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Authentic Reproductive Regulation

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Response

Authentic Reproductive Regulation

Bridget J. Crawford[†]

INTRODUCTION

Glenn Cohen has thrown down an intellectual gauntlet in *Regulating Reproduction*.¹ This masterful article challenges scholars, judges and policy-makers to abandon the familiar “best interests of the child” argument typically made in favor of state interventions in reproductive decision-making in the form of laws prohibiting anonymous sperm donation, criminalizing certain adult incest, limiting access to reproductive technology, and funding abstinence education. In Cohen’s analysis, “best interests” is an uneasy import from family law where the best interests of an *existing* child guide decisions about custody, adoption and the like. But when transposed to laws concerning human reproductive practices, a best interests of the *resulting* child (BIRC) analysis provides flimsy support for state intervention, in Cohen’s view. Cohen’s position, simply stated, is that one cannot justify restrictions on reproductive practices by reference to the best interests of a child who would not exist but for that reproductive practice. In other words, one cannot logically “pre-argue” that any child born of certain reproductive decision (about whether, when and with whom to reproduce, for example²) would be better off had she or he not been born. Using concepts and vocabulary from the discipline of philosophy, Cohen reveals deep flaws in the BIRC analysis. He considers seriously three variations on the BIRC argument, but demonstrates persuasively that each is incomplete, problematic, or both. Glenn Cohen urges lawmakers, courts, doctors and legal

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1. I. Glenn Cohen, *Regulating Reproduction: The Problem of Best Interests*, 96 MINN. L. REV. 423 (2011).

2. *Id.* at 429.

commentators to “get real” (my phrase) about the reasons behind reproductive interventions.

As a legal scholar with strong interests in bioethics, health law and reproductive technology, Professor Cohen has a broad view and an authoritative voice. *Regulating Reproduction* will interest legal and other scholars who work in reproductive rights, constitutional law, philosophy, feminist theory, health law, and the adjudicatory process. This article, together with its companion, *Beyond Best Interests* (forthcoming in a future issue of the Minnesota Law Review)³, could change significantly the content and tone of conversations about reproductive law and medicine.

Professor Cohen approaches his subject with what he calls “a modestly libertarian view.”⁴ That is, he is willing to accept the state’s intervention in reproductive decision-making, as long as the state can justify doing so.⁵ He believes “that the state has to offer some justification for limiting individuals’ reproductive choices, although [he is] open to such justifications taking many different forms.”⁶ Cohen seeks to lay bare the “more controversial (illiberal, eugenic, etc.) ideas”⁷ behind regulation of reproduction. His is an “unmasking” project that aims to “reveal the real arguments that must stand behind these policies if they are to be justified.”⁸ Cohen proceeds to expose the BIRC argument as self-contradictory, however pervasive; he seeks to achieve an authentic understanding of the policies and normative judgments underlying reproductive interventions by the state.

I. THE WORK OF REPRODUCTION

A. DESCRIPTIVE CLAIMS

In a descriptive sense, Professor Cohen’s article makes two notable contributions to scholarship about reproductive regulation. First, Cohen develops a comprehensive but elegantly brief taxonomy for reproductive laws and policies—what he calls

3. I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. (forthcoming 2012).

4. Cohen, *supra* note 1, at 429.

5. *Id.*

6. *Id.*

7. *Id.* at 427.

8. *Id.*

“State attempts to influence reproduction.”⁹ He classifies them along three broad “dimensions”: target, means, and justification.¹⁰ “Target” interventions are those aimed at influencing “whether, when, and with whom individuals reproduce.”¹¹ The “means” of interventions range from the extreme—i.e., physical alteration in the form of sterilization—to the benign—i.e., information provision.¹² Justifications for interventions may rely on theories of harm, paternalism, “wronging without harming,” or “moralism and virtue.”¹³ The labels Cohen uses for his classifications—“target,” “means” and “justification”—are perhaps not as intuitive as they might be. The labels of “what,” “how,” and “why” have more a common sense appeal, but then again, they do not sound as refined. Professor Cohen properly locates BIRC in the third “dimension”; it is a “justification” (or “why” explanation) for state intervention in reproductive decision-making.¹⁴

