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## FOR A FEMINIST CONSIDERING SURROGACY, IS COMPENSATION REALLY THE KEY QUESTION?

Julie Shapiro\*

*Abstract:* Feminists have long been engaged in the debates over surrogacy. During the past thirty years, thousands of women throughout the world have served as surrogate mothers. The experience of these women has been studied by academics in law and in the social sciences. It is apparent that if properly conducted, surrogacy can be a rewarding experience for women and hence should not be objectionable to feminists. Improperly conducted, however, surrogacy can be a form of exploitation. Compensation is not the distinguishing factor. In this essay I offer two changes to law that would improve the surrogate's experience of surrogacy. First, the law should treat traditional and gestational surrogacy similarly. Second, a surrogate should be considered a legal parent of the child she bears. These changes would address the most pressing feminist objections to surrogacy and open the way for compensation.

### INTRODUCTION

This symposium is devoted to a consideration of compensated surrogacy. Since I tend to approach legal questions as a feminist<sup>1</sup> it would follow that, for me, the questions posed are “Can a feminist support compensated surrogacy? Should she?”<sup>2</sup>

While I take these questions as a starting point, I cannot answer them in isolation. Any affirmative answer must be conditional, because the acceptability of compensated surrogacy—like the acceptability of surrogacy more generally—depends on the specifics of the practice.<sup>3</sup>

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\* Professor of Law, Seattle University School of Law. Thanks are due to many people who have helped me clarify my thinking on the complicated topic of reproductive technology, including members of the National Family Law Advisory Committee of the National Center for Lesbian Rights, members of the Legal Voice ART Workgroup, Susan Boyd, Jenni Millbank, and numerous colleagues at Seattle University. I am also indebted to regular readers and commenters on my blog, *Related Topics*, for challenging me at every turn. Finally, thanks are due to Stephanie Wilson for invaluable assistance with research.

1. There is no single feminist perspective on law, but rather a rich multiplicity of views. *See, e.g., FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

2. I recognize, of course, that not all feminists are women just as it is true that not all women are feminists. In the time-honored feminist tradition, however, I use the feminine pronoun to include men as well as women.

3. By contrast, a negative answer could be unconditional: Compensated surrogacy is never

Ultimately, I conclude that feminists can and should support surrogacy in general and compensated surrogacy in particular *so long as surrogacy is structured and regulated in ways that effectively protect the surrogate*.<sup>4</sup> This being the case, the bulk of this essay is devoted to the principles that should govern surrogacy in order to protect the surrogate.

This essay proposes two substantial legal changes that are necessary to provide that protection.<sup>5</sup> First, the law should be restructured to remove the existing systemic preference for gestational surrogacy.<sup>6</sup> While this preference may serve a number of interests, the interests of the surrogates are not among them. Gestational surrogacy may well be the personal preference of many individual intended parents and/or surrogates and I do not propose to eliminate the option, but surrogates and intended parents alike should be free to choose between traditional and gestational surrogacy. Second, and likely more controversially, the law should be restructured so that a surrogate is recognized as a legal parent of the child.<sup>7</sup> Assignment of legal parentage could help to redress some of the power imbalances that can lead to exploitation of surrogates.

Part I of this essay details the feminist perspective from which I approach the issue. Part II provides a brief discussion of the development of the law governing surrogacy. This leads me to the two proposals I am offering, which will be discussed in Part III. Finally, in

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permissible.

4. Others have reached a similar conclusion. In particular, Professor Jenni Millbank has argued that “payment alone cannot be used to differentiate ‘good’ surrogacy arrangements from ‘bad’ ones.” Jenni Millbank, *Rethinking “Commercial” Surrogacy in Australia*, 11 J. BIOETHICAL INQUIRY 1, 1 (2014).

5. The two changes discussed here are both critical and controversial, and hence warrant discussion. But they do not constitute an exhaustive list of the protections that should be in place. Some more basic and less controversial regulation of surrogacy would be desirable. For example, it should be clear that written consent should be required from all parties before beginning the process. Because these regulatory matters are relatively less controversial I have not discussed them here.

6. In the earliest form of surrogacy—commonly called “traditional surrogacy”—the surrogate is genetically related to the fetus she carries. The pregnancy is brought about by using sperm (typically from an intended father) to inseminate the woman who is serving as a surrogate. As use of in vitro fertilization has spread, “gestational surrogacy” has become more common. In gestational surrogacy, a pre-embryo conceived in vitro is transferred to the uterus of the woman who will be the surrogate. In gestational surrogacy, the surrogate (sometimes called “the carrier”) is not genetically related to the fetus she carries. The embryo to be transferred may be created with gametes provided by the intended parents or it may be created with gametes from other third-party providers. But importantly, gestational surrogacy offers many different-sex couples the possibility of creating a child genetically related to both members of the couple. For a more extensive discussion of the importance of this distinction, see *infra* text accompanying notes 45–73.

7. As is discussed further below, this does not mean that the intended parents would not also be legal parents of the child. See *infra* text accompanying notes 109–134.

Part IV I will consider the topic of compensation directly, based on the assumption that the proposed changes are in place. The conclusion that a surrogate can (and typically should) be compensated follows readily.

#### I. WHAT DOES IT MEAN TO TAKE A FEMINIST VIEW OF SURROGACY?

The proliferation of surrogacy in all its forms has not gone unnoticed. Studies by academics in psychology, sociology, anthropology, and law have documented its rise and have examined its practices and its consequences.<sup>8</sup> Of particular importance for my purposes is a rich body of empirical research—much of it conducted by feminists—drawing on women’s actual experiences of surrogacy.<sup>9</sup> Since meaningful empirical research could not be conducted until surrogacy was an established practice, this body of work did not exist at the time of *In re Baby M*<sup>10</sup> and the insights it provides could not be taken into account in the critical literature produced at the time. Those who wrote about surrogacy in the 1980s were necessarily writing based on theory rather than on practice.<sup>11</sup>

In my view, any feminist critique should be informed by the actual experience of women. This developing body of research presents a chance—perhaps, even, an obligation—to revisit the earlier debate about surrogacy. Surrogacy is far more common today than it was in 1988

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8. 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 (2010); Millbank, *supra* note 4.

9. See generally HELENA RAGONE, *SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART* (1994); Andrea Braverman et al., *Reproduction Through Surrogacy: The UK and US Experience*, in *REPRODUCTIVE DONATION: PRACTICE, POLICY AND BIOETHICS* 289, 289–307 (Martin Richards et al. eds., 2012); Busby & Vun, *supra* note 8, at 39–81 and sources cited therein; V. Jadva et al., *Surrogacy Families 10 Years On: Relationship with the Surrogate, Decisions Over Disclosure and the Children’s Understanding of Surrogacy Origins*, 27 HUM. REPROD. 3008 (2012); Millbank, *supra* note 4, at 4–10 and sources cited therein; Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM U. J. GENDER SOC. POL’Y & L. 555 (2013) and sources cited therein. In her recent discussion of the complexities of compensated surrogacy, Professor Pamela Laufer-Ukeles notes the consistency of the conclusions reached by empirical researchers. See Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1230 (2014).

10. 537 A.2d 1227 (N.J. 1988).

11. In addition, new consumers of surrogacy—gay male couples—emerged as important participants in the public debates about surrogacy. Though this development was apparently not foreseen by feminists, many feminists are eager to diminish the centrality of gender in child-rearing and are therefore supportive of a wide variety of family forms. They are therefore inclined to support the efforts of gay men to create their own families. Access to surrogacy plays an important role in the construction of these families and may offer a new basis for inclining towards approval of surrogacy.

when *Baby M* was decided.<sup>12</sup> For this reason, renewed critical analysis of the practice is essential. Thus it is hardly surprising that I join other feminist authors in this task.<sup>13</sup> Like them, my focus is on learning from the experience of the surrogate; this essay builds on their work.

Since this symposium is relatively narrowly focused on *compensated* surrogacy, I will not engage in a broader evaluation of surrogacy here. Yet, as I noted earlier, an articulated position on surrogacy generally is a necessary starting point. After all, if I found surrogacy to be generally unacceptable, it is hard to imagine I could approve of compensated surrogacy.<sup>14</sup>

In considering surrogacy here, and more particularly compensated surrogacy, my first concern is with the effect of surrogacy on the surrogate herself. I am accordingly less concerned with the intended parents, whose perspective is explored elsewhere in this volume.<sup>15</sup> Apart from the fact that it is considered elsewhere,<sup>16</sup> there are two linked reasons why I chose the surrogate as the focus of my concern. To begin with, it is worth observing that the surrogate is necessarily a woman while intended parents may be male or female.<sup>17</sup> Thus the experience of being a surrogate is necessarily a woman's experience. More importantly, given the distribution of power between the parties to surrogacy, the surrogate is typically the most vulnerable party in a surrogacy arrangement—the person most at risk of exploitation.<sup>18</sup>

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12. Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES, Sept. 18, 2014, at A1.

13. See sources cited *supra* note 8. Sara Ainsworth, another author in this symposium book, also approaches her surrogacy article from a feminist perspective. See generally Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1078–80 (2014).

14. By contrast, it is perfectly possible to approve of surrogacy generally and at the same time reject compensated surrogacy.

