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BEARING CHILDREN, BEARING RISKS: FEMINIST LEADERSHIP FOR PROGRESSIVE REGULATION OF COMPENSATED SURROGACY IN THE UNITED STATES

Sara L. Ainsworth^{*}

Abstract: Compensated surrogacy—an arrangement in which a woman carries and gives birth to a child for someone else in exchange for money—intimately affects women. Yet, feminist law reformers have not led efforts to regulate this practice in the United States. Their absence is notable given the significant influence of feminist lawmaking in a host of other areas where women's interests are at stake. This lack of feminist law reform leadership can be understood, however, in light of the complex issues that surrogacy raises—complexity that has long divided feminists.

In response to efforts to pass surrogacy legislation in Washington State in 2010, Legal Voice, a women's rights organization founded in 1978, worked to develop a progressive, feminist approach to compensated surrogacy. The organization adopted a framework based primarily on two schools of feminist legal thought—an anti-essentialist analysis and a pragmatic approach—under the overarching goal of promoting reproductive justice. This Article proposes the application of these principles to the development of any surrogacy legislation. However, my primary purpose is to urge feminist law advocates to take leadership of surrogacy law reform. Whatever the feminist objections to the practice, people increasingly engage in surrogacy arrangements to create families and to help others to do so. But it is the women who hold the least power and face the highest risk of economic exploitation who bear the most significant risks in these arrangements. Thus, it is imperative that progressive feminists meet the challenge of addressing the complexity of compensated surrogacy, and develop a shared agenda for ensuring reproductive justice in the context of assisted reproductive technologies.

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INTRODUCTION

Whatever its potential for creating loving families and fairly compensating women's labor, or for harming people whose lives and choices are constrained by oppressive legal and social structures, compensated surrogacy implicates every area of feminist concern. Understanding this, feminist theorists and academics have been deeply engaged for almost three decades in considering the complexities of compensated surrogacy. Yet, women's rights groups and feminist law reformers outside of academia have not typically led the development of jurisprudence or the efforts to regulate this practice in the United States.¹

This absence contrasts starkly with proactive feminist work in the areas of domestic and sexual violence law reform, reproductive rights jurisprudence, pay and labor equality, lesbian family recognition, and family laws generally.² It can be understood, however, in light of the complex issues of gender and sexual orientation equality, racism, colonialism, wealth inequality, autonomy, health, and bioethics that surrogacy raises.³ This complexity has long divided feminists, both in feminist legal thought and in the field of women's legal rights.⁴

This lack of consensus may help explain why Legal Voice, founded in 1978 as the Northwest Women's Law Center and a leading voice on

1. Sociologist Susan Markens describes the reactive (rather than proactive) efforts of women's rights advocates, and the conflict between women's groups, in state legislative efforts to ban or regulate surrogacy in the 1980s and early 1990s. SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* 156–70 (2007); see also Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in *APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION* 1092, 1092 (D. Kelly Weisberg & Ronnie J. Steinberg eds., 1996) (introducing arguments in favor of legal enforcement of surrogacy contracts with an explanation of the controversy among feminists in the late 1980s). But see Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 *LAW & CONTEMP. PROBS.* 109, 115–21 (2009) (describing the feminist response to surrogacy as unified in opposition to surrogacy in the late 1980s, and growing more muted in the years since).

2. See generally LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2011) (feminist law reform was critical to the legal recognition of domestic violence, although the legal response has not met the needs of all women and their families); Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 *FORDHAM L. REV.* 249 (1998) (noting the influence of feminist legal theory on generations of advocates for women's legal rights and its role in law reform in numerous areas affecting women's interests).

3. See *infra* Part I (exploring this complexity more thoroughly).

4. See MARKENS, *supra* note 1, at 156–62 (relating the conflict among California women's rights organizations responding to proposed surrogacy legislation in the late 1980s); Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 *IND. L.J.* 1223, 1223–26 (2013) (providing a succinct overview of the surrogacy debate).

women's issues in Washington State's courts and legislature,⁵ was missing from the debate during the state's first legislative response to surrogacy. In 1989, the year after the notorious *Baby M* decision in New Jersey,⁶ Washington State banned compensated surrogacy.⁷ The Washington Legislature did not reconsider the issue—and women's rights advocates never raised it—until a gay legislator lawyer, the father of children born to a woman acting as surrogate, proposed lifting the ban in 2010.⁸

Just as the practice of compensated surrogacy had evolved, so had Legal Voice's willingness to engage with the issue. In 2010, the organization recognized the imperative of bringing a progressive, feminist voice to the legislative arena—a voice informed as much as possible by the experience of women acting as surrogates. After two years of community engagement, study, and introspection, Legal Voice ultimately developed a progressive, feminist framework for considering surrogacy and its legal and social implications for women.⁹ The framework is a set of principles, based primarily on two schools of feminist legal thought—an anti-essentialist analysis and a pragmatic approach—under the overarching goal of promoting reproductive justice.¹⁰

5. See *About Us*, LEGAL VOICE, <http://www.legalvoice.org/about/> (last visited Oct. 5, 2014).

6. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

7. WASH. REV. CODE § 26.26.230 (2012) (originally enacted in 1989).

8. H.R. 2793, 61st Leg., Reg. Sess. (Wash. 2010); Terry J. Price, *The Future of Compensated Surrogacy in Washington: Anytime Soon?*, 89 WASH. L. REV. 1311 (2014) (providing a comprehensive overview of the proposed Washington legislation); see also Molly Rosbach, *Bill Would Allow Paying Surrogate Mothers in Wash.*, SEATTLE TIMES (Mar. 15, 2011), http://seattletimes.com/html/localnews/2014504976_apwaxgrsurrogatemothers3rdldwritethru.html.

9. Transgender people may also become intended parents through a surrogacy arrangement, and certainly a transgender person with the capacity to become pregnant could act as a surrogate too. However, literature on the issue is limited to discussions of transgender people acting as intended parents, rather than acting as surrogates. In a comprehensive legal guidebook for transgender people, Kylar Broadus and Shannon Price Minter discuss the possibility of transgender parents as intended parents (rather than as people acting as surrogates). Kylar W. Broadus & Shannon Price Minter, *Legal Issues*, in TRANS BODIES, TRANS SELVES, A RESOURCE FOR THE TRANSGENDER COMMUNITY 174, 174–202 (Laura Erickson-Schroth ed., 2010). Another resource on transgender, lesbian, gay, and bisexual health issues includes a brief discussion of surrogacy, assuming transgender people are intended parents, not surrogates. HARVEY J. MAKADON ET AL., THE FENWAY GUIDE TO LESBIAN, GAY, BISEXUAL, AND TRANSGENDER HEALTH 117–18 (2008). These materials, as well as media reports, academic writings, and anecdotal reports from women acting as surrogates indicate that the vast majority of people who become surrogates identify as women, and are identified as such in the legislative debates over surrogacy. For these reasons, I use the gendered phrase “women acting as surrogates” throughout this article. On a different note, I also use this term because I find “surrogate” and “gestator,” the terms commonly used in this setting, dehumanizing.

10. Reproductive justice is not a replacement term for reproductive rights or abortion rights.

As a former Legal Voice attorney who helped to develop this response, I write in part to share this framework and urge the application of these principles to the development of any surrogacy legislation. However, Legal Voice was not the first to offer a framework and model for surrogacy regulation.¹¹ What I seek to add to the discussion is a call to feminist law reform projects to develop a shared agenda for ensuring reproductive justice in the context of assisted reproductive technologies, and, most importantly, to take leadership in the field of surrogacy regulation. The risks of compensated surrogacy arrangements are primarily borne by the women acting as surrogates, who typically hold less power than other parties to these arrangements and are more likely to be subject to economic exploitation.¹² Progressive feminists thus must meet the challenge of addressing surrogacy's complexity in the legislatures and the courts. This work should focus on ensuring the humanity and dignity of the women whose interests are most at stake in the surrogacy debate.

