during a gay pride march, the interviewer noted that in Spain it is illegal to "rent a woman." The language slapped me in a way that little about surrogacy has by reducing it to something crassly akin to prostitution.[171] Both processes involve women earning money from female bodily labor, labor to which Dorothy Roberts, for example, objects.[172] She compares pregnancy to sexual intimacy, organs, and children—things that should not be for sale.[173] It is true that pregnancy involves a unique physical experience: Vivian's discussion of the physical sensation of pregnancy reminds us of the biological realities of pregnancy—the hormones, the discomforts, and the risks.[174] Perhaps because these experiences are sui generis, one may assume that they should be treated as such.

What renders surrogates vulnerable, though, is the economic fragility of many women's lives, rather than the sensitive nature of surrogacy's labor. Women's general lack of economic power defines their relationship with contracts and the consequences of disadvantageous ones.[175] In this regard, Kim

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and to my former self, it is a choice I want to own. Despite the "how not to kill your baby" class Howard and I took, no preparation could minimize either the challenges or the pleasures like smelling her head or feeling her sleep on me.

168. *See* Case, *supra* text accompanying notes 34-37.

169. *Id.*

170. *See* Ikemoto, *supra* text accompanying notes 92-96.

171. Not that I object to sex work. Interview by unknown Catalan reporter with Darren Rosenblum and Howard May (June 26, 2010).

172. *See* Mutcherson, *supra* text accompanying note 136. Mutcherson cites to Roberts but notes her disagreement with Roberts's conviction that the sale of sexual intimacy and baby carrying should be banned. *See id.*

173. ROBERTS, *supra* note 82.

174. *See* Gutierrez & Hernández-Truyol, *supra* text following note 78 (paragraph beginning "Let us share . . . ."). To the extent that I was pregnant, it was clearly not the same kind of pregnancy as that which Vivian or Beth experienced. It was not even as physically real as that of Honey, the mousey wife mocked by George and Martha in *Who's Afraid of Virginia Woolf?* for her hysterical pregnancy. EDWARD ALBEE, WHO'S AFRAID OF VIRGINIA WOOLF? 70 (Dramatists Play Service 1990) (1962). I did not have any "puff" to go "poof."

175. In these issues, I always turn to Carol Sanger's wonderful work on gender and contract law, as well as Carole Pateman's groundbreaking work, *The Sexual Contract*. CAROLE PATEMAN, THE SEXUAL

raises questions that trouble me.[176] I interpret her to say that pregnancy is not per se an experience that subjects women to exploitation and subjugation, but rather that it is the economic inequalities that make surrogacy ripe for exploitation and subjugation. She says she has a hard time imagining a world in which surrogacy did not involve some exploitation. I agree that surrogacy may always involve some potential exploitation, but my answer is that this is true for all labor—class exploitation is rife in most forms of work.[177]

3. Labor of Love?

Kim's skepticism of my reference to Beth's work as a "labor of love"[178] is valid—it would have been easy for me to gloss over potential exploitation.[179] As Kim notes, many elements of surrogacy involve objectionable practices. In particular, she notes that the pay for surrogates does not necessarily constitute just compensation, and I would agree.[180] It is also certainly true, as both Kim and Mary Anne note, that even when love is present, whether in a family or romantic relationship, there remains plenty of potential for exploitation.[181] Parents can exploit children, in the most quotidian ways or in all the child star cases,[182] and spouses may exploit each other.

Even so, I suspect that Kim and I would be close in our understanding that one could *choose* to perform such work. Beth's work was exploitative in that

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CONTRACT (1988); Carol Sanger, *(Baby) M is for the Many Things: Why I Start with Baby M*, 44 ST. LOUIS U. L.J. 1443 (2000).

176. *See* Mutcherson, *supra* text accompanying notes 143-154. I treasure the frankness of Kim's argument and appreciate deeply how we can share this conversation because of the depth of our mutual respect.

177. A parallel may be found in Janie Chuang's work on sex trafficking in which she highlights the extent to which regulatory bodies obsess over sex trafficking and ignore other kinds of labor trafficking. Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1657 (2010); *see also* Janie A. Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65 (1998) (advocating the expansion of the definition of trafficking beyond forced prostitution); 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 (2006) (endorsing a conceptual overlap between trafficking and non-sexual coercive employment).

178. Rosenblum, *supra* text preceding note 7.

179. Mutcherson, *supra* text accompanying notes 141-142.

180. It is particularly true in light of the potential for relatively easy and relatively difficult pregnancies. In an open market, that risk would be priced into the cost of surrogacy itself.

181. Case, *supra* text accompanying notes 38-42; Mutcherson, *supra* text accompanying notes 141-142. My statement that involving a relative as a surrogate would avoid exploitation was grounded in the nature of the relationship with that particular relative, who both had volunteered her services without any prompting and had no need for any monetary compensation. Even in that context, however, I'd agree that there is potential for some exploitation.

