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Radhika Rao

University of California Hastings College of Law, raor@uchastings.edu

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Hierarchies of Discrimination in Baby Making? A Response to Professor Carroll

RADHIKA RAO*

First, I applaud Professor Carroll's effort to examine these issues through the lens of equality rather than through the lens of liberty.¹ I myself advocated such an approach in *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*.² The reason for the turn to equality is that the prospect of discrimination with respect to assisted reproductive technologies is very troubling, but finding a fundamental right to procreate with the assistance of reproductive technology and reproductive collaborators goes much too far. Such an approach would appear to invalidate almost every law restricting access to the technology or the materials necessary for procreation, including laws limiting the number of in vitro embryos that could be implanted in a woman's body at the same time, or even laws proscribing reproductive cloning.

Professor Carroll may be correct when she contends that it does not matter whether or not there is a fundamental right to procreate that encompasses surrogacy, if marital status discrimination with respect to surrogacy is not rationally related to any legitimate governmental purpose.³ That was clearly true of Italy's Law 40, which confined use of ARTs to married or "stable" heterosexual couples while at the same time denying use of the technology to single persons and homosexuals.⁴ Italy's marital status requirement could not be justified as protecting children by ensuring that they are born into stable two-parent families because the law permitted unmarried but "stable" heterosexual couples access to ARTs, yet refused to extend the same privileges to equally stable homosexual couples. Stripped of the familial stability rationale, such a law fails any level of review and hence should be deemed unconstitutional: it is revealed as resting solely upon societal disapproval or prejudice, rather than any legitimate governmental interest.

But is marital status discrimination always irrational? Professor Mutcherson points out that there may be good reasons to restrict surrogacy to married couples:

A state that draws a marital status distinction . . . could persuasively argue that it is using marriage as a shorthand or proxy for other elements that the state prefers to see when people engage in a process with the end goal of creating a child for whom the state has an obligation to provide protection.⁵

* Professor of Law, University of California, Hastings College of the Law.

1. See Andrea B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 IND. L.J. 1187 (2013).

2. Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457 (2008).

3. See Carroll, *supra* note 1, at 1197.

4. See Rao, *supra* note 2, at 1458–59.

5. Kimberly M. Mutcherson, *How Parents Are Made: A Response to Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 IND. L.J. 1207, 1215 (2013).

A direct inquiry into the economic and emotional stability of the parties who intend to parent a child is difficult to conduct, so states could use marriage as a substitute to determine who should have access to surrogacy. And if this rationale provides the real basis for the state's restriction of surrogacy to married couples and is applied evenhandedly,⁶ then Professor Mutcherson is absolutely correct to conclude that "[t]he state . . . is not drawing baseless distinctions but is using data to help discern what circumstances are most likely to produce the familial stability that children need."⁷ But if marital status is not a proxy for gauging familial stability but a pretext for other, more invidious forms of discrimination, then it may not survive rational basis review—at least not the rigorous form of rational basis review applied by the U.S. Supreme Court in *Lawrence v. Texas*,⁸ or by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*.⁹ Thus, the case against marital status discrimination is much more difficult and complicated than Professor Carroll's paper would seem to suggest.

But the flaws in Professor Carroll's analysis go even further. While arguing eloquently against one form of discrimination—discrimination on the basis of marital status—Professor Carroll implicitly endorses and even encourages another kind of discrimination by drawing a bright line between traditional and gestational surrogacy.¹⁰ In so doing, Professor Carroll substitutes one category of discrimination for another, effectively favoring genetic over gestational mothers. Professor Carroll contrasts traditional surrogacy, which would "force[] a genetic mother to comply with an agreement she made, in advance of a child's birth . . . to relinquish *her own child*,"¹¹ with gestational surrogacy, asserting that "[t]he same risks and societal concerns do not necessarily arise in this alternate form of surrogacy"¹² because "[i]n gestational surrogacy, the surrogate merely acts as a carrier for the child. Her role is gestational in nature, and, by definition, she is not genetically related to the child she gestates, who is the genetic child of the intended parents."¹³ Professor Carroll is not alone in her stance: several states appear to apply a similar approach by refusing to enforce traditional surrogacy contracts while at the same time sanctioning gestational surrogacy.¹⁴ The Uniform Parentage

6. See Rao, *supra* note 2, at 1476 (suggesting that the familial stability rationale does not warrant discrimination against "married homosexuals, who exhibit as much stability and commitment as married heterosexuals").

7. Mutcherson, *supra* note 5, at 1215.

8. 539 U.S. 558 (2003).

9. 798 N.E.2d 941 (Mass. 2003).

10. See Carroll, *supra* note 1, at 1190–1191.

11. *Id.* at 1190 (emphasis added).

12. *Id.*

13. *Id.* (footnote omitted).

