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## COMPENSATED SURROGACY

Martha A. Field\*

### INTRODUCTION

The question that was put to us is whether the widespread legalization of gay marriage, supported by the Supreme Court's decision in *United States v. Windsor*,<sup>1</sup> means that compensated surrogacy should be more broadly legalized. This essay takes the position that *Windsor* has little relevance to surrogacy, which will continue to be governed by state rather than federal law. States do, and will, follow a wide spectrum of policies on surrogacy, ranging from banning it and making it illegal to promoting it by enforcing surrogacy contracts as ordinary commercial transactions. The legalization of gay marriage need not affect states' surrogacy laws.

It is easy to understand why gay couples want to be able to have genetically related babies; their reasons are the same as other couples', and the desire is widespread. Why would anyone want to interfere with a procedure that helps create loving and happy families and allows many men, single or married, to have a genetically related child? From that perspective, it seems cruel to deny this procedure to gay male couples, to couples in which the wife is infertile, or to single persons, for that matter.<sup>2</sup>

But surrogacy is not problem-free. It raises serious issues of commodification—of sex, of childbirth, of birthmothers, and of children—by allowing contracts, sales, and money to govern these once noncommercialized areas of life. Such commercialization of childbirth could profoundly affect the kind of society in which we live. Surrogacy also arguably exploits women instead of liberating them. Accordingly the calls to legalize surrogacy further are joined by calls to eliminate

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1. \_\_\_ U.S. \_\_\_, 133 S. Ct. 2675 (2013).

2. Couples in which only the male is infertile and most lesbian couples will not require surrogacy; they will simply have to purchase sperm and undergo artificial insemination, an easier and less expensive procedure that raises fewer ethical concerns.

surrogacy altogether—or to restrict it as fully as possible.

Before evaluating the competing concerns, I will quickly review the background of surrogacy law in the United States and describe the state of surrogacy and surrogacy law today. I then will discuss why *Windsor* and the gay marriage decisions in general do not affect surrogacy law and how the concerns of commodification of childbearing and exploitation of vulnerable birthmothers may legitimately discourage states from adopting strong pro-surrogacy policies. I conclude that there is no necessity for states to liberalize their surrogacy laws in view of the widespread access to surrogacy that already exists.

## I. “TRADITIONAL SURROGACY”

Surrogacy first came to widespread public attention in the United States in the 1980s, especially in connection with the *Baby M* case,<sup>3</sup> which involved what now is often called “traditional surrogacy.” Typically the husband of an infertile wife furnishes his sperm to a woman (“surrogate”) who supplies half of the genetic material for the baby-to-be as well as carrying the pregnancy and enduring the delivery. The “traditional surrogate” (who is also the genetic mother and the birthmother) is compensated for her services and expenses and is expected to turn the baby over to the contracting couple at birth. The vast majority of birthmothers do so, and the arrangement is considered successful; judicial enforcement of the contract is unnecessary.

The *Baby M* case concerned the problem that arises when the birthmother changes her mind and wants to keep the baby. Mary Beth Whitehead had entered into a surrogacy agreement with William and Elizabeth Stern, but after the child’s birth, Ms. Whitehead decided that she could not give up her child.<sup>4</sup> The central issue in the *Baby M* litigation was whether she or the Sterns would obtain custody.<sup>5</sup> The New Jersey Supreme Court ruled that the surrogacy contract was “void” as a violation of public policy and that custody would be decided, not on the basis of the contract, but instead as it usually is in custody contests between genetic parents, on the basis of the “best interests” of the child.<sup>6</sup>

In 1988 I wrote a book on the subject.<sup>7</sup> My recommendation was that states recognize surrogacy but not enforce surrogacy contracts until and

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

4. *Id.* at 1236.

5. *Id.* at 1236–37.

6. *Id.* at 1234.

7. MARTHA A. FIELD, *SURROGATE MOTHERHOOD* (1st ed. 1988).

unless the mother voluntarily turns the child over to the contracting parents after birth.<sup>8</sup> The birthmother would not be committed on the basis of a promise made before the baby was born, just as a birthmother is not when she promises an adoption.

Some proponents of surrogacy have considered that proposal “anti-surrogacy” or unfriendly to surrogacy,<sup>9</sup> but I consider nonenforcement a neutral position for a state to adopt. The state neither endorses and encourages surrogacy by enforcing surrogacy arrangements and treating them as ordinary contracts, nor does it make them illegal. Paid surrogacy can and does continue under such a nonenforcement regime. True, it would be too risky to enter into a contract if the genetic father were required to pay child support even when the birthmother reneged on the deal.<sup>10</sup> I recommended that, if state legislatures wanted surrogacy to continue as an option, legislatures should give the intended father the option to walk away, rather than serving as a parent (by visiting and paying child support, for example).<sup>11</sup> Surrogacy would continue, with persons taking every precaution to choose a surrogate who would not change her mind, a precaution that is still important in today’s world.

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8. *Id.* at 16.

9. *See, e.g.,* Miriam Pérez, *Surrogacy: The Next Frontier for Reproductive Justice*, RH REALITY CHECK (Feb. 23, 2010, 6:00 AM), <http://rhrealitycheck.org/article/2010/02/23/surrogacy-next-frontier-reproductive-justice/>.

10. It is true that there continue to be unintended fathers even though they are clearly required, in nonsurrogacy contexts, to provide child support for their offspring. Many men do continue to have unprotected sex despite the threat of undesired parenthood and child support payments. But even though the threat is not sufficient to deter men from having sex, it might nonetheless be sufficient to prevent men from entering surrogacy arrangements, a far more deliberative decision. In short, it is much more difficult to give up sex than it is to give up surrogacy contracts.

11. This suggestion would make an exception to current law, which holds biological fathers responsible as parents even though the child was unintended and was born out of wedlock. *See, e.g.,* *Milla v. Habluetzel*, 456 U.S. 91, 92 (1982) (“This Court has held that once a State posits a judicially enforceable right of children to support from their natural fathers, the Equal Protection Clause of the Fourteenth Amendment prohibits the State from denying that same right to illegitimate children.”); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (“We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother.”); MASS. GEN. LAWS ANN. ch. 273, § 15 (West 2014) (punishing a parent who does not contribute to support of a child born out of wedlock). Just as state law cannot constitutionally alter this parental obligation, neither can it be waived or surrendered by the parties, whether by contract or otherwise. *See, e.g., In re Marriage of Hammack*, 114 Wash. App. 805, 808, 60 P.3d 663, 664 (2003). Any such contract is not enforceable. *Id.*

## II. AN OVERVIEW OF SURROGACY AS IT IS PRACTICED TODAY

I will not repeat here my arguments for states to recognize and regulate surrogacy without enforcing surrogacy contracts over a birthmother's objection, and arguably not all of them apply to surrogacy today. The biggest change in surrogacy practice is that "traditional surrogacy" has been largely replaced by "gestational surrogacy," in which the birthmother has no genetic tie to the child.<sup>12</sup> She is simply the birthmother or gestator.

Whether to enforce a contract when the birthmother changes her mind remains an issue. There once was apparent unanimity for nonenforcement of surrogacy contracts,<sup>13</sup> but in 1990 the California Supreme Court ended that consensus in *Johnson v. Calvert*,<sup>14</sup> a "gestational surrogacy" case. In *Johnson v. Calvert*, the opposite-sex couple who contracted for surrogacy furnished all the genetic material, so the birthmother had no genetic tie to the baby.<sup>15</sup> When the birthmother attempted to retain the newborn, the California courts enforced the surrogacy contract, granting custody to the contracting couple.<sup>16</sup> The parties' original intention controlled.

The *Johnson v. Calvert* precedent was, however, confined to California. Ever since that decision, states have taken different positions on whether to treat surrogacy as a legitimate commercial enterprise;<sup>17</sup> or to adopt a strategy of nonenforcement (by calling the contract void, for example or by using an adoption model for surrogacy);<sup>18</sup> or even to make surrogacy illegal and punishable.<sup>19</sup> States also have differed (in court decisions as well as written laws) on whether the law should treat gestational and traditional surrogacy alike,<sup>20</sup> and also on whether the law

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12. See Peter R. Brinsden, *Gestational Surrogacy*, 9 HUM. REPROD. UPDATE 483, 483 (2003); Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 18 (2008).

13. See MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 155–69 (expanded ed. 1990).

14. 851 P.2d 776 (Cal. 1993).

15. *Id.* at 778.

16. *Id.* at 778, 787.

17. See generally Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 24, 2014), <http://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html>.

18. *Id.*

19. *Id.*

20. For example, California treats traditional and gestational surrogacy differently, while New Jersey treats them the same. See, e.g., *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Cal. Ct.

should draw a distinction between unpaid or “altruistic” surrogacy and compensated surrogacy.<sup>21</sup> But compensated gestational surrogacy is the main focus of both those who want surrogacy to be more broadly available and those who would like to cut back on it, and it is overwhelmingly the kind of surrogacy that is practiced today.<sup>22</sup>

Surrogacy is run largely by private for-profit agencies which, for a sizeable fee, bring together the contracting parents-to-be and the birthmother.<sup>23</sup> But because gestational surrogacy is the method of choice, an egg donor must often be obtained as a third contributor to the creation of the child. Couples in which the wife is infertile and gay male couples will require an egg donor and usually they, often with the help of an agency, will arrange to purchase eggs. Gay male couples (married and unmarried) constitute a substantial part of domestic surrogacy business today.<sup>24</sup>

#### A. *The Availability of Surrogacy*

Surrogacy has changed significantly since the 1980s, both domestically and abroad. In the United States, surrogacy laws vary widely. Some states are quite favorable to the practice, while others go so far as to criminalize it. An international market for surrogacy has also emerged, with a few countries currently marketing themselves as “surrogacy destinations.”<sup>25</sup> Couples can go to these destinations to enter

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App. 1994); A.G.R. v. D.R.H., 2009 N.J. Super. Unpub. LEXIS 3250 (Ch. Div. Dec. 23, 2009).