182. I always think of the Brooke Shields case in which she attempted to revoke a contract for the sale of nude photos of her entered into by her mother by arguing that as a minor she should be able to void the contract, but the judge rejected the argument. Shields v. Gross, 451 N.Y.S.2d 419 (App. Div. 1982).

we made use of it, but it did not subjugate her. The social inequality between Howard and me on one side, and Beth on the other, could have been fertile ground for such subjugation, but I do not believe it occurred.[183]

Norms in which economic inequality leads to subjugation can victimize women. Beth, perhaps even consciously, subverted this subjugation by embracing her role. Beth is not a typical Oklahoman in any way, having once shaved her head, dyed her hair black (as it was when we met), given her twin boys Mohawks (at their request), gone to the local gay pride parade, and had pet rats. She seems to revel in ignoring social convention, and perhaps for this reason she delighted in telling those who commented on her pregnancy, "Yes, I'm pregnant but it's not mine." In the middle of one of the reddest states, she was the out and proud carrier of a baby for a gay Jewish couple from New York. Carrying Melina for us was, for Beth, a political as well as a personal commitment.[184]

Despite what Kim says, for me, Beth's work began as a largely altruistic effort and became a labor of love as we developed a close relationship. I'm sure Beth did not mind getting paid, and it may have even been part of her motivation. However, that does not mean she did not enjoy the surrogacy process or that it was not meaningful to her in a real way, just as my job as an academic is meaningful to me—I love it and would do it even if I did not need income. In Beth's own words, she was able to experience something she wanted: "a planned pregnancy at a time in [her] life when [she] could enjoy the experience."[185]

As Kim points out, for Beth, money may not have been a huge motivating factor given that it is not work that is particularly well-paid for the time investment.[186] Within the structural economic inequality between us, it is hard for me to say how much of a factor compensation was, but I know that Beth loved helping another family have a child, and she loved that we are a gay family. The relationship we have developed is a meaningful one for all of us. In each of her two visits this year, she seemed proud of Melina, and to me, that seems appropriate.

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183. The characteristics of class identity are fluid, but Howard and I both have graduate degrees and work as professionals, while Beth is working toward her college degree online, and I would describe her as solidly middle-class in a relatively poor state. Despite our class privilege and comfort with legal discourses, Beth may have won in a court case had this become an awful custody battle. As Noa notes, the law's view is that where there is a genetic connection, it trumps the potential for voiding the contract due to exploitation. Ben-Asher, *supra* text accompanying notes 25-27.

184. Indeed, this may be an example of what Beth calls "mutual exploitation."

185. Jones, *supra* text following note 161.

186. Mutcherson, *supra* text accompanying note 146.

4. Protecting Surrogates

Although my participation may impede my judgment of the presence of exploitation or subjugation, I am sure that we could easily have fallen into a more ethically compromising situation had we not worked with an agency that thoroughly screened both us and Beth. As Lisa points out, such organizations engage in a directly progressive purpose.[187] The agency we used, Circle Surrogacy, was founded by a gay father who wanted to make this process available for others. The agency operates in a market, presumably for profit, but in a way that promotes thoughtful engagement with the process. In addition to careful screening of all parties, two elements in particular point to a progressive understanding of ART: requiring open relationships among the parties and requiring that the prospective parents provide attorneys and social workers for the egg provider, the surrogate, and themselves. These legal and emotional cushions facilitate a smooth surrogacy.

It is thanks, at least in part, to Circle's sense of ethics that we avoided a variety of pitfalls.[188] And yet, I share Kim's concern that the growth in medical technology and the instability of the law and contracts in this area allow for a heightened potential for exploitation.[189] One only has to look at the creation of surrogate baby factories in India to imagine a more abusive market-created choice.[190] Even more subtle alienation may arise in situations such as in an anecdote heard from a friend who lives in Paris. His friends had hired a California agency to carry their baby, and I was surprised to learn that they never met her until they went to California to retrieve the baby.

This may be where Lisa's civil rights model could come in to provide protection for surrogates that would ensure some ethical norms in surrogacy.[191] The challenge here would be to align the civil rights model with markets and contract law, instead of reifying an opposition between surrogate's rights and market dominance. Such oppositions can lead to leaving the surrogate's rights

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187. Ikemoto, *supra* text preceding note 90.

188. With regard to the kinds of subjugation in a surrogacy arrangement, Kim is right that many prospective parents insist on details as minute as cleaning supplies used. Mutcherson, *supra* text accompanying note 151. Here too, I credit Circle with pointing out to us the extent to which we had to trust our surrogate. Our agency had a former surrogate speak with us before we "met" Beth on the phone to train us in how to develop the relationship and what to expect. Again, I think it was thanks to their wisdom and guidance that we had such a good relationship. Beth also played a huge role—she chose to go out for sushi the night before the embryo transfer, saying that she hoped the seafood was her last for a while. That kind of choice conveyed to us that we could trust her, and we never felt the need to challenge anything. By requiring social workers on both sides, Circle Surrogacy created a mechanism in place for any tough conversations to be resolved.

