

Fall 2013

Reproducing Hierarchy in Commercial Intimacy

Michele Goodwin

University of Minnesota, mgoodwin@law.uci.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Health Law and Policy Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Goodwin, Michele (2013) "Reproducing Hierarchy in Commercial Intimacy," *Indiana Law Journal*: Vol. 88 : Iss. 4 , Article 8.

Available at: <https://www.repository.law.indiana.edu/ilj/vol88/iss4/8>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Reproducing Hierarchy in Commercial Intimacy

MICHELE GOODWIN*

For all the attention to *baby markets* and the articles, books, and annual symposia addressing such themes, few scholars, if any, take up the issue of civil and human rights. Indeed, across a technological spectrum so vast in array, scope, and breadth that includes in vitro fertilization,¹ ova selling,² cryopreservation of ova,³ womb renting,⁴ pre-implantation genetic diagnosis,⁵ embryo transfer,⁶ assisted hatching,⁷ intracytoplasmic sperm injection (ICSI) of ova,⁸ embryo grading,⁹ and more, relatively few scholars offer a sustained critique that encompasses socioeconomic scrutiny and race-based analysis.¹⁰

† Copyright © 2013 Michele Goodwin.

* Everett Fraser Professor of Law at the University of Minnesota. Professor of Medicine and Public Health at the University of Minnesota. President, Defence for Children International-USA. My thanks to Marian Howe-Taylor, Dr. Clifton Sanders, Debora Spar, Dorothy Roberts, Ruqaiyah Yearby, Jody Madeira, and June Carbone. A special thanks to my research assistants Allison Whelan and Sabrina Ly. I would also like to extend my appreciation to the *Indiana Law Journal* staff and editors.

1. See Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 286–87 (1997).

2. UNI, *Young American Women Sell Ova to Pay Credit Card Debts*, DAILY NEWS & ANALYSIS (Jun. 26, 2006, 12:40 IST), http://www.dnaindia.com/world/report_young-american-women-sell-ova-to-pay-credit-card-debts_1037801; see also Hasan, *Women Hatching Financial Plans: Selling Eggs to Fertility Clinics!*, DIRECTORY J. (Sept. 22, 2008), <http://www.dirjournal.com/business-journal/women-hatching-financial-plans-selling-eggs-to-fertility-clinics/>.

3. See Kathleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 201–04 (1997).

4. See Chaitra Arjunpuri, *India's Growing 'Rent-a-Womb' Industry*, ALJAZEERA (Feb. 3, 2013, 12:00 P.M.), <http://www.aljazeera.com/indepth/features/2013/01/2013128122419799224.html>; see also John B. Monteiro, *Offbeat (27): Rent a Womb or Adopt?*, BELLEVISION MEDIA NETWORK (Jan. 29, 2013), <http://www.bellevision.com/belle/index.php?action=topnews&type=5264>.

5. See David Adamson, *Regulation of Assisted Reproductive Technologies in the United States*, 39 FAM. L.Q. 727, 730 (2005) (“Regulations affecting genetics also impact ART in an increasing manner, because of the application of preimplantation genetic diagnosis and screening (PGD/S), which is performed by testing cells biopsied from embryos that have been created by IVF.”).

6. See Justyn Lezin, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN'S L.J. 185, 194 (2003).

7. See Jacques Cohen, Mina Alikani, Janet Trowbridge & Zev Rosenwaks, *Implantation Enhancement by Selective Assisted Hatching Using Zona Drilling of Human Embryos with Poor Prognosis*, 7 HUM. REPROD. 685, 685 (1992).

8. See Guzman, *supra* note 3, at 200–01 n.21.

9. See P.-O. Karlström, T. Bergh, A.-S. Forsberg, U. Sandkvist & M. Wikland, *Prognostic Factors for the Success Rate of Embryo Freezing*, 12 HUM. REPROD. 1263 (1997).

10. See Victor Y. Fujimoto, Barbara Luke, Morton B. Brown, Tarun Jain, Alicia

Yet, race exploitation and poverty are key, tolerated components of assisted reproductive technology (ART). According to a study conducted by the Center for Social Research in India, “[a]dvances in assisted reproductive techniques such as donor insemination and, embryo transfer methods, have revolutionized the reproductive environment, resulting in ‘surrogacy’, as the most desirable option.”¹¹ Scholars and policy makers frequently observe that “[t]he system of surrogacy has given hope to many infertile couples, who long to have a child of their own”¹² and has expanded reproductive options for gay men,¹³ lesbian women,¹⁴ and single persons intending to parent.¹⁵ However, the attention to the advancements in reproductive technologies and the communities they benefit may obscure externalities worth studying. In fact, reductive refrains capture a significant aspect of the socioeconomic critique of ART services with arguments about the “commodification of life”¹⁶ and baby selling¹⁷ dominating the discourse. Desperately missing are more nuanced analytics.

