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# **WINDSOR, SURROGACY, AND RACE**

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## WINDSOR, SURROGACY, AND RACE

Khiara M. Bridges\*

*Abstract:* Scholars and activists interested in racial justice have long been opposed to surrogacy arrangements, wherein a couple commissions a woman to become pregnant, give birth to a baby, and surrender the baby to the couple to raise as its own. Their fear has been that surrogacy arrangements will magnify racial inequalities inasmuch as wealthy white people will look to poor women of color to carry and give birth to the white babies that the couples covet. However, perhaps critical thinkers about race should reconsider their contempt for surrogacy following the Supreme Court's recent decision in *United States v. Windsor*. In the decision, the Court envisions same-sex couples and the families that they head as valuable threads in the fabric of American society. Surrogacy arrangements are vehicles for same-sex couples to produce the families that *Windsor* celebrates. This fact may encourage opponents of surrogacy arrangements who have been concerned about the racial implications of the practice to reconsider their opposition. This Article conducts that reconsideration, ultimately concluding that while surrogacy arrangements are beneficial because they enable persons who are unprivileged by virtue of sexual orientation to have children, they may reaffirm extant racial hierarchies and exacerbate the marginalization of persons and families that are already unprivileged by virtue of race and class. However, instead of calling for a ban on surrogacy for these reasons, the Article argues that there are more desirable avenues for destabilizing racial hierarchies and undoing the marginalization of unprivileged persons and families.

### INTRODUCTION

Scholars and activists interested in racial justice have long been skeptical of surrogacy arrangements, wherein a couple commissions a woman to become pregnant, give birth to a baby, and surrender the baby to the couple to raise as its own. Rarely have critical thinkers about race approached surrogacy as merely a technological marvel—a remarkable feat of science that enables infertile couples to bring the children that they so very much desire into the world. Instead, many scholars and activists who have devoted their time and energies to fighting for racial justice have conceptualized surrogacy as a frightening prospect, something that should be left to pages of science fiction lest it bring nightmarish racial horrors to real life. The question that sociologist Barbara Katz Rothman asks about surrogacy reflects the sentiment—the

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thinly-veiled fear and loathing—that many critical thinkers about race have had about the practice: “Can we look forward to baby farms, with white embryos grown in young and poor Third-World mothers?”<sup>1</sup> This possibility has led many persons who are interested in racial justice to argue that surrogacy ought to be prohibited.

But, perhaps critical thinkers about race should reconsider their contempt for surrogacy in light of recent shifts in society. The most significant shift that might merit a reconsideration of surrogacy is the increasing recognition and legitimation of lesbian, gay, bisexual, and transgender (LGBT) persons and the families that they have created and desire to create. The Supreme Court’s recent decision in *United States v. Windsor*<sup>2</sup> is remarkable for its inclusive vision: The Court envisions same-sex couples, and the families that they head, as valuable threads in the fabric of American society. This country is a diverse one, and *Windsor* declares that same-sex couples and the families they create make wonderful, legitimate, respected contributions to the diversity of family forms present in the nation.

Surrogacy arrangements are vehicles for same-sex couples to produce the families that *Windsor* applauds. Thus, when critical thinkers about race condemn surrogacy, they condemn a means through which same-sex couples can produce the families that *Windsor* celebrates. This fact may encourage opponents of surrogacy arrangements who have been concerned about the racial implications of the practice to reconsider their opposition.

This Article conducts that reconsideration. Part I discusses *Windsor* and its concern for the children that same-sex couples parent, noting that part of the reason why the Court strikes down the federal government’s refusal to recognize same-sex marriages is because of the harm that the refusal will inflict on the children of same-sex couples. Part II discusses the myriad reasons why critics who wrote about surrogacy in the late 1980s to mid-1990s opposed surrogacy arrangements, paying special attention to these first generation fears that surrogacy arrangements would magnify racial inequalities inasmuch as critics predicted that wealthy white people would look to poor women of color to carry and give birth to the white babies that the couples covet. Part II goes on to discuss the fact that these fears about white couples commissioning poor women of color to act as surrogates did not materialize—at least, they

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1. Barbara Katz Rothman, *Reproductive Technology and the Commodification of Life, in* EMBRYOS, ETHICS, AND WOMEN’S RIGHTS: EXPLORING THE NEW REPRODUCTIVE TECHNOLOGIES 95, 100 (Elaine Hoffman Baruch, Amadeo F. D’Adamo, Jr., & Joni Seager eds., 1988).

2. \_\_ U.S. \_\_, 133 S. Ct. 2675 (2013).

did not materialize insofar as poor, U.S.-born women of color have not been widely commissioned to act as surrogates. This Article conceptualizes this fact—white couples’ failure to look to U.S.-born women of color for surrogacy services—as a racial implication of surrogacy that is a second generation concern. Moreover, it is a concern that may move those who are interested in racial justice to continue to oppose surrogacy arrangements. Part III then asks whether the disturbing racial implications of surrogacy are muted when same-sex couples commission the birth of babies. This part ultimately concludes that while surrogacy arrangements are beneficial because they enable persons who are unprivileged by virtue of sexual orientation to have children, they may reaffirm extant racial hierarchies and exacerbate the marginalization of persons and families that are already unprivileged by virtue of race and class. However, instead of calling for a ban on surrogacy for these reasons, this Article concludes that there are more desirable avenues for destabilizing racial hierarchies and undoing the marginalization of unprivileged persons and families. These avenues are more desirable because they do not involve limiting opportunities for LGBT persons, but rather expanding opportunities for poor people of color of all sexual orientations and gender identities.

## I. THE SPIRIT OF *WINDSOR*

In *United States v. Windsor*, the Supreme Court struck down section three of the federal Defense of Marriage Act (“DOMA”), which defined marriage within federal law as only involving a man and a woman<sup>3</sup>—despite the fact that an increasing number of states had passed laws that permit individuals of the same sex to marry.<sup>4</sup> Many aspects of DOMA disquieted the five-Justice majority in *Windsor*. Justice Kennedy, who authored the majority opinion, noted that, in addition to the equal protection questions that the provision raised, there were disconcerting federalism<sup>5</sup> and due process<sup>6</sup> concerns, as well. Nevertheless, it appears

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3. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996), *invalidated by Windsor*, 133 S. Ct. at 2695. Section 3 provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.

*Id.*

4. Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 257, 258 (2013).

5. See *Windsor*, 133 S. Ct. at 2692 (“DOMA, because of its reach and extent, departs from the[] history and tradition of reliance on state law to define marriage.”). Indeed, the Court found it quite significant that the regulation of marriage was a function that had traditionally been left to the states.

that the Court took the equal protection route: it seems that, after finding the law motivated by animus<sup>7</sup> and, accordingly, that it did not pursue any legitimate governmental interest,<sup>8</sup> the Court ultimately struck down the law as a violation of the Equal Protection Clause.<sup>9</sup>

Despite the ambiguities about the basis for the Court's holding, it is apparent that the Court's decision was partially motivated by a concern

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*See id.* at 2691 (noting that the “‘regulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States’” (quoting *Sosna v. Iowa*, 419 U.S. 393, 404, 95 S. Ct. 553 (1975))); *id.* at 2680 (“The significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.”). Yet, with DOMA, the federal government usurped this function in order to limit the definition of marriage to those that only involve a man and a woman.

6. *See id.* at 2692 (noting that DOMA required the Court to “address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment”); *id.* at 2695 (noting that DOMA denied “the liberty protected by the Due Process Clause of the Fifth Amendment”).

Of course, the Court's references to “liberty” and the Due Process Clause may have nothing to do with due process, as such. The references may be due to the fact that the Fifth Amendment does not contain an Equal Protection Clause. *See* U.S. CONST. amend. V. Accordingly, all federal equal protection cases are due process cases to the extent that the Fourteenth Amendment's Equal Protection Clause has to be reverse-incorporated through the Fifth Amendment's Due Process Clause. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954). However, the majority suggests that there is more to its references to the Due Process Clause than the simple doctrine of reverse incorporation:

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. *While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does*, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

*Windsor*, 133 S. Ct. at 2695 (emphasis added) (citations omitted). Here, the Court appears to imply that the Fifth Amendment's Due Process Clause would prohibit DOMA independent of the equal protection constraints that have been reverse-incorporated into them. Whatever the Court had in mind, it certainly could have been clearer about the basis for its decision. *See* Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. ONLINE 29, 31 (2013) (discussing “the muddled nature of the majority opinion”). And, indeed, Justice Scalia looks to this very passage as evidence of the unprincipled nature of the majority's decision. *See Windsor*, 133 S. Ct. at 2705–06. (Scalia, J., dissenting) (quoting the above-cited language, asking “what can *that* mean?” (emphasis in original), and concluding that the Court's opinion “is a confusing one”).

7. *See Windsor*, 133 S. Ct. at 2695 (noting that the “principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage”); *id.* at 2693 (“DOMA seeks to injure the very class New York seeks to protect.”).

8. *Id.* at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”).

9. *See* Peter Nicolas, *Gay Rights, Equal Protection, and the Classification-Framing Quandary*, 21 GEO. MASON L. REV. 329, 330 (2014) (arguing that *Windsor* is an equal protection case “with some substantive due process and federalism principles thrown in”).

for the children being raised by same-sex couples. Justice Kennedy uses powerful language to describe the harms that DOMA inflicts on the children of individuals whose marriages the federal government refuses to recognize. He notes that, not only does DOMA demean the individuals who are lawfully wedded under state law, but it also “humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”<sup>10</sup>

Thus, *Windsor* expresses a sincere worry about the children of same-sex couples.<sup>11</sup> The Court recognizes that, because of DOMA’s purpose and effect of disparaging their parents’ relationships, these children will suffer harms. Moreover, the Court’s recognition of these harms is not begrudging in the least. Indeed, the majority’s decision is remarkable for its complete willingness to take the perspective of children being raised by two parents of the same-sex and its complete willingness to imagine

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10. *Windsor*, 133 S. Ct. at 2694.

