Surrogate Mothers: An Exploration of the Empirical and Normative

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INTRODUCTION

In 1986, Mary Beth Whitehead refused to give up the baby she was carrying as a surrogate for Elizabeth and William Stern. Baby M, as the baby and the court case name came to be known, has become shorthand for the controversy surrounding surrogacy. But, in the days following Baby M, it was Mary Beth Whitehead, the surrogate mother, who sparked the most intense debates over motherhood and family in American society.

Opposition against surrogacy focused on the surrogate mother can be characterized into two types: (1) surrogacy is bad because it directly harms the surrogate mother (2) surrogacy is bad because it harms society, whether or not it harms the individual surrogate. The first line of argument has been empirically evaluated through study of the actual experience of surrogate mothers; the second line of argument is difficult to evaluate empirically because it alleges a more intangible, normative harm to society.

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2 Unless otherwise specified, surrogacy will be used in this paper to mean commercial surrogacy, where payment is given to the surrogate mother in return for her carrying the baby to term and relinquishing any parental rights.
3 Arguments focused on children are also made in opposition to surrogacy. See Lori B. Andrews, Surrogate Motherhood: The Challenge for Feminists, in SURROGATE MOTHERHOOD, 167-69 (Larry Gostin ed., 1990) (noting three general categories of rationales for banning surrogacy: “symbolic harm to society,” “potential risks to women,” “potential risks to the potential child.”). While the same empirical (direct harm to children born of surrogacy) and normative (societal harm from commodification of children) line can be drawn, this is outside the scope of this paper.
This paper suggests that, though critics made both with equal seriousness, the opposition to surrogacy was driven more by the second type of argument than the first. The first part of this paper argues that, even early on, the first line of argument was seriously challenged by empirical studies demonstrating that, in the vast majority of surrogacy arrangements, surrogate mothers have positive experiences, have no issues relinquishing the child, and want to be surrogates again.4 Yet, uneasiness with surrogacy remained: surveys on public attitudes indicate that the majority of Americans still disapprove of surrogacy and consider it the least acceptable use of reproductive technologies;5 commentators and academics, moreover, continued to criticize surrogacy normatively without explicitly referencing empirical studies,6 extrapolating from outlier cases like Baby M,7 or, in a purely normative sense, claiming exploitation and commodification of women as per se social

6 See, e.g., Anita L. Allen, Surrogacy, Slavery, and the Ownership of Life, 13 HAR. J. L. & PUB. POL’Y 139, 148-49 (1990) (arguing against the idea that surrogacy is a source of female liberation, because the practice “pays so little, capitalizes on the traditionally female virtues of self-sacrifice and caretaking, and enables men to have biologically related children without the burden of marriage.”); BARBARA K. ROTHMAN, RECREATING MOTHERHOOD, IDEOLOGY, AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 30-45 (1989) (arguing that surrogacy co-opts into patriarchal society by allowing upper-class women to access the privilege of patriarchy); Shari O’Brien, Commercial Conception: A Breeding Ground for Surrogacy, 65 N.C. L. REV. 127, 144, 152 (1986) (arguing that commercial surrogacy “induces” a financially needy woman to be come a surrogate, and that the practice is akin to slavery).
harms of surrogacy irrespective of empirics. This suggests that the normatively driven
care of harm to society, rather than direct harm to individual surrogate mothers was, and
perhaps continues to be, the principal factor behind opposition to surrogacy. The second
part of this paper attempts to explain why surrogacy implicated fears of widespread societal
harm even when the vast majority of individuals directly affected appeared to not suffer
harm (and, in the case of commissioning parents, received immense joy). I suggest that
because surrogacy triggered many social anxieties regarding motherhood, class, race, and
family structure – encapsulated in the Baby M case – it became resonant and salient across
American society as symbolic of underlying anxiety in an era when many traditional norms
were being challenged.

The observation that opposition to surrogacy is driven more by concerns of
normative harm to society writ large rather than by direct harm to surrogate mothers may be
an obvious one given our familiarity today with a similar dynamic with regard to a host of
other controversial issues. Nonetheless, I submit that the recognition of this aspect of
opposition to surrogacy is important for several reasons. First, the argument that surrogacy
was harmful to surrogate mothers as an empirical matter was widely made. Critics repeatedly
alleged as premises or conclusions that surrogate mothers were financially and emotionally
unstable, uneducated, did not make informed decisions, and would regret their decisions and

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8 See, e.g., Baby M, supra note 1, at 1249 (stating that Mary Beth Whitehead’s “consent is
irrelevant” and “[t]he fact, however, that many women may not perceive surrogacy
negatively but rather see it as an opportunity does not diminish its potential for devastation
to other women”) (emphasis added); Carol Sanger, Separating From Children, 96 COLUM. L.
REV. 375, 458 (1996) (describing the “false consciousness” argument that however much
surrogate may say they benefit from the arrangement, surrogacy is not an advantage but a
folly); George J. Annas, Fairy Tales Surrogate Mothers Tell, 16 LAW, MED. & HEALTH CARE, 27,
MOTHER MACHINE 228-233 (1985) (arguing that it is men who perpetuate the idea that
women love to be pregnant and women have been socially conditioned to see childbearing
as their primary valuable role at the cost of other potentials).
suffer long-term psychological damage.\(^9\) Had empirical evidence revealed that surrogate mothers were financially desperate or suffered psychological damage, then the debate on surrogacy would have been entirely different, perhaps such that the more nebulous societal harm argument need not be reached to come down against surrogacy. Second, relatedly, if 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. This is a more accurate, and better lens, with which to debate and respond to the issue.

An important caveat: this paper covers only surrogacy in the U.S. and thus does not apply to the host of issues that may be raised in other contexts like international surrogacy. Admittedly, in that context, the empirical concern with financial desperation may be far more pronounced and thus warrants separate attention than what my analysis will provide here.

\(^9\) See, e.g., Ciccarelli & Beckman, supra note 5 (studying empirically the “widely expressed concern about contractual parenting being emotionally damaging or exploitive for surrogate mothers.”); Anita L. Allen, The Socio-Economic Struggle for Equality: the Black Surrogate Mother, 8 HARV. BLACKLETTER J. 17 (1991) (asserting that “minority women increasingly will be sought to serve as “mother machines” for middle and upper-class clients and that within a decade, thousands of poor and minority women will be used as a “breeder class.”); MARTHA FIELD, SURROGATE MOTHERHOOD (1990) (implying surrogate women are “people in extreme financial difficulty”); ROTHMAN, supra note 6, at 237 ((predicting that gestational surrogacy would lead to the hiring of “[p]oor, uneducated third world women and women of color from the United States and elsewhere, with fewer economic alternatives . . .”)); CHRISTINE OVERALL, ETHICS & HUMAN REPRODUCTION: A FEMINIST ANALYSIS 1, 116-118 (1987) (Asserting that surrogate mothers “often have very little education, little or no income, and very little personal security,” and that the practice is akin to slavery); COREA, supra note 8.
I. HARM TO SURROGATE MOTHERS: EVALUATING THE EMPIRICAL OBJECTION

