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Paul G. Arshagouni

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BE FRUITFUL AND MULTIPLY, BY OTHER MEANS, IF NECESSARY: THE TIME HAS COME TO RECOGNIZE AND ENFORCE GESTATIONAL SURROGACY AGREEMENTS

*Paul G. Arshagouni**

INTRODUCTION

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

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

* M.D., J.D., M.P.H. Associate Professor of Law, Michigan State University. The author would like to thank the library staff at MSU College of Law, particularly Barbara Bean, as well as others who have been so very helpful, including Steve Silva and Brent Domann. Most especially a thank you to Krisheena LaBranche, Cindy Hoang, and Beth Arshagouni, without whom there would be no article.

1. Technically, Zeus was not acting as a surrogate. Metis continued to carry and give birth to Athena while inside of Zeus' head. Nevertheless, Athena did, according to myth, spring forth from within Zeus. See Nancy Conner, *The Birth of Athena*, NETPLACES, <http://www.netplaces.com/classical-mythology/athena-the-peaceful-warrior/the-birth-of-athena.htm> (last visited Aug. 3, 2011).

2. See Nancy Conner, *The Twice-Born God*, NETPLACES, <http://www.netplaces.com/classical-mythology/partying-with-dionysus/the-twice-born-god.htm> (last visited Aug. 3, 2011).

3. See *Genesis* 16.

nosis, intracytoplasmic sperm injection, and surrogacy.⁴ There are others as well, and science may well bring even more possibilities to fertility clinics in the years to come. Each of these technologies brings its own discussion regarding the moral, ethical, and legal consequences and complications. This Article discusses the legal status of gestational surrogacy in the United States.

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

Part II of this Article briefly discusses the technical process of surrogacy.⁵ Part III discusses the various approaches states and legal organizations have taken or recommended regarding surrogacy.⁶ It also discusses the positive and negative aspects of each approach. Part IV discusses the major arguments in opposition to the enforcement of gestational surrogacy agreements and why those arguments fall short.⁷ Part V argues that the current patchwork of laws creates more harm than it resolves.⁸ Part VI concludes the Article and argues that the time has come to take a more comprehensive approach that endorses, but regulates, the use of gestational surrogacy agreements.⁹

II. WHAT EXACTLY IS SURROGACY?

Surrogacy is the use of one woman's gestational capacity to assist in the development of a child intended for someone else to parent.¹⁰ As

4. See generally AM. SOC'Y FOR REPROD. MED. (ASRM), <http://www.asrm.org> (last visited Aug. 22, 2011); SOC'Y FOR ASSISTED REPROD. TECHS. (SART), <http://www.sart.org> (last visited Aug. 22, 2011).

5. See *infra* notes 10–15 and accompanying text.

6. See *infra* notes 16–140 and accompanying text.

7. See *infra* notes 141–249 and accompanying text.

8. See *infra* notes 250–57 and accompanying text.

9. See *infra* note 258 and accompanying text.

10. See ASRM, THIRD PARTY REPRODUCTION (SPERM, EGG, AND EMBRYO DONATION AND SURROGACY): A GUIDE FOR PATIENTS 13 (2006), available at http://www.reproductivefacts.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/thirdparty.pdf.

part of this arrangement, the woman carrying the child agrees to relinquish any parental claims that she may have regarding the resulting child or children. The embryo is considered the child of the intended parents.¹¹ As learned in high school biology (or likely much earlier), there are a number of necessary steps that precede the birth of a child. One key step involves the joining of the male's sperm and the female's egg. There is, of course, the most traditional method for encouraging a sperm and an egg to fuse. This method, however, is unsuccessful for some individuals who wish to have a child. In such situations, the fusion of egg and sperm may be encouraged outside of a woman's body through IVF. Physicians or medical technologists encourage the gametes (the eggs and sperm) from the intended parents or donors to join, forming a zygote. The zygote is then allowed to divide for three to five days, forming into a small ball of cells called the blastocyst. At this stage, the blastocyst is transferred to the surrogate's uterus in hopes it will implant into the surrogate's uterine wall and pregnancy will ensue.¹²

Surrogacy is divided into two categories: traditional and gestational. Traditional surrogacy is like the situation from *Genesis*, where the surrogate is also the genetic progenitor of the resulting baby. Gestational surrogacy follows closer to the Zeus and Dionysus mythological situation, where the carrier of the child does not also provide the egg.¹³ In short, traditional surrogacy is where the woman carrying the child is also a genetic progenitor of the child, and gestational surrogacy is where the woman carrying the child is not a genetic progenitor of the child.

Intended parents choose their method of having children for varying reasons. Until the advent of modern medical practices, most particularly IVF, there were few choices available. Individuals wanting to be parents had but two viable options: they could use the traditional method or they could legally adopt a parentless child. Traditional surrogacy was available prior to IVF; however, as a traditional surrogate could only become pregnant through sexual intercourse or artificial

11. The terms "intended parent" or "intended parents" are used throughout this Article to mean the individual or individuals who intend to become parents through the use of gestational surrogacy. It should be made clear, however, that once the embryo is transferred to the gestational surrogate and implants into her uterus, the "intended parents" are the actual parents of that embryo. See *infra* notes 182–89 and accompanying text. In this Article, embryo will be used to encompass all stages of fetal development, including embryo, fetus, and resulting child.

12. For a more detailed description of the IVF and embryo transfer process, see *A Patient's Guide to Assisted Reproductive Technology*, SART, <http://www.sart.org/detail.aspx?id=4020> (last visited July 27, 2011).

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

insemination,¹⁴ this was not a common option. Today, if the traditional approach does not result in a child, intended parents may use a variety of fertility-enhancing drugs, utilize IVF and embryo transfer, employ the services of a surrogate, or adopt. If someone wishes to have a child genetically linked to herself and is unable to carry the child to term, the use of a surrogate is the only available option.

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

Although surrogacy in some form has been around for millennia, it has only recently caused the legal quagmire we find today. The legal landscape has not yet caught up with the developing technologies that allow for ever-greater reproductive options. Gestational surrogacy was only possible following the development of IVF less than forty years ago. While far from a common method of producing children, this method is being used more frequently.¹⁵

III. LEGAL RESPONSES TO SURROGACY—STRENGTHS AND SHORTCOMINGS

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

In many contractual arrangements, parties find themselves at odds over how and whether they want to go forward with the agreement as written. All states have laws and regulations governing how such disputes may be resolved.¹⁶ Surrogacy agreements, like all other agreements, are not immune to party discontent. In the early days of modern surrogacy, states had few, if any, laws specifically governing such agreements. So when disputes developed between parties, the courts had little statutory or regulatory guidance. Two early cases, *In re Baby M*¹⁷ from New Jersey in 1988 and *Johnson v. Calvert*¹⁸ from California in 1993, set the tone for future discussion.

14. Artificial insemination involves introducing sperm into the vagina or uterus without sexual intercourse. This is done relatively easily with some form of syringe.

15. Accurate statistics on gestational surrogacy are not readily available. However, both the Centers for Disease Control and SART collect data on IVF success rates. From that data we see that the rate of gestational surrogacy nearly doubled between 2004 and 2008. MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 4 (2010), available at <http://www.councilforresponsiblegenetics.org/pageDocuments/KA EVEJ0A1M.pdf>.

16. See, e.g., U.C.C. § 2-209 (2011) (modification, decision, and waiver).

17. *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (declaring surrogacy contracts unenforceable due to public policy concerns).

These two cases, while factually distinguishable, took very different approaches when determining whether or not to enforce surrogacy agreements. The key factual distinction is that Baby M was born to a traditional surrogate,¹⁹ while the child in *Johnson v. Calvert* was born to a gestational surrogate.²⁰ This distinction alone could explain their differing results; however, a closer look at the opinions provides a more fundamental explanation.

In both cases, the courts appear to recognize that contracts carry a presumption of validity. Otherwise valid contracts should be enforced unless they violate the law or some fundamental public policy.²¹ In *Baby M*, the New Jersey Supreme Court determined that it was against public policy for natural parents to contract “in advance of birth which one is to have custody of the child.”²² The court also stated “that a contractual agreement to abandon one’s parental rights, or not to contest a termination action, will not be enforced.”²³ The court went on to utterly (and properly) reject contracts that involve baby-selling, stating that “[t]here are, in a civilized society, some things that money cannot buy.”²⁴ These conclusions, however, rest on the presumption that the traditional surrogate for *Baby M* was the actual and lawful mother of the child. Given that presumption, the decision is not unreasonable.²⁵

The New Jersey Supreme Court viewed the surrogacy agreement as an improper mechanism for circumventing New Jersey adoption stat-

18. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993) (holding that gestational surrogacy contracts are not in violation of public policy and therefore enforceable).

19. See *Baby M*, 537 A.2d at 1235.

20. See *Johnson*, 851 P.2d at 778.

21. See *Balt. & Ohio Sw. Ry. v. Voigt*, 176 U.S. 498, 505 (1900) (holding that it is the role of the courts to enforce otherwise valid contracts “unless it clearly appear that they contravene public right or the public welfare”).

22. *Baby M*, 537 A.2d at 1246.

23. *Id.* at 1243.

24. *Id.* at 1249.

25. There is, however, a reasonable argument that the *Baby M* decision was nonetheless misguided. If the traditional surrogate is considered to be fulfilling two separate and distinct roles, that of egg donor and that of gestational carrier, she would not be the lawful mother of the child. Many states expressly sever any parental claim by, or parental obligation for, sperm donors. See, e.g., CAL. FAM. CODE § 7613(b) (West 2004); N.H. REV. STAT. ANN. § 168-B:11 (LexisNexis 1955 & repl. vol. 2010). A similar rule should be in effect for egg donors. Once the woman donates her egg, she may no longer assert a parental claim to the child. The same is true for sperm donors. This Article argues that gestational carriers similarly are not the child’s parents and so have no parental rights or obligations. If these two services happen to be provided by the same woman, does that convert a legal nonparent into a legal parent? This Article does not address that argument, focusing only on the validity and enforceability of gestational surrogacy. Nevertheless, the distinction between traditional and gestational surrogacy is profound.

utes.²⁶ Conversely, the California Supreme Court in *Johnson v. Calvert* rejected any analogy to, or implication of, the adoption statutes, stating that “[g]estational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes.”²⁷ As the agreement in question did not determine who the lawful parent was, the adoption laws were not implicated. The court further determined that any compensation paid to the gestational surrogate was “meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up ‘parental’ rights to the child.”²⁸ The court stated explicitly that “[the gestational surrogate’s] argument depends on a prior determination that she is indeed the child’s mother.”²⁹ Once the court held that the gestational surrogate was not the lawful mother of the child, her claim collapsed. In short, the California Supreme Court recognized this gestational surrogacy contract as a personal services contract and not a contract over parentage.³⁰

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

The long-term effects of surrogacy contracts are not known, but feared—the impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct.³¹

However, after reviewing the literature on these concerns, the court in *Baby M* acknowledged that “given the newness of surrogacy, there is little information.”³² This reveals a fundamental difference in approach between the courts in *Baby M* and *Johnson*. The court in *Johnson* rejected the assertion that gestational surrogacy exploited poor women because “there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.”³³ It similarly rejected the con-

26. See *Baby M*, 537 A.2d at 1240.

27. *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993).

28. *Id.*

29. *Id.* at 786.

30. The *Johnson* court also utterly rejected any claim that the gestational surrogacy agreement between Anna Johnson, the gestational surrogate, and Mark and Crispina Calvert, the intended parents, was the equivalent of involuntary servitude. *Id.* at 784.

31. *Baby M*, 537 A.2d at 1250.

32. *Id.*

33. *Johnson*, 851 P.2d at 785.

tention that surrogacy commodifies children because “no evidence [was] offered to support it.”³⁴

The New Jersey Supreme Court and opponents of surrogacy point to a parade of horrors and argue that we cannot risk their occurrence. The California Supreme Court and surrogacy proponents argue that until there is evidence that such agreements actually result in the parade of horrors, thus proving that the agreements violate public policy, we should not invalidate otherwise enforceable agreements. It is a simple burden of proof argument. Opponents effectively say that parties must prove that surrogacy does not lead to the horrible outcomes before courts should allow it. Proponents say that courts must have evidence that surrogacy will likely result in horrible outcomes before courts should ban it.³⁵

Reason suggests that the greater the potential harm, the less direct evidence we should demand. Exploitation of women and the sale of babies are certainly substantial harms, so perhaps we ought not demand substantial evidence that they will occur if we allow the enforceability of gestational surrogacy contracts. However, we should demand at least some reasonable evidence. More than twenty years after the availability of gestational surrogacy, we have substantial positive evidence that, even with minimal regulation, the alleged harms have not come to pass.³⁶ The parade of horrors that concerned the *Baby M* court does not provide a justification for invalidating gestational surrogacy contracts.