Before laying bare the utter weakness of BIRC reasoning, Professor Cohen makes his second major descriptive contribution. He organizes BIRC-based legislation, court decisions, and legal scholarship according to the type of philosophical problem they raise. Interventions (and their proponents) may create “perfect Non-Identity Problems” or “imperfect Non-Identity Problems.”¹⁵ Again, Cohen’s terms are not intuitive; they have origins in philosophical works. Nevertheless, Cohen explains them well and in a way that maintains the elevated tone of the piece.

Perfect Non-Identity Problems arise, Professor Cohen elaborates, if a particular intervention “can never be justified by recourse to BIRC-reasoning because doing so is self-contradictory: the policy, if effective, will *necessarily* alter when, whether, and with whom one reproduces.”¹⁶ In other words, if a policy restricts all persons from making a particular reproductive choice, then one cannot properly claim that the restriction is in the “best interests” of a child that is *not conceived* as a result of

9. *Id.* at 430.

10. *Id.* at 430–31.

11. *Id.* at 430.

12. *Id.* at 430–31.

13. *Id.* at 431.

14. *Id.* at 429.

15. *Id.* at 446.

16. *Id.*

such intervention.¹⁷ Thus, one cannot justify a particular restriction on, say, rules against brother-sister incest by reference to the resulting child *X*'s best interests.¹⁸ *X* only has interests to the extent that *X* is conceived, if not born, and therefore *X*'s interests are an unstable reason to refrain from conceiving *X*.¹⁹ As Professor Cohen explains, the BIRC analysis therefore must be revealed as an unarticulated public-interest justification if it is to do any real work.²⁰ Otherwise, on its face, the BIRC justification is “nonsensical.”²¹

In contrast to *perfect* Non-Identity Problems, an *imperfect* Non-Identity Problem arises “where state action will not necessarily alter when, whether, and with whom the *whole* population affected by the intervention reproduces.”²² Rather, notwithstanding the intervention, it is possible that at least one person might choose to reproduce at the same time with the same partner in the same way that he or she would have reproduced absent intervention.²³ Thus, these interventions permit the state to drastically limit—perhaps to a set of one—the number of children likely to be “harmed” by non-intervention.²⁴ Any particular intervention justification becomes more and more “imperfect” with the increase in the number of children who arguably may be “harmed” by non-intervention.²⁵ With these taxonomies at hand, the reader is poised to understand BIRC as a smokescreen of a justification for state interventions into reproductive decision-making.

B. WHAT'S SO BAD ABOUT BIRC?

Professor Cohen insightfully highlights a cognate area of law where courts have rejected the BIRC analysis: so-called wrongful-life torts.²⁶ A child cannot claim to have been wrong-

17. *See id.*

18. *Id.*

19. *See id.* at 448 (arguing that BIRC-style arguments “are irrational” in the context of anti-incest laws because, except for cases when incest causes abnormalities that make life not worth living, the interest of a child who would never be born under a certain law cannot be used to justify that law).

20. *See id.* at 446 (noting that “[c]lassification as a ‘perfect Non-Identify Problem’ is dependent on “what will happen if the policy is successful”).

21. *Id.* at 458.

22. *Id.*

23. *See id.*

24. *Id.* at n.107.

25. *Id.* at 458–59.

26. *Id.* at 442–45.

fully conceived and born, courts reason, insofar as conception and birth cannot harm a child, so as long as that child has a life worth living.²⁷ Wrongful *birth* actions, in contrast, are brought by parents on their own behalf, alleging that they have been harmed by the child's birth.²⁸ Courts permit these latter claims to proceed but disallow the former.²⁹ The underlying theory is that a *parent* might claim to be adversely effected by a *child's* coming into existence, but the *child* himself cannot be harmed by his *own* existence.³⁰ *Ipsa facto*, existence is not a harm to the person brought into existence.