In Part I of this Article, I explore some of the primary feminist concerns about compensated surrogacy, including one that has been less examined, and in Part II, I consider the actual experience of surrogacy as currently practiced in states where it is legal in the United States. In Part III, I describe progressive feminist principles for regulating surrogacy that draw from pragmatic feminism, an anti-essentialist approach, and reproductive justice. Finally, in Part IV, I apply those principles to specific provisions of proposed surrogacy regulation, and in conclusion, argue that surrogacy will continue to put women acting as surrogates at risk if feminist law reformers fail to assume leadership of proactive

Forward Together (formerly Asian Communities for Reproductive Justice) states that reproductive justice exists

when all people have the social, political and economic power and resources to make healthy decisions about our gender, bodies, sexuality and families for our selves and our communities. Reproductive Justice aims to transform power inequities and create long-term systemic change, and therefore relies on the leadership of communities most impacted by reproductive oppression.

What Is Reproductive Justice?, ASIAN COMMUNITIES FOR REPROD. JUST., <http://strongfamiliesmovement.org/what-is-reproductive-justice> (last visited Oct. 5, 2014); see also *infra* Part III.

11. See Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2346 (1995); Abby Brandel, *Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 MD. L. REV. 488 (1995); Laufer-Ukeles, *supra* note 4; Katherine Leiber, *Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?*, 68 IND. L. J. 205, 225–32 (1992); Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 720 (2003).

12. The experiences of people who are parties to reproductive tourism in India and other countries provide powerful examples of this disparity. See *infra* Part I.

efforts to regulate surrogacy in the United States.

I. COMPLEXITIES OF SURROGACY THROUGH A FEMINIST LENS

Compensated surrogacy¹³ garnered national attention in the late 1980s when Mary Beth Whitehead agreed, in exchange for \$10,000, to become pregnant and give the child to William and Elizabeth Stern. William provided the sperm; Elizabeth, his wife, was not biologically related to the child.¹⁴ After she relinquished the baby to the Sterns, Mary Beth Whitehead changed her mind.¹⁵ The resulting legal conflict made national headlines,¹⁶ and led to both a surge in legislation¹⁷ (usually to ban surrogacy) and significant feminist engagement with the subject.¹⁸ As feminist theory is not monolithic, the responses from feminists varied dramatically.¹⁹

13. Compensated surrogacy—the agreement to bear a child for someone else in exchange for money—is also called commercial surrogacy. While the second term is also apt, it connotes a mere market exchange and ignores the empirical and anecdotal evidence that shows that these agreements have deep emotional meaning to the parties. See Laufer-Ukeles, *supra* note 4, at 1227 (arguing that surrogacy arrangements are both commercial and intimate exchanges and that this hybrid nature of the contract is not adequately recognized under current legal structures). Accordingly, I use the term “compensated surrogacy” throughout this Article.

14. This type of surrogacy arrangement—where the woman who carries the child is also the genetic mother—is known as “traditional” surrogacy. “Gestational” surrogacy, in contrast, is an arrangement where a physician implants an embryo created by the egg and sperm of other parties (typically, but not always, from one or more of the intended parents) into the uterus of the woman acting as surrogate. Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196, 2196 (2003).

15. *In re Baby M*, 537 A.2d 1227, 1235–37 (N.J. 1988).

16. See, e.g., Robert Hanley, *Father of Baby M Granted Custody; Contract Upheld; Surrogacy Is Legal*, N.Y. TIMES, Apr. 1, 1987, at A1. See also MARKENS, *supra* note 1, at 120 (identifying 270 articles written about surrogacy and the *Baby M* case during the custody trial, and ninety-nine additional articles dedicated to the court’s decision in 1988). It appears that the press is reluctant to let go of the controversy; in May of 2014, the *New York Times* revisited the case. Clyde Haberman, *Baby M and the Question of Surrogate Motherhood*, N.Y. TIMES (Mar. 23, 2014), <http://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html>.

17. See MARKENS, *supra* note 1, at 22; Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1285–87 (2014).

18. MARKENS, *supra* note 1, at 16–17. Some of the feminist writings on surrogacy from that time period include: MARTHA FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* (1990); CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (1989); Andrews, *supra* note 1; and Katha Pollitt, *The Strange Case of Baby M*, THE NATION (May 23, 1987), <http://www.thenation.com/article/strange-case-baby-m#> (critiquing the *Baby M* decision and arguing that compensated surrogacy “bear[s] an uncanny resemblance to the all-sales-final style of a used-car lot”).

19. See, e.g., Nadine Taub & Lisa Mccauley Rarles, *In the Matter of Baby M*, 14 WOMEN’S RTS.

A group of prominent feminists argued against the practice of compensated surrogacy in an amicus brief filed in the *Baby M* case.²⁰ While part of their concern was for the way in which Mary Beth Whitehead's parenting had been maligned by the court and in the press for absurd and sexist reasons,²¹ they also argued that surrogacy exploited poor women and commodified women's bodies.²² Liberal feminists disagreed, and argued that states should permit compensated surrogacy to ensure a woman's right to self-determination and to fairly compensate her for what is inarguably difficult and risky work.²³ Critical race scholars urged a comparison to the ways in which the bodies of women of color have been long controlled and targeted for impositions and restrictions on their childbearing and parenting, and expressed concerns with the ability of a nation so steeped in racial injustice to prevent further inequities and exploitation of the bodies and lives of women of color.²⁴

Since the New Jersey Supreme Court's *Baby M* decision in 1988, the practice and empirical understanding of compensated surrogacy has evolved. But the lack of consensus in feminist thought is still present, and, I argue, has stymied the ability of feminist law reformers, in most instances, to meaningfully engage in the legal and legislative response to surrogacy. This is particularly troubling because, as Susan Markens demonstrates in her book *Surrogate Motherhood*, the legislative discussion around surrogacy invariably casts it as a "women's issue."²⁵ When all claim to promote women's rights, the voice of feminist law reformers—so present in molding the law affecting sexual and domestic violence, family laws, reproductive rights, and employment equality—is sidelined. That is especially true when those who can legitimately speak for women's interests present divergent views on the issue.

While feminists should continue the dialogue and ultimately take ownership of the question of compensated surrogacy, there are powerful

L. REP. 243, 249 (1992).

20. Elizabeth Mehren, *Feminists Fight Court Ruling in Baby M Decision: Steinem, Friedan, Chesler, French Among Supporters*, L.A. TIMES, July 31, 1987, at 1.

21. Iver Peterson, *Fitness Test for Baby M's Mother Unfair, Feminists Say*, N.Y. TIMES, Mar. 20, 1987, at B1.

22. Mehren, *supra* note 20.

23. See generally, e.g., Lori B. Andrews, *supra* note 1.

24. See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 276–85 (1st ed. 1999); Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACK LETTER J. 17, 19 (1991) ("Without a *per se* ban on commercial surrogacy, it is not clear that poor and Black women can be protected from the risks of surrogacy arrangements.").

25. MARKENS, *supra* note 1, at 62–66.

reasons for holding conflicted views on the issue. Numerous scholars, lawyers, and reporters have reflected on the complex questions of commercial surrogacy. Reconsidering some of those concerns here is necessary to explain the tensions facing women's rights supporters in crafting a progressive, feminist response to compensated surrogacy. While the complexities are many,²⁶ I focus on four that I believe are critical to consider in a progressive approach to surrogacy regulation: (1) the risks of exploitation, especially for low-income women of color and women acting as surrogates for people from other countries; (2) the relationship between women's health, health care access, and assisted reproductive technologies; (3) the intersection of surrogacy with the rights to family formation for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, and the related influence of discourse that emphasizes genetic relationship to children; and finally (4) how surrogacy discourse and practices affect people too often excluded from the dialogue, specifically people with disabilities.