A. Overview of the Empirical Objection

Opposition to surrogacy rallied around harm to the surrogate mother, in part due to what was perceived as unfair criticism of Mary Beth Whitehead during the Baby M trial. Drawing from the Baby M case itself, surrogate mothers were described by critics as women with “little education, little or no income, and very little personal security” or as women likely to be poor, young, single and from minority backgrounds. A news article post the California Supreme Court decision in 1993 upholding gestational surrogacy in Johnson v. Calvert described most surrogate mothers as women like Johnson: single moms shuttling between welfare and dead-end jobs with never-ending bills; a more recent article characterized most surrogate women as truly needing the money. Similarly, Martha Field, Professor at Harvard Law School, in criticizing surrogacy, suggested that bans on surrogacy like bans on child-selling “reflect a judgment that we do not want a society in which people in extreme financial difficulty are tempted to sell a child.” Building from this profile of vulnerability, critics, including the court in Baby M, argued that these women did not really consent or did not realize the true consequences of their decisions, and thus often, like Mary

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11 OVERALL, supra note 8.
13 5 Cal.4th 84 (1993).
14 See Katha Pollitt, *Checkbook Maternity: When is a Mother not a Mother?* THE NATION, December 31, 1990, at 839-46.
16 FIELD, supra note 9, at 27 (emphasis added).
Beth Whitehead, would regret their decision to relinquish the child and suffer psychological damage.\textsuperscript{17} Others went further to argue that even surrogate mothers who report positive experiences were deluded because “however much surrogate mothers may say they benefit from the arrangement, surrogacy is not an advantage but a folly.”\textsuperscript{18} This “false consciousness” type of argument, which on face rejects empirical studies of actual surrogate mothers’ experiences, shall be examined further below. The next section will examine the empirical evidence on surrogate mothers and contend that, contrary to characterizations above, the actual experience of the vast majority of surrogate mothers does not suggest that surrogacy causes them direct harm, leaving aside any normative social harm it may cause to women generally.

\textsuperscript{17} See Baby M, \textit{supra} note 1, at 1250 (stating that the long-term effects of surrogacy are unknown but fearing “the impact on the natural mother as the full weight of her isolation is felt along with the fully reality of the sale of her body and her child.”); Elizabeth S. Scott, \textit{Surrogacy and the Politics of Commodification}, 72 \textit{LAW \& CONTEMP. PROBS.} 109, 109 (summarizing critics as arguing “contracts were baby-selling arrangements that exploited poor women who either were coerced or did not understand the consequences of their decision.”); Rakhi Rpuarelia, \textit{Giving Away the ‘Gift of Life’: Surrogacy and the Canadian Assisted Human Reproduction Act}, 23 \textit{CAN. J. FAM. L.} 11, 43 (2007) (arguing “the existence of power hierarchies, even subtle ones, and the obligations that arise from close-knit family structures, make it difficult for women to refuse a request to be a gift surrogate.”); \textsc{British Medical Association}, \textit{Changing Conceptions of Practice of Surrogacy in Britain} (1996) (suggesting that relinquishing the child may be extremely distressing and may result in psychological problems); \textit{Field}, \textit{supra} note 9, at 27 (“But to portray surrogacy contracts as representing meaningful choice and informed consent on the part of the contracting mother, rather than to see her as driven by circumstances, also reveals an idealized perspective and a failure to take account of realities.”); cf. Elizabeth Bartholet, \textit{Family Bonds: Adoption and the Politics of Parenting}, 182 (1993) (in the context of adoption, observing that birth parents “are conditioned to think they should feel lifelong pain as the result of their ‘unnatural’ act of giving up their ‘own’ child for another to raise.”).

\textsuperscript{18} See \textit{supra} text accompanying note 8.
B. Empirical Evidence on Surrogate Mothers in the U.S.

Empirical studies on surrogate mothers have repeatedly demonstrated that the vast majority of surrogacy arrangements are successfully executed and consented to by women who are financially and psychologically stable; cases like Baby M are outliers. This section will summarize and examine the empirical literature on surrogate mothers. I note briefly at the outset that it is not my intention to show that surrogate mothers are never destitute, objectively exploited for her circumstances or suffer psychologically. Abuses in surrogacy likely exist and will continue to exist as in every area.\(^\text{19}\) I simply want to show that, in the vast majority of cases, the characterizations of actual harm to surrogate mothers made by critics in the tangible sense do not comport with the empirical evidence. In examining and evaluating the empirical evidence on surrogate mothers, I relied on the conclusions of others, and did not independently question the methodologies of the studies I reference.

1. Demographic & Psychological Profile

Karen Busby, Professor of Law at the University of Manitoba in Canada, reviewed nearly 40 empirical studies on surrogate mothers, all of which were peer-reviewed and all except one were published in academic journals or academic presses.\(^\text{20}\) Many of the empirical studies were interview-based qualitative studies on surrogate mothers, others involved psychological testing and clinical or agency file reviews.\(^\text{21}\) On the basis of the review, Busby concluded that:

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\(^{19}\) Cf. Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 GLOBAL POL’Y 91, 96 (2010) (arguing that abuses exist in all areas and that the existence of adoption abuses that are not extensive as not sufficient justification for limiting international adoption.)

\(^{20}\) All the research considered in the paper was conducted in the United States or Britain, with the exception of two conducted in Canada. Busby, *supra* note 12, at 39-40.

\(^{21}\) *Id.*
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.\textsuperscript{22}

More specifically, Busby found that “studies on surrogate mothers consistently show that most women who agree to become either gratuitous or commercial surrogates are Caucasian, Christian, and in their late 20-early 30s.”\textsuperscript{23} Helena Ragone, Ph.D, Professor of Anthropology at the University of Massachusetts, Boston, in her study of 28 American surrogates found that they averaged 27 years of age and were “predominantly white, working class, of Protestant or Catholic background.”\textsuperscript{24} Of the women Ragone studied, approximately 30 percent were full-time homemakers, married, and had an average of three children.\textsuperscript{25} Even some critics have acknowledged that a majority of surrogate mothers are married and have been pregnant before.\textsuperscript{26} In fact, as will be further explored below, surrogacy agencies specifically screen potential surrogate for such “stability” indicators.

Surrogates have varying degrees of education, but a large proportion has had some higher education. For instance, in their 2001 study of 17 surrogate mothers, Melinda

\begin{footnotesize}
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\item \textsuperscript{22} Id. at 51.
\item \textsuperscript{23} Id. at 42.
\item \textsuperscript{24} HELENA RAGONE, CONCEPTION IN THE HEART 54 (1994).
\item \textsuperscript{25} RAGONE, supra note 24, at 55.
\item \textsuperscript{26} See e.g. Beverly Horsburgh, Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy, 8 BERKELEY WOMEN’S L.J. 29, 37 n. 23 (1993).
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Hohman, PhD, Assistant Professor of Social Work at San Diego State University and Christine Hagan, PsyD, Assistant Professor of Social Work at California State University, Long Beach found that 11 of the 17 had some college education.\(^{27}\) In a 1989 study of 50 American surrogates, clinical psychologist Dr. Joan Einwohner found that most had completed high school, many had gone to college, a few had graduate degrees and one had three masters degrees.\(^{28}\) Of the 28 American surrogates studied by Ragone, 13 had some college education and all except one had a high school degree.\(^{29}\) By contrast, Professor of Social Work at the University of Huddersfield Eric Blyth’s 1994 study of British surrogate mothers showed lower education rates than the American studies: 14 of the 19 women interviewed left school before the age of 17.\(^{30}\)

Researchers using standardized psychological tests to evaluate surrogate mothers have concluded that they are within normal ranges.\(^{31}\) Hohman and Hagan’s study found that surrogate women are more likely than the general population to be self-sufficient, independent thinkers and nonconformists, and therefore tend to be less affected by social pressure than other women.\(^{32}\) Another study in 2000 on 17 American surrogate mothers showed that they scored much higher on the extroversion factor than other women, which is a factor indicating sociability, assertiveness, and optimism.\(^{33}\) On the basis of these


\(^{29}\) Ragone, *supra* note 24, at 55.

