

**Protecting the Right to Choose: Considering the Relationship Between the
State and Female Autonomy Through the Lens of Legalizing Commercial,
Gestational Surrogacy Agreements**

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Table of Contents

Chapter 1: Introduction, Background, and Research Design	4
Introduction.....	5
The Legality of Sex Markets	10
Relevant Terms	13
Background on History of Surrogacy.....	15
Background on History of Feminism.....	18
Research Design.....	21
Chapter 2: Competing Literature	24
Introduction.....	25
Perspective 1 “ <i>The Conservative Argument</i> ”	25
Perspective 2 “ <i>The Commodification Argument</i> ”	29
Perspective 3 “ <i>The Welfare Argument</i> ”	32
Perspective 4 “ <i>The Exploitation Argument</i> ”	36
Perspective 5 “ <i>The Liberal Argument</i> ”	39
Common Threads	42
Conclusion	47
Chapter 3: Case Studies	49
Case 1: <i>New Jersey, United States</i>	50
Case 2: <i>New York, United States</i>	71
Case 3: <i>Gujarat, India</i>	88
Conclusion	115
Chapter 4: Policy Recommendations	119
Introduction.....	120
Policy Recommendations	121
Conclusion	129
Works Cited.....	132

Chapter 1: Introduction, Background, and Research Design

Introduction:

Senator Kamala Harris: “Can you think of any law that gives the government the power to make decisions about the male body?”

Senator Brett Kavanaugh: *Silence*, followed by “I’m happy to answer a more specific question.”

Senator Harris: “I will repeat the question. Can you think of any law that gives the government the power to make decisions about the male body?”

Senator Kavanaugh: “I am not thinking of any right now, Senator.”¹

This exchange, between Supreme Court nominee Brett Kavanaugh and Senator Kamala Harris, is from his confirmation hearing in September 2018. The discussion refers specifically to reproductive rights and Kavanaugh’s commitment to reversing American women’s right to legal medical abortion. Laws that directly dictate what people are able to do with their bodies, most specifically their reproductive systems, have historically applied only to women. Somehow, people, especially men, forget the gendered bias in the control of bodies, as proven by Kavanaugh’s shocked silence in response to Harris.

The surrogacy regulation debate is an ideal forum to discuss legal control of women’s bodies. It represents both state and public views on motherhood; the valuation of reproductive capability; and the way the state believes family formation should (or should not) interact with markets. Although this thesis details a small fraction of the intimate labor market, commercial surrogacy, and the way that different states have regulated and discussed it, it is grounds for a larger understanding of the way women are allowed to interact with their bodies and the way laws represent and distort women’s voices, wants, and needs. Most importantly, this thesis looks

¹ Sherman, “How to Translate Supreme Court Nominee Brett Kavanaugh’s Talk About Abortion,” 1

to the address the potential *positives* of these markets for women, instead of the dangers, as many lawmakers emphasize by answering the following question: can surrogacy exist in the benefit of women?

The idea, as expressed in the Harris-Kavanaugh interaction, that there is a fundamental difference in the way the state interacts with bodies based on gender is not a modern development. Women's bodies have long been the subject of control by legal systems. Whether it be regulations that made women the property of their husbands upon marriage; the inability to practice law or be drafted; restriction from obtaining certain forms of family planning; or the requirement of women to seek permission for divorce, there is no shortage of laws that have dominated women's bodies. Not only do they regulate how a woman can interact with her own body, but they legitimize societal beliefs over the value of a woman, especially the idea that her value relates to her physical characteristics. These regulations are reflections of the place we see women occupying in society, which is not one of freedom and empowerment, but one that is supposed to be subservient to male power.

Laws that apply only to women are troublesome for many reasons. They make assumptions about the needs of women (and often merge them into one identity); they are often created by male lawmakers who do not have experience in situations that they are seeking to control; and they limit women's choices during important decision-making processes, such as in the case of abortion. These laws speak for the well-being of women, or what a set of policy makers believe the well-being of women should look like, which is ironic as many of the people drafting these regulations are not women. Not only is there a physical disconnect between the people controlling and those who are controlled, but there is also a merging of women into one identity. This is problematic as every woman is different, and one set of laws cannot possibly

capture so many individual needs. Not only do these rules constrain women, they also represent the desires and opinions of only a certain subset of the population they control (the idealized woman).

These laws are justified by people who believe they are acting in the women's own "best interests." This assumes a need to be protected, as if women could not make decisions over their own bodies without the guidance of a male lawmaker. Such regulations exist under the assumption that women would be worse off if they were not told how to use their bodies. This delegitimizes women's voices and enforces the idea that they should be subject to the decisions of men.

The most stringent, and personal, laws dictate what women can do with their bodies in relation to their reproductive capabilities. These are the regulations that have denied women access to birth control, banned abortions, and criminalized prostitution. The laws that deal with *intimate labor*, a term I use to describe the sex work market as well as surrogacy and personal care, define the way women are able to interact with their bodies on the most basic biological level. Throughout history there has been particular, and very consistent, emphasis on controlling women's intimate lives. Why is it that women's reproductive capability is of particular focus in a male-dominated regulatory landscape? What is so unique about women's interactions with sex, motherhood, and reproduction that it is subject to this control? Specifically, what is it about commodifying these sacred womanly qualities that is viewed as truly abhorrent?

Martha Nussbaum writes that on the consideration of "taking money for bodily services"

it is widely believed... that taking money or entering into contracts in connection with the use of one's sexual and/or reproductive capacities is genuinely bad. Feminist arguments about prostitution, surrogate motherhood, and even marriage contracts standardly portray financial transactions in the area of female sexuality as demeaning to women.²

² Nussbaum, "Sex and Social Justice," 277

Adam Smith wrote that there are “some very agreeable and beautiful talents,” but that they are only “admirable” when they are **not** paid for.³ Once those talents are used “for the sake of gain” they are seen “whether from reason or prejudice, as a sort of publick prostitution.”⁴ In the intimate labor market a woman’s reproductive capabilities are celebrated until they are exchanged for financial compensation.

If each of us uses our bodies to derive financial gain, why are certain professions stigmatized and others not? Is it because of reason or prejudice, as Adam Smith introduces? Whether it be as a “professor, factory worker, lawyer, opera singer... doctor, (or) legislator -- we all do things with parts of our bodies, for which we receive a wage in return.”⁵ There are many forms of labor that take money for bodily services: masseuses, servants, factory workers, professors, but only some are restricted by laws. Nussbaum refers to the archaic views that Opera singers should not be paid, a stigma that today we would regard as completely illogical and offensive. This stigmatization is attributed to two factors. The first is that

throughout much of the history of modern Europe -- as, indeed, in ancient Greece -- there was a common aristocratic prejudice against earning wages. The ancient Greek gentleman was characterized by ‘leisure’ -- meaning that he did not have to work for a living.⁶

The second belief is related to the role of the body in public.

It is shameful to display one’s body to strangers in public, especially in the expression of passionate emotion. The anxiety about actors, dancers, and singers reported by Smith is surely a piece with the more general anxiety about the body, especially the female body, that has been a large part of the history of quite a few cultures.⁷

³ Towse, “Adam Smith’s views on the supply of performers,” 297

⁴ Towse, “Adam Smith’s views on the supply of performers,” 297

⁵ Nussbaum, “Sex and Social Justice,” 276

⁶ Nussbaum, “Sex and Social Justice,” 279

⁷ Nussbaum, “Sex and Social Justice,” 280

Therefore, these regulations and laws that seek to control women's bodies, specifically the reproductive components of their bodies, are rooted in two sources of prejudice: aristocratic class discrimination and our fear of bodies and their potential for passionate expression.

The most severe form of labor control by the legal system is sex work. There is particular emphasis on prostitution as it is one of the most stigmatized forms of labor. Prostitution and surrogacy are both examples of way markets and reproduction merge. Stigmas attached to prostitution -- and justifications behind them -- extend to surrogacy. "Prostitution is widely held to be immoral" and is "bound up with gender hierarchy, with ideas that women and their sexuality are in need of male domination and control, and the related idea that women should be available to men to provide an outlet for their sexual desires."⁸ Similarly, surrogacy is a practice that was initially formed to serve a *male* need to have their own genetically-related offspring. There are a few possible explanations for the emergence of the prejudices against surrogacy and prostitution. First, many people have believed through history that nonreproductive and nonmarital sex is nefarious, and that female lust is dirty and dangerous, beliefs which still appear in modern culture. This is evidenced by the relatively recent eugenics movement attempted to phase out women who had "loose morals" or the archaic rule that allowed men to return their brides if they were not virgins when married. Secondly, and most importantly, is the idea that a sexually active woman threatens male control.

Women are essentially immoral and dangerous and will be kept in the control by men only if men carefully engineer things so that they do not get out of bounds. The prostitute, being seen as the uncontrolled and sexually free woman, is in this picture seen as particularly dangerous, both necessary to society and in need of constant subjugation.⁹

⁸ Nussbaum, "Sex and Social Justice," 286

⁹ Nussbaum, "Sex and Social Justice," 288

Even with the rise of feminism and advocacy of women on behalf of their own choices, in 2018 women **still** have to tell male lawmakers that men are not scrutinized for the choices they make over their reproductive system, while women are. The patriarchal idea that women's bodies are reserved for certain purposes (most of which serve male desires); that unnamed female sexuality is dangerous and threatening to society; and that without regulation women will make damaging choices can be seen in the fight against legalizing sex markets and the practice of surrogacy. This chapter next presents specific views on sex markets to highlight the various ways that feminism interacts with the patriarchal values present in regulations over women's bodies. Although these perspectives are towards sex markets broadly, they can be applied specifically to surrogacy.

The Legality of Sex Markets

The perspectives in the debate surrounding the legalization of sex markets span the gradient of conservative to liberal. Some of the arguments against the legalization of sex markets are founded in concerns about health and domestic violence risks; some in the lack of autonomy for the women; some in the potential for a damaging effect on people's ability to form intimate relationships because of surrogacy; some in the dangers of commodifying women's bodies; and some in the perpetuation of male dominance.

One feminist perspective "characterizes commercial sex as abusive of women and a human rights violation. (Feminists) reject it as a legitimate form of labor; it is an inherently degraded exchange" and therefore "seek its prohibition and eradication."¹⁰ These radical feminists believe that the transactional circumstances of commercial sex are fraught with coercion. They argue that "the sex men buy in prostitution is the same sex that they take in rape -

¹⁰ Davis, "Regulating Sex Work: Erotic Assimilation, Erotic Exceptionalism, and the Challenge of Intimate Labor," 1208

- sex that is disembodied, enacted on the bodies of women who, for the men, do not persist as human beings.”¹¹ Radical feminists believe that these practices occur under conditions where informed consent cannot exist, therefore that sex markets always violate women’s right to not be exploited. Radical feminists want to “rescue the women who engaged in (sex work).”¹² This stance -- and the dangerous assumption that women *need* saving -- is hardly better than the lawmakers who believe that by limiting women from receiving abortions, engaging in surrogacy, or soliciting payment for sex, they are “protecting” women. Making judgements on behalf of women is wrong, especially when they eliminate a woman’s own voice in an attempt to speak for what is the perceived “best” option for her.

Another feminist perspective, the liberal one, sees sex work as legitimate, potentially enlightening, and even possibly a subversion of the patriarchy.¹³ These liberal feminists support sex markets, “arguing that women should have the agency to determine their own trade-offs after discerning and evaluating their options.”¹⁴ There are those who believe “that professional sex is just like any other form of intimate labor and should be respected and regarded as such.”¹⁵ Many believe that “laws against prostitution prevent women from determining their own sexuality” as it limits what women can do with their bodies and violates constitutional rights of freedom of association.¹⁶ Liberal feminists defend surrogacy on the grounds that it can be beneficial to women. They believe that women’s right to make choices over their bodies is what the state should protect, not the bodies themselves. They acknowledge the potential dangers of intimate

¹¹ Davis, “Regulating Sex Work: Erotic Assimilation, Erotic Exceptionalism, and the Challenge of Intimate Labor,” 1209

¹² Davis, “Regulating Sex Work: Erotic Assimilation, Erotic Exceptionalism, and the Challenge of Intimate Labor,” 1212

¹³ Davis, “Regulating Sex Work: Erotic Assimilation, Erotic Exceptionalism, and the Challenge of Intimate Labor,” 1210

¹⁴ Davis, “Regulating Sex Work: Erotic Assimilation, Erotic Exceptionalism, and the Challenge of Intimate Labor,” 1211

¹⁵ Davis, “Regulating Sex Work: Erotic Assimilation, Erotic Exceptionalism, and the Challenge of Intimate Labor,” 1212

¹⁶ Moser, “Anti-Prostitution Zones: Justification for Abolition,” 1115-1116

labor markets and argue that regulations protect the right to choose in a safe environment. They encourage autonomy, but in regulated markets.

On the conservative side there are some, like Elizabeth Anderson, who believe that sex markets tarnish our views of the value of intimacy. Others believe that public sex markets (seeing prostitutes on the street, passing strip clubs,) are “serious threats to ‘family-friendly’ environments that cities seek to promote.”¹⁷ Their presence detracts from the allure of “ritzy hotels and nightclubs,” with owners saying it is “a horrible bother (to have) prostitutes on (their) corners.”¹⁸ Critics like these believe that sex workers are dirty and represent a group of people of low moral standards who should be relocated. There are other people who believe in the criminalization of sex markets because of the implications for public health (AIDS, HIV, etc.).¹⁹ Others believe that criminalizing these professions would promote “a moral society free from the menace of criminality and disease.”²⁰ Many conservative views attack sex workers themselves, saying it is their temptation and persuasion that traps the minds of young boys who are unable to self-advocate. The criminal justice system has “normalized sexual deviance... by covertly recognizing (boys’) involvement in prostitution as a ‘threat,’ not a ‘crime,’ and treating them as ‘victims’ of prostitutes.”²¹

The gendered, patriarchal belief that the legal system ought to control women and their reproductive capabilities has complicated roots. People, especially men, have long believed that there is something threatening about a woman who strays from a typical, traditional, mold of sexuality. She is a danger to the attitude that women should exist to serve male needs; her classless demeanor may threaten businesses by diminishing the family-friendly aspect of certain

¹⁷ Moser, “Anti-Prostitution Zones: Justification for Abolition,” 1102

¹⁸ Moser, “Anti-Prostitution Zones: Justification for Abolition,” 1120

¹⁹ Roehr, “Charity Challenges US “Anti-prostitution” restriction,” 420

²⁰ Aderinto, “Sexualized Laws, Criminalized Bodies: Anti-prostitution Law and the Making of a New Socio-Sexual Order,” 114

²¹ Aderinto, “Sexualized Laws, Criminalized Bodies: Anti-prostitution Law and the Making of a New Socio-Sexual Order,” 117

neighborhoods; and she might just not understand what is best for her, which is why regulations and laws need to step in and speak for her. This idea that the legal system needs to adopt voices for women, especially in discussions of reproductive rights, is relevant to the surrogacy debate, where the demands of the different external parties involved (up to five in modern contracts) often drown out the needs of the surrogate mother. Surrogacy represents control based on what lawmakers believe is the ideal version of female sexuality and motherhood. Next, I provide a history of surrogacy and feminist theory development before describing how I will use cases to answer my research question.

Relevant Terms

There are six distinct scenarios in which surrogacy can be conducted. These categories are concerned with the genetic relationship between contracting couple and surrogate mother, their respective nationalities, and the form of compensation the surrogate mother receives or does not receive.

The largest distinction in surrogacy today refers to the genetic details of the contract, which is either *gestational* or *traditional*. A surrogacy can be “gestational” which is when the surrogate mother is not related to the conceived child.^{22 23} Gestational surrogacy is sometimes referred to as “IVF surrogacy,” “genetic surrogacy,” or “full surrogacy” and is the most dominant form of the practice today.²⁴ The contracting couple or individual (the terms I use to describe the party which solicits the service) provides the embryo (either their own gamete or that of a separate sperm/egg donor) which the surrogate mother is artificially inseminated with.²⁵ The surrogate is **not** genetically related to the child. “Traditional surrogacy,” or “natural

²² Brinsden, “Surrogacy’s Past, Present, and Future,” 2

²³ Koert and Daniluk “Psychological and Interpersonal Factors in Gestational Surrogacy,” 70

²⁴ Koert and Daniluk “Psychological and Interpersonal Factors in Gestational Surrogacy,” 70

²⁵ Koert and Daniluk “Psychological and Interpersonal Factors in Gestational Surrogacy,” 70

surrogacy,” occurs when the surrogate mother uses her own genetic material for the conception of the child. She is either inseminated by “normal intercourse with the proposed genetic father” (happens only rarely given technological advancements) or by vaginal/cervical insemination.²⁶ The surrogate mother is genetically related to the child.

Surrogacy is *domestic* or *international*. When “domestic” is used, it refers to surrogacy arrangements where the surrogate mother and contracting couple or individual are from the same country. When “international” is used, it refers to surrogacy arrangements where the surrogate mother and contracting couple or individual are from different countries. The difference between domestic and international contracts is the crux of many regulatory and legalization conversations. Countries like India, which used to be large surrogacy destinations have recently tightened their regulation and restricted it to only domestic couples.²⁷ This is because concerns have developed that the international practice of surrogacy might allow women to be taken advantage of. There are concerns based in race relations and socio-economic statuses that financially motivated couples travel from developed countries to developing countries to engage in less expensive contracts, thus reducing the value of a woman’s body and potentially putting her in a position of decreased welfare and increased emotional stress.

The final distinction relates to the compensation, or lack thereof, involved with the contract. Traditional and gestational surrogacy arrangements can happen under *commercial* or *altruistic* circumstances. “Commercial” arrangements occur when there is a financial exchange between contracting parents and the surrogate mother. It is worth noting that commercial surrogacy arrangements are the type that spur concern about coercion and ethics. These debates are fascinating and the questions they raise are why my thesis will be focused more on the

²⁶ Koert and Daniluk “Psychological and Interpersonal Factors in Gestational Surrogacy,” 70

²⁷ Saravanan, “Addressing Global Inequalities in Surrogacy,” 41

commercial arrangements than the altruistic ones. “Altruistic” surrogacies occur in the absence of money, these are the arrangements where surrogate women are motivated by the “labor of love” as opposed to a “business deal” that would result in financial gain. An altruistic surrogate may say “that she was driven by altruism because she had enjoyed motherhood with her own child and wanted to help someone share this experience.”²⁸ These arrangements could occur through a surrogacy placement service or oftentimes connections between contracting couples and altruistic surrogacy arrangements happen between friends or family members who offer to carry a fetus for a sister or best friend who cannot conceive on her own.

This thesis is concerned with **commercial, gestational** surrogacy on a **domestic and international** scale. I will now provide a brief background on the history of surrogacy and the feminist landscape before describing the research methods used to answer the question of whether or not compensated surrogate arrangements can benefit women.

Background on History of Surrogacy

Whether it be King Hammurabi in 1800 BC who developed the rule that “a childless wife might give her husband a maid (who was no wife) to bear him children, who were reckoned hers” or Tina Fey and Amy Poehler in 2008 recounting the perils of modern-day surrogate contracts, human civilization has been practicing surrogacy for hundreds of years.²⁹ Although the basic idea that surrogacy provides a child to a single parent or a couple otherwise unable or unwilling to conceive has remained, most other factors in the practice have changed. Advances in technology; changing demographics for target surrogate mothers; the outsourcing of the practice across international borders; and depictions of the practice in media have revolutionized the way people understand surrogacy.

²⁸ Burrell and Edozien, “The Ideal Surrogate: Santa Claus, Easter Bunny, or Tooth Fairy,”¹⁰

²⁹ Brisden, “Surrogacy’s Past, Present, and Future,” 1

In-vitro fertilization was developed and successfully used for gestational surrogacy for the first time in 1978 in the birth of Louise Brown in the United States, a child who was relinquished to a 37-year-old woman who was unable to conceive due to her hysterectomy.³⁰ The practice extended outside the United States for the first time in 1986 at the Bourn Hall Clinic in the United Kingdom where the first child was born in 1989.³¹

The first legal agreement for a traditional surrogacy contract occurred in 1980, brokered by an American lawyer named Noel Keane.³² Keane is actually credited with more than beginning the legalization debate in America, he created a market for surrogacy through advertisements, organizing interested couples and surrogate mothers, and even “offering prospective mothers a fee for the service of surrogacy.”³³ He ran into “baby-selling” constraints in Michigan so he moved his business to Florida, an outsourcing practice that many international couples use today when they experience legal roadblocks to commercial gestational.³⁴

There have been moments in the history of surrogacy that have raised eyebrows and shape much of the ongoing debate today. The most famous of which was the *Baby M* controversy of 1985, which is credited with dramatically changing the regulatory landscape.³⁵ In short, surrogate mother Mary Beth Whitehead entered into a commercial, traditional surrogacy with a contracting couple, the Sterns (using the contracting father’s sperm).³⁶ Whitehead gave birth to the child and “delivered” baby Melissa to the Stern parents.³⁷ A few days later, Whitehead returned to the Stern family and said that she “could not live without the baby,” and

³⁰ Brisden, “Surrogacy’s Past, Present, and Future,” 1

³¹ Brisden, “Surrogacy’s Past, Present, and Future,” 1

³² Spar, “For love and money: the political economy of commercial surrogacy,” 293

³³ Spar, “For love and money: the political economy of commercial surrogacy,” 293

³⁴ Spar, “For love and money: the political economy of commercial surrogacy,” 294

³⁵ Scott, “Surrogacy and the Politics of Commodification,” 109

³⁶ Scott, “Surrogacy and the Politics of Commodification,” 113

³⁷ Scott, “Surrogacy and the Politics of Commodification,” 113

she and her husband illegally took baby Melissa to Florida.³⁸ Whitehead and Stern fought over custody of the child for nearly two months, a battle which ended with Judge Harold Sorkow holding the contract valid and giving Mr. Stern full custody of Melissa (Mrs. Stern was later able to enter into an adoption of Melissa as she was not genetically related to the child).³⁹ Baby M shifted public opinion about the growing surrogacy market. Some believed that Whitehead was erratic while others that she was an innocent woman who was preyed on by an upper-class couple. The aftermath of the trial still impacts our understanding of surrogacy today.

The controversy of surrogacy is not limited to Baby M. In 2008, a couple entered into a contract with an Indian surrogate mother but later split up and decided they no longer wanted the child. In 2014, a couple from Australia had twins via surrogacy, but when one was born with down syndrome they refused to take the child into custody.⁴⁰ Because of cases like these, many countries have banned the practice, including Australia, Egypt, France, India (as of 2016), Italy, Japan, Sweden, and many states within the United States. Similar to debates over prostitution and sex work, and even reproductive rights like access to birth control and abortion, one must question if the laws that seek to control women's bodies actually take into consideration what women want and what their own perception of their best interests is. Although some may counter the necessity of determining your own "best interests" by saying women can use it harmfully (choosing to illegal drugs or to engage in unsafe activity), I am focused on discussing the theory of choice of surrogacy (a practice unlike illicit drug use) in a safe environment, not the implication of unregulated freedom in all decisions. This thesis will explore these questions and

³⁸ Scott, "Surrogacy and the Politics of Commodification," 113

³⁹ Scott, "Surrogacy and the Politics of Commodification," 114

⁴⁰ Pardes, "How Commercial Surrogacy Became a Massive International Business"

make an argument for why, under appropriate and regulated circumstances, women should have the right to engage in commercial, gestational surrogacy.

Background on History of Feminism

Although modern day gestational surrogacy can involve up to five separate parties, the regulation of the commercial practice is generally focused on protecting the surrogate mother and her rights. Regulations are highly varied: there are states and countries that allow only altruistic surrogacy; there are others that allow commercial surrogacy freely; some that have strict contractual and psychological evaluations; and some that allow only domestic, heterosexual couples to engage with the practice. Each regulatory body has varying justifications for adopting their particular laws, but all state they have the “best interests of the surrogate women” in mind. Surrogacy deals with the womb, pregnancy, and motherhood, so the concerns that arise over the practice can generally be categorized as “women’s issues.” This means that the most appropriate frameworks to discuss the varying views over the legalization of this market are feminist ones.

Feminism has been defined as “the advocacy of women’s rights on the basis of equality of the sexes.”⁴¹ Others say more specifically that feminism has “its central focus (as) the concept of patriarchy, which can be described as a system of male authority, which oppresses women through its social, political, and economic institutions.”⁴² Feminism is complex and takes on many forms within the surrogacy debate, whether it be the radical feminists who argue that women engaging in intimate labor are being exploited (even if they, themselves, are complicit); the third wave feminists who believe women should have the choice to engage in any activity with their body; or anywhere in between.

⁴¹ Merriam-Webster Dictionary

⁴² Osborne, “Feminism,” 8

Although throughout history there have been women that advocated for their rights, most acknowledge the first development of the women's movement in 1789 with the French Revolution when the Citoyennes, Republicanines, and Révolutionnaires demanded the right to both vote and hold senior positions within the civilian and military leaderships in the Republic.⁴³ The American suffrage movement, or "the first wave of feminism," was born in 1848 at the Seneca Falls convention with Lucretia Mott and Elizabeth Cady Stanton releasing the *Declaration of Sentiments* which demanded acknowledgement that "all men and women are created equal."⁴⁴ The second wave of feminism (1960s-89s) is known as "women's liberation" and "grew into a vibrant, sprawling movement that... seemed to encompass as many factions as there were women in it" and was concerned with issues of equal employment, equal education, equal pay, legal and financial independence, and freedom to express sexuality.⁴⁵ The first wave was concerned primarily with suffrage while the second was much more diverse. The third wave of feminism (1996) dealt with an even wider range of issues, from political participation to sexual harassment to body image. There is a particular emphasis on inclusivity as the third wave looks to "move away from the domination of feminism by white middle class women to a more inclusive movement which addresses inequalities aggravated by attitudes towards racial minorities, sexual orientation and physical disablement."⁴⁶

There are four major classes of feminist practice: liberal, radical, cultural, and socialist.⁴⁷ Liberal feminists are concerned with "gender socialization," which is when children learn behaviors and attitudes that society deems appropriate for a given sex; radical feminists with "patriarchal foundations of society" and "male control and exploitation of women's bodies;"

⁴³ Osborne, "Feminism," 9-10

⁴⁴ Osborne, "Feminism," 18

⁴⁵ Osborne, "Feminism," 25-26

⁴⁶ Osborne, "Feminism," 35

⁴⁷ Enns, "Locational Feminisms and Feminist Social Identity Analysis," 333

cultural feminists with “the devaluation of women’s ‘different voice’ and relational strengths;” and socialist feminists with the “capitalist family and work structures that lead to confining male-female divisions of labor.”⁴⁸ There are countless nuanced forms of feminism within surrogacy discussion, but two of these above four appear the most frequently: radical and liberal.

