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# How Parents Are Made: A Response to Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy

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**How Parents Are Made:  
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Unconstitutional Treatment of Prospective Parents Through  
Surrogacy***

KIMBERLY M. MUTCHERSON\*

INTRODUCTION

As a legal scholar deeply interested in assisted reproduction and its relationship to the ever more complicated landscape of family, I applaud Professor Carroll for taking on the issue of the ways in which state laws related to surrogacy potentially infringe on constitutional rights.<sup>1</sup> The issue being explored is both interesting and important and, like others before her,<sup>2</sup> Professor Carroll highlights a place of state-sanctioned discrimination in the arena of assisted reproduction that has constitutional dimensions.<sup>3</sup> Such statutes, of course, fall within a long line of legislative and policy efforts to create and/or reinforce reproductive hierarchies built on distinctions rooted in disability status, race, age, sexual orientation, and, of course, marital status. Therefore, it is no surprise that states use statutes related to surrogacy as a way of protecting and encouraging the creation of certain kinds of families and the fulfillment of certain kinds of reproductive desires. Such statutes create a present day barrier to the procreative interests of many couples, especially same-sex couples and opposite-sex couples where one or both parties are medically infertile, and they call for careful analysis as matters of policy and law.

Recognizing that discrimination exists across multiple axes related to reproduction does not tell us whether any or all of that discrimination is unconstitutional, and Carroll's piece, while focusing on an issue worthy of deep analysis, fails its audience in some critical respects. First, Carroll does not sufficiently explain or contend with the complicated nature of surrogacy as a practice or as a subject of legal regulation. Second, she uses the precedent of *Baby*

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1. See Andrea B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 IND. L.J. 1187 (2013).

2. See, e.g., Kimberly M. Mutcherson, *Disabling Dreams of Parenthood: The Fertility Industry, Anti-Discrimination, and Parents with Disabilities*, 27 LAW & INEQ. 311 (2009); Brooke Dianah Rodgers-Miller, Note, *Adam and Steve and Eve: Why Sexuality Segregation in Assisted Reproduction in Virginia Is No Longer Acceptable*, 11 WM. & MARY J. WOMEN & L. 293 (2005).

3. Carroll focuses on statutes from Florida and Louisiana in her piece, but it perhaps speaks to the modern trend to note that later statutes, such as the Illinois Gestational Surrogacy Act passed in 2004, include no such restriction. See 750 ILL. COMP. STAT. ANN. 47/20(b) (West 2009). In the best case scenario, then, it is possible that Carroll's concerns are attached to statutes that are relics that would draw very different lines if enacted today. Even so, in addition to Florida and Louisiana, Nevada, NEV. REV. STAT. ANN. § 126.045 (2010), New Hampshire, N.H. REV. STAT. ANN. § 168-B:1 (2002), and Utah, UTAH CODE ANN. § 78B-15-801(3) (LexisNexis 2012), discriminate on the basis of marital status in their surrogacy statutes.

M,<sup>4</sup> in contradictory and underexamined ways that weaken her analysis of the case and the larger analysis of markets in gestation. Third, and finally, she fails to adequately or convincingly make the case that statutes that discriminate on the basis of marital status violate equal protection. As a consequence, the article ultimately provides an inadequate account of how to protect the procreative interests of people who want or need to have babies with the assistance of a surrogate.

### I. SURROGACY AS A CONTESTED PRACTICE

One of the most critical aspects of understanding why regulators treat surrogacy a certain way is to understand surrogacy as a thoroughly contested practice. Embedded within all discussions of the law's relationship to the practice of surrogacy are serious questions about autonomy, oppression, exploitation, and commodification. In some way, every surrogacy statute responds to these questions and is rooted in answering how to regulate a market in the building blocks of procreation, including women's bodies, and in babies. It is therefore useful to spend some time fleshing out the context of such legislation as Carroll does in her piece. I think it worth responding to that material, but I do so with an understanding that, by Carroll's own terms, none of the general concerns about surrogacy as a practice are relevant to her claims because once the state allows surrogacy, according to Carroll and Radhika Rao before her,<sup>5</sup> it must do so on an even plane. However, given how controversial surrogacy is, it is worth articulating the environment in which lawmaking takes place in order to shed light on why lawmakers narrow the circumstances in which surrogacy happens even if they do not ban the practice altogether.

