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## Credit for Motherhood

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## CREDIT FOR MOTHERHOOD\*

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*This essay builds on prior work exploring the impact of consumer lenders who sell credit products for assisted reproduction and adoption. After reviewing some basic attributes of the parenthood lending market, the essay discusses how not-for-profit lenders promote traditional conceptions of motherhood and the division of carework in ways that credit discrimination laws were not designed to address. The essay also articulates some incentives of for-profit lenders to sell motherhood and potential implications for women who are ambivalent about becoming parents.*

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### INTRODUCTION

American households are renowned for financing access to many goods and services with consumer debt.<sup>1</sup> The goods and services they acquire on credit include human eggs, sperm, alternative insemination, in

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1. See Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behaviorialism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1534 (2005) ("Modern day consumers do not just purchase household realty, goods, and services; they purchase them with borrowed funds."); Brian K. Bucks et al., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, 95 FED. RES. BULL., Feb 2009, at A1, A37, available at <http://www.federalreserve.gov/pubs/bulletin/2009/pdf/scf09.pdf> (noting that in 2007, the leverage ratio, which is the ratio of the sum of the debt of all American families to the sum of their assets, was 14.9%).

vitro fertilization (“IVF”), and adoption domestically or abroad.<sup>2</sup> In addition to offering general-purpose loans and credit cards, well-known financial institutions and smaller lenders in the United States and abroad have introduced specialty credit products tailored to assisted reproduction and adoption.

Scholars of the parenthood market rarely give sustained attention to lenders. But they should. A steady supply of loan products could affect this market in various ways. In other work, I have argued that relatively unregulated for-profit lending could be a progressive force to normalize parenting for same-sex couples and other non-traditional families.<sup>3</sup> This essay begins to consider a potentially more gendered dimension of consumer finance, particularly for heterosexual married women.<sup>4</sup> Specifically, I introduce the claim that lenders may seek to influence parenting style, carework allocation, or even a woman’s decision about whether to be a mother at all.

The essay first considers a not-for-profit entity that extends credit for adoption but identifies stay-at-home motherhood as a loan criterion.<sup>5</sup> This example reveals that private loans not only can serve as tools to facilitate or reward gendered labor divisions, but can do so in a way that confounds the framework of credit discrimination laws such as the Equal Credit Opportunity Act (“ECOA”) designed to address the opposite problem: lenders’ discrimination against married women based on the assumption that they would stop earning income.

The essay next observes a synergy between maternalism and commercial goals in the for-profit consumer lending context. First, financing family expansion can be a means to build loyalty to a lender’s

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2. See Melissa B. Jacoby, *The Debt Financing of Parenthood*, LAW & CONTEMP. PROBS., Summer 2009, at 147, 161.

3. *Id.* at 169–75. The “parenthood market” refers to the market for assisted reproduction and adoption services. See *infra* Part I, providing background on the existence of this market, key participants, and the role of debt financing.

4. Scholars have identified business, corporate, or commercial law issues that disproportionately impact women, see Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1136–43 (2005) (discussing the news media framing of bankruptcy issues through the lens of women and children interests); Elizabeth Warren, *What is a Women’s Issue? Bankruptcy, Commercial Law, and other Gender-Neutral Topics*, 25 HARV. WOMEN’S L.J. 19, 25 (2002), or that can be usefully analyzed through the analytical prism of feminism, see LORNA FOX, RECONCEPTUALISING HOME 365–66 (2007) (discussing feminist analysis of foreclosure laws in the United Kingdom); Theresa A. Gabaldon, *Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law*, 5 TEX. J. WOMEN & L. 1, 3, 36 (1995); Kristen Brandser Kalsem, *Bankruptcy Reform and the Financial Well-Being of Women; How Intersectionality Matters in Money Matters*, 71 BROOK. L. REV. 1181, 1186 (2006).

5. See *infra* note 45 and accompanying text.

consumer brand. Second, literature from other disciplines reveals consumption patterns associated with bearing and raising children, especially for women who become mothers later in life, which would be attractive to the sellers of consumer financial products.<sup>6</sup> These patterns add to lenders' motivations to promote commercial goals by selling motherhood to adult women and using a conception of priceless infants, children, and family life.

To at least some extent, the synergy between maternalism and commercial goals may incentivize lenders and other market participants to distort decision-making about parenthood. Primarily, the distortion could increase the price women are willing to pay to overcome fertility barriers. This claim is consistent with a literature positing that lenders regularly take advantage of a constellation of consumer cognitive errors with these kinds of goals in mind.<sup>7</sup> Extrapolating further, the distortion may expand the pool of women who will become mothers at all. Legal scholarship relating to assisted reproduction or adoption tends to assume that women have a fixed preference for motherhood before they begin to shop for these services. Although this often may be true, it is not universally true. Social science research suggests that women hold a spectrum of attitudes about motherhood and finds variation in those attitudes over time, presumably in response to various internal and external factors. Furthermore, lack of certainty does not prevent women from exploring assisted reproduction and adoption. This creates additional opportunities for lenders and other players in the parenthood market to ratchet up the demand for motherhood.<sup>8</sup>

Part I offers background on the parenthood market and specialty loan products. Part II discusses the ways in which not-for-profit lenders use low-cost lending to promote traditional motherhood and carework ideals and the capacity of sex discrimination credit laws to encompass such practices. Part III unpacks some motivations of for-profit lenders to promote motherhood and the impact of these motivations in light of a dynamic model of motherhood preferences.

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6. *See infra* Part III.

7. *See* Block-Lieb & Janger, *supra* note 1, *passim*.

8. *See infra* Part III, discussing lenders' motivations and the research on motherhood ambivalence.

I. BACKGROUND: DEBT AND THE PARENTHOOD MARKET<sup>9</sup>

Like the president's father, my own parents came to this country from a distant land. When they arrived in Baton Rouge, my mother was already 4-1/2-months pregnant. I was what folks in the insurance industry now call a "pre-existing condition." To find work, my dad picked up the yellow pages and started calling local businesses. Even after landing a job, he could still not afford to pay for my delivery, so he worked out an installment plan with the doctor. Fortunately for me, he never missed a payment.<sup>10</sup>

The quote above comes from a broadly televised speech delivered by Louisiana Governor Bobby Jindal. The last sentence of this remark seems to be suggesting that he, as an infant, could have been "repossessed" by the hospital had his father defaulted on the bill. Governor Jindal's joke reflects reality in some other parts of the world to the extent that birth produces debt as well as babies. For example, some hospitals and village midwives in Bali refuse to relinquish newborn babies to parents until they are compensated for their services.<sup>11</sup> Such stories are potent reminders that even routine reproduction and birth produce debtor-creditor problems, including closer to home.<sup>12</sup>

This paper more specifically addresses debtor-creditor relations arising in a discrete subset of childbirth and family expansion: the market for assisted reproductive and adoption services for people with medical or

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9. This essay generally uses the term "parenthood market" instead of baby market or baby business, adopting Martha Ertman's terminology, to emphasize the acquisition of status. See Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 7-15 (2003). This terminology avoids the issue of whether children are themselves objects of consumption because that dimension of the debate is not critical to my analysis and has other ramifications for the debates about carework. Compare MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH*, at xiv, xv, 42-43 (2004), with Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 188-91 (2001).

10. Bobby Jindal, Governor of Louisiana, Response to President Obama's Address to a Joint Session of Congress (Feb. 24, 2009) (transcript available at <http://www.cnn.com/2009/POLITICS/02/24/sotn.jindal.transcript/>).

