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Elizabeth S. Scott
Columbia Law School, escott@law.columbia.edu

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Surrogacy and the Politics of Commodification

Elizabeth S. Scott*

In 2004, the Illinois legislature passed the Gestational Surrogacy Act, providing that a child born to a surrogate mother through in vitro fertilization automatically becomes the legal child of the intended parents at birth if certain conditions are met, and that the woman who bears the child has no parental status. The bill generated modest media attention and little controversy; it passed unanimously in both Houses of the legislature.[1]

This mundane story of the legislative process in action stands in sharp contrast to the political climate surrounding surrogacy in the 1980s and early 1990s as the *Baby M* case unfolded and left its mark on American law. It was through the lens of *Baby M* that this innovative use of reproductive technology was first scrutinized as an issue of social, political and legal interest.[2] Over the course of the litigation, hostility toward commercial surrogacy arrangements hardened and support for Mary Beth Whitehead's claim to her child grew. Opponents of surrogacy, mostly feminists and religious groups, argued that the contracts were "baby-selling" arrangements that exploited poor women who did not understand the consequences of the decisions; surrogacy degraded the female reproductive function and undermined the family. This framing of the transaction as illegitimate commodification was

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* Vice Dean and Harold R. Medina Professor of Law, Columbia University. Many thanks to Kate Bartlett, Katherine Franke, Marsha Garrison, Suzanne Goldberg and Bob Scott for helpful comments and to Sara Weinberg for outstanding research assistance.

[1]750 ILL. COMP. STAT. ANN.47/1-75 See discussion infra, t.a.n. 46 to 51.

[2]In the Matter of Baby M, 537 A.2d 1227 (N.J. 1988). See t.a.n. 8 to 23 for a discussion of the history of the *Baby M* trial and appeal.

adopted by the New Jersey Supreme Court in *Baby M* and prevailed for several years thereafter, with far reaching and persistent effects on the legal regulation. By the early 1990s, many states had enacted laws prohibiting or severely restricting commercial surrogacy agreements. Some observers predicted the end of this particular use of reproductive technology.

But, as we have seen, that did not happen. In fact, the politics and social meaning of surrogacy arrangements have slowly changed, and the alarm and hostility that surrounded this issue have diminished substantially. An alternative frame has emerged, in which altruistic surrogates give the "gift of life" to deserving couples who otherwise would be unable to have children. News stories about surrogacy arrangements in the past decade have tended to be upbeat human interest tales describing warm relationships between surrogates and the couples for whom they bear children, a far cry from the acrimonious battle between Whitehead and Bill and Betsy Stern.[3]

The political and judicial response has also changed in recent years. In Illinois and other states, the contemporary legislative approach to surrogacy has been largely pragmatic, driven by a perception that parties will continue to enter these agreements, and thus it is important to have procedures that establish parental status in intended parents. Several courts, including the California Supreme Court, have also enforced gestational surrogacy contracts and provided, in

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[3]See Brigid Schulte, *Sharing the Gift of Life*, Wash. Post, May 4, 2008 at C1; Lorraine Ali and Raina Kelley, *The Curious Lives of Surrogates*, Newsweek, March 29, 2008; Judy Keen, *Surrogates Relish Unique Role; And Science has a Place in the Family too*, USA Today, Jan. 23, 2007 at 1D; Gina Bellefante, *Surrogate Mothers' New Niche: Bearing Babies for Gay Couples*, New York Times, May 27, 2005 at A1; Monica Rogers, *The Birth of a New Tradition; Showers for Surrogates*, CHI. TRIB. July 13, 2005 at C1. Tina Fey and Amy Poehler recently starred in *Baby Mama*, wacky comedy about a surrogacy arrangement gone awry that got mixed reviews but grossed $70,000,000.

the absence of statutory authority, that intended parents can be named on the birth certificate.[4] Although social conservatives continue to speak out against surrogacy in the political arena, most contemporary groups interested this issue advocate in favor of laws enforcing the arrangements.

This account raises a number of puzzling questions. How did it happen that surrogacy was framed as baby selling during the *Baby M* litigation, and why did the case generate such powerful emotional, ideological and political responses that, institutionalized through legislation, continue to define the law in many states? Just as important– why did the politics and social meaning of surrogacy change, such that a more sanguine view of the practice seems to have emerged in recent years. Why did interest groups that played such a key role in advocating legal reforms after *Baby M*– particularly feminists– mobilize during *Baby M* and then over time seemingly lose their enthusiasm for this issue? This Essay explores the history of surrogacy over the past twenty years in an effort to shed some light on these questions.

Part I of this Essay offers an historical account of the legal and social issues surrounding surrogacy over the past 20 years which presents the puzzle that the rest of the essay seeks to resolve. Part II examines the framing of surrogacy as commodification in the *Baby M* context, and argues that the political and legal responses to this case were to a considerable extent a combination of moral panic and interest group politics. The vivid drama of *Baby M* came to

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[4]Calvert v. Johnson, 851 P.2d 776 (Cal.1993)(enforcing contract over gestational mother's objection); J.F. v D.B., 879 N.E.2d 749 (Ohio 2007) (same); In re Roberto de B., 923 A.2d 115 (Md. 2007) (authorizing intended parents names on birth certificates) A.H.W. v. G.H.B., 339 N.J. Super. 495 (2000) (same); J.R. v. Utah, 261 F. Supp. 2d 1268 (2003)(Utah statute prohibiting genetic parents' name on birth certificate unconstitutional); Culliton v. Beth Israel Deaconess Med. Cntr, 756 NE2d 1133 (Mass. 2001)(hospital ordered to put gestational intended parents' names on birth certificate); Doe v. Roe, 717 A.2d 706 (Conn. 1998).

emblemize the pernicious threat that commercialization of reproductive technology posed to conventional understandings of the family and of motherhood. Opinion leaders– primarily religious groups and feminists– reinforced the moral panic and formed an unlikely but effective coalition that persisted for several years. Of particular interest is the role of feminists and why they ultimately unified in a stance that was in tension with other feminist views about reproductive agency. Part III seeks to explain how and why the social and political meaning of surrogacy have changed over the past decade or so. Several factors have been important: The moral panic has dissipated, as many of the predicted harms have not been realized. Advances in *in vitro* fertilization (IVF) have expanded the use of gestational surrogacy, which was less readily framed as commodification and thus, more palatable than traditional surrogacy. Finally, the interest group dynamic has changed: Women's groups have withdrawn, plausibly because the arguments made against surrogacy increasingly were adopted by anti-abortion advocates.

These conditions have contributed to a political climate in which lawmakers have adopted a pragmatic approach, regulating with a goal of minimizing the social cost of surrogacy.

I. THE FRAMING AND REFRAMING OF SURROGACY: A BRIEF HISTORY

A. *Baby M*: Surrogacy as Commodification

Political philosophers offer two objections to the commodification of certain transactions. The first focuses on coercion: Exchanges that are driven by severe inequality, ignorance, or dire economic necessity are objectionable. The second objection focuses on corruption and holds that market exchange has a degrading effect on certain goods and practices.[5] As the *Baby M* case

[5]Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets*, THE TANNER LECTURES ON HUMAN VALUES (1998). See also Elizabeth Anderson, *Is Women's Labor a*

unfolded, both objections were aimed at commercial surrogacy, effectively framing the transactions as illicit commodification. Opponents claimed that surrogacy unfairly exploited poor women who unwillingly entered these contracts that they would come to regret. They also degraded children and women– by treating children as commodities to be exchanged for profit, and by treating women's bodies as factories and by paying them not to bond with their children**.**

Surrogacy arrangements were not completely unfamiliar to law makers or to the public in 1986, when the *Baby M* story first attracted media attention. In the 1970s and early 1980s, a few courts had addressed the question of whether surrogacy contracts were enforceable and in 1986, a bill regulating (but allowing) the enforcement of these novel arrangements was under consideration in the New York legislature.[6] Surrogacy had also received some media and academic attention.[7] But *Baby M*, the dramatic and emotional legal battle between a housewife who had dropped out of high school and a couple with graduate degrees and professional careers who sought to have a child with her assistance, focused national attention on the issue and framed the practice as commodification.

The outlines of the story are familiar. Days after Whitehead gave birth to the baby

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Commodity? 19 PHIL. & PUBLIC AFFAIRS 71 (1988); Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987).

[6]Surrogate Parenting Assocs. V Kentucky, 704 S.W.2d 209 (Ky 1986)(adoption requirements do not apply to surrogacy; contract not baby-selling); Syrkowski v. Appleyard, 362 N.W. 2d 211 (Mich. 1985)(statute allows father to seek determination of paternity following birth of child under surrogacy contract). See also James Feron, *Testimony Given on Surrogates' Bill*, N.Y TIMES, April 12, 1987 (describing testimony by infertile parents and surrogates favoring New York bill introduced in 1986).

[7] See Patricia Avery, *Surrogate Mothers: Center of a New Storm*, U.S. NEWS & WORLD REP., June 6, 1983 at 76; GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS, 272-324 (1985) (feminist critique of surrogacy).

(named Melissa by the Sterns), she told Stern she could not bear to give her up and shortly thereafter she took Melissa to Florida to hide out with relatives. After she was apprehended and the baby returned to Stern, Whitehead fought his effort to enforce the contract in a highly publicized and messy trial, in which experts questioned her parenting abilities on the basis of her erratic behavior and the games she played with Melissa.[8] At the same time, Betsy Stern's claim that she feared the impact of pregnancy on her health was challenged; Harold Cassidy, Whitehead's attorney, described Stern as a woman who "thought her career was too important to bear her own children."[9] The trial stretched over two months; at the end, Judge Harold Sorkow enforced the contract, terminated Whitehead's parental rights and issued an adoption order making Betsy Stern Melissa's legal parent.[10]

Media coverage of the case was intense from the time the Whiteheads fled with Melissa to Florida and persisted through the New Jersey Supreme Court decision. This is not surprising as the story had all the elements of high melodrama. Moreover, the case raised compelling questions about the uncertain impact of a novel use of reproductive technology on family structure, the nature of motherhood, the welfare of children— and the role of law in this unfamiliar terrain. Over the course of the trial, reporters observed a shift in public attitudes. At the outset, the Sterns were viewed sympathetically as an infertile couple eager to have a child, while Whitehead was portrayed as an erratic woman who had reneged on her agreement. But as

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[8]Margot Hornblower, *Surrogate Mother Breaks Pact*, WASH. POST, August 22, 1986 at A3. Elizabeth Kolbert, *Surrogate Mother Seeks Baby*, August 22, 1986 at B2.

[9] See Carol Sanger, *Developing Markets in Baby-Making*: In the Matter of Baby M, in CONTRACT STORIES 127 (Douglas Baird, ed. 2007) at note 118.