The first is the radical feminist, whose primary goals are “freeing women from the imposition of so-called ‘male values,’ and creating an alternative culture based on ‘female values’” and “(ending) male supremacy in all areas of social and economic life.”⁴⁹ ⁵⁰ Radical feminists argue against surrogacy or any form of intimate labor (prostitution, exotic dancing, pornography, surrogacy) because they believe the practice is always an extension of male domination/patriarchal values and reduces women to baby-making machines.

The second is the liberal feminist perspective. These feminists believe “an individual woman should be able to determine her social role with as great freedom as does man.”⁵¹ Liberal feminists think that in the divide between public and private women and their roles, duties, and societal contributions have been placed into the latter bin and “unjustly denied access to the public sphere.”⁵² “Liberal feminism is based upon the belief that women are individuals possessed of reason, that as such they are entitled to full human rights, and that they should therefore be free to choose their role in life and explore their full potential in equal competition with men.”⁵³ These feminists emphasize choice and “are concerned that we treat women as incompetents when we question their freedom and capacity to rationally choose to serve as a surrogate.”⁵⁴ The liberal feminist theory is that women should have access to surrogacy, but

⁴⁸ Enns, “Locational Feminisms and Feminist Social Identity Analysis,” 333-334

⁴⁹ Willis, “No More Nice Girls: Countercultural Essays,” x

⁵⁰ Yelin, “Recuperating Radical Feminism,” 114

⁵¹ Kensinger, “(In)Quest of Liberal Feminism,” 184

⁵² Kensinger, “(In)Quest of Liberal Feminism,” 184

⁵³ Kensinger, “(In)Quest of Liberal Feminism,” 184

⁵⁴ Parks, “Gestational Surrogacy and the Feminist Perspective,” 26

acknowledges that there should be protective regulations to ensure that women can choose to engage in the practice but are not coerced or misled.

My thesis explores the possibility that surrogacy can exist in the benefit of women. This is not a widely accepted opinion as many believe surrogacy violates women's safety, whether through physical or emotional vulnerability, social ostracization, reinforcement of gender norms, or patriarchal oppression. I will be comparing three cases to determine the appropriate regulations that create transparent, mutually beneficial surrogacy arrangements.

Research Design

The goal of this thesis is to answer the following question: can the commercial, gestational surrogacy market exist in the benefit of women? This question is important because although the surrogacy market is highly controversial and composes a significant part of many countries' economies, it is also a metaphor for the way we represent certain voices in policy construction. In order to answer the research question detailed above, my thesis will apply a mix of primary and secondary sources to three cases to explore how different states have discussed surrogacy and how five different perspectives have shaped the regulatory decisions made in those states. In short, those perspectives are four arguments against surrogacy ("*The Conservative Argument*," "*The Commodification Argument*," "*The Welfare Argument*," and "*The Exploitation Argument*") and one that accounts for the concerns presented in perspective one through four while supporting the legalization, under careful regulation, of these markets ("*The Liberal Argument*"). I will use these to discuss the regulatory debate and how various arguments have shaped the legality of surrogacy. I will then use demographic data and personal narratives from interview transcripts to support my argument that surrogacy can be beneficial to women. More importantly, I will discuss how the other perspectives fail to account for the state's

role in protecting women's right to choose how and why they use their body to engage in surrogacy.

I analyze surrogacy in New Jersey, New York, and India to determine whether these markets can benefit the women involved in them. Although they are very different examples, they span the gradient of regulation and represent very different applications of the five perspectives. Most interestingly is how they compare to each other. The first two cases are part of the largest surrogacy market destination in the world yet have drastically different regulatory landscapes, with New Jersey creating space for a legal and highly regulated market, and New York being one of the only two American states to still ban the practice. The third case, India, is the former largest surrogacy destination in the world and is often described as grounds for the most exploitative transactions in the market and has adopted extremely stringent regulations in recent history. Primary sources include court transcripts from the most famous surrogacy debates in each case, newspaper clippings, TV specials that shaped the surrogacy debate (specifically a very famous Oprah Winfrey TV documentary on one of the most famous Indian surrogacy clinics), and a collection of transcripts from interviews with surrogates.

The thesis will conclude with policy recommendations, ones specifically based off of New Jersey's 2018 regulatory changes and other proposed regulations by surrogacy experts. The following chapter will introduce the five perspectives and discuss four common threads that tie them together to highlight the largest factors of influence in the surrogacy debate. The third chapter will analyze New Jersey, New York, and India to answer the question as to whether or not surrogacy can benefit the women involved. It will also expose the largest areas of concern in the practice and what can be done to mitigate them, which serves as the basis for the final chapter. Chapter Four will recommend a hypothetical set of policies which account for

perspectives one through four but highlight the importance of perspective five, which allows women access to markets and grants them control over their bodies but protects them through careful regulation.

Chapter 2: Competing Literature

Introduction

This chapter focuses on comparing the arguments presented in the surrogacy debate to develop the “five perspectives.” These perspectives condense the myriad of opinions over surrogacy regulation into five schools of thought. Ideas like the danger of commodification; the importance of traditional family structure; the need to protect women and children from psychological and physical damage and exploitation; and the importance of giving women space to choose what they do with their bodies have been present in discussions about surrogacy since the practice was first developed. These perspectives apply not only to the domestic surrogacy debate but also to the international market. They form the basis of the analysis of this thesis. Each will be applied across the three cases to show their relative influences.

These perspectives are applicable outside of the niche market that is commercial, gestational surrogacy. They shape the larger debate about how women should be allowed to choose what they do with their bodies. The Conservative Argument is not only about traditional values of parentage but is important to how people see the right to abortion. The Commodification and Exploitation arguments are derived from the way people speak about prostitution. The Exploitation Argument can be applied broadly to sex tourism and our notions of classism, racism, and how the two influence informed consent. Finally, the Liberal Argument ties all of these together with an argument about the importance of choice and regulation that allows that choice to be made without coercion, danger, or domination.

Perspectives

Perspective 1 “The Conservative Argument”: *Surrogacy threatens the traditional values of parentage, kinship, and motherhood, and thus should be prohibited.*

The first argument is less concerned with application of human rights laws but rather seeks to protect natural family formation and traditional notions of family structure and parenthood. Many of those who support the conservative perspective believe that family planning, abortion, and assisted reproductive technology threaten the pristine nature of biological motherhood and diminish the value of the natural mother-child bond which can only be achieved through one's own womb. They would argue that motherhood is a status. "Women (are) mothers. Mothering (is) not something women *do*, it is something women *are*. Motherhood was in fact a master status, and everything women (do) is seen in terms of our motherhood, or our potential for motherhood."⁵⁵ Supporters argue that the work enables the "commodification of children and the proletarianization of motherhood" and detracts from the natural way of family conception.⁵⁶

Barbara Rothman thinks that surrogacy "reduces the intimate and emotional experience" of motherhood and alters "the language of work for mothering."⁵⁷ Rothman says that the modern day understanding of mothering is that it is "an activity," "a service," "work" instead of something intimate and sacred.⁵⁸ She does not believe surrogacy can be equated to other labor: "Pregnancy is just exactly like pregnancy. There is nothing else quite like it... Having a baby grow in your belly is not like anything else that one can do. It is unique. If we're going to try and call it work, then we know it is women's work."⁵⁹ Central to her understanding of surrogacy is the belief that there is something special and invaluable about motherhood, something that cannot and should not be replicated. Surrogacy makes labor and pregnancy about monetary compensation and not intimacy, thus reducing the value and privilege of the natural practice. Rothman goes so far as to say that prenatal diagnostic tests are even problematic as they assign

⁵⁵ Rothman, "The Commodification of Motherhood, 313

⁵⁶ Pande, "Wombs in Labor: Transnational Commercial Surrogacy in India," 6

⁵⁷ Pande, "Wombs in Labor: Transnational Commercial Surrogacy in India," 6

⁵⁸ Rothman, "The Commodification of Motherhood, 313

⁵⁹ Rothman, "The Commodification of Motherhood, 315

value to certain fetuses and make only certain babies “precious,” while others fall short in “quality control” tests which makes motherhood a competition and about matching a certain image of kinship instead of an actual relationship with one’s child.⁶⁰ She believes that surrogacy continues this legacy, where motherhood is replicated to support a market, instead of rightly preserved for the women who can conceive the natural way.

Surrogacy opens parentage up to couples who would otherwise be unable to have a child. This includes women who have had hysterectomies or suffer from infertility. It also includes gay and lesbian couples as well as single women and men. The majority of the surrogacy-contracting demographic is heterosexual couples and gay men (as gay men do not possess the biological capacity to carry a child).⁶¹ In Canada, one study found that 20.3% of the contracting parents were same-sex male couples, but other countries have found that number to be as high as 50%.⁶² Those with highly conservative views of family formation are frustrated by surrogacy as it supports the creation of non-traditional family structures. A traditional family structure would have a mother, a father, and children carried by said mother. This is important as it informs much of the American and international regulatory landscape. Domestically, many southern states have banned surrogacy at some point in their history as it threatens their conservative notion of family structure. Barriers to gay marriage in some American states can be a roadblock to surrogacy. It is easier to get a surrogacy contract if a couple is married because transferring parentage rights is far simpler, therefore banning gay marriage leads to heightened difficulty in obtaining surrogacy services.⁶³

⁶⁰ Rothman, “The Commodification of Motherhood, 314

⁶¹ Schwartz, “LGBT Issues in Surrogacy,” 56

⁶² Brinsden, “Surrogacy’s Past, Present, and Future,” 2

⁶³ Schwartz, “LGBT Issues in Surrogacy,” 57

Internationally, many countries (including India, Mexico, Nepal, and Australia) allow only heterosexual couples access to the practice because they want to protect traditional family formation, which has pushed much of the demand to the parts of the United States where gay couples can enter contracts.⁶⁴ In 2012 the Indian Home Ministry adopted new surrogacy laws and stated that they would ban the practice for single and homosexual individuals and couples for two reasons. The government made this choice for two reasons. First was ideological: they wanted to protect conservative ideals by restricting parenthood to only heterosexual couples. Second was more practical: determining biological parentage in heterosexual couples is complicated as only one parent is genetically related to the child, so citizenship was difficult to determine and was creating problems for the state.⁶⁵ Then, in 2016 the Indian Home Ministry adopted new surrogacy laws and stated that they would restrict the practice to “needy Indian married couples” and cut off the international component of the market completely.⁶⁶

Rothman’s understanding of how surrogacy negatively alters the way women interact with motherhood (seeing it as work as opposed to emotional endurance) is on the other end of conservative policy. Implicit in the Conservative Argument is an understanding about the place of motherhood and parenthood in the “natural order of things,” a sentiment that extends internationally. The Conservative Argument relies on the notion that there is something biologically special, something worth protecting, about the traditional family structure (one mother, one father, children conceived and carried in the mother’s own womb). Similar arguments have been made about abortion: that women’s “self-focused interests” should fall behind the “well-being of the family.”⁶⁷ This limits our understanding of women and their

⁶⁴ Schwartz, “LGBT Issues in Surrogacy,” 57

⁶⁵ Pande, “Cross-Border Reproductive Surrogacy,” 143

⁶⁶ Pande, “Cross-Border Reproductive Surrogacy,” 143

⁶⁷ Hummer, “Motherhood and Family Politics,” 191

relationship to motherhood, reducing pregnancy and childrearing to something that should always be accepted; always be seen as a blessing; always be seen as the right role for women to play. Rothman introduces a new question towards the five perspectives introduced in this thesis: how do biases about the biological nature/value of motherhood intertwine between these five facets of the surrogacy debate?

Perspective 2 “The Commodification Argument”: *Surrogacy is an extension of male domination and commodifies women’s bodies to be used for patriarchal gain (radical feminism) and therefore should be illegal.*

The “commodification” argument, born out of radical feminism, argues that surrogacy is “(equal) to child-buying and reduces women to ‘wombs for hire.’”⁶⁸ If the Conservative Argument restricts family to certain people and emphasizes the importance of preserving the biological meaning of motherhood, the Commodification Argument does not support any form of intimate labor or activity because it turns female bodies into objects for men to use, exchange, and trade. Sharyn Anleu writes that

surrogacy reduces women to mere reproductive vehicles, to rented wombs, they become incubators which enable men to have children with whom they have genetic links. Women’s reproductive capability becomes a commodity to be bought and sold on the market. The sale severely curtails women’s rights to make choices about her own body.⁶⁹

Surrogacy acts on the intersection of technology and patriarchy and produces a “depersonalized mother machine being manipulated to efficiently produce babies out of valued sperm.”⁷⁰ Anleu and others believe that surrogacy was created to serve male desires to have children. The history of the practice confirms this assumption. The earliest surrogates were contracted because men

⁶⁸ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 128

⁶⁹ Anleu. “Reinforcing Gender Norms,” 65

⁷⁰ Pande. “Wombs in Labor,” 6

married women who were unable to conceive and because they believed it was their right to have a child of their own blood, they found other women to carry their bloodline.

Although there are many women who seek out surrogacy without male presence (single women, lesbian couples), radical feminists believe that it is patriarchal values that emphasize the need for women to have children. This has encouraged the outsourcing of childbearing to the surrogacy market. This perspective looks to end all forms of male supremacy and patriarchal organization, thus a practice that uses women's bodies to serve male desire should be completely illegal, especially given that "the designers of fertility aids traditionally have been white upper-class men" concerned primarily with extending their lineage.⁷¹

Anleu uses a case of commercial surrogacy to explain the deeply entrenched gender norms present in surrogacy and to argue against the practice. She describes the 1985 New Jersey Superior Court case where the genetic surrogate mother, Mary Beth Whitehead wanted custody of the child, igniting litigation. In the hearing, Whitehead was described as an "alternative reproduction vehicle" and had engaged in the practice because she was "mercenary, self-seeking, pragmatic" and therefore did not deserve custody, while the Court and media believed that Stern would make a great father based on his "desire to have a child and heir, regardless of cost."⁷²

Anleu's argument is that because surrogate mothers are criticized because they stray from natural conceptions of "women as motivated by altruism, emotion, concern for others, and identifying of childbirth as a natural not economic element" of womanhood, the practice is sexist and fraught with problematic gender norms.⁷³ "The Court underscored (Mary Beth's) 'deviantness' by referring to her 'self-interestedness', but did not level this charge at Stern - he

⁷¹ Lowry, "Understanding Reproductive Technologies as Surveillant Assemblage," 361

⁷² Anleu, "Reinforcing Gender Norms," 68

⁷³ Anleu, "Reinforcing Gender Norms," 67

was conforming to male gender expectations, namely, pragmatism, self-interestedness, goal achievement and individualism.”⁷⁴ Anleu exposes the biting double standard of surrogacy where the buyer of the service does not face criticism but the supplier is ridiculed. She parallels surrogacy and prostitution, saying that men are able to violate the law and exploit women, but do not face stigmatization while women are ostracized for engaging in transactional sex, thus reinforcing the notion of gender inequality in both practices.⁷⁵

David Peña-Guzmán and GKD Crozier argue generally against medical contracts (including surrogacy) as they believe they commodify women. They call their ethical concerns “intrinsic objectifications” to the use of contracts in surrogacy.⁷⁶ Intrinsic, or principle objections, say that surrogacy contracts “turn bodily resources and biological functions into ‘commodities’ that can be bought and sold... These contracts violate the moral worth of the surrogate by treating her as a means rather than an end (i.e. as an object rather than a person with agency)... transnational gestational surrogacy contracts are inextricably entwined with patriarchal norms that subjugate women.”⁷⁷ Peña-Guzmán and Crozier believe that the practice is outside the field of “contractibility.” Intrinsic objectifications do not consider context or consequences but believe that all forms of surrogacy should remain without contracts, regardless of class, race, power, motive, or compensation. “There is no version of transnational gestational surrogacy that could ever be ethically satisfactory, regardless of how it might be regulated.”⁷⁸ At the core of Peña-Guzmán and Crozier’s argument is that contracts translate the worth of a service into words onto paper, assign a value to it, and then hold people accountable to performing that service to a certain standard.

⁷⁴ Anleu, “Reinforcing Gender Norms,” 67

⁷⁵ Anleu, “Reinforcing Gender Norms,” 68

⁷⁶ Peña-Guzmán and Crozier, “Surrogacy as Medical Tourism,” 46

⁷⁷ Peña-Guzmán and Crozier, “Surrogacy as Medical Tourism,” 47

⁷⁸ Peña-Guzmán and Crozier, “Surrogacy as Medical Tourism,” 47

The commodification perspective argues that surrogacy is an application of patriarchal values and male privilege. Anleu believes, through her analysis of prejudices that surrogate mothers face in litigation, that the practice reinforces gender norms. She proves this through case studies where women are called selfish and deviant, but men are committed and compassionate fathers-to-be. Peña-Guzmán and Crozier think that contracts commodify women's bodies and reduce their value to that of an object. Radical feminists call for a ban on all surrogacy as they claim the practice, even under perfect regulations, is an extension of male power.

Perspective 3 “The Welfare Argument”: *It is physically dangerous to both surrogate mothers and children to subject these parties to the practice.*

The “welfare” response to legalization of commercial surrogacy states that the practice introduces “the possibility of harm to the surrogate mother or child,” and therefore should be banned completely.⁷⁹ This includes both psychological and physical harm. For the child, that may be physical problems that result from being born in a less developed country or being transported long distances as an infant. Or it may be the more complex “confusion and pain over personal identity, a sense of being abandoned or given away by their ‘real mother,’ and anxiety over whether or not it is the child its parents hoped they would get from the arrangement.”⁸⁰ For the surrogate mother, the welfare perspective is concerned with higher rates of Caesarian sections and the above-average chance of carrying multiple fetuses that arises from the transfer of multiple embryos in the IVF treatment (heightened physical risks come with carrying multiple fetuses).⁸¹ Social-welfare concerns deal with the trauma that women face when they are separated from their families and communities during their gestational period, like has happened

⁷⁹ Humbyrd, “Fair Trade International Surrogacy,” 112

⁸⁰ Oultram et al., “Gestational Surrogacy, Ethics, and the Family,” 17

⁸¹ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 127

in certain instances of “dormitory-style” housing in Indian surrogacy.⁸² Additionally, there are concerns that the “breaking of the natural mother-infant bond” can harm the surrogate mother, but that relies on the assumption that all surrogate mothers feel a connection to their child.

Scott Carney argues against surrogacy through the welfare lens, which is a typical stance of Western media. He writes in his piece “Cash on Delivery,” about the physical and emotional perils Indian surrogate women endure during their pregnancies. He states that women undergo severe social ostracization (they are “the subject of village gossip”); do not leave the pregnancy dormitories; all receive C-sections and are poorly supported through the recovery; and struggle to hand over the newborns (he quotes one mother saying that “maybe it will be easier to give up the baby when I see it and it doesn’t look like me”).⁸³ He tells the horror stories of women who hemorrhaged post-birth in clinics that were “unprepared for complications,” resulting in deaths of surrogates.⁸⁴ Even before the actual birth, Carney believes that implantation standards are lower in India, allowing women to be implanted with five or more embryos at a time, “boosting the success rate but also (resulting) in multiple births, which are far riskier for the woman and often lead to premature delivery and dire health problems for the infants.”⁸⁵

Carney argues that in developing countries there is not enough regulation -- or even infrastructure -- to ensure the safety of women. Therefore, any legalization of the practice will result in the opening of sub-par clinics that present real dangers to surrogates. The theory behind the Welfare Argument is self-explanatory but is valid only under key assumptions. The first is that all women have a connection to the child they are contracted to birth. The second is that

⁸² Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 127

⁸³ Carney, “Cash on Delivery,” 71

⁸⁴ Carney, “Cash on Delivery,” 71

⁸⁵ Carney, “Cash on Delivery,” 72

developing countries do not have the capacity to self-regulate and do not have the infrastructure to ensure that women do not face heightened risks during and after pregnancy.

Emily Koert and Judith Daniluk state that the “research that has been conducted on surrogates’ experiences and their psychological well-being does not support” the concern that “relinquishing a child may have a negative long-term psychological impact on women who are surrogates.”⁸⁶ “Although some surrogates may find the period immediately after childbirth to be difficult, for most surrogates these feelings appear to abate over time.”⁸⁷ Carney’s logic is not applied to adoption because there is an assumption that in adoption the mother chose to give up the child whereas in surrogacy she was required to because of a contractual obligation. As for the infrastructure argument, surrogacy technology is complex and requires a significant amount of investment to obtain. Successful in vitro fertilization requires “particularly high levels of expense and effort” and medical facilities must be equipped to handle “highly invasive procedures” with skilled doctors and proper equipment.⁸⁸ Carney argues against the legalization of surrogacy under strict regulation because he does not believe the infrastructure to regulate could exist. Contrary to his argument, many countries have already invested significant resources into establishing assisted reproductive technologies, thus disproving the basis of his bias against regulation.⁸⁹

Susan Golombok agrees with Koert and Daniluk’s perspective, using a “longitudinal study of children conceived by assisted reproductive procedures” and their mothers to prove that children born via surrogacy do not face psychological trauma. In fact, they found that these families “reflected higher levels of warmth and interaction between mothers and their 3-year-old

⁸⁶ Koert and Daniluk, “Psychological and Interpersonal Factors in Gestational Surrogacy,” 72

⁸⁷ Koert and Daniluk, “Psychological and Interpersonal Factors in Gestational Surrogacy,” 72

⁸⁸ Lowry, “Understanding Reproductive Technologies as Surveillant Assemblage,” 361

⁸⁹ Roy, “Protecting the Rights of Surrogate Mothers in India”

children in assisted reproduction families than in families with a naturally conceived child.”⁹⁰

Similarly, Vasanti Jadva conducted a study of surrogate mothers with the conclusion that “surrogate mothers do not appear to experience psychological problems as a result of the surrogacy arrangement.”⁹¹

Others who disagree with perspectives like Carney’s state that if the strongest reason to ban surrogacy is because it is dangerous for the women involved in the practice, then many other forms of labor should be banned as well. In many developing countries, jobs that attract the same women as surrogacy (generally those of low socio-economic status and with little education) pose even greater physical and emotional risks, such as factories or sweat shops. According to the World Bank, the maternal death rate in India was 174 deaths per 100,000 live births (as compared to 14 in the United States and 6 in Australia) and the World Health Organization has estimated that “88-98% of all maternal deaths could probably have been prevented with proper handling” and infrastructure developments.^{92 93} Additionally, “surrogates have admitted that the housing, care, and nutrition that they receive while living at the clinic is superior to their day-to-day living conditions in impoverished communities while working in marginalized occupations.”⁹⁴

With the input from surrogates regarding the conditions of their living conditions while pregnant and the knowledge that better infrastructure could cut down on maternal (infrastructure like the surrogates described experiencing), an argument can easily be formed that surrogates face better chances of surviving childbirth while under contract, especially given the delivery doctors’ incentive to keep mother and child safe to fulfill the contract covenants. Although there

⁹⁰ Golombok et al., “Non-genetic and non-gestational parenthood,” 1918

⁹¹ Jadva et al., “Surrogacy: the experiences of surrogate mothers,” 1

⁹² The World Bank *Maternal Mortality Ratio*

⁹³ Prakash et al., “Maternal mortality in India: current status and strategies for reduction,” 1

⁹⁴ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 127

is no consistent data about maternal death rate in surrogacy, it is clear that in developing countries where the maternal death rate is high, those deaths are preventable. Because doctors are more likely to protect mother and child in surrogacy arrangements because of the monetary compensation, it is very likely that the surrogate death rate is lower than non-surrogates in childbirth.

Overall, the Welfare Argument is a controversial one as there is limited scientific understanding of the long-term psychological effects of surrogacy on mother and child, outside of the studies previously mentioned that disprove concerns. Carney, and others, believe that many countries do not have the ability to adequately administer and regulate surrogacy and therefore the practice should be globally banned. Others believe that it is wrong to assume women feel a connection to a child, especially one that is not biologically hers. Finally, those who believe in access to labor state that statistically surrogacy may actually be a safer form of employment for women in developing countries and surrogacy provides a sort of protection as clinics are a safe haven that women in undeveloped communities would otherwise not experience.

Perspective 4 “The Exploitation Argument”: *Surrogacy is exploitative, taking advantage of women by reinforcing a power hierarchy, and therefore should be illegal*

The exploitation perspective builds on the Commodification Argument, saying that in these transactions where female bodies are reduced to something tradeable and objectifiable, there is a vast “power differential between the customer and the service provider,” which opens the practice up to exploitation.⁹⁵ Proponents believe that surrogacy contracts

reinforce systems of privilege and oppression that promote asymmetric power relations between the races, sexes, and socioeconomic classes...one party is subordinated to another in a hierarchical or proto-hierarchical fashion and in

⁹⁵ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 128

which power flows in a rigid, one-directional form -- from top to bottom. Here, the privileged party is able to command greater control over what happens, how it happens, and when it happens. This party can have more control over its subordinate: it can mute dissent and have its preferences count more than those of others.⁹⁶

Exploitation can take many forms, but the two most commonly referred to in the surrogacy debate deal with are financial compensation and informed consent. Critics of surrogacy worry that the pay gap for surrogates in developed and developing countries signals exploitation. Women in the US are compensated at a much higher rate for the same service. Informed consent is the idea that women must agree to engage in surrogacy without coercion or false knowledge of the process and supporters of the Exploitation Argument are concerned that that this is difficult to attain when there are power hierarchies, language barriers, and cultural differences present in agreements.

