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THE DEBT FINANCING OF PARENTHOOD

MELISSA B. JACOBY*

I

INTRODUCTION

In the department of controversy, a market for babies enjoys a prime place. From proposals to liberalize adoption pricing in the 1970s to technological advances in assisted reproduction today, family expansion that requires intermediaries raises questions for nearly every academic discipline and many fields of law.

Throughout these debates, people from across the ideological spectrum often maintain that babies and related rights should not be sold. A small group of scholars has started to approach assisted reproduction, surrogacy, and adoption with the same analytical tools that they would apply to less-contested markets.¹ Such work is central to improving the provision of goods and services relating to parenthood and family expansion. But, so far, it has largely left unexplored the role of debt financing and particularly repeat-playing lenders in this industry.

This article reflects on the role of lenders in the parenthood market and how they might facilitate access and shape this industry in more profound ways. Standing at a kiosk within a fertility clinic, a forty-two-year-old woman of modest means can seek approval, in minutes, of a \$20,000 Capital One Fertility installment loan at 25.99% interest for a round of *in vitro* fertilization (IVF) and the eggs of a younger woman.² Lenders also promote and distribute such

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1. See, e.g., DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 3–6 (2006).

2. See *infra* III.

unsecured installment loans through sellers of IVF package deals and money-back guarantees.

Lenders are regularly in the business of financing adoption costs too. Via foundations and agencies, Bank of America offers unsecured adoption loans in amounts up to \$25,000, while JP Morgan Chase has offered a “Chase New Additions” adoption home-equity line of credit for significantly larger sums.³ Foundations and nonprofit adoption agencies that offer loans sometimes refrain from charging interest at all, or they charge low rates normally associated with borrowers who are practically risk-free. But these lenders may attach other strings that relate to the child’s origin or such characteristics of the potential parent as religious observance, marital status, sexual orientation, and adherence to traditional gender roles.⁴

The development of specific products and marketing channels is consistent with claims that the posited parenthood market exists and is thriving. This makes it important to shift the focus from the threshold inquiry of such a market’s desirability to the best regulatory structure. It also forces one to consider whether the addition of lenders to this market might relieve or exacerbate the conditions that give people pause about parenthood markets in the first place.

This task is especially critical for assisted reproduction. Mainstream fertility-treatment lending complicates a common narrative that most people cannot access these services unless they have insurance coverage or “happen to be rich.”⁵ Although calls for regulation have not necessarily abated on this basis,⁶ the presumption that only a small set of elite customers could buy access has perhaps eased the urgency of these demands. Even if people long have borrowed money on an ad hoc basis for access to fertility treatment and adoptions, the distribution of consumer credit products through fertility clinics and other related channels could increase demand and access to IVF and related procedures considerably. Lack of insurance coverage is not a reliable substitute for substantive oversight of the assisted-reproduction industry.

Repeat-playing institutional lenders should be recognized as relevant to political-economy analysis of the parenthood market. These lenders may improve or aggravate a variety of issues in this market, which in turn can affect

3. See *infra* III.

4. See *infra* III.

5. CHARIS THOMPSON, MAKING PARENTS: THE CHOREOGRAPHY OF REPRODUCTIVE TECHNOLOGIES 26–27 (2005).

6. A list of scholars’ calls for regulation can be found in Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL’Y L. & ETHICS 283, 288 n.20 (2008); Michael J. Malinowski, *Creating Life? Examining the Legal, Ethical, and Medical Issues of Assisted Reproductive Technologies: A Law-Policy Proposal to Know Where Babies Come from During the Reproductive Revolution*, 9 J. GENDER RACE & JUST. 549, 552 (2006). For arguments against regulation, see Martha M. Ertman, *What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 22 (2003) (discussing the benefits to nontraditional parents of the lack of public regulation of the parenthood market).

the need or demand for regulation. This article notes several possible contexts in which these lenders might affect the distribution of goods and services in assisted reproduction, including egg-supplier compensation, expanding parenthood possibilities for same-sex couples, and quality control of IVF.

Section II introduces the issue of financing assisted reproduction and adoption. Section III reviews specialty loans for assisted reproduction and adoption, reflecting traditional research in case law and legal and nonlegal scholarly literature, as well as results from a review of news media and Web sites of prominent intermediaries and service suppliers. Section IV presents a sampling of political-economy implications relevant to assisted reproduction, leaving other issues for future investigation. Section V concludes.

II

PARENTHOOD MARKET FINANCE: BACKGROUND

A. Fertility Barriers and Options

The traditional and common definition of infertility covers those who have not conceived after a designated period of unprotected heterosexual intercourse.⁷ But assisted reproduction is also important to those with “structural infertility”—that is, those who want to be parents but do not want to engage in heterosexual intercourse.⁸

Assisted-reproduction specialists and clinics charge a lot of money to attempt to surmount fertility barriers of either kind. Artificial or alternative insemination is among the least invasive and the cheapest options, but still may cost over \$1000 for the initial round.⁹ The price of just one round of IVF or related processes far exceeds what an average household of four spends out of

7. See, e.g., SPAR, *supra* note 1, at 1–2, 31 (“Roughly 10 to 15 percent of all adults experience some form of infertility.”). Infertility is difficult to measure because many do not report to their doctors. See Michele Goodwin, *Assisted Reproductive Technology and the Double Bind: The Illusory Choice of Motherhood*, 9 J. GENDER RACE & JUST. 1, 18 (2005) (“Poorer women, who lack health coverage, are likely to be disproportionately underrepresented or unaccounted for with infertility statistics.”). For racial differences in diagnosing infertility, see also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 255 (1997).

8. Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 24 (2008); see also Ertman, *supra* note 6; Charles P. Kindregan Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 226–27 (2008) (discussing a more inclusive definition of infertility that includes “the desire to achieve pregnancy by means other than sexual intercourse”); Lars Noah, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 FLA. L. REV. 603, 613 (2003).

9. Ertman, *supra* note 6, at 15; cf. Amy B. Monahan, *Value-Based Mandated Health Benefits* 25 (Univ. of Minn., Working Paper No. 25, 2008) (citing a range of monthly costs for ovulation stimulation and artificial insemination from \$200 to \$5000, depending on drugs and medical monitoring). Artificial insemination is the most frequently used. See John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 324, 349 (2004).

pocket on health care for an entire year.¹⁰ Employing a gestational surrogate costs tens of thousands of dollars in jurisdictions in which the parties believe courts will enforce the underlying contracts.¹¹

Although the comparison is sometimes resisted, adoption is functionally an alternative route to family expansion for those with fertility barriers.¹² Adoption costs vary greatly depending on the type of adoption and the characteristics of the child.¹³ Adopting children from foster care is relatively inexpensive, at least in terms of up-front costs.¹⁴ But costs for many adoptions can be \$30,000 or more.¹⁵

Some couples with fertility barriers “want what to them is irreplaceable, and they will frequently pay whatever they can. They will mortgage their houses, sell their cars, deplete the family savings.”¹⁶ Others with fertility barriers refrain

10. For IVF costs, see SPAR, *supra* note 1, at 59 tbl.2-3 (listing costs at representative clinics). According to the latest Medical Expenditure Panel Survey, out-of-pocket expenditure on health-insurance premiums in 2004 was \$2336 for a family of three or more persons. DIDEM BERNARD & JESSICA BANTHIN, MED. EXPENDITURE PANEL SURVEY, FAMILY-LEVEL EXPENDITURES ON HEALTH CARE AND INSURANCE PREMIUMS AMONG THE U.S. NONELDERLY POPULATION, 2004, at 5, 13 (2007). Mean total expenditures for privately insured families were \$6430. *Id.* at 2.

11. Gestational surrogacy costs range from \$30,000 to \$120,000. SPAR, *supra* note 1, at 92, 96 (describing prices as of 2004). On who actually profits from such transactions, see Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203 (2009).

12. SPAR, *supra* note 1, at 210 (“Both sides of this market would prefer to believe that they are not substitutes for one another. But in reality, of course, they are.”); Krawiec, *supra* note 11 (noting that intended parents for whom assisted reproduction is unsuccessful or unavailable may resort to adoption). On whether it is truly a substitute, see Gillian Hewitson, *The Market for Surrogate Motherhood Contracts*, 73 ECON. RECORD 212, 213 (1997). On the social construction of the preference for biological children, see, for example, ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 93 (1993); ROBERTS, *supra* note 7, at 267 (referring to the desire for genetically related children as “cultural artifact”); *id.* at 260 (“Infertile white couples are expected to turn to adoption only as a last resort, after exhausting every available means of producing a genetically related child. The Black community, on the other hand, expects its financially secure members to reach out to the thousands of Black children in need of a home.”). See generally SPAR, *supra* note 1, at 160; Susan Freilich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 432 (observing that adoption agencies encourage potential parents to think of adoption as a last resort “by rejecting prospective adopters who are simultaneously exploring medical interventions to have a child”); Robin Fretwell Wilson, *Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements*, 29 AM. J.L. & MED. 337, 340 (2003) (discussing how states used to give adoption preference to people with known infertility). For a historical perspective, see Viviana A. Zelizer, *From Baby Farms to Baby M*, SOCIETY, March 1988, at 23, 24 (reviewing changes to the value of children to adults generally and noting that “[b]y 1937, infant adoption was being touted as the latest American fad.”).

13. See Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 66–67 (2006) (comparing costs of adoption for white and black infants).

14. See Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1441 (2006) (debunking the myth that international adoptions are cheaper than domestic ones, particularly when compared to African American children).

15. See, e.g., SPAR, *supra* note 1, at 179 tbl.6-1 (listing domestic adoption-placement fees from 2004 for eight agencies, with only two charging on an income-based sliding scale); *id.* at 184 (listing foreign-adoption fees by agency and specific program fees by country).

16. SPAR *supra* note 1, at 4; see also Elizabeth Heitman, *Infertility as a Public Health Problem: Why Assisted Reproductive Technologies Are Not the Answer*, 6 STAN. L. & POL’Y REV. 89, 96 (1995)

from assisted reproduction,¹⁷ or from adoption, or both.¹⁸ Although cost is not the exclusive sorting factor,¹⁹ it certainly is an important one.²⁰

B. Tax and Insurance

Tax laws offer some subsidies to intended parents. Medical expenses are deductible from federal-tax obligations if they exceed 7.5% of an itemizing taxpayer's adjusted gross income.²¹ An Internal Revenue Service publication condones using this deduction for fertility treatments, including IVF and temporary storage of eggs or sperm.²² The federal tax code also provides an adoption tax credit that phases out for wealthier families.²³ One commentator

("Infertile couples reportedly willing to try and to pay 'almost anything' to create their own baby are not unlike many chronically ill Americans searching for a cure.")

17. See, e.g., Marianne Bitler & Lucie Schmidt, *Health Disparities and Infertility: Impacts of State-Level Insurance Mandates*, 85 FERTILITY & STERILITY 858, 859 (2006) ("Of the 6.2 million women with impaired fecundity in 1995, 2.7 million (44%) had ever sought treatment."); Daar, *supra* note 8, at 29 ("Generally, only half of all individuals who are diagnosed as infertile seek treatment to assist them in reproduction."); Dorothy Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 937, 941 (1996) (discussing possible reasons for racial disparities in the use of reproductive technology); Barton H. Hamilton & Brian McManus, *Infertility Treatment Markets: The Effects of Competition and Policy* 3 (Oct. 2005) (unpublished manuscript, available at <http://www.olin.wustl.edu/faculty/hamiltonb/wpapers/Infertility%20Treatment%20Markets.pdf>) ("Access to ART is a central issue in infertility treatment because of the large difference between the number of American couples who report reproductive difficulties and those who use ART.").

18. See BARTHOLET, *supra* note 12, at 30–32 ("The adoption world does essentially nothing to reach out to the infertile to educate them about adoption possibilities."). For barriers to adoption compared to reproductive medicine, see Appleton, *supra* note 12, at 444–46.

19. See ROBERTS, *supra* note 7, at 251–64 (stating "[b]lacks make up a disproportionate number of infertile people avoiding reproductive technologies" and reviewing reasons beyond economic factors); Daar, *supra* note 8, at 34–40 (including among barriers to access psychological factors and some discrimination against certain groups); see also Hamilton & McManus, *supra* note 17, at 3–4 (discussing how increased competition between clinics is an alternative method of expanding access, although effects are not identical).

20. See SPAR, *supra* note 1, at 30 ("In this market . . . price acts harshly as a constraint on demand.").

21. 26 U.S.C. § 213(a) (2006).