14. See, e.g., FLA. STAT. §§ 63.212–213, 742.15–.16 (West 2010, 2012 & Supp. 2013) (distinguishing between gestational surrogacy contracts, which are enforced if one of the intended parents is genetically related to the child, and traditional surrogacy, called a "preplanned adoption agreement," under which the birth mother is given forty-eight hours after birth to change her mind); ILLINOIS Gestational Surrogacy Act, 750 ILL. COMP. STAT. ANN. 45/6, 47/10–70, 410 ILL. COMP. STAT. ANN. 535/12 (West 2009, 2011) (enforcing gestational surrogacy contracts while remaining silent on the status of traditional surrogacy); NEV. REV. STAT. ANN. § 126.045 (2010) (enforcing gestational surrogacy contracts); N.D.

Act (UPA) also adopts this position by recommending that gestational surrogacy contracts should be deemed enforceable and effective to transfer parental rights, while leaving the status of traditional surrogacy in legal limbo.¹⁵ Thus, disparate treatment of these two types of surrogacy appears to be accepted without question under current law.¹⁶

But why should the law treat gestational surrogacy so differently from traditional surrogacy? Professor Carroll provides scant justification or explanation besides her assertion that “[i]n a gestational surrogacy, the surrogate does not have any genetic connection to the child, making the relinquishment bargain she makes less offensive.”¹⁷ Is Professor Carroll implying that parenthood is determined by genetic ties rather than by gestational connections, so that a woman who gestates without a genetic connection would not be deemed the legal mother of the child? This appears to be the unspoken premise underlying her pronouncement that a gestational surrogate should be deemed a mere “carrier” and not the real mother of the child.¹⁸ But as a factual matter, this is not necessarily true. Indeed, most states

CENT. CODE §§ 14-18-01 to -08; 14-19-01; 14-20-01 to -66 (2009) (distinguishing between gestational surrogacy contracts, which are legal and enforceable, and traditional surrogacy contracts, which are void and unenforceable); UTAH CODE ANN. § 78B-15-801 to -809 (LexisNexis 2012) (permitting gestational surrogacy contracts while prohibiting traditional surrogacy); TEX. FAM. CODE ANN. §§ 160.751–.763 (2008) (explicitly allowing gestational surrogacy as long as the surrogate does not use her own eggs).

15. Article 8 of the UPA substitutes the term “gestational mother” for “surrogate mother,” the term that was previously used, on the grounds that “gestational mother” is a more appropriate term because it includes both a woman who gestates a child without being that child’s genetic mother and a woman who is both the genetic and gestational mother. UNIF. PARENTAGE ACT art. 8 cmt. (amended 2002), 9B U.L.A. 77 (Supp. 2012). Thus, although the UPA uses the term “gestational mother,” it defines gestational mother inclusively to include a woman who may also possess a genetic connection to the child. However, the comments to this section of the UPA make it clear that the term “gestational mother” was deliberately selected because the majority of ART practitioners try to avoid the scenario in which a woman supplies both egg and womb on the rationale that “the gestational mother’s genetic link to the child too often creates additional emotional and psychological problems in enforcing a gestational agreement.” *Id.*

16. Professor Elizabeth Scott carefully describes how and why the social and political meanings of surrogacy have changed over the last decades and the process by which gestational surrogacy became normalized, pointing out that “[t]he move to gestational surrogacy has facilitated the change in the social meaning of surrogacy from a mother’s sale of her baby to a transaction involving the provision of gestational services. It is telling that gestational surrogates are often described as ‘carriers,’ rather than as ‘mothers.’” Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 140 (2009); see also June Carbone, *Negating the Genetic Tie: Does the Law Encourage Unnecessary Risks?*, 79 UMKC L. REV. 333, 335 (2010) (“[T]he acceptance of surrogacy, legally and practically, followed from the separation of genetic and gestational motherhood. While the initial cases frowned on the practice, modern law in states that range from Texas to Illinois and Virginia to California and Florida expressly authorizes the practice. Psychological and legal acceptance closely followed the change in the nature of the genetic relationship.”).

17. Carroll, *supra* note 1, at 1191.

18. See Scott, *supra* note 16, at 141 (“The relatively positive response to gestational surrogacy suggests that gestational motherhood is devalued when it is separated from genetic parenthood—and perhaps that surrogates who are not also genetic mothers, unlike traditional

have statutes which presume that the woman who gives birth is the legal mother of the child.¹⁹ Moreover, even in *Johnson v. Calvert*,²⁰ the most famous gestational surrogacy case, the California Supreme Court ruled that both the woman who provided the egg and the woman who gestated had provided sufficient evidence of maternity to be deemed the biological mother of the resulting child.²¹ In that case, the court used intent as a tiebreaker to determine which of these two women should be deemed the legal mother of the child, awarding custody to the genetic parents rather than the gestational surrogate.²² But if a woman gestated a child conceived with the egg of another with the intention of rearing the child as her own, the California Supreme Court would have declared the gestator to be the legal mother of the child.²³ Surely, Professor Carroll does not mean to suggest that, in such a case, a gestational mother who lacks a genetic connection should be treated as a legal stranger to her child?

