

2009

## Surrogacy and the Politics of Commodification

Elizabeth S. Scott  
*Columbia Law School*, [escott@law.columbia.edu](mailto:escott@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Family Law Commons](#), [Health Law and Policy Commons](#), [Law and Economics Commons](#), [Law and Gender Commons](#), [Law and Society Commons](#), and the [Sexuality and the Law Commons](#)

---

### Recommended Citation

Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72(3) LAW AND CONTEMP. PROBS. 109 (2009).

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/321](https://scholarship.law.columbia.edu/faculty_scholarship/321)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [cls2184@columbia.edu](mailto:cls2184@columbia.edu).

# SURROGACY AND THE POLITICS OF COMMODIFICATION

ELIZABETH S. SCOTT\*

## I

### INTRODUCTION

In 2004, the Illinois legislature passed the Gestational Surrogacy Act, which provides that a child conceived through *in vitro* fertilization (IVF) and born to a surrogate mother automatically becomes the legal child of the intended parents at birth if certain conditions are met. Under the Act, the woman who bears the child has no parental status.<sup>1</sup> The bill generated modest media attention, but little controversy;<sup>2</sup> it passed unanimously in both houses of the legislature and was signed into law by the governor.<sup>3</sup>

This mundane story of the legislative process in action stands in sharp contrast to the political tale of surrogacy that unfolded in the 1980s and early 1990s as the *Baby M* case<sup>4</sup> left its mark on American law. It was through the lens of *Baby M* that this innovative use of reproductive technology was first scrutinized as an issue of social, political, and legal interest.<sup>5</sup> Over the course of the litigation between the intended parents, William and Elizabeth Stern, and the surrogate mother, Mary Beth Whitehead, hostility toward commercial surrogacy<sup>6</sup> arrangements hardened. Opponents of surrogacy—mostly feminists and religious groups—argued that the contracts were baby-selling arrangements that exploited poor women who either were coerced or did not understand the consequences of their decisions. Opponents argued that surrogacy degraded the

---

Copyright © 2009 by Elizabeth S. Scott.

This Article is also available at <http://law.duke.edu/journals/lcp>.

\* Vice Dean and Harold R. Medina Professor of Law, Columbia University. Many thanks to Kate Bartlett, Noa Ben-Asher, Judith Daar, Maxine Eichner, Yasmine Ergas, Marsha Garrison, Suzanne Goldberg, Vicki Jackson, Kim Krawiec, Bob Scott, Jana Singer, Liz Schneider, and participants at conferences at Cardozo Law School and George Washington University Law School for helpful comments and to Sara Weinberg for outstanding research assistance.

1. 750 ILL. COMP. STAT. 47/1-75 (2006); see *infra* notes 90–96 and accompanying text.

2. See Judith Graham, *State Sets Standards on Surrogacy Birth; Legislation Called Most Liberal in U.S.*, CHI. TRIB., Jan. 2, 2005, at C1.

3. *Id.*

4. *In the Matter of Baby M*, 537 A.2d 1227 (N.J. 1988).

5. See *infra* notes 22–30 and accompanying text for a description of the *Baby M* trial and appeal.

6. In this article “surrogacy” refers to *commercial* surrogacy, in which a woman is paid to carry and bear the product of her egg and donor sperm or an implanted, fertilized donor egg. Compare “gift surrogacy,” in which a woman agrees to carry and bear another’s child without payment.

female reproductive function and undermined the family. This framing of the transaction as illegitimate commodification was adopted by the New Jersey Supreme Court in *Baby M* and prevailed for several years thereafter, with far-reaching effects on legal regulation. By the early 1990s, many states had enacted laws prohibiting or severely restricting surrogacy agreements.<sup>7</sup> Some observers predicted the end of this particular use of reproductive technology.<sup>8</sup>

But that did not happen. In fact, the politics and social meaning of surrogacy arrangements have slowly changed, and the alarm and hostility that surrounded this issue have diminished substantially. An alternative frame has emerged, in which altruistic surrogates (contractually bound and compensated nonetheless) provide the “gift of life” to deserving couples who otherwise would be unable to have children. News stories about surrogacy arrangements in the past decade have tended to be upbeat, human-interest tales describing warm relationships between surrogates and the couples for whom they bear children<sup>9</sup>—a far cry from the acrimonious battle between Ms. Whitehead and the Sterns over Baby M.

The political and judicial response to surrogacy has also changed in recent years. In Illinois and other states, the contemporary legislative approach has been largely pragmatic, driven by a perception that parties will continue to enter these agreements and thus, that it is important to have procedures that establish parental status in intended parents.<sup>10</sup> In the absence of statutory authority, several courts, including the California Supreme Court, have also enforced gestational-surrogacy contracts and have held that the intended parents can be named on the birth certificate.<sup>11</sup> Although social conservatives

---

7. The New York statute passed in 1992 was reported to be the eighteenth statute prohibiting or severely restricting commercial surrogacy contracts. See George E. Curry, *New York State May Bar Mothers for Hire, Surrogate Parenting for Pay at Issue*, CHI. TRIB., May 31, 1992, at 17; sources cited *infra* note 53.

8. See *infra* note 71 and accompanying text.

9. See Gina Bellefante, *Surrogate Mothers' New Niche: Bearing Babies for Gay Couples*, N.Y. TIMES, May 27, 2005, at A1 (profiling various surrogacy relationships between women and gay couples); Judy Keen, *Surrogates Relish Unique Role; And Science Has a Place in the Family Too*, USA TODAY, Jan. 23, 2007, at D1 (profiling the positive surrogacy relationship between a woman and a gay couple); Raina Kelley et al., *The Curious Lives of Surrogates*, NEWSWEEK, Mar. 29, 2008, at 44 (describing surrogacy as “[a]n act of love, but also a financial transaction, that brings people together”); Alex Kuczynski, *Her Body, My Baby: My Adventures with a Surrogate Mom*, N.Y. TIMES MAG., Nov. 30, 2008, at 42 (describing the author’s experience as an intended parent); Monica Rogers, *The Birth of a New Tradition; Showers for Surrogates*, CHI. TRIB., July 13, 2005, at C1 (describing baby showers thrown for surrogate mothers); Brigid Schulte, *Sharing the Gift of Life*, WASH. POST, May 4, 2008, at C1 (profiling the positive relationship between a surrogate mother, surrogate daughter, and intended parents after fourteen years). Tina Fey and Amy Poehler recently starred in *BABY MAMA* (Universal Pictures 2008), a wacky comedy about a surrogacy arrangement gone awry that got mixed reviews but grossed approximately \$70,000,000. See *Baby Mama*, <http://www.boxofficemojo.com/movies/?id=babymama.htm> (last visited May 19, 2009).

10. See, e.g., *infra* notes 89–93 and accompanying text.

11. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (enforcing contract over gestational mother’s objection); *Doe v. Roe*, 717 A.2d 706 (Conn. 1998) (holding that trial court had jurisdiction to approve surrogacy agreement); *In re Roberto D.B.*, 923 A.2d 115 (Md. 2007) (reversing lower court’s refusal to

continue to speak out against surrogacy in the political arena,<sup>12</sup> most contemporary groups interested in this issue advocate in favor of laws enforcing the arrangements.<sup>13</sup>

This account raises a number of puzzling questions. How did it happen that surrogacy was framed as baby selling during the *Baby M* litigation? And why did the case generate such powerful emotional, ideological, and political responses that, institutionalized through legislation, continue to define the law in many states? Just as important—why did the politics and social meaning of surrogacy change, such that a more sanguine view of the practice seems to have emerged in recent years? Why did interest groups, particularly feminists, that played such a key role in advocating restrictive laws after *Baby M*, mobilize during the litigation and then over time seemingly lose interest in this issue? This article explores the history of surrogacy over the past twenty years in an effort to shed some light on these questions.

A roadmap of the essay may be helpful. Section II offers a historical account of the legal and social issues surrounding surrogacy over the past twenty years. These issues present the puzzle that the rest of the article seeks to resolve. Section III examines how surrogacy was framed as commodification in the *Baby M* context. Although opponents of surrogacy had legitimate concerns about unfamiliar uses of reproductive technology, the political and legal responses to this case were to a considerable extent a combination of moral panic and interest-group politics. The vivid drama of *Baby M* came to symbolize the pernicious threat that commercialization of reproductive technology posed to conventional understandings of the family and of motherhood. Opinion leaders, primarily religious groups and feminists, reinforced the moral panic and formed an unlikely but effective coalition that persisted for several years. Of particular interest is the role of feminists in the political arena and why they ultimately unified in a stance favoring legal prohibition of surrogacy that was in tension with other feminist views about reproductive agency. In section IV, I seek to explain how and why the social and political meanings of surrogacy have changed over the past decade. Several factors have been important: The moral panic has dissipated, as many of the predicted harms have not been realized. Further, advances in IVF have expanded the use of gestational surrogacy, which, because the surrogate is not genetically related to the baby, was less

---

remove the surrogate mother's name from a birth certificate when both the surrogate mother and the genetic intended parent desired that the surrogate's name be removed); *Culliton v. Beth Israel Deaconess Med. Cntr.*, 756 N.E.2d 1133 (Mass. 2001) (hospital ordered to place gestational intended parents' names on birth certificate); *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. Super. Ct. 2000) (allowing birth certificate naming intended, genetic parents to issue after a waiting period, but refusing to enforce a pre-birth contract terminating the surrogate mother's parental rights); *J.F. v D.B.*, 879 N.E.2d 749 (Ohio 2007) (holding gestational-surrogacy contract was not against public policy and should be enforced); *J.R. v. Utah*, 261 F. Supp. 2d 1268 (Utah 2002) (Utah statute prohibiting recording of genetic parents' names on birth certificate held unconstitutional as an undue burden on the fundamental right to procreate).

12. See, e.g., *infra* notes 98–99 and accompanying text.

13. See, e.g., *infra* notes 94–101 and accompanying text.

readily framed as commodification and thus was more palatable than traditional surrogacy.<sup>14</sup> Finally, the interest-group dynamic has changed: women's groups have withdrawn their engagement with the issue, perhaps because their arguments against surrogacy were increasingly adopted by anti-abortion advocates. These conditions have contributed to a political climate in which lawmakers have adopted a pragmatic approach, authorizing surrogacy arrangements while seeking to minimize potential tangible harms. In a liberal society, this stance seems like the correct governmental response to a social practice that some continue to view with concern but about which no consensus exists.

## II

### THE FRAMING AND REFRAMING OF SURROGACY: A BRIEF HISTORY

#### A. *Baby M*: Surrogacy as Commodification

Political philosophers offer two objections to the commodification of certain transactions. The first focuses on coercion; exchanges that are driven by severe inequality, ignorance, or dire economic necessity are problematic.<sup>15</sup> The second objection focuses on corruption and holds that the market has a degrading effect on certain goods and practices.<sup>16</sup> As the *Baby M* case unfolded, both objections were aimed at surrogacy, effectively framing the transactions as illicit commodification. Opponents claimed that surrogacy unfairly exploited poor women who unwillingly entered contracts that they would come to regret.<sup>17</sup> Critics also claimed that surrogacy degraded children and women by treating children as commodities to be exchanged for profit and women's bodies as childbearing factories; the arrangements also degraded the mother-child relationship by paying women not to bond with their children.<sup>18</sup>

Surrogacy arrangements were not completely unfamiliar to lawmakers or to the public in 1986, when the *Baby M* story first attracted media attention. In the early 1980s, a few courts had addressed whether surrogacy contracts were

---

14. "Gestational surrogacy" refers to conception via IVF, where the surrogate is unrelated genetically to the child and "traditional surrogacy" refers to conception via artificial insemination, as in *Baby M*. The surrogate is the biological mother of the child in traditional surrogacy and (usually) the intended father is the sperm donor.

15. Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, Address at Brasenose College, Oxford (May 11–12, 1998), in 21 *THE TANNER LECTURES ON HUMAN VALUES* 89, 94 (Grethe B. Peterson ed., 2000), available at <http://www.tannerlectures.utah.edu/lectures/sandel/100.pdf> (explaining how socioeconomic inequality might lead to coercion as an objection to surrogacy).

16. *Id.*; see also Elizabeth S. Anderson, *Is Women's Labor a Commodity?* 19 *PHIL. & PUB. AFF.* 71, 74 (1990) (arguing that when women's capacity to carry children "is treated as a commodity, the women who perform it are degraded"); Margaret Jane Radin, *Market Inalienability*, 100 *HARV. L. REV.* 1849, 1928–36 (1987) (analyzing surrogacy as the commodification of women's reproductive services and of children).

17. See, e.g., Radin, *supra* note 16, at 1930.

18. See, e.g., *id.* at 1932–34.

enforceable,<sup>19</sup> and in 1986 a bill regulating (but allowing) the enforcement of these novel arrangements was under consideration in the New York legislature.<sup>20</sup> Surrogacy had also received some media and academic attention.<sup>21</sup> But the *Baby M* case—a dramatic and emotional legal battle between a housewife who had dropped out of high school and a couple with graduate degrees and professional careers who sought to have a child with her assistance—focused national attention on the issue and framed the practice as commodification.

The outlines of the *Baby M* story are familiar. In February 1985, Mary Beth Whitehead and Bill Stern executed the surrogacy contract, brokered by the Infertility Center of New York and its director Noel Keane.<sup>22</sup> Days after Ms. Whitehead gave birth, she delivered the baby to the Sterns (who named her Melissa), but she returned the next day and told them that she “could not live without [the] baby.”<sup>23</sup> Shortly thereafter, Ms. Whitehead and her husband took the baby to Florida to hide out with relatives.<sup>24</sup> After Ms. Whitehead was apprehended and the baby returned to the Sterns, Ms. Whitehead fought Mr. Stern’s effort to enforce the contract in a highly publicized and messy trial that stretched over two months.<sup>25</sup> At its end, Judge Harold Sorkow held the surrogacy contract valid, ordering that Ms. Whitehead’s parental rights be terminated and that Mr. Stern receive sole custody; shortly thereafter, the judge entered an order allowing Ms. Stern’s adoption of Melissa.<sup>26</sup>

19. See, e.g., *Surrogate Parenting Assocs. v. Kentucky*, 704 S.W.2d 209 (Ky. 1986) (holding that a Kentucky statute prohibiting the sale of a child “for the purpose of adoption” does not apply to a surrogacy contract entered into prior to conception); *Syrkowski v. Appleyard*, 362 N.W.2d 211 (Mich. 1985) (holding the Michigan Paternity Act, allowing the putative father of a child born out of wedlock to seek a determination of paternity, applies when a surrogate mother is married and the biological and intended father is married to a different woman).

