

(ed. Michele Bratcher Goodwin 2010)

## 2 The Upside of Baby Markets

MARTHA ERTMAN

Most people object to markets in babies. I disagree, at least in the case of the gamete markets. I take this position because market mechanisms provide unique opportunities for law and culture to recognize that people form families in different ways. If state or federal law, rather than the laws of supply and demand, determines who can have children using reproductive technologies, then many single and gay people likely will be excluded from this important life experience. Moreover, many children will not have the chance to be born at all. Gamete markets allow some minorities – those who, by virtue of their numbers, are unlikely to obtain legal rights and protections through the legislative process – to skirt the majoritarian morality that would otherwise prevent them from forming families.<sup>1</sup>

Majoritarian hostility to families headed by gay and single parents often finds expression in legislative enactments such as the 1996 Welfare Reform, Defense of Marriage Acts, and popular opposition to decisions such as *Goodridge v. Dept. of Health*, in which the supreme judicial court of Massachusetts overturned the legislative ban on same-sex marriage.<sup>2</sup> Supporters of measures protecting so-called traditional families (and harming so-called nontraditional families) often make moral arguments that heterosexuality and two-parent families are natural, relegating others to the category “unnatural.” *Moral* or *natural* are flexible terms that carry multiple meanings such as “inevitable” (“it’s only natural”) or “mandated by either biology or God” (i.e., designating nonprocreative acts as “crimes against nature”).<sup>3</sup> This reasoning often translates to a commitment to traditional gender roles for men and women, especially in families.<sup>4</sup> It could also translate to opposition to reproductive technologies, if so-called natural parenthood is understood as parenthood through coitus rather than with medical assistance.<sup>5</sup> But moral arguments can take other directions.<sup>6</sup>

Market mechanisms present a different moral vision, which gives priority to liberty and innovation, rather than to tradition and divine or biological mandates. Millian liberalism embraces norms of consent, equality, and most important, a liberal commitment to freedom of action absent evidence that one’s actions harm someone else.<sup>7</sup> The ideal of freedom of contract imports these norms. Thus framed, the question in the context of baby markets becomes whether the upside of allowing single and gay parents to contract for parenthood is outweighed by a detriment to third parties. Because children are not part of the initial decision to

use reproductive technologies, I will treat them as third parties, despite their direct interest, perhaps more than any other, in the transaction.

Reasonable people disagree, as this volume demonstrates.<sup>8</sup> Downsides of alternative insemination include dangers associated with limited access, parental anonymity, eugenics, and objectification. I have argued elsewhere that although these concerns are serious, they do not justify demarketizing sperm either because they are not unique to the alternative insemination market or because addressing the concern will itself trigger other negative effects.<sup>9</sup> Then, as now, I think that the most serious concern is objectifying children.<sup>10</sup>

This chapter revisits my objectification analysis of four years ago, expanding that analysis to explore whether law should recognize, tolerate, or facilitate a market for parenthood through egg and embryo sales. In an article titled "What's Wrong with a Parenthood Market?" I addressed the objectification question in four paragraphs:

Importantly, purchasing gametes to conceive a child could cause the child to feel that he or she has been purchased like a new car. Radin claims that "conceiving of any child in market rhetoric harms personhood."<sup>11</sup> This statement asks us to consider whether the parenthood market, as manifested through adoption and reproductive technologies, treats children like chattel, thus harming their personhood. It is possible to have a market in parenthood but maintain linguistic mechanisms that mask that reality to reassure ourselves and the children that they are different from Corvettes.

However, this analysis suggests a monolithic market, in which all transactions are interchangeable. Even transactions conventionally understood in market terms, such as insurance, car sales, and housing, are governed by different rules that reflect the different contexts. Ambiguities in insurance contracts, for example, are construed against insurers. For their part, car buyers enjoy the implied warranty of merchantability as well as protection in their contractual relationships with financing institutions. Tenants, in turn, are protected by the implied warranty of habitability. The market for parental rights is just one more market with its own unique rules.

Becoming a parent invokes a raft of obligations quite different from those entailed in car ownership. Legally speaking, parents are obliged to, among other things, feed, clothe, shelter, and educate their child; keep the child out of wage labor; and refrain from discipline that rises to the level of abuse. From an ethical standpoint, parents have the duty to help the child develop a healthy sense of self, become an independent adult, and learn how to be a good citizen. While a car owner is obliged to maintain insurance and refrain from using the car to sell illegal drugs, that owner is also free to destroy the car, if she chooses, or run it into the ground through lack of maintenance. Parents are obviously not free to do the same.

In sum, while one might want to guard against language and transactions that treat children as chattel, the mere existence of a market in parenthood does not pose that particular danger. If it did, wage labor would be akin to chattel slavery. Indeed, wage labor is the opposite of slavery, an insight that shows how slavery is problematic as an instance of both overcommodification (treating people as things for exchange) and undercommodification (refusing to pay people for their labor). In both labor and parenthood markets, the market's character depends on the obligations and rights built into it. The mere fact of market rhetoric's presence (or absence), or money changing hands, does not provide us with this crucial information.<sup>12</sup>

The preceding excerpt concerned only the case for marketizing sperm, which is, I think, the most easily defended element of the market for parental rights. But I think that this reasoning and the other reasoning regarding access, anonymity, and eugenics apply equally well to egg sales. Finding the upside of embryo markets differs somewhat because what is marketed differs – component parts of a baby as opposed to the fertilized egg that matures into a baby – and because the interests served by the market differ. However, to the extent that the objections to the embryo market reject contractualizing family relationships, I continue to view them as misguided. I elaborate this argument subsequently, trying to harmonize the plurality of family forms with the wisdom in guarding against objectification concerns that arise when we treat children as chattel.

Overall, I contend that many dangers of marketization can be countered by taking advantage of the fact that marketization takes various forms. Thus, law and culture can shape parenthood markets to maximize benefits and minimize dangers. We could cabin the downsides of, say, an embryo market by controlling the mechanisms of the sale. For example, one might say that auctions are inappropriate because of their associations with slavery. Moreover, we could recognize the effectiveness of private regulation. eBay already has a policy against posting humans and body parts. In short, the mere fact of exchanging money does not answer the question of whether markets are good, bad, or indifferent.<sup>13</sup> Money itself can express connection or separation.