A. *The Risk of Exploitation*

Of all the possible objections to allowing compensated surrogacy to flourish, the one that has been most often articulated—by feminists and non-feminists alike—is the fear that women acting as surrogates will be exploited. Proponents of this viewpoint urge that the possibility of acting as a surrogate to earn money will encourage women to become surrogates because other financial options are unavailable to them.²⁷

26. See, e.g., Susan Berke Fogel et al., *Invoking Choice When Discussing Surrogacy as a Feminist Concern Is a Mistake*, RH REALITY CHECK (Apr. 23, 2014), <http://rhrefactitycheck.org/article/2014/04/23/invoking-choice-discussing-surrogacy-feminist-concern-mistake/> (urging that a simplistic assertion of “choice” as the answer to the dilemmas of surrogacy elides the many difficult social justice questions inherent in “contract pregnancy,” including questions of class, cross-border surrogacy, and reproductive autonomy). For a thorough overview of the feminist response in the context of surrogacy in India (addressed infra) see *Birthing a Market: A Study on Commercial Surrogacy*, SAMA-RESOURCE GROUP FOR WOMEN & HEALTH, <http://www.samawomenshealth.org/downloads/Birthing%20A%20Market.pdf> (last visited Oct. 5, 2014) [hereinafter *Birthing a Market*].

27. See, e.g., Barbara Katz Rothman, *Daddy Plants a Seed: Personhood Under Patriarchy*, 47 HASTINGS L.J. 1241, 1246 (1996) (arguing “[y]ou have only to look at the poor women of color tending their white affluent charges in the playgrounds of every American city to understand which women will be carrying valued white babies in their bellies as a cheap service”). Another common objection to surrogacy, that I will not address here, is that it turns children into commodities. See *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993) (in the context of upholding a gestational surrogacy contract, the court briefly considers then rejects these arguments); MARGARET JANE RADIN, *CONTESTED COMMODITIES* 64 (1996). “Baby-selling” is also one of the primary objections offered by social conservatives who oppose surrogacy. See, e.g., Wesley J. Smith, *Biological Colonialism Surrogacy Fraudsters*, NAT'L REV. (July 30, 2014), <http://www.nationalreview.com/human-exceptionalism/384136/biological-colonialism-surrogacy-fraudsters-wesley-j-smith> (in a

While the analogy to sex work is often made,²⁸ it is not necessary to compare surrogacy to sex work²⁹ to see the potential ramifications of offering thousands of dollars for approximately ten months of work, in a setting where there is very little competition (and none from men) for women of reproductive age. Especially for lower wage earners, who are unlikely to earn such a significant amount of money in such a relatively short time, the offer could be very financially attractive.

1. *The Role of Race and Class in Reproduction in the United States*

However, viewing surrogacy as a simple monetary transaction obscures the long and brutal history of state and state-sanctioned control of the reproduction, childbearing, and parenting of women of color, especially African American and Native American women, whose particular histories of enslavement and colonization in the United States continue to inform law and policy.³⁰ As Dorothy Roberts has explained in *Killing the Black Body*, enslaved African and African American women's reproductive capacity was severed from their motherhood during slavery, and rape by white men was used to subjugate women and enslave their children.³¹ Anita Allen argues that, effectively, enslaved women were surrogate mothers for the white men who owned them, bearing children to whom they had no parental rights who were also the property of the slave owner.³² The ongoing subjection of African American women—especially poor women—to coercive reproductive policies in the welfare programs and through the drug war remains a reality.³³ African American women are disproportionately poor,³⁴

commentary on surrogacy arrangements between United States intended parents and women acting as surrogates in Mexico and India, exclaiming, “[b]abies are being purchased like lumber at Home Depot!”).

28. See DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 82–83 (2006) (explaining that surrogacy is frequently likened to sex work).

29. It is beyond the scope of this paper to do justice to the complexity of the analogy. Moreover, as an advocate for the decriminalization of sex work, and consistent with my stance of recognizing the humanity of people who engage in surrogacy contracts, I am not willing to make the comparison in the service of demonizing either practice.

30. See, e.g., ROBERTS, *supra* note 24, at 282–83; ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* (2005) (recounting the sexual and reproductive violence perpetrated by European colonizers of the Native American land and peoples of the current United States, including rape, sexual abuse, and the forced separation of children from their families and cultures).

31. ROBERTS, *supra* note 24, at 22–55.

32. Allen, *supra* note 24, at 18–19.

33. ROBERTS, *supra* note 24, at 150–245.

disproportionately incarcerated,³⁵ and disproportionately targets of welfare laws³⁶ and judicial interventions³⁷ that coerce them to have fewer children or use potentially dangerous contraception.

Women of color incarcerated in California have recently been the targets of coercive sterilization,³⁸ a practice that echoes the forced and coerced sterilizations of women on welfare and Native American women receiving health care through the Indian Health Services in the 1960s and early 1970s.³⁹ To this day, women in poverty—but especially poor women of color—are overrepresented in the child welfare system, meaning that they are more likely to have their parenting, let alone their reproduction, interrogated, monitored, and too often disrupted by the

34. Alexandra Cawthorne, *The Straight Facts on Women and Poverty*, FOR AM. PROGRESS 1 (Oct. 2008), http://cdn.americanprogress.org/wp-content/uploads/issues/2008/10/pdf/women_poverty.pdf (“Over a quarter of black women and nearly a quarter of Latina women are poor. Black and Latina women are at least twice as likely as white women to be living in poverty.”).

35. PAUL GUERINO ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010, at 7 (2012), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf> (noting that in 2010, African American women were incarcerated at three times the rate of white women).

36. Sanford F. Schram, *Race and State Welfare Reform Choices: A Cause for Concern*, in FROM POVERTY TO PUNISHMENT: HOW WELFARE REFORM PUNISHES THE POOR 89, 92–100 (Gary Delgado ed., 2002) (explaining that states with higher percentages of African American and Latina recipients are more likely to enact “get-tough” welfare policies, such as family caps, that target the procreation of mothers receiving welfare by limiting the number of children for whom a recipient can receive additional monthly funds); see also Gary Delgado & Rebecca Gordon, *From Social Contract to Social Control: Welfare Policy and Race*, in FROM POVERTY TO PUNISHMENT: HOW WELFARE REFORM PUNISHES THE POOR 25, 45–57 (describing the racist origins of welfare reform rhetoric and noting the sexual and reproductive control policies in the welfare program); ROBERTS, *supra* note 24, at 203–45 (also exploring the racist origins of welfare reform rhetoric, and linking that rhetoric and sexual and reproductive control policies to the demonization of black motherhood from the time of slavery and throughout United States history).

37. ROBERTS, *supra* note 24, at 151–71 (describing, among other interventions, a case in which a judge gave a woman the “choice” between a longer prison sentence and probation on condition that she be implanted with Norplant, a long-acting contraceptive that requires medical removal); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH POL. POL’Y & L. 299, 300–01 (2013) (documenting hundreds of arrests, prosecutions, forced cesarean sections, and other forced medical interventions directed at pregnant women during the period studied, and finding that “low-income women and women of color, especially African American women, are overrepresented among those who have been arrested or subjected to equivalent deprivations of liberty”).

38. See Sara Ainsworth & Rachel Roth, “*If They Hand You a Paper, You Sign It*”: A Call to End the Sterilization of Women in Prison, 26 HASTINGS WOMEN’S L.J. 1 (forthcoming December 2014); Robin Levi et al., *Prisons as a Tool of Reproductive Oppression*, 5 STAN. J. C.R. & C.L. 309 (2009); Corey G. Johnson, *Female Inmates Sterilized in California Prisons Without Approval*, CENTER FOR INVESTIGATIVE REPORTING (July 7, 2013), <http://cironline.org/reports/female-inmates-sterilized-california-prisons-without-approval-4917>.