15. This is not to say that the intended parents are not also vulnerable and subject to exploitation, but this exploitation is more likely to come at the hands of the surrogacy providers than at the hands of the surrogate. See, e.g., Tamar Lewin, *A Surrogacy Agency That Delivered Heartache*, N.Y. TIMES, July 28, 2014, at A1 (discussing instances of exploitation of intended parents by surrogacy agencies).

16. For example, Professor Nicolas frames his article in this symposium around his recent experience as an intended parent of a compensated surrogacy arrangement. See generally 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, 1236 (2014).

17. Generally speaking, intended parent(s) are heterosexual couples, gay male couples, or single men. It would seem that lesbian couples would be the least likely consumers of surrogacy, as it is often possible for one of the women to carry a pregnancy to term.

18. The biblical precedents invoked by Professor Nicolas, *supra* note 16, at 1283 nn.266–67, are

The intended parents are generally always better situated than the surrogate. They usually have greater wealth, education, and social status, as well as stronger connections to institutions of power.<sup>19</sup> This is not to say that intended parents aim to exploit their surrogates. The vast majority of intended parents intend no such thing. Neither is it to deny that the intended parents are not themselves vulnerable to exploitation.<sup>20</sup> But I remain concerned that even well-intentioned intended parents may unwittingly exploit their surrogate simply by making demands she is not in a position to resist.<sup>21</sup>

Of equal concern is the distribution of power between a commercial surrogacy agency<sup>22</sup> and the surrogate. Surrogacy agencies are often run by highly educated and skilled individuals.<sup>23</sup> As with the intended

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stark instances of this power imbalance and of the exploitative potential of surrogacy. The women employed as surrogates in these stories—Hagar, Bilha, and Zilpah—had no autonomy. They were servants or slaves required to do the bidding of the intended parents. *See Genesis* 16:1–6, 30:1–10. They were treated as property. They did not choose to be surrogates, nor did they choose to engage in sexual relations with the men who impregnated them. *See THE TORAH: A WOMAN'S COMMENTARY*, 70–71, 166–67 (Tamara Cohen Eskenazi & Andrea L. Weiss eds., 2008).

19. This is not to say that all intended parents are upper class or members of ruling elites. Clearly this is not the case. The point here is that generally the status of the intended parents is greater than that of the surrogate. I do not mean to suggest that women who become surrogates are necessarily victims or are incapable of making intelligent decisions regarding surrogacy, as some opponents of paid surrogacy argue, only that there are certain structural factors that place them at a disadvantage when the terms of the surrogacy are negotiated.

20. *See, e.g., Lewin, supra* note 15. Indeed, the factor that makes intended parents vulnerable to exploitation—a compelling desire for children—is what could unwittingly lead them to exploit a surrogate. When one considers the immense investment (of time, money, and emotional energy) required of intended parents, it is clear that their desire for children must be deeply felt indeed. In some intended parents it may approach desperation. Under these circumstances it seems inevitable that at least some intended parents would find it difficult to keep the interests of the surrogate foremost in their minds.

21. Intended parents often wish to control the prenatal care provided to the surrogate as well as the surrogate's behavior during this period. Given our increasing appreciation of the importance of the prenatal environment, this is not surprising. Intended parents may wish to select the doctors or midwives who will provide care or specify particular activities that the surrogate will/will not engage in. These are decisions that would ordinarily be left to the pregnant woman, possibly with the participation of her partner. In strictly legal terms, contractual reallocation of these decisions is probably unenforceable. It is hard to imagine that a court would order a surrogate to attend a prenatal yoga class, or that she take particular vitamins. But the power dynamic between the surrogate and the intended parents may be such that the surrogate is inclined to accede to their wishes even when they do not align with her own.

22. The majority of commercial surrogacies are brokered by for-profit surrogacy agencies. Morgan Holcomb & Mary Patricia Bym, *When Your Body is Your Business*, 85 WASH. L. REV. 647, 651 (2010). While many of these agencies may have extensive safeguards in place to minimize exploitation and ensure the best possible outcomes for all parties, it is equally clear that there are agencies that have fallen far short of this mark.

23. *See id.* at 651–52 (discussing the prominence of the “multi-million dollar” surrogacy industry). As Professor Nicolas notes, surrogacy agencies often employ a wide variety of

parents, these individuals will typically be of greater social status, have greater wealth, and be more educated than the surrogates they work with.<sup>24</sup> Further, surrogacy agencies will generally have access to (or themselves be) legal professionals who are well-versed in the laws governing surrogacy.<sup>25</sup> They are repeat players with established expertise and experience in the field.<sup>26</sup> By contrast, many surrogates, at least in their first employment as surrogates, likely bring little experience or expertise to the table.<sup>27</sup> A woman offering to be a surrogate who demands more favorable terms might reasonably fear that she will not be hired.<sup>28</sup> These circumstances create a situation in which

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professionals. Nicolas, *supra* note 16, at 1248. By contrast, most surrogates, while neither poor nor uneducated, are comparably less educated and of lower class status. *See Peng, supra* note 9, at 560–61. There is nothing per se objectionable about the participation of a range of professionals in the process of surrogacy. Indeed, given its complexity (legal, medical, and psychological) the participation of professionals from appropriate fields is clearly desirable. At the same time, a surrogate will rarely possess comparable credentials in any field. It is not that this necessarily leads to misuse of the process of surrogacy, it is merely that this may create conditions that raise some concerns. For a description of the typical process a surrogate goes through, including the participation of various professionals, see Braverman et al., *supra* note 9, at 291.

24. Several of the agencies Professor Nicolas considered are owned and/or run by former surrogates. Nicolas, *supra* note 16, at 1248 n. 99. *See* About Us, FUTURE FAMILIES NW, LLC, <http://www.futurefamiliesnw.com/about-us.html> (last visited Nov. 16, 2014); About Us, GREATEST GIFT SURROGACY CENTER NW, <http://ggscnw.com/about-us/> (last visited Nov. 16, 2014). While this may address many concerns about power imbalance arising from class and background, clearly agency owners have far greater experience than does any individual surrogate. As above, in noting this imbalance, I do not mean to suggest that agencies will seek to exploit surrogates. Few probably do. I only mean to suggest that this is a potential problem, which should be kept in view.

25. *See* Holcomb & Byrn, *supra* note 22, at 651 n.16. As Professor Nicolas makes clear, surrogacy law in the United States is a complex field with great variation among jurisdictions. Nicolas, *supra* note 16, at 1239–45. Given this complexity, it stands to reason that surrogacy agencies and intended parents must rely on legal guidance.

26. *See* Holcomb & Byrn, *supra* note 22, at 651–52. Generalizations are, as always, fraught with peril. There are important distinctions among surrogacy agencies both among jurisdictions and within jurisdictions. Thus, many established surrogacy centers in the United States are run according to high professional standards that minimize risks of exploitation. By contrast, some run overseas provide few protections for the surrogates, who are likely more vulnerable to begin with. *See* Lewin, *supra* note 15 (describing one instance of exploitative surrogacy practices in Mexico). And in all settings there are occasional unethical practitioners who take advantage both of surrogates and intended parents. I do not mean to suggest that all surrogacy agencies exploit surrogates. This is clearly not the case. However, any woman seeking to be a surrogate runs the risk of ending up in a situation where she will be exploited and this is the focus of my concern.

27. Professor Braverman notes that experienced surrogates frequently receive higher compensation than first-time surrogates. Braverman et al., *supra* note 9, at 295. This likely reflects a premium offered to someone who has successfully completed a surrogacy arrangement.

28. It is striking that one does not “shop” for a surrogate in the same way one “shops” for a gamete provider. While the person who provides gametes is seen as making a profound contribution to the child-to-be, the surrogate is sometimes viewed as a carrier or host, who will have less influence on the child than an eventual nanny might.

exploitation is possible, whether it is intended by agencies or not.<sup>29</sup>

Even a cursory examination of the actual experiences of surrogacy demonstrates that this is a well-founded concern, for there is no shortage of stories that reveal instances where surrogates are exploited.<sup>30</sup> In the end, I choose to focus on the surrogate because I am concerned that surrogacy poses a risk of systematic exploitation of surrogates who will always and only be women.

Choosing to examine surrogacy from the perspective of the woman who is the surrogate necessarily means setting the perspective of children born via surrogacy aside. Readers may consider this omission at best curious and at worst a fatal failing. Surely we all share a concern for the well-being of children generally, including those conceived via surrogacy. This ultimately requires us to consider the well-being of these children. Children are absent from this discussion not because the rights and well-being of these children are unimportant, but because of the specific situation children occupy in surrogacy. They are not parties to surrogacy agreements, nor do they participate in the process of surrogacy itself. They are instead the desired end result of surrogacy.

We cannot yet fully appreciate the articulated perspective of the children of surrogacy themselves—after all, Melissa Stern, “Baby M,” is among the oldest of those we are aware of, and she is only twenty-eight.<sup>31</sup> In any event, the opinions of those born of surrogacy who choose to speak out may not be definitive. Those who choose to speak about their experience as children of surrogacy may not be a representative sample.<sup>32</sup>

But this does not mean we are without information about the well-being of those children. The evidence gathered so far seems to tell a story similar to that told by studies of other children of assisted reproductive technology and of children generally—most do quite

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29. In fact, the *Baby M* opinion, discussed below, expressed strong concerns about the practice of surrogacy potentially leading to exploitation. See *In re Baby M*, 537 A.2d 1227, 1242 (N.J. 1988) (“Baby-selling potentially results in the exploitation of all parties involved.”).