11. Other moments in the majority opinion evince the majority’s concern about children. *See id.* at 2689 (noting that states began to recognize same-sex marriages when they acknowledged “the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before *their children*, their family, their friends, and their community” (emphasis added)); *id.* at 2695 (noting that DOMA can cause children of same-sex couples financial harm due to its effect on tax and social security laws). Some commentators have cautioned against too much celebration of *Windsor*’s concern about children because of the work that the decision does to construct some parents as noble and worthy and other parents as dishonorable and deviant. For one, Melissa Murray observes that, like the Court in *Windsor*, lower courts recognizing same-sex marriages and other advocates for marriage equality have argued that refusing to allow persons of the same-sex to marry inflicts the injury of illegitimacy on these individuals’ children. *See* Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 398, 419–21 (2012) (citing several instances in which courts and advocates have argued that same-sex marriages ought to be recognized in order to spare the children of such unions the status of illegitimacy). These courts and commentators argue that the children of same-sex couples that reside in jurisdictions that do not recognize same-sex marriages are being coerced into their status as illegitimate because their parents seek a legal marriage, yet the jurisdictions in which they reside deny them that ability. *Id.* at 421 (“[I]llegitimacy is something that is thrust upon them and their children against their will. And it is the lack of choice—the absence of volition—that rankles. Implicit in the argument is a sense that if same-sex couples raising children could marry, *they would*. They would not hobble their children with the taint of illegitimacy.” (emphasis in original)). Murray argues that the children of same-sex couples who wish to marry are implicitly compared to children being parented by individuals who do *not* seek a legal marriage. *Id.* (“For those who *can* marry legally, but choose not to do so, the burdens of illegitimacy—for themselves and their children—are the (deserved) costs of that (irrational) choice.”). These latter parents, who have “willfully depart[ed] from the marital model and [have borne] and raise[d] children out of wedlock are, by comparison, imperfect and deviant.” *Id.* at 423.

the shame and sense of illegitimacy that DOMA could make them feel.<sup>12</sup>

*Windsor's* defense of *families* headed by same-sex parents functions to declare that these families are more than “acceptable”—more than something that an enlightened society should merely tolerate. Instead, the decision asserts, albeit implicitly, that families headed by individuals of the same-sex are a *welcome* and *wanted* feature of contemporary life in the United States—adding to the diversity of family forms found in a country that, historically, has proclaimed pride in its diversity. If this is the spirit of *Windsor*, then the decision may call into question laws that function to frustrate the formation of those nontraditional families that the Court’s decision welcomes into the body politic.

So, the question becomes: How will the children that the Court worries about in *Windsor* come to be? That is, how will the individuals involved in same-sex marriages become parents of the children that influence the Court’s interpretation of the Constitution in *Windsor*? The question is an important one: If *Windsor* implicitly declares the legitimacy of families headed by individuals of the same sex, then it may also implicitly declare the *illegitimacy* of laws that frustrate the formation of those families.

The families contemplated in *Windsor* can form in a multiplicity of ways. Parents can bring children from previous, heterosexual relationships into a subsequent same-sex marriage. Same-sex couples can also formally adopt genetically unrelated children, or they can informally care for children of family members, friends, or other members of their communities. Also, same-sex couples can turn to assisted reproductive technologies and produce children to whom at least one parent is biologically related. One of the members of a female couple can become pregnant through artificial insemination and raise the child to whom she gives birth together with her partner. And a male couple can seek to create a family through commissioning a surrogate to give birth to a child (possibly biologically related to one of the men) whom the couple will ultimately parent. Moreover, couples can pursue two avenues with respect to surrogacy. The first is traditional surrogacy, in which a surrogate is inseminated with donor sperm; the child to whom she gives birth and whom she eventually surrenders for adoption is genetically related to her. The second is gestational surrogacy, in which a fertilized ovum is implanted into a surrogate; the child to whom she

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12. See Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not “Argle Bargle”*: The Inevitability of Marriage Equality After *Windsor*, 23 TUL. J.L. & SEXUALITY 17, 54–56 (2014) (observing that the *Windsor* majority recognized “the real and stigmatizing harms to children caused by DOMA”).



gives birth and whom she later relinquishes to the intended parents is genetically unrelated to her.

Again, to the extent that *Windsor* celebrates diverse family forms and, accordingly, calls into question laws that frustrate the formation of these diverse family forms, a wide range of laws rest on shaky legal ground. These include child protection laws and policies that do not recognize the legitimacy of families headed by individuals of the same-sex; laws and policies that make it difficult for individuals involved in same-sex marriages to adopt or to foster children formally; laws and policies that make it difficult for lesbians to become pregnant through artificial insemination; and laws that prohibit the enforceability of surrogacy contracts. This Article will focus on the last.

## II. THE RACIAL IMPLICATIONS OF SURROGACY

States take a variety of approaches to the regulation of surrogacy contracts. About half of the states do not have statutes that explicitly regulate surrogacy arrangements, leaving their permissibility to be worked out by the courts.<sup>13</sup> Some courts have upheld surrogacy contracts;<sup>14</sup> others have struck them down.<sup>15</sup> Of those states that have statutes that speak directly to the permissibility of surrogacy contracts, six jurisdictions outlaw them outright, making all surrogacy contracts void and unenforceable.<sup>16</sup> Other states take a more nuanced approach to the issue, regulating surrogacy based on the type of surrogacy involved and the features of the arrangement. For example, some prohibit traditional surrogacy while allowing gestational surrogacy.<sup>17</sup> Some prohibit compensated surrogacy while allowing uncompensated surrogacy.<sup>18</sup> Some make other requirements of the parties to the contract, *e.g.*, the surrogate must have given birth to a child in the past,<sup>19</sup>

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13. See COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW* § 4:2 (2013–2014 ed. 2013) (noting that only “[a]bout half of the states have statutes specifically addressing the permissibility of at least some forms of surrogacy”).

14. See, *e.g.*, *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993).

15. See, *e.g.*, *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988).

16. See JOSLIN, MINTER, & SAKIMURA, *supra* note 13, at § 4.2 (Arizona, the District of Columbia, Indiana, Michigan, New York, and North Dakota).

17. See *id.* (California, Delaware, Florida, Illinois, Nevada, Texas, and Utah).

18. See, *e.g.*, WASH. REV. CODE § 26.26.230 (2012) (“No person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract, written or unwritten, for compensation.”).

19. See, *e.g.*, DEL. CODE ANN. tit. 13, § 8-806(a)(2) (West, Westlaw through ch. 428 of 2014 legislation); 750 ILL. COMP. STAT. ANN. 47 / 20(a)(2) (West, Westlaw through P.A. 98-972, with

the parents who will ultimately have custody of the child (that is, the intended parents) must be married,<sup>20</sup> or the child must be genetically related to one of the intended parents.<sup>21</sup>

The patchwork of state laws that take quite different approaches to the regulation of surrogacy demonstrates the wide breadth of reactions that people have had to the practice. Some have welcomed surrogacy as an unqualified boon to society, conceptualizing it as a desirable technique that allows individuals to have genetically related children that they otherwise would not be able to have.<sup>22</sup> Others have been less sanguine about it, discomforted by the specter of “baby-selling” that the practice generates.<sup>23</sup> Others have been disturbed by the gendered dimensions of the practice; approaching it through a feminist lens, they have seen it not as a technique whereby individuals can have genetically related children, but rather as a technique whereby *men* can have genetically related children.<sup>24</sup> Through this lens, women figure in surrogacy as no more than commoditized vessels through which men can propagate their genes.<sup>25</sup>

Other critics have seen surrogacy as akin to prostitution, organ-selling, and other practices that involve the commoditization of aspects of life that they argue never ought to be commoditized.<sup>26</sup> Relatedly,

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the exception of P.A. 98-944, of the 2014 Reg. Sess.); TEX. FAM. CODE ANN. § 160.756(b)(5) (West, Westlaw through 2013 3d Called Sess.); UTAH CODE ANN. § 78B-15-803(2)(f) (West, Westlaw through 2014 Gen. Sess.).

20. FLA. STAT. ANN. § 742.15(1) (West, Westlaw through 2014 Sp. “A” Sess.); TEX. FAM. CODE ANN. § 160.754(b).

21. *See, e.g.*, UTAH CODE ANN. § 78B-15-801(5); VA. CODE ANN. § 20-160(B)(9) (West, Westlaw through 2014 Reg. & Special Sess.).

22. Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women’s Bodies and Children?*, 12 WIS. WOMEN’S L.J. 113, 116 (1997) (“Surrogacy is a viable alternative reproductive method that allows other women to assist infertile women . . . [in] the birth of a truly wanted child.”).

23. *See, e.g.*, George J. Annas, *Fairy Tales Surrogate Mothers Tell*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 43, 49 (Larry Gostin ed., 1990).

24. *See* Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 241 (1995) (Surrogacy “allow[s] a man to be a genetic father rather than enabling a woman to become a mother.”); Kerian, *supra* note 22, at 160 (“Radical feminists believe surrogacy exploits women because ‘men control the rules, the courts and women’s bodies.’” (quoting Rosemarie Tong, *Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus*, in REPRODUCTION, ETHICS AND THE LAW 55, 76 (Joan C. Callahan ed., 1995))).

25. *See, e.g.*, BARBARA K. ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 33 (1989) (describing surrogacy as reducing the woman to a container in order to fulfill a man’s desire to perpetuate his “seeds”).