\(^{30}\) Eric Blyth, *“I wanted to be interesting. I wanted to be able to say “I’ve done something interesting with my life”: Interviews with Surrogate Mothers in Britain*, 12 J. REPROD. & INFANT PSYCHOL. 189 (1994).

\(^{31}\) Busby, *supra* note 12, at 46.

\(^{32}\) Hohman and Hagan, *supra* note 26, at 80-81.

psychological tests, Einwohner concluded that surrogate mothers are intelligent, self-aware, stable adults who are down to earth, optimistic and not worriers.  

2. Entering the Process

Another consistent finding in the empirical research is that the idea of becoming a surrogate mother started with the women themselves; there was no evidence in any study reviewed by Busby that indicated the women were being pressured or coerced into becoming surrogates. Hohman and Hagan’s interview-based study of 17 American women reported that “far from being ‘used’ or exploited as has been suggested, the participants in this study appeared to be very clear that this is what they wanted to do, often despite negative responses from those around them.” Ragone also found that the surrogates she interviewed decided to pursue the process on their own, often because an advertisement they saw spoke to them in some way. One of the surrogates Ragone interestingly used pro-choice language to explain her decision: “it’s my right to do what I want to do with my body.” From her review of the empirical research, Busby concluded that “overwhelmingly, the research demonstrates that the women who become surrogate mothers go into the process on their own initiative, with a strong sense of what it is that they are committing to and that they rarely regret having been a surrogate mother.”

34 Einwohner, supra note 27, at 126.
35 Busby, supra note 12, at 50.
36 Hohman and Hagan, supra note 26, at 80-81.
37 RAGONE, supra note 24, at 55.
38 Id. at 67.
39 Busby, supra note 12, at 81.
3. Relinquishing the Baby

Often drawing from what biological mothers are said to feel in traditional adoption cases, some have argued that the psychological risks women face and the potential for regret in surrogacy are enormously high.\(^{40}\)

Out of as many as 25,000 surrogacy arrangements that is thought to have taken place since 1970s,\(^{41}\) it has been estimated that less than 1 percent of surrogate mothers changed their minds and less than one-tenth of 1 percent of surrogacy cases end up in court battles.\(^{42}\) The majority of surrogates have reported high satisfaction with the process and report no psychological problems as a result of relinquishment.\(^{43}\) Most surrogates report that relinquishment of the baby is a happy event and that they would do surrogacy again.\(^{44}\) Longitudinal studies show that these attitudes remain stable over time.\(^{45}\)

Interestingly, there has been documentation that surrogates may not receive as much social support as other mothers during pregnancy precisely because of negative popular attitudes towards surrogacy, which could dispose to them to be more vulnerable.\(^{46}\)

4. Motivations

The issue of motivation of surrogate mothers is a complicated one, and a difficult issue for research to fully document, particularly given that subjective motivations are likely

\(^{41}\) Teman, supra note 4, at 1.
\(^{42}\) Id. See also Andrews, supra note 3, at 171.
\(^{43}\) See Vasanti Jadva et al., *Surrogacy: the Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196 (2003); H. Baslington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57 (2002); Kleinpeter & Hohman, supra note 33; RAGONE, supra note 24; Blyth, supra note 29; Einwohner, supra note 27.
\(^{44}\) See van den Akker & Teman supra note 4.
\(^{45}\) See van den Akker & Ciccarelli, supra note 4.
\(^{46}\) See Edelmann, supra note 5.
to be filtered through the dominant social framework of what is acceptable behavior. The empirical argument, often couched in terms of exploitation, is that the surrogate is financially desperate or needy, and, therefore, is exploited or coerced in some way in turning to surrogacy as a “final economic resort.”

First, as previously mentioned, studies do not indicate surrogate mothers are financially desperate, despite the fact that “nearly every study of surrogates’ motivations attempts to determine sufficient financial distress in the surrogate’s life that might provide a reason for her need to turn to this desperate measure.” Busby reviewed no study that indicated any surrogate mothers became involved with surrogacy because they were experiencing financial distress. Ciccarelli and Beckman reviewed 27 American empirical studies published between 1983 and 2003 and reached a similar conclusion. They concluded that “surrogate mothers’ family incomes were most often modest (as opposed to low) and they are from working class backgrounds.” In Ragone’s 1994 study, the average family income of married surrogates was $38,700 and unmarried surrogates’ income level ranged from $16,000 to $24,000. The median household income in the U.S. in 1994 was $32,264; the median per capita income was $16,555. Thus, it appears that surrogate women, while likely not as wealthy as most intended parents, are also not financially distressed.

47 RAGONE, supra note 24, at 54-55.
49 Teman, supra note 4, at 1107.
50 Busby, supra note 12, at 44.
51 Ciccarelli & Beckman, supra note 5.
52 Id.
53 RAGONE, supra note 24, at 54-55.
Second, the empirical studies reveal that the financial motive is one of many that factor into the surrogate’s decision. Regarding compensation as motivation, Ciccarelli reports that “[a]lthough financial reasons may be present, only a handful of women mentioned money as their main motivator.”\textsuperscript{55} Teman observed after her survey of studies on the issue that almost every study concluded that money was rarely the sole or even the primary reason for entering the surrogacy arrangement.\textsuperscript{56} Most surrogates enjoyed pregnancy and childbirth, and many surrogates noted that surrogacy increased their fulfillment and self-confidence and opened up their social circles.\textsuperscript{57} Others indicated it allowed them a way to continue being a mother to their own children.\textsuperscript{58} At the same time, Ragone points out that surrogates may be influenced by social pressure to construct their motivations as more altruistic because that will be more socially accepted than if they named money as their sole motivation.\textsuperscript{59} This is supported by Einwohner’s 1989 study of 50 American surrogate mothers, of which 40 percent of them said money was the main but not sole motivator.\textsuperscript{60}

The question of motivation, as alluded to earlier, is one of the more difficult aspects to empirically document in part because it crosses most heavily over to normative assumptions. The empirical evidence does show, contrary to some critics’ claims, that surrogate mothers are not financially desperate, but it also indicates that they are likely to be less wealthy than commissioning parents given how much a surrogacy arrangement typically costs. Here, it is interesting to note that critics and others have acknowledged that infertility

\textsuperscript{55} Ciccarelli & Beckman, supra note 5.
\textsuperscript{56} Teman, supra note 4, at 1107.
\textsuperscript{57} See van den Akker, supra note 4; RAGONE, supra note 24; Blyth supra note 29; Edelmann, supra note 4.
\textsuperscript{58} See Hohman & Hagan, supra note 26, at 69.
\textsuperscript{59} RAGONE, supra note 24, at 71-73.
\textsuperscript{60} Einwohner, supra note 27.
affects all classes of people, and commissioning parents are not necessarily wealthy or even middle-class.\textsuperscript{61} Further, it is also fair to say that, whatever other altruistic reasons may exist, most surrogates are likely motivated at least somewhat by money like everyone else. Some have argued that paid surrogacy is not fundamentally different from other kinds of jobs where people are motivated by money and are employed by those wealthier than they are.\textsuperscript{62} They point out that surrogacy critics typically regard unpaid or altruistic surrogacy as not as harmful or exploitive, though, in that case, \textit{nothing} is given to the surrogate mother for her labors.\textsuperscript{63} By contrast, others have argued that the likely income differential between the two parties is per se enough to constitute exploitation or coercion, in part on the assumption that “normally” women would not want to be surrogates.\textsuperscript{64} These differing views of the empirical evidence indicate underlying normative disagreement over reproduction and motherhood, namely whether one believes surrogacy represents conduct “money cannot buy” because of its social harms.\textsuperscript{65} I will try to situate these normative views in Part II and suggest that because American society predominantly views motherhood as natural and sacred, a practice that counters those norms in a fundamental way will trigger social anxiety.