[10]In re Baby M., 537 A2d 1227 at1237-38 (N.J. 1988)(describing the facts recited in the text).

the trial progressed, Whitehead took on the status of victim, a working class mother who was exploited and unfairly attacked by powerful adversaries.[11]

Opposition to surrogacy arrangements and sympathy for Mary Beth Whitehead was generated by a disparate group of outspoken advocates and opinion leaders. Politicians denounced the practice; New Jersey Governor Kean appointed a task force to study surrogacy.[12] Many religious leaders spoke out, most prominently, the Conference of Bishops of the Catholic Church. This group amplified a 1987 Papal statement on reproductive technologies arguing that surrogacy contracts were baby selling arrangements that undermined the family, degraded women and harmed children.[13] Child welfare groups focused on the harm to children if babies could be exchanged for cash and adoption advocates argued that allowing surrogacy would erode the prohibition against purchasing babies for adoption.[14] The characterization of the surrogacy transaction as "baby selling" was invoked repeatedly by opponents; ultimately it was adopted by the New Jersey Supreme Court and by lawmakers in other states.[15] Surrogacy, it was argued,

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[11]Iver Peterson, *Fitness Test for Baby M Unfair, Feminists Say*, N.Y. TIMES, Michael Kinsley, *Baby M and the Logic of Capitalism*, WALL STREET J., 31, April 16, 1987; James Barron, *Views on Surrogacy Harden After Baby M Ruling*, N.Y. TIMES, April 2, 1987, A1.

[12] *Kean Tells Legislators to Look at Surrogacy*, N.Y. TIMES, April 3, 1987 B2.

[13]*Church Hits Surrogacy*, WASH. POST, July 16, 1987 at A9; Roberto Suro, *Vatican's Moral Mission*, N.Y. TIMES, March 12, 1987 at A1; Craig McCoy, *N.J. Bishops Decry Surrogate Parenting as Prostitution*, PHILA. INQUIRER, July 16, 1987.

[14]*Child Welfare Plans to Urge a Ban on Surrogacy Pacts*, N.Y. TIMES, May 26, 1987, 6.

[15]"[T]he essential evil is the same [as in the sale of a child for adoption], taking advantage of a woman's circumstances (the unwanted pregnancy or the need for money) in order to take away her child...." 537 A.2d at 1249. "There are, in civilized society, some things that money can't buy... [T]he surrogate mother's agreement to sell her child is void." 537 A.2d at 1249-1250.

threatened not only specific children who were produced through these arrangements, but the social value of children generally.[16]

Feminists and liberals were among the most active advocates, unifying against surrogacy as the *Baby M* litigation played out. Early in the trial, feminists acknowledged that surrogacy was a hard issue; news reports described them as "torn between support [of] a women's right to use her body as she chooses" and concern about exploitation of women.[17] But feminist columnists advocated vehemently against surrogacy and for Whitehead, criticizing the Sterns, Noel Keane and the Judge Sorkow.[18] Moreover, women's advocates became increasingly angry at the attacks on Whitehead by the Sterns' lawyers and mental health experts, believing that the emphasis on her lifestyle and shaky finances was infused with class bias and the gender discrimination typical of child custody disputes. Whitehead, on their view, was "being held to an unfair standard of motherhood."[19] Feminists also targeted intermediaries like Noel Keane who arranged the contracts for high fees. As one feminist put it, these brokers who exploited poor

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[16]Elizabeth Anderson, supra note 5.

[17]Iver Peterson, *Baby M Trial Splits Ranks of Feminists*, N.Y.TIMES Feb. 24, 1987, B1 (reporting that membership of N.J. NOW split on surrogacy). Debbie Ratterman, *The Attack on Motherhood*, OFF OUR BACKS: A WOMEN'S NEWSJOURNAL Dec 31, 1988 (book review describing split among feminists); PHYLLIS CHESLER, SACRED BOND: THE LEGACY OF BABY M (1988)(describing reluctance of feminists to rally around Whitehead early in the trial).

[18]Katha Pollitt, *The Strange Case of Baby M*, THE NATION, May 23, 1987; Ellen Goodman, *Surrogates Could Make Pregnancy an Industry*, L.A. TIMES, Sept. 2, 1986.

[19]See Iver Peterson, *Fitness Test for Baby M's Mother Unfair, Feminists Say*, N.Y. Times, March 20, 1987. One expert diagnosed Whitehead as having a narcissistic personality disorder because she died her hair and criticized her for offering Melissa a stuffed panda rather than pots and pans. *Id.* Phyllis Chesler, a key supporter of Whitehead, made the link to the broader issue of discrimination in child custody disputes. See PHYLLIS CHESLER, *supra* note 17.

women with few choices were "the pimps of the surrogacy movement."[20] By the time the trial concluded with a judgment upholding the contract, feminists and women's groups presented a united front in opposition to surrogacy; few defended the enforcement of the contracts. On the last day of trial testimony, 124 prominent women released a statement supporting Whitehead's right to have her child and denouncing commercial surrogacy.[21] Prominent feminists also submitted an amicus brief to the New Jersey Supreme Court arguing for reversal of the trial court decision, as did the New Jersey Catholic Congress, the Family Research Counsel and the National Committee for Adoption.[22]

The New Jersey Supreme Court reversed the lower court, holding that the contract was not enforceable under New Jersey statutory law and also violated public policy. The contract was offensive because it was effectively "the sale of a child." prohibited in this context for the same reason as in adoption, because women who needed money would be coerced to enter these agreements. Moreover, the pre-birth agreement by the mother to relinquish parental rights was also prohibited under the state's adoption statute; the agreement could never be voluntary or informed, as a woman can not know what it will mean to give up her baby.[23] The Supreme Court decision solidified the emerging social meaning of surrogacy as an undesirable commercial arrangement that involved the selling of children and exploitation of women.

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[20] See Peterson, *Fitness Test for Baby M's Mother Unfair*, *Id.*

[21] *Id.*

[22]Joseph Sullivan, *Brief By Feminists Opposes Surrogate Parenthood*, N.Y.TIMES, July 31, 1987, at B3. Amicus briefs arguing for reversal of the trial court decision greatly outnumbered those that favored upholding the decision. See list of *amicus curiae* briefs, *In the Matter of Baby M*, 537 A2d 1227, 1232 (N.J. 1988).

[23]532 A2d 1227, 1245-46 (N.J. 1988)

B. The Aftermath of *Baby M*

It would be hard to exaggerate the impact of *Baby M* on the legislative regulation of surrogacy arrangements in the late 1980s and early 1990s. When the case broke in 1987, no state had enacted a statute regulating surrogacy arrangements; those that began to consider the issue in the mid-1980s were inclined to regulate rather than prohibit the contracts.[24] By December, 1987, even before the New Jersey Supreme Court decided *Baby M*, 70 bills had been introduced in 27 legislatures, and by late 1988, six states had passed laws banning the agreements or declaring them void– often with little opposition.[25] Through *Baby M*, surrogacy opponents had succeeded in framing the transactions as baby-selling and exploitation of women and legislatures responded to advocates' urgent cries for restriction of the practice. Almost all of the laws passed during the post-*Baby M* period either prohibited the agreements or discouraged them by disallowing payment to the surrogate or to intermediaries or by giving surrogates the opportunity to rescind after the birth of the baby.[26] In some states, lawmakers initiated the

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[24] *See* SURROGATE PARENTING IN NEW YORK: A PROPOSAL FOR LEGISLATIVE REFORM, New York Sen. Judiciary Comm., Dec. 1986 at 40(discussing proposed legislation in New York and other states) .

[25] See Sam Okpakuc, *The Aftereffects of the Baby M Case*, N.Y. TIMES, March 20, 1988 at 20. The Nebraska legislature voted 41-1 in favor of a bill prohibiting commercial surrogacy arrangements. *Anti-Surrogacy Bill Passes*, NY TIMES, Feb. 6, 1988 at 28. See also Phillip Hilts, *N.Y. Ban Urged on Surrogate Mother Deals*, Wash. Post, May 30, 1988 at A4.(reporting 20 states considering bans); *Baby M Bill Passes in Michigan*, Wash. Post, June 10, 1988 (describing Michigan enactment banning surrogacy). See statutes cited in note 28 infra..

[26] *Id.* Post *Baby M* statutes include the following: ARIZ. REV. STAT. ANN. S 25-218 (1989)(prohibition, declared unconstitutional in *Soos v. Superior Ct.*, 897 P.2d1356 (Ariz. App. 1994); IND. CODE ANN. S 31-20-1-1 (1988)(no enforcement); LA. REV. CODE ANN. S 2713 (1987)(contract void); MICH. COMP. LAWS ANN. SS 722.851-863 (1988)(contract void; paid surrogacy is misdemeanor); NEB. REV. STAT. s 25-21, 200 (1988)(contract void); N.D. CENT. CODE ss 14-18-01-07 (1989)(contract void; surrogate is legal mother); UTAH CODE ANN. S 76-7-204(1989)(gestational carrier is legal mother; declared unconstitutional in J.R. v. Utah, 261 F.

legislation, often with little apparent involvement by lobbying groups. In others, such as New York, a coalition of religious groups, adoption and child welfare advocates and women's groups actively lobbied for laws that prohibited or discouraged the practice.

In New York, where Noel Keane's agency brokered the Whitehead-Stern contract, the legislature changed course mid-stream in response to *Baby M*. In early 1987, a bill that protected against exploitation but ensured enforcement of surrogacy contracts was making its way quietly through the legislature; by June, this bill was withdrawn in the face of intense opposition from a coalition of religious and feminist lobbying groups.[27] A Task Force created by Governor Mario Cuomo, an opponent of surrogacy, held hearings dominated by surrogacy opponents; it issued a report that referred frequently to *Baby M* and emphasized the threat posed by these contracts of commodification of children and exploitation of poor women.[28] The report proposed statutory reform banning commercial surrogacy and subjecting brokers to criminal penalties.

Beginning in 1989, Governor Cuomo introduced legislation based on the Task Force report recommendations. The legislature did not act until 1992, however, when the New York State Department of Health published another report, which described the flourishing market in

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Supp. 2d 1268 (2003).

[27] See SURROGATE PARENTING IN NEW YORK, *supra* note 24 (proposing legislation for judicial approval of surrogacy contracts before insemination). Jeffrey Schmalz, *Albany Surrogacy bill is Withdrawn*, N. Y. TIMES, June 18, 1987 at B2.