As a starting point to this analysis, I note that some policymakers and commentators respond to surrogacy differently depending on whether the surrogate is gestational or traditional.<sup>6</sup> Further, opinions and concerns about surrogacy can vary depending on whether the surrogate is a family member or a stranger.<sup>7</sup> Similarly, laws and beliefs about surrogacy may shift depending on whether the surrogate is paid or unpaid<sup>8</sup> or whether she is hired in a developing versus

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

5. Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1460 (2008) (arguing that when the government regulates access to reproductive technology it must not restrict access in an unequal fashion).

6. For instance, the Illinois Gestational Surrogacy Act provides a framework for creating legal protection for gestational surrogacy arrangements but does not provide protection for traditional surrogacy arrangements. See 750 ILL. COMP. STAT. ANN. 45/10, 45/15 (West 2009). By contrast, Kentucky and Louisiana law forbids traditional surrogacy but does not speak to gestational surrogacy. See KY. REV. STAT. ANN. § 199.590 (LexisNexis 2007); LA. REV. STAT. ANN. § 9:2713 (2005).

7. See, e.g., Ethics Comm. of the Am. Soc'y for Reprod. Med., *Using Family Members as Gamete Donors or Surrogates*, 98 FERTILITY & STERILITY 797 (2012) (describing pros and cons of using a family member as a surrogate).

8. Several jurisdictions that regulate surrogacy ban such arrangements if they are done in exchange for money but allow unpaid surrogacy. See, e.g., WASH. REV. CODE ANN.

developed nation.<sup>9</sup> Carroll's piece, though, draws few of these distinctions that are so deeply part of the broader conversation of how and why states respond to surrogacy.

The themes of autonomy, oppression, exploitation, and commodification play throughout Carroll's piece but in ways that are perhaps too subtle to help the reader understand the broad context of surrogacy regulation. A few examples will suffice to illustrate this concern. In Carroll's description of the *Baby M* case, she refers to Mary Beth Whitehead as "a former employee of a bar and a go-go dancer."<sup>10</sup> It is unclear what one is to make of this description, but perhaps it is intended to offer background on Mrs. Whitehead or to contrast her employment history with that of the Sterns. However, it also reminds the reader that there is frequently a gap between the educational and economic attainment of surrogates as compared to that of individuals who hire surrogates.<sup>11</sup> This speaks to some of the issues of exploitation and oppression that often accompany attempts to regulate surrogacy. Carroll's piece also does not clearly explain that the contract in *Baby M* was between Mr. Stern, Mrs. Whitehead, and Mrs. Whitehead's husband; Mrs. Stern was excluded.<sup>12</sup> The New Jersey Supreme Court suggested that her exclusion was a ploy "to avoid the application of the baby-selling statute to this arrangement."<sup>13</sup> The contract also made clear in its terms that the money exchanged was not for the sale of a child and that the parties agreed that it was in the best interest of any child born as a result of the arrangement to be in the custody of Mr. Stern.<sup>14</sup> So in addition to exploitation, surrogacy regulation is about avoiding the commodification of both women and babies that happens when babies and women's wombs are the subject of market exchanges.

Carroll, of course, is correct that the law has been more willing to embrace some forms of assisted reproduction more quickly than others, but on a global scale surrogacy is among one of the most banned forms of assisted reproduction.<sup>15</sup> Scholars, especially feminist scholars, continue to raise serious concerns about the

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§§ 26.26.210, .230 (2005) (forbidding surrogacy contracts that pay compensation beyond covering reasonable expenses for the surrogacy); Human Fertilisation and Embryology Act 2008, c. 22, § 54(8)(a)–(d) (U.K.).

9. See, e.g., Ethics Comm. of the Am. Soc'y for Reprod. Med., *Cross-Border Reproductive Care: A Committee Opinion*, 99 FERTILITY & STERILITY (forthcoming 2013) (noting that "[c]oncern about exploitation of gamete donors and surrogates in destination countries occupies much of the critique of [cross border reproductive care]").

10. Carroll, *supra* note 1, at 1189.

11. While it may be the case that some surrogates are college educated and solidly upper-middle class, many others are less financially secure, though not poor, including many military wives who can earn more through one gestational surrogacy arrangement than their husband's annual base pay. Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK (Mar. 29, 2008, 10:55 AM), <http://www.thedailybeast.com/newsweek/2008/03/29/the-curious-lives-of-surrogates.html>.

12. See *In re Baby M*, 537 A.2d 1227, 1265–70 (N.J. 1988).

13. *Id.* at 1235.

