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# Baby M Turns 30: The Law and Policy of Surrogate Motherhood

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# Baby M Turns 30: The Law and Policy of Surrogate Motherhood

Eric A. Feldman<sup>†</sup>

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*This article marks the 30<sup>th</sup> anniversary of the Supreme Court of New Jersey’s Baby M decision by offering a critical analysis of surrogacy policy in the United States. Despite fundamental changes in both science and society since the case was decided, state courts and legislatures remain bitterly divided on the legality of surrogacy. In arguing for a more uniform, permissive legal posture toward surrogacy, the article addresses five central debates in the surrogacy literature.*

*First, should the legal system accommodate those seeking conception through surrogacy, or should it prohibit such arrangements? Second, if surrogacy is permitted, what steps can be taken to minimize the potential exploitation of women who are willing to rent their wombs for income? Third, what criteria should govern the eligibility to serve as a surrogate mother and an intended parent? Fourth, what principle(s) should serve as the basis for determining the parentage of children born through surrogacy? Fifth, is regulatory uniformity in the surrogacy realm desirable? Is it achievable?*

*The article concludes that courts and legislatures should accept the validity of surrogacy contracts, determine parentage according to intent, and identify transparent criteria for the eligibility of both surrogates and intended parents.*

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## I. INTRODUCTION

On February 3, 1988, the Supreme Court of New Jersey invalidated a contractual agreement between William and Elizabeth Stern and Mary Beth Whitehead.<sup>1</sup> The Sterns wanted a baby but believed they could not safely conceive; Whitehead wanted to give “the ‘gift of life’.”<sup>2</sup> Their contract stipulated that Whitehead would be inseminated with William Stern’s semen, gestate the baby, and surrender it to the Sterns for a fee of \$10,000.<sup>3</sup>

The court’s rejection of the surrogacy contract did not signal a concern that Whitehead had signed it under duress, or lacked the mental capacity to understand the contractual terms.<sup>4</sup> Nor was the court worried about misrepresentation. Instead, in the court’s judgment,

[t]he surrogacy contract is based on principles that are directly contrary to the objectives of our laws. It guarantees the separation of a child from its mother; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this...through the use of money.<sup>5</sup>

“There are in a civilized society,” the court concluded, “some things that money cannot buy.”<sup>6</sup>

For the past three decades, the *Baby M* case has cast a shadow over the regulation of surrogate motherhood in the United States, despite fundamental changes in both science and society. Scientifically, the Supreme Court of New Jersey’s opinion was shaped by the fact that Ms. Whitehead was the biological mother of Baby M. Because her gamete was fertilized by Mr. Stern’s sperm, the court had little difficulty considering Whitehead the “real” mother of the baby (as illustrated by the quote above). In contrast, surrogacy arrangements today predominantly use gametes supplied by the intended mother or an anonymous donor, not the surrogate mother.<sup>7</sup> As a result, the biological link between surrogate mothers and the babies they gestate is significantly weaker now than it was in the case of Baby M.<sup>8</sup>

Sociologically, when Baby M was conceived three decades ago, those seeking surrogates were most likely to be married, heterosexual, infertile couples. Today, married, heterosexual couples like the Sterns continue to use surrogate mothers, but so do same-sex married couples, unmarried couples (both heterosexual and same-sex), and individuals, sometimes using donated eggs, donated sperm, or both. As Elisabeth Schwartz observes:

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<sup>1</sup> *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

<sup>2</sup> *Id.* at 1236.

<sup>3</sup> *Id.* at 1234.

<sup>4</sup> *Id.* at 1249.

<sup>5</sup> *Id.* at 1250.

<sup>6</sup> *Id.* at 1249.

<sup>7</sup> Surrogacy that uses the surrogate’s gamete is called traditional surrogacy, and is now much less common than gestational surrogacy, in which the surrogate mother does not supply a gamete. See Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, ABA JOURNAL ONLINE (Mar. 2011), [http://www.abajournal.com/magazine/article/as\\_surrogacy\\_becomes\\_more\\_popular\\_legal\\_prolife\\_rate](http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_prolife_rate) [<https://perma.cc/HX9V-CC49>].

<sup>8</sup> *In vitro* fertilization (“IVF”) and intracytoplasmic sperm injection are the most common methods.

Times sure have changed. Members of the lesbian, gay, bisexual, and transgender (LGBT) community are enjoying ever-increasing acceptance in many parts of the developed world. As cultural barriers and legal restrictions that have obstructed the parenting dreams of LGBT people gradually loosen, the desire to become parents is no longer a far-off fantasy. Today, same-sex couples are more able to avail themselves of family-formation options including adoption and assisted reproductive technology . . . .<sup>9</sup>

Indeed, almost 20% of all same sex couples in the U.S. are currently raising children, some of which were born through surrogacy.<sup>10</sup>

In addition to the scientific and sociological changes that have occurred since the *Baby M* decision, courts and legislatures across the United States have articulated a wide range of legal approaches to surrogacy.<sup>11</sup> In the 1993 case of *Johnson v. Calvert*, involving a zygote formed from the egg and sperm of the intended parents, the California Supreme Court found the intended mother to be the child's "legal, natural" mother, and held that the surrogacy contract was not "inconsistent with public policy."<sup>12</sup> In contrast, in 1992, the New York Legislature passed a law stating that "surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable."<sup>13</sup> Beyond New York and California, some states limit intended surrogate parents to married couples, others place sharp restrictions on who can serve as a surrogate, a few prohibit payment to surrogates, and still others have been silent about surrogacy in both legislation and case law.<sup>14</sup> Globally, nations have adopted widely divergent approaches to surrogacy, from prohibition to acceptance. All the while, infertility rates among women in the U.S. hover at approximately 12%, and surrogacy has become "a booming, global business."<sup>15</sup>

There is no better way to mark the 30<sup>th</sup> anniversary of the *Baby M* decision than to reevaluate the legal status of surrogate motherhood. This article looks back at the debate over surrogacy triggered by the *Baby M* case, and analyzes five central issues that continue to divide scholars, policymakers, and the public. It argues that the varied and often opaque domestic and global regulation of surrogacy fails those who seek children through surrogacy, those who serve as surrogates, those born to surrogate mothers, and society more generally. To combat those failures, the article calls for more

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<sup>9</sup> Elizabeth F. Schwartz, *LGBT Issues in Surrogacy: Present and Future Challenges*, in HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES 55 (E. Scott Sills ed., 2016).

