Surrogacy Law?
The Unparalleled Social Utility of Surrogacy and
The Need for Federal Legislation

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Introduction

What makes a person a parent? What makes a woman a mother? Does contributing the genetic material necessary to conceive a child confer parentage legally or morally? If so, how can this definition be rectified with cases of sperm and egg donation? The men and women who provide the gamete necessary for conception to occur in these forms of assisted reproduction are generally afforded no legal rights in instances where custody disputes arise. These men and women are most frequently anonymous donors and do not intend to have any relationship with any child potentially created through the contribution of their genetic material. Can motherhood then be defined solely by a woman’s ability to provide gestation and labor of a child? If this is the case, what rights do genetic parents that employ the use of a gestational carrier have? This determination, too, seems inapplicable, especially given that the courts have generally prioritized the genetic contribution to a child rather than the gestation and labor of a child in situations where the custody of a child born through the use of gestational surrogacy is disputed.

Surrogacy raises complicated issues like these—and many more. Surrogacy’s ability to separate the biologic and social responsibilities of parenting makes it a very unique assisted reproductive technology, one very different from other assisted reproductive technologies like egg donation or in vitro fertilization. Surrogacy allows women and men who were unable to conceive a child naturally the opportunity to use medical technology and the services of another human being to become a parent. In this way, surrogacy provides the opportunity for women and men who want to become parents but have biological barriers to such a second chance at parenthood. Surrogacy opens the doors of parenthood to women who are infertile or are unable to carry a child to full term, as well as homosexual couples. Surrogacy provides something that no other assisted reproductive technology or adoption can—the chance to have a child genetically related to oneself or one’s partner.
It has been said that, “Conception lasts a few moments, gestation a few months and delivery a few hours, whereas parenting is for life” (Bromham 1995, 511). Seen in this light, surrogacy provides a benefit to childless men and women unparalleled by any other means of obtaining children because it offers those hopeful parents the opportunity to have a genetically related child, if they so choose, and to parent it from birth. The way it currently exists, surrogacy presents a very real separation between the biological and social contributions of parenting, allowing for a greater expansion of familial relationships, especially to those who would have been unable to obtain them by any other means. In doing so, surrogacy provides a positive and desirable contribution to society. There are some, however, who believe that surrogacy also threatens cultural norms and exploits and objectifies women and children and does not deserve the praise it receives.

The media, for example, often take a very critical view of surrogacy. From coverage of court cases like *In Re Baby M* (1988) to the 2008 film, *Baby Mama*, the media has capitalized more on the social and legal problems created by surrogacy than benefits the intended parents, surrogate mother, and child might reap. For twenty years, the media have subjected surrogate motherhood agreements to rather intense scrutiny and criticism. While scholars have long debated (and will continue to debate) whether the media has any effect on public opinion or what kind of effect it has—it would be hard to deny that the media plays some role, even if a limited one, in determining how the public views world events and politics. The media affects public opinion, even if only minimally, largely because it is so difficult to escape the reach of the media in the United States. Television, radio, magazines, newspapers, billboards; the media is everywhere. Thus, media portrayals of surrogacy are probably at least somewhat influential in shaping what citizens believe to be true about surrogacy and ultimately whether they will lend support for surrogacy or not.

Media portrayals of surrogacy are problematic primarily because they serve to highlight the negative aspects of surrogacy, focusing on the potential for dispute between the intended parents
and the surrogate mother or the arduousness of the surrogacy process. These negative portrayals have the ability to affect public opinion regarding surrogacy, especially given the limited knowledge most citizens have of the surrogacy process. Speaking about how the media has portrayed surrogate motherhood agreements, Anleu (1992) asserts that, “The media…describe commercial surrogacy as deviating from proscriptions on baby selling and as exploiting women who act as surrogate mothers” (Anleu 1992, 32). Anleu argues that the media consistently portrays surrogacy, and especially surrogate mothers, in a negative light. Thomas Shevory (2000) agrees that the media plays a large role in determining how the public feels about surrogacy contracts. Shevory argues that the media has turned surrogacy into a very political issue, placing politicians and political commentators on the left versus right spectrum and pitting them against one another (Shevory 2000, 52-53). Shevory charges the media with preventing the public from embarking on a serious discourse about surrogacy and the merits and drawbacks to its practice. Shevory believes that because the media has turned coverage of famous surrogacy cases and surrogacy legislation into a support versus oppose type of argument, devoid of evidence for either position or real facts, that the public is not encouraged to dig deeper and come to their own conclusions about whether they believe surrogacy is ethical and should be legal or whether it is immoral and should be illegal (Shevory 52-55).

While there is no conclusive way to prove whether the media has an influence on public opinion regarding surrogacy, or any political issue for that matter, it is helpful to at least be aware of the potential effects of the media. The media, as scholars have asserted, is often responsible for creating some of the more critical frames of surrogacy. If the media does have a measurable effect on the way the public views surrogacy contracts, its often very serious criticism of commercial surrogacy arrangements could have a marked effect on public support for federal legislation that regulates or even prohibits such agreements. Increased interest in surrogacy, from the media and subsequently the American public, has made the issue all the more pressing. Surrogacy, the laws
protecting it and the laws regulating it, or the real lack thereof, can no longer be ignored in the United States, as the media has so deftly demonstrated.

The goal of this paper is multifaceted; it seeks to prove (1) that surrogacy provides an unparalleled social utility, (2) that surrogacy is seriously threatened by the non-uniform and unstable political landscape in which it currently exists, and (3) that federal legislation is the best way to protect surrogacy as a practice, as well as the parties involved in surrogacy contracts. To do this, surrogacy will be defined to the greatest extent possible, the benefits that surrogacy provides to childless men and women will be discussed, the serious criticisms to surrogacy will be addressed, a defense of surrogate motherhood will be offered, the threats to the future of surrogacy will be laid bare, and the inadequacy of the current legal and political framework with regards to surrogacy will be made clear.

**Surrogacy, Defined**

**What is Surrogacy?**

To have a real, thoughtful discussion on surrogacy and engage with the legal, moral, and ethical considerations linked to its practice, a basic working definition is both helpful and necessary. Accomplished family law practitioners Charles Kindregan and Maureen McBrien (2006) offer a simple and helpful place to start; “A common definition of a surrogate is a woman who substitutes for another who is unable to become pregnant” (Kindregan and McBrien 2006, 129). At the most basic level, a surrogate mother is responsible for the tasks most commonly associated with the beginning stages of motherhood including carrying, gestating, and giving birth to a child. In surrogacy contracts, a surrogate mother is essentially responsible for delivering a child for the intended parents, through an understandably very complicated process. The first basic distinction drawn in surrogacy agreements is that between traditional surrogacy, sometimes referred to as full surrogacy, and gestational surrogacy, which is also often known as partial surrogacy.
Clark, Davis, Hayes, Murphy, and Theall (2009) offer one of the most clear and simple definitions of the differences between full surrogacy and gestational surrogacy. Explaining traditional surrogacy, the authors write, “A traditional surrogate is inseminated with the sperm of the intended father or with donor sperm, and the resulting child is genetically related to the surrogate” (Clark, Davis, Hayes, Murphy, and Theall 2009, 38). In traditional surrogacy, the woman is responsible for both contributing the genetic material necessary to produce offspring and also providing the gestation and labor required to birth the intended child. To look at it a different way, the surrogate mother in traditional surrogacy is both the egg donor and the birth mother of the intended child. The surrogate mother undergoes the artificial insemination (AI) procedure in order to become pregnant with a child comprised of her egg and a donor sperm cell, typically contributed by the intended father. In nearly all cases in which a dispute over the custody of the child might arise, the surrogate mother would be considered the legal mother of the intended child, because the contribution of both a gamete and the gestation and labor process overrides the interest of upholding any contract the surrogate may have signed relinquishing her parental rights to the intended parents.

On the other hand, Clark et al. note that, “Gestational surrogates are women who carry a pregnancy with eggs donated from the intended mother or an egg donor and sperm donated from the intended father or a sperm donor” (Clark et al. 2009, 42). Gestational surrogacy is different from traditional surrogacy for one very important reason—the surrogate mother is not genetically related to the intended child in any way. The surrogate mother becomes pregnant with a child conceived through in vitro fertilization. The zygote is formed, usually by inseminating a healthy egg cell from the intended mother with a sperm cell from the intended father, although this is not always the case. Sperm donors or egg donors may be used in cases of gestational surrogacy, although in most cases the zygote is formed from the gametes of the intended parents. The surrogate mother, then, is
responsible for carrying the child to term and giving birth to the child but not responsible for any genetic donation to the intended child. Under these circumstances, the woman serving as the surrogate may also be referred to as a gestational carrier. The term gestational carrier implies that the woman has no genetic relationship to the child and is in fact carrying a fetus that was implanted as a fully fertilized zygote.

The fact that surrogacy exists in two different forms makes it very difficult to have blanket discussions about surrogacy as a practice. Because the circumstances underlying traditional surrogacy and gestational surrogacy are very different from one another, as are the surrogate mother’s contributions to each of the processes, there are different moral, legal, and ethical considerations for each. A traditional surrogate is the natural birth mother of the child; through the artificial insemination procedure, the woman’s egg was fertilized with donor sperm. The surrogate is the natural, biological mother of the child. A gestational surrogate, however, carries a child that is not genetically related to her. For this reason, determining parental rights in situations where gestational surrogacy is involved is complicated on many levels, largely because the woman is not the biological mother to the child she is carrying. Emily Jackson (2001) expands on this, explaining that a child born via gestational surrogacy “…could potentially have six adults with an apparent claim to parenthood: their genetic mother and father; the couple who intend to bring them up, and the surrogate mother and her husband or partner” (Jackson 2001, 266). Jackson paints a picture in which a gestational surrogate is impregnated with a zygote conceived through the use of in vitro fertilization with both an anonymous egg donor and an anonymous sperm donor. While this is not typical for most gestational surrogacy arrangements primarily because the parents commissioning the arrangement do so because of their desire for a child genetically related to one or both of them—it is still possible that situations like this might arise.
For the majority of surrogacy arrangements though, at least three people will be either physically or legally involved: the surrogate mother and the commissioning couple. But, like the complex scenario Jackson described in which many adults hold a potential claim to parental rights, complications can also arise where only two or three people are committed to a surrogacy contract. For instance, surrogacy contracts are becoming more frequently employed by both unmarried individuals and homosexual couples that wish to have children. Complications arise on both biological and legal levels when both people wishing to become the parent of a child born through the use of a surrogate mother are of the same sex. For example, if a homosexual couple enters into a surrogacy contract and one of them donates the genetic material for the intended child and the other half of the genetic material is acquired through gamete donation, it becomes very difficult to determine which persons have legitimate claims to parental rights because often the legal status of homosexual couples is not recognized as legitimate, either by the state or federal government. Surrogacy arising under situations like this can present a myriad of other moral and legal issues—issues that also need to be dealt with promptly.

**Where did Surrogacy Originate?**

Despite common misconception, surrogacy is not a new or recent development. Debora Spar (2005) explains, “As a substitute means for producing children, surrogacy is an ancient practice. Women across the globe have long used others to bear the children they could not conceive, relying on a combination of tradition, coercion, and affection to create the desired result” (Spar 2005, 290). Jackson (2001) makes the argument that surrogacy has existed for hundreds, if not thousands of years, as evidenced by obvious Biblical references to the practice of surrogacy (Jackson 2001, 261). In her work, Jackson recounts a story from the book of Genesis in which Abraham’s wife Sara conscripts her maid, Hagar, to have a child with her husband. Jackson points to this as positive proof that surrogacy does in fact have ancient roots (Jackson 2001, 260-261). Jackson also references
the story of Rachel, and Rachel’s use of Bilbah to produce an heir for her husband Issac, as evidence both that surrogacy existed and was practiced thousands of years before the advent of assisted reproductive technologies (Jackson 2001, 262). Jackson does note, however, that the fact that these Biblical stories clearly involve the use of enslaved women in the childbearing process does somewhat complicate the argument that surrogacy is a well-established practice and clearly limits the parallels that can be drawn from these Biblical references to surrogacy (Jackson 2001, 262).

Spar notes that surrogacy has been practiced in various other ways throughout history. For example, “Sometimes infertile women simply adopted at birth the ‘surplus’ children of a neighbor or friend.” (Spar 2005, 290). During the period of American colonization, families blessed with many children often lent out their younger children, offering them up as a source of labor to families without children, or with very few children, in an effort to help provide for everyone in the community (Spar 2005, 290). Sharyn Roach Anleu (1992) offers evidence that surrogacy has also been practiced throughout Africa. She writes, “Anthropological studies also document societies in which social and biological parents are not the same people. For example, among the Kgatla people of Southern Africa, when a related couple have no children, a couple may decide that their next child will be “born for” the infertile couple” (Anleu 1992, 30).

The arrangements Spar, Jackson, and Anleu describe were not referred to as surrogacy arrangements during the periods of time in which they occurred. They were not seen as a deviation from normal familial practices. Typically, no arrangements were made prior to the birth of the child and no monetary exchange took place. The so-called “surrogate” arrangements generally occurred out of necessity and for crude survival purposes rather than a serious emotional or psychological need for biologically related children, as is often the case in modern surrogacy arrangements, though, it is possible that the women and men involved in the ancient practices of surrogacy were also emotionally or psychologically drawn to the idea of having children.
Whether these practices were labeled as surrogate mother arrangements then or whether they conform to the modern characterization of surrogacy is largely unimportant—they indicate the fact that the basic structure and practice of modern day surrogacy has existed in some form for thousands of years. The core tenet of surrogacy, the idea that one woman carries, gestates, and gives birth to a child intended for another woman (or man as modernity allows) is present in these arrangements and indicates that the practice is not a recent creation.

**How is Surrogacy Related to Other Assisted Reproductive Technologies?**

As discussed, surrogacy in the most basic sense is not a new development. Surrogacy is also really not very different from the many other assisted reproductive technologies (ARTs) that exist, are in frequent use, and are not in danger of being prohibited by state or federal legislatures. The criticism that surrogacy has received is unfair and unwarranted, especially when contrasted with the treatment of other assisted reproductive technologies. Surrogacy combines different reproductive technology procedures that are largely widely accepted by the public with, at minimum, a contribution of gestation and labor from a woman who is not the intended mother of the child. As will be elaborated, the fear of surrogacy and desire to restrict its practice in some forms, or prohibit it entirely, appears to result more from a perceived threat to the traditional family structure and ideas held regarding women and femininity than any real moral issue over the reproductive technologies used. This becomes evident when comparing how the legislature and the courts handle surrogacy and how they handle other assisted reproductive technologies.

Surrogacy really involves either the medical procedure known as in vitro fertilization (IVF) or the procedure known as artificial insemination (AI). In cases of gestational surrogacy, the intended egg and intended sperm are fertilized outside the body of the surrogate mother and later implanted into her uterus through the in vitro fertilization (IVF) procedure. Traditional surrogacy involves a much simpler medical procedure known as artificial insemination (AI) in which donor
sperm are used to fertilize the egg of the surrogate mother (Clark et al. 2009, 15-44). Neither of these procedures is viewed as particularly controversial, or risky, by either the medical profession or the public when used by heterosexual couples trying to conceive a child. However, when infertility problems are such that a woman is entirely unable to carry a child or neither partner can birth a child because they are both male, and the gestation of a third party becomes medically necessary for the creation of the intended child, the procedures become a cause for concern with the scholarly community, the media, and the public.

One of the more noteworthy arguments for prohibiting or severely restricting surrogacy, however, is the idea that humans should not exchange money for genetic material or children. But, as Martha Ertman notes, “Academic hand wringing about whether selling parenthood would be a good thing implies that we do not already buy and sell it. But the practice is alive and well in various guises, direct and indirect. People routinely exchange funds to obtain parental rights and obligations through adoption and reproductive technologies” (Ertman 2008, 301). Spar (2005) discusses at length the very open and active market in which gametes, both eggs and sperm, and assisted reproductive technologies are regularly sold. Spar notes that hundreds of clinics in the United States offer in vitro fertilization and artificial insemination procedures, for a fee. Eggs and sperm are also up for sale—fetching prices anywhere from $2,500 to $50,000 depending on the personal characteristics of the donor (Spar 2005, 293-297). Surrogacy, arguably just combination of gestation and artificial insemination or gestation and in-vitro fertilization, however, faces more serious and harsh criticism than any of these other practices.