21. In some states in the United States, altruistic surrogacy is permissible, while compensated surrogacy is forbidden. See KY. REV. ST. § 199.590 (West, Westlaw current through end of 2014 legislation); *In re Roberto d.B.*, 923 A.2d 115, 130–31 (Md. 2007); 85 Op. Md. Att’y Gen. 348, 366 n.22 (Md. 2000); 83 Op. Okla. Att’y Gen. 162 (Okla. 1983). Similarly, England, Belgium, and Canada ban compensated surrogacy. See, e.g., Surrogacy Arrangements Act, 1985, c. 49. (Eng.); Hannah Flint, *Legal Situation of Surrogacy Explained*, TELEGRAPH (Aug. 1, 2014, 5:09 PM), <http://www.telegraph.co.uk/news/worldnews/asia/thailand/11006524/Legal-situation-of-surrogacy-explained.html>.

22. Anemona Hartocollis, *And Surrogacy Makes 3*, N.Y. TIMES, Feb. 20, 2014, at E1.

23. See Morgan Holcomb & Mary Patricia Byrn, *When Your Body Is Your Business*, 85 WASH. L. REV. 647, 650 (2010) (stating that surrogacy is “a multi-billion dollar business” and that surrogacy agencies “recruit and rigorously screen” potential surrogates).

24. See, e.g., *id.* (stating that gestational surrogacy accounts for “almost all” surrogacy in the United States and discussing gay men using gestational surrogacy to have children).

25. Some governments have adopted policies to promote themselves as medical tourism and surrogacy destinations. The principal countries for surrogacy, other than the United States, are India, Thailand, the Mexican state of Tabasco, and Ukraine. See Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES, July 6, 2014, at A1; Thomas Fuller, *Thailand’s Business in Paid Surrogates May Be Foundering in a Moral Quagmire*, N.Y. TIMES, Aug. 28, 2014, at A12.

Although surrogacy has thrived in Thailand, well known for its sex industries, in fact it has been neither sanctioned nor forbidden by law. Fuller, *supra*, at A12. The Thai government is now trying

into a surrogacy contract at a lower price than they might find in the United States. Ultimately, these different surrogacy options make commercial surrogacy available to individuals and couples who have the money to afford it.

### 1. *Availability in the United States*

In the 1980s and before, state laws on surrogacy were largely indeterminate, but in general, surrogacy contracts were legal but unenforceable.<sup>26</sup> Internationally, the United States was the country deemed most accepting of surrogacy.<sup>27</sup> After *Baby M* and *Johnson v. Calvert*, state legislatures began to adopt more explicit and focused positions on surrogacy.<sup>28</sup> In states where the legislature passed no law, state courts were presented with cases in which they had to decide

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to cut back on the surrogacy industry, with the junta claiming it is a national scandal and vowing to allow only altruistic surrogacy, with no brokers, agencies, or advertising. *Id.*

The story is similar in India. Although commercial surrogacy became legal in India in 2002 and has become a billion-dollar-a-year industry, there are no laws regulating it. Jennifer Kirby, *These Two Americans Want Babies Through Indian Surrogates. It's Not Been Easy*, NEW REPUBLIC (Dec. 1, 2013), <http://www.newrepublic.com/article/115873/fertility-tourism-seeking-surrogacy-india-thailand-mexico>. The Indian Council of Medical Research has promulgated some recommended guidelines for surrogacy agencies to follow; for example, restricting surrogacy to opposite-sex married couples. Sarah Mortazavi, *It Takes a Village To Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2272 (2012). But surrogacy agencies and IVF clinics in India actually operate under a system of self-regulation, creating their own rules and practices and not accountable for them to any authority. Kristine Schanbacher, *India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women*, 25 HASTINGS WOMEN'S L.J. 201, 218 (2014).

Since at least 2007, the Indian Ministry of Health and Family Welfare has been attempting to create an official regulatory mechanism. By 2008 it had drafted and promulgated the Assisted Reproductive Technology (Regulation) Bill in an effort to govern the industry. Smerdon, *supra* note 12, at 17. Since then the bill has undergone several drafts. The 2008 and 2010 drafts were both widely circulated for public comment, Anil Malhotra, *Ending Discrimination in Surrogacy Laws*, THE HINDU (May 3, 2014, 1:04 AM), <http://www.thehindu.com/opinion/op-ed/ending-discrimination-in-surrogacy-laws/article5970609.ece>, but the latest version, the 2013 draft, has been designated "top secret" and is not available for public review. *Id.* That version may be introduced at the next Winter Session of the Indian Parliament. Salome Phelamei, *Bill to Regulate Surrogacy*, ZEE NEWS INDIA (Oct. 18, 2014, 5:57 AM), [http://zeenews.india.com/news/health/news/bill-to-regulate-surrogacy-ivr-soon-in-india-foreigners-to-be-barred\\_1486426.html](http://zeenews.india.com/news/health/news/bill-to-regulate-surrogacy-ivr-soon-in-india-foreigners-to-be-barred_1486426.html).

26. See FIELD, *supra* note 13, at 155–75.

27. Smerdon, *supra* note 12, at 22.

28. See, e.g., Act of Feb. 10, 1988, No. 674, § 1, 1988 Neb. Laws 572 (codified at NEB. REV. STAT. ANN. § 25-21,200 (West, Westlaw through 2014 Reg. Sess.)) (Nebraska); Act of Mar. 5, 1988, No. 175, 1988 Ind. Acts 2050; Act of July 1, 1997, No. 1, 1997 Ind. Acts 255 (codified at IND. CODE ANN. §§ 31-20-1-1 to 31-20-1-2 (West, Westlaw through 2d Reg. Sess. & 2d Technical Sess. 2014)) (Indiana); Assisted Conception Act, ch. 184, § 5, 1989 N.D. Laws 561, 562 (codified at N.D. CENT. CODE ANN. § 14-18-05 (West, Westlaw through 2013 Reg. Sess.)) (North Dakota).

whether surrogacy was legal and enforceable or was not.<sup>29</sup> (A decision to criminalize it would have to come from the legislature.)

A number of states currently have laws in place that affirmatively allow surrogacy to take place within their borders. The state that currently is the most friendly to surrogacy is California,<sup>30</sup> although it may be more expensive there than in some other states. Since *Johnson v. Calvert*, the California courts have continually supported enforcement of gestational surrogacy contracts.<sup>31</sup> Moreover, they have not imposed restrictions on access to surrogacy like those that exist in other jurisdictions.

Other states also provide for enforcement, but many of them restrict the practice in other ways. Florida, for example, requires that either the egg or the sperm (or both) come from the intended parents.<sup>32</sup> Additionally, it permits the contract only if a licensed physician has determined that the intended mother cannot carry a baby on her own.<sup>33</sup> Florida also limits the amount that can be paid to the birthmother to “reasonable” expenses,<sup>34</sup> and it places certain obligations on the birthmother that are not required of pregnant women outside of the surrogacy context. For example, a requirement that the birthmother “adhere to reasonable medical instructions about her prenatal health.”<sup>35</sup> And in order to obtain legal parental status, the intended parents must petition a court, after the child’s birth, and participate in a court hearing to determine whether the statutory requirements have been met.<sup>36</sup>

Perhaps most relevant, Florida allows only a married couple to contract for surrogacy.<sup>37</sup> In addition, Florida purports to ban same-sex

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29. Both *Baby M* and *Johnson v. Calvert* are themselves examples of courts creating the rules in the absence of legislative action.

30. Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1245 (2014) (“[T]he estimated costs for pursuing gestational surrogacy in California using one of its more popular agencies is \$150,000 or more.”) (citing *Cost of Hiring a Surrogate*, GROWING GENERATIONS, <http://www.growinggenerations.com/surrogacy-program/intended-parents/surrogacy-cost/> (last visited Jul. 14, 2014)).

31. *See, e.g.*, *Buzzanca v. Buzzanca*, 61 Cal. Rptr. 4th 1410, 1412–13 (Cal. Dist. Ct. App. 1998).

32. *See* FLA. STAT. ANN. § 742.13(2) (West, Westlaw current through Ch. 22 (end) of 2014 Sp. “A” Sess. Of 23d legislature).

33. *See id.* § 742.15(2)(a).

34. *See id.* § 742.15(4).

35. *See id.* § 742.15(3)(b).

36. *See id.* § 742.16 (1)–(3).

37. *See id.* § 742.15(1).



marriage,<sup>38</sup> thereby limiting surrogacy to opposite-sex couples in which the wife is infertile. A district court has held that Florida's ban on same-sex marriage is unconstitutional;<sup>39</sup> the case is currently on appeal to the U.S. Court of Appeals for the Eleventh Circuit.<sup>40</sup> If the marriage ban is struck down, it will be interesting to see whether Florida attempts to persist in denying surrogacy, although not marriage, to same-sex couples.