For example, if a lesbian couple wants to have a child, the two women could divide their labor in a way that reflects the joint nature of the endeavor. One partner might gestate the child, conceived by alternative insemination with an anonymous donor, because health or age considerations make this the most appropriate choice. The other, nonbiological mother might signal her engagement in the family by finding a doctor, making medical appointments, researching medical procedures as they arise, searching the Web for sperm banks, and paying for the sperm. The language they – and we – might use to describe these efforts as reflecting the non-biological mother's "investment" and "buy-in" to the family arrangement indicates the rhetorical power of marketized thinking to express connection as well as separation. Assume now that the women were friends, instead of lovers. In that case, expenditures of time and money might express something different. Assume further that the birth mother's eggs were unsuitable for fertilization and that she paid her friend for her eggs. That payment could signal that the birth mother, not the egg donor, is the intended mother. Now assume that the women are romantic partners, intending to create a family together. The genetic mother would give, not sell, her eggs to her partner, and the partner would gestate the child. In this instance, they could both be mothers, at least in California.<sup>14</sup> In short, we need to know more than the mere fact of marketization, and contractualization, to reach normative conclusions on gamete and embryo markets.

This insight, that contract can facilitate connection as well as separation, relates to a theoretical point regarding default rules. A liberal commitment to freedom assumes that contracts are permissible, unless there is a reason to think otherwise. A communitarian commitment to dignity, solidarity, and equality, in contrast, takes the reverse default position, assuming that demarketization of contested commodities (such as sex, body parts, and babies) is appropriate, unless there is

reason to think otherwise. The falseness of the choice between these antimonies has led commodification theory to travel on fixed rails, with one line of thought concluding that baby selling is bad and another one asserting its benefits.<sup>15</sup> But we need not remain stuck on these fixed rails. We can transcend the false choice between freedom, on one hand, and dignity, solidarity, and equality, on the other, by asking a different question than whether to commodify parental rights.

Asking who controls and benefits from the transactions provides more satisfying answers.<sup>16</sup> It also makes sense since the role of law is largely expressive in this context. Willing buyers and sellers create markets regardless of legal prohibitions, only they are black markets (as in illegal drugs, stolen art, and the flourishing, if shameful, slave trade in human beings). If the law cannot abolish markets, it can create incentives and protect some vulnerable parties from some dangers they would face in a black market.

Baby markets present a modal case for expressing law's role in markets, along with prostitution and body parts. While prostitution is the oldest profession, these other markets – babies and organs – invite futuristic visions.<sup>17</sup> Baby markets especially invite expressive function in law. Who, in the public imagination, is more worthy and in need of protection than a baby? Moreover, babies and children represent the future. If we worry about the future, and expanding the role of markets in that future, baby markets present the perfect context for expression of how far contract, and markets, should go in that future.<sup>18</sup>

As a positive matter, the parenthood market is flourishing, through adoption as well as reproductive technologies. An Internet search under the terms "sperm bank" and "egg bank" demonstrates that there are plenty of willing buyers and sellers for gametes. Currently, reproductive technologies, including egg and sperm sales, are largely unregulated in the United States, creating a relatively free, open market in which most middle-class people can participate.<sup>19</sup> In short, the legal question is largely normative because the market will likely continue to exist regardless of what legal doctrine dictates.

A rich literature weighs in on the question of how law should regulate markets in babies, much of it critical. In defending the upside of the baby market, I am swimming upstream against the following currents:

- Harvard political theorist Michael Sandel, who objects to markets in human gametes and surrogacy on the ground that they corrupt the communal value of human life<sup>20</sup>
- Vassar political scientist Mary Lyndon Shanley, who supports a ban on human gamete sales because of eugenic concerns, concluding that we do not own our body parts, but rather hold them as stewards for the next generation<sup>21</sup>
- Social conservative David Blankenhorn, who critiques gamete markets for creating fatherless families<sup>22</sup>
- Northwestern family law and critical race theorist Dorothy Roberts, who wonders why legal and social mechanisms should facilitate white people creating babies at any cost, where African American women lack access to reproductive technologies and, moreover, face public hostility to their fertility through policies aimed at minimizing the number of black babies born<sup>23</sup>

- Harvard Business School economist Debora Spar, who calls for increased regulation of reproductive technology to protect the interests of parents as well as children<sup>24</sup>
- Stanford property theorist Margaret Jane Radin, whose canonical critique of marketization of body parts, sex, and babies is better described as commodification skepticism than commodification revulsion; still, she unequivocally asserts that “conceiving of a child in market rhetoric harms personhood”<sup>25</sup>

Departing from this center of gravity, my position may be closest to Elisabeth Landes and Richard Posner, who argued in 1979 for marketizing adoption to create incentives for pregnant women not to terminate their pregnancies and move children out of foster care into permanent homes.<sup>26</sup> But I disagree with their comparison of foster children to unsold inventory in warehouses, and think that it is bad to have a racialized valuation of children in adoption markets.<sup>27</sup> My analysis picks up where Landes and Posner leave off. Although Landes and Posner support a limited market in *babies* (refusing to support a market in children and limiting remedies for breach of contract in baby sales), they do not draw a precise line for where the market stops. Here, I make a modest attempt to sketch this line by defending the marketization of sperm and eggs as well as exploring the extent to which this analysis also supports marketizing embryos.

A succinct way of drawing this line is to say that I do not support posting a baby on eBay. But why stop at the eBay baby, and where should law intervene in markets short of the eBay baby?

Although Posner and Landes wrote their article decades before eBay existed, I suspect that they, too, would have refrained from supporting the posting of a baby on eBay. Legal and social grounds support this conclusion. Legally, the Thirteenth Amendment abolishes slavery and involuntary servitude, and putting a child on an auction block, electronic or otherwise, is simply too close to treating a person like a thing, which is the defining characteristic of slavery. Socially, the Millian principles of harm come into play most strongly once a child is born.<sup>28</sup> A person is not greatly harmed by knowing that her mother paid for the sperm to conceive her because medical care and child care are already, and uncontroversially, marketized. Moreover, this child would not be alive but for that transaction, and presumably, the fact of life is worth something in the analysis. On this reasoning, marketizing sperm is unproblematic. But things get more complex as we expand our vision to allow for marketizing eggs and embryos.