John Tobin is aware of the financial benefits surrogacy can provide women relative to other forms of work. He writes that surrogate mothers in developing countries

are paid substantially less for their services than, for example, women in the USA... Moral outrage may fuel the argument that Indian women should not be paid less for providing the same 'service' and delivering the same 'product'. The logic of this argument, however, would render exploitative every practice in a developing country for which less remuneration is received than in a developed country and require prohibition. This is neither practical nor accurate.⁹⁷

Compared to local rates of pay, surrogacy actually provides women with financial support. Tobin is concerned with the informed consent argument: "evidence points to serious deficiencies in the process leading to a surrogacy arrangement and suggests that surrogate mothers may not be fully

⁹⁶ Peña-Guzmán and Crozier, "Surrogacy as Medical Tourism," 49

⁹⁷ Tobin, "To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?," 345

informed of their rights or obligations under these contracts.”⁹⁸ He cites barriers in literacy, lack of interpreters, insignificant documentation (consent given with a simple thumbprint).⁹⁹

Tobin knows that liberal feminists will propose regulating in a way that eliminates questions of exploitation, but he believes that developing countries are just not capable of enforcing the necessary regulatory framework and makes a comparison to the shortcomings of intercountry adoption (similar to Carney).

The reality is that the measures required to ensure that a woman provides her fully-informed and free consent are substantial. Significant resources must be allocated to ensure these measures are effective. States may not possess these resources and/or there may be a disincentive to adopt them because they would increase the cost of a commercial surrogacy and thereby reduce the comparative price advantage currently enjoyed in developing States. The reality is that the incentives for corruption, or at least something less than best practice, are significant.¹⁰⁰

The exploitation perspective reveals the most important regulatory shortcomings. It highlights the places in which women are taken advantage of, whether it is because they do not have the same cultural understanding of contractual obligation, they did not grasp the extent of the contract they signed, or they were not aware they were signing a contract in the first place. Tobin makes a strong point by saying that informing consent is not a cheap process, but other research has shown that adopting surrogacy adds enough economic value that it is in the best interest of the state to keep the practice safe and sustainable. To contextualize the purely monetary value of surrogacy: in 2015 “the global industry of commercial surrogacy... (was) estimated to be worth

⁹⁸ Tobin, “To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?,” 345

⁹⁹ Tobin, “To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?,” 345

¹⁰⁰ Tobin, “To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?,” 346

approximately US\$6 billion annually” and is expected to grow at 6.3% a year.¹⁰¹¹⁰² In India the practice adds \$450 million annually to the country’s economy.¹⁰³

The final perspective accounts for the concerns presented thus far but will argue that under appropriate regulation the surrogacy market can be simultaneously safe and beneficial for women. Those benefits can be from the financial compensation a surrogate mother receives from engaging in a contract; the fact that surrogacy is one of the safest forms of employment in developing countries; the belief that God will provide a favor to women who use their bodies to help other women; or the satisfaction that many surrogate mothers derive from helping women that could otherwise not have a child.¹⁰⁴ The Liberal Argument does not claim that surrogacy does not have shortcomings, but rather argues for the minimization of said shortcomings through smart regulation.

Perspective 5 “The Liberal Argument”: *Although commercial surrogacy poses potential threats of exploitation and womb commercialization, under appropriate regulations the practice can actually benefit women by providing access to well-compensated labor in safe environments.*

The “liberal argument” stems from the liberal feminist perspective and claim that it is undemocratic to limit women from engaging in certain employment practices and it is a human rights violation to prevent women from using their bodies freely. It is important to understand that this perspective does not call for open surrogacy markets. Liberal feminists are aware that exploitative practices will arise as a result of the power differentials and financial motives, but they also believe that the market will exist whether it is legal or not since the technology has been invented. They believe that if the practice is pushed underground it will become more

¹⁰¹ Deonandan, “Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy”

¹⁰² Sensible Surrogacy, “The Unavoidable Growth of the Surrogacy Market”

¹⁰³ Smerdon, “Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India,” 24

¹⁰⁴ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law”

dangerous and exploitative, therefore regulations should exist so that women are protected and compensated through labor laws, healthcare provision, and psychological counseling.

Nicole Bromfield and Karen Rotabi argue that, under the appropriate circumstances to encourage consent and transparency, women should have the ability to make choices over their bodies. They reduce surrogacy down to a simple form of labor and explain that it is a violation of democratic freedom to restrict work opportunities. Under liberal feminism, removing the privilege of engaging in any type of work undermines women's autonomy and equality as citizens.¹⁰⁵ Indian surrogates

were willing to take on stigmatized work because the income was better than their other options for employment which (were) low wage and often dangerous. Such a cost-benefit approach to decision making is consistent with the social exchange theory in which a woman may weight her options -- working in a factory for very long hours and low wages or other more stigmatized but higher-paying work including dancing and bar-girl employment or sex work.¹⁰⁶

“It is difficult to argue against a woman's right to choose her work and to be compensated fairly for that work. In some low-resource countries, surrogacy may be one of the better occupations available to a poor woman in terms of risk and reward.”¹⁰⁷

Bromfield and Rotabi support the surrogacy market, but not without careful regulation. They write that once a technology is introduced to the public (whether it be the technology for abortions, surrogacy, birth control, cancer treatment, anything else), people will do anything to get it, even if it pushes the market into a dangerous black-market.¹⁰⁸ “At this point in history, it is more pragmatic to meaningfully regulate global surrogacy” than to ban it.¹⁰⁹ It is better for governments to invest in safe regulation than to ban it, knowing the market will continue to exist

¹⁰⁵ Markens, “Surrogate Motherhood and the Politics of Reproduction,” 17

¹⁰⁶ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 126

¹⁰⁷ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 131

¹⁰⁸ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 131

¹⁰⁹ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 131

and add economic value, but under more harmful conditions (similar to abortion in the 1970s -- when banned, women went to back alley doctors and suffered from botched procedures).

Martha Nussbaum extends this argument by saying that there is prejudice against women who use their bodies for money: “it is widely believed... that taking money or entering into contracts in connection with the use of one’s sexual and/or reproductive capacities is genuinely bad. Feminist arguments about prostitution, surrogate motherhood, and even marriage contracts standardly portray financial transactions in the area of female sexuality as demeaning to women.”¹¹⁰ Nussbaum believes that women should have access to all types of labor, but there is something about the combination of transaction and sexual activity that is perceived as morally wrong. Nussbaum supports the notion of appropriate, protectionary labor regulation, and not a ban over the intimate labor market. She says that “the most urgent issue raised by prostitution is that of employment opportunities for working women and their control over the conditions of their employment. The legalization of prostitution...is likely to make things a little better for women who have too few options to begin with.”¹¹¹ Nussbaum believes that compensation must be fair and that states must uphold labor regulations so that if women believe surrogacy is the right form of employment for them, they are compensated appropriately.

Casey Humbyrd argues “that the only valid objection to international surrogacy is that surrogate mothers may be exploited by being given too little compensation. International surrogacy is ethical provided it is practiced following the principles of Fair Trade.”¹¹² She is concerned with “Fair Trade,” which is the term she uses for a type of surrogacy that is transparent, ethical, and where “the benefits of surrogacy transactions are justly shared between

¹¹⁰ Nussbaum, “Sex and Social Justice,” 277

¹¹¹ Nussbaum, “Sex and Social Justice,” 278

¹¹² Humbyrd, “Fair Trade International Surrogacy,” 112

the participating parties.”¹¹³ She pushes back against my first, second, and third perspective as she believes the only way surrogacy could violate women is if they were not paid enough, a concern that can easily be controlled by engaging in Fair Trade surrogacy. She disproves the Welfare Argument by saying that compared to other workplaces, surrogacy does not provide any more significant physical threats: “the risks of work are even greater for women in developing countries. In India, the rate of occupational accidents is nearly three times as high the rates of accidents in established market economies.”¹¹⁴ Laura Purdy agrees, saying “Poor women now face substantial risks in the workplace. Even a superficial survey of the hazards in occupations available to poor women would give pause to those who would prohibit surrogacy on grounds of risk.”¹¹⁵

The wide range of arguments in the surrogacy debate has been reduced to five perspectives, but it is important to understand the underlying theories that mold the perspectives. Many of them are shaped by societal expectations for women and their role in motherhood and their relationship to sexuality. These beliefs represent some of the strongest determinants of legislative outcomes. The following section show how the five perspectives fit together and highlight the varying biases that influence the adoption of regulations.

Common Threads

Thread 1 “Biological meaning of motherhood”: *There is something inherently special about biological motherhood. The bond between mother and child and this should be preserved and protected.*

The “Conservative Argument” supports certain types of families, and more specifically, certain types of mothers. Supporters of this argue that surrogacy devalues labor and makes the

¹¹³ Humbyrd, “Fair Trade International Surrogacy,” 112

¹¹⁴ Humbyrd, “Fair Trade International Surrogacy,” 112

¹¹⁵ Humbyrd, “Fair Trade International Surrogacy,” 112

connection between a womb and child replicable and artificial. The Exploitation and Welfare Arguments also have their roots in the limited biological conception of motherhood. These perspectives rely on the assumption that a woman feels a connection to a child she gives birth to. Supporters of this thread believe that there is an idealized bond between mother and child, and if it is broken, it can be psychologically damaging for the surrogate mother. Additionally, supporters would say that in the case of international arrangements, a surrogate mother from a less developed country is “unaware of the difficulties in relinquishing a child to another couple,” and would suffer even more from a breaking of this bond.¹¹⁶ “A woman may be induced into a surrogacy arrangement by the opportunity to make some money without realizing the emotional consequences.”¹¹⁷ The supporters of the welfare perspective argue that “to force a woman to give away a child is cruel, inhumane, and unnatural,” but this relies on the belief that women already have an established connection to a child, which is a prejudice born out of biological understandings of motherhood and connection.¹¹⁸

“Biological determinism” claims that “childbearing and mothering are natural, biological consequences of being a woman, (and) making any deviation from these roles (is) unnatural and inappropriate.”¹¹⁹ Peña-Guzmán and Crozier argue that it is the contractibility of surrogacy that is wrong as there is something sacred about pregnancy that should not be written into a contract. This thread is important as it shows that the way people view surrogacy is influenced by deep-set beliefs over the “right” relationship between a mother and her child. Many people have a bias towards this idealized view of motherhood, and they are likely to take issue with a practice that endangers that image.

¹¹⁶ Anleu, “Reinforcing Gender Norms,” 65

¹¹⁷ Anleu, “Reinforcing Gender Norms,” 65

¹¹⁸ Anleu, “Reinforcing Gender Norms,” 65

¹¹⁹ Anleu, “Reinforcing Gender Norms,” 65

Thread 2 “Surrogacy is grounds for neocolonialism”: *International commercial surrogacy is an extension of neocolonial tendencies as it is an opportunity for parties of higher socioeconomic status to use bodies in developing countries for their own gain.*

There are many motivations for people looking outside their own countries for surrogacy services. Maybe they cannot obtain a surrogacy contract because it is illegal in their own country. Maybe their sexuality restricts them from the practice. Most of the time, contracting couples are driven by financial incentives. Commissioning parents see a fraction of the costs associated with a surrogate in a developing country than in the United States, attracting large volumes of people to the international market.¹²⁰ In India, for example, surrogacy may cost US\$50,000, while in the United States it is US\$100,000.¹²¹ Supporters of the commodification and exploitation argument would both say that surrogacy is an extension of neocolonialism, as it allows outside powers to use capitalism and globalization to influence developing countries by taking control of surrogate women’s bodies and lifestyles. “Commercial surrogacy is fundamentally exploitative and is a manifestation of a neo-colonialist phenomenon.”¹²² They see surrogacy as an allegory of “gendered racial debt,” where free market economies are taken a step too far and women’s bodies are vehicles that benefit colonizers.¹²³

On the other hand, it is similarly problematic to assume that women from other countries need saving and protection. Most of the literature cited in this paper is that of Americans, who are imposing their beliefs about what is ethical and what is not onto women’s experiences in developing countries. Although these concerns that surrogacy creates an imbalance that benefits outside powers are legitimate, it is not fair to assume the experience of surrogate mothers and to

¹²⁰ Saravanan, “Addressing Global Inequalities in Surrogacy,” 42

¹²¹ Saravanan, “Addressing Global Inequalities in Surrogacy,” 42

¹²² Vembu, “Rent-a-womb trend is a form of neo-colonialism,” 1

¹²³ Kim, “Debt, the Precarious Grammar of Life and Manjula Padmanabhan’s *Harvest*,” 219

make judgements without accounting for actual voices. Not only does the law represent only a select group of voices, but it artificially creates an image which disempowers surrogate mothers so that they are reliant on protection from the state.

Thread 3 “Competing human rights”: *Surrogate mothers have the human right to not be exploited/not engage in labor that reinforces gender inequality, but women also have the right to do with their body what they choose. There are two competing human rights, one being the right to choose and the other protecting women from being taken advantage of.*

Many have questioned how surrogacy is legal under existing human rights laws. Between the surrogate mother’s right to not be exploited to the child’s rights to identity, protection, and development there are a myriad of human-rights based concerns in the surrogacy debate. Many of these are represented by the radical feminist perspective. Anleu writes there are “race and class differentials between the commissioning couple and the surrogate mother. Such differences have resulted in contracts severely limiting the autonomy of the surrogate and favouring the interests of the commissioning couple.”¹²⁴ This means that the surrogate mother is coerced and manipulated, violating the need for informed consent. Tobin agrees and writes that surrogacy in developing countries cannot be based in mutual understanding because issues in communication, literacy, legal representation, and even cultural understanding of contractual obligation, means that surrogacy cannot fit into a model of informed consent. Others are concerned with the rights of the child and argue that surrogacy “inflicts psychology harm on the children born,” whether that is longstanding issues with abandonment, the inability to have a complete view of their heritage, the complications that arise from expanding family formation to more parties, or the

¹²⁴ Anleu, “Reinforcing Gender Norms,” 65

stress and anxiety caused by the transfer of parentage rights from the surrogate mother to contracting parents.¹²⁵

Many authors argue that the surrogacy market violates the mother's human rights, others are aware of the human rights perspective in the surrogacy debate but take the opposite stance. They believe that a woman's most important right is to choose and that it is the state's job to ensure that her choices to engage in intimate labor do not come at the cost of her own safety. They believe that there is danger in all forms of labor and that surrogacy, relative to other jobs for women in developing countries, can come with better compensation, better hours, and safer conditions. More importantly, it is undemocratic to restrict a person from accessing labor, no matter the type. These liberal feminists would counter Tobin, Anleu, and Oultram by saying that it is problematic to assume women think they are being taken advantage of. They argue against the radical perspective with the belief that women should be free to choose the type of labor they engage in and that the commodification perspective is only legitimate when the woman believes she is being objectified, which is rarely the case in surrogacy contracts.

This thread shows the dichotomy of the human rights lens: some argue that the practice subjects women to problematic conditions which violate human rights and the others believe the most important human right to preserve is the one to choose.

Thread 4 “Monetizing the female body is wrong”: *Many believe that the female body simply should not be used to make money*

Whether it be prostitution, exotic dancing, organ trade, or any other form of intimate labor, there is a narrative that female's bodies should not be used to make money. Supporters of the Commodification Argument would say this is because any monetary compensation would be

¹²⁵ Oultram et al. “Gestational Surrogacy, Ethics, and the Family,” 17

to satisfy male demand and patriarchal values. Under this perspective, women cannot make money without also being subjected to domination and sexism. Surrogacy assigns value to a woman's body and this reinforces a gendered hierarchy. The conservative perspective is that these forms of labor diminishes the value of motherhood and intimacy broadly, as it should be reserved for certain relationships and its meaning is tarnished when made transactional.

Surrogacy therefore threatens the natural form of motherhood. The welfare perspective is that intimate labor is dangerous for women and puts them in a position for psychology and physical harm, for surrogacy it is the higher rates of C-sections, harm from being separated from a child, or maternal death rates. For other forms of intimate labor, it might be exposure to sexually transmitted diseases, unplanned pregnancies, or sexual violence that a woman might encounter during her work.

This thread weaves together every argument in this literature review and is exactly what the liberal perspective is so concerned with. Arguing against surrogacy is sexist as it is wrong to limit women's ability to engage in labor. It is more important to regulate the market so that if women choose to participate it is under safe conditions where informed consent is enforced. I will be using three cases to identify how these five theories interact in countries that have undergone radical regulatory change (one which has legalized the practice and the other which has banned) and to determine the best regulations to keep the practice safe and legal.

Conclusion

I begin with the case of New Jersey, which despite having a history of surrogacy controversy has recently adopted a set of strict regulations to legalize the practice and ensure informed consent, very much through the liberal perspective. I then explain New York, a state who takes a generally liberal stance on social issues but has been unable to reverse their ban on

surrogacy, even under the pressure of public demand. Finally, I reference India, a country whose economy benefitted greatly from international surrogacy but has reversed their lenient regulations and completely banned the international and non-heterosexual couple demographic from their market, as well as forced all surrogacy contracts to be altruistic. I describe and analysis how the first four perspectives influenced the divergences in each case's adoption of surrogacy laws. Finally, using a combination of ethnographic and demographic data, I argue for the importance of the fifth perspective and provide a set of policy recommendations.

Chapter 3: Case Studies

Case 1: New Jersey, United States

New Jersey's Stance on Gestational, Commercial Surrogacy Today

On April 12, 2018, the New Jersey Legislature, under Governor Phil Murphy, passed a revolutionary law to allow *legally binding written gestational surrogacy contracts*. The New Jersey Gestational Carrier Agreement Act came after nearly three decades of tight bans against the practice in the wake of the infamous “Baby M” controversy.^{126 127} The law comes with a new set of protective clauses for the surrogate mother and the parents which were put in place to increase both informed consent and transparency. The list of stipulations is as follows:

- ❖ The gestational surrogate mother (“she”) must be “at least 21 years of age”
- ❖ She must have “given birth to at least one child”
- ❖ She must have “completed a medical evaluation approving her suitability to serve as a gestational carrier”
- ❖ She must have “completed a psychological evaluation approving her suitability to serve as a gestational carrier”
- ❖ She must be represented by an attorney (one who is independent of the parents’ representation)
- ❖ The contracting parents (“they”) must each have “completed a psychological evaluation approving the intended parent’s suitability to serve as a gestational carrier”
- ❖ They must be represented by an attorney¹²⁸

Under the New Jersey Gestational Carrier Agreement Act, gestational surrogacy is not seen as “adoption, surrendering custody, or terminating parental rights.”¹²⁹ It is instead a legal transfer of parental rights before the birth of a child, allowing the agreement to be pre-determined, legal, and enforceable. This monumental shift is unlike the regulatory landscape in

¹²⁶ Booth et al., “Surrogacy Contracts Now Recognized by Law in New Jersey,” 1

¹²⁷ Weinberger Divorce & Family Law Group, “Big Step For New Jersey Gestational Surrogacy Bill,” 1

¹²⁸ State of New Jersey, “S482 [2R] Vitale,” 5

¹²⁹ Weinberger Divorce & Family Law Group, “Big Step For New Jersey Gestational Surrogacy Bill,” 1

many other states. This change was the result of years of debate and disagreement heightened by the intensely emotional history of surrogacy in the state. The next part of my analysis discusses the history of surrogacy in New Jersey and then describes how feminist perspectives influenced the April 2018 legalization of the practice.

History of Surrogacy in New Jersey

The most significant moment in the history of the development of a New Jersey surrogacy practice was the “Baby M” case, which is the most referenced controversy across the global surrogacy market. It drove the tightening of surrogacy laws and caused the practice to switch from traditional contracts to gestational ones. It was one of the first publicized cases of surrogacy, so it ultimately influenced what the majority of people believe the practice should look like today.

Mary Beth Whitehead entered a contract in 1985 to become pregnant with William Stern’s genetic child through artificial insemination and to give the child to Stern and his wife, Elizabeth Stern, in exchange for money.¹³⁰ She was to be paid \$10,000.¹³¹ The contract stated that this payment was made in order for Whitehead to pay for the services required to carry a child, not a fee “for the termination of parental rights or for adoption.”¹³² She verbally agreed “to surrender custody of the child” once it was born.¹³³ Once Whitehead, who was the *genetic* mother of the child, gave birth, she decided she wanted to keep the child, at which point the Stern couple initiated litigation. Whitehead and her husband fled to Florida and remained in hiding for three months.¹³⁴

¹³⁰ Anleu, “Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,” 66

¹³¹ Gittleman, “In the Matter of Baby M: A Setback for Surrogacy Contracts,” 1313

¹³² Anleu, “Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,” 66

¹³³ Gittleman, “In the Matter of Baby M: A Setback for Surrogacy Contracts,” 1313

¹³⁴ Gittleman, “In the Matter of Baby M: A Setback for Surrogacy Contracts,” 1313

Following the birth of the child, with the Stern family's consent, Whitehead temporarily reunited with the child.¹³⁵ There was some concern that Whitehead was mentally unstable and the Sterns believed a short period of time with the child might help her, but when she brought the child with her to Florida and put her house up for sale, the Sterns believed the child was in danger.¹³⁶ The Sterns immediately took the issue to court. New Jersey Superior Court Judge Harvey Sorkow concluded that the contract was valid and enforceable in 1987, saying that Whitehead had no parental rights and gave permanent custody to the Sterns. Sorkow forced Whitehead to surrender custody in protection of the child and immediately started the adoption process to officially transfer Whitehead's parentage to Mrs. Stern. Whitehead appealed Sorkow's decision and in 1988 the New Jersey Supreme Court "ruled that commercial surrogacy contracts are illegal and restored her parental rights," under the reasoning that Stern's "right to procreate did not include a right to custody, which depended on the mother's competing claim and the child's best interest."¹³⁷ The court believed that the surrogacy contract was illegal and invalid because it "(conflicted) with state law and public policy."¹³⁸

At the time, New Jersey required "adoption be accomplished through state-licensed non-profit adoption agencies," and even though private adoptions were technically allowed, they were strongly disfavored by the state.¹³⁹ Receiving payment in exchange for placing a child for adoption was a "high misdemeanor," and terminating parental rights was a three-pronged process including a "voluntary surrender by the parent to an approved agency or to the Division of Youth and Family Services;" an action written to "protect the child;" and a "private placement

¹³⁵ Annas, "At Law: Baby M: Babies (and Justice) for Sale, 13

¹³⁶ Annas, "At Law: Baby M: Babies (and Justice) for Sale, 13

¹³⁷ Anleu, "Reinforcing Gender Norms: Commercial and Altruistic Surrogacy," 68

¹³⁸ Gittleman, "In the Matter of Baby M: A Setback for Surrogacy Contracts," 1314

¹³⁹ Gittleman, "In the Matter of Baby M: A Setback for Surrogacy Contracts," 1321

adoption.”¹⁴⁰ The Court ruled that surrogacy agreement was illegal for four reasons. The first was because the \$10,000 the Sterns had paid Whitehead was typical of private placement adoption, which was illegal at the time. Secondly, the Court believed that the termination of parental rights did not occur within the strict standards laid out above. Third, the contract conflicted with “established public policy of the state” against baby selling and private placement adoption. Finally, the Court felt that Mr. Stern’s argument that his constitutional right to procreate did not grant him custody rights.¹⁴¹ After the Baby M ruling, the Supreme Court prohibited all compensated surrogacy in New Jersey. They specifically emphasized that all agreements were illegal as they violated “state laws and policies against baby-selling.” This is important because

if the court had merely banned the fee to the broker without ruling on the fee arrangement between the mother and the father, or if it had merely declared the contract voidable by the mother or unenforceable by the court, it might actually have encouraged surrogacy by putting potential parties to a surrogate contract on notice that they could use New Jersey courts to terminate parental rights, certify the father’s paternity, and legalize the adoption by the father’s wife.¹⁴²

It took thirty years for New Jersey to move past the Baby M controversy and legalize contracted, compensated gestational surrogacy. Since 1988 the surrogacy debate has not subsided. The 2018 bill “had twice been passed, but vetoed, under the prior administration,” which indicates that the influence of Baby M was long reaching.¹⁴³ At the time, Governor Chris Christie was worried that legalizing surrogacy would have a “profound change” on the way families were formed.¹⁴⁴ He therefore vetoed the identical bill two times over the course of just

¹⁴⁰ Gittleman, “In the Matter of Baby M: A Setback for Surrogacy Contracts,” 1321-1322

¹⁴¹ Gittleman, “In the Matter of Baby M: A Setback for Surrogacy Contracts,” 1322-1337

¹⁴² Gittleman, “In the Matter of Baby M: A Setback for Surrogacy Contracts,” 1340-1341

¹⁴³ Guston, “New Jersey Passes Gestational Carrier Law and Amendments to Update Artificial Insemination Law”

¹⁴⁴ Racioppi and Pugliese, “New Jersey couples looking to start a family can now sign contracts with surrogate mothers”

three years, once in 2012 and once in 2015.¹⁴⁵ Christie stated officially in his 2015 veto letter, prefacing it with the mention that he is both “a Governor and a father” that:

permitting adults to contract with others regarding a child in such a manner (surrogacy) unquestionably raises serious and significant issues. While some will applaud the freedom to explore these new, sometimes necessary, arranged births, others will note the profound change in the traditional beginnings of a family that this bill would enact. I am not satisfied that these questions have been sufficiently studied by the Legislature at this time. Validating contracts for the birth of children is a step that cannot be taken without the most serious inquiry, reflection, and consensus.¹⁴⁶

Finally, in 2017, New Jersey’s insurance coverage mandate laws changed. They widened IVF coverage to extend to “lesbian couples, single women,” and “gay men” who would be “using surrogacy to grow their families in the small employer and state employee insurance market.”¹⁴⁷

It is believed that this change, which opened the assisted reproductive technology up to more couples through increased insurance coverage, as well as the change in the party of New Jersey leadership (Republican Governor Chris Christie was replaced by Democratic Governor Phil Murphy) allowed the bill to pass six years after it was first drafted, without changing a single word.