14. *Id.* at 1266.

15. See Anna Pia Ferraretti, Guido Pennings, Luca Gianaroli, Francesca Natali & M. Cristiana Magli, *Cross-Border Reproductive Care: A Phenomenon Expressing the Controversial Aspects of Reproductive Technologies*, 20 REPROD. BIOMEDICINE ONLINE 261, 262 (2010).

ways in which surrogacy has the potential to exploit and injure women,<sup>16</sup> diminish family life,<sup>17</sup> degrade the process of procreation and women's role in it,<sup>18</sup> and devalue the worth of children.<sup>19</sup> It is against this backdrop that states seek to regulate surrogacy. On one hand, there are those who, because of a variety of circumstances, including medical or social infertility, use surrogacy as a means of bringing children into their families, often but not always with a genetic connection to one or both parents. On the other hand, states must contend with a practice that has enormous potential, frequently unrealized, to cause serious harm to individuals and, perhaps, the larger society. In this sense, states are in a significant bind when it comes to legislating surrogacy practices. That bind merits being explicitly articulated to provide context for why states appear torn between protecting the reproductive desires of some while also limiting access to a morally and ethically challenging practice. It is possible that all of this background is irrelevant to the equal protection claim that Carroll purports to answer, but it is not immediately obvious that this is true, for all of this is relevant to why it might be rational for state actors to circumscribe access to arrangements that potentially negatively impact individuals, families, and the larger society for reasons other than impermissible discrimination.

## II. *BABY M* AS USEFUL PRECEDENT

In addition to considering the broader context of surrogacy regulation, Carroll's piece includes multiple discussions of the famous *Baby M* case. She uses the case in ways that do not all fit logically together. For instance, Carroll argues in part that *Baby M* "likely did not speak to gestational surrogacy"<sup>20</sup> and that "*Baby M*'s

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16. See, e.g., DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS 127–32 (2010); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1930–31 (1987).

17. See, e.g., Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHILO. & PUB. AFF. 71, 90 (1990).

18. See, e.g., JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 139–40 (1993) (describing surrogacy and other forms of reproductive technology as a form of human trafficking); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD 160–64 (2d ed. 2000) ("I think surrogacy is an evil system: it diminishes women and discounts pregnancy as a relationship.").

19. See, e.g., Margaret Jane Radin, Address, *What, If Anything, Is Wrong with Baby Selling?*, 26 PAC. L.J. 135, 135 (1995) ("Every state has a law against exchanging consideration for obtaining a child. So if you want a contract pregnancy like surrogacy to be legal, you have to make an exception to every state law, or else you have to repeal all of that and say it's okay to exchange consideration for obtaining a child.").

20. Carroll, *supra* note 1, at 1191. Carroll's argument about the distinction between gestational surrogacy and traditional surrogacy has no bearing on marital status discrimination in access to surrogacy services, but it is worthwhile to briefly note that Carroll at one point refers to gestational surrogates as "*merely* act[ing] as a carrier for the child." *Id.* at 1190 (emphasis added). Intentional or not, this language minimizes the role of gestation and shows a significant lack of appreciation for the myriad ways in which surrogacy, gestational or traditional, disturbs traditional notions of family and kinship. The resort to genetic tie as the most basic trump in the relationship between surrogates and

lessons should, therefore, be interpreted narrowly, as limited to traditional surrogacy.”<sup>21</sup> However, as recently as 2009 in a New Jersey surrogacy case involving a same-sex couple and a gestational carrier who was also the sister of one member of the couple, a superior court judge relied heavily on *Baby M* to determine that the gestational surrogate was a legal mother to the twins that she bore.<sup>22</sup> The court wrote, “A legal analysis of the rights involved in this matter unquestionably begins with an understanding of *In the Matter of Baby M*.”<sup>23</sup> The court noted the genetic connection between the child and the surrogate mother in *Baby M* and acknowledged that the intended parents in the case before it asserted that the lack of genetic connection between the gestational carrier and the babies at issue in this case distinguished the two cases and made *Baby M* less of a useful precedent.<sup>24</sup> In rejecting that argument in the case, the court wrote that “the genetic makeup of the infant as it relates to the birth mother was only mentioned once in *Baby M*”<sup>25</sup> and that the *Baby M* court never limited its holding in the way that Carroll suggests that it should be so limited.<sup>26</sup> Further, the court determined that the public policy considerations relevant to the court’s holding in *Baby M*, including