30. A number of examples of exploited surrogates arise out of the international surrogacy market. See generally Seema Mohapatra, *Achieving Reproductive Justice in the International Surrogacy Market*, 21 ANNALS HEALTH L. 191 (2012); Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15 (2009).

31. Baby M was born on March 27, 1986. *In re Baby M*, 537 A.2d at 1236.

32. In both the adopted and the donor-conceived community, the most persistent voices are those who are dissatisfied with the status quo. This may not be because that is the majority view of these children, but rather that those who seek change are more likely to speak publicly. It is quite possible that a similar phenomenon would be observed with children of surrogacy.



well.<sup>33</sup> There is no evidence that surrogacy per se is harmful to the children it produces but it may well be that the conditions of surrogacy are salient.<sup>34</sup>

In any event, a detailed assessment of the impact of surrogacy on children is far beyond the scope of this Article as well as the competence of the author. It seems possible that lessons learned with regard to adopted and donor-conceived children will be pertinent here. In general, there is widespread agreement that honesty is the best policy when it comes to children of adoption or assisted reproductive technology.<sup>35</sup> Thus, parents are now routinely counseled to consider how they will discuss the origin story of the child.<sup>36</sup> Those who are adopted or donor-conceived need to know the truth of their origins. There is no reason to think this will be less true for those born to surrogates. A child's origins in surrogacy cannot be readily concealed.<sup>37</sup> While there is, no doubt, much to say when considering surrogacy from the perspective of the children of surrogacy, I leave that for another author and focus my analysis using the perspective of the surrogate.

Despite concerns about the potential for exploitation of surrogates noted above, I do not oppose surrogacy generally. For there is other evidence from the practice of surrogacy to take into account: Over the last thirty years, thousands of women have served as surrogates and found it to be a rewarding and enriching experience.<sup>38</sup> And just as it seems impossible to ignore the potential for—and the evidence of—exploitation, it seems to me unreasonable to discard or invalidate the experience of the women who have benefitted from being surrogates. The ability to gestate and give birth to a child is a uniquely female capacity. Prohibiting surrogacy restricts the freedom of women to use this capacity as they choose. Thus, it diminishes the autonomy of women to make their own choices about the way they will spend their time and their talents. Rather than restrict the freedom of women, we should

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33. See generally Busby & Vun, *supra* note 8; Jadva et al., *supra* note 9; Millbank, *supra* note 4, at 5.

34. Perhaps of particular relevance here, there is no evidence that children of altruistic surrogacy fare differently from children of compensated surrogacy. See Millbank, *supra* note 4, at 5.

35. See, e.g., Braverman et al., *supra* note 9, at 303; Jadva et al., *supra* note 9, at 3012 (2012).

36. See Braverman et al., *supra* note 9, at 291.

37. See Jadva et al., *supra* note 9, at 3013 (noting that families who use surrogacy have a very high rate of explaining surrogacy to their children probably because “couples have to explain the arrival of a baby in the absence of a pregnancy”). It seems likely that disclosure will typically be necessary as most young children are deeply interested in the time “when I was in mommy’s tummy.”

38. See Peng, *supra* note 9, at 563 and sources cited therein.

identify the conditions that heighten risks of exploitation as well as those that enhance the possibility of positive outcomes. We can then seek to structure surrogacy so that the potential for enrichment is maximized even as the potential for exploitation is minimized. The role of compensation for surrogacy must be considered as part of this larger project. The initial question is how surrogacy can be structured so as to empower the surrogate and protect her from potential exploitation.

## II. SURROGACY IN A NUTSHELL, FROM *BABY M* TO THE PRESENT DAY

The starting point for any legal discussion of surrogacy must be *In re Baby M*. Many authors have discussed this case in detail.<sup>39</sup> For purposes of this essay, however, only a brief overview is necessary.

This landmark case arose when William and Elizabeth Stern entered into a contract with Marybeth Whitehead.<sup>40</sup> The contract provided that Whitehead would be inseminated with William Stern's sperm.<sup>41</sup> The contract provided that the resulting child would be surrendered by Whitehead to the Sterns.<sup>42</sup> Marybeth Whitehead's parental rights would be terminated and Elizabeth Stern would adopt the child.<sup>43</sup> The baby would then be the Sterns' legal child.<sup>44</sup> In exchange, Whitehead would receive \$10,000.<sup>45</sup>

Whitehead gave birth to a baby girl, but found she was unable or unwilling to surrender the child to the Sterns.<sup>46</sup> In the ensuing litigation, the Sterns sought to enforce the contract.<sup>47</sup> Ultimately, the New Jersey Supreme Court refused to do so.<sup>48</sup> It noted that Marybeth Whitehead was the legal mother of Baby M.<sup>49</sup> The contract, which required her to surrender the child in exchange for money, was therefore a contract for

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39. For a comprehensive discussion of the *Baby M* case in this symposium, see Terry J. Price, *The Future of Compensated Surrogacy in Washington State: Anytime Soon?*, 89 WASH. L. REV. 1311, 1312–17 (2014).

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

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *See id.* at 1236–37. Marybeth Whitehead named the child Sara Elizabeth, while the Sterns called her “Melissa.” *Id.* at 1236. In legal documents she became “Baby M.” *Id.*

47. *Id.* at 1237.

48. *See id.* at 1240.

49. *Id.* at 1263.

the sale of a child.<sup>50</sup> As such, it was void as against public policy.<sup>51</sup> Marybeth Whitehead could not be forced to relinquish her parental rights and Elizabeth Stern would not be permitted to adopt the child. Instead, the court determined that the case should be analyzed as a custody case between William Stern (who was the legal father of the child, having provided the sperm) and Marybeth Whitehead.<sup>52</sup> The New Jersey courts ultimately determined that custody should lie with the Sterns with only limited visitation for Marybeth Whitehead.<sup>53</sup>

As is amply demonstrated elsewhere in this volume, the case engendered an enormous amount of public interest as well as attention from the legal academy.<sup>54</sup> It drew particular attention from legal feminists who divided over the proper treatment of surrogacy.<sup>55</sup> Some feminists supported surrogacy while others opposed it.<sup>56</sup> The idea that pregnancy could become a service provided in exchange for money was of obvious importance to women. Concerns about commodification, exploitation, and autonomy predominated.<sup>57</sup> While there was no consensus view and the case fractured the feminist legal community, it seems a clear majority opposed surrogacy generally and/or commercial surrogacy.<sup>58</sup>

While the New Jersey Supreme Court concluded in *Baby M* that the

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50. *Id.* at 1248.

51. *See id.* at 1255.

52. *Id.* at 1256.

53. *Id.* at 1259 (determining that the Sterns would be awarded custody of Baby M); *see also In re Baby M*, 542 A.2d 52, 55 (N.J. Super. Ct. Ch. Div. 1988) (outlining visitation schedule for Mary Beth Whitehead).

54. *See, e.g.,* Price, *supra* note 39, at 1312–17. Another useful overview of the *Baby M* controversy and its aftermath can be found in a “Retro Report” published by the New York Times. The report includes historical video coverage of the litigation of the *Baby M* case. Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 23, 2014), [http://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html?smid=fb-nytimes&WT.z\\_sma=US\\_BMA\\_20140325&bicmp=AD&bicmlukp=WT.mc\\_id&bicmst=1388552400000&bicmet=1420088400000&\\_r=2](http://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html?smid=fb-nytimes&WT.z_sma=US_BMA_20140325&bicmp=AD&bicmlukp=WT.mc_id&bicmst=1388552400000&bicmet=1420088400000&_r=2).

55. *See, e.g.,* Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759 (1988) (acknowledging utilitarian justifications for surrogacy but nevertheless questioning alienability of parental rights); Judith Areen, *Baby M Reconsidered*, 76 GEO. L.J. 1741 (1988) (arguing that the law should refuse recognition of surrogacy contracts).

56. Over 100 women, most identified as feminists, joined in a statement that protested the treatment and the portrayal of Mary Beth Whitehead during the trial. Iver Peterson, *Fitness Test for Baby M's Mother Unfair, Feminists Say*, N.Y. TIMES, Mar. 20, 1987, at B1. They also objected to the commercialization of surrogacy. *Id.*

57. *See generally* Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223 (2013).

58. Busby & Vun, *supra* note 8, at 16–19.

surrogacy contract (which was a compensated surrogacy contract) was void as against public policy, this was not the death knell for surrogacy. Indeed, the New Jersey court's opinion hardly seems to have slowed the spread of surrogacy at all.<sup>59</sup> Once an oddity, surrogacy is now relatively routine.<sup>60</sup> Only celebrity surrogacy<sup>61</sup> or dramatic surrogacy failures<sup>62</sup> make the news these days. The routine (and typically successful) surrogacy is not noteworthy.

