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## Surrogate Mothers: An Exploration of the Empirical and the Normative

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# SURROGATE MOTHERS: AN EXPLORATION OF THE EMPIRICAL AND THE NORMATIVE

LINA PENG\*

Introduction .....	555
I. Harm to Surrogate Mothers: Evaluating the Empirical Objection .....	558
A. Overview of the Empirical Objection.....	558
B. Empirical Evidence on Surrogate Mothers in the United States.....	559
1. Demographic & Psychological Profile .....	560
2. Entering the Process .....	562
3. Relinquishing the Baby.....	562
4. Motivations .....	563
C. Counterarguments.....	566
II. Harm to Society: Evaluating the Normative Objection .....	568
A. Overview of the Normative Objection .....	568
B. Surrogacy as Implicating Social Anxieties.....	571
1. The Political and Social Context Leading up to <i>Baby M</i> .....	573
2. The <i>Baby M</i> Case as Encapsulating Social Anxieties.....	578
Conclusion .....	581

## INTRODUCTION

In 1986, Mary Beth Whitehead refused to give up the baby she was carrying as a surrogate for Elizabeth and William Stern. *Baby M*,<sup>1</sup> as the baby and the court case name came to be known, has become shorthand for the controversy around surrogacy.<sup>2</sup> But, in the days following *Baby M*, it was Mary Beth Whitehead, the surrogate mother, who sparked the most

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1. See generally *In re Baby M*, 537 A.2d 1227 (N.J. 1988). The details of this case are summarized *infra* Part III.

2. Unless otherwise specified, “surrogacy” in this Article means commercial surrogacy, where payment is given to the surrogate mother in return for her carrying the baby to term and relinquishing any parental rights.

intense debates over motherhood, women's roles, and family in American society.

Arguments against surrogacy focusing on the surrogate mother<sup>3</sup> can be characterized as one of two types: (1) surrogacy is bad because it directly harms the surrogate mother; and (2) surrogacy is bad because it harms society, whether or not it harms the individual surrogate. The first line of argument has been empirically evaluated through study of the actual experience of surrogate mothers; the second line of argument is difficult to evaluate empirically because it alleges a less tangible, normative harm to society.

This Article suggests that the opposition to surrogacy was driven more by the second type of argument than the first, although critics made both with equal seriousness. Part I of this Article argues that the first line of argument, quite early on, was seriously challenged by empirical studies demonstrating that, in the vast majority of surrogacy arrangements, surrogate mothers have positive experiences, have no issues relinquishing the child, and want to be surrogates again.<sup>4</sup> Yet, uneasiness with surrogacy remains: surveys of public attitudes indicate that the majority of Americans still disapprove of surrogacy and consider it the least acceptable use of reproductive technologies.<sup>5</sup> Commentators and academics, moreover, continue to criticize surrogacy normatively without explicitly referencing empirical studies,<sup>6</sup> extrapolating from outlier cases like *Baby M*,<sup>7</sup> or, in a

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3. Arguments focused on children are also made in opposition to surrogacy. See Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in SURROGATE MOTHERHOOD 167, 169 (Larry Gostin ed., 1990) [hereinafter Andrews, *Surrogate Motherhood*] (noting three general categories of rationales for banning surrogacy: "symbolic harm to society," "potential risks to women," and "potential risks to the potential child"). While the same empirical (direct harm to children born of surrogacy) and normative (societal harm from commodification of children) lines can be drawn, arguments focusing on children are outside the scope of this Article.

4. See, e.g., Elly Teman, *The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood*, 67 SOC. SCI. & MED. 1104, 1104 (2008); Olga B.A. van den Akker, *Psychological Aspects of Surrogate Motherhood*, 13 HUM. REPROD. UPDATE 53, 56 (2007); Janice C. Ciccarelli, *The Surrogate Mother: A Post-birth Follow-up Study* 39 (Apr. 15, 1997) (unpublished Ph.D. dissertation, California School of Professional Psychology).

5. See Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 29 (2005); R.J. Edlmann, *Surrogacy: The Psychological Issues*, 22 J. REPROD. & INFANT PSYCHOL. 123, 127 (2004).

6. See, e.g., BARBARA K. ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 35-36, 45 (1989) (arguing that surrogacy co-opts into patriarchal society by allowing upper-class women to access the privilege of patriarchy); Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HAR. J.L. & PUB. POL'Y 139, 147-48 (1990) [hereinafter Allen, *Surrogacy, Slavery, & Ownership*] (arguing against the idea that surrogacy is a source of female liberation, focusing on the minimal compensation associated with surrogacy and postulating that the practice not only reinforces the traditional female role as self-sacrificing and caretaking, but relieves men of the responsibilities of marriage and child-rearing); Shari

purely normative sense, claiming exploitation and commodification of women as per se social harms of surrogacy irrespective of empirical research.<sup>8</sup> This suggests that the normatively driven concern of harm to society, rather than direct harm to individual surrogate mothers was, and perhaps continues to be, the principal factor behind opposition to surrogacy. Part II of this Article attempts to explain why surrogacy implicated fears of widespread societal harm even when the vast majority of individuals directly affected appeared to not suffer harm (and, in the case of commissioning parents, received immense joy). The Article suggests that because surrogacy triggered many social anxieties regarding motherhood, class, race, and family structure—encapsulated in the *Baby M* case—it became resonant and salient across American society as symbolic of underlying anxiety in an era when many traditional norms were being challenged.

The observation that opposition to surrogacy is driven more by concerns of normative harm to society writ large than by direct harm to surrogate mothers may be an obvious one given our familiarity today with a similar dynamic with regard to a host of other controversial issues. Nonetheless, recognition of this aspect of opposition to surrogacy is important for several reasons. First, the argument that surrogacy was harmful to surrogate mothers as an empirical matter was widely made. Critics repeatedly alleged as premises or conclusions that surrogate mothers were financially and emotionally unstable, uneducated, did not make informed decisions, and would regret their decisions and suffer long-term psychological damage.<sup>9</sup> Had empirical evidence revealed that surrogate

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O'Brien, *Commercial Conception: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 144, 152 (1986) (asserting that commercial surrogacy “induces” a financially needy woman to become a surrogate, and that the practice is akin to slavery).

7. See, e.g., Heather E. Dillaway, *Mothers for Others: A Race, Class, and Gender Analysis of Surrogacy*, 34 INT’L J. SOC. FAM. 301, 304 (2008) (using *Baby M* and *Johnson v. Calvert* to argue that surrogacy exploits poor black women).

8. See, e.g., *In re Baby M*, 537 A.2d 1227, 1249-50 (N.J. 1988) (stating that Mary Beth Whitehead’s “consent is irrelevant” and arguing that many women’s perception of surrogacy as an opportunity does not change the harmful effect that the practice has on other women); GENE COREA, *THE MOTHER MACHINE* 232-33 (1985) (arguing that it is men who perpetuate the idea that women love to be pregnant and women have been socially conditioned to see childbearing as their primary valuable role at the cost of other potentials); George J. Annas, *Fairy Tales Surrogate Mothers Tell*, 16 L. MED. & HEALTH CARE, 27, 31 (1988) (describing surrogate mothers’ “purposeful self-deception”); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 458 (1996) (describing the “false consciousness” argument, which characterizes surrogacy as a “folly” despite the surrogate mother’s belief that they benefit from the arrangement).

9. See, e.g., Karen Busby & Delaney Vun, *Revisiting The Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 17 (2010) (asserting that surrogate mothers “often have very little education, little or no income, and very little personal security,” and that the practice is akin to slavery); COREA, *supra* note 8, at 228-32; MARTHA FIELD, *SURROGATE MOTHERHOOD* 27 (1990)

mothers were financially desperate or suffered psychological damage, then the debate on surrogacy would have been entirely different, perhaps such that the more nebulous societal harm argument need not be reached to oppose surrogacy. Second, and relatedly, if the actual experience of surrogate mothers can be tabled as a reason for opposing surrogacy, then a different lens crystallizes: the issue is no longer about whether to protect a vulnerable class of women from making a decision harmful to themselves, but whether to restrict individual freedom for the benefit of better normative social ordering. This is a more accurate, and better, lens through which to debate and respond to the issue.