26. *See, e.g.*, Anita Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17, 30 (1991) (“It has been said many times before, but it bears repeating: tolerating practices that convert women’s wombs and children into valuable market commodities threatens to deny them respect as

others have seen in it yet another opportunity for the economically privileged in this country to exploit the economically disadvantaged.<sup>27</sup> In these analyses, women who contract to be surrogates are driven by financial need and would never consent to such arrangements if other avenues for economic survival were open to them; however, because of financial necessity, they agree to be physically, mentally, and emotionally damaged by a service they provide to the wealthy people who could afford to purchase it from them.<sup>28</sup> In addition to economic exploitation, some critics see in surrogacy the exploitation of women who only consent to act as surrogates because they have failed to comprehend precisely what is at stake. Lina Peng describes critics as contending that surrogate mothers invariably are “emotionally unstable, uneducated, did not make informed decisions, and would regret their decisions and suffer long-term psychological damage.”<sup>29</sup> The only way to protect women from the bad decisions that they would make due to their instabilities and lack of information and education is to prohibit them from being able to make the bad decision—to ban surrogacy. In this way, the psychological damage that they would inevitably suffer would be prevented.<sup>30</sup>

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equals. Commercial surrogacy encourages society to think of economically and socially vulnerable women as at its disposal for a price.”).

27. See Jeremy Rifkin & Andrew Kimbrell, *Put a Stop to Surrogate Parenting Now*, USA TODAY, Aug. 20, 1990, at A8 (“Minority women increasingly will be sought to serve as ‘mother machines’ for embryos of middle and upper-class clients.”).

28. See Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, 11 WOMEN’S RTS. L. REP. 15, 35 (1989) (“[M]any poor women may agree to such arrangements, in part, because they have so few other job options, particularly paying \$10,000 to \$15,000 for nine months’ work. It may be difficult for a woman in financial distress to weigh accurately the advantages and disadvantages of surrogacy.”).

29. Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U. J. GENDER SOC. POL’Y & L. 555, 557 (2013).

30. See *id.* Interestingly, the argument that these critics of surrogacy make sounds eerily similar to the arguments that many anti-abortion activists have made. These activists have contended that women who decide to terminate pregnancies cannot make informed decisions; indeed, the fact that they have decided to undergo an abortion is evidence of their inability to make informed decisions. See Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 143 (2009) (stating that opponents of abortions claim that mothers must be coerced into abortions because “[it] is so far outside the normal conduct of a mother to implicate herself in the killing [of] her own child” (quoting REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 56 (2005), available at <http://www.voteyesforlife.com/docs/TaskForceReport.pdf>)). The only way to protect them from the psychological damage that will inevitably result from the decision to terminate a pregnancy is to prevent them from being able to make the bad decision—to ban abortion. *Id.* Sadly for abortion rights activists, this line of argumentation has made it into the jurisprudence via Justice Kennedy’s majority decision in *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) (“[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can

A. *Race and Surrogacy: First Generation Concerns*

Some commentators writing during the late 1980s to mid-1990s realized that the practice of surrogacy would necessarily take place on a national and global landscape marked by racial stratification and inequality.<sup>31</sup> Given this reality, they thought it necessary to consider the racial implications of the practice before we, as a society, could intelligently decide whether it should be welcomed or withheld. And, through this lens, they were disturbed by what surrogacy could mean within this country and within the globe. This lens revealed to them that surrogacy does not simply involve the commoditization of aspects of life that never ought to be commoditized, but rather involves the commoditization of *bodies of color* for *white benefit*. It is not simply a means by which the wealthy can exploit the poor, but rather is a means by which wealthy *white people* can exploit *poor people of color*. It is not simply a practice in which women figure as commoditized vessels through which men could propagate their genes, but rather is a practice in which *women of color* figure as commoditized vessels through which *white men* could propagate their genes.

Some commentators writing during this time imagined a dystopic future in which there exists a “breeder class” composed of indigent black women, their reproductive capacities readily available for purchase by infertile, wealthy white couples who seek to use black women’s bodies to overcome their own physical limitations and to have children that were their genetic progeny.<sup>32</sup> Other commentators raised concerns about

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follow . . . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know.”).

31. See, e.g., Roberts, *supra* note 24, at 263 (noting that because race follows class closely in the U.S., surrogacy arrangements will likely involve wealthy white families paying poor women of color to act as surrogates); Nita Bhalla, *India’s Surrogacy Tourism: Exploitation or Empowerment*, THOMSON REUTERS FOUND. (Oct. 4, 2013, 4:21 PM), <http://www.trust.org/item/20131004162151-r5i0w/> (noting that commercial surrogacy in India usually involves wealthy couples from wealthier nations paying poor Indian women to act as surrogates).

32. See Allen, *supra* note 26, at 30 (“Minority women increasingly will be sought to serve as ‘mother machines’ for embryos of middle and upper-class clients. It’s a new, virulent form of racial and class discrimination. Within a decade, thousands of poor and minority women will likely be used as a ‘breeder class’ for those who can afford \$30,000 to \$40,000 to avoid the inconvenience and danger of pregnancy.”); April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 88 (2001) (noting the “potential for the operation of racism [to create] a breed of women of color prostituted in surrogacy”); Nsiah-Jefferson, *supra* note 28, at 34 (“The prospect of women of color carrying white babies is frightening and merits serious and immediate consideration. The idea of using poor and minority women as incubators for the white upper and middle classes raises serious moral and practical questions.”).

the existence of advanced reproductive technologies like surrogacy alongside coercive reproductive policies directed at poor, usually black, women—like forced sterilization, compelled contraceptive usage, and the incarceration of women who are addicted to drugs and their prosecution for child abuse.<sup>33</sup> Professor Dorothy Roberts, for one, noted that surrogacy and its disproportionate use by white persons function to venerate white reproduction; meanwhile, other coercive reproductive policies aimed at black women function to discourage, disparage, and denounce black reproduction.<sup>34</sup>

Moreover, critical thinkers about race were concerned about the role that race would play if disputes arose about the enforceability of surrogacy contracts should the surrogate change her mind about relinquishing the baby to the intended parents.<sup>35</sup> The cases of *Baby M*<sup>36</sup> and *Johnson v. Calvert*<sup>37</sup> realized these thinkers' fears. Both cases involved surrogate mothers who changed their minds and sought to have the surrogacy contracts into which they had entered declared unenforceable.<sup>38</sup> The surrogate in the *Baby M* case won, and the court deemed unenforceable the contract that voided her parental rights to the child that she bore;<sup>39</sup> the surrogate in *Johnson v. Calvert* lost and was denied any legal rights to the child that she bore.<sup>40</sup> Of note: the surrogate in the *Baby M* case was a white woman who gave birth to a white

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33. See Roberts, *supra* note 24, at 212 n.10.

34. See *id.* at 210 (“As I have charted the proliferation of rhetoric and policies that degrade Black women’s reproductive decisions, I have also noticed that America is obsessed with creating and preserving white genetic ties. Trading the genetic tie on the market lays bare the high value placed on whiteness and the worthlessness accorded blackness.”).

35. Interestingly, Peng has documented that very rarely have surrogates changed their minds about relinquishing the children that they carry to the intended parents. See Peng, *supra* note 29, at 563 (“Out of 25,000 surrogacy arrangements estimated to have taken place since the 1970s, less than one percent of surrogate mothers have changed their minds and less than one-tenth of one percent of surrogacy cases end up in court battles.”). Indeed, she documents that surrogates usually conceptualize the surrender of the baby to the intended parents as a positive event. See *id.* (“Most surrogates have viewed the relinquishment of the baby as a happy event and have reported that they would be surrogates again. Longitudinal studies show that these attitudes remain stable over time.”).

36. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

37. 851 P.2d 776 (Cal. 1993).

38. *Johnson*, 851 P.2d at 778 (describing the facts of the case, in which the child’s birthmother refused to comply with the surrogacy contract); *In re Baby M*, 537 A.2d at 1237 (same).

39. *In re Baby M*, 537 A.2d at 1234 (“[I]n this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, [and] we void both the termination of the surrogate mother’s parental rights and the adoption of the child by the wife/stepparent. We thus restore the ‘surrogate’ as the mother of the child.”).

40. *Johnson*, 851 P.2d at 778 (declaring the Calverts as the child’s natural parents).

baby;<sup>41</sup> the surrogate in *Johnson v. Calvert* was a black woman who gave birth to a white baby.<sup>42</sup> The cases can be reconciled without allowing the race of the surrogates to have explanatory value because they involved different types of surrogacy: *Baby M* involved a traditional surrogacy arrangement within which the surrogate was genetically related to the child to whom she gave birth;<sup>43</sup> *Johnson v. Calvert* involved a gestational surrogacy arrangement within which the surrogate was genetically unrelated to the child to whom she gave birth.<sup>44</sup> The *Baby M* court found it unconscionable to separate a woman from her own genetic offspring.<sup>45</sup> On the contrary, the *Johnson v. Calvert* court was relatively undisturbed that its decision meant that a woman would have to be separated from a child with which she had no genetic<sup>46</sup> relationship.<sup>47</sup>

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41. Cherry, *supra* note 32, at 89 (explaining that the surrogate mother in the *Baby M* case was white).

42. *Id.* at 86 (explaining that Anna Johnson, the surrogate in the *Johnson* case, was an African-American single mother).

43. *Id.* at 89–90 (describing the *Baby M* case as one having to do with a traditional surrogacy agreement).

44. *Id.* at 90 (describing the *Johnson* case as one involving a gestational surrogacy agreement).

45. *In re Baby M*, 537 A.2d 1227, 1246–47 (N.J. 1988) (“The surrogacy contract guarantees permanent separation of the child from one of its natural parents. Our policy, however, has long been that to the extent possible, children should remain with and be brought up by both of their natural parents.”).

46. The court’s privileging of the fact that there was no *genetic* relationship between Anna Johnson and the baby that she bore caused it to dismiss the fact that Johnson had an extensive *biological* relationship with the baby. Her biological processes inevitably influenced—indeed, enabled—the baby’s own biological processes. And certainly, the baby’s biological processes impacted her own.

47. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (“We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.”). Some commentators have argued that part of the motivation for the judge’s decision to deny Johnson legal rights to the child that she bore was his, perhaps unconscious, sense that a black woman could not be a mother to a phenotypically white child. See Allen, *supra* note 26, at 23. Certainly, black women are thought capable of *mothering* white children. See *id.* (noting that “[t]hroughout history, Black women and mulatto women have been hired or enslaved to play a number of important *de facto* ‘mothering’ roles in American families”); Nsiah-Jefferson, *supra* note 28, at 35 (noting that Black women have mothered white children throughout history by acting as wet-nurses and nannies); Cherry, *supra* note 32, at 117 (observing that black women have always been “called upon to perform affective labor for White families” and noting that “[b]lack women traditionally have performed the affective labor of caring for White families’ homes and children in disproportionate numbers”). Nevertheless, they are thought incapable of being actual—and legal—*mothers of* white children. See Allen, *supra* note 26, at 23 (observing that although black women have mothered white children throughout history, “few regard Black women as the appropriate legal mothers of children who are not at least part Black”

Critical thinkers about race found these decisions immensely problematic. One begins to understand these thinkers' discontent by observing that, despite the fact that people of color suffer from infertility at higher rates,<sup>48</sup> white people are the primary consumers of advanced reproductive technologies, including surrogacy.<sup>49</sup> Further, because the traits that code for race oftentimes are passed through genes,<sup>50</sup> a white

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and observing that many believe that "Blacks are not supposed to have white children" and "Blacks are not supposed to want to have white children of their own—not in the adoption context and not, therefore, in the surrogacy context.”).

48. See Nsiah-Jefferson, *supra* note 28, at 32 (“Black women have an infertility rate one and one-half times higher than that of white women.”); Roberts, *supra* note 24, at 244 (“The use of fertility clinics does not correspond to rates of infertility. Indeed, the profile of people most likely to attempt IVF is precisely the opposite of those most likely to be infertile. The people in the United States most likely to be infertile are older, poorer, Black, and poorly educated.”).

49. See Roberts, *supra* note 24, at 244 (noting that “[o]ne of the most striking features of these technological efforts to provide parents with genetically related offspring is that they are used almost exclusively by affluent white people” and observing that “[m]ost couples who use IVF services are white, highly educated, and affluent”).

50. I choose to say that “the traits that code for race oftentimes are passed through genes” instead of “race is transmitted through genes” in order to clearly align myself with the body of thought that rejects the idea of biological race, choosing instead to conceptualize race as a social construction. The concept of biological race posits that races are genetically distinct or homogenous entities. See Deborah A. Bolnick, *Individual Ancestry Inference and the Reification of Race as a Biological Phenomenon*, in *REVISITING RACE IN A GENOMIC AGE* 70, 73 (Barbara A. Koenig et al. eds., 2008) (observing that while “traditional notions of race” are variable, “most describe racial groups as equivalent, biologically distinct units”). According to notions of biological race, race is passed along through the racial genes that members of that group possess. However, the weight of good science is against the concept of biological race. See, e.g., ASHLEY MONTAGU, *STATEMENT ON RACE: AN EXTENDED DISCUSSION IN PLAIN LANGUAGE OF THE UNESCO STATEMENT BY EXPERTS ON RACE PROBLEMS 15* (1951) (noting that race “is not so much a biological phenomenon as it is a social myth”); Charles N. Rotimi, *Are Medical and Nonmedical Uses of Large-Scale Genomic Markers Conflating Genetics and “Race”?*, 36 *NATURE GENETICS* S43, S44 (2004) (noting that “[t]o reap the full benefits of the Human Genome Project . . . we must be willing to move beyond . . . defined social proxies of genetic relatedness like ‘race’”); David R. Williams, *Race and Health: Basic Questions, Emerging Directions*, 7 *ANNALS OF EPIDEMIOLOGY* 322, 323 (1997) (noting the “growing consensus that racial classification schemes do not reflect genetic homogeneity”); Ritchie Witzig, *The Medicalization of Race: Scientific Legitimization of a Flawed Social Construct*, 125 *ANNALS OF INTERNAL MED.* 675, 678 (1996) (arguing that “race groupings are not biologically or anthropologically relevant”). Race, instead, is a social construction—formed by social and political processes, not biological processes. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 4 (2d ed. 1994) (describing the theory of racial formation as one that “emphasizes the social nature of race, the absence of any essential racial characteristics, the historical flexibility of racial meanings and categories, . . . and the irreducible political aspect of racial dynamics.”); Camara Phyllis Jones, *Invited Commentary: “Race,” Racism, and the Practice of Epidemiology*, 154 *AM. J. EPIDEMIOLOGY* 299, 300 (2001) (“Race is a social construct, a social classification based on a phenotype, that governs the distribution of risks and opportunities in our race-conscious society.”). Accordingly, race is not passed through the genes; instead, features (like skin color, eye shape, nose width, hair texture, etc.) that code for race in any particular sociopolitical moment are transmitted through genes.

couple seeking a traditional surrogacy arrangement (in which the surrogate is genetically related to the child that she bears) will look to a white woman to act as a traditional surrogate because of the latter's ability to give birth to a white baby and because of the couple's likely desire to have a baby that shares their racial ascription and identification. Black women and other women of color would not be sought after to act as traditional surrogates because they would likely be unable to give birth to the white children that the intended parents desire. On the other hand, women of color would be sought after to act as *gestational* surrogates because, having no genetic relationship to the children that they bear, they would be able to give birth to phenotypically white babies for the white couples that desire them.<sup>51</sup> As the *Baby M* and *Johnson v. Calvert* cases dramatized, white women acting as traditional surrogates would get rights to the babies that they bear if they changed their minds about surrendering the children to the intended parents. Simultaneously, women of color acting as gestational surrogates would have to relinquish the babies that they bear to the intended parents if they, similarly, changed their minds. Critical thinkers about race writing at the time that these cases were decided—scholars who were interested in interrupting the sometimes obvious, oftentimes obscure processes by which racial inequality in this country is reproduced—considered it self-evident that they should challenge a legal regime that recognizes the labor that white women perform while discounting and rendering invisible the labor that women of color perform.<sup>52</sup>

Moreover, to the extent that women of color, specifically black women, would be commissioned to act as gestational surrogates, critical thinkers about race writing during the late 1980s to mid-1990s thought the parallels to slavery were just too obvious to ignore. During the centuries of chattel slavery in the United States, enslaved black women were essentially surrogates: because their owners also owned *all* of the products of their labor, the women did not have any legal claim to the children they bore.<sup>53</sup> Just like Anna Johnson, the surrogate at the center of the dispute in *Johnson v. Calvert*, enslaved women bore for another's

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51. See Roberts, *supra* note 24, at 263 ("Gestational surrogacy invokes the possibility that white middle-class couples will use women of color to gestate their babies. Since contracting couples need not be concerned about the surrogate's genetic qualities (most importantly, her race), they may favor hiring the most economically vulnerable women in order to secure the lowest price for their services.").

52. *Id.*

53. See Allen, *supra* note 26, at 17–18 ("Before the American Civil War, virtually all southern Black mothers were, in a sense, surrogate mothers. Slave women knowingly gave birth to children with the understanding that those children would be owned by others.")



benefit children to whom they had no recognized legal claim.<sup>54</sup>

*B. Race and Surrogacy: Second Generation Concerns*

Interestingly, the fears that critical thinkers about race had about the potential of surrogacy in the U.S. to result in a class of indigent black women being used for the benefit of wealthy white people were not realized. As Peng delineates quite clearly, surrogates in the U.S. do not tend to be uneducated, poor, or racial minorities; further, they do not tend to be unaware of the psychological and physical risks that surrogacy entails.<sup>55</sup> In fact, surrogates in the U.S. actually tend to be fairly well educated,<sup>56</sup> financially stable,<sup>57</sup> *white* women<sup>58</sup> who choose to become surrogates for a plethora of reasons; very rarely do those reasons involve financial imperatives.<sup>59</sup>

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54. See Anita Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J. L. & PUB. POL'Y 139, 144 (1990) (“[A]s a result of the American slave laws, all black mothers were de facto surrogates. Children born to slaves were owned by Master X or Mistress Y and could be sold at any time to another owner. Slave women gave birth to children with the understanding that those children would be owned by others.”). It may be important to note that, while Allen argues that surrogacy and reproduction during the period of chattel slavery have important elements in common, she also notes that there is a danger involved in understanding the two as morally indistinguishable practices: “By treating the two practices as moral equivalents, one ignores the enormous scope of control the slave owner exerts over the slave, a feature quite lacking in surrogacy arrangements.” *Id.* at 142.

55. See Peng, *supra* note 29, at 560 (“The profile of surrogate mothers emerging from the empirical research in the United States and Britain does not support the stereotype of poor, single, young, ethnic minority women whose family, financial difficulties, or other circumstances pressure her into a surrogacy arrangement. Nor does it support the view that surrogate mothers are naively taking on a task unaware of the emotional and physical risks it might entail. Rather, the empirical research establishes that surrogate mothers are mature, experienced, stable, self-aware, and extroverted non-conformists who make the initial decision that surrogacy is something that they want to do.” (quoting Karen Busby & Delaney Vun, *Revisiting The Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 51–52 (2010)).

56. See *id.* at 561 (noting that “[s]urrogates have varying degrees of education, but a large proportion have had some higher education”).

57. See *id.* at 563–64 (citing Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 611 J. SOC. ISSUES 21, 31 (2005)) (observing that “research has not revealed that surrogate mothers are financially desperate” and citing studies that show that surrogates’ incomes tended to be modest (rather than low) and hovered around the median income level in the United States).