Between 1988 and 2012, the first time the bill was presented to Christie, the use of assisted reproductive technology grew across the entire country. 242,618 cycles of IVF were initiated in 2016, the year before the insurance expansion catalyzed the signing of the New Jersey Gestational Carrier Agreement Act.¹⁴⁸ Although the history of surrogacy is more nuanced than the brief outline given above, the most important takeaway from the case of Baby M is that one highly publicized case limited accessibility to surrogacy in New Jersey. After Baby M, it

¹⁴⁵ Livio, “Christie again vetoes bill regulating surrogacy parenting pacts in N.J.”

¹⁴⁶ Christie, “State of New Jersey: Senate Bill No. 1559,” 2

¹⁴⁷ Guston, “New Jersey Passes Gestational Carrier Law and Amendments to Update Artificial Insemination Law”

¹⁴⁸ American Society for Reproductive Medicine, “National Summary Report 2016”

was unclear whether or not surrogacy would ever be legal again in New Jersey, as evidenced by the thirty years and multiple vetoes it took to pass the New Jersey Gestational Carrier Agreement Act.

The Baby M case had national impact. Before the trial most people had only ever heard of surrogacy through *The New York Times* and *Los Angeles Times* coverage of Elizabeth Kane, the first surrogate mother in the early 80s. Baby M “can be viewed as instrumental in making surrogate motherhood a permanent fixture in the American vocabulary and consciousness.”¹⁴⁹ Media coverage was divided, with some focusing on the commercial aspects and labeling the practice as baby selling. Another was concerned with the sentimental aspect of surrogates’ altruism helping couples start families. An article titled “Giving Love, or Selling Life,” asked if “bearing a child for someone unable to do so is ‘a gift of love’ as its enthusiasts suggest? Or is it simply baby selling?”¹⁵⁰ A similar article was released two weeks later, questioning “is it proper for women to rent out their wombs in this way? Or should this be viewed as a good way for a childless couple to have a baby?”¹⁵¹ These competing perspectives about baby selling versus allowing people access to childbearing did not go unnoticed.

In 1987 “national public opinion polls indicated the impact of the Baby M case in etching surrogacy indelibly onto national consciousness” as “93 percent of those surveyed” stated they heard of the Baby M case and 79 percent believed they “had read or heard enough about the case to feel they knew what it was about.”¹⁵² In the years following the Baby M trial, media coverage of surrogacy and custody issues spiked, with 270 articles being written in one year.¹⁵³ The influence does not stop at public opinion and media coverage, but directly affected

¹⁴⁹ Markens, “Competing Frames of Surrogacy: Comparing Newspapers’ Coverage of ‘Horror Stories,’” 104

¹⁵⁰ New York Times, “Giving Love or Selling Life?”

¹⁵¹ Los Angeles Time, “The Case of Baby M”

¹⁵² Markens, “The New Problem of Surrogate Motherhood: Legislative Responses,” 20-21

¹⁵³ Markens, “The New Problem of Surrogate Motherhood: Legislative Responses,” 20-21

legislation. “A surge of legislative bills accompanied the unfolding story of the Baby M battle, and the tenor of these bills changed direction from acceptance of to hostility toward the practice.”¹⁵⁴ More specifically, “in 1987, bills were split fifty-fifty on whether to permit or prohibit the practice, but the proportion of bills that sought to prohibit the practice rose to 57 percent in 1988, 66 percent in 1989, and 64 percent in 1990.”

The following section examines how the perspectives one through four specifically influenced public opinion. It is important not to merely acknowledge the extent to which Americans understood the Baby M trial, but how political and media opinions shaped the future course of New Jersey’s surrogacy market. Using the four perspectives will help show what shaped opinions over the place of surrogacy in our understanding of human rights and parentage. Additionally, they will provide possible explanations for the 30-year delay between the outcome of the Baby M trial and the re-legalization of commercial gestational surrogacy in New Jersey.

Applying the Perspectives

Perspective One: “The Conservative Argument”

As mentioned in Chapter Two, the Conservative Argument states that surrogacy threatens the traditional values of parentage, kinship, and motherhood, and thus should be prohibited. The influence of this perspective is evident in 1) the framing of surrogacy during the Baby M case; 2) Governor Christie’s vetoes; 3) statements of conservative family planning groups during the first two attempts at passing the New Jersey Gestational Carrier Agreement Act. Christie wrote that he takes “seriously the need to guard against any societal deprecation of the miracle of life.” This reflects the belief that surrogacy changes and threatens the natural way of parentage by opening up the process and changing it with the presence assisted reproductive technology.¹⁵⁵

¹⁵⁴ Markens, “Competing Frames of Surrogacy: Comparing Newspapers’ Coverage of ‘Horror Stories,’” 107

¹⁵⁵ Livio, “Christie again vetoes bill regulating surrogacy parenting pacts in N.J.”

Media coverage ultimately served as “an endorsement of the views that parental relationships are supposed to be free of commercial transactions,” reinforcing an idea that surrogacy harms our traditional ideas of what parenthood should look like.¹⁵⁶ Surrogacy was seen as a crass form of commerce because it straddled the boundary of good and bad parenting. The media created a narrative that “commercial surrogacy was not acceptable because it was contrary to dominant norms regarding reproduction and maternal-child relations. Surrogate parenting was perceived as a problem that needed to be stopped.”¹⁵⁷

The Conservative Argument is also grounded in the idea that there is something uniquely special about motherhood and the natural process of carrying a child, something that should be reserved for parents and not replicated as a transaction in a marketplace. Markens highlights a common theme present across media portrayals of surrogacy in the wake of Baby M: that the relationship the Sterns contracted Whitehead to have with the child was unnatural and detracted from humanistic (and specifically female) tendencies to nurture one’s child. Surrogacy was dangerous because it threatened that sacred relationship between mother and child. She writes:

Also on trial, however, is the validity and worth of the bond between a mother and child, the most fundamental bond in the perpetuation of the human species... That this is being questioned in this case is truly extraordinary, but it serves to underscore the fact that surrogate motherhood violates the most fundamental instinctual drives of women.¹⁵⁸

It is clear that the Conservative Argument is woven through the history of surrogacy in New Jersey. Whether it is in media portrayals of the Baby M controversy which highlighted the wrongness of replicating familial relationships and reducing motherhood to a transaction or in Governor Christie’s reasoning for vetoing the bill that would legalize commercial surrogacy in

¹⁵⁶ Markens, “Competing Frames of Surrogacy: Comparing Newspapers’ Coverage of ‘Horror Stories,’” 110

¹⁵⁷ Markens, “Competing Frames of Surrogacy: Comparing Newspapers’ Coverage of ‘Horror Stories,’” 113

¹⁵⁸ Markens, “Competing Frames of Surrogacy: Comparing Newspapers’ Coverage of ‘Horror Stories,’” 109

his state in 2012 or 2015, there is an underlying bias against the liberal understanding of what right women have to making decisions over their bodies. The power of the Conservative Argument can be seen clearly in the case of New Jersey, and combined with the other oppositional perspectives, which are described below, to ban the practice for thirty years.

Perspective Two: “The Commodification Argument”

The Commodification Argument is that surrogacy is an extension of male domination and serves to commodify women’s bodies to be used for patriarchal gain (radical feminism). This perspective is evident in the 2012 and 2015 denial of the New Jersey Gestational Carrier Agreement Act. Opponents of the bill were often concerned with the commodifying aspect of the proposed legislature. The New Jersey Family Policy Council, represented by Gregory Quinlan, called the veto in 2012 “excellent news” because “we fought the ‘rent a womb’ bill.”¹⁵⁹ “This is not just about creating a family, it’s the use of another human being’s body -- commercializing someone else’s uterus.”¹⁶⁰ In 2015, Marie Tasty, the executive director for N.J. Right to Life said that the bill “(treats) children as a product and (turns) the miracle of pregnancy and birth into just another commercial transaction” and warned that the “law would create a ‘breeder’ class of women.”¹⁶¹

The Commodification Argument extends further back than 2012-2018 when New Jersey was passing the legalization of surrogacy. The Baby M case was the perfect breeding ground for the enforcement of gender norms and placement of surrogacy within patriarchal control. The media and the judge framed the case in ways that reinforced the commodification of surrogate mothers.¹⁶² Judge Sorkow, the 1987 judge who removed Whitehead’s custody rights, called her a

¹⁵⁹ Livio, “Christie vetoes bill that would have eased tough rules for gestational surrogates”

¹⁶⁰ Livio, “Christie vetoes bill that would have eased tough rules for gestational surrogates”

¹⁶¹ Livio, “Surrogate parenting expansion approved by N.J. Assembly panel”

¹⁶² Anleu, “Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,” 67

“surrogate uterus and not a surrogate mother,” which strips Whitehead of her humanity and reduces her to an object that can be bought, sold, and traded, and is *only* associated with her reproductive capability (“uterus”).¹⁶³ She was deemed an “alternative reproduction vehicle” by Sorkow.¹⁶⁴ The use of the word vehicle is particularly damaging as I believe it literally equates Whitehead to an object, one that served Mr. Stern’s masculine needs to reproduce. She serves a purpose, which is to meet his desires, but she has no other connection to the child besides the transactional responsibility to satisfy his goal of having a child.

Many sources positioned Whitehead as deviant, selfish, and dangerous, which changed the way the public saw the rights of surrogate mothers. In two separate national polls, 74 percent and 75 percent of those surveyed believed that Stern should have received custody of the baby.¹⁶⁵ Whitehead’s “participation in a surrogacy contract was defined as deviation from gender norms specifying women as motivated by altruism, emotion, concern for others, and identifying childbirth as a natural not economic element of women's roles.”¹⁶⁶ “The strong message was that Whitehead did not deserve custody because of her motives -- mercenary, self-seeking, pragmatic -- violated gender norms.”¹⁶⁷ The media painted her to be a wicked woman unfit to be a mother because of her selfish desires contributed to public opinion over custody.

The media did not hold Stern to the same moral standard. He was often situated as the hero. He was a man who simply wanted access to his own child. He gained sympathy while she was judged. “He was conforming to male gender expectations, namely, pragmatism, self-interestedness, goal achievement and individualism,” but when Whitehead displayed similar

¹⁶³ Anleu, “Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,” 67

¹⁶⁴ Anleu, “Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,” 67

¹⁶⁵ Markens, “The New Problem of Surrogate Motherhood: Legislative Responses,” 22

¹⁶⁶ Anleu, “Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,” 67

¹⁶⁷ Anleu, “Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,” 68

characteristics she was ridiculed.¹⁶⁸ There was specific emphasis placed on his need for “genetic kinship and progeny” and a uniquely strong desire to have a child to whom he was genetically related.¹⁶⁹ Stern explained that this was because his family had been murdered in concentration camps during World War II, and because of the horrific childhood experience he had, “he wanted a child biologically related to him so that his family would not die out.”¹⁷⁰ The media thus painted a narrative in which Stern’s personal tragedy made his desire to be a father more legitimate than Whitehead’s to be mother. His story resonated with historical gendered claims (the only way for men to claim biological kinship is through genetic ties) and his tragic background in the Holocaust and a “particular racial-ethnic narrative” evoked public sympathy, as reflected by the public opinion polls in support of his custody, and not Whitehead’s.¹⁷¹

People took note that the media, and Judge Sorkow, was actively positioning Whitehead as a transactional object used to serve a gendered desire to have a genetically related child. The commodification perspective was born out of the framing of Whitehead as a womb for rent.

Baby M is what gave this perspective momentum. The 1987 *New York Times* wrote that

it's terribly sad and terribly frightening to see a state in the business of upholding these contracts. It's sad enough that we've constructed for ourselves a world in which motherhood is up for sale, but it's just terrifying to me that the state will uphold a contract that says that the woman with the stretch marks is not the mother...It is not a triumph for women; it is not in the interests of women, because surrogate parenting is a solution to a rich man's problem, not his wife's.¹⁷²

Jeremy Rifkin, the President of the Foundation on Economic Trends, compared surrogacy to a new eugenics movement and said that Sorkow’s decision to give Stern paternity rights reinforced the commodifying nature of the practice.¹⁷³ He stated that surrogacy allows “you to go to other

¹⁶⁸ Anleu, “Reinforcing Gender Norms: Commercial and Altruistic Surrogacy,” 67

¹⁶⁹ Markens, “Competing Frames of Surrogacy: Comparing Newspapers’ Coverage of ‘Horror Stories,’” 108

¹⁷⁰ Markens, “Competing Frames of Surrogacy: Comparing Newspapers’ Coverage of ‘Horror Stories,’” 109

¹⁷¹ Markens, “Competing Frames of Surrogacy: Comparing Newspapers’ Coverage of ‘Horror Stories,’” 109

¹⁷² Peterson, “Baby M’s Future”

¹⁷³ Peterson, “Baby M’s Future”

wombs, other eggs, other sperms, other embryos in order to eliminate problems with your offspring. By honoring that contract, (Sorkow) basically decided that alternative reproductive technology is contractually legitimate. So in a commercial sense (Sorkow) has legitimized the contractual basis of renting a womb.”¹⁷⁴

The Commodification Argument played a critical role in the way people perceived surrogacy in the wake of the Baby M controversy. It was clear that Judge Sorkow used language that objectified Whitehead and commodified her reproductive capacities. He also portrayed her as unstable and unfit to be a mother, deviating from the traditional standards that we hold women to, which reinforced the perceived patriarchal nature of the practice. His actions worked in tandem with the media, who positioned Stern as a man who had suffered a great deal of personal tragedy and was thus more deserving of a genetically related child, again forcing Whitehead to serve male desires. Baby M was the perfect breeding ground for the emergence of the Conservative Argument, whose power was evidenced in 2012 and 2015 when opponents of the New Jersey gestational surrogacy act referenced the objectifying nature of the practice.

Perspective Three: “The Welfare Argument”

The Welfare Argument is concerned that surrogacy is physically and emotionally damaging to both surrogate mothers and the children born through these contracts. The idea that there is an emotional burden experienced by the mother and child, was evident during the Baby M trial and was part of the basis for Governor Christie’s two vetoes of New Jersey’s gestational surrogacy bill. In 1987 the *New York Times* asked questions about what would happen if there was “a situation where (the surrogate doesn’t) have a healthy baby.”¹⁷⁵ Opponents of surrogacy are often concerned that if a surrogate baby is not born completely healthy, the responsibility to

¹⁷⁴ Peterson, “Baby M’s Future”

¹⁷⁵ Peterson, “Baby M’s Future”

parent will appear blurred and the child will be deserted, clearly a negative for its physical and emotional well-being. The idea, that children born to surrogate mothers are more susceptible to developmental problems caused by instability and lack of appropriate “handling and love,” was woven throughout the Baby M. David Liederman, the Executive director of the Child Welfare League of America, commented in 1987:

obviously, the impact of surrogate parenting on the child is the concern we have. In this case, it's very complicated. I struggled with it myself. In some ways, the judge was trying to act in the best interests of the child in keeping the child bonded to one party in the dispute. I would always look to it in terms of the best interests of the child - what would help the child have **stability**, who is the child support system? The child in this case is so young that it is important to establish some of that; this child needs consistent handling and love.¹⁷⁶

In the 1980s the Welfare Argument also extended to protecting the mental and physical well-being of the surrogate mother. The media certainly portrayed Whitehead as being taken advantage of by surrogacy and being damaged by the harmful process of giving up a child. A story was released in which Elizabeth Kean, the first surrogate mother, describes the constant anguish she feels from giving up her child. It is extremely emotional and uses vivid description of pain and loneliness to send a message that surrogacy harms the women who must bear, and give up, their children.

I was just drained by the decision. I feel as if somebody died. When I heard the news that Mary Beth had lost all visitation rights, I suddenly thought of how my son looked the last time I saw him, in his cradle when he was two days old, and I thought of all the Christmases and all his birthdays without him, and all the grief I've gone through, and I thought, ‘Oh my God, Mary Beth is going to have to go through all that too.’ I was just crushed.¹⁷⁷

Others wrote that a “mother must not be deprived of her baby, to which she is now bonded in the natural way” because of the negative impact it will have on her well-being.¹⁷⁸

¹⁷⁶ Peterson, “Baby M’s Future”

¹⁷⁷ Peterson, “Baby M’s Future”

¹⁷⁸ Markens, “Competing Frames of Surrogacy: Comparing Newspapers’ Coverage of ‘Horror Stories,’” 109

The Welfare Argument often appears as sets of questions in opposition to surrogacy today. People wonder what will happen if the fetus does not meet certain standards and if it changes parentage, or what kind of rights each party has to abortion. Christie's 2014 and 2015 decisions were partially dictated by the complicated nature of pregnancy and fetal health. Certain legal representatives "agreed with (Chris Christie) that the legislation did not answer all of the important questions, such as what happens if a birth defect is diagnosed in utero or if the parents have the right to abort."¹⁷⁹ Although not thoroughly researched, there are questions about the connection between emotional and physical developmental challenges and children born via surrogacy, as well as the mental state of mothers after relinquished children birthed in surrogacy contracts. This perspective clearly still dominates the surrogacy debate and is heightened in international arrangements between countries where there are disparities in development, infrastructure, and access to health care.

Perspective Four: "The Exploitation Argument"

The fourth perspective states that surrogacy is exploitative and takes advantage of women by reinforcing a power hierarchy. This has been applied less frequently to surrogacy in New Jersey than in the international market. It was suggested briefly in 2015 that the proposed gestational surrogacy bill "exploited" carriers.¹⁸⁰ In the case of Baby M, it is possible that Judge Sorkow favored a certain socioeconomic class in his ruling, thus justifying exploitation based on class.¹⁸¹ "One must marvel at the overt contempt Judge Sorkow shows for the lower-middle-class Whiteheads, and the obsequiousness he displays for the upper-middle-class Sterns."¹⁸² Sorkow intentionally said that the Sterns had been "married by a minister friend of

¹⁷⁹ Livio, "Christie vetoes bill that would have eased tough rules for gestational surrogates"

¹⁸⁰ Livio, "Surrogate parenting expansion approved by N.J. Assembly panel"

¹⁸¹ Annas, "At Law: Baby M: Babies (and Justice) for Sale, 13

¹⁸² Annas, "At Law: Baby M: Babies (and Justice) for Sale, 13

the family” while the Whiteheads “were married” and Mr. Stern “contributed to the support of his family by working at various after school jobs” while Whitehead “held a part-time job primarily as a hand in a pizza-deli shop.”¹⁸³ The Sterns had a *home*, one that was “near parks, the library, and (was) a short walk to the shopping area” while the Whitehead’s *house* was “a living room, kitchen, and a back porch.”¹⁸⁴

The Exploitation Argument can be best connected, in the Baby M case, to the evaluation Judge Sorkow made in determining that Whitehead had to surrender her custody rights. The initial surrogacy contract between the Sterns and Whitehead was fraught with power imbalances. By granting William Stern parentage over baby Melissa, he was legitimizing the contract, and own his sexist and classist biases contributed to his decision-making, which served to justify the exploitative nature of the contract. “The average judge would spend more time examining the terms of a door-to-door vacuum cleaner sale than Judge Sorkow spent looking at the totally one-sided contract Mrs. Whitehead signed.”¹⁸⁵ Some of the clauses in the agreement Whitehead and Stern signed were as follows:

the contract, for example, required her to undergo amniocentesis, and in the event that the fetus was ‘genetically or congenitally abnormal’ to abort the fetus ‘upon the demand of William Stern.’ Refusal to abort would terminate Mr. Stern’s obligations under the contract. An abortion at his demand, on the other hand, would result in a \$1,000 payment to Mrs. Whitehead. In the event of miscarriage prior to the fifth month of pregnancy, Mrs. Whitehead would receive *no* compensation; miscarriage or stillbirth thereafter would result in a \$1,000 payment.¹⁸⁶

Sorkow favored Stern in his ruling. Elements of the contract were problematic, ones that a judge would typically call into question, but Sorkow chose to look past the injustices to grant

¹⁸³ Annas, “At Law: Baby M: Babies (and Justice) for Sale,” 14

¹⁸⁴ Annas, “At Law: Baby M: Babies (and Justice) for Sale,” 14

¹⁸⁵ Annas, “At Law: Baby M: Babies (and Justice) for Sale,” 14

¹⁸⁶ Annas, “At Law: Baby M: Babies (and Justice) for Sale,” 14

Stern custody instead of Whitehead. Gender bias may have led to judgments regarding Whitehead's education and socioeconomic background, each of which helped Stern and his wife exploit her in the initial contract, an act which Sorkow then justified by upholding the contract and forcing Whitehead to relinquish the child. "Hire a mother for your child whom a judge is likely to view as unfit to raise it."¹⁸⁷ The Exploitation Argument is generally one applied to international agreements where racism and classism make women susceptible to abuse and manipulation. It can still be seen in the stipulations of Whitehead and Stern's contract as well as Sorkow's classist and sexist decision to label Whitehead by her gender, socioeconomic background, and education.

Understanding Perspective Five in the Legalization of Surrogacy in New Jersey

New Jersey is the perfect example of how public opinion of reproductive rights is shaped by media and politicians. One controversial case of surrogacy changed the way the entire country viewed the practice. From the standpoint of gender norms, Judge Sorkow's depiction of Whitehead as unfit reinforced the idea that women serve male desire to have children. From a welfare perspective, the case formed questions about mental and physical wellbeing that dominate surrogacy discourse even today. Somehow, even in the face of serious controversy, New Jersey was able to move past the Baby M case and legalize gestational, commercial surrogacy under a revolutionary set of criteria.

It is clear that it was the impactful nature of Baby M itself that forced the state to adopt a law that comes with such strict stipulations. Whitehead and Stern's publicized and emotional custody battle shaped New Jersey's understanding of how consent can be informed through legal clauses and clear definition of parentage. This is where the fifth perspective, the "Liberal

¹⁸⁷ Annas, "At Law: Baby M: Babies (and Justice) for Sale," 15

Argument,” is relevant. It acknowledges the potentially harmful nature of the practice but claims that because the technology for the surrogacy market has already been invented, people will continue to engage with the practice regardless of its legality. It is therefore more important to regulate surrogacy than to unsuccessfully try and prevent it. To be clear, in the United States, this “underground” surrogacy practice looks more like people engaging in unenforceable contracts and then disputing parentage than it does smuggling surrogate mothers across borders. In either scenario, surrogacy could be seen as harmful to women and children, but the majority of the danger can be regulated out of the market through laws that carefully create environments for informed consent.

Legalization is supported by the liberal perspective. The Liberal Argument is that a woman’s right to her own body equates to a woman’s right to engage in surrogacy. If she wants to enter into a contract, she should be free to make that choice. It is not the state’s place to tell her that she is being objectified or commodified. Instead, the state should make it so that contracts, which do fall into the jurisdiction of the government (while the choice to use your body in certain ways does not), protect her. Women should form their own opinions about surrogacy. Some women actually see it as empowering. They believe they are giving the gift of life and helping families access children that would otherwise be unable. “A UK study showed that only 1 in 34 women who had surrogacy pregnancies were motivated by financial gain and that most were driven by altruism to help childless couples.”¹⁸⁸ There are two women in the UK known as being the most “prolific” surrogate mothers in the world, birthing 10 and 13 children, respectively and “have one thing in common: both stated that they had never had a problem

¹⁸⁸ Burrell and Edozien, “The Ideal Surrogate: Santa Claus, Easter Bunny, or Tooth Fairy,” 6

handing over any of the babies because they never viewed the babies as belonging to them in the first place.”¹⁸⁹

Online surrogacy support websites have evidenced that surrogacy is a “labor of love” for many women.¹⁹⁰ Surrogate mothers write, “there are a great number [of surrogates] I have spoken to who say it’s not a job and they do it solely because they . . . want to help, money is not an issue.”¹⁹¹ It is well documented that IVF is more dangerous if multiple embryos are transferred, but some surrogate mothers have cited being willing to accept that danger because they are so committed to helping contracting couples become parents. One wrote on a blog that her contracting mother “had a long journey with failed attempts, miscarriage . . . and I really wanted to be ‘the one’ to help her become a mom. I was willing and fully accepting of the possibility of carrying three.”¹⁹²

The opponents of surrogacy who are concerned with the potentially commodifying, exploitative nature of the practice have valid concerns, but it is ultimately the right of a woman to engage with her body, regardless of the people who think she is being commodified. She should form her own conclusions about the relationship between choice and surrogacy without influence of the state. As evidenced above, women may form the perspective that the practice is empowering and allows them to give back to less fortunate couples. Not only is the theory of liberalism important, but it had a direct impact on New Jersey’s 2018 law. This legislature was written to carefully acknowledge the injustices faced by Whitehead in the Baby M case and prevent them from happening again.

¹⁸⁹ Burrell and Edozien, “The Ideal Surrogate: Santa Claus, Easter Bunny, or Tooth Fairy,” 6

¹⁹⁰ Berend, “The Emotion Work of a ‘Labor of Love,’ An Ethnographic Account of Surrogacy Arrangements in the United States,” 62

¹⁹¹ Berend, “The Emotion Work of a ‘Labor of Love,’ An Ethnographic Account of Surrogacy Arrangements in the United States,” 65

¹⁹² Berend, “The Emotion Work of a ‘Labor of Love,’ An Ethnographic Account of Surrogacy Arrangements in the United States,” 66

New Jersey's legalization of commercial, gestational surrogacy was only possible because the clauses of the 2018 law were based on past failures. I believe that New Jersey thoughtfully accounts for these controversies. The regulations in the market acknowledge issues of exploitation, commodification, and welfare. Not only is the law grounded in giving women access to their own bodies, but it simultaneously creates an environment of informed consent. Women can make choices over their bodies without worry that they are being taken advantage of or put in potentially dangerous situations. This section discusses how the law has directly addressed claims of commodification, exploitation, and welfare.

