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American Surrogacy: Babies for Sale?

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Introduction

More surrogacy contracts are fulfilled in the United States than in any other country (Bromfield, 2016, p. 193). In 2014, there were approximately 2,000 surrogacy arrangements in the U.S., yet the market is totally unregulated (Shellnutt and Grizzle, 2018, p. 31). Given that 1 in 6 American couples face infertility, there will continue to be a demand for alternative and assisted reproductive options (Shellnutt and Grizzle, 2018, p. 34). This paper seeks to explore several areas of surrogacy, including contract enforcement, potential problems parties in surrogacy agreements face, current legislation, the role of religion in surrogacy, and specific case studies. The culmination of these facets is a policy recommendation that the author feels is the best practice for future cases.

What is Surrogacy?

Surrogacy is the practice of having a biological female carry and deliver a baby for other families (Imrie and Jadva, 2014, p. 425). There are two types of surrogacy. Traditional surrogacy, in which the surrogate female is artificially inseminated with sperm from a male intended parent, and gestational surrogacy, in which one or more of the intended parents undergoes in-vitro fertilization to produce a viable fetus, which is then placed in the womb of the surrogate mother (Imrie and Jadva, 2014, p. 425). There are two primary forms of surrogacy agreements, compensated surrogacy agreements, and compassionate surrogacy agreements. As the names suggest, compensated surrogacy agreements include terms and conditions for financial compensation of the surrogate mother, beyond just the expenses incurred during the pregnancy. Compassionate surrogacy agreements do not provide any financial compensation but do usually

cover the expenses directly related to the pregnancy. Usually, those who participate in compassionate surrogacy are relatives or close friends of the intended parents (Imrie and Jadva, 2014, p. 425).

There is significant debate on the morality and legality of surrogacy. Public opinion continues to shift as a greater understanding of surrogacy is more readily available. The American Bar Association published an article in 1987 titled *Surrogacy = Baby Selling*. Although this was a common viewpoint in the 1980s, surrogacy has gained significant traction as a legitimate form of assisted reproduction. The foundation of surrogacy discourse is whether one thinks it is ethically right to allow a consenting third party to bear a child for another. The issues of payment, compensation, legislation, and enforcement are a result of a personal belief about whether or not this practice is acceptable.

However, there are several issues that can arise over the course of a surrogate pregnancy. Legally, the issues boil down to these: what happens if a surrogate mother changes her mind and wants to keep the baby? What if she wants to abort the baby and end the pregnancy? What if the prospective parents back out and do not want to take the baby after it is born? We do know that when compensation is involved, more issues tend to arise.

Surrogacy is considered a part of the pharmaceutical industry. The global surrogacy market saw $112.80 million in revenue in 2015, but it is expected to grow to 201.40 million by 2025 (Allied Market Research, 2020). This figure takes into account the impacts of COVID-19 on the market, as surrogacy has been greatly impeded by travel restrictions imposed by COVID-19 (Allied Market Research, 2020).

Case Study: The Baby M Case

One such issue is when the surrogate mother decides she would like to keep the baby. The first case in which this appeared is the infamous Baby M case. The case, which was decided in February of 1988, two years after the child was born, involves a couple seeking surrogacy as a result of the wife having multiple sclerosis (Younger, 1988, p.76). This couple, the Sterns, entered into a surrogacy agreement with Mary Whitehead, whom they found via a newspaper advertisement (The Supreme Court of New Jersey). Mrs. Whitehead agreed to be artificially inseminated with Mr. Stern's sperm and complete a traditional surrogacy and the Sterns agree to compensate her with $10,000 (The Supreme Court of New Jersey). She agreed to terminate her parental rights upon the birth of the child so that Mrs. Stern could legally adopt the child, while Mr. Stern was already determined as the biological father (Younger, 1988, p. 76). Mrs. Stern was not a party in the surrogacy agreement, but it was listed that she should retain sole parental rights if Mr. Stern were to pass away (The Supreme Court of New Jersey). While the $10,000 was not to be paid until the completion of the surrogacy arrangement, Mr. Stern paid an additional $7,500 to The Infertility Center of New York, or ICNY, to facilitate the traditional surrogacy (The Supreme Court of New Jersey). The INCY provided the formal surrogacy contract, as well as legal counsel for the process (The Supreme Court of New Jersey).

Mr. Stern had particularly moving motives for wanting a child. While he respected his wife's concerns about her health, he desperately wanted to continue his bloodline, as the rest of his family had been killed in the Holocaust (The Supreme Court of New Jersey). The Sterns eliminated adoption as an option, due to both their age and differing religious views (The Supreme Court of New Jersey). Mrs. Whitehead said her motivation lay in being able to give

another couple the "gift of life," as well as being able to help her own family with the $10,000 (The Supreme Court of New Jersey). For context, the $10,000 that was paid in 1986 when the baby was born is worth $25,000 in 2021 according to the CPI Inflation Calculator.