B. *The States' Mixed Responses*

State legislatures' reactions to surrogacy agreements have varied widely, ranging from full acceptance and enforcement of all gestational surrogacy agreements to a complete rejection of any surrogacy arrangements enforced through criminal penalties. Some states will enforce some surrogacy contracts, but not others; some states limit the availability of surrogacy agreements to only certain qualified parties (such as married couples or women incapable of carrying a fetus to term); some states require certain provisions or prerequisites for the enforcement of surrogacy arrangements; some states combine these approaches. The largest group of states, however, has said virtually nothing directly pertaining to surrogacy agreements.

34. *Id.*

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

36. See discussion *infra* Part IV.

Arizona and Indiana invalidate all surrogacy agreements by statute.³⁷ In addition to declaring surrogacy agreements void, some jurisdictions also impose civil or criminal penalties. The District of Columbia imposes a civil penalty of up to \$10,000 and a criminal penalty of up to one year imprisonment on anyone who facilitates a surrogacy contract.³⁸ New York imposes a penalty of up to \$500 on anyone entering into a surrogacy agreement and a civil penalty of up to \$10,000 for facilitating a surrogacy agreement in exchange for compensation.³⁹ Further, anyone in New York who assists in arranging a surrogacy contract after already being subject to a civil penalty is guilty of a felony.⁴⁰ Michigan has the harshest penalties for entering into or facilitating a surrogacy contract. It imposes a fine of up to \$10,000 and up to one year imprisonment for entering into a surrogacy contract and a fine of up to \$50,000 and up to five years imprisonment for anyone compensated for facilitating a surrogacy contract.⁴¹ Other states refuse to enforce surrogacy agreements through judicial action. The most notable example is New Jersey, where the New Jersey Supreme Court refused to enforce traditional surrogacy agreements in the seminal case of *In re Baby M*.⁴²

A number of states allow enforcement of only some surrogacy agreements by statute. Florida, Nevada, New Hampshire, Tennessee, Texas, Utah, and Virginia allow for enforcement of gestational surrogacy agreements if the intended parents are married.⁴³ Several states, including Florida, New Hampshire, Texas, Utah, and Virginia, require that the intended parents have a medical need for surrogacy.⁴⁴ This is generally, although not always, defined to mean that the intended mother is unable to safely carry a child to term. Some states, including Illinois, New Hampshire, Utah, and Virginia, require that at least

37. See ARIZ. REV. STAT. ANN. § 25-218 (2007); IND. CODE §§ 31-20-1-1 to -20-1-3 (repl. vol. 2008).

38. D.C. CODE § 16-402(b) (2001).

39. N.Y. DOM. REL. LAW § 123(2)(a)-(b) (McKinney 2010).

40. *Id.* § 123(2)(b).

41. MICH. COMP. LAWS ANN. § 722.859 (West 2002). If the surrogate involved is an unemancipated minor or has a mental or developmental disability, Michigan will impose a fine of up to \$50,000, imprisonment for not more than five years, or both on anyone else entering into the agreement (except the surrogate herself) as well as the facilitators. *Id.* § 722.857(2).

42. See *supra* notes 16-36 and accompanying text.

43. FLA. STAT. § 742.15(1) (2011); NEV. REV. STAT. § 126.045(1) (2009); N.H. REV. STAT. ANN. § 168-B:1 (LexisNexis 1955 & repl. vol. 2010); TENN. CODE ANN. § 36-1-102(48)(A) (repl. vol. 2010); TEX. FAM. CODE ANN. § 160.754(b) (West 2008); UTAH CODE ANN. § 78B-15-801(3) (LexisNexis 2008); VA. CODE ANN. § 20-156 (1950 & repl. vol. 2008).

44. FLA. STAT. § 742.15(2); N.H. REV. STAT. ANN. § 168-B:17(II); TEX. FAM. CODE ANN. § 160.756(b)(2); UTAH CODE ANN. § 78B-15-803(2)(b); VA. CODE ANN. § 20-160(8).

one of the intended parents provide gametes for the creation of the embryo.⁴⁵

Some states, including New Hampshire, allow for traditional as well as gestational surrogacy.⁴⁶ Florida also allows for traditional surrogacy through a preplanned adoption agreement.⁴⁷ However, the preplanned adoption agreement is subject to a right of the traditional surrogate to rescind the agreement for forty-eight hours following the child's birth.⁴⁸ Florida bans any compensation in excess of reasonable living, medical, legal, and mental health expenses,⁴⁹ as do Nebraska, Nevada, New Hampshire, New Mexico, and Washington.⁵⁰ A few states prohibit compensation for any individual or entity that facilitates a surrogacy agreement.⁵¹

A number of states require judicial approval of any surrogacy agreement, including New Hampshire, Texas, Utah, and Virginia.⁵² These same states also require an evaluation of the intended parents mirror that required in adoption proceedings.⁵³ New Hampshire specifically requires an assessment of "[t]he ability and disposition of the person being evaluated to give a child love, affection and guidance."⁵⁴

California has the most permissive approach toward surrogacy services, having decided in the 1993 case of *Johnson v. Calvert* that gestational surrogacy agreements do not conflict with the state's public policy.⁵⁵ Subsequent California cases have reinforced the *Johnson de-*

45. 750 ILL. COMP. STAT. 47/20(b)(1) (2011); N.H. REV. STAT. ANN. § 168-B:17(III); UTAH CODE ANN. § 78B-15-801(5); VA. CODE ANN. § 20-160(9).

46. See, e.g., N.H. REV. STAT. ANN. § 168-B:17(IV). The New Hampshire law appears to allow third-party donation of sperm, as only one of the two intended parents must contribute a gamete. *Id.* § 168-B:17(III). However, either the intended mother or the surrogate must provide the egg. Thus, anonymous sperm donors are possible, but anonymous egg donors are not. This poses an interesting, and apparently unresolved, equal protection question.

47. See FLA. STAT. § 63.213(1).

48. *Id.* § 63.213(2)(a).

49. *Id.* §§ 63.213(f), 742.15(4).

50. See NEB. REV. STAT. § 25-21,200 (2008); NEV. REV. STAT. § 126.045(3) (2009); N.H. REV. STAT. ANN. § 168-B:25(V); N.M. STAT. ANN. § 32A-5-34 (1978); WASH. REV. CODE § 26.26.230 (2010).

51. N.H. REV. STAT. ANN. § 168-B:16(IV); VA. CODE ANN. § 20-165 (1950 & repl. vol. 2008) (imposing a penalty equal to triple the compensation charged); WASH. REV. CODE § 26.26.230.

52. See N.H. REV. STAT. ANN. § 168-B:16(I)(b); TEX. FAM. CODE ANN. § 160.756 (West 2008); UTAH CODE ANN. § 78B-15-801(4) (LexisNexis 2008); VA. CODE ANN. § 20-159(B).

53. N.H. REV. STAT. ANN. § 168-B:18; TEX. FAM. CODE ANN. § 160.756(b)(3); UTAH CODE ANN. § 78B-15-803(2)(c); VA. CODE ANN. § 20-160(3).

54. N.H. REV. STAT. ANN. § 168-B:18(II)(a).

55. See *supra* note 18 and accompanying text.

cision.⁵⁶ To date, the California legislature has not seen fit to involve itself with the question of surrogacy.

Roughly half of the states have no statutes or case law specifically addressing surrogacy contracts. As such, it is entirely unclear how enforceable such contracts would be in those states. In two of those states, there are attorney general opinions that suggest the unenforceability of such contracts.⁵⁷ A few other states have statutes or case law that suggest the alternative outcome. Iowa's statute prohibiting human trafficking (including baby-selling) explicitly excludes surrogacy arrangements from the definition of human trafficking.⁵⁸ West Virginia explicitly excludes fees and expenses paid to a surrogate mother from the prohibition on the purchase or sale of a child.⁵⁹ Alabama explicitly excludes surrogacy from the prohibition on payment made for placing a child up for adoption.⁶⁰ These provisions may implicitly condone compensated surrogacy agreements. To date, however, there are no clarifying statutes or cases.

In short, states are all over the proverbial map on surrogacy regulation. This utter lack of consistency can pose a significant problem for those wishing to engage the services of a surrogate. Few intended parents with sufficient means are likely prevented from traveling to a different jurisdiction to utilize the services of a gestational surrogate if they truly wish to do so. Such travel could, however, add substantially to the transaction and legal costs. The lack of consistency artificially limits the supply of surrogacy agencies, medical specialists, and gestational surrogates, thereby further increasing costs. More significantly for the intended parents (and the resulting child), the radically disparate and unclear legal status from state to state raises the potential for not knowing if the state one travels to, or through, will even recognize the parent-child relationship. A more uniform state-by-state or federal approach would eliminate the confusion, ambiguity, and uncertainty that currently exist in the provision of gestational surrogacy services.

56. See, e.g., *K.M. v. E.G.*, 117 P.3d 673, 675 (Cal. 2005) (holding that each parent in a lesbian couple could qualify as the "mother" under the *Johnson* intention standard); *Kristine H. v. Lisa R.*, 117 P.3d 690, 692 (Cal. 2005) (holding that parties who sought a judicial declaration as to parentage may not later challenge that order); *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (reinforcing the determination of lawful parentage when "the medical procedure [is] initiated and consented to by the intended parents").

57. See, e.g., 85 Op. Att'y Gen. 348 (Md. 2000) (considering surrogacy agreements invalid because they are too similar to adoption for pay); Op. Att'y Gen. No. 81-18 (Ky. 1981) (suggesting that surrogacy agreements may violate the state's ban on buying and selling children).

58. IOWA CODE § 710.11 (2011).

59. W. VA. CODE ANN. § 48-22-803(e)(3) (LexisNexis repl. vol. 2009).

60. See ALA. CODE § 26-10A-34(c) (1975 & repl. vol. 2009).

C. *Illinois's Statutory Approach: The Gestational Surrogacy Act*

In 2004, Illinois passed its Gestational Surrogacy Act (GSA), one of the more comprehensive statutory regimes allowing for the enforceability of gestational surrogacy agreements.⁶¹ The Illinois statute demonstrates a good-faith attempt to meet many of the concerns regarding gestational surrogacy with respect to commodification and exploitation. It includes requirements for the surrogate's age,⁶² parity,⁶³ and legal representation.⁶⁴ In addition, it requires that the surrogate undergo complete medical and psychological evaluations.⁶⁵ These requirements seem to be reasonable safeguards to minimize the risk of exploiting unsuspecting women while not preventing competent, capable, and willing women from offering gestational surrogacy services.

The GSA clearly envisions both married and unmarried couples as intended parents. It also appears to allow single individuals to be intended parents.⁶⁶ This is a more expansive view than some other jurisdictions that allow surrogacy only for married couples, and Illinois's legislation implicitly acknowledges that the right to procreate is not—and should not be—a function of marital status.

The statute does have some limitations. It requires that the intended parents obtain a physician's affidavit verifying a "medical need for the gestational surrogacy."⁶⁷ However, it is unclear what is meant by "medical need for gestational surrogacy," as the GSA does not define "medical need." A plain reading suggests that the intended parents are physiologically incapable of bringing a child to term. This may be easy to determine if one (or both) of the intended parents is female.⁶⁸ The statute is unclear regarding a single man (or a gay male couple). He would certainly be physiologically incapable of carrying a child to term, although he may or may not be physiologically infertile.

61. See Gestational Surrogacy Act, 750 ILL. COMP. STAT. 47/1–47/75 (2010).

62. *Id.* § 47/20(a)(1) (requiring surrogates to be at least twenty-one years of age).

63. *Id.* § 47/20(a)(2) (requiring surrogates to have had at least one child prior to the surrogacy).

64. *Id.* § 47/20(a)(5) (requiring that the surrogate have independent legal advice regarding the surrogacy contract).

65. See *id.* §§ 47/20(a)(3)–(4), 47/60 (requiring surrogates to undergo medical and mental health evaluations in accordance with the recommendations of the ASRM and the American College of Obstetricians and Gynecologists).

66. The statute defines "intended parent" as "a person or persons who enters into a gestational surrogacy contract" and goes on to add that "[i]n the case of a married couple, any reference to an intended parent shall include both husband and wife for all purposes of this Act." *Id.* § 47/10.

67. 750 ILL. COMP. STAT. 47/20(b)(2).