20. See James Feron, *Testimony Given on Surrogates’ Bill*, N.Y. TIMES, Apr. 12, 1987, at A39 (describing testimony by infertile parents and surrogates favoring the bill).

21. See GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* 272–324 (1985) (offering a feminist critique of surrogacy); Patricia A. Avery, *Surrogate Mothers: Center of a New Storm*, U.S. NEWS & WORLD REP., June 6, 1983, at 76.

22. Under the contract, Mr. Stern agreed to pay Ms. Whitehead \$10,000 in exchange for her agreement to be inseminated, carry any resulting pregnancy to term, deliver the baby, and relinquish it to the Sterns, giving up her parental rights. Stern also agreed to pay \$7500 to the Infertility Center of New York. Ms. Whitehead was artificially inseminated with Mr. Stern’s sperm and delivered a baby girl. The original birth certificate listed Ms. Whitehead and her husband as the parents of the baby. *In the Matter of Baby M*, 537 A.2d 1227, 1236 (N.J. 1988).

23. *Id.* at 1236–37. The Sterns reported that they believed Ms. Whitehead to be so distraught as to be suicidal, and so allowed her to keep the baby for a week. When it became apparent that Ms. Whitehead would not relinquish the baby, Mr. Stern sought to enforce the contract. *Id.* at 1237.

24. *Id.* Ms. Whitehead fled when a New Jersey process server attempted to deliver an order to relinquish custody. *Id.*

25. Margot Hornblower, *Surrogate Mother Breaks Pact*, WASH. POST, Aug. 22, 1986, at A3; Elizabeth Kolbert, *Surrogate Mother Seeks Baby*, N.Y. TIMES, Aug. 22, 1986, at B2.

26. *In the Matter of Baby M*, 525 A.2d 1128, 1175–76 (N.J. Super. Ct. 1987), *rev’d in part*, 537 A.2d 1227 (N.J. 1988).

On appeal, the New Jersey Supreme Court reversed the lower court, holding that the contract was unenforceable under New Jersey statutory law and that it violated public policy.<sup>27</sup> The court found that the contract offended public policy because it was effectively “the sale of a child,” prohibited in this context for the same reason that it was banned under state adoption law: because women needing money might be coerced into giving up their children.<sup>28</sup> Moreover, the pre-birth agreement by the mother to relinquish parental rights was explicitly prohibited under the adoption statute.<sup>29</sup> The Court concluded that a surrogacy contract could never be voluntary or informed, because a woman could not know what it would mean to give up her baby.<sup>30</sup>

\*\*\*

Media coverage of the *Baby M* case was intense from the time the Whiteheads fled with Melissa to Florida, and it persisted through the New Jersey Supreme Court decision. This is not surprising. The case raised compelling questions about the uncertain impact of a novel use of reproductive technology on family structure, the nature of motherhood, the welfare of children, and the role of law in this unfamiliar terrain. The story also had powerful elements of human drama.

Over the course of the trial, reporters observed a shift in public attitudes.<sup>31</sup> At the outset, the Sterns were viewed sympathetically as an infertile couple eager to have a child, while Ms. Whitehead was seen as an erratic woman who had reneged on her agreement.<sup>32</sup> But as the trial progressed, Ms. Whitehead increasingly was portrayed as a victim, a working-class mother who was exploited and unfairly attacked by powerful adversaries.<sup>33</sup> Trial narratives, repeated in the media, may have contributed to these shifts in attitude. Some observers were offended by the depiction of Whitehead as a bad mother by Stern’s experts, who questioned her parenting abilities on the basis of her

27. *Baby M*, 537 A.2d at 1240.

28. *Id.* at 1241 (“Our law prohibits paying or accepting money in connection with any placement of a child for adoption.”) (citing N.J. STAT ANN. § 9:3-54 (West Supp. 1984) (repealed 1994)). The court noted that the policy underlying this law was, in part, concern that the possibility of money for children would make the decision “less voluntary.” *Id.* at 1241.

29. N.J. STAT ANN. § 9:3-41 (West 2009).

30. *Baby M*, 537 A.2d at 1248 (opining that any decision “prior to the baby’s birth is, in the most important sense, uninformed”).

31. Iver Peterson, *Fitness Test for Baby M’s Mother Unfair, Feminists Say*, N.Y. TIMES, Mar. 20, 1987, at B1 (noting a “shift in public attitude” from “an initial negative perception of Ms. Whitehead as a woman who had entered into a contract to have a baby for money and then reneged” to “a victim, exploited by people better off than she and subjected to unfair scrutiny of her family life and personality”).

32. *Id.*

33. *Id.*; see also James Barron, *Views on Surrogacy Harden After Baby M Ruling*, N.Y. TIMES, Apr. 2, 1987, at A1 (examining objections to commodified surrogacy); Michael Kinsley, *Baby M and the Moral Logic of Capitalism*, WALL ST. J., Apr. 16, 1987, at 31 (noting that the Sterns’ “litigation steamroller” and status as “upper-middle-class professionals . . . created a backlash of sympathy for the underdog [Ms. Whitehead]”).

lifestyle, shaky finances, and failure to provide intellectual stimulation to the child.<sup>34</sup> At the same time, Ms. Stern's claim that she feared the impact of pregnancy on her health was challenged, perhaps effectively. Harold Cassidy, Ms. Whitehead's attorney, described Ms. Stern to the jury as a woman who "thought her career . . . too important to bear her own children."<sup>35</sup>

Opposition to surrogacy arrangements and sympathy for Ms. Whitehead were generated by a disparate group of outspoken advocates and opinion leaders. Politicians denounced the practice; New Jersey Governor Thomas Kean appointed a task force to study surrogacy.<sup>36</sup> Religious leaders played an important role, most prominently the Conference of Bishops of the Catholic Church. This group amplified a 1987 Papal statement on reproductive technologies arguing that surrogacy contracts were baby-selling arrangements that undermined the family, degraded women, and harmed children.<sup>37</sup> Child-welfare groups focused on the threat of harm to children if babies could be exchanged for cash, and adoption advocates argued that allowing surrogacy would erode the prohibition against purchasing babies for adoption.<sup>38</sup>

Feminists and liberals were among the most active advocates, unifying against surrogacy as the *Baby M* litigation played out. Early in the trial, feminists acknowledged that surrogacy was a hard issue; news reports described them as "torn between support [of] a women's right to use her body as she chooses" and concerns about the exploitation of women.<sup>39</sup> But feminist columnists advocated vehemently in support of Whitehead and against

---

34. Peterson, *supra* note 31 (noting feminist objections to expert testimony questioning Ms. Whitehead's parenting abilities on the basis of games she played with the child, such as "patty cake"); see also Katha Pollitt, *The Strange Case of Baby M*, THE NATION, May 23, 1987, at 682; *infra* notes 39–42 and accompanying text.

35. Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, in CONTRACT STORIES 127 n.118 (2007); see also Pollitt, *supra* note 34, at 683.

36. See *Kean Tells Legislators to Look at Surrogacy*, N.Y. TIMES, Apr. 3, 1987, at B2. Governor Kean seemed conflicted on the issue of surrogacy; he found surrogacy arrangements "deeply, deeply disturbing" and did not "like the idea of renting a womb," but "to say it should be banned also goes against my grain." *Id.*

37. JOSEPH CARDINAL RATZINGER, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY (1987), <http://www.usccb.org/prolife/tdocs/donumvitae.shtml>; see *Church Hits Surrogacy*, WASH. POST, July 16, 1987, at A9 (reporting on objections to surrogacy contracts in an amicus curiae brief filed by Roman Catholic bishops in the *Baby M* appeal); Craig R. McCoy, *N.J. Bishops Decry Surrogate Parenting as Prostitution*, PHILA. INQUIRER, July 16, 1987, at B1; Roberto Suro, *Vatican's Moral Mission*, N.Y. TIMES, Mar. 12, 1987, at A1.

38. *Child Welfare Unit Plans to Urge a Ban on Surrogacy Pacts*, N.Y. TIMES, May 26, 1987, at A1.

39. Iver Peterson, *Baby M Trial Splits Ranks of Feminists*, N.Y. TIMES, Feb. 24, 1987, at B1 (reporting that the membership of the New Jersey National Organization for Women split on surrogacy); see also PHYLLIS CHESLER, SACRED BOND: THE LEGACY OF BABY M (1988) (describing the reluctance of feminists to rally around Whitehead early in the trial); Debbie Ratterman, *The Attack on Motherhood*, OFF OUR BACKS: A WOMEN'S NEWSJOURNAL, Dec. 31, 1988, at 41 (reviewing SACRED BOND, which describes the split among feminists in their support of Whitehead).



surrogacy, criticizing the Sterns, Judge Sorkow, and Noel Keane, the broker.<sup>40</sup> Moreover, women's advocates became increasingly angry at the attacks on Ms. Whitehead by the Sterns' lawyers and mental-health experts, believing that the emphasis on her lifestyle and financial problems was infused with class bias and the gender discrimination typical of child-custody disputes.<sup>41</sup> Ms. Whitehead was, in their view, "being held to an unfair standard of motherhood."<sup>42</sup> Feminists also targeted intermediaries such as Noel Keane, who charged high fees for arranging the contracts.<sup>43</sup> As one feminist put it, these brokers, who exploited poor women with few options, were "the pimps of the surrogacy movement."<sup>44</sup> By the time the trial concluded with a judgment upholding the contract, feminists and women's groups presented a united front in opposition to surrogacy; few defended the judge's decision. On the last day of trial testimony, 124 prominent women released a statement supporting Ms. Whitehead's right to keep the child and denouncing surrogacy.<sup>45</sup> Prominent feminists also submitted an amicus brief to the New Jersey Supreme Court arguing for reversal of the trial-court decision, as did the New Jersey Catholic Congress, the Family Research Council, and the National Committee for Adoption.<sup>46</sup> Amicus briefs arguing for reversal of the trial-court decision greatly outnumbered those that favored upholding the decision.<sup>47</sup>

Over the course of the *Baby M* litigation, advocates in the political arena effectively framed surrogacy as illegitimate commodification. First, the characterization of the surrogacy transaction as baby selling was invoked repeatedly by opponents; ultimately it was adopted by the New Jersey Supreme Court and by lawmakers in other states.<sup>48</sup> Surrogacy, it was argued, threatened not only the specific children who were produced through these arrangements,

40. Ellen Goodman, *Surrogates Could Make Pregnancy an Industry*, L.A. TIMES, Sept. 2, 1986, at B5 ("I do not believe that anyone should be able to sign away parental rights before she has even borne the child. A baby is not a piece of goods, and human emotions do not make for neat contracts."); Pollitt, *supra* note 34, at 681.

41. Pollitt, *supra* note 34, at 682.

42. Peterson, *supra* note 31. One expert diagnosed Ms. Whitehead as having a narcissistic personality disorder because she dyed her hair and criticized her for offering Melissa a stuffed panda rather than pots and pans. *Id.* Phyllis Chesler, a key supporter of Ms. Whitehead, made the link to the broader issue of discrimination in child-custody disputes. *See* CHESLER, *supra* note 39, at 11, 16, 97.

43. Keane received \$7500 for the Infertility Center's services in brokering the contract. *In the Matter of Baby M*, 537 A.2d 1227, 1236 (N.J. 1988); *see supra* note 22.

44. *See* Peterson, *supra* note 31.

45. *Id.*

46. Joseph S. Sullivan, *Brief by Feminists Opposes Surrogate Parenthood*, N.Y. TIMES, July 31, 1987, at B3.

47. *See* the list of amicus curiae briefs in *In the Matter of Baby M*, 537 A.2d 1227 (N.J. 1988).

48. *In the Matter of Baby M*, 537 A.2d at 1249-50 ("[T]he essential evil is the same [as in the sale of a child for adoption], taking advantage of a woman's circumstances (the unwanted pregnancy or the need for money) in order to take away her child . . . . There are, in civilized society, some things that money can't buy[;] . . . the surrogate mother's agreement to sell her child is void."); *see also infra* notes 51-54 and accompanying text (describing the use of commodification rhetoric in New York).

but the social value of children generally.<sup>49</sup> Second, opponents also argued that these arrangements exploited poor women who did not understand the serious consequences of their decisions to bear children for the benefit of wealthier, more-powerful men.<sup>50</sup> The intense focus on surrogacy over the course of the trial and appeal profoundly influenced public and political opinion about these arrangements. At the outset surrogacy contracts were unfamiliar, but were likely viewed by most people with curiosity rather than alarm. Over time, opposition to surrogacy grew in the political arena; the New Jersey Supreme Court decision simply reinforced and solidified the emerging social meaning of surrogacy as an undesirable commercial arrangement that involved the selling of children and exploitation of women.

### B. The Aftermath of *Baby M*

It would be hard to exaggerate the impact of *Baby M* on the legislative regulation of surrogacy arrangements in the late 1980s and early 1990s. When the case broke in 1987, no state had enacted a statute regulating surrogacy arrangements; those that began to consider the issue in the mid-1980s were inclined to regulate rather than to prohibit the contracts.<sup>51</sup> But by December of 1987, even before the New Jersey Supreme Court decided *Baby M*, seventy bills concerning surrogacy had been introduced in twenty-seven legislatures, and by late 1988, six states had passed laws banning the agreements or declaring them void—often with little opposition.<sup>52</sup> As *Baby M* played out, surrogacy opponents framed the transactions as baby-selling and exploitation of women, and legislatures responded to advocates' calls for restriction of the practice. Almost all the laws passed during the post-*Baby M* period either prohibited the agreements or discouraged them by disallowing payment to the surrogate or to intermediaries or by giving surrogates the right to rescind after the birth of the baby.<sup>53</sup> In some states, lawmakers initiated the legislation, often with little

---

49. Anderson, *supra* note 16, at 78.

50. See *supra* notes 40–44 and accompanying text.

51. See N.Y. ST. SENATE JUDICIARY COMM., SURROGATE PARENTING IN NEW YORK: A PROPOSAL FOR LEGISLATIVE REFORM, at 40 (1987) [hereinafter SURROGATE PARENTING IN N.Y.] (proposing regulation of contractual surrogacy in New York and discussing the law in other states).