[28]In the May 1987 Task Force hearings, the New York State Coalition on Women's Legislative Issues urged that "surrogacy contracts dehumanized women and commercialized reproduction." The group also argued that women could not waive their parental rights before birth when they could not calculate the enormous physical and emotional effects of pregnancy. SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY, N.Y. State Task Force on Life and the Law, 104-05 (1988).

commercial surrogacy in New York– particularly focusing on Noel Keane's business– and strongly advocating passage of Cuomo's bill.[29] The legislature responded, passing the law by a sizable majority in the Assembly and near unanimity in the Senate.

The legislative vote mirrored strong and diverse support for the bill and widespread hostility toward surrogacy. Newspaper editorials around the state overwhelmingly supported the legislation. (The Daily News editorial with characteristic subtlety carried the headline "Wanna Buy a Baby?").[30] Several state agencies endorsed the bill, including the Council on Children and Families and the Division for Women, which argued that commercial surrogacy "reinforces the notion that women and children are chattels."[31] Also supporting the legislative ban were the New York State Catholic Conference, the New York Civil Liberties Union, and the National Council for Adoption (in a statement describing Noel Keane's "seedy business").[32] Finally, feminists and women's groups were united in support of the legislation; the New York Women's Bar Association and the NOW-NYS lobbied actively for passage of the law, which was

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[29]THE BUSINESS OF SURROGATE PARENTING, New York St. Dep't.of Health (1992). The report estimated that 40% of surrogate contracts were arranged in New York. David Bauder, *Proposal Targets Surrogate Parenting*, ALBANY TIMES UNION, May 13, 1992, B10.

[30] *It's Baby Selling and It's Wrong*, N.Y. TIMES; *Womb to Rent*, Newsday; *Wanna Buy a Baby?* DAILY NEWS; *Ban Commercial Surrogacy*, BUFF. NEWS; collected in 12590 Legislative Bill & Veto Jacket, Counsel to the Governor, State Archives and Records Admin. (1992).

[31]See *Memorandum in Support*, Paulette Taylor, General Counsel, Division for Women, 12590 Legislative Bill & Veto Jacket, *Id.*

[32]Legislative Bill & Veto Jacket, *supra* note 30. John Kerry of the Catholic Conference suggested that a child born of a surrogacy arrangement would "grow up with the horrifying realization that his real mother conceived him in order to sell him..." Letter to Elizabeth Moore, Counsel to the Governor, June 30, 1992.

sponsored in the Assembly by Helene Weinstein, a pro-choice Brooklyn Democrat.[33]

Opposition was muted. A few legislators argued that law was far too restrictive and that reasonable regulation could diminish the relatively modest risks posed by surrogacy arrangements. Beyond this, opposition to the bill was not organized, coming from a few surrogate mothers and from infertile couples, some of whom had acquired children through surrogacy.[34] Interestingly, brokers seem to have played little role in the legislative process, including Noel Keane, whose business was the target of much criticism.[35]

The 1992 passage of the New York statute represents the political high water mark of anti-surrogacy movement. Enthusiastic supporters predicted that surrogacy would soon die out as other states followed New York's lead in prohibiting the agreements. But this did not happen. Political and media interest in surrogacy dwindled, and by the mid-1990s, little legislative activity focused on this issue. In several states, bills prohibiting surrogacy died without action. For example, in 1993, legislative sponsors in New Jersey proposed a bill similar to the New York statute, based on the recommendations of a task force appointed by Governor Kean that had studied surrogacy exhaustively for four years. The bill generated little interest or support and

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[33] Legislative Bill & Veto Jacket, *supra* note 30. The NOW memorandum described surrogacy as threatening the "potential erosion of parental, reproductive and privacy rights of women"

[34] *See* Letter from Assemblyman G. Oliver Koppell to Governor Cuomo, July 2, 1992 Legislative Bill & Veto Jacket, *supra* note 30 (opposing bill). Koppell pointed out that the Health Department report, *supra* note 29, found only three cases involving serious problems. Parents' letters describe their joy in their children and warm relationships with surrogates.

[35] In an interview, Noel Keane even appeared to endorse allowing courts to decide custody if the surrogate backs out. Catherine Clabby, *Surrogate Moms on the Way Out? New Laws Prohibit Pregnancy Profits*, ALBANY TIMES UNION, July 26, 1992. Only Betsy Aigen, who had a small surrogacy agency, opposed the bill. Legislative Bill & Veto Jacket, *supra* note 30.

it was withdrawn in 1994, never to be reintroduced.[36]

C. Toward a New Model of Surrogacy Regulation

Contrary to predictions, surrogacy practice has flourished over the past decade or so and attitudes toward these arrangements have mellowed considerably in the political arena, despite restrictive laws in key states like New York. Legislatures in several states have established enforcement procedures and requirements, while in others, courts have upheld surrogacy contracts. A survey of these lawmaking activities and of recent media coverage suggests that surrogacy has assumed a new social meaning. Today the issue is not typically framed as baby selling and exploitation; instead, the discourse emphasizes the service provided by surrogates to couples who otherwise could not genetically related children. Moreover, the express legislative goal of discouraging and punishing a pernicious practice has been largely replaced by the pragmatic objective of providing certainty about parental status and protection of all participants, especially children.[37]

Two factors stand out in the account of these legal developments. First, with improvements in IVF, gestational surrogacy, in which a preembryo is implanted in the surrogate, has largely replaced traditional surrogacy, in which the pregnancy results from artificial insemination. The new arrangements have proved to be not only more attractive to the parties but more palatable to law makers and the public. Second, the constellation of interest groups

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[36] See Randy Diamond, *Assembly Baby Broker Bill Goes Nowhere*, N.J. RECORD, March 16, 1994, A5. See AFTER BABY M: THE LEGAL, ETHICAL AND SOCIAL DIMENSIONS OF SURROGACY, N. J. Comm. L. and Ethical Problems in Delivery of Health Care (1992).

[37]This response is evident in statements by legislators in Illinois and other states, and by courts, authorizing intended parents to be named on the birth certificate, even without statutory authorization. *See* cases cited in note 4.

lobbying to shape legislation in recent years has changed dramatically. Attorneys, brokers and parents' groups have become active advocates for supportive regulations, while women's groups and civil liberties organizations have withdrawn from the political arena. Today only religious groups and social conservatives lobby actively against facilitative regulation.

1. **The Rise of Gestational Surrogacy: *Calvert v. Johnson***

In the lawmaking frenzy that followed *Baby M*, little attention was directed toward the distinction between traditional and gestational surrogacy. This may not be surprising, in that Baby M herself was the product of traditional surrogacy and gestational surrogacy was not common in the 1980s. Most statutes enacted in the late 1980s and early 1990s applied generically to all surrogacy contracts, as did the ABA Model Act and the Uniform Act.[38]

This began to change with *Calvert v. Johnson*, a 1993 California Supreme Court decision involving a baby who was the genetic child of both intended parents.[39] The court rejected the parental claim of the surrogate, holding that Calvert, the intended mother, was the child's legal mother. The court found that Johnson and Calvert had both produced "acceptable proof of maternity" under the state's parentage statute– Johnson on the basis of pregnancy and birth, and Calvert on the basis of genetics– distinguishing the case from the traditional arrangement where the surrogate was both genetic and gestational parent. In this situation, the court reasoned, parental status should be determined on the basis of the parties' intentions as expressed in the surrogacy contract. Rejecting Johnson's constitutional argument, the court concluded that she

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[38]The 1989 ABA Model Surrogacy Act offered two alternatives–a ban and a statute authorizing but regulating surrogacy. See *A.B.A's Two Models for 'Baby M' Laws*, N.Y. Times, Feb 9, 1989 at C13. See also Uniform Status of Children of Assisted Conception Act (1988).

[39]Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). Ms. Calvert, the intended mother, could not become pregnant due to a hysterectomy.

was not exercising procreative choice, but was providing a service.

Calvert generated surprisingly little controversy, but the case had a profound impact on surrogacy practice.[40] California quickly became a surrogacy center, but other states also favored gestational surrogacy, which overwhelmingly became the preferred arrangement. Within a relatively brief period, many states recognized the parental status of intended where a donated egg was used and neither the surrogate nor the intended mother was the child's genetic mother.[41] Gestational surrogacy arrangements became standard, in part because they now offered legal certainty about parental status and also because improvements in reproductive technology have made pregnancy outcomes in IVF more predictable and thus less costly than previously.[42]

The difference between gestational and traditional surrogacy contracts has become an important legal distinction. In the absence of statutory authority, numerous courts have directed that intended parents in gestational arrangements be named on birth certificates, emphasizing the difference from traditional surrogacy.[43] Moreover, the new Uniform Parentage Act and most of the surrogacy statutes enacted since 2000 deal exclusively with requirements for enforcement of

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[40] Katha Pollitt was unusual in her scathing denunciation. Katha Pollitt, *When is a Mother Not a Mother*?, THE NATION, Dec. 31, 1990.

[41] See cases cited in note 4. See also Buzzanca v. Buzzanca, 72 Cal. Rptr. 280 (Cal. App. 1998).

[42]DEBORA SPAR THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF COMMODIFICATION 28-30, 55(2006). In 1985, about 10-15%% of IVF produced a child; by 2002, the odds had risen to 30-35% for women under age 35. *Id.* at 55.

[43] See cases cited in note 4. Where all parties are in agreement, courts have struck down state statutes prohibiting the agreements. For example, one appellate court held a statute making the surrogate the child's legal mother to be unconstitutional when applied to cases like *Calvert*. Soos v. Superior Ct., 897 P2d 1356 (Ariz. App. 1994). See also J.R. v. Utah, 261 F. Supp. 2d 1268 (2003)(Utah statute prohibiting genetic parents' name on birth certificate unconstitutional).

gestational surrogacy agreements, leaving traditional arrangements in a legal netherland.[44]

2. **Statutory Reform- The Second Wave of Surrogacy Laws**

The recent statutory reforms in surrogacy law have largely been driven by pragmatic concerns. As couples eager to have children increasingly have shown themselves ready to turn to surrogates even when the agreements are of uncertain legality, lawmakers have recognized the potential harms posed by the lack of regulation. In a legal vacuum, and even where the contracts are prohibited, a host of legal problems can arise regarding the rights and obligations of the participants toward the child. Together with the risk of acrimonious custody litigation, the divorce of the intended parents or their reluctance to accept the child can result in costly uncertainty. Against this background, many lawmakers concluded that surrogacy arrangements would continue with or without facilitating legislation and the appropriate legal response was to establish clear rules under which parental status was clearly prescribed.[45]

The Illinois legislation is representative. In 2003, the Illinois Supreme Court implored the legislature to safeguard the interests of children born as a result of assisted reproduction by clarifying the parental status of the involved adults.[46] The legislature responded in 2004 by passing the Gestational Surrogacy Act (GSA). This statute is similar to other contemporary laws

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[44] UNIFORM PARENTAGE ACT (2000); Fla. Stats. Ann Sect. 742.15; NEV. REV. STATS. ANN. 126.045 (WEST); 750 ILL. COMP. STAT. ANN. 47/25. N.D. Some states authorize enforcement without distinguishing between gestational and traditional agreements. VA.CODE ANN. S. 20-159; N .H. REV. STAT. S S 168 B:1-B:32.

