



Third-party reproductive practices: legislative inertia and the need for nuanced empirical data

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INTRODUCTION

In their article, ‘Gamete donor anonymity and limits on numbers of offspring: the views of three stakeholders’, Margaret K. Nelson, Rosanna Hertz and Wendy Kramer draw on survey data from gamete donors, parents who used gametes to conceive, and donor-conceived offspring in order to understand the position that various stakeholders are likely to hold regarding the regulation of two issues pertaining to gamete donation: anonymity and limits on numbers of offspring.¹ This commentary elaborates on the politics underlying conflicts and agreements among various stakeholders involved with third-party reproduction and details the need for data to better inform legislation regarding assisted reproductive medicine. In so doing, I draw from social science research on third-party reproductive practices as well as from my own research on surrogacy, an area of third-party reproductive practice that shares many of the particular issues involved with gamete donation. First, I discuss the dearth of laws that regulate the reproductive industry in the United States and the contradictions and tensions that contribute to legislative inertia regarding reproductive medicine. Next, I survey the lack of data on ethical and legal issues that arise from assisted third-party reproductive

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¹ Margaret K. Nelson, Rosanna Hertz, & Wendy Kramer, *Gamete Donor Anonymity and Limits on Numbers of Offspring: the Views of Three Stakeholders*, 3 J. L. & BIOSCI. 39 (2016).

arrangements, and I show how social science research on these issues can challenge common assumptions about the practice. At the same time, I examine the difficulty in collecting good representative data in this realm. Finally, I discuss the complexities of translating the nuances of social science research into workable legislation.

THE WILD WEST OF THE REPRODUCTIVE INDUSTRY

The USA has often been characterized as the ‘wild west’ of the reproductive industry given its relatively lax and sparse regulation of third-party and assisted-conception transactions. Unlike other nations which ban or strictly control practices such as surrogacy or gamete donation, the USA has no such federal legislation that regulates the rights and responsibilities of various players—from physicians and clinics to intended parents, donors and surrogates, and donor-conceived children—involved in third-party assisted reproduction in the USA.²

Given the absence of federal oversight in the USA, any regulatory statutes regarding third-party assisted reproduction fall to each state to decide. This has resulted in both a lack of legislation dealing with these types of reproductive arrangements and inconsistencies between states when laws have been enacted. In my earlier research on political debates about surrogate parenting in the USA, for instance, I found that between 1987 and 1992 (the five years after the infamous Baby M case³) over 200 different bills on surrogacy were introduced in state legislatures. Yet, by 1992, only 15 states had enacted legislation, and, of those, some permitted while others banned the enforcement of surrogacy contracts.⁴ Furthermore, most of the laws enacted during this heightened period of legislative attention only pertained to traditional surrogacy arrangements; by the 1990s, gestational surrogacy emerged as the preferred form for such third-party reproductive arrangements.⁵ In the over two decades since, nine more states have enacted legislation allowing for gestational surrogacy contracts,⁶ although several of these either codified standing case law from their respective state’s Supreme Court or expanded laws previously enacted by the state. As a result, most states still do not have specific statutes passed by their legislatures that stipulate the legal rights of those involved in surrogacy transactions, and the USA remains more hospitable to surrogacy than most other countries.⁷

This legislative landscape similarly characterizes the market for donor gametes. As Nelson et al. discuss in their essay, other countries have established various legislative restrictions and regulations on donor gamete conceived offspring—from banning or

² The FDA and CDC specify use of specimens, but only require record keeping regarding success rates with IVF, not donor insemination or surrogate births, and don’t provide any regulations regarding the rights and responsibilities of the parties who make use of these technologies. The Association of Reproductive Medicine provides some guidelines, for instance suggesting limits to sperm donors, but these are not legal mandates.

³ In the Baby M case, the surrogate mother, Mary Beth Whitehead, changed her mind and fought for custody of the child. The lower court upheld the surrogacy contract and severed her parental rights, but the New Jersey Supreme Court ruled that surrogacy contract was unenforceable, restored Whitehead’s parental rights, yet gave primary custody to the Sterns, the couple who had hired Whitehead. The custody case received a lot of attention in the late 1980s and is attributed to bringing public attention to the practice.

⁴ SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* (2007).

⁵ The term traditional surrogacy refers to when the surrogate is also the genetic mother. Gestational surrogacy is when the surrogate does not contribute the egg to the pregnancy.

