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Virgin Fathers: Paternity Law, Assisted Reproductive Technology, and the Legal Bias against Gay Dads

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VIRGIN FATHERS: PATERNITY LAW, ASSISTED REPRODUCTIVE TECHNOLOGY, AND THE LEGAL BIAS AGAINST GAY DADS

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I. INTRODUCTION

In a small town called Bethlehem, the famous story goes, a young virgin woman gave birth to a son.[1] At the heart of this story lies an enigma that would transform Western civilization: if a woman becomes pregnant without engaging in sexual intercourse with a man, who is the father of her

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1. *Matthew* 1:18.

child?

In the twenty-first century United States, the proliferation of assisted reproductive technology (ART) has given this metaphysical question new significance.[2] More specifically, how the law assigns paternity outside of sexual intercourse is relevant for all men who participate in ART and become "virgin fathers." In practice, how we view the relationship between sexual intercourse and fatherhood is especially critical for gay men who seek to conceive without sexual intercourse, and who must also contend with profound societal stigma as potential parents.[3] By creating obstacles to fatherhood for men who conceive without sexual intercourse, the law celebrates the notion that the ideal father is always heterosexual.[4]

This modern legal construction of fatherhood reflects the evolution of legitimacy law toward a focus on sex rather than marriage.[5] Historically, the law of legitimacy incentivized heterosexual intercourse exclusively between married men and women by treating children born out-of-wedlock as second-class citizens.[6] As social attitudes toward premarital sex progressed, family courts sought to equalize the treatment of children born to unmarried parents while preserving legitimacy's heteronormative relational aims.[7]

Courts therefore began blurring sexual and marital relationships in paternity inquiries, treating a sexual relationship at the time of conception like a pseudo-marriage.[8] At the same time, courts emphasized a new categorical distinction between sexual and non-sexual conception.[9]

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2. *See* Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & LAW 183, 189 (1995) (outlining the cultural and legal issues faced by gay men seeking to have biological children in the 1990s); *see also* Raymond C. O'Brien, *Family Law's Challenge to Religious Liberty*, 5 U ARK. LITTLE ROCK L. REV. 3, 52-53 (2012) (exploring religious reactions to the implications of assisted reproductive technology).

3. *See infra* part III.B.

4. *See infra* part III.B.

5. Susan Frelich Appleton, *Illegitimacy and Sex: Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 348 (2012) (discussing the emergence of sexual intercourse as a dividing line in legitimacy law).

6. *Id.* at 350-51.

7. In *Illegitimacy and Sex*: *Old and New,* Susan Appleton explores how legitimacy law sought to maintain existing racial, economic, and gender hierarchies. *See id.* at 350-351, 376-77.

8. *See id.* at 362 ("Accordingly, today courts consistently hold unmarried men responsible for child support for children conceived during a sexual encounter on the same terms applicable to married fathers, whether or not the father has yet developed any personal relationship with the child."); *see also infra* part II.B.1.

9. *See* Appleton, *supra* note 5, at 376-77.

Currently, a man who conceives a child through sexual intercourse with an unmarried woman is presumed to be the father of the child.[10] In contrast, a man who conceives a child through ART faces the opposite presumption.[11]

This approach disadvantages gay men seeking to become fathers.[12] Although courts have embraced the maternal rights of a woman who conceives through ART, or a "virgin mother," the law is loathe to recognize her male counterpart, the "virgin father."[13] By definition, a man who conceives a child through heterosexual intercourse engages in heterosexual activity.[14] By presumptively denying recognition of fatherhood to men who conceive through ART while conveying it to men who conceive sexually, the law validates the notion that a "father" is a man who has sexual intercourse with women—namely, he is straight.[15] If an unmarried woman becomes pregnant without engaging in sexual intercourse with a man, then the child simply does not have a father.[16]

Part I will discuss infertility and Assisted Reproductive Technology.[17] Part II will explore the evolution of marital legitimacy law toward a focus on sexual intercourse, and the resulting distinctions between sexual and non-sexual conception in paternity inquiries.[18] Part III will argue that family law elevates "virgin mothers," or women who conceive through ART, while at the same time minimizing ART's "virgin fathers."[19] This part will also argue that this discrepancy reflects a stigma against gay men as fathers, and that the law should adopt a gender-neutral and plural "virgin parent" approach to presumptions of ART parentage.[20]

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10. *See id.* at 358; *see also* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1, 57 (2004) (summarizing the discordances in existing paternity law and advancing a unifying, contract-based theory of paternity).

11. *See* Appleton, *supra* note 5, at 370.

12. *See infra* part III.B.

13. *See infra* part III.A.

14. *See, e.g.*, P.M. Bentler, *Heterosexual Behavior Assessment I—Males*, 6 BEHAVIOUR RES. & THERAPY 21 (1968).

15. *See infra* part III.B.

16. *See infra* part III.A.

17. *See infra* part I.

18. *See infra* part II.

19. *See infra* part III.A.

20. *See infra* parts III.B and III.C.

II. ASSISTED REPRODUCTIVE TECHNOLOGY, PATERNITY, AND GAY FATHERHOOD

A. Infertility

The conventional screenplay for a family calls for the casting of a heterosexual couple.[21] In the familiar narrative, a man and a woman fall in love, get married, have a baby, and raise the child together.[22] The man in this story is the "father," and the woman is the "mother." Each of these parental roles is characterized by uniquely stereotyped duties and benefits.[23]

The traditional story is upended when one or both of the partners are infertile.[24] Infertility is loosely understood to mean the inability to conceive biological children.[25] Functional infertility refers to the inability to conceive arising from reproductive dysfunction.[26] A woman may be functionally infertile if she cannot get pregnant, or if she cannot carry a pregnancy to viability.[27] A man may be infertile if he is unable to produce healthy sperm in sufficient quantities.[28] Structural infertility refers to infertility due to social factors independent of reproductive function.[29] Men and women who are celibate or who are in a same-sex couple are structurally infertile.[30]

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21. *See* Courtney Megan Cahill, *Regulating at the Margins: Nontraditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 49 (2012) (arguing that the law seeks to channel individuals into normative familial relationships by incentivizing them relative to non-traditional relationships).