189. Mutcherson, *supra* text accompanying notes 138-152.

190. Rajesh Bardale, Correspondence, *Made in India? Ethics of Outsourcing Surrogate Motherhood to India*, 6 INDIAN J. MED. ETHICS 56 (2009), *available at* http://www.issuesinmedicalethics.org/171cr56.

191. Ikemoto, *supra* text accompanying notes 89-97.

by the wayside. Even modest regulation may clarify for parties which surrogacy contracts merit enforcement.

The markets functioned for us as Peter says: contracts do provide an opportunity to alter one's status, from childless to parent, from gay man to mother, and for Beth to assume some queer identity as a provider of children to gay couples.[192] It is worth noting that in a society with levels of socioeconomic inequality as great as ours, contracts (and the lawyers that draft them) are not accessible for most people. That being said, contracts do not only serve the interests of the powerful. As Pat Williams pointed out so eloquently in *The Alchemy of Race and Rights*, contracts can serve as a way to get around the potential for subjugation in ordinary economic interactions.[193]

B. Identity

Contracts and markets create the opportunity to change one's identity status. Several identities surface in this conversation surrounding surrogacy: those of gender and motherhood as well as race and sexuality, and those based on culture and biology.

1. Gendered Parenthood

> *Melina, welded to my chest by the baby carrier, flirts with a middle-aged woman on the E train downtown. "Does your wife usually take care of her?" she asks. I'm about to get off the train, so I decide not to engage—"No, we split it."*
>
> *Howard and I walk into a restaurant with Melina in her stroller and head for a table for two. "How many are you?," the waitress asks, apparently confused by our going for a two-top instead of a larger table that could accommodate the expected arrival of a mother. "Just us two plus the baby," we reply.*

Earlier in this conversation, I said, "Parenting seems to be experienced as an almost entirely gendered phenomenon. I feel like I'm forced to be a father—a man—when I feel like a person and/or a parent-to-be."[194] This is still true, but read "heterosexual" into "father" and "man." The two experiences above, both

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192. Siegelman, *supra* text accompanying notes 156-158.

193. PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR (1991). Williams tells of renting an apartment in New York and how she relied on legal formalities, trusting less in more casual relationships because informality tended to leave her as a black woman unprotected. *Id.* at 146-49; *see also* Robert S. Chang & Adrienne D. Davis, *Making Up is Hard To Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER 1, 14-15 (2010) (explaining a law school exam hypothetical where the majority of students enforced a restrictive covenant requiring that a family live on the property against a long-time monogamous lesbian couple).

194. Rosenblum, *supra* text following note 18 (paragraph beginning "The invisibility of 'parent' . . . .").

fairly commonplace, reveal the intensity of this heteronormative presumption. It may be that I have had so many experiences like the first story that I assume heteronormativity is operating even when not explicit, such as in the second story.[195]

What I'm trying to undo is the presumption that men are "fathers" and women are "mothers," and that parenting hinges on this binary. The centrality of women in parenting is daunting as a father trying to take on both parenting roles. At first, the only hook I could find to attach bags to Melina's stroller was a "Mommy Hook." When Howard and I bought a high chair, I noticed that "Good for Mommy" was written on the box. Moreover, I repeatedly found a plethora of classes and websites focusing on "mommies" and a scant few focusing on fathers. Particularly in the summer when Melina was a newborn, several nannies approached me with offers to take care of Melina. I suppose the paucity of male caregivers gave the impression that something had gone amiss with my nanny. Unlike every other couple I know in Manhattan, we do not have a nanny. In Melina's "Little Maestros" music classes or her "Big Muscles for Little Babies" class, I am always the only male parent/caregiver. Our rare arrangement allows me to be a very engaged male parent, a motherly father in some way, but in that role I feel I often stand out in public settings.

This presumption that women are better parents functions as the default for a largely heterosexual society, but I feel somewhat besieged by strangers and even acquaintances who imply or even state that a mother could take better care of Melina.[196] In my mind, I am saying, "Just because I have a penis doesn't mean I don't know how to take care of my baby." But I say nothing, and I know that ultimately I will have to hear and perhaps accept it in most circumstances because it is a part of traditionally sexed parenting. Now that I have experienced this, I wonder if my earlier interest in becoming a "mom" was not just anti-heteronormative but also about being a primary parent, which even for me was a sexed concept.

In its most extreme form, men's relationship with children edges toward the suspect. Although it is true that more child abuse is committed by men, it is sexist to tar all men in this way. As Angela and Jacob reflected on the difficulty their single male friend had in adopting, it is worth noting the extent to which men are not expected to care as much about parenting as women. In the recent situation comedy *Modern Family*, Phil, the husband, is the bungling parent, the one who consistently makes incoherent parenting choices.[197] No wonder I want to be a "mom."

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195. My resistance to heteronormativity, when it comes to me, feels like a case study from Judith Butler's *Undoing Gender*. JUDITH BUTLER, UNDOING GENDER (2004).

196. I should say that several mothers have pointed out to me that they also have been the target of such comments. They argue that my experience is not about my sex, but is one common to all parents receiving unwanted advice.

