Rethinking Reproductive Discrimination

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Ten years ago, in language that today sounds increasingly archaic, an Indiana court upheld that state's same-sex marriage prohibition by drawing a clear distinction between "artificial" and "natural" reproduction.[1] The purpose of marriage, the court explained, was to provide a stable context for opposite-sex couples who "accidentally" procreated outside of marriage.[2] Because same-sex couples procreated—if at all—by design and therefore never by chance, they did not need the protections that marriage affords.[3]

This so-called "responsible procreation" argument flourished in the courts for years, justifying marriage prohibitions in left-leaning and right-leaning states alike.[4] Indeed, it was not until the recent wave of marriage equality victories in the United States that courts started to reject the "responsible procreation" justification as a legitimate basis for marriage prohibitions. When Indiana tried to use that rationale once again in 2014 to justify its same-sex marriage prohibition, Judge Posner, with characteristic wit, promptly dismissed it. "Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to married," he wrote.[5] "Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure."[6]

While the responsible procreation argument, like the marriage prohibitions that it has long sustained, is fading into oblivion,[7] the reproductive discrimination on which that argument rests persists. After *Lawrence v. Texas*, it is no longer constitutionally permissible for states to distinguish between certain sex acts because of what those acts look like, who is engaging in them, and which parts of the body they involve.[8] By contrast, countless examples exist of the law's differential treatment of certain

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[1] Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005) (upholding Indiana's limitation of marriage to cross-sex couples).

[2] *Id*. at 24-25.

[3] *Id*.

[4] *See, e.g.*, Hernandez v. Robles, 794 N.Y.S.2d 579, 599 (Sup. Ct. 2005), *rev'd and vacated by* 805 N.Y.S.2d 354 (2005), *aff'd*, 855 N.E. 2d 1 (N.Y. 2006) (stating that "recognition of marriage would not promote the State's interest in marital procreation, particularly unintended procreation from heterosexual intercourse"); Standhardt v. Superior Court, 77 P.3d 451, 463 (Ariz. App. Div. 2003) ("Because same-sex couples cannot themselves procreate, the State could reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships"). Procreationist logic emerges in marriage equality cases in forms other than the responsible procreation rationale. For instance, some courts have upheld exclusionary marriage laws by adverting to the necessary link between marriage and procreation and to the possibility that same-sex marriage will weaken that link. *See* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1016 (2012), *rev'd and remanded by* Latta v. Otter, 771 F.3d 456, 471 (9th Cir. 2014) (rejecting all forms of procreationist logic and holding that Idaho and Nevada's exclusionary marriage laws violate the federal Equal Protection Clause) ("The perpetuation of the human race depends upon traditional procreation between men and women. The institution developed in our society, its predecessor societies, and by nearly all societies on Earth throughout history to solidify, standardize, and legalize the relationship between a man, a woman, and their offspring, is civil marriage between one man and one woman"). As with decisions upholding marriage inequality on the basis of responsible procreation, these decisions posit a legally relevant distinction between sexual and non-sexual procreation. *See Sevick*, 912 F. Supp. 2d at 1016 ("Human beings are created through the conjugation of one man and one woman. The percentage of human beings conceived through non-traditional methods is minuscule").

[5] Baskin v. Bogan, 766 F.3d 648, 662 (7th Cir. 2014).

[6] *Id*.

[7] *See, e.g.*, *Latta*, 771 F.3d at 471 (rejecting the procreation rationale for exclusionary marriage laws); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 956-57 (N.D. Cal. 2010) (same).

[8] The *Lawrence* Court criticized the *Bowers v. Hardwick* Court's obsessive focus on the mechanics of the sex act at issue there, reasoning that the intimate relationship, not the conduct that relationship entails, is the proper focus of a constitutional inquiry. Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("To say that the issue in *Bowers* was simply

procreative acts—and the legal relationships those acts create—because of what those acts look like, who is engaging in them, and which parts of the body they may or may not involve. In fact, marriage equality jurisprudence aside, the overwhelming trend by courts, regulators, and scholars is to treat procreation differently depending on the manner in which it occurs.