Florida's system illustrates that whether a state claims to enforce surrogacy contracts is not necessarily the decisive factor in considering whether it is a surrogacy-friendly state. Even a state that purports to honor the contracts can encumber the process with other restrictions and regulations.<sup>41</sup> Utah's system is similar to Florida's, requiring the surrogacy arrangement to be validated by a court,<sup>42</sup> requiring the intended parents to be married to each other<sup>43</sup> and at least one of them to be genetically related to the child,<sup>44</sup> requiring all parties to attend counseling,<sup>45</sup> and requiring any payment to be "reasonable."<sup>46</sup> In addition, either the intended parents or the birthmother must have been

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38. *See id.* § 741.212 (stating that marriages between people of the same sex are not recognized for any purpose in Florida).

39. *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1282, (N.D. Fla. 2014).

40. *Brenner v. Armstrong*, No. 14-14061 (11th Cir. appeal filed Sept. 5, 2014).

41. Certain restrictions are very common. For example, almost all states and agencies with articulated policies require the birthmother to be over twenty-one years old, to have already had a child, and to undergo a physical and psychological examination. Requirements in excess of such common and very reasonable ones can reduce the desirability of surrogacy or access to it, even in an enforcement jurisdiction like Florida. New Hampshire's earlier statute, replaced just this past summer, was an extreme case of an enforcement jurisdiction that nonetheless appeared unfriendly to surrogacy. First, there was a regulation that the birthmother could be compensated only for expenses. N.H. REV. STAT. ANN. § 168-B:25 (West, Westlaw through 2013 Reg. and Special Sess.) (repealed 2014). In addition, the birthmother had seventy-two hours after birth in which she could opt to keep the child. *Id.* § 168-B:25 (repealed 2014). Moreover, surrogacy was available only to married couples with a medical need to use it, *id.* § 168-B:17 (repealed 2014), and egg donors were not allowed; the egg had to come either from the intended mother or from the birthmother. *Id.* § 168-B:17 (repealed 2014). New Hampshire further required a home study of all the parties, *id.* § 168-B:18 (repealed 2014), and court approval prior to entering the contract, *id.* §§ 168-B:16(I)(b), 168-B:23 (repealed 2014). And while it allowed surrogacy, it made it criminal for third persons to receive a fee for facilitating a surrogate arrangement, *id.* §§ 168-B:16, B:30 (repealed 2014), thus effectively banning surrogacy agencies from the state. Yet even with these extreme restrictions, New Hampshire was considered a surrogacy-enforcement state.

42. UTAH CODE ANN. §§ 78B-15-801(4), 78B-15-803 (West, Westlaw through 2014 Gen. Sess.).

43. *Id.* § 78B-15-801(3).

44. *Id.* § 78B-15-801(5).

45. *Id.* § 78B-15-803(2)(d).

46. *Id.* § 78B-15-803(2)(h).

resident in Utah for ninety days.<sup>47</sup> Texas<sup>48</sup> and Virginia<sup>49</sup> also have detailed statutes governing and allowing surrogacy enforcement but, like Florida and Utah, they regulate the practice and restrict access.

Delaware<sup>50</sup> and New Hampshire,<sup>51</sup> like California, enforce surrogacy contracts without imposing cumbersome requirements and, like California, they permit intended parents to get a pre-birth order from a court determining legal parentage before the child is born. Nevada also enforces surrogacy contracts but does not allow a pre-birth order; the intended parent becomes a parent “upon birth of the child.”<sup>52</sup> Finally, several states have court decisions suggesting that they will enforce surrogacy contracts, but partly because the law is judge-made and there are no governing statutes, there are no regulations restricting surrogacy or denying access to particular persons. Those states include Massachusetts,<sup>53</sup> Maryland,<sup>54</sup> and Wisconsin.<sup>55</sup>

States need not be committed to enforcing surrogacy contracts in order to allow the practice of surrogacy, and many surrogacy arrangements are successfully completed in states that would not have enforced the contract if the birthmother had changed her mind.<sup>56</sup>

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47. *See id.* § 78B-15-802(2).

48. *See* TEX. FAM. CODE ANN. § 160.754 (West, Westlaw through 3d Called Sess. 2013) (requiring the intended parents to be married to each other and requiring both of them and the birthmother’s husband, if she is married, to agree to the procedure at least two weeks before implantation in the birthmother occurs).

49. *See, e.g.*, VA. CODE ANN. § 20-156 (West, Westlaw through 2014 Reg. Sess. & 2014 Special Sess.) (criminalizing third-party facilitation of a surrogacy arrangement); *id.* § 20-162 (requiring court approval, with elaborate provisions voiding contracts that were not pre-approved).

50. DEL. CODE ANN. tit. 13, §§ 8-801 to 8-813 (West, Westlaw through 2014 ch. 428).

51. *See* N.H. REV. STAT. ANN. §§ 168-B:1 to 168-B:21 (West, Westlaw through ch. 330 of the 2014 Reg. Sess.).

52. *See* NEV. REV. STAT. ANN. §§ 126.710–126.710.810 (West, Westlaw through 2013 Reg. & Special Sess.).

53. *See* *Culliton v. Beth Israel Deaconess Med. Ctr.*, 435 Mass. 285 (Mass. 2001); *Hodas v. Morin*, 442 Mass. 544 (Mass. 2004).

54. *See In re d.B.*, 399 Md. 267 (Md. 2007) (ordering removal of a gestational mother’s name from a birth certificate when both the intended father and the gestational mother requested that her name be removed).

55. *In re F.T.R.*, 833 N.W.2d 634 (Wisc. 2013); Thomas J. Walsh, *Viewpoint: Wisconsin’s Undeveloped Surrogacy Law*, 85 WISC. LAWYER (Mar. 2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=85&Issue=3&ArticleID=2445>; Scott Bauer, *Wisconsin Supreme Court Upholds Surrogate Mother Agreements*, TWIN CITIES PIONEER PRESS (July 11, 2013, 10:32 AM), [www.twincities.com/ci\\_23640952/supreme\\_court\\_upholds-surrogate\\_mother\\_agreements](http://www.twincities.com/ci_23640952/supreme_court_upholds-surrogate_mother_agreements) (agreements can be enforced unless they are not in the best interests of the child, but they cannot terminate the parental rights of the birthmother; adoption processes are required).

56. Surrogacy takes place in these states even though the parties are aware that a contract will not

Arkansas, Connecticut, and Tennessee, for example, have laws facilitating surrogacy but explicitly taking no position on enforcement of surrogacy contracts,<sup>57</sup> an issue that becomes relevant only if the birthmother wants to reject the contract.

Successes also occur in states where there is no regulation whatsoever. As Professor Nicolas has explained, Oregon appears friendly to surrogacy although it has no written law on the subject.<sup>58</sup> Jurisdictions with “no law” will become regulated either when their legislature chooses to act or when surrogacy cases come before state courts. Until then states with “no law” can be and are sites for surrogacy; contracts performed there will escape any judicial scrutiny unless something goes wrong. Indeed, surrogacy can be arranged in any state that does not make it criminal. Even jurisdictions that have declared surrogacy contracts unenforceable, like New Jersey,<sup>59</sup> Indiana,<sup>60</sup> or Nebraska,<sup>61</sup> for example, can be sites for full voluntary performance of a surrogacy agreement. When the contract is actually performed, the only real problem lies in states that have laws making the birthmother (and sometimes her husband) the legal parent(s) of the child. Such laws may effectively require an adoption by the intended mother, thereby reducing some of the appeal of a surrogacy arrangement.

In general, where state legislatures have adopted surrogacy regulations the governing rules are clearer and much more detailed than in jurisdictions where courts, unguided by legislation, have had to formulate surrogacy law by deciding the few cases presented to them. Even though many of the regulations that have been adopted may seem misguided, there is some advantage in having legislatures participate. Whether or not it opts to enforce surrogacy contracts, any state that recognizes surrogacy and does not criminalize it can then regulate rules of access, for birthmothers as well as would-be parents, and, most

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be enforced. DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 71 (2006).

57. See ARK. CODE ANN. § 9-10-201 (West, Westlaw through 2014 2d Extraordinary Sess.); CONN. GEN. STAT. ANN. § 7-48a (West, Westlaw through 2014 Reg. Sess.); TENN. CODE ANN. § 36-1-102 (West, Westlaw through 2014 2d Reg. Sess.); *Raftopol v. Ramey*, 12 A.3d 783, 785 n.4 (Conn. 2011).

58. Nicolas, *supra* note 30, at 1246–49.

59. See *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988); *A.H.W. v. G.H.B.*, 772 A.2d 948, 952–54 (N.J. Super. Ct. Ch. Div. 2000).

60. See IND. CODE §§ 31-20-1-1, 31-20-1-2 (West, Westlaw through 2d Reg. Sess. & 2d Technical Sess. 2014).

61. See NEB. REV. STAT. § 25-21,200 (West, Westlaw through 2014 Reg. Sess.).

important, it can regulate surrogacy agencies.<sup>62</sup> Regulation and supervision of intermediaries are necessary; fraud has been a problem, as the New York Times has recently reported.<sup>63</sup>

Moreover, a state law regime that recognizes surrogacy even without providing for judicial enforcement of the contract can still respect the parties' intentions and support the contract terms once the baby is given to the intended parents.<sup>64</sup> States that call the contract "void," as New Jersey does for example, may not look to the contract at all; but other states have a nonenforcement policy that is relevant only to the occasional custody dispute. Apart from that, the contract controls.