Ertman believes that surrogacy has the same basic underpinnings as other ARTs and that there is a serious disconnect in the discourse surrounding surrogacy and the actual regulation regarding the procedures used (Ertman 2008, 299-302). Ertman argues that despite serious concerns about exploitation and eugenics in gamete markets, both egg and sperm, that a relatively free and
unregulated market for these cells exists (Ertman 2008, 300). Ertman explains that, “People routinely exchange funds to obtain parental rights through…reproductive technologies…In the case of reproductive technologies, especially in vitro fertilization and alternative insemination, this market is a relatively free market, operating as it does largely unhampered by legal regulation” (Ertman 2008, 300). So far, legislatures have not felt that ARTs like artificial insemination, in vitro fertilization, egg donation, or sperm donation pose serious threats to society and should be prohibited or restricted. This serves as proof that many objections to surrogate motherhood, as well as the threat of prohibition or serious restriction on the practice, are better characterized as a response to the gestation of the child and relinquishment of parental rights undertaken by the surrogate mother than as a response to the assisted reproductive technologies used.

Noa Ben-Asher (2009) sheds light on one of the reasons that the surrogacy procedure and process is viewed as entirely unique from other assisted reproductive technologies. Ben-Asher’s central argument is that because surrogacy has not been portrayed as a cure for female infertility in the same way that the medical community has accepted artificial insemination or in-vitro fertilization as cures for male fertility, it has come under severe scrutiny from the masses (Ben-Asher 2009 1886-1888). This distinction between possible cures for male and female infertility is a result of what Ben-Asher describes as:

a sex based-differentiation in the regulation of reproductive technologies: while the legal recognition of sperm donation has involved a full detachment of the paternal body from the process of reproduction through replacement of paternal sperm with donor sperm, the parallel full detachment of the maternal body from the process of reproduction through the use of a full surrogate has not been legally recognized (Ben-Asher 2009, 1888).

Because of the different biologic contributions to pregnancy, namely the fact that the female is responsible for providing both the gestation and birth of the child, the medical community has essentially refused to equate both forms of surrogacy with sperm donation or artificial insemination by donor (AID) (Ben-Asher 2009, 1889). There is no question of legality or parental rights for a
child conceived through the use of AID despite the fact that the intended father did not provide one half of the genetic material needed to create the intended child. The husband of the mother, the theoretical intended father, will be legally recognized as the father of the child in question largely because the commonly held perception in the medical world is that artificial insemination or artificial insemination by donor are valid cures for male infertility. The same is not true for children born through full surrogacy in which the surrogate mother serves as both the egg donor and the gestational carrier of the intended child.

The medical field has refused to legitimize full surrogacy as a cure for female infertility in the same way that it did for in vitro fertilization, artificial insemination, or for gestational surrogacy. It is not widely accepted throughout the medical community that full surrogacy serves as an alternative means to having children for infertile women and homosexual persons (Ben-Asher 2009, 1890-1891). Public policy and legislation have followed the lead of the medical community, and surrogacy, especially full surrogacy, has been placed in front of a proverbial firing squad. The failure to treat both types of surrogacy, both traditional and gestational, as a cure for female infertility or childlessness has unfairly placed the practice in danger of prohibition and even criminalization in some states.

The problem with surrogacy is not about the assisted reproductive technologies being used, it is about the process of gestation and relinquishment of parental rights undertaken by the surrogate mother. This, however, is something that occurs routinely within the context of adoption. In this way, surrogacy not only has close ties to other assisted reproductive technologies but also to adoption. Surrogacy’s close relationship to both ARTs and adoption makes the necessary protective and regulatory legislation understandably complicated. Surrogacy, while similar to both other assisted reproductive technologies and the adoption process, is not synonymous enough for the same laws and/or regulations to apply. Both artificial insemination and in vitro fertilization are regulated largely
by medical professionals because of the health risks that are associated with the procedures for all parties involved; legislation regulating or restricting these procedures is still largely absent in the United States. Adoption is a much more long standing practice and is subject to a great deal of regulation, both at the state and federal levels. Many hopeful parents actually shy away from adoption, however, because of the incredibly large bureaucracy and hassle that is associated with the process.

Surrogacy, then, stands alone. While surrogacy obviously employs the use of some assisted reproductive technologies, like AI and IVF, it also involves a serious legal transaction in which the surrogate mother must relinquish her parental rights, similar to adoption. However, surrogacy is neither synonymous with assisted reproductive technologies nor the adoption process, although it shares obvious elements with both. Surrogacy exists almost as a hybrid, combining both the base elements of many assisted reproductive technologies and of adoption. Accordingly, however, neither of the existing bodies of law are sufficient to protect or regulate surrogacy contracts despite the commonalities they both share with surrogate motherhood arrangements. As demonstrated throughout, only federal legislation is sufficient to both protect and provide needed regulation of surrogate motherhood arrangements.

**Why is Surrogacy Needed?**

Surrogacy is undoubtedly complicated. The whole process can be very emotionally taxing, expensive, and take years to come to fruition. As it is, however, the very real inability to have children naturally is what drives most couples to enter into surrogacy arrangements. For most couples, surrogacy is the last resort. Many have tried artificial insemination, in vitro fertilization, both, or a whole host of other assisted reproductive technologies before even considering surrogacy. Surrogacy is a last resort for most infertile couples because of the very real, negative aspects of surrogacy. The process is very expensive, costing the intended parents anywhere from $10,000 to
$100,000 dollars, depending on the terms of the contract signed with the surrogate mother and the number of times the medical procedures must be performed (Ragoné 30-36). Also, as will be discussed, the legality of surrogacy is unclear, making all parties to surrogacy contracts wary because their rights and responsibilities under the contract are ill-defined.

Hopeful parents face many serious obstacles in their quest for parenthood long before the intended child is born. Still, many women and men desire to have children in face of all the difficulties—legal, ethical, and otherwise—that surrogacy and many other assisted reproductive technologies present. While there is certainly no constitutional right to have children in the United States, more recent Supreme Court cases have established a right to privacy in both contraceptive and reproductive aspects of human life, and the desire to have children is very real for many women and men. It should come as no surprise that women and men would pursue any outlets that helps further their desire to become parents. As Helena Ragoné notes, “As little as fifteen years ago, a couple in which the wife was infertile was presented with only two choices, to adopt a child or to accept their childlessness. Surrogate motherhood has created a third option for those financially able to avail themselves of this choice, the option to have a genetically related child from the moment of his or her birth” (Ragoné 1994, 13). Surrogacy has presented infertile couples a new and generally very medically successful way of having children of their own, sometimes genetically related and sometimes not, and it is unlikely that the practice of surrogate arrangements will abate any time in the near future, especially given the increasing difficulty that many women and men have faced when trying to have children.

For one, infertility has become a very serious problem in the United States. R.J. Edelmann (2004) explains, “The indications are that infertility in the Western world has increased among younger people. There are a variety of reasons for this including problems posed by sexually transmitted diseases, exposure to occupational hazards and environmental toxins and postponing
child-bearing hence increasing vulnerability to age-related biologic risk of infertility” (Edelmann 2004, 123). While there is evidence to suggest that infertility appears to be increasing, there is little to indicate a serious decline in the desire to have children or experience parenthood. Building on Edelmann’s comments, Peter Schuck notes that, “In the United States… one out of every six couples of childbearing age is infertile, and a very large percentage of those infertile couples desperately wants to have children” (Schuck 1990, 132). Many men and women want to have children and are willing to endure the agony and frustration associated with assisted reproductive technologies, like surrogacy, because it will allow them the opportunity to have children that either biology or natural causes originally denied them.

Some critics argue that just because couples chose to delay having children until the later and less fertile years of their life does not mean that surrogacy should be allowed. But, Lynda Beck Fenwick (1998) points out that there are many other reasons why a couple may not be able to bear a child. Fenwick elaborates, “Age is not the only explanation for the number of infertile couples, however. Other possible causes are such common reproductive toxins as alcohol, cigarettes, or the environment, or in other instances, tubal blockage from sexually transmitted diseases or contraceptives” (Fenwick 1998, 183). Beyond this, many women may be unable to carry a child because of a debilitating disease like multiple sclerosis, cancer, or physical abnormalities present from birth like a deformed or missing uterus or malfunctioning fallopian tubes. Some women are also unable to have a child because of an inability to contribute viable gametes.

Surrogacy, then, could be considered some form of cure to female infertility. While obviously surrogacy does not actually cure the cause of a woman’s inability to give birth to a child, it does provide a cure for the consequence of infertility—childlessness. Gestational surrogacy provides the opportunity for parents, both male and female, to be the genetic parents of their child if they so desire, and traditional surrogacy still allows one parent, the male, a chance to be genetically related to
the child. Some critics of surrogacy suggest that adoption, too, provides a cure for childlessness and is equal in many, if not all, regards to surrogacy because it gives men and women who want to become parents the ability to realize that desire. However, both gestational surrogacy and full surrogacy provide infertile women and infertile couples an option that is in most ways more desirable to them than adoption, the opportunity to have genetic children, and this is an option which they should have the right to fully exercise if they wish to do so. While adoption is a very worthwhile and rewarding endeavor, it does not replace the desire to have genetic children for most couples.

But surrogacy is more than just a solution for female infertility. Surrogacy is a possible solution for women, men, or couples who want to have children but are unable to do so because of infertility or other barriers to reproduction. As lawyer Darra Hoffman notes,

Traditionally families have been defined to a large extent by biology. Genetic connection has been the major foundation of most families, and roles within families were as much a product of age and sex as of individual characteristics and aptitudes. The only options for a person to become a ‘mother’ or a ‘father’ were through sexual intercourse or adoption, and until quite recently in the Western world, social and often legal strictures limited both of those choices to married heterosexuals. [But with] the advent of the various ART techniques, [there has been a] seemingly sudden ability of non-traditional individuals and couples to become parents outside the purview of legal regulation… (Hoffman 450-451)

Hoffman clearly notes that not only does surrogacy allow infertile heterosexual couples to have children by nontraditional means, but it also allows homosexual couples who are restricted from having children for biologic reasons to obtain children by means other than adoption, opening the door to the possibility that the child may be genetically related to one of them. By separating the biological component of becoming a parent from the social component of becoming a parent, at least to some degree, surrogacy allows for men, women, and couples who would have been unable to conceive naturally a second chance.
How is Surrogacy Practiced Today?

Just as aspiring parents might pay a woman for the relinquishment of her parental rights during a pre-birth adoption arrangement, the majority of surrogacy arrangements are formed through the use of a contract or commercial arrangement that involves the exchange of a substantial amount of money. Because many women would not be inclined to become surrogate mothers without some form of monetary enticement, surrogacy has become a semi-commercial industry of sorts. This section attempts to explain how surrogacy is currently practiced in the United States without passing judgment about the terms of surrogate motherhood agreements.

Discussed earlier, it appears that surrogacy is becoming a more commercial than private operation in most cases. According to Elly Teman, more than 25,000 women have given birth to children through commercial or semi-commercial surrogacy agreements since surrogacy became a viable medical option in the late 1970s and early 1980s (Teman 2008, 104). Writing about commercial surrogacy, Stephen Wilkinson (2003) explains, “By ‘commercial surrogacy,’ I mean: surrogacy arrangements in which a woman is paid a fee (not merely compensation) for carrying and giving birth to a fetus/child and for subsequently giving up that child (and all associated parental rights) to the ‘commissioning parents’” (Wilkinson 2003, 169-170). While not all surrogacy arrangements are commercial or even compensated, it appears that the majority of surrogacy arrangements are commercial. The fact that more than one hundred assisted reproductive technology centers in the United States offered surrogacy services in 2004 further suggests that commercial surrogacy comprises the majority of surrogate motherhood arrangements (Clark et al. 2009, 43).

A surrogate mother obviously endures serious demands on her body and her time in order to provide gestation for a child. The complicated process involving a contractual pregnancy, including payments, assumption of medical risk, lost wages, miscarriage, and the enforcement or lack
thereof of the surrogate agreement can be overwhelming for both the intended parents and the potential surrogate mother. For these reasons, most hopeful parents seek the consultation of a commercial surrogacy agency or a lawyer in drafting a contract or agreement between the parties stipulating all of the details of the surrogate arrangement. Without expounding greatly upon the benefits and potential negative aspects of commercial surrogate arrangements, I will simply note that the majority of surrogate arrangements in the United States do involve a third-party of some sort, whether it be outside legal counsel or legal counsel provided through a commercial surrogacy center. There is even a growing field of literature for hopeful parents and potential surrogate mothers that seeks to explain the practice, the medical procedures involved, the concerns of both parties and more (Clark et al. 2009; Ragoné 1994). Surrogacy, in fact, is becoming such a commercial industry that books like this offer a summary of financial costs, mock contracts, prospective surrogate mother questionnaires, and more. As surrogacy becomes a more widespread practice, these guides help hopeful parents and surrogate mothers navigate the murky legal waters of surrogate motherhood arrangements.

Women and men wishing to have a child can start the process just about anywhere; in some states potential surrogate mothers may place advertisements online or in the newspaper classified section. Some intended parents may also take the same route, placing notices of their need for a surrogate mother in public venues. Commercial surrogacy agencies attempt to streamline this process by making it easier for hopeful parents to link up with potential surrogate mothers (Clark et al. 2009, 38-45). Commercial surrogacy centers provide for surrogate mother screenings, psychological counseling, and legal advice for both parties that is generally not included or provided for in private surrogacy arrangements. Commercial surrogacy centers provide all of this, but obviously at a price. Many commercial surrogacy centers require hefty fees for the services they provide, totaling well over $10,000 in some cases (Clark et al. 38-45). Even after this painstaking
process—the legality of surrogacy arrangements is still largely unclear in most states. Children conceived through the use of both gestational and full surrogacy are subject to serious custody battles as there is no uniform federal legislation regarding the enforcement of surrogacy contracts.

Not all children born through the use of a surrogate mother are the product of commercial surrogacy, however. As Teman discusses though, it is often difficult to tell how many children have been born through non-commercial, altruistic surrogacy arrangements, because little legal consultation is sought in those instances and thus little documentation of the arrangement exists (Teman 2008, 1104). However, instances of altruistic surrogacy, in which one woman offers to be the gestational carrier (and potentially even the egg donor and thus genetic mother) of a child intended for another woman without any compensation beyond her own medical expenses occur frequently enough to warrant serious consideration. Lynda Beck Fenwick (1998) recounts very emotional, personal narratives from women who were able to have a child because their sister or their mother volunteered to carry the genetic child of her and her husband. In these instances, the hopeful mother’s serious infertility problems coupled with her strong desire to have a child lead relatives or close friends to offer her their own gestational services out of love and compassion (Fenwick 1998, 209-214). State legislatures generally exempt altruistic surrogacy arrangements from prohibitions or criminalization because they are viewed as being categorically different from commercial surrogacy arrangements.

Altruistic surrogacy arrangements, however, do not differ from contractual surrogacy arrangements in most regards. There is still a serious risk of exploitation, especially considering the woman will receive no compensation for any of the difficulties she may have experienced during the period of time in which she was pregnant with the intended mother’s child, as will be discussed in greater detail later. Also, by only allowing situations of altruistic surrogacy to exist, state legislatures are seriously curtailing many couples’ ability to employ the use of a surrogate mother. The majority
of couples do not have the luxury of having a woman in their life willing volunteer to carry their genetic child, birth him or her, and relinquish all parental rights to the child after its birth. Because of this, permitting altruistic surrogacy alone is not sufficient for the majority of men and women seeking the use of a surrogate. Confining the rights of intended parents to the use of only those surrogate mothers who provide the very philanthropic deed of offering their childbearing services without any expectation of payment or parental rights would seriously curb the use of surrogate motherhood in the United States because women rarely volunteer to give such a huge gift.

**What Does Social Function does Surrogacy have?**

Surrogacy, by its very nature, is a less satisfactory option than natural childbirth for most intended parents. Surrogacy does not provide couples or individuals interested in becoming parents with the complete experience of parenthood. Intended parents have to miss out on the experience of pregnancy, with all of its joys and all of its pains. Surrogacy is undoubtedly considered a second-rate option for becoming a parent for the majority of adults pursuing surrogate motherhood agreements. Still, surrogacy still provides a social service that is unmatched by any other assisted reproductive technology or adoption. Surrogacy gives infertile women or couples prevented from reproducing because of biological reasons the chance to become parents. Before surrogacy, physical and natural barriers would have prevented these people from having genetic children. For many couples, surrogacy is the cure to their childlessness. Without surrogacy, many men and women would have no other way to obtain genetic children. Surrogacy—whether gestational or traditional, provides a much wanted child to hopeful parents. There are many reasons to not only allow surrogacy, both commercial and altruistic, to exist in the United States, but to protect the practice.