<sup>10</sup> *Id.*

<sup>11</sup> For a review of different state approaches, see SUSAN MARKENS, *Unity, Divisions, and Strange Bedfellows: Divergent Legislative Responses to Surrogate Motherhood*, in SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 139, 139-70 (2007).

<sup>12</sup> *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993).

<sup>13</sup> N.Y. Dom. Rel. Law § 122 (McKinney 2010). Under New York law, parties, "[a] birth mother or her husband, a genetic father and his wife, and, if the genetic mother is not the birth mother, the genetic mother and her husband who violate this section shall be subject to a civil penalty . . ." N.Y. Dom. Rel. Law § 123 (McKinney 2010).

<sup>14</sup> See CTR. FOR BIOETHICS & CULTURE NETWORK, STATE-BY-STATE SURROGACY SUMMARY (2012), [http://www.cbc-network.org/wp-content/uploads/2012/08/State-by-State\\_Surrogacy\\_Sum\\_CBC.pdf](http://www.cbc-network.org/wp-content/uploads/2012/08/State-by-State_Surrogacy_Sum_CBC.pdf) (detailing surrogacy laws in all fifty states and the District of Columbia).

<sup>15</sup> PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements* 11 (2011), <https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf>.

consistent and permissive regulation of surrogacy. As noted by the author of an influential book on assisted reproductive technology:

. . . inconsistency and variation together carry a steep price. Because they make surrogacy a riskier endeavor than it need be: riskier for the intending parents, who, even in liberal states like California, don't fully know whether their contracts are enforceable; and riskier for the surrogates, who don't have the same kinds of protection that prevail in other endeavors.<sup>16</sup>

No one wins when questions of parentage end up in court, babies are left stateless, contractual agreements between intended and surrogate parents are contested, and borders between states and nations are gamed in an effort to find a suitable regulatory environment for one's procreative preferences. Moving beyond three decades of legal limbo and developing a coherent, consistent, and ethical approach to the regulation of surrogacy is the best way to celebrate the 30-year milestone of *Baby M*.

Parts II-VI of the article address the following five questions. First, should the legal system accommodate those seeking conception through surrogacy, or should it prohibit such arrangements? Second, if surrogacy is permitted, what steps can be taken to minimize the potential exploitation of women who are willing to rent their wombs for income, and to ensure that surrogacy does not inappropriately commodify reproduction? Third, what criteria should govern the eligibility to serve as a surrogate mother and an intended parent? Fourth, what principle(s) should serve as the basis for determining the parentage of children born through surrogacy? Fifth, is regulatory uniformity in the surrogacy realm desirable and is it achievable? These are difficult questions, and addressing them fully in a short article is not possible. Instead, the article takes note of the major issues, highlights the range of arguments made by advocates of different positions, underscores the strongest of those arguments, and argues that after three decades of debate it is time for a more proactive legal response to surrogacy that moves beyond current academic disagreements. Rather than another 30 years of debate, the United States needs a more consistent regulatory posture—one that accepts the validity of surrogacy contracts, determines parentage according to intent, and identifies criteria for the eligibility of both surrogates and intended parents. Part VII offers a brief conclusion.

## II. ACCEPTANCE OR PROHIBITION?

As Richard Storrow pointed out in a recent review of surrogacy in the U.S., “the legislative trend, if there is one, is toward legalizing surrogacy where it has been illegal, or providing a statutory framework for it where it has been practiced with minimal legislative guidance.”<sup>17</sup> There are a number of reasons why one should welcome this trend. First, as noted above, collective ideas about what constitutes a couple, and a family, have changed dramatically in the past several decades, underscored by the legalization of same-sex marriage.<sup>18</sup> Many same-sex couples, heterosexual couples, and individuals desire children but are unable to conceive. For them, surrogacy offers a route to parenthood, often to children with whom they have at least some genetic

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<sup>16</sup> DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 94 (2006).

<sup>17</sup> Richard Storrow, *Surrogacy: American Style*, in *SURROGACY, LAW AND HUMAN RIGHTS* 193, 193-216 (Paula Gerber & Katie O'Byrne eds., 2015).

<sup>18</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

link. Absent a compelling reason to deny them the opportunity to parent a child, the laws around surrogacy should be structured to facilitate rather than to thwart their desires.

Second, as a basic matter of social justice, one must be attentive to the gap between those able to pay the costs associated with surrogacy, and those who lack the financial resources to afford such an arrangement. The current patchwork of regulations in the U.S. means that in many cases intended parents must travel to, and spend significant time in, a state with permissive surrogacy laws.<sup>19</sup> In other cases, they leave the U.S. in search of surrogates abroad.<sup>20</sup> More uniform acceptance of surrogacy in the U.S. will make it more widely available, and will consequently decrease the gap between those who can afford to enter into a surrogacy arrangement and those who cannot.

Third, and more pragmatically, the genie is already out of the bottle. Over the past 30 years, the urge to procreate has proven sufficiently strong, and those intent on hiring a surrogate mother have not hesitated to cross state or national borders in order to find one.<sup>21</sup> With the increasing availability and decreasing cost of ARTs globally, it is simply too late to effectively prohibit those who want children from entering into some form of a surrogacy arrangement. Banning surrogacy in some states simply pushes people to make surrogacy arrangements in surrogacy-friendly states; banning it in all states would trigger an increase in gestational tourism, a practice in which intended parents hire surrogates in countries with permissive surrogacy laws that may offer only limited legal protections to surrogates, leaving them prone to coercion and exploitation.<sup>22</sup> Similarly, when surrogacy is unavailable, demand for alternative means

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<sup>19</sup> See Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), <http://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html> (“There is nothing resembling a national consensus on how to handle [surrogacy] . . . and no federal law, leaving the states free to do as they wish.”); *Gestational Surrogacy Law Across the United States: State-by-State Interactive Map for Commercial Surrogacy*, CREATIVE FAMILY CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> [<https://perma.cc/A99U-7JFN>].

