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## The Baby Business: How Money, Science and Politics Drive the Commerce of Conception

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## **BOOK REVIEW:**

### **THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION**

Authored By: *Debora L. Spar\**

In *The Baby Business*, Debora Spar argues that it is time to acknowledge the commercial truth about reproduction and to establish a standard that governs its transactions. In this fascinating behind-the-scenes account, she combines pioneering research and interviews with the industry's top reproductive scientists and trailblazers to provide a first glimpse at how the industry works: who the baby makers are, who makes money, how prices are set, and what defines the clientele. Fascinating stories illustrate the inner workings of market segments--including stem cell research, surrogacy, egg swapping, "designer babies," adoption, and human cloning--as Spar explores the moral and legal challenges that industry players must address. The first purely commercial look at an industry that deals in humanity's most intimate issues, this book challenges us to consider the financial promise and ethical perils we'll face as the baby business moves inevitably forward.

Reviewed By: *Mary L. Shanley\*\**

I first learned of the publication of Debora Spar's book, *The Baby Business*,<sup>1</sup> while listening to the radio. Although I cannot remember the exact program, I recall an excited commentator hailing this book in which a professor at the Harvard Business School used her professional expertise to overturn the common opinion that the family and the market belong to two quite distinct realms. Listeners would be astonished and distressed to learn, he said, that there is "commerce of conception." I subsequently heard and read in public media similar

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<sup>1</sup> DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* (Harvard Business School Press ed., 2006) (Feb. 14, 2006).

expressions of surprise at Spar's findings, and these reactions show how badly needed and useful this book is. While those working in the field of reproductive technologies, law and bioethics have been aware of the trade in human gametes and gestational service, the shock with which many commentators greeted Spar's book indicates that the general public has not known the degree to which use of reproductive technologies is a largely unregulated market.

Tremendously useful as a demonstration of the ways and the extent to which eggs, sperm, gestational services and children available for adoption are part of a baby market, and a valuable and much-needed call for government regulation of that market, the book is less satisfying in clarifying the principles—both economic and moral—that should guide such regulation. On the one hand, Spar affirms the usefulness of the commerce of conception, deems it a “good thing,” and calls for rigorous public discussion to decide upon desirable regulations. On the other hand, her discussions of particular practices and policies indicate that she has reservations about the market's ability to serve the values of human dignity and equal citizenship. Her endorsement of a “mixed regime” of a partially free and a partially regulated market cries out for her thoughts concerning which activities belong in which category, and why, and which aspects of human reproduction should be kept outside the market entirely. Once these matters are clarified, then one can proceed to the public discussion of specific regulations that Spar hopes to inspire. The lack of clarity arises, I think, from an unresolved ambivalence on Spar's part about the adequacy of the market. If she could clearly articulate that ambivalence, she could more readily identify the principles that are at stake in the debates she calls for, and strengthen the important contribution her work will make to those critical deliberations.

## I. ESTABLISHING THE EXISTENCE AND EXTENT OF THE BABY MARKET

Spar begins her book with admirable clarity: “despite popular protests to the contrary, and despite the heartfelt sentiments of parents and providers, there is a flourishing market for both children and their component parts *The Baby Business* does not insist that this market is either good or evil. It simply argues that it exists.”<sup>2</sup> True to her promise, Spar does an excellent job of revealing the multitudinous

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<sup>2</sup> *Id.* at xv.

ways in which both adoption and use of new reproductive technologies *are* markets. Rejecting the view that procreation using market mechanisms is morally unacceptable, she concludes that given the inevitability of a baby market, government needs to develop “a regulatory framework in which the business of babies can proceed.”<sup>3</sup>

To get people to recognize the unequivocally market nature of various transactions by which people are forming families, Spar lays out the dimensions of the baby market—indeed some might call it the baby industry—clearly and authoritatively. She describes the market in gametes (that is, sperm and eggs) and embryos, pointing out that treatments for infertility range from moderately costly to very expensive. In 2003, the cost of a single cycle of in vitro fertilization (IVF) was \$12,400, placing it out of reach of the average family. Some people purchase not only genetic material, but also gestational services, which cost between \$10,000 and \$30,000, and are regulated by vastly different regulatory schemes in various states (from California’s acceptance to Michigan’s prohibition). As Spar points out, people can now purchase genetic material, create an embryo using IVF, and hire a woman to gestate the fetus, thereby involving markets in both goods and labor.