However, both parties had some less than altruistic motivations. Mrs. Whitehead seemed unbothered by whether or not the Sterns would be good parents for the child that would be biologically hers. On the other hand, the Sterns dismissed the potential psychological and physical impacts surrendering a baby may have on Mrs. Whitehead due to their desperation for a baby (The Supreme Court of New Jersey).

Baby M was born in March of 1986 after a smooth pregnancy. However, the difficulties began in the hospital. Mrs. Whitehead told the Sterns that she was unsure if she would be able to part with the child and began to cry (The Supreme Court of New Jersey). However, she did turn over the child 3 weeks later at the Sterns home (The Supreme Court of New Jersey). But Mrs. Whitehead entered into such a state later that night that the Sterns were concerned she would take her own life (The Supreme Court of New Jersey). Mrs. Whitehead said she needed the baby back for a week and would then return her. The Sterns reluctantly agreed, fearing for Mrs. Whitehead's life, and trusting that she would keep her word and return the baby (The Supreme Court of New Jersey). The child was not returned to the Sterns for four months and had to be forcibly removed from Mrs. Whitehead (The Supreme Court of New Jersey). During the period, Mrs. Whitehead was fleeing, she threatened to kill herself and the baby, and falsely accuse Mr. Stern of molesting one of her own children (The Supreme Court of New Jersey).

The Sterns brought a case before the New Jersey Superior Court, asking that the surrogacy contract be enforced, which included clauses regarding the termination of Mrs. Whitehead's parental rights (The Supreme Court of New Jersey). The trial court stated that the

surrogacy agreement was valid but devoted most of its attention to the good of the child (The Supreme Court of New Jersey). It also found that Mr. Stern's rights under the contract fell under Constitutional protection (The Supreme Court of New Jersey). Mrs. Whitehead appealed and the Supreme Court of New Jersey granted said appeal (The Supreme Court of New Jersey). Mrs. Whitehead stated that the surrogacy contract should be invalidated for several reasons (The Supreme Court of New Jersey). One of her primary reasons was that what was best for a child was to be raised by both biological parents (The Supreme Court of New Jersey). She stated that full custody should go to her, rather than Mr. Stern, to deter future surrogacy agreements from taking place (The Supreme Court of New Jersey).

The Supreme Court of New Jersey found the surrogacy contract to be unenforceable and void (The Supreme Court of New Jersey). However, they used the same best interests of the child doctrine as the Superior Court and awarded the Stern's custody of Baby M and visitation rights to Mrs. Whitehead (The Supreme Court of New Jersey). Although this ruling included a traditional surrogacy contract, in which Mrs. Stern was the biological parent, the ruling was used as precedent to rule that the surrogate mother in a gestational surrogacy agreement was the legal mother of a child in A.G.R. V. D.R.H. & S.H. (Superior Court of New Jersey). Interestingly, as of 2007, Baby M had reached adulthood and terminated Mrs. Whitehead's parental rights, while moving forward with formal adoption measures to legally instate Mrs. Stern as her mother (New Jersey Monthly, 2007). Mrs. Whitehead had divorced her husband, remarried, and had two more children (New Jersey Monthly, 2007). While this case is markedly tragic, it is an anomaly in surrogacy agreements.

Legal Framework

The center of the debate surrounding surrogacy agreements is whether they should fall under contract law or family law (Andrews, 1995). However, to reach a point where this discussion holds significant merit, the need for federal legislation surrounding surrogacy must become more prominent. Currently, there are no laws governing surrogacy on a federal level, and states have wildly inconsistent approaches to legislating both gestational and traditional surrogacy.

Take California for example, a state where several surrogacy cases have made it before state courts. California has ruled in favor of upholding surrogacy agreements as valid and continues to reinforce this idea in subsequent cases (The Surrogacy Experience, 2021). California has produced state legislation defining surrogacy, outlining legal counsel requirements for parties involved, and required stipulations to be included in surrogate agreements (CA Assembly Bill No. 1217). On the other hand, Michigan became the first state to criminalize surrogacy in response to the Baby M case (Risen, 1988). A 1988 law forbids any form of surrogacy for pay (The Surrogacy Experience, 2021). The only form of surrogacy permitted is compassionate surrogacy. Anyone who engages in a form of surrogacy other than compassionate is subject to criminal penalties (The Surrogacy Experience, 2021). The 1988 law was upheld and deemed Constitutional in a 1992 Michigan Court of Appeals case (Michigan Fertility Alliance, 2021). This has had devastating impacts on families using alternative family planning in the state. The Myers family case is currently ongoing and deserves particular attention.

Case Study: The Myers Family

Grand Rapids couple Tammy and Jordan Myers made national news in their quest to gain legal rights to their twins conceived via gestational surrogacy (CBS News, 2021). The Myers were the parents of a two-year old, hoping to conceive again when Tammy was diagnosed with breast cancer. Knowing the treatment would leave her unable to have children, Tammy had her eggs frozen (CBS News, 2021). Thankfully, Tammy made a full recovery, and her and Jordan began to seek out alternative methods to grow their family. They posted on Facebook, expressing their desire for a gestational surrogate. Lauren Vermilye, also located in the Grand Rapids area, responded, offering to carry the baby for free. Vermilye, married with two children of her own, stated that she and her husband were drawn to the idea of being able to give back to the community, as Vermilye had lost her father to cancer and was familiar with the devastation it presented. The embryo transfer was successful and resulted in Vermilye becoming pregnant with twins (CBS News, 2021).