[45] For example, in 2000, the Uniform Parentage Act provision that offered states the option of declaring surrogacy agreements void was repealed, on the ground that regulation was essential because parties would continue to enter these agreements. *See* U.P.A. SECT. 801, COMMENT (2000). See also In the Parentage of M.J., et. al., 787 N.E.2d144 (Ill. 2003).

[46]In the Parentage of M.J., et. al., 787 N.E.2d144 (Ill. 2003)(emphasizing that the Illinois Parentage Act, enacted in 1975, did not contemplate the new reproductive technologies).

in limiting enforcement to gestational surrogacy contracts and providing that the intended parents automatically become the child's legal parents at birth. Also like other statutes, the GSA requires that the surrogate must have given birth before and that the intended parents have a medical need for the gestational surrogacy.[47] But the Illinois law creates a more efficient (and less expensive) process than other states, by providing for pre-birth registration rather than a judicial proceeding to establish the status of the intended parents.[48]

An account of the legislative process in Illinois suggests how much the legal and political landscape had changed since the days of *Baby M*. No reports indicates that the bill was challenged as promoting "baby selling" or that it was criticized for being exploitative of women who served as surrogates. Indeed, one is hard pressed to find opposition to the Illinois bill.[49] Advocating for the bill were parents' groups, the Illinois Bar Association, and attorneys who practiced in the area of adoption and assisted reproduction.[50] The news coverage was positive as well, with reports of warm relationships between surrogates and grateful couples and explanations of how the new law would avoid the "horror stories" in which surrogates or

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[47] 750 ILL. COMP. STAT. ANN. 47/35(A)SECT. 20 (A)(1) ; SECT. 20(B).

[48] The statute also directs that parentage be determined on the basis of the parties' intent if the parties fail to meet a statutory requirements. 750 ILL. COMP. STAT. ANN. 47/25(E). Further, it allows contract terms regulating the surrogate's behavior in matters that may affect the health of the fetus, including compliance with medical advise and abstention from alcohol, tobacco, and non-prescription drugs. 750 ILL. COMP. STAT. ANN. 47/25 (D).

[49]Nidhi Desai, an attorney intimately involved in the process and the drafting of the bill reports that few opponents- and no women's groups- spoke against the bill. According to Desai who testified in support of the bill, "the members had a lot of questions, and they were satisfied with the answers." July 9, 2008 phone interview with author.

[50] Individual attorneys, such as Desai herself, whose practice focused on adoption and assisted reproductive technology, also advocated for the bill. *Id.*

intended parents backed out of agreements.[51] The bill was passed without opposition in both houses of the legislature.

Despite the equanimity with which the GSA was enacted in Illinois, opposition to surrogacy arrangements continues in some quarters. In 2008, the Minnesota legislature passed a bill almost identical to the Illinois statute, but in the face of stiff opposition from social and religious conservatives, including several anti-abortion groups. The Catholic Church criticized the bill in measured terms, but the Minnesota Family Council called the legislation "legalized baby-selling" and charged that the statute would encourage more single parent and same-sex parent households.[52] Lobbying in favor of the bill was the state Bar Association and Resolve, an increasingly active organization of adults dealing with infertility problems. The legislature voted almost 2-1 in favor of the bill– which was then vetoed by Republican Governor Tim Pawlenty.[53] As in Illinois, no evidence indicates that any women's organizations or civil liberties groups participated in the legislative process in Minnesota.

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The history of surrogacy regulation over the past 20 years presents several puzzles. How

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[51]See Judith Graham, *State Sets Standards on Surrogacy Birth; Legislation Called Most Liberal in U.S.*, CHI TRIB. Jan. 2, 2005 at C1 (quoting the bill's House sponsor, "The idea was to clarify who has responsibility for the child born through this process" and avoid litigation). Monica Rogers, *The Birth of a New Tradition; Showers for Surrogates,* CHI. TRIB. July 13, 2005 at C1.

[52] Mike Kaszuba, *Group Says Surrogacy Bill Allows for Baby-Selling,* MINNEAPOLIS-ST. PAUL STAR-TRIB. April 9, 2008 at 5B.

[53] Andy Birkey, *Surrogacy Bill Passes Minnesota Legislature*, REPRODUCTIVE HEALTH http://www.rhrealitycheck.org. Veto letter by Gov. Tim Pawlenty, Journal of the Senate, 85th Legislature, May 16, 2008. Https://www.revisor.leg.state.mn.us/bin/bldbill.php?bill=S2965.2.html&session+ls85.

did one case generate such intense hostility and alarm about an arrangement that had attracted little attention until that time? Women's groups and social conservatives seldom ally on matters of reproductive choice: How did that alliance form and why was it so short-lived? And what are the forces that altered the social meaning and political dynamic of surrogacy in a relatively short period? In what follows I will seek to unravel these puzzles and to shed some light on the framing and reframing of surrogacy.

II. THE *BABY M* ERA: MORAL PANIC AND INTEREST GROUP POLITICS

The intense interest in surrogacy triggered by the *Baby M* decision shaped the law in ways that have had a lasting impact in many states. In this Part, I argue that this response had the flavor of a moral panic, which became institutionalized through legislation. Because of the drama and salience of the case and the novelty of surrogacy, repeatedly reinforced by political actors and the media, surrogacy came to be perceived as a practice that posed a serious threat to core social values. This perception was shaped and promoted by feminist and religious "opinion leaders," who amplified the social meaning of surrogacy as baby-selling and the exploitation of women. I seek to explain the forces motivating these groups which led to a political alliance that played an important role in shaping the law for years to come.

A. Why a Moral Panic?

Sociologists have long been interested in moral panics, a form of collective action in which the public, the media and political actors reinforce each other in an escalating pattern of intense and disproportionate concern in response to a perceived social threat.[54] Moral panics are

[54] Erich Goode and Nachman Ben-Yehuda have authored the authoritative analysis of moral panics. ERICH GOODE AND NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL

often triggered by highly publicized events that engender public fear. Typically, alarm and hostility target a particular group of individuals who are deemed responsible for the threat and must be stopped. What distinguishes a moral panic from a straightforward effort to deal with a pressing social problem is the gap between the perception of the threat and the reality. In a moral panic, participants exaggerate the seriousness of the threat and the urgency of the need for government action in response.

On first inspection, the response to *Baby M* and to surrogacy arrangements seems somewhat different from the classic moral panic. Unlike a school shooting that triggers outraged calls for cracking down on juvenile crime, surrogacy did not inherently represent a social evil. Conceivably, during the course of the trial, surrogacy could have taken on the more benign social meaning that it later assumed. But this did not happen. The meaning of surrogacy as baby selling and exploitation of poor women crystalized; accordingly, public and political concern about the threat of social harm intensified along with demands for official attention.

In part, the framing of surrogacy as commodification was facilitated by an amorphous unease about new reproductive technologies emerging in the 1980s. Although traditional surrogacy of the Whitehead-Stern variety was quite low-tech, it was associated in public discourse with IVF and cloning, unfamiliar and sophisticated technological developments. Less than a decade after the birth of Louise Brown, the first child produced through IVF, American society had only begun to contemplate the dramatic changes in family formation made possible by technologies that allowed genetic, gestational and social parenting to be disaggregated.[55] The

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CONSTRUCTION OF DEVIANCE (1994).

[55] DEBORA SPAR, THE BABY BUSINESS, *supra* note 42 at 26-30.

scientific innovations raised the possibility of breeding farms and markets in designer babies.[56] Thus, the negative response to *Baby M* was driven in part by anxiety about the uncertain risks associated with surrogacy and with the new reproductive technologies generally.[57] At the same time, the unhappy outcome of the Stern-Whitehead arrangement reinforced a general concern that the "brave new world" of assisted reproduction was a perilous one.

This escalating anxiety suggests ways in which the response to *Baby M was* typical of the way that a dynamic interplay among political actors, the media, and the public can create and sustain a moral panic as it runs its course. The role of the media was key in maintaining public attention; the troubling story of the fight over the child was in the news for more than a year. The

story was interesting in itself; it also intensified media and public interest in the broader issues surrounding surrogacy, and every discussion of the broader issues was linked to the case. In this way, *Baby M* fueled political and public concern as it came to represent of the risks generally posed by surrogacy arrangements.

Cognitive psychologists have clarified the mechanisms through which a moral panic is generated and sustained by showing how attention directed at a particular threat affects individuals' perceptions about the magnitude of the danger. Individuals use heuristics, or rules of

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[56] For a gripping fictional account, see MARGARET ATWOOD, THE HANDMAID'S TALE. See *generally* GENA COREA, *supra* note 7.

[57]Both the New York and New Jersey Task Force reports linked *Baby M* to social and ethical issues raised by new reproductive technologies. SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY, *supra* note 28 at 1-2; AFTER BABY M: THE LEGAL, ETHICAL AND SOCIAL DIMENSIONS OF SURROGACY, *supra* note 36 at 1. Unfamiliar risks often appear to be more threatening than familiar risks. Timur Kuran & Cass Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

thumb, to process information and assess the importance of particular data; these short-cuts are very useful but can lead to systematic biases. One such cognitive short-cut, the availability heuristic, leads us to overvalue vivid experiential data that can be readily brought to mind and to discount the importance of abstract information.[58] Thus individuals are likely to judge the risk of an event that is readily imaginable to be more probable than one that is remote or not easily contemplated. The *Baby M* story was not representative of typical surrogacy arrangements, but it is easy to see how intense media coverage of the acrimonious dispute assumed disproportionate salience to a person evaluating the social harm of surrogacy– as compared to abstract evidence that most surrogacy arrangements were carried out smoothly. Opponents of surrogacy focused on *Baby M* and a few other horror stories to underscore the substantial threat of harm to children and women posed by these arrangements.[59]

Distorted perceptions of risk that fuel a moral panic are not simply a matter of *individual* misperceptions. Public concern about the seriousness of a social problem is magnified when the threat is repeated and reinforced in public discourse– as re-telling makes the threat more salient. Scholars have called this dynamic process an *availability cascade*.[60] In the case of surrogacy, politicians and other opinion leaders generated and reinforced public interest and concern, using *Baby M* to frame the issue. Governors Kean and Cuomo (both Catholics) spoke out against

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[58]Amos Tversky and Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in DANIEL. KAHNEMAN *ET. AL.*, EDS., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (CAMBRIDGE, 1982), 11.