<sup>20</sup> See *As Demand for Surrogacy Soars, More Countries Are Trying to Ban It*, THE ECONOMIST (May 13, 2017), <https://www.economist.com/news/international/21721926-many-feminists-and-religious-leaders-regard-it-exploitation-demand-surrogacy> [<https://perma.cc/FPU5-3EEH>]; *Cheaper Overseas: Surrogate Mothers*, ABC NEWS (Sept. 23, 2007), <http://abcnews.go.com/GMA/story?id=3664065> [<https://perma.cc/54RE-T88R>]; see also Darlena Cunha, *The Hidden Costs of International Surrogacy*, THE ATLANTIC (Dec. 22, 2014), <https://www.theatlantic.com/business/archive/2014/12/the-hidden-costs-of-international-surrogacy/382757/> [<https://perma.cc/2AQY-VD3H>]; Danielle Preiss & Pragati Shahi, *The Dwindling Options for Surrogacy Abroad*, THE ATLANTIC (May 31, 2016), <https://www.theatlantic.com/health/archive/2016/05/dwindling-options-for-surrogacy-abroad/484688/> [<https://perma.cc/Q9AH-2Y3W>]; Ari Shapiro, *Surrogate Parenting: A Worldwide Industry, Lacking Global Rules*, NPR (June 11, 2015), <https://www.npr.org/sections/parallels/2015/06/11/413406325/surrogate-parenting-a-worldwide-industry-lacking-global-rules> [<https://perma.cc/A8HZ-VDEM>] (detailing the use of surrogates abroad).

<sup>21</sup> See Tamara Audi & Arlene Chang, *Assembling the Global Baby*, WALL ST. J. (Dec. 10, 2010), <https://www.wsj.com/articles/SB10001424052748703493504576007774155273928>; see also Susan Donaldson James, *Infertile Americans Go to India for Gestational Surrogates*, ABC NEWS (Nov. 7, 2013), <http://abcnews.go.com/Health/infertile-americans-india-gestational-surrogates/story?id=20808125> [<https://perma.cc/8DLE-MDGR>]; Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), [https://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html?\\_r=0](https://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html?_r=0); Douglas Pet, *Make Me a Baby As Fast As You Can*, SLATE (Jan. 9, 2012), [http://www.slate.com/articles/double\\_x/doublex/2012/01/reproductive\\_tourism\\_how\\_surrogacy\\_provider\\_pl\\_anethospital\\_speeds\\_up\\_pregnancies\\_and\\_lowers\\_costs\\_.html](http://www.slate.com/articles/double_x/doublex/2012/01/reproductive_tourism_how_surrogacy_provider_pl_anethospital_speeds_up_pregnancies_and_lowers_costs_.html) [<https://perma.cc/D67N-TL7K>] (discussing the lengths some people will go to have a child).

<sup>22</sup> Martha Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1181-82 (2014) (noting that “attempts to forbid surrogacy are likely to result either in travel for surrogacy or in a robust black market . . . once the public knows that surrogacy can be accomplished as a scientific matter, it will be practiced, legally or illegally”); see also Sheela Saravanan, *Addressing Global Inequalities in Surrogacy*, in HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES (E. Scott Sills, ed., 2016).

of bearing children, like uterine transplants, will increase, imposing higher costs and greater risks on individuals and couples.<sup>23</sup>

Fourth, the legal system is well-equipped to manage surrogacy. A more permissive legal stance toward surrogacy requires that contracts between surrogate mothers and intended parents be encouraged and enforced.<sup>24</sup> Of course, enforcing a surrogacy contract does not mean that surrogates will be forced to do certain things they may find objectionable. Surrogate mothers cannot be denied their constitutional right to an abortion, for example, or be forced to abide by contractual terms that micromanage their behavior, like requiring them to adhere to a particular exercise regimen.<sup>25</sup> Indeed, contracts governing surrogacy agreements are prime examples of relational contracts, in which specific contractual terms are informed by social norms, informal understandings, and emotions.<sup>26</sup> Nonetheless, although specific performance may not always be required, surrogacy contracts must be legally enforceable, meaning surrogate mothers will be held to contractual terms that require them to give up their parental rights and relinquish the children they gestate.<sup>27</sup>

For 30 years, scholars have debated the merits and pitfalls of surrogacy, and they could easily do so for another 30.<sup>28</sup> There are serious issues at the heart of the debate about which people are likely to remain divided; premising policy action on substantive consensus is a guarantee of inaction. Instead, while debates about contracts, commodification, and exploitation continue, policymakers must weigh the relative costs of action *versus* inaction. Policies permitting surrogacy are not cost-free, but they represent the most acceptable way forward.<sup>29</sup> As Elizabeth Scott wrote in her survey of legal and social issues surrounding surrogacy in the 20 years after the *Baby M* case, “well-designed regulation can greatly mitigate most of the potential *tangible* harms of surrogacy, and this would seem to be the appropriate function of law in a liberal society in response to an issue on which no societal consensus exists.”<sup>30</sup>

### III. MITIGATING EXPLOITATION AND COMMODIFICATION

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<sup>23</sup> John A. Robertson, *Other Women's Wombs: Uterus Transplants and Gestational Surrogacy*, 3 J.L. & BIOSCIENCES 68, 68 (2016).

<sup>24</sup> See generally, I. Glenn Cohen & Katherine L. Kraschel, *Gestational Surrogacy Agreements: Enforcement and Breach*, in HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES (E. Scott Sills, ed., 2016) (providing a general discussion of surrogacy contracts and enforcement).

<sup>25</sup> MARTHA FIELD, SURROGATE MOTHERHOOD 79 (1988) (stating “it seems unimaginable that the law would enforce a contract to undergo an abortion”).

<sup>26</sup> Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 L. & SOC'Y REV. 143, 148 (2015).

<sup>27</sup> Field, *supra* note 25 at 79 (arguing that personal service contracts are not enforceable by specific performance. But once the baby is born, says Field, the idea that a personal service contract cannot be enforced by specific performance is no longer helpful to a surrogate, because performance has been completed, so this would be like the transfer of a completed object).

<sup>28</sup> See FRANCE WINDDANCE TWINE, OUTSOURCING THE WOMB (2011) (giving a recent, thoughtful analysis of surrogacy, comparatively).

<sup>29</sup> For a detailed argument for how regulating surrogacy can work effectively to protect the interests of intended parents and surrogates, see Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1227 (2013) (arguing “that in transactions of commercial intimacy such as surrogate motherhood, regulation should be formulated that respects the benefits of commercial transaction while taking seriously the relational intimacy and potential exploitation involved in surrogate motherhood.”).

<sup>30</sup> Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. 109, 146 (2009).