58. See *id.* at 560–61 (citing one study showing that the vast majority of surrogates are “Caucasian, Christian, and in their late 20–early 30s” and another showing that surrogates are “predominantly white” (citing Busby & Vun, *supra* note 55, at 42)).

59. See *id.* at 564 (citing one study within which only a “handful of women mentioned money as their main motivator” for becoming surrogates and another that “concluded that money was rarely the sole or even the primary reason for entering the surrogacy arrangement” (citing Ciccarelli & Beckman, *supra* note 57, at 30)). The reasons women cited for wanting to become surrogates were varied: “most surrogates reported enjoying pregnancy and childbirth, and many noted that surrogacy

Now, although we have not witnessed in the U.S. the development of a “breeder class” of indigent black women having white babies for the wealthy white couples who can afford to purchase their reproductive capacities, critical thinkers about race may still find reason to be troubled by the practice of surrogacy. As Peng insightfully notes,

[I]f the actual experience of surrogate mothers can be tabled as a reason for opposing surrogacy, then a different lens crystallizes: the issue is no longer about whether to protect a vulnerable class of women from making a decision harmful to themselves, but whether to restrict individual freedom for the benefit of better normative social ordering.<sup>60</sup>

Accordingly, critical thinkers about race may wonder about the effect that surrogacy may have on racial inequality in this country despite the fact that women of color are not being commissioned to act as surrogates. And critical thinkers about race may be disturbed by that very fact: *women of color are not being commissioned to act as surrogates*. We have to wonder why. It might be that the reproductive capacities of white women are simply more highly valued than those of women of color. It is possible that wealthy white couples that hire surrogates deem women of color untrustworthy. They may believe that women of color will somehow harm the children that they carry. As Dorothy Roberts writes, “Black mothers are seen to corrupt the reproduction process at every stage . . . . They damage their babies in the womb through their bad habits during pregnancy.”<sup>61</sup> Perhaps these discourses that construct black reproduction as a form of degeneracy explain the happenstance of white women being hired as surrogates to the exclusion of black women. Which is to say: the racial geography of surrogacy may nevertheless disturb critical thinkers about race. We might advocate for surrogacy’s restriction because we think that eliminating this racial geography results in a better normative social ordering.

Further, transnational commercial surrogacy arrangements have become increasingly popular in recent years. In India, which is one of a few countries that have not proscribed the practice, commercial surrogacy is big business.<sup>62</sup> Wealthy couples are traveling to the country

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increased their fulfillment and self-confidence and opened up their social circles. Others indicated that it allowed them a way to continue being a mother to their own children.” *Id.*

60. *Id.* at 558.

61. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 9 (1997).

62. See Bhalla, *supra* note 31 (noting that while commercial surrogacy is banned in most

in large numbers to hire invariably indigent Indian women to carry and give birth to the couples' genetic progeny.<sup>63</sup> In this context, the concerns that critical thinkers about race have articulated about the ownership and exploitation of the bodies of women of color for white benefit have come to be realized.

And there is always the possibility that, in the future, couples seeking surrogates will turn to U.S.-born women of color.

Essentially, surrogacy may create a racial catch-22: the commissioning of women of color to act as surrogates may be as terrifying as the failure to commission women of color to act as surrogates.

### III. RETHINKING THE RACIAL IMPLICATIONS OF SURROGACY POST-*WINDSOR*?

We must ask whether critical thinkers about race should reconsider their distaste for surrogacy in light of the new context provided by the legalization of same-sex marriages and *Windsor*'s legitimation of families headed by same-sex couples. That is: does the practice of surrogacy become less problematic when the intended parents are a same-sex couple? Are the disturbing racial implications of surrogacy eliminated, or at least somewhat muted, when the practice is commissioned by a same-sex couple desiring to start a family?

There may be something quite different about surrogacy when it is same-sex couples, instead of privileged different-sex couples, that are using the bodies of relatively unprivileged women to produce their families. While some LGBT persons may enjoy privileges (of class and race, for example), it would be wrong to claim that they are privileged in every respect. That is, as sexual minorities, they lack a privilege that heterosexual, cisgender<sup>64</sup> persons enjoy. Ours is a society in which LGBT persons are currently battling to win some semblance of formal equality—let alone substantive equality.<sup>65</sup> And the fight for formal

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countries, India is “free of regulation” and describing commercial surrogacy in India as “a lucrative, \$400 million-a-year business with over 3,000 fertility clinics across India that recruit poor, uneducated women to carry the embryos of others through to birth”).

63. *See id.*

64. “Cisgender” is a term that refers to people who are not transgender. *See* Dean Spade, *Be Professional!*, 33 HARV. J.L. & GENDER 71, 76 n.6 (2010).

65. It is important not to equate formal equality with substantive equality. Should LGBT persons win formal equality under law, inequalities between LGBT persons and their heterosexual, cisgender counterparts will likely endure due to the operation of structural and institutional forces. *See* Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. Rev. 1010, 1066

equality is far from over. While *Windsor* is significant insofar as it prohibits the federal government from discriminating between different-sex marriages and same-sex marriages that are recognized by the states,<sup>66</sup> it does not directly speak to the constitutionality of states denying same-sex couples the right to marry.<sup>67</sup> Indeed, at the time of printing, in fifteen states, individuals do not have the right to marry their partners if they are of the same sex.<sup>68</sup> If equality means equal rights, then LGBT persons do not enjoy equality in this country.

Moreover, marriage equality may be the tip of the iceberg. In many jurisdictions, LGBT persons are not protected from discrimination

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(2014) (“It would be remarkable if over a century of legal condemnation and attempted erasure of same-sex desire did not leave a mark . . . . Advocates for LGBT people should think more critically about the enduring effects of homophobia as well as the structural obstacles that same-sex couples are likely to face.”).

66. *Windsor* may be far more significant from a discursive perspective. That is, it may bring only insubstantial *material* changes to the lives of LGBT persons. First, the only individuals that directly benefit from the decision are those who are married to partners of the same-sex. That may be a small slice of a larger LGBT community. See *Same-Sex Couple Households by Sex, Partner Status and Presence of Children—States: 2010, 2014* PROQUEST STAT. ABSTRACT OF THE U.S. 60 (stating that the U.S. Census estimated 646,464 same-sex households with 131,729 reporting that they were married, which is about twenty percent of same-sex households). Second, the practical benefits that this slice receives may be modest. See *United States v. Windsor*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2675, 2694 (2013) (noting that DOMA deprives same-sex couples of the “Bankruptcy Code’s special protections for domestic-support obligations [and it] forces them to follow a complicated procedure to file their state and federal taxes jointly”). Moreover, those benefits might be offset by the disadvantages that are concomitant to those benefits. See *id.* at 2695 (noting that DOMA exempts same-sex married couples from considering the income of both spouses when calculating financial aid eligibility, and it also exempts same-sex married couples from certain rules designed to prohibit conflicts of interest that result when a person’s spouse has a financial interest in activities in which he/she is involved). Of course, those “disadvantages” may seem like benefits when one considers that they are a product of the fact that the state recognizes the relationship.

However, *Windsor* is much more significant when one considers the cultural work that it does. It communicates the message that LGBT persons are not deviants within the body politic. Indeed, far from being dangerous aberrations that should be expunged from society or strange anomalies that should be merely tolerated, *Windsor* declares that sexual minorities are to be embraced as equal and valued contributors to the nation. In this sense, *Windsor* is quite a landmark decision.

67. Of course, as Justice Scalia laments in his characteristically spirited dissent, the logic of the decision is consistent with a finding that it is unconstitutional for states to deny individuals the ability to marry partners of the same sex. See *id.* at 2709–10 (Scalia, J., dissenting) (performing a series of slight alterations to the text of the majority opinion in order to illustrate how little of it needs to be changed in order to transform the opinion into one that declares the unconstitutionality of state laws limiting marriage to different-sex couples). In his Article for this symposium, Dean Infanti has compiled a comprehensive, state-by-state chronology of the decisions since *Windsor* in which courts have taken Justice Scalia at his word and have struck down state marriage bans. See Anthony C. Infanti, *The House of Windsor: Accentuating the Heteronormativity in the Tax Incentives for Procreation*, 89 WASH. L. REV. 1185, 1188–1210 (2014).

68. *Freedom to Marry—States*, FREEDOM TO MARRY.ORG, <http://www.freedomtomarry.org/sites/> (last visited November 25, 2014).

through civil rights statutes that prohibit discrimination on the basis of sexual orientation and/or gender identity.<sup>69</sup> Accordingly, in many jurisdictions, it is still perfectly legal to deny sexual minorities housing, employment, education, and public accommodations—indeed, the basic stuff of citizenship—because of their sexual orientation or gender identity. Further, one cannot confidently claim that the law and the society it regulates are definitely on a path that will inevitably end in sexual minorities being determined to be legally indistinguishable from their heterosexual, cisgender counterparts. That is, it is not at all clear how the law will answer the question of “religious accommodations” and “religious exemptions”—specifically whether religious organizations can be exempted from civil rights laws prohibiting discrimination on the basis of sexual orientation and/or gender identity when that prohibition conflicts with their tenets.<sup>70</sup> As such, it is not at all clear that LGBT persons will ever be free from state-sanctioned discrimination. The courts may determine that such discrimination is allowed—indeed, the First Amendment or the Religious Freedom Restoration Act may protect it—as long as a religious entity is the perpetrator of the discrimination.