197. *Modern Family*, *supra* note 4.

As a parent, I feel that I constantly contest my own presumptions of a gender role that draws on my maleness. During law school, I wore dresses and skirts to class on a regular basis because I liked the clothes and was resisting maleness. Now I only do full drag and only occasionally. "Wearing" the baby (whether in a carrier or a stroller) butches me up, which helps me pass as straight. Perhaps my idea of butching it up differs from most men, who would achieve this effect by cracking open a beer and watching a football game. Wearing a baby would feminize them. Sometimes, I find myself amping up the flame factor more than before to contest the hetero-butchness conferred by Melina. Because I'm a man, it's a given that I am viewed as a father. My identification as mother not only connects me with those traits, but also permits me to resist the social sexing of my parenting.

My own experience as a differently-gendered parent has forced me to reconsider the relationship between parenting and sex. Indeed, as I argue in another piece, not only should gender be "undone," but parenting should be unsexed. I borrow the term "unsex" from my own work on sex and gender,[198] and of course, from Shakespeare's Macbeth.[199] As Lady Macbeth gathers the strength to achieve her evil ends, she implores the spirits to "unsex me here."[200] In my prior article, *Unsex CEDAW*, I recognized that CEDAW (the Convention on the Elimination of All Forms of Discrimination Against Women) has goals that are nobler than Lady Macbeth's aims. She believes that her feminine gender obstructs the ability to commit evil. Only by "unsexing" herself will she be empowered to kill King Duncan. I argue that whereas Lady Macbeth needs to be unsexed to commit evil, CEDAW requires unsexing to achieve its worthwhile goals. Parenting is a sexed endeavor—both society and law establish explicit rules binding people to roles of "mothers" and "fathers" based on their sex. Parenting should be unsexed to embrace both the fluidity of contemporary understandings of gender and the need for balancing roles within the family.

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198. Rosenblum, *supra* note 55. I argue in *Unsex CEDAW* that the exclusive focus on women's equality in the Convention on the Elimination of All Forms of Discrimination Against Women overlooks the interrelational nature of sex and gender inequality. Instead of focusing on "women" as part of a male/female binary, CEDAW would benefit from using a category of discrimination, such as "sex" or "gender." Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. Sixty-four countries signed CEDAW on July 17, 1980; CEDAW has as its principal goals the protection and promotion of women's rights and the elimination of discrimination against women. Although challenges have hobbled implementation of CEDAW, it remains the central pillar of gender equality norms at the international level. *See* Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. TRANSNAT'L L. 759 (2007).

199. WILLIAM SHAKESPEARE, MACBETH act 1, sc. 5.

200. Thanks to Bridget Crawford for connecting my ideas with this Shakespearian theme. As Lady Macbeth prepares to murder Duncan, she says: "The raven himself is hoarse/ That croaks the fatal entrance of Duncan/ Under my battlements. Come, you spirits/ That tend on mortal thoughts, unsex me here/ And fill me from the crown to the toe top-full/ Of direst cruelty. Make thick my blood." *Id.*

Parenting is especially gendered in terms of my role. When Melina was born, Howard and I flipped a coin to figure out which of us to put on the birth certificate. Howard called heads, won the toss, and his name appears on the Oklahoma birth certificate as Melina's legal father. In the hospital where Melina was born, they had never handled a surrogacy before, but were fine improvising. On their certificate, which is only of ceremonial value, the nurse replaced the "mother" and "father" on the form with "parent" before entering both of our names. Yet when the second-parent adoption is final, one of us will be listed as "mother" and one will be listed as "father" on the issued birth certificate. It is not clear to me whether or how we can influence this. In thinking about unsexed parenting, the archaic labeling shocks me at the same time as the small step of the nurse's solution inspires me to think about ways to frame all parents beyond their sex.

I do recognize that there is an appealing feel to the words "mother" and "father." Thinking of myself as a "mother" in this Essay is part of my resistance to heteronormativity. I don't need this construct within my family, where I feel I am both "mother" and "father" alternatively with Howard, in relatively fluid ways. Rather it is outside where I need to resist presumptions about what kind of parent I am based on my maleness. Now that we have Melina with us, I feel that I go back and forth from mothering to fathering in a way that probably many people do. Prior to Melina's birth, I felt like I was pregnant, and thus an expectant mother, but in a way that was not so easily subject to the mutability of performance. One cannot change one's mind on parenting—once the child is born, at that point, she or he is yours.[201] I can switch from being papi to mami, or even from papi to daddy or mami to mommy or even ema,[202] but I did not want to switch from being pregnant to not-pregnant (nor did I want to), and I cannot switch from being parent to not-parent. I *would* like to "unsex" parenting the way Berta and Vivian said I tried to unsex pregnancy.

The problem is that the "mother" and "father" scripts are so omnipresent as to make this a nearly utopian venture in our society. Certain behaviors that merely involve parenting are commonly read as "father" or "mother." For example, in the recent film, *The Kids Are All Right*, one might be tempted to label Annette Benning's role as the "father" and Julianne Moore as the "mother," but the gender dichotomy in this homosexual relationship is more minor than in most representations of heterosexual parents.[203] This statement

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201. Of course one can put a child up for adoption, but this is a very different decision than getting pregnant—the child will always exist.