An important caveat: this Article covers only surrogacy in the United States and thus does not apply to the host of issues that may be raised in other contexts, such as international surrogacy. Admittedly, in that context, the empirical concern with financial desperation may be more pronounced and thus warrants separate attention from what this analysis will provide.

## I. HARM TO SURROGATE MOTHERS: EVALUATING THE EMPIRICAL OBJECTION

### A. Overview of the Empirical Objection

Opposition to surrogacy rallied around harm to the surrogate mother, in part due to what was perceived as unfair criticism of Mary Beth Whitehead in the *Baby M* trial.<sup>10</sup> Drawing from the *Baby M* case itself, surrogate mothers were described by critics as women with “little education, little or no income, and very little personal security”<sup>11</sup> or as women likely to be poor, young, single, and from minority backgrounds.<sup>12</sup> A news article discussing the trial court decision leading to the 1993 California Supreme Court decision upholding gestational surrogacy in *Johnson v. Calvert*<sup>13</sup> described most surrogate mothers as single mothers shuttling between

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(implying that surrogate women are “people in extreme financial difficulty”); ROTHMAN, *supra* note 6, at 237 (predicting that gestational surrogacy would lead to the hiring of “[p]oor, uneducated third world women and women of color from the United States and elsewhere, with fewer economic alternatives . . .”); Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17, 30 (1991) (asserting that poor and minority women will become a “breeder class” as they increasingly serve as “mother machines” for middle and upper class women); Ciccarelli & Beckman, *supra* note 5, at 29 (studying empirically the “widely expressed concerns about contractual parenting being emotionally damaging or exploitive for surrogate mothers”).

10. Iver Peterson, *Fitness Test for Baby M's Mother Unfair, Feminists Say*, N.Y. TIMES, Mar. 20, 1987, at B1 [hereinafter Peterson, *Fitness Test for Baby M's Mother*]; see also *infra* Part II.2.

11. Busby & Vun, *supra* note 9, at 17.

12. See *id.* at 41; Mary Lyndon Shanley, “Surrogate Mothering” and Women’s Freedom: A Critique of Contracts for Human Reproduction, 18 SIGNS 618, 618 (1993).

13. 851 P.2d 776 (1993).

welfare and dead-end jobs with never-ending bills.<sup>14</sup> A more recent article characterized most surrogate women as truly needing the money.<sup>15</sup> Similarly, in criticizing surrogacy, Martha Field, Professor at Harvard Law School, suggested that bans on surrogacy, like bans on child-selling, “reflect a judgment that we do not want a society in which people in *extreme financial difficulty* are tempted to sell a child.”<sup>16</sup> Building from this profile of vulnerability, critics, including the court in *Baby M*, argued that these women did not really consent or did not realize the true consequences of their decisions, and thus often would regret relinquishing their child and suffer psychological damage.<sup>17</sup> Others went further to argue that even surrogate mothers who report positive experiences were deluded because “however much surrogate mothers may say they benefit from the arrangement, surrogacy is not an advantage but a folly.”<sup>18</sup> This “false consciousness” type of argument, which on its face rejects empirical studies of actual surrogate mothers’ experiences, is examined further below. The next section examines the empirical evidence on surrogate mothers and contends that, contrary to the characterizations above, the actual experience of the vast majority of surrogate mothers does not suggest that surrogacy causes them direct harm.

### *B. Empirical Evidence on Surrogate Mothers in the United States*

Empirical studies on surrogate mothers have repeatedly demonstrated

14. See Katha Pollitt, *Checkbook Maternity: When Is a Mother Not a Mother?*, NATION, Dec. 31, 1990, at 839, 842.

15. See Lorraine Ali & Raina Kelley, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2008, at 45.

16. FIELD, *supra* note 9, at 27 (emphasis added).

17. See *In re Baby M*, 537 A.2d 1227, 1250 (N.J. 1988) (stating that the long-term effects of surrogacy are unknown but fearing “the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child”); BRITISH MED. ASS’N, CHANGING CONCEPTIONS OF MOTHERHOOD: THE PRACTICE OF SURROGACY IN BRITAIN 45-46 (1996) (suggesting that relinquishing the child may be extremely distressing and may result in psychological problems); FIELD, *supra* note 9, at 27 (characterizing the idea that a woman’s choice to be a surrogate may be driven by informed consent rather than an economic imperative as idealistic, and devoid of recognition of economic realities); Rakhi Ruparelia, *Giving Away the “Gift of Life”: Surrogacy and the Canadian Assisted Human Reproduction Act*, 23 CAN. J. FAM. L. 11, 43 (2007) (“[T]he existence of power hierarchies, even subtle ones, and the obligations that arise from close-knit family structure, make it difficult for women to refuse a request to be a gift surrogate.”); Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 109 (2009) (summarizing critics who characterize women who agree to surrogacy as having either been coerced or having made the decision without sufficient understanding of the consequences). Cf. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 182 (1993) (observing, in the context of adoption, that birth parents “are conditioned to think they should feel lifelong pain as the result of their ‘unnatural’ act of giving up their ‘own’ child for another to raise”).

18. See Sanger, *supra* note 8, at 458.

that the vast majority of surrogacy arrangements are successfully executed and consented to by women who are financially and psychologically stable. This section summarizes and examines the empirical literature on surrogate mothers. The analysis here is not intended to show that surrogate mothers are never destitute, objectively exploited for their circumstances, or suffer psychologically. Abuses in surrogacy likely exist and will continue to exist as they do in every area of human interaction.<sup>19</sup> This section simply demonstrates that in the vast majority of cases, the characterizations of tangible harm to surrogate mothers do not comport with the empirical evidence. In examining and evaluating the empirical evidence on surrogate mothers, this section relies on the conclusions of others, and does not independently question the methodologies of the studies referenced.

### *1. Demographic & Psychological Profile*

Karen Busby, Professor of Law at the University of Manitoba in Canada, with Delaney Vun, reviewed nearly forty empirical studies on surrogate mothers, all of which were peer-reviewed and all except one were published in academic journals or academic presses.<sup>20</sup> Many of the empirical studies were interview-based qualitative studies of surrogate mothers; others involved psychological testing and clinical or agency file reviews.<sup>21</sup> On the basis of the review, Busby and Vun concluded that:

The profile of surrogate mothers emerging from the empirical research in the United States and Britain does not support the stereotype of poor, single, young, ethnic minority women whose family, financial difficulties, or other circumstances pressure her into a surrogacy arrangement. Nor does it support the view that surrogate mothers are naively taking on a task unaware of the emotional and physical risks it might entail. Rather, the empirical research establishes that surrogate mothers are mature, experienced, stable, self-aware, and extroverted non-conformists who make the initial decision that surrogacy is something that they want to do.<sup>22</sup>

More specifically, Busby and Vun found that “studies on surrogate mothers consistently show that most women who agree to become either gratuitous or commercial surrogates are Caucasian, Christian, and in their

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

20. All the research considered in the paper was conducted in the United States or Britain, with the exception of two conducted in Canada. Busby & Vun, *supra* note 9, at 39-40.

21. *Id.* at 39.

22. *Id.* at 51-52.

late 20-early 30s.”<sup>23</sup> Helena Ragoné, Ph.D., Professor of Anthropology at the University of Massachusetts, Boston, in her study of twenty-eight American surrogates, found that they averaged twenty-seven years of age and were “predominantly white, working class, of Protestant or Catholic background.”<sup>24</sup> Of the women Ragoné studied, approximately thirty percent were full-time homemakers, married, and had an average of three children.<sup>25</sup> Even some critics have acknowledged that a majority of surrogate mothers are married and have been pregnant previously.<sup>26</sup> In fact, as further explored below, surrogacy agencies specifically screen potential surrogate for such “stability” indicators.

Surrogates have varying degrees of education, but a large proportion have had some higher education. For instance, in their 2001 study of seventeen surrogate mothers, Melinda Hohman, Ph.D., Assistant Professor of Social Work at San Diego State University, and Christine Hagan, Psy.D., Assistant Professor of Social Work at California State University, Long Beach, found that eleven of the seventeen had some college education.<sup>27</sup> In a 1989 study of fifty American surrogates, clinical psychologist Dr. Joan Einwohner found that most had completed high school, many had gone to college, a few had graduate degrees, and one had three masters degrees.<sup>28</sup> Of the twenty-eight American surrogates studied by Ragoné, thirteen had some college education and all except one had a high school degree.<sup>29</sup> By contrast, Professor of Social Work at the University of Huddersfield Eric Blyth’s 1994 study of British surrogate mothers showed lower education rates than the American studies: fourteen of the nineteen women interviewed left school before the age of seventeen.<sup>30</sup>

Researchers using standardized psychological tests to evaluate surrogate mothers have concluded that they are within normal ranges.<sup>31</sup> Hohman and

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23. *Id.* at 42.