22. *Id.* at 49-51.

23. *See* Erin Marie Meyer, *Gay Fathers: Disrupting Sex Stereotyping and Challenging the Father-Promotion Crusade*, 22 COLUM. J. GENDER & L. 479, 484 (2011).

24. *See* Cahill, *supra* note 21, at 46; Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 363 (2011).

25. *See Reproductive Health: Infertility FAQs*, CTR. DISEASE CONTROL & PREVENTION (Feb. 12, 2013), http://www.cdc.gov/reproductivehealth/infertility/. *See generally* Maya N. Mascarenhas et al., *Measuring Infertility in Populations: Constructing a Standard Definition for Use with Demographic and Reproductive Health Surveys*, 10 POPULATION HEALTH METRICS 17, 3 (2012).

26. *See* Dana, *supra* note 24, at 363.

27. *Id. See also Reproductive Health: Infertility FAQs*, *supra* note 25.

28. *See* Dana, *supra* note 24, at 363.

29. *Id.* at 359.

30. *Id. See* Catherine DeLair, *Ethical, Moral, Economic, and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 175 (2000) ("By definition, gays and lesbians are not medically infertile, rather, they are constructively infertile because they do not have

B. Assisted Reproductive Technology (ART)

ART comprises a set of medical procedures designed to induce pregnancy in the absence of sexual intercourse.[31] A fertile woman who wishes to become a mother without vaginal intercourse may undergo artificial insemination,[32] a procedure entailing non-copulative insertion of sperm into a woman's reproductive tract.[33]

A man seeking to conceive and raise a biological child without vaginal intercourse must employ a female surrogate embryo carrier.[34] Surrogacy, or the practice of a woman carrying a child to term that she does not intend to raise, has two forms.[35] In the first form of surrogacy, called traditional or gestational surrogacy, an ovulating woman agrees to be artificially inseminated.[36] In contrast, genetic or partial surrogacy involves the participation of separate women as egg donor and birth mother.[37] Genetic or partial surrogacy requires in vitro fertilization (IVF), or fertilization of an egg outside of the uterus.[38]

Although artificial insemination is relatively safe and inexpensive, surrogacy arrangements present unique economic and legal obstacles.[39] Surrogacy is expensive, potentially costing hundreds of thousands of dollars.[40] Additionally, the legal landscape for surrogacy contract enforcement is fractured.[41] Although some states enforce some surrogacy contracts, such as California, other states such as Indiana and Arizona

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sexual intercourse with members of the opposite sex."). For information about gay men and ART specifically, *see* Hollandsworth, *supra* note 2 at 186-87. For information about lesbian women specifically, *see* Nicole Rank, *Barriers for Access to Assisted Reproductive Technologies by Lesbian Women: The Search for Parity Within the Healthcare System*, 10 HOUS. J. HEALTH L. & POL'Y 116 (2009).

31. *See* Christina M. Eastman, *Statutory Regulation of Legal Parentage in Cases of Artificial Insemination by Donor: A New Frontier of Gender Discrimination*, 41 MCGEORGE L. REV. 371, 374 (2010).

32. *Id.*

33. *Id.*

34. *See* Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 801-02 (2012); Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 98 (2010).

35. *See* Arshagouni, *supra* note 34, at 800-01.

36. *Id.*

37. *See* Spivak, *supra* note 34, at 98.

38. *See* Eastman, *supra* note 31, at 374.

39. *Id.*

40. *See* Dana, *supra* note 24, at 363.

41. *See* Arshagouni, *supra* note 34, at 805-06.

categorically bar their enforcement.[42] Many states have no statutes or case law that address the validity of surrogacy agreements.[43]

III. PATERNITY ANALYSIS IN SEXUAL CONCEPTION VS. ASSISTED REPRODUCTIVE TECHNOLOGY: A DOUBLE STANDARD

A. Paternity and Legitimacy

Paternity refers to the attachment of responsibility to men for their biological children.[44] Historically, paternity law was interrelated with legitimacy law.[45] Under the law of legitimacy, a child was regarded as being a legitimate heir if he or she was born to married parents.[46] Conversely, children born out of wedlock were regarded as non-entities, or "illegitimate."[47] To ensure that illegitimate children were cared for by the men who had conceived them, paternity frameworks developed to facilitate relationships between these children and their fathers.[48]

As societal attitudes towards sexual relationships outside of marriage became more progressive in the mid-twentieth century, the stigma of illegitimacy became increasingly anachronistic.[49] In 1973, the Uniform Law Commissioners drafted the Uniform Parentage Act (UPA), a model statute designed to set standards for relationships between biological fathers and children that were independent of the parents' marital status.[50] In 2000, a new version of the UPA was promulgated to reflect updates in ART.[51] In 2002, additional modifications were made to ensure a more equitable approach to parentage for children of unmarried parents.[52] The 2002 UPA creates a presumption of paternity for a man who is married to

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42. *See* ARIZ. REV. STAT. ANN. § 25-218 (2008); IND. CODE § 31-20-1-1 (2013). *But see* CAL. FAM. CODE §§ 7960-7962 (2013).

43. *See* Arshagouni, *supra* note 34, at 807.

44. *See* Baker, *supra* note 10, at 9.

45. *Id.* at 6.

46. *See* Appleton, *supra* note 5 at 355.

47. *Id.* at 351.

48. *See* Baker, *supra* note 10, at 6.