#### A. EGGS AND EMBRYOS

Why not allow a market in eggs and embryos? Although little federal regulation exists regarding sperm, egg, and embryo transfers (other than record keeping and donor testing requirements),<sup>29</sup> nearly half the states restrict the sale of eggs or embryos to some extent. For example, Louisiana flatly prohibits “the sale of a human ovum, fertilized human ovum, or human embryo.”<sup>30</sup> Indiana criminalizes the sale of human eggs or embryos but allows egg donors to be paid up to three thousand dollars for “recovery time” as well as expenses for lost work and travel time.<sup>31</sup>

Virginia, in contrast, excludes "ova . . . and other self-replicating body fluids" from its statute criminalizing the sale of body parts, but also allows for expense reimbursements.<sup>32</sup> Maryland takes yet another approach, making selling "unused material" in fertility treatments a misdemeanor.<sup>33</sup> The Maryland statute, like much of the other state legislation regarding the sale and use of human eggs and embryos, seems aimed to prevent commodification for research, rather than fertility, purposes.<sup>34</sup> It is telling that my research did not yield any statute prohibiting the sale of sperm, a difference that may raise constitutional issues.

But perhaps there is a legitimate reason to regulate sperm differently than eggs. Maybe egg sales harm the parties and society in more severe ways than sperm sales. On the other hand, the different regulation of men and women in this context may be invidious. Gametes are one of the few things that women command a higher price for selling than men do. Whereas men may get paid seventy-five dollars for a sperm donation, women get, on average, four thousand dollars for each egg donation.<sup>35</sup> The popular press trumpets stories of egg sales, often noting that elite college newspapers feature advertisements offering up "tens of thousands" of dollars for egg donations.<sup>36</sup> A feminist reader with a chip on her shoulder might suspect that this legal and cultural wrangling about women getting paid too much for selling their eggs smacks of patriarchal desire to control and/or protect women. Indeed, egg sales are one of few contexts in which women of color enjoy even higher compensation because of the scarcity of their eggs in the donor pool.<sup>37</sup> But egg extraction can be painful and involves hormone treatments that might pose danger to the donor's short- and long-term health.<sup>38</sup> That difference, coupled with the limited supply of eggs compared to the nearly infinite supply of sperm, explains the price differential. But paternalism and/or perpetuation of traditional gender roles may play a role in limits on egg prices. A review of the leading communitarian critique of expansive commodification reveals how this may occur.

Michael Sandel proposes a two-part analysis to evaluate markets in contested commodities, looking to whether marketization evidences either coercion or corruption of fundamental social interests or values.<sup>39</sup> Applying his methodology to egg and embryo markets, I conclude that there is insufficient reason to interfere with the egg market by banning payment or otherwise. Embryos present a harder case, both because Sandel's corruption argument is stronger and because counterarguments in defense of intentional families are weaker.

Sandel worries about coercion and corruption. If a sale is coerced, he reasons, as when a poor person is forced by economic desperation to sell his kidney, then we should not tolerate it.<sup>40</sup> But even if the kidney sale is fully voluntary, making the coercion argument inapplicable, we still might prohibit the sale if it corrupts something that society holds sacred (such as human life or human bodies).

Applying this analysis to egg sales leads me to a different conclusion than Sandel reaches. He opposes such sales.<sup>41</sup> In contrast, I do not see problems with coercion and view any corruption of the sacred quality of human life as outweighed by other aspects of human life, notably the equality considerations of allowing gay and single people to become parents, and the interests of children in these families coming into being.

Coercion is an easy case. It is hard to say that college women donating their eggs are coerced into doing so, at least in ways that differ from other kinds of employment. Although it is tempting to say that the high price for eggs could create incentives for young women to sell what they would otherwise keep, this argument does not hold up under scrutiny. Certainly the temptation is there.<sup>42</sup> But if generous remuneration is problematic for socially controversial employment, perhaps prize fighters should not get paid (or only reimbursed for their medical expenses and lost wages). The same reasoning would caution against paying Halliburton for its contributions to the Iraq War, which was controversial from the start and has proved financially, politically, and internationally disastrous.

Corruption is the harder case, in part because of social distinctions between fatherhood and motherhood. This is where feminist concerns about equality and dignity come into play. The relative lack of fuss about the sperm market in either law or the wiser culture may reflect the different expectations of fathers than mothers as well as the relative ease with which sperm is separated from the human body. Men donate sperm in a transaction that is painless, and that may even involve sexual pleasure. Egg extraction, in contrast, involves a minor surgical procedure and powerful drugs. Moreover, sperm donation does not deprive the donor of much because sperm is regenerated every three months. In contrast, females are born with their store of eggs for life so that each donation leaves a woman with fewer eggs with which to create her own family, and any harm extraction causes to her reproductive system might jeopardize reproduction entirely. Thus, perhaps law should regulate egg sales more stringently than sperm sales.

Further analysis indicates, however, that these matters are insufficient justification for banning egg sales or capping the prices on those sales. Both constitutional norms and contemporary notions of formal equality indicate that law should not make distinctions between men and women absent good reason to do so, framing the question as to whether there is sufficient reason to more closely control egg sales. Coming from a position of Millian liberalism, which defends formal equality (and trumpets the dangers of treating men and women differently), I would be inclined to let the market determine the relative value of eggs and sperm, rather than cap egg prices out of concern that young women will be tempted by high prices to sell what they otherwise would not. The very dangerousness of the procedure argues for higher compensation, rather than limiting it. Fortunately, existing doctrines offer models for addressing some concerns associated with either coercion or corruption in a more nuanced way than a blunt ban on payment or an incoherent distinction banning payments and allowing reimbursement for expenses, including Indiana's "recovery costs" capped at three thousand dollars. The following section fleshes out this argument, parsing out the corruption-related dangers of eggs sales related to access, anonymity, eugenics, and objectification that I used to evaluate the sperm market.<sup>43</sup>

Starting with access, one can argue that the egg market corrupts notions of universal access to social goods because not everyone can afford to enter the market. Certainly, fewer buyers have access to the egg market than to the sperm market, given the higher price of eggs. However, the buyers may themselves have

more money to spend, on average. First, heterosexual couples may buy eggs if the woman in the couple cannot conceive with her own eggs. And gay men may buy the eggs to be used with their own sperm in a gestational surrogacy arrangement. Because men enjoy higher wealth and income than women, they are better able to afford the prices. Moreover, to the extent that couples of various types and single people are priced out of the market, this pattern is not unique to the parenthood market. These same people may be priced out of expensive cars or beach vacations, as well. In sum, even with the higher relative price for eggs, there is little reason to single out reproductive technologies for special sanction on the grounds of being elitist.