Armstrong, David A. Grainger & Mark D. Hornstein, *Racial and Ethnic Disparities in Assisted Reproductive Technology Outcomes in the United States*, 93 FERTILITY & STERILITY 382 (2010), available at <http://www.sciencedirect.com/science/article/pii/S0015028208044208>.

11. CTR. FOR SOC. RES., SURROGATE MOTHERHOOD: ETHICAL OR COMMERCIAL 3 (2012), available at <http://www.womenleadership.in/Csr/SurrogacyReport.pdf>.

12. *Id.*

13. See *Family Building Options for Gays and Lesbians*, FERTILITY AUTHORITY, <http://www.fertilityauthority.com/your-fertility/family-building-options-gays-and-lesbians> (“Increasingly, gay and lesbian individuals and couples are using egg donation, sperm donation and surrogacy to help them have a biological family.”); Jane Hansen, *Men Want Kids on Their Own*, TELEGRAPH (Feb. 3, 2013, 12:00 AM), <http://www.dailytelegraph.com.au/news/men-want-kids-on-their-own/story-e6freuy9-1226567324733>; *Surrogacy Options for Gay Couples: In Search of a Womb of One’s Own*, IT’S CONCEIVABLE, <http://itsconceivablenow.com/surrogacy/>.

14. *Overview of the Surrogacy Process*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/overview-of-the-surrogacy-process> (“Some lesbian couples find gestational surrogacy attractive because it permits one woman to contribute her egg and the other to carry the child.”).

15. See Mireya Navarro, *The Bachelor Life Includes a Family*, N.Y. TIMES, Sept. 7, 2008, at ST1, available at http://www.nytimes.com/2008/09/07/fashion/07single.html?pagewanted=all&_r=0 (“At 46, Dr. Gurr, who is settled in his job but now unattached, is finally fulfilling his wish. Next month, through a surrogate, he will become the single parent of a baby boy.”).

16. Barbara Katz Rothman, *Reproductive Technology and the Commodification of Life*, 13 WOMEN & HEALTH 95, 95 (1988) (“This paper suggests that the key unifying concept in the development and application of new reproduction technology has been the increasing commodification of life—treating people and parts of people as marketable commodities. This commodification process is made most dramatically clear in (1) prenatal diagnosis, in which the fetus is treated as a product subject to quality control measures and women are treated as producers without emotional tie to their products and (2) so-called ‘surrogacy’ arrangements in which an actual price tag is placed on pregnancy, and women sell both their ‘labor’ and their ‘product.’”).

17. STEPHEN WILKINSON, BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE 134–81 (2003).

In *Confessions of a Serial Egg Donor*,¹⁸ Julia Derek reveals that her racially ideal status (as perceived by white, American prospective parents) made her an ideal gamete provider.¹⁹ She became a “serial donor” by virtue of demand for her ova.²⁰ Derek came to understand that, although European, her genetics satisfied the American ideal and fantasy for offspring: blond, white, tall, and college educated.²¹ Clinics confirm the disproportionate demand for this ethnic demographic.²² However, it would be a mistake to read Derek’s story as only about race; her powerful confessional also exposes the hidden socioeconomic dynamics that equally define assisted reproduction. Weeks, if not days, from poverty in the United States, Derek needed money—and providing gametes “saved” her.²³

Despite the intersections of race and poverty that pervade contemporary reproductive technologies, scholars have not taken up this over-ripe inquiry.²⁴ For example, critical race theory scholars might offer valuable insights about the racial dynamics that dominate who seeks—and who is sought after for—reproductive services. Critical race theorists might also offer important insights about the financial interests that shape and sustain the reproductive technology industry.²⁵ However, reproductive technology remains an area of law under-explored by critical race theorists. Nor have legal scholars of law and medicine provided a sustained, credible engagement on racial preferences and reproductive technology or sturdy frameworks to analyze the scope and scale of race and the potential for economic exploitation in ART. Activist-scholars such as Lorretta Ross offer important critiques about those who study women and the law, arguing that activism and scholarship on reproduction tends toward emphasizing choice frameworks at the risk of ignoring reproductive justice concerns that impact the lives of poor women and women of color. In other words, feminist theory tends toward blindly engaging and emphasizing socioeconomic hierarchies and essentialism. In the context of gestational surrogacy, access to gestational surrogacy may trump exploring the lives of the women who service their wealthier counterparts.

