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

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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, then who is the father of her child?

In the twenty-first century United States, the proliferation of assisted reproductive technology (ART) has given this metaphysical question a 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 codifies the notion that the ideal father is always heterosexual.\(^4\)

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\(^1\) Matthew 1:18.


\(^3\) See infra part III.B.

\(^4\) See infra part III.B.
This modern legal construction of fatherhood reflects the evolution of legitimacy law toward a focus on sex rather than marriage. Historically, the law of legitimacy incentivized heterosexual intercourse exclusively between married men and women by penalizing children born out-of-wedlock. As social attitudes toward premarital sex progressed, family courts sought to equalize the treatment of children born to unmarried parents while preserving legitimacy’s relational aims.

Courts thus began blurring sexual and marital relationships in paternity inquiries, treating a sexual relationship at the time of conception like a pseudo-marriage. At the same, courts emphasized a new categorical distinction between sexual and non-sexual conception. Currently, a man who conceives a child through sexual intercourse with an unmarried woman is presumed to be the father of the child. In contrast, a man who conceives a child through ART faces the opposite presumption.

This approach pointedly disadvantages gay men seeking to become fathers. 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.” By definition, a man who conceives a child through heterosexual intercourse engages in heterosexual activity. By presumptively denying recognition of fatherhood to men who conceive through ART while

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6 Id. at 350-351.
7 See id. at 376-377.
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 376-377.
10 See Appleton, supra note 5; 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 (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).
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 has no 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 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

I. Assisted Reproductive Technology, Paternity, and Gay Fatherhood

A. Infertility

The conventional screenplay for a family calls for the cast 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

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.
21 Courtney Megan Cahill, Regulating at the Margins: Nontraditional Kinship and the Legal Regulation of Intimate and Family Life, 54 Ariz. L. Rev. 43 (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.
The traditional story is upended when one or both of the partners is infertile. Infertility is loosely understood to mean the inability to conceive biological children. Functional infertility refers to the inability to conceive arising from reproductive dysfunction. Women may be functionally infertile if they cannot get pregnant, or if they cannot carry a pregnancy to viability. Men may be infertile if they are unable to produce healthy sperm in sufficient quantities. Structural infertility refers to infertility due to social factors independent of reproductive function. Men and women who are celibate or who belong to same-sex couples are structurally infertile.

B. Assisted Reproductive Technology (ART)

ART comprises a set of medical procedures designed to induce pregnancy in the absence of sexual intercourse. Fertile women who wish to become mothers without sexual intercourse may utilize artificial insemination. Artificial insemination refers to the non-sexual insertion of sperm into a woman’s reproductive tract.

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26 Dana, supra note 24, at 363.
27 Id. See also Reproductive Health: Infertility FAQs, supra note 25.
28 Dana, supra note 24, at 363.
29 Id.
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 sexual intercourse with members of the opposite sex.”). For information about gay men and ART specifically, see Hollandsworth, supra note 2. 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 115 (2009).
32 Id.
33 Id.
Men seeking to conceive and raise biological children without heterosexual intercourse must utilize the services of a female surrogate embryo carrier.\textsuperscript{34} Surrogacy, or the practice of a woman carrying a child to term that she does not intend to raise, has two forms.\textsuperscript{35} In the first form of surrogacy, called traditional or gestational surrogacy, an ovulating woman agrees to be artificially inseminated.\textsuperscript{36} In contrast, genetic or partial surrogacy involves the use of separate women as egg donor and birth mother, respectively.\textsuperscript{37} The latter technique requires in vitro fertilization, or fertilization of an egg outside of the uterus.\textsuperscript{38}

Although artificial insemination is relatively safe and inexpensive, surrogacy arrangements present unique economic and legal obstacles.\textsuperscript{39} To begin with, surrogacy is extremely costly, potentially costing hundreds of thousands of dollars.\textsuperscript{40} Additionally, the legal landscape for surrogacy contract enforcement is fractured.\textsuperscript{41} Although some states enforce some surrogacy contracts, such as California, other states such as Indiana and Arizona categorically bar their enforcement.\textsuperscript{42} Many states have no statutes or case law that address the validity of surrogacy agreements.\textsuperscript{43}

\begin{footnotesize}
\begin{enumerate}
\item Arshagouni, supra note 34, at 800-801.
\item Id.
\item Spivak, supra note 34, at 99-100.
\item Eastman, supra note 31, at 375.
\item Id.
\item Dana, supra note 24, at 363.
\item See Arshagouni, supra note 38, at 805-806.
\item See Arshagouni, supra note 34, at 807.
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II. 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. Historically, paternity law was interrelated with legitimacy law. Under the law of legitimacy, a child was regarded as being a legitimate heir if he or she was born to married parents. Conversely, children born out of wedlock were regarded as non-entities, or “illegitimate.” 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.

