Be Fruitful and Multiply, By Any Means Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements

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I. Introduction

Surrogacy, the practice of carrying a child to term for the benefit of someone else has been with us since before recorded history. One of the earliest surrogates was none other than Zeus, king of the Olympian gods. Zeus may actually qualify as the first multiple surrogate. Athena burst forth from his head after Zeus had swallowed whole her pregnant mother, Metis.\(^1\) Zeus more directly served as the gestational surrogate for Dionysus, the god of wine. As Dionysus’ pregnant mother, Semele (daughter of King Cadmus of Thebes) died, Zeus snatched the developing fetus and sewed it up into his own thigh. Zeus gave birth to the god of wine some time later.\(^2\) Another frequently cited early example, the story of Abraham, Sarah, and Hagar, comes from Genesis.\(^3\) Unable to conceive a child, Sarah offered her handmaiden Hagar to provide a child for Abraham. Ishmael was the result of that arrangement.

Surrogacy today has taken a somewhat different form than was practiced by the Olympian gods or figures from Genesis. Modern medicine has developed a host of assisted reproductive technologies. The potential list includes hormonal therapies, artificial insemination, in vitro fertilization, pre-implantation genetic diagnosis, intracytoplasmic sperm injection and

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3 See Genesis 16.
surrogacy. There are others as well, and science may well bring even more possibilities to fertility clinics in the years to come. Each of these technologies brings its own discussion as to the moral, ethical, and legal consequences and complications. This article will discuss the legal status of gestational surrogacy in the United States.

Today, the laws governing the use of gestational surrogacy vary widely from state to state. This has led to a fractured market and increased inefficiencies and has resulted in significant inequities for potential surrogates and the individuals seeking to utilize their services. There is no clear majority approach to surrogacy. There is not even a clear plurality approach. Some states permit and enforce a wide range of surrogacy contracts. Some enforce only a limited subset of such contracts. Many states have no law on the subject or refuse to enforce surrogacy contracts. Three states not only refuse to enforce surrogacy contracts, but impose civil or criminal penalties on those arranging and entering into surrogacy contracts.

In Section 2 of this article I will briefly discuss the technical process of surrogacy. In Section 3 I will discuss the various approaches states and legal organizations have taken or recommended regarding surrogacy. I will also discuss the positive and negative aspects of each approach. In Section 4 I will discuss the major arguments in opposition to the enforcement of gestational surrogacy agreements and why those arguments fall short. In Section 5 I argue that the current patchwork of laws creates more harm than it resolves. In Section 6 I conclude the article and argue that the time has come to take a more comprehensive approach that endorses, but regulates, the use of gestational surrogacy agreements.

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4 See AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, http://www.asrm.org (last visited August 22, 2011) and SOCIETY FOR ASSISTED REPRODUCTIVE TECHNOLOGIES, http://www.sart.org (last visited August 22, 2011) for information on each of these technologies.
II. What Exactly Is Surrogacy?

Surrogacy is the use of one woman’s gestational capacity to assist in the development of a child intended for someone else to parent. Surrogacy comes in two varieties, traditional and gestational. In either situation, the woman carrying the child has agreed to relinquish any parental claims she may have regarding the resulting child or children. The embryo/fetus/child is considered the child of the intended parents.\(^5\) The key difference between traditional and gestational surrogacy lies in whether or not the woman carrying the child through gestation is the genetic mother of the child as well.

As we all learned in high school biology (or more likely much earlier), there are a number of necessary steps that precede the birth of a child. One key step involves the joining of the male’s sperm and the female’s egg. There is, of course, the most traditional method for encouraging a sperm and an egg to fuse. This method, however, does not work for some people who wish to have a child. In such situations, the fusion of egg and sperm may be encouraged outside of a woman’s body through in vitro fertilization (IVF). Physicians or medical technologists encourage the gametes (i.e. eggs and sperm) from the intended parents or donors to join, forming a zygote. The zygote is then allowed to divide for three to five days, forming into a small ball of cells called the blastocyst. At this stage that the blastocyst is transferred to the

\(^5\) The term “intended parent(s)” is used throughout this article to mean the individual(s) who intend to become parents through the use of gestational surrogacy. It should be made clear, however that once the embryo is transferred to the gestational surrogate and implants into her uterus, the “intended parents” are the actual parents of that embryo/fetus/child. See discussion infra pp. 45-50.
surrogate’s uterus in hopes it will implant into the surrogate’s uterine wall and pregnancy will ensue.6

Surrogacy is divided into two categories, traditional surrogacy and gestational surrogacy. Traditional surrogacy is as with the Abraham/Sarah and Hagar situation. The surrogate is also the genetic progenitor of the resulting baby. Gestational surrogacy follows closer to the Zeus/Dionysus situation, where the carrier of the child did not also provide the egg.7 In short, traditional surrogacy is where the woman carrying the child is also a genetic progenitor of the child. Gestational surrogacy is where the woman carrying the child is not a genetic progenitor of the child.

Intended parents choose their method of having children for varying reasons. Until the advent of modern medical practices, most particularly IVF, there were few choices available. Individuals wanting to be parents had but two viable options. They could only use the traditional method, or they could legally adopt a parentless child. Traditional surrogacy was available prior to IVF. However, as a traditional surrogate could only become pregnant through sexual intercourse or artificial insemination8 this was not a common option (Biblical precedents notwithstanding). Today, if the traditional approach does not result in a child, intended parents may use a variety if fertility-enhancing drugs, utilize IVF and embryo transfer, utilize the services

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7 An argument can be made that Zeus was also a traditional surrogate as he was the genetic father. Nonetheless, the analogy is close.

8 Introducing sperm into the vagina or uterus without sexual intercourse. This is relatively easily done with some form of syringe.
of a surrogate, or adopt. If someone wishes to have a child genetically linked to him/herself and is unable to carry the child to term, the use of a surrogate is the only available option.

Traditional and gestational surrogacies have significantly different ethical and legal consequences. Many of the concerns raised in traditional surrogacy, in particular those concerning a woman contracting to give up parental rights for her biological child, do not exist in gestational surrogacy. This paper will primarily discuss gestational surrogacy.

Although surrogacy, in some form has been around for millennia, it has only recently become the legal quagmire we find today. The legal landscape has not yet caught up with the developing technologies that allow for ever greater reproductive options. Gestational surrogacy was only possible following the development of in-vitro fertilization less than 40 years ago. While far from a common method of producing children, it is growing in frequency.9

III. Legal Responses to Surrogacy – Strengths and Shortcomings

A) Early Judicial Responses: Baby M and Johnson v. Calvert

In many contractual arrangements parties sometime find themselves at odds over how and whether they want to go forward with the agreement as written. All states have laws and regulations governing how such disputes may be resolved.10 Surrogacy agreements, like all other agreements, are not completely immune to party discontent. In the early days of modern surrogacy, states had few, if any, laws specifically governing such agreements. So when disputes

9 Accurate statistics on gestational surrogacy are not readily available. However, both the Centers for Disease Control and the Society for Assisted reproductive Technologies collect data on IVF success rates. From that data we see that the rate of gestational surrogacy more than doubled between the years of 2004 and 2008. See Magdalina Guguceva, SURROGACY IN AMERICA (Council for Responsible Genetics), available at http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf.

10 See, e.g., UNIFORM COMMERCIAL CODE.
developed between the parties, the courts had little statutory or regulatory guidance. Two early cases, In re Baby M\textsuperscript{11} from New Jersey in 1988 and Johnson v. Calvert\textsuperscript{12} from California in 1993, set the tone for future discussion.

These two cases, while factually distinguishable, took very different approaches when determining whether or not to enforce surrogacy agreements. The key factual distinction is that Baby M was born to a traditional surrogate,\textsuperscript{13} while the child in Johnson v. Calvert was born to a gestational surrogate.\textsuperscript{14} This distinction alone could explain their differing results. However, a closer look at the opinions provides a more fundamental answer.

In both cases, the courts appear to recognize that contracts carry a presumption of validity. Otherwise valid contracts should be enforced unless they violate the law or some fundamental public policy.\textsuperscript{15} In Baby M the New Jersey Supreme Court found that it is against public policy for natural parents to contract “in advance of birth which one is to have custody of the child.”\textsuperscript{16} The court also found that a “[c]ontractual agreement to abandon one’s parental rights, or not to contest termination action, will not be enforced.”\textsuperscript{17} The court goes on to utterly (and properly) reject contracts that involve baby selling, saying that “[t]here are, in a civilized society, some

\textsuperscript{11} In re Baby M, 109 N.J. 396 (1988) (declaring surrogacy contracts unenforceable as against public policy).

\textsuperscript{12} Johnson v. Calvert, 5 Cal. 4th 84 (1993) (holding that gestational surrogacy contracts are not in violation of public policy and therefore enforceable).

\textsuperscript{13} See 109 N.J. at 412.

\textsuperscript{14} See at 5 Cal.4th at 87.

\textsuperscript{15} See Baltimore & O.S.W. Ry. Co. v. Voigt, 176 U.S. 498, 505 (1900) (holding that it is the role of the court to enforce otherwise valid contracts “unless it clearly appear that they contravene public right or the public welfare.”).

\textsuperscript{16} 109 N.J. at 434.

\textsuperscript{17} Id. at 429.
things that money cannot buy.”¹⁸ These conclusions, however, rest on the presumption that Marybeth Whitehead, the traditional surrogate for Baby M, is the actual and lawful mother of the child. Given that presumption, their decision is not unreasonable.¹⁹

The New Jersey court viewed the surrogacy agreement as an improper mechanism for circumventing New Jersey adoption statutes.²⁰ Conversely, the California court in Johnson v. Calvert rejected any analogy to, or implication of, the adoption statutes, saying that “[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes.”²¹ As the agreement in question did not determine who is the lawful parent, the adoption laws are not implicated. The court further determined that any compensation paid to the gestational surrogate was “meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up ‘parental’ rights to the child.”²² The court states explicitly that “Anna's argument depends on a prior determination that she is indeed the child's mother.”²³ Once the court holds that Anna is not, and never was, the lawful mother of the child,

¹⁸ Id. at 440.

¹⁹ There is, however, reasonable argument that the Baby M decision was nonetheless misguided. If the traditional surrogate is considered to be fulfilling two separate and distinct rolls, that of egg donor and that of gestational carrier, she would not be the lawful mother of the child. Many states expressly sever any parental claim by (or parental obligation for) gamete donors. Once the woman donates her egg, she may no longer assert a parental claim to the child. The same is true for sperm donors. I argue here that gestational carriers similarly are not the child’s parents and so have no parental rights or obligations. If these two services happen to be provided by the same woman, does that convert a legal non-parent into a legal parent? This article does not address that argument in this article. The distinction between traditional and gestational surrogacy is profound. This article is focused only on the validity and enforceability of gestational surrogacy.

²⁰ See 109 N.J. at 423.

²¹ 5 Cal.4th at 96.

²² Id.

²³ Id. at 99.
Anna Johnson’s claim collapsed. In short, the California Supreme Court recognized this as a personal services contract and not a contract over parentage.\(^{24}\)

Both the New Jersey and the California courts displayed a concern regarding the potential for adverse affects on the well-being of the parties involved in surrogacy contracts. The New Jersey court said

> The long-term effects of surrogacy contracts are not known, but feared-the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct.\(^{25}\)

However, after reviewing the literature on these concerns, the court in Baby M acknowledged that “given the newness of surrogacy, there is little information.”\(^{26}\) This reveals a fundamentally different approach between the courts in Baby M and Johnson v. Calvert. The court in Johnson rejected the assertions that gestational surrogacy exploited poor women because “there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.”\(^{27}\) Or that surrogacy commoditizes children because “no evidence is offered to support it.”\(^{28}\)

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\(^{24}\) The *Johnson* court also utterly rejects any claim that the gestational surrogacy agreement between Anna Johnson and Mark and Crispina Calvert is the equivalent of involuntary servitude. *See id.* at 96-97.


\(^{26}\) *Id.*

\(^{27}\) *5 Cal.4th* at 97.

\(^{28}\) *Id.*
The New Jersey court and opponents of surrogacy services point to a parade of horribles and say that we cannot risk them occurring. The California court and surrogacy proponents argue that until there is evidence that such agreements actually result in the parade of horribles, and so would violate public policy, we should not invalidate otherwise enforceable agreements. It is a simple burden of proof argument. Opponents effectively say we must prove that surrogacy does not lead to the horrible outcomes before we should allow it. Proponents say that we must have evidence that surrogacy will likely result in horrible outcomes before we should ban it.29

Reason would tell us that the greater the potential harm, the less direct evidence we should demand. Exploitation of women and selling babies are certainly substantial harms. So perhaps we ought not demand substantial evidence that they will occur if we allow the enforceability of gestational surrogacy contracts. However, we should demand at least some reasonable evidence. There may have been some initial justification for declining to take even a small risk of their occurring. Now, twenty plus years after the availability of gestational surrogacy, we have substantial positive evidence that, even with minimal regulation, the alleged harms have not come to pass.30 The parade of horribles that concerned the Baby M court does not provide justification for invalidating gestational surrogacy contracts.