But when it came time to obtain legal parental rights, not only was Tammy denied rights, but Jordan was also denied fatherhood rights, something rare in surrogacy cases. A second judge upheld the ruling. Both judges cited the Michigan Surrogate Parenting Act of 1988. The Act deems all surrogate contracts as void and unenforceable (Surrogate Parenting Act, 1988), (CBS News, 2021). Although one judge expressed concerns with the Act, they ruled it was not their place to change the precedent at this time (CBS News, 2021).

The twins were born on January 11th, 2021. Lauren Vermilye and her husband were listed as the parents on the birth certificates, despite having no genetic relation to the twins (CBS News, 2021). Because of the archaic nature of Michigan law, it is assumed that Lauren must be

the biological mother of the twins, as they were birthed by her. Even more concerning is the fact that because Lauren is married, her husband is automatically given fatherhood rights (CBS News, 2021).

The Myer's lawyer draws attention to the injustice of the situation; since 2005, at least 72 cases have seen pre-birth rights granted to surrogate parents in similar positions to that of the Myers. In order to obtain rights to their children, the Myers must enter the adoption process to legally adopt them. However, this process is lengthy, time consuming, and expensive. The Myers are more than willing to oblige, but they are pushing for the law to be changed. Their plight has drawn attention from across the nation, including from the American Civil Liberties Union (Jones, 2021).

The Myers have made some progress since the birth of their twins at the start of the year. As of April 2021, they were granted legal guardianship (Brown, 2021). This is significant, as the twins were born prematurely, and have spent significant time in the ICU, and require ongoing medical care. With legal guardianship, the Myers are now allowed to make medical decisions for the twins (Brown, 2021). As of the writing of this paper, in November of 2021, the Myers have still not obtained parental rights to the twins.

Only two other states have surrogacy laws as strict as Michigan's: Nebraska and Louisiana. A family law attorney stated that Michigan is the riskiest state to attempt to execute a surrogacy contract in (CBS News, 2021). However, costs increase substantially when attempting to orchestrate interstate agreements (CBS News, 2021). Clearly, the impacts of the Surrogacy Parenting Act of 1988 are still being felt, and Michigan is beginning to stand out as a negative legal influence.

Return to Legal Framework

Reverting to an examination of surrogacy as a form of contract law or family law highlights some of the fundamental differences in the understanding of surrogacy. Those who prefer the family law approach frame contracts as too machine-like and unable to address the nuances of such emotional work (Andrews, 1995, p. 2344). However, evidence suggests the contract enforcement does consider more humanistic factors (Andrews, 1995, p. 2344). Past cases also demonstrate that women often fare poorly in family law cases, so Andrews postulates that consideration of contract law may turn out to be the more equitable route for women (1995, p. 2344). Given that this article is from 1995, so it provides a perspective of women and pregnancy that would be considered old-fashioned in modern discourse, but Andrews still provides valuable insight into the potential legislation on surrogacy.

A primary concern with the use of family law to govern surrogacy is its dependance on a heterosexual, male-led family as the basis for legislation (Andrews, 1995, p. 2345). Yet, most states have taken a family law approach since the Baby M case (Andrews, 1995, p. 2347).

Gendered Justice: A Feminist Approach

The concern that surrogacy will be detrimental to the professional aspirations of women is a long-standing concern. Andrews outlines the concern as this, “Some feminists, disappointed that women have been prevented by discrimination from achieving power in the workplace and political sphere, are understandably reluctant to have women serve as surrogate mothers, thus turning over the power they have in the reproductive sphere to men just because men have mobile sperm and a checkbook” (Andrews, 1995, p. 2345).

Some argue that allowing for monetary compensation in surrogacy contracts creates a commodification of women's labor and children themselves. Is surrogacy really a matter of selling babies? As the Myers case demonstrates, this is simply not the case. But the argument is still worth examining. In a piece by Anderson, she alleges that the commodification of pregnancy is inherently degrading to women (Anderson, 1990, p. 74). But Anderson takes too simplistic a view. She states that the use of money to procure a child indicates that there is a lack of love. This is best demonstrated in her quote about the potential commodification of children, "The most fundamental calling of parents to their children is to love them. Children are to be loved and cherished by their parents, not to be used or manipulated by them for merely personal advantage" (Anderson, 1990, 75). It is certainly difficult to imagine that any party in a surrogacy contract is acting entirely for personal gain. Even with the introduction of compensation to a contract, the amount of money being offered in most contracts could be acquired by the surrogate mother in much less physically and emotionally tolling ways.