22. I.R.S. Publication 502 (2008), available at <http://www.irs.gov/publications/p502/index.html> (reporting that deductible expenses include procedures to "overcome an inability to have children" including "[p]rocedures such as *in vitro* fertilization (including temporary storage of eggs or sperm)" and reversal surgery and other procedures). Medical care is "the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body." 26 U.S.C. § 213(d)(1)(A) (2006). See generally Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121 (2004) (discussing the taxation of fertility treatment costs); Anna L. Benjamin, Note, *The Implications of Using the Medical Expense Deduction of I.R.C. 213 to Subsidize Assisted Reproductive Technology*, 79 NOTRE DAME L. REV. 1117 (2004) (addressing the implications of using the medical-expense deduction to subsidize fertility treatments).

23. For taxable years beginning in 2008, the maximum federal adoption tax credit is \$11,650. 26 U.S.C. § 23(b)(1) (Supp. II 2008); Rev. Proc. 2007-66, 2007-45 I.R.B. 3–4. This adoption tax allowance is a credit against taxes due under the Internal Revenue Code. § 23(a)(1). It can be carried forward if a portion of the credit is unused, but it is not "refundable." § 23(c)(1). The tax credit starts phasing out for taxpayers with modified adjusted gross income exceeding \$174,730 and is completely phased out if income exceeds \$214,730. Rev. Proc. 2007-66, 2007-45 I.R.B. 4.

has asserted that this credit is sufficient to cover the costs of some domestic adoptions out of foster care.²⁴ Although the current federal-tax treatment can incentivize family expansion, it does not help those lacking the means to pay the up-front costs of adoption or fertility treatments. This perhaps explains the heavy emphasis on insurance in debates about assisted-reproduction finance.

Most health-insurance plans do not directly cover assisted reproduction.²⁵ Fewer than a third of states mandate that insurance plans cover some fertility services or mandate that insurers offer coverage.²⁶ For at least twenty years, advocates of intended parents have been lobbying lawmakers to conceptualize infertility as a disease or its treatment as a medical necessity and to adopt mandates.²⁷

In states where such mandates are in place, rates of access to assisted reproduction have been significantly higher.²⁸ But many people with fertility barriers do not have coverage for fertility treatments even in those states. Some people have no insurance for any medical care. Others are covered through self-insuring employers, to which mandatory-coverage rules do not apply.²⁹ According to one recent analysis, no state requires insurance coverage of IVF or artificial insemination for same-sex couples.³⁰

Still, if additional states or the federal government mandated coverage, significantly more people would seek access to assisted reproduction.³¹ Commentators do not universally support this result. Some scholars are critical

24. Maldonado, *supra* note 14, at 1441 n.124.

25. By recent counts, about a quarter of health-insurance plans cover some fertility diagnoses or treatments. Lucie Schmidt, *Effects of Infertility Insurance Mandates on Fertility*, 26 J. HEALTH ECON. 431, 432 (2007); *see also* Monahan, *supra* note 9, at 30 (offering estimates of large-employer coverage for various diagnoses and treatments of infertility).

26. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, 50 STATES SUMMARY OF STATE LAWS RELATED TO INSURANCE COVERAGE FOR INFERTILITY THERAPY (2008), *available at* <http://www.ncsl.org/programs/health/50infert.htm>; American Society of Reproductive Medicine, Frequently Asked Questions About Infertility, <http://www.asrm.org/Patients/faqs.html#Q8> (last visited June 23, 2008) (listing fourteen states whose laws "require insurers to either cover or offer to cover some form of infertility diagnosis and treatment").

27. Peter J. Neumann, *Should Health Insurance Cover IVF? Issues and Options*, 22 J. HEALTH POL. POL'Y & L. 1215, 1217 (1997); Sonia L. Nazario, *Infertility Insurance Gains Backing*, WALL ST. J., Dec. 5, 1989. For a discussion of the efforts to characterize infertility as a disease, *see* Margarete Sandelowski & Sheryl de Lacey, *The Uses of a "Disease": Infertility as a Rhetorical Vehicle*, in *INFERTILITY AROUND THE GLOBE: NEW THINKING ON CHILDLESSNESS, GENDER, AND REPRODUCTIVE TECHNOLOGIES* 33, 36–37 (Marcia C. Inhorn & Frank van Balen eds., 2002).

28. *See, e.g.*, Neumann, *supra* note 27, at 1216–17 (reviewing studies).

29. *See* Amy Monahan, *Federalism, Federal Regulation, or Free Market? An Examination of Mandated Health Benefit Reform*, 2007 U. ILL. L. REV. 1361, 1371. About eighty-five percent of companies with more than 1000 employees self-insure, and, overall, self-insuring companies account for half the workforce employed by companies offering health insurance. Christina H. Park, *Prevalence of Employer Self-Insured Health Benefits: National and State Variation*, 57 MED. CARE RES. & REV. 340, 347 (2000).

30. *See* Monahan, *supra* note 9, at 48.

31. Neumann, *supra* note 27, at 1220.

of mandates generally and question the distribution of their benefits.³² Mandating fertility-treatment coverage is a hard sell when so many people lack any health insurance.³³ Mandates also steer some intended parents toward assisted reproduction who might otherwise have seriously considered adoption.³⁴ One scholar notes that “providing insurance for expensive fertility treatments but not adoption (which can also cost thousands of dollars) ironically makes these technologies the only alternative some people can afford.”³⁵ She and others posit that preventive care and promotion of general health to reduce infertility *ex ante* could be a better use of funds.³⁶

More fundamentally, mandatory coverage is controversial because of the underlying services.³⁷ Assisted reproduction has many supporters who frame it as a component of reproductive freedom, but it also attracts objections from a range of parties, including religious organizations and some feminists.³⁸ In addition, some fear these technologies will be used to select children with particular traits.³⁹ The live-birth rate from IVF and related procedures for some

32. Mandated coverage faces objections not specific to reproductive medicine. See Clark C. Havighurst & Barak D. Richman, *Distributive Injustice(s) in American Health Care*, 69 LAW & CONTEMP. PROBS. 7, 62 (Autumn 2006) (discussing the role of mandates in raising costs and mandates as the product of special-interest lobbying “in an atmosphere of general consumer–voter disinterest”); Barak D. Richman, *Insurance Expansions: Do They Hurt Those They Try To Help?*, 26 HEALTH AFF. 1345, 1348 (2007) (finding that mandated insurance coverage did not equalize the use of pharmaceutical and mental-health services among vulnerable populations).

33. See Neumann, *supra* note 27, at 1218–19 (“An emotional debate has attended the issue of health insurance coverage for IVF.”); Carson Strong, *Too Many Twins, Triplets, Quadruplets, and So On: A Call for New Priorities*, 31 J.L. MED. & ETHICS 272, 276 (2003) (“Particularly relevant is the fact that millions of people in the United States lack health insurance and do not qualify for Medicaid or Medicare.”).

34. See BARTHOLET, *supra* note 12, at 211–12 (lamenting that the “significant IVF-related regulatory move” has been coverage mandates rather than imposing stricter regulations on IVF).

35. ROBERTS, *supra* note 7, at 290; see also BARTHOLET, *supra* note 12, at 34–35 (describing how society gives “preferred treatment to those who choose child production over child adoption”); Neumann, *supra* note 27, at 1225–26, 1232 (“Any decision by health insurers regarding IVF has implications for adoption.”). See generally Appleton, *supra* note 12, at 427, 428–31 (discussing barriers to adoption that do not exist for reproductive medicine and the possibility that they affect demand).

36. See, e.g., ROBERTS, *supra* note 7, at 291 (“Research designed to reduce infertility, programs that facilitate adoption, and the general provision of basic human needs are examples of expenditures that would help a far broader range of people than IVF.”); Heitman, *supra* note 16, at 96–97 (conceptualizing infertility as a public-health problem).

37. Some of the controversy relates to the use of extra fertilized eggs that will not be discussed here. See, e.g., Steven Goldberg, *Technology Unbound: Will Funded Libertarianism Dominate the Future?*, 18 STAN. L. & POL’Y REV. 21, 27–28 (2007) (“To many Americans, a ‘spare embryo’ is a human life. As a result, discarding an embryo is entirely unacceptable.”).

38. See, e.g., THOMPSON, *supra* note 5, at 56 (“Feminists are well placed to understand the special burden that involuntary childlessness places on women, but they are ambivalent about supporting women who seek infertility treatments because of the implicit support that this seems to lend to conventional gender roles and gendered stratification.”); Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J.L. SCI. & TECH. 505, 522–23 (2005) (reviewing Catholic objections to IVF).

39. See Mary Crossley, *Dimensions of Equality in Regulating Assisted Reproductive Technologies*, 9 J. GENDER RACE & JUST. 273, 285 (2005) (discussing trait-selection practices); Goodwin, *supra* note 7,

users is very low, and some clinics inflate claims of achievement to attract customers.⁴⁰ Social scientists have observed that, for some women, the failure to reproduce after invasive and time-consuming treatments imposes trauma independent of any original disappointment from fertility barriers.⁴¹ Due to current practices in assisted reproduction, those who become pregnant have a much greater likelihood of higher-order multiple births, which produce health risks for the mother and children.⁴² Families may experience financial hardship as a result, although neither the families nor their fertility clinics fully internalize the very high costs of their resulting medical needs.⁴³ Indeed,

at 31 (discussing the use of procedures to choose sex and features of children); King, *supra* note 6, at 285 (“The technology has been a godsend to couples with family histories of genetic disorders and chromosomal mutations causing infertility. However, expanding its use to permit prospective parents to select embryos based on a wide array of genetic characteristics presents substantial risks to individuals involved in the procedure and to society as a whole.”).

40. See, e.g., Goodwin, *supra* note 7, at 22 (“Despite its popularity, ART is a gamble: there are no guarantees of pregnancy (although some doctors make exaggerated claims that they can help 95% of patients conceive.)”); Neumann, *supra* note 27, at 1230 (“The concern has been compounded by the fact that programs have used varying definitions of what constitutes a success: some programs have defined a success as a “live birth,” while others have used a ‘pregnancy,’ whether or not the pregnancy came to term.”); Noah, *supra* note 8, at 614 (describing “questions . . . about the accuracy of promotional claims made by fertility clinics”); Strong, *supra* note 33, at 272 (describing “misleading advertising by some infertility programs, particularly in regard to pregnancy success rates”).

41. See ROBERTS, *supra* note 7, at 248–49 (noting how “arduous” the IVF process is, “usually followed by heartbreaking disappointment,” the physical and emotional trauma of which concerns many feminists); Charis Cussins, *Producing Reproduction: Techniques of Normalization and Naturalization in Infertility Clinics*, in *REPRODUCING REPRODUCTION* 66, 74 (Sarah Franklin & Helena Ragoné eds., 1998) (“Infertility clinics expect infertility treatments to be stressful, and almost all clinics have in-house psychologists to counsel patients (at an additional cost.)”); Heitman, *supra* note 16, at 95 (discussing how disappointed expectations compound the trauma of fertility barriers); Sandelowski & de Lacey, *supra* note 27, at 38 (reviewing research on the impact of failure at various phases of treatment).

42. See, e.g., Hamilton & McManus, *supra* note 17, at 4 (calling multiple births “socially expensive and dangerous”); Heitman, *supra* note 16, at 95 (“The growing use of infertility treatments nationwide has been associated with a marked rise in the number of multiple-gestation pregnancies and an attendant incidence of related complications and costs for mothers and babies.”); Moses, *supra* note 38, at 583–84 (discussing the relationship between multiple birth and health risks); Neumann, *supra* note 27, at 1226 (discussing health risks to the mother); John Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 *AM. J.L. & MED.* 7, 10 (2004) (“The most serious health problem posed by assisted reproduction is the high rate of multiple gestations.”); Strong, *supra* note 33, at 272 (discussing multiple births and their consequences, and positing that the problem is that “too much weight is given to the autonomy of infertile couples and not enough to the interests of the children.”); see also Cussins, *supra* note 41, at 75 (“The rigors of repeated invasive techniques and hormonal hyperstimulation on women, and the associated culture of perseverance, have been much criticized in infertility medicine.”); King, *supra* note 6, at 308 (discussing health risks to the mother in an unsuccessful pregnancy); Wilson, *supra* note 12, at 344–47 (discussing literature on the risks to children born through IVF or ISCI). Some studies show a lower rate of multiple births when intended parents have insurance coverage for assisted reproduction. See THOMPSON, *supra* note 5, at 4 tbl.1.1 (reviewing data); Strong, *supra* note 33, at 275 (“The study found that in the states with comprehensive coverage there was a statistically significant decrease in the number of preembryos per transfer and the multiple birth rate per transfer cycle.”).