B) The States’ Mixed Responses

The reaction of states to surrogacy agreements has been extremely mixed, ranging from full acceptance and enforcement of all gestational surrogacy agreements to a complete rejection of any surrogacy arrangements enforced through criminal penalties. Some states will enforce

29 And that to the extent that surrogacy could result in bad outcomes, we should only ban the practice if reasonable regulation cannot mitigate any potential harms.

30 See Section IV discussion infra pp. 33-53.
some surrogacy contracts, but not other; some states limit availability of surrogacy agreements to only certain qualified parties (such as married couples or if the woman is incapable of carrying a fetus to term); some states require certain provisions or prerequisites for the enforcement of surrogacy arrangements; or some combination thereof. The largest group of states, however, has said virtually nothing directly pertaining to surrogacy agreements.

Arizona\(^{31}\) and Indiana\(^{32}\) by statute invalidate all surrogacy agreements. In addition to declaring surrogacy agreements void, some jurisdictions also impose civil or criminal penalties. Washington D.C. imposes a civil penalty of up to $10,000 and/or one year imprisonment on anyone who facilitates a surrogacy contract.\(^{33}\) New York imposes a $500 penalty on anyone entering into a surrogacy agreement\(^{34}\) and a $10,000 civil penalty for facilitating a surrogacy agreement in exchange for compensation.\(^{35}\) Further, anyone in New York who assists in arranging a surrogacy contract after already being subject to a civil penalty is guilty of a felony.\(^{36}\) Michigan has the harshest penalties for entering into or facilitating a surrogacy contract. It imposes a $10,000 fine and up to one year imprisonment for entering into a surrogacy contract and a $50,000 fine and up to five years imprisonment for anyone facilitating (for compensation) a surrogacy contract.\(^{37}\) Other states refuse to enforce surrogacy agreements through judicial

\[^{31}\text{See Ariz. Rev. Stat. } \S\text{ 25-218 (LexisNexis 2011).}\]
\[^{32}\text{Ind. Code } \S\text{s 31-20-1-1 to 31-20-1-3 (West, Westlaw through 2011).}\]
\[^{33}\text{See D.C. Code } \S\text{ 16-402(b) (West, Westlaw through 2011).}\]
\[^{34}\text{See N.Y. Dom. Rel. Law } \S\text{ 123(2)(a) (McKinney 2011).}\]
\[^{35}\text{Id. } \S\text{ 123(2)(b).}\]
\[^{36}\text{See id.}\]
\[^{37}\text{See Mich. Comp. Laws } \S\text{ 722.859 (West, Westlaw through 2011) (If the surrogate involved is an unemancipated minor or has a mental or developmental disability, Michigan will impose a}\]

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action. The most notable example is New Jersey, which refused to enforce traditional surrogacy agreements in the seminal case of In re Baby M.\(^\text{38}\)

A number of states will, by statute, allow enforcement of some, but not other, surrogacy agreements. Florida, Nevada, New Hampshire, Tennessee, Texas, Utah, and Virginia allow for enforcement of gestational surrogacy agreements if the intended parents are married.\(^\text{39}\) Several states, including Florida, New Hampshire, Texas, Utah, and Virginia require that the intended parents have a medical need for surrogacy.\(^\text{40}\) This is generally, although not always, defined to mean that the intended mother is unable to safely carry a child to term. Some states, including Illinois, New Hampshire, Virginia, and Utah, require that at least one of the intended parents provide gametes for the creation of the embryo.\(^\text{41}\)

Some states, such as New Hampshire, allow for traditional as well as gestational surrogacy.\(^\text{42}\) Florida also allows for traditional surrogacy through a preplanned adoption

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\(^38\) In re Baby M, 109 N.J. 396 (1988) (declaring surrogacy contracts unenforceable as against public policy). See supra pp. 6-10 for a discussion regarding the Baby M case.


\(^42\) See for example N.H. Rev. Stat. Ann. § 168-B:17(IV). The New Hampshire law appears to allow third party donation of sperm, as only one of the two intended parents must contribute a gamete. However either the intended mother or the surrogate must provide the egg. Thus,
agreement. However, the preplanned adoption agreement is subject to a right of the traditional surrogate to rescind the agreement for 48 hours following the child’s birth. Florida bans any compensation in excess of reasonable living, medical, legal, and mental health expenses, as do Nebraska, Nevada, New Hampshire, New Mexico, and Washington State. A few states prohibit compensation for any individual or entity that facilitates a surrogacy agreement.

A number of states require judicial approval of any surrogacy agreement, including New Hampshire, Texas, Utah, and Virginia. These same states also require an evaluation of the intended parents that mirrors that required in adoption proceedings. New Hampshire requires that and a bit more. The evaluation specifically requires an assessment of the “ability and disposition of the person being evaluated to give a child love, affection and guidance.”

Anonymous sperm donors are possible, but anonymous egg donors are not. This poses an interesting, and apparently unresolved, equal protection question.

43 See Fla. Stat. 63.213.
44 See id. § 63.213(2)(a).
45 See id. §§ 63.213(f), 742.15(4).
California is, perhaps, the most permissive toward surrogacy services, having decided in the 1993 case of Johnson v. Calvert that gestational surrogacy agreements do not conflict with California public policy. Subsequent California cases have reinforced the Johnson decision. To date, the California legislature has not seen fit to get involved in the question of surrogacy.

Roughly half of the states have no statutes or case law specifically addressing surrogacy contracts. As such, it is entirely unclear how enforceable such contracts would be in those states. In a few those states we have Attorney General Opinions that suggest the unenforceability of such contracts. A few other states have statutes or case law that suggest either the enforceability or unenforceability of surrogacy contracts. Iowa’s statute prohibiting human trafficking (e.g. baby selling) explicitly excludes surrogacy arrangements from the definition of human trafficking. West Virginia explicitly excludes fees and expenses paid to a surrogate mother from the prohibition on the purchase or sale of a child. Alabama explicitly excludes surrogacy from the prohibition on payment made for placing a child for adoption. These

51 5 Cal.4th 84 (holding that gestational surrogacy contracts are not in violation of public policy and are therefore enforceable); see discussion supra at pages 6-10.

52 See e.g., Buzzanca v. Buzzanca, 72 Cal. Rptr.2d 280 (Cal. Ct. App. 1998) (reinforcing the intentionality determination of lawful parentage); K.M. v. E.G., 37 Cal.4th 130 (Cal. 2005) (holding that a lesbian couple could both qualify as “mother” under the Johnson intention standard); and Kristine H. v. Lisa R., 37 Cal.4th 156, (Cal. 2005) (holding that parties who has sought a judicial declaration as to parentage may not later challenge that order).


54 See IOWA CODE § 710.11 (2009).


provisions may implicitly condone compensated surrogacy agreements. To date, however, there are no clarifying statutes or cases.

In short, states are all over the proverbial map on surrogacy regulation, ranging from enforcing surrogacy arrangements much like any other contracts to enforcing some, but not others, to enforcing none, to imposing civil or criminal penalties on people who enter into or facilitate such agreements. There is an utter lack of consistency. This can pose a significant problem for those wishing to engage the services of a surrogate. Few intended parents with sufficient means are likely prevented from utilizing the services of a gestational surrogate if they truly wish to do so. Travel to a jurisdiction that allows and enforces such agreements is not terribly difficult. It could, however, add substantially to the transaction and legal costs. It artificially limits the supply of surrogacy agencies, medical specialists, and gestational surrogates, thereby further increasing the costs. More significantly for the intended parents (and the resulting child), radically disparate and unclear legal status from state to state raises the potential for not knowing if the state you may travel to, or through, will even recognize the parent-child relationship. A more uniform state-by-state or federal approach would eliminate the confusion, ambiguity, and uncertainty that currently exist in the provision of gestational surrogacy services.

C) One State’s Statutory Approach: the Illinois Gestational Surrogacy Act

In 2004, Illinois passed its Gestational Surrogacy Act (GSA), one of the more comprehensive statutory regimes allowing for the enforceability of gestational surrogacy agreements. The Illinois statute makes a good faith attempt to meet many of the concerns

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regarding gestational surrogacy with respect to commodification and exploitation. It includes requirements for the surrogates’ age,\(^{58}\) parity,\(^{59}\) and legal representation.\(^{60}\) In addition, it requires that the surrogate have undergone complete medical and psychological evaluations.\(^{61}\) These requirements seem reasonable safeguards to minimize the risk of exploiting unsuspecting women, while not preventing competent, capable, and willing women from offering gestational surrogacy services.

The GSA clearly envisions both married and unmarried couples as intended parents. It also appears to allow single individuals to be intended parents.\(^{62}\) This is a more expansive view than some other jurisdictions that allow surrogacy only for married couples, and implicitly acknowledges that the right to procreate is not (and should not be) a function of marital status.

The statute does have some limitations. It requires that the intended parents obtain a physician’s affidavit verifying a “medical need for the gestational surrogacy . . .”\(^{63}\) It is unclear what is meant by “medical need for gestational surrogacy.” The GSA does not define “medical need.” A plain reading would suggest that the intended parents are physiologically incapable of bringing a child to term. This may be easy to determine if one (or both) of the intended parents is

\(^{58}\) See id. § 20 (a)(1) (requiring surrogates to be at least 21 years of age).

\(^{59}\) See id. § 20 (a)(2) (requiring surrogates to have had at least one child prior to the surrogacy).

\(^{60}\) See id. § 20 (a)(5) (requiring that the surrogate have independent legal advice regarding the surrogacy contract).

\(^{61}\) See id. §§ 20 (a)(3)-(4) (requiring surrogates to undergo medical and mental health evaluations in accordance with the recommendations of the American Society for Reproductive Medicine and the American College of Obstetricians and Gynecologists).

\(^{62}\) The statute defines “intended parent” as “a person or persons who enters into a gestational surrogacy contract” and goes on to add that “In the case of a married couple, any reference to an intended parent shall include both husband and wife for all purposes of this Act.” Id. § 10.

\(^{63}\) Id. § 20 (b)(2).
female. What about a single man (or a gay male couple)? He is certainly physiologically incapable of carrying a child to term, although he may or may not be physiologically infertile. If medical need were meant to be biological infertility, no man capable of producing viable sperm would, on his own, qualify.

The GSA requires that at least one intended parent must provide gametes. The interplay of two requirements, medical need and provision of gametes, could effectively prevent some classes of individuals from utilizing gestational surrogacy. A single woman who has had a radical hysterectomy (or for some other reason lacks both a uterus and ovaries) would be prevented from having a child through gestational surrogacy. As would all single men. A single man who is unable to produce viable sperm could not provide the gametes, and a single man who could provide sperm may not have a physiological medical need.

The GSA poses a problem for a couple (married or not) wherein both partners cannot produce viable gametes. The desire to have at least one of the intended parents contribute gametes would seem to be a way to guard against commoditization of the child and to avoid circumventing of the state’s adoption laws. When neither of the intended parents provides gametes, there is less justification for choosing this route to parenthood over traditional adoption. But that is not to say that there are no justifications. Intended parents who cannot provide their own gametes may still want to have a greater degree of control over the course of the pregnancy.

64 Or perhaps not. Does medical need mean physiologic need, or might it include psychological or social impediments as well?

65 See § 20 (b)(1).

66 A radical hysterectomy removes both the uterus and the ovaries.

67 If a couple (or an individual) wished a child to which it has no genetic connection, then adoption may seem to be the more reasonable route to take. Choosing surrogacy instead may then appear to be an attempt to avoid the adoption process.
than they could with adoption. The GSA expressly states that a gestational surrogacy agreement is still valid even if it includes provisions that require the gestational surrogate to undergo medical exams and fetal monitoring, refrain from alcohol, smoking, non-prescription drugs, and other activities.\(^{68}\) The gestational carrier may be willing to comply with the intended parents requests regarding diet, activities, etc. No such involvement is available in the adoption context. Intended parents who can provide neither sperm nor egg may wish to select gamete donors that have similar genetic histories to themselves, including close relatives, than may be possible with adoption. How common these situations may be is unknown. Most likely the intended parents will want to use their own gametes whenever possible. Nevertheless, we ought not foreclose the option of donor gametes without good justification.\(^{69}\)

The apparent concern for gestational surrogates in the GSA goes beyond protecting her physical and psychological well being. Requirements that the parties undergo physical and psychological evaluations prior to the agreement would do that. There is also a provision intended to protect the gestational surrogate’s financial interest in the gestational surrogacy agreement. If she is to receive any compensation for her services, the compensation must be placed in escrow prior to commencing any medical procedures.\(^{70}\) There can only be one reason for this, to protect the gestational surrogate from a potential breach by insolvent intended parents. In essence, we ensure specific performance by one party while disallowing it on the other.\(^{71}\)

\(^{68}\) See § 25(d).