So there are many different models that states can adopt. Full enforcement and acceptance of commercial surrogacy as a business to be encouraged is not the only model compatible with surrogacy, although it may be the safest one for intended parents. Within nonenforcement jurisdictions, there are many variations that can still lead to successful surrogacy arrangements.

A final model is to make compensated surrogacy illegal, as it is in Washington,<sup>65</sup> New York,<sup>66</sup> Michigan,<sup>67</sup> and the District of Columbia.<sup>68</sup> Those jurisdictions' basic regulation is that paid surrogacy cannot exist, making violations punishable. But even though it is illegal to arrange or perform surrogacy contracts inside such jurisdictions, residents can use the services of nearby states. They may not even have to travel to do so.

Even though few states explicitly treat surrogacy as a fully legitimate

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62. Several states criminalize third parties participating in arranging surrogacy, even while allowing individuals to engage in surrogacy within the state. *See, e.g.*, VA. CODE ANN. § 20-165 (West, Westlaw through 2014 Reg. Sess. & 2014 Special Sess.).

63. Thomas Fuller, *Thailand's Business in Paid Surrogates May Be Foundering in a Moral Quagmire*, N.Y. TIMES, Aug. 28, 2014, at A12; *see also* Tamar Lewin, *A Surrogacy Agency That Delivered Heartache*, N.Y. TIMES, July 28, 2014, at A1.

64. There are other situations as well in which the contract is enforceable once performed, even though it was not subject to specific performance beforehand. Parties cannot be forced to work despite a contract, but when work is performed, the contract controls. Similarly, although promises to marry are unenforceable, marriage is surely legal and effective when performed voluntarily by both parties. And the same is true of a contract to give up a baby for adoption. The contracts are not illegal and they are recognized, although the state would not enforce them against an unwilling participant before the promise was performed.

65. Washington State's statute makes compensated surrogacy criminal, and it imposes criminal penalties. *See* WASH. REV. CODE §§ 26.26.230, 26.26.250 (2012).

66. New York imposes only civil penalties on the principals to the surrogacy arrangement but places criminal penalties on intermediaries. *See* N.Y. DOM. REL. LAW §§ 121, 122, 123 (McKinney, Westlaw through 2014 legislation).

67. *See* MICH. COMP. LAWS ANN. § 722.859 (West, Westlaw through 2014 Reg. Sess. Act 282).

68. The District of Columbia penalizes all types of surrogacy. *See* D.C. CODE §§ 16-401, 16-402 (West, Westlaw through Sept. 1, 2014).

commercial enterprise, the United States is still considered the prime destination for people seeking surrogacy. Many well-to-do foreigners come to the United States for surrogacy.<sup>69</sup> The procedure is much more expensive than elsewhere<sup>70</sup> (with the exception of the Chinese black market<sup>71</sup> described *infra* in Part III.E.), but the intended parents trust surrogacy agencies in United States to produce appropriate birthmothers and contracts that will be fulfilled.<sup>72</sup> Non-U.S. residents seeking surrogacy come to states like California,<sup>73</sup> where surrogacy is openly promoted, and they also come to states with less explicit or less complete surrogacy protections.<sup>74</sup>

People from other countries also come here because they have confidence in U.S. living conditions and medical facilities.<sup>75</sup> Moreover, many surrogacy agencies in this country accept all clients, including gays and singles, and even fertile couples, who seek surrogacy merely for convenience. As noted above, some states prohibit access by these groups, and some agencies are selective even when state law does not require that.<sup>76</sup> Foreign destinations also frequently impose access restrictions; India, for example, recently revised its guidelines to recommend surrogacy only for opposite-sex married couples.<sup>77</sup> Because many states and agencies in the United States do not impose such restrictions and because the surrogacy business in the United States is relatively reliable, foreigners constitute a significant portion of

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69. See, e.g., Lewin, *supra* note 25 (stating that the majority of clients of large surrogacy agencies in the U.S. are not U.S. residents).

70. See, e.g., *id.*

71. Ian Johnson & Cao Li, *China Experiences a Booming Underground Market in Child Surrogacy*, N.Y. TIMES, Aug. 3, 2014, at A4.

72. See, e.g., Lewin, *supra* note 25; Karishma Vyas, *Indian Law Forbids Same-Sex Surrogate Parents*, AL JAZEERA (July 16, 2014, 7:32 AM), <http://www.aljazeera.com/video/asia/2014/07/indian-law-forbids-same-sex-surrogate-parents-201471661231232873.html>.

73. See, e.g., Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES, Sept. 18, 2014, at A1 (“California has a booming surrogacy industry, attracting clients from around the world.”); Lewin, *supra* note 25 (characterizing California as friendly to surrogacy and stating that more than 2000 babies will be born from U.S. surrogates for foreign intended parents).

74. Lewin, *supra* note 25.

75. *Id.* (“For overseas couples, the big draw is the knowledge that many states have sophisticated fertility clinics, experienced lawyers, a large pool of egg donors and surrogates, and, especially, established legal precedent.”).

76. *Id.* (“[T]here has been a recent uptick in the number of clients seeking ‘social surrogacy’—that is, having someone else carry their baby so as not to damage their career, or their figure. And not all agencies follow the guidelines.”). *But see id.* (“[M]ost surrogacy agencies say they will work only with intended parents who cannot carry their own baby, as recommended by the guidelines of the American Society for Reproductive Medicine.”).

77. Vyas, *supra* note 72.

American surrogacy clientele.<sup>78</sup>

## 2. *Availability of Surrogacy Internationally*

In the 1980s the United States was the primary place in which surrogacy was legal,<sup>79</sup> and after *Johnson v. Calvert*, enforcement of gestational surrogacy contracts in California made it seem even more reliable. Since then, international destinations like India,<sup>80</sup> Thailand,<sup>81</sup> Ukraine,<sup>82</sup> and the Mexican state of Tabasco<sup>83</sup> have become important centers for surrogacy.<sup>84</sup> While rich foreigners come to the United States, many Americans (and others) look for birthmothers in countries that have less well-developed economies in an attempt to save money.<sup>85</sup> They may indeed end up paying only half as much as what they would pay in the United States, or even less.<sup>86</sup>

So the predicted use of low cost international surrogacy<sup>87</sup> has come to pass. Moreover, biotechnological developments, especially the ability to send a fertilized egg to be implanted in a foreigner's womb, have allowed broader and even easier use of international surrogacy markets:

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78. See Lewin, *supra* note 25 (reporting that the majority of clients at large surrogacy agencies in the U.S. are foreigners).

79. Smerdon, *supra* note 12, at 22.

80. See, e.g., Fuller, *supra* note 63, at A12 (stating that India is the only Asian country other than Thailand that allows surrogacy).

81. See *id.* (stating that Thailand provides surrogacy at a lower cost than the U.S., which makes it more attractive for would-be parents).

82. See, e.g., NEW LIFE UKRAINE, <http://www.newlifeukraine.com/> (last visited Sept. 23, 2014) (noting various advantages to using surrogates in Ukraine, including lower costs, a short waiting time, and favorable laws).

83. See Lewin, *supra* note 73.

84. Most Western European countries, for example Italy, France, and Germany, ban surrogacy altogether. DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 71, 83 (2006). England bans only compensated surrogacy. Surrogacy Arrangements Act, 1985, c. 49. (Eng.).

85. Lewin, *supra* note 63, at A1 (“Those able to pay more than \$100,000 for services often turn to an American agency in a state where surrogacy is legal and fairly widely practiced. Those with less money often go to India or to Mexico.”); see also Lewin, *supra* note 25 (“Because surrogacy is so expensive in the United States, many couples travel to India, Thailand or Mexico, where the total process costs half or less.”).

86. Lewin, *supra* note 25. Sources differ as to the costs of surrogacy in various countries, and even in the U.S. the prices can differ widely. *Id.* At least one agency in Ukraine advertises that the cost is sixty to seventy percent less in Ukraine than in the United States. *Advantages*, NEW LIFE UKRAINE, <http://www.newlifeukraine.com/advantages> (last visited Dec. 1, 2014).

87. See, e.g., FIELD, *supra* note 7, at 32, 43–45 (predicting low-cost international surrogacy); Bartha M. Knoppers & Sonai LeBris, *Advances in Medically Assisted Conception: Legal, Ethical, and Social Issues*, 17 AM. J.L. & MED. 329, 341 (1991) (same).

couples no longer have to travel in order to have their genetic material, together with that of a donor egg, implanted in a foreigner's womb.

Surrogacy operates differently in many countries than it does in the United States. Regulations differ, and in many places there are no regulations.<sup>88</sup> It is not uncommon in Mexico, Thailand, or India, for example, for the birthmother to be required by the contract to stay in a supervised dormitory for birthmothers and to sever or limit contact with her husband and children during the pregnancy.<sup>89</sup> In addition, the birthmother's diet and activities may be prescribed,<sup>90</sup> and she will not have rights that would be recognized in the United States.<sup>91</sup> For example, the contract may provide that the intended parents may demand an abortion, a provision that would doubtless be illegal throughout the United States.<sup>92</sup>

Although international surrogacy is usually inexpensive by American standards, the differences in national economies make the birthmothers' perspectives quite different. For their services, birthmothers in other countries may take home a fee that is up to ten times their household's annual income.<sup>93</sup> That generous incentive may make surrogacy especially difficult to resist for many. Some will be pressured by their families, if not their life circumstances, to agree to this kind of employment (pressures also present, of course, in the United States).