As social attitudes towards sexual relationships outside of marriage became more progressive in the mid-twentieth century, the stigma of illegitimacy became increasingly anachronistic. 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. In 2000, a new version of the UPA was promulgated to reflect updates in ART. In 2002, additional modifications were made to ensure a more equitable approach to parentage for children of unmarried parents. The 2002 UPA creates a presumption of paternity for a man who is married to the child’s birth mother or

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44 See Baker, supra note 10, at 6-10.
45 Id.
46 Appleton, supra note 5.
47 Id. at 351.
48 See Baker, supra note 10, at 6.
49 See Appleton, supra note 5, at 354.
51 Parentage Act Summary, supra note 50.
52 Id.
who has “held out” the child as his own.\textsuperscript{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.\textsuperscript{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.\textsuperscript{55} Underlying any paternity inquiry, however, is the question of what is ultimately in the “best interest of the child.”\textsuperscript{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 any, who conceived him or her through sexual intercourse.\textsuperscript{57}

B. Sexual vs. Nonsexual Conception

Men who wish to conceive and raise children through ART must confront a vexing legal double standard.\textsuperscript{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.\textsuperscript{59} This discrepancy, explains Professor Susan Appleton, is owed to a transition in the law of legitimacy towards a focus on sexual intercourse rather than marriage.\textsuperscript{60} “Hence, a regime that makes marriage the dividing line has given way to one that makes sex the dividing line,” says Appleton.\textsuperscript{61}

\textsuperscript{55} See generally Baker, supra note 10.
\textsuperscript{57} See infra part III.
\textsuperscript{58} See Appleton, supra note 5, at 364-366.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 350-364.
\textsuperscript{61} Id. at 384.
The heteronormative scaffolding of marital legitimacy thus continues to cast a long shadow in the law of ART.\textsuperscript{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.\textsuperscript{63} But the law of legitimacy was never truly about classifying embryos, as scholars have cautioned.\textsuperscript{64} Rather, it was always about policing the sexual behavior of the adults who conceive them.\textsuperscript{65}

1. Sexual Conception

As they sought to obviate the “illogical and unjust” stigma of illegitimacy, courts began treating unmarried heterosexual couples as pseudo-marital unions for the purpose of allocating paternity.\textsuperscript{66} Historically, the law maintained a bright line between marital and non-marital sex, privileging the former and discouraging the latter.\textsuperscript{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 in the public imagination.\textsuperscript{68} However, the judicial impetus to dismantle legitimacy was tempered by the desire to reinforce stable heterosexual couplings.\textsuperscript{69} In order to reconcile these goals, courts began working backwards: they started elevating the status of a sexual relationship at the time of conception, effectively

\textsuperscript{62} Cahill, supra note 21, at 51.
\textsuperscript{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 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 (2013).
\textsuperscript{64} See Appleton, supra note 5, at 350-351; see also Baker, supra note 10, at 16-18.
\textsuperscript{65} See Appleton, supra note 5, at 350-351.
\textsuperscript{67} Heterosexual sexual intercourse outside of marriage was criminalized for a substantial part of the 20th century. HENDRICK HARTOG, MAN & WIFE IN AMERICA: A HISTORY 306.
\textsuperscript{68} Appleton, supra note 5, at 350-351.
\textsuperscript{69} See id.
treated 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 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 been demonstrated to have a biological paternal relationship 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 his 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, just like marriages. In the 1989 case Moorman v. Walker, the Court of Appeals of Washington held that a man who conceived a child with an unmarried