\(^{70}\) See § 25(b)(4).

\(^{71}\) See id. § 50(b) (prohibiting specific performance as a remedy for a breach by the gestational surrogate).
While specific performance by the gestational surrogate should be disallowed,\textsuperscript{72} a requirement that the intended parents fully perform at the outset of the agreement is similarly inappropriate. It may well be that prospective gestational surrogates demand such assurances that the intended parents can and will provide the requisite compensation. Intended parents may be quite willing to transfer full compensation to an escrow agent to reassure potential gestational surrogates. Such contractual provisions should be left to the parties to negotiate. Mandating it in law displays an unnecessary level of paternalism by a legislature and reveals an ongoing presumption that gestational surrogates are incapable of protecting themselves from exploitation by unscrupulous intended parents. Until there is evidence of frequent refusals to pay the required compensation, this is a solution seeking a problem.

Nonetheless, despite the limitations of the GSA, Illinois took a significant step forward in advancing the availability and enforceability of surrogacy agreements. With some modifications, it can serve as a good model for future legislation.\textsuperscript{73}

D) The Problem with California

California has a relatively permissive legal regime with respect to gestational surrogacy. In Johnson v. Calvert, the California Supreme Court determined that in the absence of any evidence of supposed harms, gestational surrogacy does not violate public policy\textsuperscript{74} and adopted

\textsuperscript{72} See RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981) (“A promise to render personal service will not be specifically enforced.”).

\textsuperscript{73} It is interesting to note that the Minnesota legislature passed a nearly identical bill in 2008, which was vetoed by Governor Tim Pawlenty. See Letter from Tim Pawlenty, Minnesota Governor, to James Metzen, President of the Minnesota Senate (May 16, 2008), available at http://www.leg.state.mn.us/archive/vetoes/2008veto_ch329.pdf.

\textsuperscript{74} See Johnson v. Calvert, 5 Cal. 4th 84, 87 (1993).
intentionality for the determination of lawful parentage. Subsequent courts have endorsed and expanded on the ability to engage in gestational surrogacy contracts in California. In the 18 years since Johnson, there has developed a fairly well established common practice for gestational surrogacy agreements in California. However, California’s legal environment is entirely the result of favorable court decisions, without any actual statutory or administrative regulation or oversight. The lack of clear regulation and oversight may lead some to seek improper shortcuts resulting in the very problems surrogacy opponents fear. Sadly, this appears recently to have happened.

In August 2011, Therese Erickson, a San Diego attorney specializing in reproductive law, plead guilty to fraud charges regarding improper gestational surrogacy arrangements. Under normal procedures intended parents contract with gestational surrogates well before any embryos are transferred into the surrogate. Erickson arranged for surrogates to travel to the Ukraine for transfer of donated embryos before any intended parents were identified. The surrogates then returned to California to complete the pregnancy and give birth. After the twelfth week of pregnancy, when the highest risk for miscarriage has passed, Erickson would then locate couples seeking surrogacy services. She would tell the prospective parents that the original intended parents had backed out of a (non-existent) surrogacy contract at the last minute. Those couples,

75 See id. at 93.
76 See supra note 52 and accompanying text.
78 See Zarembo, supra note 77.
79 See Watson, supra note 77.
believing that they would be parents much sooner than they had previously thought, happily entered into surrogacy arrangements they believed were legal and proper.

The Erickson situation is perilously close to baby selling. Opponents (as well as supporters) of gestational surrogacy should rightly decry what was done. However, it does not directly implicate harms from enforcing gestational surrogacy agreements. The very problem involved was the lack of a gestational surrogacy agreement. Nonetheless, opponents may argue that allowing such agreements to stand creates an environment in which unscrupulous people may take advantage of the uncertain rules. The solution to individuals taking improper advantage of uncertain rules regarding a given activity is not to ban the activity.\textsuperscript{80} It is to bring certainty to those rules.

Gestational surrogacy does not, when reasonable procedures are followed, lead to any of the harms opponents trumpet.\textsuperscript{81} Erickson, it seems, may well have taken the opportunity presented by California’s lack of clear rules to take such advantage. This sad situation highlights the need for legislative action clarifying the rules regarding gestational surrogacy. Had a clear legal regime been in place, the intended parents found post-implantation would know that the prior intended parents could not renounce their parental obligations any more than could soon-to-be parents expecting a child in the more traditional fashion. This will give all parties, including potential surrogates, intended parents, medical professionals, legal counsel, and the courts a far

\textsuperscript{80} Isolated incidents of unlawful baby selling by individuals who fraudulently circumvent standard surrogacy procedures no more an argues for complete prohibitions than the existence of fraudulent home mortgages would argue for a ban on individuals wanting to borrow money to buy a house.

\textsuperscript{81} See discussion \textit{infra} pp. 33-53.
better resource for determining what is, and what is not, acceptable, lawful, and enforceable
procedure for gestational surrogacy.

California has a very good judge-based set of rules for gestational surrogacy. The state
should now codify its current best practices regarding gestational surrogacy agreements. Such a
codification would look similar to the Illinois GSA if modified in keeping with the discussion in
Section III. C. above. If federal action is not taken in the near future, the California legislature
should move forward and clarify its own rules.

E) The Model Acts

1) Uniform Parentage Act

In 2000, the Uniform Law Commission revised (and in 2002 amended) its Uniform
Parentage Act (UPA). To date the UPA has been adopted in part in several states, although few
have elected to include Article 8, the section that addresses gestational agreements. UPA Article
8 allows for enforceable gestational surrogacy agreements. That alone makes it a substantial
improvement over the current situation in many states. However, as it reads, the UPA has some
significant defects.

The UPA begins with a faulty nomenclature. It identifies the gestational surrogate as the
“gestational mother.” The use of the term “gestational mother” throughout Article 8 is
inappropriate as it fosters a false presumption: that the gestational carrier is actually the child’s

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83 See UPA § 801(a) and throughout.
mother.\textsuperscript{84} She is not. Rather, she is the woman who carries another couple’s child to term. Inappropriately designating her as “mother” leads to further correlative defects in the UPA. The UPA should instead use the term “gestational carrier.”

UPA then requires that “[t]he man and the woman who are the intended parents must both be parties to the gestational agreement”.\textsuperscript{85} This also creates an inappropriate presumption. It would seem to limit gestational surrogacy contracts only to opposite-sex couples. This poses a problem for same sex couples and for singles individuals who wish to utilize surrogacy as a means of procreation. The “man and the woman” need not be married, but the UPA clearly envisions only heterosexual couples.

Under the UPA gestational agreements are only valid if they are first submitted to a court for approval.\textsuperscript{86} There is no need for this, and it creates an unnecessary and burdensome step. Having a standardized surrogacy agreement that is modifiable to meet individual needs offers some advantages. But there is simply no need for judicial oversight prior to enforceability.\textsuperscript{87} We do not require court approval for other contracts dealing with what are essentially medical procedures and personal services. It is an unnecessary burden here as well.

One potential, albeit misguided, justification for requiring judicial approval of gestational surrogacy agreements is found in Section 803. Here we find one of the more troubling aspects of the UPA. Before a court may approve a gestational surrogacy agreement, the relevant child-

\textsuperscript{84} With traditional surrogacy, this position may have some legitimacy. With gestational surrogacy, it does not.

\textsuperscript{85} UPA § 801(b).

\textsuperscript{86} See UPA § 801(c).

\textsuperscript{87} Enacting regulations mandating certain provisions to be in (or excluded from) a surrogacy agreement may be appropriate, but requiring both specific provisions and judicial oversight is unnecessary.
welfare agency must have “made a home study of the intended parents and the intended parents meet the standards of suitability to adoptive parents.”\textsuperscript{88} It ties directly back to the false presumption we found in the terminology of “gestational mother.” This requirement raises the implication that gestational surrogacy is the equivalent of adoption.\textsuperscript{89} If gestational surrogacy were the same as adoption, then prior court approval, with a home visit, may be justified. However, the analogy is fundamentally flawed.

In adoption the concern is whether the state should transfer parental rights and obligations from one person (or the state) to a particular individual or pair of individuals. The state has an interest in making sure it has not made a poor choice and placed a child in harm’s way. This is not what is happening in gestational surrogacy. The intended parents already have the rights and obligations as parents of the resulting child irrespective of the gestational agreement. This is true even under the UPA itself. Under the UPA, even without an approved agreement, the intended parents may be subject to child support.\textsuperscript{90}

The adoption analogy only holds up if the state is, in fact, transferring parental rights and obligations from the gestational carrier to the intended parents. By this logic should not all people using ART be required to have a home study? There is a contract between the ART provider and the intended parents whenever medical intervention is utilized. How does surrogacy change this? Not because there is an eventual child involved who must be protected. That is true of all forms of ART. Surrogacy only falls under the logic of adoption if we presume that the gestational surrogate is the actual and lawful parent of the child. If we accept that the intended

\textsuperscript{88} UPA § 803(b)(2). (This provision may be waived by the court.)

\textsuperscript{89} The Official Comments to this section make this analogy explicit.

\textsuperscript{90} See UPA § 809(c) (which imposes on the intended parents the obligations of child support irrespective of the gestational surrogacy agreements validity).
parents are the lawful and actual parents of the child from the moment of the child’s personhood, complete with all the rights and obligations of parenthood, then adoption is inapplicable.

UPA Sec. 806 allows for termination of the gestational agreement by any party to the agreement, provided that such termination occurs prior to the gestational carrier becoming pregnant pursuant to the agreement. This provision is not problematic. However, Sec. 806 goes on to relieve the gestational carrier and her husband of any liability to the intended parents for the termination. Immunity from liability, however, is not similarly granted to the intended parents. There is little justification offered for this asymmetry. If the surrogate, or her husband, may hold the intended parents liable for any uncompensated loss or harms resulting from a breach, so too should the intended parents be able to hold the gestational carrier (or her husband) liable for loss or harms resulting from a breach. The only justification for this asymmetry is a presumption that there is such an imbalance in bargaining power between the gestational carrier (and her husband) and the intended parents, that we should allow the presumptively weaker party to disavow an otherwise valid agreement (one already approved and validated by a court) with no liability. These presumptions have no merit.

UPA Sec. 807 allows the intended parents to petition the court for an order confirming that they are the parents of the child and ordering that the child be surrendered to the intended parents. However, the intended parents may not file the petition until after the child is born.

\[91\text{ See UPA }\text{ § 806(a).}\]
\[92\text{ See UPA }\text{ § 806(d).}\]
\[93\text{ See discussion on the exploitation of the surrogate infra pp. 33-41.}\]
\[94\text{ See UPA }\text{ § 807(a)(1).}\]
\[95\text{ See UPA }\text{ § 807(a)(2).}\]
\[96\text{ See UPA }\text{ § 807(a).}\]
There is no reason not to allow the intended parents to petition the court for a pre-birth order. Allowing the parties to clarify the parental status of the child while it is still in utero is far more convenient than waiting until the frenzied days following the child’s birth.

Section 802 contains a residency provision requiring that at least one of the parties must have been a resident of the state for 90 days before they may petition a court to approve the surrogacy agreement.97 This provision is expressly intended to prevent forum shopping.98 It is unclear why a state, accepting of gestational surrogacy, should want to prevent non-residents from accessing such services. There appear to be three plausible reasons; (1) a desire not to have its courts swamped with petitions for validating gestational surrogacy agreements from non-residents, (2) a desire not to offend or interfere with other states’ public policies, or (3) a desire not to facilitate residents of other states trying to escape their home state’s restrictive or uncertain laws. The first reason would disappear if, as I propose, there were a national standard. The matter of forum shopping would be moot. Further, elimination of judicial pre-approval of surrogacy agreements, along with clear guidelines for such agreements, would dramatically reduce the need for any court involvement. The second reason does not seem to apply in other contexts. States routinely use their laws to attract businesses and jobs from other states. The third reason does not seem to be a legitimate concern. The conduct of New Jersey’s residents is not a matter for California to regulate.

Article 8 of the UPA is a good faith attempt to address the growing practice of gestational surrogacy. It makes a number of steps forward and would help clarify the law for many states.