By parity of reasoning, Professor Cohen reveals BIRC justifications for reproductive interventions as lacking the same logical consistency missing with respect to so-called wrongful life torts.³¹ BIRC reasoning cannot be sustained, Cohen explains, because any child who comes into existence as a result of the targeted reproductive decision is, by definition, not harmed.³² Existence is not harmful.³³ As between being conceived or not being conceived, any child is better off having been conceived.³⁴

C. ALTERNATIVES TO BIRC

1. Justifications for State Intervention

Given the fatal flaws in the BIRC analysis, what would Cohen suggest in its place? He considers, but ultimately rejects, three theories for state intervention in reproduction. These do not suffer the same internal incoherence of BIRC, but Professor Cohen reveals them as equally flawed. First, Cohen considers the expansion of the "life not worth living" theory. His correct reading of wrongful life cases is that courts do not consider children with extremely severe abnormalities to have a "life not worth living."³⁵ Professor Cohen would be willing, if somewhat tentatively, to expand the traditional understanding of the category to include children born with Lesch-Nyhan syndrome or

27. *Id.* at 444.

28. *Id.* at 443.

29. *Id.*

30. *See id.*

31. *See id.* at 442–45 (analyzing cases in which courts have rejected wrongful life torts).

32. *See id.*

33. *See id.*

34. *See id.*

35. *Id.* at 443–45.

Tay-Sachs,³⁶ two particularly pernicious, debilitating and fatal diseases. But Cohen acknowledges that even this modestly expanded definition of a “life not worth living” probably is not sufficient to justify almost any existing reproductive interventions in the form of laws prohibiting anonymous sperm donation, criminalizing certain adult incest, limiting access to reproductive technology, or funding abstinence education.³⁷

A second possible justification for a state intervention—what Professor Cohen calls “[a]llowing the perfect/imperfect line to do some work”³⁸—is somewhat difficult to understand. It might take shape as follows: an intervention is justified if the likely number of children who may or may not come into existence if the intervention *is* in place is *less* than the likely number of children who may or may not come into existence if the intervention is *not* in place.³⁹ In other words, the likely population-wide aggregate of actual harm to actual children is lower with the intervention in place.⁴⁰ If this reading of Professor Cohen’s analysis is correct, then perhaps he could be (mis)interpreted to justify reproductive interventions that cause overall fertility rates to decline. It is not entirely clear that this is his view, however, and this aspect of the argument might be developed or clarified in future work.

A third possible justification for state intervention in reproductive decision-making relies on what Professor Cohen calls “non-person-affecting principles.”⁴¹ This is the belief, in other words, that “the world would be better off if, instead of person *A* who will experience serious suffering or limited opportunity coming into existence, person *B*, who will not experience [those things], would come into existence.”⁴² The non-person-affecting principle might be understood more easily—at least by the non-philosophically-trained reader—as a mandate to “do no harm when you could do well.”⁴³ To illustrate, the fact that humans live on a planet containing more than two people justifies a prohibition on first-cousin incest insofar as those wishing to reproduce have a choice of reproductive partners. To insist

36. *Id.* at 473.

37. *Id.* at 473–74.

38. *Id.* at 479–80.

39. *See id.* at 480.

40. *See id.* at 480.

41. *Id.* at 481–85.

42. *Id.* at 482.

43. *See id.* at 481–85.

on reproduction with one's first cousin, for example, would be to "do harm" to society, when instead one has the option to "do well" (in a genetic sense) by reproducing with someone other than a first cousin. In fact, Professor Cohen reads certain prohibitions on first-cousin incest, for example, as relying in fact on a non-specific social benefit argument, not a BIRC argument.⁴⁴ Professor Cohen is more hospitable to claims that "the world is better off even though no person is made better off; the world is better in an impersonal sense"⁴⁵ than he is to BIRC arguments. A mandate to "do well" does not occlude its normative claim with an assertion of harm to a particular future child.

