

## Purchasing Race; or, The Pursuit of White Sperm and Eggs

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Camille Gear Rich, *Contracting Our Way to Inequality: Race, Reproductive Freedom and the Quest for the Perfect Child*, \_\_ **Minnesota L. Rev.** \_\_ (forthcoming, 2019), available at [SSRN](#).

“But not yet have we solved the incantation of this whiteness, and learned why it appeals with such power to the soul; and more strange and far more portentous—why, as we have seen, it is at once the most meaning symbol of spiritual things, nay, the very veil of the Christian’s Deity; and yet should be as it is, the intensifying agent in things the most appalling to mankind.” —Herman Melville<sup>1</sup>

Consider this breezy narrative published a few years ago in the [New York Times](#): “I chose my son by clicking and unclicking a series of boxes, not unlike online dating. Some days, I’d scroll through all of the redheads. Other days, all of the [Jude Law](#) look-alikes....There was no easy way for me to choose from so many flawless (but relatively indistinguishable) men, particularly when this choice would have such a profound impact on both my life and my child’s. [¶] One of them looked like [Tom Brady](#) and had a Ph.D. I added him to my cart.”<sup>2</sup> Stories like this are increasingly commonplace and seemingly innocuous. That is, until something goes wrong. For Jennifer Cramblett, that moment came when, already pregnant, she decided to order more sperm from a sperm bank so that, down the road, she and her partner could give their baby a biologically related sibling.<sup>3</sup> While on the phone placing her order, she encountered a mixup regarding the donor’s identification number: did Cramblett really mean donor number 380, not 330, the receptionist asked? Did Cramblett request an African American donor? Cramblett replied, “No, *why would I do that? My partner and I are Caucasian.*”<sup>4</sup> As it dawned on her that she was likely pregnant with a mixed-race child, Cramblett’s “excitement and anticipation of her pregnancy was replaced with anger, disappointment and fear.”<sup>5</sup> Cramblett ultimately sued the sperm bank alleging harms stemming from the sperm bank’s racial mistake.

Cramblett’s personal misfortune reveals an unremarked trait shared by the pool of “flawless,” “relatively indistinguishable,” Jude-Law- and Tom-Brady-like sperm donors in the *New York Times* story: their whiteness. Some people may see nothing wrong with the practice of selecting sperm or eggs because of the perceived race of the donor. Others may be troubled by the prospect of racially motivated gamete selection but view it as an unfortunate side effect of respecting individual autonomy.<sup>6</sup> In her thoughtful and provocative new article, *Contracting Our Way to Inequality: Race, Reproductive Freedom and the Quest for the Perfect Child*, Professor [Camille Gear Rich](#) challenges these views. She uses Cramblett’s lawsuit against the sperm bank as a jumping-off point to show how the [Assisted Reproductive Technology](#) (“ART”) market packages race and *produces* the discriminatory preferences that ultimately lead to racial subordination. By detailing the market framework for the exercise of supposedly private preferences, Rich calls attention to the ways in which the law can subsidize or alternatively dismantle private discrimination.

Rich begins the article by describing the different ways in which ART providers package and sell race. This packaging begins far before the point of sale. Donors are screened for “undesirable” traits such as mental illness or a history of incarceration. They are also excluded if they are too short or overweight, or do not have aesthetically pleasing bodies. ART providers also screen based on proxies for intelligence like SAT scores and educational accomplishments. All of these decisions are motivated by the providers’ perceptions of market demands.

The packaging of race takes place within this context. The demand for certain racial backgrounds is higher, resulting in higher payments to donors from those groups, as well as a larger pool of samples for consumers to choose from. For example, although 60% of Americans identify as white, 80% of sperm and eggs come from white donors. These

choices are meaningful. The relative overabundance of white gametes means that white consumers are less likely to be challenged to look beyond their group and that non-white consumers might perceive that the ART industry is not for them. Moreover, race is socially rather than biologically based. Providers are ultimately marketing racially-associated phenotypes rather than any essential set of traits. Underscoring the degree to which race is a social construct, while donors are prompted to identify their racial backgrounds, providers actually make the final determination categorizing the gamete donors into specific racial categories. Deciding which phenotypes should be associated with which racial category—for instance, by assigning mixed-race individuals to one or another category—is another way that providers shape racial understandings.

The way in which donor gametes are presented to consumers as products also has pernicious effects. The websites of most major sperm banks typically ask consumers to identify their own race as well as the race of their desired donor, effectively highlighting the centrality of race to their ultimate decision. Results are then filtered by the seller's predetermined racial categories, suggesting that people with certain phenotypes should naturally be associated with certain racial categories and, more broadly, suggesting that race has a biological basis. Fascinatingly, even whiteness is not immune to the effects of this packaging and commodification. Rich notes that "consumers are being invited into a catalogue of elite whiteness that celebrates whiteness in an artificial and surreal form." (P. 20.) Donors are on average "taller, more physically fit, more accomplished, and more traditionally beautiful than the general pool of whites in the United States." (P. 20.) She speculates that this commodified whiteness has several consequences. The purchasing experience reinforces a narrow definition of whiteness. This perception prompts customers to purchase a better version of whiteness rather than seek to replicate themselves. In the process, it reveals the existence of "marginal whiteness"—that there are "more and less privileged versions of white identity"—and suggests that consumers may be responding to fears of marginalization. (P. 21.)