Neither legislatures nor the federal government have articulated standards for transnational ART despite its increased use flowing from the United States and Europe to developing countries.²⁶ Pamela Laufer-Ukeles alludes to this point in her

18. JULIA DEREK, *CONFESSIONS OF A SERIAL EGG DONOR* (2004).

19. *Id.* at 175–76.

20. *Id.* at 174.

21. *Id.* at 175–76.

22. See, e.g., Hawley Fogg-Davis, *Navigating Race in the Market for Human Gametes*, in *GENETICS: SCIENCE, ETHICS, AND PUBLIC POLICY* 115, 125 (Thomas A. Shannon ed., 2005) (noting that 85% of donors “hired” by California Cryobank identify as Caucasian); Mark V. Sauer, *Egg Donor Solicitation: Problems Exist, But Do Abuses?*, 1 *AM. J. BIOETHICS*, Fall 2001, at 1, 1.

23. DEREK, *supra* note 18, at 7–8.

24. See, e.g., Fujimoto et al., *supra* note 10.

25. See Kari L. Karsjens, *Boutique Egg Donations: A New Form of Racism and Patriarchy*, 5 *DEPAUL J. HEALTH CARE L.* 57, 78–81 (2002).

26. See Timothy F. Murphy, *Access and Equity: International Standards and Assisted Reproductive Technologies*, 14 *REPROD. BIOMED. ONLINE (SUPPLEMENT 1)* 12, 12 (2007),

recent article, *Mothering for Money: Regulating Commercial Intimacy* published in this issue.²⁷ For example, commercial surrogacy became legalized in India a decade ago as a means of advancing the country's growing supply of medical services for patients seeking therapies ranging from lifesaving techniques to cosmetic surgeries.²⁸ Scholars describe this as a means for tourists from the West to obtain "cheap" health care services. For example, surrogacy in the United States can approach as much as \$150,000.²⁹ By comparison, surrogacy in India can be facilitated for as little as \$12,000.³⁰

The scale and scope of gestational outsources to India is more difficult to measure. Nevertheless, industry figures suggest that medical tourism benefits India by more than \$2 billion per year in revenues and surrogacy outsourcing is an important part of that overall economic growth, accounting for at least \$500 million in annual revenue.³¹ However, the cultural optics of this type of outsourcing are difficult to ignore.³² As Barbara Stark recently warned, "transnational surrogacy results in complex, and often conflicting, rules regarding basic family law issues of maternity, paternity, custody, visitation, and children's rights."³³ Professor Imrana Qadeer, a public health specialist at Jawaharlal Nehru University, echoes Stark's

available at <http://download.journals.elsevierhealth.com/pdfs/journals/1472-6483/PIIS1472648310607195.pdf>. As Timothy Murphy observes:

The United Nations Declaration on Universal Human Rights points in this direction when it emphasizes the right to found a family. Moreover, the idea of moral progress—defined as increases in humaneness and humanity—also favours the extension of assisted reproductive technologies to couples seeking children, in order to lift the burdens of childlessness for parents and the burdens of disorders and disease for children themselves. At the very least, working toward global standards will help minimize the differences in access to assisted reproduction treatments that are rooted in economic disadvantages. While the Council of Europe's 1997 Oviedo Convention began the kind of work necessary to help frame transnational standards in bioethics, it ultimately avoided key questions of assisted conception. Ultimately, global standards will help people get past cultural barriers as they look for help in having children.

Id.

27. Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223 (2013).

28. See Sunita Reddy & Imrana Qadeer, *Medical Tourism in India: Progress or Predicament?*, ECON. & POL. WKLY., May 15, 2010, at 69, available at <http://www.environmentportal.in/files/Medical%20Tourism%20in%20India.pdf>.

29. Ramon Johnson, *Before Gay Men Choose Surrogacy Through In Vitro Fertilization (IVF)*, ABOUT.COM, <http://gaylife.about.com/od/gayparentingadoption/a/surrogacy.htm>.

30. Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE (Jul. 29, 2007), <http://www.marieclaire.com/world-reports/news/surrogate-mothers-india>.

31. Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 370 (2012); Scott Carney, *Inside India's Rent-a-Womb Business*, MOTHER JONES (Mar./Apr. 2010), <http://www.motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel>.

32. Stark, *supra* note 31, at 370 ("As set out in a recent report by the Permanent Bureau at the Hague Conference on Private International Law, commercial surrogacy has been banned in many nation states . . . [because,] [i]n addition to the monetary costs, there are human costs.").

33. *Id.*

concerns, emphasizing that “total madness is prevailing” within India’s surrogacy tourism. As she explained to one reporter, “[i]t is a totally unregulated thing . . . in India the doctors get away with a lot of things because people trust them and also there is a lot of ignorance about the technologies. . . . Women are vulnerable, they can be pressured, and it’s spreading like wildfire.”³⁴ Commissioning or intended parents terminate contracts and fetuses at whim³⁵ or subject surrogates to high risk multiple gestations. As one doctor who regularly implants four embryos joked, although his clinic is responsible for only 4 sets of triplets, his services have resulted in the birth of more than 1,000 sets of twins. He considers it a “two-for-one bonus.”³⁶

Concerns about surrogacy exploitation and evidence of coercion surface in Karen Busby’s and Delaney Vun’s empirical research on gestational surrogacy.³⁷ The authors distinguish Western surrogacy arrangements from those they raise caution about in India. Indeed, they paint a complicated world reflective of contemporary surrogacy dynamics, explaining that Indian surrogates lack basic protections, including no compensation should the reproductive process fail, no legal rights under the contract, and usually no legal representation.³⁸ They note, “[s]ome women are only paid after they give birth and only if the commissioning parents agree to accept the child.”³⁹ News reports highlight these accounts, pointing to cases of rampant contract breaches, where “intended parents” breach contracts, rejecting the babies born from destitute Indian surrogates.⁴⁰ Nandita Rao, an attorney in India, claims that in that society, “which is so fiercely patriarchal, many families are using their daughters-in-law as baby-churning factories.”⁴¹

Collectively, these types of concerns recently resulted in the passage of new requirements for foreign individuals seeking reproductive services in India. According to the new regulations, prospective parents must now register for medical visas rather than tourist visas.⁴² Moreover, only heterosexual couples married for two years or more may utilize reproductive surrogacy in the country.⁴³ The new rules are described by some Indian groups as discriminatory and unwelcomed.⁴⁴

34. Stephanie Nolan, *Desperate Mothers Fuel India’s “Baby Factories,”* GLOBE & MAIL (Feb. 13, 2009, 12:00 AM), <http://www.theglobeandmail.com/news/world/desperate-mothers-fuel-indias-baby-factories/article1153508/?page=all>.

35. *Id.* (“A year ago, Anita had another surrogate pregnancy under way with a woman she brought to stay at her home, but six months in, Anita began to suspect the surrogate was stealing. ‘We lost confidence in her, so we terminated that pregnancy,’ she said calmly.”)

36. *Id.*

37. Karen Busby & Delaney Vun, *Revisiting The Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CANADIAN J. FAM. L. 13 (2010).

38. *Id.* at 82.

39. *Id.*

40. Nolan, *supra* note 34.

41. *Id.*

42. Madhavi Rajadhyaksha, *No Surrogacy Visa for Gay Foreigners*, TIMES INDIA (Jan. 18, 2013, 12:26 AM), http://articles.timesofindia.indiatimes.com/2013-01-18/india/36415052_1_surrogacy-fertility-clinics-home-ministry.

43. *Id.*

44. *India Bans Gay Foreign Couples from Surrogacy*, TELEGRAPH (Jan. 18, 2013, 2:57

Yet, the question remains, who truly benefits from ART outsourcing and who is harmed? That is to say, despite what Debora Spar and a succession of scholars cleverly and so accurately brand as “reproductive tourism,” Americans exporting their reproductive “burdens” and demand to the poor of the developing world,⁴⁵ the U.S. government fails to monitor, establish guidelines, or intervene. The result is an underdeveloped analysis of what governments abroad describe as a pernicious form of exploitation of vulnerable women hired as reproductive surrogates.⁴⁶ Has the West reified social hierarchy in India by creating a reproductive caste? It is an inescapable reality that communities of Indian women now live in reproductive “tribes” for Americans, sharing dormitory like facilities segregated from their communities to gestate for bargain-seekers.⁴⁷