49. *See* Appleton, *supra* note 5, at 354.

50. Unif. Parentage Act §§ 1-2. (1973). *See* Jessica Hawkins, *My Two Dads: Challenging Gender Stereotypes in Applying California's Recent Supreme Court Cases to Gay Couples*, 41 FAM. L. Q. 623, 623-24 (2007). For a summary of the UPA's changes, *see generally Parentage Act Summary*, UNIF. LAW COMM'N http://uniformlaws.org/ActSummary.aspx?title=Parentage%20Act (last visited May 16, 2013).

51. *See Parentage Act Summary*, *supra* note 50, at 1.

52. *Id.*

the child's birth mother or who has "held out" the child as his own.[53] In contrast, a sperm donor, defined as a man who conceives a child through ART, is presumed not to be the father of his biological child.[54]

Today, courts draw from a patchwork of legal, biological, and social factors for determining if a man ought to be recognized as the father to a child of an unmarried mother.[55] The overarching goal of a paternity inquiry is typically described as determining what is in the "best interest of the child."[56] The following sections will explore how family courts began codifying the assumption that it is always in a child's best interest to be raised by the man, if one exists, who conceived him or her through sexual intercourse.[57]

B. Sexual v. Nonsexual Conception

Men who wish to conceive and raise children through ART must confront a vexing legal double standard.[58] Namely, a child conceived through sexual intercourse with an unmarried woman is presumed to be his or her biological father's child, but a child conceived through ART is not.[59] This discrepancy, suggests Professor Susan Appleton, is owed to a transition in the law of legitimacy towards a focus on sexual intercourse rather than marriage.[60] As she explains, "a regime that makes marriage the dividing line has given way to one that makes sex the dividing line."[61]

The heteronormative scaffolding of marital legitimacy thus continues to cast a long shadow in the laws governing ART.[62] From a scientific standpoint, the distinction between sexual and non-sexual conception is baseless; an embryo conceived in a test tube will be biologically equivalent to an embryo conceived in a reproductive tract.[63] The law of legitimacy,

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53. Unif. Parentage Act § 204 (1973) (amended 2002), 9B U.L.A. 23-24 (2011). The "holds out" provision creates a means for a man to establish paternity by behaving as a parental figure and by assuming parental responsibilities.

54. Unif. Parentage Act §§ 701-704 (1973) (amended 2002), 9B U.L.A. 67-69 (2011). This presumption can be rebutted by demonstrating intent to parent. *See* Johnson v. Calvert, 851 P.2d. 776, 776 (Cal. 1993).

55. *See generally* Baker, *supra* note 10.

56. *See* Michael H. v. Gerald D., 491 U.S. 113, 119 (1992).

57. *See infra* part III.

58. *See* Appleton, *supra* note 5, at 364-66.

59. *Id.* at 370.

60. *Id.* at 349-50..

61. *Id.* at 384.

62. *See* Cahill, *supra* note 21, at 51.

63. Embryos conceived through in vitro fertilization may have a higher risk of cardiovascular and metabolic complications, but this discrepancy may be due to other

however, was never truly about classifying embryos.[64] Rather, the law of legitimacy was always about policing adults' sexual behavior.[65]

1. Sexual Conception

As courts sought to obviate the "illogical and unjust" stigma of illegitimacy, they began treating unmarried heterosexual couples as pseudo-marital unions for the purpose of allocating paternity.[66] Historically, the law maintained a bright line between marital and non-marital sex, privileging the former and discouraging the latter.[67] As social and legal attitudes towards non-marital heterosexual sexual intercourse liberalized, the justifications for penalizing children for their parents' marital status also began to disappear from the public perception.[68] However, the judicial impetus to dismantle legitimacy was tempered by the desire to reinforce stable heterosexual couplings.[69] To reconcile these goals, courts began working backwards: courts started elevating the status of a sexual relationship at the time of conception, effectively treating it as a pseudo-marriage.[70] As a result, whether a man is the legal father of a child has remained predicated on the nature of his relationship with the child's birth mother.[71]

Even after DNA testing became the gold standard for proving or disproving a biological relationship between a man and a child, courts continued to emphasize the relevance of a sexual relationship between the putative father and birth mother.[72] In the 1984 case *Crawford v. Burritt*, the Superior Court of Pennsylvania held that a mother's history of sexual intercourse with an alleged father was relevant to a paternity inquiry, even where the man had already demonstrated a biological paternal relationship

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associated risk factors such as advanced maternal age and multiple gestations. *See* Roger Hart & Robert J. Norman, *The Longer-Term Health Outcomes for Children Born as a Result of IVF Treatment: Part I–General Health Outcomes*, 19 HUMAN REPROD. UPDATE 232, 234 (2013).

64. *See* Appleton, *supra* note 5, at 351; *see also* Baker, *supra* note 10, at 16-18.

65. *See* Appleton, *supra* note 5, at 351.

66. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

67. Heterosexual sexual intercourse outside of marriage was criminalized for a substantial part of the twentyith century. *See* HENDRICK HARTOG, MAN & WIFE IN AMERICA: A HISTORY 306, 307 (2000).

68. *See* Appleton, *supra* note 5, at 354.

69. *See id.* at 359.

70. *See id.* at 351.

71. *See id.* at 358.

72. *See* Crawford v. Burritt, 671 A.2d 689, 691 (Pa. Super. Ct. 1995).

with the child.[73] In this case, an unmarried birth mother sought a new trial to overturn a jury's finding that the man proven through DNA to have a 99.63% probability of being the likely biological parent was not the child's legal father.[74] Although the court held that the original jury was unfairly prejudiced by testimony concerning the mother's sexual history, the court distinguished between evidence concerning her general sexual history and evidence suggesting a history of sexual monogamy with the putative father at the time of the conception.[75] The latter, the court explained, was an "extremely important" part of the inquiry.[76] A man's history of sexual intercourse with a woman, though no longer essential to the proof of a biological relationship with the child, thus remains highly relevant to demonstrating a relationship with the child's mother.

