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## Essay

# Reproducing Race in an Era of Reckoning

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Surrogacy, *in vitro* fertilization, and other methods of assisted reproduction have help to make hundreds of thousands of babies in the United States each year.<sup>1</sup> Some parents are single; others are couples, whether same-sex or different-sex. They might face barriers to adoption, or struggle with infertility, hereditary conditions, or pregnancy risks that complicate their hope for a child who shares their genes. For those who need another person's sex cells—and want to avoid the emotional messiness of asking someone they know—many turn to sperm banks or egg vendors to find an anonymous donor from among a pool of candidates screened for their reproductive health.<sup>2</sup> An extra fee buys a meticulous run-down including height, family history, baby pictures, voice samples, personality tests, SAT scores, educational achievements, hobbies, religious views, even celebrity look-alikes.<sup>3</sup>

One thing that many people long in a child they have is one who's more likely to resemble them. They may in turn think of features like

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1. See Saswati Sunderam, Dmitry M. Kissin, Sara B. Crawford, Suzanne G. Folger, Sheree L. Boulet, Lee Warner, & Wanda D. Barfield, *Assisted Reproductive Technology Surveillance—United States, 2015*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 16, 2018), <https://www.cdc.gov/mmwr/volumes/67/ss/ss6703a1.htm> [<https://perma.cc/97YF-RJ57>].

2. See Dov Fox, *Silver Spoons and Golden Genes*, 33 AM. J. LAW & MED. 568, 604–09 (2007); Dov Fox, *Selective Procreation in Public and Private Law*, 64 UCLA L. REV. DISC. 294, 308–16 (2016).

3. See DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW 162–64 (2019); Dov Fox, Birth Rights and Wrongs: *Reply to Critics*, 100 B.U. L. REV. ONLINE 159, 164–65 (2020).

skin color and hair type in terms of whatever racial or ethnic group(s) they identify with. Those identities aren't genetic facts but social constructs, with enduring influence in America today—ones that still get black and brown people treated as dishonest or dangerous; as “other,” or “less than.”<sup>4</sup> These realities are front and center in this era of moral convulsions and social reckoning over matters from police brutality and mass incarceration to school inequalities and public health disparities.<sup>5</sup> Aspiring parents are no less aware than others of how race or ethnicity might be expected to inform the experiences and challenges they would face in forming a family and raising a child.

They may have various reasons for caring about their kid's perceived race.<sup>6</sup> Different-sex couples who struggle to conceive might be looking to model a biological family structure from which baby would pass as “natural” kin. Take Kristina Koedderich and her husband, both white. They turned to IVF to fertilize her egg with his sperm.<sup>7</sup> The baby's “Asian” appearance apparent from birth made it hard for the couple to deny that someone else's DNA had been used—a stranger's sample instead of her spouse's.<sup>8</sup> When LGBTQ couples and single parents reproduce, they rely from the start on genetic material from another person—they may hope all the same to have a child who resembles them in ostensibly racialized ways. Aspiring parents might want to share certain familiarities or understandings with how their child is likely to navigate a social world that cares about race.<sup>9</sup>

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4. See Dov Fox, *The Second Generation of Racial Profiling*, 38 AM. J. CRIM. L. 49, 61–66 (2010).

5. See, e.g., Cheryl I. Harris, *Reflections on Whiteness as Property*, 134 HARV. L. REV. F. 1 (Aug. 13, 2020).

6. See Hawley Fogg-Davis, *Navigating Race in the Market for Human Gametes*, 31 HASTING CTR. REP. 13, 17 (2001); Dov Fox, *Race Sorting in Family Formation*, 49 FAMILY L.Q. 55, 58–69 (2015).

7. See *White Couple Gives Birth to Asian Daughter After Alleged Fertility Clinic Mix-up*, CBS NEWS (Sept. 12, 2019), <https://www.cbsnews.com/news/fertility-clinic-sperm-donor-mixup-white-couple-give-birth-to-asian-daughter/> [<https://perma.cc/V2C9-JB6W>].

8. *Id.* For cases in which white fertility patients unexpectedly end up with a baby of color, see *Andrews v. Keltz*, 838 N.Y.S.2d 363, 368 (N.Y. Sup. Ct. 2007); Dorinda Elliot & Friso Endt, *Twins—With Two Fathers: A Fertility Clinic's Startling Error*, NEWSWEEK, July 3, 1995, at 38; Mark Fuller, *Tube Twins From Different Sperm*, TIMES, June 20, 1995; Dareh Gregorian, *Fertility Clinic Is Sued on Egg Mixup*, N.Y. POST, Mar. 27, 1999, at 1; Michael Lasalandra, *Woman, Ex and Hospital Settle Over Sperm Mixup*, BOSTON HERALD, Aug. 27, 1998, at 12; Marlise Simons, *Uproar Over Twins, and a Dutch Couple's Anguish*, N.Y. TIMES, June 28, 1995, at A03; Ronald Sullivan, *Sperm Mix-Up Lawsuit Is Settled*, N.Y. TIMES, Aug. 1, 1991, at B4.