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70 See id.
71 See id.
73 Id.
74 Id. at 694.
75 Id.
76 Id. (citing Butler v. DeLuca, 478 A.2d 840 (1984)).
woman could not seek damages for having been intentionally misled into conceiving the child.\textsuperscript{77} In this case, the father sought damages for having been duped into conceiving a child through sexual intercourse following the mother’s representation of a uterine disorder rendering her infertile.\textsuperscript{78} Paving over history, the Moorman court suggested that fatherhood arising from a non-marital sexual relationship has always been foundational to our social order.\textsuperscript{79} “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.’”\textsuperscript{80} The court further explained that all heterosexual intercourse carries the gravitas of “life itself.” Sex is not “a simple contractual transaction,” the court said.\textsuperscript{81} “We can no more recognize a lawsuit which trivializes the responsibility for consensual sex than we can one which trivializes life itself.” Like a marriage, the court implied, a fruitful heterosexual fling ought to be treated as a sacred bond.\textsuperscript{82}

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.\textsuperscript{83} 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

\textsuperscript{77} Moorman v. Walker, 773 P.2d 887 (1989) (holding that a birth mother’s unfair representation of infertility does not give rise to tortuous damages). In this case, the birth mother had been diagnosed with a uterine disorder, and claimed that she believed that this condition rendered her infertile. \emph{Id}. The father sought damages, claiming that the mother had either intentionally or negligently misrepresented herself as unable to conceive. \emph{Id}.

\textsuperscript{78} \emph{Id}.

\textsuperscript{79} \textit{See id.} at 466.


\textsuperscript{81} \textit{See id.} at 466.

\textsuperscript{82} \textit{Id}.

\textsuperscript{83} \textit{Id}.

\textsuperscript{84} \textit{See id}.

\textsuperscript{85} Such as, for example, agreements between an intended birth mother, her husband, and an anonymous gamete donor. \textit{See} In re K.M.H., 169 P.3d 1025 (Kan. 2007). \textit{See} Appleton, \emph{supra} note 5, at 370.
man and a woman that commands a presumption of fatherhood. Consequentially, unlike a man who conceives a child sexually, a man who conceives through ART is not presumed to be his child’s legal father.

Ten years after the *Moorman* court alluded to sex not being like a “simple contractual transaction,” a Pennsylvania Superior Court majority echoed this suggestion in *Kesler v. Weniger*. In this case, the court refused to enforce a contractual waiver of paternity entered into by a sexually conceiving heterosexual couple. 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.’”

Meanwhile, courts and lawmakers are willing to enforce agreements to absolve men of paternity in cases where the conception occurs through ART. In *Ferguson v. McKiernan*, the Pennsylvania Supreme Court agreed to uphold an agreement between a birth mother and a non-sexually conceiving father absolving him of all responsibility for the child. Lower Pennsylvania courts, citing to *Kesler*, had found the contract unenforceable. The *Ferguson* 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.”

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86 See infra notes 108-119.
87 See Appleton, supra note 5, at 362; see also Baker, supra note 10, at 10; Eastman, supra note 31, at 384-386. See infra notes 108-119.
88 *Kesler v. Weniger*, 744 A.2d 794, 796 (Pa.Super 2000) (holding that a biological father cannot contract to be relieved of paternity obligations attaching to child conceived sexually). In this case, no actual agreement was found to have existed between the parties. Id.
89 Id.
90 Id.
91 See Appleton, supra note 5; 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.”)
92 *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007) (distinguishing between sexual and nonsexual conceptions and holding that oral agreement between sperm donor releasing donor from child support was enforceable).
93 Id. 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.” 744 A.2d 794, 796. The *Ferguson* court instead 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.” 940 A.2d 1236, 1246.
court reversed, explaining that the relational differences between intercourse and sperm donation are “self evident.” 94 “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. 95

In fact, men who conceive through ART wishing to be recognized as fathers face a challenging and variable set of hurdles. 96 Most critically, they must conclusively demonstrate a pre-conception intent to parent. 97 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 conceived by means other than sexual intercourse.” 98

The peculiarity of this standard is illustrated by the holding in the Indiana case In re paternity of M.F., 99 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 kids. 100 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. 101 The question of paternity, the court said, boiled down to

94 940 A.2d 1236, 1246.
95 Id.
96 See Baker, supra note 10, at 10-11.
97 Id.
98 Id.
100 938 N.E.2d 1256.
101 Id. at 1261.
“proving that the manner of insemination rendered the Donor Agreement unenforceable.”