[59]Another case frequently cited involved intended parents who allegedly refused to take twin babies, insisting that they had only agreed to take one child. THE BUSINESS OF SURROGATE PARENTING, *supra* note 29.

[60] Kuran and Sunstein, *supra* note 57 at 683-768, 720-723 (1999).

surrogacy and established task forces to study the practice.[61] Feminists, women's groups and religious organizations (especially the Catholic Church) created support for Whitehead and momentum for anti-surrogacy law reform through courthouse vigils, interviews, petitions, newspaper columns, amicus briefs and legislative testimony.[62] They ultimately were successful in shaping the social meaning of surrogacy as a degrading business in which poor women were unfairly exploited and coerced to sell their babies by profit-seeking brokers like Noel Keane. The media, perceiving the public's interest, continued to give the issue substantial coverage and editorial opinion was almost uniformly hostile to surrogacy and favorable to restriction.[63] Through this process, the "baby selling\ women exploiting" narrative was created and sustained, and the view that "something must be done" by the government to respond to the threat was translated into law reform in several states.

Although the primary evil of surrogacy was baby selling, neither the sellers or the buyers were cast as the villains of the moral panic triggered by *Baby M*. Instead, opponents targeted the intermediaries like Noel Keane as the evil-doers who must be stopped. According to advocates, commercial surrogacy was a business venture, operated with the goal of making a profit from the exploitation of poor women and childless couples. Keane, who ran the largest and best

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[61] Both advocated for restrictive legislation and played key roles in the political process. Beginning in 1989, Governor Cuomo introduced a bill banning surrogacy in each legislative session until it was passed in 1992. See t.a.n. 27 to 29 supra.

[62] See t.a.n 18 to 22 *supra*. Phyllis Chessler played a key role as an opinion leader in mobilizing feminist support. She describes the roles of various individuals and groups in building support for Whitehead and opposition to surrogacy. SACRED BOND , *supra* note 17 at 71-107.

[63] See "*There is Nothing Surrogate About the Pain*," N.Y. Times March 9, 1987. See also editorials favoring New York statute, supra note 30.

known surrogacy agency was frequently depicted as the typical broker– an unsavory opportunist who had grown rich in the baby-selling business. In New York, for example, the Health Department report that pointed to the threat posed by Keane and his ilk successfully mobilized a previously reluctant legislature to pass a strict prohibition with criminal sanctions for intermediaries.[64] In fact, Keane operated the *only* sizable agency arranging surrogacy contracts during this period, suggesting the extent to which the threat of surrogacy was exaggerated in the midst of the moral panic surrounding *Baby M*.[65]

That other participants in surrogacy arrangements were viewed as less culpable is not surprising. As suggested, surrogates themselves were depicted sympathetically; their decisions to become involved in the reprehensible arrangements were seen as coerced by circumstances (and by the brokers) and ill-informed about the consequences. Infertile couples seeking to acquire children fared somewhat less well. Surrogacy opponents criticized the Sterns for participating in the exploitation of Whitehead– rich people using their superior wealth and social status to indulge their desire for a genetically linked child. Betsy Stern was ridiculed as a woman who put her career first and found child bearing inconvenient; Whitehead supporters expressed skepticism about her claimed medical disability.[66] Nonetheless, although angry advocates disparaged the Sterns, the vilification of infertile couples seeking to have children through this

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[64] THE BUSINESS OF SURROGATE PARENTING, *supra* note 28 at 3-8. . For an informative description of Keane and his role, see Sanger, *supra* note 9 at 144-149.

[65]THE BUSINESS OF SURROGATE PARENTING, *supra* note 28 at 3. The New Jersey Task Force reported that only 14 agencies existed of which only 6 had arranged 40 or more surrogacies. See AFTER BABY M, *supra* note 36 at 39.

[66]See Pollitt, *The Strange Case of Baby M*, *supra* note 18; Sanger, *supra* note 9 at 153-54.

means did not stick. Most observers likely had some sympathy for their plight, seeing the desire to have a child with a biological connection to one parent not as a selfish indulgence but as a natural and understandable impulse.[67] Thus, in the political arena, the involvement of parties to surrogacy arrangements was characterized sympathetically as either wrongheaded or coerced.

B. The Activists for Law Reform– An Unlikely Coalition

At one level, the legislative reform following *Baby M* is a straightforward story of interest group politics. In New York, as we have seen, several well organized constituencies joined together to lobby for the legislative ban; these included civil liberties groups, adoption and child welfare organizations, religious organizations (most prominently the Catholic Church), groups promoting family values, and women's groups. At the same time, opposition to the bill was weak and not well organized.[68]

But the effective coalition of lobbying groups was a curious one; feminists and civil liberties groups seldom ally with traditional religious organizations– particularly on issues relating to the regulation of reproductive choices. For the Catholic Church and other social conservatives, political opposition to surrogacy was compatible with broader family policy agendas. This was less clear for civil libertarians, feminists and women's groups, whose stance on surrogacy seemed to be in tension with their commitment to women's reproductive autonomy– as some feminists recognized at the outset.[69] Two questions should be addressed:

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[67] AFTER *BABY M*, *supra* note 36 at 13-14; SURROGATE PARENTING, supra note28 at 7-13 (task force reports describing infertility).

[68]See discussion tan 30 to 35 supra. The legislative packet includes many letters from organizations supporting the statute and only a handful, mostly from individuals, opposed. See Legislative Bill & Veto Jacket, *supra* note 30.

[69]See Peterson and other sources, *supra note* 19.

What explains the anti-surrogacy position taken by feminists and civil liberties groups? And what explains the lack of dissent among feminists in the political arena– given the early recognition that the issue was a hard one for feminists?

1. Conservative opposition to surrogacy

The Catholic Church opposed surrogacy arrangements and supported legal prohibition even before *Baby M* captured national attention. Surrogacy was simply one dimension of a larger threat to core Catholic beliefs about family formation posed by the new reproductive technologies. In 1987, while *Baby M* was in the headlines but not yet decided, the Vatican issued a forceful statement condemning surrogacy and explaining that *all* means of assisted reproduction were prohibited under Church doctrine, which required that children be created (only) through the conjugal union of husband and wife.[70] This pronouncement (the product of two years of study) was immediately linked to *Baby M* in news accounts; it specifically called on governments to prohibit surrogacy. For the Church, *Baby M* provided an opportunity to influence lawmaking on a matter of grave moral and doctrinal importance; its active efforts to frame surrogacy as commodification and to influence its regulation of surrogacy were grounded on this religious foundation.[71]

More generally, opposition to surrogacy arrangements was (and is) compatible with the

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[70] *See* Bernard Lo, *Vatican Statement on Life is a Start, Not an Answer*, L.A. TIMES, March 19, 1987 (describing Instruction on Respect for Human Life and its Origin and on the Dignity of Procreation); Roberto Suro, *Vatican's Moral Mission*, N.Y. TIMES, March 12, 1987 at A1. The statement, authored by Joseph Cardinal Ratzinger (the current Pope Benedict XVI) was initiated in the early 1980s by the Pope, out of concern about the new reproductive technologies.

[71] An *amicus curaie* brief submitted Supreme Court in *Baby M* by the New Jersey Catholic Conference stated that surrogacy is "a new form of prostitution,. . . traffic[ing] for profit in human lives,"degrading women and "dehumaniz[ing] children."Craig McCoy, *N.J. Bishops Decry Surrogate Parenting as Prostitution*, Phila. Inquirer July 16, 1987 at B1.

family values agenda of religious and social conservatives. Indeed, the views of pro-life activists about abortion and motherhood also illuminate their hostility to surrogacy arrangements. In her important study of abortion activists, Kristin Luker found that many abortion opponents were women who saw sexuality, pregnancy and motherhood within traditional marriage as the essential core of women's identity.[72] These women viewed pro-choice advocates as careerists whose efforts to control fertility undermined the family and devalued women's most important role. It is easy to see how these attitudes might translate into hostility toward surrogacy (and toward career woman, Betsy Stern). For religious and social conservatives, surrogacy arrangements represented a threat to the traditional family and to women's roles as wives and mothers. Whitehead's urgent desire to keep her child was a "natural mother's instinct" that should be respected.[73]

2. Opposition to Surrogacy by Women's Advocates

a. Feminist commitments and surrogacy This account of the motivation of conservative opponents of surrogacy does little to illuminate the response of most feminists. A core part of the feminist political agenda has been vigilant resistance to the notion that the government, and not women themselves, should control reproductive decisions. One might have expected support among pro-choice advocates for allowing women to make their own decisions about entering surrogacy arrangements. In fact, early in the *Baby M* trial, some feminists expressed reservations about the political agenda of Whitehead supporters, arguing that paternalistic restrictions on surrogacy contracts were dangerous incursions into women's

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[72]*See generally* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984).

[73]*Id.* At 160.

procreative freedom.[74] But advocates with this view ultimately played little role in the political process.

To an extent, the prevailing feminist position opposing surrogacy *was* compatible with core feminist commitments of gender equality, control over reproduction, and with a general concern that women not be defined by their reproductive capacity. First, some advocates framed the issue of control over reproduction by focusing not on the surrogacy decision, but on the relinquishment of the child. On this view, the woman's reproductive choice was not to execute the agreement, but to keep the baby, a decision that powerful men (Stern, Keane and Judge Sorkow) were seeking to override. Further, for many feminists, surrogacy represented yet another context in which women were valued primarily for their sexual and reproductive capacities rather than for their intellect and skills. One feminist compared the surrogate to "human potting soil for the man's seed."[75] The practice of surrogacy was designed to satisfy men's desire for children– or for profit, in the case of brokers like Noel Keane– and the arrangements relegated women to the low status\ low wage job of "baby maker." Finally, some feminists were deeply troubled that the bond between a mother and her child developed during

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[74] See Lorraine Sorrel, *Baby M Again*, OFF OUR BACKS: A WOMEN'S NEWSJOURNAL, July 31, 1987. Sorrel argued that Whitehead should be held to her contract or women's ability to make reproductive decisions would be threatened and that motherhood would be unduly sanctified so women could not assume other roles. Opponents of surrogacy and Whitehead supporters described the reluctance of feminists to get on board. See K. Pollitt, *The Strange Case of Baby M*, *supra* note 18; P. CHESLER, SACRED BOND, *supra* note 17 at 22, 34. A few feminist legal scholars also argued for enforcement of surrogacy contracts. See Lori Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 LAW, MEDICINE & HEALTH CARE 72 (1988).