9. See SUSAN GOLOMBOK, MODERN FAMILIES: PARENTS AND CHILDREN IN NEW FAMILY FORMS 54 (2015). Single and same-sex parents are more likely, by comparison, to

Rosa Ortiz wanted a donor of Mexican descent in hopes that her child would appear to share that part of her own ethnicity.<sup>10</sup> B.A. Williams was looking for a donor who would reflect her and her partner's blackness.<sup>11</sup> Both Ortiz and Williams had trouble finding a donor of color because they are hard to come by.<sup>12</sup> Most of the men who sperm banks pay to provide samples identify as Caucasian.<sup>13</sup> The people who are able and willing to try to become parents this way are by and large themselves white, like Jennifer Cramblett and her partner.<sup>14</sup> The couple picked a white donor in hopes of having a white child.<sup>15</sup> The girl Cramblett gave birth to appeared "mixed race."<sup>16</sup> A donor switch left them to confront disadvantages in housing and education that the couple hadn't encountered, or ever anticipated for the family they made.<sup>17</sup> Their case has driven a wave of legal scholarship and critical theory to ask whether racial matching in assisted reproduction is troubling, and whether that practice should be limited, even banned.<sup>18</sup>

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consider adopting a child of a different race. See Mariagiovanna Baccara, Allan Collard-Wexler, Leonardo Felli, & Leeat Yariv, *Child-Adoption Matching: Preferences for Gender and Race*, 6 AM. ECON. J. 133, 153–54 (2014).

10. See Miriam Zoila Pérez, *Where Are All the Sperm Donors of Color?*, REWIRE NEWS (Nov. 28, 2018), <https://rewire.news/article/2018/11/28/where-are-all-the-sperm-donors-of-color/> [<https://perma.cc/8RDE-E798>].

11. See B.A. Williams, *Desperately Seeking a Black Sperm Donor*, N.Y. TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/parenting/fertility/black-sperm-donor.html> [<https://perma.cc/DE9T-VYGJ>].

12. See James F. Smith, Michael L. Eisenberg, David Glidden, Susan G. Millstein, Marcelle Cedars, Thomas J. Walsh, Jonathan Showstack, Louri A. Pasch, Nancy Adler, & Patricia P. Katz, *Socioeconomic Disparities in the Utilization and Success of Fertility Treatments: Analysis of Data from a Prospective Cohort in the United States*, 96 FERT. & STER. 95, 97–98 (2011).

13. See RENE ALMELING, SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM 57 (2011); Martha M. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 27–28 (2003); Sohmakun, *Has Anyone Ever Used a Donor of a Different Race?*, MOTHERING.COM (Jan. 18, 2009, 7:38 PM), <http://www.mothering.com/forum/438-multicultural-families/1032432-has-any-one-ever-used-donor-different-race.html> [<http://perma.cc/Z47V-Y47Q>]; Brittney Thornburley, *Aspiring Queer Mom Seeks Black Sperm Donor, Can't Find Too Many*, AUTOSTRADDLE (Apr. 20, 2017, 11:00 AM), <https://www.autostraddle.com/aspiring-queer-mom-seeks-black-spermdonor-cant-find-too-many-375953/> [<http://perma.cc/N97Q-592Z>].

14. Complaint for Wrongful Birth and Breach of Warranty at 5, *Cramblett v. Midwest Sperm Bank, LLC*, No. 2014-L-010159 (Ill. Cir. Ct. Sept. 29, 2014), 2014 WL 4853400.

15. *Id.*

16. *Id.*

17. *Id.* For discussion, see FOX, BIRTH RIGHTS AND WRONGS, *supra* note 3, at 154–59.

18. See, e.g., Suzanne Lenon & Danielle Peers, "Wrongful" Inheritance: Race, Disability and Sexuality, 25 FEMINIST LEGAL STUD. 141, 160 (2017); Dorothy E. Roberts, *Why*

The most comprehensive and commanding such argument comes from Professor Camille Gear Rich.<sup>19</sup> Her influential article argues that markets in assisted reproduction reflect the systematic injustices behind how ideas of (donor) race have been constructed.<sup>20</sup> But that's not all, according to Rich. The race-conscious promotion of egg and sperm also shapes how that racial construction takes form, and what social meaning it carries.<sup>21</sup> Specifically, she claims the disclosure of donor race in egg and sperm catalogs props up two badly misguided ideas about race—both of them as false as they are pernicious. The first of these ideas is that race is inscribed in our DNA, as something you can control through the race of the donor you pick.<sup>22</sup> Second is that donors of color have less value than their white counterparts.<sup>23</sup> To be clear, the agencies and labs that recruit and broker these donors don't assign racial groups to any explicit reproductive hierarchy: They don't charge higher prices for sperm from donors of some preferred race, for example, or store their samples in gold-colored vials as opposed to silver used for others groups. What Rich objects to is instead the *packaging of race* through promotional materials and drop-down menus that she says advertise idealized whiteness to all-white families.<sup>24</sup>

Rich builds on a growing school of academic philosophy and law that lays bare the push-and-pull between reproductive markets and structural racism.<sup>25</sup> These negotiations should give us pause when they operate to instantiate the divisive assumption that multiracial families are less desirable than single-race ones.<sup>26</sup> But an element of

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*Baby Markets Aren't Free*, 7 U.C. IRVINE L. REV. 611, 616–17 (2017); Patricia J. Williams, *The Value of Whiteness: A Lawsuit is Being Waged Against the "Wrongful Birth" of a Black Child*, NATION (Nov. 12, 2014), <https://www.thenation.com/article/value-whiteness> [<https://perma.cc/22D6-HQMX>].

19. Camille Gear Rich, *Contracting Our Way to Inequality: Race, Reproductive Freedom and the Quest for the Perfect Child*, 104 MINN. L. REV. 2375 (2020).

20. *See id.* at 2401–02.

21. *See id.* at 2437–43.

22. *Id.* at 2406–13.

23. *Id.*

24. *Id.* at 2397–2404.