⁶ Washington D.C. also passed legislation in 1993 declaring surrogacy contracts unenforceable.

⁷ See <http://www.creativefamilyconnections.com/us-surrogacy-law-map> (accessed on May 24, 2016).

limiting the practice altogether to rules about donor anonymity. In the USA, as with surrogacy regulation, states vary as to what, if any, statutes exist regarding donor gametes, and the focus of laws that do exist is on defining legal parenthood. None address issues of donor anonymity or numerical limitations on offspring conceived per donor.

Due to the lack of regulatory oversight of the reproductive industry, there have been many calls for legislation. Before crafting any such legislation, we should first answer the question of why the USA has so few laws specifically dealing with these issues.

CONTRADICTIONS, TENSIONS, AND LEGISLATIVE INERTIA

As I argued in my earlier research, the permissive approach to assisted reproductive practices found in the USA fits within the dominant American cultural ideology of wariness about government interference in the ‘private’ sphere of the family. Nelson et al. find, too, that limits on donor choice may be met ‘with great suspicion’ in a country where citizens are loath for the government to regulate the family.⁸ Yet, in my examination of actors on different sides of the surrogacy debate, I found that both supporters and detractors of the practice drew on the ideology of the private sphere as separate from the public sphere of politics and the marketplace.⁹ Such cultural consensus about families therefore does not predict what, if any, legislative approach is taken regarding third-party reproductive practices. In fact, assumptions about the sacrosanct nature of the family may contribute to the legislative stalemate and inertia surrounding such reproductive practices in the USA.

Moreover, it is a common assumption that the lenient approach in the USA to assisted reproductive practices is attributable to the *laissez-faire* approach to the marketplace in the USA more generally. However, just as there is a strong cultural distaste for government interference in kinship relations, I as well as other researchers have found that there is also profound caution surrounding commercial transactions and commodified relations pertaining to third-party reproduction.¹⁰ For instance, social scientists studying those involved in such practices in the USA find that individuals distance themselves from pecuniary aspects of such transactions.¹¹ Meanwhile, there is more societal acceptance and more successful supportive regulation when the non-commercial, or ‘altruistic’, aspects of the practices are emphasized.¹²

Additionally, in my study of surrogacy I identified a tension between those who see it as typifying the commodification of reproduction and those who see it as epitomizing reproductive freedom.¹³ Indeed, it is this tension among competing ideologies and values that I suggest contribute to the legislative inertia in the USA surrounding surrogacy. Sociologist Heather Jacobson, in her recent ethnographic study of the surrogacy industry in the USA, finds a similar conflict: ‘There is demand and support for surrogacy, yet it remains controversial, arousing deep-seated anxieties about the intersection of the

⁸ Nelson et al., *supra* note 1, at 29.

⁹ Markens, *supra* note 4.

¹⁰ *Id.*; RENE ALMELING, *SEX CELLS* (2011); HEATHER JACOBSON, *LABOR OF LOVE* (2016); DEBRA SPAR, *THE BABY BUSINESS* (2006). This distancing of the commodified aspects is an American phenomenon and is not found as strongly with Israeli and Indian surrogates. See ELLY TEMAN, *BIRTHING A MOTHER* (2010) and SHARMILA RUDRAPPA, *DISCOUNTED LIFE* (2015).

¹¹ *Id.*

¹² Markens, *supra* note 4; see also Spar, *supra* note 10.

¹³ *Id.*

market and reproduction, women and work, and the commodification of humans and their biological products'.¹⁴ These complexities and contradictions may be contributing to the legislative lacuna around gamete donation in the USA as well.

In fact, there are additional contradictions and conflicts that shape the lack of statutory oversight of third-party reproductive transactions in the USA. For instance, there are competing interests and opposing concerns that pit reproductive justice advocates against queer families¹⁵ or consumers against clinics and agencies that shape debates over these practices.¹⁶ At the same time, third-party reproductive practices may also often generate agreements such as circumspection about state involvement in family relations, as well as shared concerns about broad principles of 'women's rights' and 'children's rights'. Disagreements, however, often emerge about what policy position best upholds such rights.¹⁷

In the end, the US policy landscape surrounding third-party reproduction seems stalled at least partially because of the contradictions and tensions emanating from both ideological agreements and disagreements. Intersecting with this reality is a dearth of empirical evidence concerning what legislation, if any, is desired by various stakeholders.