68. Or perhaps not—does medical need mean physiological need, or might it include psychological or social impediments as well?

If medical need were defined as biological infertility, no man capable of producing viable sperm would qualify on his own.

The GSA requires that at least one intended parent provide gametes.⁶⁹ The interplay of these two requirements, medical need and provision of gametes, could effectively prevent some classes of individuals from utilizing gestational surrogacy. A single woman who has had a radical hysterectomy⁷⁰ or lacks both a uterus and ovaries for some other reason would be prevented from having a child through gestational surrogacy. As would all single men. A single man who is unable to produce viable sperm could not provide the gametes, and a single man who could provide sperm may not have a physiological medical need.

The GSA poses a problem for a couple (married or not) when both partners cannot produce viable gametes. The desire to have at least one of the intended parents contribute gametes would seem to be a way to guard against commodifying the child and to avoid circumvention of the state's adoption laws.⁷¹ When neither of the intended parents provides gametes, there is less justification for choosing this route to parenthood over traditional adoption. But that is not to say that there are no justifications. Intended parents who cannot provide their own gametes may still want to have a greater degree of control over the course of the pregnancy than they could with adoption. The GSA expressly states that a gestational surrogacy agreement is valid even if it includes provisions that require the gestational surrogate to undergo medical exams and fetal monitoring, or refrain from alcohol, smoking, nonprescription drugs, and other activities.⁷² The gestational carrier may be willing to comply with the intended parents' requests regarding diet or activities. No such involvement is available in the adoption context. Intended parents who can provide neither sperm nor egg may wish to select gamete donors that have more similar genetic histories to themselves, including close relatives, than may be possible with adoption. How common these situations are is unknown. Most likely, the intended parents will want to use their own gametes when-

69. 750 ILL. COMP. STAT. 47/20(b)(1).

70. A radical hysterectomy is a medical procedure in which both the uterus and the ovaries are removed. *Radical Hysterectomy*, NAT'L CANCER INST., <http://www.cancer.gov/dictionary?cdrid=322879> (last visited Feb. 25, 2012).

71. If a couple or an individual wished for a child to which it has no genetic connection, then adoption may be the more reasonable route to take. Choosing surrogacy instead may otherwise appear to be an attempt to avoid the adoption process.

72. 750 ILL. COMP. STAT. 47/20(d).

ever possible. Nevertheless, we ought not foreclose the option of donor gametes without good justification.⁷³

The apparent concern for gestational surrogates in the GSA goes beyond protecting their physical and psychological well-being. Requirements that the parties undergo physical and psychological evaluations prior to the agreement would sufficiently do that. There is also a provision intended to protect the gestational surrogate's financial interest in the gestational surrogacy agreement. If she is to receive any compensation for her services, the compensation must be placed in escrow prior to commencing any medical procedures.⁷⁴ There can only be one reason for this: to protect the gestational surrogate from a potential breach by insolvent intended parents. In essence, it ensures specific performance by one party while disallowing it on the other.⁷⁵ While specific performance by the gestational surrogate should be disallowed,⁷⁶ a requirement that the intended parents fully perform at the outset of the agreement is similarly inappropriate. It may well be that prospective gestational surrogates demand such assurances that the intended parents can and will provide the requisite compensation. Intended parents may be quite willing to transfer full compensation to an escrow agent to reassure potential gestational surrogates, but such contractual provisions should be left to the parties to negotiate. Mandating their performance through law displays an unnecessary level of paternalism by the legislature and reveals an ongoing presumption that gestational surrogates are incapable of protecting themselves from exploitation by unscrupulous intended parents. Until there is evidence of frequent refusals to pay the required compensation, this is a solution seeking a problem.

Nonetheless, despite the limitations of the GSA, Illinois took a significant step forward in advancing the availability and enforceability of surrogacy agreements. With some modifications, it can serve as a good model for future legislation.⁷⁷

73. For a discussion of why surrogacy is not the equivalent of adoption, see Melanie B. Jacobs, *Procreation Through ART: Why the Adoption Process Should Not Apply*, 35 CAP. U. L. REV. 399 (2006).

74. 750 ILL. COMP. STAT. 47/25(b)(4).

75. *See id.* § 47/50(b) (prohibiting specific performance as a remedy for a breach by the gestational surrogate).

76. *See* RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (1981) ("A promise to render personal service will not be specifically enforced.").

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

D. The Problem with California

As previously stated, California has a relatively permissive legal regime with respect to gestational surrogacy. In *Johnson v. Calvert*, the California Supreme Court determined that in the absence of any evidence of supposed harms, gestational surrogacy does not violate public policy⁷⁸ and adopted intentionality as the determinant of lawful parentage.⁷⁹ Subsequent courts have endorsed and expanded on the ability to engage in gestational surrogacy contracts in California.⁸⁰ In the nineteen years since *Johnson*, a common practice for gestational surrogacy agreements in California has developed. However, California's legal environment is entirely the result of favorable court decisions without any statutory or administrative regulation or oversight. The lack of clear regulation and oversight may lead some to seek improper shortcuts resulting in the very problems surrogacy opponents fear. Sadly, this appears recently to have happened.

In August 2011, Theresa Erickson, a San Diego attorney specializing in reproductive law, pleaded guilty to fraud charges regarding improper gestational surrogacy arrangements.⁸¹ Under normal procedures intended parents contract with gestational surrogates well before any embryos are transferred into the surrogate. Erickson arranged for surrogates to travel to Ukraine for the transfer of donated embryos before any intended parents were identified.⁸² The surrogates then returned to California to complete the pregnancy and give birth.⁸³ After the twelfth week of pregnancy, when the highest risk for miscarriage had passed, Erickson would locate couples seeking surrogacy services.⁸⁴ She would tell the prospective parents that the original intended parents had backed out of a (nonexistent) surrogacy contract at the last minute.⁸⁵ Those couples, believing that they would be parents much sooner than they had previously thought, happily entered into surrogacy arrangements they believed were legal and proper.

78. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

79. See *id.* at 782 (“[S]he who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.”).

80. See *supra* note 56 and accompanying text.

81. Alan Zarembo, *Women Deceived in Surrogacy Scam*, L.A. TIMES, Aug. 14, 2011, at A13; Julie Watson, *Surrogacy Scandal Raises Question About Regulation*, ABCNEWS.COM (Aug. 2011), <http://abcnews.go.com/US/wireStory?id=14284989>.

82. Zarembo, *supra* note 81.

83. *Id.*

84. *Id.*

85. Watson, *supra* note 81.

Erickson's actions are perilously close to baby-selling. Opponents—as well as supporters—of gestational surrogacy should rightly decry what was done. However, her actions do not directly implicate harms from enforcing gestational surrogacy agreements; the very problem was the lack of a gestational surrogacy agreement. Nonetheless, opponents may argue that allowing such agreements to stand creates an environment in which unscrupulous individuals may take advantage of the uncertain rules. The solution to individuals taking improper advantage of uncertain rules regarding a given activity is not to ban the activity; it is to bring certainty to those rules.⁸⁶

When reasonable procedures are followed, gestational surrogacy does not lead to any of the harms opponents trumpet.⁸⁷ Erickson, it seems, may well have taken the opportunity presented by California's lack of clear rules for her advantage. This sad situation highlights the need for legislative action clarifying the rules regarding gestational surrogacy. Had a clear legal regime been in place, the intended parents found post-implantation would know that the prior intended parents could not renounce their parental obligations any more than could soon-to-be parents expecting a child in the more traditional fashion. This would give all parties, including potential surrogates, intended parents, medical professionals, legal counsel, and the courts, a far better resource for determining what is acceptable, lawful, and enforceable procedure for gestational surrogacy and what is not.

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

E. The Model Acts

1. Uniform Parentage Act

In 2000, the Uniform Law Commission revised (and in 2002 amended) its Uniform Parentage Act (UPA).⁸⁸ To date the UPA has been adopted in part by several states, although few have elected to include Article 8, the section that addresses gestational agreements.

86. Isolated incidents of unlawful baby-selling by individuals who fraudulently circumvent standard surrogacy procedures no more lend themselves to complete prohibitions than the existence of fraudulent home mortgages would to a ban on borrowing money to buy a house.

87. See *infra* notes 141–203 and accompanying text.

88. UNIF. PARENTAGE ACT (amended 2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf>.

UPA Article 8 allows for enforceable gestational surrogacy agreements. That alone makes it a substantial improvement over the current situation in many states. However, the UPA still contains significant defects.

The UPA begins with faulty nomenclature. It identifies the gestational surrogate as the “gestational mother.”⁸⁹ The use of the term “gestational mother” throughout Article 8 is inappropriate, as it fosters the false presumption that the gestational carrier is actually the child’s mother.⁹⁰ She is not. Rather, she is the woman who carries another couple’s child to term. Inappropriately designating her as “mother” leads to correlative defects in the UPA. The UPA should instead use the term “gestational carrier.”

The UPA then requires that “[t]he man and the woman who are the intended parents must both be parties to the gestational agreement.”⁹¹ This also creates an inappropriate presumption, as it would seem to limit gestational surrogacy contracts only to opposite-sex couples. This poses a problem for same-sex couples and for single individuals who wish to utilize surrogacy as a means of procreation. The “man and the woman” need not be married, but the UPA clearly envisions only heterosexual couples.

Under the UPA, gestational agreements are only valid if they are first submitted to a court for approval.⁹² There is no need for this, and it creates an unnecessary and burdensome step. Having a standardized surrogacy agreement that is modifiable to meet individual needs offers some advantages, but there is simply no need for judicial oversight prior to enforceability.⁹³ Court approval is not required for other contracts dealing with what are essentially medical procedures and personal services. It is an unnecessary burden here as well.

One potential, albeit misguided, justification for requiring judicial approval of gestational surrogacy agreements is found in § 803 of the UPA. Here one finds a particularly troubling aspect of the UPA. Before a court may approve a gestational surrogacy agreement, the relevant child welfare agency must have “[conducted] a home study of the intended parents,” ensuring that they “meet the standards of suita-

89. See, e.g., *id.* § 801(a).

90. With traditional surrogacy, this position may have some legitimacy; with gestational surrogacy, it does not.

91. UNIF. PARENTAGE ACT § 801(b) (amended 2002).

92. See *id.* § 801(c).

93. Enacting regulations mandating certain provisions to be in (or excluded from) a surrogacy agreement may be appropriate, but requiring both specific provisions and judicial oversight is unnecessary.

bility applicable to adoptive parents.”⁹⁴ It ties directly back to the false presumption found in the terminology of “gestational mother.” This requirement raises the implication that gestational surrogacy is the equivalent of adoption.⁹⁵ If gestational surrogacy were the same as adoption, then prior court approval, with a home visit, may be justified. However, the analogy is fundamentally flawed.

In adoption, the concern is whether the state should transfer parental rights and obligations from one person (or the state) to a particular individual or pair of individuals. The state has an interest in making sure it has not made a poor choice and placed a child in harm’s way. This is not what is happening in gestational surrogacy. The intended parents already have the rights and obligations as parents of the resulting child irrespective of the gestational agreement. This is true even under the UPA itself, which provides that the intended parents may be subject to child support even without an approved agreement.⁹⁶

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

UPA § 806 allows for termination of the gestational agreement by any party to the agreement, provided that such termination occurs prior to the gestational carrier becoming pregnant pursuant to the agreement.⁹⁷ This provision is not problematic. However, § 806 goes on to relieve the gestational carrier and her husband of any liability to the intended parents for the termination.⁹⁸ Immunity from liability is not similarly granted to the intended parents. There is little justifica-

94. UNIF. PARENTAGE ACT § 803(b)(2) (amended 2002). This provision may be waived by the court. *Id.*

95. The official comment to § 803 makes this analogy explicit. *See id.* cmt., at 73.

96. *Id.* § 809(c) (imposing on the intended parents the obligations of child support irrespective of the gestational surrogacy agreement’s validity).

97. *Id.* § 806(a).

98. *Id.* § 806(d).

tion offered for this asymmetry. If the surrogate or her husband may hold the intended parents liable for any uncompensated loss or harms resulting from a breach, so too should the intended parents be able to hold the gestational carrier (or her husband) liable for loss or harms resulting from a breach. The only justification for this asymmetry is a presumption that there is such an imbalance in bargaining power between the gestational carrier (and her husband) and the intended parents that we should allow the presumptively weaker party to disavow an otherwise valid agreement—one already approved and validated by a court—with no liability. This presumption has no merit.⁹⁹

UPA § 807 allows the intended parents to petition the court for an order confirming that they are the parents of the child and ordering that the child be surrendered to the intended parents.¹⁰⁰ However, the intended parents may not file the petition until after the child is born.¹⁰¹ There is no reason to disallow the intended parents to petition the court for a prebirth order. Allowing the parties to clarify the parental status of the child while it is still in utero is far more convenient than waiting until the frenzied days following the child's birth.