To argue that sexual minorities lack the privileges that their heterosexual, cisgender counterparts have, one need not look solely at the patchwork of antidiscrimination laws and the uncertainty of whether the courts will answer the question of religious accommodations so as to maintain LGBT persons’ second-class citizenship status. One can also

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69. Significantly, it was less than twenty years ago that Justice Scalia (and others) characterized laws prohibiting discrimination on the basis of sexual orientation as giving “special rights” and “special protections” to sexual minorities. *Romer v. Evans*, 517 U.S. 620, 641–42 (1996) (Scalia, J., dissenting) (describing Amendment 2, which prohibited at any level of Colorado government the passage of laws that protected LGBT persons from discrimination, as prohibiting the passage of laws that gave “special favors” or “special protections” to this group). Indeed, one organization opposed to allowing LGBT persons to receive protections under basic antidiscrimination statutes disseminated a video titled “Gay Rights/Special Rights,” in which it made the claim that is the title of the video. See Ninja Scroll, *Gay Rights, Special Rights: Inside the Homosexual Agenda*, YOUTUBE (Jan. 17, 2011), <https://www.youtube.com/watch?v=RPZv6cATn-w> (last visited June 16, 2014). If basic protections against discrimination give something “special” to sexual minorities, then it follows that those basic protections are undeserved. It was less than twenty years ago that a Justice that sits on this nation’s highest Court made that argument. This may imply that we, as a nation, are farther away from treating sexual minorities as equals than *Windsor* suggests.

70. See *Burwell v. Hobby Lobby Stores, Inc.*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2751 (2014) (holding that the Religious Freedom Restoration Act exempts a closely held, for-profit corporation from a law that conflicts with the owners’ religious beliefs). While *Hobby Lobby* speaks neither to the religious rights that non-closely held companies have nor to the rights that corporations may or may not have under the First Amendment, it certainly does not close the door to corporations and individuals arguing that they ought to be exempt from laws that prohibit discrimination on the basis of sexual orientation and/or gender identity because the prohibition conflicts with their religious beliefs.

look at the fact that sexual minorities are victims of crimes directed at them because of sexual orientation and/or gender identity at rates that dwarf their counterparts. The National Coalition of Anti-Violence Programs (“NCAVP”) reports that over 2000 LGBT persons were victims of bias-motivated violence in 2012.<sup>71</sup> Twenty-five persons were killed.<sup>72</sup> Moreover, more than half of persons who identify as LGBT report being concerned about being a victim of bias-motivated violence.<sup>73</sup> This is a concern that most non-LGBT persons simply do not have.<sup>74</sup> That sexual minorities are unprivileged relative to heterosexual and cisgender individuals is also demonstrated by the vulnerability experienced by many LGBT youth. According to the Centers for Disease Control (“CDC”), reports from LGBT youth indicate that eighty percent of LGBT youth had been verbally harassed at school, forty percent had been physically harassed, and twenty percent had been the victims of a physical assault.<sup>75</sup> The CDC also reports that LGBT youth have higher rates of suicidal thoughts, suicide attempts, and suicide than their heterosexual, cisgender counterparts.<sup>76</sup>

So, yes: it may be fair to characterize LGBT persons as unprivileged. Accordingly, should LGBT persons look to poorer women of color—women who do not enjoy class and race privilege—for their assistance in producing the families that they desire, then we as a society will witness the unprivileged helping the unprivileged. And we might understand that as a revolutionary alliance. Undeniably, the racial geography that disquieted many critical thinkers about race could still be realized. Because race privilege follows class privilege closely in this country, those same-sex couples with the money to afford a surrogacy arrangement will likely be white. Thus, we may still witness wealthy

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71. NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2012 8 (2013), available at [http://www.avp.org/storage/documents/ncavp\\_2012\\_hvreport\\_final.pdf](http://www.avp.org/storage/documents/ncavp_2012_hvreport_final.pdf). Note that LGBT persons of color are almost twice as likely to be victims of violence and discrimination as are white LGBT persons. *Id.* at 9.

72. *Id.*

73. MICHELLE A. MARZULLO & ALYN J. LIBMAN, HUMAN RIGHTS CAMPAIGN, HATE CRIMES AND VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE 7 (2009), available at [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Hatecrimeandviolenceagainstlgbtpeople\\_2009.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Hatecrimeandviolenceagainstlgbtpeople_2009.pdf).

74. *See id.* (“Less than one in 10 out of the general population (6 percent in 2007 and 7 percent in 2006) frequently worries about hate violence; just more than half (55 percent in 2007 and 52 percent in 2006) never worry about becoming the victim of a hate crime.”).

75. *See Lesbian, Gay, Bisexual, and Transgender Health—Youth*, CTRS. FOR DISEASE CONTROL, <http://www.cdc.gov/lgbthealth/youth.htm> (last visited May 22, 2014).

76. *Id.*

white persons commoditizing the bodies and reproductive capacities of poorer black, Latina, and Indian women. However, that the privileged whites commoditizing the bodies of women of color are simultaneously unprivileged sexual minorities may perhaps temper the disquieting aspects of the racial geography. Might we conceptualize surrogates as black, Latina, and Indian allies to LGBT persons and communities? And in light of the perception that communities of color in the U.S. do not support the movement for full civil rights for sexual minorities,<sup>77</sup> might this alliance be worthy of celebration?

But then again, critical thinkers about race have been careful in other contexts not to celebrate the disadvantaging of unprivileged groups by other unprivileged groups.<sup>78</sup> Indeed, the emergence of Latino Critical Race Studies, or LatCrit, can be understood as an effort to challenge the disadvantaging of one unprivileged racial group by another unprivileged racial group. LatCrit was a response to the silencing of Latinos' experiences with racial discrimination in traditional Critical Race Theory (CRT).<sup>79</sup> LatCrit charged that CRT utilized a black/white paradigm of race relations and racism, making it difficult and oftentimes impossible for CRT theorists to see the racism in practices to which black people were not subjected.<sup>80</sup> For example, the black/white paradigm rendered unrecognizable as racism discrimination on the basis of language, accent, and immigration status—forms of discrimination that were not leveled against United States-born black people, but to which Latinos, Asians, and other non-black racial minorities were commonly subjected.<sup>81</sup> LatCrit criticized CRT for being somewhat willfully blind to the experiences of non-black racial minorities—for seemingly wanting to have a monopoly on racial victimhood and to dominate the

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77. See Robinson, *supra* note 65, at 1021–35 (documenting the prevalence of the belief that black people did not support civil rights for LGBT people after the former were unfairly blamed for the passage of Proposition 8 in California, which stripped LGBT persons of their right to marry their partners).

78. See *also id.* at 1037 (discussing the “hierarchies among sexual minorities” as well as the “descriptive claim that minorities do not discriminate against other minorities”).

79. See Leslie Espinosa & Angela P. Harris, *Afterword: Embracing the Tar Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1615 (1997) (noting the “black/brown conflict” that can describe the LatCrit critique of traditional CRT).

80. See Juan F. Perea, *The Black/White Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213, 1215 (1997) (arguing that “the Black/White binary paradigm operates to exclude Latinos/as from full membership and participation in racial discourse” and contending that the “exclusion serves to perpetuate not only the paradigm itself but also negative stereotypes of Latinos/as”).

81. See Espinosa & Harris, *supra* note 79, at 1618 (describing how language and accent discrimination is “invisible” within the black/white paradigm of race relations).

conversation about racial suffering in the United States.<sup>82</sup> It is fair to say that CRT has taken seriously LatCrit's critique and has developed a richer understanding of race and racism in the years since the critique was first articulated.<sup>83</sup> This history of the dialogue between LatCrit and CRT should serve to demonstrate that critical thinkers about race have been careful not to greet the disadvantaging of disempowered groups by other disempowered groups as wanted; indeed, they would certainly refuse to describe exploitation of one unprivileged group by another as a revolutionary alliance. We as a society might be well advised not to do so in the context of surrogacy. We might condemn the exploitation of those who are unprivileged by virtue of class and race at the hands of those who are unprivileged by sexual orientation. Further, we ought to be aware that those who would be purchasing the services of surrogates, although unprivileged by virtue of sexual orientation, would remain privileged by virtue of race and class.<sup>84</sup>

Moreover, we might be aware of the fractures within the LGBT community around the issue of same-sex marriage. Some LGBT persons, many of whom are racial minorities, are critical of the prioritization of marriage equality.<sup>85</sup> They fear that those who will enjoy

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82. See *id.* at 1615 (articulating the sense that black Americans had “bought the franchise on race victimhood and [did not] want to share the territory of suffering—and righteous indignation—with other outsider groups”).

83. See, e.g., KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* (2011) (analyzing the complex racial discourses that operate in an obstetrics clinic serving an incredibly diverse population of poor women seeking prenatal care).

84. See Robinson, *supra* note 65, at 1036 n.125 (noting that when “whites come out as LGB, they may for the first time form an identity as a minority”; however, it “does not automatically erase a lifetime of experiences as a fully privileged white American, nor does it eradicate the white privilege that LGB people enjoy even when fully out of the closet”).