Perhaps Professor Carroll believes that enforcement of the relinquishment bargain made by a gestational surrogate is less offensive because gestational surrogates who lack a genetic connection generally feel less attachment to the resulting child. Yet this may not always be the case. For many women, gestation rather than genetics may be the source of their maternal bond with the child. Indeed, the Supreme Court relied upon the strength of the gestational connection between mother and child to justify a gender-based citizenship presumption that essentially discriminated against genetic fathers.²⁴ Professor Carroll does not really defend her assumption that one biological connection—the genetic tie—should trump the other biological connection with the child, nor does she provide a reason why we should privilege genes over gestation. Indeed, it could be argued that an approach that favors the genetic tie over the lengthy and arduous physical process of gestation and childbirth ironically replicates the wrongs of patriarchy, which typically denigrated or dismissed the importance of women's unique contributions while exalting the male role in providing the seed and ultimately viewing children as the genetic property of their fathers. Of course, Professor Carroll's approach is more egalitarian in its conclusion that children should be viewed as the genetic property of both the male and female progenitors!

Are there good reasons for the law to prefer gestational surrogacy to traditional surrogacy? Some might suggest that the prevalence of gestational surrogacy contracts today reflects widespread parental preferences—people prefer to have

surrogates, might be expected *not* to form a maternal bond with a child who 'belongs' to others." (emphasis in original)).

19. See Kristine S. Knaplund, *Jus Sanguinis: Determining Citizenship for Assisted Reproduction Children Born Overseas* 18 (March 26, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=2181026> (pointing out that State Department policy conflicts with the law in most states, which generally presume that the woman who gives birth to a child is the child's mother); see also Carbone, *supra* note 16, at 338.

20. 851 P.2d 776 (Cal. 1993).

21. *Id.* at 782.

22. *Id.*

23. See *id.*

24. See *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding gender-based presumption that automatically awarded U.S. citizenship to children born to citizen-mothers, while requiring proof of an actual connection in order to confer citizenship upon the genetic children of citizen-fathers).

children who are the product of their own genes, rather than the genes of others.²⁵ But if so, why should the law simply ratify such private preferences? Moreover, intending parents often choose gestational surrogacy even when the child is not the product of their own eggs and sperm but of donated gametes. This suggests that the preference for gestational surrogacy is a consequence of legal regulation rather than the cause—the preference for gestational surrogacy may actually be the result of legal rules that clearly enforce gestational surrogacy contracts while leaving open the status of traditional surrogacy. If this is so, then the desire to disconnect the genetic and the gestational components of motherhood may be an artifact of the law. Disentangling the various elements of reproduction makes it more difficult to label a gestational surrogate as a “mother” whose claims to the child may trump those of the intending parents.²⁶ Thus, the fragmentation of parenthood into multiple parts may serve no purpose other than to alienate women from the products of their labor—figuratively and literally—in order to facilitate the transfer of legal rights to the resulting children.

Moreover, if there is good reason to distinguish between these two forms of surrogacy, one could argue that the result should be exactly the other way around. Gestational surrogacy, because it requires in vitro fertilization, is more risky and invasive than traditional surrogacy. In vitro fertilization requires ingestion of drugs to hyperstimulate a woman’s ovaries, encouraging the release of multiple eggs which will be retrieved through laparoscopy, a procedure in which a lengthy needle is inserted in a woman’s navel.²⁷ And fertilization of these eggs with sperm occurs externally in a petri dish, rather than inside the womb. All of these procedures entail certain risks to both women and children, and they are also much more expensive than artificial insemination. If protecting health and safety is the primary purpose of regulation, then the law should promote traditional surrogacy over gestational surrogacy. Yet disparate legal treatment of these two forms of surrogacy actually seems to have prompted a shift from the cheaper and less invasive, low-tech procedure of artificial insemination to the risky and expensive high-tech alternative, not for any good reasons, but arguably because of unthinking stereotypes and prejudices that endow genes with greater significance than other biological connections and envision a gestational surrogate as a mere “carrier” and not the real mother.

25. Professor Carbone suggests that the separation of genetic and gestational parenthood might also be the result of intending parents’ desire to negate unwanted genetic ties. See Carbone, *supra* note 16, at 338.

26. Cf. I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008) (arguing that there is no “naked” right not to be a genetic parent, unbundled from the obligations of gestational and legal parenthood).

27. Radhika Rao, *Coercion, Commercialization, and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research*, 21 BERKELEY TECH. L.J. 1055, 1058 & n.13 (2006).