SHOW ME THE DATA: INCORRECT ASSUMPTIONS, METHODOLOGICAL SHORTCOMINGS, AND THE PROBLEMS OF TRANSLATION

As mentioned earlier, the most legislative attention to surrogacy in the USA occurred in the five years after the Baby M case. I have argued that such dramatic events can greatly shape the public and political reaction to an emerging social issue.¹⁸ For instance, prominent news stories of sperm donors having sired dozens of offspring, including a widely discussed *New York Times* story in 2011 that highlighted a donor with 150 donor children,¹⁹ have brought public attention to the lack of regulatory oversight to the gamete industry in the USA and, in turn, have prompted calls to limit the number of offspring produced by a single gamete donor. Despite the dramatic nature of such cases and the lack of regulatory oversight they bring to light, the legislative proposals they have prompted are, for the most part, based on assumptions about the practices and are not informed by data—either because empirical studies often challenge the assumptions based on these dramatic events or there are very little data on which to draw conclusions.

¹⁴ Jacobson, *supra* note 10, at 177.

¹⁵ Nancy Naples, presentation at Reproductive Technologies: Research, Policy, and Ethics in Building LGBTQ Families Conference (2015).

¹⁶ Almeling, *supra* note 10; Katherine M. Johnson, *Fertility Clinic, Egg Donation Agencies, and Sperm Bank Policies*, 96 FERTIL. & STERIL. 877 (2011); LAURA MAMO, *QUEERING REPRODUCTION* (2007).

¹⁷ Marks, *supra* note 4.

¹⁸ *Id.*

¹⁹ See <http://www.nytimes.com/2011/09/06/health/06donor.html> (accessed May 24, 2016). In response to concerns about the number of offspring sired per gamete donor, several commentators have noted that statistically it would be highly improbable that one sperm donor could produce the hundreds of children depicted in feature films such as 2013's *Delivery Man* that have stoked concerns about the current lack of oversight. See eg Eliana Dockterman, 'Delivery Man': 9 Sperm-Donation Questions You're Too Embarrassed to Ask, *TIME*, Nov. 22, 2013.

For instance, as Nelson et al. find in their study, the most common response to donor anonymity was neutrality across all three stakeholders they surveyed, and donor-conceived offspring provided the most varied responses regarding support for banning anonymity. These important findings raise questions about current pushes to prohibit anonymity in gamete donation in the name of stakeholders. Meanwhile, Almeling's ethnographic study of gamete donors upends gendered assumptions within gamete-donor experiences. In contrast to expectations, her research shows that it is men, not women, who are both burdened more by the donation process and more likely to consider resulting offspring their children.²⁰ These findings raise questions about regulatory efforts that tend to focus more on protecting egg than sperm donors.

Research has also challenged assumptions about other third-party reproductive practices. For instance, one concern from critics of surrogacy stems from the assumption about surrogates' bonding with the baby, and the resulting difficulty and sense of loss surrogates may experience giving up the children they bear for others. However, the vast majority of social science and psychological research has found that surrogates' most potent bonds are often with the intended parents, and thus any loss felt after a surrogate birth involves the loss of the relationship with the couple (and in particular the intended mother), not the baby.²¹ Specifically, these research findings call into question the utility of policy proposals that focus on surrogates' legal rights to the children they bear; more generally, they highlight the complexities in formulating protective regulations for those who participate in third-party reproductive practices.

An examination of existing research also reveals the need for more robust data on assisted reproductive practices. As Nelson et al. note regarding gamete donation in particular, since clinics are not required by law to keep data, and practice standards vary by clinics in this regard, the number of offspring that are conceived by a single donor is unknown. Without statistics or record keeping, it is unclear which problems, if any, need to be addressed with legislation. Furthermore, with the exception of the work conducted by Nelson et al.,²² there is very little research that examines the views and experiences of donor-conceived offspring. Indeed, most social science research about families created via third-party reproduction has focused on the meanings given to the practices by the various adult players involved, with little to no attention to the perspectives of the children conceived.²³

Additionally, a discussion is imperative regarding the problems with the data that do exist. While providing important and useful information that can inform conversations about best regulatory responses, studies such as that by Nelson et al. often come with limitations. First, empirical work in this arena is often cross-sectional, a snapshot in time. Given the ever-shifting landscape of third-party reproduction—from changing laws and cultural norms to the rise of websites such as the Donor Sibling Registry (DSR)—it is hard to determine whether various stakeholders' attitudes are stable. There is the issue of whether views change over one's lifecycle, something Nelson

²⁰ Almeling, *supra* note 10.

