

On the Tenth Anniversary of the Baby Markets Roundtables

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INTRODUCTION: IN MEMORIAM OF PROFESSOR JOHN ROBERTSON

This special Issue arrives after the recent passing of our dear colleague and friend, John A. Robertson, holder of the Vinson & Elkins Chair at the University of Texas at Austin School of Law. John was an extraordinary member of that faculty, where he served for over thirty-five years.

At the time of John's death, I was in Europe working on the forthcoming edition of the *Baby Markets Reader*. Several of John's colleagues wrote to me, informing me of his passing and expressing condolences. I was moved by their kindness and am grateful to them and to John. This special Issue is dedicated to Professor John Robertson, for his visionary leadership, mentorship, intellectual curiosity, and generosity of spirit. He was a great friend and scholar.

Professor Robertson was a pioneer in health law and a renowned bioethics scholar. In 2010, the American Society of Law, Medicine, and Ethics honored him with its Lifetime Achievement Award. John was worthy of that honor and many others. He authored over 200 articles and two groundbreaking books: *Children of Choice: Freedom and the New Reproductive Technologies* and *The Rights of the Critically Ill*. Up until his untimely death, he was completing manuscripts, including the entry for this special Issue of the "Baby Markets" symposium.

John was a supporter and key contributor to the *Baby Markets Roundtable* series, which has produced symposia, special issues, books, and a reader adopted at universities the world-over for the past ten years. The most recent roundtable occurred at the University of Texas, hosted by John only a few short weeks before his passing. As co-organizers of that meeting, we sat side by side throughout the proceedings, passing notes, keeping time, and reflecting on the scholarship developed throughout the history of this meeting.

Indeed, John was a contributor to the first edition of the reader: *Baby Markets: Money and the New Politics of Creating Families*.¹ That book, like this special Issue,

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1. MICHELE GOODWIN, *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* (2010).

featuring his scholarship, broke new ground and expressed diverse, compelling, and even controversial views about modern reproduction, which is tangled in law, sexual as well as asexual reproduction, finance, politics, and frequently heartbreak. These issues are often quite complicated because they also involve power, status in society, and vulnerabilities. The very issues we discussed at the launch of the *Baby Markets* series, including LGBTQ parenting. In fact, some states banned gay parents from adopting. In other states, private discrimination, essentially legalized through lack of state action and intervention, effectively barred or made it incredibly difficult for lesbian or gay couples from using assisted reproductive technologies (ARTs) to become parents. Ten years later, much has changed, particularly in the wake of *Obergefell v. Hodges*,² the Supreme Court case legalizing marriage equality.

The goal of the project was to expand beyond the limited ways in which families were studied, critiqued, and analyzed in law and society, particularly within the contexts of ARTs. Thus, we focused on preimplantation genetic diagnosis, multiple gestations, and selective reduction, among other topics. These issues, in addition to matters of race, class, and social status were quite controversial then. As the title suggests, I also wanted to push the envelope on financial and economic questions of law and society. The fact that Black children could practically be given away in adoptions, but to adopt a white baby could cost upwards of \$50,000 demanded a nuanced examination about the role of financial incentives and markets in babies.

These inquiries were important despite concerns that it would be repugnant to rigorously probe the curious economic and political interplay in the creation of modern families. Those who signed up bravely engaged in intellectual debates about the very foundations of family law and brought to that discourse other discourses: business, contracts, law and economics, critical race theory, property, constitutional law, torts, and much more. John was among those who annually made the pilgrimage to the Baby Markets Roundtables. He was steadfast and devoted.

Among the qualities that made John special to many of us were his abilities to bring out the best in others, to think critically and grapple with nuance, his openness to new and diverging ideas, and a youthful spark until the end of his life. Most of all, he was incredibly generous to junior colleagues. Many of the scholars who paved the course of this series experienced that.

John was particularly enthusiastic about this special Issue and its multiple intersections of race, class, gender, and sex to unpack legal issues related to adoption, abortion, unintended parenthood, surrogacy, and human rights. John's contribution, *Whole Woman's Health and the Future of Abortion Regulation*, demonstrates his willingness to dive into the thicket of controversial issues with a sharp mind and eager pen.³ Whether his prediction that Supreme Court's most

2. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

3. John A. Robertson, *Whole Woman's Health and the Future of Abortion Regulation*, 7 U.C. IRVINE L. REV. 623, 623 (2017).

recent abortion jurisprudence truly “reorients” “the terms of the abortion debate” such that it shrinks “the field of play for opponents within the confines of *Roe* and *Casey*” remains to be seen. John’s lingering thought was that “pretextual or ill-considered health restrictions will not stand, and precedents about licensure and waiting periods may now have to be rethought.” Time will tell.

Joining John in this special Issue are other luminaries who share my deep sadness at his passing and admiration for the tremendous contributions that mark his lifetime of achievements and scholarship. They include Professors Dorothy Roberts, the George A. Weiss University Professor of Law and Sociology, Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights, Professor of Africana Studies at the University of Pennsylvania; June Carbone, the Robina Chair in Law, Science and Technology at the University of Minnesota Law School; Naomi Cahn, the Harold H. Greene Chair at the George Washington University Law School; Kristine S. Knaplund, Professor of Law at Pepperdine University School of Law; Debra Wilson, Senior Lecturer in Law, University of Canterbury in Christchurch, New Zealand; and Rachel Rebouche, the Associate Dean for Research and Professor of Law at Temple University, Beasley School of Law. One theme that runs throughout the symposium papers is the vulnerability of individuals dispossessed of access to sophisticated technologies or basic economic social equality—be they children or women.