\textsuperscript{61} See, e.g., Linda J. Lacey, “O Wind, Remind him that I have no Child”: Infertility and Feminist Jurisprudence, 5 MICH. J. GENDER & L 163, 183-84 (1998) (describing infertility as affecting people of all classes and races and that many low-income people seek out infertility clinics); NOEL E. KEANE & DENNIS L. BREO, THE SURROGATE MOTHER 31, 181 (1982) (describing some commissioning parents as having mortgaged their homes). \textit{See also} Baby M, supra note 1, at 1249 (acknowledging that “the Sterns are not rich and the Whiteheads not poor,” but nonetheless asserting “doubt that infertile couples in the low-income bracket will find upper income surrogates.”).


\textsuperscript{63} Wertheimer, supra note 62, at 217; \textit{See also} LORI ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, AND BRAVE NEW BABIES 259 (1989) (asking from a surrogate mother’s perspective, “why am I exploited if I am paid, but not If am not paid?”).

\textsuperscript{64} See ANDREWS, supra note 63.

\textsuperscript{65} See Baby M, supra note 1, at 1250.
and discomfort. For the moment, I reiterate that the empirical evidence at minimum
demonstrate that surrogate mothers are not financially desperate, which in conjunction with
other characteristics, refute the stereotyped profile some critics have painted to oppose
surrogacy.

C. Counterarguments

There are three counterarguments one might raise regarding the empirical evidence
presented in this section. First, one might argue that the empirical evidence is incomplete or
biased. As some scholars have pointed out, however, precisely because surrogacy challenged
social norms regarding motherhood and family, numerous studies have set out to prove that
there is something “abnormal” about surrogate mothers, including whether they experience
financial hardship, regret or other psychological distress.66 Despite not locating such traits,
continuous attempts have been made to prove otherwise for more than 20 years since Baby
M.67 Even studies that result in no adverse findings are quick to put in caveats that their
study may not have captured all the relevant factors.68 Particularly given the opposition to
surrogacy in the years following Baby M, it is actually more likely that empirical studies would
be skewed, in line with normative notions of motherhood, to disfavor surrogacy than to
favor it. Yet, study after study has been consistent in not finding negative experiences or
objective indicia of exploitation in the vast majority of surrogacy arrangements. Again, it is
not my intention claim that there is none of what may be objectively construed as exploitive
or coercive in surrogacy arrangements.69 However, given the efforts to document such

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66 Teman, supra note 4.
67 Id. at 1104-1112.
68 Id.
69 In fact, it is possible that some experienced surrogates could exploit new commissioning
parents, who are likely to be new to the process and be heavily dependent on the surrogate.
occurrences and the lack of supportive findings, such conditions likely do not accurately reflect the majority of surrogacy arrangements in the U.S. to date.

Nor is the profile I have summarized above of the surrogate mother a surprising one given the incentives of the parties involved. It is not in the interests of commissioning parents or surrogacy agencies to choose surrogates who are financially or emotionally unstable precisely because they may be more likely to change their minds; surrogate mothers are screened specifically to not have the socially vulnerable profile opponents portray. 70

Keeping in mind that the commissioning parents must depend on the surrogate mother for the duration of the pregnancy, “it is not in [their] interests to find a surrogate whom they can exploit, as they do not want the surrogate engaging in behavior that could harm the child, or reconsidering her decision mid-course.” 71

A second counterargument made by some is that surrogate mothers suffer from a kind of “false consciousness,” dictated by the socialization of a patriarchal society and, as a result, their “choice” and subsequent positive reporting of their experiences cannot be given full weight. 72 In contrast to some cabined objections that accept surrogacy contracts only on the condition that “women entering into them do so with fully informed consent . . . maintain control over their own bodies throughout pregnancies,” 73 the false consciousness position doubts surrogate women could ever volitionally choose to be surrogates. 74 Gena Corea, who previously chaired the National Coalition Against Surrogacy, argued that “[g]iven

70 See RAGONE, supra note 24, at 15-37 (describing the procedures of surrogacy agencies in choosing potential surrogates).
72 See Sanger, supra note 8.
73 ROTHMAN, supra note 6, at 241-42 (characterizing the position of the “liberal” wing of feminism as not necessarily opposing surrogacy contracts).
74 See Lieber, supra note 40, at 215.
that childbearing is the prime function for which women are valued, it is not surprising that some women only feel special when they are pregnant and assert that they love reproducing,” and that it is men who perpetuate the idea that women love to be pregnant. Others have asserted that surrogate mothers construct “fairy tales” to deceive themselves into believing that they enjoy the experience. In short, positive empirical accounts of surrogates’ experiences prove only a false reality through a filtered patriarchal lens.

First, I note that this type of argument depends on rejecting women’s own accounts of their experiences no matter well considered and fully voluntary, which some have characterized as a “hard paternalist position” and as in opposition to the charge of feminism to “listen to what women say and respect their choices.” For the purposes of this paper, I will simply contend that this type of argument rejects the empirical evidence because of its non-conformity with a pre-existing normative view of the world in support of my thesis that opposition to surrogacy is more normatively driven. By contrast, a separate argument that there is lack of consent because women are unaware of their emotional responses to pregnancy and relinquishment can be evaluated against empirical evidence showing that most surrogate have had children, display positive attitudes towards surrogacy over time and want to be surrogates again.

Finally, a third counterargument, related to the second, is that, regardless what the empirical evidence may show, surrogacy is still bad for society writ large. Because such an argument stands independently of any empirical evidence that can be presented on surrogate

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75 COREA, supra note 8, at 228-233.
76 Annas, supra note 8.
78 Sanger, supra note 8, at 458. See also Andrews, supra note 3, at 171-173.
79 See infra text accompanying notes 20-46.
mothers or their experiences, it is precisely of the purely normative variety that this paper contends is at the heart of the opposition to surrogacy. My sense is that even if we could hypothetically demonstrate with empirical certainty that, from the perspective of surrogate mother, there are no tangible harms or the experience is positive, certain critics and a majority of the American public would find still little comfort in that fact. In attempting to strip away the empirical piece in this section, I hoped to more clearly delineate the universe of opposition towards surrogacy. As I stated in my introduction, if the direct harm to the surrogate mother can be tabled (at least as to the vast majority of surrogate mothers in the U.S.), then we can better understand the perceived normative, social harms of surrogacy. The rest of the paper will seek to provide a fuller explanation of the normative uneasiness with surrogacy through exploring the social and political anxieties that surrogacy represents.