97 See UPA § 802(b)(1).
98 See Official Comments to UPA § 802.
However, it has several shortcomings. With modification, it could be a reasonable model for states to adopt.

2) ABA Model Act Governing Assisted Reproductive Technologies

The American Bar Association promulgated a Model Act Governing Assisted Reproductive Technology in 2008. The Model Act contains two alternative approaches regarding when surrogacy agreements should be considered enforceable. Alternative A follows closely the model of the UPA and would impose nearly identical requirements for enforceable gestational surrogacy agreements, including, residency requirements of the parties, judicial pre-approval, home study of the intended parents, and asymmetry in liability for early termination of the agreement. For all the reasons discussed with respect to the UPA, the Model Act Alternative A similarly falls short.

One additional aspect of the judicial approval required under the UPA and the Model Act Alternative A is that the court has independent discretion regarding whether or not to approve the agreement even if all the statutory requirements are met. There is little reason to give the court such discretion. The court's role, if there even is one, should be limited to ensuring that the


100 See id. art. 7 (Gestational Agreement).

101 See id. Alternative A § 702(2)(a).

102 See id. Alternative A § 701(3).

103 See id. Alternative A § 703(2)(b).

104 See id. Alternative A § 706(4).

105 See discussion supra pp. 22-27.

106 UPA § 803(a); Model Act Alternative A § 703(1).
requirements of the statutes have been met. Once the court has made that determination, it ought not have an additional veto power over the surrogacy agreement. Such power allows for identically situated parties to be treated differently under the law depending on the whim of the presiding judge. The drafters of the Model Act recognized this potential. In a subsequent article explaining the Model Act, Steven Snyder and Charles Kindregan\textsuperscript{107} wrote that this

> also gives the presiding judge discretion as to whether to approve any agreement, thereby creating at least the possibility that similarly situated parties in front of two differently inclined judicial officers may receive different results in their approval process for no apparent or substantive reason.\textsuperscript{108}

They do not, however, explain the rationale for this discretion. Both the UPA and the Model Act Alternative A do use “shall order” language elsewhere.\textsuperscript{109} If judicial pre-validation is to be maintained, both Acts should be amended to say “if the requirements of this Act are satisfied, the court shall issue an order validating the gestational agreement.”\textsuperscript{110}

On the positive side, both Alternatives A and B use more appropriate nomenclature, identifying the surrogate as the “gestational carrier” rather than, as in the UPA, a “gestational mother.” This sets a more accurate tone for the relationships amongst the parties.

\textsuperscript{107} The then current and past chairs of the ABA Section of Family Law Reproductive and Genetic Technologies Committee which promulgated the Model Act.


\textsuperscript{109} See, e.g, UPA §§ 807(a), 807(b), 807(c); Model Act Alternative A §§ 707(1), 707(2), 707(3).

\textsuperscript{110} Interestingly, the Proposed Model Act from 2006 does say that the “court shall validate a gestational agreement within thirty (30) days of the filing of the petition” if the agreement is in compliance with the Act. \textit{See} Proposed Model Act Governing Assisted Reproduction, § 604(2) (proposed 2006, amended 2007), available at \texttt{http://apps.americanbar.org/family/committees/artmodelcode_feb2007.pdf}. 
The key difference between Alternatives A and B, and how Alternative B differs from the UPA is that it allows for self-executing agreements without any requirement for prior judicial approval.\textsuperscript{111} This alone makes it the much more attractive alternative. Alternative B does, however, have its own shortcomings.

The Model Act Alternative B is very similar to the Illinois GSA. It has similar eligibility requirements for the surrogate, that she: (1) be at least 21 years old; (2) has given birth to at least one child; (3) has completed a medical evaluation relating to the expected pregnancy; (4) has completed a mental health evaluation related to being a gestational carrier; (5) has had independent legal counsel; and (6) that she have medical insurance to cover her until at least 8 weeks following delivery of the child.\textsuperscript{112} Like the Illinois GSA, Alternative B requires that the intended parents have a medical need for surrogacy services,\textsuperscript{113} at least one of the intended parents provide gametes for the embryo,\textsuperscript{114} and that they have a mental health evaluation pertaining to the agreement.\textsuperscript{115} Alternative B contains similar provisions regarding clauses required in the gestational agreement.\textsuperscript{116} Like the Illinois GSA, the Model Act Alternative B denies specific performance by the gestational carrier for a breach of the agreement.\textsuperscript{117} Unlike the Illinois GSA, however, it does allow for all other remedies at law or equity for breach by

\textsuperscript{111} See Model Act Alternative B § 703(1).
\textsuperscript{112} See id. Alternative B § 702(1).
\textsuperscript{113} See id. Alternative B § 702(2)(b).
\textsuperscript{114} See id. Alternative B § 702(2)(a).
\textsuperscript{115} See id. Alternative B § 702(2)(c).
\textsuperscript{116} See id. Alternative B § 703.
\textsuperscript{117} See id. Alternative B § 709(2).
either party.\textsuperscript{118} There are, in fact, few differences between the Illinois GSA and the ABA Model Act Alternative B with respect to the validity and enforceability of gestational agreements. To the extent that they are the same, the Model Act Alternative B carries all the same shortcomings as the Illinois GSA.\textsuperscript{119}

There is one key distinction between the Illinois GSA and the Model Act (applying to both Alternative A and Alternative B). The Illinois GSA defines the gestational surrogacy as when “a woman attempts to carry and give birth to a child . . . to which the gestational surrogate has made no genetic contribution.”\textsuperscript{120} The Model Act defines the gestational carrier as a woman “who enters into a gestational agreement to bear a child, whether or not she has any genetic relationship to the resulting child.”\textsuperscript{121} The Model Act thereby explicitly allows for both traditional and gestational surrogacy, while the Illinois GSA allows only for gestational surrogacy. This is a somewhat controversial approach by the ABA. Many state courts, state legislatures, and commentators find a distinction between traditional and gestational surrogacy such that they warrant disparate treatment. The ABA Model Act does not hold to this view.

F) The International Option: Outsourcing Gestational Surrogacy Is Not The Answer

In an attempt to avoid the legal prohibitions and uncertainties found in many states, as well as seeking a less costly option, many intended parents travel overseas to find surrogacy services. International surrogacy, however, is problematic and fraught with risk.

\textsuperscript{118} See id. Alternative B § 710.

\textsuperscript{119} See discussion regarding the Illinois GSA, supra pp. 15-19.

\textsuperscript{120} 750 ILL. COMP. STAT. 47/10 (2011).

\textsuperscript{121} Model Act § 102(16)
India has become a viable option and is a frequent destination for those seeking international surrogacy services.\textsuperscript{122} Even so, India does present its own set of limitations. India’s own Baby M case provides a cautionary tale.\textsuperscript{123} In November of 2007, Ikufumi and Yuki Yamada, a Japanese couple, contracted for surrogacy services in India, using an egg donor and a gestational surrogate. Baby Manji was born in late July 2008. Unfortunately, during the pregnancy, the Yamadas divorced, and Mrs. Yamada ceased to be involved. Because Baby Manji was not born to a Japanese mother, the Japanese embassy in India declined to grant her a passport. Indian law was silent on surrogacy, and a 120 year old law prohibited single men from adopting baby girls. This posed a problem for the now single Mr. Yamada. Eventually, the Indian Supreme Court resolved the issue in favor of Mr. Yamada, and he was able to take his daughter home. Since the Baby Manji situation, Indian lawmakers have proposed draft bills addressing surrogacy and other reproductive technologies.\textsuperscript{124} To date, these bills have not been enacted into law.

India has also posed additional challenges for intended parents. In 2010, Myleen and Jan Sjodin of Toronto, Canada, faced unexpected difficulty after their child was born to an Indian surrogate. The Sjodins reported that the physician dramatically raised her fees prior to the child’s

\begin{itemize}
\item \textsuperscript{122} See Amelia Gentleman, \textit{India Nurtures Business of Surrogate Motherhood}, N.Y. Times, Mar. 10, 2008, at A9, available at \url{http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html}.
\item \textsuperscript{123} For a full discussion of the Baby Manji situation see KARI POINTS, COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI (The Kenan Institute of Ethics at Duke University, Cased Studies in Ethics), available at \url{http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf} (last visited August 19, 2011).
\item \textsuperscript{124} See Nishat Hyder, \textit{India Debates New Surrogacy Laws}, BIONEWS (February 7, 2011), \url{http://www.bionews.org.uk/page_88796.asp}.
\end{itemize}
birth and used India’s bureaucracy to delay their return to Canada. The rise of India as a destination for surrogacy services can lead to abuses.

“Today, unfortunately, even the smallest clinics are doing surrogacy because it’s a simple procedure and four times as profitable” as other fertility treatments, said Dr. Aniruddha Malpani, a fertility specialist in Mumbai. “Some aren't up to the mark, and foreigners get fleeced.”

Despite these problems, India remains a popular destination for international surrogacy. A number of agencies in the United States specifically advertise surrogacy services available in India. India is not the only international destination for intended parents. The Ukraine has also become an increasingly popular location for international surrogacy services. It, too, carries risks for the intended parents.

International surrogacy also raises another troubling ethical dilemma. While surrogacy services are not inherently exploitative, there remains a potential for exploitation. Factors that could potentially lead to exploitation are more prevalent in countries where poverty is more widespread and women possess less political, economic, and social control over their own lives. We have the capacity to ensure that gestational surrogacy services are safe and legal questions as to the status and relationships amongst the parties are clear from the outset. Prohibiting

126 Id.
129 See discussion infra pp. 33-44.
gestational surrogacy here in the United States only serves to encourage intended parents to travel to countries where gestational surrogates have fewer legal and social protections.

IV. Arguments In Opposition – And Why They Fail

Opponents of surrogacy as a reproductive option raise a number of seemingly valid arguments. These arguments fall into a few broad categories. Surrogacy has the potential to commodify or exploit the surrogate. Surrogacy has the potential to harm children by commoditizing them. It is tantamount to baby selling. Surrogacy confuses parental status. Children born through surrogacy may have developmental or psycho-social difficulties growing up. Surrogacy is an attempt to circumvent adoption statutes. Each of these concerns has, at first blush, an apparent degree of legitimacy. On closer inspection, however, none of them holds up. They either are founded on misplaced presumptions or the actual evidence following years of experience proves them to be unfounded.

A) Are Surrogates Commodified and Exploited?

In Margaret Atwood’s science fiction, dystopian novel, The Handmaid’s Tale, fertile women are treated as commodities and serve as surrogate mothers for the elite of society. These women are treated like breeding stock and have no rights or freedoms. Atwood’s novel reads as a cautionary tale as to what can go very wrong with surrogacy. Interestingly, this fictional novel was first published in 1985, just before events leading to the case of Baby M took place. The Handmaid’s Tale is, in part, a depiction of the parade of horribles envisioned in that case.

The Handmaid’s Tale is a work of fiction about a fictional future, but real world arguments that surrogacy unethically commodifies or exploits women have been with us for some
time. In 1988, the court in Baby M was quite concerned about the potential commodification of surrogates and the buying and selling of their services.\textsuperscript{130} In 1990, Elizabeth Anderson makes a forcefully argument that a contract for surrogacy services renders the surrogate as little more than a commodity.\textsuperscript{131}

The argument that surrogacy commodifies the gestational carrier rests on the notion that she is paid for her services. That something is being bought and sold. With respect to commodification of the surrogate, that something is the surrogate herself. If taken literally this is a patently false argument. The woman, herself, is not bought or sold. She is not selling herself. She is providing a service and being paid for it.

Opponents are not making a literal claim that the surrogate is bought and sold. Rather it is that the services of her body are being bought and sold. Surrogacy, in this respect, is sometimes compared to prostitution.\textsuperscript{132} On a superficial level there is a similarity. In both situations a woman is exchanging the services of her body to another for money.\textsuperscript{133} However, the analogy to prostitution falls apart under closer scrutiny. Prostitution is used for the sexual gratification of the patron, with the fervent hope (nearly always) that a child not be the result. Gestational

\textsuperscript{130} In re Baby M, 109 N.J. 396, 440-441 (1988).


\textsuperscript{132} See, e.g., Christine L. Kerian, Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children, 12 WIS. WOMEN'S L.J. 113, 158 (1997); Amy M. Larkey, Note, Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements, 51 DRAKE L. REV. 605, 614 (2003); Lisa L. Behm, Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States, 2 DEPAUL J. HEALTH CARE L. 557, 578 (1999)

\textsuperscript{133} This does not explain the objection to uncompensated gestational surrogacy. Indeed, some states have chosen to enforce uncompensated surrogacy agreements while prohibiting compensated surrogacy.
surrogacy, on the other hand, involves no sexual gratification for anyone and carries the fervent hope that a child will result. Prostitution does not involve the uterus; surrogacy does. Prostitution utilizes the vagina as the end goal; surrogacy utilizes the vagina only as the most direct method to access the uterus.