More specifically, courts began treating heterosexual sexual relationships as socially significant and morally sacrosanct, similar to marriages. In the 1989 case *Moorman v. Walker*,[77] the Court of Appeals of Washington held that a man who conceived a child with an unmarried woman could not seek damages for having been intentionally misled into conceiving the child.[78] In this case, the father sought damages for having been duped into conceiving a child through vaginal intercourse following the mother's representation of a uterine disorder rendering her infertile.[79] Turning a blind eye to history, the *Moorman* court declared that fatherhood arising from a non-marital sexual relationship has always been foundational to our social order.[80] "In no prior case," the court explained, "has one sought 'so radical a change in the socially accepted ideas and views of sexual conduct, family relationship, parental obligations, and legal and moral responsibility.'"[81] The court further explained that all heterosexual intercourse carries the gravitas of "life itself."[82] Sex is not "a simple

73. *Id*.

74. *Id.* at 694.

75. *Id.* at 693-94.

76. *Id.* at 694 (citing Butler v. DeLuca, 478 A.2d 840 (Pa. Super. Ct.1984)).

77. Moorman v. Walker, 773 P.2d 887, 888 (Wash. Ct. App. 1989)

78. *Id.* at 888-89 (holding that a birth mother's unfair representation of infertility does not give rise to tortious damages when the birth mother was diagnosed with a uterine disorder, and claimed that she believed that this condition rendered her infertile, and the father sought damages, claiming that the mother had either intentionally or negligently misrepresented herself as unable to conceive).

79. *Id.*

80. *See id.* at 889.

81. *Id.* (citing to Stephen K. v. Roni L., 105 Cal.App.3d 640, 643 (1980)).

82. *See id.*

contractual transaction," the court said.[83] "We can no more recognize a lawsuit which trivializes the responsibility for consensual sex than we can one which trivializes life itself."[84] Like a marriage, the court implied, a fruitful heterosexual fling ought to be treated as a sacred bond.[85]

2. Non-Sexual Conception

As family courts began erasing the distinction between heterosexual sexual relationships and marriages, they also began to distinguish these relationships from non-sexual relationships resulting in conception.[86] In contrast to sexual relationships, courts said, non-sexual agreements to conceive a child do not demonstrate the kind of socially foundational connection between a man and a woman that commands a presumption of fatherhood.[87] Consequentially, unlike a man who conceives a child sexually, a man who conceives through ART is not presumed to be the child's legal father.[88]

Ten years after the *Moorman* court alluded to sex not being a "simple contractual transaction," a Pennsylvania Superior Court echoed this suggestion in *Kesler v. Weniger*.[89] In this case, the court refused to enforce a contractual waiver of paternity entered into by a sexually conceiving heterosexual couple.[90] Refusing to normatively equate a sexual relationship with artificial insemination, the majority concluded, "[w]hile science has enabled all manner of assisted conception, variations of which continue to evolve, we decline to recognize a category of 'artificial insemination by intercourse.'"[91]

Meanwhile, courts and lawmakers are willing to enforce agreements to absolve men of paternity in cases where the conception occurs through

83. *Id*.

84. *Id.*

85. *See id.*

86. Such as agreements between an intended birth mother, her husband, and an anonymous gamete donor. *See In re* K.M.H., 169 P.3d 1025, 1029 (Kan. 2007); Appleton, *supra* note 5, at 371.

87. *See infra* notes 108-119.

88. *See* Appleton, *supra* note 5, at 370; *see also* Baker, *supra* note 10, at 10; Eastman, *supra* note 31, at 385. *See infra* notes 108-119.

89. Kesler v. Weniger, 744 A.2d 794, 796 (Pa. Super. Ct. 2000) (holding that a biological father cannot contract to be relieved of paternity obligations attaching to child conceived sexually when no actual agreement was found to have existed between the parties).

90. *Id.*

91. *Id*.

ART.[92] In *Ferguson v. McKiernan,*[93] the Pennsylvania Supreme Court upheld an agreement between a birth mother and a non-sexually conceiving father absolving him of all responsibility for the child.[94] Lower Pennsylvania courts, citing to *Kesler*, had found the contract unenforceable.[95] The *Ferguson* court reversed, explaining that the relational differences between intercourse and sperm donation are "self evident."[96]

> In the case of traditional sexual reproduction," the court said, "there simply is no question that the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires. . . . In the institutional sperm donation case, however, there appears to be a growing consensus that clinical, institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor.[97]

A man who conceives through ART and wishes to be recognized as a father faces a challenging and variable set of hurdles.[98] Most critically, he must conclusively demonstrate a pre-conception intention to assume the legal responsibilities of paternity.[99] As Professor Katharine K. Baker articulated the current landscape, "a man may knowingly assist in the creation of a child, but if his preconception intent is that he not assume responsibility for the child, he is not responsible, as long as the child is

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92. *See* Appleton, *supra* note 5, at 370; *see also* Baker, *supra* note 10, at 10 ("Most states have statutes divesting a man who voluntarily sells or donates his sperm of all parental rights and obligations, as long as the insemination using his sperm is performed by a licensed medical professional.").

93. Ferguson v. McKiernan, 940 A.2d 1236, 1238 (Pa. 2007).

94. *Id.* at 1238, 1241 (distinguishing between sexual and nonsexual conceptions and holding that an oral agreement releasing a donor from child support was enforceable).