Anderson continues by arguing that two fundamental pillars are violated when pregnancy is commodified: respect and consideration (1990, p. 80). Andrews addresses these concerns on page 2350 of her report, in which she addresses the physical, emotional, and symbolic risks to women who engage in surrogacy (1995). Claims of commodification and objectification are addressed in a variety of ways. First, the idea that women are used by fertile men with open checkbooks is becoming obsolete with the growing prevalence of gestational surrogacy (Andrews, 1995, p. 2352). From 2004 to 2008, gestational surrogacy grew by 89 percent (Bromfield, 2016, p. 193). Now, the woman who provided the egg also has genetic, and often monetary ties to the embryo. But perhaps the most striking evidence is the studies on the psychological and emotional effects surrogacy has on surrogate mothers. Andrews cites a

psychologist who has interviewed over 200 surrogate mothers, with the vast majority of them reporting that they feel what they are doing is a great service to the world and gives them a sense of purpose, as well as the feeling of giving back to their community (1995, pp. 2353-2354).

Additionally, there is a persuasive argument that surrogacy preys on poor women of color. Women who have no other choice and will be forced to take on surrogacy contracts (Bromfield, 2016, 196). But in the United States, this is simply not the case. Research shows that most surrogate mothers are white, middle-class, Christian women who are married and have families of their own (Berend, 2012, p. 916), (Stark, 2012, p. 376), (Ciccarelli and Beckman, 2005, p. 3). Women of color are actually underrepresented in surrogacy contracts (Bromfield, 2016, p. 197).

Another prevalent approach is to liken surrogacy to adoption. Through this lens, surrogate mothers are likened to birth mothers and intended parents become adoptive parents (Bromfield, 2016, p. 198). However, many theorists caution against this framework, as the conditions are dramatically different. In a surrogacy agreement, the plan for transfer of the child is in place before the pregnancy begins, the woman often bears no genetic relation to the child, and the child is not given up under duress (Bromfield, 2016, p. 198). In the only longitudinal study done of children produced via surrogacy showed markedly positive results when the children were interviewed at age 10 (Jadva et al., 2012, pp. 3008-3014). In the case of adoption, children often feel distressed and suffer negative psychological consequences (Bromfield, 2016, p. 198). Surrogate children reported a positive view of their surrogate mothers and relayed that they were glad they were born via surrogacy (Bromfield, 2016, p. 198). The parallel between adoption and surrogacy does not hold enough merit to be taken into account.

In returning to the psychological effects of surrogacy on women, a 2016 content analysis of blog posts, done by Nicole Bromfield, looked at the blogs of 22 U.S. commercial surrogates. The content analysis provided five major themes: pride in their work, self-identifying as a member of a special community, a commitment to education and advocacy surrounding surrogacy, note that the child did not belong to the surrogate, and the importance of a relationship with the intended parents (Bromfield, 2016, 204). This was the first study of its kind, and Bromfield chose the method of blog post analysis due to the extensive bias found in previous interviews surrounding surrogacy (2016, p. 202). Surrogate mothers expressed particular joy when being able to carry for a non-heterosexual couple, some even attending Pride events with the intended parents (Bromfield, 2016, p. 205). The findings were clear that women felt empowered by their ability to be a surrogate mother and some even considered this ability as divine (Bromfield, 2016, p. 206). One area of note is the avoidance of discussing money and compensation among the bloggers (Bromfield, 2016, p. 210). Bromfield hypothesizes that this is likely an unconscious attempt to remove themselves from potential accusations of exploitation, baby selling, and greed (2016, p. 210). Bromfield also recognizes the American cultural norm that labels any discussion of money as taboo, likely exacerbating the effects of the norms surrounding the financials of surrogacy (2016, p. 210).

Many studies have been done to investigate the role of money in surrogate contracts, and the vast majority of the evidence indicates that most Americans choose to enter into surrogacy for altruistic reasons, rather than purely financial (Bromfield, 2016, p. 211). The sum of the literature is disproving of the common myths of great psychological harm to mother and child, the exploitative nature of surrogacy on women, and the potential that women are merely selling babies.

The Role of Religion

Given that religion undoubtedly influences the discourse surrounding assisted reproduction, it is paramount to consider the approaches of a few major religions in the United States. Although individuals within each religion may have differing views, there are key themes that arise from each religion being considered. In Islam, particularly among Sunnis, who make up 80-90% of the world's Muslim population, there is a consensus against the use of surrogacy (Shabana, 2015, pp. 82, 89). Islamic law relied on the agnatic, or paternal, line of descent when determining family lineage and membership (Shabana, 2015, p. 83). Paternity is determined via sexual relations, verified though marriage, witness, or even casting lots in particularly doubtful situations (Shabana, 2015, p. 83). Maternity comes through the "natural bond" formed between a mother and child (Shabana, 2015, p. 83). This is usually confirmed via pregnancy, childbirth, and breastfeeding (Shabana, 2015, p. 83). The Quran states that "None can be their mothers except those who gave them birth (58:2). This construction does allow for men who impregnate a woman outside of legitimate relationships to deny fatherhood, whereas a woman is not given such an option (Shabana, 2015, p. 83). Therefore, the development of certain assisted reproductive technologies casts Islamic law into turmoil.