2. The Particular Failure of the Non-Person Affecting Approach

Professor Cohen offers three detailed reasons that the "non-person affecting approach"⁴⁶ is a faulty theoretical ground for state intervention in reproduction. First, interventions that limit *whether* certain people reproduce necessarily mean that those people will not reproduce.⁴⁷ Further limitations on *with whom* and *when* individuals may reproduce mean that those people might not, in fact, engage in reproductive activity.⁴⁸ Thus, these so-called non-person affecting interventions are not what he calls "same-numbers" cases; total reproduction will not remain constant in the presence or absence of the intervention.⁴⁹ Second, the non-person affecting approach is under-inclusive. In other words, it is illogical to justify a legal prohibition on an unmarried person's access to reproductive technology (on the grounds that the resulting child will suffer from having an unmarried parent), unless one also prohibits unmarried individuals from reproducing via traditional coitus (thus bringing into existence a child having an unmarried parent).⁵⁰ Third, Cohen reads the non-person-affecting approach to imply (at

44. *Id.* at 483 ("To forestall confusion, let me emphasize that the non-person-affecting approach is *not* a claim that the intervention is desirable for the sake of that other child. He will not be harmed if he is not brought into existence.").

45. *Id.* at 484 (emphasis in original omitted).

46. *See id.* at 481–85 (discussing the "non-person affecting approach").

47. *See id.* at 487 ("Those policies that will produce fewer children—all the regulations affecting *whether* individuals reproduce directly have this effect . . .").

48. *Id.*

49. *See id.* at 489–90.

50. *See id.* at 494.

least potentially) that individuals have an obligation to create the best children they possibly can.⁵¹ If that is true, Cohen says, then the state should intervene to require individuals to engage in only “enhancing” reproduction, which he (understandably) finds objectionable.⁵² He raises concerns about the social messaging implications of legal interventions. For the state to devote resources to the prevention of certain reproductive practice, Cohen says, is to communicate to the children born from such practices that they are less worthy or deserving of life than other children.⁵³ This, Cohen rightly decries, is too similar to the eugenics movement of the twentieth century and its associated political practices,⁵⁴ moments in world history that all liberty-loving people should be loathe to revisit.

II. THE PRESENT AND FUTURE OF REPRODUCTIVE SCHOLARSHIP

A. THE PRESENT: A GAUNTLET THROWN

Throughout *Regulating Reproduction*, Professor Cohen demonstrates deep familiarity with contemporary legal scholarship concerning reproductive regulation. He exposes the wide and deep extent to which BIRC reasoning has been absorbed by experienced scholars. He points as an example to Naomi Cahn’s arguments in favor of limitations on incestuous procreation on the grounds of “harm to future offspring.”⁵⁵ Similarly, Debora Spar has endorsed parental fitness examinations for would-be users of reproductive technology by explicit analogy to the “best interests” analysis used in adoption cases.⁵⁶ Lynn Wardle, too, does not shy away from the wholesale importation of “best interests” as a justification for denying access to reproductive technology by those she deems undesirable for one reason or another: single parents, lesbian or gay parents, would-be users of anonymous sperm donors.⁵⁷ Indeed, if one were to assemble

51. *See id.* at 496–98.

52. *See id.* at 496–98.

53. *Id.* at 500.

54. *See id.* at 500–04.

55. *Id.* at 448 (citing Naomi Cahn, *Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARV. J. L. & GENDER 59, 61, 86–87 (2009)).

56. *Id.* at 455 (citing Debora L. Spar, *As You Like It: Exploring the Limits of Parental Choice in Assisted Reproduction*, 27 LAW & INEQ. 481, 491 (2009)).