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88. Of course there also are no explicit regulations in some of our states. But even without regulation, constraints such as those imposed in India, Ukraine, Mexico, and Thailand would not be tolerated. *See, e.g.*, Johnson & Li, *supra* note 71, at A4; Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191, 192 (2012); SCOTT CARNEY, *THE RED MARKET* 136–38 (2011).

89. *See* Johnson & Li, *supra* note 71, at A4; Mohapatra, *supra* note 88; CARNEY, *supra* note 88.

90. *See* Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 J. WOMEN CULTURE & SOC'Y 969 (2010); CARNEY, *supra* note 88, at 136–38.

91. *See* Pande, *supra* note 90; CARNEY, *supra* note 88, at 136–38.

92. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 65–75 (1976) (holding that the decision whether to abort belongs to the birthmother). If a husband is not permitted to dictate abortion choices to his wife despite a marital contract and any other arrangement the couple has made, surely a stranger cannot acquire by contract a right to choose abortion. State statutes often make explicit this limitation on the contracting parents' rights. *See, e.g.*, TEX. FAM. CODE ANN. § 160.754(g) (West, Westlaw through 3d Called Sess. 2013); UTAH CODE ANN. § 78B-15-808(2) (West, Westlaw through 2014 Gen. Sess.) (both forbidding surrogacy arrangements that restrict a surrogate's right to protect the fetus). *But see* Nicolas, *supra* note 30, at 1258–59; I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1191–92 (2008).

93. *See* Pande, *supra* note 90, at 974 (stating that the payments that surrogates receive are often four or five times as much as the surrogates' annual household income); CARNEY, *supra* note 88, at 139 (“\$5,000 is more than [the Indian surrogate] would make in ten years of ordinary labor.”); *Insight: Outsourcing to Indian Surrogate Mothers* (CNN television broadcast Oct. 17, 2006) (interviewing an attorney who states that in India a surrogate mother can earn ten times what her husband earns); Mohapatra, *supra* note 88, at 193.

So surrogacy is available today, whatever one thinks of it. Of course, it is only available to people with substantial funds. If you have money, however, you can buy both an egg donor and a birthmother, domestically or internationally. And you can contact a commercial agency, easily found on the Internet, to help you do it.

### III. SHOULD THE *WINDSOR* DECISION LEAD TO A LOOSENING OF RESTRICTIONS ON PAID GESTATIONAL SURROGACY?

I have trouble understanding why *Windsor* should lead to greater legalization of commercial surrogacy. True, we have seen a widespread legalization of gay marriage by the states. Further, it is a safe prediction that the right to marry will soon be constitutionalized and thereby will become the law in every state. I welcome this development. But why should that affect commercial surrogacy?

#### A. *No Necessary Connection Between Surrogacy and Marriage*

An easy answer, of course, is that *Windsor* and the ensuing litigation have added considerably to the number of married couples who may not be able to have children in other ways, and in that sense there is added pressure to legitimate this avenue to parenthood. But even a full-fledged constitutional right to gay marriage would not importantly affect the case for surrogacy, in my mind. After all, surrogacy in this country has not been limited to married people. Before *Windsor*, gay couples used surrogacy, whether or not they were legally married in their state of residence, and unmarried gay couples still do. Opposite-sex unmarried couples also use surrogacy, as do single men and even single women who cannot carry a pregnancy. In short, there is no necessary connection between marriage and surrogacy.

Because couples in which the woman is unable to become pregnant or to carry a pregnancy have always “needed” surrogates in order to produce a genetically related child, *Windsor* does not create a new problem, or even a new set of issues, in relation to surrogate parenting.

It is true that children are often associated with marriage, and those who marry often want to have children. In that sense it is likely that *Windsor* has increased demand for surrogacy services. It would be nice if marriage always entailed the ability to procreate, so that all couples, given the right to marry, could choose to reproduce, but that has never been the case. First comes love, then comes marriage, but these cannot always be followed by a baby carriage. And, unfairly perhaps, it is much easier for some to reproduce than others; like health, beauty, and



intelligence, reproductive capacity is not evenly distributed.

*B. Policy Arguments Against Allowing Surrogacy*

Perhaps the suggestion that gay marriage should lead to further access to and legitimation of paid surrogacy reflects the view that having access to surrogacy is a right, albeit a right available only to those who have funds to pay. But—unlike gay marriage—constitutional protection of surrogacy is extremely unlikely. Among the reasons is that there are legitimate policy arguments on both sides of the surrogacy issue. Especially serious considerations disfavoring surrogacy are fears of exploitation of birthmothers and of commodification of childbirth, women, and children that are associated with surrogacy. It may for some people be key to having the child of their dreams, but to others the practice of surrogacy seems uncomfortably close to human trafficking and baby selling.

*1. Commodification of Intimate Relationships, of Birthmothers, and of Children*

A couple of stories are sufficient to illustrate the commodification concern. A California surrogacy attorney tells of a man who came to California to use surrogate services but wanted to hire six birthmothers, and create six babies, so that after the births he could pick out two of them.<sup>94</sup> When asked what he proposed for the other newborns, he told the agency it could sell them.<sup>95</sup>

The agency declined the would-be-client's request.<sup>96</sup> But the story nonetheless illustrates an attitude of entitlement to the perfect baby, allowing the would-be parent to pick and choose. This is obviously a dangerous attitude for parents-to-be to adopt, at least until we arrive in the era where science allows parents to select genetic traits before embryos are implanted. The story also reflects the perspective that a person with money is entitled to buy whatever he wants and to satisfy himself in any way, without regard for consequences to others.

Another illustration of the same phenomenon occurred recently when an Australian couple hired a birthmother in Thailand who delivered

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94. Lewin, *supra* note 25.

95. *Id.*

96. *Id.* In a separate incident, a Japanese man recently fathered a dozen babies with different paid birthmothers in Bangkok; the babies were born just weeks and months apart. Fuller, *supra* note 63, at A12.

twins, a boy and a girl.<sup>97</sup> The boy had Down syndrome but his twin sister did not, so the couple who had hired the birthmother decided to leave behind the boy, returning to Australia only with his twin sister.<sup>98</sup> The couple had asked the birthmother to have a selective abortion of the boy in the sixth month of pregnancy, but the birthmother had refused on religious grounds.<sup>99</sup> She now has custody of the abandoned baby and is raising him as her own.<sup>100</sup> The baby needs a heart operation, and people in Australia, ashamed of the actions of their countrymen, have raised hundreds of thousands of dollars to help with his care.<sup>101</sup>

The Australian couple also has never paid the full fee that was agreed upon to the birthmother.<sup>102</sup> In fact, the father has asked the agency to refund part of his fee, because “no parent wants a son with a disability.”<sup>103</sup> The story has also brought to light another potential problem: Investigation has revealed that the father was convicted and imprisoned for twenty-two counts of sexual abuse in the 1990s.<sup>104</sup>

These stories suggest an attitude that if you have money you can buy anything, including a perfect baby and a birthmother to produce it for you. You can achieve these priceless contributions to your life, while avoiding responsibility if things go wrong.

## 2. *Exploitation or Freedom of Choice?*

Another serious problem is raised by charges of exploitation of the birthmothers. Whether this is a legitimate attack on surrogacy is much debated. After all, we do believe in freedom of contract, and a surrogacy contract represents an explicit agreement between the intended parents and the birthmother-to-be. Persons who enter into agreements to serve as birthmothers for a couple are usually people in financial constraints, or people who do not have the option of another well-paying job.<sup>105</sup>

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97. Lewin, *supra* note 25.

98. See Fuller, *supra* note 63, at A12.

99. Juarawee Kittsilpa, *Thai Surrogate Says Unaware Twin Had Down Syndrome Until Late in Pregnancy*, REUTERS UK EDITION (Aug. 3, 2014, 4:57 PM), <http://uk.reuters.com/article/2014/08/03/us-thailand-surrogacy-idUKKBN0G30KT20140803>.

100. *Id.*

101. Fuller, *supra* note 63, at A12; Kittsilpa, *supra* note 99.

102. Kittsilpa, *supra* note 99.

103. Fuller, *supra* note 63.

104. *Id.*

105. See, e.g., Mohapatra *supra* note 88, at 195, discussing surrogacy in India (“[T]he payments that surrogates receive for carrying a baby often equals four or five times their annual household income . . . the sum is significant in the lives of these surrogates. Surrogates state that the income allows them to provide education for their children or to purchase a home.”); Pande, *supra* note 90,

Serving as a birthmother may be the most profitable job available, or the job that the woman prefers. Birthing is also one of a very few jobs that are available only to women. Should legislators take that option away from them? Should not women be permitted to use their bodies any way they want?

These arguments resemble arguments often made for legalizing commercial sex (prostitution), another job that is primarily for women.<sup>106</sup> Many believe commercial sex should be legal, as long as women are not coerced to become sex workers. Should there be freedom of choice, or is state regulation protecting the women against their own choice appropriate when the subject is paid sex? Like surrogacy, commercial sex is legal and regulated in some jurisdictions, domestic and foreign, but it is forbidden in many others.<sup>107</sup> Both commercial sex and surrogacy can be called “voluntary” on the part of the participating women; they are jobs they have agreed to and are their means of livelihood. When an intelligent woman consents to such a relationship, why should she be unable to bind herself by her promise because others feel that the arrangement exploits her?