202. Hebrew for "mom." ISAAC E. MOZESON, THE WORD: THE DICTIONARY THAT REVEALS THE HEBREW SOURCE OF ENGLISH 104 (2001).

203. THE KIDS ARE ALL RIGHT (Focus Features 2010). This has been the subject of critique by Jack Halberstam. Jack Halberstam, *The Kids Aren't Alright*, BULLY BLOGGERS (Jul. 15, 2010), http://bullybloggers.wordpress.com/2010/07/15/the-kids-arent-alright/.

also holds true in *Modern Family*, the situation comedy that features one set of gay parents.[204] While one of the two parents in that couple is more effeminate, neither seems to play a particular "mother" or "father" role.

In the year that we have been parents, Howard and I have shared parenting responsibilities. We shifted our work schedules to ensure that one of us is with Melina almost all the time. Lisa Belkin recently explained how lesbian and gay parents have something to teach straight parents about balancing parental responsibilities equally,[205] discussing in part another recent study revealing that lesbian and gay couples tend to divide the responsibilities of housework more evenly and with less tension than straight couples.[206] Families are extraordinarily opaque entities, even to their own members and it would be naive to presume that one parenting arrangement (even an ostensibly more egalitarian one) surpasses another. Even so, something can be learned from families that recognize the fluidity of parenting.

2. Homophobia: Identity as the Predator

It is only now that I realize that the constant harassment and beatings I faced in high school drummed into me a profound fear, one that had to influence my choices in our family. I fear a replay of some version of my high school experience where another student mocked me for being gay. To get him back, I played on his homophobia by asking if he liked me since all he did was talk about me. The following day he jump-kicked me in the chin; I fell to the floor, and he kicked me again in the head. When I was able to rise, find out who did this to me, and involve the school administration, he was asked why he did this. He answered that he was scared of me. In his mind, I was the predator.

An adult replay of this experience surfaces in my fear that the heteronormative state will hold a similar perception of me as a gay parent. Because I am not the legal father of Melina, Howard and I executed documents establishing me as the standby guardian, copies of which reside at all times in her diaper bag. When we recently traveled abroad, I ran nightmare scenarios in my head of Melina getting injured while I was alone with her and my having to explain to hospital officials who I was. Although the state generally defers to parents in decisions regarding their children, as I previously mentioned in the Essay, I fear my authority as a parent will be ignored and I may be perceived as some predator or child trafficker. As time goes by, and more people seem to respect our parental rights, the fear has subsided somewhat, but we still carry Melina's documents in the diaper bag just in case.

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204. *See generally Modern Family*, *supra* note 4.

205. Lisa Belkin, *The Way We Live Now—What's Good for the Kids*, N.Y. TIMES MAG., Nov. 8, 2009, at MM9, *available at* http://www.nytimes.com/2009/11/08/magazine/08fob-wwln-t.html.

206. *Id.*

Now that I am a parent, I realize that my prior existence was unwittingly free—when I was a teenager, or a law student, or after—to allow me to walk around in the queeniest of outfits, even when it risked a violent homophobic response. I was always asked, even harangued with, the allegation that I was "flaunting it." I did not think that it was "flaunting it" to express myself the way I wanted. I told my concerned mother that it was the homophobe's problem to deal with me, not mine to follow their rules.

It makes me sad, however, that the queer kid I was is now an adult making parenting decisions that are in some ways reacting to that fear. This fear is not entirely based in the past—twice people have called me "faggot" while I was pushing Melina in a stroller, both times right in my very own "gayborhood," Chelsea. Before becoming a parent I felt vulnerable when dressed in an effeminate fashion, but now it feels far more threatening to be harassed while pushing Melina's stroller. Although it doesn't stop me from wearing what I like, protecting her from a violent harasser's homophobia awakens my "mama grizzly bear"[207] instincts far more than just defending myself.

The other element of queer parenting that unnerves me is the real and imagined tenuousness of my parental rights. It is here that the comments of Angela and Jacob are most pointed as they consider and compare LGBT parenting with interracial parenting. Their description of mutual friends, Catherine and Jennifer, reminded me how challenging it can be to have a multiracial family.[208] Imagining the confusion of other guests at the sight of that agglomeration of adults and children crossing race and gender boundaries is delicious—I am sure they made many people think. The fact that each variation of the grouping aroused a different response exposes the complexity of intersections of race, gender, and sexual orientation norms.