95. *Id.* at 1241. The *Kesler* court had also held that "the right to support is a right of the child, not the mother or father. It cannot be bargained away before conception any more than it can be bargained away after birth, nor can it be extinguished by principles of estoppel." *Kesler*, 744 A.2d at 796. In comparison, the *Ferguson* court focused on the nature of the relationship between the parents, explaining that this couple had "negotiated an agreement outside the context of a romantic relationship; they agreed to terms; they sought clinical assistance to effectuate IVF and implantation of the consequent embryos, taking sexual intercourse out of the equation." *See Ferguson*, 940 A.2d at 1246.

96. *Ferguson*, 940 A.2d at 1246.

97. *Id.*

98. *See* Baker, *supra* note 10, at 11.

99. *Id.* at 10.

conceived by means other than sexual intercourse."[100]

The peculiarity of this standard is illustrated by the holding in the Indiana case *In re paternity of M.F*,[101] in which the Court of Appeals of Indiana held that the biological father of two children conceived through ART with the same woman was paternally responsible for only one of the children.[102] In this case, the parents had executed a formal agreement absolving the father of paternity following insemination, but it was unclear whether the contract was intended to apply to only one child or to both.[103] The question of paternity, the court said, boiled down to "proving that the manner of insemination rendered the Donor Agreement unenforceable."[104] Specifically, "if insemination occurred via intercourse, the Donor Agreement would be unenforceable as against public policy."[105] The father was therefore found to be responsible for the child who was neither explicitly covered by the insemination contract nor demonstrably conceived through sexual intercourse.[106]

III. VIRGIN FATHERS AND HETEROSEXISM IN THE LAW OF ART

A. The Law Embraces "Virgin Mothers" and Rejects "Virgin Fathers"

The crux of marital legitimacy, that the ideal foundation of a family consists of a pregnant woman and her husband, remains a pillar of family law.[107] In recent years, the widening availability of ART has made it possible for infertile individuals and couples to conceive and raise biological children non-sexually with the assistance of a third party.[108] In the courtroom, disputes arising from these arrangements have been greeted with skepticism and disdain—with the notable exception of agreements between a conceiving woman, her husband, and a gamete donor who intends to remain anonymous.

To begin with, the law of ART jealously guards the rights of "virgin

100. *Id*. at 10-11.

101. *In re* M.F., 938 N.E.2d 1256, 1257 (Ind. Ct. App. 2010); *see* Appleton, *supra* note 5, at 372-73.

102. *See In re M.F.*, 938 N.E.2d at 1263.

103. *Id.* at 1262.

104. *Id.* at 1260.

105. *Id.*

106. *Id.*

107. *See* Cahill, *supra* note 21, at 49.

108. *See* Eastman, *supra* note 31, at 374. Infertile couples may require donated gametes (eggs or sperm) or the assistance of a surrogate pregnancy carrier. See *supra* notes 24-30.

mothers," or women who conceive through ART.[109] Anne R. Dana says, "[t]he law is a method by which to maintain and reinforce what is often taken as static: the social relationships that qualify as 'natural.'"[110] Toward this end, the law of ART exhibits what Dana refers to as the "adulation of women as mothers."[111] Similarly, Professor Nicole Rank explains that the "typical infertile person" is constructed in the law as a "heterosexual, married woman who is unable to conceive—regardless of whether the problem is due to the husband's or wife's reproductive system."[112]

The construction of the archetypal ART patient as a heterosexual, married, infertile woman intending to conceive a child is reflected by the 1973 UPA's coverage of artificial insemination.[113] Under a section titled "Artificial Insemination," the UPA states:

> If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. . . .[114]

In the same breath, the framework also diminishes the rights of "virgin fathers."[115] The original UPA continues:

> [t]he donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.[116]

The 2002 update to the UPA includes male ART participants, and distinguishes between men seeking to donate sperm and those seeking fatherhood.[117] However, even the updated version continues to emphasize the primacy of the conventional family narrative, providing reassurance that a married individual belonging to a heterosexual couple who uses his

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109. *See* Dana, *supra* note 24, at 375.

110. *Id.* at 376.

111. *Id*. at 375.

112. *See* Rank, *supra* note 30, at 121.

113. Unif. Parentage Act § 5(a) (1973), 9B U.L.A. 287 (2011).

114. *Id*.

115. *See infra* notes 138-156.

116. Unif. Parentage Act § 5(b) (1973), 9B U.L.A. 287 (2011). The UPA was updated in 2002 to reflect both sperm and egg donors. *See* Eastman, *supra* note 35, at 380.

117. Unif. Parentage Act, Art. 7 §§ 701-03 (amended 2002), 9B U.L.A. 287 (2011).

or her own gametes to conceive will always be a "parent."[118]

In kind, state laws modeled after the UPA reinforce the rights of birth mothers and their husbands, while at the same time minimizing the interests of gamete "donors." In Alabama, for example, the law simply states that "a man is presumed to be the father of a child if. . . . he and the mother of the child are married to each other and the child is born during marriage."[119] A Uniform Comment to the code further specifies that in conceptions arising through ART, if a husband who disputes paternity can demonstrate his lack of consent to the mother's insemination, "the child will be without a legally-recognized father, because the sperm donor is not the father. . . ."[120] Other states with similarly structured laws include Arizona, Florida, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, and Wyoming.[121]

That the law tends to exalt "virgin mothers" while downplaying "virgin fathers" reflects the jurisprudential goal of preserving the semblance of the child's parents as a legitimate marital union consisting exclusively of the birth mother and her husband.[122] In other words, if a conception occurs in the absence of a heterosexual sexual relationship, the law endeavors to

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118. *See* Unif. Parentage Act, Art. 7 cmt (amended 2002), 9B U.L.A. 287 (2011) ("If a married couple uses their own eggs and sperm to conceive a child born to the wife, the parentage of the child is straightforward. The wife is the mother—by gestation and genetics, the husband is the father—by genetics and presumption. And, insofar as the Uniform Parentage Act is concerned, neither parent fits the definition of a 'donor.'"). The 2002 update to the UPA also hints that paternity determinations for donors are inherently harder to prove than maternity determinations, saying that "certain provisions found in the balance of the Act logically do not apply in a proceeding to establish maternity" and "the Act continues the decision made in UPA (1973) not to burden these already complex provisions with unnecessary references to the ascertainment of maternity," because "[e]xcept in circumstances involving immigration, cases involving disputed maternity are extraordinarily rare." Unif. Parentage Act, Art. 7 §702 cmt(amended 2002), 9B U.L.A. 287 (2011).