But surrogacy and commercial sex are not the only contexts in which women’s promises to perform are not legally enforceable until performance has taken place. In other contexts as well, persons are protected from binding promises concerning intimate subjects—like a promise to have sex, a promise to marry, a promise to give up a child for adoption, or even a promise to work for a person. So if surrogacy promises were to be legal but not binding or judicially enforceable, it would be only one of several subjects of extreme personal importance

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at 974 (stating that the payments that surrogates receive are often four or five times as much as the surrogates’ annual household income); CARNEY, *supra* note 88, at 139 (“\$5,000 is more than [the Indian surrogate] would make in ten years of ordinary labor.”); *Insight: Outsourcing to Indian Surrogate Mothers* (CNN television broadcast Oct. 17, 2006) (interviewing an attorney who states that in India a surrogate mother can earn ten times what her husband earns); Smerdon, *supra* note 12, at 32 (stating that the general payment to a gestational surrogate in the United States was between \$14,000 and \$18,000).

106. Nancy Erbe, *Prostitutes: Victims of Men’s Exploitation and Abuse*, 2 L. & INEQUALITY 609, 624–25 (1984); Erin Fuchs, *7 Reasons Why America Should Legalize Prostitution*, BUS. INSIDER (Nov. 13, 2013, 1:03 PM), <http://www.businessinsider.com/why-america-should-legalize-prostitution-2013-11>; Reihan Salam, *It’s Time for Legalized Prostitution*, SLATE (July 31, 2014), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/07/legalized\\_prostitution\\_there\\_s\\_no\\_way\\_to\\_end\\_demand\\_for\\_sex\\_work\\_so\\_why.html](http://www.slate.com/articles/news_and_politics/politics/2014/07/legalized_prostitution_there_s_no_way_to_end_demand_for_sex_work_so_why.html).

107. Prostitution is legal in eight counties in Nevada, although only in licensed brothels. NEV. REV. STAT. ANN. § 201.354 (West, Westlaw through End of 28th Special Session 2014).

In Sweden, the customer of the sex worker is a criminal, but the sex worker is not. Prabha Kotiswaran, *Do Feminists Need an Economic Sociology of Law?*, 40 J.L. & SOC’Y 115, 129 (2013).

that take that approach. Commercial contract law does not necessarily apply to intimate activities, and a possible objection to surrogacy is that it inserts contract into what has traditionally been an intimate realm.

A more concrete objection is that surrogacy does have an exploitative aspect that is difficult to overlook, even with apparent “consent” by the birthmother. Undeniably, the rich are hiring the poor to bear their babies. The divide between the intended parents and the birthmother is usually very wide, and the division is based on money, class, and often race.

After all, why have infertile couples, gay and straight, changed so thoroughly from traditional to gestational surrogacy, when the former variety is easier and does not involve the additional time and expense of obtaining a donor’s egg? Not only does gestational surrogacy require an additional female participant, but it also requires in vitro fertilization (IVF), whereas artificial insemination usually suffices for traditional surrogacy. IVF has a significantly lower success rate and is considerably more expensive and risky than artificial insemination.<sup>108</sup> Why have so many people nonetheless opted to erase the genetic tie between the birthmother and the infant?

One reason is that a birthmother with no genetic tie might be thought to have a lesser claim to custody. Indeed, the enforcement approach that the California courts adopted for gestational surrogacy has not been carried over to the traditional variety.<sup>109</sup> Other jurisdictions disagree with that distinction.<sup>110</sup> In many places, the law is still developing.

Gestational surrogacy also widens the divide between the intended parents and the birthmother, allowing men to use women of other races to carry their children even when they are unwilling to have a biracial child. More generally, some intended parents may prefer gestational surrogacy because they do not want the genes of the woman they would hire as a birthmother to constitute half of the baby’s genetic material. With gestational surrogacy, they can obtain an egg from a person who would never consent to be paid as a birthmother (or if she did, she would demand far more than the going rate). Egg donors are sought in places

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108. *Differences Between Artificial Insemination and In Vitro Fertilisation*, INSTITUTO BERNABEU, <http://www.institutobernabeu.com/foro/en/2011/12/14/differences-between-artificial-insemination-and-in-vitro-fertilisation/> (last visited Nov. 17, 2014); *Fertility Treatment: Artificial Insemination (IUI)*, BABY CENTER, [http://www.babycenter.com/0\\_fertility-treatment-artificial-insemination-iui\\_4092.bc](http://www.babycenter.com/0_fertility-treatment-artificial-insemination-iui_4092.bc) (last visited Nov. 17, 2014); *Infertility and In Vitro Fertilization*, WEB MD, [www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization](http://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization) (last visited Nov. 17, 2014); *Infertility and Artificial Insemination*, WEB MD, [www.webmd.com/infertility-and-reproduction/guide/artificial-insemination](http://www.webmd.com/infertility-and-reproduction/guide/artificial-insemination) (last visited Nov. 17, 2014).

109. *See generally In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994).

110. *See, e.g., A.G.R. v. D.R.H.*, 2009 N.J. Super. Unpub. LEXIS 3250 (Ch. Div. Dec. 23, 2009).

like college campuses, where smart, well-to-do, and privileged female students may want to make some extra money by donating their eggs.<sup>111</sup> Intelligent and athletic blue-eyed blondes are heavily in demand.<sup>112</sup> But when a woman is bearing your child but not providing the genetic material, you can be less fussy about her attributes and accordingly pay less for her services.

In fact, it is not uncommon for the intended parents to pay far more to the egg donor than to the surrogate.<sup>113</sup> Donating an egg is a complex procedure, and it is not entirely risk-free. An egg donor must take fertility drugs and undergo an egg retrieval procedure. In that way, she undertakes much more than a sperm donor does, and she is better compensated. But her services are far less onerous overall than those of the birthmother.

The imbalance of power between the birthmother and the intended parents inherent in surrogacy arrangements is exacerbated when U.S. citizens use international surrogacy. It is now common for frozen embryos to be sent to foreign countries so that genetically unrelated birthmothers can carry and deliver a baby. The baby is usually turned over to the intended parents through an agency who arranged the contract. Questions about “what is voluntary” and the limits of freedom of contract become even more difficult when birthmothers are offered several times their annual household income for bearing a child.

Does the fact that the birthmother is offered so much money make the contract involuntary, because the monetary incentive is too great, or does it just show she has her own reasons for offering her services? Should

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111. Diversity Fertility Services, LLC, a company that finds egg donors and matches them with intended parents, states that egg donors with certain traits can receive higher compensation. The traits include: documented superior intelligence and academics (tested IQ over 138, Ivy League student or graduate, very high standardized test scores); exceptional beauty with specific physical features and height (typically over 5'7"); or above-average athletic ability. DIVERSITY FERTILITY SERVICES, LLC, <https://dfsdonors.com/EggDonors.html> (last visited Sept. 23, 2014); see also Melinda Henneberger, *The Ultimate Easter Egg Hunt: 'Ivy League Couple' Seeks Donor with 'Highest Scores'*, WASH. POST (Mar. 21, 2013), <http://www.washingtonpost.com/blogs/she-the-people/wp/2013/03/21/the-ultimate-easter-egg-hunt-ivy-league-couple-seeks-donor-with-highest-percentile-scores/>; Gina Kolata, *\$50,000 Offered to Tall, Smart Egg Donor*, N.Y. TIMES, Mar. 3, 1999, at A10 (discussing an ad in a few top college newspapers where a couple offered \$50,000 to an egg donor who fit their specific criteria, which included a tall, athletic woman with high academic achievement); Kevin Su, *Not by the Dozen*, YALE HERALD (Feb. 21, 2014), <http://yaleherald.com/news-and-features/not-by-the-dozen/>.

112. See, e.g., Su, *supra* note 111.

113. See, e.g., Smerdon, *supra* note 12, at 32 (writing in 2008 that the general payment to a gestational surrogate in the United States was between \$14,000 and \$18,000, while donor eggs in the U.S. can sell for as much as \$50,000) (citing JAN SWASTHYA ABHIYAN, NAT'L COORDINATION COMM., NEW TECHNOLOGIES IN PUBLIC HEALTH: WHO PAYS AND WHO BENEFITS? 65–66 (2007)).

we worry about Americans being exploitive by hiring a birthmother for a sum that is minimal for them? Should we worry that the women hired internationally have fewer protections than those in the United States?

Both internationally and domestically, some women who become birthmothers for hire are reluctant. They may be pressured by husbands, for example. But the pressure may be even more prevalent and extreme in other cultures. One account of an Indian village suggests that young women in the village generally were expected to improve the standard of living by becoming birthmothers for hire.<sup>114</sup> So in individual cases, there are real questions whether the consent given should be deemed voluntary. Other paid birthmothers, however, may be enthusiastic about the ability to contribute vastly to their household earnings.<sup>115</sup>

International gestational surrogacy has not only widened the poverty divide between the contracting parties, it also has greatly increased the use of nonwhites to produce children for Caucasians. Because gestational surrogacy allows intended parents to settle for a birthmother of a different race, for example, or one they consider genetically their inferior, it can be even more exploitative and demeaning to the birthmothers who are hired.

A lack of respect shown to the birthmother is another indication that surrogacy can be degrading to the birthmothers involved and that they are in no way treated as equal contracting partners. For example, the Thai woman who was left with the Down syndrome baby was not informed when the agency and the contracting couple learned that one of the children she was carrying had Down syndrome.<sup>116</sup> They informed her only months later, when they wanted her to have a selective abortion.<sup>117</sup> Moreover, the living arrangements that are forced upon contracting birthmothers in many foreign destinations are disrespectful of their independence and the importance of their own lives and families. Indeed, the whole notion of automatically enforcing surrogacy contracts in favor of contracting intended parents belittles the role of the birthmother, her importance to the baby's development, and the relationship that grows between birthmother and infant during the course of pregnancy.