II. HARM TO SOCIETY: EVALUATING THE NORMATIVE OBJECTION

A. Overview of the Normative Objection

Empirical evidence contradicting claims of direct harm to surrogate mothers in the vast majority of surrogacy arrangements alleviated little of the uneasiness with surrogacy on a normative level. Twenty plus years after Baby M, public opinion of surrogacy in the U.S. remains largely negative. A survey of 400 randomly selected residents in the U.S. in 1994 indicated that the majority disapproved of surrogate motherhood.\textsuperscript{80} Scholars writing more recently suggest that the largely negative attitude has remained.\textsuperscript{81} Of the approximately 18 states with statutes specifically addressing permissibility of at least some form of surrogacy, 6 expressly prohibit all forms of surrogacy agreements and 3 expressly prohibit paid surrogacy,

\textsuperscript{81} Teman, \textit{supra} note 4, at 1105; van den Akker, \textit{supra} note 4; Edelmann \textit{supra} note 5, at 127.
with some imposing civil or criminal penalties like Michigan, D.C., Florida and New York.\(^82\) 5 states ban traditional surrogacy arrangements but allow gestational surrogacy arrangements where the surrogate is not genetically related to the child; others require at least one parent to be genetically related to the child and at least one state, Nevada, requires both intended parents to be genetically related to the child.\(^83\)

Popular perception of surrogacy has also been negatively influenced by media portrayals.\(^84\) Media accounts of the Baby M case introduced most Americans to the world of surrogacy and frequently framed the issue as dichotomies between “Giving Love, or Selling Life?” and “Gift of Life . . . or simply baby-selling?”\(^85\) Public attention on Baby M was intense from the time the Whiteheads fled New Jersey with the baby and persisted through the New Jersey Supreme Court decision holding the surrogate contract unenforceable.\(^86\) As the trial went on, Mary Ann Whitehead, the surrogate, was increasingly portrayed as a victim.\(^87\) In part driven by the strategy of the Sterns’ lawyers to paint her as a bad mother through the use of experts to question her parenting techniques and lifestyle, the public attitude shifted from “an initial negative perception of Mrs. Whitehead as a woman who had entered into a contract to have a baby for money and then reneged,” to “a victim, exploited by people better off than she and subjected to unfair scrutiny of her family life and personality.”\(^88\) While early on in the Baby M case feminists were “torn between support [of] a women’s right to use her body as she chooses” and concerns about the exploitation of

\(^{82}\) \textit{Lesbian, Gay, Bisexual & Transgender Family Law Database,} § 4:2 (2011), \textit{available at} Westlaw LGBTFAMLAW.

\(^{83}\) \textit{Id.}

\(^{84}\) Teman, \textit{supra} note 4; van den Akker, \textit{supra} note 5.


\(^{86}\) Scott, \textit{supra} note 17, at 114.

\(^{87}\) Peterson, \textit{supra} note 10.

\(^{88}\) \textit{Id.}
women, this opinion quickly dissipated into a strong negative position on surrogacy.\textsuperscript{89} To be sure, there were women that defended surrogacy on women’s choice grounds even early on, but they were in the minority.\textsuperscript{90} By the time the Baby M trial ended at the lower court level in 1987, feminists and liberals became the most active advocates against surrogacy.\textsuperscript{91} At the appeals level, amicus briefs for reversal far outnumbered those in favor of the decision; amici for reversal included prominent feminists, the New Jersey Catholic Congress, the Family Research Council, and the National Committee for Adoption.\textsuperscript{92} Post Baby M, the media continued to reinforce the popular narrative of bad surrogacy experiences.\textsuperscript{93}

The popular unease with surrogacy was reflected in the academic discourse where critiques of surrogacy were particularly scathing in the years immediately following Baby M.\textsuperscript{94} As already alluded to, normative critiques of surrogacy based on harm to society, independent of any empirical harm to surrogate women, were made by academics in two main ways: exploitation and commodification. The theoretical underpinning came from

\textsuperscript{89} Iver Peterson, Baby M Trial Splits Ranks of Feminists, N.Y. TIMES, Feb. 24, 1987, at B1 (reporting that the membership of the New Jersey National Organization of Women split on surrogacy); see also PHYLLIS CHESLER, SACRED BOND: THE LEGACY OF BABY M (1988) (describing the reluctance of feminists to rally around Whitehead early in the trial).

\textsuperscript{90} Scott, supra note 86, at 116. Feminists and women’s groups were united against the trial level decision of Baby M and similarly united in support of the New York State legislation banning surrogacy. \textit{Id.} The New York Women’s Bar Association and the New York chapter of the National Organization for Women lobbied actively for the passage of the law and the bill itself was sponsored by Helene Weinstein, a pro-choice Brooklyn Democrat. \textit{Id.} at 119. One of first feminists to come out in favor of surrogacy was Carmel Shaley. See CARMEL SHALEY, BIRTHPOWER (1989).

\textsuperscript{91} Scott, supra note 86, at 116; Peterson, supra note 10.

\textsuperscript{92} See list of amicus curiae briefs in Baby M, supra note 1; Joseph S. Sullivan, Brief by Feminists Opposes Surrogate Parenthood, N.Y. TIMES, July 31, 1987, at B3.

\textsuperscript{93} See Teman, supra note 4, at 1105 (“Stories featuring surrogacy in films and on television replicate similar plotlines, seldom portraying surrogacy in positive, uncomplicated ways.”); see, e.g., FINAL VENDETTA (1996) (depict psychologically disturbed surrogate mothers with ulterior motives terrorizing their commissioning couples); THE SURROGATE (1995) (depicting the surrogate reneging on the contract); see also supra note 5.

\textsuperscript{94} Scott, supra note 86, at 115.
feminist theory, which argued that “[i]t is women’s motherhood that men must control to maintain patriarchy,” and that surrogacy and other reproductive technologies, “will enable men – at last – to have women for sex and women for reproduction, both controlled with sadistic precision by men.” In more extreme versions of the argument, surrogacy is compared to a form of slavery or prostitution because it “pays so little, capitalizes on the traditionally female virtues of self-sacrifice and caretaking, and enables men to have biologically related children without the burden of marriage.” In addition to serving the patriarchal wish for reproduction, surrogacy was said to be harmful in reinforcing the stereotypical image of women as mothers or caretakers. Still others criticized surrogacy as commodification that “reduce[d] the woman to a container” for the fulfillment of the male desire of perpetuating their “seeds,” only, now, some upper-class women are afforded the privileges of patriarchy as well.

There were many versions of these arguments, some incorporating empirical claims regarding the economic and social statuses of surrogate women. As I argued in Part I, the empirical evidence, however, supports the view that it is a normative unease – i.e. regardless of harm to surrogate mothers, surrogacy is still socially harmful – that drove this opposition. Moreover, these normative arguments do not depend on empirical evidence because, by definition, surrogacy involves the exchange of money for pregnancy, which alone is sufficient to implicate the wrongs of commodification and exploitation for many of these critics. This normative opposition to surrogacy, as distinct from empirical objections, is most well illustrated by the Baby M decision itself where the New Jersey Supreme Court,

95 ROTHMAN, supra note 6, at 31.
96 ANDREW DWORKIN, RIGHT WING WOMEN, 188 (1983).
97 Allen, supra note 6, at 147-48.
98 Lacey, supra note 61, at 173.
99 ROTHMAN, supra note 6, at 244.
referring to Mary Beth Whitehead, the surrogate mother, stated that “[p]utting aside the issue of how compelling her need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy.”\(^{(100)}\)

In recent years, there has been some suggestion that public attitudes are changing towards a more permissive view of surrogacy.\(^{(101)}\) This shift, however, cannot be explained by any new results from empirical studies, which have remained consistent over time. The next section will explore the normative opposition to surrogacy as a function other social anxieties that were brewing in the 1980s when Baby M launched surrogacy as a salient issue into the public sphere.