52. Sam O. Okpaku, *The Aftereffects of the Baby M Case*, N.Y. TIMES, Mar. 20, 1988, § 12, at 26. The Nebraska legislature voted 41–1 in favor of a bill prohibiting commercial surrogacy arrangements. *Anti-Surrogacy Bill Passes*, N.Y. TIMES, Feb. 6, 1988, § 1, at 28; see also *'Baby M' Bill Passes in Michigan*, WASH. POST, June 10, 1988, at A4 (describing Michigan bill banning commercial surrogacy); Phillip J. Hilts, *N.Y. Ban Urged on Surrogate-Mother Deals*, WASH. POST, May 30, 1988, at A4 (reporting that twenty states were considering banning commercial surrogacy).

53. Hilts, *supra* note 52. Post-*Baby M* statutes included: ARIZ. REV. STAT. ANN. § 25-218(A) (1989) (prohibiting commercial surrogacy contracts and granting the surrogate status as the legal mother), *invalidated* by *Soos v. Superior Ct. (Maricopa County)*, 897 P.2d 1356, 1360 (Ariz. App. 1994) (holding that the statute violates equal protection, for “a man [can] rebut the presumption of legal paternity by proving ‘fatherhood’ but [the statute] does not provide the same opportunity for a woman”); IND. CODE § 31-20-1-1 (1988) (declaring surrogacy contracts unenforceable as against public policy); LA. REV. STAT. ANN. § 9:2713 (1987) (declaring surrogacy contracts void and unenforceable as against public policy); MICH. COMP. LAWS §§ 722.851–.863 (1988) (declaring surrogacy contracts void

apparent involvement by lobbying groups.<sup>54</sup> In other states, such as New York, a coalition of religious groups, adoption and child-welfare advocates, and women's groups actively lobbied for laws that prohibited or discouraged the practice.<sup>55</sup>

In New York, where Noel Keane's agency had brokered the Whitehead-Stern contract, the legislature changed course mid-stream in response to the *Baby M* decision. In early 1987, a bill that had been aimed at protecting women and children against exploitation while ensuring judicial enforcement of surrogacy contracts that met statutory requirements was making its way quietly through the legislature. By June, this bill was withdrawn in the face of intense opposition from a coalition of religious organizations and women's groups.<sup>56</sup> A task force created by Governor Mario Cuomo, an opponent of surrogacy,<sup>57</sup> held hearings dominated by surrogacy opponents. The task force issued a report that referred frequently to *Baby M* and emphasized the threat posed by contracts commodifying children and exploiting poor women.<sup>58</sup> The report proposed statutory reform banning surrogacy and subjecting brokers to criminal penalties.<sup>59</sup>

Beginning in 1989, Governor Cuomo introduced legislation based on the task-force recommendations. The legislature did not act until 1992, however, when the New York State Department of Health published a report describing the flourishing surrogacy market in New York.<sup>60</sup> The report focused particularly

---

and unenforceable as against public policy; declaring payment for surrogacy a misdemeanor); NEB. REV. STAT. § 25-21, 200 (1988) (declaring surrogacy contracts void); N.D. CENT. CODE §§ 14-18-01 to -07 (1989) (declaring surrogacy contracts void and that surrogate is the legal mother of the resulting child); UTAH CODE ANN. § 76-7-204 (1989) (granting surrogate status as the legal mother), *invalidated* by J.R. v. Utah, 261 F. Supp. 2d 1268, 1272 (D. Utah 2003) (a statute presuming a gestational surrogate as the mother is unconstitutional as a burden on the fundamental right to privacy and procreation).

54. For example, the Nebraska statute passed in early 1988 on a forty-one to one vote of the legislature, with what appears to be minimal consideration by the legislature. *Anti-Surrogacy Bill Passes*, *supra* note 52.

55. *See infra* notes 64-67 and accompanying text.

56. *See* SURROGATE PARENTING IN N.Y., *supra* note 51, at 51-56 (recommending legislation requiring judicial approval of a surrogacy contract prior to artificial insemination, suggesting means to ensure informed consent, and setting forth a specific-performance remedy for breach); Jeffrey Schmalz, *Albany Surrogacy Bill is Withdrawn*, N.Y. TIMES, June 18, 1987, at B2.

57. *See* Hilts, *supra* note 52.

58. In the task force hearings held in May 1987, the New York State Coalition on Women's Legislative Issues urged that "surrogacy contracts dehumanized women and commercialized reproduction." The group also argued that women could not waive their parental rights before birth when they could not calculate the enormous physical and emotional effects of pregnancy. N.Y. STATE TASK FORCE ON LIFE & THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 104-05 (1988) [hereinafter SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY].

59. *Id.* at A2.

60. NEW YORK ST. DEP'T. OF HEALTH, THE BUSINESS OF SURROGATE PARENTING 1 (1992) [hereinafter THE BUSINESS OF SURROGATE PARENTING]; *see* Curry, *supra* note 7 (describing the importance of the Health Department report as an impetus for legislation after several unsuccessful efforts by Governor Cuomo, beginning in 1989).

on Noel Keane's business and strongly advocated the passage of Cuomo's bill.<sup>61</sup> The legislature responded quickly, passing the law by a sizable majority in the Assembly and near unanimity in the Senate.<sup>62</sup>

The legislative vote mirrored strong and diverse support for the bill and widespread hostility toward surrogacy. Newspaper editorials around the state overwhelmingly supported the legislation. (The *Daily News* editorial, with characteristic hyperbole, carried the headline, "Wanna Buy a Baby?")<sup>63</sup> Several state agencies endorsed the bill, including the Council on Children and Families and the Division for Women, which argued that surrogacy "reinforces the notion that women and children are chattels."<sup>64</sup> Also supporting the legislative ban were the New York State Catholic Conference, the New York Civil Liberties Union, and the National Council for Adoption, which described Noel Keane's agency as a "seedy business."<sup>65</sup> Finally, feminists and women's groups were united in support of the legislation. The New York Women's Bar Association and the New York chapter of NOW (the National Organization for Women) lobbied actively for passage of the law.<sup>66</sup> The bill was sponsored in the Assembly by Helene Weinstein, a pro-choice Brooklyn Democrat.<sup>67</sup>

---

61. See THE BUSINESS OF SURROGATE PARENTING, *supra* note 60, at 1; see also David Bauder, *Prosal Targets Surrogate Parenting*, THE TIMES UNION (Albany), May 13, 1992, at B10.

62. N.Y. Counsel to the Governor, 12590 Legislative Bill & Veto Jacket, ch. 308, at 2 (1992) [hereinafter Legislative Bill & Veto Jacket] (on file with *Law and Contemporary Problems*) (reporting the results of the Senate vote on the bill, 59-0, and the General Assembly vote, 104-39).

63. Editorial, *Ban Commercial Surrogacy*, BUFF. NEWS, June 11, 1989; Editorial, *It's Baby-Selling and It's Wrong*, N.Y. TIMES, June 4, 1988, at A26; Editorial, *Wanna Buy a Baby?*, DAILY NEWS, May 19, 1992; Editorial, *Womb to Rent*, NEWSDAY, June 8, 1992, at 32.

64. Memorandum from Paulette Taylor, General Counsel, State of New York Division for Women, to Elizabeth Moore, Counsel to the Governor (July 9, 1992), Legislative Bill & Veto Jacket, *supra* note 62, at 25; Memorandum from Frederick B. Meservy, Acting Executive Director, State of New York Council on Children and Families to Elizabeth Moore, Counsel to the Governor (July 8, 1992), Legislative Bill & Veto Jacket, *supra* note 62, at 24.

65. Memorandum from New York Civil Liberties Union to Elizabeth Moore, Counsel to the Governor (1992), Legislative Bill & Veto Jacket, *supra* note 62 at 28-29; Letter from William Pierce, President, National Council for Adoption, to Christopher J. Mega, Chair, Senate Judiciary Committee (May 22, 1992), Legislative Bill & Veto Jacket, *supra* note 62, at 41. John M. Kerry of the Catholic Conference suggested that a child born of a surrogacy arrangement would "grow up with the horrifying realization that his real mother conceived him in order to sell him." Letter from John M. Kerry, Executive Director of the New York State Catholic Conference, to Elizabeth Moore, Counsel to the Governor (June 30, 1992), Legislative Bill & Veto Jacket, *supra* note 62, at 94-95.

66. Letter & Memorandum from Joan Leary Matthews, Co-Chair, Women's Bar Association of the State of New York, to Mario M. Cuomo, Governor of the State of New York (July 9, 1992), Legislative Bill & Veto Jacket, *supra* note 62, at 32-36; Memorandum from Marilyn Pitterman, President; Lois Shapiro-Canter, Lobbyist; and Simone Charlton, Legislative Vice President, New York State National Organization for Women, to Elizabeth Moore, Counsel to the Governor (May 26, 1992), Legislative Bill & Veto Jacket, *supra* note 62, at 62. The NOW memorandum described surrogacy as threatening the "potential erosion of parental, reproductive, and privacy rights of women."

67. Letter from G. Oliver Koppell, Member of Assembly, to Mario M. Cuomo, Governor of the State of New York (July 2, 1992), Legislative Bill & Veto Jacket, *supra* note 62, at 15 (noting Weinstein's sponsorship of the bill).

Opposition was muted. A few legislators argued that the bill was far too restrictive and that reasonable regulation could diminish the relatively modest risks posed by surrogacy arrangements.<sup>68</sup> Beyond this, opposition to the proposed law was not organized, coming from a few surrogate mothers and from infertile couples, some of whom had acquired children through surrogacy.<sup>69</sup> Interestingly, brokers seem to have participated little in the legislative process, including Noel Keane, whose business was the target of much criticism.<sup>70</sup>

The 1992 passage of the New York statute represents the political high-water mark of the antisurrogacy movement. Enthusiastic supporters of the bill hoped that surrogacy would soon die out as other states followed New York's lead in prohibiting the agreements.<sup>71</sup> But this did not happen. Political and media interest in surrogacy dwindled, and by the mid-1990s, little legislative activity focused on this issue. In some states, bills prohibiting surrogacy died without action. For example, in 1993, legislative sponsors in New Jersey proposed a bill similar to the New York statute, based on the recommendations of the task force appointed by Governor Thomas Kean, which had studied surrogacy exhaustively for four years.<sup>72</sup> The bill generated little interest or support and it was withdrawn in 1994, never to be reintroduced.<sup>73</sup>

### C. Toward a New Model of Surrogacy Regulation

Contrary to predictions, surrogacy has flourished over the past decade and attitudes toward these arrangements have mellowed considerably in the political arena, despite restrictive laws in such key states as New York. Legislatures in several states have established procedures and requirements for

---

68. *Id.* (letter opposing bill). Koppell pointed out that the Health Department report, *THE BUSINESS OF SURROGATE PARENTING*, *supra* note 60, found only three cases involving serious problems. *Id.*

69. Parent's letters described their joy in their children and warm relationships with surrogates. See letters collected in *Legislative Bill & Veto Jacket*, *supra* note 62; see also Curry, *supra* note 7 (describing "no organized opposition").

70. In an interview, Noel Keane even appeared to endorse allowing courts to decide custody if the surrogate backs out. Catherine Clabby, *Surrogate Moms on the Way Out? New Law Prohibits Pregnancy Profits*, *THE TIMES UNION* (Albany), July 26, 1992, at 1 (quoting Keane regarding waiting periods: "If [a surrogate] changes her mind in a 20- to 30-day period, you could award custody by the courts based on the best interests of the child."). Only Betsy Aigen, owner of a small surrogacy agency, opposed the bill. Letter from Dr. Betsy Aigen to Elizabeth Moore, Counsel to the Governor, *Legislative Bill & Veto Jacket*, *supra* note 62, at 53-61.

71. See, e.g., *Antisurrogacy Laws Gain Ground on "Baby Sellers," Challengers Say Last Hopes Are Worth a Fight*, *BALTIMORE SUN*, July 28, 1992, at 4A (expressing hope that the law would eliminate the practice). This hope may have seemed quite realistic in that forty percent of the surrogacy arrangements in the country were brokered in New York. See Clabby, *supra* note 70.

72. See N.J. COMM. ON LEGAL & ETHICAL PROBLEMS IN THE DELIVERY OF HEALTH CARE, *AFTER BABY M: THE LEGAL, ETHICAL AND SOCIAL DIMENSIONS OF SURROGACY* (1992) [hereinafter *AFTER BABY M*] (findings of the New Jersey Task Force regarding surrogacy and proposed reform).

73. Randy Diamond, *Assembly Baby Broker Bill Goes Nowhere*, *THE RECORD* (New Jersey), Mar. 16, 1994, at A5.

enforcing surrogacy contracts, while in other states, courts have upheld the agreements.<sup>74</sup> A survey of these lawmaking activities and of recent media coverage suggests that surrogacy has assumed a new social meaning. Today the issue is seldom framed as baby selling and exploitation; instead, the discourse emphasizes the service provided by surrogates to couples who otherwise could not have genetically related children.<sup>75</sup> Moreover, the legislative goal of discouraging and punishing a pernicious practice largely has been replaced by the pragmatic objective of providing certainty about parental status and protecting all participants, especially children.<sup>76</sup>

Two factors stand out in the account of these legal developments. First, with improvements in IVF, gestational surrogacy, in which a pre-embryo is implanted in the surrogate, has largely replaced traditional surrogacy, in which the pregnancy results from artificial insemination of the surrogate's own egg. Gestational surrogacy has proven to be more attractive to the parties and more palatable to lawmakers and the public.<sup>77</sup> Second, the constellation of interest groups lobbying to shape legislation in recent years has changed dramatically. Attorneys, brokers, and parents' groups have become active advocates for supportive laws, while women's groups and civil-liberties organizations have withdrawn from the political arena. Today only religious groups and social conservatives lobby actively against facilitative regulation.<sup>78</sup>

### 1. The Rise of Gestational Surrogacy: *Calvert v. Johnson*

In the wave of legislation that followed *Baby M*, little attention was directed toward the distinction between traditional and gestational surrogacy. This may not be surprising, in that Baby M herself was the product of traditional surrogacy, and gestational surrogacy was not common in the 1980s.<sup>79</sup> Most statutes enacted in the late 1980s and early 1990s applied generically to all surrogacy contracts, as did the ABA Model Act and the Uniform Act.<sup>80</sup>

This generic response began to change with *Calvert v. Johnson*, a 1993 California Supreme Court decision involving a baby who was the genetic child

---

74. See, e.g., the Illinois Gestational Surrogacy Act, 750 ILL. COMP. STAT. 47/1-75 (2006); see also cases cited *supra* note 11.