²¹ Jacobson, *supra* note 10; Elly Teman, *The Social Construction of Surrogacy Research*, 67 *SOC. SCI. MED.* 1104 (2008); ZsuZsa Berend, *The Romance of Surrogacy*, 27 *SOC. FOR.* 913 (2012).

²² See eg Rosanna Hertz, Margaret K. Nelson & Wendy Kramer, *Donor Conceived Offspring Conceive of the Donor*, 86 *SOC. SCI. MED.* 52 (2013).

²³ Almeling, *supra* note 10; Berend, *supra* note 21; Jacobson, *supra* note 10; Mamo, *supra* note 16; Teman, *supra* note 10.

et al. find in their study with regard to offspring's views on anonymity. Perhaps more importantly, donor-conceived offspring born in recent years may grow up with different experiences and attitudes than those who were born in decades past, especially given the trend toward openness and earlier ages of donor-conceived awareness, the growth in non-traditional families that make use of third-party reproduction, and the advent of online communities for donor-conceived offspring such as the DSR. That is to say, today's representation of a certain stakeholder's interests and views may not represent what future generations will feel are in their best interests and rights.

Furthermore, and crucially, there is the problem of sample bias. Nelson et al. confront and acknowledge this methodological limitation in their study as the vast majority of their informants come from an online community of people already interested in forming ties with genetic relatives (siblings, as well as bio-parents and children). As a result, selection bias may be present in terms of attitudes toward kinship that may in turn shape respondents' attitudes about issues such as donor anonymity.²⁴ Internet-based studies of organizations involved in the gamete industry, meanwhile, can only assess how different organizations present themselves publicly and not how practices are actually enacted on the ground.²⁵

Finally, there is the difficulty of translating the nuances of social science findings to concrete legislative proposals. That is, even when there are 'good' data, how these data get taken up in the political arena can be variable and problematic. For one, social science research often focuses on contradictions and nuances. Ethnographic studies of third-party reproduction often point out gamete donors' and surrogates' agency while also acknowledging structural inequalities that shape these transactions.²⁶ My own research over legislative battles reveals how competing policy approaches can, at the same time, similarly reinforce traditional notions of family; this poses dilemmas to scholars and activists who seek to advocate for regulations that expand notions of kinship.²⁷ How might these kinds of nuances get translated into specific policy proposals? And how do we make sure that social science findings do not get misused? As recent battles over gay marriage and non-normative families reveal, social science findings can be manipulated to bolster positions that the data and authors do not support.²⁸ This reality is recognized by Nelson et al. when they write, 'evidence derived from empirical research is often cherry picked by policy makers'.²⁹

CONCLUSION

Despite the issues raised in this commentary, when it comes to data about third-party reproduction, we should not throw the baby out with the bathwater, to use an apt metaphor. I thus agree with Nelson et al. when they write that 'empirical research ... can capture the conflicted and contested views of various stakeholders... To say as much

²⁴ Similar limitations regarding selection issues exist in recent studies of surrogacy, where online forums make up the study site (see Berend, *supra* note 21). At the same time, given this bias, Nelson et al.'s finding that the dominant response from their informants is neutrality seems particularly noteworthy.

²⁵ Johnson, *supra* note 16.

²⁶ Rudrappa, *supra* note 10; Mamo, *supra* note 16; Teman, *supra* note 10.

²⁷ Markens, *supra* note 4.

²⁸ Judith Stacey, *Marital Suitors Court Social Science Spin-sters*, 51 SOC. PROB. 131 (2004).

²⁹ Nelson et al., *supra* note 1, at 26.

is not to imply that social science research has no place in policy'.³⁰ For it is preferable that empirical data rather than dramatic events and assumptions shape regulatory statutes. In the end, Nelson et al.'s research points us in the right direction of obtaining additional, improved, and nuanced empirical data to inform and encourage appropriate regulatory legislation in the USA for third-party reproductive practices.

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³⁰ *Id.*