57. *Id.* at 454–55 (citing Lynn Wardle, *Global Perspective on Procreation and Parentage*, 35 CAP. U. L. REV. 413, 444–51 (2006)).

the citations in the footnotes into a single list, one would have a veritable “who’s who” of scholars writing about reproductive technology. Glenn Cohen takes on the lot, scrupulously showing how pervasive BIRC language is, and challenging scholars to leave it behind.⁵⁸

B. THE FUTURE: A GAUNTLET TO RUN

Professor Cohen concludes *Regulating Reproduction* with an intriguing but brief sketch of possible constitutional problems with reproductive interventions by the state. He suggests, but does not fully explain here, that some interventions justified by reference to BIRC or alternate theories are not likely to pass even a “rational basis” test.⁵⁹ Cohen maps out a future article in which he will “consider BIRC and each of its reformulations under each possible tier of scrutiny.”⁶⁰ In doing so, he lays the groundwork for a more complete challenge in the future to the claims of constitutional scholars like Radhika Rao⁶¹ and Marsha Garrison.⁶² Each has defended as constitutional (and even “desirable”) a variety of legal limitations on the use of artificial reproductive technologies.⁶³ Cohen’s stated aim is to “start a conversation about the way in which the normative and constitutional analyses are in some places symmetrical and in others divergent.”⁶⁴ His actual aim may be nothing short of re-routing scholarly discussions. Professor Cohen has set up an in-

58. It is in this sense that I suggest that Glenn Cohen figuratively “throws down” a “gauntlet,” where a gauntlet refers to a glove of medieval armor, and throwing down the same represents a challenge. See 6 OXFORD ENGLISH DICTIONARY 404 (2d ed. 1989) *gauntlet*, n.1 (“A glove worn as part of medieval armour, usually made of leather, covered with plates of steel.”); *id.* at c. (also explaining throwing down the gauntlet “to give a challenge, from the medieval custom of throwing down a glove or gauntlet in challenging an opponent”). The word derives from the French for glove.

59. Cohen, *supra* note 1, at 514–15.

60. *Id.* at 514.

61. See Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1460 (2008) (arguing that “there is no general right to use ARTs as a matter of reproductive *autonomy*, but there may be a limited right to use ARTs as a matter of reproductive *equality*.”).

62. See Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1625–28 (2008) (arguing that federal courts are unlikely to adopt an expansive interpretation of the procreative–liberty case law).

63. *Id.* at 1625.

64. Cohen, *supra* note 1, at 517.

tellectual obstacle course or gauntlet⁶⁵ of sorts that he intends to run in his future scholarship. I suspect that the course—not Glenn Cohen—will be worse for it.

III. A RIGHTS TEST

Professor Cohen's few minor elisions and glosses are insignificant in the context of his overall argument. He dissects alternatives to the BIRC justification and shores up his under-inclusiveness critique with the assertion that there is no significant difference between regulation of assisted reproduction and coital reproduction.⁶⁶ He writes that "the natural/artificial line ought to carry no weight. I suspect that views to the contrary are the product of misfires of intuitions on positive versus negative liberty; they are misfires because *both* preventing access to reproductive technology and preventing coital reproduction are *negative liberty* violations."⁶⁷ The reader, however, likely persists with a misfiring intuition, as it is not immediately obvious that the state's failure to fund assisted reproduction is a negative liberty violation. Such a result *appears* to obtain only to the extent that there is a constitutional right to become a genetic parent *by any means necessary*, not merely a generalized right to become a genetic parent. (I say "appears to obtain" because of the possibility that my own intuition has misfired completely.) In prior work, Cohen himself has puzzled over the articulation of a right to a genetic relationship to a child as either a negative right that can be violated or a positive right that requires state aid.⁶⁸ He suggests that courts have rejected the positive right argument in other contexts.⁶⁹ Why, then, might there be a positive right to access reproductive technology? It may be that Professor Cohen has the better argument, but future expansion of this point would be helpful.