## A. EXPLOITATION

What can be done to best ensure that surrogate motherhood does not exploit poor women who are willing to serve as surrogate mothers because they are desperate for cash? As a starting point, it should be acknowledged that in almost all cases surrogate mothers will be less financially secure than the intended parent(s) for whom they are gestating a child.<sup>31</sup> Financial inequality however, does not necessarily lead to financial exploitation. The important question is whether those who serve as surrogates agree to do so out of financial desperation, and thus lack any bargaining power when entering a contractual relationship. Do they have other income options? Are their human rights being violated by limiting their activities, food choices, or ability to terminate their pregnancy while serving as surrogates?<sup>32</sup>

Qualitative studies of surrogate mothers indicate that contrary to the claims of scholars who describe surrogate mothers as most likely to be poor, single, ethnic minorities, surrogates are generally white, often married, and usually financially stable.<sup>33</sup> Whereas Anita Allen paints a bleak picture of “a new, virulent, form of racial and class discrimination,” in which “thousands of poor and minority women will likely be used as a ‘breeder class,’” the reality is that “women of color are greatly under-represented as surrogate mothers.”<sup>34</sup> Significantly, a comprehensive review of the empirical literature on surrogate mothers concludes that “surrogate mothers are mature, experienced, stable, self-aware, extroverted non-conformists who make the initial decision that surrogacy is something that they want to do.”<sup>35</sup> Importantly, it does not find that surrogate mothers in the U.S. are exploited, or are unable to meaningfully consent to being surrogates.<sup>36</sup>

Perhaps the empirical literature paints a misleadingly positive picture of surrogate mothers in the United States, but it is the most accurate picture currently available, and it should at the very least call into question some of the negative assumptions and stereotypes about surrogacy. Outside of the U.S. and other industrialized democracies, however, there is greater cause for concern. For those who desire children but find the American regulatory climate and cost prohibitive, gestational tourism is an oft-traveled path. Countries that are destinations for such gestational tourism are generally economically underdeveloped, and expose women to the possibility of exploitation.<sup>37</sup> Weak legal protections make surrogates vulnerable to contractual clauses that control their behavior in a variety of circumstances; surrogates may be housed in dehumanizing communal shelters; and the payment offered to

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<sup>31</sup> One can imagine a health insurance system that fully covered the costs of surrogacy, and which as a result made such services available regardless of the assets of intended parents. But that is not currently the case.

<sup>32</sup> For a detailed examination of surrogacy in India, see generally AMRITA PANDE, *WOMBS IN LABOR: TRANSNATIONAL COMMERCIAL SURROGACY IN INDIA* (2014).

<sup>33</sup> Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Motherhood*, 26 CAN. J. FAM. L. 13, 34, 40-41 (2010). For a thoughtful review of the empirical literature on surrogacy, see Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 J. GENDER, SOC. POL'Y & L. 555, 560-561 (2013).

<sup>34</sup> Anita L. Allen, *The Socio-Economic Struggle for Equality: The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17 (1991); see also Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 31 (2005).

<sup>35</sup> Busby & Vun, *supra* note 33, at 25.

<sup>36</sup> *Id.* at 46.

<sup>37</sup> PANDE, *supra* note 32, at 172-73; Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MGMT. & HEALTHCARE POL'Y 111 (2015).



surrogates can be egregiously low.<sup>38</sup> The concerns that fuel opposition to surrogacy in the U.S. are thus significantly magnified in places where some Americans desirous of children have sought surrogates, like India, Thailand, Ukraine, and Mexico.<sup>39</sup>

To the extent that concerns remain about the exploitation of surrogate mothers both within and outside of the U.S., they can be addressed partially by ensuring that surrogates have their own legal representation. Such representation can be paid for by agencies offering surrogacy services, with the cost passed through to intended parents. By guaranteeing that surrogates are able to consult with attorneys who can help them to understand the terms of their surrogacy contracts, advocate for adequate compensation, and help to protect their individual rights, opportunities for the exploitation of surrogates will be greatly reduced.<sup>40</sup> Concerns about the exploitation of surrogates overseas may also be addressed by advocating for a more permissive legal regime for surrogacy in the United States. Reducing demand for gestational tourism will decrease the potential for coercion and exploitation that too often threatens to undermine international surrogacy arrangements.

## B. COMMODIFICATION

Feminists, medical ethicists, legal scholars, human rights advocates, and others have articulated thoughtful arguments not only about the potential exploitation of vulnerable women whose economic circumstances drive them to work as surrogates, but also about what they consider to be the unpalatable commodification of reproduction that results from paying someone to bear a child.<sup>41</sup> Such objections are difficult to counter, because they focus on a type of harm that is challenging to sharply define. As Elizabeth Scott notes, “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 is valued?”<sup>42</sup>

One can proffer data about the economic conditions of surrogates that defies claims that surrogacy takes advantage of lower income women, and one can empirically study the financial arrangements between surrogates and intended parents to demonstrate that they represent reasonable contractual terms. But data about the material conditions of surrogacy will do little to persuade those whose concerns are less about money *per se* than about surrogacy’s impact on how society values and understands human reproduction. With what sort of evidence can one refute the claim that a contractual relationship between surrogates and intended parents inevitably turns

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<sup>38</sup> Normann Witzleb & Anurag Chawla, *Surrogacy in India: Strong Demand, Weak Laws*, in *SURROGACY, LAW AND HUMAN RIGHTS* (Paula Gerber & Katie O’Byrne eds., 2015).

<sup>39</sup> *Id.*

<sup>40</sup> Parties to surrogacy arrangements would also be well served by building into their contracts some form of alternative dispute resolution. Litigation may loom as a possibility when relationships sour, but mediation (for example) is likely to be a faster, less costly, and more satisfactory way of handling conflicts. Keeping conflicts out of court will also avoid a sticky jurisdictional issue—whose jurisdiction governs surrogacy contracts, and where should conflicts be litigated.

<sup>41</sup> See, e.g., Jennifer A. Parks, *Gestational Surrogacy and the Feminist Perspective*, in *HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES* 25 (E. Scott Sills, ed., 2016). Parks contrasts the views of feminist care ethicists and liberal feminists, noting that “there are a number of feminist perspectives on the rising practice of gestational commercial surrogacy (both domestic and international) that lead to differing conclusions about the morality of the practice.”

