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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.\(^10\)

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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).


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


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.


12. Id.


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.’”).

In *Confessions of a Serial Egg Donor*, Julia Derek reveals that her racially ideal status (as perceived by white, American prospective parents) made her an ideal gamete provider. She became a “serial donor” by virtue of demand for her ova. Derek came to understand that, although European, her genetics satisfied the American ideal and fantasy for offspring: blond, white, tall, and college educated. Clinics confirm the disproportionate demand for this ethnic demographic. 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.

Despite the intersections of race and poverty that pervade contemporary reproductive technologies, scholars have not taken up this over-ripe inquiry. 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. 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. Pamela Laufer-Ukeles alludes to this point in her

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19. *Id.* at 175–76.
20. *Id.* at 174.
21. *Id.* at 175–76.
23. *Derek, supra* note 18, at 7–8.
recent article, *Mothering for Money: Regulating Commercial Intimacy* published in this issue. 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. 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. By comparison, surrogacy in India can be facilitated for as little as $12,000.

The scale and scope of gestational outsourcing 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. However, the cultural optics of this type of outsourcing are difficult to ignore. 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.”

Professor Imrana Qadeer, a public health specialist at Jawaharlal Nehru University, echoes Stark’s

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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

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.
38. Id. at 82.
39. Id.
40. Nolan, supra note 34.
41. Id.
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, 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. 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.

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.

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. 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.” In other words, for Laufer-Ukeles, achieving relational intimacy is an important aspect of permissible surrogacy. Geographic distance and the emphasis on “commercialization in lieu
of intimacy” shape the potential for greater exploitation in her view, making those
transactions more troubling.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{55} wherein everyone loved their maids, gardeners, and African American
caretakers—“they were all like ‘family.’”\textsuperscript{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.\textsuperscript{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.\textsuperscript{58} More
importantly, the story of intimacy assuaged white guilt, shame, and embarrassment
for economic racism and \textit{de jure} segregation.\textsuperscript{59} Intimacy was a given, but it did not
create equality.\textsuperscript{60}

Professor Patricia J. Williams offers a similar critique in the \textit{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.\textsuperscript{61} Williams’s
aunt’s “only contact with love, attention, and intimacy was always at the expense of
[her] own children or family.”\textsuperscript{62} Williams describes this as a peonage founded on
the “real exchange” of suffering.\textsuperscript{63}

\textsuperscript{52.  Id.}
\textsuperscript{53.  Id. at 1265–75.}
\textsuperscript{54.  Id. at 1230–34.}
\textsuperscript{55.  See \textsc{Jonathan Odell}, \textsl{The Healing} (2012); \textsc{Jonathan Odell}, \textsl{The View from
Delphi} (2004).}
\textsuperscript{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).}
\textsuperscript{57.  See id.}
\textsuperscript{58.  See id.}
\textsuperscript{59.  See id.}
\textsuperscript{60.  See id.}
\textsuperscript{61.  \textsc{Patricia J. Williams, The Alchemy of Race and Rights} 22–23 (1991).}
\textsuperscript{62.  Id. at 23.}
\textsuperscript{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.

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