25. *See* SONU BEDI, PRIVATE RACISM 152–53 (2019); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 263 (1997); CAMISHA A. RUSSELL, THE ASSISTED REPRODUCTION OF RACE 3–4, 132–34, 153–59, 161 (2015); Jonathan M. Berkowitz & Jack Snyder, *Racism and Sexism in Medically Assisted Conception*, 12 BIOETHICS 25, 28–29, 33 (1998); Robin A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071, 2085–86 (2017); Kimani Paul-Emile, *When a Wrongful Birth Claim May Not Be Wrong: Race, Inequality, and the Cost of Blackness*, 86 FORDHAM L. REV. 2811, 2817–18, 2822 (2018).

26. This is the criticism I myself developed in a 2009 student note that introduced a salience-varying spectrum of ways to manage the racial sorting of reproductive

Rich's argument troubles me. My concern lies in its unexamined implication that people who need help reproducing are looking for something different—more finicky, even racist—than the same forms of intimacy (or otherwise) that parents generally hope to share with their kids. Rich wouldn't forbid people from choosing a donor with an eye to race. But her censure of race-consciousness in this larger sphere is reserved only for people who turn to assisted reproduction. That singular focus has the effect of demeaning LGBTQ, single, and infertile people—some of whom identify as racial or ethnic minorities. Concentrating racially charged condemnation on these individuals and couples diminishes their parental dreams by treating them as if preoccupied with race, even conditioned on it.<sup>27</sup> It also suggests that those who reproduce *without* such assistance don't themselves think about and act on race in similar ways in their own choices about forming a family. Neither idea is true, and both stigmatize. Expressive harms aren't the only one incurred by imposing special sanctions on access to ART. There is also the practical harm of further restricting the ability to make babies for the very people whose struggle to conceive or gestate already places them at a reproductive disadvantage.

ART markets often present reproductive choices in visibly racialized terms.<sup>28</sup> Sperm banks and egg vendors promote mostly white-looking couples on their websites, for example, and catalog white, tall, well-educated donors at disproportionate rates.<sup>29</sup> This overrepresentation of whiteness in advertising and inventory responds to

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materials, some more conspicuous, others less so. See Dov Fox, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1864–85 (2009). That piece spelled out a framework of choice-structuring mechanisms to balance respect for reproductive choice with a duty to work against conditions that divide us. See *id.* at 1886–98. My approach would allow vendors to identify a donor's race while pushing them to make its influence less pronounced. See *id.* at 1881–82.

27. For critical examination of how existing regulations of assisted reproduction can discriminate against these groups, see Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010); Courtney G. Joslin, *Nurturing Parenthood Through the UPA*, 127 YALE L.J. F. 589 (2018).

28. But this showcasing of race shouldn't be overstated. For example, sperm banks no longer classify donors in the explicitly ranked terms that Rich claims they do, whether by charging more for white sperm donors than black ones, or by "us[ing] color coded caps to classify and organize sperm." See Rich, *supra* note 19, at 2383 n30. It's been well over a decade since sperm banks have been reported to engage in such practices, whereby: "Black sperm vials have a black cap, Asian sperm receives a yellow cap, and white sperm a white cap." *Id.*

29. Rich argues that having so many white men in the donor pool disadvantages black candidates financially by their exclusion from the same opportunities to sell their sperm. See *id.* at 2405–06, 2426.

predominantly white consumers who want white babies.<sup>30</sup> According to Rich, that's to avoid not just discrimination<sup>31</sup> but interaction with non-whites to "maintain the white monoracial family norm." Rich argues that facilities are doing more than vindicating preexisting preferences—they are shaping what these preferences are, and the hold they have on the people who exercise them.<sup>32</sup> Race's visibility in ART markets "biologizes" a "racial essence" she claims reduces the complexity of these constructs to crude probabilities of heritance.<sup>33</sup> On Rich's account, the industry's promotional tactics connect race to genetics in ways that fool parents into thinking that buying *this* donor, with *that* label will bequeath their child an "idealized version of whiteness" through "pure white racial bloodlines."<sup>34</sup>

Rich also charges race-conscious sperm banks and egg vendors with propagating the view that black people are unworthy of passing along their genes. Three conceptual moves lead her to this conclusion: First is the lopsided supply of white donors, together with prized traits like beauty and success that are easy for users to associate with biological whiteness.<sup>35</sup> Next, Rich argues, this airbrushed portrayal "reinvest[s] in a logic of blood lines and racial purity" that "underpins white supremacy" and "the naturalness of segregation."<sup>36</sup> That idealized depiction of reproductive fitness combines with a history of eugenics and "one-drop" rule to fortify preferences for a white donor.<sup>37</sup> Rich concludes that race-matching in assisted reproduction is "not the

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30. See *id.* at 2399–40. The reason that white people use ART more isn't that they need or desire it more—it's that they can afford it. If ART cost less or was better insured for, African Americans could be expected to use it just as much to achieve similar forms of intimacy through racial matching to black donors. For social context on the pull of biology in African American history, see Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995).

31. Rich, *supra* note 19, 2441–43.

32. *Id.* at 2445, 2399–2400, 2407, 2413.

33. *Id.* at 2382, 2406–07. Elizabeth Anderson names this "minimal race"—designating clusters of traits by geographic ancestry. ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 157–58 (2010). She recommends decoupling racial descriptors from biological, behavioral, or psychosocial conceptions of race. *Id.* Rich might excuse such labels to refer to a group of individuals, even as she finds them troubling when they're used to classify the sperm and eggs that come from those people.

34. Rich, *supra* note 19, at 2435, 2407, 2417.

35. *Id.* at 2411.

36. *Id.* at 2407.