11. The director of a nonprofit midwifery practice in Bali reported to a colleague of mine in an interview that one of the practice's prenatal patients used a midwife in her village for the actual birth of her twins. When the mother was unable to remit the full fee to the village midwife, that midwife gave her only one of the babies and sold the other. Miandering: Notes from the Road, <http://miandering.com/2009/08/03/greetings-and-new-photos-from-bali/> (Aug. 3, 2009). That infant, who had been sent to the island of Java, was returned to the biological parents only after human rights lawyers got involved. *Id.*

12. See Susan D. Kovac, *Judgment-Proof Debtors in Bankruptcy*, 65 AM. BANKR. L.J. 675, 710-11 (1991) (discussing this point).

structural fertility barriers.<sup>13</sup> People from across the ideological spectrum often maintain that neither babies nor parenthood should be subject to commercial exchange, but scholars increasingly recognize that such a market already exists: parties can buy and sell fertility treatments, surrogacy, and adoption services as well as eggs and sperm.<sup>14</sup> This parenthood market is a controversial example of the blending of family and commerce. The use of debt for assisted reproduction recently received global notoriety when a seventy-seven-year-old man, who desired a male heir, borrowed money on a credit card for IVF, which resulted in his seventy-year-old wife bearing twins in India.<sup>15</sup>

In the domestic context, the cost of fertility treatments and adoption can be monumental for average American households.<sup>16</sup> The most commonly discussed financing for fertility treatments—health insurance—remains both controversial and relatively rare.<sup>17</sup> The Internal Revenue Code offers tax credits for adoptions and deductions for medical interventions,

13. Structural infertility includes people who seek to become parents without heterosexual intercourse. Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 24 (2008).

14. Scholars from a variety of disciplines have observed the existence of a commercial parenthood market, or segments of it. *E.g.*, ELAINE TYLER MAY, *BARREN IN THE PROMISED LAND* 232 (1995); CAROLYN M. MORELL, *UNWOMANLY CONDUCT* 10 (1994); DEBORA L. SPAR, *THE BABY BUSINESS*, at xi (2006); Ertman, *supra* note 9, at 22; Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 210 (2009). For examples of arguments against full commodification in this market, see CHRISTINE OVERALL, *ETHICS AND HUMAN REPRODUCTION* 51–53 (1987); BARBARA KATZ ROTHMAN, *THE TENTATIVE PREGNANCY* 10 (1986); MARY LYNDON SHANLEY, *MAKING BABIES, MAKING FAMILIES* 94, 150 (2001).

15. According to news reports, the credit card debt was in addition to spending his life savings and selling his farm animals. Mail Foreign Service, *World's Oldest Mother Gives Birth to Twins at 70*, MAIL ONLINE, July 5, 2008, <http://www.dailymail.co.uk/news/worldnews/article-1031722/Worlds-oldest-mother-gives-birth-twins-70.html> (last visited April 9, 2010).

16. SPAR, *supra* note 14, at 59, 92, 96, 179 (providing statistics for costs of fertility treatments); *see also* Jacoby, *supra* note 2, at 149–51 (discussing range of costs). Artificial or alternative insemination can cost over one thousand dollars for the first round of treatment and potentially thousands more in monthly costs; one round of IVF treatment could be over six thousand dollars for privately insured families; gestational surrogacy costs range from thirty thousand dollars to one hundred and twenty thousand dollars; and adoptions are typically thirty thousand dollars or more. *Id.*

17. Many insurers do not offer coverage for various kinds of fertility treatments. Lucie Schmidt, *Effects of Infertility Insurance Mandates on Fertility*, 26 J. HEALTH ECON. 431, 432 (2007). Fewer than a third of states mandate that health insurance plans offer fertility coverage or explicitly require that they cover some fertility services, and the laws with some requirements vary widely. Nat'l Conference of State Legislatures, *State Laws Related to Insurance Coverage for Infertility Treatment* (2009), <http://www.ncsl.org/programs/health/50infert.htm> (last visited Mar. 21, 2010). For at least twenty years, groups such as RESOLVE have lobbied to conceptualize infertility as a disease or its treatment as a medical necessity, with the goal of insurance plans picking up more of the cost and/or to encourage states to mandate some coverage. *See* Jacoby, *supra* note 2, at 152, n.27 (citing sources discussing such lobbying efforts).

but these incentives do not make up for an absence of up-front cash.<sup>18</sup> Parenthood market providers may prefer not to directly extend credit.<sup>19</sup> Adoption agencies generally will not complete the legal process if fees have not been fully satisfied in advance.<sup>20</sup> Like other medical providers, fertility clinics face considerable financial risk if they perform services without early receipt of payment.<sup>21</sup>

The news media, case law, and some scholarly work reveal a myriad of financing techniques.<sup>22</sup> In addition to generic credit cards, installment loans, and mortgages, earlier research unearthed approaches such as buying money-back guarantees or bundled packages of fertility treatments, borrowing money from friends and family, depleting savings and retirement and flexible medical spending accounts, pawning or selling property, sharing prescription drugs, receiving discounted fertility services in exchange for “donating” extra fertilized eggs, participating in clinical trials, joining the military, taking additional jobs, encouraging friends and

18. The federal tax code provides an adoption tax credit that phases out for wealthier families. 26 U.S.C. § 23(b)(1) (2006). Also, medical expenses are deductible from federal tax obligations if they exceed 7.5% of an itemizing taxpayer’s adjusted gross income. 26 U.S.C. § 213(a) (2006). An Internal Revenue Service publication condones using this deduction for fertility treatments, including IVF and temporary storage of eggs or sperm. DEP’T OF TREASURY OF THE INTERNAL REVENUE SERV., PUBLICATION 502: MEDICAL AND DENTAL EXPENSES 8 (2009), available at <http://www.irs.gov/pub/irs-pdf/p502.pdf>.

19. Jacoby, *supra* note 2, at 161.

20. For example, *Adoptive Families* magazine explains that an agency will typically require the entire child placement fee due before placement of the child or birth of the baby. See ADOPTIVE FAMILIES, ADOPTION GUIDE 58 (2009), available at <http://www.theadoptionguide.com>.

21. Melissa B. Jacoby & Mirya R. Holman, *Managing Medical Bills on the Brink of Bankruptcy*, 10 YALE J. HEALTH POL’Y L. & ETHICS (forthcoming 2010) (manuscript at 4, on file with the North Carolina Law Review) (describing medical bill management techniques that enable families on the verge of bankruptcy to relieve their doctors of bad debt). Medical providers in most non-emergency contexts are free to avoid becoming creditors by requiring payment of self-pay obligations in advance. An extensive medical practice management literature instructs doctors and health care facilities to structure interactions with patients in ways that encourage immediate payment. Encouraging payment entails a variety of strategies, from the physical set-up of offices, to scripts that office workers should use when talking to patients, and even the color of the stationery used for patient correspondence. Fertility clinics may differ from other medical providers in some important ways but they do seem to share the intent to avoid becoming creditors of their customers. Charis Cussins, *Producing Reproduction: Techniques of Normalization and Naturalization in Infertility Clinics*, in REPRODUCING REPRODUCTION 72 (Sarah Franklin & Helena Ragoné eds., 1998) (reporting from clinic observation about how financial arrangements affect scheduling and treatment decisions); Jacoby, *supra* note 2, at 161. Hawkins’s recent survey of fertility clinic Web sites, in which most were silent on the question of direct credit for services, is consistent with this suspicion. Jim Hawkins, *Doctors as Bankers: Evidence from Fertility Markets*, 84 TUL. L. REV. (forthcoming 2010) (manuscript at 11), available at <http://ssrn.com/abstract=1435610> (“[O]nly 2 of 381 fertility clinic websites indicated that doctors were willing to extend credit to patients.”).

22. Jacoby, *supra* note 2, at 155–60.

family to shop through programs that dedicate percentages of purchases to adoption accounts, and engaging in fertility tourism—going overseas to get services more cheaply.<sup>23</sup> There are also (very isolated) examples of more illicit means, e.g., using false pretenses to charge in vitro fertilization to the credit card of an ex-fiancé, and a lawyer stealing from a client account, resulting in disbarment.<sup>24</sup>

Blending family and commerce even more, lenders and service providers market personal loans and credit products specifically tailored to assisted reproduction or adoption. While scholars have extensively debated the desirability of and foundations for regulation of assisted reproductive technology,<sup>25</sup> surrogacy,<sup>26</sup> and adoption,<sup>27</sup> the role of debt financing has received little more than passing mention by experts in the field. Furthermore, many researchers have studied the forces that encourage persistence in successive rounds of fertility treatments,<sup>28</sup> but even that research has not reflected the impact of ongoing credit access on these phenomena.<sup>29</sup>

The third parties offering specialty credit are a diverse lot. A bank in the nation of Lebanon claims to be the first lender worldwide to offer

23. Jacoby, *supra* note 2, at 157–58. Some approaches, such as diverting money that otherwise would be spent on luxury purchases, continue to be available only to the very wealthy. HELENA MICHIE & NAOMI R. CAHN, CONFINEMENTS: FERTILITY AND INFERTILITY IN CONTEMPORARY CULTURE 142–43 (1997).