UPA § 802 contains a residency provision requiring that at least one of the parties be a resident of the state for ninety days before petitioning a court to approve the surrogacy agreement.¹⁰² This provision is expressly intended to prevent forum shopping.¹⁰³ It is uncertain why a state, accepting of gestational surrogacy, should want to prevent non-residents from accessing such services. There appear to be three plausible reasons: (1) a desire not to have its courts swamped with nonresidents' petitions for validating gestational surrogacy agreements; (2) a desire not to offend or interfere with other states' public policies; or (3) a desire not to facilitate residents of other states trying to escape their home state's restrictive or uncertain laws. The first reason would disappear if, as this Article proposes, there were a national standard. The matter of forum shopping would be moot. Further, elimination of judicial pre-approval of surrogacy agreements, along with clear guidelines for such agreements, would dramatically reduce the need for any court involvement. The second reason does not seem to apply in other contexts. States routinely use their laws to attract businesses and jobs from other states. The third reason does

99. See *infra* notes 141–67 and accompanying text.

100. UNIF. PARENTAGE ACT § 807(a)(1)–(2) (amended 2002).

101. See *id.* § 807(a).

102. *Id.* § 802(b)(1).

103. *Id.* cmt., at 72.

not seem to be a legitimate concern. The conduct of New Jersey's residents is not a matter for California to regulate.

In sum, Article 8 of the UPA is a good-faith attempt to address the growing practice of gestational surrogacy. It takes a number of steps forward and would help clarify the law for many states. However, it has several shortcomings. Much like Illinois's GSA, the UPA could be a reasonable model for states to adopt with modification.

2. *ABA Model Act Governing Assisted Reproductive Technologies*

The American Bar Association (ABA) promulgated the Model Act Governing Assisted Reproductive Technology in 2008.¹⁰⁴ The Model Act contains two alternative approaches to the enforceability of surrogacy agreements: Alternative A and Alternative B.¹⁰⁵ Alternative A closely follows the model of the UPA and imposes nearly identical requirements for enforceable gestational surrogacy agreements, including residency requirements of the parties,¹⁰⁶ judicial pre-approval,¹⁰⁷ "home study of the intended parents,"¹⁰⁸ and asymmetry in liability for early termination of the agreement.¹⁰⁹ For all the reasons discussed with respect to the UPA, Alternative A falls short.

One additional aspect of the judicial approval required under the UPA and Alternative A is that the court has independent discretion regarding whether or not to approve the agreement even if all the statutory requirements are met.¹¹⁰ There is little reason to give the court such discretion. The courts' role, if there even is one, should be limited to ensuring that the requirements of the statute have been met. Once the court has made that determination, it ought not have an additional veto power over the surrogacy agreement. Such power allows for identically situated parties to be treated differently under the law depending on the whim of the presiding judge. The drafters of the Model Act recognized this potential. In an article explaining the Model Act, Steven Snyder and Charles Kindregan wrote that this "gives the presiding judge discretion as to whether to approve any

104. MODEL ACT GOVERNING ASSISTED REPROD. TECH. (Proposed Official Draft 2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

105. *Id.* art. 7 (Legislative Note).

106. *See id.* § 702(2)(a) (Alternative A).

107. *See id.* § 701(3).

108. *See id.* § 703(2)(b).

109. *See id.* § 706(4).

110. *See* UNIF. PARENTAGE ACT § 803(a) (amended 2002); *accord* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 703(1) (Proposed Official Draft 2008) (Alternative A) ("If the requirements of subsection (b) are satisfied, a court *may* issue an order validating the gestational agreement" (emphasis added)).

agreement, thereby creating at least the possibility that similarly situated parties in front of two differently inclined judicial officers may receive different results in their approval process for no apparent or substantive reason.”¹¹¹ They do not, however, explain the rationale for this discretion. Both the UPA and Alternative A use “shall order” language elsewhere.¹¹² If judicial pre-validation is to be maintained, both Acts should be amended to read “if the requirements of this Act are satisfied, the court shall issue an order validating the gestational agreement.”¹¹³

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

The key difference between Alternatives A and B (and how Alternative B differs from the UPA) is that Alternative B allows for self-executing agreements without any requirement for prior judicial approval.¹¹⁴ This alone makes it the much more attractive alternative. Alternative B does, however, have its own shortcomings.

Alternative B is very similar to the Illinois GSA. The two have similar eligibility requirements for the surrogate.¹¹⁵ She must (1) be at least twenty-one years old; (2) have given birth to at least one child; (3) have completed a medical evaluation relating to the expected pregnancy; (4) have completed a mental health evaluation related to being a gestational carrier; (5) have independent legal counsel; and (6) have medical insurance to cover her until at least eight weeks following delivery of the child.¹¹⁶ Like the Illinois GSA, Alternative B also requires that the intended parents have a medical need for surrogacy services,¹¹⁷ that at least one of the intended parents provide gametes

111. Charles P. Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 *FAM. L.Q.* 203, 222 (2008). At the time of their article’s publication, Snyder was the chair of the ABA Section of Family Law Reproductive and Genetic Technologies Committee, which promulgated the Model Act; Kindregan held the position prior to Snyder.

112. See, e.g., UNIF. PARENTAGE ACT § 807 (amended 2002); MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 707 (Proposed Official Draft 2008) (Alternative A).

113. Interestingly, the Proposed Model Act from 2006 does state that “[t]he court shall validate a gestational agreement within thirty (30) days of the filing of the petition” if the agreement is in compliance with the Act. See PROPOSED MODEL ACT GOVERNING ASSISTED REPROD. § 604(2) (2007), available at http://apps.americanbar.org/family/committees/artmodelcode_feb2007.pdf.

114. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 703(1) (Proposed Official Draft 2008) (Alternative B).

115. See *id.* § 702.

116. *Id.* § 702(1).

117. *Id.* § 702(2)(b).

for the embryo,¹¹⁸ and that they have a mental health evaluation pertaining to the agreement.¹¹⁹ Alternative B contains similar provisions regarding clauses required in the gestational agreement.¹²⁰ Like the Illinois GSA, Alternative B denies specific performance by the gestational carrier for a breach of the agreement.¹²¹ Unlike the Illinois GSA, however, Alternative B does allow for all other remedies at law or equity for breach by either party.¹²² There are, in fact, few differences between the Illinois GSA and Alternative B with respect to the validity and enforceability of gestational agreements. To the extent that they are the same, Alternative B carries all the same shortcomings as the Illinois GSA.¹²³

There is one key distinction between the Illinois GSA and the Model Act (applying to both Alternative A and Alternative B). The Illinois GSA defines gestational surrogacy as when “a woman attempts to carry and give birth to a child . . . to which the gestational surrogate has made no genetic contribution.”¹²⁴ The Model Act defines the gestational carrier as a woman “who enters into a gestational agreement to bear a child, whether or not she has any genetic relationship to the resulting child.”¹²⁵ The Model Act thereby explicitly allows for both traditional and gestational surrogacy, while the Illinois GSA allows only for gestational surrogacy. This is a somewhat controversial approach by the ABA. Many state courts, state legislatures, and commentators find a distinction between traditional and gestational surrogacy, such that they warrant disparate treatment.

F. The International Option: Outsourcing Gestational Surrogacy Is Not the Answer

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

118. *Id.* § 702(2)(a).

119. *Id.* § 702(2)(c).

120. *See* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 703(3) (Proposed Official Draft 2008) (Alternative B).

121. *Id.* § 709(2).

122. *See id.* § 710.

123. *See supra* notes 61–77 and accompanying text.

124. 750 ILL. COMP. STAT. 47/10 (2010).

125. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(16) (Proposed Official Draft 2008).

India has become a viable option and is a frequent destination for those seeking international surrogacy services.¹²⁶ Even so, it presents its own set of limitations. India's own *Baby M* case—Baby Manji—provides a cautionary tale.¹²⁷ In November 2007, Ikufumi and Yuki Yamada, a Japanese couple, contracted for surrogacy services in India, using an egg donor and a gestational surrogate.¹²⁸ Baby Manji was born in late July 2008.¹²⁹ Unfortunately, during the pregnancy, the Yamadas divorced, and Mrs. Yamada ceased to be involved.¹³⁰ Because Baby Manji was not born to a Japanese mother, the Japanese embassy in India declined to grant her a passport.¹³¹ Indian law was silent on surrogacy, and a 120-year-old law prohibited single men from adopting baby girls.¹³² This posed a problem for the now-single Mr. Yamada. Eventually, the Indian Supreme Court resolved the issue in favor of Mr. Yamada, and he was able to take his daughter home.¹³³ Since the Baby Manji situation, Indian lawmakers have proposed draft bills addressing surrogacy and other reproductive technologies.¹³⁴ To date, these bills have not been enacted into law.

India has also posed additional challenges for intended parents. In 2010, Myleen and Jan Sjodin of Toronto, Canada faced unexpected difficulty after their child was born to an Indian surrogate.¹³⁵ The Sjodins reported that the physician dramatically raised her fees prior to the child's birth and used India's bureaucracy to delay their return to Canada.¹³⁶

The rise of India as a destination for surrogacy services can lead to abuses. “‘Today, unfortunately, even the smallest clinics are doing surrogacy because it's a simple procedure and four times as profitable' as other fertility treatments, said Dr. Aniruddha Malpani, a fertility specialist in Mumbai. ‘Some aren't up to the mark, and foreigners get

126. See Amelia Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9.

127. For a full discussion of the Baby Manji situation, see KARI POINTS, KENAN INST. OF ETHICS AT DUKE UNIV., *COMMERCIAL SURROGACY AND FERTILITY TOURISM IN INDIA: THE CASE OF BABY MANJI* (2009), available at <http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf>.

128. *Id.* at 4.

129. *Id.* at 5.

130. *Id.*

131. *Id.*

132. *Id.*

133. POINTS, *supra* note 127, at 6–7.

134. See Nishat Hyder, *India Debates New Surrogacy Laws*, BIONEWS (Feb. 7, 2011), http://www.bionews.org.uk/page_88796.asp.

135. Mark Magnier, *A Bundle of Joy with Baggage*, L.A. TIMES, Apr. 18, 2011, at A1.

136. *Id.*

fleeced.”¹³⁷ Despite these problems, India remains a popular destination for international surrogacy. A number of agencies in the United States specifically advertise surrogacy services available in India.¹³⁸ India is not the only international destination for intended parents. Ukraine has also become an increasingly popular location for international surrogacy services. It, too, carries risks for the intended parents.¹³⁹

International surrogacy raises another troubling ethical dilemma. While surrogacy services are not inherently exploitative,¹⁴⁰ there remains a potential for exploitation. Factors that could potentially lead to exploitation are more prevalent in countries where poverty is more widespread and women possess less political, economic, and social control over their own lives. We have the capacity to ensure that gestational surrogacy services are safe and that legal questions as to the status and relationships among the parties are clear from the outset. Prohibiting gestational surrogacy in the United States only serves to encourage intended parents to travel to countries where gestational surrogates have fewer legal and social protections.

IV. ARGUMENTS IN OPPOSITION AND WHY THEY FAIL

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

137. *Id.*

138. See, e.g., SURROGACY ABROAD INC., <http://www.surrogacyabroad.com> (last visited Nov. 29, 2011) (based in Chicago, Illinois); WEECARE PARTNERS USA, <http://www.weecaresurrogacy.com> (last visited Nov. 29, 2011) (based in Plainwell, Michigan).

139. See Claire Bigg & Courtney Brooks, *Ukraine Surrogacy Boom Not Risk-Free*, RADIO FREE EUR./RADIO LIBERTY (June 4, 2011), http://www.rferl.org/content/womb_for_hire_ukraine_surrogacy_boom_is_not_risk_free/24215336.html.

140. See *infra* notes 141–78 and accompanying text.

A. *Are Surrogates Commodified or Exploited?*

In Margaret Atwood's dystopian, science fiction novel, *The Handmaid's Tale*, fertile women are treated as commodities and serve as surrogate mothers for the elite of society.¹⁴¹ These women are treated like breeding stock and have no rights or freedoms. Atwood's novel reads as a cautionary tale as to what can go very wrong with surrogacy. Interestingly, this fictional novel was first published in 1985, just before events leading to the case of *Baby M* took place. *The Handmaid's Tale* is, in part, a depiction of the parade of horrors envisioned in that case.