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intended parents gives far too short shrift to the reality of pregnancy as a state of physical enmeshment between a pregnant woman and the baby that she carries to term regardless of whether her tie to that future child is genetic. It is certainly possible to imagine many circumstances in which women feel confident about severing any bond that they have had with a fetus, but to minimize the impact of the physical and emotional relationship potentially created here undermines Carroll’s argument. It is possible to show deep respect for gestation while recognizing that women may experience gestation differently depending upon their circumstances. For instance, when a woman who intends to parent a child gestates an embryo formed from an egg not her own, there is an extent to which gestation trumps genetics, often (though not always) in the social and legal realms. In the social realm, seldom would a woman be called upon to declare whether the embryo she carried and the child to whom she gave birth were formed from her own egg or from a donated or purchased egg. As a matter of simple definition, to mother means to give birth, without regard to genetic tie. See WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1474 (2002) (defining a mother as “a woman who has given birth to a child: a female parent”). In the legal realm, the law continues to struggle with how to deal with gestation separated from genetics. See, e.g., ARIZ. REV. STAT. ANN. § 25-218 (2007) (banning surrogacy contracts and declaring surrogate mothers to be the legal mothers of children they bear). But see JESSICA ARONS & ELIZABETH CHEN, FUTURE CHOICES II: AN UPDATE ON THE LEGAL, STATUTORY, AND POLICY LANDSCAPE OF ASSISTED REPRODUCTIVE TECHNOLOGIES 15 (2013) (noting the requirement of a genetic connection between parent and child, including a gestating mother, in order to confer U.S. citizenship on a child born abroad). Arguing that genetics should always trump gestation in surrogacy arrangements feels a bit like trying to have one’s cake and eat it too. And while Carroll is almost certainly correct that the line between traditional and gestational surrogacy matters in these debates, it is not clear that this line matters any more than does the line between commercial or altruistic surrogacy, or other distinctions that might be relevant to courts.

21. Carroll, *supra* note 1, at 1191.

22. See *A.G.R. v. D.R.H.*, No. FD-09-1838-07, slip op. at 5–6 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

23. *Id.* at 3.

24. *Id.* at 5.

25. *Id.* at 4.

26. See *id.*

concerns about baby selling and exploitation of women, are “far reaching and unrelated to a strict genetic connection.”<sup>27</sup> So again, as I suggested in the first section of this response, the context of lawmaking, statutory or otherwise, has meaning, and the background conditions that make surrogacy a contested practice always play a role in how surrogacy is understood. Thus, an argument that *Baby M* has no relevance to gestational surrogacy agreements is easily dismissed if not sufficiently grounded in an understanding of the public policies that motivated that decision, which need not be understood as inextricably linked to genetic tie.

After dismissing *Baby M* as a useful precedent because it was a traditional surrogacy case and most present surrogacy arrangements are gestational,<sup>28</sup> Carroll uses that case to bolster her claim of almost certain psychological trauma for the surrogate, the intended parents, and the children born through a surrogacy arrangement.<sup>29</sup> She then claims that such trauma is likely diminished in gestational surrogacy without explaining why this should be the case or why it should even matter to her analysis.<sup>30</sup> If it is true, as she seems to argue in part, that psychological trauma attends surrogacy arrangements almost all of the time and for all parties involved, that standing alone seems like a rational reason why states might seek to limit the number of such agreements that happen and the circumstances in which they occur, even if not banning them altogether.

Carroll also asserts that the *Baby M* court came to the ultimate conclusion “that surrogacy agreements must not be enforced,”<sup>31</sup> which is not exactly the court’s conclusion. The court explicitly states that it “find[s] no offense . . . where a woman voluntarily and without payment agrees to act as a ‘surrogate’ mother, provided that she is not subject to a binding agreement to surrender her child.”<sup>32</sup> In this way, *Baby M* was less clear-cut than Carroll’s narrative suggests, and, therefore, it continues to resonate for how courts, policymakers, and, for that matter, lay people think about the institution of surrogacy.

### III. THE EQUAL PROTECTION CLAIM: WHY THE STATUS OF PARENTS MATTERS TO CHILDREN

The question of the proper level of scrutiny to apply in these cases is certainly foundational. The turn away from claims based on fundamental rights analysis saves Carroll the difficulty of making the fundamental right argument for the use of assisted reproductive technology (ART), but it creates an equally thorny problem by rejecting the notion of marital status discrimination based on the rational basis test. I cannot agree with Carroll’s assertion that the standard applied to statutes that withhold access to surrogacy based on marital status “does not matter.”<sup>33</sup> In fact, as is true in so many cases, the standard of review is critical and perhaps decisive. No doubt Carroll would argue that the case for the unconstitutionality of marriage

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27. *Id.* at 5.