43. See, e.g., Goodwin, *supra* note 7, at 3–4 (“Largely ignored are agency, financial incentives, choice, and the health risks associated with the technology.”); Moses, *supra* note 38, at 584 (discussing

scholarly articles are referring to assisted reproduction as gambling.⁴⁴ Thus, although some studies suggest that mandating insurance coverage of assisted reproduction would impose relatively little cost, expansion of mandates is neither inevitable nor universally supported.

Furthermore, it would be incorrect to assume that mandated, or otherwise-expanded, insurance coverage resolves financial-access questions. By design, insurance products normally do not cover all costs associated with a particular service or treatment, and likely would not do so in this situation either.⁴⁵ People with private insurance coverage in particular incur significant out of pocket expense, and sometimes more than the uninsured who avoid getting health care.⁴⁶ To the extent that insurance coverage incentivizes intended parents to seek treatment in the first place, insurance expansions could expand rather than diminish the demand for supplemental credit products.

C. Alternative Financing Approaches

Notwithstanding limits on tax subsidies and insurance coverage, some intended parents do seek services on what many commentators have assumed is a cash basis.⁴⁷ Every year, thousands of people pay out of pocket for assisted reproduction,⁴⁸ and those considering adoption likewise need cash to prepare and complete the transaction. Recognizing the potential to attract patients without deep pockets or insurance, standalone companies and clinics have

the health problems and financial burdens of multiple births); Noah, *supra* note 8, at 619–24 (describing the problems with multiple births, low birth weight, and prematurity).

44. See, e.g., Goodwin, *supra* note 7, at 22 (“Despite its popularity, ART is a gamble”); Neumann, *supra* note 27, at 1219 (noting others who have referred to IVF use as gambling); David Schmittlein & Donald Morrison, *A Live Baby or Your Money Back: The Marketing of In Vitro Fertilization Procedures*, 49 MGMT. SCI. 1618, 1619 (2003) (referring to couples considering IVF as “placing the largest-scale single [financial] gamble of their lives”).

45. Some mandate legislation prohibits higher cost-sharing for fertility treatments than for other medical services, but does not prohibit cost-sharing altogether. See, e.g., Family Building Act of 2007, H.R. 2892, 110th Cong. § 2707(c) (2007); S. Res. 759, 2007 Sess., at § 4 (N.C. 2007).

46. Jessica S. Banthin et al., *The Financial Burden of Health Care 2001–2004*, HEALTH AFF., Jan. 2008, at 188, 190 (reporting on the increase in financial burden from health care being driven by people with private insurance).

47. See, e.g., Cussins, *supra* note 41, at 72 (reporting from clinic observation that “[i]f you are not covered for the treatment and are not prepared verbally to attest that you can personally cover the costs, no scheduling will occur. If you have been seen but have reneged on a payment, no subsequent appointments will be made either.”); Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 661–62 (1997) (“[C]onsumers largely pay cash for services rendered[.] . . . in most cases patients either pay cash or use credit cards for all services”); Noah, *supra* note 8, at 607, 616 (referring to reproductive technology as being in a market in which most patients pay out of pocket in full); Barton H. Hamilton & Brian McManus, *Technology Diffusion and Market Structure: Evidence from Infertility Treatment Markets* 3, 8 (Sept. 2005) (unpublished article), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=813826 (describing how the fertility market is a health-care market based on direct patient payments).

48. See Goodwin, *supra* note 7, at 50–51 (“Indeed, that thousands of infertile couples annually pay out-of-pocket costs for assisted conception technologies further demonstrates the demand for such services.”).

offered money-back guarantees or package deals on multiple rounds of IVF.⁴⁹ One academic study found that money-back-guarantee programs are not profitable unless they channel younger and “less infertile” patients into IVF.⁵⁰ Two national businesses engage in a robust trade of these arrangements. The consumer-services division of IntegraMed, a publicly held company, sells a program that refunds some money if IVF is unsuccessful.⁵¹ IntegraMed reports that revenue from this program increased twenty-three percent in the first six months of 2008 from the same period in 2007.⁵² Advanced Reproductive Care

49. See THOMPSON, *supra* note 5, at 63 tbl.2.1 (describing package deals and refund programs that charge \$27,000 for three rounds of IVF and refund \$20,000 if the patient is not pregnant within a year); *id.* at 237 (discussing flat-fee unlimited-service plans). The American Medical Association Code of Medical Ethics generally discourages making fees contingent on the successful outcome of medical treatment. See American Medical Association Code of Medical Ethics Opinion 6.01 (1994). For a critique of that position, see David A. Hyman & Charles Silver, *You Get What You Pay For: Result-Based Compensation for Health Care*, 58 WASH. & LEE L. REV. 1427 (2001).

50. See Schmittlein & Morrison, *supra* note 44, at 1618, 1632 (“Our analysis suggests that guarantees . . . are made economically viable for clinics by pursuit of *less*-infertile couples who are in the beginning stages of fertility assistance, rather than using IVF as a ‘last resort’ as had been the case previously.”); *id.* at 1619 (“The guarantees *are* viable if new, relatively fertile couples are induced to proceed directly to IVF instead of trying natural conception or less invasive procedures. For these couples, on standard economic bases, these IVF ‘guarantees’ are not a good deal.”). See generally Noah, *supra* note 8, at 613 (discussing whether some doctors start treating infertility too early). Cf. Lisa Barrett Mann, *A Baby, or Cash Back: Some IVF Centers Offer Risk-Sharing Deals*, WASH. POST, May 18, 2004, at HE01 (reporting that encouraging earlier IVF increases the chances of success). But see David A. Hyman & Charles Silver, *supra* note 49, at 1469 (critiquing Schmittlein and Morrison’s interpretation of their results).

51. IntegraMed claims that one out of five IVF procedures in the United States is performed by an associated fertility practice. Press Release, IntegraMed America, Inc., IntegraMed President & CEO Jay Higham Named Ernst & Young Metro New York Entrepreneur of the Year 2008 Award Winner (June 30, 2008), available at <http://www.reuters.com/article/pressRelease/idUS95456+30-Jun-2008+BW20080630>. IntegraMed’s recent SEC filing describes two relevant divisions as follows:

Our Fertility Centers Division is comprised of a provider network of 10 contracted fertility centers located in major markets across the United States. We offer products and services to these providers designed to support the fertility centers’ growth. This division also supports a Council of Physicians and Scientists, as well as ARTIC, a captive insurance company which provides malpractice insurance to member physicians. Our Consumer Services Division offers products directly to fertility patients. The division’s Shared Risk(R) Refund and financing programs are designed to make the treatment process easier and more affordable for patients. As of June 30, 2008, the division maintained a contracted network of 22 independent fertility clinics under its Affiliate program which is designed to distribute the division’s products and services to a wider group of patients than just those serviced by our Fertility Center locations. The division also offers fertility medications directly to patients via a competitively priced mail-order pharmacy.

IntegraMed, Quarterly Report (Form 10-Q), at 8 (June 30, 2008). See generally Greg Borzo, *National Networks Try to Attract Infertility Patients*, OB/GYN NEWS, Feb. 15, 2001, at 1; Marilyn Case, *Doctors Begin Offering Creative Payment Plans for Fertility Treatment*, WALL. ST. J., Sept. 8, 2000, at B1. IntegraMed collects accounts receivable for the clinics in its network. See IntegraMed, Quarterly Report (Form 10-Q), at 23 (June 30, 2008).

52. IntegraMed, Quarterly Report (Form 10-Q), at 18 (June 30, 2008). IntegraMed’s second-quarter profits in 2008 rose forty-six percent. See Market Watch, *IntegraMed Q2 Revenue Grows 46%, Drives 19% Rise in Net Income*, <http://www.reuters.com/article/pressRelease/idUS132468+31-Jul-2008+BW20080731> (last visited Sept. 18, 2008).

(ARC), privately held and significantly doctor-owned, offers package deals on IVF treatments and refund guarantees if no live birth results.⁵³ Even if intended parents participate in these programs, however, they still need money to pay.

Intended parents have employed a variety of creative methods for funding assisted reproduction or adoption, including borrowing money from friends and family,⁵⁴ pulling money from savings and retirement accounts,⁵⁵ pawning or selling property,⁵⁶ sharing prescription drugs,⁵⁷ “donating” extra fertilized eggs to obtain a discount on fertility services,⁵⁸ participating in clinical trials,⁵⁹ joining

53. ARC reports that its associated clinics represent thirty-five percent of the IVF market. Advanced Reproductive Care, ARC’s Background, <http://www.arcfertility.com/employers/backgrounder.html> (last visited Sept. 18, 2008).

54. See, e.g., *Ewing v. Ewing*, No. 06-CA-148, 2007 WL 4563458, at *1 (Ohio Ct. App. Dec. 20, 2007) (using the mother’s money to partially finance fertility treatments); Robert J. Stillman, *A 47-Year-Old Woman with Fertility Problems Who Desires a Multiple Pregnancy*, 297 J. AM. MED. ASS’N 858, 859 (2007) (“I did have an insurance carrier that covered my first couple of IVF treatments. But after that, they’re not covering anything anymore. So I have had to, you know, get some money from some of my relatives.”); Esther B. Fein, *Calling Infertility a Disease, Couples Battle with Insurers*, N.Y. TIMES, Feb. 22, 1998, §1, at 1 (“If [couples with fertility problems] can, they usually then borrow from relatives or friends.”); NAT’L ENDOWMENT FOR FIN. EDUC., HOW TO MAKE ADOPTION AN AFFORDABLE OPTION 36–37, available at <http://www.smartaboutmoney.org/nefe/uploadfiles/AdoptionOption.pdf> [hereinafter NEFE] (listing relatives as a source of adoption financing).

55. See, e.g., *Ewing*, 2007 WL 4563458, at *16 (describing how funds for IVF were drawn from a 401(k) account, a life insurance policy, and a gift from the mother). The National Endowment for Financial Education lists loans against retirement funds as a source of adoption cash, but also notes the risks to long-term financial stability. NEFE, *supra* note 54, at 36–37; see also Mary Jo Feldstein, *Creative Financing Plans Aimed at Steep Infertility Treatment Costs*, ST. PAUL PIONEER PRESS (Minn.), Sept. 3, 2006, at 7E [hereinafter Feldstein, *Creative Financing Plans*]; Mary Jo Feldstein, *The Cost of Conception*, ST. LOUIS POST-DISPATCH, Aug. 6, 2006, at A1 [hereinafter Feldstein, *The Cost of Conception*] (discussing the use of savings to pay for \$40,000 to \$50,000 in fertility treatments).

56. See, e.g., Fein, *supra* note 54; *In re Pisko*, 364 B.R. 107, 110 (Bankr. M.D. Fla. 2007) (adjudicating the case of a couple who sold their house and used \$12,000 of the proceeds to pay for Honduran adoption expenses rather than for delinquent federal taxes).

57. See, e.g., Fein, *supra* note 54 (describing a “drug cooperative for needy, infertile women from the local Orthodox Jewish community”).

58. See Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. 45, 51 n.35, 54, 58 (2007) (discussing discounted fees for “oocyte sharing”); *id.* at 65 (noting that the United Kingdom disallows payment for eggs but permits reduced-price treatments to egg donors); see also BARTHOLET *supra* note 12, at 221 (“Patients in some programs pay for part of their treatment by agreeing to surrender some of the eggs or embryos that they produce for use by others.”); THOMPSON, *supra* note 5, at 257 (discussing example from Brazil); Appleton, *supra* note 12, at 422 (citing examples of “egg sharing” financing); June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 515 (2005) (noting that obtaining additional unused eggs from women undergoing IVF often involves “less inconvenience and expense” than purchasing them from other donors); Roberts, *supra* note 17, at 941 (same); IntegraMed Fertility Network, Shared Risk for IVF Treatment Plan—Boost success and control IVF costs, <http://www.integramed.com/inmdweb/content/cons/shared.jsp> (last visited Sept. 18, 2008).

59. See Janet L. Dolgin, *The Evolution of the “Patient”: Shifts in Attitudes About Consent, Genetic Information, and Commercialization in Health Care*, 34 HOFSTRA L. REV. 137, 176 (2005) (citing Antonio Regalado, *Clinical Trials Offer In-Vitro at a Discount*, WALL ST. J., Jan. 13, 2004, at D1).

the military,⁶⁰ draining flexible medical-spending accounts,⁶¹ taking additional jobs,⁶² and encouraging friends and family to shop via programs that dedicate percentages of purchases to adoption accounts.⁶³ People also move to states that mandate coverage of their desired services or engage in overseas fertility tourism.

Some methods of raising funds for assisted reproduction or adoption are more extreme. In one case, a woman represented to her ex-fiancé that she needed to use his credit card to finance \$8700 for “surgery and therapy for a life-threatening blood disorder,” and, once she had secured permission, used the credit card instead for IVF.⁶⁴ In another, a Colorado lawyer used funds embezzled from his law firm to pay debts incurred for fertility treatments and adoption fees.⁶⁵

D. The Missing Link of Credit and Debt

In other contexts, scholars routinely discuss consumer credit as a method of smoothing lifecycle consumption to overcome temporal mismatches between a household’s financial means and various wants and needs.⁶⁶ Surprisingly, however, little systematic attention has been given to the role of formal credit—and simple debt—in the parenthood market. A review of case law, scholarly commentary, and the media reveals mostly anecdotal references to paying for

60. See, e.g., Child Welfare Information Gateway, Military Families and Adoption, http://www.childwelfare.gov/pubs/f_milita.cfm (last visited June 24, 2008) (discussing the adoption subsidy for military families).

61. See, e.g., Chen May Yee & Josephine Marcotty, *Miracles for Sale: With Rising Competition, Some IVF Clinics Are Offering Money-Back Guarantees and Going Farther Afield to Look for Patients*, MINN. STAR TRIB., Oct. 22, 2007 (reporting on one person who “cleaned out” FSA in addition to a “medical loan”).

62. See, e.g., Feldstein, *supra* note 54 (discussing working extra shifts to finance fertility treatments).

63. See, e.g., Buy For Charity, <http://www.buyforcharity.com/> (last visited Sept. 18, 2008); iGive.com, <http://www.igive.com/welcome/> (last visited Sept. 18, 2008); One Cause, <http://www.onecause.com/> (last visited Sept. 18, 2008).

64. *Colleen M. v. Fertility & Surgical Assocs. of Thousand Oaks*, 132 Cal. App. 4th 1466, 1470 (Cal. Dist. Ct. App. 2005).

65. *Guyerson v. Colorado*, 85 P.3d 1073, 1075 (Colo. 2004). Although later reinstated, Guyerson originally was disbarred. See *Colorado v. Guyerson*, 898 P.2d 1062, 1064 (Colo. 1995).

66. See Douglas Baird, *Technology, Information, and Bankruptcy*, 2007 U. ILL. L. REV. 305, 310 (discussing the benefits of a constant standard of living over years of fluctuating income); see also ERIC BELSKY & REN ESSENE, HARV. UNIV., JOINT CTR. FOR HOUS. STUDIES, CONSUMER MORTGAGE CREDIT AT A CROSSROADS: PRESERVING EXPANDED ACCESS WHILE INFORMING CHOICES AND PROTECTING CONSUMERS (2008) (reviewing economic literature). According to the latest Survey of Consumer Finance data, the percentage of households with any type of debt—the most prevalent of which were home mortgages and installment loans (such as student and car loans)—reached 76.4 in 2004. BRIAN K. BUCKS, ARTHUR B. KENNICKELL & KEVIN B. MOORE, FED. RESERVE BD., RECENT CHANGES IN U.S. FAMILY FINANCES: EVIDENCE FROM THE 2001 AND 2004 SURVEY OF CONSUMER FINANCES A25–A30 (2006), available at <http://www.federalreserve.gov/pubs/oss/oss2/2004/bull0206.pdf>.

fertility treatments or adoption with home-equity loans,⁶⁷ credit cards,⁶⁸ or general loans.⁶⁹

Some people who incur debt to overcome fertility barriers can be found in bankruptcy. In response to a general question about the source of the financial trouble, one bankruptcy filer reported,

Our problems mainly stemmed from infertility. My husband [and] I both had two surgeries and insurance covered very little. We have spent the last five years trying to figure out why we couldn't have a baby. I went through numerous procedures [and] nothing worked. We got in over our heads because [it's] something I wanted so badly. We ended up finding out 2 m[on]ths after we first talked to the bankruptcy lawyer that we we[re] pregnant.⁷⁰

Case law provides several other examples of debt intertwined with fertility problems for bankruptcy filers. One financially troubled household used Chapter 7 bankruptcy to discharge about \$200,000 of unsecured claims, which included debt for fertility treatments and adoption expenses running over \$3600 per month.⁷¹ Another couple unsuccessfully proposed a three-year Chapter 13

67. See, e.g., *Ewing v. Ewing*, No. 06-CA-148, 2007 WL 4563458, at *6 (Ohio Ct. App. Dec. 20, 2007) (involving an intended parent using a home-equity line of credit to finance fertility treatments); SPAR, *supra* note 1, at 4; Feldstein, *Creative Financing Plans*, *supra* note 55 (reporting on the use of home-equity lines for fertility treatments); Feldstein, *The Cost of Conception*, *supra* note 55 (same); Justin Martin, *A Baby or Your Money Back: Dr. Geoffrey Sher's Fertility Clinics Promise Results and Deliver Profits. Some Rivals Find His Methods Unseemly. Others Imitate Them*, FORTUNE, Nov. 10, 2003 (discussing how a couple used a second mortgage to pay for an "outcome-based" assisted-reproduction plan); Laurence Zuckerman, *Couple Now Has No Savings, More Debt and Little Hope of Having a Baby*, N.Y. TIMES, Jan. 9, 1996, § 1, at 39 (reporting that \$12,000 of a home-equity line of credit was used for gamete intrafallopian transfer plus embryo preservation); *Some Discover Hopes of Family Lie with Insurer*, AUGUSTA CHRON., Oct. 31, 2007, at A22 (reporting on the use of home-equity loans before changes in insurance to cover \$20,000 of IVF).

68. See, e.g., *In re Pobiner*, 309 B.R. 405, 413 (Bankr. E.D.N.Y. 2004) (discussing a \$1685-per-month credit-card obligation for fertility treatments); Daar, *supra* note 47, at 661–62 (describing how "patients either pay cash or use credit cards for all services"); Fein, *supra* note 54; Martin, *supra* note 67 (discussing the use of credit cards to pay for an "outcome-based" plan); Liza Mundy, *A Special Kind of Poverty: The Poor Get Used to Going Without. But Going Without a Baby is Hard to Get Used To*, WASH. POST, Apr. 20, 2003, at W8; Zuckerman, *supra* note 67; *Some Discover Hopes of Family Lie with Insurer*, *supra* note 67 (reporting how a woman used credit cards before her husband's insurance changed to cover \$20,000 of IVF).

69. See, e.g., Goodwin, *supra* note 7, at 34 (referring to an IntegraMed advertisement for loan terms); Gena Kittner, *Special Place in Brooklyn for Family; The Klahn Family Is Preparing Their Home for Four Siblings They Are Adopting from Russia to Join a Son Adopted Seven Years Ago*, WIS. STATE J., Apr. 1, 2001, at A1 (reporting that a family took a \$65,000 loan to adopt children from Russia). To supplement these observations, I combined other research paths with a review of the Web sites of Spar's list of top fertility clinics and representative adoption agencies, as well as those of IntegraMed and ARC, for loan information. See SPAR, *supra* note 1, at 54 tbl.2–1 (listing the top twenty U.S. clinics by number of IVF cycles performed in 2002); *id.* at 179 tbl.6–1, 184 tbl.6–2 (listing typical domestic and international fees at adoption agencies). These observations are discussed in section III.

70. Case # W3-0938H, 2007 Consumer Bankruptcy Project (on file with author).

71. *Pobiner*, 309 B.R. at 413. This debtor sought to discharge student loans under 11 U.S.C. § 523(a)(8) (2000) and the judge denied the request. This was based in part on the judge's assessment that fertility and adoption expenses did not relate to maintaining a minimal standard of living, which is part of the undue-hardship test. *Id.*

payment plan in bankruptcy in which the filers proposed to spend over \$800 per month on fertility treatments.⁷²

In summary, fulfilling goals of parenthood for those with fertility barriers continues to come with a hefty price tag. When governmentally subsidized approaches such as taxes or insurance are not comprehensive, the strong desire for parenthood propels people of modest means into a range of coping mechanisms from the mundane to the extreme. Given the central role consumer credit plays in other major household expenditures, it makes sense to focus more intently on the role of consumer debt in the parenthood market.

III

PARENTHOOD MARKET LOANS

Notably, although one can imagine a market for parenthood loans for both adoption and assisted reproduction,⁷³ today's providers of specialty loan products seem to be marketing their wares either to assisted-reproduction customers or to adoption customers, but not to both. And once an intended parent has gone to a fertility clinic, it is unlikely that she will be counseled on adoption or adoption financing.⁷⁴ Even a consultant report recommending that credit unions make loans for both adoption and fertility treatments suggests that borrowers will feel "more comfortable" if fertility loans are offered through doctors' offices.⁷⁵ What this means, then, is that two distinct loan markets have developed—one for each route to parenthood.

72. *In re Bayless*, 264 B.R. 719, 721 (Bankr. W.D. Okla. 1999). The court sustained American Express's objection to the proposed fertility expenditure, denied confirmation of the plan, and dismissed the case:

The Court can find no reported cases on the question of elective or discretionary medical treatments of any variety being funded through a Chapter 13 plan. This Court refuses to approve a plan that requires unsecured creditors to subsidize fertility treatments. While having children is a major life activity, it is not a necessary one, or one that cannot be postponed. On the contrary, in the modern era, it is simply another lifestyle choice.

Id. at 721.

73. See MARK C. MEYER, FILENE RESEARCH INST., LIFESTYLE LENDING OFFERS INNOVATION AND GROWTH FOR CREDIT UNIONS 6, 8 (2005) (proposing that credit unions make loans for both adoption and fertility treatments).

74. According to Spar,

During the course of fertility treatment . . . doctors do not typically suggest alternatives to their own form of treatment; they rarely advise their patients to contemplate adoption, foster care, or living without children. Such options simply are not within the confines of their profession: even though they are actually in the business of providing children for parents to raise, they define their role as curing infertility.

SPAR, *supra* note 1, at 208–09; see also THOMPSON, *supra* note 5, at 95 (reporting on the sense among women in treatment that there always was something new to try, making it very difficult to stop treatment until a doctor declared options exhausted or finances lapsed); Neumann, *supra* note 27, at 1225 (talking about how doctors treat the desire for a child as a medical problem rather than as a social problem that can be addressed in other ways).

75. MEYER, *supra* note 73, at 8.

A. Loans for Assisted Reproduction

About a decade ago, a news story reported that fertility clinics that failed to require full payment at the time of services had low collection rates thereafter.⁷⁶ The Coker Group, a health-care consultant, advises in a report published by the American Medical Association that doctors should protect their own financial interests and should not extend credit to their patients.⁷⁷ Some fertility providers simply do not follow this advice and become creditors of their patients for many thousands of dollars.⁷⁸

Other parties intentionally offer fertility credit, with doctors and clinics playing important roles in distribution. The most prominent lender appears to be Capital One Fertility, which is part of Capital One Healthcare Finance, which in turn is a subsidiary of Capital One Financial Corporation.⁷⁹ Capital One Fertility “offer[s] loans from \$1,500 to \$40,000, giving . . . a flexible range of funds to help pay for fertility treatment options like Clomid, PCOS treatment, IVF, IUI, ICSI, surgery, tubal ligation reversals, and donor eggs.”⁸⁰

Capital One Fertility gets much support from other players in the assisted-reproduction industry. Many Web sites of high-volume fertility clinics directly or indirectly refer visitors to Capital One.⁸¹ ARC and IntegraMed, the sellers of package deals and refund programs, also market Capital One Fertility to pay for these package deals.⁸² According to IntegraMed, a Capital One Fertility loan

76. See Roxanne Nelson, *Financing Infertility*, CNN.com, May 19, 1999, <http://www.cnn.com/HEALTH/women/9905/19/financing.infertility/> (noting that clinics experienced low collection rates when people were billed later—especially in the absence of a live birth).

77. See THE COKER GROUP, MAXIMIZING BILLING AND COLLECTIONS IN THE MEDICAL PRACTICE 43 (Am. Med. Ass’n 2007); see also Rhonda L. Rundle & Paul Davies, *Hospitals Start to Seek Payment Upfront*, WALL ST. J., June 2, 2004, at D1.

78. For an example of unpaid reproductive medical expenses of over \$12,000 in a marriage-dissolution case, see *Darbelli v. Korbeh*, No. FA044000730, 2005 WL 1219732, at *1–*2 (Conn. Super. Ct. 2005) (allocating those expenses to the husband who sought divorce due to wife’s inability to bear children). See also Jane Gross, *The Fight to Cover Infertility; Suit Says Employer’s Refusal to Pay Is Form of Bias*, N.Y. TIMES, Dec. 7, 1998, at B1 (reporting on a patient paying a few hundred dollars per month on a debt of \$10,000 to a fertility doctor who refuses to treat without payment); cf. Cussins, *supra* note 41, at 72.

79. See Company Report for Capital One Healthcare Finance, Osiris, Jul. 10, 2008 (on file with *Law and Contemporary Problems*). The Healthcare Finance subsidiary reported operating revenue of \$30.3 million in 2006 but does not separately list fertility revenue. *Id.*

80. Capital One Fertility, <http://www.capitalonehealthcarefinance.com/fertility/> (last visited Feb. 19, 2009).

81. Prominent clinics that link to or mention Capital One Fertility include Boston IVF, Highland Park IVF Center, Shady Grove Reproductive Science Center, Cooper Center for In Vitro Fertilization, Reproductive Biology Associates, Midwest Reproductive Medicine, Fertility Center of New England, Inc., and the New England Clinic of Reproductive Medicine. The Center for Advanced Reproductive Services at the University of Connecticut offers low-interest loans of up to \$25,000 that appear to be funded by Capital One Fertility. The Center for Advanced Reproductive Services, Financial Counseling, http://www.uconnfertility.com/programs_patient.htm (last visited Sept. 18, 2008).

82. ARC features an “affordable monthly payment plan” that is a Capital One Fertility loan. ARC Affordable Payment Plan, http://www.arcfertility.com/family_building/financial_services.html. IntegraMed offers “infertility financing” that is administered and offered by Capital One (last visited Feb. 19, 2009); see also IntegraMed, *Infertility Financing—Apply for a Loan Now*, <http://www.integra>

is available to people with a gross annual income of as little as \$15,000.⁸³ Doctors must have a relationship with Capital One Fertility for their patients to use the credit at the clinic.⁸⁴ As of 2006, Capital One Fertility had a nationwide network of 30,000 doctors who paid to participate in the program.⁸⁵ Some doctors even have loan kiosks in their offices to facilitate the process.⁸⁶ Capital One Fertility holds out the potential of loan approval “in minutes.”⁸⁷

Capital One Fertility loans are closed-end credit with fixed interest rates. The payment calculator on Capital One’s Web site shows a range of pricing for \$20,000 and \$40,000 loans.

To borrow \$20,000:

Repayment Term	Monthly Payments	APR
84 Months	\$344–\$525	10.99%–25.99%
36 Months	\$610–\$815	5.99%–25.99%
18 Months	\$1130–\$1369	1.99%–25.99%

To borrow \$40,000:

Repayment Term	Monthly Payments	APR
84 Months	\$688–\$1050	10.99%–25.99%
36 Months	\$1220–\$1629	5.99%–25.99%
18 Months	\$2260–\$2737	1.99%–25.99%

Figure 1: Examples of Capital One Fertility Loan Pricing⁸⁸

If the forty-two-year-old patient from the introduction to this article were to repay her \$20,000 loan over eighty-four months, she would pay \$44,100 in total. This figure excludes fees, charges, and any increased rates that might be imposed if she paid late and does not capture repeated attempts at treatment beyond the scope of the first loan. The cost would match some of the priciest adoptions—except that her odds of ending up with a child would be lower.⁸⁹ If

medfertility.com/inmdweb/content/cons/financingpartners.jsp (last visited Feb. 19, 2009); Goodwin, *supra* note 7, at 34 (reporting on how the IntegraMed Web site encourages people to finance fertility treatments with loans).

83. IntegraMed Fertility Network, Finance—Application Form, <https://integramed.feeplan.com/form.asp?Plan=FFP&currPage=0> (last visited Sept. 18, 2008); *see also* Kathleen Kerr, *Boom in the Baby Business*, *NEWSDAY*, Oct. 18, 2007, at A42 (discussing loan terms).

84. Capital One’s Web site lists doctors by geography. *See* Capital One Healthcare Finance, Find A Doctor, <http://www.capitalonehealthcarefinance.com/fertility/find.asp> (last visited Sept. 18, 2008).

85. Feldstein, *The Cost of Conception*, *supra* note 55.

86. *Id.*

87. Feldstein, *Creative Financing Plans*, *supra* note 55; Capital One HealthCare Finance, Fertility, <http://www.capitalonehealthcarefinance.com/fertility/> (last visited Sept. 18, 2008).

88. Capital One HealthCare Finance, Fertility, *supra* note 87.

89. *See* Neumann, *supra* note 27, at 1226 (comparing costs based on the likelihood of becoming a parent through adoption and IVF).

she repays the debt in eighteen months instead, her total debt would be \$24,642.

Capital One Fertility is not alone in soliciting assisted-reproduction customers for credit products. CareCredit, part of GE Money Bank, specifically advertises credit for fertility treatments as well as for services like weight loss, chiropractic treatment, and hair restoration.⁹⁰ The joining of credit products for fertility treatments among other such services reinforces one line of perception that many advocates of fertility-insurance mandates strenuously oppose—that such assisted reproduction is a “luxury” rather than a medical need.⁹¹

Other lenders agree to serve customers of particular fertility-service providers. The Institute for Reproductive Medicine and Science of Saint Barnabas sends patients to Wachovia Bank or PFS Patient Financing.⁹² The Home National Bank has a program with The World Egg Bank “to bring unprecedented affordability to frozen donor eggs to our recipients” through loans at “affordable interest rates” available through “easy online application and approval.”⁹³ The World Egg Bank’s fee schedule anticipates that intended parents make bulk purchases of eggs (at least 5 or 6); thus, if 100 percent financed, the principal on the loans could hover around \$15,000 or \$20,000 for eggs alone.⁹⁴ Because The World Egg Bank lists surrogacy prices on its fee schedule, it is possible that loans could be extended to such services as well, although the Web site does not explicitly note this. At one time, Citibank was reported to have an arrangement with a clinic in Brooklyn, New York.⁹⁵

90. At least one sperm bank uses the CareCredit payment plan. Rene Almeling, *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*, 72 AM. SOC. REV. 319, 333 (2007); see, e.g., CareCredit, *The Choice Is Yours*, <http://www.carecredit.com/other/whycc.html> (last visited Sept. 18, 2008); see also PFS Patient Financing Home Page, <http://www.p-f-s.com/> (last visited Sept. 18, 2008); PFS Patient Financing, *What We Do*, <http://www.p-f-s.com/consumer/> (last visited Sept. 18, 2008) (noted by some fertility clinics as providing loans, but on the Web site also advertising loans for “liposuction, hair restoration, and facelifts, as well as cosmetic and implant, and orthodontic dentistry, laser vision correction, dermatology, orthotics and prosthetics, home health equipment, bariatric treatments, behavioral medicine”).

91. See MEYER, *supra* note 73 (discussing fertility lending as part of a lifestyle lending portfolio); SPAR, *supra* note 1, at 217–24 (spelling out several alternative models, including the luxury model, for the regulation of the baby business); *In re Bayless*, 264 B.R. 719, 721 (Bankr. W.D. Okla. 1999) (referring to the use of assisted reproduction as a “lifestyle choice”).

92. The Institute for Reproductive Medicine and Science of Saint Barnabas, *Financial Information*, http://www.sbvif.com/financial_information.htm (last visited Sept. 18, 2008). Like some other financiers, PFS’s business is not limited to fertility customers. See PFS Patient Financing Home Page, *supra* note 90.

93. The World Egg Bank, *Recipient’s Finance Option*, <http://www.theworldeggbank.com/The%20World%20Egg%20Bank/Recipients/egg-recipient-finance.aspx> (last visited Mar. 26, 2009). The program is available to U.S. residents only. *Id.*

94. The World Egg Bank, *Fee Schedule*, <http://www.theworldeggbank.com/The%20World%20Egg%20Bank/Recipients/egg-recipient-fee-schedule.aspx> (last visited Mar. 26, 2009).

95. See Fein, *supra* note 54 (reporting on the relationship). “Brooklyn IVF” may now be “Genesis Fertility & Reproduction Medicine,” a member of IntegraMed. See Amy Waldman, *For Childless Orthodox Jews, Fertility Treatment Is No Simple Solution*, N.Y. TIMES, Aug. 10, 1997, § 13, at 8 (describing Dr. Richard V. Grazi as the “director of Brooklyn IVF, an infertility clinic”); Genesis

Another clinic advertises that loans with up to a five-year repayment schedule are available through a local bank's arrangement with a hospital,⁹⁶ or refers patients to MedChoice Financial.⁹⁷ For surgical procedures related to fertility, that clinic also offers a "24 Month Prepayment" plan under which, as the name suggests, the debtor prepays for the operation over two years—a service layaway plan that flips the debtor–creditor relationship.⁹⁸

The fertility loan is not exclusively a U.S. innovation. Indeed, the First National Bank, in Lebanon, claims to have been the pioneer of specialty loans for fertility treatments after experiencing success with plastic-surgery loans.⁹⁹ This bank offers online applications and "quick approval" for revolving loans to cover fertility and delivery costs, baby accessories, plus stem-cell collection and preservation cost, repayable over periods of up to thirty-six months.¹⁰⁰ The loans cannot exceed certain (significant) portions of a borrower's monthly income.¹⁰¹ Borrowers should not be over the age of sixty-four when the term of the loan ends.¹⁰² According to a news account, a bank representative claimed to receive 200 to 250 calls per day from potential customers after the bank advertised the loans on billboards.¹⁰³

B. Loans for Adoption

The adoption loan market is similar to the assisted-reproduction loan market in that for-profit financial institutions also make adoption-specific loans.

Fertility & Reproduction Medicine, Meet Our Team, <http://genesisfertility.com/index.html> (last visited Sept. 11, 2008) (including Dr. Grazi).

96. This clinic notes this financing in connection with two "unlimited service" plans: The FertileCare Gold Plan (Two Years) and the Preferred Plan (One Year). Babies by Levin, FertileCare Physician Service Agreement, http://www.babies-by-levin.com/psc_3.htm (last visited Sept. 18, 2008) (advertising a flat fee for unlimited services for one or two years). The Web site says the alternative is to "pay as you go" and "take your chances with your insurance." *Id.* For patients who purchase tubal-reversal surgery, this provider also offers free fertility treatments. Babies by Levin, Reversal Pricing, http://www.babies-by-levin.com/rev_10.htm (last visited Sept. 18, 2008).

97. Babies by Levin, Payment Options, <http://www.babies-by-levin.com/finance.htm> (last visited Feb. 19, 2009).

98. A patient pays twenty-four monthly installments of \$291.67 for an in-patient procedure or \$258.33 for an out-patient procedure. *Id.* Higher-weight patients may have to pay more. Babies by Levin, Weight Table, <http://www.babies-by-levin.com/prepay24.htm> (last visited Sept. 12, 2008). This provider also offers a "Fast-Track" program for patients who want tubal-ligation reversal quickly. Babies by Levin, Tubal Reversal—Fast-Track, http://www.babies-by-levin.com/fast_track.htm (last visited Sept. 11, 2008). A nonrefundable half of the cost must be paid to lock in the date. *Id.* The balance is due one week before the procedure. *Id.* "If the balance of the fee is not paid at that time and in that fashion then the procedure will be cancelled and will not be rescheduled." *Id.*

99. First National Bank, Fertility Loan "The First of Its Kind," <http://www.fnb.com.lb/template.asp?id=170> (last visited Mar. 26, 2009).

100. *Id.*

101. *Id.*

102. *Id.*

103. Hayeon Lee, *A Fertile Market: A Controversial New Loan Helps Lebanese Couples Conceive*, NOW LEBANON, Aug. 25, 2008, available at <http://www.nowlebanon.com/NewsArticleDetails.aspx?ID=56159>.

But on the adoption side, nonprofit foundations are more heavily involved in financing as well, and some pursue nonpecuniary social objectives instead of high-interest payments and fees.

Major adoption organizations have forged partnerships with financial institutions to offer secured and unsecured credit to help intended parents defray adoption costs. The National Council for Adoption (NCA) and Bank of America established a program for an adoption line of credit of up to \$25,000, with repayment terms from twenty-four to eighty-four months.¹⁰⁴ The National Adoption Foundation (NAF) and Bank of America also offer unsecured loan products: the National Adoption Foundation Visa Platinum Card,¹⁰⁵ and a GoldOption Flexible Line of Credit of up to \$25,000.¹⁰⁶ In advertising this loan, NAF states,

The National Adoption Foundation offers an unsecured loan program that gives families, whether renters or owners, an additional source of needed funds without pledging their homes or other forms of collateral. This program has proved enormously helpful, with very high approval rates. Over four thousand families have accomplished their dream through the NAF.¹⁰⁷

Prominent adoption agencies and foundations spread the word about the Bank of America loans.¹⁰⁸

Like fertility clinics, adoption agencies have developed direct connections to financial institutions for loans. For example, Families Thru International Adoption reports that Old National Bank will offer loans to its clients in five states, and Fifth Third Bank will do the same in seven states.¹⁰⁹ Maps Adoption and Humanitarian Aid says Key Bank will provide adoption loans to intended parents at “very competitive rates.”¹¹⁰ Maps Adoption also recommends checking with local banks and credit unions for home-equity loans.¹¹¹ Another tells potential parents that some banks offer “special rates and incentives” for

104. National Council for Adoption, Financing Your Adoption, https://www.adoptioncouncil.org/resources/fianance_adoption.html (last visited Sept. 18, 2008).

105. National Adoption Foundation, Apply for a Card, <http://www.nafadopt.org/NAF-credit-card/NAF-credit-card.shtml> (last visited Sept. 18, 2008).

106. *Id.*; Bank of America, GoldOption Flexible Line of Credit, <http://www.fialoans.com/GoldOption/NationalAdoption/> (last visited Sept. 18, 2008).

107. National Adoption Foundation, Apply for a Card, *supra* note 105.

108. *See, e.g.*, Dave Thomas Foundation for Adoption, Adoption Resources, http://www.dave-thomasfoundation.org/Adoption-Resources/Adoption-Links#CMSNestedLinks_Id4 (linking to Bank of America) Wide Horizons for Children, Adoption ABC's: General Adoption Funding Sources, <http://www.whfc.org/basics/FundingResources.htm> (last visited Sept. 18, 2008) (linking to the National Adoption Foundation and the National Council for Adoption's loan programs with consumer-credit providers).

109. Families Thru International Adoption, Grant and Loan Resources, <http://www.ftia.org/grantsloans.asp> (last visited Sept. 18, 2008). The Web site did not list terms.

110. Maps Adoption and Humanitarian Aid, Financial Aid for Adoption, <http://www.mapsadopt.org/adoption/financialaid.html> (last visited Sept. 18, 2008).

111. *Id.*

adoption loans.¹¹² The funding for adoption loans from other organizations is not obviously from financial institutions. So, for example, Oxford Adoption Foundation, Inc., offers international adoption loans for up to \$5000, with escalating interest over the nine-year repayment period.¹¹³

Although some loans, such as those from Bank of America, are unsecured, others require collateral. The family home is likely to be the pledged asset, meaning that the home could be lost to foreclosure if the parents default on the adoption debt.¹¹⁴ For example, although some of the promotional material Web pages are no longer active, until very recently, JP Morgan Chase Bank had an arrangement with the Dave Thomas Foundation for Adoption to offer the Chase “New Additions” home-equity line of credit. The Dave Thomas Foundation is dedicated to increasing adoption out of the U.S. foster-care system, but it is not clear whether the line of credit shared that limit.¹¹⁵ The Chase New Additions line of credit had a one-percent teaser rate for the first six months and came with a payment card that could be used to access the line of credit.¹¹⁶ Through this program, an applicant could get a large enough loan—in the hundreds of thousands of dollars—to pay off higher-priority mortgages, giving Chase a first-priority position.¹¹⁷

Other entities that make adoption loans may condition approval on factors not directly related to the ability to repay. Some loans are available only for the adoption of children who are less in demand or more expensive to raise.¹¹⁸ For

112. American Adoptions, Financial Resources, http://www.americanadoptions.com/adopt/cost_resources#adoption (last visited Sept. 18, 2008); see also Jeanie Wyatt, *More than Money: Adoption Requires Financial Juggling*, SAN ANTONIO EXPRESS, Dec. 18, 2006, at 1E (recommending that potential users investigate loans carefully).

113. The interest rate on a nine-year loan is 0% for three years, 3% for three years, and 6% for three years. Oxford Adoption Foundation, Inc., Application Process, <http://www.oxfordadoption.com/application.htm> (last visited Sept. 18, 2008); Oxford Adoption Foundation, Inc., Promissory Note, <http://www.oxfordadoption.com/promissory.pdf> (last visited Sept. 18, 2008). In addition to basic financial information, the application requires a letter of introduction that includes family information, reasons for adopting, and reasons for seeking a low-interest loan.

114. I’ve found none that contemplate reproductive materials or babies as collateral, as scholars sometimes imagine. See Kevin H. Smith, *Security Interests in Human Materials*, 28 HOFSTRA L. REV. 127, 131 (1999) (hypothesizing human eggs as collateral and the steps needed for secured creditors to take possession under Article 9 of the Uniform Commercial Code).

115. Dave Thomas Foundation for Adoption: Finding Forever Families for Children in Foster Care, <http://www.davethomasfoundation.org> (last visited Feb. 19, 2009). This foundation pledges not to discriminate on the basis of sexual orientation, marital status, or other such criteria. *Id.*

116. Chase, Chase New Additions (on file with *Law and Contemporary Problems*).

117. See Chase, Chase Home Equity Loan Application, http://www.chase.com/ccpmweb/home_equity/document/heapplication.pdf (last visited Sept. 18, 2008).

118. For current gaps in supply and demand of children for adoption, see Erwin A. Blackstone et al., *Market Segmentation in Child Adoption*, 28 INT’L REV. L. & ECON. 220, 220 (2008) (observing a mismatch between supply and demand and proposing that surpluses from adoptions of healthy white babies be used to subsidize adoptions of children less in demand); Krawiec, *supra* note 11, at 60 (“Perhaps, in the absence of a sufficient number of healthy, white infants, prospective parents would be forced into the only sector of the baby trade that, sadly, does not suffer from a shortage of supply—the state-run foster care system, through which a disproportionate number of older, minority, and special needs children are available.”).

example, one agency offers loans of up to about \$5000 for adopting children from China who are older or have special needs.¹¹⁹ Another makes loans of up to \$4500, repayable over three years, to those who adopt through the agency's African American Infant Program or who adopt children with special needs.¹²⁰ A third offers loans for up to \$4000 for adopting children currently placed in foster care.¹²¹

Availability of adoption loans sometimes depends on intended-parent characteristics and on the observance of traditional family structures. These loans replicate filtering based on parental characteristics that takes place earlier in the adoption process.¹²² Applications often ask for "family name" and information about the "mother" and the "father,"¹²³ or "male applicant" and "female applicant," even if marriage is not a loan requirement per se.¹²⁴ Other organizations offer adoption loans (or grants) only to observant Christians.¹²⁵ To get a loan from one such fund, applicants must be married, and the fund prefers that the mother not work outside the home.¹²⁶ The loan application queries the borrower about church involvement, spiritual testimony, and what the potential parents intend for their children to learn regarding issues such as creation and

119. China Care, Financial Aid for American Adopting Families, <http://www.chinacare.org/CHIN065FinAidApp4.pdf> (last visited Sept. 18, 2008).

120. World Association for Children and Parents, Financial Assistance, <http://www.wacap.org/FinancialAssistance.asp> (last visited Sept. 18, 2008).

121. Arkansas Adopt Today, U.S. Waiting Child Fund, <http://www.arkansasadopttoday.org/USWCF.htm> (last visited Sept. 18, 2008).

122. See BARTHOLET *supra* note 12, at 33–34 (describing the "parental screening" process used by adoption agencies). For race discrimination in the parenthood market, see, for example, ROBERTS, *supra* note 7, at 246–93; Goodwin, *supra* note 13, at 70–71.

123. China Care, Adoption Financial Assistance, <http://www.chinacare.org/CHIN065FinAidApp4.pdf> (last visited Sept. 18, 2008); Oxford Adoption Foundation, Inc., Application Process, <http://www.oxfordadoption.com/application.htm> (last visited Sept. 18, 2008) (referring to "mother applicant" and "father applicant").

124. A Child Waits Foundation, Borrowers Consent Form, <http://www.achildwaits.org/forms/consentform.htm> (last visited Sept. 18, 2008); A Child Waits Foundation, Low Interest Loan Program Questions and Answers, <http://www.achildwaits.org/Foundationinfo.htm> (last visited Sept. 18, 2008).

125. See, e.g., The ABBA Fund, FAQ, <http://www.abbafund.org/faq.html> (last visited Sept. 18, 2008); see also God's Grace Adoption Ministry, Application for Financial Aid, <http://www.ggam.org/main.html> (last visited Sept. 27, 2008) (offering grants between \$1000 and \$4000 to married couples with incomes of \$60,000 or less to put toward international adoption, reporting an average grant of \$2000, and asking applicants to give their Christian testimony); Life International, Adoption Grant and Loan Application, <http://www.lifeintl.org/images/downloads/Application.pdf> (last visited Sept. 27, 2008) (asking for a "personal statement of faith" as part of the grant application); Lifesong for Orphans, Adoption Grants and Loans, <http://www.lifesongfororphans.org/images/downloads/GrantsLoansInfo.pdf> (last visited Sept. 18, 2008) (discussing matching grants, interest-free loans, and fundraising support); Lifesong for Orphans, Loan FAQ, <http://www.lifesongfororphans.org/images/downloads/LoanGrantFAQ.pdf> (last visited Sept. 18, 2008) ("The couple agrees to exercise financial stewardship responsibility to both LifeSong and to God, to use funds that God provides to them to reimburse LifeSong for the financial assistance that God graciously provided.").

126. The ABBA Fund, *supra* note 125. The application requests information about the "adopting father" and "adopting mother" and the adopting mother's maiden name. The ABBA Fund, Application for Adoption Financial Assistance, <http://www.abbafund.org/applicationforassistance.pdf> (last visited Sept. 18, 2008).

redemption.¹²⁷ Some of these loan applications ask whether the applicants already have biological children.¹²⁸ Another organization provides interest-free loans for adoption of up to \$10,000, repayable over two to five years, but only to Jewish residents of Northern California.¹²⁹ Moreover, borrowers need not be married, a policy reflected on the organization's Web site featuring a single woman who adopted her daughter from Russia.¹³⁰

Foundations or agencies might also screen borrowers for what might be described as desperation. For example, A Child Waits Foundation offers a low-interest loan program for international adoptions. These loans can be extended for up to \$10,000 or fifty percent of adoption expenses, repayable at five-percent interest over five years.¹³¹ However, loan approval also seems to be conditioned on the following:

Before potential adoptive families apply to the foundation, they should first try to obtain funds from other sources such as friends, relatives and home equity loans. *Our loans are not a low cost alternative to other financing options; rather they are a last means of financing for families who have already exhausted all other possibilities and funds.*¹³²

IV

DISCUSSION

The idea of a commercial market for parenthood inevitably touches a variety of “societal nerves.”¹³³ Yet the establishment of industry-specific loan

127. The ABBA Fund, Application for Adoption Financial Assistance, *supra* note 126. Another application inquires about the applicant's definition of “eternal salvation” and similar concepts. Lifesong for Orphans, Adoption Grant and Loan Application, *supra* note 125. Life International's application for international adoption includes a religious statement that, among other things, asks applicants to describe their daily walk with God, to share salvation testimonies, and asks how God has led the applicant to adopt. Life International, *supra* note 125.

128. *Id.*

129. Hebrew Free Loan, Home Page, <http://www.hflasf.org/> (last visited Sept. 18, 2008); Hebrew Free Loan, Overview of Our Loan Program, <http://www.hflasf.org/loanoverview.html> (last visited Sept. 18, 2008); Hebrew Free Loan, Types of Loans Available, <http://www.hflasf.org/loantypes.html> (last visited Sept. 18, 2008). Applicants need third parties to co-sign or pledge collateral. Hebrew Free Loan, How to Apply for an HFLA Loan, <http://www.hflasf.org/loanapply.html> (last visited Sept. 18, 2008).

130. *See* Hebrew Free Loan, Client Success Stories, <http://www.hflasf.org/clientstories.html#suzanne> (last visited Sept. 18, 2008) (explaining how a mother used her loan to adopt a girl from a Moscow orphanage).

131. A Child Waits Foundation, Low Interest Loan Program Application Process, <http://www.achildwaits.org/howtoapply.htm> (last visited Sept. 18, 2008) (emphasis added). There is no prepayment penalty. *See id.* This loan requires automatic withdrawal from bank accounts for repayment. *See id.* If the loan defaults, the borrowers are responsible for one third of collection costs and the foundation's attorneys' fees. *Id.* Late payments have late charges of ten percent. *Id.* Like other organizations, A Child Waits may request to use the child's picture and story but consent to this does not affect loan determination. *Id.*

132. *Id.*

133. Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price Fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS. 59, 61 (Summer 2009). *See generally* Philip E. Tetlock, *Coping with Trade-Offs: Psychological Constraints and Political Implications*, in ELEMENTS OF REASON:

products reinforces the fundamental descriptive claim that this market is in full swing.¹³⁴ This section explores implications relating particularly to assisted reproduction, leaving some of the adoption loan issues for future investigation.

The prospect of a fruitful collaboration between lenders and assisted-reproduction service providers across the country suggests that the consumer credit industry should be incorporated into political-economy accounts of the parenthood market. Consumer lenders are powerful political actors.¹³⁵ If they become repeat players in the baby business, they join the ranks of parties who shape this trade.¹³⁶

Lender involvement might indirectly fuel some calls for regulation. Commentators traditionally have referred to assisted reproduction as serving a largely “elite” clientele.¹³⁷ Providers of fertility services and money-back

COGNITION, CHOICE, AND THE BOUNDS OF RATIONALITY 253 (Arthur Lupia et al. eds., 2000) (discussing fears of taboo trades, such as baby auctions).

134. See SPAR, *supra* note 1, at xv, 3, 101, 207 (describing the growth of the baby industry despite popular protests); Appleton, *supra* note 12, at 421; Margaret F. Brinig, *The Effect of Transaction Costs on the Market for Babies*, 18 SETON HALL LEGIS. J. 553, 554 (1994) (“The truth is that an adoption market already exists, however distasteful that may seem.”); Dolgin, *supra* note 59, at 157, 175–80 (describing the business of infertility treatment); Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2332 (1995) (referring to a “gray market (where fees go to the brokers, lawyers, and doctors who handle these transactions, and to the (inflated) medical expenses of the mother)”; Ertman, *supra* note 6, at 15 (discussing the costs of alternative insemination procedures); Goodwin, *supra* note 7, at 17 (describing “an incredibly active infertility marketplace”); Goodwin, *supra* note 13, at 64–66 (describing “evidence of a *de facto*, largely unregulated, adoption free market”); Krawiec, *supra* note 11 (“Throughout the world, in fact, baby selling is formally prohibited. And throughout the world babies are bought and sold each day.”); Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 165 (2000) (explaining “a marked and widespread unwillingness to acknowledge the essential role of commerce in the distribution and allocation of human biological materials”); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 60 (1987) (discussing misconceptions about the “efficiency” of exchanging money for babies); Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers’ Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 519 (2005) (“The market features and the role of money in infant adoption raise ethical questions related to the decisionmaking of mothers.”); Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 71 (2007) (discussing “the economic framework of a developing market”); Debora L. Spar, *For Love and Money: The Political Economy of Commercial Surrogacy*, 12 REV. INT’L POL. ECON. 287, 289, 304–05 (2005) (discussing surrogacy as a commercial arrangement).

135. For the industry’s power in bankruptcy-law debates in public and behind the scenes, see, for example, Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091 (2004); Victoria A. Nourse & Jane Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

136. See, e.g., Pamela D. Bridgewater, *Reconstructing Rationality: Towards a Critical Economic Theory of Reproduction*, 56 EMORY L.J. 1215, 1224 (2007) (listing parties who shape the baby business in the absence of government regulation).

137. See Schmidt, *supra* note 25, at 444 (reporting on the characteristics of those who receive fertility treatments); see also Cussins, *supra* note 41, at 73 (discussing a split among fertility professionals as to whether an elite clientele was an aspiration or a problem); Crossley, *supra* note 39, at 278 (discussing how disparate finances and the lack of insurance produces unequal access to assisted reproduction). See generally ROBERTS, *supra* note 7, at 247–64 (discussing the privileged lifestyle that IVF or similar procedures require).

guarantees want a broader customer base.¹³⁸ To achieve this expansion, they must move beyond the elite to those of more-modest means. Specialty consumer credit could be a key ingredient to this expansion, particularly when partnered with other financial products such as money-back guarantees. Clinics stand to gain by promoting consumer-credit arrangements even if they do not originate the loan or profit directly from the credit extension.¹³⁹ If fertility credit expands access for people of modest means as predicted, tensions in assisted reproduction could be magnified. For example, some “successful” parents may have difficulty managing the financial consequences that result from, say, twins, triplets, or more after being implanted with multiple embryos. This in turn could increase the pressure to regulate doctors’ implantation practices with greater rigor.

In addition to the consequences that arise from facilitating broader access, lenders’ preferences could impact the market in a variety of ways. To provoke future work on this question, I close by briefly offering three examples.

First, repeat-playing lenders arguably have a financial stake in the debate over compensation to women who supply “donor” eggs. Particularly in the absence of a unified loan market that includes adoption, lenders might benefit if the egg trade were opened to market forces, although it is possible that the status quo of functionally capped prices would better serve their interests.¹⁴⁰

138. See generally Martin, *supra* note 67 (discussing Sher’s “embrace of information technology” and Internet outreach); Gina Kolata, *Fertility Inc.: Clinics Race to Lure Clients*, N.Y. TIMES, Jan. 1, 2002 (reporting on fertility specialists trying to attract attention through their Web sites and noting “[s]ince most patients pay with their own money, in cash, and cash-paying patients can pretty much pick and choose where they go, fertility specialists say that if they want to survive, they have to get the attention of both patients and referring doctors”); Yee & Marcotty, *supra* note 61 (discussing how “pursuers” of fertility treatments “have become the pursued,” and discussing how industry is “thriving” on the Internet, in part through featuring services and special deals on Web sites); Hamilton & McManus, *supra* note 47 (studying early movers offering new reproductive technology and comparing their impact in competitive markets and monopoly markets); *id.* at 25 (recommending future study on how firms differentiate themselves); see also THOMPSON, *supra* note 5, at 88 (describing how the supply of infertility procedures started to “outstrip demand” in some places); Sandelowski & de Lacey, *supra* note 27, at 41 (discussing various models of infertility and how consumer models underemphasize efforts of the fertility industry to create products to sell); Fred Scaglione, *Conceiving Profits in Fertility Medicine*, EQUITIES, Spring 2006, at 10 (citing IntegraMed’s president predicting that the fertility market could grow four-fold).

139. In some medical-credit models, lenders have recourse against medical providers if their patients do not pay. See Melissa B. Jacoby & Elizabeth Warren, *Beyond Hospital Misbehavior: An Alternative Account of Medical-Related Financial Distress*, 100 NW. U. L. REV. 535, 559 (2006) (discussing various medical-credit relationships and role of medical-credit providers in medical providers’ accounts-receivable management). For problems with the commercialization of the patient provider relationship, see generally Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643 (2007).

140. See Krawiec, *supra* note 11, at 57–58 (noting “inefficiently low supply, high consumer prices, and distributional disparities stemming from the distorted division of profits”); Krawiec, *supra* note 133, at 82 (explaining that, in an oligopsony, “consumers of fertility services are deprived of the full range and number of eggs that would be available to them in a free market”); *id.* at 65–66 (observing minimal egg donation in nations that have banned compensation); Mahoney, *supra* note 134, at 188. For similar discussions about organs, see Michele Goodwin, *The Body Market: Race Politics & Private*

Capital One Fertility specifically contemplates that and advertises that intended parents can borrow money for “donor eggs.”¹⁴¹ The Home National Bank likewise contemplates loaning for egg purchase in its joint program with The World Egg Bank.¹⁴² Given the interest rates associated with fertility credit, this presumably is a lucrative business for the lender, particularly for intended parents who need third-party eggs to pursue assisted reproduction at all.¹⁴³ Egg acquisition currently is a small portion of the overall parenthood market.¹⁴⁴ But parenthood loans could expand this volume, especially if consumer credit attracts older women with a greater need for donor eggs.¹⁴⁵

Second, because they should perceive same-sex couples as a significant untapped demand for parenthood loans, lenders may seek to attract them as borrowers. In so doing, they may indirectly promote individualized decision-making about child-bearing by nontraditional families. Significant proportions of gay men and women have expressed interest in parenting.¹⁴⁶ Same-sex couples have structural fertility barriers that alternative insemination,

Ordering, 49 ARIZ. L. REV. 599, 603–10 (2007) (revisiting arguments against financial compensation for organ donors and responding to those arguments); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1814, 1842 (2007) (discussing concern about financial coercion, but then comparing it to dangerous occupations with higher death rates than organ removal).

141. See Capital One Fertility, *supra* note 80. Eggs can be acquired through an intermediary if no family or friends have offered them. Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 118; Bridgewater, *supra* note 136, at 1224; Krawiec, *supra* note 11, at 20; Krawiec, *supra* note 133, at 63–64.

142. The World Egg Bank, Recipient’s Finance Option, *supra* note 93.

143. See *supra* III, fig.1 (reporting rates of interest). Lenders of course would not be alone in profiting from the parenthood trade. See Daar, *supra* note 47, at 661–62 (referring to the provision of reproductive technology as a “high profit business”); Krawiec, *supra* note 11, at 42 (“In the absence of similar attempts to control the prices charged by providers of fertility goods and services to customers, anti-commodification objections boil down to assertions that the ultimate supplier of the good—the egg donor—should be the only party not profiting from the transaction, or at least she should not profit too much.”); Lawrence J. Nelson et al., *Taking the Train to a World of Strangers: Health Care Marketing and Ethics*, 19 HASTINGS CENTER REP. 36, 38 (1989) (discussing profitable fertility treatments paid in cash as in tension with doctors’ fiduciary obligations); Noah, *supra* note 8, at 614 (referring to fertility clinics as “lucrative profit centers” for the hospitals that establish them); Viviana A. Zelizer, *Risky Exchanges*, in *BABY MARKETS: MONEY, MORALS, AND THE NEOPOLITICS OF CHOICE* (forthcoming 2009) (noting the lack of objection to medical professionals earning money for caring for babies or body parts). For a similar discussion of taboo organ markets, see, for example, Korobkin, *supra* note 58, at 46 (making a parallel argument about who profits from stem-cell research and regenerative medicine); Volokh, *supra* note 140, at 1815, 1834 (2007) (noting that hospitals and surgeons are paid “well” for their roles in transplants).

144. See SPAR, *supra* note 1, at 3, tbl.1-1 (reporting revenue from the 2004 fertility-treatment market by product or service).

145. There would be some limits to this growth if, as in some other countries, the United States restricted access to assisted reproduction for older intended parents. Heitman, *supra* note 16, at 92.

146. See GARY J. GATES ET AL., *ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 5* (2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf> (reporting that over half of gay men and over forty percent of lesbians want to be parents).

surrogacy, and other procedures can address.¹⁴⁷ In general, “the number of unmarried persons, including those who are gay or lesbian, who seek medical assistance to reproduce” has been on the rise.¹⁴⁸ But the state imposes special obstacles on same-sex couples becoming parents. Parenthood lenders cannot counteract every obstacle, but they can weaken the financial ones.

Although assisted reproduction is generally regarded as lightly regulated, lawmakers who do intervene often seem intent on promoting traditional family structures. Some lawmakers have sought to restrict access to assisted reproduction based on sexual orientation or marital status.¹⁴⁹ No states mandate insurance coverage for assisted reproduction for same-sex couples.¹⁵⁰ When states have mandated coverage, they often have defined infertility in a way that depends on heterosexual intercourse.¹⁵¹ This does not necessarily steer same-sex

147. See generally Ertman, *supra* note 6, at 37 (“One important effect of new family forms is that they increase agency for women and gay people generally by undermining patriarchal understandings of family.”); Robertson, *supra* note 42, at 12–13 (noting how assisted reproduction enables parenting in “novel family arrangements”).

148. ETHICS COMM. OF THE AM. SOC’Y FOR REPROD. MED., ACCESS TO FERTILITY TREATMENT BY GAYS, LESBIANS, AND UNMARRIED PERSONS 1333, 1334 (2006) (exploring the implications of reproduction by single and homosexual individuals); Ertman, *supra* note 6, at 35 (noting increases in gay parenting likely due to alternative insemination); Robertson, *supra* note 9, at 349 (“[I]t is widely assumed that several thousand children are born each year from physician insemination of single women and lesbian couples.”). Experts cited in the media have estimated that at least five percent of fertility clinics’ clients are gay or lesbian. See, e.g., Carl T. Hall, *Gays, Lesbians Seeking Parenthood Increasingly Turn to Infertility Clinics*, SAN FRANCISCO CHRON., May 6, 2007, at A1. At the Reproductive Science Center of the San Francisco Bay Area, the rate may be as high as ten percent. *Id.* Regarding adoption, one agency reports that approximately five to ten percent of U.S. child adoptions are by unmarried people. Adoption Services, Single Parent Adoption, http://www.adoption-services.org/adoption/adoption_single.htm (last visited Sept. 7, 2008). The Evan B. Donaldson Institute reports that 1.3 percent of all adoptions completed by over 300 adoption agencies were to self-identified homosexual parents. GATES ET AL., *supra* note 146, at 3. See generally William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America’s Children*, FUTURE CHILD., Fall 2005, at 97, 98 (noting that though “[n]o one knows just how many American children are being raised by same-sex couples today,” conservatively, at least 166,000 children are being raised by gay and lesbian couples).

149. See, e.g., Daar, *supra* note 8, at 45–46. For example, Indiana State Senator Patricia Miller tried to introduce a bill that would have effectively prohibited single people from undergoing fertility treatments. See *id.* She eventually dropped the bill because “[t]he issue [was] more complex than anticipated.” Joshua Claybourn, *Legislator Drops Assisted Reproduction Bill*, IND. BARRISTER, Oct. 5, 2005, available at http://www.indianabarrister.com/archives/2005/10/legislator_drops_assisted_repr.html. Similarly, a Virginia house bill was introduced to prohibit licensed health providers from providing certain fertility treatments to unmarried women. Daar, *supra* note 8, at 45 (referring to H.B. 187, 2006 Gen. Assem., Reg. Sess. (Va. 2006)). The bill was opposed and dropped. *Id.* at 46. Nevertheless, a few states were successful in passing such legislation. *Id.* at 45, n.109 (referring to FLA. STAT. ANN. § 742.15(1) (2005) and TEX. FAM. CODE ANN. § 160.754(b) (2005)).

150. Monahan, *supra* note 9, at 48.

151. THOMPSON, *supra* note 5, at 216 (giving an example of a lesbian couple with insurance coverage who were told that they could not satisfy definition of infertile without heterosexual intercourse); Bridgewater, *supra* note 136, at 1225 (“In addition to being priced out of the market, a number of buyers explore other markets for the most favorable legislative framework governing the reproductive markets and their participants.”); Goodwin, *supra* note 7, at 18 n.89 (noting how traditional definitions of infertility omit gay couples). As of August 27, 2008, fifteen states have

intended parents toward adoption, for both the state and private parties discriminate perhaps even more against same-sex couples in adoption matters.¹⁵²

Financial institutions are unlikely to replicate this bias unless it relates more directly to underwriting.¹⁵³ One complication to this analysis is that clinics are a

adopted legislation requiring insurance coverage for infertility treatment to some extent. Of those states, six have expressly defined the term “infertility” in their statutes, and all six define “infertility” in the traditional sense. *See* CAL. HEALTH & SAFETY CODE § 1374.55(b) (2008) (defining infertility as “either (1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception”); CONN. GEN. STAT. ANN. § 38a-509(a) (2007) (defining infertility as the inability to conceive or sustain a pregnancy for a period of one year); ILL. COMP. STAT. ANN. 5/356m(c) (2008) (same); MASS. GEN. LAWS ANN. ch. 175, § 47H (2008) (same); N.J. STAT. ANN. § 26:2J-4.23 (2007) (defining infertility as “the disease or condition that results in the abnormal function of the reproductive system such that a person is not able to: impregnate another person; conceive after two years of unprotected intercourse if the female partner is under 35 years of age, or one year of unprotected intercourse if the female partner is 35 years of age or older or one of the partners is considered medically sterile; or carry a pregnancy to live birth”); R.I. GEN. LAWS. § 27-20-20(b) (2007) (requiring an individual to be married in addition to being unable to conceive or sustain a pregnancy). It is possible but not a foregone conclusion that monthly artificial-insemination attempts would count toward infertility. A pending federal proposal does not require marriage, but also uses the traditional infertility screening:

Sec. 2707(a)(2) INFERTILITY DEFINED—For purposes of this section, the term “infertility” means a disease or condition that results in the abnormal function of the reproductive system, which results in—(A) the inability to conceive after 1 year of unprotected intercourse, or (B) the inability to carry a pregnancy to live birth.

Family Building Act of 2007, H.R. 2892, 110th Cong. (2007). Some language is more general, but still is likely to be construed as the traditional definition. *See, e.g.*, H.R. 1384, 2007-08 Gen. Assem., Reg. Sess. (Ga. 2008) (defining infertility as “the condition of an otherwise presumably healthy individual who is unable to conceive or sustain a pregnancy during a period of one year” and mandating coverage by insurance policies of “medically necessary expenses of diagnosis and treatment of infertility”). *But cf.* S. 750, 2007 Gen. Assem., Reg. Sess. (N.C. 2007) (premising insurance coverage on infertility treatment being recommended by the attending physician and performed in medically supervised facilities rather than on meeting a statutory definition of infertility).

152. *See, e.g.*, GATES ET AL., *supra* note 148, at 3 (reviewing state restrictions on adoption and foster care); Robertson, *supra* note 9, at 336–37 (reviewing states prohibiting gay or lesbians from adopting); W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 888 n.29, 889–90 (2006) (listing states prohibiting adoption by unmarried people); Christian Eichenlaub, Comment, “Minnesota Nice:” *A Comparative Analysis of Minnesota’s Treatment of Adoption by Gay Couples*, 5 U. ST. THOMAS L.J. 312, 315–28 (2008) (reviewing a spectrum of state approaches to the possibility of adoption by gay and lesbian couples). *See generally* THOMPSON, *supra* note 5, at 6 (discussing the state’s role in family creation through adoption “only according to tacit criteria of social engineering”).

153. For example, loans to single people could be different. After the enactment of the Equal Credit Opportunity Act (ECOA), some scholars observed that, from the perspective of women’s groups and civil-rights organizations, “lenders continue to deny loans to creditworthy consumers and practice gender and spousal discrimination.” Willy E. Rice, *Race, Gender, “Redlining,” and the Discriminatory Access to Loans, Credit, and Insurance: A Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950–1995*, 33 SAN DIEGO L. REV. 583, 585–86 (1996) (arguing that ECOA has not achieved its goal of protecting at-risk consumers and courts have been inefficient in resolving discrimination claims). Allegations of sex discrimination in lending were commonly tied to allegations of marital discrimination. Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U. MEM. L. REV. 37, 106 n.321 (1994) (noting that a creditor may request the designation of a courtesy title, such as “Mr.” or “Mrs.,” only if the application form states it is optional). According to one commentator, prior to ECOA,

major marketing and distribution channel for the loans. Some clinics have resisted serving same-sex couples or have manifested a “heterosexual norm.”¹⁵⁴ It is doubtful that financial institutions would sever ties to clinics on this basis alone, but refusing to serve same-sex intended parents is probably of declining frequency and, in some states, of dubious legality.¹⁵⁵ Overall, one would expect a specialty loan market to advance the objectives of individuals and same-sex partners to become parents. In other words, lenders’ self-interest could make them an unexpected ally to those who argue that there is nothing to fear from allowing and enabling same-sex couples to become parents.¹⁵⁶

Third, financing through private debt may affect the quality of assisted-reproduction services. Thinking optimistically, perhaps lenders would direct their financing business toward clinics with greater IVF success rates. This could be particularly rational if “successful” borrowers feel a greater commitment to pay. In addition, because multiple births impose substantial pressure on household budgets and thus reduce a borrower’s ability to repay, perhaps lenders would direct their business toward clinics that maximize singleton birth rates and minimize multiple birth rates.

Thinking pessimistically, it seems unlikely that decisions of major consumer lenders to partner with clinics would be so carefully calibrated. Even more negatively, lenders might be more interested in financing successive rounds of

“women were forced to answer questions on credit application forms that addressed age, sex, race, religion, birth control practices, and childbearing intentions.” Laura Eckert, *Inclusion of Sexual Orientation Discrimination in the Equal Credit Opportunity Act*, 103 COM. L.J. 311, 336 n.4 (1998).

154. See ROBERTS, *supra* note 7, at 248 (discussing how clinics reinforce traditional conceptions of family and may not serve “single women, lesbians, welfare recipients, and other women who are not considered good mothers”); *id.* at 247 (describing reproductive medicine as “more conforming than liberating”); THOMPSON, *supra* note 5, at 86 (discussing a heterosexual norm in observed clinics, particularly in the earlier days); Crossley, *supra* note 39, at 276 (reporting examples of clinics discriminating against same-sex couples); Heitman, *supra* note 16, at 94 (discussing a stable-marriage requirement at some clinics); Robertson, *supra* note 42, at 38 (balancing the rights of same-sex couples to have children with the professional discretion of providers); Robertson, *supra* note 9, at 325, 349 (discussing clinics that screen out gay or lesbian patients and whether they have legal right to do so). *But see* Ertman, *supra* note 6, at 25–26 (noting a decline in discrimination at sperm banks for lesbian and single women who are attempting artificial or alternative insemination).

155. See, e.g., *N. Coast Women’s Care Med. Group, Inc. v. San Diego County Superior Court*, 44 Cal. 4th 1145 (Cal. 2008) (finding that a doctor who refused to perform certain actions to provide fertility care to lesbian couple was not exempt from compliance with the California Unruh Civil Rights Act); Jacob M. Appel, *May Doctors Refuse Infertility Treatments to Gay Patients?*, HASTINGS CENTER REP., July–August 2006, at 20, 21 (“What remains unclear is whether physicians with bona fide religious objections to treating certain patients are exempt from these [statutory] proscriptions.”); Daar, *supra* note 8, at 22, 35, 43–44 (discussing some reproductive-medicine providers’ attempts to discriminate on the basis of marital status, sexual orientation, or disability); see also sources cited *supra* note 154.

156. For a review of the literature suggesting that children of same-sex couples are not at undue risk, see Meezan & Rauch, *supra* note 148; Charlotte Patterson, *Children of Lesbian and Gay Parents*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 241–44 (2006) (reviewing studies and positions of major professional organizations); Robertson, *supra* note 42, at 38 (“The question remains, however, whether the right of gays to reproduce should be deemed so important that they should be protected against discrimination by ART providers who object to gay reproduction and rearing.”).

treatment (at potentially successively higher rates of interest), contraindicating higher initial live birth rates.¹⁵⁷

Understanding more about the parenthood loan market would help determine which direction lenders might nudge the quality of assisted reproduction. For example, knowing whether loans have been securitized, the extent to which loans are coupled with money-back guarantees, and the fee structure for late installment payments might help shed light on lenders' interest in assisted reproduction quality. The important point for now, however, is that the arrival of lenders into assisted reproduction on a routine basis would be likely to have a previously unexplored impact on services.

V

CONCLUSION

Not only is there a parenthood market, but consumer lenders have joined it. Loans are available for the distinct purposes of buying the eggs of other women, accessing assisted reproduction with wildly variable success rates, or for adopting children—whether babies from Asia or teenagers from the American foster-care system. The lenders range from small, nonprofit, religious organizations to major, for-profit, financial-service corporations. Some want to perpetuate certain understandings about the traditional family, while others want collateral and cosignors. Lenders promote these credit products through close partnerships with medical providers, providers of money-back guarantees, and adoption agencies.

There is much to consider about parenthood loans—too much for one symposium contribution. Thus, the discussion section of this article highlighted some political-economy implications and questions for assisted reproduction. The express interest of for-profit fertility lenders in making loans to people of modest means, in close alliance with providers of services and money-back guarantees, suggests that this market could touch millions of intended parents who were thought unlikely to be able to pursue such a course. Merely by expanding access to a broader population, the debt financing of parenthood could increase the urgency of regulatory debates, while specific lender preferences could affect aspects of the assisted-reproduction industry in previously unexplored ways.

157. The structure of Capital One Fertility loans—fixed-installment loan rather than credit card or line of credit—obscures the possibility that borrowers often are repeat-loan customers.