To what can this phenomenon be attributed? Is the failure of government response a sign of deference to markets and the private sector in cases of reproduction? Is the lack of regulation in this sphere a failure at all? Laufer-Ukeles does not attempt to answer these questions, although her contribution in this volume does seek to distinguish her very strong support for American surrogacy from the “reproductive tourism” taking place in India, Panama, and other developing nations.⁴⁸

Several stories can be told to answer these questions; however, two stand apart. For example, Western exportation of reproductive demands—hiring the wombs of women in India to gestate American fetuses—describes market perfection.⁴⁹ By this, an equilibrium narrative can be described; supply meets demand and demand furthers an eager, ready, and willing population of women with limited if any other options. This story could be perceived as an ideal domain where markets promote pareto superior outcomes, where externalities exist, but are balanced against overwhelming benefits to gestating parties as well as the intended parents.

By example, Laufer-Ukeles explains “under a framework of mixed commodification and relational autonomy, regulation that cannot promote a mutually beneficial and appropriate system of commercial surrogacy cannot be translated abroad to the commissioning of foreign surrogates.”⁵⁰ In other words, for Laufer-Ukeles, achieving relational intimacy is an important aspect of permissible surrogacy.⁵¹ Geographic distance and the emphasis on “commercialization in lieu

PM), <http://www.telegraph.co.uk/news/worldnews/asia/india/9811222/India-bans-gay-foreign-couples-from-surrogacy.html>.

45. See DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 214–16 (2006).

46. For example, Australia bans commercial surrogacy overseas. Attorney General Greg Smith supports the ban, saying that it is “justified by the need to . . . avoid exploitation of women.” Cosima Marriner, *Booming Surrogacy Demand Sparks Exploitation Fears*, SYDNEY MORNING HERALD (Sept. 2, 2012), <http://www.smh.com.au/national/booming-surrogacy-demand-sparks-exploitation-fears-20120901-25742.html>.

47. See Amrit Dhillon, *Mothers for Hire: Many Australians Travel to India and Pay Surrogate Mothers to Bear Their Child. But the Local Women Are Often Poor, Desperate and Exploited*, AGE (Sept. 7, 2012), <http://www.theage.com.au/national/mothers-for-hire-20120906-25hi1.html>.

48. Laufer-Ukeles, *supra* note 27.

49. See Arjunpuri, *supra* note 4.

50. Laufer-Ukeles, *supra* note 27, at 1267.

51. *Id.*

of intimacy” shape the potential for greater exploitation in her view, making those transactions more troubling.⁵² Her analysis is to be commended in that it excellently frames the descriptive contours of domestic and international surrogacy, particularly the physical and emotional intimacy of surrogacy.⁵³ But, why should physical and emotional intimacy matter to surrogacy? What might it cover? Finally, does race really matter in international surrogacy arrangements?

The challenge for junior and more senior scholars in this field is to add nuance to their analyses. How might scholars move forward? First, Laufer-Ukeles emphasizes the importance of intimacy through friendship and bonding between surrogates and intended parents as a sign of a good, healthy contractual relationship.⁵⁴ However, I encourage the development of a discourse in this domain that moves beyond the seductive accounts of friendship and bonding as a regulatory point (i.e., ART is permissible if friendships and intimacy are the baseline criteria; ART is permissible if the financial exchange is less generous—ergo less coercive).

In his groundbreaking novels on race in the American South, author Jonathan Odell, a white Mississippian, describes the palatable race stories of the Jim Crow era,⁵⁵ wherein everyone loved their maids, gardeners, and African American caretakers—“they were all like ‘family.’”⁵⁶ Odell reminds readers (and listeners) that the story of affection and intimacy, when controlled and told by the dominant within the space of hierarchy, cannot be trusted.⁵⁷ In other words, the South did not lack for systems of intimacy between African Americans and whites, yet hierarchy, racism, perpetual subordination, and economic coercion reigned.⁵⁸ More importantly, the story of intimacy assuaged white guilt, shame, and embarrassment for economic racism and *de jure* segregation.⁵⁹ Intimacy was a given, but it did not create equality.⁶⁰

Professor Patricia J. Williams offers a similar critique in the *Alchemy of Race and Rights*, as she recounts the sacrifices made by an aunt who cleaned fraternity houses at Harvard. She recounts, “‘just like family’ is how the aunt who was the maid was described by rich young men whose rooms she cleaned.”⁶¹ Williams’s aunt’s “only contact with love, attention, and intimacy was always at the expense of [her] own children or family.”⁶² Williams describes this as a peonage founded on the “real exchange” of suffering.⁶³

52. *Id.*

53. *Id.* at 1265–75.