The second possible concern turns on how anonymity in the egg market might corrupt family relations. It has more gravity than the first because it implicates the interests of children as well as parents. Mothers differ from fathers both culturally and biologically. Culture expects mothers to stick around, and of course, gestation marks the first nine months of doing just that. Indeed, the benchmark of loneliness is set by songs like "Sometimes I Feel Like a Motherless Child."<sup>44</sup> Fathers, in contrast, can do their essential work in a matter of minutes, and often, they do just that. Under this reasoning, one could argue that the sperm market is fine, whereas the egg market violates crucial cultural and emotional components of motherhood by allowing a child to be raised by people who are not genetically related to him or her. Moreover, children benefit from being raised by and knowing their genetic parents, and also from the material support and kinship networks these people provide. However, this reasoning gives way under pressure. Law has long recognized adoption, which generally involves being raised by genetic strangers. Moreover, anonymity is not a foregone conclusion. Just as open adoptions have become the norm in some contexts, gestational and genetic mothers may retain contact with children that are raised by the "intended parents."<sup>45</sup> Finally, although it is nice for a child to know his or her genetic heritage, and to enjoy those parents' financial and emotional support, lots of children do not have this benefit. To demand that the children of reproductive technology have gold-standard family environments, when coitally conceived children live with a range of circumstances, is to unfairly burden this one kind of parenthood. Thus anonymity, as with sperm sales, does not provide sufficient reason to ban or sharply limit marketizing parenthood through egg sales.

Eugenics, representing the corruption of moral norms of racial and other forms of diversity, suggests a third reason for limiting egg sales. If people buy and sell some people's eggs for higher prices, and other people's eggs do not have a price on the market at all, then patterns of reproduction may tend toward the breeding of a master race. Certainly the reproductive market is racialized, as other markets are, such as car sales and organ transfers.<sup>46</sup> But my limited review of the inventory of a major sperm bank indicated that the percentage of donors who were men of color was not wildly out of sync with those groups' prevalence in the general population, other than a slight underrepresentation of white donors, an underrepresentation of black donors, an overrepresentation of Asian donors, and a seeming lack of Hispanic donors.<sup>47</sup> The discrimination seems to occur at the level of buyers, and it is hard to see how law can interfere with that process. People select mates for racial,



educational, and other characteristics that they deem optimal for a coparent, and legal efforts to intervene are constitutionally problematic.<sup>48</sup> People conceiving with medical help should be entitled to the same level of protection for their choices in creating a family.

Screening for disabilities poses a different kind of danger. Preimplantation genetic diagnosis is now routine in the United States for in vitro fertilization (IVF) procedures so that patients wanting to prevent their child from having Down's syndrome, Tay-Sachs disease, or Huntington's disease can screen embryos for the genes and implant only those with the desired genetic makeup.<sup>49</sup> As Spar observes, "no-one wants to live in a brave new world in which parents peruse a catalog of traits and carefully select their perfect child: a clever cellist, perhaps, with hazel eyes, brown hair, and a left-side dimple."<sup>50</sup> Dorothy Roberts notes, in a similar vein, that such genetic diagnosis shifts the burden of care and responsibility. Without the technology, genetic defects are unfortunate incidents that society accommodates by paying for medical care, establishing special education programs, installing ramps in buildings and on sidewalks, and so on. When, however, these diseases are preventable, parents who do not screen for the genetic mutations, or who do not terminate the pregnancy when they occur, might be seen as responsible for the illness. This line of thinking might transfer, wrongly in Roberts's view, ethical, financial, and social responsibility for genetic illnesses away from God or fate and onto the parents.<sup>51</sup>

However, like the access consideration, eugenics is either an overblown concern in the embryo market or not unique to that market. First, not that many people will use IVF. As one medical expert put it, given the choice between preimplantation genetic diagnosis accompanying IVF and the more conventional way of conceiving a child, "most people would rather have sex."<sup>52</sup> Even if increased access of the embryo market translates to more babies being born by that method, those babies are more likely to be racially diverse, at least, if the prices go down and allow a wider range of people to conceive that way. Reproductive technologies such as preimplantation genetic diagnosis would likely accompany an embryo market, decreasing the incidence of genetic diseases in the resulting children. But reproductive technologies themselves create other physical disabilities in children. Men with low sperm count, for example, can conceive using a technique that injects sperm directly into an egg. The sons born as a result may share their father's low sperm count, necessitating the same treatment once they reach reproductive age.<sup>53</sup> Additionally, and more seriously, fertility drugs and IVF often lead to multiple births, which themselves create health risks for the children (as well as burdens on both parents and the larger society).<sup>54</sup> Reproductive technologies, and thus egg markets, could have a broader social and medical impact than one would expect given the relatively small number of people who conceive this way. Indeed, Liza Mundy contends that it has had as big an impact as the birth control pill in the 1960s and legal protections for abortion in the 1970s.<sup>55</sup> In short, while eugenics concerns may be misplaced or overblown, there may be real social concerns associated with reproductive technologies, especially IVF. Prior to sorting how law might respond to those concerns, I address the most serious concern in the egg market: objectification.

The fourth and final factor, the corruption of the sacredness of being human itself by treating people as objects – objectification – plays out differently in egg and sperm sales. With sperm sales, as I described earlier, marketization need not result in children being treated like Corvettes merely because their parents expended funds in creating the parent–child relationship. Indeed, law carefully regulates different kinds of contractual relationships to protect the interests of systemically vulnerable parties like buyers of goods and residential tenants. In the egg sale context, we may worry about objectification of the donor as well as objectification of the resulting child.

Women as donors are more likely to suffer from objectification because their status as full citizens and legal subjects is relatively recent and, moreover, according to some accounts, remains incomplete.<sup>56</sup> Thus law might worry if egg sales risked turning women into egg factories, or if they lacked the power to fully consent to the transactions. However, the dangers of paternalism seem to outweigh the benefits of protectionism in the prior instance. Furthermore, women now have more opportunities than ever for market participation that does not involve selling intimate parts of themselves. Whereas American law has deprived married women of contractual capacity on the grounds of either vulnerability or cognitive inability through the doctrine of coverture, Married Women's Property Acts long ago began the process of whittling away the vestiges of coverture and recognizing women as full subjects, capable of voting, contracting, and other acts of citizenship.<sup>57</sup>

On the question of objectifying the children, the same analysis applies as with sperm sales. Parents who reproduce coitally obtain prenatal care by paying doctors for ultrasounds and office visits and pharmaceutical companies for prenatal vitamins. Adoptive parents pay agencies a fee to obtain parental rights. None of these payments change the parents' obligations to love, feed, educate, clothe, shelter, and otherwise care for their children, nor to refrain from abuse. In short, the children are not rendered thinglike, or objectified, by virtue of their parents acquiring parental rights and obligations over gametes.