Preimplantation genetic diagnosis (PGD), a technique that increases potential parents’ control over the attributes of their future child, creates a market for a procedure that some say should be banned, at least when used... for enhancement rather than avoidance of disease or disability; and, when cloning becomes possible, the question of the propriety of the selection of genetic traits will become more acute. While sympathetic to the kinds of situations that might lead some people to seek to use technology to select the traits of their offspring (for example, creating a sibling who could be a compatible donor for a deathly ill child), Spar is aware that such choices “carry social costs.” She insists that “society must have some say in how these choices are made and the extent to which they are left to private preferences and market forces.”<sup>4</sup> But she is uncomfortable with the prospect both of sex selection and with “savior siblings” and of restrictions on the market; and, so she hopes that “even rich parents” will abjure the market and decide “to let nature take its course,” trusting in their gene pool, openness to the unbidden, or the ease and pleasure of sexual procreation. It is a hope that conveys Spar’s sound values, but it fails to

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<sup>3</sup> *Id.* at xix.

<sup>4</sup> *Id.* at 126.

identify the principles that should inform the public debate she regards as crucial for setting public policy.

## II. SPAR'S CASE FOR REGULATION OF THE BABY MARKET

Contrary to her claim at the beginning of the book that she is not concerned with whether the baby market is good or evil, but only to demonstrate that it exists, Spar does have a normative position. She regards a baby market as a good thing: it provides mechanisms by which orphaned, abandoned, or neglected children can find homes through adoption, and it provides people who want children with the option of using third-party genetic material to help them create a child that they will raise: "the baby business. . . produces a good that is inherently good. It produces children, for people who want them."<sup>5</sup> Instead of denouncing the market, we should examine "how market mechanisms might help produce a socially desirable outcome."<sup>6</sup> But in the absence of any regulation, "supply will flourish, but only the rich will enjoy its benefits;"<sup>7</sup> the world will be divided into two classes, the GenRich and the GenPoor, (rather like the world of the film, *Gattica*), a situation Spar finds unacceptable on egalitarian grounds.

So the market is a good thing, but only if we fix certain aspects of the market, and only if it is properly regulated. By "fixing" the market Spar means clarifying the property rights involved in the baby business. And by proper regulation, she means policy based on a mixture of four kinds of regulatory approaches. These two propositions are at the heart of her analysis about regulation, and deserve careful consideration.

Spar believes that treating sperm, eggs, and wombs as property would bring desirable predictability and transparency to thorny issues that arise with assisted reproduction. She mentions the case of a man who sued an infertility clinic for implanting an embryo created with his sperm in his ex-wife's womb without his permission; the case of two sets of parents who had made payment to adopt twin girls through a transaction conducted over the internet; and a couple who sued a clinic for disposing of embryos that had been in storage for five years. These cases clearly suggest the need for principles that should guide their

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<sup>5</sup> *Id.* at 196.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 223.

resolution and those of future cases (which hopefully will be few and far between). But predictability and transparency could also be achieved by clear regulations; much present confusion arises from the fact that the law varies from state to state and that many courts must decide such cases in the absence of any statutory guidance. Treating gametes and embryos as property also raises the question of whether the law should allow differential pricing, letting the market set the price (for example, putting a premium on the gametes of those with high SAT scores). It is not clear that resolving some disputes by treating gametes as property will not bring with it other problems involving the commodification about which Spar has expressed reservations.

Spar may be right that treating gametes and embryos as property is the way to lend transparency and predictability to transactions and to insure that the supply of gametes meets the demand, but two other parts of her text seem to work against this conclusion or at least to call out for more detailed analysis. The first is her discussion of adoption. One of the best and most interesting aspects of Spar's book is her insistence that both adoption and the world of reproductive technologies are subject to market mechanisms— indeed, that they are part of a unified market. Despite the fact that uses of and access to reproductive technologies are in the hands of the medical profession, and adoption is facilitated by social workers and so appear to involve two different realms of human activity, the goals of each are the same. What people seek in acquiring eggs, sperm, embryos, gestational services, or adoptive children is the ability to form a family relationship; adoption and the use of reproductive technologies are alternative means to form a parent-child relationship. If there is a significant cost difference between forming a family through use of reproductive technologies or adoption, price will influence all but the rich in choosing one means or the other.