37. See *id.* at 2405–06. Rich thereby traces today's race-matching to generations-old prejudice and de jure discrimination. See Rich, *supra* note 19, at 2392.

innocent nondiscriminatory moment it seems,” but indeed holds the “key to the American regime of racial subordination.”<sup>38</sup>

Rich takes assisted reproduction—its markets and participants—as her point of departure and object of study.<sup>39</sup> That focus makes it curious how little attention she pays to the people who rely on third parties to make a family, or to their reasons for using a surrogate or donor. Most ART users need medical assistance or help from someone who’s not their partner to conceive or gestate. That need for help might stem from age, health, sexual orientation, the trauma of a past pregnancy, or risk of harsh, heritable disease. For those affected, access to sperm and eggs isn’t just about the freedom to have a child who bears genetic affinity, physical resemblance, or similar connection to the tribe or past with which they identify.<sup>40</sup> Surrogacy and donor services also place reproductively disadvantaged LGBTQ, single, and infertile people—that is, the wealthier among them who can afford these services—on a more equal footing with those who don’t need extra help to have kids.<sup>41</sup> The social norms that systematically favor white over black Americans plausibly inform the racial preferences that at least some parents exercise in assisted reproduction.<sup>42</sup> But these families might also have more diverse motivations or circumstances for caring about race than Rich allows for.

Consider the white woman who said she was looking to “choose a donor of color” in order to “use my white privilege to help them fight . . . a system designed not to serve them[.]”<sup>43</sup> Or the white couple with two adopted Black children already, who sought out IVF embryos that had been donated from an African American couple so the new

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38. *Id.* at 2445 n.303, 2385.

39. *See, e.g., id.* at 2414–15 (arguing that sperm banks and egg vendors discourage racial mixing by warning most white customers off of black or other different-race donors, whether for the sake of the would-be child or their larger family’s welfare).

40. *See* Dov Fox, *Making Things Right When Reproductive Medicine Goes Wrong: Reply to Robert Rabin, Carol Sanger, and Gregory Keating*, 118 COLUM. L. REV. ONLINE 94, 99–106 (2018); Dov Fox, *Redressing Future Intangible Losses*, 69 DEPAUL L. REV. 201, 239–40 (2020).

41. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2285–87, 2293 (2017); Douglas NeJaime, *Griswold’s Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality*, 124 YALE L.J. F. 340, 345–47 (2015).

42. These norms are propped up by laws and policies that enable discrimination in housing, education, and employment.

43. *See* the letter quoted in Kwame Anthony Appiah, *How Should I Think About Race When Considering a Sperm Donor?*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/magazine/how-should-i-think-about-race-when-considering-a-sperm-donor.html> [<https://perma.cc/MD5J-2PHP>].

babies would look more like their siblings.<sup>44</sup> These examples may be outliers. A couple cases don't and can't paint a full picture of what race means to different families. Yet Rich draws on no more cases to conclude "the key animating force" for using ART is the "quest for the perfect child"<sup>45</sup> and a special "preoccupation with white racial purity."<sup>46</sup> These preferences are neither pervasive among ART users nor unique to them.<sup>47</sup> To whatever extent people think about race when picking a donor, similar racial anxieties are likely to influence the decisions people make in choosing an adoptive child or romantic partner with whom to reproduce. Rich stops short of urging a ban on racial disclosure in the markets for sperm or eggs.<sup>48</sup> But she'd strictly police ART markets in this one context—her proposed measures range from racial disclaimers and import bans on those cells from mostly white countries like Denmark or the Czech Republic to more austere versions of the sin tax and ad limits I myself once proposed.<sup>49</sup>

My biggest problem with this critique is that Rich directs it solely at the context of assisted reproduction. This targeting has the effect of singling out sexual minorities and infertile people for beliefs and behaviors around race and parenting. Rich seems uninterested in regulating very similar understandings and actions by couples who adopt kids, for example, or who reproduce sexually based on the same racial norms she criticizes in ART.<sup>50</sup> Interracial dating and marriage is more common than it used to be, but still doesn't come anywhere close to what random sorting would predict.<sup>51</sup> In the romantic practices that lead to reproductive sex, the norm is pairing off by race: "like attracts

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44. See *White Woman Delivers 3 Black Children*, NEWSNER (May 17, 2017), <https://en.newsner.com/family/woman-delivers-3-dark-haired-children-the-truth-behind-them-moves-the-world-to-tears/> [<https://perma.cc/T7KT-YBVF>].

45. Rich, *supra* note 19, at 2437.

46. *Id.* at 2437, 2439. See also *id.* at 2430 ("*Cramblett v. Midwest Sperm Bank* and *Andrews v. Keltz* provide . . . a window into performance of the monoracial family . . . I closely read the complaints that were filed and looked for confirmation of the sentiments expressed in other places."); *Id.* at 2433–34 n.265 (declining to elaborate on other cases).

47. For connections to adoption, see, e.g., Jessica M. Hadley, *Transracial Adoptions in America: An Analysis of the Role of Racial Identity Among Black Adoptees and the Benefits of Reconceptualizing Success Within Adoptions*, 26 WM. & MARY J. RACE, GENDER & SOC. JUST. 689 (2020).

48. *Id.* at 2446–48.

49. See Fox, *Racial Classification*, *supra* note 26, at 1864–85.

50. Rich gives passing reference to racial preferences in practices such as adoption or dating. *Id.* at 2388–89, 2442.

51. See Raymond Fisman, Sheena S. Iyengar, Emir Kamenica, & Itamar Simonson, *Racial Preferences in Dating*, 75 REV. ECON. STUD. 117, 117 (2008).



like,” it goes, or “birds of a feather flock together.”<sup>52</sup> When people need help making babies, their reasons for picking a donor are less hidden, more out-in-the-open, and explicitly about reproduction. The whole point is to create a new person with genetic material from a chosen source. But Rich doesn’t distinguish donor catalogs from adoption directories or dating websites—along these lines or any other—to explain why she subjects assisted reproduction to stricter scrutiny.