24. HELENA RAGONÉ, *SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART* 54 (1994).

25. *Id.*

26. See, e.g., Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 *BERKELEY WOMEN’S L.J.* 29, 37 n.23 (1993).

27. Melinda Hohman & Christine B. Hagan, *Satisfaction with Surrogate Mothering: A Relationship Model*, 4 *J. HUM. BEHAV. SOC. ENV’T.* 61, 66 (2001).

28. Joan Einwohner, *Who Becomes a Surrogate: Personality Characteristics*, in *GENDER IN TRANSITION: A NEW FRONTIER* 123, 125 (J. Offerman-Zuckerberg ed., 1989).

29. RAGONÉ, *supra* note 24, at 55.

30. Eric Blyth, “*I wanted to be interesting. I wanted to be able to say ‘I’ve done something interesting with my life’*”: *Interviews with Surrogate Mothers in Britain*, 12 *J. REPROD. & INFANT PSYCHOL.* 189, 191 (1994).

31. Busby & Vun, *supra* note 9, at 46.



Hagan's study found that surrogate mothers are more likely than the general population to be self-sufficient, independent thinkers, and nonconformists, and therefore tend to be less affected by social pressure than other women.<sup>32</sup> Another study in 2000 on seventeen American surrogate mothers showed that they scored much higher on extroversion—a factor indicating sociability, assertiveness, and optimism—than other women.<sup>33</sup> On the basis of these psychological tests, Einwohner concluded that surrogate mothers are intelligent, self-aware, stable adults who are down to earth, optimistic, and not worriers.<sup>34</sup>

## 2. *Entering the Process*

Another consistent finding in the empirical research is that the idea of becoming a surrogate mother starts with the women themselves. There was no evidence in any study reviewed by Busby and Vun that indicated the women were being pressured or coerced into becoming surrogates.<sup>35</sup> Hohman and Hagan's interview-based study of seventeen American women reported that "far from being 'used' or exploited as has been suggested, the participants in this study appeared to be very clear that this is what they wanted to do, often despite negative responses from those around them."<sup>36</sup> Ragoné also found that the surrogates she interviewed decided to pursue the process on their own, often because an advertisement they saw spoke to them in some way.<sup>37</sup> One of the surrogates Ragoné interviewed interestingly used pro-choice language to explain her decision: "it's my right to do what I want to do with my body."<sup>38</sup> From their review of the empirical research, Busby and Vun concluded that "overwhelmingly, the research demonstrates that the women who become surrogate mothers go into the process on their own initiative, with a strong sense of what it is that they are committing to and that they rarely regret having been a surrogate mother."<sup>39</sup>

## 3. *Relinquishing the Baby*

In predicting that there are high psychological risks associated with relinquishing the baby, surrogacy critics often analogize to the regret

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32. Hohman & Hagan, *supra* note 27, at 80-81.

33. Christine Kleinpeter & Melinda Hohman, *Surrogate Motherhood: Personality Traits and Satisfaction with Service Providers*, 87 *PSYCHOL. REP.* 957, 964 (2000).

34. Einwohner, *supra* note 28, at 126.

35. Busby & Vun, *supra* note 9, at 50.

36. Hohman & Hagan, *supra* note 27, at 80-81.

37. RAGONÉ, *supra* note 24, at 55.

38. *Id.* at 67.

39. Busby & Vun, *supra* note 9, at 81.

biological mothers are said to feel in traditional adoption.<sup>40</sup>

Out of 25,000 surrogacy arrangements estimated to have taken place since the 1970s,<sup>41</sup> less than one percent of surrogate mothers have changed their minds and less than one-tenth of one percent of surrogacy cases end up in court battles.<sup>42</sup> The majority of surrogates have reported high satisfaction with the process and report no psychological problems as a result of relinquishment.<sup>43</sup> Most surrogates have viewed the relinquishment of the baby as a happy event and have reported that they would be surrogates again.<sup>44</sup> Longitudinal studies show that these attitudes remain stable over time.<sup>45</sup>

Of note, there has been documentation that surrogates may not receive as much social support as other mothers during pregnancy precisely because of negative popular attitudes towards surrogacy, which could cause them to be more vulnerable than they otherwise would be.<sup>46</sup>

#### 4. Motivations

The motivations of surrogate mothers are not easy to understand. Admittedly, the issue is a difficult one for research to fully document, particularly given that subjective motivations are likely to be filtered through the dominant social framework of what is acceptable behavior.<sup>47</sup> The empirical argument, often couched in terms of exploitation, is that the surrogate is financially desperate or needy, and, therefore, is exploited or coerced in some way to turn to surrogacy as a “final economic resort.”<sup>48</sup>

First, as previously mentioned, research has not revealed that surrogate mothers are financially desperate. This is the case despite the fact that nearly all studies analyzing the motivations of surrogates look for evidence that financial distress is the reason behind such a “desperate measure.”<sup>49</sup>

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40. See Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205, 215 (1992).

41. Teman, *supra* note 4, at 1104.

42. *Id.*; see also Andrews, *Surrogate Motherhood*, *supra* note 3, at 171.

43. See Hazel Baslington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process*, 7 J. HEALTH PSYCHOL. 57, 59, 67 (2002); Blyth, *supra* note 30; Einwohner, *supra* note 28, at 126; Vasanti Jadvva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196, 2203 (2003); Kleinpeter & Hohman, *supra* note 33, at 968; RAGONÉ, *supra* note 24, at 81.

44. See van den Akker, *supra* note 4, at 56; Teman, *supra* note 4, at 1104.

45. See generally van den Akker, *supra* note 4; Ciccarelli, *supra* note 4.

46. See Edelmann, *supra* note 5, at 127.

47. RAGONÉ, *supra* note 24, at 54-55.

48. JANICE RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM*, at xix-xx, 103 (1993).

49. Teman, *supra* note 4, at 1107.

No study that Busby and Vun reviewed indicated that “any surrogate mothers became involved with surrogacy because they were experiencing financial distress.”<sup>50</sup> Ciccarelli and Beckman reviewed twenty-seven American empirical studies published between 1983 and 2003 and reached a similar conclusion,<sup>51</sup> finding that “surrogate mothers’ family incomes were most often modest (as opposed to low) and they are from working class backgrounds.”<sup>52</sup> In Ragoné’s 1994 study, the average family income of married surrogates was \$38,700 and unmarried surrogates’ income level ranged from \$16,000 to \$24,000.<sup>53</sup> The median household income in the United States in 1994 was \$32,264; the median per capita income was \$16,555.<sup>54</sup> Thus, it appears that surrogate women, while likely not as wealthy as most intended parents, are also not financially distressed.

Second, studies reveal that the financial motive is one of many that factor into a surrogate’s decision. Regarding compensation as motivation, Ciccarelli and Beckman reported that “[a]lthough financial reasons may be present, only a handful of women mentioned money as their main motivator.”<sup>55</sup> Teman, after her survey of studies on the issue, observed that almost every study concluded that money was rarely the sole or even the primary reason for entering the surrogacy arrangement.<sup>56</sup> Instead, most surrogates reported enjoying pregnancy and childbirth, and many noted that surrogacy increased their fulfillment and self-confidence and opened up their social circles.<sup>57</sup> Others indicated that it allowed them a way to continue being a mother to their own children.<sup>58</sup> At the same time, Ragoné points out that surrogates may be influenced by social pressure to construct their motivations as altruistic because that is more socially acceptable than to state money as their sole motivation.<sup>59</sup>

Motivation, as alluded to earlier, is difficult to empirically document in part because it crosses most heavily over to normative assumptions. True, the empirical evidence demonstrates that surrogates are not financially

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50. Busby & Vun, *supra* note 9, at 44.

51. Ciccarelli & Beckman, *supra* note 5, at 24, 30.

52. *Id.* at 31.