Prostitution and surrogacy are, in actuality, two very different things. True, throughout most of human history, there has been, and continues to be, a rather close link between the sexual act and the gestation of a child. There is logic in the argument that when one activity (sexual services for money) is banned, any inextricably linked activity (e.g. gestational surrogacy for money) should also be banned. This could apply to traditional surrogacy before the advent of IVF. However, in the current situation, the sexual intercourse and the gestation of the fetus have been completely disconnected. The discussion as to whether prostitution should or should not be lawful, but regulated, is left for others to debate. The fact remains that prostitution and surrogacy are fundamentally different, both in process and purpose. Any conclusion that prostitution is unethical, harmful, and illegal, and therefore gestational surrogacy is also unethical, harmful, and illegal is logically misplaced. Any such arguments as to why prostitution should be disallowed cannot be automatically applied to gestational surrogacy.

Even if we did conclude that the surrogate has not been commodified, is she not exploited nonetheless? It may be argued that the gestational surrogate places herself at great risk for the benefit of someone else. It has been argued that the great majority of gestational surrogates are

134 It is certainly true that the surrogate agrees to provide a rather intimate service. The physical intimacy, however, is not with the intended parents. It is with the developing fetus. The intended parents and the surrogate contract for the services she provides.

135 It is also true that some sincerely held religious beliefs hold that sexual intercourse should only be done within the context of procreation. That is not the reality for most people. Those practicing those religious should not be allowed to impose their religious beliefs on the remainder of a secular society.
substantially of lower socio-economic status than the intended parents. These are true facts. But on their own, they do not prove exploitation.

There are many occupations, jobs, and services that involve a substantially greater risk to the lives and well-beings of the individuals performing those activities. The active duty military, miners, fire fighters, police officers, and fishermen come to mind. Are the men and women who perform these valuable services exploited? Were pregnancy deemed an “occupation” its fatality rate of 12.1 per 100,000 pregnancies would not even make it into the top thirty most dangerous occupations. Further the pregnancy fatality rate accounts for all pregnant women. If we were to only include women who had planned pregnancies after being prescreened for any health risks and with early and ongoing prenatal care, the rate would undoubtedly be significantly lower.

It is not the offering of compensation that renders something exploitation. It is not whether individuals would perform such tasks absent financial compensation. We offer military

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137 According to the Bureau of Labor Statistics the ten civilian occupations with the highest fatality rate in civilian occupations in 2009 were (fatalities per 100,000 full time equivalents): fishers (203.6); loggers (65.5); aircraft pilots and flight engineers (59.0); farmers and ranchers (39.7); roofers (43.7); structural iron and steel workers (30.3); refuse and recyclable materials collectors (26.5); driver/sales workers and truckers (20.2); construction laborers (18.8); and industrial machine installation, repair, and maintenance workers (18.5). See U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, NUMBER AND RATE OF SELECTED OCCUPATIONS WITH HIGH FATAL INJURY RATES, 2009, at 19 (2011), available at http://www.bls.gov/iif/oshwc/cfoi/cfoi_rates_2009hb.pdf.


recruits signing bonuses and college tuition. Are solders exploited? It is not that they put their life at risk. Many professions involve placing one’s physical well being at risk. We often make heroes out of those that put themselves at risk to help others. Some individuals become featured in popular television shows because they put themselves at significant danger to keep diners well supplied with Alaskan king crab.

No, it is not the money, itself, nor the risk itself. It is a question of whether the individual is compelled by circumstances to accept a level of risk they would not otherwise take in order to gain a benefit that most would consider far too meager to justify the inherent risk. Put another way; is the risk/compensation ratio much higher than an ordinary person would willingly accept absent the coercive effects of desperation?

So what does constitute exploitation in the context of surrogacy? That question is directly addressed by Stephen Wilkinson in his article “The Exploitation Argument Against Commercial Surrogacy.” Wilkinson argues that surrogacy is exploitative, but that banning it would only drive the women into more exploitative work. Hence, it is better to allow and regulate surrogacy services, thereby reducing the overall risk of exploitation of the women involved.

Wilkinson first defines what he considers to be exploitation. He identifies two possible situations that could result in exploitation: (1) where the distribution of harm and benefit between

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140 Young men (and women) regularly provide the services of their bodies to protect, defend, and kill for America. They do so at the risk to their own life and health. Is it not just a noble to provide the services of your body to help bring another life into the world, as it is to provide the services of your body to defend life and country?

141 See Deadliest Catch (Discovery Channel) (more information available at http://dsc.discovery.com/tv/deadliest-catch/).


143 Id. at 186.
the two parties is unjust, and (2) where the party possibly being exploited has not validly consented.\footnote{Id. at 173.} This is not at all unreasonable definition of exploitation. However, Wilkinson comes to the wrong conclusion when he applies it to gestational surrogacy.

The question of distribution of harm and benefit often comes down to whether the individual is adequately compensated for the risks and burdens they take. Are gestational surrogates underpaid? That is a difficult question to answer with any certitude. How do we know if someone is paid a fair wage for his or her services?\footnote{One calculation sometimes made is whether compensation for gestational surrogacy meets minimum wage. (See, e.g., Christine L. Kerian, \textit{Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?}, 12 WIS. WOMEN'S L.J. 113, 164 (1997).) There are approximately 6400 hours in the average human pregnancy. At the current minimum wage of $7.25/hour, that would total $46,400. That is roughly double what the average first time surrogate is directly compensated gestational services. Of course, pregnant women are able to engage in other activities during the majority of the time they are pregnant.\footnote{Id. at 180-181. Although he does hold out the possibility that surrogacy cannot be fairly compensated if it is regarded as baby-selling. For discussion of baby-selling, see infra pp. 44-45.} Wilkinson rightly argues that underpayment as an argument is problematic. Any potential underpayment can be resolved through regulation that mandates higher compensation.\footnote{Wilkinson at 180.}\footnote{For example, first time surrogates through Growing Generations, a gestational surrogacy agency located in Los Angeles, CA, are paid $22,000. \textit{See Surrogate Fee Information}, GROWING GENERATIONS, \url{http://www.growinggenerations.com/surrogacy-program/surrogates/financial-information} (last visited August 14, 2011). First time surrogates through Surrogacy Specialists of}
generally also contain provisions for compensation for lost wages, child care, travel, housekeeping, and clothing allowances, as well as additional and separate compensation for each procedure performed. Is that adequate? It may not be enough to convince one of the Housewives of Beverly Hills. But that is hardly a valid argument. They would not likely work at the local fast food establishment for $15/hour (even though that may be well above the going rate).

Still, arguments of exploitation often center around the belief that surrogates are more likely poor and intended parents are more likely well off. Commentators have raised concern that gestational surrogates tend to be poor and of ethnic minorities, while intended parents tend to be affluent and white. It may well be true that gestational surrogates tend to come from ethnic minorities of lower socio-economic status. Such facts may certainly raise a question of potential exploitation. They do not, however, answer it. To constitute exploitation, there needs to be something more.

Wilkinson recognizes that the employment argument could just as easily apply to “poorly paid cleaning work, or factory work, or prostitution.” He then says that one distinction “is the


151 Wilkinson, supra n. 142, at 183.
thought that [surrogacy] is particularly harmful, especially psychologically, because of the close relationship between women and their offspring.”\textsuperscript{152} Wilkinson seems to accept this distinction as valid. Because of this supposed harm, “people tend to think” that surrogates cannot be compensated fairly, and women only agree because they feel coerced.\textsuperscript{153} This is a misguided concern as there is no evidence that the great majority of surrogates is psychologically harmed. There is little evidence that even a substantial minority of surrogates is psychologically harmed.\textsuperscript{154}

Interestingly, although Wilkinson seems to conclude that surrogacy is exploitative, he does not conclude that it should be banned. Rather, he argues that it should be properly regulated to minimize whatever exploitive nature it may have.\textsuperscript{155} On the point of effective regulation, I wholeheartedly agree. Perhaps the most effective means of minimizing potential exploitation is to ensure full disclosure of potential risks and complications of being a gestational surrogate, as well as adequate screening procedures and independent social and legal counsel.

An appropriate level of regulation could help to ensure a more equal bargaining position between the gestational surrogate and the intended parents. We are concerned that the gestational surrogate not be negotiating from a position of weakness. Arguably, however, it is the intended parents who are in the weaker position at the bargaining table. It is gestational surrogate’s services that are the rate-limiting step. There are three essential components in the full process of gestational surrogacy: (1) obtaining gametes, (2) finding medical professionals capable of

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} See discussion \textit{infra} at pages 41-44.

\textsuperscript{155} See Wilkinson, \textit{supra} n. 142 at 186. He makes the argument that depriving these women of the opportunity to perform surrogacy services will only drive them into more exploitative and more harmful options. The better approach is to allow surrogacy, but regulate it more effectively.
handling the necessary medical procedures, and (3) finding a gestational surrogate to carry and deliver the child.

If they use their own gametes, obtaining component (1) poses no difficulty for the intended parents. If they must use donor gametes this too poses little difficulty (absent the legal impediments created by some jurisdictions). Sperm donors are readily available. Egg donors can be more problematic, but are not difficult to locate. Component (2), willing medical professionals, are easily found in virtually any reasonably large metropolitan area. The most difficult part is with component (3). Finding a surrogate willing and able to commit to this process is the most difficult part of the process. As such, the reality is that the intended parents need the surrogate much more than the surrogate needs the intended parents.

B) Psychological Affects on the Surrogate

One of the concerns raised by the court in Baby M is the psychological affect surrogacy may have upon the surrogate herself. Opponents fear that if the surrogate is required to give up the child she had carried and grown emotionally attached to for nine months, she is at substantial risk for potentially severe adverse psychological consequences. If this fear is substantiated, it could be a legitimate justification for restrictive legislative action, potentially even banning the practice. So, we must ask what are the actual psychological affects on the surrogates? Several articles have been published in the psychological literature over the past several years looking precisely at this question. Thus far, they have found no adverse consequences.

In 2004, R.J. Edelman looked at the then available literature regarding the psychological issues resulting from surrogacy.\footnote{R.J. Edelmann, \textit{Surrogacy: the Psychological Issues}, 22 J. REPROD. & INFANT PSYCHOL. 123 (2004).} Prof. Edelman found that the available literature provided a picture “of surrogates, motivated largely by altruism, who establish good rapport with the commissioning couple, and have little difficulty separating from children born as a result of the arrangement, with the children themselves subsequently showing good adjustment.”\footnote{Id. at 133. Edelman, however, does acknowledge that the available literature is limited and that researchers should conduct further studies.} This does not suggest much scientific support for the view that surrogates are at significant risk for psychological trauma.

In 2005, Janice Ciccarelli and Linda Beckman added to the discussion with a further review of the psychological and social science literature on surrogacy.\footnote{Janice Ciccarelli & Linda Beckman, \textit{Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy}, 61 J. Soc. Issues 21 (2005).} Their review of the literature confirmed Edelman’s findings that surrogates are primarily motivated by altruistic concerns.\footnote{Id. at 30.} This is not to suggest that financial considerations do not play a substantial role in their decisions to become surrogates, but it runs counter to the notion that they are being exploited. Further, Ciccarelli finds that surrogates are quite satisfied with their role and experience as surrogates even 5 and 10 years after giving birth.\footnote{Id. at 31.}

Additional studies support Edelmann’s and Ciccarelli’s conclusions. Considerable works has been done at the Centre for Family Research at Cambridge University looking into (among other things) the psycho-social affects of various forms assisted reproductive technologies on the
people involved. In 2003, Dr. Vasanti Jadva\textsuperscript{162} published a study looking directly at the effects of surrogacy on the surrogate herself.\textsuperscript{163} Dr. Jadva found that “[o]verall, surrogacy appears to be a positive experience for surrogate mothers.”\textsuperscript{164} Rather than experiencing psychological problems, “surrogate mothers often reported a feeling of self-worth.”\textsuperscript{165} This is not to say that there were no difficulties. While none of the surrogates reported experiencing “any doubts or difficulties whilst handing over the baby,”\textsuperscript{166} there were some surrogates (32\%) who did report some difficulty in the weeks following delivery.\textsuperscript{167} However, within a few months that number had fallen to only 15\%, and by one year after delivery better than 94\% of surrogates reported no difficulties.\textsuperscript{168}

While of legitimate concern initially, the weight of evidence now available argues strongly that women are capable accurately assessing their psychological suitability to serve as gestational surrogates. A small number of surrogates appear to experience some minimal psychosocial difficulties, but the great majority appear to do quite well. Gestational surrogacy is certainly not suitable for all women. Just as not all women (or men) are suited to be coal miners, nurses, or combat solders. Those that do choose to become surrogates do not suffer from the psychological trauma that opponents of surrogacy describe. If anything, this evidence suggests a

\textsuperscript{162} Research Associate at the Centre for Family Research.