Therefore, a condemnation of surrogacy creates some clarity and allows for the laws to remain applicable (Shabana, 2015, p. 84). The primary reason cited for the modern Muslim stance on surrogacy is a disagreement with the introduction of a third party into a relationship (Shabana, 2015, p. 84). However, some argue that there should be a conceptual distinction between adultery and surrogacy, but that stance has not gained significant traction (Shabana, 2015, p. 89).

In Christianity, there is significant variation across denominations, despite the fact that surrogacy dates back to Biblical times and makes several appearances in the Bible (Kleinpeter et al., p. 2, 2006), (Butterfield, 2020, p. 101). In the book of Genesis, Rachel, the wife Jacob is barren and proclaims to her husband "Give me children, or else I die!" (Genesis, 30:1). used her maid Bilhah to conceive a child on her behalf (Genesis, 30:3). Bilhah gave birth to two sons by Jacob, both of whom Rachel Claimed as her own (Genesis, 30:5-7). This is just one of several examples of traditionally surrogacy arrangements in the Bible.

But there is a general consensus that the process of creating and carrying life outside of the Biblical marriage model creates ethical concerns (Shellnutt and Grizzle, 2018, p. 30). In 2017, a former Arizona congressman resigned from his position after allegations that he was attempting to solicit a surrogate mother for him and his wife, who were having trouble conceiving (Shellnutt and Grizzle, 2018, p. 30). He had pro-life and conservative views, in addition to being a member of the Baptist church, and his supporters felt his desire to use a surrogate conflicted with those views (Shellnutt and Grizzle, 2018, p. 30).

There is an interesting conflict within the framework of Christianity and the culture it has created. There is a heavy emphasis placed on the family. Children are described as a gift from the Lord (Psalms 127:3) and when a barren woman is able to convince this is seen as an immense gift from God (Psalm 113: 9). Motherhood is virtually synonymous with womanhood. So, when a Christian woman is not able to conceive, it can be devastating both personally and spiritually. Yet, there is a general distaste towards assisted reproduction. But the emphasis on motherhood creates significant demand for surrogates for Christian couples unable to conceive on their own (Shellnutt and Grizzle, 2018, p. 32). This creates a moral bind that the ex-congressman experienced.

Many consider the solution to be adoption. In a case study on a young Christian mom named Jenna Miller, this was the first route she tried (Shellnutt and Grizzle, 2018, p. 32). However, Jenna was unable to carry her own children due to experiencing heart failure at 24 (Shellnutt and Grizzle, 2018, p. 32). This caused adoption agencies to disregard or disqualify Jenna and her husband as potential parents, and they felt they had to look elsewhere (Shellnutt and Grizzle, 2018, p. 32). They completed two successful surrogacy arrangements with the same woman, having a baby boy during one pregnancy, and a baby girl the next (Shellnutt and Grizzle, 2018, p. 32). But Jenna and her husband believe that life begins at conception, as is the dominant belief among Christians (Shellnutt and Grizzle, 2018, p. 32). They created only four embryos in the lab and implanted two of them in each surrogacy (Shellnutt and Grizzle, 2018, p. 32). They were prepared for potential twins and did not create more embryos than they could reasonably implant (Shellnutt and Grizzle, 2018, p. 32-33). Jenna's surrogate reported feeling that God protected her heart, so that she never felt the baby was hers and did not suffer any negative psychological outcomes (Shellnutt and Grizzle, 2018, p. 33). In fact, she reported feeling elated with the arrangements and was overjoyed to be able to provide two children for Jenna (Shellnutt and Grizzle, 2018, p. 33).

Perhaps the most questionable situation arises when abnormalities are present in the fetus and the surrogate and intended parents have differing views on abortion. Shellnutt and Grizzle state that abortion needs to be settled before the pregnancy begins, but not all couples have taken this step (2018, p. 30). In a 2014 film, *Breeders: A Subclass of Women?,* directed by Jennifer Lahl, a surrogate mother named Heather is interviewed. Heather had a very rewarding surrogate experience in her twenties and decided to continue to offer her services. She was a mother of two and used it as a way to provide for her family from home. However, on a subsequent pregnancy,

the baby developed a brain condition, and the intended parents asked her to terminate the pregnancy at 21 weeks. Heather refused due to her religious convictions, and the intended father told Heather that she would suffer spiritual consequences for disobeying the demands of the intended parents. The parents did decide to keep the baby, but they were hesitant at best. The intended mother did not show up for the delivery. This issue can be avoided by including abortion clauses in surrogacy contracts.

The Catholic church is against all forms of assisted conception (Nakash and Herdiman, 2009). In Judaism, surrogacy is permitted, as Jewish law places a responsibility to have children on practicing members (Nakash and Herdiman, 2009). However, the child belongs to the father who provided the sperm, and the woman who gave birth to the child (Nakash and Herdiman, 2009). Hinduism and Buddhism are considered to be accommodating of assisted reproduction technology and accepting of surrogacy (Nakash and Herdiman, 2009). The responses to surrogacy vary widely across major religions, but their influence on its regulation, prevalence, and use is undeniable.