Rich writes as if the individuals and couples who rely on ART want different things than people who have kids in other ways, or want the same things for different reasons. Yet she gives no reason to presume that people who use sperm or egg donors are not looking for the characteristic intimacy and family life that everyone else tends to seek out in sexual procreation and foster care.<sup>53</sup> As in these domains of family formation, ART is complicated and contested; its public meaning takes shape against the backdrop of evolving social conditions surrounding how (much) race matters and why. And when people choose a partner or donor on racial grounds, it can send all kinds of messages—that it’s better to have a child who shares your race, or regrettable for families to cross racial lines, or that it’s worth preserving some racialized community or pursuing the social privilege associated with having a child of one race, or avoiding the social tax associated with another.<sup>54</sup> This multiplicity of social meanings makes it strange for Rich to denounce in such categorical terms what she takes to be the “naturalized assumptions at the heart of the ART market.”<sup>55</sup>

Rich’s proposed regulations of ART markets would threaten reproductive equality in two ways. The first one is practical. It has to do with the greater costs and lesser access these restrictions would impose on people who need these tools to reproduce. As Martha Ertman argues, this market:

provide[s] unique opportunities for law and culture to recognize that people form families in different ways. If state or federal law, rather than the laws of supply and demand, determines who can have children using reproductive

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52. See Solangel Maldonado, *Romantic Discrimination and Children*, 92 CHI.-KENT L. REV. 105, 111–13 (2008); see also Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1318–22 (2009) (breaking down statistical nuances that including an apparent hierarchy of racial preferences even among those willing to date outside their race).

53. On the role of race in adoption, see R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 883 (1998); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1165 (1991).

54. See Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 2009 UTAH L. REV. 845, 852–56 (2009).

55. Rich, *supra* note 19, at 2383.

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technologies, then many single and gay people [who can afford them] will be excluded from this important life experience. . . . Gamete markets allow some minorities [who are] unlikely to obtain legal rights and protection through the legislative process . . . to skirt the majoritarian morality that would prevent them from forming families.<sup>56</sup>

Restrictions may be justified and necessary to ensure consent is informed (by keeping clinics from withholding risks, or making false promises) and protect vulnerable patients (by encouraging safe and reliable procedures)—indeed, I’ve advocated such reforms myself.<sup>57</sup> And I’d cheer on policies more inclusive of “minority gamete donors and minority ART consumers.”<sup>58</sup> But such measures should also acknowledge and account for the tradeoffs in reproductive access that Rich overlooks.<sup>59</sup> For example, the ban she’d impose on egg and sperm imports from European countries would reduce supply and increase costs, making it harder still for infertile or same-sex couples to get the help they need.<sup>60</sup> Even the sin taxes and ad limits that I myself proposed a decade ago risk promoting *racial* equality at the expense of *other* reproductive forms of equality. Making IVF, surrogacy, and donor services more expensive or less available can limit who gets to form families, and how.<sup>61</sup> It’s hard to predict exactly how much more difficult Rich’s proposed regulations would make it for people to pay for ART. But she is certainly right that “the price charged for ART services is [already] so high that poor couples, many of whom are minorities, simply cannot afford to use them.”<sup>62</sup> And it’s those very same individuals who would be further excluded by making these procedures costlier still.

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56. Martha M. Ertman, *The Upside of Baby Markets*, in MICHELE BRATCHER GOODWIN, *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 23, 23 (2010). For elaboration, see MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW CONTRACTS AND DEALS SHAPE ALL KINDS OF FAMILIES* xix-xx (2015).

57. See Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149 (2017); Fox, *Making Things Right*, *supra* note 40.

58. Rich, *supra* note 19, at 2449.

59. See *id.* at 2386, 2469.

60. See *id.* at 2449–51, 2452–56.

61. People who rely on these services and procedures to have kids might worry whether regulation could lead the U.S. down the path adopted by parts of the world that to this day forbid same-sex couples and single people from using ART. See *Surrogacy Bill 2010* (NSW.), pt 2 div 2 s 8 (Austl.); *Surrogacy Act 2008* (WA), pt 2 div 2 ss 8–9 (Austl.). The U.S. was an outlier in permitting same-sex couples to become parents before legalizing their unions, given that most other countries recognized same-sex relationships before same-sex parenting under the law. See, e.g., Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CAL. L. REV. (forthcoming 2021) (discussing state policies that require married couples to use the gametes of both partners for a surrogacy contract to be legal).

62. Rich, *supra* note 19, at 2401.

Beyond these more tangible restrictions on reproductive access, Rich's blinkered attention to race in assisted procreation risks expressive harms to people who need help to reproduce, as if their dreams for family life are less deserving, or somehow tainted by illegitimate racial views. To be clear, Rich doesn't come out and say she thinks sexual reproduction is superior to ART. Nor does she accuse single, LGBTQ, and infertile people of being more racist than others. But her critique of racial consciousness in ART markets and nowhere else paints their choices as revealing an obsession with race that's somehow distinct to families forged with help from donors or doctors. Rich might respond that race-matching tendencies are simply easier to identify in the splashy donor ads and catalogs that sperm banks and egg vendors broadcast. Or she might say that it's harder to address similar racial dynamics outside this particular domain—in the larger context of romance and reproduction—because that work of reforming the outsized or misplaced role of race in family formation more broadly would require more complex changes to our social order.