One reason that the *Baby M* opinion failed to stem the tide of surrogacy was changing technology. Even as the New Jersey court articulated reasons to reject surrogacy, advances in assisted reproductive technology made surrogacy more appealing and therefore more commercially feasible. In particular, as in vitro fertilization (IVF) became more reliable and more widespread, gestational surrogacy became increasingly popular.<sup>63</sup> Many, including courts,<sup>64</sup> commentators, and the general public viewed gestational surrogacy as meaningfully different from—and more acceptable than—the process at issue in *Baby M*, which (somewhat ironically) came to be called “traditional surrogacy.”<sup>65</sup>

While it is hard to attribute the rising acceptability of surrogacy to any one development, technological or otherwise, it is clear that surrogacy has become a crucial part of the expanding assisted reproductive technology industry. Assisted reproductive technology is an industry that, like so many others, has become global in its reach. Individuals and couples frequently travel to distant destinations to access reproductive

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59. It does remain the law in New Jersey. See *A.H.W. v. G.H.B.*, 772 A.2d 948, 952–54 (N.J. Super. Ct. Ch. Div. 2000). Like New Jersey, a number of other jurisdictions still prohibit surrogacy. See Nicolas, *supra* note 16, at 1240.

60. The fact that no one can produce reliable statistics on surrogacy reflects its largely unregulated nature. One recent article reports that 2000 U.S. births per year are the result of surrogacy. Lewin, *supra* note 12.

61. Celebrities known to have used surrogates include Angela Bassett, Sarah Jessica Parker and Matthew Broderick, Neil Patrick Harris, Elton John, Nicole Kidman and Keith Urban, and Ricky Martin. Anemona Hartcollis, *And Surrogacy Makes Three*, N.Y. TIMES, Feb. 20, 2014, at E1.

62. See, e.g., Terrence McCoy, *How a Thai Baby with Down Syndrome Raised Questions About Global Surrogacy*, WASH. POST (Aug. 4, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/08/04/the-thai-baby-with-down-syndrome-and-a-controversy-about-global-surrogacy/>.

63. Braverman et al., *supra* note 9, at 289.

64. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). But see *A.G.R. v. D.R.H.*, 2009 N.J. Super. Unpub. LEXIS 3250 (Ch. Div. Dec. 23, 2009) (reasoning that *Baby M* is not restricted to traditional surrogacy but must also bar enforcement of gestational surrogacy agreements in New Jersey in so far as they are the basis for the termination of parental rights).

65. Braverman et al., *supra* note 9, at 289; see generally CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE* (2d ed. 2006) (describing techniques of assisted reproductive technology).

technology that is not available to them in their home jurisdictions.<sup>66</sup> What some call “reproductive tourism” is common.<sup>67</sup> The United States is both a destination for those from countries with restricted access to reproductive technology,<sup>68</sup> and a point of departure for some United States citizens who may travel to seek treatment overseas due to reduced cost.<sup>69</sup>

Even as surrogacy has become a thriving industry in far-flung corners of the world like Thailand, India, and Georgia, it has also proliferated within the United States.<sup>70</sup> Thousands of women have served as surrogate mothers and have given birth to thousands of babies. Estimates are that up to 1500 births per year are the result of U.S. surrogacy.<sup>71</sup> And just as some nations have become reproductive tourism destinations, so have some states.<sup>72</sup> As surrogacy becomes increasingly common the need to consider the conditions under which it can best be practiced is compelling.

### III. FEMINIST CONDITIONS FOR SURROGACY

Two conditions must be met in order to justify surrogacy from the feminist viewpoint with which I approach this essay. First, in those states where the law supports surrogacy, the law<sup>73</sup> typically reflects a

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66. See Richard Storrow, *Assisted Reproduction on Treacherous Terrain: The Legal Hazards of Cross-Border Reproductive Travel*, 23 REPROD. BIOMEDICINE ONLINE 538, 539 (2011). Professor Nicolas was forced to travel outside of his home jurisdiction of Washington in order to access legal channels for surrogacy in Oregon. For more detail on that experience, see Nicolas, *supra* note 16, at 1246–49.

67. See Storrow, *supra* note 66, at 3.

68. See Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES, July 6, 2014, at A1.

69. *Id.* This dual role for the U.S. is somewhat unusual. In general, countries are either destinations (India and Thailand, say) or points of departure (Spain, Germany, Japan). And of course, the U.S. is not a unitary jurisdiction, but a collection of states with widely varying laws. Thus, for those using surrogacy, California and Oregon are destinations within the U.S. and Washington State is a point of departure. For more information on the wide array of surrogacy laws in the United States, see Nicolas, *supra* note 16, at 1239–45.

70. Indeed, the U.S. is one of the global surrogacy destinations, along with India and Thailand. See generally Lewin, *supra* note 68.

71. Lewin, *supra* note 12 (noting that more than 2000 babies will be born in the United States through surrogacy this year). See generally ELLY TEMAN, *BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF* (2010).

72. See Nicolas, *supra* note 16, at 1243–44 (discussing the jurisdictions within the United States that “go the furthest in providing for the enforcement and facilitation of gestational surrogacy contracts”).

73. I distinguish the legal preference, which is the preference reflected in law, from the cultural or individual preference, which are reflected in individual choices. Consistent with a commitment to

strong preference for gestational surrogacy as opposed to traditional surrogacy. This preference is counter to the interests of the surrogate generally and denies her the opportunity to make a decision about which form of surrogacy is better for her. It is therefore inconsistent with a feminist practice of surrogacy. I will initially examine the legal preference accorded gestational surrogacy and the consequences of that preference and then consider the justifications for the preference, concluding that they are not sufficient to justify the burdens the preference imposes. I therefore conclude that the law should be changed to treat gestational and traditional surrogacy similarly.

Second, legislatures need to grant surrogate mothers parentage rights that can be voluntarily terminated by the surrogate upon the birth of the child. This strengthens the position of the surrogate vis-à-vis the intended parents and so tends to level the playing field. Surrogacy is only justifiable once both of those conditions are met. In this section I consider each of these points in turn.

#### A. *The Preference for Gestational Surrogacy*

The preference for gestational surrogacy is clearly reflected in the law in most jurisdictions that promote surrogacy. California law offers one example. *Johnson v. Calvert*<sup>74</sup>—a California surrogacy case—is as significant to the development of surrogacy law as was *Baby M*. In *Johnson*, two women claimed legal maternity of the child—Crispina Calvert, who was the intended mother, and Anna Johnson, who was the surrogate.<sup>75</sup> But unlike Mary Beth Whitehead, Anna Johnson was not genetically related to the child she carried.<sup>76</sup> Crispina Calvert had provided the egg used to create the embryo transferred to Johnson's womb.<sup>77</sup>

This distinction was critical to the California Supreme Court's resolution of the case. Given that both women had claims to legal parentage under California law (one by virtue of gestation/birth and one by virtue of genetics), the court turned to intent as a tiebreaker.<sup>78</sup> Since it

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individual autonomy, individuals should be free to participate in whatever form of surrogacy they prefer. The law should not play favorites.

74. 851 P.2d 776 (Cal. 1993).

75. *Id.* at 778. It was agreed by all parties that Mark Calvert, Crispina's husband and the man who provided the sperm, was the legal father of the child. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 782 ("Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in

was clear from the surrogacy agreement that the intended mother was Crispina Calvert, the court ruled in her favor.<sup>79</sup> While the court does not say so explicitly, it is apparent that this is not the result it would have reached had Johnson been the genetic as well as the gestational mother.<sup>80</sup>

California's favorable treatment of gestational surrogacy has expanded substantially since *Johnson*. In *In re Marriage of Buzzanca*,<sup>81</sup> the California Court of Appeals made it clear that intent was the determining factor even when the intended parents could not claim any genetic connection to the child.<sup>82</sup> Even more recently, California codified its surrogacy law to provide that when gestational surrogacy is used, the intended parents are the legal parents of the child.<sup>83</sup> Significantly, the codification preserves the distinction between a traditional surrogate and a gestational carrier<sup>84</sup>—the legal regime for treatment of surrogacy outlined in California Family Code, section 7962 refers exclusively to gestational carriers. There are no corresponding rules for treatment of traditional surrogates. Thus, anyone employing a traditional surrogate in California would face legal uncertainty while use of gestational surrogacy ensures a clear legal path to parenthood for the intended parents. The preference for gestational surrogacy is manifest.<sup>85</sup>

It stands to reason that California surrogacy agencies prefer to offer services where the legal outcome can be guaranteed just as intended parents prefer to enter into surrogacy arrangements that are governed by

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the surrogacy agreement.”).

79. *Id.*

80. The *Calvert* court concluded that the intended mother in a surrogacy arrangement would be considered the natural mother under California law so long as one woman did not give birth to the child *and* have a genetic link to the child. *Id.* at 782. Therefore, absent the genetic link between Crispina and the child, there would have been no initial basis on which Crispina could claim legal status as a parent. Thus, there would have been no “tie” between Crispina and Anna and no need to turn to intent to break the tie.

81. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

82. *Id.* at 282.

83. See CAL. FAM. CODE § 7962(f) (West, Westlaw through Ch. 931 2014 Reg. Sess., Res. Ch. 1 of 2013–2014 2d Ex. Sess., all propositions on 2014 ballots).