85. See Marlon M. Bailey, Priya Kandaswamy & Mattie Udora Richardson, *Is Gay Marriage Racist?*, in *THAT'S REVOLTING!: QUEER STRATEGIES FOR RESISTING ASSIMILATION* 113, 117 (Mattilda Bernstein Sycamore ed., 2008) (contending that the movement for same-sex marriage “is led by white middle-class gays and lesbians who would largely benefit from same-sex marriage”); Feinberg, *supra* note 4, at 258–59 (“The movement’s focus on marriage equality as opposed to acquiring legal rights and protections to serve the needs of the diverse relationship and familial forms in existence today without regard to marriage eligibility (pluralistic relationship recognition) has long been the subject of criticism by many individuals within the LGBT rights movement.”). While many critics of the marriage equality movement have been racial minorities, many racial minorities are strong supporters of the movement. See JUAN BATTLE ET AL., *NAT’L GAY AND LESBIAN TASK FORCE, SAY IT LOUD: I’M BLACK AND I’M PROUD* 29 (2002), available at [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/SayItLoudBlackAndProud.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/SayItLoudBlackAndProud.pdf) (noting that the LGBT persons of color who were surveyed ranked marriage equality as the third most important issue their community faced and observing that the survey results “contradict[] the position of those, most often on the left, who see marriage as an issue most salient to White GLBT communities”).



in practice the security that the marriage right brings in theory are those who are the most privileged members of the LGBT community—wealthy white people.<sup>86</sup> Some LGBT persons argue that the energies of the community are better spent working to produce change that could make less precarious the lives of the most marginalized sexual minorities.<sup>87</sup> Given the tragic vulnerability of many poor black and Latino LGBT persons, and given the likelihood that marriage equality will do nothing to change their desperate circumstances, these voices argue that fighting for the right to marry is an exorbitant luxury—a disastrous waste of resources.<sup>88</sup>

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86. See, e.g., JUAN BATTLE ET AL., *supra* note 85, at 29 (observing that “some progressives and radicals within the GLBT movement argue that the prioritization of civil marriage rights reflects the dominance of the movement by White, middle class people” and that “[s]ome have even said marriage is a ‘White’ gay issue”); Bailey, Kandaswamy & Richardson, *supra* note 85, at 115–16 (“We should not assume, in a racist, sexist, heterosexist and homophobic society, that all people will have access to the so-called rights and privileges that marriage purports to offer . . . . For many Black people, marriage has never been the answer to these problems simply because Black people’s social institutions are not seen as institutions worth honoring.”). In an insightful article, Luke Boso notes that simply *coming out* as LGBT may be a luxury of the privileged. Luke Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562, 599 (2013). He notes that for many individuals residing in rural parts of the country, coming out may not be a tenable option, given the hostility that may greet public affirmations of LGBT identity. He writes that “coming out [might] be self-destructive or even dangerous” if there is not a welcoming community that will greet such affirmations. *Id.* at 597. Because of the dangers of public affirmations of LGBT identity, as well as the possibility that declaring such an identity may overwhelm other equally salient identities that persons have, many individuals residing in rural parts of the nation do not choose to identify as LGBT—even to themselves. See *id.* at 596 (“Rural sexual minorities who come out, or tell others that they are gay, risk being seen only through the prism of sexual orientation, regardless of how significant or insignificant sexuality is to their individual identities. Reflecting this reality, many rural people who have same-sex desire or same-sex sex reject LGB identities.”); *id.* (“[B]ecause many rural sexual minorities are detached from dominant narratives about gay culture and identity, or are unable to access gay communities and amenities tangibly, they simply decline to self-identity as LGB because they feel excluded by these purported indicia of gay culture.”). If coming out as LGBT is a privilege that many of those who reside in rural areas do not have, then it is clear that the right to marry a person of the same-sex would mean very little to them. Boso also notes that some LGBT persons residing in rural parts of the country may strike a compromise with their communities: although their same-sex desires and relationships may be known generally, they will not “engage in overt same-sex intimacy or other markers of gay identity” in exchange for the ability “to participate in community life.” *Id.* at 598. It may be that marrying an individual of the same sex would violate this “unspoken transactional bargain.” *Id.*

87. See, e.g., Bailey, Kandaswamy & Richardson, *supra* note 85, at 117–18 (arguing that the leaders of the movement for same-sex marriage “are not concerned about . . . the vast majority of people of color who do not enjoy such social mobility and who are largely disenfranchised, and who need health care and don’t have it,” and contending that when these leaders characterize marriage equality as the “‘last barrier’ to full citizenship . . . [t]his argument is a slap in the face to everyone who continues to experience institutionalized oppression in this country”).

88. See *id.* at 119 (arguing that “marriage is not even a first step for addressing the needs of queer people”); Boso, *supra* note 86, at 608 (noting that “issues considered most pressing for urban gays and lesbians, such as marriage equality or obtaining benefits for same-sex partners, may lack the

These critics of the movement for marriage equality would balk at the suggestion that *Windsor* declares legitimate *all* families that are headed by parents of the same sex. They would argue that *Windsor* declares the legitimacy of only *some* families that are headed by parents who are of the same sex. The analogy is to the jurisprudence that declares the sanctity of the family and declares the principle that the state ought not to cross the highly idealized line that separates the public from the private family.<sup>89</sup> Indeed, the Court has spoken of a “private realm of family life which the state cannot enter.”<sup>90</sup> Yet, this private realm exists solely in theory for many poor families of color. The state’s power of *parens patriae* gives the state the ability to override individuals’ rights to keep the government out of their private families if the state intervenes in order to protect children from abuse and neglect. This *parens patriae* power is often invoked to justify the state’s regulation of poor families.<sup>91</sup> And while it is not entirely clear that children in poor families are more frequently abused and neglected,<sup>92</sup> it *is* entirely clear that these families

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same urgency for economically and geographically marginalized sexual minorities” and observing that, for rural sexual minorities, “access to basic resources may constitute even more pressing ‘homosexual issues’”); Robinson, *supra* note 65, at 1038 (noting that “[w]ealthy white males dominate the gay rights agenda, which prioritizes rights that are most meaningful for people who are middle or upper class and neglects the discrimination faced by poorer LGBT people, such as in the contexts of immigration and mass incarceration”).

89. Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 520 (1996) (“The Supreme Court has long interpreted the Constitution as creating a zone of privacy that insulates families from state intrusion.”).

90. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

91. See Kindred, *supra* note 89, at 530–31 (“Although there is a general lack of consensus as to standards establishing what constitutes neglect or when a court should declare a particular child as neglected, poverty is a common characteristic of families charged with neglect. Evidence suggests that the state routinely intercedes in poor families and that poor children are more likely to end up in the foster care system than are children of other classes.”).

92. Some scholars have disputed the assumption that poor parents are more likely to abuse or neglect their children. They argue instead that officials perceive non-abusive and non-neglectful parenting behaviors as abuse and neglect because they view these behaviors through a dominant cultural lens. See Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 788–89 (2001) (“Neglect and, to a lesser extent, abuse, are problematic standards that are extraordinarily contingent on cultural norms of decisionmakers. Many . . . have criticized these standards as class-based and racially discriminatory.”). There is also a strong argument that poor mothers are more likely to come within the ambit of child protective services not because they are more abusive or neglectful towards their children, but rather because they do not conform to traditional ideas of how women are supposed to behave. See Annette Ruth Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 579 (1997) [hereinafter Appell, *Protecting Children*] (noting that some poor mothers of color “deviate from the normative notions of mother and womanhood and are defined as bad”); Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL’Y 61, 62 (1995) (arguing that the termination of parental rights is often “not based on the mother having harmed the child, but rather on the mother exhibiting

are more frequently regulated pursuant to the state's power of *parens patriae*.<sup>93</sup> The result is that there may be two principles that govern families in this country: one of nonintervention for wealthier families and another of intervention for poorer families, who are disproportionately of color. Writes one observer,

In the U.S., race is the strongest determinant of whether or not the state chooses to recognize your parental ties. Black families are the most likely of any racial group to be disrupted by Child Protection authorities, and 42 percent of all children in foster care in the U.S. are black.<sup>94</sup>

There may be little reason to believe that things would be any different for families of color that are headed by same-sex spouses. That is, while *Windsor* declares the legitimacy of same-sex marriages and the families produced by the spouses involved in those marriages, it may not declare the legitimacy of same-sex marriages and the families produced by the spouses involved in those marriages when the spouses are people of color. As one commentator has noted:

If being married doesn't protect straight black families from having their children taken away, it's unlikely that it will protect queer black families . . . . While marriage might offer limited protections to some people, it will not change the

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the characteristics of being a bad woman" and concluding that "[s]ince bad women can never be good mothers, their relationships with their children are terminated on that basis"). Thus, the state's power of *parens patriae* takes on a more punitive, instead of protective, cast. See Appell, *Protecting Children*, *supra*, at 579 (describing child protective services as an "often punitive, rather than empowering, system focused more on mothers than on their children"). Finally, there is the argument that poor families come within the ambit of child protective services more frequently simply because they lead more public lives—having to rely on public services and institutions more often than their wealthier counterparts. Appell makes this point quite eloquently:

Poor families are more susceptible to state intervention because they lack power and resources and because they are more directly involved with governmental agencies . . . . [P]oor families lead more public lives than their middle-class counterparts: rather than visiting private doctors, poor families are likely to attend public clinics and emergency rooms for routine medical care; rather than hiring contractors to fix their homes, poor families encounter public building inspectors; rather than using their cars to run errands, poor mothers use public transportation.

*Id.* at 584. It is because of the increased frequency of contact with the state and its agents that they find themselves under state surveillance at higher rates than wealthier counterparts. The assumption is that if wealthier parents had to depend on the state and the services it provides as often as do the poor, their parenting would be observed, and problematized, more frequently.

93. See Appell, *Protecting Children*, *supra* note 92, at 584 n.35; Kindred, *supra* note 89, at 533 ("[F]amily problems of the indigent come to the attention of child welfare agencies at a disproportionate rate . . . . State protective agencies routinely rely on neglect statutes to remove children from the homes of parents who are too poor to support them."); Roberts, *supra* note 24, at 269 n.257.