Except to supporters of absolute freedom of contract for all things,

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114. Mohapatra, *supra* note 88, at 194–95 (2012); *see also* Smerdon, *supra* note 12, at 51.

115. On differences between coercion, exploitation, and inducement, albeit in a different context, see I. Glenn Cohen, *Regulating the Organ Market: Normative Foundations for Market Regulation*, 77 *LAW & CONTEMP. PROBS.* 101, 105–09 (2014).

116. Kittsilpa, *supra* note 99.

117. *Id.*

these facts might suggest exploitation by nationality and gender, as well as by wealth, class, and race. They are sufficient to raise concern whether surrogacy should be enforced and also whether governments should underwrite and promote the surrogacy industry.

*C. Do We Need a Uniform National Surrogacy Law?*

A different interpretation of the search for connections between *Windsor* and surrogacy suggests a search for uniformity concerning U.S. surrogacy laws, or perhaps even for constitutional protection of access to surrogacy, just as there is evolving constitutional protection for same-sex marriage. People with little understanding of our federal system often criticize U.S. surrogacy as involving a “mishmash of laws,” differing state by state and utterly unclear in some instances.<sup>118</sup> But surrogacy is a matter of state law, whether that law is announced by the state legislature or the state courts or instead remains totally undeveloped. Possibly Congress could create uniform legislation on surrogacy,<sup>119</sup> although there is little disposition to do so.<sup>120</sup> In any case, the Supreme Court will not take on the role of giving it constitutional protection.

I take as a given that a constitutional right to same-sex marriage will soon be recognized. *Windsor* did not have that effect; it only protected marriages that were legal in the states where they took place.<sup>121</sup> But *Windsor* is widely considered a precursor to a simpler holding that the right to marry a same-sex partner is protected by the United States Constitution and states cannot forbid it.<sup>122</sup> That is not the law today, but that ruling will come.

One reason a national solution must prevail on the issue of same-sex

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118. Pérez, *supra* note 9.

119. *Hoke v. United States*, 227 U.S. 308 (1913) (upholding the Mann Act, forbidding the transportation across state lines of a woman for purpose of prostitution). *But see United States v. Morrison*, 529 U.S. 598 (2000); *Lopez v. United States*, 514 U.S. 549 (1995).

120. No bills on the subject have been introduced since 1989. Indeed when Congress did take an interest in legislating on the subject of surrogacy, its effort was to prohibit surrogacy, not to support or facilitate it. *See* Commercialized Childbearing Act of 1989, H.R. 1188, 101st Cong.; Anti-Surrogate Mother Act of 1989, H.R. 576, 101st Cong.; Surrogacy Arrangements Act of 1989, H.R. 275, 101st Cong.; Anti-Surrogate Mother Act of 1987, H.R. 3264, 100th Cong.; Surrogacy Arrangements Act of 1987, H.R. 2433, 100th Cong.; *see also* FIELD, *supra* note 13, at 155–56.

121. *United States v. Windsor*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2675 (2013).

122. *See, e.g.*, Adam Liptak, *A Steady Path to Supreme Court as Gay Marriage Gains Momentum in States*, N.Y. TIMES, Feb. 15, 2014, at A1; Michael J. Klarman, Op-Ed., *Better Late than Never: Expect a High Court OK on Marriage Equality Soon*, L.A. TIMES (Sept. 20, 2014, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-klarman-gay-marriage-supreme-court-20140921-story.html>.

marriage is the difficulty of administering a federal system in which persons are legally married in some states but not in others. If a couple separates in a state where their union was unrecognized, must they divorce? If they do not divorce, will they be bigamists when they enter a marriage that is legal and recognized? These are just a few of the many problems that can arise if one's status differs by state. The United States had similar problems when interracial marriage was forbidden in some jurisdictions but not in others; interracial couples would leave home in order to marry legally out of state only to be arrested and imprisoned upon their return home.<sup>123</sup>

A uniform rule concerning gay marriage is necessary because states need not recognize marriages that are inconsistent with state public policy.<sup>124</sup> The same need for uniformity does not exist in relation to surrogacy, because a parent-child relationship established and recognized in one state must be respected in other states under the U.S. Constitution's Full Faith and Credit Clause.<sup>125</sup> In that way, uniformity of recognition of parent-child relationships is assured even while states pursue different surrogacy policies.

*D. Could Surrogacy Access Be Protected by the United States Constitution?*

Somewhat to my surprise, a few scholars have suggested that surrogacy, like gay marriage, should be constitutionally protected. They argue that a right of access to surrogacy is a fundamental right protected by the United States Constitution.<sup>126</sup> There obviously is a very legitimate desire on the part of gay couples (married or not) to have children; that desire can be very central to what the couple wants to do with their lives. Bans on surrogacy deny that experience even though the solution is technically available and medically safe. Looked at solely from the point of view of those with a need for surrogacy, an argument for

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123. See, e.g., *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869 (Va. 1878) (upholding the conviction of a man for getting married to a woman of another race in another state and returning to Virginia); *Ex parte Kinney*, 14 F. Cas. 602 (C.C.E.D. Va. 1879) (habeas denied).

124. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971 & Supp. 2014).

125. U.S. CONST. art. IV, § 1.

126. See JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 32–40 (1993); Nicolas, *supra* note 30, at 1279–82. One case also holds unconstitutional one aspect of state interference with a consensual, undisputed surrogacy arrangement. In *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002), the district court held unconstitutional Utah's requirement that the birthmother be listed on the birth certificate rather than the intended parents. The context was a surrogacy arrangement involving no dispute between the parties, so except for the birth certificate, there were no enforcement issues.



constitutional protection might have some force: bans and even restraints on surrogacy interfere with some persons' rights to procreate, a right that has achieved constitutional protection. As part of his argument that access to surrogacy is constitutionally protected, Professor Nicolas also characterizes surrogacy as part of our historical tradition.<sup>127</sup> For this argument, he relies on the fact that surrogacy has been largely unregulated over the ages, with prohibitions on the practice emerging only in the 1980s.<sup>128</sup>

With all due respect, I find the argument that surrogacy access is a constitutional right to be extremely weak. True, it can be characterized as part of a right to procreate, but to assume that it will thereby partake of constitutional protection is to ignore the Supreme Court's constitutional distinctions, which make clear that a personal right to do something does not necessarily carry over to a right to enlist the assistance of another. The Supreme Court's "right to die" cases are illustrative. The Supreme Court has strongly suggested that there is a constitutional right to refuse medical treatment.<sup>129</sup> An individual is even entitled to have life-saving equipment disconnected at his or her option.<sup>130</sup> Nonetheless, the Court has denied that there exists a constitutional right to any other assistance in ending one's life, whether by physicians or by individuals.<sup>131</sup> The U.S. Constitution remains neutral on the issue whether to allow physician-assisted suicide; the question is a policy issue, left to resolution by the states.<sup>132</sup>

The argument Professor Nicolas makes that surrogacy is a fundamental right because it has not been regulated or prohibited historically<sup>133</sup> is even less convincing. To equate it to an ingrained American practice like marriage is indeed a stretch. Surrogacy went unregulated until the 1980s largely because the practice had not come to widespread public attention. One could just as easily say that sado-masochism (traditionally unregulated) has constitutional protection today. Similarly, domestic violence was ignored or even condoned by law until the last few decades. It was not punished or even forbidden; instead the husband had control of his household. That history did not

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127. Nicolas, *supra* note 30, at 1282–94.

128. *Id.*

129. *Cruzan v. Dir., Mo. Dept. Health*, 497 U.S. 261, 270–74 (1990).

130. *Id.*

131. *See generally* *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

132. *See* *Gonzales v. Oregon*, 546 U.S. 243, 269–75 (2006).

133. Nicolas, *supra* note 30, at 1282–94.

mean that domestic violence was constitutionally protected.

Of course, this is not in any way to equate surrogacy with those practices, but simply to say that the fact that a practice has not been the subject of legal regulation or ban does not mean that it is a fundamental right under the Due Process Clause or that the Constitution insulates it from legal regulation or ban.

One reason that the affirmative argument for constitutional protection of access to surrogacy is so weak is because surrogacy involves using another person or persons, albeit with their consent. Libertarians might argue that permitting surrogacy is constitutionally required on grounds of freedom of contract and women's rights to do as they want with their bodies. The many states still criminalizing commercial sex, to which these same arguments apply, demonstrate that these arguments cannot carry the day. Why would the Supreme Court insulate a practice from legislative revision by calling it a fundamental unenumerated constitutional right, when the practice is arguably exploitative? Why would it create an unenumerated right commercializing areas of intimate personal activity that have traditionally and at common law been insulated from commercial exchange? Like arguments about commercial sex, there are legitimate policy arguments on both sides of the surrogacy issue. Accordingly, it is appropriately resolved in the states rather than at a constitutional level.

The United States Supreme Court, if faced with the issue, would hold that the Constitution allows states to choose to ban surrogacy, even when it does not allow them to ban same-sex marriage. Indeed at this time in our history it seems much more likely that the Constitution would be held to *prohibit* surrogacy (and perhaps commercial sex, human trafficking, and baby-selling) than it would be held to protect those practices against contrary state regulation.