119. ALA. CODE § 26-17-204(a)(1) (LexisNexis 2009).

120. ALA. Code § 26-17-705 (LexisNexis 2013).

121. ARIZ. REV. STAT. ANN. § 25-814(A)(1) (LexisNexis 2013); FLA. STAT. ANN. § 382.013(2)(a) (West 2013); KAN. STAT. ANN. § 23-2208(a)(1)(West 2013); KY. REV. STAT. ANN. § 406.011 (West 2013); LA. CIV. CODE ANN. art. 185 (2012); MD. CODE ANN., FAM. LAW § 5-1027(c)(1) (LexisNexis 2012); MASS. GEN. LAWS ANN. ch 209(c), §6(a)(1) (West 2013); N.M. STAT. ANN. § 40-11A-204(A)(1) (2012); N.D. CENT. CODE ANN. § 14-20-10(1)(a) (West 2013); OKLA. STAT. ANN. tit. 10, § 77-204(A)(1) (West 2013); S.D. CODIFIED LAWS § 25-8-57 (West 2013); TENN. CODE ANN. § 36-2-304(a)(1)(West 2013); TEX. FAM.CODE ANN. § 160.204(a)(1) (West 2012); WYO. STAT. ANN. § 14-2-504(a)(i) (2011). For a comprehensive list, *see* Gartner v. Dep't Pub. Health, 830 N.W.2d 335, 345 n.1 (Iowa 2013).

122. *See, e.g.*, Cahill, *supra* note 21, at 49.

create the semblance of one.[123] To accomplish this, the law applies two presumptions. First, the law assumes that a woman who conceives through ART plans to raise the child that she bears.[124] Second, the law assumes that men participating in ART are either married to the birth mother, or intend to remain wholly anonymous.[125]

First, the recognition of the rights of "virgin mothers" in ART law manifests as a presumption of maternity for women who conceive.[126] Most notably, the courts and lawmakers are generally hostile to the enforcement of surrogacy contracts, or agreements entailing that a woman conceive and bear a child that she does not intend to raise.[127] In fact, courts have invalidated surrogacy contracts even in cases where the intended parents consist of a heterosexual couple.[128]

At the same time, the law presumes that both male and female gamete donors seek to remain anonymous.[129] In cases where a woman is an egg donor to a surrogate mother, for example, the donor will be recognized as the mother only if she expressed the pre-conception intent to parent.[130] In the landmark case *Johnson v. Calvert*, a California court upheld a disputed IVF surrogacy contract, finding that the woman who had donated the egg was legally the mother because she had demonstrated the pre-conception intent to parent.[131]

Both the presumption of maternity for conceiving mothers and the desire for anonymity for male and female gamete donors suggest that the real aim of the law is to reinforce the appearance of a circumstance in which two people, a man and a woman, in a monogamous sexual relationship, conceive a child.[132] By exclusively facilitating anonymous gamete donation, the law allows married, heterosexual couples to conceive while ensuring that the donor does not enter the family portrait.[133] Notably,

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123. *See supra* notes 66-80.

124. *See infra* notes 126-128.

125. *See infra* notes128-130.

126. *See, e.g.*, Johnson v. Calvert, 851 P.2d. 776, 782 (Cal. 1993) (applying a California law modeled after the UPA).

127. *See generally* Arshagouni, *supra* note 34.

128. *See, e.g.*, *In re* Baby M., 537 A.2d 1227, 1234 (N.J. 1988); *see also* Spivak, *supra* note 34, at 99.

129. *See* Eastman, *supra* note 31, at 380-383.

130. *See Johnson*, 851 P.2d. at 782.

131. *Id.*

132. *See* Appleton, supra note 5, at 369; Cahill, *supra* note 21, at 53; Dana, *supra* note 24, at 373.

133. *See* Mary Kate Kearney, *Identifying Sperm and Egg Donors: Opening Pandora's Box*, 13 J.L. & FAM. STUD. 215 (2011).

surrogacy contracts do not lend themselves to anonymity.[134] As a result, even arrangements between surrogate mothers and heterosexual couples mar the silhouette of the heterosexual marital union: they introduce an extra woman.[135]

The upshot is that a man seeking to become a father through ART is a *persona non grata*—unless he happens to be married to the birth mother.[136] At this time, the technology does not exist for men to function as gestational carriers.[137] An unmarried "virgin father," therefore, faces an uphill battle seeking recognition as a full-fledged parent.[138] In the eyes of the law, a man who conceives without sexual intercourse plays one of two roles: he is either the anonymous gamete donor, or else he is the birth mother's husband.

B. Why Favoring Fatherhood For Men Who Conceive Through Heterosexual Intercourse Is Heterosexist and Reflects Bias Against Gay Men

The law's preference for awarding fatherhood to men who conceive heterosexually, and its complementary disdain for recognizing as fathers men who conceive non-sexually, is rooted in heterosexism.[139] Heterosexism has been defined as "an ideological system that denies, denigrates, and stigmatizes non-heterosexual forms of behavior, identity, or relationships."[140] The choice to engage in heterosexual sexual intercourse is the quintessential behavior identified with a heterosexual orientation.[141] By facilitating fatherhood for men who engage in heterosexual intercourse,

134. *See* Spivack, *supra* note 34, at 98-99.