24. *See, e.g.*, Colleen M. v. Fertility & Surgical Assocs. of Thousand Oaks, 132 Cal. App. 4th 1466, 1470 (Cal. Dist. Ct. App. 2005); Colorado v. Guyerson, 898 P.2d 1062, 1064 (Colo. 1995); Guyerson v. Colorado, 85 P.3d 1073, 1075 (Colo. 2004).

25. *See, e.g.*, Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1625 (2008); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 845–52 (2000).

26. *See, e.g.*, BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 229–39 (1989).

27. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION (1993).

28. CHARIS THOMPSON, MAKING PARENTS: THE CHOREOGRAPHY OF REPRODUCTIVE TECHNOLOGIES 94 (2005). Thompson's fieldwork in fertility clinics reveals the "lack of alternative operationalizations [to ultimately giving birth] and an epistemic culture based on statistics" about giving birth rather than coming to terms with not becoming a parent or pursuing adoption. *Id.* Thompson recounts how rare it was to find women who stopped treatment early without getting pregnant. *Id.* at 95, 99. Other scholars' work offers consistent observations. *See, e.g.*, MAY, *supra* note 14, at 224, 236–37; MICHIE & CAHN *supra* note 23, at 156–57 (exploring messages found in fertility self-help books that encourage increasingly invasive treatments as a "small price to pay for having a baby"); JUDITH S. MODELL, KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE 95 (1994); Deborah Gerson, *Infertility and the Construction of Desperation*, 19 SOCIALIST REV. 45, 59–60 (1989); Margarete Sandelowski, *Compelled to Try: The Never-Enough Quality of Conceptive Technology*, 5 MED. ANTHROPOLOGY Q. 29, 33 (1991).

29. For a discussion of reactions to sunk costs, see Block-Lieb & Janger, *supra* note 1, at 1550.



fertility loans at five percent interest.<sup>30</sup> But for-profit financial institutions and finance companies in the United States could not have been far behind. Examples of financing from the past few years include Capital One installment loans at up to 25.99% interest for unsecured installment fertility loans that were available through kiosks in doctors' offices, a Bank of America home equity loan for adoption, and smaller lenders that gave credit for fertility treatments as well as cosmetic surgery, hair loss reversal, and bariatric surgery.<sup>31</sup> More recently, some peer or social lending groups have included fertility loans along with credit for small businesses, cars, education, and debt consolidation.<sup>32</sup> Adoption agencies and fertility clinics also make arrangements with local banks.<sup>33</sup>

To generate a higher volume of business while managing their own risk, service providers have incentives to actively promote third-party credit arrangements.<sup>34</sup> Probably due to these credit distribution networks, little evidence has been found for method-neutral parenthood loans that might be available for fertility treatments *or* adoption; loan products appeared to be targeted toward one or the other.<sup>35</sup>

In the midst of the recent financial crisis, several major for-profit lenders ceased some of their specialty loan programs or stopped advertising

30. See, e.g., *A Different Loan for Lebanese Couples* (NPR radio broadcast, May 25, 2009), available at [http://marketplace.publicradio.org/display/web/2009/05/25/am\\_lebanese\\_fertility](http://marketplace.publicradio.org/display/web/2009/05/25/am_lebanese_fertility) (discussing First National Bank loans for fertility treatments and its earlier cosmetic surgery loans in light of pressure on women to reproduce shortly after marriage and Lebanon's infertility rate). For an example from South Africa, see First Health Finance, Covered Cosmetic Procedures, <http://www.fhf.co.za/covered-medical-procedures/> (last visited Jan. 18, 2010).

31. Jacoby, *supra* note 2, at 162 fig.1.

32. Lending Club, Fertility Treatment Loans, <https://www.lendingclub.com/public/fertility-treatment-loans.action> (last visited Jan. 3, 2010) (offering installment loans for fertility treatments for up to \$25,000).

33. Jacoby, *supra* note 2, at 165–67.

34. Hawkins, *supra* note 21 (manuscript at 4); see Jacoby, *supra* note 2, at 161–62. For a recent example, see Reproductive Science Institute of Suburban Philadelphia, Paying For Fertility Treatments, <http://www.rsiinfertilityblog.com/tag/special-loan/> (last visited Jan. 18, 2010) (listing specialty loans as among the options patients have successfully used to gain access to fertility treatments and that “won’t render you penniless” and noting that such loans “can help tremendously if you qualify”).

35. Jacoby, *supra* note 2, at 160. For discussions of factors that affect selection within the parenthood market, see BARTHOLET, *supra* note 27, at 64–67; Susan Freilich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 404; Anne Donchin, *Feminist Critiques of New Fertility Technologies: Implications for Social Policy*, 21 J. MED. & PHIL. 475, 487 (1996) (reviewing concerns arising when women prefer to start adoption process but husbands want to pursue fertility treatments due to biological child preference); Gerson, *supra* note 28, at 58–61. Of course, financing by itself cannot overcome some of the other risks and the aversion to the greater public intrusion and bureaucracy associated with adoption. See SHANLEY, *supra* note 14, at 80–81.

them.<sup>36</sup> But other for-profit lenders are seeking to fill any gaps.<sup>37</sup> For example, The World Egg Bank now offers loans for the purchase of human eggs and IVF and is expressly seeking to fill a perceived fertility credit void.<sup>38</sup> IntegraMed, already a significant player in the fertility industry, recently announced it will help market and distribute more consumer financial products.<sup>39</sup> Its new partner, Springstone Patient Financing, will extend credit for IntegraMed's package deals and IVF for loan amounts ranging from two thousand dollars to forty thousand dollars, repayable over eighteen to eighty-four months, with interest rates ranging between 5.99% and 17.99%.<sup>40</sup> In some instances, credit decisions are available "within seconds."<sup>41</sup>

In summary, both generic and specialty consumer credit markets aim to serve people who wish to overcome fertility barriers. The next two Parts address lenders' motivations that are relevant to the roles and goals of adult women.

## II. MISSION-ORIENTED NOT-FOR-PROFIT LENDERS

Diverging from the typical model of consumer lenders extending credit for a profit, some adoption lenders use low-cost lending to promote particular social missions. For example, some want to encourage the adoption of children of particular nationalities, ethnicities, racial identities,

36. Capital One, which was once the most prominent fertility lender, suspended its health care consumer finance products in spring of 2009. Hawkins, *supra* note 21 (manuscript at 14–15). However, it continues to offer installment loans that it touts as being available for any reason. Capital One Personal Loans, No Hassle Personal Loans, <http://www.capitalonehealthcarefinance.com/> (follow the links to "Loans" and then "Personal Loans") (last visited Mar. 21, 2010). The status of Bank of America's adoption loan program is less clear.

37. See, e.g., Health Care Finance, LLC, Our Process, <http://www.thirdfocus.com/process.html> (last visited Jan. 3, 2010); Health One Financial, *Patient Financing*, <http://www.healthone-financial.com> (last visited Jan. 11, 2010).

38. New Fertility Financing Program For Donated Eggs Fills Void Left by Capital One, [http://www.redorbit.com/news/health/1769872/new\\_fertility\\_financing\\_program\\_for\\_donated\\_eggs\\_fills\\_void\\_left/index.html](http://www.redorbit.com/news/health/1769872/new_fertility_financing_program_for_donated_eggs_fills_void_left/index.html) (last visited Oct. 14, 2009). The financing appears to be offered by the Home National Bank. See Egg Donor Recipient Financing, <http://www.theworldeggbank.com/financing.html> (last visited Oct. 16, 2009).