53. RAGONÉ, *supra* note 24, at 54-55.

54. U.S. CENSUS BUREAU, INCOME, POVERTY, AND NONCASH BENEFITS: 1994 (1996), available at <http://www.census.gov/prod/1/pop/p60-189.pdf>.

55. Ciccarelli & Beckman, *supra* note 5, at 30.

56. Teman, *supra* note 4, at 1107.

57. See RAGONÉ, *supra* note 24, at 81; van den Akker, *supra* note 4, at 56; Blyth, *supra* note 30, at 92; Edelman, *supra* note 5, at 130.

58. See Hohman & Hagan, *supra* note 27, at 73.

59. RAGONÉ, *supra* note 24, at 71-73. This is supported by Einwohner’s 1989 study of fifty American surrogate mothers, of which forty percent said money was the main but not sole motivator. Einwohner, *supra* note 28, at 130.

desperate. But given how expensive a surrogacy is, surrogates are likely to be less wealthy than the commissioning parents. Further, it is also fair to say that, whatever other altruistic reasons may exist, most surrogates are likely motivated at least somewhat by money, like everyone else. At the same time, critics and others have acknowledged that infertility affects all classes of people, and commissioning parents are not necessarily wealthy or even middle-class.<sup>60</sup> Some have argued that paid surrogacy is not fundamentally different from other kinds of jobs where people are motivated by money and are employed by those wealthier than they are.<sup>61</sup> They point out that surrogacy critics typically regard unpaid or altruistic surrogacy as not as harmful or exploitive, though, in that case, *nothing* is given to the surrogate mother for her labors.<sup>62</sup> By contrast, others have argued that the likely income differential between the two sides in a surrogacy is enough to constitute exploitation or coercion, operating on the assumption that “normally” women would not want to be surrogates.<sup>63</sup> These differing views of the empirical evidence indicate underlying normative disagreement over reproduction and motherhood, namely whether one believes surrogacy represents conduct “money cannot buy” because of its resultant social harms.<sup>64</sup> Part II attempts to situate these normative views and suggests that, because American society predominantly views motherhood as natural and sacred, a practice that counters those norms in a fundamental way will trigger social anxiety and discomfort. The empirical evidence, at a minimum, demonstrates that surrogate mothers are not financially desperate, which, in conjunction with other characteristics, refutes the stereotyped profile some critics have painted to oppose surrogacy.

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60. See, e.g., Linda J. Lacey, “*O Wind, Remind him that I have no Child*”: *Infertility and Feminist Jurisprudence*, 5 MICH. J. GENDER & L. 163, 183-84 (1998) (describing infertility as affecting people of all classes and races and noting that many low-income people seek out infertility clinics); NOEL E. KEANE & DENNIS L. BREO, *THE SURROGATE MOTHER* 31, 181 (1982) (describing some commissioning parents as having mortgaged their homes); see also *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988) (acknowledging that “the Sterns are not rich and the Whiteheads not poor,” but nonetheless asserting “doubt that infertile couples in the low-income bracket will find upper income surrogates”).

61. Alan Wertheimer, *Two Questions About Surrogacy and Exploitation*, 21 PHIL. & PUB. AFF. 211 (1992); Stephen Wilkinson, *The Exploitation Argument Against Commercial Surrogacy*, 17 BIOETHICS 169, 183 (2003).

62. Wertheimer, *supra* note 61, at 217; see also LORI ANDREWS, *BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, AND BRAVE NEW BABIES* 259 (1989) [hereinafter ANDREWS, *BETWEEN STRANGERS*] (asking from a surrogate mother’s perspective, “why am I exploited if I am paid, but not if I am not paid?”).

63. See ANDREWS, *BETWEEN STRANGERS*, *supra* note 62.

64. See *In re Baby M*, 537 A.2d 1227, 1250 (N.J. 1988).

C. Counterarguments

There are three typical counterarguments that can be made against the empirical evidence presented in this section. The first is that the empirical evidence is incomplete or biased. But as some scholars have pointed out, precisely because surrogacy challenges social norms regarding motherhood and family, numerous studies have set out to prove that there is something “abnormal” about surrogate mothers, including whether they experience financial hardship, regret, or other psychological distress.<sup>65</sup> Despite not identifying such traits, attempts to prove their existence have continued for more than twenty years, since *Baby M* thrust the issue into the American consciousness.<sup>66</sup> Even studies that result in no adverse findings are quick to put in caveats that their study may not have captured all the relevant factors.<sup>67</sup> Particularly given the opposition to surrogacy in the years following *Baby M*, and pre-existing notions of motherhood, it is actually more likely that empirical studies would be skewed to disfavor rather than to favor surrogacy. Yet study after study has consistently failed to find negative experiences or objective indicia of exploitation in the vast majority of surrogacy arrangements. Again, this Article does not claim that there is none of what may be objectively construed as exploitation or coercion in surrogacy arrangements.<sup>68</sup> However, given the efforts to document such occurrences and the lack of supportive findings, such conditions likely do not accurately reflect the majority of surrogacy arrangements in the United States to date.

Nor is the profile of the surrogate mother summarized above a surprising one given the incentives to the parties involved. It is not in the interests of commissioning parents or surrogacy agencies to choose surrogates who are financially or emotionally unstable, precisely because they may be more likely to change their minds. In fact, surrogate mothers are screened specifically to *not* have the socially vulnerable profile opponents portray.<sup>69</sup> Keeping in mind that the commissioning parents must depend on the surrogate mother for the duration of the pregnancy, “it is not in [their] interests to find a surrogate whom they can exploit, as they do not want the surrogate engaging in behavior that could harm the child, or reconsidering her decision mid-course.”<sup>70</sup>

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65. Teman, *supra* note 4, at 1106.

66. *Id.* at 1104-07.

67. *Id.* at 1105-06.

68. In fact, it is possible that some experienced surrogates could exploit new commissioning parents, who are new to the process and likely heavily dependent on the surrogate.

69. See RAGONÉ, *supra* note 24, at 15-19 (describing the procedures of surrogacy agencies in choosing potential surrogates).

70. Angie Godwin McEwen, *So You're Having Another Woman's Baby*:

A second counterargument made by some is that surrogate mothers suffer from a kind of “false consciousness,” dictated by the socialization of a patriarchal society and, as a result, their “choice” and subsequent positive reporting of their experiences cannot be given full weight.<sup>71</sup> In contrast to some cabined objections that accept surrogacy contracts only on the condition that “women entering into them do so of their own volition, with fully informed consent, and . . . maintain control over their own bodies throughout the pregnancies,”<sup>72</sup> the false consciousness position doubts surrogate women could ever volitionally choose to be surrogates.<sup>73</sup> Gena Corea, who previously chaired the National Coalition Against Surrogacy, argued that “[g]iven that childbearing is the prime function for which women are valued, it is not surprising that some women only feel special when they are pregnant and assert that they love reproducing”; it is men who perpetuate the idea that women love to be pregnant.<sup>74</sup> Others have asserted that surrogate mothers construct “fairy tales” to deceive themselves into believing that they enjoy the experience.<sup>75</sup> In short, positive empirical accounts of surrogates’ experiences prove only a false reality through a filtered patriarchal lens.

This type of argument depends on rejecting women’s own accounts of their experiences no matter how well considered and fully voluntary, a position some have characterized as a “hard paternalist” position<sup>76</sup> and as opposed to the charge of feminism to “listen to what women say and respect their choices.”<sup>77</sup> This Article simply contends that this type of argument rejects the empirical evidence because of its non-conformity with a pre-existing normative view of the world in support of the thesis that opposition to surrogacy is more normatively driven. By contrast, a separate argument that there is lack of consent because women are unaware of their emotional responses to pregnancy and relinquishment can be evaluated against empirical evidence showing that most surrogates have had children, display positive attitudes towards surrogacy over time, and want to be surrogates again.<sup>78</sup>

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*Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT’L L. 272, 293 (1999).

71. See Sanger, *supra* note 8.

72. ROTHMAN, *supra* note 6, at 241-42 (characterizing the position of the “liberal” wing of feminism as not necessarily opposing surrogacy contracts).