**Criticisms of Surrogate Motherhood**

There, are many scholars, however, who do not agree that surrogacy should be protected. Some argue that because of moral and ethical considerations, the practice should not even be
permitted to exist. Serious criticisms of surrogacy will be discussed at length in this section, and a critique of these criticisms follows in the next section. Many of these objections to surrogate motherhood have strains that run throughout one or even all of the other criticisms; effort was made to classify the serious critiques of surrogacy as neatly as possible so that arguments could be given due credit and each could be discussed in adequate detail. Another disclaimer, stated beautifully by feminist scholar Cécile Fabre, is that the scholars who object to surrogacy “do not always clearly specify whether they aim to show merely that surrogacy contracts are morally impermissible and should be regarded as legally null and void, or whether they aim to show, more strongly, that they ought to be made unlawful” (Fabre 2006, 195). Many of these scholars raise serious concerns about the practice of surrogate motherhood—both through the use of commercial contracts and through altruistic means—but many believe that in spite of these concerns, it would not be necessary or appropriate to prohibit surrogacy agreements in the United States.

Commodification of Children

**Baby Selling.** One of the most convincing and disturbing criticisms of surrogacy is the observation that the practice is synonymous with baby-selling. All commercial surrogacy contracts involve the exchange of money, from the intended parents to both the surrogacy agency and the surrogate mother. Surrogate mothers who enter into private legal contracts with men and women who hope to become parents are also generally compensated for their services. Proponents of surrogacy claim that the woman serving as the surrogate mother is being paid for her gestational services, not for the child. A woman can be legally compensated for the relinquishment of her parental rights and services as a gestational carrier and/or egg donor in most states. It is a violation of the Thirteenth Amendment to the United States Constitution and of statutes in nearly every state, however, to sell a child. Thus, proponents of surrogacy generally fall into the camp that believes that
the woman serving as the surrogate mother is selling her gestational and/or reproductive services, and not the child, lest the practice would be considered wholly illegal.

Many scholarly critics of surrogacy, however, do not believe that the woman is being paid between $10,000 and $100,000 for her gestational services, but rather, for her child and for the voluntary termination of parental rights. Herbert Krimmel (1992) explains this belief, stating, “What is fundamentally unethical about surrogate mother arrangements is that they, of necessity, treat the creation of a person as the means to the gratification of the interests of others, rather than respect the child as an end in himself. They treat a person (the child) as though he were a thing, a commodity” (Krimmel 1992, 58). Krimmel clearly believes that surrogacy arrangements—whether compensated or uncompensated—commodify children because they treat the child as an object which can be traded, bartered, or purchased through the use of a contract (Krimmel 1992, 57-65).

Krimmel condemns the practice of surrogacy contracts and argues that the very nature of contracting for something to be passed from one party to another indicates that one party values the object more highly than the other and is willing to demonstrate that fact through the terms of the contract. Krimmel argues that this is evident in the manner in which intended parents compensate the surrogate mother for the child (Krimmel 1992, 60). Martha Field concurs with most of Krimmel’s assertions, writing that, “Society has an interest in keeping certain subjects outside of the market economy—and the transfer of children is one of them. Laws prohibiting baby-selling apply even though a particular child may be better off in the home that purchased him… this objection is called an objection to commodifying children—to treating them as objects to barter and exchange” (Field 1993, 225). Field argues in her work that surrogacy can be equated with baby selling in nearly all regards and that it is both morally repugnant and should be illegal (Field 1993, 224-230).

Eugenic Concerns. Another related concern about the commodification of children is that surrogacy allows the creation of a eugenics market, allowing parents to hand select the characteristics
that they would like their children to have (Ertman 2008, 302). The basic premise of the argument is that men and women who want to have children would have access to surrogacy and would use it as a way to select the most desirable characteristics for their child. Men and women employing the use of a surrogate mother would have the ability to control for certain physical characteristics, levels of intelligence, athletic or musical abilities, and etcetera.

**Harm to Children**

In discussing surrogacy contracts, the majority of scholars, especially feminists, seem to focus on the harm that surrogacy has on women. Some, however, note that there is also the potential for serious harm to children. Davies (1985) argues that children born through the use of surrogacy arrangements might suffer serious psychological issues later in life (62). Davies asserts that there is the potential for serious personal identity issues with both forms of surrogacy and a confused sense of family lineage in cases of traditional surrogacy (1985, 62). It is also possible the child may feel worthless or degraded, especially in cases of traditional surrogacy, because he or she knows that they were purchased by their parents (Davies 1985, 62).

**Commodification of Women**

Critics of surrogacy generally charge that surrogacy contracts commodify women and children; the choice was made to separate the issues in order to discuss them more fully and to later justify and defend surrogacy in light of both claims. Having previously discussed the commodification of and harm to children that may arise from surrogacy arrangements, the discussion turns to the commodification of women.

*Compensated Surrogacy Agreements.* Some scholars believe that surrogacy contracts constitute baby selling; others believe that surrogate mothers are selling their reproductive and/or gestational services. Some probably believe it is both. To say, however, that a woman is being paid for her gestational services indicates that a market price can be put on a female's reproductive
services. This is problematic for many scholars because of the belief that women’s reproductive services should not be for sale and that to do so would be either immoral, illegal, or both. As has already been noted many times, there is an open and largely unregulated market where gametes, both sperm and egg, are for sale. Surrogacy, though, further develops that market by putting a price on female fertility—and the creation of a market in which female reproduction is put up for sale is something that many scholars, especially feminists, have serious concerns about.

The discussion among scholars on this topic is very heated. Scott Rae (1994) harshly criticizes the idea that women should be allowed to sell their gestational services, saying, “there is a substantial difference between selling one’s labor in most other areas and selling one’s reproductive capacities” (54). He continues, “Though the right to contract gives on the right to sell one’s services, there are certain services that cannot be for sale without violating human dignity,” and according to Rae, surrogacy contracts constitute a violation of human dignity under this principle (Rae 1994, 54-55). Rae contends that that it is immoral and unethical to allow for the sale of reproductive capabilities. Damielo and Sorenson (2008) concur, arguing that surrogacy can be likened to prostitution in many ways (270). The authors explain that, “Prostitution consists in the selling of women’s bodies for sexual satisfaction” and that “surrogacy contracts require a woman to perform nine months of gestational labor… the woman in effect sells her womb and relinquishes all control of her body” (Damielo and Sorenson 2008, 270). Following this argument, surrogacy, because it too involves the sale of sexual reproduction, should also be outlawed.

**Altrusitic Surrogacy.** Some feminists, like Mary Lyndon Shanley (2001), believe that by prohibiting compensated surrogacy agreements, but not uncompensated surrogacy agreements (often known as altruistic surrogacy agreements) the problem of commodifying women’s reproductive services could largely be solved (Shanley 2001, 110). Shanley believes that if women are not being paid for their services, or the relinquishment of their child, they will have greater freedom
in deciding whether to give the child up to the intended parents or not. Shanley further argues that without the enticement of monetary gains, only women who are really certain that they want to be and are ready to be a surrogate mother would volunteer for such a service (Shanley 2001, 109-111).

Exploitation of Women

Objectification. The choice was made to qualify some arguments against surrogacy under the blanket condemnation, exploitation, rather than commodification, because many of these concerns have nothing to do with the market value of a woman’s body or services, but rather the way in which society purportedly takes advantage of her sex through the use of surrogacy contracts. One of the most significant arguments presented against surrogacy is that it objectifies women and does so in many ways. Put simply, the charge that surrogacy objectifies women means that women in surrogate motherhood contracts are treated like objects rather than like human beings and are used as a means to an end, often by hopeful parents and commercial surrogacy agencies. Suze Berkhout (2008) comes down hard on surrogate motherhood arrangements, arguing that commercial surrogate arrangements always serve to objectify women and that, “Clearly, the surrogate is a tool for the social parents, allowing them to attain a child that is genetically related to at least one of them” (Berkhout 2008, 105). Berkhout argues that the surrogate mother serves as an instrument for the intended parents because she helps produce a product that they desire and that does not have a real value beyond that to the commissioning couple, or commercial surrogacy center if one is used (Berkhout 2008, 104-106).

Because of this, Berkhout argues that the surrogate mother’s feelings, emotions, concerns, and doubts about the pregnancy and the contract are not taken into account or given much thought by the intended parents or the surrogacy agency (Berkhout 2008, 104-106). The objectification and lack of concern for the surrogate mother allows for intended parents to ask outrageous things of the surrogate mother—like oversight of the type of food she consumes, the amount of sleep she
receives, and the number of times per week she exercises. Objectifying the surrogate mother allows the intended parents and the agency to become insensitive to the very demanding “job” that the woman has undertaken; pregnancy is a twenty-four hour a day commitment for nine months—not exactly something to take lightly (Berkhout 2008, 109). Berkhout claims that surrogacy contracts generally only consider and protect the interests of the agency and the intended parents, often leaving the surrogate mother very vulnerable. In addition, the surrogate mother’s health and finances are often of little concern to the parents or the agency, according to Berkhout (2008, 109). Furthermore, because the woman serving as the surrogate is seen as an object by the agency and the intended parents, she is viewed as interchangeable with other women in the same position and thus her position in the agreement is not highly valued, and is compensated accordingly (Berkhout 2008, 110).

**Concerns about Race and Poverty.** Another primary concerns for women expressed by critics of surrogacy is the overwhelming likelihood that poor or minority women will disproportionately serve as surrogate mothers. Shanley (2001) notes that poor women might be more enticed to serve as surrogate mothers because of the limited economic resources available to them (Shanley 2001, 120). Also, Shanley writes that, “In a society where employment opportunity is as stratified by race as it is in the United States, it is not irrational to think that black and Hispanic women would often agree to be gestational surrogates for a lower fee than would white women” (Shanley 2001, 121). Scholars like Shanley are concerned that poor or minority women will become breeders for white and middle class women (Shanley 2001, 120-122).

Dorothy Roberts (2008) is one scholar who shares the same concern. Roberts argues that because African American women generally earn less money than Caucasian women they will not only be more likely to serve as surrogate mothers, but in disputes over custody of the child, African American women and poor women would be less likely to challenge the intended parents because
they are probably less able to afford legal counsel and a lengthy trial (Roberts 2008, 311-312). While there are no solid figures to prove conclusively that minority women or working class women disproportionately serve as surrogate mothers, Shanley suggests that a look at the international surrogacy market indicates that this is likely the situation in the United States (Shanley 2001, 123). Shanley argues that the disproportionate use of women from less developed and developing countries shows that serious race stratification exists in surrogate motherhood practices, especially in cases of gestational surrogacy because the surrogate mother’s genetic material is not needed to conceive the child (Shanley 2001, 120-124).

Many members of the feminist community also fear that surrogacy is just another exercise of gender inequality. Because men generally make more money than women, women are forced into taking jobs or pursuing money-making activities that they would not choose if their economic status allowed them an option (Jackson 2001, 301). Because of a dire need for money and the monetary gains associated with becoming a surrogate mother, some scholars argue that women cannot actually be giving full and informed consent because the process is tainted by monetary exchange (Jackson 2001, 300-301). In other words, women, especially poor women and minorities, are essentially coerced into serving as surrogate mothers as a product of their economic circumstances.

**Limits to Woman’s Autonomy.** It has also been argued that surrogacy also limits woman’s autonomy. Because many scholars believe that women are coerced into surrogacy contracts because of their race or because they are poor, they believe that the woman’s right to choose is often very limited (Wilkinson 2003, 174). Berkhout fully agrees with Wilkinson’s (2003) assertions; she believes that not only are women often coerced into becoming surrogate mothers but much of their autonomy is compromised during the signing of a surrogacy contract (Berkhout 2008, 97-98). Berkhout claims that because women are seen as kind, compassionate, and always concerned for others’ well being that their wants and needs are often overlooked in the creation of as surrogate
motherhood contract. Further, because society expects women to be docile and generous, surrogate mothers often feel as if they cannot ask for more money for their services, or even demand fair payment, leading to what Berkhout believes is a group of seriously underpaid surrogate mothers (Berkhout 2008, 98-99). Wilkinson asserts that probably all surrogate mothers are under rewarded for their services because they are paid relatively little in comparison to the benefit received by the commissioning parent or parents, a child, and the pain and discomfort associated with pregnancy (Wilkinson 2003, 179).

Not only is the compensation that the surrogate received largely dictated by the commissioning parents or the commercial agency, but important decisions regarding the gestation of the child are also made by parties other than the surrogate mother. Berkhout writes that, “Typically, contracts such as those used by commercial surrogate agencies have denied the surrogate the ability to have input into the decisions surrounding pregnancy, as the contracts ensure that the decisions made related to the pregnancy be made by the commissioning couple” (Berkhout 2008, 101). Many surrogacy contracts contain provisions that allow a commissioning parent to force the surrogate into prenatal testing, weekly checkups, and fetal surgery in extreme circumstances. It has also been reported that some surrogacy contracts contain clauses that would force the surrogate mother to abort the baby if it was afflicted by either a physical or mental handicap (Narayan 199, 66-67). Further, commissioning parents can control whether women smoke, drink, engage in “risky activities” and like through the terms of the surrogacy contract; all of this, argue critics, seriously constrains a woman’s autonomy and control over her own person (Fabre 2006, 204).

**Effects on Adoption**

Discussed earlier in the paper, many critics of surrogacy argue that it is not necessary because adoption provides another alternative to childlessness in the United States. Martha Field charges that, “It would be a real societal harm for surrogacy to substitute for adoption. Surrogacy
allows creation of new, made-to-order children but only at the expense of children who need homes” (Field 1993, 226). Basically, the argument against surrogacy is that men and women should not be allowed to employ the services of a surrogate mother in order to have a child because there are plenty of children in the world already and they should be forced to adopt them first.

**Limited Access to Surrogacy Market**

Ertman (2008) notes that another criticism of surrogacy is that because of the expense that the practice is limited to the upper echelons of society (Ertman 2008, 303). Costing anywhere between $10,000 and $100,000—surrogate motherhood arrangements come with a hefty price tag, one that few, if any, working class and poor citizens could afford.

**Religious Concerns**

Not only do scholars raise serious concerns about the morality and legality of surrogacy, but many religious denominations have reservations about the use of many assisted reproductive technologies like egg donation, sperm donation, artificial insemination, in vitro fertilization, and of course, surrogacy (Steinbock 2004, 256). For example, the Roman Catholic Church condemns the use of all assisted reproductive technologies because the official position of the Church is that procreation should not occur in the absence of sexual intercourse. The Church also condemns sexual intercourse when it does not have clear reproductive purposes (Steinbock 2004, 256). Beyond the objections of the Roman Catholic Church, Steinbock notes that many other religions shun assisted reproductive technologies for many of the same reasons that scholars object to them; they, too, believe that surrogacy and other assisted reproductive technologies objectify women and men and are exploitive (Steinbock 2004, 256).
Defense of Surrogate Motherhood

Defending surrogacy does not necessarily involve undermining valid criticisms of the practice. In defending surrogacy, however, it is necessary to show that some critiques are greatly oversold or are not characteristic of the majority of surrogate motherhood arrangements.

Commodification of Children

Baby Selling. It is difficult to defend surrogacy against the charge that it constitutes baby selling. Surrogacy contracts, especially commercial surrogacy contracts, generally do involve a substantial payment from the intended parents to the surrogate mother and it is admittedly difficult to prove that the money is only for the surrogate's gestational services or the relinquishment of her parental rights. It is very possible that in some cases the payment is for something more than gestation. The problem here is that the majority of state legislatures do not agree that the practice can be equated with baby selling, as will be discussed to a great extent later in the paper. It is difficult to condemn surrogacy contracts on the grounds that they are synonymous with baby selling because in the last twenty-five years, the majority of state legislatures and trial courts have not found this to be the case. Discussed in great depth later, only two legislatures have actually legally equated surrogacy with baby selling and have consequently criminalized the practice.

Beyond state legislatures’ rejection of the idea that surrogacy is synonymous with baby selling, many scholars also reject the notion. Lori Andrews presents an interesting argument defending surrogacy against such charges:

The baby is not being transferred to a stranger who can then treat the child like a commodity, doing anything he or she wants with the child. The money is being paid to enable a man to procreate his biological child; this hardly seems to fit the characterization of a sale. Am I buying a child when I pay a physician to be my surrogate fallopian tubes through in vitro fertilization (when, without her aid, I would remain childless)? Am I buying a child when I pay a physician to perform a needed Caesarean section, without which my child would never be born alive? At most, in the surrogacy context, I am buying not a child but the preconception termination of the mother’s parental rights. (Andrews 1992, 207-208).
Andrews’ comments here are very astute and punch serious holes in critics’ arguments that the surrogate mother is selling her baby. First of all, it would be difficult to argue that a surrogate mother is selling her child in cases of gestational surrogacy. Because the child birthed via gestational surrogacy agreements is not the genetic child of the surrogate, the surrogate would not actually be selling her child, because she would not be considered the legal mother of the child in most states, as the contribution of genetic material is often given priority over the gestation. Thus the parties to this contract cannot be accused of baby selling, or baby buying, because the woman is selling a baby that is not legally hers and the commissioning couple would be purchasing a baby in which they already have a legal parental claim.