One might ask how surrogacy (or commercial sex) *could* be constitutionally forbidden when the woman involved has given her consent. A court might deem the consent involuntary, but the better analysis for such a holding would be to require continuing consent, so that the birthmother (or sex worker) could withdraw her consent at any time prior to fulfillment of the contract. That is the approach applied to promises to give up a child for adoption, to promises to marry, and to promises to perform a job. Those promises are not subject to specific enforcement until the adoption/marriage/job completion takes place. For those topics, any consent given in a contract can be withdrawn by the performing party. Once withdrawn, consent no longer exists.

Indeed it is familiar that this dynamic controls the legality of sexual relationships. A person may consent to sexual intercourse, but if she

changes her mind in the middle of the act, her change of mind must be respected. At that point, no means no and refusing to accept her change of heart constitutes rape.

If a continuing consent were deemed necessary for surrogacy, as for other intimate acts, once consent was withdrawn enforcement of the contract could be characterized as “involuntary servitude,” in violation of the Thirteenth Amendment of the U.S. Constitution. Specific performance of the contract might also violate the birthmother’s rights to bodily integrity and liberty, protected by the Due Process Clause of the Fourteenth Amendment.

Of course, I am not seriously contending that it is *unconstitutional* for states to allow surrogacy (or commercial sex). My basic point is that access to surrogacy is *neither* constitutionally forbidden *nor* constitutionally required, although it is possible to formulate arguments on both sides of the question. Instead of any constitutional ruling emanating from the federal courts, it is much more likely that the practice of surrogacy will continue to be regulated by the states, which sometimes will mean it is not regulated at all.

There will continue, then, to be sharply differing surrogacy laws, but it is not necessarily disadvantageous to allow each state to pursue the policy it deems best. One advantage of differing laws is that the states and the public can learn from the implementation of different systems and will eventually have a better basis, including an empirical basis, for forming their surrogacy policy.

So in the United States, surrogacy is a matter of state policy, and it is likely to stay that way for a long time. It can be fostered in some places and in others it can be impeded by surrogacy laws and other state regulations. There is no federal compulsion for states to allow surrogacy—for gay couples or for anyone else.<sup>134</sup>

Some states, of course, like Florida, Utah, and Texas, as noted above, allow surrogacy to opposite-sex couples but not gay couples, and those states require also that intended parents be married. These regulations, like other discriminations against gays, raise much more serious constitutional issues than those denying access to surrogacy more generally. Rules denying gay couples the same access to adoption or foster parenting as other would-be parents are similarly vulnerable to upcoming Equal Protection challenge. Such discriminatory rules could be held unconstitutional if the Supreme Court (in its gay marriage

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134. See generally Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1474–75 (2008).

decisions or elsewhere) finds that discrimination accordingly to sexual orientation, like discrimination by race, religion, or gender, violates the Equal Protection clause.

Access to surrogacy for same-sex couples would be vastly increased in the United States by a successful attack on the laws allowing surrogacy to some people but not to gay men. That course of challenging discrimination as a violation of Equal Protection is likely to be productive much sooner than the attempt to construct a Due Process entitlement of access to surrogacy which is under discussion here.

But even after the Constitution compels equal treatment of same- and opposite-sex couples, each state will have to decide what it considers the “best” surrogacy policy to adopt. State lawmakers—legislative, executive, or judicial—will need to assess the pros and cons of surrogacy. Washington State has recently gone through a long process of considering whether to replace its ban on surrogacy, a process described in detail in Professor Price’s informative article.<sup>135</sup> Legislative sponsors have tried but failed to enact a policy affirmatively allowing paid surrogacy and surrogacy agencies within its borders, as well as automatically enforcing surrogacy contracts despite a birthmother’s change of heart.<sup>136</sup> Other states also are considering a variety of surrogacy laws.<sup>137</sup>

#### *E. The Range of Options for State Laws*

Even apart from *Windsor* and gay marriage, each state will eventually be faced with a need to make decisions about that state’s surrogacy policy. Will it endorse surrogacy, or recognize and regulate it without enforcing it, or will it try to make it illegal?

It is unrealistic to think that full prohibition of surrogacy could be accomplished even if that were the will of a state or a national government. Instead, attempts to forbid surrogacy are likely to result either in travel for surrogacy or in a robust black market. Those men who are desperate for a genetically connected baby, now aware of the potential for surrogacy, do not give up so easily. The experience of China, where surrogacy is illegal, is illustrative.

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135. Terry J. Price, *The Future of Compensated Surrogacy in Washington State: Anytime Soon?*, 89 WASH. L. REV. 1311, 1326–36 (2014).

136. *Id.*

137. See discussion about pending state laws in Lewin, *supra* note 63, at A1 (including a discussion of a legislative hearing in Kansas in which there was proposed legislation to impose a fine or even imprisonment on those entering into a surrogacy contract).

The Chinese interest in surrogacy may be affected by a traditional and cultural emphasis on the necessity of having children, which makes it especially difficult for an infertile couple.<sup>138</sup> Moreover, some have used surrogacy in evading the one-child-only policy that China enforced in some areas of the country until recently.<sup>139</sup> Couples who have lost their only child but are too old to reproduce are also attracted to surrogacy.<sup>140</sup>

Surrogacy is not legal in China,<sup>141</sup> but many Chinese who want it have not been willing to use foreigners, either as egg donors or as birthmothers. A man who works in a surrogacy agency in China attributed this attitude to a belief that Chinese are superior, even when only pregnancy and childbirth are involved.<sup>142</sup> In any case, a very expensive black market in surrogacy is booming in China, servicing Chinese couples who wish to use surrogacy, and charging them much more even than is typical in the United States.<sup>143</sup>

The lesson is that once the public knows that surrogacy can be accomplished as a scientific matter, it will be practiced, legally or illegally. The desire to have a genetically related child is sufficiently strong that a vigorous black market will appear if no other market is available.<sup>144</sup>

#### IV. SHOULD STATES INCREASE PROTECTION OF SURROGACY?

If surrogacy were actually fully illegal and the ban could be successfully enforced, couples like those allowed to marry in *Windsor* and many other couples would have no opportunity to have a genetically related child. In a situation like that, an appeal to open up surrogacy somewhere in the United States, subjecting it to regulation but not ban, might be compelling. The plight of gay male couples (and others who

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138. Johnson & Li, *supra* note 71, at A4.

139. Alexandra Harney, *Chinese Look Overseas for Surrogates*, N.Y. TIMES (Sept. 24, 2013), <http://www.nytimes.com/2013/09/24/business/global/chinese-look-overseas-for-surrogates.html>.

140. Johnson & Li, *supra* note 71, at A4.

141. Harney, *supra* note 139.

142. Johnson & Li, *supra* note 71, at A4.

143. *Id.*

144. Others have argued, however, that a ban on surrogacy is preferable to regulation and claim that laws regulating surrogacy end up promoting it. One point is that a ban on surrogacy would at least reduce the number of these arrangements. Less persuasive is the argument that a ban would result in greater protection for birthmothers. Smerdon, *supra* note 12, at 39–40; JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* 207–08 (1993).

want a genetically-related child and cannot accomplish that on their own) would militate against full prohibition of surrogacy.

But clearly, full prohibition is not the current situation. Surrogacy is entirely available, even to persons who live in states that criminalize it. Both in the United States and abroad, there are governments that endorse surrogacy and attempt to attract surrogacy clients. And surrogacy is also available in many states and countries that do not openly promote it but that allow it to exist. In short, people who have money and who want to use surrogacy to create a child can do so.

When a few states are already affirmatively friendly to surrogacy, treating it like an ordinary business to be promoted and encouraged, the case for other states' joining their number is sharply reduced. States may be legitimately reluctant to allow commerce and contract to govern conception, childbirth, and custody, areas otherwise insulated from monetary transactions by adoption and baby-selling laws. There may be realistic fears of exploitation of women. These reasons may cause states to keep surrogacy agencies and even private surrogacy transactions outside of their borders, even while inevitably allowing their citizens to make use of surrogacy services that are available elsewhere. That policy might appear best, even though it can add to the expense of an already expensive transaction to have to enter a surrogacy arrangement away from home.

What further legalization would accomplish is to make surrogacy more convenient and easier to achieve, to make it more "normal." Those goals may be positive in relation to gay marriage, but the costs of surrogacy and its degrading aspects should also be considered before the practice is deliberately encouraged and spread. It does not seem unduly burdensome to require would-be parents in Washington State to travel to Oregon or California to enter a contract to obtain a child.<sup>145</sup> The amount of trouble that causes the intended parents is miniscule in comparison to what any birthmother experiences in gestating and delivering the child.

## CONCLUSION

*Windsor* is only tangentially relevant to surrogacy, if at all, and does not state a case for taking any particular position on surrogacy. The

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145. Even rights that are recognized as constitutionally required can sometimes be burdened, with the Supreme Court upholding a right of access but allowing states to discourage exercise of the right. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (abortion); *Cruzan v. Dir., Mo. Dept. Health*, 497 U.S. 261, 280 (1990) (rights to refuse and to discontinue medical treatment); *Planned Parenthood Se., Inc. v. Strange*, No. 2:13cv405-MHT, 2014 WL 3809403, at \*1 (M.D. Ala. Aug. 14, 2014) (abortion).

issues are entirely different. Nor does *Windsor* suggest that access to surrogacy will be subject to national rules, statutory or constitutional. Even apart from *Windsor* and gay marriage, each state will eventually be faced with a need to make decisions about that state's surrogacy policy. Surrogacy will remain broadly available to those who have money, whether or not more states decide actively to promote it.