73. See Lieber, *supra* note 40, at 215.

74. COREA, *supra* note 8, at 228-30, 232-33.

75. Annas, *supra* note 8.

76. See Richard J. Arneson, *Commodification and Commercial Surrogacy*, 21 PHIL. & PUB. AFF. 132, 159 (1992).

77. Sanger, *supra* note 8, at 458; see also Andrews, *Surrogate Motherhood*, *supra* note 3, at 171-73.

78. See *supra* text accompanying notes 20-46.

Finally, a third counterargument, related to the second, is that, regardless of what the empirical evidence may show, surrogacy is still bad for society writ large. Because such an argument stands independent of any empirical evidence that can be presented on surrogate mothers or their experiences, it is precisely of the purely normative variety that this Article asserts is at the heart of the opposition to surrogacy. Even if it could be hypothetically demonstrated with empirical certainty that there are no tangible harms to the surrogate mother and that the experience is a positive one from her perspective, certain critics and a majority of the American public would be uncomfortable with surrogacy because of the role of the surrogate mother. By stripping away the empirical piece in this section, the universe of opposition to surrogacy is delineated more clearly. As stated in the Introduction, if the direct harm to the surrogate mother can be tabled (at least as to the vast majority of surrogate mothers in the United States), then the perceived normative, social harms of surrogacy can be better understood. The remainder of this Article seeks to provide a fuller explanation of the normative uneasiness with surrogacy through exploring the social and political anxieties that surrogacy presented.

## II. HARM TO SOCIETY: EVALUATING THE NORMATIVE OBJECTION

### *A. Overview of the Normative Objection*

Not surprisingly, empirical evidence contradicting claims of direct harm to surrogate mothers in the vast majority of surrogacy arrangements alleviated little of the uneasiness with surrogacy on a normative level. More than twenty years after the emergence of surrogacy as a salient issue, public opinion of surrogacy in the United States remains largely negative. A survey of 400 randomly selected United States residents in 1987 indicated that the majority disapproved of surrogate motherhood.<sup>79</sup> Recent scholarship suggests that the largely negative attitude has remained.<sup>80</sup> Of the approximately eighteen states with statutes specifically addressing permissibility of surrogacy, the vast majority severely limit it or ban forms of it altogether. Six states expressly prohibit all forms of surrogacy agreements and three expressly prohibit paid surrogacy. Some states, like Michigan, Florida, and New York, and the District of Columbia, go as far as imposing civil or criminal penalties.<sup>81</sup> Five states ban traditional

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79. Gregory L. Wiess, *Public Attitudes About Surrogate Motherhood*, 6 MICH. SOC. REV. 15, 15 (1992).

80. Teman, *supra* note 4, at 1105; van den Akker, *supra* note 4, at 53; Edelmann, *supra* note 5, at 127.

81. COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW DATABASE, *Statutory Provisions Regarding the Permissibility and Enforceability of Surrogacy Agreements* § 4:2 (2012), available at

surrogacy arrangements but allow gestational surrogacy arrangements where the surrogate is not genetically related to the child; others require at least one parent to be genetically related to the child. At least one state, Nevada, requires both intended parents to be genetically related to the child.<sup>82</sup>

Popular perception of surrogacy has also been negatively influenced by media portrayals.<sup>83</sup> Media accounts of the *Baby M* case introduced most Americans to the world of surrogacy and frequently framed the issue as dichotomies between “Giving Love, or Selling Life?” and “Gift of Life . . . or simply baby-selling?”<sup>84</sup> Public attention on *Baby M* was intense from the time the surrogate mother fled New Jersey with the baby and persisted through the New Jersey Supreme Court decision holding the surrogate contract unenforceable.<sup>85</sup> As the trial went on, Mary Beth Whitehead, the surrogate, was increasingly portrayed as a victim.<sup>86</sup> In part driven by the commissioning parents’ lawyers’ strategy to paint her as a bad mother through the use of experts to question her parenting techniques and lifestyle, the public attitude shifted from “an initial negative perception of Mrs. Whitehead as a woman who had entered into a contract to have a baby for money and then reneged,” to “a victim, exploited by people better off than she and subjected to unfair scrutiny of her family life and personality.”<sup>87</sup> While early on in the *Baby M* case feminists were “torn between support [of] a women’s right to use her body as she chooses” and concerns about the exploitation of women, this opinion quickly dissipated into a strong negative position on surrogacy.<sup>88</sup> To be sure, there were women who defended surrogacy on women’s choice grounds even early on, but they were in the minority.<sup>89</sup> By the time the *Baby M* trial ended at

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Westlaw as LGFAMLAW.

82. *Id.*

83. Teman, *supra* note 4, at 1104; van den Akker, *supra* note 4, at 55.

84. SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 104-15 (2007).

85. Scott, *supra* note 17, at 114.

86. Peterson, *Fitness Test for Baby M’s Mother*, *supra* note 10.

87. *Id.*

88. Iver Peterson, *Baby M Trial Splits Ranks of Feminists*, N.Y. TIMES (Feb. 24, 1987) [hereinafter Peterson, *Baby M Trial*], <http://www.nytimes.com/1987/02/24/nyregion/baby-m-trial-splits-ranks-of-feminists.html> (reporting that the membership of the New Jersey National Organization for Women split on surrogacy); *see also* PHYLLIS CHESLER, SACRED BOND: THE LEGACY OF *BABY M* 24 (1988) (describing the reluctance of feminists to rally around Whitehead early in the trial).

89. Scott, *supra* note 17, at 116. Feminists and women’s groups were united against the trial level decision of *Baby M* and similarly united in support of the New York State legislation banning surrogacy. *Id.* The New York Women’s Bar Association and the New York chapter of the National Organization for Women lobbied actively for the passage of the law and the bill itself was sponsored by Helene Weinstein, a pro-choice Brooklyn Democrat. *Id.* at 119. One of the first feminists to



the lower court level in 1987, feminists and liberals had become the most active advocates against surrogacy.<sup>90</sup> At the appellate level, amicus briefs for reversal far outnumbered those in favor of the decision; amici for reversal included prominent feminists, the New Jersey Catholic Congress, the Family Research Council, and the National Committee for Adoption.<sup>91</sup> Post *Baby M*, the media continued to reinforce the popular narrative of bad surrogacy experiences.<sup>92</sup>

The popular unease with surrogacy was reflected in the academic discourse, where critiques of surrogacy were particularly scathing in the years immediately following *Baby M*.<sup>93</sup> As already alluded to, normative critiques of surrogacy based on harm to society, independent of any empirical harm to surrogate women, were made by academics on two main themes: exploitation and commodification. The theoretical underpinning came from feminist theory, which argued that “[i]t is women’s motherhood that men must control to maintain patriarchy,”<sup>94</sup> and that surrogacy and other reproductive technologies, “will enable men—at last—to have women for sex and women for reproduction, both controlled with sadistic precision by men.”<sup>95</sup> In more extreme versions of the argument, surrogacy is compared to a form of slavery or prostitution because it “pays so little, capitalizes on the traditionally female virtues of self-sacrifice and caretaking, and enables men to have biologically related children without the burden of marriage.”<sup>96</sup> In addition to serving the patriarchal wish for reproduction, surrogacy was said to be harmful in reinforcing the stereotypical image of women as mothers or caretakers.<sup>97</sup> Still others criticized surrogacy as commodification that “reduce[d] the woman to a

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come out in favor of surrogacy was Carmel Shalev. See CARMEL SHALEV, BIRTH POWER 11 (1989).

90. Peterson, *Fitness Test for Baby M’s Mother*, *supra* note 10; Scott, *supra* note 17, at 116.

91. See *In re Baby M*, 537 A.2d 1227, 1232-33 (N.J. 1988) (listing of amicus curiae briefs); Joseph F. Sullivan, *Brief by Feminists Opposes Surrogate Parenthood*, N.Y. TIMES (July 31, 1987), <http://www.nytimes.com/1987/07/31/nyregion/brief-by-feminists-opposes-surrogate-parenthood.html>.

92. See Teman, *supra* note 4, at 1105 (“Stories featuring surrogacy in films and on television replicate similar plotlines, seldom portraying surrogacy in positive, uncomplicated ways.”); see, e.g., *Plot Summary for Final Vendetta*, IMDB, <http://www.imdb.com/title/tt0116306/plotsummary> (last visited Jan. 12, 2013) (depicting psychologically disturbed surrogate mothers with ulterior motives terrorizing their commissioning couples); *Plot Summary for The Surrogate*, IMDB, <http://www.imdb.com/title/tt0114585/plotsummary> (last visited Jan. 12, 2013) (depicting the surrogate renegeing on the contract).