39. BioSpace Financial Content, <http://investor.biospace.com/biospace/?GUID=1065192&Page=MediaViewer&Ticker=INMD> (last visited Feb. 7, 2010); IntegraMed, Form 10-Q (quarterly period ending Sept. 30, 2009), [http://www.faq.s.org/sec-filings/091116/INTEGRAMED-AMERICA-INC\\_10-Q/](http://www.faq.s.org/sec-filings/091116/INTEGRAMED-AMERICA-INC_10-Q/) (discussing introduction of new consumer financial products after constricted credit climate led "leading patient financing firms to exit the market").

40. IntegraMed Fertility Network, Infertility and IVF Financing, <http://www.integratedfertility.com/inmdweb/content/cons/financing.jsp> (last visited Jan. 3, 2010).

41. *Id.*

disabilities, or ages.<sup>42</sup> Or, they might be trying to expand families that practice particular religions.<sup>43</sup>

Furthermore, some lenders implicitly or explicitly perpetuate traditional gender roles through their loan terms or stated preferences. In addition to loan applications that presume a single family name, with specified slots for “mother” and “father,” some loans seem conditioned on legal heterosexual marriage.<sup>44</sup>

Going even further, consider this excerpt describing loan criteria:

In allocating funds for loans from the general loan fund, factors that are important to the Board include: (a) spiritual maturity; (b) worldview; (c) the length and stability of the applicants’ marriage (but loans have been made to both young and old!); (d) church involvement; (e) philosophy of education; (f) *whether the mother works outside the home or is at home with the children (the Board prefers the mother to be home with the children, although loans have been made in certain cases to couples where both parents work outside the home)*; and (g) how much of their own money the

42. For a review of some loans dependent on child characteristics, see Jacoby, *supra* note 2, at 165–68. For example, see Adoption Financial Aid Resources, <http://www.chinesechildren.org/DownloadFiles/AdoptionFinancialAid.pdf> (last visited Feb. 7, 2010). To the extent these loans’ criteria produce controversy, it may be because they further contribute to the differential pricing of adoption of children. See, e.g., SPAR, *supra* note 14, at 179; Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 61–63 (2006).

43. One organization offers interest-free loans for adoption only to Jewish residents of Northern California. See, e.g., Hebrew Free Loan Home Page, <http://www.hflasf.org/> (last visited Apr. 9, 2010); Hebrew Free Loan, Types of Loans Available, <http://www.hflasf.org/loantypes.html> (last visited Apr. 9, 2010); Hebrew Free Loan, Overview of Our Loan Program, <http://www.hflasf.org/loanoverview.html> (last visited April 9, 2010). Applicants need third parties to co-sign or pledge collateral. Hebrew Free Loan, How to Apply for an HFLA Loan, <http://www.hflasf.org/loanapply.html> (last visited April 9, 2010). Others are available exclusively to observant Christians. See, e.g., The ABBA Fund, FAQ, <http://www.abbafund.org/faq.htm> (last visited Apr. 9, 2010); see also God’s Grace Adoption Ministry, Application for Financial Aid, <http://www.ggam.org/ggam.pdf> (last visited Apr. 9, 2010) (offering grants between one thousand dollars and four thousand dollars to married couples with incomes of sixty thousand dollars or less to put toward international adoption, reporting an average grant of two thousand dollars and asking applicants to give their Christian testimony); Lifesong For Orphans, Adoption Grants and Loans, <http://www.lifesongfororphans.org/images/downloads/GrantsLoansInfo.pdf> (last visited Apr. 9, 2010) (discussing matching grants, interest-free loans, and fundraising support); Lifesong for Orphans, Loan FAQ, <http://www.lifesongfororphans.org/images/downloads/LoanGrantFAQ.pdf> (last visited Apr. 9, 2010) (“The couple agrees to exercise financial stewardship responsibility to both Lifesong and to God, to use funds that God provides to them to reimburse Lifesong for the financial assistance that God graciously provided.”). These tend to require evidence of church involvement, spiritual testimony, and the content of intended religious teaching of adopted children. Lifesong for Orphans, Loan FAQ, *supra*.

44. Jacoby, *supra* note 2, at 167.

applicants are putting into the adoption (the Board prefers that the applicants have a large percentage invested in the adoption, but the Board has made loans in certain cases that covered almost all of the expenses due).<sup>45</sup>

Although it was not possible to find case law on point, one suspects a judge would not enforce a loan condition that required women to refrain from work for money outside the home or consider the failure to adhere to such a condition an actionable default. Of course, the lack of *ex post* formal enforcement of such a condition hardly renders it benign. The volume of loans that include such blatant role-reinforcing characteristics is probably small, and potential applicants are probably self-selected. Nonetheless, this example reveals the capacity of lenders and loan conditions to incentivize carework decisions and gender roles in ways not ordinarily contemplated in the literature.

The idea that a creditor prefers that a borrower refrain from earning income inverts conventional lending expectations. Once upon a time, if married women wanted income to count toward loan qualification, they might be required to promise to use birth control, and, in some documented instances, even promise to have an abortion in the event of pregnancy.<sup>46</sup> Sex-related credit laws were generated in part to protect women from discrimination by lenders who feared women would *stop* earning income, not that they would start.<sup>47</sup> Perhaps the criteria for colorable sex-related

45. The ABBA Fund, *supra* note 43.

46. Emily Card, *Women, Housing Access, and Mortgage Credit*, 5 SIGNS S215, S218 (1980) (reporting example); see also Laura Eckert, *Inclusion of Sexual Orientation Discrimination in the Equal Credit Opportunity Act*, 103 COM. L.J. 311, 336 n.4 (1998) (“[Prior to the enactment of the Equal Credit Opportunity Act,] women were forced to answer questions on credit application forms that addressed age, sex, race, religion, birth control practices, and childbearing intentions.”).

47. See Equal Opportunity Credit Act (“ECOA”), 15 U.S.C. § 1691 (2006); Card, *supra* note 46, at S217 (“[T]he spectre of pregnancy dominated the lending world’s view . . . to lenders, all women under the age of fifty were candidates for marriage and motherhood . . . . It was considered self-evident that as soon as a woman married, or shortly thereafter, she would drop out of the work force . . . .”); Eckert, *supra* note 46, at 314; Susan Smith Blakely, *Credit Opportunity for Women: The ECOA and Its Effects*, 1981 WIS. L. REV. 655, 660 (identifying as examples of credit discrimination creditors who seek information about birth control practices, apply “stricter standards to married applicants where the wife rather than the husband is the primary supporter of the family” and unwillingness to consider woman’s income if she is married). For a discussion of state antidiscrimination laws, see John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L. J. 1415, 1417 (1991) (discussing state laws that added the term “marital status” in the 1970s to lists of protected classes in anti-discrimination statutes). Facially, these kinds of loans also seem in tension with laws that prohibit discrimination on grounds like religion and marital status. *E.g.*, ECOA, 15 U.S.C. § 1691 (prohibiting discrimination based on religion and marital status, among other criteria); NAT’L CONSUMER LAW CTR., CREDIT DISCRIMINATION 48–53 (5th ed. 2009) (discussing prohibited bases for denying credit under ECOA). Lenders should fit the definition of “creditors” under

credit discrimination should be revisited over time to reflect a range of lender preferences and practices.

### III. FOR-PROFIT LENDERS

The maternalist interests of for-profit lenders, who lack a discrete *social* mission, take more work to unpack. Part I demonstrated that for-profit lenders have entered the world of specialty financing in ways that directly affect assisted reproduction and adoption. This Part posits that for-profit lenders have financial motivations to sell motherhood, including to women who are ambivalent about having children. Although I do not claim that lenders are uniquely situated to influence such decisions, they are part of a broader set of actors and commercial forces that shape public and private perceptions of motherhood and family.