Abortion Clauses

It is necessary to return to one of the trickiest situations presented by surrogacy arrangements: abortions. In 2013, a woman named Crystal Kelley refused to terminate her pregnancy when the intended parents requested that she do so. The fetus has a cleft palate, heart defects, and a brain cyst and would need extensive surgeries upon delivery (Forman, 2015, p. 29). The intended parents already had three children with special needs and stated that they wanted to prevent another child from suffering (Forman, 2015, p. 29). Kelley stated that she was always against abortion but did offer to terminate the child for $15,000 [the initial surrogacy

contract was for $5,000] (Forman, 2015, p. 29), (Superior Court of Pennsylvania, 2015, p. 6). The intended parents refused, and requested again that Kelley terminate the pregnancy, or they would consider her in violation of their contract. Kelley stood her ground, so the intended parents began to investigate surrendering the child to the state of Connecticut (Forman, 2015, p. 29).

Kelley's lawyer advised her to leave the state of Connecticut, which would enforce the surrogacy contract. Kelly chose Michigan, where the contract would be deemed void (Forman, 2015, p. 30). She did not want the child herself, so she began the adoption process with a couple in Michigan (Forman, 2015, p. 30). The baby was born with defects including failure of the brain to divide, severe heart defects, misplaced internal organs, two spleens, a small head, a malformed ear, and a cleft lip and palate (Forman, 2015, p. 30). The baby survived, although its quality of life is currently unknown (Superior Court of Pennsylvania, 2015). As of 2015, the baby was given an amended birth certificate that listed the names of the intended parents, and they still have custody, although it appears that the intended parents have since split, and the child resides with the father (Superior Court of Pennsylvania, 2015).

Although a dramatic example of what can go wrong in a pregnancy, there are only two cases where the issue of abortion in surrogacy has been brought before the court (Forman, 2015, p. 30). According to the Center for Disease Control, approximately 18,400 babies were born via surrogacy in the United States between 1999 and 2013 (2016). So the prevalence of these cases is nearly non-existent. This does not discount the issue, but the solution is simple: abortion clauses included in the initial surrogacy agreement. The two most common reasons for termination in a surrogate pregnancy are birth defects and elimination of additional fetuses if several implant successfully (Forman, 2015, p. 34). There is also the potential for the fetus to

threaten the life of the surrogate mother (Forman, 2015, p. 34). There is no cut and dry answer for these scenarios, so each set of intended parents and surrogate mothers must decide what their agreement is. If parties are not in agreement about the conditions of termination, the intended parents should seek out an alternative surrogate mother. Abortion clauses also include the stipulation that the surrogate mother cannot terminate the pregnancy unless it falls within the contract provisions.

The primary issue with these clauses is that their enforceability varies by state, creating a system of chaos, where a surrogate like Kelley can flee to a state like Michigan where the contract is no longer valid. Additionally, the availability and legality of abortions is also varied. Under current Texas law, a fetus cannot be aborted after a heartbeat is detectable, usually around 6 weeks (Texas Senate Bill 8). In other states, including California, there is no set number of weeks where abortion is no longer available (Shouse California Law Group). This variation will be discussed in the recommendation portion of this paper.

Some states have recognized the potential issues in abortion stance discrepancies, and New Hampshire has instituted a requirement that the intended parents and surrogate mother sign a written, contractual agreement that outlines the conditions under which an abortion can occur (New Hampshire General Court, Section 168-B:1). In Nevada, an amendment to surrogacy law allows for the enforcement of abortion clauses, even if it goes against the wishes of the surrogate mother, although the mother would have had to initially agree to the contract (Nevada Statute § 126).

Recommendation

Currently, the lack of federal legislation and wild inconsistency between state laws make the issue of enforcement virtually impossible. Just as Kelley chose to flee to Michigan, so can any surrogate or intended parent who wishes to alter the conditions of the surrogacy contract. There is a desperate need for uniform law, as the surrogacy market continues to grow. There will always be a desire for children, causing a virtually unlimited market with no regulations. Although not clearly defined, the courts often apply a standard called the "best interests of the child" (Children's Bureau, 2020). Surrogacy agreements need to be considered as affecting the interests of the child and deserves much greater attention. Although national legislation including clear regulations is the most desirable outcome, a possible intermediate solution has been identified.

As mentioned earlier, there is significant disagreement over whether surrogacy should fall under family law or contract law (Andrews, 1995, p. 2344). Family law concerns itself more with the wellbeing of the child, whereas contract law protects the autonomy of the individuals (Purshouse and Bracegirdle, 2018, p. 559). But some have recently proposed that we move beyond this false dichotomy and consider the use of the law of unjust enrichment (Purshouse and Bracegirdle, 2018, p. 559). "Unjust enrichment occurs when Party A confers a benefit upon Party B without Party A receiving the proper restitution required by law. This typically occurs in a contractual agreement when Party A fulfills his/her part of the agreement and Party B does not fulfill his/her part of the agreement. Unjust Enrichment is distinguished from a gift, as a gift is given without the reasonable expectation of receiving something in return. As such, when Party A gives Party B a gift, Party A has no legal recourse to receive something in return." (Legal Information Institute, 2021). Money qualifies as enrichment, therefore allowing commercial