\textsuperscript{163} Vasanti Jadva et al., \textit{Surrogacy: the Experiences of Surrogate Mothers}, 18 \textit{Hum. Reprod.} 2196 (2003).

\textsuperscript{164} \textit{Id.} at 2203.

\textsuperscript{165} \textit{Id.} at 2204.

\textsuperscript{166} \textit{Id.} at 2200.

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} \textit{Id.}
possible need for minor regulatory requirements regarding proper informed consent and careful evaluation of potential surrogates. It does not argue for a complete ban.

C) The Misguided Concern for the Child

1) Commodification of the Child

Is the child being bought and sold? That is the underlying question here. But first, a distinction must be drawn between a traditional surrogate and a gestational surrogate. With traditional surrogacy, the surrogate is agreeing to make no claim of parental rights over a child that is genetically her own. With gestational surrogacy, the child has no genetic connection to the surrogate, thus greatly attenuating any potential claim of parentage.

But is a child really being sold? Not literally. Technically, it is not the child that is being “bought and sold.” The child is not “owned” by anyone. What is really being argued is that the parental rights and obligations with respect to the child are being “bought and sold”. While this may be a distinction without much of a practical difference, it does, however, change the nature of the argument. The claim of baby selling, then, rests on the premise that the surrogate is agreeing to transfer her parental rights and obligations to someone else, in exchange for some consideration. This, in turn, raises the question of whether the surrogate actually has parental rights and obligations. I argue that she does not, at least with respect to gestational surrogacy.

In both traditional and gestational surrogacy, the intended father is neither buying nor selling parental rights. The child is his regardless of whom we determine the mother properly to

169 The Thirteenth Amendment to the Constitution makes literal ownership of children, or anyone else, impossible in the United States. U.S. CONST. amend. XIII.

170 A similar argument can be made in traditional surrogacy. However, it requires some additional analysis. See note 19, supra.
be. The intended father has the same rights and obligations he would have if he produced the child in the more conventional fashion. The only question is whether the woman who provided the egg is buying parental rights and obligations from the woman who provided the services of her uterus.

So, is the surrogate selling her parental rights and obligations? With compensated surrogacy, money is certainly changing hands. Two facts are clear, the intended parents pay the gestational surrogate a substantial amount of money, and the gestational surrogate agrees to carry the embryo/fetus to term and to make no claim of parental rights over the child. The juxtaposition of the payment of money and the formal surrender of any potential legal claim of parentage can easily lead to the conclusion that the surrogate is giving up her parental rights in exchange for money. Some commentators have looked at these bare facts and concluded that this can only mean that a baby is being sold. 171 But is that the actual nature of the transaction? To answer that we must first ask does the gestational surrogate have parental rights and obligations to sell? Or is she, in fact, “selling” something else?

2) A Question of Parentage

Is the gestational surrogate a mother who gives up her parental rights; or was she never the mother at all, without any parental rights to give up? If the former, we may have a problem. If the later, then what is the money for? It is not for giving up the child. It is for the service of carrying the child for nine months. We do not say that a daycare provider is “giving up” a child entrusted to her for the day. We do not say that a nanny is “giving up” a child entrusted to her for

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a week or more while the parents are on vacation. Nor do we say that the headmaster of a boarding school is “giving up” a child at the end of the school term. No, they are returning to the parents a child entrusted to their care. This is precisely what the gestational surrogate is doing as well.

But isn’t there something more intimate with respect to actually gestating a fetus than there is with providing babysitting services? Of course, but that is a difference of degree. The fundamental starting place is to whom does the child actually belong? We do not hear any argument that the embryo belongs to surrogate prior to transfer into her uterus. That would be considered a rather absurd argument. The embryo belongs to the individuals who created it.

Whether the embryo is mere property or holds personhood status is not, however, irrelevant to the surrogacy question. If embryos are mere property, then a concern regarding commodification of the embryo certainly seems warranted. Property is, almost by definition, commoditized. If the embryo is property, it becomes a commodity to be bought and sold. As the embryo becomes the baby, we are, in effect buying and selling the baby. This fear is misplaced. Whether the embryo is deemed property or person, the implications for gestational surrogacy are nonexistent. The end result is the same.

Let us first assume, for the sake of argument, that embryos are properly categorized as property. Prior to transfer to the gestational surrogate, the embryos are the property of the

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172 The status of the embryo/fetus remains of some controversy. Whether such embryos hold personhood status or are mere property has significant implications in determining how they should be handled, what may be done with them, and the rights and obligations of the embryos’ progenitors. The seminal case discussing this question is Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992). The Davis court comes to the conclusion that embryos are not persons, nor are they property. Rather they are something in between. This “splitting of the baby” is not entirely satisfying and does not fully address the difficulties inherent in excess embryo production. While this is an interesting and as yet unresolved debate, it does not answer the question as to whom the embryos belong.
intended parents. They are produced from the intended parents own gametes. At what point did the intended parents transfer their property rights to the surrogate? There is no express transfer of such rights. In fact, the expressed intention of the parties is quite the opposite. There is no abandonment. The intended parents certainly want back the property they entrusted to the surrogate. That is the very intent of the agreement. If anything, the surrogate has a bailment over the embryos (subject to the terms of the bailment agreement). There is no other form of property transfer taking place. If there is no transfer of property, then the consideration being paid to the gestational surrogate cannot be in exchange for the embryo/child as property.

If we next assume that the embryo has personhood status, then the embryo must have parents from the moment it is created. The only candidates for parenthood are the intended parents who provided the gametes. The intended parents are the legal parents before the embryo is ever transferred into the surrogate. The medical procedure that transfers the embryo into a surrogate’s uterus cannot transfer legal parental rights. We should no more transfer parental rights to the surrogate than we would a long-term caregiver in a boarding school. In short, the intended parents are the parents before, during, and after the embryos are within the surrogate’s uterus.

As we see, the property/personhood status dichotomy is only tangentially relevant here. Regardless of its status before, during, or immediately after transfer, the embryo certainly does gain personhood status at some point during gestation. By the time of its birth, that embryo has

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173 There is an added analytical wrinkle when donor sperm or eggs are used. But legally, this should provide no significant obstacle. The intended mother provides the egg, either her own or one donated to her by a third party. The intended father provides the sperm, either his own or one donated to him by a third party.

174 Under a bailment theory, the surrogate has a duty to keep and protect the property/embryo for the duration of the bailment and a duty to transfer possession back to the rightful “owners” at its conclusion.
become a baby. As a baby, it absolutely qualifies as a person. Whether the intended parents were the “owners” of an embryo, or the “parents” of an embryo, they are now the parents of a baby.

Now, the status dichotomy may be only tangentially relevant, but it is still relevant. If the embryo is a person, then the answer is clear. The intended parents were the parents at the beginning and they remain so at the end. In this situation, the surrogate cannot be considered to be selling her parental rights; she has no parental rights to sell. However, if the embryo were property, then even embryos conceived in the usual fashion would be property. At some point in development, the embryo transitions from property to personhood. At that point, the embryo/property becomes a baby with parents. There are two possible pathways. Either the intended parents, the owners of the property/embryo, themselves transition into parents; or the surrogate becomes the parent of the newly formed child and the intended parents legal connection is snuffed out.

If, as the Davis court would have it, embryos are neither property nor persons, we still have a problem nearly identical to the situation in which they are considered property. There must be a point reached during the gestation at which time the embryo transitions away from being a part property, part person hybrid to become fully a person. As with the pure property analysis, we must ask who then are this new person’s parents? The most reasoned approach would look to who is the “owner” of the property aspects and who is the “parent” of the person

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175 Although most courts looking at the property-personhood divide take the Davis route of designating embryos as something in between, as a practical matter, they tend to treat embryos as is they were property. The general view seems to be that if the parties who create the embryos have a contract designating what will happen to the embryos, that contract will be honored. See, e.g., Kass v. Kass, 91 N.Y.2d 554 (N.Y. 1998) (holding that an agreement, if there is one, should control the distribution of cryopreserved embryos); Litowitz v. Litowitz, 146 Wash. 2d 514 (Wash. 2002) (holding that the contract, if one exists, should govern control and dispensation of the embryos). Respecting the contract, even when it calls for the destruction of the embryos, treats the embryos more like property than persons.
aspects of the embryo. As the intended parents fill both of these roles, it is no great twist of logic to recognize the intended parents as the undisputed parents of the resulting baby.

Regardless of how we characterize the embryo prior to implantation, it does become a child with parents. The question is, does it become the child of the surrogate or of the intended parents? This is a potentially profound and difficult question. Is a woman the mother because she gestates the fetus, or is she the mother because she is the genetic progenitor? With respect to the father there is no question. He is the father by virtue of being the genetic progenitor. Should there be different standard between men and women? Clearly men and women play a different role in the creation of a child. That is not really the question here. The question is whom the law shall recognize as the legal parent.

The problem stems from a dual definition as to who qualifies as the lawful mother. The Uniform Parentage Act identifies the mother as the woman who is the genetic progenitor, or the woman who gives birth to the child.\textsuperscript{176} In the vast majority of cases, they are the same women. Until the advent of in vitro fertilization, they were always the same woman. IVF and gestational surrogacy change this reality.\textsuperscript{177} Faced with two women having competing claims as to motherhood, jurisdictions must either determine which definition of motherhood should prevail, or prevent the situation from ever occurring.

To resolve the dilemma, California has determined that we should look at the intentions of the parties involved. If the parties intended the genetic progenitor to be the mother, then she is recognized as the lawful mother. The gestational carrier is simply that, the women who provided

\textsuperscript{176} See UNIF. PARENTAGE ACT § 201(a) (2002).

\textsuperscript{177} The UPA recognizes this reality by including Article 8 dealing with surrogacy arrangements. See UPA art. 8.
gestational services for the intended couple. Alternatively, if the parties intended carrier to be the mother, then the carrier is the mother and the genetic progenitor would, effectively, be an egg donor.

If we accept the determination that any child resulting from a gestational surrogacy agreement is lawfully the child of the intended parents from the very beginning of the process, there can be no actual or perceived commodification of the child. Gestational surrogacy is simply another mechanism by which parents have children. No one is actually buying or selling the child. No private contracting transfers parental rights. The resulting child is the child of the intended parents regardless of any agreement they may have with the gestational surrogate. The gestational surrogacy agreement is, as it should be, only an agreement regarding the surrogate’s services as a gestational carrier for the child and nothing more.

This is not baby selling. It can only be baby selling if the gestational surrogate was the lawful mother, and she exchanged her baby for money. If the child is not hers, then she has nothing to sell. Any payment she receives can only be in compensation for the valuable services she does provide – i.e. gestational services. It is true that the surrogate will often be asked to sign papers surrendering any claim she may have on the child. This, however, is only a result of a “belt and suspenders” approach to contracting and a presumption that, in the absence of any other evidence, the woman who gives birth to a child should be considered the child’s parent. Here, there is ample evidence to utterly refute that presumption. Asking the gestational surrogate to acknowledge that in writing an existing legal reality is hardly baby selling.

3) But What About the Kids?

178 See Johnson v. Calvert discussion, supra pp. 6-10.
One of the primary and early concerns of those opposed to surrogacy involves the potential harms that may be visited upon the children. For the past several years Professor Susan Golombok of Cambridge University has been researching this very question. Professor Golombok has been conducting a longitudinal study of surrogacy families and comparing them with natural conception family controls. The first, second, and third installments looked at the families one year, two years, and three years after the child’s birth. The fourth, and most recent, installment in this ongoing research looks at the families when the child is seven years old and is forthcoming in Developmental Psychology.

Professor Golombok’s findings are illuminating and put to rest any serious notion that surrogacy poses any potential or meaningful risk of harm to the families or the resulting children. Far from leading to harmful effects early on in childhood, Golombok found the surrogacy families to have a greater degree of psychological well-being than natural conception families. Professor Golombok specifically references the concerns of surrogacy raised by the court in

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183 Susan Golombok et al., Families Created Through Surrogacy: Mother-Child Relationships and Children’s Psychological Adjustment at Age 7, DEVELOPMENTAL PSYCHOL. (forthcoming 2011) [hereinafter Golombok IV] (copy of draft the article is on file with the author).