Even if the dangers are greater in gamete sales than in coital reproduction, those concerns could be addressed in marketlike regulations without unduly limiting access to these markets. Anthropologists recognize the ways that commodification can be controlled by dictating the terms of the sale.<sup>58</sup> Pharmaceutical drugs are marketized, but in a controlled way that limits who can authorize the sale (physicians) and who can dispense the drugs (pharmacists). Egg and sperm sales might be regulated in a similar fashion if there are health risks to sellers akin to risks associated with drugs.

Just as minors generally lack the capacity to contract, very young women (and men) are likely barred from donating their gametes. If the donation of eggs poses particular dangers to long-term reproductive health, perhaps legal doctrine could further limit the conditions of the sale. If people cannot contract to buy alcohol until they are twenty-one, perhaps they could be barred from selling their gametes until that age. In the alternative, we could mirror the age limit imposed by many car rental companies and require gamete sellers – both male and female – to be twenty-five years old. None of these interventions interferes with the fundamental

choice of people purchasing gametes, which is the most serious danger posted by public regulation of reproductive technologies.

## B. EMBRYOS

Embryos present a harder case because they are closer to human beings, raising concerns regarding the crucial cultural dividing line between people, which are not for sale, and things, which generally are. Sperm banks, such as the California Cryobank and the Fairfax Cryobank, store embryos for a fee.<sup>59</sup> But storage is a far cry from sale, a fact illustrated by the newspaper coverage, across the globe, of the expansion of parenthood markets into sale of formed embryos (as opposed to egg and sperm) by a small company, the Abraham Center of Life, in San Antonio, Texas.<sup>60</sup> The outcry seems to have nipped the market in the bud, as a recent visit to the Abraham Center of Life's Web site reports that it discontinued its "human embryo bank" because it was not cost-effective.<sup>61</sup> That market may have barely existed. Jenalee Ryan, who founded the Abraham Center, admitted that "it's a bank without anything in it"<sup>62</sup> during the height of the media flurry in January 2007 that surrounded her founding of the company. Although the embryo market may remain hypothetical, at least for the moment, it represents a significant step in marketizing parenthood beyond the commodification of eggs and sperm.

As discussed earlier, I believe that the benefits of marketizing gametes – eggs as well as sperm – outweigh the downside of the market in gametes. Most important, I think that the higher toll on women of egg sales – compared to the toll on men from sperm sales – actually justifies marketization. However, analogical reasoning, in addition to intuition, cautions against automatic extension of the market for parental rights to human embryos. Applying the four negative elements I explored in relation to gamete sales supports this line of thought. The following discussion addresses access, anonymity, eugenics, and objectification in turn.

Access is a double-edged sword. On one hand, assuming that Jenalee Ryan, the Abraham Center's founder, makes IVF markedly more accessible by reducing the price for an embryo nearly 50 percent, to as little as twenty-five hundred dollars for an embryo and ten thousand dollars for each attempt at pregnancy,<sup>63</sup> lowering prices means that people who are now excluded from the market could participate – not poor women, certainly, but many middle-class people, and also many people of color, given racialized income and wealth disparities in America. It seems that the most likely customers of an embryo bank would be heterosexual couples and older single women. Gay men are less likely to buy fertilized eggs as they would like to use their own sperm to have genetically related children. Lesbians, likewise, are likely to buy sperm and use their own eggs. Allowing older people to become parents through an embryo bank seems reasonable given longer life expectancies. Moreover, other bodies of law allow older people to become parents such as adoption rules and the famous law school estates and trusts class case of the fertile octogenarian.<sup>64</sup>

However, this increased access also triggers a larger impact on the general culture. If more people can participate in IVF, then more people – children, parents, relatives, coworkers, classmates – are affected. It seems premature to worry about

designer babies in such a world, where most babies are conceived coitally, often unintentionally.<sup>65</sup> However, if prices go down sufficiently, then a former luxury item can have a broader social impact. As Debora Spar points out, the reproductive technology business exhibits a different relationship between supply and demand than other contexts in that the "quest to conceive" can become "an endless, bottomless demand," leading would-be parents to "take out a second mortgage, wipe out their savings, or give up a lucrative job."<sup>66</sup> Given that reproductive technologies are often a gamble, especially for the older women likely to use them, and that gambling is a highly regulated industry to protect people from harming themselves, one might argue that the state should step in to keep reproductive technologies sufficiently expensive that only people who can afford to pay can play. But such reasoning collapses pretty fast. It ignores the widespread availability of credit cards that can, and do, finance all kinds of things that are beyond the purchasers' means. Moreover, it interferes with a fundamental premise of the liberal state, namely, that individuals are generally better situated to determine their own best interests than the state, especially in matters of child bearing and child rearing.

Second, anonymity might present a fatal downside of the embryo market. Unlike the gamete market, where a child is likely to know and grow up with one genetic parent, the embryo market presupposes total anonymity – no knowledge, no social, financial, or emotional support. However, like the preceding analysis regarding egg sales, this is no different from adoption, except that children are conceived with the knowledge that they will not grow up with either genetic parent. This may be a crucial difference. In adoption, young people get pregnant unintentionally, and adoption makes the best of a bad situation for both children and birth parents. An embryo market, in contrast, creates that situation. This difference might be one ground for a court or other regulatory body to regulate embryo markets more closely than other markets.

Eugenics, the third corruption-based possible objection to the embryo market, also overlaps with the analysis of the egg market. Like the previous factors, eugenics similarly seems to cut both ways as we evaluate the embryo market. But like the anonymity concerns, it may be that there are greater eugenic dangers in the embryo market than in the market for gametes. On one hand, and apparently different from the gamete market, the fledgling embryo bank business evidences the tendency to create embryos from blue-eyed blondes, where at least one genetic parent has an advanced degree and neither exhibits mental or physical illness.<sup>67</sup> Moreover, the prefab nature of the business may tend to create a lowest-common-denominator inventory that undercuts human diversity, just as Wal-Mart may undercut diversity in the retail world. However, the embryo market, like the egg market, is unlikely to be as ubiquitous as Wal-Mart. People would, after all, most likely rather have sex than pay twenty-five hundred dollars for an embryo and a total of around ten thousand dollars for a round of IVF.