For instance, the law in every state that has addressed the legal status of sperm donors[9] makes a distinction between sexual and alternative reproduction in the laws of parentage: fatherhood can never be contractually waived by a man if he procreates with a woman sexually,[10] even if his intention is to be a 'mere' sperm donor, whereas it can likely be waived by a man if he procreates with a woman anonymously and through alternative insemination under certain conditions.[11] Indeed, the rights and legal obligations of men who create children in non-coital ways are measured by the extent to which their non-coital reproduction approximates traditional reproduction, with more intimate procreation (even if of a non-sexual nature) resulting in a higher likelihood of rights and obligations.[12] In some cases, paternal obligations have even been imposed on men whose sperm was "stolen" by women following oral sex and used by those women to self-inseminate; in one case, a court reasoned that imposing child support on a

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the right to engage in *certain sexual conduct* demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse") (emphasis added); *id*. at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be *but one element* in a personal bond that is more enduring") (emphasis added). Some commentators have argued that this and other language from *Lawrence* place constitutional limits around governmental regulation of alternative reproductive technology. *See* Amber D. Abbasi, *The Curious Case of Trent Arsenault: Questioning FDA Regulatory Authority over Private Sperm Donation*, 22 ANNALS HEALTH L. 1 (2013); Katheryn D. Katz, Lawrence v. Texas*: A Case for Cautious Optimism Regarding Procreative Liberty*, 25 WOMEN'S RIGHTS L. REP. 249, 253 (2004) (arguing that *Lawrence* "gives reason to hope and a basis to argue that reproductive choices using ARTs are . . . entitled to recognition and protection").

[9] Surprisingly, not all states have addressed the legal status of sperm donors, whether anonymous/commercial or known, through either statute or case law. These states include Arizona, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nevada, Tennessee, Vermont, and West Virginia. *See* Lauren Gill, *Who's Your Daddy?: Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1738 n.153 (2013).

[10] *See, e.g.*, Katharine Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 701 (2008) (stating that American law has "never allowed men and women to agree to waive parental status before or after the intercourse that led to conception"); Katharine K. Baker, *Bargaining or Biology?: The History and Future of Paternity Law and Paternal Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 22-23 (2004).

[11] Some states still follow the Uniform Parentage Act (UPA) of 1973, which provides that donors are not legal fathers if they provide semen to a physician for inseminating a married woman who is not the donor's wife. *See* Gill, *supra* note 9, at 1738 & n.151; *see also* Unif. Parentage Act § 5(b) (stating that a male donor will not be considered a father of a child born of artificial insemination if the sperm is provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife). Other states follow the Uniform Parentage Act of 2002, which provides that no donor will be considered a parent of any child that results from his donation, regardless of the marital status of the recipient and regardless of whether the insemination involved a physician. Gill, *supra*, at 1738 & n.152. For the 2002 Uniform Parentage Act, see Unif. Parentage Act § 702 (amended 2002) (stating that "[a] donor is not a parent of a child conceived by means of assisted reproduction"). The comments to § 702 clarify that this section of the revised UPA dispenses with the requirement that a recipient be married in order for the donor to avoid paternity, as well as with the requirement that the donor provide semen to a licensed physician. With respect to the first requirement, the amended UPA comments state that "[t]his requirement is not realistic in light of present ART practices and the constitutional protections of the procreative rights of unmarried as well as married women"). The revised UPA of 2002 also makes clear that the term "donor" applies only to assisted reproduction and therefore does *not* include someone who helps to create a child through sexual intercourse. *See* Unif. Parentage Act of 2002 § 701 (stating that "[t]his [article] does not apply to the birth of a child conceived by means of sexual intercourse").

[12] As this paper will show below, known donors, as well as anonymous donors who do not use third-party intermediaries (like doctors), tend to have more rights and obligations than unknown donors and/or known donors who use third-party intermediaries. *See infra* Part I.

man in that situation was justified on the ground that "he had *some sort* of sexual contact with [the] plaintiff around the time frame of alleged conception."[13]

Similarly, the Food and Drug Administration (FDA) distinguishes between sperm donations that occur between "sexually intimate partners" (for instance, a man and his wife who are conceiving with third-party assistance but who are otherwise sexually intimate) and sperm donations that occur between non-sexually-intimate partners (for instance, an anonymous or known donor who facilitates conception but is not in a "sexually intimate" relationship with the recipient of his gametes).[14] Under current law, the former category of donations (those between sexually intimate partners) are exempt from the FDA's myriad—and costly—testing requirements for communicable diseases like HIV and West Nile virus, whereas the latter category of donations (those between persons who are not sexually intimate) are not.[15] Making eligibility for the exemption turn on the nature of the relationship between donor and recipient, as the FDA regime does, has prompted criticism by commentators[16] as well as a federal lawsuit by individuals who wish to avoid the added costs associated with mandatory testing.[17]