184 Golombok I, supra note 180, at 408.
Baby M and concludes, “The findings of the present study do not support these negative assumptions with respect to the child’s 1st year of life.”\footnote{Id. at 409.}

The family situation and positive child development continued at age two. The parents of children born through surrogacy even seemed to do marginally better than parents of naturally conceived children.\footnote{Golombok II, \textit{supra} note 181 at 219.} With respect to the children, Golombok concludes

“In spite of the concerns that have been raised regarding the increased risk of psychological problems among children born through a surrogacy arrangement, the children in the present investigation did not differ from the naturally conceived children with respect to socio-emotional or cognitive development.”\footnote{Id. at 220.}

The message is clear, at least through age two, children born through surrogacy do every bit as well as children born through the more conventional method.

The findings at age three bring an important addition. By age three 44\% of the parents had begun discussing with their child that he/she was born through surrogacy.\footnote{Golombok III, \textit{supra} note 182, at 1921.} This seems to have little impact on the children’s well being, as children born through surrogacy continued to do just as well as naturally conceived children.\footnote{Id. at 1922.}

Seven years following birth showed continued normal development for the children born to surrogacy as compared to naturally conceived children. The only difference found at age 7 was a somewhat less positive maternal-child relationship in surrogacy than natural conception.\footnote{The reverse findings existed for ages 1, 2, and 3, when a more positive relationship was found in surrogacy families. See Golombok IV, \textit{supra} note 183, at 20.}

Nevertheless, Golombok “emphasiz[es] that the children were functioning well, with no

\footnote{Id. at 409.}

\footnote{Golombok II, \textit{supra} note 181 at 219.}

\footnote{Id. at 220.}

\footnote{Golombok III, \textit{supra} note 182, at 1921.}

\footnote{Id. at 1922.}
differences identified according to family type by the mother or the child’s teacher.”

Golombok concludes saying that “[o]verall, the findings indicate that these families continue to function well in the early school years and are more similar than they are different.” In short, children born through surrogacy experience essentially the same level of psycho-social development as children born through natural conception. The feared adverse affects on the children have not materialized. Simply put: the kids are all right.

D. Scholarly Objections to Gestational Surrogacy and Why They Fall Short

A number of scholars have written critically of the practice of surrogacy. Professor Vanessa Brown-Barbour, for example, has written an impassioned argument against the practice of surrogacy that typifies much of the scholarly arguments in opposition to surrogacy and the enforceability of surrogacy agreements. Professor Brown-Barbour makes and summarizes many of the arguments in opposition to the enforceability of surrogacy agreements, including several of the ones already discussed. Among in her arguments are (1) “best interest of the child” rather than contract is the appropriate analysis for determining child custody; (2) surrogacy is tantamount to slavery or peonage; (3) procreative liberty does not include the use of a

\[\text{id. at 22.}\]
\[\text{id. at 24.}\]
\[\text{See id. at 439-443}\]
\[\text{See id. at 467-468.}\]
gestational carrier;\textsuperscript{196} (4) freedom of contract does not include surrogacy agreements;\textsuperscript{197} (5) surrogacy is nothing more than baby selling.\textsuperscript{198} Each of these arguments comes up short.

First, Professor Brown-Barbour argues that such agreements must be assessed using the “best interest of the child” analysis.\textsuperscript{199} However, she does not adequately address the question as to why “best interest” analysis should trump other considerations. To support her argument, she discusses the prevailing law regarding the transfer of legal custody from one lawful parent to another in the adoption or divorce contexts.\textsuperscript{200} Professor Brown-Barbour argues (reasonably) that in such circumstances, jurisdictions require a best interest analysis and will decline to enforce prior agreements between the parents. While Professor Brown-Barbour’s analysis is sound as far as it goes, it relies on an invalid assumption. Her analysis presumes that the circumstances inherent in surrogacy are the equivalent of the circumstances found in adoption or divorce. They are not. In adoption or divorce there is an existing child whose interests the court must protect. Absent an enforceable surrogacy agreement, there is no child to protect. Inherent in her argument is an assumption that the surrogate is a lawful parent of the child she carries. Certainly in the context of gestational surrogacy, this is a faulty assumption.\textsuperscript{201}

Her argument raises a fundamental question: why should “best interest of the child” be the determinative and exclusive factor when determining the validity of a surrogacy contract?

\textsuperscript{196} See id. at 468-470.

\textsuperscript{197} See id. at 470-471.

\textsuperscript{198} See id. at 471-474.

\textsuperscript{199} See id. at 439-443.

\textsuperscript{200} See id. at 439-443.

\textsuperscript{201} See discussion supra pp. 45-50. The argument is more compelling, albeit not dispositive, with respect to traditional surrogacy as the surrogate is a genetic progenitor of the child.
Even if we decide that it should, why does a surrogacy contract inherently fail this test? Absent the surrogacy agreement, the particular child in question would not exist. Is it in the better interest of the resultant child to exist or not to exist? 202

Best interest analysis aside, Professor Brown-Barbour then argues that the more “compelling argument against [surrogacy] arrangements” is that they “are merely baby selling contracts that violate federal law and, thus, are void and unenforceable.” 203 She goes on to equate surrogacy with slavery and says that surrogacy agreements violate the 13th Amendment and federal Anti-Peonage statutes. 204 While Professor Brown-Barbour makes this assertion, she offers no explanation as to why surrogacy is tantamount to slavery. The gestational carrier is hardly being bought and sold. She is providing a valuable and honorable service to the lawful parents. Nor is there any involuntary servitude. The surrogate is not being compelled by force to accept transfer of an embryo. There is nothing involuntary about gestational surrogacy. The prospective gestational surrogate voluntarily agrees to the procedures and to providing gestational services in exchange for agreed upon compensation. The argument of slavery only works if it the surrogate is coerced against her will. This rests on a presumption of exploitation. As discussed above, surrogates are not exploited. 205 Without the exploitation prop to rest upon, the slavery argument falls apart.

Nor does a gestational surrogacy agreement constitute peonage. The United States Code defines peonage as the holding of persons to labor or service in liquidation of a debt or

202 This is not to say that the best interests of the child cannot be a factor. It simply is not a valid argument for declaring all surrogacy agreements null and void from the outset.

203 Brown-Barbour, supra note 193, at 467.

204 See id. at 467-468.

205 See supra pp. 33-41 for discussion regarding potential exploitation of the surrogate.
Surrogacy does not qualify under the definition of peonage. At no time is the surrogate being held in labor in satisfaction of a debt. She is providing an ongoing service in exchange for ongoing payment. The only reasonable link to peonage is that a surrogate, once pregnant with a viable fetus, may not terminate the pregnancy. However, this inability is not a function of the surrogacy agreement itself. It is a function of independent prohibitions and limitations on abortion. Further, if this qualifies as peonage, than so too must babysitting. A babysitter may not abandon the child placed in his or her care.

Professor Brown-Barbour correctly states that the United States Supreme Court has not yet determined whether procreative liberty includes the use of a gestational surrogate. However, the lack of a Supreme Court decision expressly and overtly affirming a particular right does not mean that they government may interfere with otherwise valid good-faith agreements premised upon other grounds.

Brown-Barbour appears to accept the general argument that freedom of contract would suggest, at least initially, that otherwise valid agreements, entered into in good faith should be respected. She then asserts, correctly, that the “[f]reedom of contract, however, is not absolute.” Freedom of contract does not apply to “contracts that are illegal, void, or violate public policy.” While contracts contrary to public policy are properly unenforceable, she offers unconvincing reasons as to why surrogacy arrangements violate public policy. She asserts

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207 It may or may not be that contractual obligations to continue carrying the fetus prior to fetal viability could violate anti-peonage statutes. If so, such provisions within a surrogacy agreement would be unenforceable without rendering the remaining provisions null and void.

208 Brown-Barbour, supra note 193, at 470.

209 Id.

210 Id.
that they are personal services contracts, and therefore unenforceable. She equates gestational services to slavery, citing to the Thirteenth Amendments prohibition on involuntary services as a “primary reason[] that the law finds personal contracts to be unenforceable.” However, it is not that the personal services contract is unenforceable; it is that specific performance is not available as a remedy for a breach of such contracts. A provision in a gestational surrogacy agreement that precluded an otherwise lawful abortion may well be unenforceable as an invalid specific performance clause in a personal services contract. That, however, is a far cry from a conclusion that the entire contract must be declared void and unenforceable.

Finally, she asserts that surrogacy agreements are nothing “merely baby selling devices that commodify women and babies.” Gestational surrogacy in no way involves the buying or selling of anyone. The child was from its conception the product of the intended parents. The very title of her article, “Bartering for Babies,” carries a flawed assumption. The intended parents and the potential surrogate are not bartering over the baby. They are bartering over the surrogate’s services in carrying the intended parents’ baby to term.

Ultimately, Professor Brown-Barbour rests her argument on the notion that “some things are not for sale.” On this point we do agree. Where we disagree, and Professor Brown-Barbour gets it wrong, is in her assertion that gestational surrogacy involves the selling of a baby or of a gestational surrogate. It does not. The baby in question is the child of the intended parents from the time conceived on forward. The intended parents cannot be “purchasing” that which is

211 Id.
212 Id. at 471.
213 Id. at 485.
already theirs. Nor can the gestational surrogate be “selling” that which is not hers.\textsuperscript{214} The surrogate is not enslaved. She is providing a valuable service for individuals who very much want a child. In short, the arguments against gestational surrogacy rest on the presumption that the gestational carrier is a lawful parent of the resulting child; that she is being exploited by the intended parents; or that the child is being commodified. Each of these presumptions is without foundation.

Professor Brown-Barbour raises one last concern regarding the long-term welfare of the children that are born through surrogacy.\textsuperscript{215} She is legitimately concerned with potential adverse impacts on the child’s social and cognitive development. At the time of her writing she could find no long-term studies looking into the psycho-social effects of surrogacy on the child. We now have such studies, and they reveal no adverse affects.\textsuperscript{216}

1) Splitting the Mother

Bryn Williams-Jones argues that surrogacy fragments motherhood.\textsuperscript{217} This too may be a potential concern, but only if we consider that the surrogate is actually a “mother” to the child. Here, again, a distinction must be drawn between traditional surrogacy and gestational surrogacy. With traditional surrogacy, Williams-Jones raises a potentially legitimate concern. Traditional surrogates are both the genetic progenitor and the gestational carrier of the child.\textsuperscript{218}

\textsuperscript{214} More precisely, the intended parents are not purchasing, nor is the gestational surrogate selling anyone’s the right to be the child’s parents.

\textsuperscript{215} Brown-Barbour, supra note 193, at 483.

\textsuperscript{216} See discussion supra pp. 50-53.

\textsuperscript{217} Williams-Jones, supra note 171, § 3.1

\textsuperscript{218} Although even this does not necessarily constitute the fracturing of the status of motherhood. We must come to terms with the reality that modern science has altered the assumptions of how
This is not the case with gestational surrogacy. With gestational surrogacy, the carrier’s only connection to the child is having carried the embryo/fetus to term. That is hardly an insignificant contribution to be sure. However, does that alone constitute motherhood? The argument that gestational surrogacy “fragments” motherhood requires us to accept both that carrying the embryo/fetus to term is an essential aspect of being a “mother,” and that it alone is sufficient to be deemed “mother.” It suggests that a woman who does not carry the child, but who nurtures and raises the child after birth, can achieve nothing more than a fractured motherhood. Many scholars now dispute this as required. Motherhood (and, indeed, fatherhood) is something more than just the biological act of conceiving and giving birth. It involves primarily the responsibility for and act of raising the child in the years following birth.

What is motherhood (or fatherhood) status? Does it arise simply from gestating a fetus or is it something more. I agree with the position that it is something more. We may even ask, when does the woman “become” the mother? When does the man “become” the father? A wife does not often tell her husband that she is pregnant by saying, “Honey, you are a father.” No, she more often says, “Honey, you are going to be a father.” This bit of common human behavior suggests one becomes a parent. Until recently, it was only through biology or legal adoption. ART is challenging those as the only paradigms.

Are all adoptive mothers fractured? One might also ask that even if we assume a fractured motherhood, is that necessarily a bad thing? Or might having multiple individuals as potential “mothers” actually be advantageous?

that “parenthood” begins, in most peoples’ minds, at the birth of the child. Surrogacy does not fracture motherhood. It is merely another means of achieving motherhood.

E. Other Arguments

1) Religious/Moral/Ethical Objections

In the end, there is a divergent view of morality and legality. Much of the remaining opposition to surrogacy stems from a subjective view that this sort of practice is inherently immoral. It does not matter whether any specific feared outcomes actually occur. A practice that is on its own morally wrong should, arguably, be disallowed regardless of the potential for any secondary harms. This position often stems from sincerely held religious beliefs. The Catholic Church has long opposed any form of technological interference with the reproductive process.