39. ROBERTS, *supra* note 24, at 89–96; see also Ainsworth & Roth, *supra* note 38.

state.⁴⁰

Given the deep structural inequities that remain entrenched in United States law and society, why should we allow and spend resources regulating arrangements that increase the reproductive capacity of affluent, most often white,⁴¹ people when the reproductive health, equality, and self-determination of people of color remains at risk? We are not so far from a time when the bodies of women of color could be legally owned, and the United States still grapples with structural vestiges of that history, as well as the ongoing trafficking of people for labor and sex work both within and to this country.⁴² While it appears that surrogates in the United States have not typically been low-income women of color or women who consider themselves coerced into the practice, concerns of exploitation are present in another surrogacy practice of intended parents in the United States: reproductive tourism, or contracting with a woman from another country to act as a surrogate.

2. *Reproductive Tourism and the India Experience*

The advent of a lucrative surrogacy industry in India⁴³ has been extensively described in recent years—and with particular concern from feminists in India and around the world.⁴⁴ International surrogacy

40. See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

41. There is little recent empirical research that focuses on the demographics of intended parents, as opposed to women acting as surrogates. A 1988 federal resource indicated that ninety-five percent of intended parents were white. U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, *INFERTILITY: MEDICAL AND SOCIAL CHOICES* 269 (1988). Given the demographics of race and affluence in the United States, and the expense of surrogacy arrangements, it is a safe assumption (if only an assumption) that at this time, the majority of intended parents in the United States are white.

42. See, e.g., HEATHER J. CLAWSON ET AL., U.S. DEP'T. OF HEALTH & HUMAN SERVS., *HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE* 4 (2009), available at <http://aspe.hhs.gov/hsp/07/humantrafficking/litrev/index.pdf> (estimating that 600,000 to 800,000 people are trafficked into the United States annually, and an additional 200,000 to 400,000 people are victims of domestic trafficking).

43. Lucrative, that is, for the Indian surrogacy industry, which brought in an estimated 20 billion dollars in 2011. Preeti Nayak, *The Three Ms of Commercial Surrogacy in India: Mother, Money, and Medical Market*, in *GLOBALIZATION AND TRANSNATIONAL SURROGACY IN INDIA: OUTSOURCING LIFE* 1, 2 (Sayantani DasGupta & Shamita Das Dasgupta eds., 2014).

44. *Id.*; see also FRANCE WINDDANCE TWINE, *OUTSOURCING THE WOMB: RACE, CLASS, AND GESTATIONAL SURROGACY IN A GLOBAL MARKET* (2011); Karen Busby & Delaney Vun, *Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 82–85 (2010); Sreeja Jaiswal, *Commercial Surrogacy in India: An Ethical Assessment of Existing Legal Scenario from the Perspective of Women's Autonomy and Reproductive Rights*, 16 GENDER TECH. & DEV. 1 (2012); Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 J. WOMEN CULTURE & SOC'Y 969 (2010); *Birthing a Market*, *supra* note 26, at 7.

arrangements are popular in part because many countries (and states in the United States) ban or strictly limit commercial surrogacy within their borders.⁴⁵ Intended parents seeking to have a child through a surrogacy arrangement go to the states or countries where surrogacy is permitted or, in the case of India, expressly sanctioned by law.⁴⁶

Women acting as surrogates in India are typically paid significantly less than women acting as surrogates in the United States,⁴⁷ but there are additional reasons beyond cost that attract intended parents to surrogacy arrangements there. First, the practice is not underground; India expressly legalized commercial surrogacy in 2002.⁴⁸ In addition, medical care in India is of comparable quality to the intended parents' home countries, and, as will be explained more thoroughly below, intended parents appreciate the ability to closely monitor the women acting as surrogates.⁴⁹ And, until recently, gay couples and single adults could enter into surrogacy arrangements there.⁵⁰

Feminists in India, as well as in the United States and in other countries, have expressed deep concern about the practice of reproductive tourism. Before considering those concerns, it is important to point out that Western feminist critique (as opposed to that of feminists in India) must recognize its cultural distance when critiquing the experiences and practices that affect women in India. As Alison Bailey points out, Western feminists have frequently presented Western ideas as "liberating" and viewed women in the Global South as "backward, poor, illiterate, culturally oppressed, and in need of rescue."⁵¹ It is important to recognize that limitation when considering

45. See Nicolas, *supra* note 17, at 1239–45.

46. Scott Carney, *Inside India's Rent-a-Womb Business*, MOTHER JONES (Mar./Apr. 2010), <http://www.motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel>.

47. See *Indian Surrogacy Helps Lift Some Poor, But Raises Ethical Issues*, PBS NEWSHOUR (Aug. 5, 2011), http://www.pbs.org/newshour/bb/globalhealth-july-dec11-surrogates_08-05/ (the entire costs of a surrogacy arrangement in India are about \$10,000 to \$15,000, and the woman acting as a surrogate receives approximately \$7,000); Deborah L. Cohen, *Surrogate Pregnancies on Rise Despite Cost Hurdles*, REUTERS (Mar. 18, 2013), <http://www.reuters.com/assets/print?aid=USBRE92H11Q20130318> (costs of surrogacy in the United States range from \$75,000 to \$120,000 or more for the entire process; in the example cited in this article, the surrogates themselves received from \$30,000 to \$35,000).

48. Carney, *supra* note 46.

49. *Birthing a Market*, *supra* note 26, at 7.

50. See, e.g., Nilanjana Bhownick, *Why People Are So Angry About India's New Surrogacy Rules*, TIME (Feb. 15, 2013), <http://world.time.com/2013/02/15/why-people-are-angry-about-indias-new-surrogacy-laws/>.

51. Alison Bailey, *Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy*, 26 HYPATIA 715, 717 (2011).

critique from feminists outside India.

What has concerned feminists (and ethicists) so greatly about reproductive tourism is the huge disparity in wealth between the women acting as surrogates and the intended parents, as well as the distance between them that necessitates an arms-length transaction and third party involvement.⁵² All of these factors tend to diminish the power of the women acting as surrogates relative to the power of the intended parents. The practice around surrogacy in India is of concern as well. The Ashanksa Fertility Clinic in the state of Gujarat has gained fame (and notoriety) for taking a significant amount of the money in the transaction, for requiring the women acting as surrogates to spend their pregnancies in a compound away from their families where their diet and activities are monitored, and for encouraging unnecessary cesarean births.⁵³ And yet, women who act as surrogates in India frequently earn several times what they could otherwise earn in a year, enabling them to purchase homes or send their own children to school.⁵⁴ In short, India's situation presents precisely the dilemma that so vexes feminists in the United States—the risk that women's bodies and lives will be additionally subject to state and private control when economic need leads them to employ their reproductive capacity as wage labor.

3. *Pregnant Women and State Control*

There is a real risk that women engaged in surrogacy arrangements in the United States, as well as in other countries, will be subject to intrusive, even punitive constraints on their liberty. The experiences of some women acting as surrogates in India is an example. In the United States, where feminist movement gains in recent decades have wrought significant change for women, the rhetoric of choice elides the fact that for many pregnant women, not only is access to abortion difficult or impossible, but drug policy and the rise of mass incarceration have together created a two-tiered system of reproductive access and control.⁵⁵

52. See, e.g., Amrita Pande, *Transnational Commercial Surrogacy in India: Gifts for Global Sisters?*, 23 REPROD. BIOMED. ONLINE 618, 623 (2011) ("As transactions in reproductive services cross borders, the differences between the buyers and sellers, whether based on race, class or nationality, become glaring. Unarguably, transnational commercial surrogacy in India is shaped by profound inequities in power."); see also *Birthing a Market*, *supra* note 26, at 25–26, 103.