<sup>42</sup> Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 *L. & CONTEMP. PROBS.* 109, 125 (2009) (“The framing of surrogacy as commodification was shaped and promoted by feminists and religious leaders who amplified its social meaning as baby-selling and the exploitation of women. These groups were driven by different ideological and political goals, but they forged an effective political alliance that played an important role in shaping the law for years to come.”).

women into baby production machines? What data—quantitative or qualitative—speaks to the concern that offering payment to a woman to bear a child does not necessarily turn babies into fungible commercial products?<sup>43</sup>

Perhaps the most compelling response to those who worry about commodification is to point out that those who support surrogacy most decidedly do not support baby selling. What is the difference? Baby selling is just that—put a price tag on the good (a child) and sell it to someone willing to meet the asking price. The money exchanged is explicitly for the purchase of the child, just like the money one pays for a car is for the acquisition of a car. Surrogacy arrangements do not involve putting a price on a baby, but instead focus on paying surrogate mothers for their medical care, lost wages, health insurance, and more. As Glenn Cohen convincingly writes, “compensation for the medical costs and lost wages of a mother in a surrogacy contract is different from buying children or commercial surrogacy. The former transactions recognize that the money is not a substitute for the child—that some value remains uncompensated—whereas the latter do not.”<sup>44</sup>

If the concern about commodification and surrogacy is that *any* money is changing hands, then all one can do is to point out that procreation in the 21<sup>st</sup> century does not simply involve the coupling of a man and a woman. It is shaped by a wide variety of factors—science, technology, social norms, explicit policy choices, and perhaps most of all, the market. Starting well before a woman becomes pregnant and continuing well past the birth of a child, the conception, gestation, and birth of a child implicates a wide range of expensive technologies and carries a broad array of costs. Some may bemoan the marriage of the market with human conception, and there are surely some reasons for concern. But even if there is desire to go back to the halcyon days of simple human reproduction (if they ever existed) it is too late to do so, and it would be unwise to reject surrogacy for involving the same sort of financial transaction that characterized the entire procreative process.<sup>45</sup>

#### IV. ELIGIBILITY CRITERIA

A third foundational issue concerns the eligibility criteria for both surrogates and intended parents. What types of legal limitations, if any, should be imposed on those who desire to have a child through surrogacy? What about the requirements for those who want to serve as surrogates? Across the U.S., and globally, there are a number of limitations on intended parents. Most frequently, they exclude individuals, and/or same sex couples, and/or unmarried couples from becoming intended parents. The justification for such limitations is not generally articulated, perhaps because making a logical case for their appropriateness is difficult, but the underlying view appears to be that married, heterosexual couples provide the “best” environment for raising children. Regardless of such stereotypes, there is no reason why marital status or sexual

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<sup>43</sup> *Id.* at 112 (“Critics [of surrogate motherhood] claimed that surrogacy degraded children and women by treating children as commodities to be exchanged for profit and women’s bodies as childbearing factories; the arrangements also degraded the mother–child relationship by paying women not to bond with their children.”).

<sup>44</sup> I. Glenn Cohen, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 707 (2003).

<sup>45</sup> SPAR, *supra* note 16. See MARTHA ERTMAN, *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (2005); MICHELLE B. GOODWIN, *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES*, (2010); Margaret Jane Radin, *From Babyselling to Boilerplate: Reflections on the Limits of the Infrastructures of the Market*, 54 OSGOODE HALL L. J. (forthcoming 2017).

orientation should be disqualifying for surrogacy, just as they are not disqualifying for same-sex couples seeking to adopt, or unmarried couples choosing to conceive.

Still, not everyone is well-suited to being a surrogate parent. Ensuring that surrogacy is in the best interests of the child requires the identification of potentially disqualifying characteristics. In establishing eligibility criteria for adoption, the Children's Bureau of the U.S. Department of Health & Human Services is broadly inclusive: "Most people are eligible to adopt, regardless of whether they are married or single, their age, income, or sexual orientation. Having a disability does not automatically disqualify a prospective adoptive parent."<sup>46</sup> Nor is a criminal record disqualifying, unless it involves a child-related offense.<sup>47</sup> During the 150-year history of adoption in the U.S., states have developed a relatively uniform set of criteria governing who may adopt.<sup>48</sup> Those criteria establish a baseline, but more stringent standards should be imposed on intended surrogate parents, at least until surrogacy is a well-established practice. Protecting the best interests of children born through surrogacy counsels that intended parents be physically and psychologically stable, have no disqualifying criminal history (most misdemeanors are not disqualifying, whereas most felony convictions are), have the financial means to raise a healthy child, and do not abuse drugs or alcohol. Many surrogacy agencies impose at least some of these limitations, but a more uniform approach to the eligibility of intended parents would underscore the importance of the best interests of the child in surrogacy arrangements.<sup>49</sup>

Determining who can act as a surrogate mother owes less to adoption and more to the accumulated experience of different jurisdictions and organizations that have regulated and offered surrogacy services. Although there is some variation, among the most widely used criteria are that women serving as surrogates must have previously given birth to (and in some cases, raised) a child; must be between 21 and 40, must be financially stable (often meaning that they cannot be living in state-sponsored housing and must have private medical insurance), must have a healthy lifestyle (no smoking or drug use), and must be U.S. citizens or legal residents.<sup>50</sup> The requirements for serving as a surrogate mother have in general been less controversial than those for being an intended parent.<sup>51</sup> Of the many concerns that plague the regulation of surrogacy, they represent an area of relative calm.

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<sup>46</sup> *Who Can Adopt?*, CHILD WELFARE INFORMATION GATEWAY (2016), <https://www.childwelfare.gov/topics/adoption/adoptive/whocan/> [<https://perma.cc/BD4B-8MU8>]. Although there are many differences between surrogacy and adoption, when it comes to evaluating who qualifies as a suitable parent, the issues are quite similar.

<sup>47</sup> *Id.*

<sup>48</sup> In 1851, Massachusetts was the first state to pass an adoption law. *Timeline of Adoption History*, THE ADOPTION HISTORY PROJECT (2012), <http://pages.uoregon.edu/adoption/timeline.html> [<https://perma.cc/KM53-M3BK>].

<sup>49</sup> Justice Kennard's dissent in *Johnson v. Calvert* argues that the best interests of the child standard should be used to determine parentage on a case by case basis. *Johnson v. Calvert*, 851 P.2d 776, 788-801 (Cal. 1993) (Kennard, J., dissenting). But, it is more useful to rely on that standard when establishing eligibility criteria for intended parents.

<sup>50</sup> See, e.g., Celia Burrell & Leroy C. Edozien, *The Ideal Surrogate: Santa Claus, Easter Bunny, or Tooth Fairy?*, in HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES 9 (E. Scott Sills ed., 2016); *Surrogate Mother Requirements*, SURROGATE ALTERNATIVES, <https://www.surrogatealternatives.com/surrogate-mothers/surrogate-mother-requirements/> [<https://perma.cc/2JNY-MCHT>].

<sup>51</sup> See Steven H. Snyder, *Screening and Qualification of Intended Parents Participating in Third-Party Reproduction*, STEVEN H. SNYDER & ASSOCIATES ATTORNEYS AT LAW, <https://www.snyderlawfirm.com/Articles/Screening-And-Qualification-Of-Intended-Parents-Participating-In-Third-Party-Reproduction.shtml> [<https://perma.cc/8FYX-TLBK>].