75. See, e.g., sources cited *supra* note 9.

76. This response is evident in statements by legislators in Illinois and other states, see *infra* note 88, and by courts, authorizing intended parents to be named on the birth certificate, even without statutory authorization, see cases cited *supra* note 11.

77. See *infra* notes 81–87 and accompanying text.

78. See *infra* note 98 and accompanying text.

79. Louise Brown was the first child born by IVF in 1978. Thus, gestational surrogacy was relatively new in the 1980s. The use of IVF increased dramatically from the mid-1980s through 2002. DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 24, 32 (2006).

80. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988); *A.B.A.'s 2 Models for 'Baby M' Laws*, N.Y. TIMES, Feb. 9, 1989, at C13 (noting that the 1989 ABA Model Surrogacy Act offered two alternatives—a ban on enforcement of contracts providing financial compensation to a surrogate, and a statute authorizing but regulating surrogacy).

of both intended parents.<sup>81</sup> The court rejected the parental claim of the gestational surrogate (Johnson), holding that the intended mother (Calvert) was the child's legal mother. The court found that Johnson and Calvert had both produced "acceptable proof of maternity" under California's parentage statute—Johnson on the basis of pregnancy and birth, and Calvert on the basis of genetics—distinguishing the case from the traditional arrangement in which the surrogate was both the genetic and the gestational parent. The court held that, in this situation, parental status should be determined on the basis of the parties' intentions as expressed in the surrogacy contract. Rejecting Johnson's argument that the surrogate had a "constitutionally protected liberty interest in the companionship of the child, based on her status as the 'birth mother,'" the court concluded that, as a surrogate, Johnson was not exercising procreative choice, but was providing a service.<sup>82</sup>

*Calvert* generated surprisingly little controversy,<sup>83</sup> but the case had a profound impact on surrogacy practice. Gestational surrogacy quickly became the preferred arrangement.<sup>84</sup> Within a relatively brief period, many states went beyond *Calvert*, recognizing the parental status of intended mothers when a donated egg was used and neither the surrogate nor the intended mother was the child's genetic mother.<sup>85</sup> Gestational surrogacy arrangements became standard, in part because they offered legal certainty about the parental status of all parties to the surrogacy contract, and also because improvements in reproductive technology made pregnancy outcomes in IVF more predictable and thus less costly than in its early years.<sup>86</sup>

The difference between gestational- and traditional-surrogacy contracts has become an important legal distinction. In the absence of statutory authority, numerous courts have directed that intended parents, and not the surrogate, be named on the birth certificate in gestational arrangements.<sup>87</sup> Moreover, the new Uniform Parentage Act and most of the surrogacy statutes enacted since 2000

---

81. 851 P.2d 776, 778 (Cal. 1993). Ms. Calvert, the intended mother, could not become pregnant because of a hysterectomy.

82. *Id.* at 787. The court distinguished between the constitutional protections granted to a woman who chooses to bear her own child and a woman who enters a contractual surrogacy agreement. *Id.*

83. Katha Pollitt was unusual in her scathing denunciation of the *Calvert* decision. Katha Pollitt, *When is a Mother Not a Mother?*, THE NATION, Dec. 31, 1990, at 839, 842 ("[The decision] defines, or redefines, maternity in a way that is thoroughly degrading to women.").

84. See Sanger, *supra* note 35, at 140.

85. See cases cited *supra* note 11.

86. SPAR, *supra* note 79, at 28–30. In 1985, IVF produced a child about 10–15% of the time; by 2002, the odds had risen to 30–35% for women under age 35. *Id.* at 28, 55.

87. See cases cited *supra* note 11. When all parties are in agreement, courts have struck down state statutes prohibiting such agreements. For example, one appellate court held a statute making the surrogate the child's legal mother to be unconstitutional when applied to disputes between the intended parents when the intended mother was also the biological parent. *Soos v. Super. Ct.*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (striking down statute on equal-protection grounds for treating genetic mother and father differently); see also *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2003) (holding Utah statute unconstitutional that prohibited putting the genetic parent's names on the birth certificate and that automatically granted the gestational surrogate status as the legal mother).

deal exclusively with requirements for enforcement of gestational-surrogacy agreements, leaving traditional arrangements in a legal void.<sup>88</sup>

## 2. Statutory Reform: The Second Wave of Surrogacy Laws

The recent statutory reforms in surrogacy law have been driven largely by pragmatic concerns. As couples eager to have children have increasingly shown themselves ready to turn to surrogates, even when the agreements are of uncertain legality, lawmakers have recognized the potential harms posed by the lack of regulation. In a legal vacuum, and even when surrogacy contracts are prohibited, a host of legal problems can arise regarding the rights and obligations of the participants toward the child. Along with the risk of acrimonious custody litigation between the surrogate and the intended parents, costly uncertainty can result when the intended parents divorce or decline to accept the child, perhaps because the baby is born with a medical condition or disability. Against this background, many lawmakers concluded that because surrogacy arrangements would continue with or without facilitating legislation, the appropriate legal response was to establish rules under which parental status was clearly prescribed.<sup>89</sup>

The Illinois legislation is representative. In 2003, the Illinois Supreme Court implored the legislature to safeguard the interests of children born as a result of assisted reproduction by clarifying the parental status of the involved adults.<sup>90</sup> The legislature responded in 2004 by passing the Gestational Surrogacy Act (GSA). Like other contemporary laws, this statute limits enforcement to gestational (and not traditional) surrogacy contracts and mandates that the intended parents automatically become the child's legal parents at birth.<sup>91</sup> Also like other contemporary statutes, the GSA restricts enforcement to arrangements in which the surrogate has given birth before and the intended parents have a medical need for the surrogacy.<sup>92</sup> But the Illinois law creates a more efficient (and less expensive) process than other states by providing a pre-birth registration process rather than a judicial proceeding to establish the status of the intended parents.<sup>93</sup>

---

88. UNIF. PARENTAGE ACT, 9B U.L.A. 299 (2000) (referring only to gestational surrogacy); 750 ILL. COMP. STAT. 47/25 (2006); FLA. STAT. § 742.15 (2008) (referring only to gestational surrogacy); NEV. REV. STAT. § 126.045 (2008) (requiring "an egg and sperm from the intended parents"). Some states authorize enforcement without distinguishing between gestational and traditional agreements. *E.g.*, VA. CODE ANN. § 20-159 (2008); N.H. REV. STAT. §§ 168-B:1 to -B:32 (2008).

89. For example, in 2000, the Uniform Parentage Act provision offering states the option of declaring surrogacy agreements void was repealed, on the ground that regulation was essential because parties would continue to enter these agreements. *See* UNIF. PARENTAGE ACT § 801, 9B U.L.A. 362 cmt. (2000); *see also In re Parentage of M.J.*, 787 N.E.2d 144 (Ill. 2003).

90. *In re M.J.*, 787 N.E.2d at 150 (emphasizing that the Illinois Parentage Act, enacted in 1975, did not contemplate the new reproductive technologies).

91. 750 ILL. COMP. STAT. 47/15 (2006); UNIF. PARENTAGE ACT, 9B U.L.A. 299 (2000).

92. 750 ILL. COMP. STAT. 47/20(a)(2), 20(b)(2) (2006).

93. The statute also directs that parentage be determined by a judicial proceeding on the basis of the parties' intent if the parties fail to meet statutory requirements. 47/25(e). Further, it allows contract



An account of the 2004 legislative process in Illinois illustrates how much the legal and political landscape had changed since the days of *Baby M*. No reports indicate that the bill was challenged as promoting baby selling or that it was criticized for being exploitative of women who served as surrogates. Indeed, one is hard-pressed to find opposition to the proposed Illinois law.<sup>94</sup> Advocating for the bill were parents' groups, the Illinois State Bar Association, and attorneys who practiced in the area of adoption and assisted reproduction.<sup>95</sup> News coverage was also positive, with reports of warm relationships between surrogates and grateful couples, and explanations of how the new law would avoid the "horror stories" in which surrogates or intended parents backed out of agreements.<sup>96</sup> The bill was passed without opposition in both houses of the legislature.<sup>97</sup>

Despite the equanimity with which the GSA was enacted in Illinois, opposition to surrogacy arrangements continues in some quarters. In 2008, the Minnesota legislature passed a bill almost identical to the Illinois statute, but in the face of stiff opposition from social and religious conservatives, including several anti-abortion groups.<sup>98</sup> The Catholic Church criticized the bill in measured terms, but the Minnesota Family Council called the legislation "legalized baby-selling" and charged the statute with promoting single-parent and same-sex-parent households.<sup>99</sup> Lobbying in favor of the bill were the Minnesota State Bar Association and Resolve, an increasingly active organization of adults dealing with infertility problems.<sup>100</sup> The legislature voted almost 2–1 in favor of the bill—which was then vetoed by Republican Governor Tim Pawlenty.<sup>101</sup> As in Illinois, no evidence indicates that any women's

---

terms regulating the surrogate's behavior in matters that may affect the health of the fetus, including compliance with medical advice and abstention from alcohol, tobacco, and nonprescription drugs. 47/25(d).

94. Nidhi Desai, an attorney intimately involved in drafting and proposing the bill, reports that few opponents—and no women's groups—spoke against it. According to Desai, who testified in support of the bill, "the members [legislators] had a lot of questions, and they were satisfied with the answers." Telephone Interview with Nidhi Desai, in Chicago, Ill. (July 9, 2008).

95. *Id.*

96. See Graham, *supra* note 2 (quoting the bill's House sponsor: "The idea was to clarify who has responsibility for the child born through this process," and to avoid litigation); see also Rogers, *supra* note 9.

97. H.R. Roll Call, H.B. 4962, 93rd Gen. Assem., Third Reading (Ill. 2004) (vote recorded 113–0); S. Vote, H.B. 4962, 93rd Gen. Assem., Third Reading (Ill. 2004) (vote recorded 53–0).

98. Mike Kaszuba, *Group Says Surrogacy Bill Allows for Baby-Selling*, MINN. STAR TRIB., Apr. 9, 2008, at 5B.

99. *Id.*

100. See RESOLVE: The National Infertility Association, <http://www.resolve.org> (last visited Feb. 1, 2009); see also T.W. Budig, *Surrogacy Legislation Fills a Void, Supporters Say*, ISANTI COUNTY NEWS, Mar. 13, 2008, available at [http://isanticountynews.com/index.php?option=com\\_content&task=view&id=2942&Itemid=59](http://isanticountynews.com/index.php?option=com_content&task=view&id=2942&Itemid=59) (describing political opposition to and support of the Minnesota bill).

101. Andy Birkey, *Surrogacy Bill Passes Minnesota Legislature*, REPRODUCTIVE HEALTH, May 19, 2008, <http://www.rhrealitycheck.org/blog/2008/05/16/surrogacy-bill-passes-minnesota-legislature>; Governor Tim Pawlenty, Letter to James P. Metzen Vetoing the 2008 Surrogacy Gestational Bill, S. 85-

organizations or civil-liberties groups participated in the legislative process in Minnesota.

The history of surrogacy regulation over the past twenty years presents several puzzles. How did one case generate such intense hostility and alarm about an arrangement that had attracted little attention until that time? Women's groups and social conservatives seldom ally on matters of reproductive choice. How did that alliance form and why was it so short-lived? And what are the forces that altered the social meaning and political dynamic of surrogacy in a relatively short period? The discussion that follows is intended to unravel these puzzles and to shed some light on the social and political framing and reframing of surrogacy.

### III

#### THE *BABY M* ERA: MORAL PANIC AND INTEREST-GROUP POLITICS

The intense interest in surrogacy triggered by the *Baby M* decision shaped the law in ways that have had a lasting impact in many states. This response had the flavor of a moral panic that became institutionalized through legislation. Because of the drama and salience of the case and the novelty of surrogacy, the contracts came to be perceived as a serious threat to core social values, a perception that was reinforced by political actors and the media. The framing of surrogacy as commodification was shaped and promoted by feminists and religious leaders who amplified its social meaning as baby-selling and the exploitation of women. These groups were driven by different ideological and political goals, but they forged an effective political alliance that played an important role in shaping the law for years to come.

#### A. Why a Moral Panic?

Sociologists have long been interested in moral panics, a form of collective action in which the public, the media, and political actors reinforce each other in an escalating pattern of intense and disproportionate concern in response to a perceived social threat.<sup>102</sup> Moral panics are often triggered by highly publicized events that engender public alarm.<sup>103</sup> Typically, hostile attention is focused on a particular group of individuals who are deemed responsible for the threat and who, it is felt, must be stopped.<sup>104</sup> A moral panic is distinguished from a straightforward effort to deal with a pressing social problem by the gap between perception of the threat and reality.<sup>105</sup> In a moral panic, participants exaggerate

---

2965, 117th Day, at 10378–79 (Minn. 2008), available at <http://www.senate.leg.state.mn.us/journals/2007-2008/20080516117.pdf#Page67>.

102. Erich Goode and Nachman Ben-Yehuda authored the authoritative analysis of moral panics. ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* (1994).

103. *Id.* at 82.

104. *Id.*

105. *Id.* at 31.

the seriousness of the threat and the urgency of the need for government action in response.<sup>106</sup>

On first inspection, the response to *Baby M* and the opposition to surrogacy arrangements that was generated by the case seem somewhat different from the classic moral panic. Unlike a school shooting that triggers outraged calls for a crackdown on juvenile crime, surrogacy did not inherently represent a social evil. Conceivably, during the course of the trial, surrogacy could have taken on the more-benign social meaning that it has assumed in recent years. But this did not happen. The meaning of surrogacy as baby selling and exploitation of poor women crystallized; accordingly, public and political concern about the threat of social harm intensified, along with demands for official attention.