In a related vein, Professor Cohen might elaborate beneficially on the difference between interventions that make access to reproductive technology *difficult*, on the one hand, and inter-

65. Gauntlet, as used here, derives from the Swedish *gatlopp*, meaning *gata* lane + *lopp* course. To run the *gantlope* (corruptly, the *gauntlet*) is to pass through a course of punishment or challenge. See THE OXFORD ENGLISH DICTIONARY 405 (2d ed. 1989).

66. Cohen, *supra* note 1, at 494–95.

67. *Id.* at 495 (footnote omitted).

68. See I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 524–25 (2010).

69. See *id.*

ventions that *prevent* access to reproductive technology, on the other. He convincingly argues that target interventions other than outright denial of access may operate as *de facto* limitations on reproduction.⁷⁰ But it is not clear that all *when*-based limitations, for example, rise to the level of a *de facto* limitation (and thus are unjustifiable). Again, this is not to say that Professor Cohen is not correct in his overall conclusion, but merely that intermediate interventions—such as a limitation (but not a ban) on the use of anonymously-donated sperm—might require further scrutiny before one can adjudge them as wholly unjustifiable.

IV. A TAX TEST

Professor Cohen's critique of the BIRC justification is a lens through which one can examine a variety of points of state intervention into reproductive decision-making. Consider, for example, the potential application of Cohen's analytic framework to the income tax treatment of amounts received by a woman for acting as a gestational surrogate. There is widespread agreement among legal commentators that compensation received by a woman for carrying and bearing a child is taxable income.⁷¹ This is true even though some surrogacy contracts specifically recite that any receipts are to reimburse the surrogate for "living expenses," "food," or "clothes."⁷² Surrogates themselves may refer to the receipts as compensation for the "needles, sticks, stretch marks and pain/suffering" associated with pregnancy.⁷³ Nevertheless, there is no income tax law that would exclude from gross income amounts received for acting as a surrogate.

70. Cohen, *supra* note 1, at 478–81.

71. See Lisa Milot, *What Are We - Laborers, Factories, or Spare Parts? The Tax Treatment of Transfers of Human Body Materials*, 67 WASH. & LEE L. REV. 1053, 1103 (2010); Jay A. Soled, *The Sale of Donors' Eggs: A Case Study of Why Congress Must Modify the Capital Asset Definition*, 32 U.C. DAVIS L. REV. 919, 949–50 (1999); Note, *Tax Consequences of Transfers of Bodily Parts*, 73 COLUM. L. REV. 842, 853–54 (1973); James Edward Maule, *Federal Tax Consequences of Surrogate Motherhood*, TAXES: THE TAX MAGAZINE, Sept. 1982, at 657 ("Unquestionably, the fee paid to a surrogate mother . . . is gross income to the surrogate mother.").

72. See, e.g., BRIDGET J. CRAWFORD, *Taxing Surrogacy*, in CHALLENGING GENDER INEQUALITY IN TAX POLICYMAKING 95, 97 (Kimberley Brooks et al. eds., 2011) (citing interview with Joseph X).

73. George Saenz, *Tax Talk*, BANKRATE (May 24, 2005), http://www.bankrate.com/brm/itax/tax_adviser/20050524a1.asp.

For as clear as tax commentators are on the income tax consequences of surrogacy, agencies and surrogates themselves are unclear. Surrogacy agencies do not provide consistent or accurate guidance to surrogates. One internet discussion group for surrogates mentioned 18 surrogacy agencies.⁷⁴ Only six of those agencies reportedly issue a Form 1099-MISC to surrogates.⁷⁵ Twelve of those agencies reportedly do not.⁷⁶