First, family expansion is an effective site at which to build brand loyalty. Consider the “Going Home Barbie,” a Barbie doll holding an adopted Chinese baby.<sup>48</sup> Mattel distributes this doll without charge to adoptive parents staying in Guangzhou, China, at the five-star White Swan Hotel where Mattel also has set up a playroom.<sup>49</sup> Presumably, early association with Mattel products, particularly in this setting, encourages continued purchases of Mattel products. For-profit companies that sell fertility or adoption loans are no less interested in brand loyalty than companies that sell tangible items.<sup>50</sup> Most lenders who offer parenthood-

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ECOA, which is much broader than that in the Truth in Lending Act. See Elizabeth Schlitz, *The Amazing, Elastic, Ever-Expanding Exportation Doctrine and Its Effect on Predatory Lending*, 88 MINN. L. REV. 518, 534 n.64 (2004) (comparing the two definitions). These lending arrangements do not obviously fit within the “special purpose credit program” exception that would allow discrimination to meet “special social needs.” 15 U.S.C. § 1691(c)(3) (2006); 12 C.F.R. § 202.8(3) (2006); NAT’L CONSUMER LAW CTR., *supra*, at 64–66 (discussing the special program details). However, religious organizations may seek to make arguments that their activities are protected based on the Religious Freedom Restoration Act, or state-level equivalents. See Nelson Tebbe & Robert Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 491–92 (2010) (explaining origins of Religion Freedom Restoration Act (“RFRA”) and the state law versions).

48. Ann Anagnost, *Maternal Labor in a Transnational Circuit*, in CONSUMING MOTHERHOOD 139, 153 (Janelle S. Taylor, Linda L. Layne & Danielle F. Wozniak eds., 2004). There is no known ‘Ken doll’ equivalent to represent a father taking home an adopted baby.

49. Parents’ reactions to the doll have varied. Janice Page, *And Zoe Makes Three*, BOSTON GLOBE MAG., Oct. 3, 2004, (Magazine), at 18. Some are cynical about Mattel’s motivations, some have appreciated the cash from selling the Barbie doll, and some have been petitioning Mattel for the ability to buy the doll in the United States. Online Coming Home Barbie Petition, <http://www.petitiononline.com/chb/petition.htm> (last visited Aug. 1, 2009) (requesting that the doll be sold in the United States for all parents who adopted babies from China).

50. See, e.g., Nick Paumgarten, *The Death of Kings; Notes from a Meltdown*, NEW YORKER, May 18, 2009, at 48 (noting that the founder of Commerce Bank used his previous experience developing sites for one of the world’s most recognizable brands, McDonald’s restaurants, as the template to build brand loyalty in the banking business); see also *Banking Potential; Saving*, AGE

market financing offer additional credit products, whether the lender is a major financial institution or credit card bank, a local bank engaged in a variety of retail financial services, or a specialized health care lender.<sup>51</sup> A representative of the Lebanese bank that claims to have inaugurated the fertility loan has emphasized this brand loyalty point:

every time they look at their baby and the baby would smile, they will remember [First National Bank]. It's the best way to get into their life.<sup>52</sup>

Second, researchers who study material culture, sociology, and consumer marketing make clear that marketing to children, and families with children, is especially profitable. Households with children, in turn, face greater financial demands and are more likely to use expensive credit products to finance this consumption. Viviana Zelizer observes that the current cultural view of children as priceless obscures the important economic role that children play.<sup>53</sup> James McNeal, an expert on children's marketing, characterizes children and infants as independent economic agents who also strongly encourage parental consumption and then become future adult consumers.<sup>54</sup> McNeal uses the language of gestation—the “consumer embryo”—in discussing an infant's consumer development.<sup>55</sup>

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(Melbourne, Australia), Feb. 3, 2003 (discussing how children are the customers of the future and banks are working to develop brand loyalty); Gabriel Chen, *Banking on Kids*, STRAITS TIMES (Singapore), Aug. 9, 2008, available at [http://www.straitstimes.com/Breaking%2BNews/Money/Story/STIStory\\_266153.html](http://www.straitstimes.com/Breaking%2BNews/Money/Story/STIStory_266153.html) (last visited Apr. 9, 2010) (“[Banks in Singapore are] going the extra mile to win over children—in the full awareness that brand loyalty can start early and that these tykes will grow up to become their potential credit card and mortgage clients.”).

51. Jacoby, *supra* note 2, at 161–64 (providing examples of parenthood lenders who sell other credit products).

52. *A Different Loan for Lebanese Couples*, *supra* note 30; cf. Franke, *supra* note 9, at 189 (discussing MasterCard making Martina Navratilova a spokesperson in the hopes of drawing more gay and lesbian card users).

53. Lydia Martens, Dale Southerton & Sue Scott, *Bringing Children (and Parents) into the Sociology of Consumption*, 4 J. CONSUMER CULTURE 155, 162 (2004) (expressing concern about children's invisibility in theories of consumption); Viviana Zelizer, *Kids and Commerce*, 9 CHILDHOOD 375, 391 (2002) (discussing child as “consumer, producer and distributor . . . [and] engaged actively in bargaining, contesting, and transforming their own relations with the economy”); *id.* at 392 (discussing rise in childrens' participation in shopping measured by both dollar value and time expended). See generally VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD; THE CHANGING SOCIAL VALUE OF CHILDREN* (1985) (discussing the evolution of the economic and social value of children).

54. JAMES U. MCNEAL, *THE KIDS MARKET; MYTHS AND REALITIES* 29 (1999) (describing how children will make and influence more purchases than any other age group); see DANIEL THOMAS COOK, *THE COMMODIFICATION OF CHILDHOOD; THE CHILDREN'S CLOTHING INDUSTRY AND THE RISE OF THE CHILD CONSUMER* 67 (2004); Martens et al., *supra* note 53, at 159 (discussing problems with oversimplifying ways in which infants and children participate in and influence consumption patterns: “indeed, a great deal of consumption takes place on behalf of

Children directly and indirectly stimulate hundreds of billions of dollars of consumer spending.<sup>56</sup> “[H]ouseholds with school-aged children outspend households without children by at least one-third. Households with children spend around 40 percent more on apparel, 35 percent more on entertainment, and 20 percent more on personal-care products.”<sup>57</sup> Historian Elaine Tyler May cites post-World War II references to:

business men . . . who see in each newborn child a consumer of automobiles and handkerchiefs, electricity and sugar-cured hams, fountain pens and woolen blankets.<sup>58</sup>

Even in the early twentieth century, retailers understood the importance of “Johnny and his nickel” as a link to more spending power from his family.<sup>59</sup> Challenging the idea of “purely oppressive markets

children still to be born and babies and toddlers . . .”); *id.* at 162 (expressing concern about children’s invisibility in theories of consumption).

55. MCNEAL, *supra* note 54, at 37 (“[T]he consumer embryo begins to develop during the first year of existence, at first slowly, and then very rapidly until it becomes a bona fide functioning consumer at around 8 or 9 years of age.”); *id.* at 39–40 (“[F]oundations of childrens’ consumer behavior patterns are constructed before they take their first steps.”); *see also* JULIET B. SCHOR, *BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE* 19 (2004) (“Kids can recognize logos by eighteen months, and before reaching their second birthday, they’re asking for products by brand name. . . . Upon arrival at the schoolhouse steps, the typical first grader can evoke 200 brands.”).

56. *See* DAVID BUCKINGHAM, *AFTER THE DEATH OF CHILDHOOD: GROWING UP IN THE AGE OF ELECTRONIC MEDIA* 65 (2000) (discussing substantial increases in the proportion of household income in the United Kingdom devoted to children and products overwhelmingly purchased only by households with children present, and perceiving this as evidence of a perception of children as independent consumers rather than purely conduits to parents); MCNEAL, *supra* note 54, at 86 (noting that children directly influence over \$187 billion of parents’ purchases annually and indirectly influence at least \$300 billion more); SCHOR, *supra* note 55, at 24 (reporting survey results in which parents overwhelmingly reported that even young children have overwhelming influence on purchases of food, videos, books and substantial influence on restaurants, clothes, health and beauty products); *id.* at 11 (“Children have become . . . the link between advertisers and the family purse”); Franke, *supra* note 9, at 192 (discussing extensive marketing toward children as part of critique of argument that children are public goods).

57. MCNEAL, *supra* note 54, at 87.

58. MAY, *supra* note 14, at 82 (citing company president); *see also* Gary Cross, *Wondrous Innocence: Print Advertising and the Origins of Permissive Child Rearing in the U.S.*, 4 *CONSUMER CULTURE* 183, 187 (2004) (giving other historical examples of advertising agencies understanding children as “portals to the new world of consumption by their natural desires” with ads emphasizing that kids “naturally knew what was best” in terms of product selection); *id.* at 190 (discussing ways in which advertisement of new consumer products emphasized their ability to “ease the often strained relations with their children”); E. Melanie DuPuis, *The Body and the Country: A Political Ecology of Consumption*, in *NEW FORMS OF CONSUMPTION: CONSUMERS, CULTURE, AND COMMODIFICATION* 131, 148 (Mark Gottdiener ed., 2000) (discussing how the “healthy, happy child” became the way in which milk was sold at the turn of twentieth century).