What might be seen as a private racial preference, then, is ineluctably shaped by the ways that clinics and consumers perceive and respond to market forces. By analyzing racial mix-up cases such as Cramblett's, Rich identifies exactly what consumers believe they have purchased: a family unit that will appear "natural" and will not draw undue scrutiny or inquiry (Pp. 34-36); immunity from having to interact with people from different cultural backgrounds (Pp. 37-38); and the avoidance of exposure to racial discrimination (Pp. 38-39). These consumer expectations reveal that the marketing of race ultimately promotes a "white intra-group esteem system that helps to maintain the white monoracial family norm." (P. 39.)

If Rich were to end the article at this point, she would already have made an important contribution. But she also devotes attention to analyzing how best to respond to some of these market-facilitated distortions. She does this first by questioning whether reproductive freedom necessarily entails the right to purchase racial essence. She points out that scholars have often conflated the concepts of reproductive freedom with technological developments in the ART market, uncritically accepting that the technologies reflect private choices beyond the reach of the state. But she notes that the state has regulated procreative freedom in order to promote its views in cases and controversies concerning contraception, abortion, and welfare, mostly to the detriment of poorer women of color. (P. 42.) She also argues that equality commitments embodied in the equal protection clause could support state interventions. In the voting context, for example, the Supreme Court rejected the practice of identifying candidates by their race on ballots because such labels could trigger improper considerations of race at a critical moment—in the voting booth. In the affirmative action context, the Court has recognized that racial labeling can interfere with individualized consideration, promoting inequality. Many of these doctrinal developments have emerged in cases with decidedly unprogressive ends, and I remain skeptical that courts would deploy them in a neutral fashion. That said, Rich shows that the arguments are there to be made.

This brings us to Rich's proposed solutions. She argues that the ultimate goal of any intervention should be to encourage ART consumers to abandon biological concepts of race and look beyond racial categories. (P. 51.) By this point in the article, I was expecting a proposal along the lines of [R. Richard Banks](#)'s proposal to prohibit adoption agencies from racially classifying adoptive children in order to facilitate race-based selection.<sup>7</sup> Rich takes a different approach. Perhaps recognizing that any blanket ban on the marketing of race would fail if consumers could continue to

look at donor photos and shop based on racially salient features like hair or eye color, Rich focuses on channeling consumer behavior. First, she proposes that the U.S. restrict the importation of gametes from European countries like Denmark and the Czech Republic, disrupting American consumers' global search for white gametes and opening the possibility that supply would come instead from a more diverse domestic pool of donors. (P. 52.) Second, she proposes that clinics should be required to post a series of warnings and disclaimers about race—for instance, that there is no genetic basis for race; that the mechanisms by which phenotypes are transmitted are not fully understood; and that the phenotypes of a given donor are not guaranteed to be present in the donor's child—to change consumer behavior. (P. 54.) And third, she proposes that the government could offer subsidies to ART providers that do not use race to characterize gametes. (P. 55.) Although these interventions would not stop consumers from selecting phenotypes associated with race, they would likely result in consumers being exposed to donors from different backgrounds and invite consumers to recognize similarities across race.

The concerns addressed by Rich in this article connect two stories that dominated the news as I drafted this review: first, the mass shooting of Muslims in New Zealand, which sources suggest was motivated by white supremacy, in particular, belief in the white race's biological distinctiveness;<sup>8</sup> and second, the college admissions scandal, which, at its heart, is about purchasing, and thereby reproducing, privilege.<sup>9</sup> The ART market contributes to the notion that whiteness can be perfected and that race—like other markers of prestige—has a price. Rich joins scholars like Banks and [Russell Robinson](#)<sup>10</sup> in showing that racial preferences within the intimate realm are rarely ever purely private or harmless. Especially at this moment, we ought to consider very seriously Rich's argument that marketing race is wrong and that the law should do something about it.

1. Herman Melville, *Moby-Dick* 169 (Harrison Hayford & Hershel Parker eds., 1967).
2. Dawn Bovasso, [An Open Egg Donor, Now Reversing the Role](#), *N.Y. Times*, Feb. 19, 2015.
3. Complaint at ¶ 13, *Cramblett v. Midwest Sperm Bank, LLC*, 2014 WL 4853400 (Ill. Cir. Ct. Sept. 29, 2014) (No. 2014-L-010159).
4. *Id.* ¶ 15 (emphasis added).
5. *Id.* ¶ 17.
6. See, e.g., [Dov Fox, Race Sorting in Family Formation](#), 49 *Fam. L.Q.* 55, 66 (2015); Dov Fox, [Choosing Your Child's Race](#), 22 *Hastings Women's L.J.* 3, 6-8 (2011).
7. See [R. Richard Banks, The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action](#), 107 *Yale L.J.* 875, 883 (1998) (proposing to end the practice of facilitative accommodation for white adoptive parents in furtherance of the goal of ridding the adoption system of racial preferences). To be clear, Banks was talking about the actions of public agencies. I understand, and Rich acknowledges, that the pathway to achieving this outcome would be different when thinking about private actors. (See P. 47).
8. See, e.g., [Nellie Bowles, "Replacement Theory," a Racist, Sexist Doctrine, Spreads in Far-Right Circles](#), *N.Y. Times*, Mar. 19, 2019.
9. See, e.g., [John Eligon & Audra D. S. Burch, "What Does It Take?": Admissions Scandal Is a Harsh Lesson in Racial Disparities](#), *N.Y. Times*, Mar. 13, 2019.
10. See, e.g., [Russell K. Robinson, Structural Dimensions of Romantic Preferences](#), 76 *Fordham L. Rev.* 2787 (2008) (exposing the ways that online dating services facilitates race-based selection of intimate partners).

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