Noel Keane (1992), considered by some to be the founder of commercial surrogacy, contributes to the defense of surrogacy, adding that it is also fairly clear that the payment is for the gestation and relinquishment of the parental rights because of the timing of the payments. Most surrogate mothers are paid the bulk of the fee before the child is born (Keane 1992, 273). If the payment were to come in one lump sum after the child and parental rights are relinquished, the argument that the surrogate mother is selling her child might be stronger. This, however, is not the case for the majority of surrogacy arrangements. Keane’s other defense of surrogacy includes his faith in the commercial nature of the system. Keane argues that commercial markets are created to supply a demand for something—in this case, children. Some consider a market that operates on a supply and demand curve for children unethical. But, Keane asks, is it immoral that fertile couples have a demand for children? If not, then it should not be immoral or illegal for infertile couples to have those same desires. The surrogacy market then is just a way to fulfill those desires for childless women and men and is preferable to forms of black market adoptions or actual baby selling (Keane 1992, 271-273).
A last solid contention that surrogacy arrangements do not constitute baby selling is provided by Andrews’ (1992) in depth look at baby selling statutes. The purpose of baby selling statutes was to prevent the psychological harm to children that might be bought and sold by various families; the purpose was not to restrict surrogacy practices according to Andrews (1992, 210-215). Andrews notes that surrogacy is different from baby selling because the child involved in surrogacy has a stable home after birth and cannot be sold to another family during his or her childhood. The child is not in a state of insecurity, always concerned about being auctioned off to the neighbors (Andrews 1992, 213-214). Thus, based primarily on the purpose of state baby selling statutes, Andrews argues that they are largely inapplicable to surrogate motherhood arrangements.

In sum, it is both difficult to prove that surrogacy is a form of baby selling and difficult to prove that it is not. As Keane notes, the timing of the payments is crucial. The surrogate mother appears to be paid for her services throughout her pregnancy and not paid for the child at the close of her pregnancy. Also, the purpose of baby selling statutes does not seem to undermine the practice of surrogacy agreements, as Andrews noted. Because state legislatures have not yet agreed that surrogacy is synonymous with baby selling and because the argument can be seriously undermined by looking at the factual practice and existence of surrogacy, there is not a strong enough base with which to serious restrict or prohibit surrogacy. In closing, Cecile Fabre offers that, “… to impose a blanket prohibition on surrogacy contracts; for were we to do so, we would unfairly penalize surrogate mothers who do not view and treat the resulting children as a commodity” (Fabre 2006, 190-191).

**Eugenic Concerns.** Concerns about the creation of a eugenics market seem to be largely unfounded. The pool of potential surrogate mothers is limited and most intended parents plan to use their own genetic material in any case. In instances of traditional surrogacy, the surrogate is almost always implanted with the intended father’s sperm through artificial insemination. In cases of
gestational surrogacy, the surrogate usually has a zygote created from the gametes of both the intended mother and the intended father implanted to her uterus. Neither one of these common practices involves any purported hand selection of preferred genetic characteristics. In fact, one of the primary benefits of surrogacy is that unlike other assisted reproductive technologies, the intended parents can use their own genetic material to conceive the child. While eugenic concerns may be appropriate in the cases of egg donation or sperm donation, in which the recipients can screen potential donors, concerns about eugenics is largely inapplicable to surrogacy as it is currently practiced.

**Harm to Children**

Fabre (2006) notes that in discussing the potential harm that may be inflicted on children born through the use of surrogacy, many simply reiterate the argument that surrogacy commodifies children. Critics of surrogacy basically argue that the sale and purchase of a child may have serious psychological and emotional ramifications for the child later in life (Fabre 2006, 210-211). Most claims that surrogacy arrangements harm children are based on the belief that children will feel that they were bought and sold—and that feeling like an item that can be bought and sold will have long lasting psychological effects on the child (Jackson 2001, 294-295). Jackson explains, however, that, “There is little information about the long-term impact of surrogacy arrangements upon children, so any argument against surrogacy based upon the possibility of psychological harm to children is largely speculative” (Jackson 2001, 295). The only real proven psychological harm to children conceived through surrogacy agreements has revolved around situations of physical or emotional abuse, but this is not a situation unique in any way to surrogacy and thus poses no more of a problem in these arrangements than in everyday life (Robertson 1992, 49).

Jackson does mention that the early research being conducted shows that children born out of surrogacy arrangements demonstrate no measurable differences from children born naturally;
because the children are relinquished to the intended parents from birth, there is a good chance that there will be no visible physical, emotional, or psychological differences (Jackson 2001, 296). Children that are the products of surrogacy arrangements have developed and socially matured at the rates of all other children according to preliminary research in the area (Jackson 2001, 296-297). Jackson even suggests that children born through the use of surrogacy may have greater feelings of self-worth and more confidence than other children because they know their parents really wanted them and went to great lengths to have a child (Jackson 2001, 297). There could be concerns that because commissioning parents have greatly anticipated the birth of their child they might have unrealistic expectations for the child. However, this too is not a situation unique to surrogacy arrangements. Many parents push their children to be talented musicians, athletes, or academics because of the high expectations that they have for their children.

Further, in the purely physical sense, little harm is generally done to children through the procedures needed to make surrogate motherhood successful. John Robertson writes, “Unlike embryo transfer, gene therapy, and other manipulative techniques (some of which are collaborative), surrogate arrangements do not pose the risk of physical harm to the offspring” (Robertson 1992, 49).

**Commodification of Women**

**Compensated Surrogacy Agreements.** Supporters of surrogacy, like the noted Bonnie Steinbock, argue that, “To commodify something is to give it a market price. That in itself is not a bad thing… Every service in our economy is sold: academics sell their minds; athletes sell their bodies… why should a fecund woman be denied the ability to sell her eggs? Why is one more demeaning than the other?” (Steinbock 2004, 260). Steinbock asserts that if women are not able to sell their reproductive services, there must be some strong argument against it or a rationale for prohibiting the sale of their talents or services like other citizens are able to do (Steinbock 2004, 260-
While pregnancy is certainly a risky and dangerous undertaking, jobs like coal mining, crab fishing, and firefighting also pose serious risks to the men and women who choose those professions; no serious proposals are made to ban those careers because they are dangerous to the lives of those who pursue them. Why is surrogacy any different, Steinbock asks? (Steinbock 2004, 260-261).

Feminists are deeply divided on this issue, as well. Some side with Steinbock, arguing that it is liberating for women to be able to sell their services, both reproductive and otherwise, in an open marketplace, and some argue that it is not only demeaning for women to sell their ability to become pregnant and gestate a child, but that it is morally reprehensible. Noted for her work on surrogacy, feminist Carmel Shalev (1989) sides with Steinbock, arguing that allowing women to expand the opportunities that they have to make money makes them more independent and frees them from some societal strictures (Shalev 1989, 150-159). Shalev argues that surrogacy opens economic possibilities to women of all walks of life, as the sum of money offered to women willing to be surrogate mothers is often quite sizeable (Shalev 1989, 157). To Shalev, it is beneficial for women to be able to choose the activities or professions that they would like to pursue, surrogacy included (Shalev 1989, 160).

Lori Andrews discusses the opposing argument offered by some feminist contingents; Andrews writes that these feminists believe that women need to be protected from themselves and from the decisions that they might make (Andrews 1992, 209). Feminists who oppose the practice of compensated surrogacy believe that women will be enticed to volunteer as a surrogate, putting themselves in threat of both physical and emotional danger, because they want to receive the monetary reward associated with the process (Andrews 1992, 206-207). These feminists push for a ban on surrogacy so that women will no longer have the opportunity to exercise the choice to become a surrogate; feminists believe this is beneficial because it will protect the sanctity of the
female body and female reproductive services (Andrews 1992, 204-207). Andrews argues that, “…the rationales for such a ban are often the very rationales that feminists have fought against in the contexts of abortion, contraception, non-traditional families, and employment. The adoption of these rationales as the reason to regulate surrogacy could severely undercut the gains previously made in these areas” (Andrews 1992, 207).

The points made by Steinbock, Shalev, and Andrews are strong. Women should be trusted to make their own decisions about the use of their body and/or their reproductive capacities. As discussed, men and women are already permitted to sell their genetic material in a free and unregulated market. While notable differences exist between egg and sperm donation and surrogacy, the differences are not so drastic that surrogacy should be outlawed or criminalized.

**Altruistic Surrogacy Agreements.** Allowing only altruistic surrogacy arrangements to exist is problematic for two reasons. First, removing compensated surrogacy arrangements and commercial surrogacy contracts from the table will really limit the choices that childless men and women have. Few women are willing to volunteer to become surrogate mothers without some form of payment, although as Ragoné notes, money is not the sole or primary motivating factor for most women who volunteer to serve as surrogates (Ragoné 1994, 52-57). Expanding further on this point, pregnancy puts an enormous strain on a woman’s body, family, and time; she should have the right to seek monetary compensation for the trouble that pregnancy has caused for more than nine months of her life. Women should not be expected to perform a social function like this because of their own philanthropic tendencies; they should be fairly compensated for the service that they provide.

Secondly, there is no proof that women are commodified by the commissioning parents or legal counsel any less in an uncompensated agreement than in a compensated agreement. Uma Narayan (1999) looks at the ways in which commercial surrogacy and altruistic surrogacy are essentially the same; altruistic surrogacy should not be immune from any of the criticisms that are
offered for commercial surrogacy because in reality, it is not practiced much differently (Narayan 1999, 65-83). Anleu (1992) also discusses at this false distinction at length, arguing that altruistic surrogacy places the same demands on a woman’s body that compensated surrogacy agreements does. Simply refusing to allow payment to surrogate mothers does not improve the practice of surrogacy agreements in any way (Anleu 1992, 36-38). In fact, as Narayan argues, altruistic surrogacy might cause more problems than it solves (Narayan 1999, 76). Typically altruistic surrogate agreements are made between close friends or family members; few strangers offer to gestate and give birth to a child intended for another woman. The close bond between the intended parents and the surrogate often leads the parents to demand even more of the surrogate; imposing absurd restrictions on what she eats and how much she sleeps and demanding that she undergo invasive medical procedures to assess the health and development of the child (Narayan 1999, 75-76).

Removing the financial incentive for women to serve as surrogate mothers does little to improve the practice for women; it simply makes surrogacy appear more like an act of generosity than a commercial transaction to the public.

Thus, removing compensation from surrogate motherhood agreements does not solve all of the problems involved with surrogacy contracts. In fact, as Narayan (1999) points out, it creates an entirely new set of problems. Women who volunteer to serve as surrogate mothers should be compensated for their pain, distress, and trouble.

**Exploitation of Women**

**Objectification.** For most intended parents, the surrogacy process is very long, drawn out, costly, and exhausting. Finding a woman who is willing and able to carry a child for the couple is very difficult and when it finally happens—many parents are abundantly appreciative of the surrogate and the service that she provides. This is true both of gestational surrogacy, in which the surrogate may undergo multiple rounds of in-vitro fertilization and of traditional surrogacy, in which
the surrogate is expected to relinquish her own genetic child and her coupled parental rights to the intended parents at the close of the contract. In a section labeled, “Surrogates and Their Couples,” Helena Ragoné (1994) discusses the amazing bond that most surrogate mothers and intended couples have and how cooperative and understanding all parties to the contract typically are with one another (Ragoné 1994, 68-73). Ragoné writes that one surrogate mother described her experience as nothing but pleasant and told her that, “We talk on the phone every day. Every other weekend we go to my son’s ball game and swim at their pool. She [the adoptive mother] introduced me to sailing” (Ragoné 1994, 68). Ragoné has found through her research that most intended parents more than fulfill their portion of the contract and often compensate or reward the surrogate for her services far above and beyond what they originally agreed to. Ragoné’s research leads to a much different conclusion than Berkhout’s (2008); intended parents seem to be extremely grateful for the gift they have been given by the surrogate mother and are very concerned about her physical, emotional, and psychological well-being. Ragoné even writes that it is not unusual for the intended parents and the surrogate to maintain frequent contact even after the child is born (Ragoné 1994, 68-73).

Surrogacy contracts undoubtedly create a situation in which women have the potential to be victims of exploitation. Like other contracts, there is no guarantee that all parties to the contract will fulfill their duties to the other party, and will do so with respect and concern for the other person. This is a risk that parties to all contracts take upon their entrance into said contract. This, however, is not a valid reason to prohibit the formation of contracts, including those regarding surrogacy.

Concerns about Race and Poverty. It should be noted here that many feminists believe that motherhood in general is exploitive and that surrogate motherhood would, by necessity, also be exploitive, both to minority and non-minority women (Narayan 1999, 68). Narayan writes that, “While commercial surrogacy may well involve economic exploitation, many instances of ‘ordinary
motherhood’ also involve the economic exploitation of women. Many mothers do most of the work involved in child care and child rearing, as well as the bulk of associated domestic work, as unpaid labor” (Narayan 1999, 69). Seen in this light surrogacy does not seem to exploit minority women or women in poverty, but rather any woman who carries a child.

In defense of surrogacy, Steinbock (2004) explains, “Very large offers of money could be quite tempting to any woman, not just those in need of money” (Steinbock 2004, 262). Expanding on Steinbock’s point, it is unlikely that prohibiting or restricting surrogacy will help solve the income disparity problems between men and women or between minority citizens and Caucasians in the United States. It is unfair to restrict surrogacy practices in order to pursue the lofty goals of wealth redistribution in the United States. While it is unfortunate that so many women and minorities are unable to achieve their full economic potential, eliminating surrogate motherhood is unlikely to provide a remedy to this or other similar social ills.

Anita Allen (1990) also makes an astute comment on the likelihood that minority women will become a class of breeders. Allen points out that it is probably unlikely that minorities, especially African Americans, will become a “surrogate class” because they suffer from higher rates of infertility and have more complications during pregnancy than do Caucasian women (Allen 1990, 136). Putting economic gains aside, Allen notes that it in all practicality, African American women are probably less likely to be sought out as surrogates because they are generally less fecund than Caucasian women (Allen 1990, 135). Allen does little to quell concerns about the economic coercion that might exist for poor or minority women who serve as surrogates; she does, however, offer a solid counterargument for why this concern may never be fully realized.

Shanley (2001) notes that one possible way to curb the potential negative effects that surrogacy has on minority women or women in poverty would be to allow only women with a certain level of economic income to serve as surrogates (Shanley 2001, 107). While this would
eliminate some of the criticism that surrogacy agencies and intended parents exploit women in financial distress, it would raise serious criticism with some feminists who argue that women should have the right to choose their own means to earn money. Restricting who can and who cannot serve as a surrogate mother might eliminate some concerns about exploitation, but it seems to raise larger problems about restricting personal liberty and freedom of choice.

Limits Female Autonomy. While it is true that the commissioning parents do have the ability to exert some control over a woman under the terms set forth in most surrogacy contracts, a parallel argument can be made that a woman’s employer can control some of the activities she engages in or how she spends her free time. For example, a school teacher might face serious sanctions at work if he or she were to engage in some form of sexually explicit, albeit legal, activity. To some degree, all contracts constrain the actions of one or both of the parties. While forcing a woman to have an abortion if a child is mentally retarded or has a physical handicap seems beyond the bounds of contractual obligation or contract law in any form, requiring her to lead a healthy lifestyle and not endanger the child by smoking tobacco or drinking alcohol seems rather reasonable, given the serious consequences that such activities would have on the health of the child and the fact that she voluntarily entered into the agreement.

Effects on Adoption

It is difficult to defend surrogacy against the critique that it hampers the adoption process because while there is no solid evidence of this, common sense suggests that it is very possible that adoption has been affected by the advent of surrogacy. However, it is not the job of hopeful parents to adopt. It is not fair to tell infertile couples that they may not have a genetically related child because there are children in need of adoptive parents when the same standard is not applied to fertile couples. Infertile couples should be treated no differently from any other person and should be able to seek the services of a gestational surrogate in an effort to have a child genetically related
to both of them if they so choose. Adoption is a very worthwhile endeavor and is one that many men and women who are childless do seek out as a solution to their inability to conceive naturally. However, as Dr. Peter Schuck explains, “A morally relevant fact is that adoption today is considerably less available than it was in the past—even the recent past. Some reasons for this are the increase in abortions, the increased availability and use of contraception, and the reduced stigma of bearing children out of wedlock… In short, adoption is a diminishing solution to the problem of infertility” (Schuck 1990, 133).