53. See PBS NEWSHOUR, *supra* note 47.

54. *Id.*

55. See generally Paltrow & Flavin, *supra* note 37; see also JEANNE FLAVIN, OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA 20–21, 105–21 (2009);

As Lynn Paltrow and Jeanne Flavin have documented, pregnant women throughout the United States are subject to arrest, prosecution, conviction, or other judicial interventions.⁵⁶ Pregnant women have been and are currently being prosecuted or subjected to additional charges, longer jail sentences, and higher bail because of drug use (including use of prescribed medication), mental health problems, or abortion.⁵⁷ Newborn children have been taken from their mothers by child welfare systems because their mothers took a drug during pregnancy—even in the absence of any demonstrated harm to the newborn.⁵⁸ Other pregnant women have been ordered by courts and forced by their physicians to have cesarean surgeries.⁵⁹ Poor women of color are more likely to be targeted for such interventions and punishment.⁶⁰

These arrests and interventions reflect what concerns feminists about surrogacy, too. When courts enforce surrogacy contracts, such contracts present yet another opportunity for state-sanctioned control of pregnant women. Indeed, surrogacy contracts in states that allow the practice may be used to limit and control the decisions, actions, and self-determination of pregnant women. For example, Illinois' surrogacy law permits the enforcement of surrogacy contracts that include terms that restrain the pregnant woman's decision-making and autonomy, including the

ROBERTS, *supra* note 24 at 150–94.

56. Paltrow & Flavin, *supra* note 37, at 312.

57. *Id.*; see also McCormack v. Hiedeman, 694 F.3d 1004, 1025 (9th Cir. 2012) (affirming, in part, district court's decision enjoining Idaho's prosecution of woman who self-induced an abortion with medication she obtained online); Nina Liss-Schultz, *First Woman Arrested Under Tennessee Pregnancy Criminalization Law, for a Drug Not Covered Under the Law*, RH REALITY CHECK (July 10, 2014), <http://rtherealitycheck.org/article/2014/07/10/first-woman-arrested-tennessee-pregnancy-criminalization-law-drug-covered-law/> (reporting the first arrest of a woman for assault in relation to a positive toxicology screen at the birth of her child, pursuant to Tennessee's highly controversial law amending its fetal homicide statute to allow the prosecution of pregnant women and new mothers).

58. See, e.g., Paltrow & Flavin, *supra* note 37, at 318–19 (explaining that even a mistaken belief that a pregnant woman has used drugs has led to state interventions against pregnant women and new mothers); Kristen Gwynne, *Victory for Woman Whose Newborn Baby Was Taken Away After Poppyseed Bagel Caused Positive Drug Test*, ALTERNET (July 3, 2013), <http://www.alternet.org/drugs/new-mother-who-failed-drug-test-due-poppy-seed-bagel-gets-baby-back>.

59. See, e.g., *In re A.C.*, 573 A.2d 1235, 1261–64 (D.C. Cir. 1990) (reversing lower court's grant of court order forcing Angela Carder (A.C.), a pregnant cancer patient, to have a cesarean section without her consent; tragically, the cesarean section led to the death of both Ms. Carder and her baby).

60. See Paltrow & Flavin, *supra* note 37, at 311–12; AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 321: MATERNAL DECISION MAKING, ETHICS, AND THE LAW 8–9 (2005), <http://www.acog.org/-/media/Committee%20Opinions/Committee%20on%20Ethics/co321.pdf?dmc=1&ts=20140913T2016315945> (citing studies that found that the vast majority of court-ordered cesarean sections were directed at poor women of color).

woman's

agreement to abstain from any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child, including, *without limitation*, smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the gestational surrogate's pregnancy, exposure to radiation, or *any other activities* proscribed by a health care provider.⁶¹

Such a provision was also in place in the contract at issue in the well-known surrogacy decision in *Johnson v. Calvert*,⁶² but because that contract contained a contradictory provision regarding abortion, the California Supreme Court did not address the question of whether that provision could be enforced.⁶³

Some intended parents who make surrogacy arrangements have expectations that reinforce the concern that pregnant women's liberty is at risk. As Sharmila Rudrappa explains, a consistent theme among intended parents contracting with Indian women as surrogates is the desire of the intended parents to regulate the life of the pregnant woman.⁶⁴ One couple working with a United States woman acting as surrogate described being distressed that the pregnant woman was taking night classes, and secretly relieved when her physician recommended bed rest for the remainder of the pregnancy.⁶⁵ Other intended parents who had made surrogacy arrangements with women in India described appreciating the more controlled environment, believing that the women were less likely to do something that endangered the pregnancy.⁶⁶ While it is understandable that intended parents want to ensure prenatal health, it is another thing entirely to judicially enforce contracts that constrain the liberty of pregnant women to make decisions about their own health and lives.

61. 750 ILL. COMP. STAT. ANN. 47 / 25-(d)2 (West 2012 & Supp. 2013) (emphasis added).

62. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

63. *Id.* at 784 ("We note that although at one point the contract purports to give Mark and Crispina the sole right to determine whether to abort the pregnancy, at another point it acknowledges: 'All parties understand that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable.' We therefore need not determine the validity of a surrogacy contract purporting to deprive the gestator of her freedom to terminate the pregnancy.").

64. Sharmila Rudrappa, *Mother India: Outsourcing Labor to Indian Surrogate Mothers*, in GLOBALIZATION AND TRANSNATIONAL SURROGACY IN India, *supra* note 43, at 125, 135–40.

65. *Id.* at 138.

66. *Id.* at 137–38.

Under such a scheme, the civil rights and self-determination of pregnant women would become secondary to the concerns of the intended parents—and subject to state control and intervention through judicial enforcement. And when pregnant women's lives can be monitored and controlled, all women's status as rights bearers and constitutional persons is at risk. So a challenge for feminists in considering surrogacy is how to protect the rights of pregnant women from coercive interventions. This challenge is compounded for feminists because surrogacy arrangements have also become an important route to parenthood for gay (but not necessarily lesbian) couples, whose own rights to self-determination and privacy have only recently been vindicated in some contexts and jurisdictions.⁶⁷

B. Rights to Family Formation and the Question of Genetic Ties

Whatever challenges surrogacy poses for feminist concerns regarding women's self-determination and freedom from exploitation, it also has increasingly been a process by which gay male couples, in particular, have children and create families.⁶⁸ A key feminist project has been to free people in society from constricting gender roles.⁶⁹ Ensuring equal family recognition for lesbian and gay families is part of that project, although lesbian, gay, bisexual, transgender, and queer activists, including people of color, have also argued either that the attainment of marriage equality and other family rights are not sufficient or that they are the wrong goal.⁷⁰ While gay couples increasingly turn to women acting as surrogates to form families, legalizing surrogacy has not been a

67. See, e.g., *United States v. Windsor*, __U.S. __, 133 S. Ct. 2675 (2013) (striking down Defense of Marriage Act's marriage definition as a liberty deprivation); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that laws that criminalize sexual intimacy between consenting adults of the same sex violate the right to privacy).

68. See generally Nicolas, *supra* note 17 (describing his experience of having a child with his husband through a surrogacy arrangement); Miriam Pérez, *Surrogacy: The Next Frontier for Reproductive Justice*, RH REALITY CHECK (Feb. 23, 2010), <http://rhrealitycheck.org/article/2010/02/23/surrogacy-next-frontier-reproductive-justice/>.

69. See Martha A. Fineman, *Gender and Law: Feminist Legal Theory's Role in New Legal Realism*, 2005 WIS. L. REV. 405, 407 (2005) ("Feminism, as a discipline, is focused on the significance of gender and the societal inequalities resulting from values and assumptions based on gender. As a group, feminists are concerned with the implications of historic and contemporary exploitation of women within society, seeking the empowerment of women and the transformation of institutions dominated by men.").