One source of the moral panic surrounding *Baby M* was an understandable (and legitimate, under the circumstances) unease about the new reproductive technologies emerging in the 1980s. Although traditional surrogacy of the Whitehead–Stern variety was quite low-tech, it was associated in public discourse with IVF and cloning—unfamiliar and sophisticated technological developments.<sup>107</sup> Less than a decade after the birth of Louise Brown, the first child conceived through IVF, American society had only begun to contemplate the dramatic changes in family formation made possible by technologies that allowed genetic, gestational, and social parenting to be disaggregated.<sup>108</sup> Thoughtful people had concerns about these scientific developments that seemed to pose a threat to core social values and these concerns likely contributed to the framing of surrogacy as commodification.<sup>109</sup> Scientific innovation raised the possibility of breeding farms and markets in designer babies.<sup>110</sup> Thus, some of the negative response to *Baby M* was driven by anxiety about the unfamiliar and uncertain risks associated with surrogacy and with the new reproductive technologies generally.<sup>111</sup> The unhappy outcome of the Whitehead–Stern arrangement simply reinforced a general concern that the “brave new world” of assisted reproduction was a perilous one.

Although grounded in legitimate concerns, the response to *Baby M* in the political arena was typical of the way a dynamic interplay among political actors, the media, and the public can create and sustain a moral panic. The

---

106. *Id.* at 26, 120.

107. See SPAR, *supra* note 79, at 70.

108. *Id.* at 24, 26–30 (explaining the birth and growth of the “baby market” and discussing Louise Brown).

109. See generally *supra* notes 15–16 (describing philosophical arguments against surrogacy).

110. For a gripping fictional account, see MARGARET ATWOOD, *THE HANDMAID’S TALE* (1985), describing a futuristic, patriarchal society where the only role of women is to submissively reproduce (although not through reproductive technologies). See generally COREA, *supra* note 21.

111. Both the New York and New Jersey task force reports linked *Baby M* to social and ethical issues raised by new reproductive technologies. See AFTER *BABY M*, *supra* note 72, at 1 (New Jersey report); SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY, *supra* note 58, at 1–2 (New York report). Unfamiliar risks often appear to be more threatening than familiar risks. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 783 (1999).

media played a key role in maintaining public attention—the troubling story of the fight over the child was in the news for more than a year. The story was compelling in itself, but it also intensified media and public interest in the broader issues surrounding surrogacy, and discussions of the broader issues were often linked to the case. In this way, *Baby M* fueled political and public concern as it came to represent the risks posed generally by surrogacy arrangements—and perhaps by uses of other novel reproductive technologies as well.

Cognitive psychologists have clarified the mechanisms through which a moral panic is generated and sustained by showing how attention directed at a particular threat affects individuals' perceptions about the magnitude of the danger.<sup>112</sup> Individuals use heuristics, or rules of thumb, to process information and assess the importance of particular data; these short-cuts are very useful but can lead to systematic biases.<sup>113</sup> One such cognitive short-cut, the availability heuristic, leads us to overvalue vivid experiential data that can be readily brought to mind and to discount the importance of abstract information.<sup>114</sup> Thus we are likely to judge a readily imaginable event to be more risky than one that is remote or not easily contemplated.<sup>115</sup> The *Baby M* story was not representative of typical surrogacy arrangements, but it is easy to see how the intense media coverage of the acrimonious dispute might have assumed disproportionate salience to a person evaluating the social harm of surrogacy, as compared to the abstract evidence that most surrogacy arrangements were carried out smoothly. Opponents of surrogacy focused on *Baby M* and a few other stories involving unhappy outcomes to underscore the substantial threat of harm to children and women posed by these arrangements.<sup>116</sup>

Assessments of risk that fuel a moral panic are not simply a matter of *individual* misperceptions. Public concern about the seriousness of a social problem is magnified when the threat is repeated and reinforced in public discourse, for each re-telling makes the threat more salient. Scholars have called this dynamic process an “availability cascade.”<sup>117</sup> In the case of surrogacy, politicians and other opinion leaders generated and reinforced public interest and alarm, using *Baby M* to frame the issue. Governors Kean and Cuomo, for example, spoke out against surrogacy and established task forces in their

---

112. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982).

113. *Id.*

114. *Id.* at 3, 11.

115. Paul Slovic, Baruch Fischhoff & Sarah Lichtenstein, Fact Versus Fears: Understanding Perceived Risk, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 112, at 465.

116. Another case frequently cited involved intended parents who allegedly refused to take twin babies, insisting that they had only agreed to take one child. THE BUSINESS OF SURROGATE PARENTING, *supra* note 61, at 8.

117. See generally Kuran & Sunstein, *supra* note 111.

states.<sup>118</sup> Feminists, women's groups, and religious organizations (especially the Catholic Church) stimulated support for Ms. Whitehead and momentum for antisurrogacy law reform through courthouse vigils, interviews, petitions, newspaper columns, amicus briefs and legislative testimony.<sup>119</sup> Ultimately, opponents successfully shaped the social meaning of surrogacy as a degrading business in which poor women were unfairly exploited and coerced by profit-seeking brokers to sell their babies. This attention by opinion leaders was fed by the media, which, perceiving the public's interest, continued to give the issue substantial coverage; editorial opinion, tracking the attitude of civic and social leaders, was almost uniformly hostile to surrogacy and favorable to restriction.<sup>120</sup> Through this process, a powerful narrative defining surrogacy as commodification was created and sustained, and the view that "something must be done" by the government to respond to the threat was translated into law reform in several states.

Although advocates identified the primary evil of surrogacy as baby selling, neither the sellers nor the buyers were cast as the villains of the moral panic triggered by *Baby M*. Instead, opponents targeted the broker intermediaries as the evil-doers who must be stopped. Commercial surrogacy was seen as a business venture, operated with the goal of making a profit through the exploitation of poor women and childless couples.<sup>121</sup> Noel Keane, whose surrogacy agency was the largest and best-known, was frequently depicted as the typical broker—an unsavory opportunist who had grown rich in the baby-selling business.<sup>122</sup> In New York, for example, the Health Department report that pointed to the threat posed by Keane and his ilk was the key to mobilizing a previously reluctant legislature to pass a strict prohibition with criminal sanctions for intermediaries.<sup>123</sup>

That other participants in surrogacy arrangements were viewed as less culpable is not surprising. Surrogates themselves were depicted sympathetically;

---

118. Both advocated for restrictive legislation and played key roles in the political process. Beginning in 1989, Governor Cuomo introduced a bill banning surrogacy in each legislative session until it was passed in 1992. See sources cited, *supra* note 60.

119. Feminist activism against surrogacy is described *supra* notes 39–46 and accompanying text. Phyllis Chessler played a key role as an opinion leader in mobilizing feminist support. In her book, *Sacred Bond*, she describes the roles of various individuals and groups in building support for Ms. Whitehead and opposition to surrogacy. CHESLER, *supra* note 39, at 71–107. Catholic opposition to surrogacy is described *supra* note 37 and accompanying text.

120. See Editorial, *Nothing Surrogate About the Pain*, N.Y. TIMES, Mar. 9, 1987, at A14; see also editorials favoring the New York statute cited *supra* note 63.

121. See, e.g., *infra* note 146 and accompanying text.

122. See, e.g., *id.* The New Jersey task force reported that only fourteen agencies existed, of which only six had arranged forty or more surrogacies. AFTER *BABY M*, *supra* note 72, at 39. Keane operated the *only* sizable agency arranging surrogacy contracts during this period, suggesting the extent to which the threat of surrogacy was exaggerated in the midst of the moral panic surrounding *Baby M*. THE BUSINESS OF SURROGATE PARENTING, *supra* note 61, at 3–8. For an informative description of Keane and his role, see Sanger, *supra* note 35, at 144–49.

123. See Curry, *supra* note 7 (describing the importance of the Health department report as a catalyst for the legislation).

their decisions to become involved in the reprehensible arrangements were seen as coerced by circumstances (and by the brokers) and as ill-informed about the consequences. Infertile couples seeking to acquire children fared somewhat less well. Surrogacy opponents criticized the Sterns for participating in the exploitation of Ms. Whitehead, characterizing them as rich people using their superior wealth and social status to indulge their desire for a genetically linked child.<sup>124</sup> Critics expressed skepticism about Ms. Stern's claimed medical disability, ridiculing her as a woman who put her career first and found child bearing inconvenient.<sup>125</sup> But, despite these disparaging attacks on the Sterns, the vilification of infertile couples seeking to have children through surrogacy arrangements did not seem to stick. Most observers likely had some sympathy for their plight, seeing the desire to have a child with a biological connection to one parent as a natural and understandable, if wrongheaded, impulse.<sup>126</sup> Thus, in the political arena and in the media, brokers were the villains and parties to surrogacy arrangements, on the whole, were described sympathetically.

#### B. The Activists for Law Reform: An Unlikely Coalition

At one level, the legislative reform following *Baby M* is a straightforward story of interest-group politics. In New York, for example, several well-organized constituencies joined to lobby for the ban on commercial surrogacy, while opposition to the bill was weak and not well organized.<sup>127</sup> But the coalition was a curious one: feminists and civil-liberties groups seldom ally with traditional religious organizations—particularly on issues relating to the regulation of reproductive choices. For the Catholic Church and other social conservatives, political opposition to surrogacy was compatible with broader family-policy agendas. This was less clear for civil libertarians, feminists, and women's groups, whose stance on surrogacy seemed to be in tension with their commitment to women's reproductive autonomy—as some feminists recognized at the outset.<sup>128</sup> Two questions should be addressed: What explains the antisurrogacy position taken by feminists and civil-liberties groups? And what explains the lack of dissent within these groups in the political arena—given the early recognition that the issue was a hard one for feminists?

---

124. Pollitt, *supra* note 34, at 682.

125. *Id.* (“[W]e never found out why Dr. Elizabeth Stern claimed to be infertile on her application . . . or why she didn't confirm that diagnosis until shortly before the case went to trial, much less consult a specialist in the management of MS pregnancies.”); Sanger, *supra* note 35, at 153–54 (“Bill and Betsy had never tried to conceive a child together . . .”).

126. AFTER *BABY M*, *supra* note 72, at 13–14 (describing infertility data, causes, and prevention); SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY, *supra* note 58, at 7–13 (same).

127. See *supra* notes 68–70. The legislative packet includes many letters from organizations supporting the statute and only a handful, mostly from individuals, opposed. See Legislative Bill & Veto Jacket, *supra* note 62.

128. See Peterson, *supra* note 31; Peterson, *supra* note 39.

### 1. Conservative Opposition to Surrogacy

The Catholic Church opposed surrogacy arrangements and supported legal prohibition even before *Baby M* captured national attention. Surrogacy was simply one dimension of a larger threat to core Catholic beliefs about family formation posed by new reproductive technologies. In 1987, while *Baby M* was in the headlines but not yet decided, the Vatican issued a forceful statement condemning surrogacy and explaining that *all* means of assisted reproduction were prohibited under Church doctrine, which requires that children be created only through the conjugal union of husband and wife.<sup>129</sup> This pronouncement, the product of several years of study, specifically called on governments to prohibit surrogacy; it was immediately linked to *Baby M* in news accounts.<sup>130</sup> For the Church, *Baby M* provided an opportunity to influence lawmaking on a matter of grave moral and doctrinal importance, and the Church's active efforts to frame surrogacy as commodification and to influence its regulation rested on this religious foundation.<sup>131</sup>

More generally, opposition to surrogacy arrangements was (and is) compatible with the family-values agenda of religious and social conservatives. Indeed, the views of pro-life activists about abortion and motherhood also illuminate their hostility to surrogacy arrangements. In her important study of abortion activists, Kristin Luker found that many abortion opponents were women who saw sexuality, pregnancy, and motherhood within traditional marriage as the essential core of women's identity.<sup>132</sup> These women viewed pro-choice advocates as careerists whose efforts to control fertility undermined the family and devalued women's most important role.<sup>133</sup> It is easy to see how these attitudes might translate into hostility toward surrogacy and toward career women like Ms. Stern. For religious and social conservatives, surrogacy arrangements represented a threat to the traditional family and to women's roles as wives and mothers, whereas Ms. Whitehead's urgent desire to keep her child was a "natural mother's instinct" that should be respected.<sup>134</sup>

---

129. Ratzinger, *supra* note 37. The statement, authored by Joseph Cardinal Ratzinger (the current Pope Benedict XVI) was initiated in the early 1980s by Pope John Paul II, out of concern that new reproductive technologies were inconsistent with traditional religious norms. *See also* Bernard Lo, *Vatican Statement on Life Is a Start, Not an Answer*, L.A. TIMES, Mar. 19, 1987, at 5 (describing the Church's statement); Roberto Suro, *Vatican's Moral Mission*, N.Y. TIMES, Mar. 12, 1987, at A1 ("[The Vatican's statement] exploits what some church officials consider an unparalleled opportunity to influence governments before they enact laws on controversial medical innovations.")

130. *See, e.g., Church Hits Surrogacy, supra* note 37.

131. An amicus curiae brief submitted to the New Jersey Supreme Court in *Baby M* by the New Jersey Catholic Conference stated that surrogacy is "a new form of prostitution, . . . traffic[ing] for profit in human lives," degrading women, and "dehumaniz[ing] children." Craig McCoy, *N.J. Bishops Decry Surrogate Parenting as Prostitution*, PHILA. INQUIRER, July 16, 1987, at B1.

132. *See generally* KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 194-208 (1984).

133. *Id.*

134. *Id.* at 160.

## 2. Opposition to Surrogacy by Women's Advocates

This account of the motivation of conservative opponents of surrogacy does little to illuminate the response of most feminists. A core part of the feminist political agenda has been vigilant resistance to the notion that the government, and not women themselves, should control reproductive decisions. One might have expected that some pro-choice advocates would support allowing women to make their own decisions about entering surrogacy arrangements. And in fact, early in the *Baby M* trial, some feminists expressed reservations about the political agenda of those supporting Ms. Whitehead, arguing that paternalistic restrictions on surrogacy contracts were dangerous incursions into women's procreative freedom.<sup>135</sup> But advocates with this view ultimately played little role in the political process.