28. *See* Carroll, *supra* note 1, at 1190–91.

29. *Id.* at 1201.

30. *See id.* at 1203.

31. *Id.* at 1190.

32. *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988).

33. Carroll, *supra* note 1, at 1197.

based restrictions on access to surrogacy is strengthened if access to ART is a fundamental right. Similarly, the case for unconstitutionality might be strengthened by noting that such statutes work a particular violence on the procreative choices of same-sex couples, especially gay men. One might imagine that the kind of rigorous rational basis review applied in *Lawrence v. Texas*<sup>34</sup> or *Goodridge v. Department of Public Health*<sup>35</sup> would give Carroll much more fodder for her claim of unconstitutional discrimination, but Carroll does not avail herself of these avenues of argument.

Rather, to make her case that the state has no basis for distinguishing between married couples and unmarried couples or single people for purposes of access to surrogacy, Carroll articulates and quickly rejects several rationales put forth in cases related to contraception, especially *Eisenstadt v. Baird*.<sup>36</sup> She bases her rejection of these arguments on “the importance of procreative liberty in American jurisprudence.”<sup>37</sup> Of course, the equal protection claim that she imagines will not hinge on the importance of procreative liberty or the fact that the Court has in multiple cases found such liberty to be fundamental.<sup>38</sup> Instead, she puts a violation of equal protection in the category of rational basis review, which requires that the state show that “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.”<sup>39</sup> Given this standard, Carroll’s argument simply does not persuade.

Carroll may be right that rationales about protecting health or preserving morality,<sup>40</sup> as argued in cases not involving ART, might need to fall if the state made such claims for marital status discrimination in surrogacy statutes because they would be relevant to all surrogacy arrangements and not just those entered into by single or unmarried couples. But these claims seem like strawmen. They are so unrelated to the marital status discrimination and so specious that it is difficult—if not impossible—to imagine that a state would even raise them in this context as a basis for discrimination rather than a complete ban.

But another claim that Carroll rejects with ease warrants more delicate treatment than she offers it. She asserts that the state has no valid interest in using surrogacy statutes to channel procreation into marital units because surrogacy has nothing to do with sex and procreation.<sup>41</sup> This argument just does not hold up under scrutiny. She points to the work of Richard Storrow who notes, correctly, that “[m]arriage has been an important component of social systems worldwide for millennia. Its value to contemporary American Society is primarily as a socially sanctioned locus

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34. 539 U.S. 558 (2003).

35. 798 N.E.2d 941 (Mass. 2003).

36. 405 U.S. 438 (1972).

37. Carroll, *supra* note 1, at 1198.

38. *See, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

39. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

40. *See* Carroll, *supra* note 1, at 1199.

41. *See id.* at 1200.



for sexual activity, procreation, and support for children.”<sup>42</sup> While Carroll is right that surrogacy statutes cannot be used to channel sexual activity, they most certainly can play a role in channeling procreation into particular familial units. Faced with a challenge to a marital status distinction in its surrogacy laws, it is much more likely that the state would argue, with data to back it up, that children benefit from being born into families with married parents. A state with such a limitation on the use of surrogacy would claim that “[c]hildren are less likely to thrive in cohabiting households, compared to intact, married families.”<sup>43</sup> As the Institute for American Values notes in its report, *Why Marriage Matters*:

On many social, educational, and psychological outcomes, children in cohabiting households do significantly worse than children in intact, married families, and about as poorly as children living in single-parent families. And when it comes to abuse, recent federal data indicate that children in cohabiting households are markedly more likely to be physically, sexually, and emotionally abused than children in both intact, married families and single-parent families . . . . Only in the economic domain do children in cohabiting households fare consistently better than children in single-parent families.<sup>44</sup>

In fact, the benefit of marriage for children in terms of economic and emotional stability is often cited as a reason to extend marriage equality to same-sex couples. For instance, in *Goodridge v. Department of Public Health*, a seminal marriage equality case, the court wrote:

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth’s strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, . . . the fact remains that marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one’s parentage.<sup>45</sup>

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42. Richard F. Storow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 318 (2006).

43. INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES 7 (3d ed. 2011).

44. *Id.*

45. 798 N.E.2d 941, 956–57 (Mass. 2003) (citations omitted); *see also* Bill Keller, Op-Ed, *About the Children*, N.Y. TIMES, Apr. 8, 2013, at A19 (describing the benefits denied to the children of same-sex couples when their parents cannot legally marry).

A state that draws a marital status distinction in its statute, then, could persuasively argue that it is using marriage as a shorthand or proxy for other elements that the state prefers to see when people engage in a process with the end goal of creating a child for whom the state has an obligation to provide protection. The state, then, is not drawing baseless distinctions but is using data to help discern what circumstances are most likely to produce the familial stability that children need.<sup>46</sup>

Carroll also asks far too much of the state, under rational basis review, when she rejects an argument based on the needs of a child because the state cannot “ensure the child’s continued support or care by two parents” given that the parents could end up divorcing.<sup>47</sup> There is no reason to think that rational basis review requires the state to guarantee that a child will be raised in any particular configuration. The state must only have a rational basis for asserting that such unions accrue to the benefit of children and that people who are married are more likely to provide such a union than are people who are cohabitating, people whose unions are less stable, or a single individual. The burden that Carroll places on the state proves too much.

Based solely on the state’s interest in providing children with stable familial circumstances, it is much less certain than Carroll suggests that the only reason a state would draw a distinction between married and unmarried couples’ use of surrogacy is bald prejudice or societal disapproval. While it may be the case that this is what sits underneath such statutes, particularly as a historical matter, to make the claim that this is all that supports such claims in the present is weak.

Where favorable surrogacy laws exist, a consistent thread that runs through them is a commitment to clearly describe the parentage of children born through surrogacy.<sup>48</sup> That surrogacy statutes are consistent about dealing with this issue makes sense because they are at their core about protecting the most vulnerable nonparty to the contract—the child. No doubt, states have a keen interest in the children born of surrogacy as they have a keen interest in the birth of all children and the marital status distinction is, arguably, simply another way of acting on behalf of the children of surrogacy. Let me be clear that in rejecting Carroll’s claim I am not supporting a marital status requirement for the use of surrogacy. In other work, I have expressed strong support for state backing for the right to procreate and parent for marginalized families, including those formed by people who experience discrimination based on sexual orientation or gender identity.<sup>49</sup> The

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46. And, of course, marital status discrimination in access to ART is not pervasive but is not completely anomalous. *See, e.g.*, Richard F. Storrow, *Marital Status and Sexual Orientation Discrimination in Infertility Care*, 3 L.J. SOC. JUST. 99, 102 (2012).

47. Carroll, *supra* note 1, at 1204.

48. *See, e.g.*, Gestational Surrogacy Act, Pub. Act 93-0921, 2004 Ill. Laws 3256 (codified as amended at 750 ILL. COMP. STAT. ANN. 45/2.5, 45/6, 47/1–47/75 (West 2009 & Supp. 2012)).

49. *See, e.g.*, Kimberly M. Mutcherson, *Welcome to the Wild West: Protecting Access to Cross Border Fertility Care in the United States*, 22 CORNELL J.L. & PUB. POL’Y 349 (2012) (arguing in part that travel restrictions on the use of ART could have a pernicious impact on people who experience sexual orientation based discrimination in their countries of origin); Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187 (2013) (arguing in part for the importance of protecting access to assisted reproduction for marginalized families including those created by lesbians and gay men).

concern here is not that Carroll is wrong as a normative matter, but that she fails to make her case.

#### CONCLUSION

I will end where I began by asserting again that as a policy matter I strongly reject the notion that states should draw distinctions based on marital status when people seek to use surrogacy for the purpose of creating a child. Though Carroll does not offer a paradigm case of who is impacted by such a distinction, one can surmise that same-sex couples, particularly gay men, are hard hit by such laws in a world in which marriage equality is the exception instead of the rule. Therefore, in the interest of inclusion, one might reject the notion of marital status as a barrier to making babies with surrogacy, but that is not the same as suggesting that there is no rational reason to believe that marriages, no matter the sex of those involved, provide quantifiable benefits to the children born into them. As intimated in the previous section, arguments rooted in fundamental rights or even in discrimination based on sexual orientation might provide a stronger foundation for Carroll's claims, but in choosing to leave those arguments behind she makes her conclusions and the people who would benefit from those conclusions substantially vulnerable.