The Handmaid's Tale depicts a fictional future, but real-world arguments that surrogacy unethically commodifies or exploits women have been with us for some time. In 1988, the court in *Baby M* was quite concerned about the potential commodification of surrogates and the buying and selling of their services.¹⁴² In 1990, Elizabeth Anderson made a forceful argument that a contract for surrogacy services renders the surrogate as little more than a commodity.¹⁴³

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

But opponents are not making a literal claim that the surrogate is bought and sold. Rather, it is that the services of her body are being bought and sold. Surrogacy, in this respect, is sometimes compared to prostitution.¹⁴⁴ On a superficial level, there is a similarity. In both situations a woman is exchanging the services of her body to another

141. See MARGARET ATWOOD, *THE HANDMAID'S TALE* (1986).

142. See *In re Baby M*, 537 A.2d 1227, 1264 (N.J. 1988).

143. See generally Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990). Professor Anderson reiterated her argument ten years later in *Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales*, 8 HEALTH CARE ANALYSIS 19 (2000).

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

for money.¹⁴⁵ However, the analogy to prostitution falls apart under closer scrutiny. Prostitution is used for the sexual gratification of the patron, nearly always with the fervent hope that a child not be the result. Gestational surrogacy, on the other hand, involves no sexual gratification for anyone and carries the fervent hope that a child will result. Prostitution does not involve the uterus; surrogacy does. In prostitution, the body *is* the service; in surrogacy, the body is merely the vessel through which the services are rendered.

Prostitution and surrogacy are, in actuality, two very different things. True, throughout most of human history, there has been and continues to be a rather close link between the sexual act and the gestation of a child.¹⁴⁶ There is logic in the argument that when one activity (such as the exchange of sexual services for money) is banned, any inextricably linked activity (such as gestational surrogacy for money) should also be banned. This could apply to traditional surrogacy before the advent of IVF. However, in the current situation, sexual intercourse and the gestation of the fetus have been completely disconnected. The discussion as to whether prostitution should be lawful, but regulated, is left for others to debate. The fact remains that prostitution and surrogacy are fundamentally different, both in process and purpose. Any conclusion that prostitution is unethical, harmful, and illegal and therefore gestational surrogacy is also unethical, harmful, and illegal is logically misplaced. Any such argument as to why prostitution should be disallowed cannot be automatically applied to gestational surrogacy.¹⁴⁷

Even if a surrogate has not been commodified, is she not exploited nonetheless? It may be argued that the gestational surrogate places herself at great risk for the benefit of someone else. It has been argued that the great majority of gestational surrogates are substantially of lower socioeconomic status than the intended parents.¹⁴⁸ On their own, these facts do not prove exploitation.

145. This does not explain the objection to uncompensated gestational surrogacy. Indeed, some states have chosen to enforce uncompensated surrogacy agreements while prohibiting compensated surrogacy. *See supra* notes 49–50.

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

147. It is also true that some sincerely held religious beliefs hold that sexual intercourse should only be done within the context of procreation. That is not the reality for most people. Those practicing such religions should not be allowed to impose their religious beliefs on the remainder of a secular society.

148. *See, e.g.,* Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 *CARDOZO L. REV.* 497, 524 (1996).

There are many occupations, jobs, and services that involve a substantially greater risk to the lives and well-being of the individuals performing those activities. Active-duty military personnel, miners, fire fighters, police officers, and fishermen come to mind.¹⁴⁹ Are the men and women who perform these valuable services exploited? Were pregnancy deemed an “occupation,” its fatality rate of 12.1 per 100,000 pregnancies¹⁵⁰ would not even make it into the top twenty-five most dangerous occupations.¹⁵¹ Further, the pregnancy fatality rate accounts for all pregnant women. If it were to only include women who had planned pregnancies after being prescreened for any health risks and who received early and ongoing prenatal care, the rate would undoubtedly be lower.

It is not the offering of compensation that renders something exploitation; it is not whether individuals would perform such tasks absent financial compensation. We offer military recruits signing bonuses and college tuition. Are soldiers exploited?¹⁵² It is not that they put their life at risk. Many professions involve placing one’s physical well-being at risk. We often make heroes out of those that put themselves at risk to help others. Some individuals become featured in popular television shows because they put themselves in significant danger to keep diners well supplied with Alaskan king crab.¹⁵³

It is a question of whether the individual is compelled by circumstances to accept a level of risk they would not otherwise take in order to gain a benefit that most would consider far too meager to justify the inherent risk. Put another way, is the risk–compensation ratio much

149. According to the Bureau of Labor Statistics, the ten civilian occupations with the highest fatality rate per 100,000 full-time equivalents in 2009 were fishers (203.6); loggers (65.5); aircraft pilots and flight engineers (59.0); farmers and ranchers (39.7); roofers (34.7); structural iron and steel workers (30.3); refuse and recyclable material collectors (26.5); driver/sales workers and truck drivers (20.2); construction laborers (18.8); and industrial machinery installation, repair, and maintenance workers (18.5). BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, NUMBER AND RATE OF SELECTED OCCUPATIONS WITH HIGH FATAL INJURY RATES 19 (2011), available at <http://www.bls.gov/iif/oshwc/cfoi/cfch0008.pdf>.

150. See NAT’L CTR. FOR HEALTH STATISTICS, DEP’T OF HEALTH & HUMAN SERVS., VITAL AND HEALTH STATISTICS: MATERNAL MORTALITY AND RELATED CONCEPTS 1 (2007), available at http://www.cdc.gov/nchs/data/series/sr_03/sr03_033.pdf.

151. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, FATAL OCCUPATIONAL INJURIES, TOTAL HOURS WORKED, AND RATES OF FATAL OCCUPATIONAL INJURIES FOR CIVILIAN WORKERS BY SELECTED WORKER CHARACTERISTICS, OCCUPATIONS, AND INDUSTRIES, 2009 (2011), available at http://www.bls.gov/iif/oshwc/cfoi/cfoi_rates_2009hb.pdf.

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

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

higher than an ordinary person would willingly accept absent the coercive effects of desperation?

So what does constitute exploitation in the context of surrogacy? That question is directly addressed by Stephen Wilkinson in his article, *The Exploitation Argument Against Commercial Surrogacy*.¹⁵⁴ Wilkinson argues that surrogacy is exploitative, but that banning it would only drive the women into more exploitative work. Hence, it is better to allow and regulate surrogacy services, thereby reducing the overall risk of exploitation of the women involved.¹⁵⁵

Wilkinson first defines what he considers to be exploitation. He identifies two possible situations that could result in exploitation: (1) circumstances in which the distribution of harm and benefit between the two parties is unjust and (2) circumstances in which the party possibly being exploited has not validly consented.¹⁵⁶ This is a not an unreasonable definition of exploitation. However, Wilkinson comes to the wrong conclusion when he applies it to gestational surrogacy.

The question of distribution of harm and benefit often comes down to whether the individual is adequately compensated for the risks and burdens she takes. Are gestational surrogates underpaid? That is a difficult question to answer with any certainty. How do we know if someone is paid a fair wage for his services?¹⁵⁷ Wilkinson rightly argues that underpayment as an argument is problematic. Any potential underpayment can be resolved through regulation that mandates higher compensation.¹⁵⁸ Free-market advocates would likely want to let the law of supply and demand determine the appropriate level of compensation. To be exploitation, must there be some facet of surrogacy that renders it impossible to pay a fair price? Wilkinson raises and rejects this aspect of surrogacy as exploitation.¹⁵⁹

What is the appropriate level of payment for compensated gestational surrogacy? Currently the going rate for a first-time surrogate is

154. Stephen Wilkinson, *The Exploitation Argument Against Commercial Surrogacy*, 17 *BIOETHICS* 169 (2003).

155. *See id.* at 186.

156. *Id.* at 173.

157. One calculation sometimes made is whether compensation for gestational surrogacy meets minimum wage. *See, e.g.*, Kerian, *supra* note 144, at 164. There are approximately 6,400 hours in the average human pregnancy. At the current minimum wage of \$7.25 per hour, that would total \$46,400. That is roughly double what the average first-time surrogate is directly compensated for gestational services. Of course, pregnant women are able to engage in other activities during the majority of the time they are pregnant.

158. Wilkinson, *supra* note 154, at 180.

159. *See id.* at 180–81. He does hold out the possibility that surrogacy cannot be fairly compensated if it is regarded as “baby-selling.” *Id.* For a discussion of baby-selling, see *infra* notes 179–81 and accompanying text.

in excess of \$20,000.¹⁶⁰ Surrogacy contracts generally also contain provisions for compensation for lost wages, child care, travel, house-keeping, and clothing allowances, as well as additional and separate compensation for each procedure performed.¹⁶¹ The adequacy of that rubric would change for different individuals. Wealthier individuals would not likely work at the local fast food establishment for \$15 per hour, even though that may be well above the going rate.

Still, arguments of exploitation often center around the belief that surrogates are more likely poor and intended parents are more likely well off. Commentators have raised concern that gestational surrogates tend to be poor and of ethnic minorities, while intended parents tend to be affluent and white.¹⁶² It may well be true that gestational surrogates tend to come from ethnic minorities of lower socio-economic status. Such facts may certainly raise a question of potential exploitation. They do not, however, answer it. To constitute exploitation, there needs to be something more.

Wilkinson recognizes that the employment argument could just as easily apply to “poorly paid cleaning work, or factory work, or prostitution.”¹⁶³ He then says that one distinction “is the thought that [surrogacy] is particularly harmful, especially psychologically, because of the close relationship between women and their offspring.”¹⁶⁴ Wilkinson seems to accept this distinction as valid. Based on this supposed harm, opponents generally think that surrogates cannot be compensated fairly and that women only agree to serve as gestational surrogates because they feel coerced.¹⁶⁵ This is a misguided concern, as there is no evidence that the great majority of surrogates are psycho-

160. For example, first-time surrogates through Growing Generations, a gestational surrogacy agency located in Los Angeles, California, are paid \$22,000. *Surrogate Fee Information*, GROWING GENERATIONS, <http://www.growinggenerations.com/surrogacy-program/surrogates/financial-information> (last visited Aug. 14, 2011). First-time surrogates through Surrogacy Specialists of America, a gestational surrogacy agency located in Houston, Texas, are paid between \$15,000 and \$25,000. *Surrogacy Costs*, SURROGACY SPECIALISTS OF AM., <http://www.ssa-agency.com/default.aspx?menuitemid=120> (last visited Aug. 14, 2011). First-time surrogates through Sunrise Surrogacy Solutions, a gestational surrogacy agency located in southern California, are paid between \$24,000 and \$26,000. *Costs*, SUNRISE SURROGACY SOLUTIONS, http://www.sunrisesurrogacy.com/ip_costs.html (last visited Aug. 19, 2011).

161. See, e.g., GROWING GENERATIONS, *SURROGATE BENEFIT PACKAGE—GESTATIONAL SURROGACY* (2010), available at http://www.growinggenerations.com/content/pdf/Surrogate_Benefit_Package_6_1_1590.pdf.

162. See, e.g., Angie Godwin McEwen, Note, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 *VAND. J. TRANSNAT'L L.* 271, 277 (1999).

163. Wilkinson, *supra* note 154, at 183.

164. *Id.*

165. *Id.*

logically harmed. There is little evidence that even a substantial minority of surrogates are psychologically harmed.¹⁶⁶

Interestingly, although Wilkinson seems to conclude that surrogacy is exploitative, he does not conclude that it should be banned. Rather, he argues that it should be properly regulated to minimize whatever exploitive nature it may have.¹⁶⁷ On the point of effective regulation, I wholeheartedly agree. Perhaps the most effective means of minimizing potential exploitation is to ensure full disclosure of the potential risks and complications of being a gestational surrogate, as well as adequate screening procedures and independent social and legal counsel.

An appropriate level of regulation could help to ensure more-equal bargaining positions between the gestational surrogate and the intended parents. The concern is that the gestational surrogate not be negotiating from a position of weakness. Arguably, however, it is the intended parents who are in the weaker position at the bargaining table. It is gestational surrogates' services that are the rate-limiting step. There are three essential components in the full process of gestational surrogacy: (1) obtaining gametes; (2) finding medical professionals capable of handling the necessary medical procedures; and (3) finding a gestational surrogate to carry and deliver the child.

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

B. *Psychological Effects on the Surrogate*

One of the concerns raised by the court in *Baby M* is the psychological effect surrogacy may have upon the surrogate herself.¹⁶⁸ Oppo-

166. See *infra* notes 168–78 and accompanying text.

167. See Wilkinson, *supra* note 154, at 186. Wilkinson makes the argument that depriving these women of the opportunity to perform surrogacy services will only drive them into more exploitative and more harmful options. *Id.* The better approach is to allow surrogacy but regulate it more effectively.