84. See *id.* § 7960(f).

85. For a recent instance of a court following this preference, see *In re Baby*, No. M2012-01040-SC-R11-JV, 2014 WL 4815211 (Tenn. Sept. 18, 2014). The Tennessee Supreme Court did not follow the rationale of *Johnson v. Calvert* but, in its own way, manifested a preference for gestational surrogacy by recognizing rights in a traditional surrogate that would not exist for a gestational surrogate. Following this decision, couples in Tennessee who might choose a traditional surrogate face clear legal risks that those who choose a gestational surrogate do not. Thus, the court's opinion effectively enforces a preference for gestational surrogacy.

clear legal rules. Thus, the structure of the law governing surrogacy strongly favors use of gestational surrogacy as it discourages the use of traditional surrogacy.

Though the development of IVF preceded *Baby M*,<sup>86</sup> it was not widely available in 1985 when Baby M was conceived and it was not used by the Sterns. Mary Beth Whitehead was the genetic mother of Baby M. In its opinion in *Baby M*, the New Jersey Supreme Court focused on surrogacy generally and drew no distinction between gestational and traditional surrogacy.<sup>87</sup> Since *Baby M*, however, IVF has become far more common<sup>88</sup> and gestational surrogacy has become more widespread. In many jurisdictions where commercial surrogacy is permitted, gestational surrogacy is the norm and traditional surrogacy the exception.<sup>89</sup>

Though they are seldom noted, the preference for gestational surrogacy is not without costs. For my purposes here, the most important cost is that, practically speaking, it limits the freedom of women who would choose to be traditional surrogates. The structure of law effectively precludes them from doing so within the compensated surrogacy market. Instead, the only way a woman can become a surrogate is to enter into the complicated and intrusive world of IVF. Where a traditional surrogate need only undergo assisted insemination (a fairly simple process requiring no medications), in gestational surrogacy an embryo must be transferred into the surrogate's uterus.<sup>90</sup> The surrogate may be treated with drugs in order to ensure her uterine lining

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86. Louise Brown, the first person born as a result of IVF, was born in 1978. See *It's a Healthy Girl*, N.Y. TIMES, July 26, 1978, at A1.

87. See generally *In re Baby M*, 537 A.2d 1227 (N.J. 1988). New Jersey is among the states that do not distinguish between gestational surrogacy and traditional surrogacy. Neither can be entered into for compensation. In *A.G.R. v. D.R.H. & S.H.*, the New Jersey Superior Court noted that the concerns articulated in *Baby M* do not arise from the genetic connection between Mary Beth Whitehead and the child. No. FD-09-001838-07, at 5 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009), available at [http://graphics8.nytimes.com/packages/pdf/national/20091231\\_SURROGATE.pdf](http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf) ("The lack of plaintiff's genetic link to the twins is, under the circumstances, a distinction without a difference significant enough to take the instant matter out of *Baby M*."). In general, states that bar surrogacy have no reason to distinguish the two forms of surrogacy. The distinction is crucial in those states that permit only gestational surrogacy or provide advantageous legal treatment for gestational surrogacy.

88. IVF is frequently used by couples who are not engaged in surrogacy as a variety of infertility issues can be overcome via IVF.

89. Diane Hinson & Maureen McBrien, *Surrogacy Across America*, 34 FAM. ADVOC. 32, 33 (2011) (noting that gestational surrogacy accounts for approximately ninety-five percent of all surrogacy in the U.S.).

90. In addition, an egg must be retrieved from either the intended mother or some third-party provider.



is receptive to transfer at the appropriate time.<sup>91</sup>

Beyond that, though, there are costs borne by the intended parents. In purely economic terms, gestational surrogacy is more expensive than traditional surrogacy. It requires an egg retrieval procedure that would not otherwise be needed, IVF, and then transfer of the embryo. For intended parents who are price-sensitive these added costs might be prohibitive, and even for those of ample means the costs are worthy of consideration. When intended parents are only offered gestational surrogacy, these costs remain invisible.<sup>92</sup>

Less tangibly, gestational surrogacy enmeshes the intended parents and the surrogate within the much higher-tech world of IVF as opposed to the simpler world of assisted insemination. For many, this may be a more stressful and perhaps even dangerous path to parenthood.<sup>93</sup> If the intended mother is to provide the gamete then she, too, is subject to invasive (and somewhat risky) medical procedures.<sup>94</sup>

Given the added costs of gestational surrogacy, the justification for the legal preference<sup>95</sup> ought to be subjected to scrutiny. Yet this is hardly common. In fact, justifications for the legal preference for gestational surrogacy are rarely offered, much less examined.

The primary justification seems<sup>96</sup> to rest on assumptions about the importance of genetic connection in the construction of parenthood. These assumptions might support the preference in two distinct ways.

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91. See generally KINDREGAN, JR. & MCBRIEN, *supra* note 65.

92. Surrogacy providers do not bear the costs, and indeed, may actually reap a financial benefit when they provide the more complicated medical procedures required in gestational surrogacy.

93. It may also be one fraught with difficult ethical issues that would not otherwise be presented. For example, generally in IVF multiple embryos are created. It is then common to do some form of pre-implantation genetic diagnosis. At its most innocuous, this allows the intended parents to select and transfer the most vigorous embryo, but it may also present the intended parents with more difficult choices about what characteristics they would select for. Further, it will leave them with a number of extra embryos, which are typically frozen. The disposition of frozen embryos is a difficult issue for many people, as a result of which tens of thousands of frozen embryos remain in cryobanks around the United States. See, e.g., Tara Parker-Pope, *Deciding the Fate of Frozen Embryos*, N.Y. TIMES (Dec. 8, 2008), <http://well.blogs.nytimes.com/2008/12/08/deciding-the-fate-of-frozen-embryos/>.

94. See RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* 88–99, 108–09 (2011).

95. It is important to distinguish between the *legal* preference for surrogacy, which is the subject of my inquiry, and individual preferences. Undoubtedly many individuals—prospective surrogates and intended parents alike—prefer gestational surrogacy. I would not foreclose them from expressing this preference. I am concerned here with the structure of law, which effectively forecloses (or at least impedes) people from choosing traditional surrogacy.

96. I speculate here because the law's preference for gestational surrogacy is so rarely questioned that scant justification is offered.

First, gestational surrogacy offers some couples (those composed of different-sex individuals capable of producing gametes) to create a child that is genetically related to both of them. Thus, the intended parents have a genetic connection with the child they will raise. If this genetic connection is of importance, that might seem to justify a preference for gestational surrogacy. Second, the gestational surrogate has no genetic connection to the child and hence, it is often assumed, can more easily complete her obligations as a surrogate. If the child she carries is not “hers”—in the sense that it is genetically related to her—then she can more easily surrender the child to the genetic parents. Seen in this light, the legal preference for gestational surrogacy only appears as a paternalistic assumption that women who would choose to be traditional surrogates are not competent to make this choice.

While genetic connection is undoubtedly important to some—perhaps many—individuals, this merely explains *individual* preferences. But my focus here is not the individual preferences of intended parents or surrogates. Rather it is the structure of the law governing surrogacy. The justification discussed above leaves unanswered the central question: If there are surrogates and intended parents who would elect traditional surrogacy, should not the law facilitate this choice as well? Why allow women to be compensated surrogates, but only if they are gestational surrogates?

In fact, the underlying assumption about the importance of the genetic connection noted above—that it binds the intended parents to the child even as it diminishes the surrogate’s connection to the child—is debatable. The significance of the genetic connection between parent and child is the subject of extensive discussion and extended consideration is beyond the scope of this essay.<sup>97</sup> There are clearly many parents who raise children without having a genetic connection present. This includes adoptive parents and those using third-party gametes.<sup>98</sup>

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97. See Julie Shapiro, *Counting From One: Replacing the Marital Presumption With a Presumption of Sole Parentage*, 20 AM. U. J. GENDER SOC. POL’Y & L. 509 (2012). Legal structures that give conclusive weight to genetic connection raise broader concerns than those discussed here. Reliance on genetics may seem to promote equality, as from a perspective of genetics, the male and female contribute equally to the child. While this may appear to promote equality goals, it does so by devaluing a contribution that can only be made by a woman. There is, of course, a long history of devaluing women’s work, particular in regards to the home and family. In light of that history it would seem that at least some scrutiny of the genetic preference is appropriate. Additionally, over-reliance on genetics cannot serve those who hope to create lesbian and gay families, as the children in these families will always be genetically related to at most one of their legal parents. See PETRA NORDQVIST & CAROL SMART, *RELATIVE STRANGERS: FAMILY LIFE, GENES AND DONOR CONCEPTION* (2014).

98. This category includes all lesbian couples, only one of whom can be genetically related to a

Undoubtedly the presence of the genetic connection between parent and child is important for some people,<sup>99</sup> but it seems equally clear that it is not crucial for all people.

Experience from jurisdictions that permit traditional surrogacy suggests that it is not the presence or absence of a genetic bond that determines whether a surrogate will surrender the child.<sup>100</sup> Cases like *Johnson v. Calvert* demonstrate that gestational surrogacy, too, can devolve into strife and discord.<sup>101</sup> No studies suggest that the rates at which surrogacy fails—at which it devolves into a bitter struggle—are greater for traditional surrogates than for gestational surrogates.<sup>102</sup> This is entirely consistent with research finding that the experience of traditional surrogates is essentially similar to that of gestational surrogates.<sup>103</sup>

Screening and counseling of prospective surrogates and intended parents alike is far more likely to ensure successful surrogacy than is reliance on gestational surrogacy.<sup>104</sup> Beyond screening, the critical feature determining the success of surrogacy is the commitment of the surrogate to follow through on the promise she has made to the intended parents. This, in turn, seems to be at least partly determined by the relationship between the surrogate and the intended parents.<sup>105</sup>

In sum, the systemic preference for gestational surrogacy is unjustified. It causes some intended parents to incur needless costs and it limits the autonomy of women who would choose to be traditional surrogates. It does so based on problematic assumptions about the meaning of the genetic connection.<sup>106</sup> Instead, the law should treat

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child and who must use third-party sperm, and all gay male couples, only one of whom can be genetically related to the child and must use third-party eggs.