Surrogacy, then, should not be prohibited or restricted in an effort to increase the number of couples who adopt children. Restricting surrogacy in an effort to promote adoption is problematic for two reasons. First, the practice essentially denies infertile couples equal protection of the law as guaranteed by the Fourteenth Amendment to the United States. Fertile couples are not forced or even encouraged to adopt children before having children of their own; equally, neither should infertile couples. Secondly, there is no proof that seriously restricting surrogacy would have any effect on adoption. Couples who wish to have children genetically related to both of them via in vitro fertilization and the use of a gestational surrogate, or genetically related to the male via artificial insemination and traditional surrogacy, might opt not to have children at all if the doors to surrogacy were closed to them.

Limited Access to Surrogacy Market

Exorbitant costs are a problem of all assisted reproductive technologies and adoption. Adoption costs range from $4,000 to $30,000, in-vitro fertilization costs can total up to $200,000, and artificial insemination, coming in with the smallest price tag still costs anywhere between $1,000 and $4,500 (Ertman 2008, 303). The basic defense suggested by Ertman (2008) is that the surrogacy market should not be closed because it cannot be accessed by all (Ertman 2008, 304). Ertman explains that in prohibiting surrogacy on this basis, “… a concrete good (extending parenthood to
people otherwise excluded from that life experience) would be snuffed out to serve an end that is so
grant (wealth redistribution) as to be aspirational rather than practical” (Ertman 2008, 304).
Ertman’s point is well taken; surrogacy, like many other services, may be reserved for the wealthier
portions of the population. However, prohibiting surrogacy is not likely to help cure the economic
and social ills that create societal distinctions based primarily on wealth and those infertile couples or
homosexual couples seeking the social service that is provided by surrogate motherhood should not
be the ones punished for the fact that economic stratification is real.

**Religious Concerns**

While scholars like Steinbock (2004) find it hard to comprehend why many religious groups
oppose the use of assisted reproductive technologies, they recognize that it is not the scholarly
community’s place to criticize the religious beliefs of others. Steinbock and many of her colleagues
believe that egg donation, sperm donation, and even surrogacy can be seen as equal to the donation
of blood or a kidney in many regards. Religion, understandably, draw a distinction between the
donation of blood, which is often necessary to save a life, and the donation of sperm or eggs, cells
technologies are not shunned because they involve a bodily donation from one person to another
but are shunned because by their nature they involve the use and exchange of sexual organs and
reproductive cells, something seen by many religions as worthy of great protection (Steinbock 2004,
257). Steinbock explains, “It might be thought that I am missing the obvious point. Selling one’s hair
is not wrong because one’s hair is unrelated to sex and reproduction. Selling one’s eggs is akin to
selling one’s body” (Steinbock 261). And for that reason, it is understandable that many religions
would object to surrogacy and other assisted reproductive technologies and it is not necessary to
demean or try defeat their opposition to surrogacy.
The Social Utility of Surrogacy

In undertaking this project, it became difficult to describe or qualify the service that surrogacy really provides to society. Surrogacy arrangements produce a child for those who were previously unable to conceive a child naturally. Surrogacy, then, allows for the creation of a child that would not have existed by other means. It is difficult to describe what this actually provides, both for the commissioning parents and for society, in the same way that it is hard to express or qualify what the birth of a child really means. Undoubtedly the birth of a child is a very important and significant event. Edelmann (2004) writes that, “…the opportunity to become a parent has been described as one of the most important developmental milestones in a person’s life” (Edelmann 2004, 124). Men and women, unable to have children because of problems of infertility or because they are of the same sex, are offered a second chance at the opportunity to have genetically related children because of surrogacy. In this regard, surrogacy provides a service that is currently unparalleled by any other.

Benefits for Parents. Peter Schuck’s (1990), “The Social Utility of Surrogacy,” is one of the driving forces behind this thesis. Schuck describes in simple terms what he believes surrogacy provides to all parties involved and why criticisms that it is an immoral practice are unfair. Schuck believes that, “…surrogacy, unlike adoption, is an arrangement that creates new life. It is not simply the reallocation of rights to existing children. It is a phenomenon that promises the creation of new, desperately wanted life” (Schuck 1990, 133). Schuck believes that the creation of life is an inherently positive endeavor and that surrogacy provides the opportunity not only to introduce a new life to the world, but to introduce a new life to a man, woman, or couple who desperately want to have a child. Shanley (2001) argues that surrogacy benefits childless women and men in ways than adoption and other assisted reproductive technologies cannot. Shanley writes that, “…contract pregnancy allows a couple to take responsibility for a child even before conception…” (Shanley 2001, 106). In
this way, surrogacy provides a more complete experience of parenthood for the commissioning couple than other ARTs or adoption offer. The couple does not have to miss out on the birth, first few months or even years, of life of their child, as might be required by adoption regulation. Surrogacy, seen in this regard, provides one of the most amazing gifts available—the ability to parent a child from the moment of its birth. Schuck argues that it is very difficult to condemn a practice that is underlain by what he believes to be such positive values (Schuck 1990, 133).

Not only does surrogacy provide the creation of a new life, and a very much desired child for the commissioning couple, but it provides a renewed sense of worth for many couples. Robertson (1992) argues that for many couples unable to conceive children, feelings of worthlessness and despair seep into their psyches and their marriages (Robertson 1992, 47). The inability to conceive children naturally or the intense financial and emotional drain that occurs during the adoption process puts an enormous burden on hopeful parents as individuals, as well as their marriage (Robertson 1992, 47-49). Edelmann (2004) sees that surrogacy provides benefits that can help ease the anxiety and allay the worries of hopeful parents. He explains that, “…childlessness makes couples feel like ‘second-class’ citizens and that the drives the desire of many to become parents. A more intrinsic motive is their desire to continue the family’s genetic line” (Edelmann 2004, 128). Edelmann argues that parenthood provides serious psychological benefits to adults because it allows for them to have the opportunity to express love for a child and to receive love from a child. Because surrogacy allows for parenthood to occur, it opens the door to psychological benefits that childless men and women would not have had otherwise (Edelmann 2004, 129).

Further, surrogacy and other forms of assisted reproductive technologies allow homosexual men, women, and couples to experience the joy of parenthood. The changing family structure and increasing acceptance of homosexual couples by society has helped open the door to the creation of less traditional families (Levin 2003, 183). In this regard, surrogacy plays a pivotal role in helping
homosexual couples create a family of their own. Ertman (2008) argues that, “The increasing prevalence of these new families is positive in several ways. First, as parenthood is an important social and personal experience, opening that option to previously excluded individuals facilitates human flourishing for those people and thus for society as a whole” (Ertman 2008, 305). Surrogacy provides an immeasurable social utility to homosexual couples because it provides a completely unique way for gay men and women to start families.

Benefits for Surrogate Mothers. Ragoné’s (1994) research focuses largely on the experiences of surrogate mothers, from the initial contact with the commercial surrogacy agency or commissioning couple until years after they have relinquished the child and their parental rights. Ragoné finds not only that there are a number of factors that motivate women to serve as surrogate mothers but that these women believe that they gain a great deal from the surrogate experience (Ragoné 1994, 52-68). Ragoné argues that some women feel like it is a calling that they must fulfill; surrogacy, for them, is an “important means by which both to express and to fulfill themselves” (Ragoné 1994, 55). Many surrogates enjoy feeling like an important component of a couple’s ability to start a family. Many also enjoy the experience of being pregnant, whether with their own child or with someone else’s (Ragoné 1994, 56-57). Further, some women really want to become pregnant again but do not want to have the burden of raising another child, especially in already large families. Surrogacy provides these women the opportunity to become pregnant without feeling guilty that the child will not be provided or well-cared for (Ragoné 1994, 61).

The fact that surrogacy has the power to separate pregnancy and gestation from social parenthood benefits both the intended parents and the surrogate mother by allowing both of them to partake in the process. Surrogacy also has potential psychological and emotional benefits for some women; Ragoné claims that many women feel a sense of pride and confidence in their ability to become pregnant and gestate a child and that it contributes to the creation of a positive self-image
(Ragoné 1994, 65). Robertson argues that surrogacy can also have a psychological reparative effect; women who feel guilt over a past abortion or adoption might use surrogacy as a way to repair their guilty conscience and come to terms with past regrets (Robertson 1992, 47).

Jadva, Murray, Lycett, MacCallum, Golombok’s (2003) study confirms much of Ragoné’s findings. Jadva et al. argue that surrogacy largely provides important benefits to both the intended parents and the surrogate mother and that this is not widely known because the media tends to focus only on the negative aspects of surrogacy (Jadva et al. 2003, 2196). The tendency is to highlight the problems that arise from surrogacy and not to discuss or describe the benefits reaped by both parties (Jadva et al. 2003, 2196-2197). The authors find that, “Overall, surrogacy appears to be a positive experience for surrogate mothers. Women who decide to embark upon surrogacy often have completed a family of their own and they wish to help a couple who would not otherwise be able to become parents” (Jadva et al. 2003, 2203). Many surrogate mothers report that they benefit from what they see as a very compassionate and giving act on their behalf.

Robertson notes that surrogate mothers often benefit economically, although very few cite economic gains as the primary motive or benefit of serving as a surrogate mother (Robertson 1992, 47-48). Surrogacy provides women another means with which to make money; for some women, surrogacy is a better alternative to other jobs that they may have been forced to take as a consequence of their economic situation (Shanley 2001, 109). Surrogacy also provides the opportunity for women who enjoy pregnancy to make a significant sum of money doing something that they love and enjoy (Shanley 2001, 109). Further, many feminists argue that surrogacy has the power to liberate women from societal pressures because it allows them to capitalize on a service they are generally expected to offer free of charge and it provides them another means to earn compensation and a way to better themselves.
A Threatening Political Landscape

To reiterate, there are really three goals here: (1) to prove that surrogacy provides a serious social utility in the United States and that much criticism of the practice is either fair or unwarranted, (2) to demonstrate that the political landscape in which surrogacy currently exists threatens the continuation of the practice, and (3) to prove that federal legislation would be the best way to regulate and protect surrogate motherhood agreements. Having demonstrated that surrogacy provides an unparalleled social service to childless men and women, the discussion turns to the reasons why surrogacy is threatened in the United States, including the lack of surrogacy legislation at both the state and federal levels and the courts’ tendency to shy away from making serious legal determinations in cases of surrogate motherhood agreements.

The United States: A Nation Devoid of Surrogacy Legislation

One major threat to surrogacy is the real lack of regulatory legislation, both at the state and federal levels (Human Rights Campaign, 2009). This is problematic, especially considering that surrogacy could potentially be regulated by either federal or state statutory law, or a variety of other existing bodies of law such as family law, contract law, and even employment and labor law (Jackson 2001, 263). Neither the federal government nor the state governments appear to be stepping up to take control of regulating the assisted reproductive technology or surrogacy markets, however.

Federal Legislation. No legislation regarding surrogacy, regulatory or otherwise, exists at the federal level in the United States as Markens (2007) and nearly every scholar in this area explains. The United States is one of the only industrialized nations that does not have nation-wide legislation affecting the practice of surrogate motherhood agreements. Markens explains that she believes this represents a “lack of consensus in the United States, and the ambivalence it represents is thus singularly American and may be accounted for chiefly by two deeply ingrained national characteristics: our exaltation of individual rights and laissez-faire approach to the marketplace and
our protective stance toward families” (Markens 2007, 23). Australia, Canada, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Norway, Spain, Sweden, and Switzerland all have comprehensive legislation regarding surrogacy (Markens 2007, 23). All of these countries, however, either prohibit or seriously constrain surrogacy arrangements. The United States is unlikely to pursue the same pathway, because as Markens notes, the United States holds respect for individual rights and a more laissez-faire approach to markets, even fertility markets, in high regards. For this reason, the United States would probably not pursue public policies that seriously infringed upon individual rights like the right to privacy in family planning or the right to procreate. Unlike legislation in other Western countries, federal legislation in the United States would probably take more of a regulatory than prohibitory approach.

State legislation. Because no federal legislation regarding surrogacy exists, decisions regarding the enforceability of surrogacy contracts and the determination of parental rights during disputes between surrogate mothers and intended parents are left entirely under the purview of the states. Laws regarding surrogacy vary greatly from state to state, though the majority of states have no legislation regarding surrogacy (Human Rights Campaign 2009). Because the politics behind surrogacy are often very messy, it is hard for state legislatures to come to a consensus on how to regulate the very complicated practice (Hoffman 2009, 450-454). Kindregan and McBrien explain that there are also probably other contributory factors to states’ reticence regarding surrogacy laws. They write, “Many states are hesitant to enact legislation because, given the advances in reproductive science, there will always be a factual exception to the rule” (Kindregan and McBrien 2005, 125).

Markens explains that there has also really been little push for states to enact legislation regarding surrogacy or to produce uniform legislation (Markens 2007 23-27). The only attempts at producing any sort of uniformity amongst state surrogacy laws were the 1988 Uniform Status of Children of Assisted Conception Act and the act that replaced it in 2000, the Uniform Parentage
Act, both proposed by the National Conference of Commissioners on Uniform State Laws. Neither one of the acts had a marked impact on state legislation regarding surrogacy; only two states adopted the Uniform State of Children of Assisted Conception Act\(^1\) and to date no state has adopted the exact language of the National Conference of Commissioners’ Uniform Parentage Act\(^2\), although some have adopted similar acts independently. As such, laws regarding surrogacy really vary widely from state to state.

There is a great disparity in the types of legislation that states have adopted regarding surrogacy. For example, in the District of Columbia and Michigan, surrogacy contracts, both gestational and traditional, are void, unenforceable, and all parties entering into surrogacy contracts or facilitating surrogacy contracts are subject to criminal prosecution (Human Rights Campaign 2009 and Hoffman 2009). In other states, like California, Illinois, and Texas surrogacy contracts are both permitted and deemed enforceable either through the implementation of state statutes or case law regarding the practice (Hoffman 2009). Such serious extremes of legislation are not altogether surprising, considering that the political landscape of many states has guided their responses to the use of traditional surrogacy, gestational surrogacy, and both compensated and uncompensated surrogacy arrangements. These extreme responses, at both ends of the spectrum, and the complete lack of legislation in most states, however, leaves surrogates and intended parents confused about the legality of their actions and places unfair restrictions on some couple’s access to surrogacy contracts. Lawyer Darra Hoffman explains, “In states with no explicit acknowledgement of surrogacy or with an absence of procedures for establishing the intended parents as the legal parents,

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\(^1\)According to the Act, the Uniform Status of Children of Assisted Conception was created to “clarify the rights of children born under the new technology as well as the rights of the parties to these arrangements.” It is not intended to regulate surrogacy or other assisted reproductive technologies, but rather to guide the legal determination of parental rights in these instances.

\(^2\)The Uniform Parentage act builds on the work done by the Uniform State of Children of Assisted Conception Act and provides means for the courts to legally determine maternal and paternal rights. It also discusses the ways in which parental rights may legally be severed.
both intended parents, but particularly the intended mother, risk losing rights to the child” (Hoffman 2009, 461). This cluttered landscape of state legislation and lack of federal legislation has left parties unsure of their rights, uncertain about the legality of their actions, and in some states without a venue in which to address concerns or questions about surrogacy contracts.

Clark et al. (2009) explain also that, “Legislation on surrogacy is also constantly changing. Many current state laws are the result of cases that have gone to court, where the judge writes the laws with each ruling” (Clark et al. 2009, 41). This means that in many states individual judges will have control over deciding which parties receive parental rights and how certain terms of the surrogacy contract should be enforced (Clark et al. 2009, 41-42). The lack of legislation regarding surrogacy combined with individual judges’ discretion in creating the case law has really created a legal mess—one that many commissioning couples and intended parents find hard to fully understand. This legal uncertainty is what leads many parties to seek adjudication of their issues in court. The courts, however, are also not providing the legal guidance that parties to surrogacy contracts both want and need.