## V. DETERMINING PARENTAGE

Who should be considered the legal parent(s) of a child born through surrogacy? In the *Baby M* case, the Supreme Court of New Jersey had little difficulty in finding that Mr. Stern was the baby's father.<sup>52</sup> Determining motherhood was a more challenging task, at least in part because Mrs. Stern was the intended mother but was not biologically related to Baby M, whereas Mary Beth Whitehead provided her gamete and gestated the baby.<sup>53</sup> In the court's view, Whitehead was the mother; Mrs. Stern could only become Baby M's legal mother through adoption.<sup>54</sup>

A somewhat different conflict over parenthood arose in the *Baby Mukai* case, in which a Japanese media personality, Aki Mukai, and her professional wrestler husband, Nobuhiko Takada, arranged for a surrogate to bear their child.<sup>55</sup> A de facto ban on surrogacy in Japan led Mukai and Takada to find a jurisdiction that would allow them to contract with a surrogate mother.<sup>56</sup> They chose Nevada, where in 2003 two embryos created with Mukai's eggs and Takada's sperm were implanted in a surrogate.<sup>57</sup> Unlike Whitehead, Cindy (the surrogate) willingly relinquished the babies, and Mukai and Takada obtained a birth certificate from Nevada listing them as the baby's legal parents.<sup>58</sup> When they returned to Japan with their twins, however, the Japanese government refused to recognize Mukai as the mother, triggering a legal conflict over parentage that languished until Mukai legally adopted the children five years later.<sup>59</sup>

Baby M and Baby Mukai are just two examples of how surrogacy, together with *in vitro* fertilization ("IVF"), egg donation, and sperm donation, have reshaped conceptions of parenthood, and highlighted the distinction between genetic, gestational, and legal parentage. Who are the legal parents of a baby gestated by a surrogate when the intended parents have used a donated egg and the intended father's sperm to create a zygote? What about when both the egg and sperm are donated? How will the use of artificial wombs affect the determination of legal parentage?<sup>60</sup> *In vitro* gametogenesis ("IVG"), which enables the creation of both eggs and sperm from skin cells, further complicates the picture—not only can individuals in same-sex relationships both be genetically related to their child, but a single individual's cells can be used to create both eggs and sperm.<sup>61</sup> Equally challenging is "multiplex parenting," involving a gamete derived from two people that is combined with a gamete from a third individual. "Would we view each of those three as equal genetic parents, or do we give greater rights and duties to the parent who contributed more genetic material?"<sup>62</sup> When surrogacy and IVG are combined, the situation becomes even more vexing.

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<sup>52</sup> *In re Baby M*, 537 A.2d 1227, 1261 (N.J. 1988).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Yuri Hibino, *Gestational Surrogacy in Japan*, in HANDBOOK OF GESTATIONAL SURROGACY: INTERNATIONAL CLINICAL PRACTICE AND POLICY ISSUES 177 (E. Scott Sills ed., 2016).

<sup>56</sup> *Id.*

<sup>57</sup> *See id.*

<sup>58</sup> *See id.*

<sup>59</sup> *Id.*

<sup>60</sup> Aarathi Prasad, *How Artificial Wombs Will Change Our Ideas of Gender, Family and Equality*, THE GUARDIAN (May 1, 2017, 3:00 PM), <https://www.theguardian.com/commentisfree/2017/may/01/artificial-womb-gender-family-equality-lamb> [<https://perma.cc/3UJD-RFFN>].

<sup>61</sup> Tamar Lewin, *Babies from Skin Cells? Prospect Is Unsettling to Some Experts*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/2017/05/16/health/ivg-reproductive-technology.html>.

<sup>62</sup> I. Glenn Cohen, George Q. Daley, and Eli Y. Adashi, *Disruptive Reproductive Technologies*, 9 SCI. TRANSLATIONAL MED. 1, 3 (2017) ("IVG's most disruptive impact might be on our very conception of parentage.").

There are clearly no simple answers when it comes to determining parentage. Gestation, genetics, and social factors all matter, but which matters more, and how should courts adjudicate their relative importance when making decisions about legal parentage?<sup>63</sup> In an article published in 1990, Marjorie Shultz argues that intent, as evidenced in contractual agreements or in other ways, should motivate the legal determination of parentage.<sup>64</sup> In her view, if a person or persons desiring a child hire a surrogate, the agreement reveals an intent to parent the child, so the legal parent(s) of the child is/are the person/couple who hired the surrogate.<sup>65</sup> As Shultz puts it, the

legal rules governing modern procreative arrangements and parental status should recognize the importance and the legitimacy of individual efforts to project intentions and decisions into the future. Where such intentions are deliberate, explicit and bargained for, where they are the catalyst for reliance and expectations, as is the case in technologically-assisted reproductive arrangements, they should be honored.<sup>66</sup>

In reaching its decision in *Johnson v. Calvert*, the California Supreme Court underscored that view, concluding that “she who intended to procreate the child -- that is, she who intended to bring about the birth of a child that she intended to raise as her own -- is the natural mother under California law.”<sup>67</sup>

Intent is never a perfect solution; it is frequently ambiguous and contested. But it has a number of benefits. It moves beyond old and outmoded approaches to parenthood, which generally assume that biological, gestational, and legal parentage will overlap. It puts individuals, same-sex couples, heterosexual couples, and married/unmarried couples on equal footing by making clear that parenthood is a determination based on social, as well as, biological factors.<sup>68</sup> And it takes into account the wide range of procreative choices that have been enabled by technological and sociological change, and that will continue to be enabled in the future.

## VI. LEGAL UNIFORMITY

The fifth and final question this paper addresses is how to manage the cross-border inconsistency of surrogacy laws and regulations. As Debora Spar notes,

What the surrogacy market lacks . . . is any kind of clear and consistent regulatory framework. Instead it is pockmarked by legal and jurisdictional inconsistencies—by the sharp divisions that linger

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<sup>63</sup> As one author puts it, “[e]ssentially, the law has a choice: faced with new reproductive arrangements, it can recognize and facilitate emerging procreative choice and intentions about parenthood. Or it can cling to definitions and frameworks suited to a different biological and social reality, as did the New Jersey Supreme court in deciding *Baby M.*” Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397 (1990).

<sup>64</sup> *Id.* at 397-398.

<sup>65</sup> *Id.* at 397.