The prevailing feminist position opposing surrogacy *was* compatible, to an extent, with core feminist commitments to gender equality and control over reproduction, and with a general concern that women not be defined by their reproductive capacity. First, for many feminists, surrogacy represented yet another context in which women were valued primarily for their sexual and reproductive capacities rather than for their intellect and skills. One feminist compared the surrogate to "human potting soil for the man's seed."<sup>136</sup> To her (and to others), the practice of surrogacy was designed to satisfy men's desire for children—or for profit, in the case of brokers like Noel Keane—and the arrangements relegated women to the low-status job of "baby maker."<sup>137</sup> Moreover, many feminists implicitly framed the issue of control over reproduction by focusing not on the decision to enter the surrogacy contract, but on the decision to relinquish the child.<sup>138</sup> In this view, the woman's reproductive choice was not to act as a surrogate, but to keep the baby, a decision that powerful men (such as Mr. Stern, Mr. Keane, and Judge Sorkow) were seeking to override. For these feminists, it was troubling that the bond between a mother and her child that developed during pregnancy could be

---

135. *E.g.*, Lorraine Sorrel, *Baby M Again*, OFF OUR BACKS: A WOMEN'S NEWSJOURNAL, July 31, 1987, at 26. Sorrel argued that Ms. Whitehead should be held to her contract or else women's abilities to make reproductive decisions would be threatened and motherhood would be unduly sanctified so women could not assume other roles. Opponents of surrogacy and supporters of Ms. Whitehead noted the reluctance of feminists to get on board. *E.g.*, CHESLER, *supra* note 39, at 22, 34 (noting feminist claims that a woman should have the right to control the use of her body, and arguments that "patriarchal motherhood" has taken away the sanctity of biological reproduction); Pollitt, *supra* note 34, at 685 ("Some women argue that to allow Ms. Whitehead to back out of her pledge would be to stigmatize all women as irrational and incapable of adulthood under the law."). A few feminist legal scholars also argued for enforcement of surrogacy contracts. *See, e.g.*, Lori Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 LAW MED. & HEALTH CARE 72, 78 (1988) (arguing that it is sexist and classist to assume that poor women cannot make educated reproductive choices).

136. Pollitt, *supra* note 34, at 688.

137. *Id.* at 687–88.

138. *See e.g.*, Katherine Bartlett, *Re-Expressing Parenthood*, 98 YALE L. J. 293, 333–34 (1988); Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 GEO. L. J. 1811, 1818–20 (1988).



severed coercively on the basis of a contract.<sup>139</sup> In general, for feminists who focused on the mother–child relationship as a core concern of feminism, the threat to this bond posed by surrogacy contracts was of primary importance.<sup>140</sup>

These arguments against surrogacy reflected genuine feminist concerns, but they rested, at least in part, on an assumption that decisions by women to enter surrogacy contracts were not autonomous choices that should be enforced. As a general proposition, most feminists presume that women are capable of assessing their own interests and making decisions in pursuit of their goals. One could imagine a narrative in which a woman decides that, in entering a surrogacy contract, she will be performing a useful service for the intended parents while furthering her own interests and those of her family—by earning money while caring for her children at home, for example.<sup>141</sup> In this narrative, surrogates are rational, self-interested actors—and should be held to their promises upon which others rely. Feminists opposing surrogacy implicitly rejected such a narrative because they believed that some dimensions of a surrogate’s decisionmaking process were seriously flawed.<sup>142</sup>

Feminists saw two problems with surrogacy contracts that weighed against enforcement and in favor of a ban. First, they argued that surrogates’ decisions were made under duress; this concern is captured in the frequent claim that these contracts exploited women.<sup>143</sup> In their view, surrogates were women with few options for meeting compelling financial needs, which made them vulnerable to exploitation by intermediaries.<sup>144</sup> As the New Jersey Supreme Court noted in *Baby M*, this concern also arises in the context of adoption, in which it is the rationale for not allowing intermediaries to receive payment for adoption placement and for prohibiting pre-birth consent to adoption by birth mothers.<sup>145</sup> In the context of surrogacy, in which the exigencies are less urgent,

139. Bartlett, *supra* note 138, at 333 (“[Surrogacy] presupposes that the biological mother–child bond is easily severed, that pregnancy and childbirth is a process which does not necessarily entail enduring human emotion and permanent connectedness, that women can have children and give them up if the price is right . . .”); Jackson, *supra* note 138, at 1818–20.

140. This points to a division within feminist theory. Liberal feminists have tended to emphasize gender equality and focus on women as autonomous individuals, while relational (or “difference”) feminists emphasize women’s nurturing and relational tendencies, which distinguish them from men. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982). Martha Fineman argues that lawmakers should protect the “mother–child dyad” as the core family relationship. See generally MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

141. Many surrogates who are happy with their involvement in surrogacy arrangements offer this description of their decision. See Kelley, *supra* note 9; Schulte, *supra* note 9.

142. See Pollitt, *supra* note 34, at 685 (“If [commercial surrogacy] becomes a socially acceptable way for a wife to help out the family budget, how can the law protect women from being coerced into contracts by their husbands?”).

143. E.g., Anderson, *supra* note 16, at 81–82; Pollitt, *supra* note 34, at 684–85.

144. Pollitt, *supra* note 34, at 688 (arguing that if surrogacy contracts were unenforceable, the “real loser . . . would be the baby-broker . . . and that would be a very good thing”).

145. See *In the Matter of Baby M*, 537 A.2d 1227, 1241, 1244–45 (N.J. Super. Ct. 1987) (noting the risks of “baby-bartering” when intermediaries accept money for arranging adoptions; construing “the

this claim may assume that most women would not agree to undertake what is seen as a degrading service were it not for their extreme need and lack of other opportunities to earn money. This theme is also heard in arguments against legalizing prostitution, an issue that has generated considerable debate among feminists.<sup>146</sup> Alternatively, surrogates who willingly entered these arrangements believing that they were performing a valuable service were considered likely to be subject to self deception generated by a patriarchal society.<sup>147</sup>

Many feminists also viewed surrogacy contracts to be defective for lack of informed consent, because women entering surrogacy contracts often would not be able to anticipate the substantial risk that they would later regret the agreement to give up the child. Surrogates might not understand that they were likely to form a bond with their children during pregnancy that could make relinquishment extremely difficult.<sup>148</sup> Scholars have described limits on an individual's ability to anticipate future emotional reactions, arguing that deficiencies in "affective forecasting" undermine informed decisionmaking and may justify non-enforcement of agreements.<sup>149</sup> In the context of surrogacy, many opponents argued that the risk of regret by the surrogate was very great—and was a good reason not to allow the agreements.<sup>150</sup>

---

child named therein" in New Jersey's adoption statutes to refer only to a child that has been born, not to a fetus or a planned child); *see also* N.J. STAT. ANN. §§ 9:3-39.1, -41 (West 2008) (adoption statute prohibiting payment to intermediary for placement of a child for adoption).

146. Some feminists favor banning prostitution, as a degrading occupation that exploits women and values them only for their sexuality. But others argue that women should be free to decide to engage in sexual activity for profit and oppose paternalistic regulation. *Compare* Catherine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991) (favoring regulation), *with* NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (1995) (opposing restrictions).

147. Margaret Radin argues that surrogates who feel fulfilled in the role may be subject to "ironic self deception," and "may actually be reinforcing oppressive gender roles." Intended mothers also are potentially subject to "false consciousness," believing they should raise their partners' genetic children. *See* Radin, *supra* note 16, at 1930–31.

148. MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 71–72 (1988) (discussing the difficulty some surrogates have in parting with a baby); Bartlett, *supra* note 138, at 333 (describing the bond that develops during pregnancy); Jackson, *supra* note 138, at 1819 ("[I]t may be quite difficult, even impossible, accurately to evaluate, prior to birth, the ability to surrender the child."); Linda J. Lacey, *The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma: Roadblocks to the Right to Procreate*, 22 TULSA L.J. 281, 317 (1987) (arguing that because woman cannot know the pain of separating with a child, "she should not be bound to a provision forcing her to relinquish the child"); Pollitt, *supra* note 34, at 684.

149. Jeremy A. Blumenthal, *Law and the Emotions: The Problem of Affective Forecasting*, 80 IND. L.J. 155, 209–11 (2005) (arguing that individuals often inaccurately forecast future emotional states, and that this deficiency is a reason not to enforce surrogacy contracts); Jackson, *supra* note 138, at 1819 (arguing that women may not anticipate regret about relinquishing a child); Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 329–30 (2005) (arguing that consent can never be informed because a woman cannot accurately predict how she will feel when giving the child up to the intended parents).

150. *See, e.g.*, Radin, *supra* note 16, at 1930.

The prediction that many women would regret their decisions to enter surrogacy contracts gained force, in part, because the issue was first considered in the context of *Baby M*, in which the surrogate *did* experience great regret. Feminists are as susceptible to the availability heuristic as anyone else, and it seems likely that vivid images of Ms. Whitehead's anguish at being separated from her child influenced their views. The argument that women should have the freedom to make these decisions might have gained greater traction with some feminists had the issue not been complicated by the unfortunate outcome in *Baby M*. But the prediction also resonated for some feminists because regret in this context seemed like a mother's natural response. The notion that the typical surrogate would coolly relinquish her child conflicted with an ideology of motherhood under which pregnancy was seen as a unique experience through which a "sacred bond" develops between mother and child.<sup>151</sup> In this way at least, feminist concerns about surrogacy overlapped with those of social conservatives.<sup>152</sup>

In sum, many feminists viewed surrogacy transactions as inherently degrading to women; they assumed that the contracts were executed because women were coerced by exigent circumstances or false consciousness and because they could not anticipate the adverse consequences of their choices. For these reasons, feminists in the political arena argued either that surrogacy arrangements should be prohibited or that women should not be bound by these contracts.

There is another piece to the puzzle of feminists' active involvement in the political movement to prohibit surrogacy arrangements. The evidence indicates that feminists coalesced in support of Ms. Whitehead and against surrogacy because they saw the case as typical of contested custody disputes in which loving mothers lost their children to more-powerful fathers. Although the legal issue in *Baby M* was whether the surrogacy contract should be enforced, in many ways, the trial played out as a custody adjudication between the biological parents, with much expert testimony about which party would be a better parent to the child.<sup>153</sup> Feminists and women's groups mobilized in response to their perception that Ms. Whitehead's parenting abilities were being unfairly scrutinized and criticized, while Mr. Stern was presumed to be competent to assume the parental role, despite his lack of experience.<sup>154</sup>

---

151. Phyllis Chesler, a leading surrogacy activist, titled her book about *Baby M*, "Sacred Bond." CHESLER, *supra* note 39; see also Bartlett, *supra* note 138, at 333–34 (discussing the assumption that a strong mother–child bond will be formed during pregnancy as part of the ideology of custody law and challenging the wisdom of facilitating the severance of that relationship for cash); Pollitt, *supra* note 34, at 684 ("Within custody law, there is a strong ideology that through pregnancy and childbirth an enduring bond develops between mother and child which cannot easily be broken.").

152. See LUKER, *supra* note 132, at 197–215 (describing religious conservatives' attitude about the importance of motherhood in women's identity).

153. See Peterson, *supra* note 31 and sources cited *supra* note 34 (describing objections to criticisms of Ms. Whitehead's parenting skills).

154. See Peterson, *supra* note 31 and sources cited *supra* note 34.

Child-custody decisionmaking was an important issue on the feminist agenda in the 1980s. The “tender years” presumption favoring mothers over fathers in custody disputes had been replaced in most states by the gender-neutral “best interest of the child” standard.<sup>155</sup> Although the empirical evidence is mixed, feminists argued that under the best-interest standard, primary-caregiver mothers often lost adjudicated custody disputes to wealthier, more-powerful fathers.<sup>156</sup> Many antisurrogacy feminists saw the Whitehead–Stern dispute as one more example of mothers’ losing struggle to keep their children in an unfair patriarchal system.<sup>157</sup> Phyllis Chesler, a long-time critic of the legal system’s treatment of mothers in child-custody cases, was one of the most active feminist supporters of Ms. Whitehead and a determined advocate for banning surrogacy arrangements. She explicitly framed the case as a typical custody dispute riddled with gender bias, with the predictable trial-court decision.<sup>158</sup> Many feminists in the political arena appear to have conflated surrogacy and child custody in the context of this compelling case. In opposing these transactions generally, they may have assumed that such biased proceedings would be the norm if surrogacy contracts were allowed.

Although surrogacy was sometimes described as a hard issue for feminists, ultimately women’s groups spoke virtually with one voice in the political arena during the *Baby M* period and thereafter for several years.<sup>159</sup> Given the complexity of the issues and the early divisions among feminists, this lack of dissent warrants some examination.

The literature on public-opinion formation and expression offers an explanation of this unified response. Timur Kuran argues that when expressions of public opinion coalesce around a dominant position, individuals whose preferences are inconsistent with that view may be silenced through a mechanism that he calls a “reputational cascade.”<sup>160</sup> This happens, according to

155. Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN’S RTS. L. REP. 235, 236 (1982).

156. See *id.* (citing studies showing fathers winning between 38% and 63% of disputed custody cases). Overall, about 10% of children were in their fathers’ custody in the early 1990s. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 168 (1992).

157. See Peterson, *supra* note 31 (describing feminists’ anger at the trial and the expert testimony about Whitehead).

158. CHESLER, *supra* note 39, at 11, 16, 97. The year before the trial court’s decision in *Baby M*, Chesler published a study of custody trials that focused on mothers who lost custody. PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* (1986).

159. See *supra* notes 40–46 and accompanying text. Although few feminist opponents of surrogacy regulation spoke out in the political arena, some academic feminists argued against restrictions on surrogacy agreements. See Andrews, *supra* note 135, at 74–76 (challenging feminist arguments based on exploitation and risk of regret); Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 346 (1990) (arguing for contractual enforcement of surrogacy agreements because effecting parties’ intentions advances gender equality).