Courts Loathe to Hear Disputes Regarding Surrogacy

If a complete lack of uniform legislation regarding surrogacy does not put the practice on shaky enough footing, the serious lack of case law regarding surrogacy certainly does. While the courts do not have an abundance of opportunities to hear cases regarding surrogacy, considering that less than one tenth of one percent of surrogacy contracts end up being disputed, the courts generally fail to provide any substantive rulings in the cases that they do take (Teman 2008, 1104). Many courts have really shied away from getting involved in disputes over the terms of surrogacy contracts, most notably the Supreme Court of the United States. Both of the major state Supreme Court decisions regarding surrogacy, *In re Baby M* (1988) and *Johnson v. Calvert* (1993), applied to the Supreme Court for a writ of certiorari and both were subsequently denied. The following analysis of
In re Baby M (1988) and Johnson v. Calvert (1993) is meant to give the reader a better understanding of the issues involved with surrogacy that state Supreme Courts have dealt with and what their central holdings were regarding these very serious and significant issues. It also addresses the shortcomings of the state courts’ rulings and what is needed to rectify these inconsistencies. The first case discussed, In Re Baby M (1988), deals with a contract between a genetic father and a traditional surrogate, involving a payment of $10,000 for the gestational services provided and the contribution of genetic material by the surrogate mother. Discussed later is Johnson v. Calvert (1993), a complaint filed by a gestational carrier that was also paid $10,000 for her services and the relinquishment of the child and all parental rights. These two cases are promising in that each addresses a different form of surrogacy, but as will be dually noted, the presence of only one significant case for each form of modern surrogacy contracts leaves much to be desired.

In re Baby M (1988). William and Elizabeth Stern met during graduate school and were married in 1974. Circumstances kept the couple from considering the addition of children to their family until 1981. Mrs. Stern was diagnosed with multiple sclerosis and worried about the effects that pregnancy might have on her health. Mr. and Mrs. Stern decided that the health risk to Mrs. Stern was far too great. Still, the Sterns, especially Mr. Stern, having lost all of his other blood relatives in the Holocaust, very much wanted the opportunity to have genetic children. So, the Sterns sought out the services of the Infertility Center of New York (ICNY). ICNY is a commercial surrogacy agency in New York that connects intended parents and surrogate mothers and facilitates the surrogacy agreement, for a fee.

Through the help of ICNY, the Sterns were introduced to Mary Beth Whitehead, a potential surrogate mother. Mrs. Whitehead had served as a potential surrogate mother through ICNY’s program before and although she was unable to become pregnant during those in vitro fertilization treatments, she was familiar with the procedures and process involved with the surrogate
motherhood arrangement. Mr. Stern and Mr. and Mrs. Whitehead entered into a surrogacy contract with one another in February of 1985. Mrs. Whitehead became pregnant with Mr. Stern’s sperm, carried the child through a relatively easy and uncomplicated pregnancy, and a baby girl was born on March 27, 1986. Mrs. Whitehead requested that none of the hospital personnel become aware of the surrogacy arrangement between her and Mr. Stern. As such, from all outward appearances it looked as if Mr. and Mrs. Whitehead were the parents of a healthy baby girl. The Whiteheads even took the baby girl home from the hospital without the presence of the Sterns. Despite some serious reservations about relinquishing the child, Mrs. Whitehead did surrender the child known to her as Sara Elizabeth Whitehead to Mr. and Mrs. Stern, who called the baby girl Melissa.

After physically relinquishing the child, however, Mrs. Whitehead became severely depressed, despondent, and inconsolable. She contacted the Sterns and told them that she could not live without her child and needed to see her for at least a week so that she could say goodbye to baby Sara, now known as Melissa, for good. Serious problems arose when Mr. and Mrs. Whitehead fled to Florida and refused to return the child to Mrs. and Mrs. Stern. Mr. Stern filed a complaint in the state of New Jersey requesting full enforcement of the surrogacy contract that both he and the Whiteheads were parties to. After the Sterns received knowledge about where the Whiteheads were hiding, Mr. Stern filed a similar complaint in the state of Florida and the local law enforcement officers raided the place where Mr. and Mrs. Whitehead were staying and retrieved the child. Under an ex parte order on behalf of a New Jersey trial court, Baby Melissa was returned to the Sterns while further legal proceedings were initiated.

The New Jersey Superior Court’s central holding was that the surrogacy contract which Mr. Stern and Mrs. and Mrs. Whitehead were parties to was valid and enforceable. The Court granted full custody of the child to Mr. Stern and terminated all of Mrs. Whitehead’s parental rights. The Superior Court allowed Mrs. Stern to legally adopt baby Melissa immediately following the decision.
Mrs. Whitehead was given minimal visitation privileges only. In reviewing the case, the New Jersey Supreme Court charged the Superior Court with largely ignoring the surrogacy contract and the details contained within. The New Jersey Supreme Court argued that the Superior Court determined parental rights by determining what would be in the best interests of the child, as they would with any typical custody dispute. In reviewing the decision of the New Jersey Superior Court, the New Jersey Supreme Court declared that:

The court’s review and analysis of the surrogacy contract, however, is not at all in accord with ours. The trial court concluded that the various statutes governing this matter, including those concerning adoption, termination of parental rights, and payment of money in connection with adoptions, do not apply to surrogacy contracts. It reasoned that because the Legislature did not have surrogacy contracts in mind when it passed those laws, those laws were therefore irrelevant. (In Re Baby M 1988)

The New Jersey Supreme Court thus granted Mrs. Whitehead’s appeal and the battle between the Sterns and Mrs. Whitehead raged on, with Baby M caught in the middle.

The New Jersey Supreme Court’s central holdings were very different from those of the Superior Court. Most importantly, the Supreme Court found that surrogacy contracts are not only invalid but conflict with the statutory and common laws in the state of New Jersey. Surrogacy contracts were held to be entirely unenforceable in the state of New Jersey. The New Jersey Supreme Court further argued that it was not only illegal for Mary Beth Whitehead to receive payment for her services as a surrogate but that it was criminal. The Supreme Court held that not only did surrogacy contracts completely fail to consider the best interests of the intended child but they were tantamount to baby-selling and were subsequently in conflict with state law; the Court continued, explaining that surrogate agreements and adoption were two very different things and could not be treated as synonymous by the law or by the courts. In sum, it is the New Jersey Supreme Court’s belief that, “The 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 other; it looks to adoption regardless of suitability; it totally ignores the child; it takes the child from its mother
regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money” (*In Re Baby M* 1988).

*In Re Baby M* (1988) dealt a crushing blow to the practice of surrogate motherhood in the state of New Jersey. While the New Jersey Supreme Court did not explicitly hold that altruistic surrogacy was illegal or criminal, it did not provide any insight or guidance on how to conduct such an agreement within the bounds of the state law. Also, permitting only altruistic surrogacy is a very shallow victory for the practice of surrogate motherhood, because as was mentioned previously and as is mentioned by the Supreme Court, “…all parties conceded that it is unlikely that surrogacy will survive without money” (*In Re Baby M* 1988). Thus while not outlawing surrogacy entirely, the New Jersey Supreme Court was very aware of the restrictive consequences that its ruling would have on the practice. Also significant about the Court’s decision is the way it strayed from discussing the differences between gestational and traditional surrogacy and the subsequent legality of each. While Mary Beth Whitehead served as a traditional surrogate, providing one half of the genetic material necessary to conceive Baby M, the Court did not focus on this fact. The New Jersey Supreme Court concluded its decision with an invitation for the state legislature to overturn or clarify its decision through legislation should it see fit.

And in fact, the state legislature did respond, albeit more than ten years after the Baby M controversy broke. Hoffman notes that common law in New Jersey now allows for the possible enforcement of uncompensated gestational surrogacy contracts (Hoffman 2009, 464). Elaborating upon the legislation, Hoffman writes that, “The procedure forbids having the surrogate enter into any binding agreement before the child’s birth, and she indeed has seventy-two hours after the child’s birth to decide to keep the child. Assuming the surrogate relinquishes the child, the intended parents have two days to be placed on the child’s birth certificate” (Hoffman 2009, 464). The legislature’s response to the *Baby M* decision is decidedly less clear than proponents of surrogacy
might have hoped. The legislation is vague about whether altruistic or traditional surrogacy is legal. The common law suggests that gestational surrogacy contracts are enforceable but the statute holds that the surrogate mother has up to seventy-two hours to decided to keep the child. These conflicting laws make it unclear whether the legislature has placed the woman’s gestational contribution to the child above another woman’s genetic contribution to the intended child or not. Such vague legal text and confusing case law often leaves wishful parents and voluntary surrogate mothers to seek surrogacy contract refuge in neighboring states.

*Johnson v. Calvert* (1993). Many years passed without a significant state Supreme Court decision regarding the legality of surrogacy contracts. Five years later, *Johnson v. Calvert* (1993) emerged from the Supreme Court of California. The Supreme Court of California promised in its opinion to determine:

> When pursuant to a surrogacy agreement, a zygote formed of the gametes of a husband and wife is implanted in the uterus of another woman, who carries the resulting fetus to term and gives birth to a child not genetically related to her, who is the child’s ‘natural mother’ under California law? Does a determination that the wife is the natural mother work a deprivation of the gestating woman’s constitutional rights? And is such an agreement banned by any public policy of this state? (*Johnson v. Calvert* 1993).

The story giving rise to the complaint is that of Mark and Crispina Calvert and the surrogacy contract that they agreed to enter into with Anna Johnson in February 1990. After having been forced to undergo a hysterectomy for medical reasons more than five years prior, Crispina still had functional ovaries and made the decision with her husband to use them and seek the services of a gestational surrogate. Ms. Johnson volunteered to serve as a surrogate for the Calverts after hearing about their inability to have children naturally and subsequent difficulties in finding suitable alternatives from a friend. The basic terms of the agreement were that Ms. Johnson would be paid $10,000 over the course of her pregnancy for her gestational services and eventual relinquishment of parental rights to the child and that Mr. and Mrs. Calvert would take out a $200,000 life insurance policy on Ms. Johnson’s life. While relations between the parties appeared friendly at first, they
quickly deteriorated and in July Ms. Johnson demanded to be paid in full or she would refuse to give up the child. The baby was born in September and was placed in the Calverts’ home by a court order that both parties agreed to, pending a real trial. The California trial court decided in October of that same year that the surrogacy contract signed by the Calverts and Ms. Johnson was both valid and enforceable. The trial court further held that the Calverts had the sole claims to parentage of the child and that Ms. Johnson had none; her rights to visitation were subsequently vacated.

Ms. Johnson appealed the trial court’s decision; the California Court of Appeal for the Fourth District, Division Three affirmed the decision of the trial court. Ms. Johnson appealed the decision once again and the Supreme Court of California agreed to review facts and legal issues of the case. The Court used the Uniform Parentage Act of 1973 to make its major determinations. It should be noted here that the Uniform Parentage Act was adopted by the National Conference of Commissioners on Uniform State Laws, but has not officially been adopted by the federal government or by all of the state governments (Place 1994, 907). In fact, to date, no state has adopted the Uniform Parentage Act suggested by the Commission, although many have adopted similar legislation. Despite this, the California Supreme Court used the Uniform Parentage Act, rather than its own determinations regarding parental rights in cases involving surrogacy contracts, to decide who should parent the child in question. The Supreme Court of California seems to be cognizant of the less satisfactory route that it pursues in the majority opinion, noting,

Passage of the Act clearly was not motivated by the need to resolve surrogacy disputes, which were virtually unknown in 1975. Yet it facially applies to any parentage determination, including the rare case in which a child’s maternity is an issue. We are invited to disregard the Act and decide this case according to other criteria, including constitutional precepts and our sense of the demands of public policy. We feel constrained, however, to decline the invitation. (Johnson v. Calvert 1993).

The Supreme Court of California did decline the opportunity to make a decision regarding the legality and legitimacy of surrogacy contracts, both gestational and traditional, and used the Act as the primary instrument when formulating its opinion. The Court held that according to the Act that
both genetic contributions and the gestation and birth process are recognized as a means with which to determine maternity. The Court argues that because both Anna Johnson and Crispina Calvert had proven maternity of the child, albeit in very different forms, that it must consider the contractual intent contained within the surrogacy contract. The Court concluded that if not for Mr. and Mrs. Calvert’s intent to create a genetic child, Ms. Johnson would have never received a fertilized zygote. The contract between the parties suggested that the intent was for a child genetically related to Mark and Crispina Calvert to be created and born by Ms. Johnson; further, the intent was never for the Calverts to donate the fertilized zygote to Ms. Johnson. The Court noted that while Ms. Johnson’s gestational contribution to the child is very important and that the child would have ceased to exist without her, that she is ultimately not the legal mother of the child. The Court explained, “We conclude that although the Act recognizes both genetic consanguinity and giving birth as a means of establishing a mother and child relationship, when the two means do not coincide in one woman, 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” (Johnson v. Calvert 1993). Here, the Supreme Court of California helped elucidate the legal standing of genetic parents and gestational carriers involved in surrogacy contracts; in cases where a dispute over maternity arises, the genetic contribution is not necessarily prioritized, although the result in this case favors the genetic consanguinity provided by Ms. Calvert, the real deciding factor is the contractual intent to create a child. The woman who goes to the great lengths to obtain a genetic child is the one that the state of California will recognize as the legal mother, as long as the surrogate was not responsible for providing both the genetic material and the gestation of the child.

Other important determinations made by the Supreme Court of California in Johnson v. Calvert (1993) were that surrogacy contracts do not violate any public statutes in California. This holding solidifies the legality of surrogacy contracts—both gestational and traditional, in the state of
California. The Supreme Court of California, like the New Jersey Supreme Court, held that surrogacy is not synonymous or equal to adoption and that the same laws did not apply to both practices. This is significant, because as I will argue in the following section of the paper, adoption laws cannot be transformed and changed to accommodate surrogate motherhood arrangements; the differences between the two practices are too great, as are the circumstances under which the different contracts arise.

**Significance.** While both *In re Baby M* (1988) and *Johnson v. Calvert* (1993) made legal determinations of parental rights in instances where surrogacy contracts are involved, neither opinion uses dicta to explain its decisions in detail, specifically by drawing distinctions between gestational and traditional surrogacy and compensated and uncompensated surrogacy. As Jeffrey Place well notes, “An effective determination must take into account the fundamental differences between gestational surrogacy and surrogate motherhood [full surrogacy]” (Place 1994, 910). Determinations on the legality of the different forms of surrogacy is not only helpful, but very necessary as many hopeful parents seek the services of surrogate mothers. Also, a court distinction between the differing forms of surrogacy would help hopeful parents be more cognizant of the rights that they have in the contract and what rights the surrogate mother has. Mary Lyndon Shanley explains that drawing this distinction would help parties to surrogacy agreements to be more aware of the potential enforceability or non-enforceability of the contract that they have entered (Shanley 2001, 104). It is understandable, though, that these judge’s decisions leave something to be desired. No existing body of law is specifically tailored to address surrogacy and custody disputes arising from surrogacy, and application of other existing laws, like those regarding adoption or assisted reproductive technologies produces an imperfect result (Markens 2007, 27-28).
A Fundamental Right in Need of Protection?

Perhaps the most significant reason that clarity regarding surrogacy contracts is so greatly needed is that fundamental personal rights and liberties are arguably infringed upon when criminalization, prohibition, or serious restriction on the ability to employ the use of a surrogate or serve as a surrogate mother occurs. Both the ability to serve as a surrogate mother or to use surrogacy as a means with which to have children could be considered derivations of the right to procreative liberty. Procreative liberty is one of the most fundamentally important activities undertaken by sentient beings; without procreation, a species would cease to exist. Procreation provides for the continuation of the human race, as well as the continuation of polities, communities, and familial lines. The desire to procreate is an innate part of the biological composition of human beings and is possibly one of the most natural life processes. Robertson (2003) notes that, “The importance of procreation as a whole derives from the genetic, biological, and social experiences that comprise it…It fulfills cultural norms and individual goals about a good or fulfilled life, and many consider it the most important thing a person does with his or her life.” (Robertson 2003, 408). Clearly, procreation is central to the maintenance of society and as such should be held in high regard.

The United States Constitution neither lists the right to procreate as one of the most fundamental rights of citizens in the Bill of Rights nor offers any semblance of constitutional protection to said right. Further, the Supreme Court has not made use of any complaints under review to clearly and unquestionably establish the right to procreative liberty. This is problematic because without a guarantee to the fundamental right to procreate, there will never be a subsequent right to the employ the use of surrogacy arrangements. As surrogacy is so clearly and wholly tied to the right of procreative freedom, a threat to the right to procreate is subsequently a threat to the use of surrogacy arrangements.
The right to procreation, however, may already exist according to some scholars. Rubenfeld (2005) points to the Supreme Court decision in *Skinner v. Oklahoma* (1942) as proof that the highest court may have already invoked the use of a fundamental right to procreate (Rubenfeld 2005, 2800). In *Skinner*, the Supreme Court struck an Oklahoma statute that allowed for the sterilization of convicted felons meeting certain criteria outlined in the legislation. The Supreme Court struck the statute on the grounds that it violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment and not on the specifically on the basis that the statute violated a fundamental constitutional right guaranteed to all citizens. But, as Rubenfeld explains, the “reading of *Skinner* as creating a substantive due process right to procreation is confirmed by the many subsequent cases in which the Court has cited *Skinner* for this proposition and has grouped *Skinner* with other cases identifying fundamental rights” (Rubenfeld 2005, 2800). Thus, *Skinner’s* obvious protection of a citizen’s right to retain the ability to procreate arguably indicates that the Supreme Court believes there to be a fundamental right to procreative liberty.