Spar contends that “theoretically . . . all these various would-be children are nearly perfect substitutes for one another.”<sup>8</sup> So why not allow the sale of children? Because nearly everyone agrees that human beings should not be bought and sold; by contrast, “in assisted reproduction, the parent is purchasing the *potential* of a child,” not the child itself.<sup>9</sup> But this distinction does not in and of itself decide the question of whether gametes and embryos should be thought of as property, and whether there should be an open market and differential

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<sup>8</sup> *Id.* at xvi.

<sup>9</sup> *Id.* at 160.

pricing of gametes. What is at stake, and what is gained and lost, by saying “gametes are the property of the person who produces them and who therefore has rights of ownership” and saying “gametes are not properly thought of as personal property because they are components of human life”? The first formulation would open the way to arguing about price regulation of commodities, and policy might or might not curtail an open market. The second formulation would open the way to discussions of whether donors could properly be paid for undergoing the procedures involved in gamete donation but not for the gametes themselves, a stipulation that would produce more uniform costs and remuneration. These questions do not come from those who would banish the market in gametes, but rather arise from Spar’s important insight that we must understand adoption and reproductive technologies as two integrally related facets of the project of creating families, and the reader longs to have her guidance as to what is at stake in each position

And then there is the matter of race. As Spar points out, in 2002, thirty-seven percent of the children in US foster care were African American, and “historically, the demand for these children has been stunted,” first by social workers reluctant to place children across racial lines, and then by parents’ perception that these were children with special needs.<sup>10</sup> While measures that prohibit race-matching and shorten the time that the state is permitted to keep children in foster care may mean “that the market in this area could well increase over time,” Spar’s understanding that adoption and reproductive technologies are two segments of the same market suggests other issues. One of the reasons that parents turn to fertility clinics and purchase gametes rather than pursue adoption is their desire to raise a child of the same race as themselves. They may do this because they want their children to look roughly like themselves, or because they do not want to raise an older child (in 2002, 73 percent of the children in foster care were over the age of five). For white parents, there is the additional knowledge that whiteness carries with it a plethora of social and economic advantages. Spar is well aware of these social facts and talks about how they structure the adoption market both in the US and internationally. Although Spar points out that there is a danger that adoption will become the mode of family formation for the poor who cannot conceive a child while the rich turn to reproductive technologies, she does not similarly address the possibility that

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<sup>10</sup> *Id.* at 177.

reproductive technologies will be a way of replicating white privilege. Her analysis only implicitly raises the question of whether the public interest in racial equality justifies regulation of gamete transfer or adoptions—or both.

Another insightful, important and under-developed point is Spar's assertion that the ability to form family ties and raise children implicates notions of equity and of equal citizenship. As a society we value babies and the happiness they can bring, and therefore "We treat them, not as rights *per se*, but at least as something to which all citizens have a nearly identical claim. How then, can we say that some people can procreate for free, whereas others must pay? And how can we permit such significant variation . . . between different versions of assisted procreation?"<sup>11</sup> Spar does not spell out the exact contours of what equity would entail, but she repeatedly suggests that equal standing as citizens necessitates fair distribution of "a chance at parenthood"<sup>12</sup> as part of the common good.

The notion that family relationships are a good that should not simply be relegated to the private realm underlies Spar's discussion of four models that govern various kinds of exchanges, the "spectrum of options" among which we might choose in deciding how to regulate the baby business. The first is the luxury model, in which we would "treat the acquisition of children like the purchase of fine jewelry."<sup>13</sup> Under this model, those who could afford to purchase gametes or gestational services or to pay the costs associated with adoption would do so, and those unable to do so would be out of luck. There would be no reason to worry about access or equity, because the chance to raise children would be thought of as analogous to the possession of a luxury item. The second model is prohibition, which Spar analogizes to the cocaine and heroin trades. The law would forbid the acquisition of gametes and babies, and drive the trade underground. The third model would have us "treat babies, and the components of babies, the way we treat kidneys."<sup>14</sup> Organ donation is based on what economists call a "hierarchy" rather than a market, that is, the good to be exchanged is distributed on the basis of criteria other than money, such as acuteness of need, the degree of match between recipient and donor, or time waiting in the queue. The problem with this model, in Spar's view, is that donations are unlikely to meet demand; many people desiring to

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<sup>11</sup> *Id.* at 214.

<sup>12</sup> *Id.* at 227.