Fourth and finally, embryo markets may raise objectification dangers in a more serious way than either sperm or egg sales. First, what is being sold is an entity that, given the right conditions, could mature into a human being. Eggs and sperm, in contrast, are component parts of a human, and thus the markets are more thinglike than personlike. Second, the prefab nature of the ordering process, which

is necessary to make the market more cost-effective than existing markets for egg and sperm, where would-be parents engage in separate transactions to acquire each element of the reproductive process, may itself be more objectifying. Reasoning by analogy, one might say that we allow the sale of fertilizer, and gasoline, and nails, but not the bombs that are made up of these things. Still, it is hard to see how the embryo market is so different from the gamete market, especially if the same banks sell eggs and sperm separately.

Assuming one or more of the preceding objections holds sway with lawmakers, the question becomes how law should step in to regulate this impact. As Fran Olsen pointed out, even refusal to regulate has regulatory impact because it leaves the parties to the bargains they strike.<sup>68</sup> The possible regulations span from private to public law. At the highly private end of the spectrum is the agreement within the industry to follow particular rules and norms. John Robertson supports this level of regulation, a method and level that Robert Ellickson has documented in other contexts such as ranchers and farmers.<sup>69</sup> On the highly public end of law, Mary Lyndon Shanley proposes banning payment for gametes, and Marsha Garrison would allow the state to limit the purchase of gametes by gay men and lesbians and mandate disclosure of donor identity.<sup>70</sup> In between these lie proposals like that of Debora Spar, who supports limited state regulation of reproductive technologies, such as preimplantation genetic diagnosis, to allow its use to select against traits such as Tay-Sachs but not to select for desired traits.<sup>71</sup> Analytically, it is hard to enforce Spar's proposal because a desire to choose against deafness is also a choice for hearing. My own proposal would lie closer to the private side of regulation.

Forms of public law could include a limit on embryo sales on the grounds that objectification is more of a concern for embryos than for gametes. Where that line is drawn, and the very existence of the ban, of course, is on a collision course with abortion debates about when life begins. If a sixteen-cell embryo is enough like a person to preclude its sale (an argument sure to be made in socially conservative circles), then what justification remains to protect a woman's right to decide whether to terminate a pregnancy during the first trimester? A line of case law declines to treat embryos as "persons." In *Jeter v. Mayo Clinic for Reproductive Medicine*, the Arizona Court of Appeals held that the Center for Reproductive Medicine was not liable for wrongful death by losing eight-celled frozen embryos. The court did, however, recognize the viability of the Jeters' claim for negligent loss or destruction of property, breach of fiduciary duty, and breach of a bailment contract.<sup>72</sup> Other case law, however, limits the ability of parties to contract regarding the use of frozen embryos. Generally speaking, contractual agreements authorizing a clinic to destroy leftover embryos are enforceable, but courts have refused to enforce agreements that would force someone to become a parent against his or her will. In *Davis v. Davis*, the leading case, the Tennessee Supreme Court declined to award a divorcing wife frozen embryos the couple had created in hope of conceiving a child together because the now ex-husband objected.<sup>73</sup> This extension of some, but not unlimited, contract rights is consistent with other doctrinal areas.

In UCC Article 9, for example, lenders and debtors can agree to many provisions regarding their relationship, but contract law, through the UCC, provides a floor

under which lenders cannot force debtors to go. One plank of the floor is the duty of good faith, defined as honesty in fact and compliance with reasonable commercial standards of fair dealing in the trade.<sup>74</sup> Attempts to waive the duty of good faith are unenforceable.<sup>75</sup> Another plank, specific to debtors and creditors under Article 9, is the right of debtors to redeem repossessed collateral before the lender liquidates it.<sup>76</sup> Any attempt by a secured creditor to include a waiver of the right to redeem in the security agreement is unenforceable.<sup>77</sup> In short, contractualization is not entirely *laissez-faire*. Different transactions are governed by different rules. This reasoning supports the idea of treating egg and sperm sales differently from embryo sales. If the benefits of gamete sales are greater than those of embryo sales, then perhaps the latter transactions might be more closely regulated to protect against downsides of the embryo market such as objectification.

One way to protect against objectification might be through methods of sale and advertising. Lawyer advertising is regulated, as is advertising for liquor, cigarettes, and pharmaceutical drugs.<sup>78</sup> Pharmaceutical drugs provide a nice analogy in that only licensed medical professionals can order the sale of drugs, and only pharmacists can sell them. This kind of controlled commodification might be used for the sale of embryos. The banks selling them might agree among themselves on standards for advertising and sales, perhaps even agreeing to price caps.<sup>79</sup> Still private, but moving along the continuum toward public law, might be tort or contract liability for losses incurred during the IVF process.<sup>80</sup> Further into the realm of public law, one might see a public accommodations statute mandating that providers of alternative reproductive medicine offer their services to anyone seeking it, regardless of race, sex, disability, marital status, or sexual orientation. In the unlikely event that this public accommodations statute were passed,<sup>81</sup> other public regulation may become more tenable. But until that happens, I think that the benefits of a *laissez-faire* treatment of reproductive technologies, including embryo sales, outweigh the dangers of big brother determining intimate family matters along the lines of majoritarian morality. As a matter of political theory, I prefer a narrow vision of the state's police or *parens patriae* powers in many areas of intimate life, including the embryo market. Once public law is in the business of regulating any of the reproductive technologies, it is hard to see that it will do a better job than the industry or the parties themselves (or private law). Moreover, it is hard to see why the state that interferes with intimate decisions that happen to occur with medical assistance to reproduce cannot similarly interfere in decisions of who to marry or otherwise have a child with by coitus.<sup>82</sup>

### C. CONCLUSION

Reproductive technologies are largely unregulated in the United States. I think this is a good thing, in part because I suspect that if legislatures were to start deciding who is worthy of having children, they would only allow heterosexual, married couples to become parents. This would leave out lots of people because recent census figures indicate that married households comprise a minority of the U.S. population.<sup>83</sup> Without gamete markets, it would be much harder for single and gay people to become parents, and lots of children would not be born.

Moreover, the very limitation would defeat the market's ability to facilitate family formation on the basis of intent and function, rather than heterosexuality and biology.

Whether these arguments apply to embryo markets is a closer call. Gay people as a class are more likely, I suspect, to buy gametes (gay men supply their own sperm and lesbians supply their own eggs). Thus the likely embryo buyers are older heterosexuals, with infertility in both partners, as well as older single women. Older heterosexuals are likely to get protection from legislation and thus are less likely to need markets to skirt majoritarian moral disapproval. But single older women would need markets, just as gay men and lesbians have been able to become parents in large numbers by virtue of the largely free, open market in American reproductive technologies. Thus, especially with controls for over-the-top marketization (i.e., posting embryos on eBay or other auctions or advertising), the benefits of embryo markets may well outweigh the dangers.