[75]See Pollitt, *The Strange Case of Baby M*, *supra* note 18.

pregnancy could be severed involuntarily on the basis of a contract.[76]

This account reflected feminist concerns, but it rested at least in part on an assumption that decisions by women to enter surrogacy contracts were not autonomous choices that should be enforced. As a general proposition, most feminists presume that women are capable of assessing their own interests and making decisions in pursuit of their goals. One could imagine a narrative under which a woman decides that, in entering a surrogacy contract, she will be performing a useful service for the couple, while at the same time, furthering her own interests and those of her family– by earning money while caring for her children at home, for example.[77] In this narrative, surrogates are rational self interested actors–and should be held to their promises upon which others rely. Feminists opposing surrogacy implicitly rejected this account because they believed that some dimensions of this decision making process were seriously flawed.

Feminists (and other critics) saw two problems with the execution of surrogacy contracts that weighed against enforcement– and in favor of a ban. First, they argued that surrogates' decisions were made under duress; this concern is captured in the frequent claim that these contracts are exploitative of women. On this view, surrogates were economically distressed women with few options for meeting compelling financial needs. These exogenous conditions made them vulnerable to exploitation by intermediaries who were happy to take advantage of their dire circumstances. As the New Jersey Supreme Court noted in *Baby M*, this concern also

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[76]*Id. See also* Katherine Bartlett, *Re-Expressing Parenthood*, 98 YALE L. J. 293, 333-34 (1988).

[77]Many surrogates who are happy with their involvement in surrogacy arrangements offer this description of their decision. *See* Brigid Schulte, *Sharing the Gift of Life*, and Lorraine Ali and Raina Kelley, *The Curious Lives of Surrogates*, *supra* note 3.

arises in the context of adoption, where it is the rationale for not allowing large payments or pre-birth consent.[78] In the context of surrogacy, where the exigencies are less urgent, this claim may assume that most women would not agree to undertake what is seen as a degrading service were it not for their extreme need and lack of other opportunities. Alternatively, surrogates who willingly entered these arrangements believing that they were performing a valuable service were likely subject to self deception generated by a patriarchal society.[79]

Some feminists also viewed surrogacy contracts to be defective because some women would not anticipate at the time of contract execution the substantial risk that they would regret their agreement to relinquish their children at birth. Women might not understand that they were likely to form a bond with their child during pregnancy that could make relinquishment extremely difficult.[80] Scholars have described limits on individual's ability to anticipate emotional reactions in the future, arguing that deficiencies in "affective forecasting" undermine informed decision making and may justify non-enforcement of agreements. In the context of surrogacy, many opponents argued that the risk of regret by the surrogate was very great–

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[78] 537 A.2d 1227 at 1244-45.

[79]Margaret Radin argues that surrogates who feel fulfilled in the role are subject to "ironic self deception," and are "reinforcing oppressive gender roles." Intended mother also are subject to "false consciousness," believing they should raise their partners' genetic children. *See* Radin, *supra* note 5 at 1930-31.

[80]See Vicki Jackson, *Baby M and the Question of Parenthood*, 76 GEO. L. J. 1811, 1819 (1988); Bartlett, *supra* note 78 at 333 (describing mystical bond that develops during pregnancy); Linda Lacey, *The Law of Artificial Insemination and Surrogate Parenthood in Oklahoma*, 22 TULSA L. J. 281, 317 (1987) ; MARTHA FIELD,, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES, 71-2 (1988).

another reason not to allow the agreements.[81]

This prediction gained force, in part, because the issue was first considered in the context of *Baby M*, which involved a surrogate who *did* experience great regret. Feminists are as susceptible to the availability heuristic as anyone else and it seems likely that vivid images of Whitehead's anguish at being separated from her child influenced their views. The argument that women should have the freedom to make these decisions might have prevailed with feminists were the issue not complicated by the unfortunate outcome in *Baby M*. But the prediction also resonated for some feminists because regret in this context seemed like a mother's natural response. The notion that the typical surrogate would coolly relinquish her child conflicted with an ideology of motherhood under which pregnancy was seen as a unique experience through which a "sacred bond" develops between mother and child.[82] In this regard at least, some feminists shared views about motherhood endorsed by social conservatives.[83]

In sum, many feminists viewed surrogacy transactions as inherently degrading to women; they assumed that the contracts were executed because women were coerced by exigent

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[81]Jeremy Blumenthal, *Law and the Emotions: The Problem of Affective Forecasting*, 80 Indiana L. J. 155 (2005)(arguing that individuals often inaccurately forecast future emotional states; this deficiency is a reason not to enforce surrogacy contracts); Molly Wilson, *Precommitment in Free Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decisionmaking Capacity*, 31 J. LEGISLATION 329 (2005); Vicki Jackson, *Id.*

[82]See Bartlett, supra note 76 at 333-34; Pollitt, *The Strange Case of Baby M*, *supra* note 18. Phyllis Chesler, a leading feminist activist, titled her book about *Baby M* "Sacred Bond," supra note 17.

[83] See K. LUKER, *supra* note 72 at 197-215. The prominent feminist role in the anti-surrogacy movement, in part, was a triumph of the views of relational feminists over those of liberal feminists. While liberal feminists emphasize gender equality and autonomy and downplay differences between women and men, relational feminists focus on women' unique identity and attributes, including relational capacities.

circumstances or false consciousness and because they could not anticipate the adverse consequences of their choices. For these reasons, feminists in the political arena argued either that women should not be held to these contracts or that the arrangements should be prohibited.

b.* Baby M *as a Custody Trial There is another piece to the puzzle of feminists' active involvement in the political movement to prohibit surrogacy arrangements. Feminists coalesced in support of Whitehead and against surrogacy because they saw the case as typical of contested custody disputes in which loving mothers lost their children to more powerful fathers. Although the legal issue in *Baby M* was whether the surrogacy contract should be enforced, in many ways, the trial played out as a custody proceeding between the parents, with much expert testimony about which party would be a better parent to the child. Feminists and women's groups mobilized in response to their perception that Whitehead's parenting abilities were being unfairly scrutinized and criticized, while Stern was presumed to be competent to assume the parental role, despite his lack of experience.[84]

Child custody decision making was an important issue on the feminist agenda in the 1980s. The tender years presumption favoring mothers had been replaced in most states by the gender neutral best interest standard. Although the empirical evidence is mixed, feminists argued that under the best interest standard, primary caretaker mothers typically lost adjudicated custody disputes to wealthier, more powerful, fathers.[85] Many anti-surrogacy feminists saw the Whitehead-Stern dispute as one more example of the losing struggle of mothers to keep their

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[84]See t.a.n. 19 *supra.*

[85]See Nancy Polikoff, *Why are Mothers Losing?* 7 WOMEN'S RTS L. REP. 235, 236 (citing studies showing fathers winning between 38% and 63% of disputed custody cases). Overall, about 10% of children are in fathers' custody. ELEANOR MACCOBY & ROBERT MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY, 168 (1992).

children in an unfair patriarchal system. Phyllis Chesler, a long time critic of the legal system's treatment of mothers in child custody cases, was one of the most active feminist supporters of Whitehead and a determined advocate for banning surrogacy arrangements. She explicitly framed the case as a typical custody dispute riddled with gender bias, with the predictable outcome.[86] For many feminists, surrogacy and child custody became conflated in the setting of this compelling case. In opposing these transactions generally, they may have assumed that such proceedings would be the norm if surrogacy were allowed.

c. Why No Dissenting Feminist Voices? Although surrogacy was often described as a challenge or "hard case" for feminists, ultimately women's groups spoke with one voice in the political arena during *Baby M* and thereafter for several years. Given the complexity of the issues and the early divisions among feminists, this lack of dissent warrants some examination.

The literature on public opinion formation and expression offers an explanation of this response. Timur Kuran demonstrates that when expressions of public opinion coalesce around a dominant position, individuals whose preferences are inconsistent with that view may be silenced through a mechanism that he calls a reputational cascade.[87] This happens, according to Kuran, because individuals seek to avoid social disapproval and censure that may follow the expression of an unpopular view. As support for a dominant view gains force, the cost of dissent rises, and individuals with nuanced or even opposing views may be reluctant to speak out.

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[86]See CHESLER, SACRED BOND, *supra* note 17 at 11, 16, 97. The year before *Baby M*, Chesler published a study of custody trials that focused on mothers who lost custody. PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY (1986).

[87]*See generally* TIMUR KURAN, PRIVATE TRUTHS; PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION (1995); Timur Kuran, *Ethic Norms and their Transformation through Reputational Cascades*, 27 J. L. STUDIES 623 (1998). See also, Timur Kuran & Cass Sunstein, *supra* note 57 at 727-29.

Reluctance may be particularly likely for those who identify generally with the perspective of opinion leaders or are reluctant to affiliate with opponents. This response can contribute to the impression that public opinion supporting the dominant position is stronger than is in fact the case. In a circular process, this makes dissent appear to be even more costly and reinforces the perception that the prevailing opinion represents a strong social consensus.

This analysis suggests why feminists with reservations about support for Whitehead and the anti-surrogacy reforms did not push their views in the political arena. In the midst of the moral panic surrounding *Baby M*, activists and opinion leaders such as Chesler moved quickly and successfully to frame surrogacy as an exploitative practice that posed a substantial threat to women and to motherhood. Feminists seeking to challenge this position might well have anticipated that they would incur substantial reputational costs. As the anti-surrogacy availability cascade gained momentum, a more tolerant stance became untenable for feminists. To oppose restrictions on surrogacy was to be anti-woman, allied with brokers and fathers against poor mothers (and other feminists). Not surprisingly, in this environment, few feminists openly expressed reservations about policies restricting the freedom of parties to enter surrogacy arrangements, although at a theoretical level such policies might be seen to be in tension with feminist values.[88]

III. THE COLLAPSE OF COMMODIFICATION: REFRAMING SURRAGACY

Since the early 1990s, surrogacy has been largely reframed as a social and political issue. In this Part, I seek to explain that reframing, which set the stage for Illinois lawmakers to approach surrogacy with the pragmatic goal of maximizing the social benefit of the arrangements

[88]One exception was Lori Andrews, who supported the trial court decision. *Baby M Decision Spurs Wide Debate*, N.Y. TIMES, April 5, 1987. See also L. Andrews, *supra* note 74.

by providing efficient procedures to establish parental status. Several factors have contributed to the change. First, the moral panic surrounding Baby M predictably dissipated, creating an environment more open to reflective consideration of surrogacy regulation. Surrogacy and the new reproductive technologies became more familiar and, with familiarity, have seemed less threatening. This happened in part because the predicted harms of commercial surrogacy largely have failed to materialize and claims of commodification no longer seem as compelling as they once did. The framing of surrogacy as "baby selling" has also lost force as traditional surrogacy has been supplanted by gestational surrogacy in recent years. Finally, whatever its abstract merits, the commodification argument has become unpalatable for feminists and liberals in the political arena, because pro-life advocates have successfully used uncomfortably similar women-protective arguments in favor of restricting abortion. The withdrawal of women's advocates has altered the political dynamic, as has the growth of pro-surrogacy interest groups who frame surrogacy as a socially beneficial practice.