A coda to this piece tries to take on these bigger social questions about whether softening racial salience in family-making would be a step in the right direction—also *why*, and, if so, *how*.<sup>63</sup> My point for now is it's a mistake to try answering that question by reference to ART alone, as if the people who have kids *this* way think about race and act on it in distinctive and troubling ways relative to other means of child-rearing. Targeting racial salience in this one isolated context demeans individuals who find themselves in need of a donor, surrogate, or IVF to have a child. Their racialized preferences aren't unique; they reflect social norms that flourish in dating, adoption, sexual procreation, and family life writ large—ones that already privilege heterosexual over LGBTQ, coupled over single, fertile over infertile.<sup>64</sup> Rich misses how these norms that govern sex, intimacy, and procreation already tend to stigmatize those people, including the various members of racial and ethnic minorities among them.<sup>65</sup>

Compared with egg vendor registries, surrogacy agency lists, and embryo "adoption" ads, race is more visible in adoption registries and dating apps, yet Rich makes little mention of these.<sup>66</sup> She singles out

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63. See *infra* notes 79–87 and accompanying text.

64. See, e.g., Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 297–98 (2020).

65. See, e.g., Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 592 (1997).

66. See, e.g., Banks, *supra* note 53, at 886; Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787 (2008).

ART on the ground that “in sperm donor catalogs, there is no risk of rejection from the consumer’s chosen love object.”<sup>67</sup> I had tried to distinguish donor selection from dating websites somewhat differently:

Autonomy interests are implicated differently in assisted reproduction . . . than they are in sexual reproduction or romantic dating. The exchange of money for genetic material provides the means to produce a child—a profoundly intimate act to which the donor contributes one-half of the necessary raw materials. But the relationship between the people who directly engage in that procreative act is characterized less by intimacy than anonymity. What is present in the romantic matching context that is missing in the reproductive matching context is meaningful interface between the parties on either side of the exchange. Prospective parents and donors transact at arm’s length through a corporate broker who does not ordinarily permit either party even to learn the name of the other, let alone have interpersonal contact. The market in donor insemination mediates reproduction to eliminate the intimacy that both typifies the relationship between consensual procreative partners, and also grounds the associational autonomy interests at stake in the act of procreation. Dating website[s] deal in the union of people; sperm banks deal in the union of gametes.<sup>68</sup>

When you conceive a baby with someone you share a life with, you might not dissect the person’s specific traits for their reproductive appeal. Maybe you think, “we’d make good babies together.” Or perhaps you want a male partner who’s tall or sporty, *both* because that stature and athleticism are traits you find attractive in a mate *and* because you’d like to see these things in your children. But for a lot of people who reproduce the old-fashioned way, all those more particular, potentially hereditary likes and dislikes are just wrapped up in your love for the person—in the chemistry and dynamic the two of you share. It may not even occur to you that there are discrete qualities you’d want to see in the child you might have together, or reasons you can give for having picked that person.

But choosing someone to have a baby with takes on a very different feel when you’re handed hundreds of anonymous profiles chock full of personal traits. How could that exhaustive inventory of details not give the illusion of greater influence than you really have over what your future kid will be like? My point was that racial descriptors operate to make race a more noticeable basis for selection in this setting than others. But perhaps this overstates the difference. Courtney

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67. Rich, *supra* note 19, at 2442. Dating websites structured by race or ethnicity have come under recent scrutiny. See Hugo Greenhalgh, *LGBT+ Dating Apps Ditch Ethnicity Filters to Fight Racism Amid U.S. Protests*, REUTERS (June 2, 2020), <https://www.reuters.com/article/us-lgbt-tech-racism-trfn/lgbt-dating-apps-ditch-ethnicity-filters-to-fight-racism-amid-u-s-protests-idUSKBN23A06D> [<https://perma.cc/645G-XC6E>].

68. See Fox, *Racial Classification*, *supra* note 26, at 1882–83.

Cahill points out that sexual and alternative forms of reproduction are alike in the ways that they can express and embody the intimate forms of familiarity and deliberation.<sup>69</sup> Prospective parents are looking for pretty much the same things whether they reproduce the old-fashioned way, or with help from third parties or medical technology. Cahill's critique applies with even greater force against Rich's singular focus on ART at the exclusion of other ways of making a family:

If a straight woman in America wants to choose a husband based on his race, height, or intelligence, she can. It's called dating. . . . But if my future wife and I use the same criteria to select a white sperm donor so my baby resembles me . . . it's called eugenics. [D]esign is a feature of all reproduction, yet one that commentators critical of designer reproduction selectively associate with the non-sexual reproductive process.<sup>70</sup>

The vagaries of falling in love—and its accompanying threat of rejection—sort of presumes an offline model of dating, where people meet and fall for people who defy their own sense of what they want. These dynamics operate differently when it comes to romantic matching that starts online with dating platforms that prompt users to declare their racial preferences. Research suggests that online daters aren't especially open to potential partners who don't have their preferred racial characteristics. Even dating websites without ethnicity filters are driven by photo swipes that make it easy to screen prospective partners based on perceived race.<sup>71</sup> The point is that ART is being singled out for scrutiny that other ways of making families aren't subjected to. Which is not to say these contexts are the same. When you date someone, you meet the person, spend time together. So you can ask anything you want and observe how that person responds or behaves before making any big life decisions that might ultimately lead to having a child—unless, that is, the pool you date from starts with a drop-down filter or photo-based swipe according to race.<sup>72</sup>

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69. See Courtney Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 670, 657–58 (2016).