70. See, e.g., DEAN SPADE, *NORMAL LIFE* 33 (2011) (critiquing the emphasis on marriage equality and hate crimes laws, arguing that "legal equality goals threaten to provide nothing more than adjustments to the window-dressing of neoliberal violence that ultimately disserve and further marginalize the most vulnerable trans populations").

major priority for LGBTQ rights activists either.⁷¹

But it is a mistake to assume that surrogacy laws have not contemplated LGBTQ families. In fact, some states' surrogacy laws have been yet another locus for legally enshrining discrimination against LGBTQ people. In Florida, for example, surrogacy provisions explicitly prohibit anyone who is not "legally married" from engaging in surrogacy; the state, as of this writing, bans marriage between partners of the same sex.⁷² For feminists who seek to undermine notions of marriage that cabin women's roles, to ensure equality and legal recognition for lesbian and gay families, and to challenge any law that expressly discriminates on the basis of sexuality, surrogacy laws present the difficult challenge of balancing potentially competing human needs and concerns. This challenge is compounded by the fact that most gay (and straight) couples who engage in surrogacy often support these arrangements by linking them to their desire to have "their own"—i.e., a genetically related—child.⁷³

The question of whether genetic relationship makes a parent is another difficult wrinkle of surrogacy. Perhaps it is the most difficult challenge, as it is one of the driving forces behind the practice in the first place. It goes without saying that there are other ways to become a parent, and genetic relationship is not the only reason people engage in surrogacy arrangements. As noted above, homophobia has led to discriminatory adoption laws and practices in several states, preventing gay people—and in some states any single person—from adopting a child, leaving surrogacy as one of a very limited number of options. But intended parents consistently frame their desire for a genetically related child as their reason for entering into a surrogacy arrangement; this is not surprising because, as sociologist Olga van den Akker explains, "current law and most cultural values define parenthood and the family in biological terms."⁷⁴ But should this desire for genetically related

71. One exception is the Washington State legislative experience, where a gay legislator led the efforts to repeal the state ban on compensated surrogacy. See Rosbach, *supra* note 8.

72. FLA. STAT. ANN. § 742.15(1) (West 2010 & Supp. 2013). However, the United States Supreme Court's decision in *United States v. Windsor* calls into question the constitutionality of laws that discriminate on the basis of sexual orientation. See *Windsor*, 133 S. Ct. at 2694–96.

73. See, e.g., Olga van den Akker, *The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK*, 15 HUM. REPROD. 1849, 1853 (2000).

74. Olga van den Akker, *Psychosocial Aspects of Surrogate Motherhood*, 13 HUM. REPROD. UPDATE 53, 54 (2007). I must point out that people who want to and can conceive through sexual intercourse get to make the decision to have genetically related children without scrutiny (myself included). Rarely are they criticized for bringing a baby into the world when there are children available for adoption, but that critique is routinely leveled at people who have children with the help of a woman acting as surrogate. See, e.g., ROBERTS, *supra* note 24, at 286 (suggesting, in the

children be legally supported from a feminist perspective?

In *Parentage of L.B.*,⁷⁵ Legal Voice (then the Northwest Women's Law Center) argued that a person who parents a child is the child's parent, and should be recognized as such in law.⁷⁶ In that case, the Washington State Supreme Court first recognized the doctrine of "de facto parenthood," allowing the non-biological mother of a child to defend her parental rights.⁷⁷ Countless grandmothers, grandfathers, aunts, uncles, siblings, friends, and neighbors in the United States care for children as kinship caregivers, often without formal legal recognition.⁷⁸ To insist that genetics makes a parent undermines the rights of people to legal and social recognition of their families.⁷⁹ Moreover, the Uniform Parentage Act, the model law on legal parentage adopted, in some form, by most states, expressly acknowledges that a person who did not contribute a gamete to create a child may nonetheless be a legal parent, with all the rights and responsibilities that status entails.⁸⁰

Surrogacy laws in many states, however, place a strong emphasis on genetic ties. In Illinois, for example—a state with what is arguably one of the most progressive surrogacy laws to date—LGBTQ families are not excluded from participation, but only gestational surrogacy is within

context of exploring the potential racist and eugenic implications of assisted reproductive technologies, "[i]t would be hypocritical to condemn people who resort to new reproductive technologies for having the same desires for their children as more conventional parents, whose decisions are not so scrutinized"). There are, of course, people who believe that it is environmentally irresponsible and selfish for *anyone* to have children, but that is a different critique.

75. *In re Parentage of L.B.*, 155 Wash. 2d 679, 122 P.3d 161 (Wash. 2005).

76. *Id.* at 702–09, 173–77.

77. *Id.* at 712, 179; *see also* *S.Y. v. S.B.*, 134 Cal. Rptr. 3d 1, 14 (Cal. Ct. App. 2011) (recognizing a non-adoptive, non-biological mother as a legal parent of the children she held out as her own, and noting that "numerous states have recognized the parental rights of same-sex co-parents who do not have a biological or adoptive relationship with a child").

78. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., KINSHIP CAREGIVERS AND THE CHILD WELFARE SYSTEM, (2010), *available at* https://www.childwelfare.gov/pubs/f_kinshi/f_kinshi.pdf (contrasting informal and formally recognized kinship caregivers); Laura Weinrib, *Kinship Care Reform: A Proposal for Consent Legislation in Massachusetts*, 87 MASS. L. REV. 23, 24 (2002) (describing the significance of informal kinship caregivers in Massachusetts and the legal impediments they face when caring for children outside the formal foster care system).

79. *See, e.g., Neil S. v. Mary L.*, 131 Cal. Rptr. 3d 51, 57 (Cal. Ct. App. 2011) (holding that biology is not determinative of parentage, and noting that California courts over the last three decades have placed increasing importance on the child's social relationship with a prospective parent).

80. *See* UNIF. PARENTAGE ACT, §§ 204(a)(5), 702 (amended 2002) (parentage may be established by holding a child out as one's own for the first two years of the child's life, regardless of biological relationship, and people who donate eggs or sperm for assisted reproduction are excluded as parents of a resulting child).

the law's reach.⁸¹ Presumably, traditional surrogacy arrangements—where the woman acting as surrogate is also the biological parent of the child she carries—would fall outside the law's protections and would end up, if contested, in family court proceedings where the law does not well fit the circumstances.⁸² The preference for gestational surrogacy enforces the social perception of the importance of having (or, in the case of the pregnant woman, not having) a genetic tie to one's child. This social perception is inaccurate, though, at least far as Western women acting as surrogates are concerned: women who engage in traditional surrogacy arrangements generally report the same levels of comfort in going through with the surrogacy and relinquishing the baby to the intended parents as do gestational surrogates.⁸³

Moreover, if the preferred feminist claim is that genetics does not make a parent, that has ramifications for whether the law should allow or prohibit “traditional” surrogacy—a surrogacy arrangement where the woman acting as surrogate contributes her own ova to the conception of the pregnancy.⁸⁴ Traditional surrogacy (the process used in the *Baby M* case, for example) is less common now—in part because it is not legally supported in some of the jurisdictions that allow surrogacy contracts.⁸⁵ However, it may carry fewer health risks for the woman acting as surrogates because no in vitro process is typically involved.⁸⁶ Moreover, women report that traditional surrogacy does not change their ability to go through with the contract and give the baby to the intended parents.⁸⁷ From this perspective, traditional surrogacy may be preferable for

81. See 750 ILL. COMP. STAT. ANN. 47 / 1 (West 2012).

82. See, e.g., Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 373 (2012) (“Pre-existing family law is inadequate to address surrogacy, in part because of the multiple parents . . .”).

83. See, e.g., Olga van den Akker, *Psychological Trait and State Characteristics, Social Support and Attitudes to the Surrogate Pregnancy and Baby*, 22 HUM. REPROD. 2287, 2293–94 (2007); Laufer-Ukeles, *supra* note 4, at 1261 (while arguing that gestational surrogacy is preferable because the women acting as gestational surrogates place importance on the lack of genetic tie as a way to distance themselves from their pregnancies and avoid bonding with the baby after birth, noting that “[t]oo much should not be made of the difference between gestational and traditional surrogacy as traditional surrogates also attest to being able to detach from the babies by focusing on the importance of social parenthood.”). This comfort was also reflected in my discussions with women acting as surrogates in Idaho and Oregon.