135. *Id.*

136. *See, e.g.*, UNIF. PARENTAGE ACT § 5 (1973), 9B U.L.A. 287 (2011).

137. Implantation of an embryo outside of a uterus is defined as an "ectopic pregnancy." Even in women, ectopic pregnancies are non-viable and dangerous. *See generally* Caroline Juneau & Gordon Wright Bates, *Reproductive Outcomes After Medical and Surgical Management of Ectopic Pregnancy*, 55 CLINICAL OBSTETRICS & GYNECOLOGY 455 (YEAR).

138. *See* Dana, *supra* note 24, at 370-71; *see also* UNIF. PARENTAGE ACT § 102 8(a) (amended 2002), 9B U.L.A. 287 (2011) (excluding a woman's husband from the definition of "donor").

139. *See* Dana, *supra* note 24, at 373.

140. *Id.* at 374.

141. Sexual orientation and sexual behavior do not define one another but are strongly correlated. *See generally* SIMON LEVAY, GAY, STRAIGHT AND THE REASON WHY: THE SCIENCE OF SEXUAL ORIENTATION (2011). The desire to engage in vaginal intercourse is not definitive of a heterosexual orientation but vaginal intercourse represents a major form of heterosexual sexual activity. *See, e.g.*, Bentler, *supra* note 14, at 23.

the law encourages fatherhood for men who are likely to identify as straight.[142] At the same time, by deterring men who do not conceive through sexual intercourse from claiming fatherhood (unless they are married to a conceiving woman), the law makes it challenging for men who do not engage in heterosexual activity from claiming fatherhood: namely, gay men.[143]

This double standard codifies the notion that the ideal father is heterosexual, and by extension, that gay men are unfit fathers. The standard of the "best interest of the child" represents the articulation of the fundamental aim of paternity inquiries: to determine whether a child's interests would be best served by recognizing a man as being legally a child's father.[144] By implicitly favoring heterosexual men as fathers, the law suggests that it is in the best interests of a child to be raised by a heterosexual man. In fact, the law says, if there is no man in a sexual relationship with the child's mother, the best outcome is a fatherless child.[145]

These ideas are interwoven in the 2007 case *In re K.M.H.*[146] In this case, a surrogate mother of twins filed a Child In Need of Care petition seeking to terminate the parental rights of the biological father and intended parent, a gay man, on the grounds that he was unfit as a parent.[147] The Supreme Court of Kansas held in her favor, and justified its holding on two grounds: lack of a written agreement, and the heteronormative aims of the law.[148]

First, the court found that the father's oral agreement with the mother was insufficient to secure his parental rights.[149] The father had contested application of a Kansas law barring a finding of paternity for sperm donors absent a written agreement expressing the preconception intention to parent.[150] Holding against the father, the court astutely observed that the statute's purpose was not to create a means for ART fathers to secure paternity through written agreements.[151] The court reasoned that the father "evidently misunderstand[s] the statute's mechanism[: it] ensures no

142. *See* LEVAY, *supra* note 141, at XI-XII.

143. *Id.*

144. *See* Michael H. v. Gerald D., 491 U.S. 110, 112 (1992).

145. *See, e.g.*, *In re* K.M.H., 169 P.3d 1025 (Kan. 2007).

146. *Id.* at 1041 (holding that a sperm donor has the right to refuse to donate sperm; once donated, a sperm donor relinquishes right to paternity in the absence of a written agreement).

147. *Id.* at 1029.

148. *Id.* at 1039-40.

149. *Id.* at 1039.

150. *Id.* at 1032-33.

151. *Id.* at 1041.

attachment of parental rights to sperm donors in the absence of a written agreement to the contrary; it does not *cut off* rights that have already arisen and attached."[152] The implicit view expressed, consistent with the holdings in *Kesler* and *Ferguson*, is that a court can absolve a man of paternity, if, and only if, he did not conceive through sexual intercourse, and whether he likes it or not.[153]

Under the UPA-based statute, the court suggested, a gay father seeking to conceive and raise a biological child is a non-entity.[154] Like "the majority of states," the court said, the Kansas legislature had intended for artificial insemination to afford infertile heterosexual couples with the opportunity to procreate.[155] In most other scenarios, the Kansas statute ensures that "the female is a potential parent or actual parent under all circumstances; by operation of the same statute, the male will never be a potential parent or actual parent unless there is a written agreement to that effect with the female."[156] In general, fatherhood vanishes upon the decision to conceive without engaging in heterosexual intercourse; "the male's ability to insist on father status effectively disappears once he donates sperm."[157]

The holding in the 2013 case *Gartner v. Iowa Department of Public Health*[158] illustrates that even at the vanguard of social progress, family law still treats parenthood as belonging to a birth mother and her monogamous partner.[159] In this case, the Supreme Court of Iowa held that a presumption of parentage statute requiring the name of "the husband" to be entered on a child's birth certificate if the mother was married at the time of conception violated the equal protection clause of the Iowa state constitution as applied to lesbian couples.[160] Notably, the court declined to strike down the statute.[161] Instead, the court explained that they "will preserve [the statute] as to married opposite-sex couples and require the Department to apply the statute to married lesbian couples."[162] As the court noted with laser-like

152. *Id.*

153. *Compare In re* K.M.H., 169 P.3d 1025, 1041 (Kan. 2007) *with* Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007) *and* Kesler v. Weniger, 744 A.2d 794, 796 (Pa. Super. Ct. 2000).

154. *See In re* K.M.H., 169 P.3d at 1039.

155. *Id.* at 1033.

156. *Id.* at 1039.