99. The extensive use of fertility treatments also stands as testimony to its importance to some people.

100. See Peng, *supra* note 9, at 560–64 and sources cited therein.

101. See Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 *CARDOZO J. L. & GENDER* 391, 391–92 (2011) (recounting litigation between gestational surrogate and intended parents); *supra* text accompanying notes 75–81.

102. See Millbank, *supra* note 4, at 7; Peng, *supra* note 9, 560–64.

103. See Olga van den Akker, *Psychological Aspects of Surrogate Motherhood*, 13 *HUM. REPROD.* 53 (2007).

104. See Braverman et al., *supra* note 9; Peng, *supra* note 9, at 560–64.

105. Additionally, it is the nature of the relationship between the surrogate and the intended parents that determines the quality of the surrogate's experience. See Ciccarelli & Beckman, *supra* note 102; Millbank, *supra* note 4, at 7.

106. There is a more subtle potential cost of the preference for gestational surrogacy that concerns me. The preference for gestational surrogacy reinforces the belief that the genetic connection between parent and child is crucial. That assumption necessarily undermines families

traditional and gestational surrogacy equally.<sup>107</sup> Those who prefer gestational surrogacy could continue to participate in that practice even as traditional surrogacy would be available to those who prefer it.<sup>108</sup> Second, many believe in the importance of the genetic connection between parent and child. Gestational surrogacy offers the possibility that both an intended mother and an intended father can have this connection. While each of these factors has explanatory power, neither provides a strong justification for the preference.

### *B. The Construction of Legal Parenthood*

It seems it is assumed that recognizing parental rights in the surrogate would undermine the practice of surrogacy.<sup>109</sup> That assumption rests on two subsidiary assumptions: first, that a surrogate who is a legal parent is less likely to surrender the child to the intended parents; and second, that if the surrogate is a legal parent then one of the intended parents (and mostly likely, the intended mother) cannot be a legal parent.<sup>110</sup> Neither of these assumptions is warranted. Surrogacy can succeed even where the surrogate is a legal parent. And the possibility of three legal parents (two intended parents and the surrogate) is increasingly recognized in law.<sup>111</sup> Further, denying surrogates recognition as legal

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with two parents of the same sex. In these families at most one parent can be genetically related to the child. Thus, if the genetic connection between parent and child is crucial, these families are less than ideal. Because I am deeply committed to equality for all families, I am wary of the preference for gestational surrogacy. Perhaps even more clearly, assumptions about the essential nature of the genetic connection undermine adoptive families.

107. New Jersey does treat them the same, at least to date, but it prohibits both. *See, e.g.*, A.G.R. v. D.R.H. & S.H., No. FD-09-001838-07 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

108. It is possible that gay men using surrogacy would be among those most willing to consider traditional surrogacy. After all, the egg used in IVF for these couples cannot possibly be produced by one of the intended parents. In this circumstance, the intended parents could use traditional surrogacy or they could obtain an egg from a third-party provider. Either way, the child will not be genetically related to at least one of the intended parents and will be genetically related to a woman who is not an intended parent. Given that traditional surrogacy should be priced significantly lower than gestational surrogacy, it seems likely that some would find this an appealing option.

109. *See, e.g.*, Nicolas, *supra* note 16, at 1240–41 & nn. 30–36. In deciding where to pursue a surrogacy arrangement, Nicolas and his then-domestic partner (now husband) eliminated from consideration states that do not permit the enforcement of a surrogacy contract and/or recognize the surrogate as the legal parent. Thus it seems safe to assume that laws recognizing the surrogate as a legal parent made surrogacy less appealing to at least these intended parents. I believe this reaction is (and would be) fairly common.

110. The second assumption is exemplified by the California Supreme Court's approach in *Johnson v. Calvert*, where only one of the two women could be the legal mother. *See generally* 851 P.2d 776, 781–82 (Cal. 1993).

111. California enacted legislation allowing a court to recognize more than two parents. *See CAL.*

parents denigrates the contribution they and all other women make to the production of children. Thus, the position of surrogates in particular and women generally would be improved by according surrogates legal status as a parent. As such, this change in law<sup>112</sup> should accompany feminist support for surrogacy.

The assignment of legal parental rights with regard to a child conceived via surrogacy is obviously critical. Because parental rights cannot be bought or sold,<sup>113</sup> surrogacy relies on the law to assign parental rights to the intended parents. Intended parents cannot receive parental rights from the surrogate in exchange for money. At the same time, states that encourage surrogacy structure their laws of parentage so that the surrogate does not become a legal parent. Thus, under California law as interpreted in *Johnson v. Calvert*, Crispina Calvert is a legal parent and Anna Johnson is not. This means that Crispina and Mark Calvert have the right to control the child, and Anna Johnson has no rights with regard to the child. The surrogacy contract is crucial evidence of intent, which, in *that case* was the determining factor of parentage, but it does not assign parentage on its own.<sup>114</sup>

It appears to me that many worry that laws ensuring that the surrogate does not acquire parental rights are essential to the operation of surrogacy. It is not hard to understand why intended parents and surrogacy centers alike might prefer to deny parental rights to the surrogate; if the surrogate has parental rights then she has the right to change her mind about surrendering the child. This would defeat the purpose of surrogacy. It seems apparent that the possibility that the

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FAM, CODE § 7601 (West, Westlaw through Ch. 931 2014 Reg. Sess., Res. Ch. 1 of 2013–2014 2d Ex. Sess., all propositions on 2014 ballots); Ian Lovett, *Measure Opens Door to Three Parents, Or Four*, N.Y. TIMES (July 13, 2012), <http://www.nytimes.com/2012/07/14/us/a-california-bill-would-legalize-third-and-fourth-parent-adoptions.html?pagewanted=all>.

112. See Nicolas, *supra* note 16, at 1240–41 & nn. 30–36. A number of states already recognize the surrogate as a legal parent, but, as noted above, these states are not attractive surrogacy destinations for intended parents. Those states that are attractive destinations generally do not recognize parental rights in the surrogate. It is in those states that I would recommend a change in the law so that parental rights of the surrogate were recognized. Those states generally already recognize parental rights in the intended parents, and I would not suggest altering this law. Thus, parental rights would be presumed to exist in the surrogate *and* in the intended parents.

113. This would be the legal equivalent of selling the child. See *infra* text accompanying notes 136–138.

114. Using intent as a defining factor for determining parenthood is inconsistent with using genetics for the same purpose. The intended parent may or may not be the genetic parent. In general, assisted reproductive technology (ART) cases are governed by intention, as the genetic standard would make the use of third-party gametes in ART impractical. There is a certain tension inherent between the parenthood by intention standard advocated by most surrogacy advocates and the preference for gestational surrogacy. See *infra* text accompanying notes 138–139.

surrogate might change her mind could be a source of immense anxiety to intended parents. It could even lead some intended parents to forgo surrogacy—an outcome that is hardly desirable from the point of view of the surrogacy providers. Surrogacy providers likely fear that surrogacy will not be a viable enterprise in a legal regime in which the surrogate has parental rights.

But it seems to me that these fears are largely resting on an assumption: If the surrogate has legal rights, she will be more likely to attempt to claim the child than if she does not.<sup>115</sup> Given that we now have access to a body of research, it seems only right to test the assumption. Does affording the surrogate rights change her willingness to surrender the child to the intended parents?

There is no real evidence that it does. Surrogacy can and does function effectively in a legal regime in which the surrogate is recognized as a legal parent.<sup>116</sup> This is the law in the United Kingdom, and while surrogacy is not as well developed in the United Kingdom as it is in California, it is hardly unknown.<sup>117</sup> Surrogates who have legal recognition as a parent routinely surrender those rights in favor of the intended parents. While specific statistics are hard to come by, nothing suggests that surrogacy fails at a higher rate in the United Kingdom than it does in California.<sup>118</sup> By the same token, surrogacy can fail even where the surrogate has no legal rights to parent. *Johnson v. Calvert* is such a case. Even where the law is clearly defined, a surrogate who wishes to keep the child can create a very difficult situation. Surrogacy cases that result in litigation are instances of failed surrogacy. The fact that the brute force of law is invoked hardly makes them successful.<sup>119</sup>

Those who support surrogacy (and I count myself among them) should not reflexively oppose recognizing parental rights in the

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115. See generally *Johnson*, 851 P.2d at 776; *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

116. See Braverman et al., *supra* note 9.

117. There are other reasons why surrogacy in the UK may be less developed. All surrogacy there is altruistic, which is to say that no compensation is permitted. See Surrogate Arrangements Act, 1985, c. 49. (Eng.). In the absence of compensation, there are no commercial surrogacy agencies. Instead, surrogacy is facilitated by volunteer organizations. See Braverman et al., *supra* note 9, at 292.

118. *Id.*

119. I worry, too, about the repercussions for the child in contentious surrogacy cases. How does a child understand the discord between the woman who carried her in utero and the parents who raise her? I do not mean that these children are in any sense doomed—Melissa Stern seems to be thriving—but nevertheless, this result can hardly be desirable. See, e.g., Peter Weber, *Revisiting Baby M and the Thorny Issue of Surrogate Pregnancies*, THE WEEK (Mar. 25, 2014), <http://theweek.com/speedreads/index/258635/speedreads-revisiting-baby-m-and-the-thorny-issue-of-surrogate-pregnancies>.

surrogate based on assumptions and anxiety. Rather, we should be guided by research as we consider the conditions under which surrogacy should be permitted. Surrogacy is, after all, a means to an end—the end being that the intended parents end up as the legal parents of the planned child. Research on what determines whether surrogacy is successful—on whether the surrogate willingly surrenders the child and on whether the experience is a positive one for surrogate and intended parents alike—points to two factors: careful screening and counseling of the parties and the construction of a positive relationship between the surrogate and the intended parents.<sup>120</sup> Legal status of the surrogate is not determinative.

The need for screening and counseling is readily apparent. Both serving as a surrogate and using surrogacy are difficult undertakings. For the surrogate there are substantial physical consequences, including some risk of permanent harm. Clearly not every woman can be a surrogate. The fact that a woman believes she can be a surrogate may not be sufficient guarantee.<sup>121</sup> Best practices suggest that trained counselors can successfully help people determine whether surrogacy is the right choice for them.<sup>122</sup> It is not only the surrogate's role that is difficult, however. Surrogacy is taxing—emotionally and psychologically—for all parties.<sup>123</sup> The intended mother must accept that another woman will be pregnant with and give birth to the child she will raise. Given the cultural centrality of childbearing to the construction of women's experience in our culture, this can be a difficult task.<sup>124</sup> Only when each individual fully appreciates the complexity of the undertaking can she effectively assess her capacity for successfully completing the task. Requiring counseling and screening are not simply proposals offered by academics. Counseling and screening are already general requirements for the vast majority of reputable surrogacy agencies.<sup>125</sup>

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120. See Braverman et al., *supra* note 9, at 295–96; Busby & Vun, *supra* note 8, at 87 (reviewing existing evidence).

121. Mary Beth Whitehead, after all, thought she could be a surrogate. See *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

122. See Braverman et al., *supra* note 9, at 295–96.

123. Screening of intended parents is crucial. While many worry about the instances in which a surrogate changes her mind, anecdotal reports suggest that it is just as common for the intended parents to change their minds. The assignment of parental rights is no insurance against a change of heart.

124. The relationship between intended mother and surrogate can be a difficult one to manage for this reason. This leads some surrogates to prefer working with gay men. See Hartcollis, *supra* note 61, at E1.

125. Nicolas, *supra* note 16, at 1248 (describing some of the screening criteria that surrogacy agencies use).

It is also apparent why a strong positive relationship between the surrogate and the intended parents leads to successful surrogacy.<sup>126</sup> In the end surrogacy is at its best when the surrogate is invested in the same outcome as the intended parents. Unsurprisingly, research documents that this is most likely to happen when there is a good relationship between the parties.<sup>127</sup> Further, a good relationship generally makes surrogacy a more positive experience for the surrogate in the long-term.<sup>128</sup> Where surrogacy ends in strife—even if the ultimate resolution is that the intended parents get to raise the child—I can hardly count it a success, particularly given my focus on the surrogate. Only where the surrogate herself finds it a positive experience can surrogacy be deemed a success. And for this, a positive relationship between the surrogate and the intended parents is a necessity.

Abandoning the legal framework that assigns parental rights solely to the intended parents requires intended parents (and more generally those who support surrogacy) to trust surrogates. Trust, of course, goes hand-in-hand with a positive relationship. But unless the surrogate is to be placed under constant surveillance, this trust is necessary in any event. The behavior of a pregnant woman can profoundly affect the outcome of pregnancy.<sup>129</sup> As much as intended parents might like to control all of the details of the pregnancy, they cannot hope to do so.<sup>130</sup> Trust in the surrogate is essential and should extend to her commitment to surrender her parental rights.

If intended parents generally trust their surrogate, why would they not trust her to surrender her parental rights? Those who support surrogacy

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126. See Braverman et al., *supra* note 9, at 299–300; Busby & Vun, *supra* note 8, at 30. One of the disturbing features of some of the overseas surrogacy operations is the complete lack of any relationship between the surrogate and the intended parents. It is possible that they never even see each other. Given the vast cultural gulfs between the local poor women who become surrogates and the generally first-world couples who are the intended parents, even brief meetings are unlikely to initiate ongoing positive relationships.

127. See Braverman et al., *supra* note 9, at 295–96; Busby & Vun, *supra* note 8.

128. Busby & Vun, *supra* note 8.

129. For instance, excessive consumption of alcohol by the pregnant woman might result in fetal alcohol syndrome. More broadly, the emerging field of epigenetics suggests that the conduct of the pregnant woman can have wide-ranging impacts during the lifetime of the child. See generally, Soc’y for Neuroscience, *Nurture Impacts Nature: Experiences Leave Genetic Mark on Brain, Behavior*, SCIENCE DAILY (Nov. 11, 2013), [www.sciencedaily.com/releases/2013/11/131111131439.htm](http://www.sciencedaily.com/releases/2013/11/131111131439.htm) (describing research finding that long-term drug use can result in genetic changes in subsequent generations).

130. Some overseas surrogacy arrangements may come close to providing this sort of surveillance. But these forms of surrogacy are objectionable for precisely that reason. The women who are surrogates are virtual prisoners. See Ian Johnson & Cao Li, *China Experiences a Booming Market in Underground Surrogate Motherhood*, N.Y. TIMES, Aug. 2, 2014, at A1.



(which presumably includes intended parents) must do so on the assumption that there are women who are capable of freely choosing to give birth to a child that they know will be raised by another. That belief lies at the very heart of surrogacy. The assumption that this is possible—that surrogacy can be a positive experience for both a woman who is a surrogate and for the intended parents—is necessary if one is to endorse surrogacy and still claim general humanitarian values. The alternative view—that surrogacy can only work if it is forced upon the surrogate, that no woman would willingly agree to do what is expected of a surrogate—would reveal surrogacy to be an appalling and inhumane practice. Put slightly differently, support for surrogacy must be premised on the notion that it is possible for a woman to be pregnant with and give birth to a child without developing a fundamental parent-child bond. A well-chosen and well-informed surrogate can and should be relied on to do so.

Of course, no system is perfect, and, if the surrogate has parental rights, there is always some risk that she will decide not to voluntarily terminate them. Research shows that the risk is small if the surrogate is carefully chosen and counseled, but it cannot be eliminated.<sup>131</sup> There is no doubt that intended parents would prefer to avoid even the smallest risk. But raising children is fraught with risk and the question must be whether there is some benefit that justifies the imposition of risk. As noted above, I am concerned about the power imbalance between the intended parents and the surrogate.<sup>132</sup> Assigning parental rights to the surrogate would redress this imbalance to some degree.

The second assumption supporting denial of the surrogate's parental rights is that it would require denying parental rights to one of the intended parents. But there is no reason why the intended parents could not also be assigned legal parental rights. In fact, the California legislature recently enacted legislation that explicitly recognizes the possibility of three parents.<sup>133</sup>

Recognizing the intended parents as well as the surrogate as legal parents would effectively place all of the parties on the same plane—each would have a claim to the child. But that does not inevitably lead to

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131. See TEMAN, *supra* note 71, at 1104 (reporting that less than one percent of surrogate mothers change their minds and less than one-tenth of one percent turn to litigation).

132. See *supra* text accompanying notes 20–29.

133. See CAL. FAM. CODE § 7601 (West, Westlaw current through Ch. 931 of 2014 Reg. Sess., Res. Ch. 1 of 2013–2014 2d Ex. Sess., all propositions on 2014 ballots). In instances of surrogacy, there would only be three parents for a brief period of time and hence, this proposal is considerably less radical than those discussed in the literature on three or more parents.

more litigation. The vast majority of surrogacy arrangements work not because women are forced by law to turn over the children they bear, but because surrogates honor their carefully made commitments. There is no reason why this should not continue to be the case.<sup>134</sup>

#### IV. COMPENSATION, COMMODIFICATION, AND COERCION

This brings me finally to the topic of this symposium—compensation for the surrogate. The first feminist impulse should be to support compensation for the labor of surrogates. After all, too often the labor of women has been un- or undercompensated and, hence, undervalued.<sup>135</sup> This experience leads me, as a feminist, to generally support compensation.

Objections to compensation are generally grounded in concerns about commodification of children and/or of the childbearing process.<sup>136</sup> There is near-universal agreement that it is bad to commodify children—to buy them and sell them as though they were a commodity. The question, of course, is when particular conduct amounts to buying or selling a child. Does paying a surrogate amount to buying a child?