During the Baby M case the public developed claims against surrogacy based in concern over patriarchal objectification and commodification. These concerns were catalyzed by Judge Sorkow's ruling and the media portrayal of Stern as more deserving of a child and Whitehead as disheveled and unable to mother. New Jersey's law prevents against objectification and commodification by requiring all parties to be represented legally (and by different, unrelated lawyers). This ensures that women do not enter into contracts that favor the male parties, like Whitehead did. The contract she originally signed was written so that her body was controlled by Stern. She had to undergo certain medical procedures and could only make certain choices about her body. The contract stated that there were only certain situations that she could terminate the pregnancy and even detailed rules about what she could consume. Enforcing a standard of fair legal representation would filter out contracts that blatantly objectify women, like in the case of Baby M, therefore accounting for the Commodification and Exploitation Arguments but still making space for women to engage freely with their bodies.

The 2018 law also considers the importance of the Welfare Argument. The psychological evaluation that the parents and surrogate mother must undergo establishes stability for the child

and surrogate mother. The rule that the mother must have given birth to a child before also guarantees her mental and physical well-being. She must prove to the state that she has the experience of giving birth to a child and thus understands the emotional and physical difficulties associated with labor and post-partum experience. Additionally, there are rules about the healthcare and services provided to ensure that both mother and child receive proper medical care throughout and after the pregnancy, which supports the parties' wellbeing. The Liberal Argument does not argue that there are not past surrogacies that have threatened the parties' welfare, it instead makes a case for regulations moving forward like New Jersey now has, which outline clearly childcare responsibility and use institutions to assess and support mental and physical well-being.

New Jersey has woven the Liberal Argument seamlessly into their bill governing gestational, commercial surrogacy. The regulations take tangible steps towards creating environments of informed consent: the surrogate mother must have experience in childbirth; all parties must show they are mentally stable enough to endure a stressful process; and there must be lawyers involved. They properly account for the first four perspectives and how they played into the Baby M case but ultimately leave the choice to engage in surrogacy in the hands of the woman, not the state. New Jersey has taken a step towards granting women access to their own bodies in the marketplace but have put in place barriers that make that marketplace safe and protect those women while letting them make their own decisions. New Jersey has accounted for three of the four anti-surrogacy arguments but does not directly address the Conservative Argument. This is because it is an ideological point of view, not a claim about the safety of women. Similar to a case like *Roe v. Wade*, or any debate about reproduction that violates

traditional ideals, the Conservative Argument is about how people view the theory of procreation.

The next part of this analysis focuses on New York, which still has some of the strictest anti-surrogacy laws. I will provide a similar outline of legislation and a history of surrogacy and discuss how the first four perspectives influence the state's current stance on the practice. It will conclude with a discussion of the importance of the fifth perspective and how it could be applied in favor of more lenient rules.

Case 2: New York, United States

New York's Stance on Gestational, Commercial Surrogacy Today

Although New York is deemed “the progressive capital of the nation on so many issues,” it is one of only two states (the other being Michigan) that still bans and criminalizes surrogacy today. Surrogacy contracts are *void* and *unenforceable*, which makes the pre-birth transfer of parentage rights and financial compensation for surrogate services illegal.¹⁹³ New York’s law “governing assisted reproductive technology relies primarily on biology rather than intention to determine parental rights.”¹⁹⁴ This is problematic as it “can result in sperm and egg donors having rights and responsibilities they don't want, while intended parents and their children are forced into legal limbo.”¹⁹⁵ For example, contracting couples/single women who use sperm or egg donors cannot fully establish legal relationship to the child because they are not completely biologically related. If a sperm donor, or egg donor were to change their mind and seek custody the contracting couple could not defend themselves. Additionally, lesbian couples using sperm donors in coordination with surrogacy have to endure cost-intensive and personally-intrusive adoptive processes to ensure parental rights outside of New York.

History of Surrogacy in New York

Most states adopted conservative laws against surrogacy because of the Baby M controversy. New York, under democratic Assemblyman Patrick Halpin sponsored their first surrogacy laws in 1983-84 and 1985-86, before Baby M warped public opinion of the practice.¹⁹⁶ Halpin was motivated by a controversy in Michigan where a child was born via surrogate contract. Halpin was not the only member of the New York legislature who supported tight

¹⁹³ Targeted News Source, “Parents, Surrogates, Elected Officials, Advocates Call on Legislature to Pass Child-Parent Security Act,” 2

¹⁹⁴ Targeted News Source, “Parents, Surrogates, Elected Officials, Advocates Call on Legislature to Pass Child-Parent Security Act,” 2

¹⁹⁵ Targeted News Source, “Parents, Surrogates, Elected Officials, Advocates Call on Legislature to Pass Child-Parent Security Act,” 2

¹⁹⁶ Markens, “The New Problem of Surrogate Motherhood: Legislative Responses,” 34

surrogacy regulations before the influence of Baby M. During the summer of 1986, Judge Raymond Radigan approved an adoption application that had been submitted to transfer the parentage rights from surrogate mother to contracting mother. He stated being “uneasy” about the transactional component of the contract but did not contest the adoption as he maintained that “New York’s laws against baby selling did not specifically outlaw payments to the surrogate mother.”¹⁹⁷ Judge Radigan did not appreciate that he had to make the decision in a legal vacuum, so he asked the rest of the legislature to look into the issue. Senator John Dunne (R) and Senator Mary Goodhue sponsored a bill (S 1429) that regulated the practice but did not ban it.¹⁹⁸ Dunne and Goodhue believed that enforcing contracts was in the best interest of the child. Assemblyman Oliver Koppell (D), who is credited with fighting against anti-surrogacy legislation, also drafted a companion bill (A 4748) to serve the same purpose.¹⁹⁹ Although New York was making progress towards taking the liberal stance of regulation, as opposed to outlawing, the narrative was shifted by the Baby M case.

As senators began discussing how New York should respond to the Radigan’s request for surrogacy legislation, they held public hearings to gauge constituency interest. After the first hearing, the Senate Judiciary Committee issued the “only official endorsement of surrogate parenting ever made by a New York State government agency or task force,” *Surrogate Parenting in New York: A Proposal for Legislative Reform* (not to be confused with the second piece of research published by New York’s government with a similar name). Unfortunately, it was that same time period, almost directly after the endorsement report was released, when the Baby M case broke. The outrage against the practice overshadowed any support for regulation,

¹⁹⁷ New York Department of Health, *Business of Surrogate Parenting*, 10

¹⁹⁸ Markens, “The New Problem of Surrogate Motherhood: Legislative Responses,” 38

¹⁹⁹ Markens, “The New Problem of Surrogate Motherhood: Legislative Responses,” 38

especially given that it was *The New York Times* that was reporting heavily on the issue. People scrutinized the practice and many completely changed their opinion regarding surrogacy. Many believed that it was no longer a way to help more couples form families, but a market for baby selling and commodifying women. The immediate response to Baby M in New York was to fully ban surrogacy, with the majority of bills introduced declaring contracts void and unenforceable as presented by Governor Cuomo's denouncement of commercial surrogacy in 1988.²⁰⁰ The law banning surrogacy was not officially fully adopted until 1992.²⁰¹

In response to changing public opinion after Baby M, Governor Mario Cuomo worked with the New York Task Force on Life to publish the 1988 report *Surrogate Parenting: Analysis and Recommendations for Public Policy*, which stated that

society should discourage the practice of surrogate parenting. This policy goal should be achieved by legislation that declares the contracts void as against public policy and prohibits the payments of fees to surrogates. Legislation should also bar surrogate brokers from operating in New York State.²⁰²

Not only did Cuomo and his task force blatantly denounce surrogacy, he made the recommendation a "Program Bill," which is used to address issues that a governor deems particularly urgent.

New York continued tightening surrogacy regulation, with many bills declaring agreements void and unenforceable (and some seeking criminal sanctions for any third parties that arranged surrogacy contracts.²⁰³ In the early 90s, New York passed its ban on surrogacy, but many interest groups, infertile couples, and senators have continued advocating for potential regulation over approved bans, which has kept the debate over the market alive in New York.

²⁰⁰ Surrogate Parenting: Analysis and Recommendations for Public Policy, 3

²⁰¹ Campanile, "Cuomo proposes law to end ban on surrogate moms"

²⁰² Surrogate Parenting: Analysis and Recommendations for Public Policy, 3

²⁰³ Markens, "The New Problem of Surrogate Motherhood: Legislative Responses," 38

Many state bodies conducted their own research, including the Legislative Commission on Science and Technology and the New York State Department of Health, with the former implying “oppositions to laws that would make surrogacy contracts enforceable” and the latter advocating for laws that “avoid the personal tragedies that have attended several instances of surrogate parenting.”²⁰⁴

It has been nearly thirty years since New York made the practice of commercial, gestational surrogacy illegal. The state is not unique in adopting a ban on the practice, as the influence of Baby M permeated the entire country (with Arizona, Indiana, Louisiana, Michigan, Arkansas, Iowa, Idaho, Montana, Nevada and others still making the practice difficult today), but it is one of only two states (Michigan as the other) that has not wavered on its ban.²⁰⁵ This is surprising given New York’s strong liberal history of social issues, whether it be gay marriage, “climate-change legislation, immigrant rights, (or) universal health care.”²⁰⁶

Although New York’s history is fraught with anti-surrogacy sentiments, there are many advocates of “modernizing” surrogacy law in New York today, including Senator Brad Hoylman and Assemblymember Amy R. Paulin, who is driven to legalize surrogacy by her own fertility issues.²⁰⁷ Hoylman and Paulin are sponsoring the Child-Parent Security Act. The Child-Parent Security Act attempts to change the state’s law

so that intended parents who enlist the help of a third-party to conceive their child would have a secure legal relationship with their child from the moment of birth. It would also legalize gestational surrogacy... provided that the arrangement follows ‘best practices’ in the field that protect the interests of the surrogate, intended parents, and child.²⁰⁸

²⁰⁴ Markens, “The New Problem of Surrogate Motherhood: Legislative Responses,” 44

²⁰⁵ Creative Family Connections

²⁰⁶ McElwee, “Can New York’s Politics Finally Be As Progressive as Its Voters?”

²⁰⁷ Targeted News Source, “Parents, Surrogates, Elected Officials, Advocates Call on Legislature to Pass Child-Parent Security Act,” 2

²⁰⁸ Targeted News Source, “Parents, Surrogates, Elected Officials, Advocates Call on Legislature to Pass Child-Parent Security Act,” 2

Said protective clauses would be similar to those in New Jersey, including protecting “the right of the surrogate to make decisions about her health and the health of the fetus, and ensuring they obtain their own legal representation, among other commonsense protections.”²⁰⁹ This movement to legalize gestational surrogacy in New York protecting children, parents, and surrogate mothers is supported by groups like the Protecting Modern Families Coalition, RESOLVE: The National Infertility Association, and parents who have had to travel outside of New York to secure surrogacy services.

Hoyleman stated that “becoming a parent should be a joyous occasion, not an illegal act. We need to legalize and regulate compensated surrogacy contracts sensibly. Passing the Child-Parent Security Act will help us do this. I'm grateful to Assemblymember Paulin and our dedicated coalition of advocates for their support.”²¹⁰ Many of the supporters are primarily concerned with protecting people’s right to have children, stating that families should always have easier access to non-traditional childbearing and that New York should help people “fulfill their dreams of having a family.”²¹¹

Governor Cuomo’s discussion of surrogacy in *Surrogate Parenting: Analysis and Recommendations for Public Policy* was very important to the trajectory of surrogacy law in New York and serves as one of the most influential pieces of official government material in shaping the surrogacy debate. It contains framing that fits all four of the perspectives presented in this thesis and will be the basis of their application to explain New York’s conservative stance on surrogacy.

Applying the Perspectives

²⁰⁹ Targeted News Source, “Parents, Surrogates, Elected Officials, Advocates Call on Legislature to Pass Child-Parent Security Act,” 2

²¹⁰ Targeted News Source, “Parents, Surrogates, Elected Officials, Advocates Call on Legislature to Pass Child-Parent Security Act,” 2

²¹¹ Targeted News Source, “Parents, Surrogates, Elected Officials, Advocates Call on Legislature to Pass Child-Parent Security Act,” 2

Perspective One: “The Conservative Argument”

The 1988 New York Task Force on Life published a report that strongly reprimands the practice of surrogacy. *Surrogate Parenting: Analysis and Recommendations for Public Policy* was, at the beginning of the twenty-first century, the “only standing government commission in the United States with a mandate to study emerging biomedical issues in order to recommend public policy solutions” and it was so influential that New York adopted seven of its recommendations.²¹² The recommendations were taken seriously for a few reasons. First, “because the task force membership was diverse, including religious leaders, feminist lawyers, philosophers, medical practitioners, and patient advocates, their findings were likely viewed as unbiased and therefore valid.”²¹³ Secondly, “the task force existed prior to its charge to study surrogacy, its members could not be seen as having been selected specifically because of their known views on the issue.”²¹⁴ People even commented that “the task force has developed a reputation, so it’s trusted. It doesn’t have any agendas, it’s nonpartisan. It’s respected nationally and internationally, so . . . its reputation has enhanced its authority.”²¹⁵ The Task Force’s findings produced a few other reports, each of which was accepted without question and continued to contribute to a public opinion that surrogacy was wrong. It is important to understand how influential the Task Force’s argument was, as it is the basis for the following analysis.

The Task Force’s argument against surrogacy has strong roots in all of the first four perspectives. Many against surrogacy will argue that it threatens traditional forms of parentage, but they understand that people also have a right to bear children and there is ethical legitimacy

²¹² Markens, “Surrogate Motherhood and the Politics of Reproduction: Divergent Legislative Responses,” 145

²¹³ Markens, “Surrogate Motherhood and the Politics of Reproduction: Divergent Legislative Responses,” 146

²¹⁴ Markens, “Surrogate Motherhood and the Politics of Reproduction: Divergent Legislative Responses,” 146

²¹⁵ Markens, “Surrogate Motherhood and the Politics of Reproduction: Divergent Legislative Responses,” 146

in wanting to help infertile couples. The New York Task Force on Life has little regard for the other side of surrogacy. They write that “the practice has the potential to undermine the dignity of women, children and human reproduction.”²¹⁶ They make the argument that surrogacy diminishes the sacred *dignity* of the purpose of human reproduction. This means that they believe parentage must look a certain way, and anything that deviates from the traditional is wrong. They say specifically that

surrogate parenting alters deep-rooted social and moral assumptions about the relationship between parents and their children. The practice involves unprecedented rules and standards for terminating parental obligations and rights, including the right to a relationship with one's own child. The assumption that "a deal is a deal," relied upon to justify this drastic change in public policy, fails to respect the significance of the relationships and rights at stake.²¹⁷

They believe that “surrogate parenting is not a reproductive technology, but a set of social and legal relationships made possible by artificial insemination and in vitro fertilization.”²¹⁸

The Task Force writes persuasively, attempting to garner public support (for anti-surrogacy sentiment) by making the issue widespread and relevant to our most basic assumptions about private-sphere life. Surrogacy “touches upon values and beliefs about the interests of children, marriage, the family, and human reproduction. *All members of society* may therefore feel some stake in society's response to the practice.”²¹⁹ Surrogacy is threatening because the technological advances “and the new social and commercial arrangements they make possible” take over our ability to create families by what they perceive as being the right way.²²⁰

“Surrogacy fractures motherhood” and “undermines long standing social traditions as well as the basic human urge to care for biological offspring.”²²¹ The Task Force mirrors the conservative

²¹⁶ Surrogate Parenting: Analysis and Recommendations for Public Policy

²¹⁷ Surrogate Parenting: Analysis and Recommendations for Public Policy

²¹⁸ Surrogate Parenting: Analysis and Recommendations for Public Policy

²¹⁹ Surrogate Parenting: Analysis and Recommendations for Public Policy

²²⁰ Surrogate Parenting: Analysis and Recommendations for Public Policy, 4

²²¹ Surrogate Parenting: Analysis and Recommendations for Public Policy, 71 & 81

perspective when talking about the role of women, how important natural motherhood is, and how immoral it is that surrogacy threatens something so sacred. “The practice is also opposed because of its consequences - that it would contribute to the disintegration of the family unit and the social and moral cohesion associated with it.”²²²

The Task Force also cites religious evidence, which is often a part of the Conservative Argument. Roman Catholic Church and Orthodox Jewish scholars both condemn surrogacy because it violates marital relationships because “the practice violates religious and/or moral beliefs about the relationship between husband and wife and between parents and their children.”²²³ It is interesting that in a typically socially liberal state such as New York, that support of a surrogacy ban is so deeply rooted in conservative ideals. It is aggressively highlighted that surrogacy changes the fundamental tenants of motherhood and represents not only the capabilities of technology, but the state of social and moral standards overall.

Perspective Two: “The Commodification Argument”

The Task Force on Life and the Law also uses the Commodification Argument to justify their anti-surrogate stance. They say that “society has a basic interest in shielding gestation and reproduction from the flow of commerce” and that “the practice also has the potential to undermine the dignity of women, children and human reproduction.”²²⁴ Surrogacy is “an arrangement that transforms human reproductive capacity into a commodity is especially problematic at the present time.” They are concerned that commodification both subjects women to the control of men and devalues children by reducing them to something that is transactional.

²²² Surrogate Parenting: Analysis and Recommendations for Public Policy, 80

²²³ Surrogate Parenting: Analysis and Recommendations for Public Policy, 80

²²⁴ Surrogate Parenting: Analysis and Recommendations for Public Policy

Interestingly, in all of the Task Force's definitions of surrogacy they discuss how the practice enables "one woman to produce a child for a man and, if he is married, for his wife," which plays directly to the argument that surrogacy reinforces the patriarchal standard that women serve male need and desire to have a child that they are genetically related to.²²⁵ The Task Forces says that if there is a custody debate because of a surrogate contract, men are favored in parentage disputes, like in the case of Baby M. Women are framed as having fewer rights and males are posed as being more deserving of a child which is evidenced by the outcome of the Baby M trial and the difference in rhetoric used to describe Whitehead and Stern.

The Task Force discusses the issue of baby selling. Although many believe surrogacy is about providing a service and not a product (therefore removing the justification for surrogacy as operating illegal baby markets), couples are concerned not with the surrogate mother but only with the child she produces, therefore making it solely about the end product. "It is disingenuous to characterize the surrogate's function as a 'service, since the intended parents do not desire a pregnancy, but a healthy, genetically-related baby."²²⁶ It is therefore commodifying to the mother as her only job is to provide a dehumanized product, simply part of an exchange of object for financial compensation. Surrogacy defined by the Task Force as is the "right to use another person's body, and to compel, if necessary, the forced surrender of the resulting child."²²⁷

Some of their arguments parallel the radical feminist idea that "surrogate parenting has profound and undesirable implications for the dignity of women, society's vision of reproduction, and the relationship of women to the children they bring into the world."²²⁸ "surrogacy reduces women to their biological function as 'gestators' or 'incubators'... women

²²⁵ Surrogate Parenting: Analysis and Recommendations for Public Policy, 23

²²⁶ Surrogate Parenting: Analysis and Recommendations for Public Policy, 41

²²⁷ Surrogate Parenting: Analysis and Recommendations for Public Policy, 61

²²⁸ Surrogate Parenting: Analysis and Recommendations for Public Policy, 83

are devalued in the process as a means to satisfy the desires of others for genetically related children. By divorcing gestation from personal identity and self, surrogacy reduces women to their reproductive capacity and diminishes their role in childbearing.”²²⁹

These are not unique arguments and appear in many feminist conversations, but it is important to understand the highly publicized nature of the Task Force on Life and the Law’s report. Because it was marked an urgent issue by Cuomo and because it was published in the wake of Baby M, it greatly dictated the opinions the public formed over surrogacy because Cuomo positioned it as an urgent issue at the same time that media coverage on surrogacy was spiking. Therefore, although it was not the first time the radical feminist argument was made that surrogacy commodifies and devalues women, it was the first time many people accepted that position because their governor had placed such emphasis on banning surrogacy because of the threats it posed to family formation, protection of women, and public health (as discussed in the next section).

Perspective Three: “The Welfare Argument”

Surrogate Parenting: Analysis and Recommendation for Public Policy uses the Welfare Argument as part of their case against surrogacy in a few ways. First, they argue that the largest causes of infertility (which drives demand for surrogacy) are actually preventable, and that if women took better care of their bodies they would not need to depend on alternative forms of reproduction. “The primary causes of infertility that can be influenced by preventative measures are: sexually transmitted diseases, smoking, and alcohol and drug abuse. It is estimated that sexually transmitted diseases account for 20% of infertility, making it the most readily preventable cause.”²³⁰ The Task Force on Life thinks that surrogacy makes room for these

²²⁹ *Surrogate Parenting: Analysis and Recommendations for Public Policy*, 84

²³⁰ *Surrogate Parenting: Analysis and Recommendations for Public Policy*, 13

unhealthy practices, and if more money was committed to prevent infertility and protect women, the practice would not be necessary in the first place. It is harmful causes that drive the growth of the market, therefore reinforcing the idea that surrogacy threatens welfare.

Secondly, they raise questions about public health concerns. They ask if “sperm or egg donors (should) be screened only for disease or genetic disorders, or can they be selected on eugenic grounds” and if the screening procedures themselves raise ethical concerns about public health.²³¹ They say that “insemination can transmit infections as well as fatal illnesses,” and that “IVF poses the risks associated with general anesthesia, as well as the increased risk of ectopic pregnancy, multiple births, prematurity, still birth, newborn death and the necessity for cesarean section.” In 1992, a woman sued a lawyer that arranged a surrogacy contract for negligence: the woman charged that the lawyer should not have allowed her to be artificially inseminated with semen that may have been infected with cytomegalovirus, a virus that causes birth defects.²³² Different from physical danger, the Task Force is concerned with the psychological damage surrogacy could have on couples. They note that “the procedures are extremely stressful for both husband and wife; it takes three to five separate attempts before successful implantation occurs. Many couples never conceive.”²³³ This is now outdated as IVF is common.

Additionally, the Task Force raises questions similar to Governor Christie in New Jersey. They wonder how transaction affects a child’s wellbeing and psychological development. “When surrogate parenting involves the payment of fees and a contractual obligation to relinquish the child at birth, it places children at risk and is not in their best interests.”²³⁴ They ask how it deviates from “the promotion of a child’s best interest” and what impact it has on “the practice

²³¹ Surrogate Parenting: Analysis and Recommendations for Public Policy, 2

²³² Lewin, “Surrogate Mother Able to Sue for Negligence”

²³³ Surrogate Parenting: Analysis and Recommendations for Public Policy, 22

²³⁴ Surrogate Parenting: Analysis and Recommendations for Public Policy

on family life and relationships.”²³⁵ They make the argument that separating children from their parents at birth is bad for their development and deviates from what they believe to be that child’s best interests. Even once the child has been transferred from surrogate mother to contracting parents, the fact that the child was a product of surrogacy puts stress on the family relationships, again damaging the family. “The state’s paramount obligation to protect the interests of children overrides any private agreement involving parental rights and child custody.”²³⁶ Because children are unable to self-advocate, they are more vulnerable. It is therefore their rights that must be considered before any other parties.

Finally, the Task Force argues that surrogacy damages other children’s welfare by lowering rates of adoption. “The dearth of children is actually a shortage of healthy, pre-school infants of the same race as the couple seeking adoption,” meaning that white couples just want to adopt children of the same race.²³⁷ Surrogacy is positioned as directly harmful to children that are already born, ones whose value is diminished by the prospect of having a child who is genetically related to the parents (or at least the same race and born in a controlled environment in a selected womb).

The welfare of the surrogate mother is a concern. Surrogacy presents “several medical risks to the surrogate, including the risks involved in artificial insemination, in vitro fertilization, pregnancy and delivery” and there are “risks associated with pregnancy, including pregnancy-related illness, impairment and possibly death.”²³⁸ The report argues that “the surrogate may face psychological harm related to relinquishing the infant at birth” and that there is “psychological trauma inherent in the decision to relinquish a child for adoption,” citing studies

²³⁵ Surrogate Parenting: Analysis and Recommendations for Public Policy

²³⁶ Surrogate Parenting: Analysis and Recommendations for Public Policy, 44

²³⁷ Surrogate Parenting: Analysis and Recommendations for Public Policy, 14

²³⁸ Surrogate Parenting: Analysis and Recommendations for Public Policy, 24

that have “found that women who relinquish their children for adoption are exposed to problems such as guilt, depression, marital problems and sexual dysfunction.”²³⁹

New York’s ban on surrogacy is largely driven by welfare concerns, both for children and surrogate mothers as well as the public at large. Lawmakers are concerned that they cannot govern all possible outcomes in surrogacy arrangements, especially contracts that lead to the birth of children with disabilities or birth defects. They also think that the discussion on how transferring parentage impacts childhood development make the practice questionable and not something that regulation can mitigate.