<sup>66</sup> For two influential articles advocating intent-based parenthood, see John. H. Hill, *What Does It Mean to Be a “Parent”?* *The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Shultz, *supra* note 63. For a more critical view of intent as the basis of parenthood, see Richard F. Storow, *Parenthood by Pure Intention: Assisted Reproduction and the Function Approach to Parentage*, 53 HASTINGS L.J. 597 (2002).

<sup>67</sup> See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993)

<sup>68</sup> For an insightful historical analysis of parenthood that highlights its social dimensions, see generally Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017).

between states that prohibit payment for surrogacy and those that permit it; states that enforce surrogacy contracts and those that do not; and states that have specific regulations regarding the terms of surrogacy arrangements and those that are mute.<sup>69</sup>

American-style federalism leaves a great many policy decisions in the hands of the states, including most of those involving health and welfare. A common justification for this delegation of power was articulated by Justice Louis Brandeis in *New State Ice Co. v. Liebmann*, where he wrote in dissent: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”<sup>70</sup> In a recent article, Martha Field, an influential voice in the debate over surrogacy, echoed Brandeis’s approach, arguing that having different surrogacy laws in different states is advantageous because “the states and the public can learn from the implementation of different systems and will eventually have a better basis, including an empirical basis, for forming their surrogacy policy.”<sup>71</sup> The idea of states as laboratories for democracy may be appealing, but at some point society must pause the collection of evidence and analyze the accumulated data. Is there any? Field says little about the empirical evidence gathered over the past three decades, and offers no indication that any state has changed its surrogacy policy on the basis of such empirical evidence.<sup>72</sup> For the foreseeable future, it seems clear that states will continue to take divergent approaches to surrogacy, regardless of (or in the absence of) the evidence generated in state “laboratories.” Assuming that is true, is it a problem? And if so, what can be done?

There are at least two reasons to be concerned about the divergent legal approaches to surrogacy embraced by different states. First, not all approaches to surrogacy are equally justifiable. To the contrary, some laws and regulations aimed at surrogacy are sounder than others.<sup>73</sup> It is important, for example, for states to have surrogacy laws that do not discriminate on the basis of sexual orientation or marital status. Legal protections ensuring that surrogate mothers are not exploited or coerced are essential. Contracts between intended parents and surrogates should be honored, not systematically rejected.<sup>74</sup> Surrogacy regulations are not all created equal; after three decades of incompatible state regulation, it is time to make a choice.

Second, regulatory diversity exacerbates those aspects of surrogacy that attract the most pointed criticism. To the extent that there are legitimate concerns about the exploitation of economically disadvantaged women and the commodification of both women and children, for example, the piecemeal regulation of surrogacy in the U.S. sharpens those worries. The divide between the haves and have nots—between those

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<sup>69</sup> See DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 94 (2006).

<sup>70</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 387 (1932).

<sup>71</sup> Field, *supra* note 22, at 1180.

<sup>72</sup> *Id.*

<sup>73</sup> One way to collect better data about surrogacy would be to require surrogacy agencies to create a database of surrogate mothers and intended parents and follow them from the inception of the surrogacy agreement until the child is ten years old. Surrogacy contracts could require parties to provide certain information during those years, and that information would provide a far better picture of surrogacy than is currently available.

<sup>74</sup> Enforcing surrogacy contracts may sometimes be at odds with the preferences of intended parents. If they change their minds and decide they do not want the child they bargained for (perhaps they do not want a child with a particular type of genetic defect, for example), they will still have to keep their end of the bargain, meaning that they must accept the child and tender full payment for the surrogacy arrangement.

with and without financial and educational resources—will inevitably be underscored if surrogacy is an option only for those who can figure out which states permit surrogacy, and then hire a surrogate in one of those states. The criticism becomes even sharper if one considers surrogacy options outside of the U.S.; gestational tourism is a prerogative of the well-off, and surrogacy outside of the U.S. is more likely to involve parties who lack basic legal protections.

However conceived, surrogacy involves contracting out the gestation of one's child. It is not cost-free, and those with greater resources will enjoy a greater range of options. But those facts alone do not mean that surrogacy should be rejected, assumed to be exploitative, or charged with commodifying the un-commodifiable. Instead, with careful regulatory choices and a configuration of laws within and among the fifty states that do not create or amplify preexisting inequities, surrogacy can offer a viable route to parenthood for those who might otherwise not be able to conceive.

## VII. CONCLUSION

The solution to the inconsistent legal treatment of surrogacy across the fifty states is easily stated but difficult to achieve—the creation of a (more) uniform regulatory approach to surrogacy.<sup>75</sup> Instead of *ad hoc* decisions made by courts, state legislatures need to get more involved. As the court in *In re Marriage of Buzzanca* wrote:

Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction . . . . Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme, looking to the imperfectly designed Uniform Parentage Act and a growing body of case law for guidance in the light of applicable family law principles. Or the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques.<sup>76</sup>

Coordinating legislation in different states is a significant challenge. Various efforts have been, and continue to be, made to achieve some uniformity in the regulation of surrogacy, both within and beyond the U.S., but they have gained little traction.<sup>77</sup> Congress took an interest in regulating surrogacy in the late 1980s, largely with the intent to prohibit it, but that effort failed.<sup>78</sup> Yet a more active Congressional posture is both possible and desirable. In an article exploring legislative approaches to surrogacy in the U.S., Alta Charo argues that the cross-border nature of surrogacy enables federal

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<sup>75</sup> Field, *supra* note 22, at 117 (arguing that uniform state laws are not necessary because the Full Faith and Credit Clause of the US Constitution guarantees that a “parent-child relationship established and recognized in one state must be respected in other states.” so the uniform “recognition of parent-child relationships is assured even while states pursue different surrogacy policies”).

<sup>76</sup> *In re Marriage of Buzzanca*, 72 Cal. Rptr. 280, 293 (Cal.Ct. App. 1998).

<sup>77</sup> Some scholars have argued that a more uniform approach to surrogacy could come from constitutional law, arguing that there is a constitutional right to surrogacy. Such arguments have generally been met with skepticism or disinterest. See Robertson, *supra* note 23. Field and others rejects claim that there is a constitutional right to surrogacy. Field, *supra* note 22, at 1177.