Professor Roberts opens this special Issue with a compelling essay based on her keynote address for the “Tenth Anniversary” symposium. She urges readers to consider *Why Baby Markets Aren’t Free*.⁴ As she explains, “creating families in the twenty-first century increasingly happens in markets where the buying and selling of reproductive goods and services are facilitated by advanced technologies, the internet, contracts, and state laws and policies.”⁵ The trouble, she explains is that this “key aspect of modern reproduction,” restricts access to many, even while “[t]he free market seems to liberate us from the constraints of biology and state control.”⁶ She offers three strong arguments to further her point. First, she explains, “baby markets aren’t free because it costs money and resources to participate in them.”⁷

Second, she offers that “apart from the obvious economic costs of the goods and services involved, [baby markets] operate within a context of interlocking systems of race, gender, and disability oppression,” imposing “tangible and intangible costs on parents and children who are devalued and marginalized by those systems and, in turn, by the markets themselves.”⁸ Finally, she writes, “baby markets aren’t free because they are just as susceptible to coercive practices as

4. Dorothy E. Roberts, *Why Baby Markets Aren’t Free*, 7 U.C. IRVINE L. REV. 611, 611–12 (2017).

5. *Id.* at 611.

6. *Id.* at 611–12.

7. *Id.* at 612.

8. *Id.*

liberating ones.”⁹ Professor Roberts urges a deeper thinking and even skepticism about economics liberating baby making. After all, she points out, “[w]hile the state diminishes its public support for families, it intensifies its punitive supervision of marginalized communities with an expanding carceral system and enhances the conditions for capital accumulation by the very wealthy.”¹⁰ Thus, even if families experience greater access to ARTs, what future is promised to their offspring?

Sometimes reproductive inequalities are so entrenched in law that offspring are severely impacted, including financially. Professor Knaplund advances this argument in *“Adoptions Shall Not Be Recognized”: The Unintended Consequences for Dynasty Trusts*, where she points out historic discrimination in adoption agreements that now spillover into ARTs.¹¹ These are issues that relate not only to wealth and poverty, but ultimately, human rights and economic dignity.

In *The Intersection of Human Rights and Reproductive Justice*, Professor Rebouche urges “[r]eproductive rights are human rights.”¹² This is an important mantra. As she explains, this is not a novel concept, but one that “has taken hold in United Nations documents, national and international advocacy campaigns, and in the position of governments across the world.”¹³ However, as her article reveals and as other scholars in this special Issue demonstrate, women’s reproductive healthcare access is under deep attack in the United States, whether related to abortion access or other healthcare services.

Indeed, Professor John Robertson echoes similar concerns in his contribution. In reality, the recognition of women’s dignity and privacy rights as articulated and legally secured in *Roe v. Wade*,¹⁴ are now in grave danger. Will a human rights agenda resolve the domestic, political turmoil that threatens to upend women’s reproductive healthcare and rights in the United States or anywhere else for that matter? Debra Wilson is doubtful—or at least argues in *Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics Committees in Determining Surrogacy Applications*, that within the broader sphere of reproductive health questions, such as surrogacy arrangements, the role of ethics might better be explored.¹⁵

Ultimately, what is contested within the space of reproductive health, rights, and justice are the salience of women’s equality, autonomy, and basic rights to govern their bodies. This fundamental point is emphasized by Professor Roberts in the article published in this Issue. It is also a theme with which Professors Carbone

9. *Id.*

10. *Id.* at 612-13.

11. Kristine S. Knaplund, *“Adoptions Shall Not Be Recognized”: The Unintended Consequences for Dynasty Trusts*, 7 U.C. IRVINE L. REV. 545, 545-46 (2017).

12. Rachel Rebouché, *The Intersection of Human Rights and Reproductive Justice*, 7 U.C. IRVINE L. REV. 579, 579 (2017).

13. *Id.*

14. *Roe v. Wade*, 410 U.S. 113 (1973).

15. Debra Wilson, *Avoiding the Public Policy and Human Rights Conflict in Regulating Surrogacy: The Potential Role of Ethics*, 7 U.C. IRVINE L. REV. 653, 653-55 (2017).

and Cahn invite us to examine in *Jane the Virgin and Other Stories of Unintentional Parenthood*.¹⁶ Rather than unpacking the traditional packaging of “choice” to make reproductive health decisions, they study “intent” versus “non-intent” and they move beyond abortion to consider making babies through ARTs. Moreover, they inquire how law addresses these concerns in the contexts of lesbian and gay family making—and whether marriage matters in these contexts. In other words, will marriage now provide greater legitimacy for gay couples seeking to use ARTs?

John would be engaged, curious, and ready to ask questions related to these articles and essays. He would celebrate their clarity and intellectual rigor while addressing pragmatic questions for our society. He would want to know how the authors arrived at their conclusions and whether there was more to be said. He would then raise his hand or send an email asking when we would next meet again.

16. June Carbone & Naomi Cahn, *Jane the Virgin and Other Stories of Unintentional Parenthood*, 7 U.C. IRVINE L. REV. 511, 511–16 (2017).