70. Courtney Cahill, *After Sex*, 97 NEB. L. REV. 1, 50 (2018) (quotation marks and citations omitted).

71. See Gerald Mendelsohn, Lindsay Shaw Taylor, Andrew T. Fiore, & Coye Chesire, *Black/White Online Dating: Interracial Courtship in the 21st Century*, 3 PSYCHOL. POPULAR MEDIA CULTURE 2, 5 (2014); Belinda Robnett & Cynthia Feliciano, *Patterns of Racial-Ethnic Exclusion by Internet Daters*, 89 SOC. FORCES 807, 810–11 (2011); Günter J. Hitsch, Ali Hortaçsu, & Dan Ariely, *What Makes You Click—Mate Preferences in Online Dating*, 8 QUANT. MARKETING & ECON. 393, 397 (2010).

72. See, e.g., RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 385 (2003); ALEX LUBIN, *ROMANCE AND RIGHTS: THE POLITICS OF INTERRACIAL INTIMACY, 1945-1954*, 154 (2005); RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 126 (2001). See also SOLANGEL MALDONADO, *RACIAL HIERARCHY AND DESIRE: INTERRACIAL INTIMACIES AND INEQUALITY* 19–20 (forthcoming).

A choice architecture designed to filter the slate of individuals according to some socially salient status encourages choosers to skip over a whole category of people. It prompts them not to consider those people in the first place when and because they belong to unpopular racial groups. That's how the Supreme Court explained the constitutional defect in a 1960 law that required each candidate's race be printed next to his name on the ballot.<sup>73</sup> By inviting citizens to vote their race-based preferences, the labels "furnishe[d] a vehicle by which racial prejudice may be so aroused."<sup>74</sup> The racial differentiation that highlighted the "single consideration of race . . . at the most crucial stage in the electoral process—the instant before the vote is cast" threatened to ratify or reconstitute how it is that people understand themselves and their relation to others in racially defined ways.<sup>75</sup> Making race stand out like this on the ballot without good reason for doing so reifies the disquieting assumption that race should determine how citizens vote or what representatives stand for. Here's how I had reasoned about the connection to assisted reproduction:

Practices that ratchet up racial salience in the donor selection process confer implied authority upon the notion that what it means to be a parent who belongs to a particular race is to have children who belong to that same race. When race is a prominent feature in donor selection, it imparts a tacit judgment that those who turn to artificial insemination should understand their parental role in racial terms and that they should distinguish among donors on the basis of race. Partitioning sperm catalogs according to the "single consideration of race" credentializes the assumption that parents-to-be are supposed to act in racially defined ways. To accentuate race above all other donor considerations is to send an implicit message that monoracial families are preferable to multiracial ones.<sup>76</sup>

This is how it works with most sperm banks and egg vendors—race occupies a prized place in their catalogs and websites. Since donor identities aren't disclosed, there's no way to meet a candidate before you settle on one or another to provide half the DNA for your future child. Whatever information a company gives you to go on is all you get. And when race appears at the top of the list, that feature is sure to get lots of attention before people decide whether to

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manuscript 2020) (concluding that "the law should stop short of encouraging interracial intimacies" on the ground that, among others, "any efforts by the state to encourage interracial intimacy would poison relationships.").

73. See *Anderson v. Martin*, 375 U.S. 399, 401–03 (1964).

74. *Id.* at 402.

75. *Id.* For extended discussion applying the logic of this case to the context of racial classification in assisted reproduction, see Fox, *Racial Classification*, *supra* note 26, at 1865–75.

76. Fox, *Racial Classification*, *supra* note 26, at 1876 (citations omitted).

reproduce.<sup>77</sup> Racial labeling flattens the more vivid and particular complexities you might perceive in an individual you would get to know on a more personal level as a potential romantic partner or adoptive child. But if that flattening of the person, with its attendant focus on race, is troubling when it happens at fertility clinics and sperm banks, it's troubling in similar contexts too.<sup>78</sup> There's a certain appeal in trying to banish considerations of race from the domain of family that tends to reproduce racial identities. I'll say a few words below about why I don't believe the state should aspire to colorblindness in family formation, at least not in any serious way. To whatever extent you disagree and think that ideal is worth promoting in the context of family-making, it shouldn't be imposed only on the single parents, same-sex couples, and others who need assistance in order to have a child.

#### CODA

I've argued that race-conscious practices in assisted reproduction shouldn't be singled out for special condemnation, at least not on the grounds that people who use IVF or donor services think and act about racial considerations in a meaningfully different way than others who bring children into their lives without assistance from medical intervention or third parties. But a larger question looms over the broader role of race in family formation across the board. Should we as a society try to reach a point where same-race families are less the norm, however we form them? I think the good of racial integration in the family unit depends on its reasons and context. Race matching can overlook bad side effects in the name of sparing kids confused racial identity or cultural deficits.<sup>79</sup> But it hardly seems wrong for members

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77. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 186–87 (1991); Selina Szakupinski Quiroga, *Blood Is Thicker than Water: Policing Donor Insemination and the Reproduction of Whiteness*, 22 *HYPATIA* 143, 151 (2007).