Such moral objections need not have empirical data of any actual harms to support them. But resting the argument on moral disapproval raises an important question as to the role of

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221 I have argued elsewhere in this article that the intended parents should be considered the parents of the resulting child even before embryo transfer. This is not inconsistent. Rather it is recognition of the reality that legal status and social status are not always the same thing.

222 See, e.g., Steven G. Calabresi, Render Unto Caesar That Which Is Caesar’s, And Unto God That Which Is God’s, 31 HARV. J.L. & PUB. POL’Y 495 (2008) (arguing that it is appropriate for governments to legislate morality and that we should prosecute perpetrators of victimless crimes).

223 Catechism of the Catholic Church 2376 states “Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral. These techniques (heterologous artificial insemination and fertilization) infringe the child's right to be born of a father and mother known to him and bound to each other by marriage. They betray the spouses' ‘right to become a father and a mother only through each other.’” Catholic Church, Catechism of the Catholic Church, THE HOLY SEE, § 2376 (citing CDF, Donum vitae II, 1), http://www.vatican.va/archive/ENG0015/__P86.HTM (last visited August 23, 2011).
government in the regulation of practices that only some members of society find morally objectionable. The State should not prohibit any conduct merely because a minority (or even a majority) finds it morally objectionable.\textsuperscript{224} Justice Kennedy when addressing the sincerely held belief by some that homosexuality is immoral said

For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.” (Quoting \textit{Planned Parenthood of Southeastern Pa. v. Casey}, 505 U.S. 833, 850 (1992).)\textsuperscript{225}

The United States Supreme Court has rejected the argument that mere moral disproval may justify government intervention. Without some accompanying demonstrable harm that the State has an interest in minimizing, the state ought not prohibit any particular activity. As I have discussed above, no such accompanying harm has been demonstrated.

2) Why Not Just Adopt?

It can be argued that people ought not be allowed to utilize surrogacy services when there are thousands of babies and children available for adoption.\textsuperscript{226} The argument distills down an assertion that it is morally and ethically wrong to have children in this way while so many other children have no parents. While this may be true, it is also irrelevant. Or rather the argument applies just as well to couples having children in the traditional way. Contraception is easy,

\begin{itemize}
\item \textsuperscript{224} See Lawrence v. Texas, 539 U.S. 558, 583 (2003) (holding that moral disapproval alone does not constitute a legitimate state interest).
\item \textsuperscript{225} Id. at 571
\item \textsuperscript{226} See, e.g., Elisabeth Eaves, \textit{Not the Handmaid’s Tale}, FORBES.COM (Dec. 19, 2008), http://www.forbes.com/2008/12/18/kuczynski-surrogacy-motherhood-oped-cx_ee_1219eaves.html (addressing the claim that intended parents “are often told that they are selfish and should instead adopt a needy child”).
\end{itemize}
inexpensive, and effective. Why not adopt rather than having one of “your own”? The couple planning to have a child through the traditional method is making the same choice as the couple utilizing surrogacy. In both cases the parents are choosing to have a child that is genetically linked to themselves rather than to adopt an unrelated child. Interference in that choice is not the province of the government.

It is, of course, considerably less expensive to conceive a child the old fashioned way as compared to adoption (or surrogacy). But when compared to the costs of raising a child to adulthood, the marginal cost of adoption is not so dramatic. Further, to even make such an argument, you are implicitly commoditizing the child. This argument boils down to “I choose traditional conception over adoption because it is cheaper.”

3) To Compensate Or Not To Compensate?

A number of commentators have raised the argument that surrogacy, if it is to be permitted, should only be uncompensated and altruistic. Indeed, a number of states, including Washington State, Nebraska, and Florida, have enacted laws that prohibit compensated gestational surrogacy. In those states, gestational surrogates may not be compensated for the service they provide in excess of reasonable expenses and medical care associated with the

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227 The cost of raising a child to age 17 is estimated to be, $206,180 for lower-income families, $286,860 for middle-income families, and $477,180 for upper-income families. This estimate does not include prenatal costs or any expenses after age 17, including any college costs. See MARK LINO, EXPENDITURES ON CHILDREN BY FAMILIES, 2010 (U.S. Dept. of Agric., Ctr. for Nutrition Policy & Promotion, Misc. Publ’n No. 1528-2010, 2011); available at http://www.cnpp.usda.gov/Publications/CRC/crc2010.pdf.


229 See supra notes 46-47 and accompanying text.
pregnancy itself. The primary argument appears to be the fear of exploitation. The promise of large sums of cash induces poor women to provide a risky service they would never otherwise consider.\textsuperscript{230} The logic seems to be that if we remove the financial lure we will protect the women from making unwise agreements.

Williams-Jones seems particularly concerned regarding compensated surrogacy, saying that “[r]emuneration is the most problematic aspect of surrogacy because it challenges the cultural ideals of women as selfless nurturers; admitting that remuneration was adequate would eliminate the ability of the women to classify their work as an altruistic ‘gift of life’ to an infertile couple.”\textsuperscript{231} One might ask what this means for nannies and au pairs who certainly accept remuneration in exchange for nurturing the children in their care. It is quite possible for women to feel both that they are providing an altruistic “gift of life” while at the same time accepting compensation. The majority of gestational surrogates interviewed held precisely to this view. Even while accepting compensation, they felt their primary motivation as one of altruism.\textsuperscript{232} Accepting compensation, it seems, does not undermine the kinder, gentler reasons many women wish to be gestational surrogates.

Although many gestational surrogates consider altruism to be a significant motivating factor\textsuperscript{233} and many commentators view the compensation aspect to be so very troubling, not all believe that altruism is necessarily a good thing in this context. Some have argued that even encouraging potential gestational surrogates to think of the service they provide in altruistic

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\textsuperscript{230} See, e.g., Brown-Barbour, supra note 193, at 476.
\textsuperscript{231} Williams-Jones, supra note 171, §3.1
\textsuperscript{232} Ciccarelli & Beckman, supra note 159, at 30.
\textsuperscript{233} See Edelman, supra note 157, at 133.
\end{flushright}
terms, rather than economic terms, works to the gestational surrogates disadvantage.\textsuperscript{234} Altruism itself is a form of compensation that serves to reduce the monetary amount needed to encourage a sense of adequate consideration in the mind of the gestational surrogate.\textsuperscript{235} The merits of this argument remain somewhat theoretical. As commercial gestational surrogacy gains wider acceptance and practice, however, whatever concern this may bring will likely diminish.

In the end, the reality is that gestational surrogates do, in fact, provide a valuable service on behalf of the intended parents and the hoped-for child. They accept a significant amount of responsibility and do so at some risk to themselves. It is only right and proper that they should be compensated for their efforts.\textsuperscript{236}

V. The Patchwork Approach Creates Harms and Resolves None

The patchwork quilt that is our states’ laws on surrogacy has resulted in significant hardships for many individuals, while failing to meet the goals that local enactors hope to accomplish. Restrictions on surrogacy are intended to protect surrogates from exploitation, protect children from commodification, and to avoid circumvention of adoption laws. As I have argued, surrogates are not exploited, children are not commodified, and adoption is inapplicable. The individual state laws discouraging surrogacy do not protect against any of these harms


\textsuperscript{235} See \textit{id}.

\textsuperscript{236} The appropriate magnitude of the compensation is a question best left to the parties to decide. Governmental regulation may, of course, set reasonable parameters to ensure that the amount is not exploitative or unconscionable. But certainly if $1000 is too low an amount, mandating that it must be $0 is even worse.
because gestational surrogacy does not create any of these harms. The inconsistent and uncertain approach to surrogacy across the country, unfortunately, does create harm.

Refusing to enforce gestational surrogacy agreements in various state, or even imposing criminal penalties has certainly not stopped the practice. Intended parents and potential surrogates either go forward regardless of the law, or they seek friendlier jurisdictions. Numerous examples can be found of individuals who utilize surrogacy despite the legal uncertainty.

In New Jersey, despite the unenforceability of surrogacy agreements following the Baby M case 18 years earlier, a gay male couple (lawfully married in California) asked one of their sisters to serve as a gestational carrier. Following the birth of twin baby girls, the sister refused to surrender them and petitioned the court to recognize her parental rights notwithstanding the gestational surrogacy agreement.237 The couple may have felt that Baby M invalidated traditional surrogacy, thereby leaving open the possibility for the enforceability of a gestational surrogacy agreement. Judge Francis B. Shultz, the trial judge, did not see a distinction between traditional and gestational surrogacy. He wrote:

“The surrogacy contract is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from it’s mother; it looks to adoption regardless of suitability; it totally ignores the child’ it takes the child from the mother regardless of her wishes and maternal fitness;” Baby M supra 109 N.J. at 441, 442. Would it really make any difference if the word “gestational” was substituted for the word “surrogacy” in the above quotation? I think not.238

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238 Id. at 5.
Whether the New Jersey Supreme Court will take this as an opportunity to limit its decision in Baby M to traditional surrogacy, or to expand its decision to all forms of surrogacy remains unknown. The New Jersey appellate courts have yet to consider this case.

Virginia allows for uncompensated surrogacy (traditional and gestational), but limits the practice to married heterosexual couples. A same-sex couple contracted with a woman to act as a traditional surrogate. The relationship between the couple and the surrogate worsened over time and geography. The couple moved multiple times to and from both North Carolina and California. Eventually, the Virginia court accepted the North Carolina judgment granting the same-sex couple full legal and physical custody.

Even in Michigan, a state that bans and imposes criminal penalties for engaging in surrogacy agreements, the practice persists. A married couple, Scott and Amy Kehoe sought the services of Shelley Baker as a gestational surrogate. She agreed and some time later gave birth to twins. After initially surrendering the children to the Kehoes, Ms. Baker filed an action to take the children back and won.

This uncertainty poses great risk to the individuals involved, not least of all the children born through surrogacy. Intended parents and surrogates move and travel. Uncertainty regarding the law inhibits this ability. There are substantial added economic, legal, and social costs resulting from the disparate and uncertain laws. As we see in these examples, laws blocking the enforcement of surrogacy agreements do not tend to prevent the practice. They only serve to

239 See VA. CODE ANN. § 20-156 to 20-165 (LexisNexis through 2011).
generate more uncertainty and more child custody disputes. The supposed solution to imagined harms does nothing more than generate more confusion and distress.

Gestational surrogacy is a reasonable alternative for individuals and couples who cannot have children through more traditional methods and who, for whatever reasons, do not wish to utilize adoption. There is no demonstrated harm to the gestational surrogates, the intended parents, or the resulting children. What has generated the most legal and social angst is the wildly disparate and uncertain legal landscape the people involved face.

The solution to this is obvious. We need to create a more uniform approach to gestational surrogacy services. This can be achieved through widespread adoption of the ABA Model Act, Alternative B, modified so as to address the shortcomings identified above in Section III. D. 2. Better yet, we should adopt a Federal Gestational Surrogacy Act with essentially the same provisions. A federal approach would achieve uniformity more quickly, and it would obviate any forum shopping within the United States.242 A federal approach would also bring all states into agreement with regard to the relationship status of children, intended parents, and gestational surrogates, greatly reducing the difficulties of all parties when one or the other of them moves to jurisdictions taking wildly different approaches.

VI. Conclusion

A gestational surrogate provides a noble service that should be respected and honored. She helps in the creation of life; bringing into the world a child who otherwise would not exist. She is not coerced or compelled into this service. She does place herself at some risk, but she

242 There may still be some who would take the international route, but a uniform legal regime in the United States would make domestic gestational surrogacy preferable with respect to the legal implications. International surrogacy would then compete on the basis of price. Intended parents would be faced with a choice of potentially lesser cost or legal certainty.
does so knowingly, willingly, and without reservation. Why this should not be honored is mystifying.

Almost 80 years ago, Louis Brandies said that the states are the laboratories of democracy.\textsuperscript{243} To the extent that that is true, we must also recognize that the time does come when a given laboratory experiment is over. We have been experimenting with the recognition of surrogacy contracts since before Baby M over two decades ago. Since that time several states have allowed gestational surrogacy to grow as a reproductive option. Thousands of women have served as gestational carriers and given birth to thousands of babies, making thousands of intended parents immeasurably happy (and sleep deprived). We have seen no evidence of adverse consequences. The women do not feel exploited. The children have not become commoditized. They grow and develop with the same sorts of problems and blessings as any other children. None of the adverse consequences posited by opponents in the early (or later) years of the experiment have come to pass. It is time to declare the experiment over and recognize the social value this practice offers for infertile people nationwide.

\textsuperscript{243} See New State Ice Co. v. Liebmann 285 U.S. 262, 311 (1932) (Brandies, J., dissenting).