Continuing with this line of thought, Rubenfeld argues that the fundamental right to procreation may be found in other lines of Supreme Court jurisprudence. Rubenfeld (2005) argues that beginning with *Griswold v. Connecticut* (1965) that the Supreme Court laid out a “‘zone of privacy’ found within the ‘penumbras’ of the Bill of Rights” (Rubenfeld 2005, 2796). These zones of privacy have primarily been used to protect various aspects of reproductive freedom through the years. Starting with *Griswold*, the Supreme Court held that the United States Constitution protected the right for married couples to seek counseling regarding contraception and to use contraceptive devices. Seven years later, in *Eisenstadt v. Baird* (1972) the Supreme Court extended the right to obtain and use contraceptives to single and unmarried persons, using the Fourteenth Amendment’s Equal Protection Clause as the basis for their decision. The Supreme Court delivered one of its most infamous decisions ever, just a year later when it argued that the Constitution protected a woman’s
right to choose not to have children through the use of the abortion procedure in *Roe v. Wade* (1973). Subsequent court decisions regarding the right to reproductive privacy like *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) have served as a means for the Supreme Court to further define reproductive rights, like that of abortion, and decide what types of restrictions may legally be imposed on the practice.

Rubenfeld (2005) and Robertson (2003) suggest that the creation of this right to privacy, especially as defined in *Roe v. Wade* (1973), could easily be extended to the right to procreation. As *Roe* protects the right to avoid procreation and childbearing, it may also be implicated in a protection of the right to procreation and the right to have children. Robertson points out, however, that “neither the Supreme Court nor lower courts, however, have provided guidance on how far the explicit protection of decisions to avoid reproduction and the implicit protection of decisions to engage in coital reproduction take us in resolving conflicts over assisted reproductive and genetic technologies” (Robertson 2003, 453). In other words, even if existing Supreme Court jurisprudence creates the right to procreation, it has not been extended and defined to the extent that it would apply to assisted reproductive technologies like surrogacy.

**The Necessity of a Federal Legislative Response**

Having demonstrated that surrogacy provides an unparalleled social utility—one that is threatened by prohibition in some states, the discussion now turns to why federal legislation is the best way to approach the problems created by surrogacy, how other scholars propose handling surrogacy, the reasons why other forms of regulation or areas of law are insufficient to protect and regulate surrogacy.

**Why Federal Legislation?**

There are a multiplicity of reasons that federal legislation regarding surrogacy is needed in the United States. First, federal legislation can offer surrogacy in its entirety protection from
prohibition. Second, federal legislation could potentially curb some of the criticisms of surrogacy by regulating surrogacy contracts in a way that is beneficial to both parties and protects both parties from potential negative consequences. Lastly, and most importantly, federal legislation provides much needed guidance in the United States. Uniform national legislation will create a situation in which surrogacy can flourish, do less harm, and legal determinations regarding parental rights can be made confidently and in accordance with written public statutes instead of the application of existing law inappropriate for the situation. Legislation can provide answers to the questions that parties have about their duties under the contract and it can offer greater protection of surrogacy and the parties to surrogacy contracts than any existing body of law.

**Federal Legislation’s Protection of Surrogacy.** Without restating all of the major tenets of the last section, suffice it to say that the complete lack of federal legislation, the combination of the lack of legislation and huge discrepancies in legislation at the state level, and the lack of uniform case law regarding surrogacy have left the practice vulnerable. Because the federal government has not specifically allowed the practice or imposed regulations upon the practice, states are free to make whatever decision they see fit, including prohibition and criminalization of the practice. Serious criticisms of surrogacy, from the scholarly community, the media, and the American public might place surrogacy in serious threat of prohibition. The District of Columbia and the state of Michigan already have legislation that makes surrogacy arrangements void and unenforceable; commercial surrogacy arrangements are also criminalized in both areas (Human Rights Campaign 2009), and Hoffman 2009). Looking at the gaping void of legislation in other states, it is very possible that states devoid of legislation will follow Michigan’s lead and make entering into a surrogacy contract a criminal offense. There is no larger threat to surrogacy than prohibition; regulation, even if stringent, is preferable to prohibition of the practice.
As a result of the Article VI Supremacy Clause in the United States Constitution, if the federal government were to pass legislation specifically permitting surrogacy arrangements—gestational, traditional, commercial, and/or altruistic—the statutes that states currently have would become void. States, like Michigan, which currently prohibit the practice, would be forced to allow citizens to freely partake in surrogacy arrangements. No greater protection could be offered to the practice of surrogacy in the United States unless the Supreme Court made a legal determination that the ability to employ the use of a surrogate to have a child was a constitutional right stemming from the right to procreative liberty and privacy. Since the Supreme Court has refused certiorari to every case regarding a disputed surrogacy contract thus far, it is probably unlikely that such a ruling would be made. Federal legislation could remove the threat of prohibition from surrogacy’s future, ensuring childless women and men the opportunity to enter into surrogacy contracts.

Federal Legislation’s Protection of Parties to Surrogacy Arrangements. Rae (1994) and Field (1993) point out how surrogacy can expose women and children to serious threats like exploitation and commodification. A real answer to these criticisms could come from federal legislation. Federal legislation could better define baby selling and explicitly exclude children born through the use of a compensated surrogacy contract from this definition, eliminating the possibility that surrogacy would be struck down because it conflicts with public policy. Concerns about the exploitation and underpayment of women who serve as surrogate mothers could be quelled by mandating a minimum payment for surrogate mothers (Spar 2006, 94). Spar continues, explaining,

Theoretically, these risks could be reduced through federal regulation. Surrogates, for example, could be treated like volunteers in scientific research studies, whose basic rights and health are protected by the U.S. Department of Health and Human Services. Or they could be treated like other paid service providers, with minimum wage requirements and regulations regarding their health and safety at work. (Spar 2006, 94-95).

Damielo and Sorenson (2008) also suggest that legislation could require any woman interested in entering a surrogacy contract to take a short informative class that would provide information
regarding her rights as a gestational carrier or a traditional surrogate (Damielo and Sorenson 2008, 270). After taking the class the woman would be more informed about what to expect during the pregnancy, relinquishment stage and beyond. Theoretically the information would also empower the woman to make her own decisions regarding the terms of the contract and the use of her body (Damielo and Sorenson 2008, 270). Policies like this are known as soft law and Damielo and Sorenson argue that, “a soft law policy in the case of paid surrogacy addressed central concerns about the…surrogate’s vulnerability” (2008, 270). Going further, Fabre (2006) argues that federal legislation could stipulate certain provisions of surrogacy contracts, offering as much or as little protection to both the rights of the surrogate mother and the intended parents as Congress felt appropriate (Fabre 2006, 212).

Legislation can offer as much or as little protection as the public demands. Unlike other areas of law, however, federal legislation regarding surrogacy can be tailored to address the needs of parties to surrogacy contracts and minimize the risk that both parties assume. Legislation can eliminate the possibility that commercial surrogacy agencies will take advantage of the surrogate mother or the intended parents. Legislation can be as far reaching or as vague as the circumstances dictate. Legislation has the opportunity not only to protect the practice from threats of prohibition, but also offer greater protection to the parties involved in surrogacy contracts by potentially more fully defining their rights as well as eliminating some areas of risk to them.

**Federal Legislation Provides Much Needed Guidance.** “There is no national policy on surrogacy, and laws governing surrogacy arrangements vary from state to state” (Clark et al. 2009, 41). It could not be any clearer; parties to surrogacy contracts are lost in the midst of a mess of non-uniform state legislation. Noted previously, legislation regarding surrogacy varies greatly from state to state and a considerable number of states have no legislation or concrete case law regarding surrogacy (Human Rights Campaign 2009, Hoffman 2009). All parties to surrogacy contracts, the
intended parents and the surrogate mother, are often unaware of the legality of their actions or what rights and responsibilities they have to one another under the contract, and further, whether the contract is even enforceable. Works like those authored by Clark et al. (2009) and Ragoné (1994) are intended to guide intended parents and surrogate mothers through the process by offering them legal advice and the most comprehensive and up to date discussion of state legislation regarding surrogacy possible.

Federal legislation has been lacking for so long that scholarly supporters of surrogacy have taken it upon themselves to provide whatever legal guidance they are able to offer parties interested in surrogate motherhood agreements. Scholars are taking up the torch because no other branch of the federal government in the United States has to date. The Supreme Court refused to grant certiorari to either In Re Baby M (1988) or Johnson v. Calvert (1993), two cases that could have been influential in shaping the case law regarding both traditional surrogacy and gestational surrogacy. The Supreme Court, however, may have refused to make any judicial determinations regarding surrogacy for the same reasons that the lower courts have refused to provide any real, definitive answers about the legality of surrogacy contracts or the terms of surrogacy contracts. Without legislation to turn to and rely upon, courts have no real concrete evidence to rely upon in their decisions. Markens explains, “[In] the early 1980s, before most of the public had even heard about surrogate motherhood, a judge in Arcadia, California, who was presiding over a custody dispute involving a surrogacy arrangement urged the legislature to ‘consider coming out with a policy statement or legal guideline’ that could be applied in similar suits in the future” (Markens 2007, 27). Not only are parties to surrogacy contracts unaware of their rights and duties, but the courts appear to also be rather unsure which direction they should favor. As Judge Henry Sorkow explains, “many questions must be answered…and the answers must come from legislation” (In Re Baby M 1988).
Alternatives to Federal Legislation

Many scholars interested in surrogacy and its regulation do not propose any sort of federal legislation or even believe that federal legislation is the best way to handle surrogacy arrangements—either from a protective or regulatory standpoint. Existing bodies of law like contract law or existing statutes, like those used to determine parental rights in custody disputes, are often offered as a panacea for the problems created by surrogacy. Here, a variety of alternatives to federal legislation will be discussed; a critique is found in the proceeding section.

Prohibition and Restriction. As discussed, there are many valid criticisms of surrogacy. Surrogacy has the potential to commodify and exploit both women and children, among other things. These concerns are not to be taken lightly. Concerns about baby selling and the exploitation of poor women are so pressing that some scholars believe only a prohibition or serious restriction on the use of surrogacy contracts is appropriate. Scholars like Scott Rae (1994) propose a ban on commercial surrogacy agreements, arguing that commercial surrogacy is synonymous with baby selling and thus must be prohibited as a rule of law (Rae 1994, 64). Rae argues that surrogacy, especially in the context of commercial arrangements, clearly puts a market price on children and this violates public policy (Rae 1994, 67). Rae suggests that no person should be allowed to enter into a commercial surrogacy agreement and that anyone who does may be found guilty of a misdemeanor and subject to fines of up to $5,000 (Rae 1994, 170-172). Rae believes that this legislative response is superior to others because it removes children from the market and protects women from exploitive practices (Rae 1994, 50-55).

Taking much the same approach as Rae, Field (1993) also believes that restricting surrogacy arrangements is desirable. While not proposing an outright ban on commercial surrogacy arrangements, Field does not believe that federal legislation regarding surrogacy agreements is needed because it will legitimize and increase the practice, something that she believes to be in
dissonance with moral values held by United States citizens (Field 1993). Field, instead, argues that the current landscape which involves sparse and non-uniform state legislation and the non-enforcement of surrogacy contracts is preferable (Field 1993, 223-226). Field believes that this will curb the practice of surrogate motherhood arrangements because parties uncertain of their legal rights and responsibilities under surrogacy contracts are likely to shy away from partaking in the practice. She does not believe an outright prohibition is appropriate, however, because it denies women the opportunity to use their bodies for the economic activities, like commercial surrogacy arrangements, that she believes they have the right to choose for themselves (Field 1993, 226).

Family Law. Far from proposing any sort of new federal legislation that regulates surrogate motherhood agreements, many scholars propose using existing legal framework to handle surrogacy agreements. Family law has been pointed to by many as the appropriate forum in which surrogacy disputes may be heard. For example, Narayan (1999) suggests that handling disputed surrogacy agreements as custody battles is sufficient (Narayan 1999, 78). Narayan believes that those who offer a genetic connection, gestation, or long term care of a child all have “prima facie bases for the standing to claim legal recognition of parental relationships to the child.” She continues, “By this I mean that each of them should suffice in its own right for the law to consider the relationship to be a parent-child relationship that might warrant legal recognition and to provide bases for claims to custody of visitation relationships between adults and children” (Narayan 1999, 79). Narayan sees that all parties in a surrogacy arrangement contribute something to the arrangement and the conception of the child; because of this, all of them have some vested interest or right to claim parentage of the child. In this way, Narayan believes that custody disputes arising from surrogate motherhood agreements are not altogether different from any other custody dispute and thus the same body of law can be used to govern both. Narayan uses this approach because she does not believe that a genetic relationship should always confer parental rights on a person, especially
considering the anonymity involved in sperm and egg donation (Narayan 1999, 79-81). Also, Narayan believes that the discomfort and risk involved with pregnancy and gestation, as well as the possibility that the gestational carrier may develop a strong relationship with the unborn child constitutes a reason for her to also be considered worthy of legal parentage of the child (Narayan 1999, 81). Like other custody disputes, Narayan writes that, “If there are conflicts or disagreements between parties who have a variety of bases for parental claims to children, decisions about custody and visitation must be determined according to the best interests of the child” (Narayan 1999, 82).

Beyond custody disputes, many lawyers treat surrogacy arrangements as legally synonymous with pre-birth adoption proceedings. Because there is no standard legal form for surrogacy arrangements, lawyers and some courts in need of guidance have tried to apply adoption regulations to surrogate motherhood arrangements.

**Contract Law.** Dr. Richard Epstein suggests that national legislation is not necessary because contract law already has established principles that apply to surrogate motherhood agreements. Epstein believes that surrogacy contracts should be enforced under contract law; there is nothing so unique about surrogacy contracts as to render them beyond the scope of contract law, he argues (Epstein 1995). Epstein remarks that, “Indeed, one of the greatest intellectual failures of modern public debate is the routine assumption that special problems require special solutions, usually ones that call for some form of government intervention into the operation of markets” (Epstein 1995, 2306). Epstein is cognizant of the fact that surrogacy contracts involve things much more precious than mere property—they essentially involve the exchange of a human life. Still, Epstein asserts that surrogacy contracts should be fully valid and enforceable.

**Failures of Alternatives to Legislation**

**Prohibition and Restriction.** Both Rae (1994) and Field (1993) propose allowing practices or implementing practices that will seriously restrict the use of surrogacy arrangements in the United
States. As should be evident by this point, this is not a satisfactory response and is not the best alternative to the current political and legislative landscape for any of the parties involved. Refusing to provide answers to the issues that surrogacy raises, by either prohibiting surrogacy entirely, or by taking no action and refusing to enforce even gestational surrogacy agreements does not solve the problems created by this assisted reproductive technology. Beyond that, imposing blanket prohibitions on surrogacy severely curbs the procreative and reproductive rights of women and men who are infertile of suffer from childlessness for other reasons. Restricting citizens’ rights in an effort to avoid a moral and political discussion regarding surrogacy is not a satisfactory solution to the surrogacy problem.

Also, as Narayan discusses, criminalizing or severely restricting surrogacy contracts has the potential to drive the process underground, creating a black market where children and parental rights can be bought and sold free from regulation of any kind (Narayan 1999, 75). While believing that surrogacy provides an unequalled social service, Schuck notes that the practice is not without imperfections and moral and ethical considerations. But, while serious considerations do exist, eliminating surrogacy because of them takes away a very valuable social utility unjustifiably. Speaking of the service surrogacy provides, Schuck notes that, “These benefits create a strong presumption that we should regulate surrogacy rather than ban it” (Schuck 1990, 134). It is undeniable that surrogate motherhood agreements provide a social utility unlike anything else—making sure that they do so in accord with respect for human dignity, human rights, and an appreciation for life should be the ultimate goal.

Family Law. Because surrogacy contracts create parental disputes far more complex than those typically arising under natural child birth, existing case law regarding custody battles would probably not suffice for long. Discussed earlier, there is the potential for a child born through the use of gestational surrogacy to have six “parents” or adults with some form of legal claim of
parentage to the child. Family court judges have little experience dealing with situations like this and are generally ill-equipped to make such significant decisions regarding the parentage of a child without some form of public policy—whether it be statutory law or federal legislation—to provide some semblance of guidance. County courts and common pleas courts cannot be expected to take on such weighty issues without the assistance of the Supreme Court or the legislature.