<sup>13</sup> *Id.* at 217.

<sup>14</sup> *Id.* at 219.



become parents will not be able to acquire the eggs or sperm or gestational service that they need. The fourth model is the hip replacement model. Spar points out that in the US “if we left hip replacement to the free market, . . . rich people who needed hip replacements would probably get them, and poorer persons would not.” Society finds this inequality unacceptable, and so we treat replacement hips as a form of a social good that the market cannot distribute equitably. Equity matters because whether one’s hip degenerates is beyond one’s control, and the difference in the quality of life available to those who can and cannot afford to replace hips is enormous.

The hip replacement model is very attractive to Spar both because it would not cut off use of reproductive technologies and would make considerations of equality and equal access of central importance: “Conceptually, such a model would work . . . well in the baby trade. All we would need to do, really, is to define infertility as a medical condition, and then subject it to the same kind of coverage now afforded other medical procedures.”<sup>15</sup> We would treat the baby trade “as a niche of modern medicine.”<sup>16</sup> The problem with this approach, as Spar sees it, is that there are objective criteria that indicate when someone needs a hip, and almost no one argues that society should not meet the need. With reproductive technologies, however, people differ in their opinions about whether the desire for children is one that society should try to meet, and there are bitter disputes about such matters as whether single persons, same-sex couples, and post-menopausal women should be able to use the technologies.

There is also the problem, as Spar has earlier argued, that we should not deal with reproductive technologies exclusively as medical procedures, but rather as instruments of family formation. So the claim would not simply be a claim to equitable distribution of medical treatments, but rather to equal opportunity to attempt to form a family. And at stake is not simply the public good of having and raising children, but equal dignity and respect for the family aspirations, and the families, of a diverse and pluralistic population.

The only way to deal with the differences of opinion that surround the issues that have arisen with respect to the proper uses of reproductive technologies, says Spar, is “to acknowledge the market that reproductive technologies have created, and then figure out how to channel this market to our own best interests.”<sup>17</sup> It would usually be at

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<sup>15</sup> *Id.* at 221.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 231.

this point in “any provocative book where the author lays out a road map for reform,” says Spar. “But this author is not going to do that.”<sup>18</sup> Why? Because “markets [are] political as well as commercial entities,” and as political entities “any top-down strategy of reform” is certain to fail. What the market needs instead “is a *politically determined* strategy, one that emerges from a dedicated and explicitly political debate.”<sup>19</sup>

The agnosticism that permeates these passages is confusing, however, because Spar has in the course of the book made insightful judgments that while not dictating the details of policies to regulate the baby business, would set parameters to any future discussion. At a number of points she indicates that she thinks that various public goods are involved in or relevant to the baby business. Her insistence that adoption and reproductive technologies should be treated as part of a single market stems from her belief that having and raising children is a good for individuals and for society. The reason to make access to reproductive technologies available to people at all income levels is that the opportunity to parent children is as central to some people’s quality of life as being free from chronic pain or being able to walk and should be as accessible to all as education, health care, and clean water. A reader understandably wants to know what aspects of human reproduction and family formation Spar regards as public goods—or human rights—and how her judgment about this sets parameters to those aspects of the baby business she would leave to be resolved by the market.

I do not want to slight the book in my hands because it is not the one I wish Spar had written. *The Baby Business* achieves Spar’s goal of documenting the ways in which and the degree to which there is a thriving baby market both in the US and internationally, and her analysis of this market is both impressive and valuable. In addition, the book is accessible and clearly written, and contains a wealth of useful and accurate information. Indeed, the footnotes contain an extensive and evenhanded guide to the scholarly literature. The impressive scholarship well serves Spar’s goal of sparking conversation and public debate. But precisely because Spar’s description of the ways in which the market shapes the acquisition of children in the United States is so powerful, I hope that she will return to this topic, and say what aspects of the baby business she thinks properly belong in the market, and

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<sup>18</sup> *Id.* at 224.

<sup>19</sup> *Id.* at 225.

which ones do not. And if, as I suspect, she is ambivalent about the adequacy of market language and mechanisms to provide a morally acceptable basis for family formation, I hope she will confront and explore that ambivalence. I would welcome a sequel to *The Baby Market* that boldly takes up the analysis where this one leaves off, discussing in greater detail the adequacy of market mechanisms to regulate family formation in a humane and liberal society, and then the principles that should guide specific regulations.