59. *See* COOK, *supra* note 54, at 64 (discussing how certain retailers found health and survival of children economically beneficial); *id.* at 123 (discussing how after baby boom,

which invade childhood,”<sup>60</sup> Cook instead focuses on the “dynamic interplay between constructions of childhood, expressions of children’s desire as reported by merchants and others, and the interests and problems of those creating an industry through time.”<sup>61</sup>

The women studied in some contemporary social science research projects distinctly used consumption to define themselves and relations to their children and society,<sup>62</sup> starting well before a baby arrived.<sup>63</sup> According to Daniel Miller, consumption skills are part and parcel of women’s identification as mothers, who “tend to channel all of their knowledge and ability as consumers into the task of shopping for the baby.”<sup>64</sup> Mother and baby are constructed through goods, gifts, and material culture.<sup>65</sup> Barbara

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“[b]abies and business were virtually equated.”); *id.* at 144; Linda L. Layne, *Making Memories: Trauma, Choice, and Consumer Culture in the Case of Pregnancy Loss*, in CONSUMING MOTHERHOOD 129 (Janelle S. Taylor, Linda L. Layne & Danielle F. Wozniak eds. 2004) (discussing how Disney is especially good at capturing idea of family “memory making” through consumption, and finding over 1,000 references to memories on Disney’s website); *see also* Martens et al., *supra* note 53, at 170 (discussing awareness of parents that they are creating memories for children through consumption patterns).

60. *See* COOK, *supra* note 54, at 122.

61. *Id.* at 144. Cook’s book contends that “markets are indispensable to the making of social persons in the ongoing consumer culture of childhood and, indeed, in consumer culture at large.” *Id.* This is distinct from a more purely exploitive model of consumption. For arguments that children define themselves in part through consumption, *see* WILLIAM A. CORSARO, *THE SOCIOLOGY OF CHILDHOOD* 112 (1997) (exploring children’s use of toys or products unappealing to adults to exert power over adults); BARRIE GUNTER & ADRIAN FURNHAM, *CHILDREN AS CONSUMERS: A PSYCHOLOGICAL ANALYSIS OF THE YOUNG PEOPLE’S MARKET* 43 (1998) (discussing children’s powerful relationship with objects and role of material possessions to self-identity).

62. Nelson-Rowe has described the ritual of toy selection in the establishment of parental identity more generally. Shan Nelson-Rowe, *Ritual, Magic, and Educational Toys: Symbolic Aspects of Toy Selection*, in TROUBLING CHILDREN: STUDIES OF CHILDREN AND SOCIAL PROBLEMS 117, 128 (Joel Best ed., 1994). As the text in this Part suggests, however, scholars often speak specifically about mothers.

63. For example, a seller of maternity clothing advertised in its window “motherhood sold here—hot deals.” Destination Maternity, in Philadelphia, Pa. (Sept. 2009).

64. Daniel Miller, *How Infants Grow Mothers in North London*, 14 THEORY, CULTURE & SOC’Y 67, 71 (1997); *id.* at 78 (discussing circumstances under which mothers use consumption to portray their children as projection of their better selves).

65. Alison J. Clarke, *Maternity and Materiality* “Becoming a Mother in Consumer Culture,” in CONSUMING MOTHERHOOD, *supra* note 59, at 55, 56 (“Linda Layne . . . maintains it is through the accumulation of goods and gifts pertaining to a new child, most often initiated prior to birth, that a baby and mother are socially constructed.”); *id.* at 58 (“[O]ther research . . . reveal[s] the significance of material culture as a key means through which mother and child are constituted and how ideologies surrounding mothering are bound to, and enacted through, specific images and conglomerations of goods.”); Linda L. Layne, *Making Memories: Trauma, Choice, and Consumer Culture in the Case of Pregnancy Loss*, in CONSUMING MOTHERHOOD, *supra* note 59, at 122, 134 (“[W]omen and their social networks employ consumer goods during the course of a pregnancy to begin the process of socially constructing their ‘fetus’ as ‘baby’ and themselves as



Katz Rothman characterizes motherhood as a series of consumer choices and offers examples of the expressive function of various consumption patterns.<sup>66</sup> The introduction to the book *Consuming Motherhood* closely connects the practice of motherhood with having and buying:

The relationship between motherhood and consumption is, however, far more than merely a theoretical question—it is a vital matter with which ordinary people struggle on a daily basis: What must I (and what *can* I) do and have and buy in order to properly love, value, educate, nurture, provide for, raise—in a word, *mother*—my child(ren)?<sup>67</sup>

The consumption patterns of women in their mid-to-late thirties are of particular appeal to the producers of consumer products, including loans. In explaining the influence that children exert on household consumption, Gunter and Furnham observe that the “tendency in many homes to postpone having children until later often means that when children do arrive they are indulged more.”<sup>68</sup> According to McNeal, “Many parents, particularly those with a college education, postpone having children until they have launched careers and reached a certain level of financial security. By the time children arrive, they are the object of substantial monetary attention.”<sup>69</sup> Although greater financial security might reduce the demand for loans to some extent, the potential profitability of older parents dovetails with a major source of customers for the parenthood market.

So far, this discussion has sought only to illustrate how the promotion of motherhood is consistent with the commercial goals of consumer lenders and providers of many other consumer goods and services. An assessment of the normative and regulatory implications is beyond the scope of this symposium contribution. However, a few observations about why lenders’ motivations matter are in order.

Early feminist reactions to assisted reproduction reflected concern that these new technologies would increase the pressure on women to be

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‘mother.’ It is clear that mothers and members of their social networks use a great deal of care in choosing which items will be their baby’s first possessions.”).

66. BARBARA KATZ ROTHMAN, *WEAVING A FAMILY: UNTANGLING RACE AND ADOPTION* 39, 48–49 (2005).

67. Janelle S. Taylor, *Introduction* to *CONSUMING MOTHERHOOD*, *supra* note 59, at 12. *See generally* MORELL, *supra* note 14, at 10 (“Advertisers sell women’s mothering along with designer diapers, orange juice, automobile tires, and airline companies.”).

68. GUNTER & FURNHAM, *supra* note 61, at 52–54.

69. MCNEAL, *supra* note 54, at 78; *see also* ROTHMAN, *supra* note 66, at 39 (giving an example of an older new mother and experiences with material consumption on behalf of a child).

mothers.<sup>70</sup> By contrast, recent writings about assisted reproduction in the legal scholarship seem less likely to question or critique a commitment to motherhood by women who seek services.<sup>71</sup> In *Theorizing Yes*, Katherine Franke challenged feminist legal scholars to more critically examine the assumption that most women will become mothers.<sup>72</sup> Franke observed that “[r]eproduction has been so taken for granted that only women who are *not* parents are regarded as having made a choice—a choice that is constructed as nontraditional, nonconventional, and for some, non-natural.”<sup>73</sup> Franke called on legal feminists to “consider the ways in which repronormative forces affect women’s child-bearing and raising ‘choices,’ just as (hetero)sexuality has come to be understood as both compulsory and ineluctably the product of heteronormative forces.”<sup>74</sup> Yet, notably, Franke’s paper was directed not to debates about assisted reproduction, but to debates about carework.<sup>75</sup>

70. OVERALL, *supra* note 14, at 159; *see also* Rebecca Albury, *Who Owns the Embryo?*, in TEST-TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD? 54, 57–58 (Rita Arditti, Renate Duelli Klein & Shelley Minden eds., 1984) [hereinafter TEST-TUBE WOMEN] (“The desperation of these women who cannot meet the cultural definition of feminine womanhood by becoming mothers is accepted by medical researchers, ethicists and law reformers as unproblematic.”); Janice Raymond, *Feminist Ethics, Ecology, and Vision*, in TEST-TUBE WOMEN, *supra*, at 427, 434 (“What the new reproductive technologies do is to give a scientific and therapeutic boost to female adaptation, thereby reinforcing women’s oppression”); Robyn Rowland, *Reproductive Technologies: The Final Solution to the Woman Question?*, in TEST-TUBE WOMEN, *supra*, at 356, 357 (discussing ways in which society encourages women to desire motherhood).