A. The Dissipation of the Moral Panic- The Changing Political Climate

Sociologists who study moral panics report that they always diminish in intensity over time as the salient incidents and images that stirred concern recede in public consciousness.[89] Thus, predictably, after the New Jersey Supreme Court decision, public interest in surrogacy and outrage about baby selling and the exploitation of women gradually waned as the media, politicians and the public turned their attention to other matters. The New York legislative reform in 1992 briefly revived interest, with advocates again invoking images of *Baby M*, but in other states bill died without action. By 1994, sponsors of a New Jersey law banning surrogacy

[89]ERIC GOODE & NACHMAN BEN YEHUDA, MORAL PANICS, supra note 54 at 38-41 (also describing the recurring nature of some moral panics).

could not even generate enough interest to bring the bill before the legislature.

Moral panics sometimes recur on a periodic basis as new incidents revive public fears. For example, high profile murders by juveniles periodically trigger public demands for cracking down on youth crime. This has not happened with surrogacy. Occasionally, horror stories are reported in the press, but even the 1995 killing of a baby by her father shortly after she was relinquished by the surrogate failed to generate a political backlash.[90] In recent years, no interest group has sought to create a new availability cascade with the goal of mobilizing support for new restrictions on the practice.

In part, this response simply reflects a growing familiarity with surrogacy and other reproductive technologies that were new and (therefore) frightening to many people in the 1980s. This familiarity assuaged fears about the potential of these scientific innovations to undermine conventional understandings of marriage, family formation and human identity. This response was not unique to surrogacy or to the 1980s; Debora Spar observed a similar reaction to pharmaceutical contraceptives, which were greeted with alarm when they were introduced in the 1930s but were gradually accepted as helpful family planning aids.[91] As surrogacy arrangements and other means of assisted reproduction lost their novelty, alarm about their potential threat diminished and the social environment was no longer conducive to generating intense concern.

B. Undermining the Commodification Frame

In large part, familiarity with surrogacy arrangements alleviated public fears because

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[90] Huddleston v. Infertility Center of America, 700 A.2d 453 (Pa. 1997).

[91] Contraception were seen as a serious threat to the family and calls for banning the drugs were common. See Debora Spar, *For Love and Money: The Political Economy of Commercial Surrogacy*, 12:2 Rev. INTERNATL POL. ECONOMY 287 AT 305-06 (2005).

many predictions of harmful consequences made by opponents in the midst of *Baby M* proved to be exaggerated or wrong, undermining the characterization of these contracts as exploitative baby-selling transactions. At one level, of course, the harms of commodification are abstract and not subject to empirical validation. How could it be determined whether surrogacy has changed the way that children or women's reproductive capacity are valued? But little evidence confirms the predictions of more concrete harms associated with the "sale" of children and the exploitation of women who act as surrogates. The empirical research and anecdotal accounts in the media offer a more benign account of surrogacy than that which prevailed earlier, assuaging fears about these transactions.[92]

Here is the picture that emerges. Most surrogates are not as wealthy as the intended parents, but few are poor.[93] Many report using the money they receive to enhance their family's welfare in conventional ways and indicate that they value the ability to earn money while staying home with their children. Further, few surrogates report reluctance to relinquish the child and a very small percentage express regret having served in the role. Contrary to the claim that surrogacy degrades motherhood and pregnancy, the available evidence suggests that surrogates view themselves as performing a service of great social value to the benefit of others.[94] Further, little evidence indicates that children born of surrogacy arrangements suffer psychological or

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[92]Janice Ciccarreli & Linda Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61(1) J. SOCIAL ISSUES 21 (2005)(review of studies of surrogacy); Hazel Basilington, *The Social Organization of Surrogacy: Relinquishing a Baby and the Role of Payment in the Psychological Detachment Process* 7 J. Health Psych. 57 (2002). See news stories in note 3 *supra.*

[93]A recent Newsweek story reports that many military wives volunteer to act as surrogates. See Ali and Kelley, *supra* note 3.

[94]See Ciccarreli & Beckman, *supra* note 92.; Sanger, *supra* note 9 at 137.

physical harm because of the circumstances of their birth, or that surrogates' other children fear that they too will be relinquished. (Melissa Stern herself appears to have bonded securely with her intended parents; as an adult, she reportedly terminated Whitehead's parental rights so that Betsy Stern could adopt her). The evidence tends to support the argument of pro-surrogacy advocates that infertile couples eager to have children are not likely to be seriously deficient parents.[95]

With the passing of time, it became clear that bad outcomes like *Baby M* were exceptional rather than typical, and that the cases that generated alarm could usually be avoided through clear legal rules and requirements aimed at protecting all participants. For example, disputes of various kinds over parental rights and responsibilities (including custody battles and efforts by intended parents to default) are less likely to arise under laws that assigned parental status to the intended parents at birth. Further, concerns about undue influence by brokers or intended parents and about the voluntariness of surrogates' consent and their emotional suitability can be mitigated through well designed regulations.

B. Gestational Contracts: From Surrogate Mothers to Gestational Carriers

The prevalence of gestational surrogacy in recent years has been a very important factor in dismantling the commodification frame and changing the way many people, including lawmakers and lobbyists, view these arrangements. Today 95% of surrogacy contracts involve IVF, and thus

[95]Jennifer Weiss, *Now It's Melissa's Time*, N.J. MONTHLY MAG., March 2007, at www.reproductivelawyer.com In her only interview, Melissa has offered warm public praise for her parents. *Id.* No studies exist on children produced through surrogacy. Studies of children produced by other forms of assisted reproduction suggest that the circumstances of birth do not negatively development. See Ciccarreli & Linda Beckman, *supra* note 92 at 37.

most surrogates are not the genetic mothers of the children they bear.[96] Under several contemporary laws, procedures for efficiently establishing intended parents' rights are limited to gestational surrogacy contracts and courts typically give intended parents' claims more weight when the surrogate is not the child's genetic parent. The evidence suggests that surrogates themselves see this distinction as important in defining their relationship with the children they will relinquish. As one gestational surrogate put it, "I would feel completely different if it were my child."[97]

The move to gestational surrogacy has facilitated the change in the social meaning of surrogacy from a mother's selling of her baby to a transaction involving the provision of gestational services. (It is telling that gestational surrogates are often described as "carriers," rather "mothers."[98]) Although some have challenged the baby-selling argument all along, on the ground that fathers can not buy their own children, this objection gained little traction as long as *mothers* were seen as selling their children. But the gestational surrogate lacks a biological connection with the child she is nurturing and bearing, and thus her identity as the child's mother is less powerful.[99] The conclusion that the child is not in fact *her* child, but rather that she is

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[96]See Sanger, supra note 9 at 140.

[97]See Lorraine Ali and Raina Kelley, *supra* note 3.

[98]See J.R. v. Utah, 261 F. Supp. 2d 1268, 1270 (D. Utah 2003) ("the couple hired a woman to serve as a gestational carrier"); Culliton v. Beth Israel Deaconess Med. Cntr, 756 NE2d 1133, 1137 (Mass. 2001). See also Noa Ben-Asher, *The Curing Law: On the Legal Evolution of Baby-Making Markets*, Columbia Law School, Public Law & Legal Theory Working Papers at http://ssrn.com/abstract=1095448 (arguing the importance of this distinction).

[99]In the floor debate in the Illinois House, Barbara Currie, the sponsor of the GSA, reassured her colleagues, "In a situation where the birth mother. . . provided the egg that results in this baby, there is no way you can't grant her the opportunity to change her mind at the 11th

providing contractual gestational services to the child's "actual" parents resonates with many people.[100]

This change in social meaning seems to have evolved in a two-step process. In *Calvert*, the first important gestational surrogacy case, both intended parents were the child's genetic parents; this carried great weight with the court and made their claim of parental status compelling. Soon, however, intended parents were assigned parental status under gestational arrangements when only one intended parent was the child's genetic parent.[101] Thus, it appears that gestational surrogacy has reshaped the social meaning of these arrangements by diminishing the maternal credentials of the surrogate, rather than by enhancing those of the intended mother. This is interesting, given that critics of surrogacy have often emphasized the mother-child bond formed in pregnancy as the foundation of the surrogate's parental claim, and the source of her predictable regret in relinquishing the child. In the literature on pregnancy and motherhood, little attention has focused on the relative importance of genetics and gestation, since the two elements are almost always bound together. The response to gestational surrogacy suggests that gestational motherhood is devalued when it is separated from genetic parenthood– and perhaps that

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hour. But the woman in a gestational surrogacy program. . . has no biological connection to the child. . ." Ill. 93rd Gen Assembly, House of Representatives, March 29, 2004.

[100]Legal scholars have also drawn a distinction between traditional and gestational surrogacy. See Marsha Garrison, *Law Making for Baby-Making: an Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000) (arguing that traditional surrogacy agreements should be subject to the standard adoption requirements, because the surrogate, in fact is the child's mother, but that the surrogate has no superior claim to the genetic mother in a gestational surrogacy agreement).

[101]Most gestational surrogacy statutes require that one intended parent be the child's genetic parent; only North Dakota requires both to be genetic parents. Compare Sect. 750 ILL. COMP. STAT. 47/20 with N.D. CENT. CODE SECT. 14-18-01 (2008).

surrogates who are not genetic mothers, unlike traditional surrogates, may be expected *not* to form a maternal bond with a child who "belongs" to others.[102] Although this reaction recalls a long-rejected notion that parents have a property-like interest in their children based on biology, gestational surrogacy has assuaged moral qualms about these arrangements.

The benign framing of gestational surrogacy has been reinforced under the new statutes by the requirement that intended parents demonstrate a medical need for surrogacy.[103] In the *Baby M* period, surrogacy was often characterized as a self indulgent effort by wealthy couples to avoid the inconvenience of pregnancy and childbirth. The medical need requirement signals the parents' legitimate purpose in turning to surrogacy and underscores the value of the service as an essential means of achieving a widely shared goal of having genetically-related children.