93. Scott, *supra* note 17, at 115.

94. ROTHMAN, *supra* note 6, at 30.

95. ANDREA DWORKIN, RIGHT WING WOMEN 188 (1983).

96. Allen, *Surrogacy, Slavery, & Ownership*, *supra* note 6, at 147-48.

97. Lacey, *supra* note 60, at 173.

container” for the fulfillment of the male desire of perpetuating their “seeds,” only now some upper-class women are afforded the privileges of patriarchy as well.<sup>98</sup>

There were many versions of these arguments, some of which incorporated empirical claims regarding the economic and social statuses of surrogate women. As demonstrated in Part I, the empirical evidence, however, does not show actual harm to surrogate mothers in the vast majority of surrogacies. And more importantly, these normative arguments do not depend on empirical evidence because, by definition, surrogacy involves the exchange of money for pregnancy, which alone is sufficient to implicate the wrongs of commodification and exploitation for many of these critics. This normative opposition to surrogacy, as distinct from empirical objections, is most well illustrated by the *Baby M* decision itself, where the New Jersey Supreme Court, referring to Mary Beth Whitehead, the surrogate mother, stated that “[p]utting aside the issue of how compelling her need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy.”<sup>99</sup>

In recent years, there has been some suggestion that public attitudes are changing towards a more permissive view of surrogacy.<sup>100</sup> This shift, however, cannot be explained by any new results from empirical studies, which have remained consistent over time. The next section explores the normative opposition to surrogacy as a function of other social anxieties that were brewing in the 1980s when *Baby M* launched surrogacy as a salient issue into the public sphere.

### *B. Surrogacy as Implicating Social Anxieties*

In the last few decades, constructivism has emerged as a sociological perspective that emphasizes the constructed nature of social problems.<sup>101</sup> From the constructionist perspective, the emergence or salience of a “social problem” is not so much connected to objective conditions but to subjective claims-making activities.<sup>102</sup> Other scholars have described a related phenomenon of a “moral panic,” often triggered by highly publicized events that engender public alarm and in which the public, the media, and political actors reinforce each other “in an escalating pattern of intense and

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98. ROTHMAN, *supra* note 6, at 244.

99. *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988).

100. Scott, *supra* note 17, at 109.

101. MARKENS, *supra* note 84, at 7.

102. *See, e.g.*, IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS (Joel Best ed., 1st ed. 1989).

disproportionate concern in response to a perceived social threat.”<sup>103</sup> A moral panic, like a constructed social problem, is distinguished from a straightforward social problem by the “gap between perception of the threat and reality.”<sup>104</sup>

These perspectives are important for understanding surrogacy because only a few people are directly affected by or involved in surrogacy, but in the years after *Baby M*, as measured by the media and legislative attention given, surrogacy was perceived as a widespread social problem.<sup>105</sup> Certainly, the fact that only a few women ever become surrogate mothers does not diminish the weight of normative arguments made against it; many abhorrent practices may directly affect only a few but could arguably decrease the morality of the entire society. But unlike many social issues where there are visible victims seeking social notice and help, surrogate mothers, the so-called “victims,” were themselves claiming positive experiences. This suggests that the heightened and sudden public alarm to surrogacy was in part constructed through the triggering of social anxieties external to any direct harm surrogacy caused to individual surrogate mothers. Susan Markens, Assistant Professor of Sociology at the City University of New York, documented media trends in reports on surrogacy in her study on surrogate motherhood and the politics of reproduction:

In the early 1980s, newspaper stories about surrogate parenting appeared only intermittently. The combined coverage provided by the New York Times, the Los Angeles Times, and the Washington Post totaled 15 articles in 1980, 19 in 1981, 8 in 1982, and 25 in 1984. News coverage dipped for the next two years until halfway through 1986, when Mary Beth Whitehead changed her mind and took Baby M from the Sterns. In that year, these three national newspapers published 41 articles on surrogacy. In [1987], during the Baby M custody trial, coverage of the issue peaked at a dramatic total of 270 articles. And in 1988, when the New Jersey Supreme Court handed down its decision on the case . . . coverage was still relatively high, at 99 articles. Media attention ebbed and flowed in the following decade, staying at mostly pre-Baby M rates, except for 1990, when 41 articles were published among these three papers.<sup>106</sup>

Legislative attention also provided an important index. In 1987, the peak year of news coverage and the year of the *Baby M* trial, twenty-six state legislatures introduced seventy-two bills on the topic.<sup>107</sup> The bills

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103. Scott, *supra* note 17, at 125.

104. *Id.*

105. See MARKENS, *supra* note 84, at 7.

106. *Id.* at 20.

107. *Id.* at 22.

introduced were evenly split on whether to permit or prohibit surrogacy.<sup>108</sup> Based on Markens' assessment, the proportion of bills prohibiting surrogacy rose to 57% in 1988, 66% in 1989, and 64% in 1990.<sup>109</sup>

The unique relationship of surrogacy to other embedded social and political issues in the consciousness of the American public—regarding motherhood, reproduction, class, and race—triggered social anxieties beyond surrogacy itself and constructed the normative reaction to surrogacy. The rest of this section examines the political and social context leading up to *Baby M*, lays out in some detail the facts of *Baby M*, and then draws some connections regarding why surrogacy triggered normative concerns and came to symbolize various social anxieties.

### 1. *The Political and Social Context Leading up to Baby M*

Throughout American history, reproductive politics, from birth control to abortion, has been shaped by a complex interplay of other social and cultural factors.<sup>110</sup> Cultural assumptions about womanhood, motherhood, class and racial equality, and the role of the state versus individual rights provide the underlying framework through which many of these debates occur. For instance, Professor of History at New York University Linda Gordon's study on the birth control movement in the United States found that diverse feminist groups in the 19<sup>th</sup> century—suffragists, moral reformers, and free lovers—agreed on the strategy of “voluntary motherhood” as a way for women to control their reproductive lives.<sup>111</sup> The study also revealed that “voluntary motherhood” itself was an ideology steeped in notions of traditional family and motherhood as the woman's natural and essential role, reflective of the white, middle-class experience of most of the female activists involved in the earlier birth control campaigns.<sup>112</sup> Similarly, Professor of Law and Sociology at the University of California, Berkeley, Kristin Luker's classic study on abortion and the politics of motherhood found that people mobilized because they “[saw] in the abortion issue a simultaneously pragmatic, symbolic, and emotional representation of states of social reality—states that they find reassuring or threatening.”<sup>113</sup> Significantly, she also found that how people aligned themselves on the abortion issue was dependent on the “social worlds” they

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108. *Id.*

109. *Id.*

110. See, e.g., LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* (2007); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 7 (1984).

111. GORDON, *supra* note 110.

112. *Id.*

113. LUKER, *supra* note 110, at 7.

inhabited.<sup>114</sup>

Prior to *Baby M*, there were several factors brewing in the political and social context that paved the way for *Baby M*'s resonance as a symbol of underlying cultural anxieties. There were at least three separate but interrelated threads developing in late twentieth-century America that influenced the normative discourse and perception of surrogacy: (1) changes in family structure and roles of women, (2) the abortion debate and new political consciousness of women around reproductive rights, and (3) a perceived infertility "epidemic" and development of artificial reproductive technologies.<sup>115</sup>

The traditional family structure and perceptions regarding motherhood were rapidly changing in the decades leading up to the 1980s. Between 1960 and 1979, there was more than a twofold increase in divorce rates.<sup>116</sup> At the same time, fertility rates had fallen for women from their peak in the mid-1950s, and the rate of childlessness for women had risen.<sup>117</sup> More cause for concern was the large increase in out-of-wedlock births, with over 25% of births to unmarried women in 1990 from only 5% in 1960.<sup>118</sup> Related to that trend was the increase in single-mother families. Between 1960 and 1992, the proportion of children living in mother-only families almost tripled from 8% to 23%.<sup>119</sup> At the same time, there was an increase in working mothers. By 1992, 68% of married women with children under eighteen were working, compared to 28% in 1960.<sup>120</sup> Between 1948 and 1991, the number of working married women with young children increased from 11% to 60%.<sup>121</sup>

Prior to the 1960s and 1970s, American society envisioned distinct gender roles: men worked and women took care of the family.<sup>122</sup> Women, especially poor women and women of color, or single and divorced women, have always been a part of the work force, but they were generally pitied for having failed at the task of maintaining a family or for not having the luxury of devoting their full energies to family-care.<sup>123</sup> Large numbers of women, even prior to the 1960s and 1970s, had made "paid labor an adjunct to the primary role of wife and mother, working before the first

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114. *Id.* at 8.