94. Bailey, Kandaswamy & Richardson, *supra* note 85, at 115.

racist . . . practices through which Child Protection Services determines who is fit or unfit to be a parent.<sup>95</sup>

It is not at all unreasonable to assume that if these critics of the movement for marriage equality conceptualize expending resources to fight for marriage equality as an inessential extravagance, they would conceptualize any attention given to problematizing prohibitions against surrogacy as an even more lavish exercise in indulgence. They would likely argue that it is simply indulgent to fight for the ability to commission a surrogate's services when the vulnerable sexual minorities who are the focus of these critics' activism are struggling to provide basic necessities for themselves and their families. They would argue that it is entirely indulgent to fight for legalized surrogacy markets when the most marginalized sexual minorities are struggling for recognition.<sup>96</sup>

Additionally, these critics would likely be concerned about what legalized surrogacy markets would mean for more marginalized sexual minorities. There is a reasonable fear that, if surrogacy became more widespread, families whose children do not share a genetic relationship with at least one of the parents would be perceived as less "family-like" than families in which there is a genetic bond between parent and child.<sup>97</sup> That is, if surrogacy became more widespread, wealthier same-sex couples could rely on surrogacy and become parents to genetically related children, while poorer couples would have to depend on the adoption of genetically unrelated children in order to become parents. The former families would mimic in important ways families headed by different-sex parents inasmuch as their children would share genetic bonds with the parents, whereas the latter families would not feature

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95. *Id.* These same-sex families of color do not exist in theory alone. One study shows that thirty-four percent of black same-sex couples are raising children, amounting to approximately 20,000 families. See ANGELIKI KASTANIS & GARY J. GATES, WILLIAMS INST., LGBT AFRICAN-AMERICANS AND AFRICAN-AMERICAN SAME-SEX COUPLES 2 (2013).

96. See, e.g., Bailey, Kandaswamy & Richardson, *supra* note 85, at 119 ("[W]e live in bodies that are not exclusively 'male' or 'female.' Many of our genders and the genders of our lovers are not recognized by the state at all.").

97. The significance of the genetic tie is variable; it might be privileged or unprivileged, as needed, in order to protect the patriarchal nuclear family or to preserve racial hierarchies. See Roberts, *supra* note 24, at 252 (examining "the shifting significance of genetic connections in various disputes over legal parentage" and arguing that the examination "reveals more clearly than any other exercise the social and historical indeterminacy of this biological fact"). Accordingly, we should expect that families in which there is a genetic bond between parent and child would only be privileged if the privileging preserves gender and racial hierarchies. As such, if the same-sex couples that use surrogacy to produce genetically related children are white, then we might expect the genetic tie to be privileged, as its privileging would facilitate the privileging of a family form common among white people.

genetic connections between parents and children. The latter families, headed by same-sex parents who do not have the means to participate in legalized surrogacy markets, may be perceived as the less legitimate versions of their class-privileged counterparts.<sup>98</sup> They may be treated as such within law.

Even in our legal present, where surrogacy is illegal in several jurisdictions and extremely constrained in others, the families that same-sex couples without privilege create are not treated as deserving of the same respect as are other families. Indeed, some activists have put forth the call to sexual minorities to “organize to have non-biological ties to children recognized and respected.”<sup>99</sup> If non-biological ties to the children that sexual minorities have formally and informally adopted are going unrecognized and disrespected in a legal terrain where it is challenging for same-sex couples to produce biologically related children, there is reason to fear that those non-biological ties will be denigrated even further in a legal terrain where those with the means can more easily access and purchase biological ties to children. If dominant discourses already construct families headed by same-sex couples as inferior when children are genetically unrelated to their parents,<sup>100</sup> what will happen to them—discursively and materially—when more same-sex

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98. Analogous to this concern is the concern raised by many within the LGBT civil rights movement that the legalization of same-sex marriage will result in the delegitimizing of nonmarital relationships between people. *See* Feinberg, *supra* note 4, at 273 (noting the fear that “pursuing same-sex marriage would necessitate ‘perpetuating the elevation of married relationships’” (quoting Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *OUT/LOOK: NAT’L GAY & LESBIAN Q.*, Fall 1989, reprinted in William B. Rubenstein, Carlos B. Ball & Jane S. Schacter, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 695 (4th ed. 2011)); JUAN BATTLE ET AL., *supra* note 85, at 29 (observing that some LGBT persons “worry that condoning marriage will lead to greater exclusion of those who choose not to marry or choose to engage in nonnormative relationships and sexual exchanges”). This fear has borne out in practice, as many proponents of marriage equality have disparaged the institution of domestic partnerships and other institutions of nonmarital relationships established by the state in order to make the argument that marriage is singular and LGBT persons ought to have access to it. *See* Feinberg, *supra* note 4, at 259 (“In order to promote marriage equality, supporters have been utilizing tactics that involve touting marriage as a superior relationship status and disparaging nonmarital relationship statuses as inadequate, inferior, and discriminatory substitutes for marriage.”). Moreover, jurisdictions have repealed or narrowed statutes recognizing domestic partnerships and other avenues of nonmarital relationship recognition when they have amended their laws to recognize same-sex marriages. *Id.*

99. Bailey, Kandaswamy & Richardson, *supra* note 85, at 115.

100. *See id.* at 118–19 (noting that the families composed of sexual minorities of color tend to be “more ‘queer’ than simply having two parents and children; we have kids enter our lives from our extended families, from our neighbors and friends” and suggesting that the veneration of same-sex couples who have families that approximate in structure those of different-sex couples “do[es] violence to the numerous forms of intimate arrangements and loving parenting that do not conform to mainstream ideas”).

couples can form genetically related families that mimic heterosexual norms? There may be little reason for optimism.

## CONCLUSION

This Article has endeavored to demonstrate that surrogacy may function to exacerbate the marginalization of families that are already quite marginalized as well as reaffirm extant racial hierarchies in this country. Accordingly, we have excellent reasons for opposing the practice.

However, there may be more effective ways of disrupting racial and other social hierarchies than simply banning surrogacy. Indeed, a ban on surrogacy may do little to interrupt the macro processes by which racial inequality is reproduced. Accordingly, this Article does not take the “easy way out” by calling for a prohibition on surrogacy. Instead, it argues that if social justice is to be realized in this country, we must do difficult, truly transformational work. Prohibiting surrogacy seems like a quick fix that likely will fix nothing.

Part of the difficult, transformational work that will produce real social justice consists of supporting families headed by same-sex couples, *as well as families headed by different-sex couples*, within which parents and children do not share a genetic relationship. With this in mind, it is well documented that the genetic tie is not quite as venerated among many black people in the United States.<sup>101</sup> For many African Americans, blood relationships do not necessarily create families.<sup>102</sup> Much more important than genetics is love. We ought to look to these communities for models of alternative family forms within which genetics is not the tie that binds. More importantly, we ought to do the difficult cultural work of unsettling the discourses that construct these families as the inferior version of “real” families that are united by blood.<sup>103</sup> We need to create counternarratives about what constitutes “good” and “bad” families. Equally important, we need to support nontraditional families wherein biology does not unite parents with

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101. *See, e.g.*, Roberts, *supra* note 24, at 230–31 (“The genetic tie has a different meaning for most Black people than for most whites . . . Black cultural definitions of group and self center less on the genetic tie than white cultural definitions do.”).

102. *See id.* at 269 (“Blood ties have not held the preeminent position in Black families that they have held in white families. Blacks’ incorporation of extended kin and nonkin relationships into the notion of ‘family’ goes back at least to slavery.”).

103. *See, e.g., id.* at 271–72 (stating that the “genetic tie is not a glorified prerequisite for inclusion in the Black family” and noting that families in which members are not genetic kin may challenge “the dominant conceptions of kinship bonds”).

children once they are created. And we need to facilitate the creation of these families.

In this vein, we should put at the center of our crosshairs laws and policies that make it difficult or impossible for same-sex couples to foster or to adopt children.<sup>104</sup> Such laws and policies include those that effectively ban same-sex couples from adopting children,<sup>105</sup> that prevent same-sex couples from acting as foster parents,<sup>106</sup> and that prioritize different-sex married couples when placing children in state custody in foster homes.<sup>107</sup> If, as this Article has suggested, *Windsor* declares the legitimacy of families headed by individuals of the same-sex, then the decision should be understood as calling into question the legitimacy of these types of policies as stridently as it calls into question prohibitions on compensated surrogacy.

There is other difficult work to be done as well. But, this seems like a fair place to start inasmuch as it does not involve limiting opportunities for the privileged, but rather expanding opportunities for the unprivileged.

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104. It is worth noting that challenges to these laws are also challenges to systems that reiterate racial inequality in this country. There are two reasons for this. First, black children are overrepresented in the foster care system. *Id.* at 269 n.257. Accordingly, laws that make it difficult for foster children to be placed in loving, permanent homes mean that more black children will suffer the ill effects of being institutionalized during their formative years. Stacy Robinson, Comment, *Remedying Our Foster Care System: Recognizing Children's Voices*, 27 FAM. L.Q. 395, 397 (1993) ("This country is presently in the midst of a foster care crisis. The foster care system is ravaged by problems, including increasing numbers of children in the system, large case loads for caseworkers, inadequate funding of social services and foster care, and ineffective representation of the children in the system."). Second, there are indications that parenting is more common among black lesbians as compared to other racial groups. See JUAN BATTLE ET AL., *supra* note 85, at 15 (observing that "parenting is somewhat more prevalent among Black lesbians than among White lesbians"). As such, laws that make it difficult or impossible for same-sex couples to adopt or to foster children function to disproportionately burden black people. See *id.* (noting that "anti-gay parenting policies may pose a particular threat to Black lesbians or would-be parents").

105. *E.g.*, FLA. STAT. ANN. § 63.042 (West, Westlaw through 2014 Sp. "A" Sess.), *invalidated by* Fla. Dep't of Children & Families v. *In re* Adoption of X.X.G., 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010); MISS. CODE ANN. § 93-17-3(5) (West, Westlaw through 2014 Regular First & Second Extraordinary Sess.).

106. Administrative Memorandum – Human Services – #1-95 from Mary Dean Harvey, Director Neb. Dep't of Social Servs., Placement in Foster Care (Jan. 23, 1995), *available at* [http://dhhs.ne.gov/children\\_family\\_services/Documents/AM-1.pdf](http://dhhs.ne.gov/children_family_services/Documents/AM-1.pdf).

107. *E.g.*, UTAH CODE ANN. § 78B-6-102(4) (West, Westlaw through 2014 Gen. Sess.).