Similar to the story previously recounted about our arrival at a restaurant, Howard and I often get strange reactions that suggest some confusion about what we are doing with a baby. The public viewing the grouping of Angela, Jacob, Catherine, and Jennifer wondered who was partnered with whom and which child belonged to which parent.[209] For us, a slightly different phenomenon arises. Recently at the bank across the street, a woman asked me which of us was the father of the child. "Both of us" was not the answer she anticipated. In another version of this, people will just come out and ask, "Is she yours?" Were our functional legal status more secure, I would be tempted to utter a sarcastic, "No, we stole her." Yet such a response would be akin to joking about bombs at an airport. As I mentioned above, fears of being read as

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207. Although perhaps without Sarah Palin's rifle. *See* Julie Bosman, *Provoking Palin's Inner Bear*, CAUCUS BLOG, N.Y. TIMES (Oct. 19, 2008), http://thecaucus.blogs.nytimes.com/2008/10/19/provoking-palins-inner-bear/.

208. Onwuachi-Willig & Willig-Onwuachi, *supra* text accompanying note 134.

209. *Id.*

a child trafficker or a child molester abound in my head in part because of the continued currency of myths of men's and in particular gay men's sexually predatory nature. The tenuousness of parentality in same-sex and multiracial couples indeed share many parallels.[210]

3. Choosing and Constructing Melina's Identities: Race, Gender, Culture

When we think of the identities passed from parent to child, there are those with some biological element: sex, race, physical features. Each of these biological elements has a meaning because of cultural practices. The story I recounted from *Rosie's Family Cruise*, which Angela and Jacob reference, is far from a unique one.[211] Not that it serves to justify the choice, but I think about Catherine, Jennifer, and Zoe at the border. It is a set of trials that I, perhaps explicitly to some extent, chose to avoid by selecting a white egg provider when our previous choice, a part-Native American woman, disappeared. In my eyes, this was the most challenging choice we faced. I shared a friend's comment against going through surrogacy while working with a black egg provider. Well-meaning as the comment was, my inclusion of this comment was to expose the persistence of racial homogeny in notions of familial legitimacy. It is disturbing to me the extent to which the social predominance of racialized phenotype played a role in our deliberation, but I think it partly arises from my own insecurity regarding the legitimacy of our family and my own fear of homophobia affecting our family. One could argue—and indeed Angela and Jacob may have if we were not such good friends—that the choice to go with a white provider was simply a reach to preserve white privilege. One could say that we wimped out, but it is more complicated than that. I think back to when this decision was made—my head was literally swimming with the possibilities involved in making a baby happen—and I now realize how weighty these choices are in a way I simply could not prior to becoming a parent.

When I was thinking about the donor's race, some frank straight-identified friends reminded me of the burden of being a kid of a gay parent. Hopefully when Melina is of age to care, homophobia will be a minor annoyance; but for me, imagining her social discomfort due to my identity weighed on my thoughts. The choice to have a biracial Melina in a white gay family ran the risk of overwhelming her with identity challenges. My experience as a victim

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210. For multiracial couples with children, often the child will match one parent's phenotype more, leading to the other parent's facing questions about his or her parentage. Onwuachi-Willig & Willig-Onwuachi, *supra* note 115, at 239.

211. *See* Onwuachi-Willig & Willig-Onwuachi, *supra* text following notes 133-134.

of racial discrimination was limited,[212] so perhaps I imagined it to be as bad, or worse, than what I suffered for being so out. Obviously, fear has been beaten into me, so perhaps I "wimped out" to avoid some imagined racial prejudice against a child I had only imagined I would parent. Perhaps it may be easier for Melina; perhaps not. In the end, I realize that to some extent it is a wash—racial identity issues surface in every family, even monoracial ones. Raising a child who is sensitive to race in our monoracial family may in the end require at least as much vigilance as to both the meanings of difference and their irrelevance.

Here is perhaps where I would locate my gut answer to the white privilege grab argument. No decision in this society is colorblind. White privilege resides everywhere and I here exercised it because of specific concerns about being perceived as a predator and more broadly about my personal experience as a victim of incessant hatred. I am not the first person in a subjugated status to take advantage of some privilege. It is an explanation, not an excuse, and it demonstrates the extent to which much work remains to be done on racialized inequality. As Jacob and Angela point out, in our country part of what it means to be a "real" family is to be monoracial—to appear to belong together. As people who are constantly excluded from the picture of definition of "real" families in so many other ways, I worried about adding one more way for our family to be disregarded.

As multiracial identity can serve to undermine a family's social legitimacy, so does the presumption that we became parents by adoption. Since becoming a parent, sidebar advertisements on Facebook have popped up selling t-shirts that say "Two Dads are Better than None." This statement presumes that where there are two dads, their child is an adopted one since only a living child could have no parents, unlike a child who has not been conceived. The intention behind the shirt, I suspect, is to counter efforts to ban lesbian and gay adoption that presume lesbian and (especially) gay parents corrupt their children. The viewer of the shirt is supposed to walk away thinking, "Why yes, it is probably better that a child be raised by a gay couple than to leave the child in an orphanage." Such a thought could undermine efforts to ban gay adoption, yet this same statement implies a normative superiority for a different sex couple over a same-sex couple: "two dads are better than none" implies that a mom and a dad are still better than two dads.

The shirt also prioritizes dual-parent arrangements when many children have loving upbringings with single or multiple parents. As I said in "Pregnant Man ?," many people assume Melina is adopted. In all innocence they may not think about surrogacy as an option, or that the gay dad may have arrived at that

212. In my many trips to France I experienced several times a perception that I was North African (particularly when I had not shaved), and thus I was subject to police suspicion. And although it is quite different than racial discrimination, I have also experienced repeated anti-Semitism.

status by having been straight or even just once having sex with a woman. They then express surprise that there is some physical similarity to one of us, which indeed would be serendipitous were we to have adopted her. Reflecting on my comments as to why we chose surrogacy, I am happy we did. As clinical as the fertilization process was, it was magical to see our two five-day old embryos vibrate while the cells multiplied, and then seeing those embryos enter Beth's uterus. It was amazing to have Beth text us sound files of the baby's heartbeat, to be present for ultrasounds and the birth, and eventually to cut Melina's cord. We had all that time to grow accustomed to welcoming Melina into our lives.

I am also happy we chose surrogacy because as much as I have dismissed nature over nurture, as I noted in "Pregnant Man?," the fact that she is our child has added a level of exciting mystery. Who will this person become? What a fascinating process! But the fact of a biological connection may add some element that I cannot easily define. Perhaps it is the most trite of parental sentimentalities surfacing in me—a desire to see one of our reflections in someone else or to avoid mortality through a child's life. The meaning of this connection is still beyond my full grasp, and yet I wonder if it too is part of the answer to the white privilege grab argument. Were Melina black, perhaps others would see her first as black and have it reinforced for them that she was not, at least biologically, ours. As I say this, though, I realize that it is not nearly as sincere as the other explanation. I was at the time of the choice (and remain) much more worried about imposing being on the bottom of yet another hierarchy on her. Maybe I care what "people might say," at least a little.

Naming is a more conscious context in which identity is passed from parent to child. As Liz Emens's own work on marital names demonstrates, the choice of names reflects deep presumptions about gender, class, and culture.[213] Take, for example, our choice to give Melina the last name "Rosenblum May." Howard liked "May" as her last name so that it would not be mistaken for an extension of her first name.[214] I preferred putting "Rosenblum" in the middle because if Melina decides to live outside the United States or Israel, she can easily hide "Rosenblum" as her middle initial to escape anti-Semitism. Although it is challenging to not fall into contemporary U.S. conventions of hyphenating, the Spanish convention of two last names provides her with this freedom to choose whether to identify as Jewish. As it is, her feminine name may make it (marginally) more difficult for her if she decides she is a boy—even though she can drop the "ina."

Having a child is a gendered endeavor, but not in ways that I could have predicted. Even with a child bearing a feminine name, Howard and I discussed

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213. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007).

214. Although one option would have been to deploy the WASP convention Mary Anne cites of using one parent's last name as a first name, here, "May Rosenblum."

that we did not want to dress our child in blue or pink based on its biological sex. The Pepto-Bismol pink explosion in our apartment was almost a force of nature. It was not solely that we did not want to gender Melina or that we did not want to participate in the cutesy baby culture, but pink is not her best color. Some pink items proved useful, but I ultimately gave in to occasionally using them for limited relief from clarifying her sex identity to inquiring strangers. After Melina's birth, I heard about this couple in Sweden who refused to tell anyone the sex of their baby for two years.[215] I found this story amazing because the societal pressure to identify a baby's sex is so overwhelming that their resistance to it is truly remarkable. The couple's treatment of its child reflects the "androgyny" that Berta mentions.[216] Of course, this societal pressure is but one variation on the omnipotence of the gender binarism that leads doctors to surgically alter the genitalia of intersex babies to conform them to one sex or the other.[217] Reflecting upon the ways in which parents impart gender to their children can easily become a nonstop exercise.

4. Social Biology

Finally I want to close with the amazing juxtaposition of thoughts by Liz Emens and Berta Hernandez and her partner Vivian Gutierrez. Liz reads my statement that I was "kind of pregnant" as an assertion of the extent to which law and biology are coterminous.[218] She ascribes to me a "similarly forceful social model of pregnancy."[219] I am happy to have my narrative take on that meaning, but want to be clear that this "social model" can supplement, but not replace, an actual biological pregnancy, the effects of which Vivian documents.[220]

Liz's discussion of the fixedness of law against the fixedness of biology dovetails nicely with Noa's triangles.[221] I do not mean to make the claim that biology has no more reality than law, but biology often can be overcome more easily than law. Transgender people live this reality when they change their bodies but the law will not recognize the reassigned sex. Indeed, Noa's scheme depends on a more complex understanding of both of these concepts. My

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215. Lydia Parafianowicz, *Swedish Parents Keep 2-Year-Old's Gender Secret*, THE LOCAL (June 23, 2009, 16:24 CET), http://www.thelocal.se/20232/20090623/.

216. *See* Gutierrez & Hernández-Truyol, *supra* text preceding note 76 (paragraph beginning "First, let us . . . ."

217. Nancy Ehrenreich, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. REV. 73 (2005).

218. *See* Emens, *supra* text accompanying note 72.

219. *Id.*

220. Gutierrez & Hernández-Truyol, *supra* text between notes 78-79. Liz, in a footnote, references "chemical pregnancies," which made me think of Honey's hysterical pregnancy in Edward Albee's *Who's Afraid of Virginia Woolf.* Emens, *supra* note 73; ALBEE, *supra* note 174. My own pregnancy was certainly more real than Honey's.

221. Ben-Asher, *supra* text accompanying notes 21-22.

inability to become biologically pregnant (through surrogacy) is more easily resolved than my inability to marry in my home state. I want to avoid the naturalistic fallacy that what ought to be is presumed by what is: simply because biology prevents a man from being pregnant (Thomas Beatie apart) does not mean that a man cannot be considered pregnant. For this reason, I find Liz's articulation of a social model of pregnancy persuasive. As she says, the biological difference is not meaningless. The social model "renders that difference relatively meaningless by shifting our focus to the ways society generates that meaning. The social model therefore offers us a way out of the back and forth struggle to claim nature *or* nurture, and rests our gaze on the significant operation of meaning making."[222] My expecting a baby means that under a social model of pregnancy, I too can be "kind of" pregnant. The biology is far from irrelevant, but if pregnancy can be achieved through force of law (contract) or to use Noa's framing in the first triangle, "cure," its role is much diminished.

Liz's social model has a nice interplay with breast-feeding. Breast-feeding is a function only women can perform, but thanks to Beth's generosity (and UPS's reliability), Melina had three months' worth of breast milk. Our experience was in marked contrast to that of my female friends who after giving birth ended up accepting all nighttime childcare because they had to nurse. I know there is a biological reality (even if Melina did not—she frequently tried to feed off our hairy chests), but it is sharply colored by the current social insistence on breast milk's superiority, an insistence that subjugates some women into feeling like "less" of a mother for not continuing to breast feed or for not enjoying it.[223] For us, if we had to decide between breast milk, with the milk provider being the nighttime caregiver, and sharing the job, we would have gone to formula fairly early in Melina's life. But, as Liz notes, just as I said I was "kind of pregnant," we "kind of" breast fed Melina because we gave her breast milk but did not have the intensely corporeal proximity to Melina through breast-feeding nor did we suffer the imposition of a rigid inequality within our couple as a result.

This social model both ratifies my urge to unsex parenting[224] and suggests its limitations. We should delink biology from parenting, in the sense that biological parenting should be an option even for those for whom heterosexual copulation is not a desirable path to childbirth. This is a normative goal I think

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222. Emens, *supra* text accompanying notes 74-75.

223. Lizzy Davies, *French Philosopher Says Feminism Under Threat from "Good Motherhood,"* GUARDIAN, Feb. 13, 2010, at 21; Kate Evans, *We Must Untangle the Web of Contradictions Around Breastfeeding*, GUARDIAN, July 28, 2009, at 27; Viv Groskop, *Let the Breastfeeding Rebellion Begin*, GUARDIAN, July 18, 2009, at 24; Kate Evans, *The Case for Breastfeeding Is Clear*, GUARDIAN.CO.UK (July 5, 2010), http://www.guardian.co.uk/commentisfree/2010/jul/05/breastfeeding-benefits-child-rearing.

224. Thanks to Berta and Vivian for this re-read of the title of my forthcoming work on CEDAW. *See* Rosenblum, *supra* note 55.

many would accept, however, in practice, it has been an uphill battle to shift women away from their parenting stronghold alongside a corresponding migration of men away from their domination of the economic sector.

Conclusion

Imagine a stroller. Imagine the person pushing the stroller. For most of us, even for me, that imagined person is gendered female. It is why I've wanted to be a mother, or "mami" as Berta's and Vivian's son Nikolai would have it. This is but one example of the deeply "sexed" parenting that merits rethinking. It all hit me when I read *The Little Prince* aloud to Melina when she was about six months old.[225] In the story the little prince has a rose he cherishes and protects on his planet against everything. When he travels to Earth, he confronts an almost existential dilemma in encountering five thousand roses. He explains to these many roses why *his* rose is different:

> You are beautiful, but you are empty . . . . One could not die for you. To be sure, an ordinary passerby would think that my rose looked just like you—the rose that belongs to me. But in herself alone she is more important than all the hundreds of you other roses: because it is she that I have watered; because it is she that I have put under the glass globe; because it is she that I have sheltered behind the screen; because it is for her that I have killed the caterpillars (except the two or three that we saved to become butterflies); because it is she that I have listened to, when she grumbled, or boasted, or even sometimes when she said nothing. Because she is *my* rose.[226]

It is this process of caretaking that makes the rose unique to him. As I read the last lines of that poetic book to Melina, it began to make sense—parenting, motherhood, even pregnancy. As I contemplate how I came to have this little honey in my life, I could not dream of better teachers than Beth and my other friends.

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225. ANTOINE DE SAINT-EXUPÉRY, THE LITTLE PRINCE (Katherine Woods trans., Harcourt Brace Jovanovich 1971) (1943).

226. *Id.* at 73.