115. *Id.* at 116-18.

116. *Id.* at 115-17.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 113.

123. *Id.* at 113-15, 117.

child is born and again after the last child is in school or has left the home” (the “M”-shaped pattern of age versus employment).<sup>124</sup> This pattern, however, meant that the job market was “sex segregated,” with women in “women’s jobs” and men in “men’s jobs.”<sup>125</sup> Women’s jobs were those that could play adjunct to what was seen as women’s primary role of being in the home.<sup>126</sup> These jobs, such as nursing, clerical work, or teaching, were, on the whole, easy to enter, easy to reenter, and consequently were low pay, low skill, lower-status, and had lower prospects for economic advancement.<sup>127</sup> Other careers—such as law, medicine, or science—were discouraged as incompatible with the requirements of motherhood and marriage.<sup>128</sup>

This traditional pattern of women’s work began changing rapidly in the 1960s and 1970s. Women’s participation in the workforce increased from 29.6% in 1950 to 33.4% in 1960 to 38.1% in 1970.<sup>129</sup> By 1979, 64% of women between twenty-five and forty-four worked, compared to 77% of men in the same age group.<sup>130</sup> As more women were exposed to the prospect of work outside of the home, they began welcoming the idea that it would compose a central, not merely secondary, part of their lives.<sup>131</sup> But the characteristics of “women’s jobs” that made them compatible with a woman’s role in the home—low skill requirements, low status, less possibility of advancement—made those jobs undesirable as professional careers.<sup>132</sup> Significant for the eventual perception of surrogacy, “women found themselves segregated in what were now seen as relatively unattractive jobs or denied opportunities for rewards or advancement *because they were mothers or potential mothers.*”<sup>133</sup>

As already suggested, these shifting trends in the structure of the family also had a class and racial dimension. The issues being confronted were divided largely along racial lines, with concern about the declining fertility rate focused on white, middle-class women and concerns around out-of-wedlock births focused on women of color.<sup>134</sup> Additionally, because white women traditionally lagged behind minority women in their labor force

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124. *Id.*

125. *Id.*

126. *Id.* at 113.

127. *Id.* at 114.

128. *Id.* at 115.

129. *Id.*

130. *Id.*

131. *Id.* at 117.

132. *Id.*

133. *Id.* at 118.

134. MARKENS, *supra* note 84, at 10.

participation, the increase in working mothers had a particularly significant effect on white women.<sup>135</sup>

The pro-choice movement around abortion beginning around the same time period, crowned by the landmark *Roe v. Wade* decision in 1973, added a different dimension to the social discourse surrounding motherhood. Luker documents the emergence in the late 1960s of a group of women as a “self-conscious interest group” that for the first time claimed that abortion was a woman’s right.<sup>136</sup> Up until that point, the medical profession, dominated by males, had “successfully argued that abortion was such a weighty decision that only a professional, a doctor, could be trusted to handle it ‘objectively.’”<sup>137</sup> A major shift in thought accompanied the women’s liberation movement of the 1960s, with women voicing, for the first time, the view that a man was unable to make an objective decision regarding a woman’s body and that only the woman herself could determine if an abortion was required.<sup>138</sup> This was revolutionary because previously, the control of a woman’s body was not her own but was subject to the competing rights exercised by her husband and the state, in regulating sexual intercourse and reproduction.<sup>139</sup> Women’s control over their own bodies was a theme later echoed in the surrogacy discourse, with some fearing that surrogacy would “undermine the right to bodily autonomy that women fought so hard to acquire.”<sup>140</sup>

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

Concurrent with, and in part as a result of these developments, there was greater social discourse around what constitutes motherhood and efforts at trying to control it. “[I]deologies of ‘intensive’ and ‘exclusive’

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135. *Id.* at 11.

136. LUKER, *supra* note 110, at 92.

137. *Id.* at 99.

138. *Id.*

139. *Id.* at 100.

140. CHERYL L. MEYER, *THE WANDERING UTERUS: POLITICS AND THE REPRODUCTIVE RIGHTS OF WOMEN* 81 (1997).

141. LUKER, *supra* note 110, at 118.

142. MARKENS, *supra* note 84, at 11.

motherhood” emerged<sup>143</sup> as well as “categories of ‘bad’ mothers, from welfare cheats and crack moms, to new mothers who did not breast-feed or who were so depressed postpartum that they thought they might (and some did) hurt their babies, to women who delayed childbearing or chose not to be mothers at all.”<sup>144</sup> The implicit fear of “career women” subordinating their traditional family duties would tinge views of Mrs. Stern, the commissioning mother, in *Baby M.*<sup>145</sup>

Finally, in the early 1980s, the so-called “infertility epidemic” was perceived by the public as yet another problem threatening the future of American families.<sup>146</sup> As baby-boom generation women who delayed having children began seeking medical help, the absolute number of office visits for infertility dramatically increased, from 600,000 in 1968 to 1.6 million in 1984.<sup>147</sup> While the overall incidence of infertility among the population remained the same, the problem was constructed into one of “epidemic” proportions.<sup>148</sup> With the increasing social acceptance of single mothers and the legalization of abortion, there were fewer babies, especially healthy white ones, which decreased the perceived availability of adoption as an alternative and fed the panic.<sup>149</sup> Increased media and academic attention on infertility and “solutions” in new artificial reproductive technologies further entrenched public salience of the issues, feeding the anxieties associated with the changes in families and motherhood described above and new anxieties regarding reproductive technology veering into the terrain of “miracle children” and eugenics.<sup>150</sup>

The larger context of social change and anxiety surrounding

143. JACQUELYN LITT, *MEDICALIZED MOTHERHOOD: PERSPECTIVES FROM LIVES OF AFRICAN AMERICAN AND JEWISH WOMEN* (2000); see, e.g., LINDA M. BLUM, *AT THE BREAST: IDEOLOGIES OF BREASTFEEDING AND MOTHERHOOD IN THE CONTEMPORARY UNITED STATES* (1999); SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* (1996); Susan Markens et al., *Feeding the Fetus: On Interrogating the Notion of Maternal-Fetal Conflict*, 23 *FEMINIST STUD.* 351 (1997).

144. MARKENS, *supra* note 84, at 11.

145. See Scott, *supra* note 17, at 115 (noting that “Mrs. Stern’s claim that she feared the impact of pregnancy on her health was challenged, perhaps effectively” and noting that “Harold Cassidy, Mrs. Whitehead’s attorney, described Mrs. Stern to the jury as a woman who ‘thought her career . . . too important to bear her own children’”).

146. MARKENS, *supra* note 84, at 14.

147. *Id.* at 15.

148. On stability of infertility rates, see generally Marilyn B. Hirsh & William D. Mosher, *Characteristics of Infertile Women in the United States and Their Use of Infertility Services*, 47 *FERTILITY & STERILITY* 618 (1987); William D. Mosher & William D. Pratt, *Fecundity and Infertility in the United States: Incidence and Trends*, 56 *FERTILITY & STERILITY* 192 (1991). On the perception of their rise, see Shirley Scritchfield, *The Social Construction of Infertility: From Privilege Matter to Social Concern*, in *IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS* (Joel Best ed., 1989).

149. MARKENS, *supra* note 84, at 15.

150. *Id.*



reproduction generated by changing family structures, concerns over infertility, conceptions of motherhood, and abortion generated a backdrop where surrogacy was ripe to emerge as a trigger for wide-spread public concern. It is against this backdrop that the *Baby M* case ensued, and the facts of *Baby M* in many ways reified those concerns.