In addition to the legal regimes that currently exist that distinguish between sexual and alternative reproduction, commentators have recently advocated for the passage of laws that are predicated on a presumed difference between sexual and alternative reproduction—laws that would reform the fertility industry in radical ways. Some scholars, for instance, have argued that gamete banks ought to be discouraged from arranging donors in race-salient ways in order to import a norm of color-blindness into the private world of third-party reproduction.[18] Others have variously argued that the law ought to eliminate anonymity in gamete donation,[19] to place mandatory caps on the number of times that a donor can successfully donate gametes to third parties,[20] to limit the number of eggs that can be transferred to a woman during a single in vitro fertilization cycle,[21] and to permit tort actions brought by children conceived from alternative reproductive technology (and "injured" because of that technology) against their parents.[22] Like marriage equality's responsible procreation rationale, these suggested reforms rest

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[13] State v. Frisard, 694 So. 2d 1032, 1036 (La. Ct. App. 1997) (emphasis added). For a fuller discussion of the "misappropriated sperm" paternity cases, see Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 ALA. L. REV. 507 (2015). For other cases where paternity has been imposed on men who were "deceived" into that legal status, see Wallis v. Smith, 22 P.3d 682, 682 (N.M. Ct. App. 2001) (holding that potentially deceitful behavior by woman before or during sexual activity does not void child support obligation); In re L. Pamela P. v. Frank S., 449 N.E.2d 713, 715 (N.Y. 1983) (same); Moorman v. Walker, 773 P.2d 887, 889 (Wash. Ct. App. 1989) (same). Indeed, paternity has even been imposed on men who were incapable of giving legal consent to sexual activity. *See, e.g.*, County of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843 (Cal. Ct. App. 1996) (holding that inability to give meaningful consent to sexual activity does not void any child support obligation that flows from that sexual activity); Kansas ex rel. Hermesmann v. Seyer, 847 P.2d 1273 (Kan. 1993) (same); Mercer County Dep't of Soc. Serv. ex rel. Imogene T. v. Alf M., 589 N.Y.S.2d 288, 289 (N.Y. Fam. Ct. 1992) (same).

[14] *See* 21 C.F.R. § 1271.90(a)(2) (2012) (stating that "[r]eproductive cells or tissue donated by a sexually intimate partner of the recipient for reproductive use" are exempt from Part 1271's requirements to screen, test, and conduct donor eligibility determinations).

[15] *Id*.

[16] *See* Abbasi, *supra* note 8, at 27-28; Jacqueline M. Acker, *The Case for an Unregulated Private Sperm Donation Market*, 20 UCLA WOMEN'S L.J. 1 (2013).

[17] Doe v. Hamburg, 2013 WL 3783749 (July 16, 2013) (dismissing a case brought by a woman who wished to engage in private sperm donation with a male provider of those services on the ground that she lacked standing to assert his constitutional claims).

[18] *See* Dov Fox, Note, *Racial Classification and Assisted Reproduction*, 118 YALE L.J. 1882 (2009).

[19] *See, e.g.*, Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 413 (2012).

[20] NAOMI CAHN, THE NEW KINSHIP 161 (2012).

[21] Naomi R. Cahn & Jennifer M. Collins, *Eight is Enough*, 103 NW. U. L. REV. COLLOQUY 501 (2009).

[22] Michele Goodwin, *A View from the Cradle: Tort Law and the Private Regulation of Assisted Reproduction*, 59 EMORY L.J. 1041 (2010).

on a perceived distinction between sexual and non-sexual reproduction, as their proponents sometimes argue that analogous regulations of sexual reproduction—for instance, regulations that eliminate anonymity and racial considerations from sexual reproduction—would likely be impermissible under the Constitution.[23]

Rather than question the wisdom of these specific reforms, this paper instead interrogates the reproductive binary on which they rest: the sexual/alternative reproduction binary. It argues that this binary, which might be explained as the product of the very law that rendered alternative reproduction licit, finds no support either in fact or in law. Gay rights jurisprudence, it contends, starting with *Lawrence* and extending through the wave of marriage equality victories that has swept the nation since the Supreme Court's landmark decision in *United States v. Windsor*,[24] stands for much more than the proposition that the state cannot criminalize the sexual conduct of sexual minorities or withhold basic civil rights from them, including marriage. Rather, or in addition, those cases stand for the proposition that the state cannot ground laws that relate either directly or indirectly to reproduction on the way in which it occurs.[25] For these and other reasons, this paper contends, family law's reproductive binary warrants serious reconsideration, if not outright rejection. In 2008, Professor John Robertson wrote that "a fully theorized approach to reproductive liberty—particularly when one actively seeks to reproduce—still wants legal elaboration."[26] This paper argues that such a "theorized approach" not only "still wants legal elaboration," but also is even more necessary today than it was 2008, when marriage equality—and the robust ethic of familial and reproductive pluralism that that movement has come to represent—was still in its (relatively) nascent state. Indeed, this paper maintains that marriage equality jurisprudence necessarily prompts a rethinking of the panoply of regulatory regimes, either in existence today or that might emerge in the future, that turn on a factual and legal distinction between sexual and alternative reproduction.

After presenting numerous examples of the way in which the law treats procreation differently depending on the mechanics that it involves, this paper briefly offers three conceptual explanations, as well as a possible historical explanation, for that differential treatment. Conceptually, the law's persistent categorizing of reproduction as either "sexual/traditional" or "non-sexual/alternative" might be explained as derivative of another deeply-rooted binary: the commerce/intimacy binary. According to it, the world of commerce and the world of intimacy are separate and distinct domains—separate and distinct enough to justify laws that keep them apart, including laws that treat "commercial" family formation different from "intimate" family formation.[27] The sexual/alternative reproduction binary is also a conceptual by-product of the law's tendency to treat sexual conduct and its correlates—*e.g.*, sex crimes, sex offenders—

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[23] *See, e.g.*, Naomi Cahn, *Do Tell!: The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1106 (2014) (arguing that sexual and alternative reproduction are "different enough" to justify different legal treatment of them); Goodwin, *supra* note 23, at 1091-92 (stating that "natural reproduction" and "clinical or assisted reproduction" are "distinctly different"); Fox, *supra* note 19, at 1182 ("Autonomy interests are implicated differently in assisted reproduction than they are in sexual reproduction or romantic dating); Dov Fox, *Choosing Your Child's Race*, 22 HASTINGS WOMEN'S L.J. 3, 11 (2011) (same).

[24] 133 S. Ct. 2675 (2013).

[25] For the argument that *Windsor* and contemporary marriage equality jurisprudence stand for a broader right to familial establishment, see Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, U.C. DAVIS L. REV. (2015, forthcoming); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 818 (2014).

[26] John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490, 1493-94 (2008).

[27] For a discussion of how this binary shapes contemporary legal norms surrounding alternative procreation, see Martha M. Ertman, *Unexpected Links Between Baby Markets and Intergenerational Justice*, 8 L. & ETHICS OF HUM. RTS. 271 (2014); Martha Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003).

as sui generis, different not just in degree but in kind from other species of conduct,[28] as well as its tendency to treat alternative reproduction as less private, and therefore more susceptible to regulation, than sexual reproduction.[29]

In addition, the sexual/alternative reproduction binary might be explained as an artifact of the legalization of alternative insemination in the 1960s and 1970s. When states began to legalize alternative insemination in the 1960s,[30] and when the Uniform Parentage Act followed suit in 1973, they made clear that the legality of that procedure depended on whether a third-party intermediary—specifically, a doctor—participated in life creation.[31] Before that time, courts routinely conceptualized alternative insemination in sexual terms, characterizing it as "adultery by doctor" and deeming the children that it created "illegitimate." Eventually, however, legislators and regulators legitimized this increasingly popular procedure—but only by de-sexualizing it and by drawing a clear distinction between sexual life creation and commercial/medical life creation.[32] As Kara Swenson explains, "[t]he participation of a doctor did the cultural work of transforming what some considered a variation of adultery into a treatment for infertility, that is, 'sin into therapy.'"[33] This paper suggests that the very laws that transformed an illegal procedure into a legal one in the 1960s and 1970s might be partially responsible for the law's persistent reproductive binary, as those laws conditioned the legitimacy of alternative insemination on how unlike sexual reproduction it appeared to be.

Simply because conceptual and historical explanations for the law's reproductive binary exist, however, does not mean that the binary is immune to criticism or to the revisionism that this paper advocates. To that end, this paper contends that the binary warrants reconsideration—and rejection—for factual and constitutional reasons.[34] It first argues that the law's reproductive binary is factually inaccurate, obscuring the similarities that exist between sexual and alternative reproduction. Consider, for instance, the similarities that sexual procreation shares with its "assisted" form. On the most basic level, all reproduction is assisted reproduction, as parthenogenesis, like Athena springing from Zeus' head, is a human impossibility. Moreover, two individuals conceiving the "old-fashioned way" often have third-party assistance: surveys suggest that a not insignificant number of individuals are thinking of someone else while having sex and are doing so in order to have sex,[35] and whole industries exist—sex aid pharmaceuticals, pornography, sex toys, sex therapy—for the purpose of facilitating sexual desire and sexual intercourse.[36] To the extent that procreation is the by-product, whether intentional or not, of that intercourse, it simply cannot be said that alternative reproduction is radically different than sexual procreation because of the third-party assistance and commerce that it involves. All of the above-mentioned industries throw into relief the commercial character of sexual reproduction, as well as the role that third-party intermediaries often play in facilitating it.

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[28] For a rich discussion of the pervasive, and often privileged, status of sex in American legal culture, see Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303 (2014).

[29] *See* Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1473-74 (2008).

[30] People v. Sorensen, 437 P.2d 495 (Cal. 1968).

[31] Unif. Parentage Act § 5(b).

[32] For a discussion of this history, see Kara W. Swanson, *Adultery by Doctor: Artificial Insemination, 1890-1945*, 87 CHI.-KENT L. REV. 591 (2012).

[33] KARA W. SWANSON, BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA 225 (2014).

[34] For commentators who have similarly questioned the law's reproductive binary, see Ertman, *supra* note 27; Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation* (unpublished manuscript on file with author).

[35] *See, e.g.*, Harold Leitenberg & Kris Henning, *Sexual Fantasy*, 117 PSYCH. BULL. 469 (1995); The American Sex Survey: A Peek Beneath the Sheets, *available at* http://abcnews.go.com/images/Politics/959a1AmericanSexSurvey.pdf.

[36] *See generally* DAGMAR HERZOG, SEX IN CRISIS: THE NEW SEXUAL REVOLUTION AND THE FUTURE OF AMERICAN POLITICS (2008).

Just as sexual procreation shares fundamental aspects with alternative procreation, so too does alternative procreation share essential attributes with sexual procreation—or, to be more precise, so too does alternative procreation share what commentators typically posit are the essential attributes of sexual procreation. For instance, much of what we call "assisted" or "alternative" reproduction is intimate and sexual. As a *Slate* article recently reports, lesbian couples are increasingly opting for at-home inseminations that can be "romantic," "intimate," and "sexual."[37] In addition, the women who have conceived children with the semen of Trent Arsenault, the sperm donor who was the subject of the above-mentioned constitutional challenge to the FDA's mandatory testing exemption for "sexually intimate partners," have argued in federal court that they are "sexually intimate" with Mr. Arsenault, even though they do not have sexual intercourse with him.[38]

Finally, the growing practice of "one night stand" or "natural" inseminations—where a man "donates" his sperm by sexually inseminating a woman for free—suggests that in some sense the boundary between "sexual" and "assisted" reproduction has blurred completely.[39] Courts have refused to treat natural inseminators like anonymous sperm donors, finding instead that sexual insemination invariably creates a legal relationship between the sexual donor and any children whose creation he facilitates.[40] Nevertheless, the men and women who enter into natural insemination agreements regard the sexual aspect of the "donation" as irrelevant to the legal status of the child that results from it, preferring instead to conceptualize sex as merely one among many different—but morally and legally equivalent—life-creating mechanisms.