The availability of gestational surrogacy also had a tangible effect on surrogacy practice. The disaggregation of gestational from genetic parenthood increased both the demand for surrogacy and the willingness of women to fill this role. Prospective parents were more willing to enter these arrangements than traditional ones because they could exercise greater control over their child's genetic make up. Further, their "requirements" in choosing surrogates were simpler– good health and a willingness to live a healthy lifestyle during the pregnancy. At the same time, more women were willing to be surrogates when it did not mean giving up their own children.[104]

C. The Withdrawal of Feminists and Liberals: Coercion as a Two-Edged Sword

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[102] Some feminists argue that maternity rests on nurturance in pregnancy and not the genetic tie. BARBARA ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY (1989).

[103] FLA. STAT. SECT. 742.15 (2008); 750 ILL. COMP. STAT. 47/20; TEX. FAM. CODE ANN. SECT. 160.755(B)(2).

[104] See DEBORAH SPAR, THE BABY BUSINESS, *supra* note 42 at 78-82.

Among the most notable changes in the political landscape of surrogacy in recent years has been the absence of feminists and women's groups (and of civil liberties organizations). Although it is difficult to find direct evidence of a change of heart on this issue or an explanation of why it happened, it seems likely that changes in the politics of abortion may have played an important role.

As suggested earlier, the feminist position on surrogacy in the *Baby M* period always seemed to be in tension with the commitment to preserving women's autonomy in other reproductive contexts– particularly abortion. The claim that women lacked agency because of coercive circumstances was unsettling, but more discordant with feminist values was the assertion that women needed protection because they could not anticipate their response to pregnancy. This suggested views about the power of female biology that historically contributed to women's subordination– views that feminists have challenged in fighting for gender equality. The prediction that women were likely to regret their surrogacy decision on the basis of natural biological and psychological urges embodied essentialist assumptions about the role of motherhood in women's lives.[105]

At the time of *Baby M*, these concerns hovered in the background, the source of unease for a few liberal feminists, but were overwhelmed by support for Whitehead and opposition to surrogacy. In recent years, however, arguments against surrogacy based on coercion and regret have become untenable for most feminists because pro-life advocates have invoked similar arguments against abortion. Recognizing that many people were offended by their standard

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[105]Katherine Franke, *Theorizing An Essay on Feminism, Law and desire*, 101 COLUM. L. REV. 181 (2001)(describing and challenging the central importance of motherhood in legal feminist thought).

"baby-killing" argument, abortion opponents began to shift to what Reva Siegel calls a "women-protective" rationale for banning abortion.[106] This argument has gained traction in the political arena and in litigation; it was endorsed by the Supreme Court in *Gonzalez v Carhart* in 2007 as a justification for restricting abortion.[107]

The women-protective argument includes two distinct but related claims, First, abortion opponents argue that boy friends, family and clinic staff coerce and mislead women to obtain abortions that they would never voluntarily obtain – because it "is so far outside the normal conduct of a mother to implicate herself in killing her own child."[108] Second, and for the same reason, many women deeply regret their abortions, suffering from psychological trauma which put them at risk for severe depression and "post-abortion syndrome," a form of post-traumatic stress disorder. This claim, based largely on anecdotal evidence, has taken hold even though it has little support in legitimate social science research. According to pro-life advocates, women must be protected from this harm by prohibiting abortion altogether.[109]

These paternalist arguments closely track claims made against surrogacy in the *Baby M* era. Surrogacy was assumed to be coerced because few women would agree to become pregnant

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[106]Reva Siegel, *The Rights' Reasons: Constitutional Conflict and the Spread of Women-Protective Anti-Abortion Argument*, 57 DUKE L. J (2008).

[107]Gonzalez v. Carhart, 127 S Ct. 1610 (2007)("[S]ome women come to regret the choice they make to abort the infant life they once created and sustained.") The women protective argument also persuaded the South Dakota legislature to ban abortion, an enactment later defeated by referendum. See Siegel, *Id* at 103.

[108]S.D. TASK FORCE TO STUDY ABORTION, *available at* http://www.voteyesforlife.com/docs/Task_Force_Report.pdf. At 56, cited in Siegel, *supra* note 106 at 111.

[109]See Siegel, *supra* note 106 at 111-13.

and sell their babies in the absence of dire financial circumstances or direct coercion. Opponents also argued that the risk was substantial that women who enter surrogacy arrangements would experience regret, because most mothers would not voluntarily relinquish their children. Although one can not trace the genealogy of the anti-abortion argument to the surrogacy debate, they likely have a common source. Indeed, Mary Beth Whitehead's attorney, Harold Cassidy, has been among the most prominent proponents of the woman-protective argument against abortion in recent years.[110]

On my view, feminists got caught up in the anti-surrogacy movement out of sympathy for Whitehead and anger at apparent class and gender bias against her as the case played out. Their withdrawal implicitly recognizes that endorsing paternalistic government restrictions on women's reproductive choices in this context is not compatible with the broader feminist political agenda. In contrast to abortion, surrogacy was not a core issue for feminists; ultimately it became clear that support for restrictions on surrogacy undermined pro-choice advocacy.

D. A New Balance of Power

After feminist interest in surrogacy waned, opposition was limited to religious and social conservatives, and even for this group, surrogacy was not a priority in a class with abortion, gay marriage or divorce reform. This may explain the relative lack of controversy in the recent law reform initiatives. At the same time, the popularity of gestational surrogacy and IVF as responses to infertility has increased.[111] This has created (or strengthened) interest groups aiming to facilitate legal certainty about the parental status of adults who acquire children through assisted

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[110]*Id* at n. 16.

[111]Spar, The Baby Business, supra note 42. statistics

reproduction, with parents groups and intermediaries playing an active role in lobbying for the new laws.[112]

The responsiveness of legislatures to this new coalition of interest groups is not surprising. In contrast to abortion, surrogacy has not been a highly polarizing issue with powerful factions competing to shape the law. In the *Baby M* period, there was little support for the novel arrangement and, with the dissipation of the moral panic and the rise of gestational surrogacy, few well funded or emotionally invested opponents have emerged. This may explain the pragmatic approach of lawmakers, who seem to accept that surrogacy and other new reproductive technologies are here to stay, and believe that their utility can be enhanced through regulation clearly establishing parental status in intended parents. This is not to say that concern about commodification in this context is altogether assuaged, even among those who do not count themselves as social conservatives. The growing number of individuals who satisfy powerful urges to form families and have children through commercial transactions continues to be a source of concern for ethicists, particularly given the recent trend to "outsource" the contracts to India and other countries where surrogates indeed may be poor women who have few financial options.[113] Moreover, some scholars are concerned that the expense of gestational surrogacy effectively limits this family-formation option to high income couples and individuals.[114] However, the goal of assisted reproduction is benign and the emerging view among lawmakers is

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[112] Among the groups that has played an advocacy role in promoting law reform in recent years is Resolve, the National Infertility Association, a group of parents and professionals. See . Resolve.org

[113] See SPAR, THE BABY BUSINESS, *supra* note 42.

[114]See Ben-Asher, *supra* note 98.

that regulation is a better means of minimizing the costs than a legal vacuum.

IV. LESSONS FOR LAWMAKERS

This account of the political and legal history of surrogacy over more than two decades suggests that lawmakers have responded to the issue in two very different settings. In *the Baby M* period, courts and legislatures, reacting to the moral panic that surrounded that case, framed surrogacy as degrading commodification. The recent judicial and legislative responses have been much more pragmatic, recognizing that surrogacy is here to stay and seeking to minimize the social costs (particularly costs to children) associated with these transactions. Although support for the earlier restrictive approach can still be found, an emerging consensus favors regulation over prohibition as a more effective means of promoting social welfare in this context.

In any event, few would argue that lawmaking in the midst of a moral panic is optimal. The exaggerated perceptions of risk generated by availability cascades almost invariably distort governmental responses, and the government action itself can institutionalize the moral panic. This dynamic is certainly not unique to surrogacy or to innovations in reproductive technology. It can be seen in the response to child sexual abuse, juvenile crime, nuclear power, and mad cow disease.[115] In many instances, high profile incidents focus public attention on an issue, generating alarm and cries for the government to "do something– now." Lawmaking under conditions of intense political pressure will seldom promote society's long term interests.

Does the history of surrogacy as a political issue offer any general lessons for responding on the basis of more accurate risk assessments to issues that generate moral panics? At a

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[115]See *generally* Kuran & Sunstein, *supra* note 57 (describing many issues where distorted perceptions of risk generate availability cascades that lead to excessively restrictive regulation).

minimum, the story clarifies that with the passage of time, moral panics diminish and political pressure for government action weakens. For the most part, legislatures that did not act in the midst of the *Baby M* furor did not later pass restrictive legislation. In several states, the political climate cooled and bills died without a vote. The New Jersey experience is instructive; by the time the Task Force issued its report and sponsors introduced the bill banning surrogacy, political pressure and legislative interest had disappeared.

The passage of time allows the political climate to cool, but it can also serve another useful purpose. An extensive period dedicated to acquiring accurate information and to deliberation provides the opportunity to correct distortions created by availability cascades. Legislative hearings, cost-benefit analyses, and the establishment of task forces to undertake in-depth studies of issues can all function to facilitate better decisionmaking by lawmakers.[116] These mechanisms might be particularly useful in contexts in which relevant (and available) information is likely to be ignored due to the vivid salience of an incident or case that has captured public attention. In other settings– and surrogacy may be one– where the novelty of an issue generates alarm and uncertainty, and dire predictions can not be immediately proved or disproved, a period of watchful observation may either allay concerns or clarify the need for restrictive regulation. In the case of reproductive technology, the accumulation of information and experience have alleviated fears that innovations that increase control over family formation pose a serious threat to core social values.

The history of surrogacy also suggests that the *political* costs of moving slowly in response to a moral panic may be less substantial than lawmakers anticipate. As an availability

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[116]See proposals in Kuran & Sunstein, *supra* note 57 at 746-60.

cascade builds and public fears escalate, politicians may conclude that their only option is to respond quickly to the perceived threat by satisfying the demand for action. But moral panics are volatile and predictably the period of intense concern is short lived. The public and the media move on to other issues and, as we have seen, even interest groups may adjust their political agendas and priorities in ways that divert their focus to other matters. Thus, the prescribed response to moral panics of careful study and deliberation over an extended period of time is often politically feasible as well as conducive to better policymaking.

CONCLUSION

The history of the changing social and political meaning of surrogacy provides an interesting case study that may offer useful insights for policy makers. The contemporary pragmatic approach to surrogacy, on my view, is superior to the crusadelike urgency of early reformers. Of course, this does not settle the question of whether these arrangements are morally problematic; opinion will continue to be divided on whether commercial surrogacy arrangements devalue children and women in intangible ways. But what has become clear is that well designed regulation can greatly mitigate most of the potential *tangible* harms of surrogacy and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists.