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Out of the Goodness of My Heart, I Give You this Child

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Out Of The Goodness Of My Heart, I Give You This Child

I. Introduction

Advancements in medical technology have improved many areas of the medical field, allowing doctors to discover new treatments and procedures to benefit the health and needs of patients. One area that has continued to advance is assisted reproductive technology.¹ As a result of the advancement, the number of people using assisted reproductive technology has increased.² Approximately 8% of women in the United States will seek infertility treatment and the assistance of technology to become or stay pregnant.³ One form of assisted reproductive technology that has expanded with the advancement of technology is surrogacy.⁴

The use of surrogates in the United States has enabled couples previously unable to conceive or carry a child of their own to become parents and start a family.⁵ There are two types of surrogacy agreements: traditional and gestational.⁶ Both traditional and gestational surrogacy agreements present moral, ethical and legal problems that the courts and legislatures are forced to address.⁷ In order to address the public policy and legal concerns of surrogacy, this paper

¹ John Lawrence Hill, *What Does it Mean to be a "Parent"?* *The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U.L. REV. 353, 355 (1991) (noting that within the past two decades, the development of reproductive technology has now separated the two processes of conception and gestation).

² Naomi Cahn, *Do Tell the Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1082 (2014) (noting that the use of infertility services is increasing).

³ *Id.* at 1081 (noting the number of women in the United States experiencing infertility).

⁴ *See generally*, Hill, *supra* note 1, at 554-55 (noting that advancements in surrogacy now provide for the potential of five parents and 16 parental combinations).

⁵ Alyssa James, *Gestational Surrogacy Agreements: Why Indiana Should Honor Them and What Physicians Should Know Until They Do*, 10 IND. HEALTH L. REV. 175, 176 (2013) (arguing that surrogacy has allowed infertile women in the United States to become parents).

⁶ Mark Strasser, *Traditional Surrogacy Contracts, Partial Enforcement, and the Challenge for Family Law*, 18 J. HEALTH CARE L. & POL'Y 85, 87-88 (2015) (explaining the two types of surrogacy procedures).

⁷ Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 238 (2010) (explaining that even though surrogacy and the number of couples choosing to use reproductive technologies to reproduce are faced with the moral, economic and legal obstacles these technologies produce).

argues that the United States should adopt a model similar to the United Kingdom's model of surrogacy agreements, and develop a uniform act that bans commercial surrogacy and requires that surrogacy agreements be based on altruistic motives.

Part II will examine the moral, ethical and legal concerns of surrogacy agreements that arise for the children born of a surrogacy agreement, to the surrogate, and the harms and concerns to the intended parents. In determining the current law in different jurisdictions throughout the United States, Part III will examine how courts have determined whether surrogacy arrangements are valid and enforceable. Part IV of the paper will examine the United Kingdom's approach to surrogacy agreements as well as the potential problems with the model the United Kingdom has implemented. Finally, Part V proposes that the United States should adopt a model similar to the United Kingdom's surrogacy agreement approach, and adopt a uniform surrogacy act that prohibits commercial surrogacy and requires altruistic motivations for entering into the agreement.

II. Moral, Ethical, Social and Legal Concerns of Surrogacy

As advanced reproductive technologies have become more sophisticated, surrogacy has emerged as possible method to assist couples in beginning a family.⁸ However, surrogacy agreements are controversial because they present moral, ethical social and legal concerns for all of the parties involved in the agreement.⁹ The parties involved that could be victimized by the surrogacy agreements include the unborn fetus, the surrogate women, and the intended parents.¹⁰ In order to understand the moral, ethical, social and legal concerns surrounding surrogacy

⁸ *Id.* at 242 (explaining that surrogacy is a relatively new advancement, only becoming widely available in the 1980s).

⁹ *Id.*

¹⁰ Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 398-409 (2012) (describing the concerns of surrogacy and the harms that could arise to the parties involved in the contract and the unborn fetus).

agreements, it is important to understand what surrogacy is and the two types of surrogacy agreements available.

Surrogacy is an agreement entered into by a woman, the surrogate, which provides that the surrogate will become pregnant and gestate a fetus on behalf of the intended parents.¹¹ The two types of surrogacy agreements are: traditional and gestational.¹² A traditional surrogate becomes pregnant via artificial insemination with the contracting father's sperm or donor sperm.¹³ The donor sperm can be either from an anonymous or a known donor.¹⁴ Further, in traditional surrogacy, the surrogate provides the ovum, creating a genetic and biological link between the surrogate and the child.¹⁵ Alternatively, in a gestational surrogacy, the surrogate has no genetic link to the child.¹⁶ Rather, the intended parents supply either their own or a donor's ovum, which is then fertilized with the intended father's or donor sperm and the resulting embryo is implanted in the gestational surrogate's uterus.¹⁷ The gestational surrogate then carries the embryo to term, creating only a biological link to the child.¹⁸ Both traditional and gestational surrogacy arrangements pose moral, ethical and legal concerns for the parties involved.¹⁹

A. *Harm to the Unborn Fetus*

¹¹ See generally, Strasser, *supra* note 6, at 87-88. (describing the two kinds of surrogacy: traditional and gestational).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See, London, *supra* note 10, at 394. (explaining the biological and genetic relationship between the parties of the surrogacy agreement and the unborn fetus in each of the two types of surrogacy arrangement).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See, Lorillard, *supra* note 7, at 238.

Baby Selling

One of the prominent concerns in the surrogacy debate is that surrogacy equates to commodification of children.²⁰ In surrogacy agreements, the surrogate typically receives compensation solely for rendering services.²¹ However, because the payment to the surrogate is contingent upon the surrogate relinquishing custody of the child, opponents claim that the payment for services rendered is a proxy for illegal baby selling.²² Further, critics also claim that surrogacy degrades children by treating them as merchandise that can easily be sold for a profit.²³

The fear that surrogacy constitutes baby-selling has been a central reason given by courts for invalidating surrogacy agreements.²⁴ Surrogacy entered the national legal discourse in the New Jersey Supreme Court case, *In re Baby M*, discussed in greater detail in Part III.²⁵ In their holding, the New Jersey Supreme Court invalidated and refused to enforce a surrogacy contract because it was void against public policy and conflicted with the state statute.²⁶ The court noted that New Jersey law, *N.J.S.A. 9:3-54a*, prohibits the paying for or accepting money in connection with any placement of a child for adoption.²⁷ The court reasoned that baby-selling has inherent evils for the child, because the child is sold without regard for whether the purchasers will be

²⁰ *E.g.*, London, *supra* note 10, at 498-400 (presenting opposing views regarding baby-selling in regards to surrogacy agreements).

²¹ *Id.* at 498.

²² *Id.* (arguing that opponents of surrogacy do not view the payment received by the surrogates is for their services rendered, but rather, the surrogates are actually receiving the payment in exchange for a child, constituting a sale of the child).

²³ Elizabeth S. Scott, *Show Me the Money: Making Markets in Forbidden Exchange: Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROB. 109, 112 (2009) (describing the view proposed by opponents of surrogacy during the *In re Baby M* case).

²⁴ *See, In re Baby M*, 109 N.J. 396, 423-25 (N.J. 1988).

²⁵ *E.g.*, Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Perspective*, 20 WM. & MARY J. OF WOMEN & L. 423, 428 (2014).

²⁶ *See generally, In re Baby M, supra* note 24 at 430-36 (arguing that the agreement was in violation of the state statute which prohibited the exchange of money for a child within the state and was against public policy because it promotes the permanent separation of the child from one of its natural parents).

²⁷ *See, Id.* at 423. (explaining that New Jersey state statute prohibits the exchange of money for a child); *See also, N.J. Stat. § 9:3-54.*

suitable parents.²⁸ Further, the court held that it is in the best interest of the child to remain with their natural parents, which critics of surrogacy have argued allows the mother-child relationship to foster by allowing the child the opportunity bond with the women.²⁹

B. *Harm to the Surrogate*

Commodification of Women

In addition to the commodification of children, opposition to surrogacy also rests on the belief that surrogacy is the commodification of a woman's body.³⁰ Opponents claim that surrogacy is a form of prostitution.³¹ Third parties, such as fertility treatment clinics, that foster the relationship between the intended parents and surrogates act as "pimps" who sell the reproductive ability of women.³² Instead of embracing the unique capability of a woman's body to bear a child, they reduce it to a commodity and rent the womb for nine months at a time.³³

Surrogacy agreements are also opposed on the assertion that surrogacy constitutes reproductive slavery.³⁴ Surrogacy is an expensive process to endure and costs thousands of dollars.³⁵ As a result, women of higher socioeconomic status, typically Caucasian women, are more likely to be able to afford to hire a surrogate of a lower socioeconomic position.³⁶ As many

²⁸ *Id.* at 425.

²⁹ *Id.* at 435 (expressing their desire to keep children with their natural parents and to avoid unnecessary separation consistent with adoption law in New Jersey).

³⁰ Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 161-62 (1997) (expressing the views of opponents that surrogacy is a commodification of a women's reproductive abilities).

³¹ *Id.*

³² *E.g., Id.* at 162 (describing the relationship between the surrogate women and the doctors and lawyers who are in the business of fostering relationships in order for profit).

³³ *E.g., Id.*

³⁴ *Id.*

³⁵ See generally, Circle Surrogacy, *Anticipated Costs for Gestational Surrogacy*, <http://www.circlesurrogacy.com/costs> (providing anticipated payment price to participate in gestational surrogacy agreements and allowing viewers to individualize situation for a predicated cost of services).

³⁶ See, London, *supra* note 10, at 405-06 (arguing that because of the high expense of surrogacy procedures, individuals who occupy higher socioeconomic, who tend to be Caucasian, will more likely be able to afford to higher a surrogate, which evidence suggests typically tend to occupy lower socioeconomic statuses, composed of a large number minorities).

minorities tend to occupy the position of lower socioeconomic statuses, minorities once again become slaves, providing undervalued services while subjugated to the needs and desires of the Caucasian women in society.³⁷ The womb of African American or minority women becomes a commodity that the white women can rent for nine months.³⁸ Upon the completion of the task, the birth of the child, the minority women are dismissed from the life of the child and the white family whom they have provided services for, and become available for the next white family that can afford to hire them.³⁹ Because the reproductive technologies are expensive, the minority women in lower socioeconomic communities are typically able to provide these services, but the lack of ability to afford these services for themselves reinforces notion that surrogacy is a method available only for white women and families.⁴⁰

Therefore, minority raced women are exploited because they are expected to provide their bodies to upper middle class women who are usually Caucasian, at a monetary rate that is undervalued and essentially encouraging reproductive slavery.

Economic Exploitation

As stated above, although not empirical, data thus far collected from couples whom are exploring the potential use of surrogacy tend to hold professional positions in the workforce, while surrogates generally are of a lower socioeconomic status.⁴¹ Those that oppose surrogacy arrangements fear that women who agree to act as surrogates expose themselves to the risk of

³⁷ *See, Id.*

³⁸ *See, Id.*

³⁹ *See generally*, April J. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83 (2001) (comparing the similarities between historical treatment of African American women as mothers and slaves to the role of African American women as surrogates).

⁴⁰ *E.g.*, London, *supra* note 10, at 408 (describing how “the reproductive rights agendas are shaped by the dynamics of class and race.”).

⁴¹ *Id.* at 405-06.

economic exploitation, as many may be in need of the money.⁴² The financial vulnerability that the women in lower socioeconomic classes endure creates the risk that the commissioning couples may take advantage, by providing minimal compensation disproportionate to the services rendered, realizing that these women are desperately in need of any financial payment they can obtain.⁴³

The fear of economic exploitation by fertility clinics is also a concern of many opponents. Surrogate pregnancies have been estimated to cost between \$80,000 and \$120,000 per pregnancy.⁴⁴ However, surrogates typically only receive ¼ of the total cost in payment, as the base fee compensation for surrogates is between \$25,000 and \$30,000, subject to increase if there are external factors that may increase compensation.⁴⁵ When examining a \$30,000 base price that surrogates may receive over a 9 month period, the payment of the surrogates hourly is vastly below the federal minimum wage, at approximately \$4 per hour.

Because surrogate women generally occupy a lower socioeconomic status in society, it is often difficult for the women to obtain employment.⁴⁶ Therefore, the potential lack of alternative employment surrogates may enter the agreement in order to ensure they have an income, even when the payment is low and can cause a health risk.⁴⁷

⁴² *Id.* at 406 (explaining that a lack of employment and economic income placed these women in vulnerable where positions where their decision to enter into the agreement may no longer be voluntary, but rather what must be done to survive).

⁴³ *See, Id.* at 408 (arguing that because of the economic status of the commissioning couples, the wealth they can offer the surrogate in need of the money, no matter how little in value, may be accepted by the surrogate in order to guarantee income).

⁴⁴ Christopher White, *Surrogate Parenthood for Money if a Form of Human Trafficking*, (April 4, 2014) <http://www.forbes.com/sites/learnvest/2012/07/23/the-newest-wave-in-outsourcing-to-india-surrogate-pregnancies/>

⁴⁵ *See generally*, Circle Surrogacy, *How Much do Surrogates Get Paid?* <http://www.circlesurrogacy.com/surrogates/how-much-do-surrogates-get-paid> (discussing how much surrogates usually receive for their services and different factors that may increase or decrease their compensation value).

⁴⁶ *See*, Mark Strasser, *Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies*, 60 *Tenn. L. Rev.* 135, 141 (1992) (arguing that there must not be any other forms of employment for these women to obtain because if they had the choice, they would not become surrogates).

⁴⁷ *Id.*

Informed Consent

Another criticism of surrogacy agreements is that the surrogate may be harmed because they are not capable of fully consenting to the surrogacy arrangement.⁴⁸ Those who believe that women are not capable of providing informed consent when entering into a surrogacy agreement believe that potential surrogates are unable to grasp the potential psychological risks associated with carrying a child.⁴⁹ This belief is founded on the assumption that a surrogate is not able to foresee the possible emotional attachment she may develop with the child during gestation.⁵⁰ The concern that a woman is not capable of providing informed consent was highlighted in the decision, *In re Baby M*, as the reason the surrogate refused to surrender Baby M and terminate her parental rights was because she felt a strong bond and connection with the child, as she was both the gestational and biological mother.⁵¹ Although *In re Baby M* demonstrates the concern of many, empirical studies have found that situations similar to what occurred in *In re Baby M* is not pervasive amongst surrogates.⁵²

However, the decision to void surrogacy arrangements on the belief that women are incapable of informed consent because they cannot foresee an emotional attachment to the child upon the birth perpetuates male dominance in society and allows for the continued exploitation of women.⁵³ By entertaining these concerns, the attitude that women in need of a man's guidance

⁴⁸ See generally, London, *supra* note 10, at 400- 02.

⁴⁹ *Id.* at 400 (arguing that pregnancy may result in a psychological connection to the child that a woman cannot predict occurring prior to the pregnancy and she therefore cannot give informed consent because she is not capable of understanding and comprehending the potential outcomes).

⁵⁰ *E.g., Id.*

⁵¹ See, *In re Baby M*, *supra* note 24, at 415 (describing how the surrogate refused to comply with the agreement to relinquish the child because she had not anticipated the emotional attachment and bond she felt with the child).

⁵² See, London, *supra* note 10, at 401 and n.90. (describing empirical evidence concluding that none of the surveyed surrogates expressed doubt in regards to their decision to relinquish the child to the intended parents).

⁵³ See, *Id.* at 401 (arguing that the advancement of this argument will undermine the feminist theory of self-autonomy).

in order to protect her psychological well-being continues to invade society.⁵⁴ By continuing to endorse the belief that women are incapable of providing informed consent, women's decision making ability will continue to be considered inferior to that of the men's.⁵⁵

C. *Harm to the Intended Parents*

Economic exploitation

Intended parents risk being the victim of economic exploitation different than that of the surrogates because the intended parents typically are in a higher socioeconomic class.⁵⁶ However, the intended parents are vulnerable to being exploited because of their desire for children and to have a family.⁵⁷ For some example, the desire of intended parent's to have a child via surrogacy costs them their life savings and did not result in a child, as the intended parents continued to provide compensation to a fertility clinic based on fraudulent statements made by the clinic.⁵⁸ Unfortunately, by the time the couple realized the scheme, it was already too late and their vulnerability and desire for a child led to their economic exploitation.⁵⁹

Surrogacy arrangements produce ethical, moral and legal problems for society.⁶⁰ The central concerns of surrogacy arrangements revolve around the harm that can result from their creation to the child born via a surrogacy arrangement, the surrogate mother, and the intended

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See, Julie Shapiro, *For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1349 (2014) (arguing that the intended parents typically are in a higher socioeconomic status than the surrogate, but the intended parents are still vulnerable to economic exploitation, even if for a different reason).

⁵⁷ See, *Id.* at 1349 n.20 (arguing that intended parents may be economically exploited because of their willingness to spend an amount necessary to fulfill their desire to have a child).

⁵⁸ See, Tamar Lewin, *A Surrogacy Agency that Delivered Heartache*, (July 27, 2014), <http://www.nytimes.com/2014/07/28/us/surrogacy-agency-planet-hospital-delivered-heartache.html> (explaining how a couple unknowingly relied on fraudulent statements and kept providing payment to a fertility clinic that took the money but did not provide for a surrogate or child).

⁵⁹ *Id.*

⁶⁰ See, Lorillard, *supra* note 7, at 238.

parents of the child.⁶¹ Some of the concerns that both opponent and proponents of surrogacy have addressed are the commodification of women and children, racial exploitation of surrogate women, economic exploitation of both the surrogate mother and the intended parents and whether the surrogate woman has the ability to provide informed consent to enter in the surrogacy agreement.⁶² Considering all of the concerns of surrogacy that scholars have eluded to, the courts in the United States have been attempted to approach surrogacy in a manner what would best protect all of the parties involved. However, in trying to do so, courts have taken different perspectives to the best approach to prevent these potential harms. The current law in the United States are inconsistent, leaving parties uncertain of their rights when entering into a surrogacy agreement.

III. Current Law

In most cases, before a surrogate become pregnant, the contracting parents and the surrogate execute an agreement setting forth the terms of the arrangement and indicating who will be the parents of the child when the child is born.⁶³ Most surrogacy agreements will never be reviewed by a judge because in most cases, the parties comply with the terms of the agreement. When they do not, however, they present intractable legal, ethical, and moral questions as we have seen. This part examines cases in the United States and the approaches different state courts and legislatures have taken when addressing the enforceability and validity of surrogacy agreements.

A. The Perspective of the Courts

⁶¹ See generally, London, *supra* note 10, 398-408.

⁶² *Id.*

⁶³ E.g., *In re Baby M*, *supra* note 24, at 411 (explaining that the two parties, the surrogate and the intended parents, had entered into a surrogacy agreement).

New Jersey

Surrogacy entered the spotlight of discussion with the decision of the New Jersey Supreme Court case *In re Baby M*, the first surrogacy case to reach a state supreme court.⁶⁴ This case involved a traditional surrogacy agreement between Ms. Whitehead, the surrogate, and Mr. Stern, the contracting father who was also the genetic father.⁶⁵ Ms. Whitehead agreed to serve as a surrogate for Mr. Stern and his wife, who was unable to conceive and carry a baby to term.⁶⁶ Upon the birth of the child, Ms. Whitehead would surrender the child to Mr. Stern and his wife as well as renounce her parental rights, allowing Mrs. Stern to legally adopt the child as her own.⁶⁷ However, after the birth of the child, Ms. Whitehead refused to comply with the terms of the contract, and refused to deliver Baby M to the Sterns or relinquish her parental rights.⁶⁸ As a result, Mr. Stern filed a complaint to have the surrogacy agreement enforced.⁶⁹ The New Jersey trial court held that the surrogacy agreement was valid and should be enforced, thereby declaring Mr. and Mrs. Stern the legal parents of Baby M as stipulated by the contract.⁷⁰

Following the decision of the trial court, Ms. Whitehead appealed.⁷¹ The New Jersey Supreme Court reversed the decision of the trial court and held that the surrogacy agreement between Mr. Stern and Mrs. Whitehead was invalid and would not enforce the agreement.⁷² As a result, the Supreme Court retracted Mrs. Stern status as the legal mother and alternatively held

⁶⁴ *E.g.*, Shapiro, *supra* note 56, at 1053 (explaining this was the first case to discuss surrogacy).

⁶⁵ *See generally*, *In re Baby M*, *supra* note 24, at 411 (discussing the general background information and facts of the case).

⁶⁶ *Id.*

⁶⁷ *Id.* at 412.

⁶⁸ *Id.* at 414-15.

⁶⁹ *Id.* at 415 (filing complaint requesting the enforcement of the surrogacy contract).

⁷⁰ *See, Id.* at 418-19 (concluding that the statutes governing the matter, such as adoption and termination of parental rights did not apply to surrogacy contracts because the legislative intent was not to include surrogacy in statutes).

⁷¹ *Id.* at 419

⁷² *See, Id.* at 421-22 (holding that the surrogacy contract was invalid and unenforceable because it conflicted with New Jersey statutes and void against public policy).

that Ms. Whitehead was the child's legal mother.⁷³ The court reasoned that a contract that requires an exchange of money for the surrender of a child is void because it is against public policy and constitutes "baby-selling."⁷⁴ The court held that "our law prohibits paying or accepting money in connection with any placement of a child for adoption."⁷⁵ Irrespective of the Supreme Court's holding, custody of Baby M was awarded to Mr. and Mrs. Stern in the best interest of the child, as the Court reasoned Ms. Whitehead had an unstable home environment to raise the child.⁷⁶ The decision of the New Jersey Supreme Court firmly established that couples and surrogates in New Jersey entering into surrogacy agreements would not be afforded protection to enforce the agreement from the courts if an issue were to arise.

The New Jersey Supreme Court again addressed the issue of surrogacy agreements fourteen years following the *In re Baby M* case in the case *In re T.J.S.*⁷⁷ However, unlike *In re Baby M*, *In re T.J.S.* involved a gestational surrogacy agreement.⁷⁸ The Plaintiffs, T.J.S. and A.L.S. were married and A.L.S. was unable to carry a baby to term.⁷⁹ In order to conceive a child, the couple decided that T.J.S. would contribute sperm to fertilize the ovum of an anonymous donor.⁸⁰ Once fertilized, the embryo would be implanted into the uterus of A.F.⁸¹ The surrogate, A.F., entered into the contract with T.J.S. and A.L.S. and was not related to either T.J.S., A.L.S., or the ovum donor.⁸²

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 396.

⁷⁶ *Id.* at 457.

⁷⁷ *In re T.J.S.*, 212 N.J. 334 (N.J. 2012)

⁷⁸ *E.g., See generally, Id.* at 335 (indicating that the ovum was to be from that of an anonymous donor, not the surrogate).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

Prior to the birth of the child, T.J.S. and A.L.S. sought an order from the court to declare A.L.S. the mother of the child.⁸³ The court entered the order and upon the child's birth, A.L.S. was listed on the child's birth certificate as the mother in compliance with the order.⁸⁴ However, after the order was issued, the Department of Health and Human Services sought to have the order vacated, arguing that it was improper for the court to declare A.L.S. mother because a New Jersey state statute, *N.J.S.A. 9:3-41(e)* stated that a gestational surrogate cannot relinquish her parental rights until seventy-two hours after the birth of the child.⁸⁵ Because A.L.S. was declared the mother prior to A.F.'s relinquishing of her parental rights, A.L.S.' title as mother needed to be removed from the birth certificate of the child.⁸⁶

The issue before the court was whether the New Jersey Parentage Act violated the equal protection clause by declaring an infertile male the automatic father of a child genetically related to his wife who had been artificially inseminated, while failing to recognize an infertile woman the automatic mother of a child genetically related to her husband, and that was born to a surrogate.⁸⁷ The trial court granted the state's motion to vacate the declaration of A.L.S. as the legal mother on the birth certificate and held that the New Jersey Parentage Act was constitutional.⁸⁸ In affirming the lower courts, the New Jersey Supreme Court stated that "the status of maternity is grounded either in a biological or genetic connection to the child."⁸⁹

Because A.L.S. was not biologically related to the child, as she did not gestate the child, or

⁸³ *Id.* (explaining that the order from the Superior Court would have mandated that the intended mother, A.L.S. would have been declared as the mother on the child's birth certificate at the time of birth).

⁸⁴ *Id.*

⁸⁵ *Id.* at 336, 347; *See also*, *N.J. Stat. § 9:3-41*.

⁸⁶ *See, Id.* at 336 (explaining that the Department of Health and Human Services said there was no basis for the relief that the plaintiffs requested and therefore the relief was invalid).

⁸⁷ *See generally, Id.* at 334

⁸⁸ *Id.*

⁸⁹ *Id.* at 336.

genetically related, as A.L.S. did not provide the ovum, the only option that remained to declare A.L.S as the mother was through adoption.⁹⁰

California

Five years after the New Jersey Supreme Court decided *In re Baby M*, the California Supreme Court addressed the enforceability of a gestational surrogacy contract in *Johnson v. Calvert*.⁹¹ Mr. and Mrs. Calvert entered into a gestational surrogacy agreement with Anna Johnson.⁹² Anna Johnson agreed to carry to term an embryo created with the Calvert's gametes.⁹³ Just as *In re Baby M* and *In re T.J.S.*, Ms. Johnson agreed to surrender all parental rights upon the birth of the child.⁹⁴ However, the relationship between the Calverts and Ms. Johnson deteriorated during the pregnancy and as a result, Ms. Johnson refused to relinquish the baby to the Calverts.⁹⁵

At the birth of the child, both women claimed to be the child's mother.⁹⁶ Mrs. Calvert, the intended mother, claimed to be the mother because the child was genetically hers.⁹⁷ Alternatively, Ms. Johnson, the surrogate, claimed to be the mother because the child was biologically hers as she had gestated the child.⁹⁸ Unlike the New Jersey Supreme Court in *In re Baby M*, the California Supreme Court enforced the surrogacy contract and concluded that in gestational surrogacy agreements, the intent of the parties would be a dispositive factor in

⁹⁰ *Id.*

⁹¹ *Johnson v. Calvert*, 5 Cal. 4th 84 (Cal. 1993).

⁹² *Id.* at 87

⁹³ *Id.* (indicating that the surrogacy agreement was a gestational surrogacy).

⁹⁴ *Id.*

⁹⁵ *Id.* at 87-88

⁹⁶ *Id.* at 88.

⁹⁷ *Id.*

⁹⁸ *Id.*

deciding parentage.⁹⁹ Therefore, because Mr. and Mrs. Calvert were the intended parents, they were the child's legal parents.¹⁰⁰

Five years after *Calvert v. Johnson* was decided, the California Court of Appeals held in *In re Marriage of Buzzanca*, that gestational surrogacy agreements are enforceable even if the intended parents are not genetically related to the child so long as the surrogate herself was not genetically related to the child.¹⁰¹ The court reasoned that the intended parents would be the legal parents of the child because it was their consent to a medical procedure that caused the procreation of a child.¹⁰² But for the actions of the intended parents, the child would not have come to existence.¹⁰³ The court iterated that “the people who ‘choose’ to bring a child into being are likely to have the child’s best interest at heart,” and therefore, the legal parents should be the intended parents.¹⁰⁴

Tennessee

The Tennessee Supreme Court in the matter, *In re C.K.G.* determined that the intent of the parties involved would not be a dispositive factor, but that it should be taken in consideration when determining parentage.¹⁰⁵ In *In re C.K.G.*, Dr. Charles K.G. and Ms. Cindy C. decided to have a child and pursued in vitro fertilization through a fertility clinic.¹⁰⁶ Although the parties were not married, both parties understood and expected that they would raise the children

⁹⁹ *Id.* at 93 (stating that when one woman contributes genetically to the child and the other biologically as the gestator, the woman that intended to procreate the child is the natural mother under California law).

¹⁰⁰ *Id.*

¹⁰¹ *In re Marriage of Buzzanca*, 61 Cal. App. 1410 (Cal. Ct. App. 1998).

¹⁰² *Id.* at 1410.

¹⁰³ *Id.* at 1425-26

¹⁰⁴ *Id.* at 1425

¹⁰⁵ *See generally, In re C.K.G.*, 173 S.W.3d 714, 728 (Tenn. 2005) (explaining that the court is declining to adopt the intent test of California, but will consider intent amongst other factors when examining the facts of a particular case).

¹⁰⁶ *Id.* at 717

together.¹⁰⁷ Because of Cindy's age, the two parties agreed to enter into a joint contract that stated that Cindy would use an anonymous donor ovum and Charles' sperm to conceive the child and explicitly included that although the children would not be genetically related to Cindy, she would be the mother of any children born to her as a result of the egg donation.¹⁰⁸ Both parties signed the contract and soon after the implementation of the embryos, Cindy became pregnant with triplets.¹⁰⁹ At the birth of the children, the birth certificate listed Cindy as the mother and Charles as the father.¹¹⁰

After the children were born, the relationship between Charles and Cindy deteriorated.¹¹¹ Charles became distant and less involved with the children and withheld financial support from Cindy and his children.¹¹² As a result, Cindy sought to have parentage established and wanted to obtain custody of the children and child support from Charles.¹¹³ In response, Charles argued that Cindy was not the mother of the children because she lacked a genetic connection.¹¹⁴ In response to the petition, the juvenile court held that Cindy "is the birth mother and always had the intent to bring these children for herself and Charles."¹¹⁵ The Court of Appeals affirmed the juvenile court's decision and adopted the intent test established in *Johnson v. Calvert*, holding that the issue of who the parents of the children are should be determined by examining the intent of the parties and not only genetic contribution.¹¹⁶ However, the Supreme Court of Tennessee refused

¹⁰⁷ *Id.* at 718

¹⁰⁸ *Id.* at 717

¹⁰⁹ *Id.* at 718

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (explaining that Cindy filed a petition in the juvenile court to establish parentage to obtain custody and child support for her children).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 719

¹¹⁶ *Id.*

to adopt the intent test.¹¹⁷ Instead, the Court decided that to determine the enforceability of the agreement in declaring the mother of the children, they would look at particular factors in making their decision.¹¹⁸ In their case analysis, the Court held that the relevant factors in determining motherhood were: genetics, intent, gestation, and the absence of controversy between the gestator and the genetic “mother.”¹¹⁹ In examining these four factors, the Supreme Court of Tennessee concluded that Cindy was the legal mother of the children because Cindy had the intent to raise the children, had gestated the children creating a biological connection, and the genetic mother was an anonymous ovum donor who was not seeking parental rights or status.¹²⁰

In an attempt to address the moral, ethical and legal concerns associated with surrogacy agreements, three different state courts provided three different approaches for determining the legal mother of the child born via a surrogate. The inconsistency in approaches determined by the court to provide for the best interests of all the parties involved is troublesome for parties contemplating entering into surrogacy agreements, as it may be unclear what their rights are if the relationship were to deteriorate or an issue were to arise. Therefore, an examination of other surrogacy models may provide a solution for the United States in helping to guide courts when determining motherhood and the validity and enforceability of surrogacy arrangements.

IV. The Model Across the Pond: A Look at Surrogacy In the United Kingdom

Because courts in the United States have continued to adopt different approaches for determining parentage in surrogacy agreement, couples and surrogates who enter into the

¹¹⁷ *Id.* at 726. (refusing to adopt either the intent test as a general rule for determining parentage with surrogacy agreements).

¹¹⁸ *Id.* at 727

¹¹⁹ *Id.* at 727-30.

¹²⁰ *See, Id.*

agreements are left with constant uncertainty of how a court is likely to decide the outcome of the case if an issue were to arise. In order to provide certainty and consistency to the parties of surrogacy contracts, the United States should adopt an approach to surrogacy agreements similar to that of the United Kingdom.

The United Kingdom's first impression with surrogacy was in 1985 when the first child, Baby Cotton, was born via a surrogate in the country.¹²¹ At the time, the United Kingdom did not have a statute that legally banned the practice of surrogacy.¹²² However, prior to the birth of Baby Cotton the United Kingdom government had commissioned a committee, the Warnock Committee, to investigate advanced reproductive technologies such as surrogacy.¹²³ Based upon the recommendations of the committee, the government enacted the Surrogacy Arrangements Act of 1985.¹²⁴

The Surrogacy Arrangements Act of 1985 is a uniform law that made it a criminal offense for any party of the surrogacy arrangement to receive financial benefit for participating in the arrangement.¹²⁵ A person violates this provision of the Surrogacy Arrangements Act of 1985 if they: "(a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement, (b) offer or agree to negotiate the making of a surrogacy arrangement, or (c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangement."¹²⁶ If a party to the arrangement or a third party, such as members of the surrogate or intended parent's family, are found to have made or received payments in violation

¹²¹ See, Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 492 (2011).

¹²² *Id.*

¹²³ *Id.* at 492-93

¹²⁴ *Id.* at 493

¹²⁵ See generally, *Surrogacy Arrangements Act*, 1985, c. 49 (1985), available at <http://www.legislation.gov.uk/ukpga/1985/49> (detailing the possible penalties that could result from a violation of the Act).

¹²⁶ *Id.* (explaining what constitutes a violation of the Surrogacy Arrangements Act)

of this section of the Surrogacy Arrangements Act of 1985, the individual faces the possibility of a monetary fine or imprisonment not exceeding 3 months time.¹²⁷

Although the committee recommended that criminal law penalties be implemented to deter commercialized surrogacy, the committee did not reject surrogacy arrangements wholly.¹²⁸ Instead, the committee recommended the allowance of altruistically motivated surrogacy arrangements without punishment.¹²⁹ In arrangements motivated by altruism, there is no exchange of money for services rendered, but the government does allow the surrogate to be compensated for “reasonable expenses.”¹³⁰ However, the government did not elaborate or define what would consist a reasonable expense.¹³¹

In addition to requiring surrogacy arrangements be non-commercialized, the United Kingdom also recommends that the intended parents of the child should be listed as the parents on the birth certification in order to help avoid litigation.¹³² In support of the decision to list the intended parents on the birth certificate, the United Kingdom examined other areas of law and circumstances that had arisen.¹³³

A. Problems with the Approach Taken by the United Kingdom

One criticism of the Surrogacy Arrangements Act of 1985 is that the Act never defined what constitutes a “reasonable expense” leaving uncertainty as to whether a payment is a violation of

¹²⁷ *See, Id.* (explaining that an individual does not have to be a party to a surrogacy arrangement in order to be subject to the penalties of the Act).

¹²⁸ *Id.*

¹²⁹ *See, Caster, supra* note 121, at 493 (arguing that the United Kingdom only invalidated surrogacy arrangements that involved monetary compensation).

¹³⁰ *Id.* at 494 (allowing for reasonable expenses to be paid to the surrogate, but did not define what constitutes a reasonable expense in the Surrogacy Arrangements Act of 1985).

¹³¹ *Id.*

¹³² *Id.* at 494-95 (allowing the intended parents to be listed on the birth certifications in order to try to prevent litigation over parentage and custody).

¹³³ *See generally, Id.* at 495 (examining the birth certificates of unwed mothers and the government’s allowance to eliminate the father’s name from the birth certificate, indicating that it is not a requirement for birth certification to like both biological parents).

the Act.¹³⁴ Because it is the responsibility of the parties to determine what constitutes a “reasonable expense,” the seemingly easy to administer law now lends itself to the possibility of abuse and leaves the parties with uncertainty as to whether they would be subject to potential criminal liability against them.¹³⁵

In addition, although the United Kingdom approach recommends the intended mother be listed as the mother, the intended mother is not automatically listed as the legal mother of the child on the birth certificate.¹³⁶ Rather, the surrogate is listed on the birth certificate automatically as the legal mother because of her biological connection to the child.¹³⁷ In order for the intended mother to be considered the legal mother, the surrogate must sign a parental order after the birth transferring her parental rights to the intended mother.¹³⁸ Because the United Kingdom does not consider the surrogacy arrangements binding on the parties, if the surrogate deviates from the arrangement and upon the birth refuses to relinquish her parental rights, the court will not enforce the order and the intended mother will not be listed on the birth certificate.¹³⁹ Therefore, incapable of predicting how parties to the arrangement will act during and after the pregnancy, both intended parents and surrogates have little certainty as to the possible outcome of the arrangement upon execution of the contract.

¹³⁴ See, *Id.* at 494 (leaving the decision of what constitutes a reasonable expense to the parties involved in the surrogacy agreement).

¹³⁵ See, *Id.*

¹³⁶ See generally, *Id.* at 494-95 (granting the intended parents the right to have their names included on the birth certificate even when there is no biological link between the intended parents and the child).

¹³⁷ See generally, gov.uk, *Rights for Surrogate Mothers*, <https://www.gov.uk/rights-for-surrogate-mothers> (acknowledging that the woman who give birth will always be declared the mother on the birth certificate unless a parental order is signed transfer parental rights to the intended parent).

¹³⁸ *Id.*

¹³⁹ See, *Id.* (indicating that if there is no violation of the Surrogacy Arrangements Act of 1985, then the court will not get involved in a dispute between the parties to the contract because the agreement is invalid to the court and the default presumption that the woman who gives birth is the mother will be enforced, even if the contract between the parties states otherwise).

V. Proposals and Recommendations for the United States

Because of the advancements to reproductive technology in the last few years, surrogacy has involuntarily led us to live in a world where a child may have as many as sixteen potential parental combinations.¹⁴⁰ As there are approximately six million women that suffer from an infertility problem, and as technology continues to advance it is likely that the number of women who elect to explore surrogacy or other infertility methods will continue to increase.¹⁴¹ In order to avoid excessive litigation and uncertainty as to the parentage of the child, the United States must adopt a model of uniform surrogacy regulation, similar to the system enacted in the United Kingdom. Authorizing a system in which surrogacy agreements are non-commercial and the intended parents are declared the parents of the child will eliminate virtually all of the concerns surrogacy agreements are often forced to overcome.

A. *Proposed Law for the United States*

The proposed law that the United States should adopt must be a uniform federal law that all states are required to abide by. The law will require that:

- (1) No person in the United States shall engage in commercial surrogacy which includes:
 - “(a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement,
 - (b) offer or agree to negotiate the making of a surrogacy arrangement, or
 - (c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements;”¹⁴²
- (2) All persons engaged in surrogacy arrangements shall:
 - (a) be engaged in the arrangement for altruistic motivations
 - (b) make and receive payments through an approved third party organization for the sole purpose of medical and legal expenses
- (3) For the purposes of this section, a person does an act on a commercial basis if:

¹⁴⁰ See, Hill, *supra* note 1, at 355 (indicating that with the advancement of technology and the ability to separate conception and gestation, there are 16 different reproductive combinations, excluding from the number traditional conception and childbirth).

¹⁴¹ See, Cahn, *supra* note 2, at 1081 (demonstrating that many women in the United States suffer to some extent from infertility problems and that 8% of the women in the United States will seek infertility assistance to try to have children).

¹⁴² See generally, *Surrogacy Arrangements Act*, *supra* note 121 (listing what constitutes commercialized surrogacy in violation of the act).

- (a) any payment is at any time received by himself or another in respect of making, negotiating or facilitating the making of any surrogacy agreement.
- (4) A person guilty of an offence under this Act shall potentially:
- (a) be subject to a fine of \$10,000 or imprisonment of no more than 6 months time, or both.
- (5) Motherhood:
- (a) in defining “motherhood,” the intended mother will automatically be declared to be the legal parent on the birth certificate at the birth of the child.

Uniformity of the Law

Adopting a uniform federal law will eliminate the uncertainty that parties to the surrogacy agreement encounter when executing the agreement. Because the courts of the states have interpreted “motherhood” using a variety of tests, both the surrogate and the intended parents are left with uncertainty of the outcome if the relationship between the parties deteriorates. A uniform law declaring the intended parents as the mother and the father on the birth certificate at birth will provide consistency and less uncertainty for the parties to the agreement. For example, if a child is born in New Jersey to a surrogate, but the surrogacy contract was entered into and executed in California, the courts no longer have to decide which state has jurisdiction or whether the New Jersey approach to determining motherhood via surrogacy or California approach should apply. Instead, both the parties and the courts will be certain of the answer prior to entering the agreement because regardless of the jurisdiction, the intended parents will be the legal parents.

Requiring the Surrogate to have an Altruistic Motivation

The requirement of compensation in exchange for surrogacy services is problematic.¹⁴³ Concerns such as the commodification of women and children and the exploitation of women, in particular of minorities, are real harms that society needs to be aware of when allowing for the

¹⁴³ See generally, London, *supra* note 10, at 398- 208 (illustrating that all of the central concerns regarding surrogacy revolve around the transfer of money and compensation).

compensation to occur.¹⁴⁴ Although the United Kingdom surrogacy model allows for the compensation of “reasonable expenses,” the United Kingdom’s lack of guidance on what a “reasonable expense” has to the potential to lead to abuse; the exception to the United Kingdom’s general rule allows for all the public policy concerns proposed in the United States to become a reality.¹⁴⁵ Therefore, in order to eliminate the potential of racial and economic exploitation and the commodification of women and children, the best option for the United States is to adopt a uniform policy that bans commercial surrogacy and allows altruistically motivated surrogacy permitting for a surrogate to receive compensation only for medical and legal expenses related to the surrogacy arrangement.

Economic Exploitation

By eliminating surrogacy compensation for services rendered, the United States will be able to reduce the risk of economic and racial exploitation of women. The concern in the United States by those who oppose surrogacy is that women who elect to be surrogates are at risk for being exploited economically due to the unequal balance of power of the parties to the agreement.¹⁴⁶

Requiring an altruistic motivation ensures that women of a lower socioeconomic status do not run the risk of being economically exploited, because the financial incentives for both the intended parents and the women in a lower socioeconomic status are eliminated. By eliminating the financial gain of compensation, women of a lower socioeconomic status have no incentive, except for altruism, to undertake the role of a surrogate because they will not receive monetary

¹⁴⁴ *Id.*

¹⁴⁵ *See*, Caster, *supra* note 121, at 494 (indicating that because the term was not defined in the act, the parties to the arrangements are responsibly for determining reasonableness).

¹⁴⁶ *See*, London, *supra* note 10, at 405-06 (arguing that the affluent couples commissioning the surrogacy have the power in the agreement because the surrogate women are in need of income that they will agree to work for the intended parents at whatever value because there is a lack of alternative employment availability).

support. This will protect surrogates from being coerced by men, such as their husbands, to become a surrogate for the financial gain. As a result, men in society will no longer feel the need to subjugate women to a position of surrogacy because they will receive no financial benefit from doing so. Women who will become surrogates will do so because they want to do so, not because they are going to receive a financial benefit, exposing them to risk.

Further, by eliminating the compensation requirement, the potential risk of economic exploitation to the intended parents is also eliminated.¹⁴⁷ Many intended parents are in a vulnerable state, as they desire to have a child and may not be able to bear a child of their own for a variety of reasons.¹⁴⁸ As many couples who seek surrogacy as an option for reproduction are affluent, their desire to have a child may place them at an increased risk of economic exploitation by the fertility clinic and also by the lower income women who are aware of the affluence of the couple and may prey upon the intended parents vulnerability and desire to elicit more compensation in exchange for the child.¹⁴⁹

In order to prevent violations of the federal law, the legalized compensation between the surrogate and intended parents for the approved medical and legal expenses should occur through a third-party broker. In order to receive a payment, the surrogate must submit an itemized bill from the doctor or lawyer indicating the fees in need of payment. The broker would then contact the intended parents and inform them of the total costs that is owed. To fulfill the payment, the intended parents would provide the fee to the broker, who would in turn, forward the costs to the surrogate.

¹⁴⁷ See, Shapiro, *supra* note 56, at 1349 (acknowledging that even though the intended parents are generally better situated financially than the surrogate, intended parents have the potential to be economically exploited as well as a result of their unwavering desire to have a baby).

¹⁴⁸ *Id.* n.20 (acknowledging that the factors that makes intended parents most vulnerable to exploitation is a desire for children).

¹⁴⁹ See, *Id.*; See also, Lewin, *supra* note 58 (demonstrating that intended parents are at risk of economic exploitation by fertility clinics).

The purpose of the third party is an attempt to minimize the contact between the surrogate and the intended parents to reduce the risk that either side is exploited economically, either by a demand for more compensation or a refusal to pay. Although the introduction of a third party may not be able to eliminate the risk fully, if the exploitation does occur, the parties may not feel pressure to acquiesce to the demands because the law will clearly establish that any compensatory payment for services is prohibited and the intended parents will be the parents of the child at birth.

Racial Exploitation

Additionally, with the elimination of compensation, more women will have the opportunity to explore surrogacy, which in turn will eliminate the risk of racial exploitation. Racial exploitation is a consequence of the economic exploitation risk that surrogacy poses when compensation is involved.¹⁵⁰ Given the costs of surrogacy in the United States, the evidence demonstrates that most women who use a surrogate to have a child are wealthy.¹⁵¹ As minorities tend to encompass lower socioeconomic status groups, they inescapably are the group most likely to serve as a surrogate for white women in the arrangements.¹⁵² However, with the elimination of compensation, minority women from lower socioeconomic status who are financially motivated will no longer agree desire become a surrogate. By eliminating the incentive, financially motivated minority women may choose not to engage in the agreements, thereby, diminishing their risk of being viewed as a reproductive slave to the white women's desire.

¹⁵⁰ See, London, *supra* note 10, at 407-09 (arguing that minorities are at risk for being exploited through surrogacy arrangements because minorities tend to occupy the lower socioeconomic status demographic that are willing to become a surrogate for a low wage for the wealthy upper socioeconomic class, who typically are white, in order to guarantee income.

¹⁵¹ See generally, Shapiro, *supra* note 56, at 1349.

¹⁵² See, London, *supra* note 10, at 405-06 .

Commodification of Children and Women

There is also the concern that surrogacy is a commodification of a woman's body and of children.¹⁵³ However, if the United States adopts the altruistic motivation requirement for surrogacy arrangements with the exception of medical and legal expenses, the concern that surrogacy baby-selling is eliminated because there is absolutely no monetary exchange for the child.

Just as the concern for baby-selling is eliminated with the prohibited compensation, the same is true for the concern that surrogacy is selling women's bodies and reproductive services. Because no compensation is exchanged for the services provided by a surrogate, there is no sale and her body and reproductive system is not being treated as a commodity capable of producing an income.

Best Interest of the Parties

Furthermore, altruistic surrogacy agreements may be in the best interest of the future child, intended parents, and surrogate. The New Jersey Supreme Court in *In re Baby M* raised the concern that surrogacy has the potential to be detrimental to the psychological health of the child or the woman.¹⁵⁴ However, with the lack of compensation provided, the new law may encourage altruistic surrogacy agreements amongst those who know each other. Therefore, if the surrogate and intended parents have a relationship, the children may be able to better understand why they were not gestated from their genetic mother because they will be able to have a relationship with both parties.

¹⁵³ *Id.* at 398.

¹⁵⁴ *See, In Re Baby M*, *supra* note 24 at 435 (arguing that it is in the best interest to keep the child with the natural mother because they would have the best interests, but also for the mother because was incapable of realizing the effect of the pregnancy).

Additionally, commentators have suggested, “only where the surrogate herself finds it a positive experience can surrogacy be deemed a success.”¹⁵⁵ If the surrogate is motivated by altruistic views, rather than in commercial surrogacy, she is more likely to find the experience positive because it is something she decided to do, rather than feeling as if she is selling her body or is being exploited for her services.

Declaration of the Intended Parents

The courts in the United States have taken different approaches in determining the mother of a child born via surrogacy. As a result, the parties are left with uncertainty as to whether they will legally be the mother at the end of the pregnancy. Therefore, to avoid the uncertainty of the parties the uniform law should declare a consistent mother of the child, and that mother should be the intended mother.

The intended mother and father of the child should always be listed as the legal parents on the birth certificate because without their initiation and action, the child would not have been brought into existence.¹⁵⁶ Since the intended parents are the individuals who chose to bring the child into existence, it is presumed that they will have the child’s best interest in mind to care for the child.¹⁵⁷

Punishment for Violations

Just as in the United Kingdom, if the surrogate, intended parents, or third party related to either of the parties is determined to have violated the law in regards to compensation, a monetary penalty or imprisonment should be imposed. By implementing the potential of a harsh

¹⁵⁵ Shapiro, *supra* note 56, at 1367.

¹⁵⁶ See, *Johnson v. Calvert*, *supra* note 91, at 93 (arguing for the adoption of the intended parent test because but for the intent to procreate the child – including the creation and raising of the child – the child would not exist).

¹⁵⁷ See, *In re Marriage of Buzzanca*, *supra* note 101, at 1425.

imprisonment sentence and monetary fine, the goal is deter the parties from participating in the violating act.

B. Enforcement and Compliance of the Law By the Government and Medical Profession

Enforcement and compliance with the law is imperative to ensure that commercial surrogacy arrangements do not occur in the United States. To enforce compliance with the law, the United States Department of Health & Human Resources would establish compliance guidelines that each state's Department of Health would be required to abide by in order to enforce the federal law.

Based upon the guidelines established by the U.S. Department of Health & Human Resources, each state is required to conduct unannounced inspections at registered fertility clinics or offices of doctors that are known or suspected of engaging in fostering surrogacy arrangements twice a year. In order to ensure each state complies with this requirement, the federal government would have the right to withhold federal funding until the inspections within the state are complete.

During inspections, the inspectors would be required to examine patient records for the sole purpose of determining whether surrogacy arrangement documents exist. If a doctor or fertility clinic is found to be in violation, the consequences of such a violation would be dependent upon whether the violation had occurred previously. A doctor or clinic that is a first time violator will be given a monetary fine at a rate to be determined by the individual state's Department of Health & Human Resources. For a second offense, the doctors and facility engaged in the practice would be placed on a probationary status and would be required to be monitored by the state's medical licensing board. If the violation continues, the third cited violation would result in a revocation of the doctor's medical license, for no less than 9 months,

with the possibility to reapply for their license after a certain period of specified time deemed appropriate by the state licensing board. Further, during the time of revocation, the doctor would be mandated to attend continuing medical education courses focused on the emotional, ethical and legal concerns of surrogacy such as exploitation and commodification of women and children. The sanctions are intended to be the minimum that that states would have to enforce, but would be permitted to implement more restrictive sanctions if deemed necessary or appropriate.

C. Anticipated Counterarguments

A major concern in prohibited commercialized surrogacy is that women will not want to be surrogates in the United States because there is no financial incentive. As a result, a concern is that women exploring surrogacy as a method of reproductive assistance technology to have a child will hire a surrogate in another country.¹⁵⁸ Surrogacy tourism is common, especially in India, where a woman from the United States can hire a surrogate in India for a lower-cost than what would be expected as payment in the United States.¹⁵⁹ However, the surrogacy market in India is unregulated and because the recommended guidelines are not strictly adhered to, it is unclear that the surrogates are receiving the proper safety measures.¹⁶⁰ If women from United States inundate India as a result of lack of willing surrogates in the United States, there is a concern that Indian women will continue to be exploited for their reproductive services and at a

¹⁵⁸ See, London, *supra* note 10, at 395 (indicating that international surrogacy arrangements have increased over the last few years, as a result of laws in other countries being restrictive in regards to engaging in surrogacy as a reproductive technology).

¹⁵⁹ See generally, London, *supra* note 10, at 395 (providing a brief background of the surrogacy arrangements in the popular surrogacy destination, India).

¹⁶⁰ *Id.*

higher frequency if the demand for surrogates increases as a result of noncommercialized surrogacy in the United States.¹⁶¹

However, there is a solution to this concern that would not prevent the United States from adopting the proposed model. In order to deter citizens of the United States from going abroad to engage in commercial surrogacy agreements that may be exploiting women worldwide, the United States could include in the proposed law that, if a United States citizen enters into a contract and engages in commercial surrogacy abroad, the child born via the surrogate will not be granted legal status in the United States. Knowing that the child may not legally be able to enter, reside or eventually obtain citizenship of the United States may be a deterrent strong enough to prevent surrogacy tourism and in turn, the exploitation of women abroad.

Another potential criticism of the proposed plan is that economic exploitation may still exist because including a third party broker cannot prevent either the surrogate or the intended parent from contacting the other party personally and either offering or demanding compensation without the broker's knowledge. Unfortunately, there is always the potential that surrogates may contact intended parents outside of the agency and demand more money and there is also always the potential that given how appreciative intended parents may be, they may desire to provide financial compensation to demonstrate their gratitude.

In examining non-commercial surrogacy agreements, it could be argued that it is implausible to believe that women will continue to become surrogates and undergo nine months of pregnancy for a stranger if no financial compensation is provided. However, because surrogacy would allow for existence only when altruistically motivated, surrogacy agreements

¹⁶¹ *See, Id.* (Indian women who are surrogates are already exploited in the surrogacy arrangements because many of the women who choose to participate in the arrangement do so under extreme economic and social pressures; by prohibiting compensation in the United States, less surrogate may be available domestically and may encourage women to go abroad, to countries that have already exploited their women and surrogates).

might become more common between friends and family members, in order to help those closest to them to achieve a family. In fact, a move in the direction of the surrogate and intended parents having a pre-existing relationship may be most beneficial for the surrogate, the intended parents and for the child. Research that has been conducted to determine whether surrogacy agreement has been successful has indicated that “construction of a positive relationship between the surrogate and the intended parents” is one factor to ensure a successful surrogacy agreement.¹⁶² When the surrogate is invested in the same outcome as the intended parent research has shown that is when both parties report the most successful surrogacy experiences.¹⁶³ This is most likely to occur when the parties have a good relationship and a key component of that relationship must be based on trust.¹⁶⁴

Additionally, as highlighted in *In re Baby M*, the fears that a surrogate is not capable of making an informed decision and will later refuse to give up the child to the intended parents are dissuaded by allowing for surrogacy on altruistic motive for two reasons. One reason is that if an altruistic requirement begins to encourage friends and families of intended parents to act as surrogates, the more likely it is that the surrogate will be able to remain in the child’s life after the birth and relinquishing of custody to the intended parents. The surrogate would still be able to interact with the child, and further the potential pre-existing bond between the surrogate and the child. Secondly, allowing surrogacy only for altruistic motivations allows both the intended parents and the surrogate to be invested in the same outcome: the well-being and delivery of a child. If other compounding factors, such as money, are considered, surrogates and intended parents may no longer be invested in the same outcome, an essential component for a successful

¹⁶² See, Shapiro, *supra* note 56, at 1366 (discussing what factors are likely to make a surrogacy arrangement successful).

¹⁶³ *Id.* at 1367.

¹⁶⁴ *Id.*

surrogacy agreement, because the compensation will force the surrogate to misplace her loyalties not to the child, but upon the compensation she is receiving.

Therefore, even though the proposed uniform law presents the potential of promoting surrogacy tourism and exploiting women abroad given that women in the United States may no longer consider participating in the agreements due to the lack of financial gain, the United States can enact a statute denying the child legal U.S. citizenship in an attempt to deter couples from going abroad to participate in commercial surrogacy. Furthermore, even if the potential number of surrogates in the United States diminishes as a result no financial compensation, this could result in the best interest of the child. With no compensation, surrogacy may begin to occur between close family and friends to help those closest to them achieve their desire to have a family. As a result of the pre-existing relationship, the best interests of the child may promoted by this surrogacy relationship, as the child will be able to maintain a relationship with both women and better understand the complexity of the relationship. Although these are concerns that must be considered, they should not be dispositive of the uniform altruistic surrogacy arrangement model proposed for the United States.

VI. Conclusion

As the medical technologies have advanced, the courts have been left to play catch-up in trying to determine what the best course of action is for all the parties involved. The silence of the government is no longer an acceptable approach to dealing with this technology, and legislation must be passed to ensure the rights of all those involved.

Many public policy concerns have been raised in deciding whether to allow for the existence of surrogacy arrangements. There is one model presently that will allow the United States to combat all of these concerns with one simple statute, and that is model of the United

Kingdom. In creating a model similar to the United Kingdom, the United States should adopt a uniform surrogacy agreement that is motivated by altruism, criminalizes any form of compensation, with the exception of legal and medical expenses, and provides that the intended parents of the child will always be listed on the birth certificate as the legal parents. With this model, not only will the United States be able to curb the opponents' concerns, but the government will be able to provide for the best interest of the child, the surrogate, and the intended parents.