Perspective Four: “The Exploitation Argument”

Both the Task Force on Life and the Law and various media outlets briefly discussed concern that surrogacy could be exploitative to women. The Task Force was concerned with “application of the informed consent doctrine.”²⁴⁰ In *The New York Times*, it was written that surrogacy “is tantamount to exploitation of women and children. They question whether a woman can give birth to a child and not suffer at all when relinquishing custody.”²⁴¹ Another article makes a similar claim, stating that

“We regard surrogacy as exploitation of women and their reproductive capacities. In our view, the bonding process between a mother and her child starts earlier than at the moment of giving birth. It is an ongoing process during pregnancy itself, in which an intense relationship is being built between a woman and her child-to-be. These bonds are essential for creating the grounds for a successful parenthood, and in our view, they protect both the mother and the child.”²⁴²

Although scholars have described “surrogate mothers as most likely to be poor, single, ethnic minorities,” surrogates are actually “generally white, often married, and usually

²³⁹ Surrogate Parenting: Analysis and Recommendations for Public Policy, 24

²⁴⁰ Surrogate Parenting: Analysis and Recommendations for Public Policy

²⁴¹ Belkin, “Surrogate Law vs. Last Hope of the Childless: Facing New Restrictions in New York, Couples Vow to Find Loopholes”

²⁴² Lewin, “Coming to the U.S. for Baby, and Womb to Carry it”

financially stable.”²⁴³ Throughout the surrogacy debate some have painted pictures of “a new, virulent, form of racial and class discrimination, in which thousands of poor and minority women will likely be used as a ‘breeder class.’”²⁴⁴ In reality, it is observed that “women of color are greatly underrepresented as surrogate mothers” and that “surrogate mothers are mature, experienced, stable, self-aware, extroverted non-conformists who make the initial decision that surrogacy is something they want to do.”²⁴⁵ Although there are concerns that in New York surrogacy targets a certain demographic, it is the least referenced perspective. This is important as it speaks to the state’s motivation for banning the practice, which is more about patriarchal standards, values of parentage, and the welfare of children and women than about the problems that arise in surrogacy from class and race differences.

Understanding Perspective Five in the Legal Status of Surrogacy in New York

A fundamental aspect of the Liberal Argument is that once a technology or product is invented, people will seek it out, regardless of its legal status. This can be damaging as it forces those markets underground, where regulations cannot protect the people buying and selling those products. A classic example is abortion, where banning it only led to a rise in “back-alley” procedures, diminishing the safety that transparency and close medical regulations provides. Surrogacy is similar. Once illegal, it just means that people turn to less qualified doctors for complicated and precise procedures. Desperate couples will go to great lengths to secure parentage. “Brokers, couples seeking surrogates and potential surrogates here are vowing to find loopholes in the new law, sign their contracts in other states, or, if necessary, go underground to have their babies.”²⁴⁶ One infertile woman specifically said that she would “find a way” around

²⁴³ Feldman, “Baby M Turns 30,” 13

²⁴⁴ Feldman, “Baby M Turns 30,” 13

²⁴⁵ Feldman, “Baby M Turns 30,” 13

²⁴⁶ Belkin, “Surrogate Law vs. Last Hope of the Childless: Facing New Restrictions in New York, Couples Vow to Find Loopholes”

the law. "We want a child," she said. "We want a family."²⁴⁷ This is the perfect grounds for the Liberal Argument. If people are going to seek out the practice whether or not the law allows it, but the law says the practice is dangerous for women, why not make it legal under regulations that keep women safe?

Similar to New Jersey, there are many examples of New York women who cite the benefits of surrogacy. Note that although contracts are void and unenforceable, creating many difficult legal situations and preventing surrogates from being compensated, women can still act as altruistic surrogates. One New York surrogate, Dawna, age 32 said, "if I was doing this for the money I would have given up a long time ago. I just like being pregnant and I like the idea of helping someone else have something so special." Dawna gave birth to three of her own daughters and did not want to raise any more children when she became a surrogate for a New York City couple in 1990.²⁴⁸

There are other reasons for regulation outside of the liberal feminist perspective that women should be the ones making choices over their bodies. The bill that has been introduced recently to reverse the surrogacy ban, (Hoylman and Paulin's Child-Parent Security Act) "would allow families to avoid much of that pain by giving them the opportunity to have a family in New York and not travel around the country, incurring exorbitant costs simply because they want to be parents."²⁴⁹ This is a common reason that people advocate for surrogate markets, because it helps contracting couples, but at the same time, it is obvious that regulated and open markets protect the mothers themselves. If people are willing to "do what it takes" to have a

²⁴⁷ Belkin, "Surrogate Law vs. Last Hope of the Childless: Facing New Restrictions in New York, Couples Vow to Find Loopholes"

²⁴⁸ Belkin, "Surrogate Law vs. Last Hope of the Childless: Facing New Restrictions in New York, Couples Vow to Find Loopholes"

²⁴⁹ Targeted News Source, "Parents, Surrogates, Elected Officials, Advocates Call on Legislature to Pass Child-Parent Security Act," 2

child with a surrogate, they are likely to bypass the law and work outside of regulated clinics and without lawyers or physical/psychological examinations to create underground surrogacy contracts. This makes the practice dangerous for all parties involved. If parentage is not officially transferred before the birth of the child, it opens the informal agreement up to debate. If the surrogate mother wants to keep the child after the birth, there is no clear procedure for handling that. If the child has a birth defect and the contracting parents no longer want it, there is no set of rules to determine parentage.

Not regulating surrogacy markets does not mean there will be fewer controversies. It actually means that there could be *more* Baby M scenarios in which careful legal representation and evaluation of all parties was absent from a contract and all parties were damaged. Because of globalization and the rise of technology, it does not matter if New York, or any other state, takes a stance against surrogacy. People will still find a way to engage with surrogates. “Many surrogates and intended parents find each other on the Internet and make their arrangements independently, sometimes without a lawyer or a formal contract.”²⁵⁰ This creates “a marketplace where vulnerable clients yearning for a baby can be preyed upon by the unscrupulous or incompetent.”²⁵¹ The United States is the largest destination for surrogacy services: “anyone who can afford it chooses the United States.” Furthermore, people are so driven by their desire to have children that they are “undeterred by local laws.”²⁵²

New York’s decision to keep surrogacy contracts void and unenforceable will not stop people from seeking out the service. Pushing the practice underground only makes it more dangerous, more exploitative, and more commodifying. Enforcing regulations can mitigate these

²⁵⁰ Lewin, “Coming to the U.S. for Baby, and Womb to Carry it”

²⁵¹ Lewin, “Coming to the U.S. for Baby, and Womb to Carry it”

²⁵² Lewin, “Coming to the U.S. for Baby, and Womb to Carry it”

effects and should be done in the protection of women. Placing bans on the practice are merely a surface-level attempt to shield women from the dangers of patriarchy and potential to be taken advantage of. In reality, those issues will exist and will be fueled by underground surrogate agreements, while regulation protects women and allows them to make choices over their bodies.

The New York public is generally concerned with the sexist and patriarchal nature of the surrogacy regulations. Some have made the argument during today's debate that a ban on commercial surrogacy is sexist as men are able to interact with the intimate labor market without regulation, but women are limited. "The law is inconsistent regarding third-party reproduction. While women are barred from using a surrogate uterus, egg and sperm donations are permitted."²⁵³ As a state, New York is ripe with concern over the way their government interacts differently with women's and men's bodies, yet somehow the anti-surrogacy ban has existed for decades.

New York is an important case that shows what happens when regulation does not exist and the influence that government prioritization of one issue in the 1990s has on the trajectory of lawmaking today. It proves that bans are not more effective at protecting women as they force the practice underground instead of eliminating it, therefore highlighting the legitimacy of the Liberal Argument. Surrogacy regulations are not just about the ethics of allowing women control over their own bodies, but they can be successful protectors of women.

²⁵³ Hershlag, "Unfair Laws on Surrogacy"

Case 3: Gujarat, India

India's Stance on Gestational, Commercial Surrogacy Today

As of 2016, commercial, gestational surrogacy in India is illegal for domestic and international heterosexual couples, homosexual couples, and single parents. Furthermore, altruistic, gestational surrogacy is only available to heterosexual Indian couples. The purchase and sale of genetic material, including embryos and gametes, is illegal, although the government can make exceptions for “needy Indian couples.”²⁵⁴ The Indian government has stated that they are making a sustained and ongoing attempt to regulate the practice, both on a national level with the National Surrogacy Board and on a micro-level with State Surrogacy Boards and the establishment of “appropriate authorities in the states and union territories.”²⁵⁵ They are concerned primarily with the welfare of the surrogate mother and her access to healthcare as well as the rise of an underground commercial, compensated practice.

History of Surrogacy in India

India has a much different surrogacy market than the United States. It is highly unregulated and has very low cost of surrogacy services, faster matching times between couples and surrogate mothers, a great availability of women interested in being surrogates, and relatively modern medical infrastructure, meaning that surrogacy transactions are frequent but not well documented.²⁵⁶ Although many of the numbers presented in this section are estimates, the history of India's surrogacy market is important to our understanding of international, commercial surrogacy, as before its regulation tightening, it was the most popular choice for

²⁵⁴ Ians, “Cabinet Approves Amendments to Surrogacy”

²⁵⁵ Ians, “Cabinet Approves Amendments to Surrogacy”

²⁵⁶ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 126

global surrogacy and is an example consistently referred to in discussions of exploitation, coercion, and commodification.²⁵⁷

Although the technology for surrogacy first appeared in the United States in the 1980s, it was not until 2002 that commercial surrogacy was legalized in India, as a part of the government's attempt to promote medical tourism (is now predicted to earn the country billions annually).²⁵⁸ In 2012, before India started regulating the practice, it was estimated that 25,000 children had been born to surrogates and 50% of their contracting couples were from Western countries.²⁵⁹ The regulatory body in 2002 was the Indian Council of Medical Research, but they provided only brief guidelines and "the combination of profit-driven clinics and financially desperate surrogates has led to serious concerns about the ethics of surrogacy in India, especially the treatment of surrogate mothers."²⁶⁰

In 2003, Dr. Nayna H. Patel popularized the practice in Gujarat by opening her globally recognized clinic: the Akanksha Infertility Clinic. Although a general infertility clinic at first, it began focusing on commercial surrogacy in 2004 after "a Gujarati woman gave birth to her own British daughter's twins at Akanksha in January."²⁶¹ Dr. Patel was charismatic and through platforms like the Oprah Winfrey Show and Western news venues, her business grew and drew international attention. She said that Akanksha's goal was "to give a helping hand with modern techniques to many infertile couples." She is credited with the expansion of India as a surrogate destination. Her legitimacy combined with relatively unregulated market to attract customers from across the globe. Dr. Patel framed commercial surrogacy as beneficial to every party involved, or a "win-win" situation. According to Patel,

²⁵⁷ Bromfield and Rotabi, "Global Surrogacy, Exploitation, Human Rights and International Private Law," 126

²⁵⁸ Shetty, "India's unregulated surrogacy industry," 1633

²⁵⁹ Shetty, "India's unregulated surrogacy industry," 1633

²⁶⁰ Shetty, "India's unregulated surrogacy industry," 1633

²⁶¹ Points, "Commercial Surrogacy and Fertility Tourism in India," 3

a woman who becomes a surrogate is paid more money than she could earn in her entire lifetime. She is doing something that she believes is good and makes her proud—bearing a child for a couple desperate to start a family, while at the same time providing for her own family...It is easy for people in India and abroad who have never experienced infertility or poverty to say this is exploitation. But we are providing a service that profoundly changes people's lives for the better.²⁶²

Ten years after her first surrogacy arrangement, Dr. Patel's legacy remained. In 2012, Yashodhara Mhatre (fertility consultant at Mumbai's Center for Human Reproduction) estimated that of the 500-600 children born to surrogates globally each year, 100-150 were from India surrogacy, demonstrating India's true share of the market.²⁶³ People note that the growth of the practice in India was powered by a few factors, which include:

its much lower costs, the large number of women willing to engage in surrogacy, top-notch private healthcare, English-speaking providers, a business climate that encourages the outsourcing of Indian labor, world-famous tourist destinations, and the total absence of government regulation.²⁶⁴

For ten years the surrogate market in India grew under loose regulations and strong international demand for a more affordable and accessible practice. Two very distinct narratives developed, each of which contributed to India's eventual adoption of heightened regulation. First, there were many that positioned the practice as a "win-win" scenario or an example of "women helping women" like Oprah, liberal news sources, liberal feminists, and surrogacy clinics and brokers. Others argued that the practice was merely a "womb farm" or "baby factory."²⁶⁵ Questions of coercion, informed consent, and welfare arose, and the media eventually painted an image where India had no control over the surrogate market. The government was accused of not taking care of its women and condoning a dangerous and unethical practice. Simultaneously, the "win-win" advocates were still driving up demand for the

²⁶² Points, "Commercial Surrogacy and Fertility Tourism in India," 4

²⁶³ DasGupta et al., "Globalization and Transnational Surrogacy in India: Outsourcing Life"

²⁶⁴ Points, "Commercial Surrogacy and Fertility Tourism in India," 3

²⁶⁵ DasGupta et al., "Globalization and Transnational Surrogacy in India: Outsourcing Life"

practice. This combination -- where many were concerned with the safety and ethics of the practice in India while more and more people were coming across the Indian border for medical tourism -- put pressure on the government to address its regulatory shortcomings.

In 2005 the Indian Council of Medical Research started drafting the Assisted Reproductive Technology (or “ART”) bill.²⁶⁶ There were subsequent drafts released in 2008 and 2010 before the eventual 2012 adoption. The ART bill was problematic from an international human rights perspective. It protected the commissioning couple, but not the surrogate mother. There was no responsibility placed on any party to take care of the surrogate mother. Furthermore, it made clear the fact that “women engaged in commercial surrogacy (would) have no rights over the child they (were) contracted to bear.”²⁶⁷ Unlike bills in the United States, like in the cases of New Jersey and New York, India did not attempt to outright ban the practice, they just wanted to restrict and control it. The government said that they had not adequately considered the complexities of reproductive technologies when they legalized it in the early 2000s. Legislation proposals attempted to “regulate the clinics and doctors engaged in reproductive technologies and their relationships with prospective mothers,” as opposed to completely banning the practice.²⁶⁸ Many people speculate that they wanted to protect certain parties because of financial incentives, as the surrogacy market was contributing hundreds of million dollars to the Indian economy every year.²⁶⁹

In India’s history there have been far fewer legal disputes as the practice has always been contractually binding and there are only rare documented cases of surrogate mothers fighting for custody.²⁷⁰ In general, women, because of cultural and financial circumstances, rarely want to

²⁶⁶ Majumdar, “Transnational Surrogacy: The ‘Public’ Selection of Selective Discourses,” 24

²⁶⁷ Roy, “Protecting the Rights of Surrogate Mothers in India”

²⁶⁸ Roy, “Protecting the Rights of Surrogate Mothers in India”

²⁶⁹ Roy, “Protecting the Rights of Surrogate Mothers in India”

²⁷⁰ Shetty, “India’s unregulated surrogacy industry,” 1633-1634

keep the child. They either cannot afford to raise another child or do not want to face the social ostracization associated with being a surrogate. The practice is considered taboo in Indian culture, meaning many women keep their pregnancies hidden. This does not mean there are not exceptions. One of the defining moments that pushed the government to finally adopt regulations after years of discussing the ART bill was the “Baby Manji” case in 2008. The Baby Manji case launched a public “need” for regulation, again emphasizing that the way public debate is crafted by the media has an enormous impact on the way governments frame and write legislation.

In 2007 a Japanese couple went to Gujarat, India and entered into a commercial, traditional surrogacy arrangement at Dr. Patel’s clinic.²⁷¹ Ikufumi and Yuki Yamada were married, but Yuki had faced infertility and was unable to produce eggs adequate for childbearing.²⁷² The status of surrogacy in Japan was “ambiguous” and had also not been clearly defined in India, which eventually led to the child being “stateless.”²⁷³ The couple used a donated oocyte, which was fertilized with the husband’s sperm and then transferred to the surrogate’s womb, complicating the biological parentage of the child.²⁷⁴ It was further complicated when the couple divorced in the summer of 2018 one month before Manji was born and Yuki, the contracting mother, refused to accept the child (who she was **not** genetically related to), which led to only Ikufumi’s name (and a blank mother’s name) on the baby’s birth certificate.²⁷⁵ Ikufumi wanted to take his daughter to Japan, but neither country allowed him to establish the parentage and citizenship necessary.²⁷⁶ Specifically, the Japanese embassy in Delhi would not issue a passport and said that she needed an India passport and “no objection”

²⁷¹ Majumdar, “Transnational Surrogacy: The ‘Public’ Selection of Selective Discourses,” 24

²⁷² Parks, “Gestational Surrogacy and the Feminist Perspective,” 25

²⁷³ Majumdar, “Transnational Surrogacy: The ‘Public’ Selection of Selective Discourses,” 24

²⁷⁴ Hibino, “Gestational Surrogacy in Japan,” 178

²⁷⁵ Hibino, “Gestational Surrogacy in Japan,” 178

²⁷⁶ Hibino, “Gestational Surrogacy in Japan,” 178

certificate to leave the country.²⁷⁷ India would not issue Manji a passport because Indian law required passports to be tied to the mother of a child, and Manji's biological mother (the surrogate) refused to take custody of the child, leaving Manji "a citizen of nowhere and a child of no one."²⁷⁸

Ikufumi's visa eventually expired during his fight to bring Manji back to Japan, forcing him to leave India and his daughter. His mother, Emiko Yamada, was issued an Indian visa and eventually got custody of her granddaughter.²⁷⁹ Manji was given a "certificate of identity, which is given to individuals who are stateless or cannot get a passport from their home countries," so her passport was only valid for Japan and did not include her mother's name or nationality, but baby Manji was able to leave India and return to her father in Japan. This controversy mirrored had profound effects on public image of surrogacy in India. "The story of Baby Manji generated intense media coverage and public debate in India. It also obliged clinics like Akanksha to reexamine their purpose and practices in light of evolving beliefs around commercial surrogacy in India."²⁸⁰ Although, as noted above, the push for regulation began in 2005 with the ICMR drafting "National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics" and in 2006 there was push from "leading activists, academics, researchers, healthcare professionals and attorneys working on women's health and human rights," the Baby Manji case exacerbated growing demands for surrogacy legislation and market control.²⁸¹

After the controversy around Baby Manji began, both domestic and international public pressure lead the government to make legislative changes. In 2008, "citing the upswing in surrogacy agreements; the potential for commercial exploitation; and the issues raised in the

²⁷⁷ Parks, "Gestational Surrogacy and the Feminist Perspective," 25

²⁷⁸ Parks, "Gestational Surrogacy and the Feminist Perspective," 25

²⁷⁹ Parks, "Gestational Surrogacy and the Feminist Perspective," 26

²⁸⁰ Points, "Commercial Surrogacy and Fertility Tourism in India," 2

²⁸¹ Points, "Commercial Surrogacy and Fertility Tourism in India," 7

Baby Manji case,” Indian health minister Anbumani Ramadoss encouraged the ICRM to draft a bill with binding regulations.²⁸² These regulations were even endorsed Dr. Patel and Dr. Aniruddha Malpan of Mumbai’s infamous Malpani Infertility Clinic, as they noted that regulation would fight against the rising issue of an “international black market” for surrogacy services, in line with the argument liberal feminists would make.²⁸³ It was years before the drafted regulations were adopted. Although there are far fewer highly publicized cases of surrogacy controversy in India than there are in the United States, the theme of media portrayal of surrogacy (both from promotional parties like Oprah Winfrey and concerned parties in the wake of Baby Manji) influencing public opinion and leading to adoption of regulation is consistent.

Interestingly enough, one of the reasons that legislative change took so long was because surrogacy contributed so much to Indian economy that the Indian media actively tried to change the depictions of surrogacy that arose after the Baby Manji case. They wanted to change exploitation to empowerment, making surrogates look strong and resilient, not desperate and coerced. Although this image of surrogacy sought to reposition the market as attractive and beneficial to women, the Indian government eventually stepped in with legislative change.

In 2012 India fully adopted its first surrogacy regulation. It banned foreigners, either single or gay, from entering into surrogacy contracts and attempted to increase regulation.²⁸⁴ The government made the process for obtaining visas for medical tourism much more difficult, adding rules that couples had to have been married for two years; had to come from countries where surrogacy was legal; and had to provide documentation that their “home countries” would

²⁸² Points, “Commercial Surrogacy and Fertility Tourism in India,” 7

²⁸³ Points, “Commercial Surrogacy and Fertility Tourism in India,” 8

²⁸⁴ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights and International Private Law,” 126

accept the child upon return.²⁸⁵ It is clear that this set of regulations directly parallels the factors that made the Baby Manji agreement so problematic but also was influenced by Indian opinion on family formation as there is strong emphasis on restricting childbearing to only heterosexual couples.

Regulatory change struck again soon after the first wave of legislation, again in response to domestic and international pressure. The Union Cabinet, under Prime Minister Narendra Modi's guidance, approved the Surrogacy (Regulation) Bill in 2016, which further restricted the practice, completely prohibiting international customers from using surrogacy services and placing limitations on the family structures of contracting couples.²⁸⁶ The regulation "prohibits commercial surrogacy and allows altruistic surrogacy to infertile Indian couples," and will provide 16 months of extended insurance coverage for surrogate mothers and attempt to regulate "unethical practices" across the country.²⁸⁷ Although a bit vague, the bill (which was applicable to all of India except the Jammu and Kashmir areas) stated that "while commercial surrogacy will be prohibited, including sale and purchase of human embryo and gametes, ethical surrogacy to the needy infertile couples will be allowed on fulfillment of certain conditions and for specific purposes."²⁸⁸ This change severely shrunk the market by restricting it not only to domestic, altruistic arrangements, but also to heterosexual couples. Note that this set of regulations is very different from any discussed in the United States, where family formation control is not the primary motivator in uptake of surrogacy laws.

India's surrogacy market emerged in the 2000s, decades after the American practice began and shortly after legislative tightening swept the United States in response to the Baby M

²⁸⁵ Hibino, "Gestational Surrogacy in Japan," 179

²⁸⁶ Ians, "Cabinet Approves Amendments to Surrogacy"

²⁸⁷ Ians, "Cabinet Approves Amendments to Surrogacy"

²⁸⁸ Ians, "Cabinet Approves Amendments to Surrogacy"

controversy. The practice grew, despite initial concerns, for a decade as it was accessible, cheap relative to other countries, had very regulations, good brokerage opportunities, many interested surrogates, and good healthcare for those surrogates. A decade later, India faced similar response to controversy that Americans did with Baby M, but this time it was Baby Manji. The Indian government continued to restrict the surrogate market, cutting off the international practice and limiting it to only heterosexual couples.

As this chapter next explores, like in the United States, legislative response is highly motivated by public opinion. Public opinion is heavily influenced by media portrayal of surrogacy, and unlike in the United States, the largest concerns in India are over exploitation (set in racial and socioeconomic differences), although all of the perspectives are relevant. After the Baby Manji case, media coverage of surrogacy increased. “There were at least eleven articles in *Indian Express*, twenty-seven in *The Times of India*, and six in *The Hindu*.”²⁸⁹ The influence of these articles, and others, on the way the India government structured their regulation will be discussed below.

Applying the Perspectives

Perspective One: “The Conservative Argument”

Conservative views on family formation have greatly shaped surrogacy regulation in India. The 2012 and 2016 laws both limit surrogacy to straight couples, implying that the Indian government very intentionally limited childbearing to an idealized model of family, both on the domestic and international level (before the practice was restricted to only India couples). In the wave of public demand for surrogacy regulation, “anxiety was linked to the larger idea of the family, its changing character, and (the idea) that India might be the source of” changes that re-

²⁸⁹ DasGupta et al., “The Rhetoric of the Womb: The Representation of Surrogacy in India’s Popular Mass Media,” 111

shaped access to child-bearing.²⁹⁰ “Exclusion of single women, or indeed gays, from altruistic surrogacy is the bill’s central concern,” emphasizing the conservative motivation in the Indian government’s regulatory choice.²⁹¹

Much of the Conservative Argument against surrogacy is rooted in India’s stance on homosexuality. Until the fall of 2018, homosexuality was a criminal offense with a 160 year-old law banning sex “against the order of nature” which was challenged for 24 years by LGBTQ Indians and the broader gay-rights activist community.²⁹² Homosexuality, specifically “carnal intercourse,” was illegal under section 377 of India penal code, and although it is no longer criminalized, the Indian government still does not recognize gay marriages or partnerships.²⁹³ Additionally, although it is legal to be homosexual, “social exclusion, identity seclusion and isolation from the social mainstream are still the stark realities faced by individuals today” especially given that the law was only recently changed.²⁹⁴ This explains the motivation for adopting two regulations that limit the practice to heterosexual couples. India cannot prevent homosexuality in other countries, but they can limit procreation by these couples by allowing surrogates to only a certain subset of couples, thus still having an influence on the acceptance of the LGBTQ culture. By allowing surrogacy to non-heterosexual couples, the Indian government would be endorsing childbearing and family formation that deviates from their traditional model, thus, they limit the practice. There is evidence of discrimination against gay couples through selective visa acceptance: “the ‘profiling’ of foreign couples/individuals coming to India to be

²⁹⁰ DasGupta, “The Rhetoric of the Womb: The Representation of Surrogacy in India’s Popular Mass Media,” 111

²⁹¹ Rao, “Chimera of Choice”

²⁹² Safi, “Campaigners celebrate as India decriminalizes homosexuality”

²⁹³ Safi, “Campaigners celebrate as India decriminalizes homosexuality”

²⁹⁴ Safi, “Campaigners celebrate as India decriminalizes homosexuality”

parents through surrogacy eventually led to the Ministry of External Affairs rejecting medical visa applications for gay couples.”²⁹⁵

Perspective Two: “The Commodification Argument”

“See Taj Mahal by the moonlight while your embryo grows in a Petri-dish” is a tag line advertised by an Indian reproductive tourism website.²⁹⁶ The Commodification Perspective extends into India and supports criticism that international surrogacy allows couples to seek out “wombs for rent.”²⁹⁷ Large practices like Dr. Patel’s are criticized as “baby farms,” where women are restricted to tiny cots and used merely as objects to produce children before being released back to their families. “The presence of many IVF clinics and high availability of surrogates in Gujarat has ensured that surrogacy has picked up majorly in Gujarat, especially in Anand, which has earned the reputation of a ‘baby farm.’”²⁹⁸ The media has contributed to this belief. One author wrote a graphic story of a surrogate woman who was consistently reminded that her purpose as a surrogate was as a fertile body, but nothing more. “Before she pressed her inked thumb on the contract agreement, they had made Ramilaben Solanki understand that she is a womb. No more, no less. They had told her that the baby would be no part of her flesh and blood. That she was its shell, only a shell.”²⁹⁹

There are stories where women are stripped of their humanity. Andrea, an American contracting mother places a call to Anand, a small town in India, where she exchanges a mere two sentences with the woman she has hired as her surrogate mother. She says “Daksha, you fine?” to which Daksha responds, “Daksha fine,” and that is the extent of their interaction.³⁰⁰ The

²⁹⁵ DasGupta, “The Rhetoric of the Womb: The Representation of Surrogacy in India’s Popular Mass Media,” 114

²⁹⁶ Pande, “Wombs in Labor: Transnational Commercial Surrogacy in India,” 11

²⁹⁷ Winfrey, “Journey to Parenthood”

²⁹⁸ Ajay, “Gujarat, a hub of rent-a-womb industry in India”

²⁹⁹ Pi, “The story of a womb”

³⁰⁰ Ajay, “Gujarat, a hub of rent-a-womb industry in India”

depictions of these arrangements is that foreign couples have no vested interest in the surrogate mothers and are merely concerned with getting a healthy baby. American media sources portray it similarly. “There is a common opinion about India which hurts very badly — that because there is poverty they sacrifice their womb by renting it for their family,” again using the rhetoric of “renting” space in a woman’s body.³⁰¹

Others write that the practice “(treats) the surrogate mother like an object, (uses) her as a factory” as the country was looking to adopt its first set of regulations.³⁰² These first regulatory changes looked to only protect the contracting parents, thus reinforcing the idea that surrogate mothers are merely a means to an end, dehumanized and depersonalized by a market. While some welcome “this attempt to govern the industry, (they still fear) the legislation favors the rights of the commissioning couple over those of the surrogate mother. The bill makes it clear that women engaged in commercial surrogacy will have no rights over the child they have contracted to bear.”³⁰³ By choosing to protect the contracting parents over the surrogate mother with their proposed laws, the government is favoring one party over another, supporting the Commodification Argument by positioning surrogate women as bodies whose purpose is to fulfill the desires of contracting couples, which ought to be protected. “We have all kinds of legal documents to protect the commissioning couple. The surrogate mother stands to lose in the absence of concrete laws to protect her.”³⁰⁴

Because surrogate mothers’ names are not even on the birth certificates, as they sign away any right to the children upon contractual acceptance, they are truly a body occupied for nine months and are then forgotten.³⁰⁵ The narrative of “renting” is objectifying and appears

³⁰¹ Najar, “India Wants to Ban Birth Surrogacy for Foreigners”

³⁰² Roy, “Protecting the Rights of Surrogate Mothers in India”

³⁰³ Roy, “Protecting the Rights of Surrogate Mothers in India”

³⁰⁴ Roy, “Protecting the Rights of Surrogate Mothers”

³⁰⁵ Gentleman, “India Nurtures Business of Surrogate Motherhood”

countless times. “The ease with which relatively rich foreigners are able to “rent” the wombs of poor Indians creates the potential for exploitation.”³⁰⁶ The anonymous aspect of the practice creates a further commodifying effect, where couples choose to keep the surrogate anonymous. A contracting father stated that “he preferred anonymity,” which removes the surrogate mother’s humanity and means she is just the *thing* that delivers his child as it is even more extreme than intentionally not putting a face to the name, as he does not even know her name.³⁰⁷ “When (the contracting father’s) surrogate gives birth later this year, he and his partner will be in the hospital, but not in the ward where she is in labor, and will be handed the baby by a nurse. The surrogate mother does not know that she is working for foreigner.”³⁰⁸

The Commodification Argument has been well-established across all three cases but is heightened in India because of the power dynamics at play. The differences in race, class, socioeconomic status, and education make it so that contracting couples paying for space in a woman’s body, or “renting her womb” as media often writes, make the practice feel colonizing and even more wrong than in New Jersey or New York. Many surrogates are white in America, so there is less concern about the implied power and coercive forces that come with white couples using their genetic material to occupy brown bodies. The Commodification and Exploitation Arguments often merge in India to create even more difficult ethical questions about how surrogacy makes women into things that can be bought and sold, often by more powerful, visiting white couples under circumstances that make informed consent difficult to establish and defend.

Perspective Three: “The Welfare Argument”

³⁰⁶ Gentleman, “India Nurtures Business of Surrogate Motherhood”

³⁰⁷ Gentleman, “India Nurtures Business of Surrogate Motherhood”

³⁰⁸ Gentleman, “India Nurtures Business of Surrogate Motherhood”

The Welfare Argument is very frequently applied to India. People believe that because the country is developing it has poor infrastructure and the practice of surrogacy puts women in the way of more harm than other forms of labor. It is subjecting her and the child to dangerous conditions. Birthing clinics are often portrayed by the media as overcrowded, understaffed, and far below any health code in developed countries. As mentioned earlier, Scott Carney is one of the largest critics of surrogacy in India, a stance he defends with the Welfare Argument. He writes that “surrogates spend their entire pregnancies within guarded residential facilities” and are cornered in “classroom-sized space” “dominated by a maze of iron cots that spills out into the hallway.”³⁰⁹ He tells graphic tales of women dying in childbirth because Indian clinics were not equipped to handle complicated births.³¹⁰ He says that rates of Caesarian sections are higher (which result in a higher maternal death rate than vaginal births) and women are frequently implanted by multiple embryos, which “results in multiple births, which are far riskier for women and often lead to premature delivery and dire health problems in the infants.”³¹¹ These horror stories, along with pictures of women writhing in pain in cramped cots and nurses using outdated ultrasound equipment, create a public perception that women in childbirth in India are likely to die or suffer greatly. A narrative has emerged where surrogate women are placed in danger by contracts, where media rarely scrutinizes other forms of labor that these women are engaged in that is equally as dangerous (factory work, sex work, etc.).

Many others contribute to this narrative, where women are described as living in inhumane conditions. One writes that surrogacy clinics

implanted in her womb the embryo and shifted her to a three-room prenatal confinement home in distant Nadiad, away from her family. ‘There were 17 other women there, all of them pregnancy with someone’s baby, mostly of foreigners,

³⁰⁹ Carney, “Cash on Delivery,” 70

³¹⁰ Carney, “Cash on Delivery,” 71

³¹¹ Carney, “Cash on Delivery,” 73

like me. We were not allowed to go home, told to stay there until we delivered. All 18 of us in those three rooms, there was barely enough space to walk around. It was hard, but we needed the money.”³¹²

These descriptions, and others, raised questions about human rights violations in international surrogacy contracts and put pressure on the Indian government to respond to criticism with regulatory change. Western sources called for regulation in 2011 because although “most clinics provide protection to the woman in many ways, looking after her health, nutrition, daily needs, and some will even offer to take care of her family... currently, the responsibility for taking care of the women is left to individual doctors and clinics” so many women go unnoticed and untaken care of.³¹³

Similar to New York, some have criticized surrogacy in India because it allows infertile couples to have babies, and infertility is a “lifestyle” disease that couples can avoid.³¹⁴ Infertility was depicted as a rising health problem and news reports blamed it on “high levels of stress, changing environments, and largely sedentary lifestyles,” all things that could be “avoided.”³¹⁵ Creating a rhetoric that infertility was a choice, and that surrogacy helped justify the actions of people spreading a public health problem, turned people against the practice as they began to believe that it was helping lazy, unhealthy couples have children. “IVF specialists, gynecologists attribute (infertility) to a combination of environmental factors -- pollution, stress, tight clothes and obesity -- and to increasing instances of couples putting off having children until they are well into their 30s.”³¹⁶ The report referenced above was released in 2011, just a few months before the government released their first regulation on the market.

³¹² Jaisinghani, B. “Maid-To-Order: Mumbai’s Poorest Let Out Womb for Childless Couples”

³¹³ Roy, “Protecting the Rights of Surrogate Mothers in India”

³¹⁴ DasGupta, “The Rhetoric of the Womb: The Representation of Surrogacy in India’s Popular Mass Media,” 120

³¹⁵ DasGupta, “The Rhetoric of the Womb: The Representation of Surrogacy in India’s Popular Mass Media,” 120

³¹⁶ Shoba, “The Baby I Can’t Have,” 9

While the Welfare Argument in developed states, like New York and New Jersey, is focused on the emotional strain experienced by surrogate mothers who have to give a child up, or the developmental issues (possibly) faced by children who are born via surrogate and suffer from exchanges in parentage at a young age, the focus in India is maternal death and health care standards. Because India is a developing country, Western media paints a picture where women are kept in inhumane conditions and left to suffer after giving birth. These sources argue that surrogacy should not be legal because it puts women in positions where they are more likely to be harmed than if they worked in a different profession. The other side of this argument will be explored later, but it is important to note that anti-surrogacy depictions of the practice by media sources was very influential. As noted earlier, in 2016 the Indian government said that they wanted to emphasize regulation for the mother's wellbeing, including sixteen months of extended healthcare coverage post-birth.

Perspective Four: "The Exploitation Argument"

A primary concern with the international aspect of India's surrogacy practice, before it was banned, was that women were being taken advantage of because they were willing to provide the same service as surrogates in America, but at a severely reduced price. In 2012, before regulations were passed which cut India out of the global market, American surrogates were estimated to be paid between \$18,000 - \$25,000USD (the cost of the entire surrogacy is much higher, this is just the fee paid to the surrogate carriers), while Indian women received between only \$3,000 - \$5,000USD.³¹⁷ This gap in compensation is concerning. It implies that couples who travel to obtain the same service for a lower price are hoping to benefit from an impoverished economy and are taking advantage of women who make very little money. It

³¹⁷ Shetty, "India's unregulated surrogacy industry," 1633-1634

additionally implies a power dynamic. The contracting couples “are wealthy relative to the incomes and savings to which persons in the developing world have access. Thus there is no question that commissioning women enjoy a degree of wealth and power – which allows them to seek such reproductive alternatives in the first place – that is denied the international surrogates they hire.”³¹⁸

The *Indian Times* released an article in 2016 before the surrogacy bill was signed titled “Chimera of Choice” with the subtitle “surrogate mothers are caught in a vortex of exploitation which the new bill does not address.”³¹⁹ Different from women in the United States who cite altruistic motivation before financial, “studies indicate that (Indian) women hiring themselves out as surrogates almost invariably do so out of economic necessity; and are exploited by a range of middlemen and women.”³²⁰ The lack of regulation and governmental oversight in the surrogacy market mean that the NGOs set up as “third party administrators (TPAs)” have emerged to aggressively recruit women as commercial surrogates.³²¹

Exploitation occurs because of the unethical brokerage structure of Indian surrogacy, where women are robbed of full compensation. “Surrogates get a fraction of the fees that the doctors and TPAs do. Research reveals the commercial surrogate receives a quarter or less of the fees paid by a commissioning couple.”³²² Research was released before the 2016 bill that made a similar argument, saying that women are unable to truly “choose” in surrogacy because women who have few resources and assets are swayed and coerced by the power that wealthier couples have.³²³

³¹⁸ Parks, “Gestational Surrogacy and the Feminist Perspective,” 28

³¹⁹ Rao, “Chimera of Choice”

³²⁰ Rao, “Chimera of Choice”

³²¹ Rao, “Chimera of Choice”

³²² Rao, “Chimera of Choice”

³²³ Sangari, “To Market, To Market: Gendered Contradictions”

Many media outlets portray surrogates as helpless and desperate women. Surrogates fit the following profile of a young Indian woman named Ramila: “a school dropout who was married off at 19 and became a mother before she turned 22, Ramila had separated from her wayward, unemployed husband soon after... Ramila’s jobless father had told her to do it for her daughter Deepali’s sake since what she brought in as a domestic help was just not enough.”³²⁴ The image that surrogates are desperate for money and support and are coerced into renting their wombs fits the Exploitation Argument. Surrogate mothers are portrayed similarly by others, with one writing the following.

Over a year ago, during the frenzy surrounding the success of *Slumdog Millionaire* at the Oscars, a reed-thin Nafisa was nursing her infant in the slums of Garib Nagar, Bandra. Mother and child were the picture of poverty, skin stretched taut over bones for they were barely able to fill their stomachs on most days... It was then that the homeless single mother was made an offer she could not refuse. As agents of Rotunda, a surrogacy agency in Bandra came scouting for potential mothers to bear children for foreign couples, Nafisa became the first to sign up from her locality.³²⁵

Stories like this position women as being taken advantage of. The descriptions of these women are graphic and emotional. Media sources make the public pity these women and their positions.

Descriptions from Western media sources of surrogate mothers as “from poor homes” and many being “illiterate” conjures an image where these women cannot possibly consent due to language barriers, where they sign contracts without being able to understand the implications.³²⁶ They cannot possibly understand the extent of these exploitative agreements. “Surrogate mothers are from poor backgrounds and are hardly aware of their rights. The ART law is trying to find a balance between the legal and the unethical, but unethical practices still

³²⁴ Pi, “The story of a womb”

³²⁵ Jaisinghani, “Maid-to-Order: Mumbai’s Poorest Let Out Womb for Childless Couples” -- SEE NOTES FOR CITAITON

³²⁶ Roy, “Protecting the Rights of Surrogate Mothers in India”

remain.”³²⁷ Another writes, “In the Mumbai clinic, it is clear that an exchange between rich and poor is under way. On some contracts, the thumbprint of an illiterate surrogate stands out against the clients’ signatures.”³²⁸ It continues, “you cannot ignore the discrepancies between Indian poverty and Western wealth. We try our best not to abuse this power. Part of our choice to come here was the idea that there was an opportunity to help someone in India.”³²⁹ Even if contracting parents state an attempt at not abusing their power, supporters of the Exploitation Argument believe that it is the inherent, unchangeable differences in money, literacy, education, and understanding of contractual obligation that make surrogacy so problematic.

Western and Indian media have both used the Exploitation Argument extensively. Many have positioned women through descriptions, pictures, and stories as products of poverty who are desperate and thus easily coerced. Contracting couples knowingly put women into exploitative situations so that they can have a child. Others have said that they simply do not understand because they are limited in their ability to merely sign a contract, let alone understand it. Finally, there are those who say that differences in race and socioeconomic status create a power dynamic where women are snatched by headhunters and forced into the practice. Many of these articles were written before legislative change happened in 2012 and 2016, signaling a strong connection between the representation of women as exploited and coerced figures and the decisions of the government to limit women from being surrogates.

Understanding Perspective Five in the Legal Status of Surrogacy in India

³²⁷ Roy, “Protecting the Rights of Surrogate Mothers in India”

³²⁸ Gentleman, “India Nurtures the Business of Surrogate Motherhood”

³²⁹ Gentleman, “India Nurtures the Business of Surrogate Motherhood”

As mentioned earlier, there is a long history of the Liberal Argument in understanding surrogacy in India. Oprah Winfrey was one of the first to frame the practice as “win-win.” She wrote, and argued in her very famous TV Special on Dr. Patel’s clinic,

as life-changing as the experience is for new parents, it is equally life-changing for surrogate mothers in India. According to Dr. Patel, each woman receives a payment of approximately \$5,000—which is equivalent to almost 10 years' salary. Lisa says the money has allowed some families to move to nice family homes and to provide a good education for their children.

Although Oprah presents a highly romanticized view of surrogacy, where she does little to acknowledge the inequalities and negative aspects of the practice (which the Liberal Argument does not hide, but instead seeks to minimize via regulation), she does highlight an important perspective of choice and liberation for surrogate women. It is women’s choice to engage in the practice and make decisions over their bodies. Indian doctors have made similar “win-win” arguments. “When the first clinics opened their doors in Gujarat, Akanksha’s founder, Dr. Nayna H. Patel, said in a highly-referenced quote that surrogacy was a win-win situation for all. Many Indian doctors agree, arguing that it is in the interest of clinics to take good care of the women involved in commercial surrogacy.³³⁰ It is clearly in the best interest of Dr. Patel and other infertility specialists to promote a practice that makes them money, but the liberal feminist would respond by saying that it is only the opinion of the surrogate mother whether the practice is a “win” or a “loss” that matters.

This idea, where the media and government choose to listen to and represent certain voices and ignore others is acknowledged.

In all of these deliberations the media identified the primary stakeholders within the arrangement, as they were positioned by policy makers and government machinery. Despite the sustained critique from India feminists against sections of the Bill that ignored the rights of the surrogate mother within the arrangement,

³³⁰ Roy, “Protecting the Rights of Surrogate Mothers”

public debates regarding this did not find their way into news reports. The womb as a person remained a silent by-stander.³³¹

To support or denounce the India surrogate market and make a case for why women should access the practice, one must understand the perspective of the most direct party involved in the market: the women carrying the children.

Amrita Pande, Nicole Bromfield, and Karen Rotabi have each conducted extensive field work in Gujarat, India in order to understand how surrogate women view the practice. Pande's research is what paved the way for Bromfield and Rotabi, who looked to either counter or support the claims she made by doing follow up research to test her findings. Pande, overall, found that the perception she formed of surrogacy through media was disillusioned. "At first glance surrogacy in India may well resemble what philosopher Alison Baily (2011) labels a "feminist dystopian novel," but sustained interactions with the women involved, from the doctor who ran the clinic to the intended mothers and the surrogates themselves, would unravel my assumptions about the nature of surrogacy."³³² Pande immediately makes a claim for the Liberal Argument, saying that we must understand the surrogates themselves.

It cannot be denied that the limited range of a surrogate's alternative economic opportunities and the unequal power relations between the client and surrogate call into question the voluntary nature of this labor. But instead of dismissing the labor market as inherently oppressive and women involved as subjects of oppressive structure, there is a need to recognize, validate, and systematically evaluate the choices that women make in order to participate in that market.³³³

Her ethnographic research method involved interviewing surrogate mothers, contracting parents, and medical professionals in order to understand the various voices that make up the market. Through her interviews, she came to understand decision-making and choice differently

³³¹ DasGupta et al., "The Rhetoric of the Womb: The Representation of Surrogacy in India's Popular Mass Media," 114

³³² Pande, "Wombs in Labor: Transnational Commercial Surrogacy in India," 4

³³³ Pande, "Wombs in Labor: Transnational Commercial Surrogacy in India," 9

than media portrayed. Women told stories of not having any savings, having to live in a “rented house for 10 years” where “the rent, the electricity, and (their) daily expenses” ate away at all the earnings they were bringing in from their work as house cleaners twelve hours a day.³³⁴ These women were making choices to enter surrogacy because *other* aspects of society were oppressive. A surrogate named Yashoda told Pande that surrogacy “(was) the first time that (she was) not giving up all (her) income to (her) mother-in-law. Whatever (she) earned as a maid (she) had to surrender to her and she would decide how much spending money (her) children would get every month.”³³⁵ Surrogacy was the first time she could keep her money and “decide what (she wanted) to do with it.”³³⁶ Yashoda cited that no matter how hard surrogacy was, she thinks “all this will be worth it” because it got her out of her mother in law’s house and gave her financial freedom for the first time in her adult life.³³⁷

Yashoda is not the only subject of Pande’s research. Ramya, another Indian surrogate, refers to the fact that surrogacy is one of the only high-paying forms of labor that uneducated women have access to. She asks, “is there any other occupation left for women in a society as unequal as ours?”³³⁸ Ramya chose to become a surrogate, despite the judgement she faced by her own husband, because she wanted to “keep sending their daughter to a good school and get her married ‘in style.’”³³⁹ Dipali, another woman, left her husband and moved in with her brother because he was abusive and wanted to save herself and her children. “My children are the main reason why I moved away from him. He used to hit me, get angry in front of them. I had to leave... see nowadays a woman can never be sure whether her marriage will last. You can’t kill

³³⁴ Pande, “Wombs in Labor: Transnational Commercial Surrogacy in India,” 44

³³⁵ Pande, “Wombs in Labor: Transnational Commercial Surrogacy in India,” 48

³³⁶ Pande, “Wombs in Labor: Transnational Commercial Surrogacy in India,” 48

³³⁷ Pande, “Wombs in Labor: Transnational Commercial Surrogacy in India,” 48

³³⁸ Pande, “Wombs in Labor: Transnational Commercial Surrogacy in India,” 40

³³⁹ Pande, “Wombs in Labor: Transnational Commercial Surrogacy in India,” 49

yourself if it doesn't nor can you sacrifice your children's future."³⁴⁰ Dipali read about surrogacy in a newspaper and uses the money from the practice to "stay independent" and not be a "burden" to her brother, saying

I want to make my own flat with the money I get out of this surrogacy. I don't want to be dependent on anyone -- neither my parents nor my brothers. I know I should go back to work in the insurance company but I don't think that's the best option for me. My children are getting older and they will need someone to help them with homework. Who will do that if I am at work? That's why I've decided I'll do this again.³⁴¹

There are also interviewees who have clearly fallen into the "exploitative potential of surrogacy arrangements," maybe they were coerced by their husbands or a broker, or maybe they did not even sign the contract themselves.³⁴² Pande is not making the claim that women in India never experience the dangers of surrogacy. One woman, Panna, told Pande "I don't know if the egg is mine or not. I wasn't involved in the paperwork either."³⁴³ Another woman, Hasomati, said "I was so scared. I didn't want to do all this. But my husband agreed, so I had to come with them to the clinic."³⁴⁴ These are women whose husbands and family members "would not give up" the idea of them being surrogates and even forced them into auto-rickshaws, crying, to bring them to surrogacy clinics without any knowledge of how the process worked.³⁴⁵ The liberal perspective acknowledges these shortcomings and makes a case for regulation, so that women like Hasomati and Panna can interact with the practice freely, without the pressure of outside parties speaking on their behalves and making decisions over their bodies.

Pande's research provides a new understanding of surrogacy through the eyes of the women directly involved. She is not the only researcher to have concluded that many surrogates

³⁴⁰ Pande, "Wombs in Labor: Transnational Commercial Surrogacy in India," 43

³⁴¹ Pande, "Wombs in Labor: Transnational Commercial Surrogacy in India," 43

³⁴² Pande, "Wombs in Labor: Transnational Commercial Surrogacy in India," 57

³⁴³ Pande, "Wombs in Labor: Transnational Commercial Surrogacy in India," 52

³⁴⁴ Pande, "Wombs in Labor: Transnational Commercial Surrogacy in India," 53

³⁴⁵ Pande, "Wombs in Labor: Transnational Commercial Surrogacy in India," 53

see the practice as a good source of money that empowers them to have financial freedom and control of their decisions. Nicole Bromfield and Karen Rotabi had a similar experience. “In our own study in Gujarat, India, like Pande we also found that women reported their choice to participate in surrogacy as *work* to be the result of limited employment opportunities in the context of extreme poverty,” meaning that women made the conscious decision to engage in a practice as a form of employment.³⁴⁶ Furthermore, “women have reported being relieved to be in the maternity hostel removed from the ordinary work of housekeeping and other labor that was necessary in their daily routines prior to the surrogacy experience—some saw the hostels as a welcome break from daily obligations.”³⁴⁷

On the topic of financial independence, Rotabi and Bromfield found, like Pande, that surrogacy provides women access to economic empowerment that they had formerly not experienced.

Some reported earning an average of US\$30 a month in their jobs and have earned US\$5,000–\$7,000 in one pregnancy, an exponential growth in income for them, unavailable in any other venture. The resulting ability to participate in a cash economy with the power of lump sum payments was clearly seen by those interviewed as a source of economic empowerment. This new sense of *power* was obvious during interviews. The women were very clear that they did not feel used or exploited. Rather, they saw themselves as exercising their autonomy to engage in a well-paid enterprise.³⁴⁸

The surrogates told stories of being able to start sewing businesses, buying auto rickshaws, opening salons, building houses, or educating their children, all opportunities they had formerly not dreamed of accessing. “I needed to get my daughter married, educate my sons, fix the house. In nine months, forget that. Even if I worked for five years, I wouldn’t have been

³⁴⁶ Bromfield and Rotabi, “Perspectives of Indian Women Who Have Completed a Global Surrogacy Contract,” 5

³⁴⁷ Bromfield and Rotabi, “Perspectives of Indian Women Who Have Completed a Global Surrogacy Contract,” 5

³⁴⁸ Bromfield and Rotabi, “Perspectives of Indian Women Who Have Completed a Global Surrogacy Contract,” 7

able to make this amount of money. And it's a good job. Money is good but then to give happiness to someone is a big thing."³⁴⁹

On the emotional and physical toll that the Welfare Argument claims surrogacy has on women, Rotabi and Bromfield found that although it is difficult for surrogates to give away the child, they have coping mechanisms to help them. "When you have a baby, you feel good. Of course, when you have to give them away you feel sad, but keeping a stone in our hearts, we do give them away. The baby is theirs after all." Rotabi and Bromfield argue that a quote like this shows "coping mechanisms that are similar to those used in cognitive behavioral therapies. It appears that some cognitive restructuring is taking place, in the case of the above surrogate, to avoid further emotions related to the pain of separation."³⁵⁰

Clearly, Pande, Bromfield, and Rotabi have all found that media portrayals of surrogacy are not always accurate. More importantly, it is crucial to include the voices of these women in the debate surrounding regulation. How can choices be made over how Indian women interact with the surrogate market without understanding how they even feel about it? These women are doing cost-benefit analysis in the same way that people do in the developed world while deciding whether to take a new job and move across the country or accept a promotion that will add stress.

Women are fully capable of making their own choices, as shown by the story of a woman who sees the practice as advantageous and empowering. Manju, a mother in the northern India state of Haryana was approached by the representative of an unlicensed surrogacy clinic that was looking for mothers. When she agreed to become a surrogate she was asked why she had agreed. She responded with: "It's good money. Risks? What risks? Any fool can have a baby, it takes a

³⁴⁹ Bromfield and Rotabi, "Perspectives of Indian Women Who Have Completed a Global Surrogacy Contract," 8

³⁵⁰ Bromfield and Rotabi, "Perspectives of Indian Women Who Have Completed a Global Surrogacy Contract," 11

smart woman to get paid for it.”³⁵¹ Manju has taken control of her decision making and sees surrogacy as a beneficial form of employment. It is no one’s job but hers to say whether monetizing her womb is unethical or controversial, or if she is being taken advantage of. The choice is hers.