surrogacy to fall under possible unjust enrichment (Purshouse and Bracegirdle, 2018, p. 569). To meet the standard of "unjust," the person who was enriched, in this case the surrogate mother via payment, must do something that causes the mother keeping the money to be unfair (Purshouse and Bracegirdle, 2018, p. 572). There are a number of contract violations that would cause this condition to be met. Therefore, it is reasonable to assume that unjust enrichment could be applied to breaches of contract in surrogacy cases, hence allowing for enforcement of the contract for the return of the money, even in states where surrogacy agreements are not recognized. This would not validate the contract in those states, but it would allow for litigation surrounding the payment, therefore helping to prevent parties from fleeing to other states to avoid contract enforcement.

In sum, this paper advocates for the introduction of federal legislation to guide the rapidly growing United States surrogacy market. It is the opinion of the author that both traditional and gestational surrogacy should be recognized as legitimate forms of assisted reproduction. Although several extraordinary cases have been examined, the vast majority or surrogacy agreements are smooth and deeply rewarding for all parties involved (Bromfield, 2016), (Berend, 2012), (Van den Akker, 2003), (Imrie and Jadva, 2014). Many classic myths surrounding surrogacy have been dispelled, but religion still plays a large role in the taboo nature of surrogacy. However, the separation of church and state should be remembered, and it is time to move towards federal legislation.

Works Cited

AB-1217 Surrogacy Agreements. California Legislature, 3 Sept. 2012, leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB1217.

Act 199 of 1988. Michigan Legislature, 1 Sept. 1988, www.legislature.mi.gov/(S(bj1ysyin1cari34p0ltnf4qk))/mileg.aspx?page=getObject&objectName=mcl-Act-199-of-1988.

American Bar Association. "Surrogacy = Baby Selling." *ABA Journal*, vol. 73, no. 8, 1 June 1987, pp. 38–39.

Anderson, Elizabeth. "Is Women's Labor a Commodity?" *Philosophy and Public Affairs*, vol. 19, ser. 1, 1990, pp. 71–92. *1*, https://www.jstor.org/stable/2265363?seq=1#metadata_info_tab_contents.

Andrews, Lori B. "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood." *Virginia Law Review*, vol. 81, no. 8, 1995, p. 2343., doi:10.2307/1073581.

Art and Gestational Carriers. Centers for Disease Control and Prevention, 5 Aug. 2016, www.cdc.gov/art/key-findings/gestational-carriers.html.

Berend, Zsuzsa. "The Romance of Surrogacy." *Sociological Forum*, vol. 27, no. 4, Sept. 2012, pp. 913–936., doi:10.1111/j.1573-7861.2012.01362.x.

Bromfield, Nicole F. "'Surrogacy Has Been One of the Most Rewarding Experiences in My Life': A Content Analysis of Blogs by U.S. Commercial Gestational Surrogates." *IJFAB: International Journal of Feminist Approaches to Bioethics*, vol. 9, no. 1, 2016, pp. 192–217., doi:10.3138/ijfab.9.1.192.

Brown, Anna. *Grand Rapids Couple Become Legal Guardians of Biological Twins Born by Surrogate*. WZZM13, 24 Apr. 2021, www.wzzm13.com/article/life/family/grand-rapids-couple-become-legal-guardians-of-biological-twins-born-by-surrogate/69-da9adbb5-a522-4d2f-b586-6299fc7ba8f5.

Butterfield, Meghan. "Should I Lie to You? A Review of Victoria's Law Regarding Disclosure of Surrogacy Arrangements to the Children They Produce — Is It Compliant with the Convention on the Rights of the Child?" *Monash University Law Review*, 23 Oct. 2020, pp. 100–134., bridges.monash.edu/articles/journal_contribution/Should_I_Lie_to_You_A_Review_of_Victoria_s_Law_regarding_Disclosure_of_Surrogacy_Arrangements_to_the_Children_They_Produce_Is_it_Compliant_with_the_Convention_on_the_Rights_of_the_Child_Advance_/13125560.

CHAPTER 126 - PARENTAGE. Nevada Legislature, 2013, www.leg.state.nv.us/nrs/nrs-126.html.

Ciccarelli, Janice C., and Linda J. Beckman. "Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy." *Journal of Social Issues*, vol. 61, no. 1, 2005, pp. 21–43., doi:10.1111/j.0022-4537.2005.00392.x.

Correa, David. *Surrogacy Market Size to Grow $201.40 Million by 2027, Claims Allied Market.*, News Bank, 28 July 2020, infoweb-newsbank-com.ezproxy.gvsu.edu/apps/news/document-view?p=WORLDNEWS&docref=news/17C8413367D5D0A0.

Determining the Best Interests of the Child. Children's Bureau, June 2020, www.childwelfare.gov/pubPDFs/best_interest.pdf.

Forman, Deborah. "Abortion Clauses in Surrogacy Contracts: Insights from a Case Study." *Family Law Quarterly*, vol. 49, no. 1, 2015, pp. 29–53., https://www.jstor.org/stable/24577601.