78. See Courtney Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 *ARIZ. L. REV.* 43 (2012).

79. See Rich, *supra* note 19, at 2441–44. I have made these very arguments myself. See Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection*, 104 *CORNELL L. REV. ONLINE*, 114, 127–36 (2019). I've seen no good "evidence to substantiate something like the 'survival skills' concern frequently cited as justification for race-matching, namely, that a child's interests in navigating a race-conscious society are better served by being raised in a same-race household than by parents of different races. Methodological complexities make it difficult to compare stability and attachment in black children adopted by white versus black parents, but the best available 'studies overwhelmingly show that children do very well raised in multiracial families,' not measurably worse on measures of psychological and social adjustment than same-race adoptees, and certainly better than children forced to remain in

of marginalized groups to pair among themselves to withstand assimilation or form closer-knit communities.<sup>80</sup> I wouldn't rebuke people for trying to reproduce their indigenous heritage against a backdrop of genocide. Nor am I troubled by Native Americans or Holocaust survivors choosing a partner who shares their background based on the idea that "DNA binds a person's past and future" or acts as a "repository of memor[ies] . . . otherwise forgotten."<sup>81</sup> And I don't see anything wrong with selecting against your own African or Eastern European ancestry as a way to avoid the heightened risks of passing along sickle cell anemia or Tay-Sachs disease.<sup>82</sup> These are among the reasons I find any full-throated or across-the-board censure of family-making decisions with an eye to race at once incomplete and unpersuasive.

Reasonable people can disagree about whether American society should adopt measures to encourage interracial families, for example, through public art or education that urges individuals to pursue partners of a different racial or ethnic background than their own.<sup>83</sup> Romantic and other preferences may operate in a way that tends to reinforce racial forms of structural inequality. But a person has to make certain choices about who to associate with for herself to fully realize the value those decisions have *for her*. These autonomy interests are especially weighty in the context of personal and far-reaching decisions about who to build a life, reproduce, or raise a child with.<sup>84</sup> People may seek to recreate an indigenous heritage or identity-based forms of intimate family life.

There are also practical limits on how people can be coaxed into forming interracial families:

Depriving parents of knowledge about donor race would not stop them from caring about race. Nor, perhaps, would [it] efface the actual influence of race in choosing a donor. Parents might still try to speculate about a donor's race by reference to donor characteristics such as hair texture, audiotapes, baby photos, or skin tone. . . . Perceived measures to conceal racial information

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temporary foster or institutional care. We might expect similar developmental comparisons, though no data exists, for transracial assisted reproduction. It is, moreover, hard to see how a child created from a black donor and raised by white parents can be 'harmed' insofar as the alternative for *that* child, as the genetic product of a unique combination of egg and sperm, was never to have existed at all." Fox, *Race Sorting*, *supra* note 6, at 65-66.

80. See Emens, *supra* note 52, 1397-98 (citations omitted).

81. KAJA FINKLER, EXPERIENCING THE NEW GENETICS: FAMILY AND KINSHIP ON THE MEDICAL FRONTIER 10 (2000).

82. Compare Elliot & Endt, *supra* note 8, with Simons, *supra* note 8.

83. See Emens, *supra* note 52, at 1398.

84. See Fox, *Racial Classification*, *supra* note 26, at 1881-82.



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might even have the paradoxical effect of making race more conspicuous in the minds of parents.<sup>85</sup>

I'd let sperm banks and egg vendors disclose donor race—same as dating websites and adoption agency catalogs—even though it lets white parents browse through candidates (albeit one-by-one) and, if so inclined, eliminate those of a particular race. But just because I'd preserve this space for the parental expression of racial identity in donor selection doesn't mean I think sperm banks or egg vendors should facilitate race-based choices that range from silly to sinister. To the contrary, I've proposed a spectrum of salience-varying approaches to manage information about donor race, favoring those that make racial information less conspicuous in the configuration of features about partners, donors, or adoptive children, absent remedial or other justifications to risk sending the problematic message that same-race families should be preferred to mixed-race ones. What I've termed a "race-sensitive" strategy would keep the prominence of race in check.

[R]educing racial salience in this way can be expected to channel parental choice by enhancing both the transaction costs required to exercise racial preferences and relative indifference with respect to donor race. A donor infrastructure that presses parents to review the profiles of individuals who do not match their preexisting racial preferences may encourage some parents to relax racial specifications and to give consideration to donors they may otherwise have filtered out and set aside on racial grounds. The purpose of tempering racial salience is less to secure holistic deliberation among individual sperm donors, however, than it is to mitigate expression of the divisive social meaning that racial identity ought to be the overriding consideration in reproductive decisionmaking.<sup>86</sup>

Again, I'd apply these modest corrective measures in other spheres of family formation as well. The vice of racial salience isn't so great that it warrants policies to suppress the disclosure of donor race. Some types of discrimination *are* so bad that not even private actors should engage in them. That's why racial discrimination in most private housing or employment, while permitted by the Constitution, is statutorily prohibited. But in most spheres of life, no law or policy limits the extent to which private citizens can choose the people with whom they trade, befriend, or live. The race-conscious design of donor catalogs and vendor marketing invites us to rethink the social meaning and practical impact of racial preferences in family formation more broadly; whether the state has a responsibility to remedy any

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85. *Id.* at 1888–89 (citations omitted). Liz Emens puts a similar point this way: “[P]olicies to encourage interracial relationships are likely to rankle, rather than persuade, as they sound like social engineering, possibly against individual or community wishes, in a highly personal realm.” Emens, *supra* note 52, at 1398 (citations omitted).

86. Fox, *Racial Classification*, *supra* note 26, at 1890 (citations omitted).

attending harms; and whether it can do so without unduly damaging the values of autonomy, pluralism, and intimacy that flourish in cherished relationships between parents and children. That race tends to reproduce itself within the family structure makes this a critical domain of life from which to ask what sort of racial self-understandings our multiracial democracy should seek to embody. This interrogation is a hard one whose contours can and should evolve in light of new circumstances and social mores about race, reproduction, and family life in the United States. This larger inquiry is enduring and complicated. But it goes awry when it singles out certain individuals and couples—those who need extra help in having a kid—for wanting the same kinds of special relationships as everyone else.<sup>87</sup>

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87. *See id.* at 1898.