168. *In re Baby M*, 537 A.2d 1227, 1247–48 (N.J. 1988).

nents fear that if the surrogate is required to give up the child she carried for nine months and to which she grew emotionally attached, she would be at substantial risk for potentially severe, adverse psychological consequences. If this fear is substantiated, it could be a legitimate justification for restrictive legislative action, potentially even banning the practice. Several articles have been published in the psychological literature over the past several years looking precisely at this question. Thus far, they have found no adverse consequences.

In 2004, R.J. Edelmann looked at the then-available literature regarding the psychological issues resulting from surrogacy.¹⁶⁹ Professor Edelmann found that the available literature provided a picture “of surrogates, motivated largely by altruism, who establish good rapport with the commissioning couple, and have little difficulty separating from children born as a result of the arrangement, with the children themselves subsequently showing good adjustment.”¹⁷⁰ This conclusion does not offer much scientific support for the view that surrogates are at significant risk for psychological trauma.

In 2005, Janice Ciccarelli and Linda Beckman added to the discussion with a further review of the psychological and social science literature on surrogacy.¹⁷¹ Their review of the literature confirmed Edelmann’s finding that surrogates are primarily motivated by altruistic concerns.¹⁷² This is not to suggest that financial considerations do not play a substantial role in their decisions to become surrogates, but it runs counter to the notion that they are being exploited. Further, Ciccarelli found that surrogates are quite satisfied with their roles and experiences as surrogates even five and ten years after giving birth.¹⁷³

Additional studies support Edelmann’s and Ciccarelli and Beckman’s conclusions. The Centre for Family Research at Cambridge University has done considerable work looking into, among other things, the psychosocial effects of various forms of ART on the people involved. In 2003, Dr. Vasanti Jadva published a study looking directly at the effects of surrogacy on the surrogate herself.¹⁷⁴ Dr. Jadva

169. See generally R.J. Edelmann, *Surrogacy: The Psychological Issues*, 22 J. REPROD. & INFANT PSYCHOL. 123 (2004).

170. *Id.* at 133. Edelmann, however, did acknowledge that the available literature was limited and that researchers should conduct further studies. *Id.*

171. See generally Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21 (2005).

172. *Id.* at 30.

173. *Id.* at 31.

174. See generally Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196 (2003). Dr. Jadva is now a Research Associate at the Centre for Family Research.

found that, “[o]verall, surrogacy appears to be a positive experience for surrogate mothers.”¹⁷⁵ Rather than experiencing psychological problems, “surrogate mothers often reported a feeling of self-worth.”¹⁷⁶ This is not to say that there were no difficulties. While none of the surrogates reported “experienc[ing] any doubts or difficulties whilst handing over the baby,” there were some surrogates (32%) who reported some difficulty in the weeks following delivery.¹⁷⁷ However, within a few months that number fell to only 15%, and by one year after delivery 94% of surrogates reported no difficulties.¹⁷⁸

The weight of evidence now available argues strongly that women are capable of accurately assessing their psychological suitability to serve as gestational surrogates. A small number of surrogates appear to experience some minimal psychosocial difficulties, but the great majority appear to do quite well. Gestational surrogacy is certainly not suitable for all women, just as not all women (or men) are suited to be coal miners, nurses, or combat soldiers. Most of those who choose to become surrogates do not suffer from the psychological trauma that opponents of surrogacy describe. If anything, this evidence suggests a possible need for minor regulatory requirements regarding proper informed consent and careful evaluation of potential surrogates. It does not argue for a complete ban.

C. *The Misguided Concern for the Child*

1. *Commodification of the Child*

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

But is a child really being sold? Not literally. Technically, it is not the child that is being “bought and sold.” The child is not “owned” by anyone.¹⁷⁹ What is really being argued is that the parental rights and obligations with respect to the child are being bought and sold. While this may be a distinction without much of a practical difference, it

175. *Id.* at 2203.

176. *Id.* at 2204.

177. *Id.* at 2200.

178. *Id.*

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

does, however, change the nature of the argument. The claim of baby-selling, then, rests on the premise that the surrogate is agreeing to transfer her parental rights and obligations to someone else in exchange for some consideration. This, in turn, raises the question of whether the surrogate actually has parental rights and obligations. This Article argues that she does not, at least with respect to gestational surrogacy.¹⁸⁰

In both traditional and gestational surrogacy, the intended father is neither buying nor selling parental rights. The child is his regardless of who is determined to be the proper mother. The intended father has the same rights and obligations he would have if he produced the child in the more conventional fashion. The only question is whether the woman who provided the egg is buying parental rights and obligations from the woman who provided the services of carrying the child to term.

So, is the surrogate selling her parental rights and obligations? With compensated surrogacy, money is certainly changing hands. Two facts are clear: (1) the intended parents pay the gestational surrogate a substantial amount of money and (2) the gestational surrogate agrees to carry the embryo to term and to make no claim of parental rights over the child. The juxtaposition of the payment of money and the formal surrender of any potential legal claim of parentage can easily lead to the conclusion that the surrogate is giving up her parental rights in exchange for money. Some commentators have looked at these bare facts and concluded that they can only mean that a baby is being sold.¹⁸¹ But is that the actual nature of the transaction? To answer that question, we must first ask whether the gestational surrogate has parental rights and obligations to sell. If she has none, then she must be “selling” something else.

2. *A Question of Parentage*

Is the gestational surrogate a mother who gives up her parental rights, or was she never the mother at all, without any parental rights to give up? If the former, this may be a problem. If the latter, then the money is for something else. It is not for giving up the child; it is for the service of carrying the child for nine months. We do not say that a day-care provider is “giving up” a child entrusted to him for the

180. A similar argument can be made in traditional surrogacy. However, it requires some additional analysis. *See supra* note 25.

181. *See, e.g.,* Bryn Williams-Jones, *Commercial Surrogacy and the Redefinition of Motherhood*, 2 J. PHIL., SCI. & L. § 4.1 (2002), available at http://www6.miami.edu/ethics/jpsl/archives/papers/comsur_williamsjones.html.

day. We do not say that a nanny is “giving up” a child entrusted to her for a week or more while the parents are on vacation. Nor do we say that the headmaster of a boarding school is “giving up” a child at the end of the school term. No, they are returning to the parents a child entrusted to their care. This is precisely what the gestational surrogate is doing as well.

But is there not something more intimate with respect to gestating a fetus than there is with providing babysitting services? Of course, but that is a difference of degree. The fundamental starting place is to determine to whom the child belongs. It remains uncontroversial that the embryo does not belong to the surrogate prior to transfer into her uterus.¹⁸² That would be considered a rather absurd argument. The embryo belongs to the individuals who created it.

Whether the embryo is mere property or holds personhood status is, however, relevant to the surrogacy question. If embryos are mere property, then a concern regarding commodification of the embryo certainly seems warranted. Property is, almost by definition, commoditized. If the embryo is property, it becomes a commodity to be bought and sold. As the embryo becomes the baby, one is in effect buying and selling the baby. This fear is misplaced. Whether the embryo is deemed property or person, the implications for gestational surrogacy are nonexistent. The end result is the same.

Let us first assume, for the sake of argument, that embryos are properly categorized as property. Prior to transfer to the gestational surrogate, the embryos are the property of the intended parents and are produced from the intended parents’ own gametes.¹⁸³ At what point did the intended parents transfer their property rights to the surrogate? There is no express transfer of such rights. In fact, the expressed intention of the parties is quite the opposite. There is no abandonment. The intended parents certainly want back the property they entrusted to the surrogate; that is the very essence of the agreement. If anything, the surrogate has a bailment over the embryos

182. The status of the embryo remains controversial. Whether embryos hold personhood status or are mere property has significant implications in determining how they should be handled, what may be done with them, and the rights and obligations of the embryos’ progenitors. The seminal case discussing this question is *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). The *Davis* court concluded that embryos are neither persons nor property. *Id.* at 597. Rather, they are something in between. *Id.* This “splitting of the baby” is not entirely satisfying and does not fully address the difficulties inherent in excess embryo production. While this is an interesting and as-yet-unresolved debate, it does not speak to whom the embryos belong.

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

(subject to the terms of the bailment agreement).¹⁸⁴ There is no other form of property transfer taking place. If there is no transfer of property, then the consideration being paid to the gestational surrogate cannot be in exchange for the embryo as property.

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

As shown, the property-personhood status dichotomy is only tangentially relevant here. Regardless of the embryo's status before, during, or immediately after transfer, it certainly does gain personhood status at some point during gestation. By the time of its birth, that embryo has become a baby. As a baby, it absolutely qualifies as a person. Whether the intended parents were the "owners" of an embryo or the "parents" of an embryo, they are now the parents of a baby.

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

If, as the *Davis* court would have it, embryos are neither property nor persons, the remaining problem is nearly identical to the situation in which they are considered property.¹⁸⁵ There must be a point

184. Under a bailment theory, the surrogate has a duty to keep and protect the embryo for the duration of the bailment and a duty to transfer possession back to the rightful "owners" at its conclusion.

185. Although most courts looking at the property-personhood divide take the *Davis* route of designating embryos as something in between, as a practical matter, they tend to treat embryos

reached during the gestation at which time the embryo transitions away from being a property–person hybrid to fully become a person. As with the pure property analysis, one must ask, who then are this new person’s parents? The most reasoned approach would look to the “owner” of the property aspect and who is the “parent” of the person aspect of the embryo. As the intended parents fill both of these roles, it is no great twist of logic to recognize the intended parents as the undisputed parents of the resulting baby.

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

The problem stems from a dual definition as to who qualifies as the lawful mother. The UPA identifies the mother as the woman who is the genetic progenitor or the woman who “give[s] birth to the child.”¹⁸⁶ In the vast majority of cases, they are the same woman. Until the advent of IVF, they were always the same woman. IVF and gestational surrogacy change this reality.¹⁸⁷ Faced with two women having competing claims as to motherhood, jurisdictions must either determine which definition of motherhood should prevail or prevent the situation from ever occurring.

To resolve the dilemma, California looks at the intentions of the parties involved.¹⁸⁸ If the parties intended the genetic progenitor to be the mother, then she should be recognized as the lawful mother. The gestational carrier would simply be that—the woman who pro-

as if they were property. The general view seems to be that if the parties who create the embryos have a contract designating what will happen to the embryos, that contract will be honored. *See, e.g.,* *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) (holding that an agreement, if there is one, should control the distribution of cryopreserved embryos); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002) (holding that the contract, if one exists, should govern control and dispensation of the embryos). Respecting the contract, even when it calls for the destruction of the embryos, treats the embryos more like property than persons.

186. *See* UNIF. PARENTAGE ACT § 201(a) (amended 2002).

187. The UPA recognizes this change by including Article 8, which deals with surrogacy arrangements. *See id.* at art. 8.

188. *See* *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993).

vided gestational services for the intended couple.¹⁸⁹ Alternatively, if the parties intended the carrier to be the mother, then the carrier would be the mother and the genetic progenitor would, effectively, be an egg donor.

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

This is not baby-selling. It could only be baby-selling if the gestational surrogate were the lawful mother and she exchanged her baby for money. If the child is not hers, then she has nothing to sell. Any payment she receives can only be in compensation for the valuable services she provides: gestational services. It is true that the intended parents will often ask the surrogate to sign papers surrendering any claim she may have on the child. This, however, is only a result of a "belt and suspenders" approach to contracting and a presumption that, in the absence of any other evidence, the woman who gives birth to a child is considered the child's parent. Here, there is ample evidence to utterly refute that presumption. Asking the gestational surrogate to acknowledge an existing legal reality in writing is hardly baby-selling.