## NOTES

- 1 Racial minorities, whether single, gay, or heterosexual and coupled, paradoxically have had less access to reproductive technologies, despite higher rates of infertility. DOROTHY ROBERTS, *KILLING THE BLACK BODY* (1997).
- 2 The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, codified as 42 U.S.C. §1305 (2000); The Defense of Marriage Act, 1 U.S.C. §7 (1997); and *Goodridge v. Dept. of Health*, 798 N.E.2d 941 (Mass. 2003).
- 3 Paradoxically, nature is also contrasted with civilization so that some kinds of "unnatural" affiliations might be viewed as "too natural," even feral, in opposition to the orderly world of heterosexual marriage. Martha M. Ertman, *The Story of Reynolds v. U.S.: Federal "Hell Hounds" Pursuing Mormons for Treason*, in *FAMILY LAW STORIES* (Carol Sanger ed., 2007).
- 4 One defect in this reasoning lies in the fact that what constitutes the so-called natural family changes over time. Anthropologists view family through the lens of kinship and note how kinship exists on the border of nature and culture by providing the cultural context for biological functions of procreation. MARILYN STRATHERN, *REPRODUCING THE FUTURE: ESSAYS ON ANTHROPOLOGY, KINSHIP, AND THE NEW REPRODUCTIVE TECHNOLOGIES* 17 (1992). Strathern notes that over the course of the twentieth century, "nature" increasingly became biologized, which has in turn biologized the idea of natural kinship. *Id.* at 19.
- 5 Strathern suggests that *natural parent* may be understood in the future to mean "one for whom no special techniques are involved and the one on whose behalf no special legislation is required." Strathern, *supra* note 4, at 20.
- 6 Moral arguments regarding organ donations often focus on altruism, an analysis that often ignores other moral considerations such as the way that race and class issues affect the rights and obligations of both donors and recipients. MICHELE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* (2006).
- 7 JOHN STUART MILL, *ON LIBERTY* (1859).
- 8 Naomi Cahn's chapter in this volume (Chapter 10) previews her book *TEST TUBE FAMILIES* (2009).
- 9 Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 26–34 (2003).

- 10 If white, blonde, blue-eyed children have particular market cachet, then other children are implicitly devalued. Moreover, the very nature of treating the acquisition of parental rights and responsibilities as a market transaction blurs the crucial cultural distinction between things and people.
- 11 MARGARET JANE RADIN, *CONTESTED COMMODITIES* 139 (2001).
- 12 Ertman, *supra* note 9, at 33–5 (citations omitted [other than Radin quote]).
- 13 VIVIANA ZELIZER, *THE PURCHASE OF INTIMACY* (2005).
- 14 *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).
- 15 Martha M. Ertman & Joan Williams, *Preface*, in *RETHINKING COMMODIFICATION* 2–5 (Martha M. Ertman & Joan C. Williams eds., 2005).
- 16 For a fuller statement of this point, see Joan Williams & Viviana Zelizer, *To Commodify or Not to Commodify: That Is Not the Question*, in *id.* at 362.
- 17 Fictional, and dystopic, renditions of these markets include MARGARET ATWOOD, *THE HANDMAID'S TALE* (1985), and KAZUO ISHIGURU, *NEVER LET ME GO* (2005).
- 18 Strathern, *supra* note 4.
- 19 See the Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. 263a-1 (2000); 21 CFR 1271 (2006); Ertman, *supra* note 9.
- 20 MICHAEL SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* (1998); Michael J. Sandel, *The Case against Perfection*, ATLANTIC, April 2004, at 52.
- 21 MARY LYNDON SHANLEY, *MAKING BABIES, MAKING FAMILIES* 92–95 (2001). She does allow for reimbursement of expenses in making donations.
- 22 DAVID BLANKENHORN, *FATHERLESS AMERICA* (1995).
- 23 Roberts, *supra* note 1.
- 24 DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* (2006).
- 25 Radin, *supra* note 11.
- 26 Elisabeth Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEG. STUD. 323 (1978). For other robust defenses of marketizing parenthood through reproductive technologies, see LORI ANDREWS, *BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, AND BRAVE NEW BABIES* (1989). See also JOHN ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994).
- 27 Prices of adoption, too, vary on the basis of race already. Ertman, *supra* note 9; Patricia J. Williams, *In Search of Pharaoh's Daughter*, in *RETHINKING COMMODIFICATION*, *supra* note 15, at 68.
- 28 Posner recognizes as much. Landes & Posner, *supra* note 26.
- 29 See the Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. 263a-1 (2000); 21 CFR 1271 (2006).
- 30 LA. REV. STAT. 9:122 (2007).
- 31 IND. CODE ANN. 35-46-5-3(a) (2007) ("A person who knowingly or intentionally purchases or sells a human ovum, zygote, embryo, or fetus commits unlawful transfer of a human organism, a Class C felony"). The statute does not prohibit paying a "woman donor of an ovum" for lost earnings, travel expenses, and up to three thousand dollars for recovery time in a "procedure to enhance human reproductive capability" such as IVF. *Id.* at 35-46-5-3(b).
- 32 VA. CODE 32.1-289.1 (2007). Like the Indiana statute, it allows for "reimbursement for expenses associated with the removal and preservation of any natural body parts for medical and scientific purposes."
- 33 MD. CODE 83A, 5-2B-10 (2007).
- 34 See National Conference of State Legislatures, *State Embryonic and Fetal Research Laws* (updated Jan. 19, 2007), <http://www.ncsl.org/programs/health/genetics/embfet.htm>.