Clearly these transcripts show that there are many women in India who see the practice as beneficial. This supports the notion that women should have a right to choose what they do with their bodies. It is not the government or media’s job to speak for certain women and represent fabricated stances on surrogacy. It is their job to protect women’s rights to choose and make the surrogate market a safe place. With that in mind, there are many who question India’s ability to enforce the regulations they have proposed, ones that **would** keep women safe. Some question how such a law would be enforced: “In a country crippled by abject poverty,” it asked, “how will the government body guarantee that women will not agree to surrogacy just to be able to eat two square meals a day? Inevitably, people are going to smell the money, and unscrupulous operators will get into the game. I don’t trust the industry to police itself.”³⁵²

Although regulation is difficult and there are questions as to whether or not India, and other developing countries, have the infrastructure to police and uphold these laws, many agree that banning is a more dangerous path than regulating. Indian and Western media sources have called for regulations over bans.

(Surrogacy) is a very good arrangement whereby a couple who is unable to carry their child can have one via surrogacy.... However medical and legal supervision is necessary to ensure that agents do not siphon off compensation intended for surrogates or that the couple is not blackmailed and that there are no medical complications for these women... Even after so many cases of successful surrogacies, the child is never a product.”³⁵³

³⁵¹ Roy, “Protecting the Rights of Surrogate Mothers in India”

³⁵² Gentleman, “India Nurtures Business of Surrogate Motherhood”

³⁵³ Ajay, “Gujarat, a hub of rent-a-womb industry in India”

It continues, with more arguing that banning surrogacy for foreigners would do more harm than good. “Our apprehension and fear is that the whole business will go underground,” said Manasi Mishra, who heads the research division at the New Delhi-based Center for Social Research, an organization that has published studies on surrogacy in India. “The bargaining capacity of the surrogate mother will further go down.”³⁵⁴ This is a defining claim of the Liberal Argument, which is that it is more important to protect through regulation than it is to ban, because once a technology exists and demand for that service has been established, as evidenced by the true size of the Indian surrogacy market, people will do what they have to access the practice. This means that the practice may actually be pushed underground, where even less regulatory oversight exacerbates the potential for abuse of surrogate mothers by brokers, contracting couples, and doctors. Regulations keep the practice safe, monitored, and above ground.

Additionally, the liberal perspective is not only that women should decide what they do with their bodies, but that *everyone* has a right to choice. That extends to sexuality, which means that the Indian government’s decision to restrict surrogacy to certain couples based on sexual orientation is wrong, because it removes the ability to choose. Furthermore, from a legal perspective, if the Indian government has banned the ability to discriminate against gay citizens, they cannot limit surrogacy to heterosexual couples as it is a clear extension of conservative bias against the LGBTQ demographic. Not only is it wrong, from a liberal stance, to limit the ability to choose to start a family, regardless of your sexuality or couple status (married versus unmarried), but it is illegal under India’s own regulations against discrimination. As mentioned earlier, the Indian government indirectly reinforces conservative perspectives on sexuality, but the liberal perspective is that it is immoral to hinder the right to choice. The legal perspective is

³⁵⁴ Najjar, “India Wants to Ban Birth Surrogacy for Foreigners”

that it is a clear form of intolerance against the gay community (and even the group of people that want to have children either as a single mother or father or outside of marriage).

Chapter 3 Conclusion

This chapter has explored three surrogacy markets, each with a different history of regulation and stance on the ethics of the practice today. New Jersey is home to the Baby M controversy, which is widely recognized as the most defining surrogacy agreement in the practice's history. Although it took many years for New Jersey to move past the belief that surrogacy was harmful to surrogate mother, child, and contracting couple (as evidenced by the repeated denials of bills reversing the state's ban on the practice) in the spring of 2018 the state passed a revolutionary law. The strict regulations are the essence of the Liberal Argument: each protects a woman's right to choose how to use her body and monetize her reproductive capacity but also ensures her safety if she decides to become a surrogate. She receives legal protection, must pass tests that ensure her mental and physical readiness for the stress of the agreement, and must be old enough with enough childbirth experience to be aware of what the process entails. Similarly, the contracting parents and protected and their well-being is measured and protected by similar tests.

Although many people have argued that even in the United States surrogacy takes advantage of women and reinforces patriarchal values, conversations between surrogates on online platforms have proved otherwise. It is not about if the media, or male legislators, think the practice is damaging to women, it is about how surrogate mothers themselves see the practice. In New Jersey it is obvious that many women do not believe they are being taken advantage of or exploited. They see it as a way to earn an income and derive personal satisfaction from helping couples achieve the "miracle of life," by giving them the ultimate gift, a child.

In New York, a liberal state in response to many social issues, has remained stagnant on their surrogacy ban. They were one of the American states that responded to the Baby M controversy with tightening rules and bans on compensated surrogacy, but unlike New Jersey, they have not reassessed their conservative stance. The state's government constantly refers back to the one official document which swore off the practice on the basis of commodification, well-being, and exploitation. Although there are many who advocate for access to compensated surrogacy, the state has yet to budge. This has resulted in the movement of the practice underground as people have cited they are willing to do "whatever it takes" to have a child that is genetically related to them, even if not through traditional norms.

Finally, there is India, which has moved in the opposite direction of New Jersey. As the former largest destination for surrogacy in the world (now the United States), it has reversed loose legal practices and completely shut the international community and non-heterosexual couples/individuals off from accessing the practice. This is motivated by an extremely conservative view of family formation and international pressure created by media depictions of the practice as commodifying, exploiting, and dangerous. India is the most referred to developing country in the discussion of the controversy of surrogacy. It is positioned as a place where powerful, rich, educated white couples come and rent space in a minority woman's body, taking advantage of her socioeconomic situation and desperation for money. Although it is always important to acknowledge the undeniable scenarios where surrogates have been abused and mistreated, it is inappropriate to assume that all surrogates feel this way. As evidenced by transcripts and interviews, there are many, many surrogates who see the practice as empowering and a better option than other available forms of employment.

It is important to understand how one case of surrogacy in India Baby Manji, had a sweeping effect on the legality of the practice, just like in New Jersey with Baby M. While there are many examples of tragedies which have affected women's safety in work environments in India, from deaths in the textile industry to the unsafe placement of female-run factories in poorly constructed multipurpose buildings to the consistent low wages that trap women in poverty, none of these wide-sweeping injustices have had the same effect that a *single* case of surrogacy has.³⁵⁵ I believe it is both the novelty of the Baby M and Baby Manji cases, as they were the first sources of controversy in markets that had been posed as being a "win-win" for all parties involved, and the distinctly human and eerily familiar aspects of the cases that caused such a strong public reaction.

People have intense connections to family dynamics as everyone has an intimate understanding of what family looks like. For many parents, the idea of Baby M and Baby Manji was probably scary as being unable to care for their newborn or even bring their newborn home is terrifying. For children, there is fear in the idea that you could be abandoned by your parents. For people looking to have a child, Baby Manji represents a horrifying hurdle. With other injustices, like factory collapse or abuse of workers, people can distance themselves, but Baby M and Manji resonate as literally everyone is someone else's child, and many people will someday have their own family. There is also the idea of the innocence of a child that conjures a defensive attitude as a child did not ask to be born via surrogate. A child does not deserve to be held at the border, unable to return home with her father. Finally, outside the influence of widespread connection to familial love, people are intimidated by situations they cannot control, which both of these cases represent.

³⁵⁵ Nittle, "What the Rana Plaza Disaster Changed About Worker Safety"

In all three cases, regardless of the outcome of legislative change, there is a common theme: the absence of surrogates' voices in conversations about their reproductive capacities. Certain voices are excluded in this debate and they happen to be those of the surrogates themselves. People, whether it is journalists, politicians, law makers, human rights advocates, or lobbyists, assign voices and identities to these women which often stray from the voices and identities these women actually have. Why do these influential parties choose to represent women in a certain way? Why does that way tend to be a position where they need saving and protection? Why are these constructed identities ones that are unable to make their own decisions? The final chapter explains policy recommendations that give women room to define their own voice and make their own choices, while still protecting them from the possibility that monetizing reproductive capabilities can be commodifying, dangerous, or exploitative through careful regulatory clauses, not dissimilar from the ones that have been so effective in New Jersey. It will explore the possibility of applying these to developing countries, where regulation is more difficult because of the nature of infrastructure. It will conclude with a final discussion of the importance of the liberal perspective and giving women space to make choice and freedom from imposing legislation.

Chapter 4: Policy Recommendations

Introduction

I refer to the posed question of whether or not commercial, gestational surrogacy can exist in the benefit of women. I have explored three cases where the depiction of the relationship between surrogacy and women's wellbeing by the media, the government, and a range of feminists has influenced the adoption of certain policies. Across New Jersey, New York, and India there have been many questions raised about the potential negative impacts that monetizing the womb may have on women and society. Whether it is the concern that surrogacy threatens family formation and the traditional norms of motherhood; that it devalues women by commodifying them and reinforcing patriarchal values; that it exploits women through the establishment of a power differential fraught with coercion; or that it puts women and children's wellbeing in danger, there are a myriad of reasons why people believe surrogacy should be banned.

I have not argued against the legitimacy of these concerns, as it is obvious that, in theory, surrogacy can reinforce these issues. I have instead considered two extensions of the surrogacy debate: a) whether or not the conversations that determine if women can freely interact with their reproductive systems **includes** the voices of those very women and b) whether or not banning these markets truly protects women in the way the policies aspire to. I sought to show the way women view the practice and describe why it is important to consider their definition of "beneficial" or "dangerous." I have explained why, when well written and well enforced, regulating the surrogate environment can be both more protective and more supportive of women's rights to choose what they do with their bodies and actually empower them, both financially and from the stance of giving them autonomy. Ultimately, I argued that the Liberal Argument is more important to enforce than its Conservative, Commodification, Exploitation,

and Welfare counterparts. Most importantly, I have tried to prove that a woman's right to choice is the most important one, but that it should be protected in an environment where the concerns raised by perspectives one through four are acknowledged.

Policy Recommendations

Although suggesting a series of policy recommendations is easier than enforcing them, especially in a developing country like India, it is still important to consider them within the debate of careful regulation versus banning. It is impossible to solve poverty and guarantee that these regulations work perfectly. Thus they should be understood as factors to consider when states discuss surrogacy legislature. As noted countless times in preceding chapters, banning surrogacy does not always lead to the elimination of the practice. Simple economics tells us that when there is demand for a service and a supplier of that service, markets will form, even if they have to exist underground. As noted by Lakshmi Ajay, in India, regulation is the only thing that keeps women from being exploited and taken advantage of: "medical and legal supervision is necessary to ensure that agents do not siphon off compensation intended for surrogates or that the couple is not blackmailed and that there are no medical complications for these women."³⁵⁶ In New York couples have cited being willing to do anything to find a surrogate and have a child.

Banning surrogacy does not promise that surrogate contracts will not exist outside of the legal space, meaning that bans would force surrogacy to move to an environment where brokers can get away with fewer protections for parties involved and fewer enforcements of important precautions, which typically come at the cost of the surrogate mothers. Without laws ensuring that infertility clinics take care of surrogates after birth or that they even pass basic tests

³⁵⁶ Ajay, "Gujarat, a hub of rent-a-womb industry in India"

determining their fitness; and without legal parties representing contracting parents and surrogate mother to ensure that the compensation is fair and made in a timely fashion; without authority making sure brokers contact potential surrogates in an appropriate manner, and not a coercive one, surrogacy becomes even more dangerous than it was in an open market.

Bromfield and Rotabi, among other scholars suggest that “at this point in history, it is more pragmatic to meaningfully regulate global surrogacy” than to ban it.³⁵⁷ They say that although international surrogacy appears to exploit women in developing countries by compensating them at a lower rate than in the United States, surrogacy is still a much better paid opportunity than the next best form of employment, which may offer worse conditions, worse pay, and more strenuous labor.³⁵⁸ They reference the dangers of other occupations, specifically the 2013 tragedy in Bangladesh, where a factory collapsed and killed 1,129 people, mostly women, “who worked long hours for little pay in a dangerous environment.”³⁵⁹ Many Western feminists are concerned that surrogacy puts women in a commodified and dangerous position, but we rarely them advocating against other forms of labor with more extreme health and safety concerns.

There is an underlying theme that poverty, both international and domestic, pressures women into surrogacy as they are desperate for money and do not have access to other opportunities. Eliminating this issue of coercion completely would require the alleviation of poverty and provision of jobs to women with less education. This is more complicated than a simple policy recommendation can possibly explore, but scholars have argued that the

³⁵⁷ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations,” 131

³⁵⁸ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations,” 131

³⁵⁹ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations,” 131

international (and domestic) community should not be in charge of restricting opportunities for poor women to participate in the surrogacy market (or intimate labor market more broadly) for the sake of fixing the pervasive problem of poverty, as our restriction would merely perpetuate their oppression. GKD Crozier writes that the ethical response to concerns of exploitation and commodification should not involve “shrinking or eliminating this global industry.”³⁶⁰

Specifically, he writes “protecting women in destination countries from being exploited by the reproductive travel industry is a laudable goal, but I suggest that this need not involve restricting their participation in the market by shrinking demand for their services.”³⁶¹ He says that the first step is to provide other jobs that make these dangerous options less appealing than alternatives, but that does not mean that the surrogacy market should be eliminated in the meantime.

Unless we have strong empirical evidence that this practice is entrenching oppressive structures or interfering with other strategic measures to alleviate oppression, we should hesitate to take actions that will clearly have negative effects for those affected parties who are in the most vulnerable groups – here, groups of impoverished women whose access to high-paying labour opportunities will be diminished.³⁶²

It is oppressive in itself to limit women from certain forms of labor, even if by limiting them lawmakers believe they are helping relieve cycles of oppression. I suggest instead that we give women the opportunity to determine oppressiveness on their own and make these decisions by themselves, within a safe environment. Regulation can allow women the chance to understand surrogacy as *theoretically* oppressive but eliminate the possibility that they are being robbed by their brokers and given inadequate healthcare (more of a *literal* oppression).

On a larger scale, reaching beyond the relatively small market that is surrogacy, the law generally looks to limit women’s autonomy and freedom of decision with respect to their bodies.

³⁶⁰ Crozier, “Protecting cross-border providers of ova and surrogacy services?,” 300

³⁶¹ Crozier, “Protecting cross-border providers of ova and surrogacy services?,” 301

³⁶² Crozier, “Protecting cross-border providers of ova and surrogacy services?,” 301-302

There are patriarchal and sexist expectations that the intimate labor market is more wrong than any other form of labor. As referenced by Nussbaum earlier, there is a stigmatization of forms of labor that monetize one's intimate functions, as we all participate in jobs that require us to use our bodies, but only some are frowned upon. She brings up a valuable point to consider before looking at the specific forms that regulation could take. Part of the motivation for banning surrogacy is rooted in concerns for women and children's safety, but a large part of it is the broader discussion of sex and intimate labor markets, which are still considered "dirty" or taboo subjects. Although women have experienced liberation through feminist movements and policy changes, discussion of the use of one's intimate capacity to make money is still largely controversial. It is important to question how underlying bias against monetizing women's bodies (specifically "slut shaming" or criticizing women for real, or presumed, sexual activities) also influence hesitation towards legalizing, under regulation, surrogacy.

Many have made suggestions what surrogacy regulation could look like. Some suggest that

states that allow paid surrogacy should require, as a minimum necessary requirement for the contract to be legal, that the surrogate participate in a short class on contract pregnancy. The content of this class, which we will discuss more below, would include information about the experience of other paid surrogates, what can and cannot legally be required of surrogates, and alternative forms of employment. The class will improve the surrogate's opportunity to make an autonomous decision and guard her right to make choices about reproduction and her body.³⁶³

This echoes a suggestion for abortion regulation, which is that it is legal, but women must consult a doctor to discuss their options. Under the right, non-coercive, impartial set of circumstances, this is an interesting model. It would open up the conversation about surrogacy and allow women to interact with the practice freely and determine their own opinion on its

³⁶³ Damelio and Sorensen, "Enhancing Autonomy in Paid Surrogacy," 269-270

merits and form their own ethical concerns. This is “a soft law,” which “mandates performances or activities that must occur before some sort of status change -- performances and activities designed to protect some substantive state interest, such as public safety.”³⁶⁴ I believe that this is an effective way to create a space for informed consent, although it is not the only set of requirements that should be included in surrogate regulation.

Another suggests that “the only valid objection to international surrogacy is that surrogate mothers may be exploited by being given too little compensation,” meaning that if there were a way to make sure the transactional portion of surrogacy was consistent, there would be nothing wrong with the practice.³⁶⁵ Therefore, policy change takes the form of labor laws and protecting fair trade principals.

Bromfield and Rotabi provide a well-developed series of four regulations. They suggest that informed consent guidelines must be developed which “not only meet Western societies’ definition of the process but also are culturally relevant to women in low-resource countries where there are likely challenges related to education and other factors in understanding surrogacy.”³⁶⁶ They say that financial transactions must be “managed in a manner that is transparent, as well as safeguarded, including how financial incentives are used in the consent process.”³⁶⁷ They also suggest that surrogacy clinics and living conditions be monitored in a manner that is “consistent with accreditation of medical facilities,” and that health coverage is

³⁶⁴ Damelio and Sorensen, “Enhancing Autonomy in Paid Surrogacy,” 275

³⁶⁵ Humbyrd, “Fair Trade International Surrogacy,” 112

³⁶⁶ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations,” 132

³⁶⁷ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations,” 132

provided to surrogates for a “specified time period during and after the surrogacy arrangement.”³⁶⁸

There are two underlying themes across the above regulations, as well as ones that have actually been enforced, like in the case of New Jersey. The first is that regulation must seek to create environments of informed consent. This means *understanding* what informed consent looks like country to country, community to community, and allowing women to understand the process and consider her own ability and desire to participate in a non-coercive manner. Secondly, regulations must protect women, both their finances and physical well-being through the provision of healthcare and by ensuring that they are paid for the labor they engage in. Finally, above and beyond all, the law should protect women’s rights to choose, and ensure that those choices do not occur in a dangerous and coercive environment.

With this in mind, I suggest the following policy recommendation: ***commercial, gestational surrogacy be legalized on the domestic and international scale, with appropriate regulatory clauses, which are identified below.*** Surrogacy would therefore be legal, enforceable, and monitored by an authoritative body. I emphasize using regulations to create spaces of informed consent, thus it is important to note, that many aspects of consent are rooted in societal norms.³⁶⁹ Consent does not look the same in every culture. This is as simple as understanding the difference in language and level of education or as complicated as the power imbalance in a marriage in India like the one cited in Chapter 3, where a husband forced his wife into surrogacy. It is not always a husband, it may also be another member of the family which pressures a woman into consenting to surrogacy. Choice, and consent, must be understood in the context of

³⁶⁸ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations,” 133

³⁶⁹ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations,” 132

poverty and the pressure it puts on a woman to make desperate choices. The nuances of cultures must be identified in international agreements so that informed consent is represented not only by Western standards but also by local. Understanding how consent is defined is crucial to being able to enforce these regulations as each seeks to create space for it.

- I. Surrogates must have already given birth to one child, i.e. they must already be mothers before becoming surrogates. A stipulation like this one would ensure that women entering the surrogate market have experienced the mental and physical hardships of pregnancy and childbirth and are adequately prepared to experience it again. This clause is present in many states and countries where surrogacy is legal and makes sense to continue enforcing.
- II. Surrogates must be above 21 years of age. An age stipulation again works to enforce informed consent. It allows time for women to develop their own ideas about choice and freedom and their relationship to their body. In other legal areas minors are seen as simply not being ready to make decisions, like with the age of consent, ability to adopt, and even the ability to drink alcohol or consume drugs. Given the lasting impact of surrogacy on women involved, it makes sense to extend that view to this market. States with age requirements say that being 21 prepares a woman to deal better with the intricacies of surrogacy. Additionally, given information about when women start having children, a surrogate younger than 21 would probably violate the first regulation presented, which is that women must have already had one child. I am aware that this age may be lower in developing countries where women become pregnant at younger ages, so this number may need to be adjusted depending on location and cultural norms, again emphasizing the importance of understanding the actors involved in each location of the surrogacy market.
- III. Both the surrogate and contracting couple, or individual, must be represented by legal parties. This regulation will be harder to enforce country to country as there are varying levels of development but given the amount of infrastructure and investment required to run a successful fertility clinic, it is not unreasonable to require legal representation in surrogacy. Legal representation would ensure that surrogate mothers are compensated fairly; do not sign contracts with exploiting and commodifying

- clauses (like in Baby M); are made aware of how surrogacy works if they are unable to understand without a lawyer; and ensures that parenting rights are transferred in a manner that does not put stress on the child. This is one of the most important clauses as lawyers could work to protect all parties involve.
- IV. Surrogates must be provided with healthcare coverage during the pregnancy and after the birth, for a pre-determined period of time. This guarantees that women receive the appropriate medical care required to protect their physical welfare. People often say that India is a difficult place for the surrogacy market because of a lack of infrastructure and investment in healthcare, but this is a regulation goal that they have already accepted (see their 2016 bill). It is crucial to the safety of women that they are adequately equipped with the proper medical attention so that they are not making a choice to enter a market which puts them in danger. Although some may say that countries are not all capable of providing this service, it is clear that developing countries (ones where people would often assume infrastructure is not a priority) are already taking this precaution, thus I support it as a defining feature of the appropriate surrogacy regulations.
- V. Surrogates must also be provided with other optional counseling services during the pregnancy and after the birth. This clause is inspired by the previous one, concerns that women experience unparalleled stress while surrogates, and the regulation suggestion that women attend classes and become educated about assisted reproductive technology before becoming surrogates. Providing counseling services would ensure the mental welfare of surrogate mothers and would further their understanding of the process and its stresses to continue creating an environment of informed consent.
- VI. Both surrogate mother and parenting couple must complete a physical and psychological evaluation before placement of the embryo in the surrogate. This regulation is directly inspired by New Jersey's, which hopes to establish preparedness across all parties hoping to enter surrogacy contracts. Psychological evaluations would test the ability of a surrogate to consent to the process and the physical evaluation would make sure that she was physically prepared for the pregnancy.

Again, this regulation stresses welfare and ensures that women can make decisions by themselves without being coerced.

Surrogacy is complicated by the determination of nationality and citizenship, as creating a way to clearly determine parentage is difficult when a child is carried to term by a woman of one citizenship but holds the genetic material of a woman with a different nationality. In the Baby Manji case it was tight citizenship regulations that caused such controversy. The Hague Permanent Bureau in The Hague, Netherlands regulates issues related to child and family matters. “This institution develops international private law to harmonize legislation globally. For example, this has been the case for intercountry adoption (ICA) in which signatory states agree upon international standards of ICA.”³⁷⁰ Although The Hague Permanent Bureau has said that with respect to intercountry adoption, states should act with “the best interest of the child” at all times, they have not adopted international private laws on surrogacy, mostly due to its highly complicated nature.³⁷¹ In order to combat this, I suggest that given the controversies caused by citizenship issues in surrogacy and the continued demand for the market, The Hague Permanent Bureau focuses attention on creating a set of international regulations for surrogacy.

Conclusion

This thesis supports the liberal feminist perspective that it is the state’s job to protect women’s right to choice, not to make those choices for her while stating that they are speaking on behalf of her “best interests.” Although it has made a case for commercial, gestational surrogacy as beneficial to women, providing them both financial and emotional empowerment and allowing them to derive joy, in some cases, from being able to share the gift of life with couples otherwise unable to have children, it has not ignored the controversial aspects of the

³⁷⁰ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations,” 130

³⁷¹ Bromfield and Rotabi, “Global Surrogacy, Exploitation, Human Rights, and International Private Law: A Pragmatic Stance and Policy Recommendations,” 130

market. Therefore, it has called upon governments to use meaningful and thoughtful regulations to allow women space to make choices for their own bodies in safe, noncoercive, non-exploitative, non-commodifying environments. This takes the form of six regulatory suggestions, each of which ensures the mental and physical welfare/preparedness of surrogate mother; protects the women engaged in the market by making sure financial transactions and expectations for the surrogacy are transparent through legal regulation; and creates an environment of informed consent.

Although countries like India have recently reversed their stance on surrogacy with constricting laws, the surrogacy market is ripe with demand in **many** countries. American celebrities have drawn international attention towards the practice through their use of surrogates and the Wall Street Journal just released “The 10 Books You’ll Want to Read this Spring” and included *The Tomb*, by Joanne Ramos about international commercial surrogacy, meaning that the debate on surrogacy is alive and fraught with disagreement on protection of rights and views of family formation. Most importantly, beyond media representation of surrogacy, is the idea that, as evidenced by the transcript with Brett Kavanaugh’s comments on the relationship between women’s bodies and the state, there are still many people unaware of the impositions the state puts on women. Surrogacy, although an important topic given its recent appeal and market growth, is a metaphor for the way we regulate bodies and the way lawmakers sift through voices and choose to represent certain ones and mute others.

Bans that are adopted because states believe they are protecting women do not account for those who have benefitted from the practice. Not only do these bans inappropriately assume the voice of surrogate mothers, but they simply do not work. They push markets underground, where women are more likely to be abused and exploited and less likely to derive the financial

empowerment and emotional gratification that the practice presents in the first place. Surrogacy forces us to consider the way women's bodies are used by the state: as objects to speak on behalf of.

Commercial, gestational surrogacy should be legalized under tight regulations globally because it not only grants women the basic rights to autonomy and choice, but it provides a well-compensated and safe (under the right conditions, of course) form of employment that women can **choose** to engage in after forming their own opinion on the ethics and morals of the practice. The controversies that have pushed the market towards bans, Baby M, Baby Manji, and all those in between, could have been avoided if the conversation around surrogacy was open to more voices than the conservative parties who want to protect the sanctity of motherhood and the parties who assume that women need saving and cannot speak on their own behalf. Regulation protects all parties and grants women the autonomy that men have never felt taken away by the hands of legislation.

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