71. *See* Hawkins, *supra* note 21, (manuscript at 29) (“[O]nly 2% of married women voluntarily make the choice to be childless.”). Although Hawkins does not cite it directly, the original source of this statistic appears to be a very brief article from over twenty years ago, Patricia Schroeder, *Infertility and the World Outside*, 49 FERTILITY & STERILITY 765 (1988), which cites the statistic without explanation or further time parameters. Hawkins cited a student law review note, Lisa M. Kerr, Note, *Can Money Buy Happiness? An Examination of the Coverage of Fertility Services Under HMO Contracts*, 49 CASE W. RES. L. REV. 599 (1999), which in turn cited a student comment, Melissa O’Rourke, Comment, *The Status of Infertility Treatments and Insurance Coverage: Some Hopes and Frustrations*, 37 SAN DIEGO L. REV. 343 (1992), which cited the Schroeder piece. I review this history because it illustrates how conceptions about women’s attitudes toward motherhood get perpetuated in some legal literature.

72. Franke, *supra* note 9, at 184.

73. *Id.* at 185.

74. *Id.* at 197. Often paired with a discussion of Franke’s article, Mary Anne Case’s article, *How High the Apple Pie?*, provides illustrations of the impact of carework subsidies and of making children the exclusive gateway to benefits on women who are not mothers. 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, 1756–58 (2001).

75. For important discussions of the carework debate, *see, e.g.*, FINEMAN, *supra* note 9, at 43; *see also* Maxine Eichner, *Dependency and the Liberal Polity: On Martha Fineman’s The Autonomy Myth*, 93 CAL. L. REV. 1285, 1298 (2005) (describing these scholars as seeking “to disrupt the persistent association of women with mothering” and analyzing this position’s contribution to debates about carework); Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST.

Not all women are mothers or wish to be.<sup>76</sup> Research from other disciplines reveals, however, that women fall along a spectrum in their level of certainty about motherhood and that they move within the spectrum over time.<sup>77</sup> Married women without children are more likely than men to be “postponers” of motherhood to the outside world, meaning that they “become permanently childless after a series of delays,” which can be contrasted with “early articulators” of an intent not to become a parent.<sup>78</sup> For postponers, “becoming childless” is more of a process than a single

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U. L. REV. 1, 64–69 (2005) (discussing and articulating limitations of “nonmaternalist” feminist legal scholarship).

76. For example, Franke cites census statistics reporting in 2000 that nineteen percent of women will not have borne children by their fortieth birthday, although they may have become mothers through adoption or other channels. Franke, *supra* note 9, at 184 n.11; *see also* Ione Y. DeOllas & Carolyn A. Kapinus, *Aging Childless Individuals and Couples: Suggestions for New Directions in Research*, 72 SOC. INQUIRY 72, 72 (2002) (citing Irene Thomas’s prediction that about a fifth of women born between 1956 and 1972 would not become mothers). The proportion of non-mother women who are legally married is smaller, perhaps because children continue to be a primary expected goal of marriage, *id.*, although the idea of companionate marriage enjoyed increased popularity at various points in history, *see* MAY, *supra* note 14, at 89 (discussing the 1920s).

77. For discussions of motherhood ambivalence from various disciplinary perspectives, *see*, e.g., MAY, *supra* note 14, at 14; JANET RADCLIFFE RICHARDS, *THE SCEPTICAL FEMINIST: A PHILOSOPHICAL ENQUIRY* 104 (1980) (suggesting spectrum of desire to be a mother to children in discussion of whether state can or should incentivize child-rearing); Gayle Letherby, *Other Than Mother and Mothers as Others: The Experience of Non-Motherhood in Relation to ‘Infertility’ and ‘Involuntary Childlessness’*, 22 WOMEN’S STUD. INT’L F. 359, 365 (1999); Gayle Letherby & Catherine Williams, *Non-Motherhood: Ambivalent Autobiographies*, 25 FEMINIST STUD. 719, 720 (1999); Carolyn Morell, *Saying No: Women’s Experiences with Reproductive Refusal*, 10 FEMINISM & PSYCHOL. 313, 316 (2000) (discussing the “wavering ‘no’ ”); Maaret Wager, *Childless by Choice? Ambivalence and the Female Identity*, 10 FEMINISM & PSYCHOL. 389, 392–93 (2000) (describing herself as fitting three different models at different times: a “transitional” woman who is childless by delay, a “transformative” woman who makes a conscious choice not to be a mother, and a “traditional” woman who “grieve[s] the loss of imagined identities as mothers . . .”). *See generally* PEGGY ORENSTEIN, *WAITING FOR DAISY* (2007) (detailing transition from initial lack of interest in being a mother to extensive efforts to have a child in a memoir).

78. Kristin Park, *Choosing Childlessness: Weber’s Typology of Action and Motives of the Voluntarily Childless*, 75 SOC. INQUIRY 372, 374 (2005); *id.* at 381 (reporting that women are less likely to be early articulators than men); *see also* Randi Locke, *Choosing Childlessness*, in *CHILDLESS BY CHOICE: A FEMINIST ANTHOLOGY* 31, 32 (Irene Reti ed., 1992) (“I had questioned my own allegiance to parenthood over and over again in my head, noting the ambivalence, the continuous postponing . . . . In view of my apprehension, I needed to be coaxed. I needed a partner who would insist on a family, who would take me by the hand and, in essence, give me that extra push.”); ORENSTEIN, *supra* note 77, at 11 (“I dodged the subject . . . I bobbed, I weaved, I changed the subject, and if none of that worked, I gave him The Stare.”); *id.* at 15 (“If my father-in-law hadn’t died, we might have never resolved whether to have a child; we might have drifted on—me avoiding the topic, Steven allowing that—until time made the decision for us . . .”).

decision.<sup>79</sup> Individuals might frame this situation as having never decided to *have* a child, rather than as having decided *not* to have one.<sup>80</sup>

In the meantime, when social expectations of motherhood are in force,<sup>81</sup> women who are subject to inquiries about childbearing intentions may be reluctant to advertise ambivalence.<sup>82</sup> Some women give cover stories to friends and family.<sup>83</sup> Elaine Tyler May even offers examples in which reluctant mothers give cover stories of infertility, revealing that faltering motherhood commitment can carry even more of a social stigma than infertility.<sup>84</sup> Other popular cover stories include waiting until educational, professional, or financial goals have been reached or (slowly progressing) adoption investigations.<sup>85</sup> These represent “socially acceptable reasons to delay childbirth and . . . neutralize the negative stigma of being childless.”<sup>86</sup>

Motherhood ambivalence, the parenthood market, and lenders can intersect in complex ways. Whether or not motherhood decision-making adheres to the straight cost-benefit analysis that some economists expect,<sup>87</sup>

79. DeOllos & Kapinus, *supra* note 76, at 74 (citing ELAINE CAMPBELL, *THE CHILDLESS MARRIAGE: AN EXPLORATORY STUDY OF COUPLES WHO DO NOT WANT CHILDREN* (1985)).

80. Letherby & Williams, *supra* note 77, at 724 (discussing examples of women who find it easier to say they had never made a decision to have children rather than say they decided not to be mothers).

81. The woman who is expressly unsure about becoming a parent has yet to be met with full social acceptance. *See, e.g.*, FINEMAN, *supra* note 9, at 41 (noting perception of women who do not have children as having made unnatural choice); MAY, *supra* note 14, at 78–79 (discussing how non-mothers were described as shirking responsibility); *id.* at 170–71 (exploring perceptions of deviance about non-mothers in history); *id.* at 9, 220 (describing claims of suspended development of non-mothers if mothering is the key passageway to adulthood); Franke, *supra* note 9, at 185; *cf.* Morell, *supra* note 77, at 317 (reporting on difficulty of finding self-help books that focus on coming to terms with not being a mother as compared to books about getting pregnant); Wager, *supra* note 77, at 391 (discussing the notion of intentional non-mothering as deviant in Finland).