The law's reproductive binary makes no more sense constitutionally than it does factually. The text of the Constitution does not support different legal treatment of sexual and alternative reproduction; nor does constitutional history or constitutional doctrine. The Constitution makes no reference to a procreative right, let alone to a sexually procreative right. Moreover, Supreme Court doctrine on the right to procreate nowhere explicitly links sex and procreation. Finally, the historical context surrounding the landmark case that appeared to establish a right to procreate in 1942, *Skinner v. Oklahoma*,[41] supports a right to procreate through either sexual or assisted means, as alternative reproduction was available, even if not altogether legal, at the time that *Skinner* was decided.[42]

In addition, and more problematic still, the law's reproductive binary is in tension with Supreme Court landmarks like *Lawrence v. Texas* as well as with the constitutional norms that are emerging—or

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[37] Jillian Keenan, *Beyond the Turkey Baster*, SLATE, Aug. 26, 2013, *available at* http://www.slate.com/articles/double_x/doublex/2013/08/intrauterine_insemination_at_home_midwives_are_performing_iuis_without_formal.html.

[38] Doe v. FDA, First Amended Complaint, *available at* http://causeofaction.org/assets/uploads/2013/01/ECF-No-33_First-Amended-Complaint.pdf.; Abbasi, *supra* note at 8, at 38 (arguing that "sexually intimate relationships can involve a broad range of physical and emotional intimacies, only some of which are contained within the [sexually intimate partner] definition advanced by the FDA").

[39] Jeff Schneider, Muriel Pearson, & Alexa Valiente, *Meet the Men Having Sex with Strangers to help them have Babies*, ABC News, Nov. 13, 2014, *available at* http://abcnews.go.com/Lifestyle/meet-men-sex-strangers-babies/story?id=26870643

[40] *See, e.g.*, Straub v. BMT, 645 N.E.2d 597 (Ind. 1994).

[41] 316 U.S. 535 (1942).

[42] Because the *Skinner* Court relied on the Equal Protection Clause when striking down Oklahoma's mandatory criminal sterilization law, some commentators maintain that the right to procreate is not an expansive privacy/liberty right but rather a more constrained equality right. *See* Rao, *supra* note 30, at 1462 (arguing that "the 'liberty' protected under the Due Process Clause of the Fourteenth Amendment doesn't appear to include a fundamental right to use ARTs"). In Rao's view, *Skinner* ought to be read to stand for the proposition that the state cannot single out particular groups (like gays and lesbians) when regulating alternative reproduction but it may regulate alternative reproduction for everyone. *See id*. Other scholars read *Skinner* as establishing a more expansive liberty right. *See* Robertson, *supra* note 27, at 1493 (arguing that "[a]lthough [*Skinner*] couched its decision in the language of equality . . . the rhetoric of a liberty right to reproduce . . . explains the frequency with which the case is now cited").

have emerged—from contemporary marriage equality jurisprudence. In prioritizing social, rather than biological, kinship, and in dismantling the link between sexual procreation and marriage, the marriage equality precedent throws into serious question legal regimes that continue to distinguish between sexual and non-sexual reproduction and to privilege one variety of family formation over another.[43] In so doing, the marriage equality precedent suggests the deep constitutional and normative deficiencies of the law's reproductive binary; at the same time, that precedent invites reflection on what reproduction in a de-binarized world—one where the robustness of the procreative right does not depend on the manner in which reproduction occurs—might look like.

This paper proceeds as follows. The first two Parts are descriptive in scope. Part I reveals the law's sexual/alternative reproduction binary as it exists in judicial decisions, state and federal legislation, and academic commentary, and Part II offers conceptual and historical reasons for it. Part III, which moves from the descriptive to the normative, subjects the law's reproductive binary to factual, constitutional, and normative critique. Here, this paper exposes the law's reproductive binary as a false one by revealing the similarities and convergences between sexual and alternative reproduction; this Part also contends that neither a textual nor a historical reading of the Constitution, nor marriage equality jurisprudence or the trajectory of family law more generally, supports differential legal treatment of procreation depending on the way in which it occurs. Part IV concludes by considering the consequences of the approach here advocated, specifically, how parity of treatment (of sexual and alternative reproduction) might affect myriad legal issues in family law and constitutional law, including, respectively, parentage determinations and the viability of religious conscience objections that arise in the third-party reproduction setting.

[43] *See generally* Cahill, *supra* note 26; Douglas NeJaime, *Before and After Marriage: Toward a Family Law Account of Marriage Equality*, passim (unpublished manuscript on file with author).