160. See generally TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1995) [hereinafter KURAN, *PRIVATE TRUTHS*]; Timur Kuran, *Ethic*

Kuran, because individuals seek to avoid the social disapproval and censure that may follow the expression of an unpopular view.<sup>161</sup> As support for a dominant view gains force, the cost of dissent rises, and individuals with nuanced or even opposing views may be reluctant to speak out.<sup>162</sup> Reluctance may be particularly likely for those who identify generally with the perspective of opinion leaders or who are reluctant to affiliate with opponents.<sup>163</sup> This response can contribute to the impression that public opinion supporting the dominant position is stronger than is in fact the case.<sup>164</sup> In a circular process, this makes dissent appear to be even more costly and reinforces the perception that the prevailing opinion represents a strong social consensus.<sup>165</sup>

This analysis may suggest why feminists with reservations about support for Ms. Whitehead and the antisurrogacy reforms did not push their views in the political arena. In the midst of the moral panic surrounding *Baby M*, activists and opinion leaders such as Chesler moved quickly and successfully to frame surrogacy as an exploitative practice that posed a substantial threat to women and to motherhood. Feminists who contemplated challenging this position might well have anticipated that they would incur substantial reputational costs. As the antisurrogacy availability cascade gained momentum, a more tolerant stance may have become uncomfortable for feminist skeptics. To oppose restrictions on surrogacy was to be antiwoman, allied with brokers and fathers against poor mothers and other feminists. Not surprisingly perhaps, in this political environment, few feminists openly expressed reservations about policies restricting the freedom of parties to enter surrogacy arrangements, although at a theoretical level such policies might be seen to be in tension with feminist values.<sup>166</sup>

#### IV

##### THE COLLAPSE OF COMMODIFICATION: REFRAMING SURROGACY

Since the early 1990s, surrogacy has been largely reframed as a social and political issue, setting the stage for contemporary lawmakers to approach these arrangements pragmatically rather than punitively. Several factors have contributed to the change. First, the moral panic surrounding *Baby M* predictably dissipated, creating an environment more open to reflective consideration of surrogacy regulation. Surrogacy and the new reproductive

---

*Norms and Their Transformation Through Reputational Cascades*, 27 J.L. STUDIES 623 (1998). See also Kuran & Sunstein, *supra* note 111, at 727–29.

161. KURAN, *PRIVATE TRUTHS*, *supra* note 160, at 60–69.

162. *Id.*

163. *Id.*

164. *Id.* at 60–69, 105–10.

165. *Id.*

166. One exception was academic Lori Andrews, who spoke out in support of the trial court's decision. See Editorial, *Baby M Decision Spurs Wide Debate*, N.Y. TIMES, Apr. 5, 1987, at E1 (noting Andrews' support of the *Baby M* decision granting custody to the Sterns); see also Andrews, *supra* note 135.

technologies became more familiar and, with familiarity, have seemed less threatening. This happened in part because the predicted harms of commercial surrogacy have largely failed to materialize, so claims of commodification no longer seem as compelling as they once did. The framing of surrogacy as baby selling has also lost force as traditional surrogacy has been supplanted by gestational surrogacy in recent years.<sup>167</sup> Finally, whatever its theoretical merits, the commodification argument against commercial surrogacy may have become unpalatable for feminists and liberals in the political arena because pro-life advocates have used uncomfortably similar women-protective arguments successfully in favor of restricting abortion. The withdrawal of women's advocates has altered the political dynamic, as has the growth of pro-surrogacy interest groups who frame surrogacy as a socially beneficial practice.

#### A. The Dissipation of the Moral Panic: The Changing Political Climate

Moral panics always diminish in intensity over time as the salient incidents and images that stirred alarm recede in public consciousness.<sup>168</sup> Thus, predictably, after the New Jersey Supreme Court decision, public interest in surrogacy and outrage about baby selling and the exploitation of women gradually waned as the media, politicians, and the public turned their attention to other matters. The New York legislative reform in 1992 briefly revived interest in the issue, with advocates again invoking images of *Baby M*. But interest quickly declined again and, by 1994, sponsors of a New Jersey law banning surrogacy could not even generate enough interest to bring the bill before the legislature.<sup>169</sup>

Moral panics sometimes recur periodically as new incidents revive public fears, but this has not happened in the case of surrogacy. Occasionally, horror stories of surrogacy agreements gone awry are reported in the press, but even the 1995 murder of a baby by his abusive, genetic father shortly after the child was relinquished by the surrogate failed to generate a political backlash.<sup>170</sup> In recent years, no interest group has sought to create a new availability cascade with the goal of mobilizing support for new restrictions on the practice.

In part, this relative quietude simply reflects a growing familiarity with surrogacy and other reproductive technologies that were new in the 1980s and therefore frightening to many people. Familiarity has assuaged fears about the potential of these scientific innovations to undermine conventional understandings of marriage, family formation, and human identity. This response was not unique to surrogacy or to the 1980s. For example, pharmaceutical contraceptives were greeted with alarm when they were

---

167. See Sanger, *supra* note 35, at 140.

168. GOODE & BEN-YEHUDA, *supra* note 102, at 38 (describing how moral panics erupt and subside quickly).

169. Diamond, *supra* note 73.

170. See *Huddleston v. Infertility Ctr. of America, Inc.*, 700 A.2d 453, 455–56 (Pa. Super. Ct. 1997) (wrongful-death action by the surrogate mother against the infertility clinic that screened the father).

introduced in the 1930s but gradually gained public acceptance as helpful family planning aids.<sup>171</sup> As surrogacy arrangements and other means of assisted reproduction lost their novelty, public concern about their potential threat diminished and the social environment was no longer conducive to generating intense opposition.

## B. Undermining the Commodification Frame

In large part, familiarity with surrogacy arrangements alleviated public fears because many predictions of harmful consequences made by opponents in the midst of the *Baby M* controversy proved to be exaggerated or wrong, undermining the characterization of commercial-surrogacy contracts as exploitative, baby-selling transactions. At one level, of course, the harms of commodification are abstract and not subject to empirical validation. How could it be determined whether surrogacy has changed the way that children or women's reproductive capacity is valued? But little evidence confirms the predictions of more concrete harms associated with the "sale" of children and the exploitation of women who act as surrogates. Since the mid-1990s, the empirical research and anecdotal accounts in the media have offered a more benign account of surrogacy than that which prevailed earlier, assuaging fears about these transactions.<sup>172</sup>

Here is the picture that emerges. Most American surrogates are not as wealthy as the intended parents, but few are poor.<sup>173</sup> Many report using the money they receive to enhance their families' welfare in conventional ways, often indicating that they value the ability to earn money while staying home with their children.<sup>174</sup> Further, few surrogates report reluctance to relinquish the child, and a very small percentage express regret about having served in the role.<sup>175</sup> Contrary to the claim that surrogacy degrades motherhood and pregnancy, the available evidence suggests that surrogates view themselves as

---

171. Contraceptives were seen as a serious threat to the family, and calls for banning the drugs were common. Debra L. Spar, *For Love and Money: The Political Economy of Commercial Surrogacy*, 12 REV. INT'L POL. ECON. 287, 305–06 (2005).

172. Hazel Baslington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57 (2002) (study of attitudes toward relinquishment); Janice C. Ciccarrelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21 (2005) (reviewing studies of surrogacy); see also popular media sources cited *supra* note 9.

173. Kelley, *supra* note 9. However, Indian women, who indeed may be poor, also serve as surrogates for American couples. See Abigail Haworth, *Surrogate Mothers: Wombs to Rent*, MARIE CLAIRE, available at <http://www.marieclaire.com/world-reports/news/international/surrogate-mothers-india> (last visited May 8, 2009).

174. Kelley, *supra* note 9 (describing military wives with husbands away on active duty volunteering to act as surrogates).

175. See Ciccarrelli & Beckman, *supra* note 172, at 31–32 (describing studies showing most surrogates reported satisfaction with experience); Kelley, *supra* note 9.

performing a service of great social value for the benefit of others.<sup>176</sup> Further, little evidence indicates that children born of surrogacy arrangements suffer psychological or physical harm because of the circumstances of their birth, or that surrogates' other children fear that they too will be relinquished.<sup>177</sup> Melissa Stern herself appears to have bonded securely with her intended parents; as an adult, she reportedly terminated Ms. Whitehead's parental rights so that Ms. Stern could adopt her.<sup>178</sup> The evidence tends to support the argument of pro-surrogacy advocates that infertile couples eager to have children are not likely to be seriously deficient parents.

With the passing of time, it became clear that bad outcomes like that of *Baby M* were exceptional rather than typical, and that the cases that generated alarm could usually be avoided through clear legal rules and requirements aimed at protecting all participants. For example, disputes of various kinds over parental rights and responsibilities (including custody battles and efforts by one or both intended parents to default on the surrogacy contract and on their parental obligations) are less likely to arise under laws that clearly assign parental status to the intended parents at birth. Further, concerns about undue influence by brokers or intended parents and about the voluntariness of surrogates' consent and their emotional suitability can be mitigated through well-designed regulations.

### C. Gestational Contracts: From Surrogate Mothers to Gestational Carriers

The prevalence of gestational surrogacy in recent years has been a very important factor in dismantling the commodification frame and in changing the way many people, including lawmakers and lobbyists, view these arrangements. Today, ninety-five percent of surrogacy contracts involve IVF, so most surrogates are not the genetic mothers of the children they bear.<sup>179</sup> As described earlier, several contemporary laws limit access to procedures for efficiently establishing intended parent's rights to gestational-surrogacy contracts, and courts typically give intended parents' claims more weight when the surrogate is not the child's genetic parent. The evidence suggests that surrogates themselves see this distinction as important in defining their relationships with the children they will relinquish. As one gestational surrogate put it, "I don't feel that motherly bond. I feel more like a caring baby sitter."<sup>180</sup>

---

176. Ciccarrelly & Beckman, *supra* note 172, at 29–30 (describing surrogates reported altruistic motivation); Sanger, *supra* note 35, at 137 (noting that many women are honored and happy to serve as surrogates for infertile couples).

177. No studies exist on children conceived using surrogacy. Studies of children conceived by other forms of assisted reproduction suggest that the circumstances of birth do not negatively affect development. Ciccarrelly & Beckman, *supra* note 172, at 37.

178. Jennifer Weiss, *Now It's Melissa's Time*, N.J. MONTHLY MAG., Mar. 2007, available at <http://www.reproductivelawyer.com/news/babym.asp>. In her only interview, Melissa offered warm praise of her parents, Bill and Betsy Stern. *Id.*

179. Sanger, *supra* note 35, at 140.

180. See Kelley, *supra* note 9.



The move to gestational surrogacy has facilitated the change in the social meaning of surrogacy from a mother's sale of her baby to a transaction involving the provision of gestational services. It is telling that gestational surrogates are often described as "carriers," rather than as "mothers."<sup>181</sup> Although some have challenged the commodification argument all along on the ground that fathers who execute surrogacy contracts cannot "buy" their own children,<sup>182</sup> this objection gained little traction as long as *mothers* were seen as selling their children. Because the gestational surrogate lacks a biological connection with the child she is nurturing and bearing, her identity as the child's mother is less powerful.<sup>183</sup> The conclusion that the child is not in fact *her* child, but rather that she is providing contractual gestational services to the "actual" parents, resonates with many people.<sup>184</sup>

This change in social meaning seems to have evolved in a two-step process. In *Calvert*, the first important gestational surrogacy case, both intended parents were the child's genetic parents. This carried great weight with the court and made the intended mothers' claim of parental status compelling.<sup>185</sup> Soon, however, many state laws granted parental status to intended parents under gestational-surrogacy arrangements even when only one intended parent was the child's genetic parent.<sup>186</sup> Thus it appears that gestational surrogacy has reshaped the social meaning of these arrangements by diminishing the maternal

---

181. See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1270 (D. Utah 2002) (describing surrogate's services as "a gestational carrier surrogate"); *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1137 (Mass. 2001) (referring to the surrogate as the "gestational carrier"); see also Noa Ben-Asher, *The Curing Law: On the Legal Evolution of Baby-Making Markets* 30 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 08-167), available at <http://ssrn.com/abstract=1095448> (arguing the importance of this distinction).

182. Richard A. Eptein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2331 (2005) (pointing out that child is father's own child); Barbara Katz Rothman, *Reproductive Technologies and Surrogacy: A Feminist Perspective*, 25 CREIGHTON L. REV. 1599, 1603 (1992) (describing but challenging this argument).

183. In the floor debate in the Illinois House, Barbara Currie, the sponsor of the GSA, reassured her colleagues: "In a situation where the birth mother . . . provided the egg that results in this baby, there is no way you can't grant her the opportunity to change her mind at the 11th hour. But the woman in a gestational surrogacy program . . . has no biological connection to the child." H.R. 111, 93rd Gen. Assem., 22, at 23 (Ill. 2004).

184. Legal scholars have also drawn a distinction between traditional and gestational surrogacy. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 898 (2000) (arguing that traditional surrogacy agreements should be subject to the same legal standard as adoption because the surrogate is in fact the child's mother, but that the surrogate has no similar claim in a gestational-surrogacy agreement).

185. *Johnson v. Calvert*, 851 P.2d 776, 781-83 (Cal. 1993); see *supra* notes 81-87 and accompanying text.

186. Most gestational surrogacy statutes require that one intended parent be the child's genetic parent; a few, including North Dakota, require both intended parents to be genetic parents. Compare 750 ILL. COMP. STAT. 47/20(b)(1) (2006) (intended parents must "contribute at least one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term"), with N.D. CENT. CODE §§ 14-18-01 (2008) ("Gestational carrier" means an adult woman who enters into an agreement to have an embryo implanted in her and bear the resulting child for intended parents, where the embryo is conceived by using the egg and sperm of the intended parents.').

credentials of the surrogate, rather than by enhancing those of the intended mother. This is interesting and a bit puzzling, given that critics of surrogacy have often emphasized the mother–child bond formed in pregnancy as the foundation of the surrogate’s parental claim and the source of her predictable regret in relinquishing the child.<sup>187</sup>

The relatively positive response to gestational surrogacy suggests that gestational motherhood is devalued when it is separated from genetic parenthood—and perhaps that surrogates who are not also genetic mothers, unlike traditional surrogates, might be expected *not* to form a maternal bond with a child who “belongs” to others.<sup>188</sup> This widespread reaction goes some distance toward explaining the reframing of surrogacy, but it has some troubling implications. First, it raises questions about the value of pregnancy relative to other dimensions of motherhood and the extent to which the mother–child bond formed during this period is assumed to be a product of the genetic tie rather than of the nurturing relationship.<sup>189</sup> It also recalls a long-rejected notion that parents have a property-like interest in their children based on biology. Nonetheless, it seems clear that the supplanting of traditional surrogacy by gestational contracts has contributed to public acceptance of surrogacy arrangements.