- 35 Spar, *supra* note 24, at 30, 39.
- 36 Roni Caryn Rabin, *As Demand for Donor Eggs Soars, High Prices Stir Ethical Concerns*, N.Y. TIMES, May 15, 2007, at F6.
- 37 Lynn Harris, *Bionic Parents and Techno-Children*, SALON.COM, May 9, 2007.
- 38 See, e.g., JULIA DEREK, *CONFESSIONS OF A SERIAL EGG DONOR* (2004).
- 39 Sandel, *supra* note 20.
- 40 Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* in RETHINKING COMMODIFICATION, *supra* note 15, at 122.
- 41 Michael Sandel, *Tanner Lectures on Human Values* at Oxford University (1998); see also Spar, *supra* note 24 (referencing Sandel's opposition to such sales).
- 42 See, e.g., Derek, *supra* note 38; Rabin, *supra* note 36 (describing a twenty-three-year-old woman's egg sale for seven thousand dollars to pay off her student loans, a transaction she would not have engaged in but for the payment).
- 43 Ertman, *supra* note 9.
- 44 WISHBONE ASH, *MOTHERLESS CHILD* (Talking Elephant 2006).
- 45 See generally, *Intended Parents, Inc* [http://intendedparents.com/Info/Surrogate\\_Moms.asp](http://intendedparents.com/Info/Surrogate_Moms.asp)
- 46 Goodwin, *supra* note 6; Williams, *supra* note 27; Roberts, *supra* note 1. IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001).
- 47 Ertman, *supra* note 9, at 310–11 (describing California Cryobank inventory from May 2001 with 68% Caucasian donors, 17% Asian donors, 11% “mixed race or unique racial designation,” and 4% African American donors, and noting that the 2000 census reported that the general population, in contrast, was 75% Caucasian, 4% Asian, 3% mixed race and American Indian and Alaskan Native, and 12% black or African American).
- 48 *Loving v. Virginia*, 388 U.S. 1 (1967); *Palmore v. Sidotti*, 466 U.S. 429 (1984).
- 49 Spar, *supra* note 24, at 112–17.
- 50 *Id.* at 123.
- 51 Roberts, *supra* note 1.
- 52 Spar, *supra* note 24, at 126, 112 (quoting Mark Hughes, a pioneering researcher in preimplantation genetic diagnosis at Baylor College of Medicine in Houston).
- 53 LIZA MUNDY, *EVERYTHING CONCEIVABLE*, 78–9 (2007).
- 54 *Id.* at 213 (noting that one child in thirty-three born is a twin), 217 (noting increased challenges faced by twins and other multiples, including prematurity, low birth weight, and cerebral palsy).
- 55 Harris, *supra* note 37.
- 56 LINDA KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES* (1998).
- 57 This progress is not always direct or complete. Reva Siegel, *Why Equal Protection No Longer Protects*, 49 STAN. L. REV. 1111 (1997).
- 58 Arjun Appadurai, *Introduction*, in *THE SOCIAL LIFE OF THINGS* (1986), reprinted in Ertman & Williams, RETHINKING COMMODIFICATION, *supra* note 15.
- 59 California Cryobank homepage, <http://www.cryobank.com>; Fairfax Cryobank Home Page, <http://www.fairfaxcryobank.com>.
- 60 See, e.g., Osagie K. Obasogie, Op-Ed, “Walmartization” of Embryos, BOSTON GLOBE, Feb. 1, 2007, at A9; Rob Stein, *Embryo Bank Stirs Ethics Fears: Firm Lets Clients Pick among Fertilized Eggs*, WASHINGTON POST, Jan. 6, 2007, at A1; Carol Midgley, *Embryos for Sale*, THE TIMES (London), Jan. 12, 2007, at 4.
- 61 Abraham Center of Life home page, <http://www.theabrahamcenterforlife.com/index4.html>.

- 62 Joe Palca, *Adoption Agency Offers Up Embryos to Couples*, <http://www.npr.org/templates/story/story.php?storyID=6749036>. Other news coverage detailed Ryan's production of twenty-two embryos from a twenty-something egg donor in Arizona and a six-foot-tall blonde lawyer whose sperm she purchased from the Fairfax Cryobank, and two pregnancies that apparently resulted from her arrangements with a New York fertility clinic.
- 63 Stein, *supra* note 60, at 1.
- 64 See BLACK'S LAW DICTIONARY (8th ed. 2004) ("fertile-octogenarian rule," "The legal fiction, assumed under the rule against perpetuities, that a woman can become pregnant as long as she is alive").
- 65 A baby conceived coitally by a heterosexual couple likely to be unintended. John Santelli *et al.*, *The Measurement and Meaning of Unintended Pregnancy*, 35 PERSP. SEXUAL REPROD. & HEALTH 94, 94 (2003) (noting that 49% of pregnancies in 1994 were unintentional, down from 57% in 1987).
- 66 DEBORA SPAR, *THE BABY BUSINESS* 32 (2006).
- 67 Stein, *supra* note 60.
- 68 Fran Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497 (1983).
- 69 John Robertson, *Commerce and Regulation in the Assisted Reproduction Industry*, 85 TEX. L. REV. 665, 694 (2007); ROBERT ELLICKSON, *ORDER WITHOUT LAW* (1991).
- 70 Shanley, *supra* note 21; Garrison, *infra* note 82.
- 71 Spar, *supra* note 24, at 126.
- 72 *Jeter v. Mayo Clinic*, 121 P.3d 1256, 1261 (Az. App. 2005).
- 73 842 SW.2d 588 (Tenn. 1992).
- 74 UCC 1-201(b) (20); 1-203; 2-103.
- 75 *See, e.g.*, *First Texas Service Corp. v. Roulier*, 750 F. Supp. 1056 (D. Colo. 1990). However, parties can define what constitutes compliance with the duty of good faith, such as written notification within ten business days to take a particular action. *See, e.g.*, *Q.C. Onics Ventures, LP v. Johnson Controls, Inc.*, 2006 U.S. Dist. LEXIS 45189 (N.D. Ind. June 21, 2006).
- 76 *In re Cilek*, 115 B.R. 974 (Bankr. W.D. Wis. 1990).
- 77 *In re Schwalb*, 347 B.R. 726 (Bankr. D. Nev. 2006).
- 78 3 Am Jur 2d Advertising §16 (2007).
- 79 Recent Supreme Court jurisprudence suggests increasing tolerance for price fixing under antitrust laws. *Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705 (U.S. 2007).
- 80 Joshua Kleinfeld, *Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury"*, 115 YALE L.J. 44 (2005).
- 81 Legislatures faced with the question of recognizing the right of gay couples to form families overwhelmingly tend to reach the opposite conclusion by passing Defense of Marriage Acts that refuse to recognize alternative families. FLA. STAT. §63.042
- 82 For an extended argument that law should regulate parental rights and responsibilities the same for children conceived with reproductive technology and coitally, *see* Marsha Garrison, *Law Making and Baby Making*, 113 HARV. L. REV. 835 (2000).
- 83 Sam Roberts, *It's Official: To Be Married Means to Be Outnumbered*, N.Y. TIMES, Oct. 15, 2006, at A14.