84. See Julie Shapiro, *For Feminists Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1346 n.7 (2014).

85. See, e.g., 750 ILL. COMP. STAT. ANN. 47 / 5.

86. Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN'S L.J. 245, 248 n.22 (2012).

87. See van den Akker, *supra* note 83.

women acting as surrogates—both to advance the principle that genetics does not make a parent, and to support women’s health.⁸⁸

C. Health, Access to Health Care, and Reproductive Technologies

Viewed through a health lens, surrogacy raises additional challenges for creating a progressive, equitable framework for the practice. Assisted reproduction in the United States is a highly medicalized affair. This is, in part, a necessity—when undergoing ovum extraction, for example, a woman must take medication that stimulates the production of ova, and then have the resulting eggs extracted by a physician through an invasive procedure.⁸⁹ Insemination with donor sperm, too, may take place in the medical setting, although people do not always require physician assistance to successfully conceive through insemination.⁹⁰ However, some states’ parentage laws require physician involvement to exclude a sperm donor as a legal parent.⁹¹ In any event, although people certainly assist each other in conceiving children outside of the medical context, the health care system is the primary provider of assisted reproduction in the United States.⁹²

This health care system remains profoundly inequitable, despite the gains of the Affordable Care Act. For many people struggling to conceive children, the options are extremely limited. This is particularly true in the context of assisted reproduction. Most people in the United States lack insurance coverage for infertility treatments,⁹³ and it is unclear whether the Affordable Care Act (ACA) will improve or further

88. See Shapiro, *supra* note 84.

89. See *Fact Sheet: Egg Donation*, AM. SOC’Y FOR REPROD. MED. (2012), http://www.reproductivefacts.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/Egg%20donation%20FINAL%204-23-12.pdf.

90. I found no scientific studies on success rates of at-home artificial insemination, but there are a number of written and online materials describing how to perform the various methods of at-home insemination. See, e.g., CYNTHIA FEAKANS & DEB COHAN, BAY AREA PERINATAL AIDS CTR., HOME INSEMINATION: A SAFER WAY TO GET PREGNANT (2011), available at <http://hiv.ucsf.edu/care/perinatal/forpatients/HomeinseminationforHIVfemalediscordantcouple.pdf> (advocating for home insemination, and explaining how it’s done, for HIV positive women who want to get pregnant without exposing an HIV negative male partner to unsafe sex).

91. See, e.g., N.J. STAT. ANN. § 9:17–44 (West 2013).

92. See, e.g., AM. SOC’Y FOR REPROD. MED., ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS (2011), available at https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf (describing the complex—and highly medical—procedures of assisted reproductive technologies, including in vitro fertilization).

93. Kate Devine et al., *The Affordable Care Act: Early Implications for Fertility Medicine*, 101 FERTILITY & STERILITY 1224, 1224 (2014).

limit access to assisted reproductive medicine.⁹⁴ The cost of surrogacy—from \$60,000 to upwards of \$120,000⁹⁵—is out of reach for most people in the United States, rendering surrogacy a reproductive option only for people with means.⁹⁶

But when considering whether to improve access to this procreative option, the considerably different rates of premature birth, maternal health complications, stillbirth, and other pregnancy outcomes for women of color⁹⁷ should give feminists pause. Women's rights activists have worked hard to improve health care access, supported universal healthcare, continued to work to use the ACA to expand access to women's health,⁹⁸ undertaken a campaign to repeal federal and state abortion funding restrictions,⁹⁹ and struggled to make contraception available to and safe for women and girls. Health care disparities remain, however, a critical concern for low-income communities and people of color.¹⁰⁰ In one of the most glaring and unjust examples, immigrants'

94. *Id.*

95. See Mike Anderson, *Surrogacy Financing: How to Afford that \$60K Price Tag*, U.S. NEWS & WORLD REP. (Oct. 23, 2013), <http://money.usnews.com/money/blogs/my-money/2013/10/21/surrogacy-financing-how-to-afford-that-60k-price-tag>.

96. This is true of infertility services generally; as Pamela Bridgewater explains, African American and Latina women are less likely to be consumers of assisted reproductive technologies, "as are poor people and people with less than a high school education." Pamela D. Bridgewater, *Reconstructing Rationality: Towards a Critical Economic Theory of Reproduction*, 56 EMORY L.J. 1215, 1225 (2007). However, prominent African American women have had children through surrogacy arrangements, most recently professor and MSNBC host Melissa Harris-Perry. Janna Zinzi, *How Melissa Harris-Perry Is Sparking a National Conversation About Fertility and Family*, RH REALITY CHECK (Mar. 18, 2014), <http://rhrefactycheck.org/article/2014/03/18/melissa-harris-perry-sparking-national-conversation-fertility-family/>.

97. See AMNESTY INT'L, DEADLY DELIVERY: THE MATERNAL HEALTH CRISIS IN THE USA, ONE-YEAR UPDATE 3, 19 (2011), available at <http://www.amnestyusa.org/sites/default/files/pdfs/deadlydelivery.pdf> [hereinafter DEADLY DELIVERY] (noting maternal mortality rate for African American women in the United States is three to four times that of white women at comparable socio-economic levels); INST. OF MED., REPORT BRIEF: PRETERM BIRTH, CAUSES, CONSEQUENCES, AND PREVENTION, (2006), available at <http://www.iom.edu/~media/Files/Report%20Files/2006/Preterm-Birth-Causes-Consequences-and-Prevention/Preterm%20Birth%202006%20Report%20Brief.pdf> (noting there are "very troubling and persistent" disparities in pre-term birth, particularly for African American and Latina women).

98. See, e.g., RAISING WOMEN'S VOICES FOR THE HEALTH CARE WE NEED, <http://www.raisingwomensvoices.net/> (last visited Oct. 8, 2014). That work was undermined, but not ended, by the Supreme Court's decision holding that closely-held for-profit companies have religious rights under the federal Religious Freedom Restoration Act that permit them to refuse to follow the minimum essential coverage mandate that includes birth control. See *Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S. ___, 134 S. Ct. 2751 (2014).

99. See ALL ABOVE ALL, <http://allaboveall.org/home/> (last visited Oct. 8, 2014).

100. See generally U.S. DEP'T OF HEALTH & HUMAN SERVS., *CDC Health Disparities and Inequalities Report — United States, 2013* (2013), available at <http://www.cdc.gov/mmwr/pdf/other/su6203.pdf>.

access to public medical assistance programs and the health care exchanges created by the ACA is limited because of a five-year bar on access to health benefits for lawful permanent residents, and the flat denial of health care to undocumented people.¹⁰¹

Health care disparities are not limited, however, to people who lack health insurance. African American and Native American women, for example, regardless of education or affluence, have significantly worse maternal and pregnancy outcomes than their white counterparts.¹⁰² And all women in the United States have worse outcomes than women in forty-nine countries, including nearly every European country, Canada, and several countries in Asia and the Middle East.¹⁰³ As Sheila Capestany has persuasively argued, we should strive to achieve European standards for all people in the United States, rather than rush to reach “equity” among our rather low United States rates.¹⁰⁴ With serious health care disparities and limited access to basic health care as a backdrop, expanding access to surrogacy as the means of procreation is unlikely to be a priority for women’s health advocates.