More specifically, “if insemination occurred via intercourse, the Donor Agreement would be unenforceable as against public policy.” The father was therefore found to be responsible only for the child whose circumstances of conception were not explicitly covered by the contract, and whom he could not prove had not been conceived through sexual intercourse.

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. 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. 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 mothers,” or women who conceive through ART. 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.’” Toward this end, the law of ART exhibits what Dana refers to as the “adulation of women as
mothers.” 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.”

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. 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. . .

In the same breath, the framework also diminishes the rights of “virgin fathers.” 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.

The 2002 update to the UPA includes male ART participants, and distinguishes between men seeking to donate sperm and those seeking fatherhood. However, even the updated version continues to emphasize the primacy of the conventional family narrative, providing

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109 Id.
110 See Rank, supra note 30, at 121.
112 Id.
113 See infra notes 138-156.
reassurance that a married individual belonging to a heterosexual couple who uses his or her own gametes to conceive will always be a “parent.”

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.” 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. . . .” 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.

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. In the absence of a sexual relationship between a woman and a man, in other words, family law seeks to create the illusion

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116 See Unif. Parentage Act, Art. 7 (2002) cmt (“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 §§ 701-03 (2002).


118 26-17-704, supra, (Uniform Comment) (LexisNexis 2012).


120 See, e.g., Cahill, supra note 21, at 49.
of a marital, or pseudo-marital-sexual relationship between the parents.\textsuperscript{121} 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.\textsuperscript{122} Second, the law assumes that men participating in ART are either married to the birth mother, or intend to remain wholly anonymous.\textsuperscript{123}

First, the recognition of the rights of “virgin mothers” in ART law manifests as a presumption of maternity for women who conceive.\textsuperscript{124} 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.\textsuperscript{125} In fact, courts have invalidated surrogacy contracts even in cases where the intended parents consist of a heterosexual couple.\textsuperscript{126}

At the same time, the law presumes that both male and female gamete donors seek to remain anonymous.\textsuperscript{127} 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.\textsuperscript{128} 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.\textsuperscript{129}

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

\textsuperscript{121} See supra notes 66-80.

\textsuperscript{122} See infra notes 124-126.

\textsuperscript{123} See infra notes 127-129.

\textsuperscript{124} See, e.g., Johnson v. Calvert 851 P.2d. 776, 776 (Cal. 1993) (applying a California law modeled after the UPA).

\textsuperscript{125} See generally Arshagouni, supra note 34.

\textsuperscript{126} See, e.g., In re Baby M, 537 A.2d 1227 (N.J. 1988); see also Spivak, supra note 34, at 99.

\textsuperscript{127} Eastman, supra note 31, at 380-383.

\textsuperscript{128} 851 P.2d. 776.

\textsuperscript{129} Id.
sexual relationship, conceive a child.\textsuperscript{130} 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.\textsuperscript{131} Notably, surrogacy contracts do not lend themselves to anonymity.\textsuperscript{132}

As a result, even arrangements between surrogate mothers and heterosexual couples mar the silhouette of the heterosexual marital union: they introduce an extra woman.\textsuperscript{133}

The upshot is that a man seeking to become a father through ART is a \textit{persona non grata}—unless he happens to be married to the birth mother.\textsuperscript{134} At this time, the technology does not exist for men to function as gestational carriers.\textsuperscript{135} An unmarried “virgin father,” therefore, faces an uphill battle seeking recognition as a full-fledged parent.\textsuperscript{136} 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.

\textbf{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.\textsuperscript{137} Heterosexism has been defined as “an ideological system that denies, denigrates, and stigmatizes non-heterosexual forms of behavior, identity, or relationships.”\textsuperscript{138}

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\textsuperscript{130} See Appleton, supra note 5; Cahill, supra note 21; Dana, supra note 24.
\textsuperscript{132} See id.
\textsuperscript{133} See id.
\textsuperscript{134} See Spivack, supra note 34, at 98-99.
\textsuperscript{135} See id.
\textsuperscript{136} See e.g., UPA, supra note 112.
\textsuperscript{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, \textit{Reproductive Outcomes After Medical and Surgical Management of Ectopic Pregnancy}, 55 CLINICAL OBSTETRICS & GYNECOLOGY 455.
\textsuperscript{138} See Dana, supra note 24. See also Unif. Parentage Act § 102 (a) (amended 2002) (excluding a woman’s husband from the definition of “donor”).
\end{flushright}
The choice to engage in heterosexual sexual intercourse is the quintessential behavior identified with a heterosexual orientation. By facilitating fatherhood for men who engage in heterosexual intercourse, the law encourages fatherhood for men who are likely to identify as straight. 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.