**B. Surrogacy as Implicating Social Anxieties**

In the last few decades, constructivism has emerged as a sociological perspective that emphasizes the constructed nature of social problems.\(^{(102)}\) From the constructionist perspective, the emergence or salience of a “social problem” is not so much connected to objective conditions but to subjective claims-making activities.\(^{(103)}\) Other scholars have described a related phenomenon of a “moral panic,” often triggered by highly publicized events that engender public alarm and in which the public, the media, and political actors reinforce each other “in an escalating pattern of intense and disproportionate concern in response to a perceived social threat.”\(^{(104)}\) A moral panic, like a constructed social problem, is

\(^{(100)}\) *Baby M*, *supra* note 1, at 1249.
\(^{(101)}\) Scott, *supra* note 86.
\(^{(102)}\) MARKENS, *supra* note 85, at 7.
\(^{(103)}\) *See, e.g., JOEL BEST eds.,* IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS (1989).
\(^{(104)}\) Scott, *supra* note 86, at 125.
distinguished from a straightforward social problem by the “gap between perception of the threat and reality.”

These perspectives are important for understanding surrogacy because only a few people are directly affected by or involved in surrogacy, but, in the years post Baby M, as measured by the media and legislative attention given to it, it was perceived as a widespread social problem. Certainly, the fact that only a few women ever become surrogate mothers does not diminish the weight of normative arguments made against it as many abhorrent practices may directly affect only a few but could arguably decrease the morality of the entire society. But unlike many social issues where there are visible victims seeking social notice and help, with surrogacy, surrogate mothers, the so-called “victims,” were themselves claiming positive experiences. This suggests that the heightened and sudden public alarm to surrogacy was in part constructed through the triggering of social anxieties external to any direct harm surrogacy caused to individuals. As documented by Susan Markens, Assistant Professor of Sociology at the City University of New York, in her study on surrogate motherhood and the politics of reproduction:

In the early 1980s, newspaper stories about surrogate parenting appeared only intermittently . . . combined coverage provided by the New York Times, the Los Angeles Times, and the Washington Post totaled 15 articles in 1980, 19 in 1981, 8 in 1982, and 25 in 1984. News coverage dipped for the next two years until halfway through 1986, when Mary Beth Whitehead changed her mind and took Baby M from the Sterns. In that year, these three national newspapers published 41 articles on surrogacy. In [1987], during the Baby M custody trial, coverage of the issue peaked

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105 Id.
106 See MARKENS, supra note 85, at 7.
at a dramatic total of 270 articles. And in 1988, when the New Jersey Supreme Court handed down its decision on the case . . . coverage was still relatively high, at 99.

Media attention ebbed and flowed in the following decade, staying at mostly pre-Baby M rates, except for 1990, when 41 articles were published among these three papers. 107

Legislative attention also provided an important index. In 1987, the peak year of news coverage, twenty-six state legislatures introduced seventy-two bills on the topic. 108 Moreover, evidence of Baby M’s influence on public visibility can be traced. According to Markens, based on the National Conference of State Legislature data on surrogacy contract bills, in 1987, the year of peak news coverage, twenty-six state legislatures introduced seventy-two bills on the topic. 109 The bills introduced were fifty-fifty on whether to permit or prohibit surrogacy. 110 Based on Markens’ assessment, the proportion of bills prohibiting surrogacy rose to 57 percent in 1988, 66 percent in 1989, and 64 percent in 1990. 111

I would argue that the connections engendered by surrogacy to other embedded social and political issues in the consciousness of the American public – regarding motherhood, reproduction, class, and race – triggered social anxieties beyond surrogacy itself and constructed the normative opinion on surrogacy. The rest of the section will examine the political and social context leading up to Baby M, lay out in some detail the facts of Baby M, and then draw some connections regarding why surrogacy triggered normative concerns and came to symbolize various social anxieties.

107 MARKENS, supra note 85, at 20.
108 Id. at 22.
109 Id.
110 Id.
111 Id.
1. The political and social context leading up to Baby M

Throughout American history, reproductive politics – from birth control to abortion – has been shaped by a complex interplay of other social and cultural factors. Cultural assumptions about womanhood, motherhood, class and racial equality, role of the state versus individual rights provide the underlying framework through which much of the debate occurs. For instance, Professor of History at New York University Linda Gordon’s study on the birth control movement in the United States found that diverse feminist groups in the 19th century – suffragists, moral reformers, and free lovers – agreed on the strategy of “voluntary motherhood” as a way for women to control their reproductive lives. The study also revealed that “voluntary motherhood” itself was an ideology steeped in notions of traditional family and motherhood as the woman’s natural and essential role, reflective of the white, middle-class experience of most of the female activists involved in the earlier birth control campaigns. Similarly, Professor of Law and Sociology at the University of California, Berkeley, Kirstin Luker’s classic study on abortion and the politics of motherhood found that people mobilized because they “[saw] in the abortion issue a simultaneously pragmatic, symbolic, and emotional representation of states of social reality – states that they find reassuring or threatening.” She also found that “how people align[ed] themselves in the abortion debate depend[ed] in part upon the social worlds in which they live[d].”

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113 GORDON, supra note 112.
114 Id.
115 LUKER, supra note 112, at 7-8.
Prior to Baby M, there were several factors brewing in the political and social context that paved the way for Baby M’s resonance as a symbol of underlying cultural anxieties. There were at least three separate but interrelated threads developing in the late-twentieth-century America that influenced the normative discourse and perception of surrogacy: (1) changes in family structure and roles of women (2) the abortion debate and new political consciousness of women around reproductive rights and (3) a perceived infertility “epidemic” and development of artificial reproductive technologies.

The traditional family structure and perceptions regarding motherhood was rapidly changing in the decades leading up to and post the 1980s. Between 1960 and 1979, there was more than a twofold increase in divorce rates. At the same time, fertility rates had fallen for women from its peak in the mid-1950s and rate of childlessness for women had risen. More cause for concern was the large increase in out-of-wedlock births with over 25 percent of births to unmarried women in 1990 to only 5 percent in 1960. Related to that trend was the increase in single-mother families. Between 1960 and 1992, the proportion of children living in mother-only families almost tripled from 8 percent to 23 percent. At the same time, there was an increase in working mothers. By 1992, 68 percent of married women with children under eighteen were working compared to 28 percent in 1960. Between 1948 and 1991, the number of working married women with young children increased from 11 percent to 60 percent.

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116 LUKER, supra note 112, at 115-117.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
Prior to the 1960s and 1970s, American society expected adult men and women to play distinctly different roles: men worked and women took care of the family. Women, especially poor and women of color or single and divorced, have always been a part of the work force but they were generally pitied for having failed at the task of making a family or for not having the luxury of devoting their full energies to family-care. Large numbers of women, even prior to the 1960s and 1970s, had made paid labor an adjunct to the primary role of wife and mother, working before the first child is born and after the last child is in school or has left the home (the “M” shaped pattern of age versus employment). This pattern, however, meant that the job market was “sex segregated” with women in “women’s jobs” and men in “men’s jobs.” Women’s jobs were those that could play adjunct to what was seen as the woman’s primary role of being in the home. These jobs, such as nursing, clerical work or teaching, were, on the whole, easy to enter, easy to reenter, and consequently were low pay, low skill, lower-status and had lower prospects for economic advancement, for instance in the fields of nursing, clerical work or teaching. Women who wanted to enter careers in law, medicine, or science were warned that they would give up the prospect of marriage and a family.

This traditional pattern of women’s work began changing rapidly in the 1960s and 1970s. In 1950 women made up of 29.6 percent of the paid workforce, in 1960, they made up 33.4 percent and in 1970, 38.1 percent. By 1979, 64 percent of all women between

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122 Id. at 113.
123 Id. at 113-115.
124 Id.
125 Id.
126 Id. at 113.
127 Id. at 114.
128 Id. at 115.
129 Id.
twenty-five and forty-four worked, compared to 77 percent of all men.  