Haberman, Clyde. "Baby M and the Question of Surrogate Motherhood." *The New York Times*, The New York Times, 23 Mar. 2014, www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html.

Imrie, Susan, and Vasanti Jadva. "The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements." *Reproductive BioMedicine Online*, vol. 29, no. 4, 2014, pp. 424–435., doi:10.1016/j.rbmo.2014.06.004.

Jones, Stephanie. "ACLU's Challenge to 1988 Surrogate Parentage Act." *Michigan Fertility Alliance*, Michigan Fertility Alliance, 11 Aug. 2021, www.mifertilityalliance.com/mfablog/aclus-challenge-to-1988-surrogate-parentage-act.

Kleinpeter, Christine B., et al. "Parents' Evaluation of a California-Based Surrogacy Program." *Journal of Human Behavior in the Social Environment*, vol. 13, no. 4, 2006, pp. 1–23., doi:10.1300/j137v13n04_01.

Lahl, Jennifer, director. *Breeders: A Subclass of Women?* Center for Bioethics and Culture Network, 2014, www.youtube.com/watch?v=rA0J1HH2gZw. Accessed 11 Nov. 2021.

Michigan Couple Denied Parental Rights to Biological Twins Because of Decades-Old Surrogacy Law. CBS News, 25 Jan. 2021, www.cbsnews.com/news/michigan-surrogacy-law-couple-denied-parental-rights-to-biological-twins/.

Nakash, A., and J. Herdiman. "Surrogacy." *Journal of Obstetrics and Gynaecology*, vol. 27, no. 3, 2007, pp. 246–251., doi:10.1080/01443610701194788.

Purshouse, Craig, and Kate Bracegirdle. “The Problem of Unenforceable Surrogacy Contracts: Can Unjust Enrichment Provide a Solution?” *Medical Law Review*, vol. 26, no. 4, 2018, pp. 557–584., doi:10.1093/medlaw/fwy001.

Risen, James. “Michigan Outlaws Surrogate Maternity Contracts; Ban Aimed at 'Baby m' Clinic.” *Los Angeles Times*, Los Angeles Times, 28 June 1988, www.latimes.com/archives/la-xpm-1988-06-28-mn-5095-story.html.

Shabana, Ayman. “Foundations of the Consensus against Surrogacy Arrangements in Islamic Law.” *Islamic Law and Society*, vol. 22, no. 1-2, 2015, pp. 82–113., doi:10.1163/15685195-02212p03.

Shellnutt, Kate, and Melanine Grizzle. “My Pregnancy, Not My Baby: Surrogacy Meets Christian Bioethics.” *Christianity Today*, vol. 62, no. 2, Mar. 2018, pp. 28–35.

Shouse California Legal Group. *Abortion Laws in California - a Breakdown of the Rules*. 6 Oct. 2021, www.shouselaw.com/ca/defense/laws/abortion-laws/.

Stark, Barbra. “Transnational Surrogacy and International Human Rights Law International Surrogacy.” *ILSA Journal of International and Comparative Law*, vol. 18, 2012, pp. 369–386., scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1719&context=faculty_scholarship.

Superior Court of Pennsylvania. *In Re: Baby S*. 2015, www.pacourts.us/assets/opinions/Superior/out/J-A28015-15o%20-%201024461805731818.pdf.

Supreme Court of New Jersey. *Matter of Baby M*. 3 Feb. 1988, file:///C:/Users/madis/Zotero/storage/DJIH8SJA/109-n-j-396-1.html#opinion.

“The Surrogacy Experience.” *The Surrogacy Experience Inc*, 2021, www.thesurrogacyexperience.com/.

“Surrogacy Process - The 6 Steps of Surrogacy.” *Information About Surrogacy*, American Surrogacy, 4 May 2021, surrogate.com/surrogates/becoming-a-surrogate/the-six-steps-of-the-surrogacy-process/.

“Texas SB8.” *LegiScan*, Texas Legislature, 1 Sept. 2021, legiscan.com/TX/text/SB8/id/2395961.

“Title XII Public Safety and Welfare.” *Chapter 168-B SURROGACY*, New Hampshire Legislature, July 2014, gencourt.state.nh.us/rsa/html/xii/168-b/168-b-mrg.htm.

Unjust Enrichment. Legal Information Institute, www.law.cornell.edu/wex/unjust_enrichment.

Van den Akker, Olga. "Genetic and Gestational Surrogate Mothers' Experience of Surrogacy." *Journal of Reproductive and Infant Psychology*, vol. 21, no. 2, 2003, pp. 145–161., doi:10.1080/0264683031000124091.

Webster, Ian. "Inflation Rate between 1986-2021: Inflation Calculator." *$10,000 In 1986 → 2021 | Inflation Calculator*, 2021, www.in2013dollars.com/us/inflation/1986?amount=10000.

Younger, Judith. "What the Baby M Case Is Really About." *Minnesota Journal of Law and Inequality*, vol. 6, no. 2, Dec. 1988, scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1347&context=lawineq. Accessed 11 Nov. 2021.