The benign framing of gestational surrogacy has been reinforced further under new statutory requirements that intended parents demonstrate a medical need for surrogacy.<sup>190</sup> In the *Baby M* period, surrogacy was sometimes characterized as a self-indulgent effort by wealthy couples to avoid the inconvenience of pregnancy and childbirth.<sup>191</sup> The medical-need requirement signals the parents’ legitimate purpose in turning to surrogacy and underscores the value of the service as an essential means of achieving a widely shared goal of having genetically related children.<sup>192</sup>

The availability of gestational surrogacy also has had a tangible effect on surrogacy practice. The disaggregation of gestational from genetic parenthood

187. See sources cited *supra* note 148.

188. Some feminists argue that maternity rests on nurturance in pregnancy and not the genetic tie. See generally BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* (1989).

189. Critics of surrogacy often emphasize the importance of the mother–child relationship formed during pregnancy in arguing against contract enforcement. See Bartlett, *supra* note 138, at 333–34; Katz Rothman, *supra* note 182, at 1607 (emphasizing the importance of pregnancy as social relationship between surrogate and child).

190. FLA. STAT. § 742.15 (2008) (intended mother must be unable to safely carry a baby to term); 750 ILL. COMP. STAT. 47/20 (2006) (“[H]e, she, or they have a medical need for the gestational surrogacy . . . .”); TEX. FAM. CODE ANN. §160.756(b)(2) (2008) (A court may only validate a gestational surrogacy agreement if “medical evidence provided shows that the intended mother is unable to carry a pregnancy to term.”).

191. See *supra* note 125 (describing skeptical comments about Ms. Stern’s motivation in pursuing surrogacy).

192. See Ben-Asher, *supra* note 181, at 34–42 (arguing that reproductive technologies (including surrogacy) become socially accepted when they are viewed as cures for infertility).

has increased both the demand for surrogacy and the willingness of women to fill this role. Prospective parents may be more willing to enter these arrangements than traditional ones because they can exercise greater control over their child's genetic make-up.<sup>193</sup> Further, their "requirements" in choosing surrogates are simpler—good health and a willingness to live a healthy lifestyle during the pregnancy. At the same time, more women are willing to be surrogates when it does not mean giving up their biological children.

#### D. The Withdrawal of Feminists and Liberals: Coercion as a Double-Edged Sword

Among the most notable changes in the political landscape of surrogacy in recent years has been the absence of feminist voices, women's groups, and civil-liberties organizations. Although it is difficult to find direct evidence of a change of heart on this issue or an explanation of why it happened, it seems likely that changes in the politics of abortion may have played an important role.

The feminist position on surrogacy in the *Baby M* period always seemed to be in tension with the commitment to preserving women's autonomy in other reproductive contexts—particularly abortion. The claim that women lacked agency because of coercive circumstances was unsettling, but even more-discordant with feminist values was the assertion that women needed protection because they could not anticipate their response to pregnancy. Such an assertion suggested views about the power of female biology that historically contributed to women's subordination—views that feminists have challenged in fighting for gender equality. The prediction that women were likely to regret their surrogacy decision on the basis of "natural" biological and psychological urges embodied essentialist assumptions about the role of motherhood in women's lives.<sup>194</sup>

At the time of *Baby M*, these concerns hovered in the background, the source of unease for a few liberal feminists, but were overwhelmed by support for Ms. Whitehead and opposition to surrogacy. In recent years, however, arguments against surrogacy based on the threat of coercion and regret have become untenable for most feminists because anti-abortion advocates have invoked similar arguments. Recognizing that many people were offended by their standard "baby killing" argument, abortion opponents began to shift to what Reva Siegel calls a "women-protective" rationale for banning abortion.<sup>195</sup>

---

193. SPAR, *supra* note 79, at 78–82. (“[O]nce IVF raised the prospect of selling eggs apart from pregnancy, supply began to grow.”).

194. See generally Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (describing and challenging the central importance of motherhood in legal-feminist thought).

195. Reva Siegel, *The Rights' Reasons: Constitutional Conflict and the Spread of Women-Protective Anti-Abortion Argument*, 57 DUKE L.J. 1641, 1642 (2008) (describing the “women-protective” rationale in the *Carhart* decision).

This argument has gained traction in the political arena and in litigation—it was endorsed by the U.S. Supreme Court in *Gonzalez v. Carhart* in 2007 as a justification for restricting abortion.<sup>196</sup>

The women-protective argument includes two distinct but related claims: First, abortion opponents argue that boyfriends, family, and clinic staff coerce and mislead women to obtain abortions that they would never voluntarily obtain—because “[it] is so far outside the normal conduct of a mother to implicate herself in the killing her own child.”<sup>197</sup> Second, and for the same reason, opponents argue that many women deeply regret their abortions, suffering from psychological trauma which puts them at risk for severe depression and “post-abortion syndrome,” a form of post-traumatic stress disorder.<sup>198</sup> This claim has taken hold even though it is based largely on anecdotal evidence and has little support in legitimate social-science research.<sup>199</sup> According to pro-life advocates, women must be protected from this harm by prohibiting abortion altogether.<sup>200</sup>

These paternalistic arguments closely track claims made against surrogacy in the *Baby M* period. Surrogacy arrangements also were assumed to be coerced, on the view that few women would undertake them in the absence of dire financial circumstances.<sup>201</sup> Surrogacy opponents also argued that the risk of regret was substantial in the surrogacy context because most mothers would not voluntarily relinquish their children. Although one cannot trace the genealogy of the anti-abortion argument to the surrogacy debate, they likely have a common source: Mary Beth Whitehead’s attorney, Harold Cassidy, has been among the most prominent proponents of the women-protective argument against abortion in recent years.<sup>202</sup>

Although surrogacy raised legitimate concerns for feminists<sup>203</sup> (not so different in some ways from prostitution),<sup>204</sup> the unified stance in response to *Baby M* was driven, at least in part, by sympathy for Ms. Whitehead and anger at apparent class and gender bias against her as the case played out. The withdrawal of women’s advocates implicitly recognizes that endorsing paternalistic government restrictions on women’s reproductive choices in this

---

196. *Gonzalez v. Carhart*, 550 U.S. 124, 159 (2007) (“[S]ome women come to regret the choice they make to abort the infant life they once created and sustained.”) The women-protective argument also persuaded the South Dakota legislature to ban abortion, an enactment later defeated by voter referendum. See Siegel, *supra* note 195, at 1642.

197. S.D. Task Force to Study Abortion, Report of the South Dakota Task Force to Study Abortion 56 (2005), available at [http://www.voteyesforlife.com/docs/Task\\_Force\\_Report.pdf](http://www.voteyesforlife.com/docs/Task_Force_Report.pdf) (cited in Siegel, *supra* note 195, at 1163).

198. Siegel, *supra* note 195, at 1649.

199. *Id.* at 1653 n.44.

200. *Id.* at 1652 (noting that the South Dakota report expressed concerns that women would receive “abortions they do not want, and in all events, should not have”).

201. *In the Matter of Baby M*, 537 A.2d 1227, 1241 (N.J. 1988).

202. Siegel, *supra* note 195, at 1646 n.16.

203. See *supra* notes 138–139 and accompanying text.

204. See *supra* note 142.

context is incompatible with the broader feminist political agenda. In contrast to abortion, surrogacy was not a core issue for feminists; ultimately it became clear that support for restrictions on surrogacy undermined pro-choice advocacy.

#### E. A New Balance of Power

After feminist interest in surrogacy waned, opposition was limited to religious and social conservatives, and even for this group, surrogacy likely was a minor issue compared to abortion, gay marriage, or divorce reform. This may explain the relative lack of controversy in the recent law-reform initiatives. At the same time, the popularity of gestational surrogacy and IVF as responses to infertility has increased.<sup>205</sup> This has led to the growth of interest groups aiming to facilitate legal certainty about the parental status of adults who acquire children through assisted reproduction; thus, parent's groups and intermediaries have played an active role in lobbying for the new laws.<sup>206</sup>

The responsiveness of legislatures to this new coalition of interest groups is not surprising. As compared to abortion, surrogacy has *never* been a highly polarizing political issue with powerful factions competing to shape the law. In the *Baby M* period, there was little support for allowing the novel arrangements and, with the dissipation of moral panic and the rise of gestational surrogacy, few well-funded or emotionally invested opponents have emerged. This may explain the pragmatic approach of contemporary lawmakers, who seem to accept that surrogacy and other new reproductive technologies are here to stay, and to believe that the utility of these arrangements can be enhanced through regulation clearly establishing parental status in intended parents.<sup>207</sup>

This is not to say that concern about commodification in this context is altogether assuaged or that any normative consensus exists about surrogacy. The growing number of individuals who satisfy powerful urges to form families and have children through commercial transactions continues to be a source of concern for ethicists, particularly given the recent trend to "outsource" the contracts to India and other countries where surrogates may indeed be poor women who have few other income options.<sup>208</sup> Moreover, some scholars are concerned that the expense of gestational surrogacy effectively limits this family-formation option to high-income couples and individuals.<sup>209</sup> However, the

---

205. See *supra* note 86 and accompanying text.

206. Among the groups that have played an advocacy role in promoting law reform in recent years is Resolve, a group of parents and infertility professionals. See RESOLVE: The National Infertility Association, <http://www.resolve.org> (last visited Feb. 1, 2009).

207. See *supra* notes 90–97 and accompanying text (discussing passage of Illinois Gestational Surrogacy Act).

208. See Haworth, *supra* note 173 (describing a clinic in India arranging for local women to act as surrogates for Americans at a fraction of the U.S. cost).

209. See Ben-Asher, *supra* note 181, at 142 (arguing that traditional surrogacy should be allowed because only wealthy people can afford gestational surrogacy). Readers responding to Alex Kuczynski's *New York Times* article about her experience acquiring a child through surrogacy, *supra*

goal of assisted reproduction is relatively benign, and the emerging view among lawmakers seems to be that regulation is a better means of minimizing the costs than a legal vacuum.

## V

### LESSONS FOR LAWMAKERS

This account of the political and legal history of surrogacy over more than two decades shows lawmakers responding to the issue in two very different settings. In the *Baby M* period, courts and legislatures, reacting to the moral panic that surrounded that case, framed surrogacy as degrading commodification. Recent judicial and legislative responses have been much more practical, with lawmakers seeking to minimize the social costs (particularly costs to children) associated with these transactions. Although some advocates continue to support the earlier, restrictive approach, lawmakers increasingly favor regulation over prohibition as a more effective means of promoting social welfare in this context. This may reflect an emerging dominant view that legal prohibition of a practice that carries little tangible harm if properly regulated is hard to justify.

In any event, few would argue that lawmaking in the midst of a moral panic is optimal. The exaggerated perceptions of risk generated by availability cascades almost invariably distort official responses, and government action itself can institutionalize the moral panic. This dynamic is certainly not unique to surrogacy or to innovations in reproductive technology. It can be seen in the response to child sexual abuse, juvenile crime, nuclear power, and even mad-cow disease.<sup>210</sup> In many instances, high-profile incidents focus public attention on an issue, generating alarm and cries for the government to “do something—now.” Lawmaking under conditions of intense political pressure will seldom promote society’s long-term interests.

Does the history of surrogacy as a political issue offer any general lessons for responding to issues that generate moral panics? At a minimum, the story clarifies that with the passage of time, moral panics tend to dissipate and political pressure for government action tends to weaken. For the most part, legislatures that did not act in the midst of the *Baby M* furor did not later pass restrictive legislation. In some states, the political climate cooled and bills died without a vote. The New Jersey experience is instructive: by the time the task force issued its report and sponsors introduced the bill banning surrogacy, political pressure and legislative interest had disappeared.

The passage of time allows the political climate to cool, but it can also serve another useful purpose. An extensive period dedicated to acquiring accurate

---

note 9, criticized the cover picture of the author in front of her Hamptons home featuring the baby’s nurse standing at attention nearby. Letters to the Editor, N.Y. TIMES MAG., Dec. 16, 2008, at 16.

210. See generally Kuran & Sunstein, *supra* note 111 (describing many situations, such as the panic surrounding Love Canal, in which distorted perceptions of risk generate availability cascades that lead to excessively restrictive regulation).

information and to deliberation provides the opportunity to correct distortions created by availability cascades. Legislative hearings, cost-benefit analyses, and the establishment of task forces to undertake in-depth studies of issues can all function to facilitate better decisionmaking by lawmakers.<sup>211</sup> These mechanisms might be particularly useful in contexts in which relevant (and available) information is likely to be ignored due to the vivid salience of an incident or case that has captured public attention. In other settings—and surrogacy may be one—when the novelty of an issue generates alarm and uncertainty, and when dire predictions cannot be immediately proved or disproved, a period of watchful observation may either allay concerns or clarify the need for restrictive regulation. In the case of reproductive technology, the accumulation of information and experience has alleviated much of the fear that innovations offering individuals increased control over family formation pose a serious threat to core social values.

The history of surrogacy also suggests that the *political* costs of moving slowly in response to a moral panic may be less serious than lawmakers anticipate. As an availability cascade builds and public fears escalate, politicians may conclude that their only option is to satisfy the demand for action by responding quickly to the perceived threat. But moral panics are volatile, and the period of intense concern is predictably short lived. The public and the media move on to other issues, and even interest groups may adjust their political agendas and priorities in ways that divert their focus to other matters. Thus, the prescribed response to moral panics of careful study and deliberation over an extended period of time is often politically feasible as well as conducive to better policymaking.

## VI

### CONCLUSION

The history of the changing social and political meaning of surrogacy provides an interesting case study that may offer useful insights for policymakers. The contemporary pragmatic approach to regulating surrogacy, in my view, is superior to the crusade-like urgency of early reformers. Of course, this does not settle the question whether these arrangements are morally problematic; opinion will continue to be divided on whether commercial-surrogacy arrangements devalue children and women in intangible ways. But what has become clear is that well-designed regulation can greatly mitigate most of the potential *tangible* harms of surrogacy, and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists.

---

211. See proposals in Kuran & Sunstein, *supra* note 111, at 746–60.