3. *But What About the Kids?*

One of the primary concerns of those opposed to surrogacy involves the potential harms that may be visited upon the children.¹⁹⁰ For the past several years, Professor Susan Golombok of Cambridge University has been researching this very question. Professor Golombok has been conducting a longitudinal study of surrogacy families and comparing them with a control group of natural-conception families. The

189. See *supra* notes 10–15 and accompanying text.

190. See, e.g., Suzanne F. Seavello, *Are You My Mother? A Judge's Decision in In Vitro Fertilization Surrogacy*, 3 HASTINGS WOMEN'S L.J. 211, 219–20 (1992).

first, second, and third installments looked at the families one year,¹⁹¹ two years,¹⁹² and three years¹⁹³ after the child's birth, respectively. The fourth, and most recent, installment in this ongoing research looks at the families when the child is seven years old and was recently published in *Developmental Psychology*.¹⁹⁴

Professor Golombok's findings are illuminating and put to rest any serious notion that surrogacy poses any potential or meaningful risk of harm to the families or the resulting children. Far from leading to harmful effects early in childhood, Golombok found that surrogacy families have a greater degree of psychological well-being than natural-conception families.¹⁹⁵ Professor Golombok specifically references the concerns of surrogacy raised by the court in *Baby M* and concludes that "[t]he findings of the present study do not support these negative assumptions with respect to the child's 1st year of life."¹⁹⁶

The positive family dynamic and positive child development continued at age two. The parents of children born through surrogacy even seemed to do marginally better than parents of naturally conceived children.¹⁹⁷ With respect to the children, Golombok concludes:

In spite of the concerns that have been raised regarding the increased risk of psychological problems among children born through a surrogacy arrangement, the children in the present investigation did not differ from the naturally conceived children with respect to socio-emotional or cognitive development.¹⁹⁸

At least through age two, children born through surrogacy appear to do every bit as well as children born through the more conventional method.

The findings at age three bring an important addition. By age three, forty-four percent of the parents had begun discussing with their chil-

191. See generally Susan Golombok et al., *Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life*, 40 *DEVELOPMENTAL PSYCHOL.* 400 (2004) [hereinafter Golombok I].

192. See generally Susan Golombok et al., *Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at Age 2*, 47 *J. CHILD PSYCHOL. & PSYCHIATRY* 213 (2006) [hereinafter Golombok II].

193. See generally Susan Golombok et al., *Non-Genetic and Non-Gestational Parenthood: Consequences for Parent-Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3*, 21 *HUM. REPROD.* 1918 (2006) [hereinafter Golombok III].

194. See generally Susan Golombok et al., *Families Created Through Surrogacy: Mother-Child Relationships and Children's Psychological Adjustment at Age 7*, 47 *DEVELOPMENTAL PSYCHOL.* 1579 (2011) [hereinafter Golombok IV].

195. Golombok I, *supra* note 191, at 408.

196. *Id.* at 409.

197. Golombok II, *supra* note 192, at 219.

198. *Id.* at 220.

dren that they were born through surrogacy.¹⁹⁹ This seems to have little impact on the children's well-being, as children born through surrogacy continued to do just as well as naturally conceived children.²⁰⁰

Children born through surrogacy showed continued normal development as compared to naturally conceived children seven years following birth. The only difference found at age seven was a somewhat less positive mother-child relationship in surrogacy than natural conception.²⁰¹ Nevertheless, Golombok "emphasiz[es] that the children were functioning well, with no differences identified according to family type by the mother or the child's teacher."²⁰² Golombok concludes saying that, "[o]verall, the findings indicate that these families continue to function well in the child's early school years and are more similar than they are different."²⁰³ In short, children born through surrogacy experience essentially the same level of psychosocial development as children born through natural conception. The feared adverse effects on the children have not significantly materialized. Simply put, the kids are alright.

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

A number of scholars have written critically of the practice of surrogacy. Professor Vanessa S. Browne-Barbour, for example, wrote an impassioned argument against surrogacy that typifies much of the scholarly arguments in opposition to surrogacy and the enforceability of surrogacy agreements.²⁰⁴ Professor Browne-Barbour makes and summarizes many of the arguments in opposition to the enforceability of surrogacy agreements, including several of the ones already discussed. Among her arguments are (1) the "best interests of the child," rather than contract, is the appropriate analysis for determining child custody;²⁰⁵ (2) surrogacy is tantamount to slavery or peonage;²⁰⁶ (3) procreative liberty does not include the use of a gestational carrier;²⁰⁷ (4) freedom of contract does not include surrogacy agreements;²⁰⁸ and

199. Golombok III, *supra* note 193, at 1921.

200. *Id.* at 1922.

201. The reverse findings existed for ages 1, 2, and 3, when a more positive relationship was found in surrogacy families. See Golombok IV, *supra* note 194, at 1585.

202. *Id.* at 1586.

203. *Id.* at 1587.

204. See generally Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429 (2004).

205. See *id.* at 439-43.

206. See *id.* at 467-68.

207. See *id.* at 468-70.

208. See *id.* at 470-71.

(5) surrogacy is nothing more than baby-selling.²⁰⁹ Each of these arguments comes up short.

First, Professor Browne-Barbour argues that such agreements must be assessed using the best interests of the child analysis.²¹⁰ However, she does not adequately address the question as to why the best interests analysis should trump other considerations. To support her argument, she discusses the prevailing law regarding the transfer of legal custody from one lawful parent to another in the adoption or divorce contexts.²¹¹ Professor Browne-Barbour reasonably argues that in such circumstances, jurisdictions require a best interests analysis and will decline to enforce prior agreements between the parents.²¹²

While Professor Browne-Barbour's analysis is sound as far as it goes, it relies on an invalid assumption. Her analysis presumes that the circumstances inherent in surrogacy are the equivalent of the circumstances found in adoption or divorce. They are not. In adoption or divorce there is an existing child whose interests the court must protect. Absent an enforceable surrogacy agreement, there is no child to protect. Inherent in her argument is an assumption that the surrogate is a lawful parent of the child she carries. Certainly in the context of gestational surrogacy, this is a faulty assumption.²¹³

Her argument raises a fundamental question: Why should the best interests of the child be the determinative and exclusive factor when determining the validity of a surrogacy contract? Even if we decide that it should, why does a surrogacy contract inherently fail this test? Absent the surrogacy agreement, the particular child in question would not exist. Is it in the better interest of the resultant child to exist or not to exist?²¹⁴

Best interests aside, Professor Browne-Barbour then argues that "[a] more compelling argument for banning [surrogacy] arrangements" is that they "are merely baby-selling contracts that violate federal laws and, thus, are void and unenforceable."²¹⁵ She goes on to equate surrogacy with slavery and says that surrogacy agreements vio-

209. *See id.* at 471–74.

210. Browne-Barbour, *supra* note 204, at 439–43.

211. *See id.* at 441–43.

212. *See id.* at 441.

213. *See supra* notes 182–89 and accompanying text. The argument is more compelling, albeit not dispositive, with respect to traditional surrogacy because the surrogate is a genetic progenitor of the child.

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

215. Browne-Barbour, *supra* note 204, at 467.

late the Thirteenth Amendment and federal anti-peonage statutes.²¹⁶ While Professor Browne-Barbour makes this assertion, she offers no explanation as to why surrogacy is tantamount to slavery. The gestational carrier is hardly being bought and sold. She is providing a valuable and honorable service to the lawful parents. Likewise, there is no involuntary servitude—the surrogate is not being compelled by force to accept transfer of an embryo. There is nothing involuntary about gestational surrogacy. The prospective gestational surrogate voluntarily agrees to the procedures and to provide gestational services in exchange for the agreed-upon compensation. The argument of slavery only works if the surrogate is coerced against her will. This rests on a presumption of exploitation. As discussed above, surrogates are not exploited.²¹⁷ Without the exploitation prop to rest upon, the slavery argument falls apart.

Similarly, a gestational surrogacy agreement does not constitute peonage. The United States Code defines peonage as “[t]he holding of any person to service or labor . . . in liquidation of any debt or obligation.”²¹⁸ Surrogacy does not qualify under this definition of peonage. At no time is the surrogate being held in labor in satisfaction of a debt. She is providing an ongoing service in exchange for ongoing payment. The only reasonable link to peonage is that a surrogate, once pregnant with a viable fetus, may not terminate the pregnancy. However, this inability is not a function of the surrogacy agreement itself.²¹⁹ It is a function of independent prohibitions and limitations on abortion. Further, if this qualifies as peonage, then so too must babysitting—a babysitter may not abandon the child placed in his care.

Professor Browne-Barbour correctly states that the United States Supreme Court has not yet determined whether procreative liberty includes the use of a gestational surrogate.²²⁰ However, the lack of a Supreme Court decision expressly and overtly affirming a particular right does not mean that the government may interfere with otherwise valid good-faith agreements premised upon other grounds.

Browne-Barbour appears to accept the general argument that freedom of contract would suggest, at least initially, that otherwise valid agreements entered into in good faith should be respected. She then

216. *See id.* at 467–68.

217. *See supra* notes 141–67 and accompanying text.

218. 42 U.S.C. § 1994 (2006).

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

220. Browne-Barbour, *supra* note 204, at 469–70.

asserts, correctly, that “[f]reedom of contract, however, is not absolute.”²²¹ Freedom of contract does not apply to “contracts that are illegal, void, or violate public policy.”²²² While contracts contrary to public policy are properly unenforceable, she offers unconvincing reasons as to why surrogacy arrangements violate public policy. She asserts that they are personal services contracts and therefore unenforceable.²²³ She equates gestational services to slavery, citing the Thirteenth Amendment’s prohibition on involuntary services as a “primary reason[] that the law finds personal contracts to be unenforceable.”²²⁴ However, it is not that the personal services contract is unenforceable; it is that specific performance is not available as a remedy for a breach of such contracts. A provision in a gestational surrogacy agreement that precluded an otherwise lawful abortion may well be unenforceable as an invalid specific performance clause in a personal services contract. That, however, is a far cry from a conclusion that the entire contract must be declared void and unenforceable.

Finally, she asserts that “[surrogacy] agreements are merely baby selling devices that commodify women and babies.”²²⁵ Gestational surrogacy in no way involves the buying or selling of anyone. The child is, from its conception, the product of the intended parents. The very title of her article, *Bartering for Babies*, carries this flawed assumption. The intended parents and the potential surrogate are not bartering over the baby. They are bartering over the surrogate’s services in carrying the intended parents’ baby to term.

Ultimately, Professor Browne-Barbour rests her argument on the notion that some “things are not for sale.”²²⁶ That is correct. What is incorrect is her assertion that gestational surrogacy involves the selling of a baby or of a gestational surrogate. It does not. The baby in question is the child of the intended parents from the time it is conceived. The intended parents cannot be purchasing that which is already theirs. Nor can the gestational surrogate be selling that which is not hers.²²⁷ The surrogate is not enslaved. She is providing a valuable service for individuals who very much want a child. In short, the arguments against gestational surrogacy rest on the presumption that the

221. *Id.* at 470.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 471.

226. Browne-Barbour, *supra* note 204, at 485; see also *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988) (“There are, in a civilized society, some things that money cannot buy.”).

227. More precisely, the intended parents are not purchasing, nor is the gestational surrogate selling, the right to be the child’s parents.

gestational carrier is a lawful parent of the resulting child, that she is being exploited by the intended parents, or that the child is being commodified. Each of these presumptions is without foundation.

Professor Browne-Barbour raises one last concern regarding the long-term welfare of the children that are born through surrogacy. She is legitimately concerned with potential adverse impacts on the child's social and cognitive development.²²⁸ At the time of her writing, she could find no long-term studies looking into the psychosocial effects of surrogacy on the child. We now have such studies, and they reveal no adverse effects.²²⁹

Bryn Williams-Jones is another prominent opponent to surrogacy contracts. Williams-Jones argues that surrogacy fragments motherhood.²³⁰ This too may be a potential concern, but only if the surrogate is considered a "mother" to the child. Here, again, a distinction must be drawn between traditional surrogacy and gestational surrogacy. With traditional surrogacy, Williams-Jones raises a potentially legitimate concern. Traditional surrogates are both the genetic progenitor and the gestational carrier of the child.²³¹ This is not the case with gestational surrogacy. With gestational surrogacy, the carrier's only connection to the child is having carried the embryo to term. That is hardly an insignificant contribution, to be sure; however, does that alone constitute motherhood? The argument that gestational surrogacy "fragments" motherhood requires us to accept both that carrying the embryo to term is an essential aspect of being a "mother" and that it alone is sufficient to be deemed the "mother." It suggests that a woman who does not carry the child, but who nurtures and raises the child after birth, can achieve nothing more than a fractured motherhood.²³² However, motherhood (and indeed, fatherhood) is something more than just the biological act of conceiving and giving birth. It involves primarily the responsibility for, and the act of, raising the child in the years following birth.²³³

228. See Browne-Barbour, *supra* note 204, at 483.

229. See *supra* notes 190–203 and accompanying text.

230. Williams-Jones, *supra* note 181, § 3.1.

231. However, even this does not necessarily constitute the fracturing of the status of motherhood. One must come to terms with the reality that modern science has altered the assumptions of how one becomes a parent. Until recently, it was only through biology or legal adoption. ART is challenging those methods as the only paradigms.