This double standard codifies the notion that the ideal father is heterosexual, and by extension, that gay men are unfit fathers. The standard 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. 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.

These ideas are interwoven in the 2007 case In re K.M.H. 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. 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.

139 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 15.
140 Bentler, supra note 14.
141 See id. See also LEVAY, supra note 139.
143 See, e.g., In re K.M.H., 169 P.3d 1025 (Kan. 2007).
144 Id. (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).
145 Id.
146 Id.
First, the court found that the father’s oral agreement with the mother was insufficient to secure his parental rights. 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. 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. In fact, the court says, the father “evidently misunderstand[s] the statute's mechanism. It ensures no 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.”

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.

Under the UPA-based statute, the court suggested, a gay father seeking to conceive and raise a biological child is a non-entity. 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. 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.” In general, fatherhood vanishes upon the decision to

\[147\] Id. at 1039.
\[148\] Id. at 1041.
\[149\] Id.
\[150\] Id.
\[152\] See 169 P.3d 1025 at 1039.
\[153\] Id. at 1033.
\[154\] Id. at 1039.
conceive without engaging in heterosexual intercourse; “the male's ability to insist on father status effectively disappears once he donates sperm.”

The holding in the 2013 case *Gartner v. Iowa Department of Public Health* illustrates that even at the vanguard of social progress, family law still treats parenthood as belonging to a birth mother and her monogamous partner. 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. Notably, the court declined to strike down the statute. Instead, the court said, “we will preserve it as to married opposite-sex couples and require the Department to apply the statute to married lesbian couples.” As the court explained with laser-like 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.” Notably, 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 man does not exist.

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. Until the 1970’s, homosexuality was regarded by the psychiatric

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155 *Id.*
156 *Gartner v. Dep’t Pub. Health, 830 N.W.2d 335 (Iowa).*
157 *Id.*
158 *Id.* at 354.
159 *Id.*
160 *Id.*
161 *Id.*
profession as a form of psychopathy. Gay men were believed to be unnaturally repulsed by women and attracted to men, and unable to control their deviant impulses. At the same time, sodomy was a felony in many states. Of particular relevance, gay men were widely equated with pedophiles, and thought to pose risks to children. 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.”

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 explained in In re Paternity of M.F., the lack of legislative guidance for resolving sperm donor agreements has given the judiciary little more than basic contract law as a touchstone. “[W]e are reluctant to set forth specific requirements with respect to such a contract's form and content,” the court said. “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.”

163 Id.
164 Id.
166 This is still the case. See, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).
167 See Meyer, supra note 23, at 527. See also Hollandsworth, supra note 2 (“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.”).
168 In re paternity of M.F., 938 N.E.2d 1256 (Ind. Ct. App. 2010).
169 Id. at 1262.
170 Id.
In order to provide better guidance to courts, states must find faith in the “virgin parent.” More specifically, states should disentangle gender from parentage presumptions. 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.” 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. 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.

Recognizing the “virgin parent” will also hopefully lead to the legislative epiphany that a child can have a plurality of parent figures, and that this may be in his or her best interests. 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 become parents through ART. More importantly, it will enhance the interests of children conceived through ART. To paraphrase Professor Browne Lewis: 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

173 Ark.Code Ann. § 28-9-209(a)(2) (2012). Notably, the Arkansas code recognizes that an unmarried biological father may be the presumed parent of a child conceived through such an agreement. Id.
actions?” The question that should be asked is: “Is it in the best interest of the child that the man be a legal parent?”

Conclusion

Two thousand years after the story of a sexless conception sparked our imaginations, the law of paternity has remained stagnant, and paternity presumptions in ART continue to unfairly burden gay men seeking to become fathers. To facilitate greater equity and optimal childrearing, courts and legislators must rethink gendered presumptions of parentage and demonstrate openness toward nontraditional family arrangements. The law of ART should reflect the basic truth that will the yearning for parenthood begins not with the desire for sexual intercourse, but with the hope to raise a child.

176 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?””).