157. *Id.*

158. Gartner v. Dep't of Pub. Health, 830 N.W.2d 335, 354 (Iowa 2013).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

precision, "[i]t is important for our laws to recognize that married lesbian couples who have children enjoy the same benefits and burdens as married opposite-sex couples who have children."[163] Common sense dictates that a gay man will never be in a marital relationship with the birth mother. The court's remarkable silence about gay men in relation to a parentage presumption law that "differentiates implicitly on the basis of sexual orientation" tacitly affirmed that in the Iowa universe of parental law, the gay father does not exist.[164]

Finally, the law's hostility toward fathers who do not have sexual intercourse with women is linked to the legacy of social antipathy toward homosexuality, particularly toward gay men, more generally.[165] Until the 1970s, homosexuality was regarded by the psychiatric profession as a form of psychopathy.[166] Gay men were believed to be unnaturally repulsed by women and attracted to men, and unable to control their deviant impulses.[167] At the same time, sodomy was a felony in many states.[168] Of particular relevance, gay men were widely equated with pedophiles, and thought to pose risks to children.[169] As Professor Erin Marie Meyer explains the persisting social negativity towards gay men as fathers, "[t]he problem with gay fathers is not merely that they defy sex role stereotypes but also that they are *gay*."[170]

C. Toward the "Virgin Parent": Gender-Neutrality and Plurality

The assumption that every ART participant is either an anonymous donor or half of a heterosexual married couple has left courts ill-equipped to address ART conflicts. As the court noted in *In re Paternity of M.F.*, the lack of legislative guidance for resolving sperm donor agreements has

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163. *Id.* at 353.

164. *Id.* at 352

165. *See* Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J. L. & HUMAN. 163, 170 (2008).

166. *Id.*

167. *Id.* at 211-12.

168. *See, e.g.*, *History of Sodomy Laws*, GAY & LESBIAN ARCHIVES OF THE PAC. NW (APR. 15, 2007), http://www.glapn.org/sodomylaws/history/history.htm.

169. This is still the case. *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 651 (2000).

170. *See* Meyer, *supra* note 23, at 527; *see also* Hollandsworth, supra note 2, at 184 ("The man who is both a homosexual and a father is an enigma in our society. The term 'gay father' is contradictory in nature. This is more a matter of semantics, however, as 'gay' has the connotation of homosexuality while 'father' implies heterosexuality. The problem lies in determining how both may be applied simultaneously to an individual who has a same-sex orientation, and who also is a parent.").

given the judiciary little more than basic contract law as a touchstone.[171] "[W]e are reluctant to set forth specific requirements with respect to such a contract's form and content," the court said.[172] "We add, however, that in view of the lack of statutory law and the paucity of decisional law in this area, parties who execute a contract less formal and thorough than this one do so at their own peril."[173]

To provide better guidance to courts, states must find faith in the "virgin parent." More specifically, states should disentangle gender from parentage presumptions.[174] In Arkansas, for example, the code specifies, "[a] child born or conceived during a marriage is presumed to be the legitimate child of both spouses."[175] The Arkansas code also provides for recognition of surrogacy agreements, and discusses scenarios in which the surrogate mother is married and unmarried, and where the intended parent or parents are either married or unmarried.[176] By transitioning away from gendered parentage presumptions that assume a heteronormative family, these laws demonstrate support and openness toward alternative arrangements, and offer men participating in ART a fairer framework in which to claim the rights and duties of parenthood. Other states with similar gender-neutral language include Georgia, Nebraska, New York, and Washington.[177]

Welcoming the "virgin parent" into parentage frameworks may also persuade lawmakers to recognize that a child can have a plurality of parent figures, and that legal recognition of all of these relationships may be in the child's best interest. [178] The dominant legal assumption that every child requires precisely two parents is an extension of the heteronormative belief that these two individuals will always be a birth mother and her partner. Creatively expanding our ideals of a "normal" family to include plural mothers and fathers will foster fairness toward all individuals who seek to

171. *In re* M.F., 938 N.E.2d 1256, 1260 (Ind. Ct. App. 2010).

172. *Id.* at 1262.

173. *Id.*

174. *See, e.g.*, Jeffrey A. Parness & Zachary Townsend, *Procreative Sex and Same Sex Parents*, 13 GEO. J. GENDER & L. 59, 613-14 (2012).

175. ARK. CODE ANN. § 28-9-209(a)(2) (2013).

176. Notably, the Arkansas code recognizes that an unmarried biological father may be the presumed parent of a child conceived through such an agreement. *Id.*

177. GA. CODE ANN. § 19-7-20(a) (West 2013); NEB. REV. STAT § 42-377 (West 2013); N.Y. DOM. REL. LAW § 24(1) (McKinney 2013); WASH. REV. CODE ANN § 26.26.116(1)(a) (West 2013).

178. *See* Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage,*15 AM. U. J. GENDER SOC. POL'Y & L. 379 (2007); *see also* Cahill, *supra* note 21, at 49.

become parents through ART. More importantly, this approach will ensure that a parenthood inquiry remain focused on achieving the outcome that is best for the child, rather than one preoccupied with the details of the child's conception.[179]

Over two thousand years after the story of a sexless conception sparked our imaginations, the law of paternity continues to favor fatherhood for men who conceive through vaginal intercourse. As a result, gay men who conceive through ART must overcome the unjust presumption that fatherhood is a privilege of heterosexuality. Courts and legislators should discard heteronormative presumptions of parentage and should become inclusive of nontraditional families. The law of paternity in ART can then begin to reflect the basic truth that fatherhood begins not with the desire for sexual intercourse, but with the yearning to raise a child.

179. *See* Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARKE L. REV. 949, 952-53 (2009) ("Under the majority of state artificial insemination statutes, the question asked is, "Has the man consented to be a legal parent by written agreement or by his actions? The question that should be asked is: "Is it in the best interest of the child that the man be the legal parent?").