<sup>78</sup> *Id.* at 1176 n.120. See Commercialized Childbearing Act of 1989, H.R. 1188, 101<sup>st</sup> Cong. (1998); Anti-Surrogate Mother Act of 1989, H.R. 576, 101<sup>st</sup> Cong. (1989); Surrogacy Arrangements Act of 1989, H.R. 275, 101<sup>st</sup> Cong. (1989); Anti-Surrogate Mother Act of 1987, H.R. 3264, 100<sup>th</sup> Cong. (1987); Surrogacy Arrangements Act of 1987, H.R. 2433, 100<sup>th</sup> Cong. (1987).

government regulation on the basis of the Commerce Clause, and urges the government to press for the harmonization of state surrogacy laws.<sup>79</sup> In her view, harmonization could be achieved thorough the development of standard contract provisions, making challenge grants available to states so that they can study legislative options, drafting a model law, or passing a joint resolution asking states to adopt a model law developed by a professional organization like the American Bar Association (“ABA”).<sup>80</sup> Congress has thus far done none of those things, and the current political climate in the U.S. does not bode well for this type of bold political action. Nonetheless, federal government action is essential to the crafting of a more uniform legal approach to surrogacy in the states.

Beyond Congress, some organizations have pressed for a consistent legal approach to surrogacy. In 1988, for example, the ABA’s Section of Family Law adopted the Model Surrogacy Act.<sup>81</sup> The Act, primarily focused on traditional surrogacy arrangements, endorsed enforceable contractual surrogacy agreements, suggested that surrogates be compensated between \$7,500 and \$12,500, proposed a simplified procedure (as opposed to adoption) of awarding parentage to the intended parents, and envisioned the creation of state-licensed agencies to handle surrogacy.<sup>82</sup> The Act has gone through a number of iterations, most recently in the 2008 Model Act Governing Assisted Reproductive Technology, which adopts and updates many of the provisions endorsed by the ABA 20 years earlier, including the validity of surrogacy contracts, the acceptability of paying surrogates a “reasonable fee”, and the legal parentage of the intended parents.<sup>83</sup> Despite the ABA’s effort, there is little to suggest that it has had much influence.

The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has also proposed legislation for regulating surrogacy, contained in Article 8 of the Uniform Parentage Act (“UPA”), but it has had a limited impact.<sup>84</sup> Only 11 states have adopted parts of the 2002 UPA, and just two (Texas and Utah) have enacted the surrogacy provisions of Article 8.<sup>85</sup> In 2017 the NCCUSL recommendations for determining the parentage of children born through surrogacy were updated, but for now it is too early to know if that effort will have an impact on state policy. In short, despite the many challenges aspiring parents face when confronted by the current patchwork of state policies governing surrogacy, there is little indication that either the federal government or state governments will expend much effort to achieve a greater degree of policy harmonization.

A similar lack of political will is evident globally, where one continues to observe a high degree of policy heterogeneity. In 2015, the Permanent Bureau of the

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<sup>79</sup> R. Alta Charo, *Legislative Approaches to Surrogate Motherhood*, in *SURROGATE MOTHERHOOD: POLITICS AND PRIVACY* 88-119 (Larry Gostin ed., 1990).

<sup>80</sup> *Id.*

<sup>81</sup> *See Draft ABA Model Surrogacy Act*, 22 *FAM. L. Q.* 123 (1988).

<sup>82</sup> *Id.*; H. Joseph Gitlin, *Family Law Section Approves Model Surrogacy Act: A Comment*, 22 *FAM. L. Q.* 145 (1988). The Act leaves open a number of important questions. Is \$7,500 the base fee, or might a lower fee be acceptable? Why would the cost sometimes be \$7,500, and other times \$12,500? Is the fee set on a case by case basis, or categorically? Would it be acceptable for intended parents to pay a premium for certain types of surrogates, like those who are young, have good dietary habits, are in particularly good health, or are of a particular race or ethnicity?

<sup>83</sup> A.B.A., *MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY* (2008), [https://www.americanbar.org/content/dam/aba/publishing/family\\_law\\_quarterly/family\\_flq\\_artmodelact.aut\\_hcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/family_law_quarterly/family_flq_artmodelact.aut_hcheckdam.pdf). The Act also includes detailed eligibility criteria for both surrogates and intended parents.

<sup>84</sup> NAT’L CONFERENCE OF COMM’N ON UNIF. STATE LAWS, *UNIFORM PARENTAGE ACT* §§ 801-809 (2017), [http://www.uniformlaws.org/shared/docs/parentage/2016AM\\_AmendedParentage\\_Draft.pdf](http://www.uniformlaws.org/shared/docs/parentage/2016AM_AmendedParentage_Draft.pdf).

<sup>85</sup> *Id.*



Hague Conference on Private International Law convened an Experts Group to study the private international law issues raised by surrogacy, particularly those involving fundamental human rights included in the U.N. Convention on the Rights of the Child—nationality, immigration status, and parentage.<sup>86</sup> At the request of the U.S. Department of State, the ABA weighed in on the merits of drafting a new Convention on international surrogacy, and argued forcefully against doing so.<sup>87</sup> Citing the importance of “local culture and concerns” over surrogacy, the ABA argued that it would be inappropriate to support the creation of uniform rules for regulating surrogacy in different countries.<sup>88</sup> With the U.S. opposing efforts to harmonize national surrogacy laws, one can expect little progress on that front.

The 30<sup>th</sup> anniversary of the *Baby M* case thus stands as a stark reminder of how little progress has been made in shaping consistent and coherent laws to regulate surrogacy. In the three decades since the Supreme Court of New Jersey issued its decision, reproductive medicine has rapidly evolved, and social norms as well as formal laws have redefined the meaning of marriage and family. Yet state courts and legislatures remain divided in their views of surrogacy, and those seeking to have children through surrogacy continue to operate in a climate of grave uncertainty. For now, one can only greet the anniversary of *Baby M* with a mixture of humility and disappointment; humility because the choices people make about bearing children are always so deeply complex and personal, and disappointment because despite profound changes in science and society, legal uncertainty about surrogacy has persisted for 30 years, and is likely to continue into the foreseeable future.

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<sup>86</sup> *The Parentage/Surrogacy Project*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> [<https://perma.cc/DTH8-VFA9>].

<sup>87</sup> A.B.A., RESOLUTION, SECTION OF FAMILY LAW SECTION OF REAL PROPERTY, TRUST AND ESTATES LAW, SECTION OF SCIENCE AND TECHNOLOGY LAW, [https://www.americanbar.org/content/dam/aba/uncategorized/family/Hague\\_Consideration.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/family/Hague_Consideration.authcheckdam.pdf).

<sup>88</sup> It did, however, voice support for the determination of parentage based on intent, which it saw as an important step in harmonizing laws involving parentage and citizenship. *Id.*