54. *Id.* at 1230–34.

55. See JONATHAN ODELL, *THE HEALING* (2012); JONATHAN ODELL, *THE VIEW FROM DELPHI* (2004).

56. Jonathan Odell, Keynote Lecture at the University of Maryland Francis King Carey School of Law Roundtable: Families, Privacy, Secrets and the Law (March 8, 2013).

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 22–23 (1991).

62. *Id.* at 23.

63. *Id.*

So, what frameworks might offer a way forward? Margaret Radin made the case some years ago for incomplete commodification in some instances.⁶⁴ In other words, as a society, we should regulate some unavoidable markets without banning them. Viviana Zelizer articulates a different approach that considers differentiated ties, which emphasizes a connected lives theory of commodification.⁶⁵ This approach suggests the permissibility of accepting money for altruistic conduct—it suggests a value for altruism. A third approach, articulated by Mary Anne Case, argues against too much intimacy in the commercial relationship.⁶⁶ Case prefers the “clean hands” approach and aligns with Odell. I share her critique, in that purported or perceived intimacy in a domestic relationship may obscure the commercial nature of the exchanges and render illusory the fact that the relationships are non-egalitarian.

Each of the above critiques offer a path forward to think about class and race in ART. Yet, the Radin, Case, and Zelizer approaches achieve only so much on race and class.⁶⁷ Their insightful frameworks start from the perspective of the party demanding the exchange of goods, a perspective that will always suffer the potential for bias.⁶⁸ I suggest a reordering of that critique, much in the same way that civil rights leaders articulated that the better integration platforms necessarily move with bi-directionality. That is to say, the weakness in creating successful ART regulatory regimes that recognize the benefits and harms for surrogates abroad or domestically necessarily should start from the perspective of surrogate need and advancement.

In other words, intended parents speak of surrogacy as helping to facilitate that which “transforms” their lives. Introducing “transformation” as an objective of surrogacy arrangements shifts the focus and dynamic from those who demand services—the recipients or consumers—to the needs of those who provide. This shift in focus serves to incentivize more than creating “intimacy,” but also overcoming the biggest concern in surrogacy—exploitation and coercion. Determining that which will “transform” surrogates lives is an important starting point toward social justice in international surrogacy arrangements.

CONCLUSION

Surrogacy arrangements exemplify an important modern phenomenon in creating families. Increasingly, intended parents turn to “others” to form the building blocks of life, whether to acquire ova and sperm donation or the more involved, extended process of gestational surrogacy. These processes provide a substantive and emotional function for intended parents. However, they also engage the law in unique and complicated ways. Gestational arrangements are sought for reasons beyond medical necessity to include “cosmetic” interests and convenience. Often, those sought to bear the cosmetic costs and inconvenience of these types of surrogacy arrangements are poor women.

64. *E.g.*, MARGARET JANE RADIN, *CONTESTED COMMODITIES passim* (2d ed. 2001).

65. VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY passim* (2005).

66. Mary Anne Case, *Pets or Meat*, 80 CHI.-KENT L. REV. 1129 (2005).

67. RADIN, *supra* note 51; ZELIZER, *supra* note 52; Case, *supra* note 53.

68. RADIN, *supra* note 51; ZELIZER, *supra* note 52; Case, *supra* note 53.

Gestational surrogacy features significantly in the shaping of new family norms in the United States and abroad. On one hand, these arrangements can be reduced to contract and negotiations—and many courts take that view. On the other hand, the intimacy of these legal arrangements cannot be ignored. Few exchanges could be more intimate than gestating another's fetus. Herein resides a modern conundrum unanswered by law. What are the appropriate emotional and legal responses to gestational surrogacy? Most scholars developing scholarship in this domain concentrate on the thorny questions related to parenthood: what legal rights attach to the relationship between gestational carrier and the resultant newborn? Can the intended parents force a gestational carrier to comply with the contract, even if it means selectively reducing or receiving an abortion? These questions expose the fault lines in ART.

Yet, as this Comment notes, race and class feature significantly in modern surrogacy arrangements as economically destitute women in developing countries increasingly shepherd embryos from the West to fetal status and then to birth. These unique arrangements cause alarm because of the power and economic imbalance in these arrangements, as well as the symbolism related to colonialism.