Many women began to accept and enjoy the expectation that work would be a primary, not just an adjunct, part of their adult lives.  

But features that made “women’s work” attractive when viewed as an adjunct to wifehood and motherhood (i.e. low skill, lower-status, lower-prospect), made those jobs unattractive as professional careers.  

Significant for the eventual perception of surrogacy, women increasingly found themselves segregated in what were now seen as unattractive jobs or denied opportunities for advancement because they were “mothers or potential mothers.”  

As already suggested, these shifting trends in the structure of the family also had a class and racial dimension. While the cultural discourse around declining fertility were generally focused on white, middle-class women, the cultural discourse around out-of-wedlock births, and in particular around teenage pregnancies, were focused on women of color.  

Additionally, because white women traditionally lagged behind minority women in their labor force participation, the increase in working mothers had a particularly significant effect on white women.  

The pro-choice movement around abortion beginning around the same time period, crowned by the landmark Roe v. Wade decision in 1973, added a different dimension to the social discourse surrounding motherhood. Beginning in the late 1960s, Luker documents the emergence of a group of women as a self-conscious interest group that for the first time  

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130 Id. at 115.  
131 Id. at 117.  
132 Id. at 117.  
133 Id. at 118.  
134 MARKENS, supra note 85, at 10.  
135 Id. at 11.
claimed that abortion was a woman’s right.\textsuperscript{136} Since the mid-nineteenth century, physicians had successfully argued that abortion was such a weighty decision that only a professional – a doctor, likely to be male – could be trusted to handle it “objectively.”\textsuperscript{137} In the 1960s, women began to claim that no man (including most physicians at the time) could make an “objective” decision on abortion, and only the woman herself could legitimately decide whether or not abortion was “necessary.”\textsuperscript{138} This was revolutionary because, up to that point, a woman’s right to her own body was defined as one of several competing rights: the right of a husband, the right of the state to regulate sexual morality through regulating the consequences of sexual intercourse, and the right of the state to control the production of potential citizens.\textsuperscript{139} Women’s control over their own bodies would a theme later echoed in the surrogacy discourse, with some fearing that surrogacy would “undermine the right to bodily autonomy that women fought so hard to acquire.”\textsuperscript{140}

Linking together the increased amount of women in the workforce to the pro-choice movement, Luker observed that “the mobilization of significant numbers of women around the issue of abortion laws can therefore be seen as an attack on symbolic linchpin that held together a complicated set of assumptions about who women were, what their roles in life should be, what kinds of jobs they should take in the paid labor force, and how those jobs should be rewarded.”\textsuperscript{141} A similar framework around choice and role would shape the surrogacy debate as well.\textsuperscript{142}

\textsuperscript{136} LUKER, supra note 112, at 92
\textsuperscript{137} Id. at 99.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 100.
\textsuperscript{141} LUKER, supra note 112, at 118.
\textsuperscript{142} See MARKENS, supra note 85.
Concurrent with, and in part as a result of these developments, there was greater social discourse around what constitutes motherhood and efforts at trying to control it. Ideologies of “intensive” and “exclusive” motherhood emerged as well as categories of “bad” mothers, from “welfare moms” and “crack moms” to new mothers who did not breast-feed or who suffered from postpartum depression that they hurt their babies and women who delayed childbearing for careers or chose not to be mothers at all. The implicit fear of “career women” subordinating their traditional family duties would tinge views of Mrs. Stern in Baby M.

Finally, in the early1980s, the so-called “infertility epidemic” was perceived by the public as a yet another problem threatening the future of American families. As baby-boom generation women who delayed having children were seeking medical help, the absolute number of office visits from infertility dramatically increased from 600,000 in 1968 to 1.6 million in 1984. While the overall incidence of infertility among the population

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145 See Scott, supra note 86, at 115 (noting that Mrs. Stern’s claim that she feared the impact of pregnancy on her health was perhaps effectively challenged and referencing Harold Cassidy, Mrs. Whitehead’s attorney, stating to the jury that Mrs. Stern was a woman who “thought her career . . . too important to bear her own children.”)

146 Marksens, supra note 85, at 14.

147 Id. at 15.
remained the same, the problem was constructed into one of “epidemic” proportions.\textsuperscript{148} With the increasing social acceptance of single mothers, and the legalization of abortion, there were fewer babies, especially white, healthy ones, which decreased the perceived availability of adoption as an alternative and fed the panic.\textsuperscript{149} Increased media and academic attention on infertility and “solutions” in new artificial reproductive technologies further entrenched the public salience of the issues, implicating the anxieties associated with the changes in families and motherhood described above and new anxieties regarding reproductive technology veering into the terrain of “miracle children” and eugenics.\textsuperscript{150}

The larger context of social change and anxiety surrounding reproduction generated by changing family structures, concerns over infertility, conceptions of motherhood, and abortion generated a backdrop where surrogacy was ripe to emerge as a salient issue. It is against this backdrop that \textit{Baby M} occurred, and the facts of \textit{Baby M} in many ways, reified those concerns.

2. \textit{The Baby M case as encapsulating social anxieties}

Almost 25 years later, there is still no surrogacy case that has quite as dramatically captured the public’s attention as \textit{Baby M}. The facts of \textit{Baby M} placed within the social and political context of the times catapulted surrogacy into the public consciousness and illuminated the fabric of normative issues and social anxiety around surrogacy. Because the facts of \textit{Baby M} were in many ways critical to shaping the perception of surrogacy, this


\textsuperscript{149} MARKENS, \textit{supra} note 85, at 15.

\textsuperscript{150} \textit{Id.}
section will lay out the facts of Baby M in some detail and the next section will examine the ways in which those facts fed into the pre-existing social anxieties surrounding motherhood and reproduction. The facts of Baby M, summarized from the New Jersey Supreme Court and the trial court opinions, were as follows:\footnote{151 For the New Jersey Supreme Court’s statement of the facts see Baby M, supra note 1, at 1235-40. For the trial court’s more detailed and explicitly judgmental statement of the facts see In Matter of Baby M, 217 N.J. Super. 313, 335-55 (1987).}

William Stern and Elizabeth Stern were in their early 40s at the time of trial, each with a PhD in biochemistry and human genetics respectively. Mr. Stern was a biochemist and Mrs. Stern was a pediatrician. The couple married in 1974 but decided to put off having children until Mrs. Stern’s pediatric residency was complete and they were more financially secure. Before they could have a child, Mrs. Stern was diagnosed with multiple sclerosis, a condition, they learned, that could render pregnancy a serious health risk. Nonetheless, the Sterns wanted to have a child. They initially considered adoption but were deterred because of the substantial delay involved and the difficulties associated with their age and differing religious backgrounds. Moreover, because Mr. Stern was his family’s sole survivor from the Holocaust, he very much wanted to continue his bloodline, making adoption a less desirable option. The Sterns decided to pursue surrogate parenting and placed an ad with the Infertility Center of New York (ICNY).

Mary Beth Whitehead, 29 years old at the time of trial, dropped out of high school in the middle of tenth grade. In 1973, she married her husband, Richard Whitehead, when she was 16 years old and he was 24 years old. Mr. Whitehead at the time of the trial was employed as a garbage truck driver. The couple had their first child in 1974 and second child in 1976, after which, Mr. Whitehead got a vasectomy because they were content with the two children. From the date of their marriage in 1973, the couple moved at least 12
times and separated on one occasion during which Mrs. Whitehead received public assistance. Mr. Whitehead had a history and ongoing problem of alcoholism, had twice lost his driver’s license as a result of drunk driving incidents. The couple also had filed for bankruptcy in 1983.