82. *See* Maggie Kirkman, *Thinking of Something to Say: Public and Private Narratives of Infertility*, 22 *HEALTH CARE FOR WOMEN INT’L* 523, 531 (2001) (noting that married women without children are expected to explain their situations whereas parents are not required to explain why they decided to have children).

83. Park, *supra* note 78, at 376–77 (drawing on work of sociologist Erving Goffman and discussing negative and deviant connotations of non-mothers).

84. *See, e.g.*, MAY, *supra* note 14, at 139 (describing “closeting” of intentional non-parenting of married couples in the early to mid-twentieth century whereby women would falsely claim to be infertile).

85. *See, e.g.*, MORELL, *supra* note 14, at 105 (using possibility of adoption as way to show that non-mothers have “kept choice alive”).

86. DeOllos & Kapinus, *supra* note 76, at 75; Morell, *supra* note 77, at 313–14.

87. Some economists convey the impression that adults conduct a cost-benefit analysis of having zero, one, or more children, and then set out to accomplish that goal up to a certain level of investment. *See, e.g.*, LAWRENCE OLSON, *COSTS OF CHILDREN* 57 (1983) (“Young couples considering whether to have children, how many to have, and when to have them can use the data

there are multiple opportunities for commercial influence. Indeed, social science research reveals that some self-characterized ambivalent women not only have engaged in procreative activity, but affirmatively have sought assisted reproduction services or adoption.<sup>88</sup> Various external or internal pressures may play a role. For example, concern about falling short of family expectations may increase the likelihood that ambivalent women will pursue fertility treatments; in the words of one woman who ultimately characterized herself as voluntarily childless, “I think I [went through fertility treatments] . . . just to sort of, I mean, I’m not going to make huge waves, I’m not that kind of person.”<sup>89</sup> Women and their partners could be receptive to messages about missed opportunities, which may fuel efforts to start treatment in advance of resolving any ambivalence.<sup>90</sup>

Offering a public example of this experience for a generalist readership, Peggy Orenstein’s memoir reports on extensive attempts to overcome fertility barriers in the face of her significant uncertainty about motherhood.<sup>91</sup> The book emphasizes the author’s ambivalence through years of unprotected intercourse with her husband, assisted reproduction with and without an egg donor, and adoption pursuits.<sup>92</sup> Orenstein admits that her drive to overcome a barrier that many other women do not confront

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presented here . . . to make an informed choice and to plan sensibly for the results of that choice.”).

[The] choice of having a child, rather than saving the money, provides a substantial loss of future income. That so many young couples still decide to have children attests to the nonmonetary benefits they expect to derive from their progeny—love, companionship, preserving the family name, and so on. In purely monetary terms, couples would be better off putting their money in a bank as a way of saving for their old age.

*Id.* at 58; see also Lois Wladis Hoffman & Jean Denby Manis, *The Value of Children in the United States: A New Approach to the Study of Fertility*, 41 MARRIAGE & FAM. 583, 585–86 (1979) (reporting results from cross-national empirical study on stated benefits and costs to parenting and implications for the number of children parents should aim to have). See generally Mary Becker, *Care and Feminists*, 17 WIS. WOMEN’S L.J. 57, 62 (2002) (discussing how economists view children and adults’ decision to have children).

88. See, e.g., MORELL, *supra* note 14, at 54; Letherby, *supra* note 77, at 362.

89. MORELL, *supra* note 14, at 54; *id.* at 86–87 (offering other illustrative examples of personal ambivalence and family expectations).

90. MICHIE & CAHN, *supra* note 23, at 139–40 (reporting that some books suggest that waiting “just six months too long” can make the difference between success and failure); MODELL, *supra* note 28, at 99 (reporting on the “when I grow old” explanations for pursuing motherhood through adoption); Michele Patenaude, *On Not Having Children*, in CHILDLESS BY CHOICE, *supra* note 78, at 35, 38 (discussing “when I grow old” fears and the concept of being a “terminal bud” on a family tree, a “biological *cul-de-sac*,” a “genetic dead end”).

91. ORENSTEIN, *supra* note 77, *passim*.

92. *Id.*

“may have rolled over my uncertainty about motherhood—replacing it with a fear that illness and infertility made me less of a woman—but the ambivalence was never resolved.”<sup>93</sup> Orenstein also was responsive to the fear that she would later experience deep regret if she did not seek to conquer fertility problems:

“So many people I knew—women and men—had tumbled into their lives without much thought, defaulted into marriages, careers, and parenthood because that was what one was supposed to do. I wanted to live my life more consciously. But what did that mean? How could I guess what I might regret in twenty years? How could I say a definite ‘no’ to motherhood while it was still a biological possibility?”<sup>94</sup>

The argument here is not that lenders pushed these particular ambivalent women into reproductive services. Rather, the point is that determinations about motherhood are far from binary. This heightens the potential for commercial forces to intercede along with the more expected mix of individual, cultural, economic, and religious values. Lenders are in a strong position to use marketing and advertising to perpetuate images and ideals about mothers and the incompleteness of adulthood without this status. A priceless treasure, anti-commerce portrayal of motherhood and children can be advanced for commercial ends.<sup>95</sup> Vendors, including those selling credit products, adopt business models that systematically seek to capitalize on cognitive errors that affect various consumption choices.<sup>96</sup> If lenders have incentives to ratchet up the preference for parenthood, and/or to increase the price adults will pay for it,<sup>97</sup> their track record suggests they will find ways to do so.<sup>98</sup> The impact of such efforts on perceptions of women and motherhood would exceed the scope of particular credit transactions and have broader expressive effects.<sup>99</sup>

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93. *Id.* at 164.

94. *Id.* at 14–15.

95. See ROTHMAN, *supra* note 66, at 33–34 (describing children as “priceless” but “costly”); ZELIZER, *supra* note 53, at 3 (“In return for such expenses a child is expected to provide love, smiles, and emotional satisfaction . . .”); Joel Best, *Troubling Children: Children and Social Problems*, in *TROUBLING CHILDREN: STUDIES OF CHILDREN AND SOCIAL PROBLEMS* 3, 6 (Joel Best ed., 1994) (describing the history of declining utility of children and the rising need to nurture them).

96. The literature is extensively discussed and evaluated in Block-Lieb & Janger, *supra* note 1.

97. See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

98. For the point that there need to be multiple acceptable paths for adult women, see Eichner, *supra* note 75, at 1321; Morell, *supra* note 77, at 321.

99. For example, marketing practices that reinforce stereotypes of women as mothers contribute to sex stereotyping more generally, which in turn may contribute to sex discrimination

## CONCLUSION

Relatively unregulated consumer finance generally expands options for people who have decided to be parents but face medical or structural fertility barriers. Although this expansion carries significant benefits, particularly for nontraditional families, this expansion of options may coexist with lender motivations to shape motherhood choices, particularly among heterosexual married women, in ways that are troubling. Expressly conditioning adoption loan funds on women serving as primary caregivers is a challenge to sex equality and an unexpected lever of gendered work allocation. For-profit lenders may have the capacity to distort decision-making about motherhood in other, less direct ways, especially to the extent that women hold a spectrum of attitudes about motherhood that vary over time. Even if readers are dubious about this latter and more attenuated claim, future research on the parenthood market should factor in the role of lenders and embrace a more dynamic account of motherhood preferences.

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in the workplace. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”); Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 119 (2d Cir. 2004) (“The principle of *Price Waterhouse* . . . applies as much to the supposition that a woman will conform to a gender stereotype (and therefore will not, for example, be as dedicated to her job), as to the supposition that a woman is unqualified for a position because she does not conform to a gender stereotype.”); Infante v. Ambac Fin. Group, No. 03CV880, 2006 WL 44172, at \*5 (S.D.N.Y. Jan. 5, 2006) (“[A]llegations that [plaintiff] was discriminated against on the basis of presumed conformity to a gender stereotype that she would stay home with her children can be evidence in support of a so-called ‘sex plus’ claim on the basis of gender discrimination under Title VII.”).