## 2. *The Baby M Case as Encapsulating Social Anxieties*

Almost 25 years later, there is still no surrogacy case that has quite as dramatically captured the public's attention as *Baby M*. The facts of *Baby M* placed within the social and political context of the times catapulted surrogacy into the public consciousness and illuminated the fabric of normative issues and social anxiety. Although this Article has already referenced *Baby M* generally, delving into its facts is warranted at this point, as they were in many ways critical to shaping the perception of surrogacy. This section will lay out the facts of *Baby M* in some detail, and the next section will examine the ways in which those facts fed into the pre-existing social anxieties surrounding motherhood and reproduction. The facts of *Baby M*, summarized from the New Jersey Supreme Court and the trial court opinions, were as follows:<sup>151</sup>

William Stern and Elizabeth Stern, with respective PhDs in biochemistry and human genetics, were in their early 40s at the time of trial. Mr. Stern was a biochemist and Mrs. Stern was a pediatrician. The couple married in 1974 but decided to put off having children until Mrs. Stern's pediatric residency was complete and they were more financially secure. Before they could have a child, Mrs. Stern was diagnosed with multiple sclerosis, a condition, they learned, that could render pregnancy a serious health risk. Nonetheless, the Sterns wanted to have a child. They initially considered adoption but were deterred because of the substantial delay involved and the difficulties associated with their age and differing religious backgrounds. Moreover, because Mr. Stern was his family's sole survivor from the Holocaust, "he very much wanted to continue his bloodline,"<sup>152</sup> making adoption a less desirable option. The Sterns decided to pursue surrogate parenting and placed an ad with the Infertility Center of New York (ICNY).

Mary Beth Whitehead, the eventual surrogate, was 29 years old at the time of trial and had dropped out of high school in the middle of tenth grade. In 1973, she married Richard Whitehead, when she was 16 years

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151. For the New Jersey Supreme Court's statement of the facts, see *In re Baby M*, 537 A.2d 1227, 1235-40 (N.J. 1988). For the trial court's more detailed and explicitly judgmental statement of the facts see *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1988).

152. *In re Baby M*, 537 A.2d 1235.

old and he was 24 years old. Mr. Whitehead at the time of the trial was employed as a garbage truck driver. The couple had their first child in 1974 and second child in 1976, after which Mr. Whitehead had a vasectomy. From the date of their marriage in 1973, the couple moved at least 12 times and separated on one occasion during which time Mrs. Whitehead received public assistance. Mr. Whitehead had a history and ongoing problem of alcoholism, and had twice lost his driver's license as a result of drunk driving incidents. The couple also had filed for bankruptcy in 1983.

Mrs. Whitehead had contacted the ICNY in response to a newspaper advertisement seeking surrogate mothers. Mrs. Whitehead had been involved as a potential surrogate mother with another couple, but the effort was abandoned after numerous unsuccessful artificial inseminations. Mrs. Whitehead testified that she was motivated to join the ICNY surrogate program to "giv[e] the most loving gift of happiness to an unfortunate couple"<sup>153</sup> and to get a fee that would assist in providing for her children's long-term educational goals.

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

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

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153. *Id.* at 1236.

though Mrs. Whitehead later admitted the threats and accusations were false. Eventually, the Sterns commenced supplementary proceedings in Florida and police forcibly removed Baby M and delivered her to the Sterns in New Jersey.

The drama of *Baby M*, to a large degree, provided the normative frame through which the public and academics perceived surrogacy. There are many aspects of *Baby M* that squarely implicated the anxieties surrounding motherhood and reproduction already brewing in American society; a few important ones are highlighted here. First, Mrs. Stern's choice to delay childbearing for her career was a direct illustration of how traditional notions of a working husband and a stay-at-home mom were being challenged. While Mrs. Stern was technically not infertile, she was nonetheless in her late 30s before she decided to try to have children, a phenomenon made more common by women in the professional workforce and part of what had fed into the perception of the "infertility epidemic" described earlier. Mrs. Stern's anxiety regarding the health risk to her during pregnancy was challenged at trial and the New Jersey Supreme Court commented that "[h]er anxiety appears to have exceeded the actual risk, which current medical authorities assess as minimal."<sup>154</sup> Mrs. Whitehead's lawyer, Harold Cassidy, went as far as to describe Mrs. Stern to the jury as a woman who "thought her career . . . too important to bear her own children."<sup>155</sup> This portrayal of Mrs. Stern to the jury indicated the social tensions that still existed with regard to what the woman's role should be.

Second, Mr. Stern's lawyers devoted a large part of the trial depicting Mrs. Whitehead as a bad mother, indirectly implicating anxieties of what good mothering ought to look like in the era of changing notions of motherhood. Experts "questioned [Mrs. Whitehead's] parenting abilities on the basis of her lifestyle, [unstable] finances, and [lack of] intellectual stimulation to the child."<sup>156</sup> Many women's advocates became increasingly angry at the attacks on Mrs. Whitehead by lawyers and mental-health experts in ways reminiscent of the protest against physicians in the abortion context; in their view, she was "being held to an unfair standard of motherhood."<sup>157</sup> Moreover, the emphasis on Mrs. Whitehead's lifestyle, parenting style, and finances was seen as typical of the gender discrimination in child-custody disputes.<sup>158</sup> In the context of a society still

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154. *Id.* at 1235.

155. Carol Sanger, *Developing Markets in Baby-Making*: In Matter of Baby M, in *CONTRACT STORIES* 127 n.118 (Douglas Baird ed., 2007).

156. Scott, *supra* note 17, at 114-15.

157. Peterson, *Baby M Trial*, *supra* note 88.

158. Scott, *supra* note 17, at 116.

grappling with what constituted motherhood for women who increasingly worked full-time or were in single-parent households, the idea that “experts” could define what good mothering entailed understandably raised protest. In many ways, the ability to define good motherhood is also the ability to control what women can do with their lives—a battle hard fought in the 1960s and 1970s.<sup>159</sup>

Third, *Baby M* presented the issue of money squarely within a social consciousness already fraught with class and racial tensions and uncomfortable with new reproductive technologies and the commodification of reproduction. The elephant in the room, as stated by the New Jersey Supreme Court was that while “the Sterns are not rich and the Whiteheads not poor . . . we doubt that infertile couples in the low-income bracket will find upper income surrogates.”<sup>160</sup> It was this implicit fear of class inequality that led, in part, to the claims of harm to financially and emotionally unstable surrogate mothers discussed in Part I. Moreover, the insertion of money into reproduction per se had undertones of baby-selling and became an objection that many made regarding the advent of reproductive technologies in general.<sup>161</sup> Although the traditional surrogacy employed in *Baby M* was relatively low-tech, it occurred less than a decade after the birth of Louise Brown, the first child conceived through IVF. At the time, American society had just begun to contemplate and grapple with the implications for family structure as a result of technologies that allowed genetic, gestational, and social parenting to be disaggregated.<sup>162</sup> Reproductive technology further raised the specter of breeding farms, designer babies, cloning, and a whole parade of horrors, reinforced by the unhappy outcome of *Baby M*.<sup>163</sup>

#### CONCLUSION

This Article demonstrates that opposition to surrogacy was driven more by concerns of normative societal harm stemming from aspects of surrogacy triggering a host of social anxieties about women’s roles, family, and motherhood surrounding the era of *Baby M*, rather than by direct harm to surrogate mothers. A lingering question is that, even if one believes what this Article set out to prove, what does it tell us about how we should

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159. Teman, *supra* note 4, at 1104-12.

160. *In re Baby M*, 537 A.2d 1227, 1249 (1988).

161. See generally Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987). But see Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage: A Modest Proposal*, 7 J. LEGAL STUD. 323 (1978).

162. DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 24, 26-30 (2006).

163. See Scott, *supra* note 17, at 126.

view surrogacy moving forward?

Elizabeth Scott, Professor at Columbia Law School, in her examination of surrogacy and the politics of commodification, argued that the social and political meanings of surrogacy have changed over the last decade to become more normatively acceptable due to the rise of gestational surrogacy, shifting interest group dynamics, and in part, as Part I of this paper outlined, a lack of many of the predicted harms materializing.<sup>164</sup> Certainly, legitimate normative objections to surrogacy will continue to exist, and this Article does not purport to fully answer such questions. Nevertheless, if the lens on the issue can be adjusted to better reflect the actual experience of surrogate mothers and pinpoint the areas of direct rather than theoretical harm, then “well-designed regulation can greatly mitigate most of the potential *tangible* harms of surrogacy, and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists.”<sup>165</sup>

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164. *See generally* Scott, *supra* note 17.

165. *Id.* at 146 (emphasis in original).