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

233. See, e.g., Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002); Melanie B.

One may ask, when does the woman “become” the mother? When does the man “become” the father? A wife does not often tell her husband that she is pregnant by saying, “Honey, you are a father.” No, she more often says, “Honey, you are going to be a father.” This bit of common human behavior suggests that parenthood begins, in most peoples’ minds, at the birth of the child.²³⁴ Surrogacy does not fracture motherhood. It is merely another means of achieving motherhood.

E. Other Arguments

1. Religious, Moral, and Ethical Objections

In the end, there is a divergent view of morality and legality. Much of the remaining opposition to surrogacy stems from a subjective view that this sort of practice is inherently immoral. It does not matter whether any specific feared outcomes actually occur. A practice that is on its own morally wrong should, arguably, be disallowed regardless of the potential for any secondary harms.²³⁵ This position often stems from sincerely held religious beliefs. The Catholic Church has long opposed any form of technological interference with the reproductive process.²³⁶

Such moral objections need not have empirical data of any actual harms to support them. But resting the argument on moral disapproval raises an important question as to the role of government in the regulation of practices that only some members of society find morally objectionable. The State should not prohibit any conduct merely because a minority (or even a majority) finds it morally objec-

Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006).

234. Other sections of this Article argue that the intended parents should be considered the parents of the resulting child even before embryo transfer. This is not inconsistent. Rather, it is a recognition of the reality that legal status and social status are not always the same thing.

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

236. The Catechism of the Catholic Church § 2376 states:

Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral. These techniques (heterologous artificial insemination and fertilization) infringe the child's right to be born of a father and mother known to him and bound to each other by marriage. They betray the spouses' "right to become a father and a mother only through each other."

CATECHISM OF THE CATHOLIC CHURCH § 2376 (2d ed. 1997) (citing CDF, *Donum vitae* II, 1).

tionable.²³⁷ Justice Kennedy, when addressing the sincerely held belief by some that homosexuality is immoral, said:

For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."²³⁸

The U.S. Supreme Court has rejected the argument that mere moral disapproval may justify government intervention. Without some accompanying demonstrable harm that the State has an interest in minimizing, the State ought not prohibit any arguably immoral activity. As discussed above, no such accompanying harm has been demonstrated.

2. *Why Not Just Adopt?*

It can be argued that people ought not be allowed to utilize surrogacy services when there are thousands of babies and children available for adoption.²³⁹ The argument distills down an assertion that it is morally and ethically wrong to have children in this way while so many other children have no parents. While this may be true, it is also irrelevant. Or rather, the argument applies just as well to couples having children in the traditional way. Contraception is easy, inexpensive, and effective. Why not adopt rather than having one of "your own"? The couple planning to have a child through the traditional method is making the same choice as the couple utilizing surrogacy. In both cases the parents are choosing to have a child that is genetically linked to themselves rather than to adopt an unrelated child. Interference in that choice is not the province of the government.

It is, of course, considerably less expensive to conceive a child the old-fashioned way as compared to adoption (or surrogacy). But when compared to the costs of raising a child to adulthood, the marginal cost of adoption is not so dramatic.²⁴⁰ Further, to even make such an

237. See *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (concluding that moral disapproval alone does not constitute a legitimate state interest).

238. *Id.* at 571 (majority opinion) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

239. See, e.g., Elisabeth Eaves, *Not the Handmaid's Tale*, FORBES.COM (Dec. 19, 2008, 12:00 AM), http://www.forbes.com/2008/12/18/kuczynski-surrogacy-motherhood-oped-cx_ee_1219eaves.html (addressing the claim that intended parents "are often told that they are selfish and should instead adopt a needy child").

240. The cost of raising a child to age seventeen is estimated to be \$206,180 for lower-income families, \$286,860 for middle-income families, and \$477,100 for upper-income families. This esti-

argument is to implicitly commodify the child. This argument boils down to choosing traditional conception over adoption because it is cheaper.

3. *To Compensate or Not to Compensate?*

A number of commentators have raised the argument that surrogacy, if it is to be permitted, should only be uncompensated and altruistic.²⁴¹ Indeed, a number of states, including Washington, Nebraska, and Florida, have enacted laws that prohibit compensated gestational surrogacy.²⁴² In those states, gestational surrogates may not be compensated for the service they provide in excess of reasonable expenses and medical care associated with the pregnancy itself. The primary argument appears to be the fear of exploitation. The promise of large sums of cash induces poor women to provide a risky service they would never otherwise consider.²⁴³ The logic seems to be that if we remove the financial lure we will protect the women from making unwise agreements.

Williams-Jones seems particularly concerned regarding compensated surrogacy:

Remuneration is the most problematic aspect of surrogacy because it challenges the cultural ideals of women and mothers as selfless nurturers; admitting that remuneration was adequate would eliminate the ability of the women to classify their work as an altruistic “gift of life” to an infertile couple.²⁴⁴

One might ask what this means for nannies and au pairs who certainly accept remuneration in exchange for nurturing the children in their care. It is quite possible for women to feel that they are providing an altruistic “gift of life” while at the same time accepting compensation. The majority of gestational surrogates interviewed held precisely this view. Even while accepting compensation, they felt their primary motivation was one of altruism.²⁴⁵ Accepting compensation, it seems, does not undermine the kinder, gentler reasons many women wish to be gestational surrogates.

mate does not include prenatal costs or any expenses after age seventeen, including any college costs. MARK LINO, CTR. FOR NUTRITION POL'Y & PROMOTION, U.S. DEP'T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2010 (2011), available at <http://www.cnpp.usda.gov/Publications/CRC/crc2010.pdf>.

241. See, e.g., Ailis L. Burpee, Note, *Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy*, 37 GA. J. INT'L & COMP. L. 305, 322 (2009).

242. See *supra* notes 49–51 and accompanying text.

243. See Browne-Barbour, *supra* note 204, at 476.

244. Williams-Jones, *supra* note 181, § 3.1.

245. Ciccarelli & Beckman, *supra* note 171, at 30.

Although many gestational surrogates consider altruism to be a significant motivating factor²⁴⁶ and many commentators view the compensation aspect to be so very troubling, not all believe that altruism is necessarily a good thing in this context. Some have argued that even encouraging potential gestational surrogates to think of the service they provide in altruistic terms, rather than economic terms, works to the gestational surrogates' disadvantage.²⁴⁷ Altruism itself is a form of compensation that serves to reduce the monetary amount needed to encourage a sense of adequate consideration in the mind of the gestational surrogate.²⁴⁸ The merits of this argument remain somewhat theoretical. As commercial gestational surrogacy gains wider acceptance and practice, however, whatever concern this may bring will likely diminish.

In the end, the reality is that gestational surrogates do, in fact, provide a valuable service on behalf of the intended parents and the hoped-for child. They accept a significant amount of responsibility and do so at some risk to themselves. It is only right and proper that they should be compensated for their efforts.²⁴⁹

V. THE PATCHWORK APPROACH CREATES HARMS AND RESOLVES NONE

The patchwork quilt that is our states' laws on surrogacy has resulted in significant hardships for many individuals, while failing to meet the goals that local enactors hope to accomplish. Restrictions on surrogacy are intended to protect surrogates from exploitation, protect children from commodification, and avoid circumvention of adoption laws. Surrogates are not exploited, children are not commodified, and adoption is inapplicable. The individual state laws discouraging surrogacy do not protect against any of these harms because gestational surrogacy does not create any of these harms. The inconsistent and uncertain approach to surrogacy across the country, unfortunately, does create harm.

Refusing to enforce gestational surrogacy agreements in various states, or even imposing criminal penalties, has certainly not stopped the practice. Intended parents and potential surrogates either go for-

246. See Edelman, *supra* note 169, at 133.

247. See Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 303 (2007).

248. See *id.*

249. The appropriate magnitude of the compensation is a question best left to the parties to decide. Governmental regulation may, of course, set reasonable parameters to ensure that the amount is not exploitative or unconscionable. But if \$1,000 is too low an amount, mandating that it be \$0 is certainly worse.

ward regardless of the law or seek friendlier jurisdictions. Numerous examples can be found of individuals who utilize surrogacy despite the legal uncertainty.

In New Jersey, despite the unenforceability of surrogacy agreements following the *Baby M* case eighteen years earlier, a gay male couple (lawfully married in California) asked one of their sisters to serve as a gestational carrier. Following the birth of twin baby girls, the sister refused to surrender the children to them and petitioned the court to recognize her parental rights notwithstanding the gestational surrogacy agreement.²⁵⁰ The couple may have felt that *Baby M* invalidated traditional surrogacy, thereby leaving open the possibility for the enforceability of a gestational surrogacy agreement. Judge Francis B. Shultz, the trial judge, did not see a distinction between traditional and gestational surrogacy. He wrote:

“The surrogacy contract is based on, principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from it’s [sic] mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness.” Would it really make any difference if the word “gestational” was substituted for the word “surrogacy” in the above quotation? I think not.²⁵¹

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

Virginia allows for uncompensated surrogacy (traditional and gestational), but limits the practice to married heterosexual couples.²⁵² A same-sex couple contracted with a woman to act as a traditional surrogate. The relationship between the couple and the surrogate worsened over time and geography. The couple moved multiple times to and from both North Carolina and California. Eventually, the Virginia court accepted the North Carolina judgment granting the same-sex couple full legal and physical custody.²⁵³

Even in Michigan, a state that bans and imposes criminal penalties for engaging in surrogacy agreements, the practice persists. A married couple, Scott and Amy Kehoe, sought the services of Laschell Baker

250. See *A.G.R. v. D.R.H.*, No. FD-09-001838-07, at 2 (N.J. Super. Ct. Dec. 23, 2009) (unpublished opinion).

251. *Id.* at 5 (citation omitted) (quoting *In re Baby M*, 537 A.2d 1227, 1250 (N.J. 1988)).

252. See VA. CODE ANN. §§ 20-156 to -165 (1950 & repl. vol. 2008).

253. See *Prashad v. Copeland*, 685 S.E.2d 199 (Va. Ct. App. 2009).

as a gestational surrogate.²⁵⁴ She agreed and some time later gave birth to twins.²⁵⁵ After initially surrendering the children to the Kehoes, Ms. Baker filed an action to take the children back and won.²⁵⁶

This uncertainty poses great risk to the individuals involved, not least of all the children born through surrogacy. Intended parents and surrogates move and travel. Uncertainty regarding the law inhibits this ability. There are substantial added economic, legal, and social costs resulting from the disparate and uncertain laws. As we see in these examples, laws blocking the enforcement of surrogacy agreements do not tend to prevent the practice. They only serve to generate more uncertainty and more child-custody disputes. The supposed solution to imagined harms does nothing more than generate more confusion and distress.

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

The solution to this is obvious. We need to create a more uniform approach to gestational surrogacy services. This can be achieved through widespread adoption of Alternative B, modified so as to address the shortcomings identified above. Better yet, we should adopt a federal gestational surrogacy act with essentially the same provisions. A federal approach would achieve uniformity more quickly, and it would obviate any forum shopping within the United States.²⁵⁷ A federal approach would also bring all states into agreement with regard to the relationship status of children, intended parents, and gestational surrogates, greatly reducing the difficulties of all parties when one or the other of them moves between jurisdictions taking wildly different approaches.

254. See Stephanie Saul, *Building a Baby, with Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at A1.

255. *Id.*

256. *Id.*

257. There may still be some who would take the international route, but a uniform legal regime in the United States would make domestic gestational surrogacy preferable with respect to the legal implications. International surrogacy would then compete on the basis of price. Intended parents would be faced with a choice of potentially lesser cost or legal certainty.

VI. CONCLUSION

A gestational surrogate provides a noble service that should be respected and honored. She helps in the creation of life, bringing into the world a child who otherwise would not exist. She is not coerced or compelled into this service. She does place herself at some risk, but she does so knowingly, willingly, and without reservation. Why this should not be honored is mystifying.

Almost eighty years ago, Louis Brandeis said that the states are the laboratories of democracy.²⁵⁸ To the extent that this is true, we must also recognize that the time comes when a given laboratory experiment is over. We have been experimenting with the recognition of surrogacy contracts since before *Baby M* over two decades ago. Since that time several states have allowed gestational surrogacy to grow as a reproductive option. Thousands of women have served as gestational carriers and given birth to thousands of babies, making thousands of intended parents immeasurably happy (and sleep deprived). We have seen virtually no evidence of adverse consequences. The women do not feel exploited. The children have not become commoditized. They grow and develop with the same sorts of problems and blessings as any other children. None of the adverse consequences posited by opponents in the early (or later) years of the experiment have come to pass. It is time to declare the experiment over and recognize the social value this practice offers for infertile people nationwide.

258. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