Simply adapting surrogacy arrangements to fit the preexisting legal statutes and legal procedures used in family court seems insufficient to protect the interests of all parties involved—the intended parents, the surrogate mother, and the unborn child. Also, while Narayan believes that both gestation and genetic contributions are fairly equal contributions to a child in the context of surrogacy, the courts have not yet adopted the same belief, as was demonstrated in *Johnson v. Calvert* (1993). Uncertain of what parental rights they would be guaranteed by law under surrogacy agreements, both hopeful parents and potential surrogate mothers may shy from taking part in the practice. This case by case kind of determination does not protect surrogacy from outside threats and criticism, provides no sense of uniformity and information regarding rights and duties under surrogacy contracts, and does little to protect the rights of the surrogate mother or the intended parents. Traditional custody disputes involving the two genetic parents of a child are much different than custody disputes arising from surrogacy agreements; not only are traditional custody disputes much easier to adjudicate and decide in the best interest of the child, but they have much less moral and ethical baggage in most cases.

Also, surrogacy and adoption are different in some very important ways. Krimmel (1992) explains that, “Adoption is an emergency: What will we do with the baby if the mother cannot keep him? Surrogate mother arrangements on the other hand, are premeditated” (Krimmel 1992, 61). Krimmel argues that the woman who is considering giving a child up for a adoption and the woman who has agreed to serve as a surrogate mother are very different from one another because one can
make a decision that she believes to be in the child’s best interest and the other cannot because she is restrained by the terms of a contract (Krimmel 1992, 61). Adoption and surrogacy are not the same; while many lawyers have treated surrogacy arrangements as pre-birth adoptions for legal purposes, mainly because a lack of better alternatives does not exist, they are not synonymous.

Because surrogacy contracts involve things not typically associated with the creation of a family, like the exchange of money for parental rights, it is difficult to make legal determinations strictly within the boundaries of family law. Family court and common pleas judges, the judges who would be on the frontlines of hearing custody disputes arising from surrogate motherhood agreements are used to handling routine custody disputes between genetic parents or family members, not children who are the products of assisted reproductive technology. Not only are family courts ill equipped to hear cases like this, but in complex surrogacy agreements involving potential egg and sperm donors, judges have few statutes to rely upon and generally even less case law to look to for guidance. Assisted reproductive technologies introduce a variety of complex medical procedures and opportunities to donate genetic material that are beyond the complexity of family law as it currently exists (Shevory 2000, 65). It is not the job of the court to legally define parenthood or what makes someone a parent and they should not be expected to do so in the course of adjudicating complaints arising from surrogacy contracts. The legislature is supposed to be the bastion providing the law for the courts to apply; when the legislature fails to create a law, the courts are left with little guidance and are forced to make legal definitions and principles of their own—something which is undesirable in the tripartite division of government that exists in the United States. The courts should not be responsible for both creating and applying the law; this is as true when applied to surrogacy arrangements as it is when applied to all other legal principles.

**Contract Law.** Richard Epstein proposes making surrogacy contracts valid and enforceable. Basically, if a woman signs a contract to gestate and give birth to a child and then relinquish her
parental rights after the child is born, she should be forced to do so as per the terms of the contract. If the woman should fail to uphold the contract, a legal remedy would be provided for the opposing party or parties to the contract. Currently very few states and very few scholars adhere to this belief. Martha Field (1990) provides a direct answer to Epstein in her article, “The Case Against Enforcement of Surrogacy Contracts.” Field argues that it is important to decide whether any social benefit is incurred from the enforcement of surrogacy contracts; Field argues that there is not (Field 1990, 202). Field argues that the current practice of non-enforcement of surrogacy contracts allows the practice to still take place without compromising the integrity of the parties involved (Field 1990, 202).

Allen (1990), too, argues that contract law is not well suited for handling surrogate motherhood agreements. Allen writes, “Contract principles seem inapposite in the child custody context as well. Surely, procreative privacy rights—rights of constitutional dimensions—and the best interest of the child dwarf mere contractual rights” (Allen 1990, 145). The complex nature of surrogacy and the serious moral concerns that are raised when deciding whether to force a birth mother to relinquish her child because she signed a pre-birth contract are very troubling and are more troubling than contract law can possibly cope with. Noel Keane (1992) opposes the use of contract law for many of the same reasons as Allen. Keane asserts that it is difficult to think of surrogacy contracts or agreements in terms of contract law because it would be difficult to provide legal remedies to certain breaches of contract either on behalf of the surrogate mother or the intended parents (Keane 1992, 275). For example, while it may be easy to force the intended parents to pay the surrogate mother the amount agreed upon in the contract, it is more difficult to force the surrogate mother, especially if she is the natural mother, to actually give up the child. If the surrogate does not want to give up the child, what legal remedy do the parents have? Also, how can the contract be enforced if the woman serving as the surrogate cannot become pregnant? Money seems
like the only ethical legal remedy available to the intended parents in these instances and it certainly falls short of the legal performance they were hoping to receive from the surrogate mother.

Field, Allen, and Keane, all point out the serious shortcomings of contract law in its relation to surrogate motherhood agreements. Fox (2000) points out that while surrogacy does generally occur within the scope of a contract, it is possible that some things are too precious and sentimental to be regulated by contract law—the same body of law that applies to employment bargaining and the sale of real estate (Fox 2000, 483). Contract law’s barriers are stretched too thin when applied to surrogacy. For one, serious ethical concerns arise from the application of contract law to surrogacy. While it may be legal to force a woman who serves as a gestational carrier to relinquish the child she carries, because it is not genetically related to her, it is not a commonly accepted fact that it is ethical or legal to force a natural mother to give up her child because she signed away her rights to him or her. The New Jersey Supreme Court held in *In Re Baby M* (1988) that traditional surrogacy contracts were void and unenforceable; the courts did not have the legal power to make a natural mother relinquish her child to parties whom she had signed a contract with.

Contract law, while possibly applicable to situations of gestational surrogacy, as the Supreme Court of California argued in *Johnson v. Calvert* (1993), does not appear as fitting in cases of full surrogacy. Contract law appears not to be the best way to protect or regulate surrogacy, as it does not fit both cases of surrogacy very well. Borrowing Emily Jackson’s words, “It is… usually assumed by family lawyers and contract lawyers alike that the ordinary law of contract has no place in the regulation of surrogacy. Contract law’s abstention from involvement in family matters has a long history, and it is undoubtedly true that contractual ordering is often assumed to be an inappropriate way to organize domestic relationships” (Jackson 2001, 309). Because contract law cannot be used equally to make legal determinations in instances of gestational surrogacy and full surrogacy and
does not take into consideration the very significant ramifications of determining parentage on the basis of contract alone, it seems inappropriate when applied to surrogacy arrangements.

In sum, alternative means for handling surrogacy arrangements are subpar, especially in comparison to the benefits that could potentially be conferred by federal legislation. Contract law, family law, and adoption statutes are not well suited to handle the issues raised by surrogacy. Each of these bodies of law is intended to deal with very different scenarios and does not accommodate surrogacy arrangements in the way that is necessary to both protect the practice and the parties to surrogacy contracts. Law better tailored to the needs and concerns raised by surrogacy is preferable to any of the existing areas of law that have been used to make legal determinations regarding surrogacy to this point.

**Concerns about Federal Legislation**

There are serious concerns about subjecting surrogacy to federal regulatory legislation. Some scholars believe that a male-dominated Congress will be insensitive or ignorant to female needs regarding surrogacy and female reproductive abilities in general. Others worry that any kind of national legislation may restrict the ability of some men and women’s ability to employ the uses of a surrogate mother. A contingent of scholars suggest that the ability to regulate surrogacy and other assisted reproductive technologies may lie beyond the scope of Congress’s power. In general, scholars raise a number of serious and noteworthy concerns regarding the possibility of a national legislative response.

concern about the federal government’s ability to impose any semblance of a regulatory framework on surrogate motherhood agreements (Robertson 1992, 52). Robertson argues that this probably prevents Congress from arguing that it has the ability to prohibit surrogacy, but it also might prevent Congress from taking steps to seriously regulate surrogate motherhood agreements for fear that their actions would be deemed unconstitutional in light of other cases regarding reproduction (Robertson 1992, 52-53). Robertson argues that not only would the federal government be beyond the scope of its powers if it tried to prohibit surrogacy, but reciprocally it may not be able to provide an explicit protection of surrogacy contracts for similar reasons (Robertson 1992, 53). Refusing to either specifically allow or prohibit surrogacy allows the government to occupy a comfortable position in which it is largely not responsible for regulating any assisted reproductive technologies (Robertson 1992, 53). Discussed earlier, the federal government seems to prefer not to regulate assisted reproductive technologies, leaving any necessary regulation regarding screening procedures, ethical concerns, etc. to the medical community.

The Relationship Between Law and Morality. Steinbock largely agrees with Robertson’s assertions; she too believes that the United States Congress could probably not prohibit surrogacy arrangements because a constitutional right to privacy regarding reproductive matters has been established (Steinbock 2004, 256). Steinbock is concerned, however, that the moral and ethical debate surrounding surrogacy may affect the tone of any national legislation that might be proposed. Surrogacy has been prohibited in many other Western countries, for what Steinbock believes to be largely moral grounds (Steinbock 2004, 256). Steinbock worries that while the United States Congress may not have the ability to impose a blanket ban on surrogacy arrangements, it may have the power to seriously restrict the availability and use of such arrangements (Steinbock 2004, 256). Steinbock asserts that even if there are serious moral concerns about surrogacy arrangements or other assisted reproductive technologies, surrogacy should not be prohibited or seriously restricted
(Steinbock 2004, 256). For one, constitutional rights stand in the way of an outright national prohibition. Secondly, surrogacy provides a serious social utility for infertile women and men and should be permitted, despite moral and ethical concerns it raises (Steinbock 2004, 256). Still, Steinbock asserts that the interaction and potential conflict between law and morality may taint any national legislative proposals and that is a cause for concern for surrogacy contract supporters. Legality and morality, Steinbock asserts, are two very different things (Steinbock 2004, 255-256).

Threats to Non-Traditional Families. Building on Steinbock’s train of thought, Ertman (2008) also worries about the potential effects that the moral debate over surrogacy will have on the practice, especially for non-traditional families. Ertman asserts that surrogacy has had an immeasurable effect on the creation of non-traditional families (Ertman 2008, 304). Surrogacy has allowed homosexual couples, single women, and single men to become parents. Ertman worries that national legislation might limit the ability of homosexuals and single men and women to employ the use of a surrogate mother (Ertman 2008, 305). Because homosexual men and homosexual women have not been given the same rights as heterosexual men and heterosexual women, especially regarding issues like marriage and the right to become a parent, Ertman wonders if the non-uniform state legislation might be preferable because it allows a wider range of people in the United States to have access to the surrogacy market. Ertman writes, “If public law was the sole determinant of who could become a parent through alternative insemination or other reproductive technologies, then many gay people would likely be excluded from that opportunity” (Ertman 2008, 305). Ertman’s concern is a very valid one; the law and the courts have refused to extend equal protection and equal rights to homosexuals in every context, and surrogacy may well be one of the next areas where there is a division between the rights of heterosexuals and of homosexuals if national legislation is introduced.
Gender Concerns. Shanley (2001) worries that legislation will not protect the rights of women or minorities. Shanley writes that, “When trying to determine what public policy with respect to surrogacy should be, it is important to take into account that payment for gestational service does not occur in some gender- and race-neutral environment” (Shanley 2001, 115). Shanley argues that the United States Congress is less likely to take the concerns of women and minorities to heart because both groups are underrepresented in Congress. The lack of female and minority Senators and United States Representatives decreases the likelihood that any national legislative response would be cognizant of the concerns of either of these groups (Shanley 2001, 115-117). Shanley argues that the male-dominated political landscape in the United States poses a threat to surrogacy because any possible legislative proposal from Congress is not likely a product of a legitimate discussion between parties likely to enter into a surrogacy contract that takes into consideration the worries and concerns they might have (Shanley 2001, 115-117). This is problematic, because as discussed earlier, the opportunity exists for women to be both taken advantage of and commodified by surrogate motherhood agreements. If potential or previous surrogate mothers have no input regarding federal legislation, the legislation may not serve to protect them any better than they are today.

Steinbock (2004), Ertman (2008), and Shanley (2001) all raise very legitimate concerns about federal legislation regarding surrogacy. Federal legislation regarding surrogacy could seriously restrict the ability to enter into surrogate motherhood agreements or it could fail to offer any better solutions to the issues surrogacy raises that state legislation already offers. These are all very valid reasons for being wary of introducing federal legislation regarding surrogacy in the United States. As supporters of surrogacy are well aware though, the lack of uniform legislation regarding surrogacy is troubling on many levels and also poses serious threats to the practice. The concerns just mentioned are as possible at state level as they are at the federal level; individual state legislatures could be
immune to these concerns in the same way that the United States Congress is accused. Strong lobbying efforts from supporters of surrogacy, however, could help raise awareness about these issues and ensure that they are address in legislative discussions.

**Thoughts on Federal Legislation**

Federal legislation not only provides the best protection of surrogacy agreements, but it also offers the best way to regulate surrogacy agreements. Schuck explains, “Surrogacy’s major risks are inadequate information and the possibility of people changing their minds as the child develops in the womb or after the child is delivered. These risks, however, can be minimized through straightforward regulatory methods” (Schuck 1990, 138). Federal legislation can protect surrogacy arrangements and the parties to surrogacy arrangements by allowing certain considerations to be taken into account. Federal legislation regarding surrogacy has the potential to drastically alter how surrogacy is practiced in the United States, presumably for the better. Federal legislation offers protection of surrogacy and those involved with the practice far superior to what other areas of existing law can offer.

Borrowing from Debora Spar, “Admittedly, imposing rules on surrogacy will not be easy. Individuals have very strong views on the practice…” (Spar 2006, 95). The road to the creation of federal legislation regarding surrogacy practices will not be a short one or one without speed bumps and setbacks. Citizens hold very strong views about surrogacy in its many forms, both in support of the practice and in opposition to the practice. Legislation specifically allowing surrogacy and regulating surrogacy would undoubtedly be the product of great compromise on behalf of both sides. Legislation would also potentially have to cover very complex issues like how to determine parental rights in a variety of theoretical situations, how much money a surrogate should be able to receive or even how much money she should be guaranteed, what should happen if the child were to die before birth, and more. These issues, however, are much better handled by the United States
Congress than by contract law or family court judges. Failing to address these issues threatens the future of surrogacy agreements and the rights of those women and men who become parties to them. Legislation, while not without its potential risks and inevitable flaws, is the best option available in the United States.

**Conclusion**

Surrogacy might not first appear a very pressing matter ethically, morally, or even legally. However, “[In] numbers now difficult to ignore, an estimated 25,000 women have given birth through surrogacy in its contemporary form as a legal, commercial process since the late 1970s” and while “It is estimated that over 99% of these women willingly relinquished the child as they had contractually agreed to do” there are still other issues related to surrogacy that are in dire need of a legislative response (Teman 2008, 1104). As critics of surrogacy have noted, surrogacy has the potential to cause serious psychological and emotional damage to members of society. Surrogate motherhood agreements leave women vulnerable to exploitation, objectification, and commodification. Surrogacy might also damage the psychological development of children born out of the practice. These are concerns that cannot be ignored. As surrogacy increases in popularity and becomes a more welcomed part of popular culture, these concerns will not dissipate but will continue to fester. Failure to address these concerns leaves surrogate motherhood agreements vulnerable to a great deal of criticism from scholars, the media, and the public, but it leaves parties to surrogacy contracts entirely without protection.

Surrogacy is a practice worthy of protection. Surrogacy, while not a medical cure to infertility or childlessness, offers those who are unable to have children naturally the chance to become parents. The opportunity to become a parent is arguably one of the most significant experiences in a person’s life. Robertson (2003) explains, “Childrearing is a rewarding and fulfilling experience, deserving respect whether or not the person who rears also provided the genes or bore the child. To
deny someone who is capable of parenting the opportunity to rear a child is to deny him an experience that may be central to his personal identity and his concept of a meaningful life” (Robertson 2003, 410). Surrogacy provides an unparalleled social utility and something no other assisted reproductive technology or adoption can provide: genetic children. Because of this, the threatening political landscape in which surrogacy currently exists must be rectified. While numerous bodies of law could arguably be applied to surrogacy arrangements, federal legislation provides the best and most comprehensive answer to the complex legal, ethical, and moral issues raised by surrogate motherhood agreements.
Bibliography