Given the conflicting information—or utter absence of information—from surrogacy agencies (who are repeat market-players that should be aware of the proper tax treatment of amounts paid to surrogates), it is not surprising that surrogates themselves appear confused about their income tax obligations. It is difficult to know for sure how many surrogates report and pay tax on amounts they receive for gestating and giving birth to a child. The United States Income Tax Return (Form 1040) does not specifically ask whether the taxpayer has received payments for carrying a child. No government agency collects this information. Thus, one must turn to the words of the surrogates themselves for anecdotal evidence. On the same online bulletin board that reported the practices of 18 agencies, the suggestion that agencies should issue to surrogates a Form 1099 for amounts paid “for services performed for a trade or business by people not treated as its employees” or “rent or royalty payments” provoked a strong reaction in the surrogate community. One surrogate wrote in response: “I believe that most of the places that do 1099 think of us as ‘independent contractors’ of which we are NOT!”⁷⁷ But another surrogate asked an online financial adviser: “I served as a surrogate carrier in 2004 and gave birth earlier this year. . . . Do I have to report my compensation? . . . I do feel I shouldn’t have to pay taxes for being compensated for helping a couple to have a baby.”⁷⁸ As a matter of law, however, the United States income tax rules do not make room for the subjective feelings of the taxpayer. Compensation for services is taxable.⁷⁹

74. SusanFrmLA. Posting to *What Agency or Attorney gives out 1099s?*, SURROGATE MOTHERS ONLINE MESSAGE BOARDS (last updated Dec. 29, 2008, 4:52PM), <http://www.surromomsonline.com/support/showthread.php?p=1604396>.

75. *Id.*

76. *Id.*

77. *Id.*

78. Saenz, *supra* note 73.

79. See I.R.C. § 61(a)(1).

Regardless of the legal “correctness” of treating paid surrogacy receipts as income, one can imagine (at least) two meta-objections to such a tax. First, openly acknowledging the taxability of surrogacy receipts impinges on the narrative of altruism that pervades the fertility industry.⁸⁰ An income tax liability for surrogacy is in direct conflict with the self-conception of surrogates—encouraged by fertility brokers—that surrogacy is a “gift” that a woman can give to a childless family.⁸¹ Acceptance of a tax on surrogacy is to accept reproductive work as a type of paid labor. Second, one can imagine the objection that the introduction of taxation to an already-fraught transaction (or “relationship,” if one prefers) makes surrogacy too much like baby-selling to be comfortable for many people. In another context, Martha Ertman has asked whether “purchasing gametes to conceive a child could cause the child to feel that he or she has been purchased like a new car.”⁸² Extending that same reasoning, one presumably might object to taxing surrogacy on the grounds that the incidence could cause the child to feel that he or she has been “grown” by a surrogate as a hired hand may grow flowers in an owner’s garden.⁸³ The anti-commodification impulse is strong among even those who support liberal access to reproductive technology, and so this argument is to be anticipated.⁸⁴

80. See, e.g., Kimberly D. Krawiec, *A Woman’s Worth*, 88 N.C. L. REV. 1739, 1757–60 (2010) (“[F]ertility-center and donor-agency screening practices . . . eliminate as unacceptable potential egg donors who claim monetary compensation as the overriding motivation for egg donation.”).

81. See *id.* at 1758 (“In addition to normalizing what is otherwise a jarring dichotomy . . . there is an obvious appeal to believing that one’s selfless behavior helps another.”).

82. Martha M. Ertman, *What’s Wrong With A Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 33 (2003).

83. Surrogates are often unaware of the correct tax treatment of surrogacy payments and most legal scholars ignore this question entirely. Cf. Bridget J. Crawford, *Taxation, Pregnancy and Privacy*, 16 WM. & MARY J. WOMEN & L. 327, 346 (2010) (“not all surrogates understand that their receipts are taxable income.”); Crawford, *Taxing Surrogacy*, *supra* note 72, at 99–100 (quoting surrogates asking tax related questions); Maule, *supra* note 71, (examining tax consequences of surrogate mother and childless couple); Milot, *supra* note 71, at 1080–82 (reviewing limited or outdated academic work relating to surrogacy taxation); Soled, *supra* note 71. See, e.g., Crawford, *Taxing Surrogacy*, *supra* note 72, at 104–05 (discussing social and cultural implications of surrogacy taxation).

84. In the forthcoming companion article to *Regulating Reproduction*, *supra* note 1, Professor Cohen assesses the anti-commodification arguments as not raising a Non-Identity Problem as long as the harm asserted is to the parents of such “commodified child” or to society at large. See Cohen, *supra* note 3.

Professor Cohen's critique of BIRC provides an entry point for evaluating the argument that taxing surrogacy makes it too commercial (and thus harmful to a resulting child's self-perception). A child cannot be said to be harmed by its own existence, as Cohen has explained.⁸⁵ Thus, the means by which a child is conceived, gestated, and born—and whether any money changes hands—should be irrelevant. In this way, the anti-tax argument suffers from the same Non-Identity Problem as do objections of Martha Ertman and Peggy Radin, among others, to compensated surrogacy (without regard to tax questions).⁸⁶

Might an anti-tax argument also raise a further Non-Identity Problem? One can speculate about the economic and behavioral effects of a clearly-expressed government statement that amounts received under a surrogacy contract would be treated as taxable income.⁸⁷ It may be that the prices for surrogacy services would go up and/or that the number of available surrogates would decline.⁸⁸ Therefore, at least in the latter case, the tax would operate as what Cohen calls a “de facto restriction on *whether* individuals can reproduce at all.”⁸⁹ Thus Professor Cohen's analysis illuminates that the anti-tax argument raises an imperfect Non-Identity Problem.⁹⁰ That is not to say that a tax could not be justified on other grounds.⁹¹ It is only to say that BIRC is not a robust enough justification for opposing such a tax.⁹²

85. See *supra* note 32 and accompanying text.

86. See generally Cohen, *supra* note 1, at 467–77 (discussing how surrogacy compensation is in the best interest of the child).

87. See Crawford, *supra* note 72, at 100–02.

88. *Id.* at 103.

89. Cohen, *supra* note 1, at 468.

90. See *id.* (“[S]o long as that population of altruistic egg/sperm donors and surrogates is different from the population of compensated ones (*with whom*) or conception occurs at a different time (*when*), the ban on compensation cannot be said to be in the best interests of *this* child—the one who would exist in commercialized regime but does not in a one that makes compensation unlawful.”).

91. One alternate justification might ground in economic distortion concerns. See Crawford, *Taxing Surrogacy*, *supra* note 72, at 100–03. The failure to tax surrogacy arrangements causes surrogacy to become, in effect, a subsidized form of labor. *Id.* at 100–05.

92. Cf. Frances Woolley, *When is a Ban a Subsidy?*, WORTHWHILE CANADIAN INITIATIVE (Feb. 18, 2011), http://worthwhile.typepad.com/worthwhile_canadian_initi/2011/02/when-is-a-ban-a-subsidy.html (discussing problems with subsidizing surrogacy using tax policy).

CONCLUSION

The contributions of *Regulating Reproduction* are considerable. Those who criticize legal scholarship for its lack of relevance to the practice of law⁹³ might be quick to point to Cohen's terminology—perfect versus imperfect, Non-Identity, non-person-affecting—as evidence of the work's inaccessibility. But Professor Cohen imports philosophical terms and reasoning in the service of revealing foundational weaknesses in contemporary legal thought—weaknesses that are shared by commentators, lawmakers, and judges. Through original taxonomy and a dauntless attention to foundational principles, Glenn Cohen has elevated the discourse about reproductive law and policy.

93. See, e.g., Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WSJ BLOGS (Apr. 7, 2010, 7:20 PM), <http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more/> (“Roberts said he doesn't pay much attention to academic legal writing. Law review articles are 'more abstract' than practical, and aren't 'particularly helpful for practitioners and judges.’”); *Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, ACSBLOG (July 5, 2011), <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts-take-on-academic-scholarship> (“If the academy wants to deal with the legal issues at a particularly abstract, philosophical level . . . that's great and that's their business, but they shouldn't expect that it would be of any particular help or even interest to the members of the practice of the bar or judges.” (quoting Chief Justice Roberts)).