Mrs. Whitehead had contacted the ICNY in response to a newspaper advertisement seeking surrogate mothers. Mrs. Whitehead had been involved as a potential surrogate mother with another couple, but the effort was abandoned after numerous unsuccessful artificial inseminations. Mrs. Whitehead testified that she was motivated to join the ICNY surrogate program to “giv[e] the most loving gift of happiness to an unfortunate couple” and to get a fee that would assist in providing for her children’s long range educational goals.

A match was made and a contract was eventually signed between Mr. Stern and Mrs. Whitehead. Mrs. Whitehead would be artificially inseminated with Mr. Stern’s sperm, carry any child conceived to term, deliver the baby to the Sterns and relinquish parental rights to the child. In return, the Sterns agreed to pay her $10,000 and to assume all her medical and incidental expenses. In a separate agreement, Mr. Stern agreed to pay $7,500 to the ICNY.

Baby M was born on March 27, 1986. Mrs. Whitehead turned over Baby M to the Sterns on March 30 at the Whitehead’s home. Later in the evening of March 30, Mrs. Whitehead became deeply disturbed, emotional and restless. On March 31, Mrs. Whitehead visited the Sterns and she told them that she could not live without the baby, that she must have her, even if only for a week, and that afterwards she would surrender the child. Out of concern for Mrs. Whitehead’s mental health, the Sterns acquiesced. Mrs. Whitehead subsequently refused to relinquish Baby M, Mr. Stern filed a complaint seeking enforcement of the surrogacy contract that was granted. When police entered Mrs. Whitehead’s home to execute the order with the process server, Mrs. Whitehead passed the child through a
window at the rear of the house to Mr. Whitehead. During the ensuing four months, the Whiteheads fled from New Jersey to Florida, staying in no less than twenty different hotels, motels and homes of assorted relatives and friends to avoid apprehension. Mrs. Whitehead made phone calls to the Sterns threatening to kill herself and Baby M and accused Mr. Stern of molesting her 10-year old daughter, though Mrs. Whitehead later admitted the threats and accusations were false. Eventually, the Sterns commenced supplementary proceedings in Florida and police forcibly removed Baby M and delivered her to the Sterns in New Jersey.

The drama of Baby M, to a large degree, provided the normative frame through which the public and academic perceived surrogacy. There are many aspects of Baby M that squarely implicated the anxieties surrounding motherhood and reproduction already brewing in American society; I will highlight a few important ones here. First, Elizabeth Stern’s choice to delay childbearing for her career was a direct illustration of how traditional notions of working husband and stay at home mom were being challenged. While Mrs. Stern was technically not infertile, she was nonetheless in her late 30s before she decided to try to have children, a phenomenon made more common by women in the professional workforce and part of what had fed into the perception of the “infertility epidemic” described earlier. Mrs. Stern’s anxiety regarding the health risk to her during pregnancy was challenged at trial and the New Jersey Supreme Court commented that “[h]er anxiety appears to have exceeded the actual risk, which current medical authorities assess as minimal.”  

Mrs. Whitehead’s lawyer, Harold Cassidy, went as far as to describe Mrs. Stern to the jury as a woman who “thought her career . . . too important to bear her own children.”

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152 Baby M, supra note 1.
injury indicated the social tensions that still existed with regard to what the woman’s role should be.

Second, Mr. Stern’s lawyers devoted a large part of the trial depicting Mrs. Whitehead as a bad mother, indirectly implicating anxieties of what good mothering ought to look like in the era of changing notions of motherhood. Experts questioned Mrs. Whitehead’s parenting abilities on the basis of her lifestyle, unstable finances, and lack of intellectual stimulation to the child. Many women’s advocates became increasing angry at the attacks on Mrs. Whitehead by lawyers and mental-health experts in ways reminiscent of the protest against physicians in the abortion context; in their view, she was “being held to an unfair standard of motherhood.”

Moreover, the emphasis on Mrs. Whitehead’s lifestyle, parenting style and finances was seen as typical of the gender discrimination in child-custody disputes. In the context of a society still grappling with what will constitute motherhood for women who will increasingly be working or in single-parent households, the questioning by outside “experts” of what is good mothering understandably raised protest. In many ways, the ability to define what is good motherhood is also the ability to control what women can do with their lives: a battle hard fought in the 1960s and 1970s. Interestingly, as much as women’s rights groups rallied around Mrs. Whitehead, subsequent developments suggest there was an academic effort, through studies on surrogate mothers, to attempt to find some pathology in these women.

154 Scott, supra note 86, at 114-115.
155 Peterson, supra note 10 (Noting feminist objections to expert testimony questioning Mrs. Whitehead’s parenting abilities on the basis of games she played with the child, such as “patty cake” and diagnosing Mrs. Whitehead with a narcissistic personality disorder because she dyed her hair).
156 Scott, supra note 86, at 116.
157 Teman, supra note 4, at 1104-1112.
Third, *Baby M* brought in the issue of money into a social consciousness already fraught with class and racial tensions and uncomfortable with new reproductive technologies and the commodification of reproduction. The elephant in the room, as stated by the New Jersey Supreme Court was that while “the Sterns are not rich and the Whiteheads not poor” is that “it is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent. Put differently, we doubt that infertile couples in the low-income bracket will find upper income surrogates.” It was this implicit fear of class inequality that led, in part, to the claims of harm to financially and emotionally unstable surrogate mothers discussed in Part I. Moreover, the insertion of money per se into reproduction had undertones of babyselling and became an objection that many made regarding the advent of reproductive technologies in general. Although the traditional surrogacy of *Baby M* was relatively low-tech, it occurred less than a decade after the birth of Louise Brown, the first child conceived through IVF, and American society had just began to contemplate and grapple with the implications for family structure as a result of technologies that allowed genetic, gestational, and social parenting to be disaggregated. Reproductive technology further raised the specter of breeding farms, designer babies, cloning and a whole parade of horrors, reinforced by the unhappy outcome of *Baby M*.

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158 *Baby M*, supra note 1, at 1149.
161 See Scott, supra note 86, at 126.
CONCLUSION

This paper sought to demonstrate that, rather than by direct harm to surrogate mothers, opposition to surrogacy was driven more by concerns of normative societal harm, which stemmed from aspects of surrogacy triggering a host of social anxieties about women’s roles, family and motherhood surrounding the era of Baby M. At the end, a lingering question is that, even if one believes what this paper set out to prove, what does it tell us about how we should view surrogacy moving forward?

Elizabeth Scott, Professor at Columbia Law School, in her examination of surrogacy and the politics of commodification, argued that the social and political meanings of surrogacy has changed over the last decade to become more normatively acceptable due to the rise of gestational surrogacy, shifting interest group dynamics, and in part, as Part I of this paper outlined, a lack of many of the predicted harms materializing.162 Certainly, legitimate normative objections exist against surrogacy and will continue to exist, and this paper does not purport to answer such questions. Nevertheless, I suggest that if the lens on the issue can be adjusted to better reflect the actual experience of surrogate mothers and pinpoint the areas of direct rather than theoretical harm, then, “well-designed regulation can greatly mitigate most of the potential tangible harms of surrogacy, and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists.”163

162 Scott, supra note 86.
163 Id. at 146.