At the outset, it is useful to notice that buying or selling a child is the equivalent of buying or selling parental rights: If I sell you my parental rights, then I am selling you my child and if I sell you my child then I must be selling you my parental rights. Our shared stance against commodification of children should lead to prohibitions on buying and selling parental rights, as well. Thus, the commodification question hinges on who does (and who does not) have parental rights and how those parental rights are acquired.<sup>137</sup>

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134. In order to complete the surrogacy process, I would propose an easy mechanism by which the surrogate could terminate her parental rights in favor of the intended parents. Because the intended parents would already be legal parents, there would be no need to go through the procedures required for adoption. There would be no requirement of a home study, for example. A streamlined surrender proceeding could readily be devised. It might consist of little more than executing consent forms shortly after birth.

135. The treatment of in-home childcare and housework are familiar instances of this phenomenon. The labor that women provide in their homes caring for children or running the household is not compensated. The value of this labor is not included in the gross national product. Childcare and housework—which are disproportionately performed by women—are thus systematically undervalued. Women's unpaid labor has long been the subject of feminist concern. See generally BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

136. See Braverman et al., *supra* note 9, at 296; Elizabeth Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. 109, 112 (2009).

137. In general, parental rights are acquired in one of two ways. Often it is by operation of law—so, for example, a woman who gives birth is recognized (outside of surrogacy) as a legal parent. In most jurisdictions her spouse is presumed to be a legal parent, and if no action is taken she or he

Understood in this way, it is possible to examine the question of what constitutes the commodification of children more concretely. The critical inquiry focuses on the allocation of parental rights. For example, if you think a man who provides sperm necessarily has parental rights with regard to *any* child conceived using that sperm, then a man who sells his sperm to a sperm bank is selling his parental rights. In this view, accepting money from a sperm bank amounts to selling a child and, given our concerns about commodification, should be prohibited. If, on the other hand, you think a man who provides sperm does not have parental rights with respect to children conceived with his sperm using assisted reproductive technology, then the sale of his sperm is unremarkable.

The central question here can therefore be reframed: Does surrogacy involve buying or selling parental rights? If parental rights are exchanged for money, then this is commodification. This framing helps explain why, as noted above, surrogacy relies on the law's initial assignment of parental rights rather than on any reassignment of parental rights.<sup>138</sup> If parental rights are not reassigned during surrogacy, then a child has not been sold. If parental rights are not transferred from the surrogate to the intended parents but instead reside with the intended parents from the beginning, this blunts the commodification argument. Rather than payment for a child (or for parental rights), the intended parents pay for the services of the surrogate.

The modification of surrogacy I have proposed above does not alter this. In my proposal the intended parents *and* the surrogate would acquire parental rights by the initial operation of law. The surrogate would not transfer her rights to the intended parents; she would agree to their termination. And she would not be obliged to do so by the terms of the contract under which she was paid. While there could (and should) be a clear understanding that this was the expectation of the parties, she would be free to change her mind. Thus, parental rights are not exchanged for money.

In fact, the commodification concerns about compensation of surrogates may be somewhat misplaced. In the United Kingdom,

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will usually become a legal parent in time. A person who holds a child out as her own may also be presumed to be a legal parent. *See, e.g.*, WASH. REV. CODE § 26.26.116(2) (2012) (“A person is presumed to be the parent of a child if, for the first two years of the child’s life, the person resided in the same household with the child and openly held out the child as his or her own.”). These are all forms of parentage that arise without any formal action being taken, by virtue of the laws that are in place. Others become parents by taking affirmative legal action—by adopting a child.

138. *See supra* text accompanying note 113.

surrogacy arrangements are unenforceable.<sup>139</sup> Only altruistic surrogacy is allowed, but an altruistic surrogate can be reimbursed for “reasonable expenses.”<sup>140</sup> But what constitutes “reasonable expenses” is not well defined and significant amounts of money can change hands.<sup>141</sup> A number of researchers have concluded that the money received by “altruistic” surrogates in the United Kingdom is roughly equivalent to that received by compensated surrogates in the U.S.<sup>142</sup> Thus, whatever concerns there are about commodification transcend the question of direct compensation for the surrogate.

A second objection to compensation for surrogates arises from concerns about risks of coercion. Medical ethicists have long recognized that there are potential concerns when money is offered to induce people to participate in research that carries risks that they would not otherwise incur.<sup>143</sup> Whatever the validity of an objection based on potential coercion, it is not, strictly speaking, an objection to all compensation for surrogacy, but only to compensation in an amount that would be coercive.

In the context of surrogacy, concerns about coercion and exploitation often arise with regard to surrogates in overseas destinations.<sup>144</sup> The money offered to entice impoverished women to be surrogates often equals or exceeds the amount the woman could hope to earn in two or three years.<sup>145</sup> No doubt this makes it extraordinarily tempting, particularly for women with dependent family members. But rather than identifying the problem as one of coercive compensation, one could equally well point to the dire conditions under which impoverished

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139. See Surrogacy Arrangements Act, 1985, c. 49 (Eng.); Busby & Vun, *supra* note 8, at 14–15.

140. Braverman et al., *supra* note 9, at 291.

141. *Id.*

142. See Millbank, *supra* note 4, at 6.

143. See, e.g., Ari Vander Walde & Seth Kurzban, *Paying Human Subjects in Research: Where Are We, How Did We Get Here, and Now What?*, 39 J.L., MED. & ETHICS 543 (2011). This concern has led the American Society for Reproductive Medicine to recommend caps on the amount of money paid to women who provide eggs. No similar caps on payment are recommended for men who are providing sperm. Ethics Comm. of the Am. Soc’y for Reprod. Med., *ASRM Ethics Committee Report: Financial Compensation of Oocyte Donors*, 88 FERTILITY & STERILITY 305 (2007), available at [http://www.asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Ethics\\_Committee\\_Reports\\_and\\_Statements/financial\\_incentives.pdf](http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/financial_incentives.pdf).

144. See, e.g., MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 25–32 (expanded ed. 1990) (discussing the question of exploitation generally); Braverman et al., *supra* note 9, at 296–97.

145. See, e.g., McCoy, *supra* note 62 (recounting payment of over \$9000 to a surrogate whose monthly wage was \$622).

women live.<sup>146</sup> It is the desperate straits in which women live that make them subject to coercion. Their need for money (rather than the amount of money) may compel them to accept compensation they would otherwise reject. Ultimately, the amount of money that is coercive—that effectively entices a woman who is otherwise unwilling into surrogacy—will vary depending on the financial position of the woman.

In the end, compensation is not the critical issue with regard to surrogacy. If surrogacy is properly constructed and properly regulated, then some women will choose to be surrogates. Indeed, some will find it a uniquely satisfying experience. While their motives may not be purely altruistic—compensation is also important—they are not unwilling participants in the enterprise. Surrogacy can be rewarding for women both emotionally and, if the law permits, financially. We should allow women to make this choice.

## CONCLUSION

Ultimately, as a feminist I am deeply concerned with the conditions under which surrogacy is provided. Given the global practices of surrogacy there can be no doubt that women who are surrogates can be exploited. The risk is especially high for poor women.

Thus, we should first consider what conditions might be placed on the practice of surrogacy to protect surrogates from exploitation. In this essay I propose two: First, that traditional surrogacy and gestational surrogacy be treated similarly in law. The current legal regimes in most surrogacy-friendly jurisdictions encourage gestational rather than traditional surrogacy. If traditional and gestational surrogacy were treated equally, individuals—surrogates and intended parents—would still be free to choose to use or provide gestational surrogacy. But the law would recognize and affirm the ability to make a different choice.

Second, surrogates (traditional or gestational) should be recognized as legal parents. This would redress the imbalance of power that is nearly always present between intended parents and surrogates. It would recognize the unique and vital contribution a surrogate makes to the creation of a child, and it would entitle the surrogate to greater recognition and respect throughout the process. It would not, however, be the end of surrogacy as we know it. When surrogacy proceeds smoothly, it does so not through the force of law but because the

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146. See, e.g., Arthur Caplan, Op-Ed., *Paid Surrogacy is Exploitative*, N.Y. TIMES (Sept. 23, 2014, 10:59 AM), <http://www.nytimes.com/roomfordebate/2014/09/22/hiring-a-woman-for-her-womb/paid-surrogacy-is-exploitative?>.

surrogates and the intended parents work together towards a shared goal. Recognition of parental rights in the surrogate would advance rather than undermine their efforts.

Whether or not surrogates should receive compensation is, to me, a secondary question. The acceptability of surrogacy does not turn on this point. If the conditions of surrogacy are exploitative (as they sometimes are, particularly in some of the overseas surrogacy destinations), the question of whether surrogates should be compensated seems to me to be irrelevant.<sup>147</sup> However, assuming that the conditions of surrogacy are favorable, women should be compensated. Too often in our history the labor of women has gone unpaid or undervalued. We should not repeat that pattern here.

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147. Perhaps surprisingly, the line between compensated and uncompensated surrogacy may be more difficult to draw than it first appears. All surrogacy in the United Kingdom is uncompensated or altruistic surrogacy. See Surrogacy Arrangements Act, 1985, c. 49 (Eng.). But it is well accepted that surrogates in the UK can receive money in recognition of various expenses incurred during the pregnancy. Remarkably, the amount of money the uncompensated UK surrogates receive as reimbursement is often close to the amount of money a compensated surrogate in the U.S. would receive. Braverman et al., *supra* note 9, at 296. Thus, formally uncompensated surrogates may in fact receive significant amounts of money.