Another important question for women’s health advocates is whether a woman acting as surrogate puts her health at risk in the process. Pregnancy is always a risky endeavor. Short of death, pregnant women face risks to their health such as gestational diabetes, high blood pressure, childbirth complications and injuries, and more.¹⁰⁵ Even an otherwise healthy and uneventful pregnancy may affect a woman’s long-term physical health. But in addition to those risks, women who act as gestational surrogates typically go through an invasive in vitro medical process. There are short-term risks to such procedures, and potentially long-term risks as well, although those risks are not yet well understood because of the relatively recent availability of in vitro fertilization procedures.¹⁰⁶

In short, surrogacy arrangements implicate health care, as well as law and policy. Questions of access, exclusion, and individual long-term

101. See *Immigrants and the Affordable Care Act (ACA)*, NAT’L IMMIGR. LAW CENTER (Jan. 2014), <http://www.nilc.org/immigrantslcr.html>.

102. See DEADLY DELIVERY, *supra* note 97, at 19.

103. *Id.* at 3.

104. Sheila Capestany, Remarks at Northwest Reproductive Justice Collaborative: Birthing and Parenting in Prison: A Community Discussion (Dec. 8, 2009).

105. See *Pregnancy Complications*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregcomplications.htm> (last visited Oct. 8, 2014).

106. Stark, *supra* note 82.

reproductive health inform the feminist understanding of surrogacy, and add to the complexity of the issue, particularly in a society where health care is not recognized as a human right and access to reproductive health care is, for many, threatened or out of reach.

D. Bringing More Voices to the Debate: People with Disabilities

Like people who lack access to health care in the United States, people with disabilities, too, are affected by the surrogacy discussion but are rarely at the forefront of the debate. Questions of assisted reproductive technology deeply affect people with disabilities, as their rights to procreate,¹⁰⁷ to participate in surrogacy,¹⁰⁸ and to be valued as full human beings¹⁰⁹ have long been questioned. Discussions about surrogacy typically do not envision people with disabilities as either intended parents or as women acting as surrogates, but as fetuses or newborn babies whose existence will challenge the parameters of the surrogacy agreement.¹¹⁰ The primary question seems to be, what should happen when a pregnant woman acting as a surrogate receives a prenatal diagnosis that the fetus has a medical condition that may cause it to be

107. For decades in the United States, people with disabilities, poor people, and people of color (especially welfare recipients and Native American women) were subjected to forced sterilization under eugenics policy. Although those policies have been repudiated, *see* Ainsworth & Roth, *supra* note 38, people with disabilities are still sterilized by court order. *See, e.g.*, Conservatorship of Angela D., 83 Cal. Rptr. 2d 411 (Cal. Ct. App. 1999). On a different note, others argue that people struggling with infertility are also suffering from a disability, and should have a right to assisted reproductive technologies, including surrogacy. *See* Lindsey Coffey, *A Rights-Based Claim to Surrogacy: Article 23 of the Convention on the Rights of Persons with Disabilities*, 20 MICH. ST. INT'L L. REV. 259, 291 (2012).

108. *See, e.g.*, ILL. COMP. STAT. ANN. 47 / 20(a)(4), (b)(3) (West 2012) (requiring both women acting as surrogates and intended parents to complete a mental health evaluation to establish eligibility to participate in a legally recognized surrogacy contract). The law is silent, however, as to what happens when a mental health evaluation indicates that a party may have a disability; perhaps the assumption is that the market will resolve the issue, and that people will not contract with each other under those circumstances. If that is so, that assessment is laden with the view that disability renders people unfit for procreation.

109. Generations Ahead, *A Reproductive Justice Analysis of Genetic Technologies: Report on a National Convening of Women of Color and Indigenous Women* 8–9 (2009), http://www.generations-ahead.org/files-for-download/articles/GenAheadReport_ReproductiveJustice.pdf; Mia Mingus, *Disabled Women and Reproductive Justice*, THE PRO-CHOICE PUBLIC EDUCATION PROJECT, <http://protectchoice.org/article.php?id=140> (last visited Aug. 13, 2014) (noting that in United States culture, disability is frequently “feared, hated, and typically regarded as a condition that reduces the value of disabled people”).

110. *See, e.g.*, Elizabeth Cohen, *Surrogate Offered \$10,000 to Abort Baby*, CNN HEALTH (Mar. 6, 2013, 2:58 PM), <http://www.cnn.com/2013/03/04/health/surrogacy-helly-legal-battle/>; Hilary Whiteman, *Surrogate Mom Vows to Take Care of Ill Twin “Abandoned” by Parents*, CNN WORLD (Aug. 7, 2014, 12:29 AM), <http://www.cnn.com/2014/08/04/world/asia/thailand-australia-surrogacy/>.

born with a disability?

Other reproductive technologies, such as pre-implantation genetic diagnosis, or PGD, allow prospective parents and their health care providers to control for certain genetic attributes in fertilized embryos before they are implanted in a woman's uterus. Ethicists and the media have raised concerns regarding "designer babies," suggesting the possibility that parents could predetermine the height, eye color, and other traits of their children.¹¹¹ But less frequently challenged is the rhetoric that equates disability with reduced human value, rhetoric that is pervasive in both surrogacy and abortion debates.¹¹²

Feminists are also at fault for this dehumanizing treatment of disability, particularly in the abortion context, as Alison Piepmeier demonstrates in her article, *Disability and What's Wrong with Feminist Framings of Reproduction*.¹¹³ After posting an article about having a child with Down Syndrome on a New York Times blog, Ms. Piepmeier received numerous comments from readers that equated giving birth to a child with Down Syndrome (or any disability) with a "crime," a "drain on society," and cruelty.¹¹⁴ As Sujatha Jesudason and Julia Epstein explain, abortion rights proponents "sometimes use disability to defend access to abortion," using rhetoric that inevitably equates disability with tragedy.¹¹⁵

Cases where the parties to a surrogate contract receive a prenatal diagnosis of disability have led to conflict and media attention.¹¹⁶ A host of questions follow: should the intended parents be permitted to force the woman acting as surrogate to have an abortion if a prenatal diagnosis shows that the child may be born with a disability, such as Down Syndrome? May the intended parents refuse to follow through with the contract? Will the woman acting as surrogate become the legal parent if the intended parents refuse to fulfill the contract, and if so, will the intended parents be legally obligated to support the child financially?

The answers to these questions have, unfortunately, rarely been

111. See, e.g., Sonia M. Suter, *A Brave New World of Designer Babies*, 22 BERKELEY TECH. L.J. 897 (2007).

112. See Sujatha Jesudason & Julia Epstein, *Disability and Justice in Abortion Debates*, CENTER FOR WOMEN'S POLICY STUDIES (Feb. 9, 2012), [http://www.centerwomenpolicy.org/news/ newsletter/documents/REPRO_DisabilityandJusticeinAbortionDebates_JesudasonandEpstein.pdf](http://www.centerwomenpolicy.org/news/newsletter/documents/REPRO_DisabilityandJusticeinAbortionDebates_JesudasonandEpstein.pdf).

113. Alison Piepmeier, *Disability and What's Wrong with Feminist Framings of Reproduction*, 39 FEMINIST STUD. 159 (2013).

114. *Id.* at 160.

115. Jesudason & Epstein, *supra* note 112.

116. See, e.g., Cohen, *supra* note 110.

framed in a way that honors the humanity of people with disabilities. A woman's right to self-determination is a feminist imperative, but so should be the dignity of people with disabilities, whose lives should not be used as a rhetorical device or a justification for surrogacy policy. Marsha Saxton's claim about the abortion context is apropos here as well: "[T]he great opportunity with this issue is to think and act and take leadership in the place where feminism, disability rights, and human liberation meet."¹¹⁷

II. PEOPLE WHO PARTICIPATE IN SURROGACY CONTRACTS: WHAT WE KNOW

In the decades since *Baby M* was decided, surrogacy arrangements in the United States and between United States intended parents and women in countries like India have become far more common. Much more is known, now, about the demographics of the women who act as surrogates and the people who become intended parents.¹¹⁸ As scholars—most notably Canadian scholars Karen Busby and Delaney Vun—have summarized this knowledge elsewhere,¹¹⁹ this section will briefly review the empirical information. While a detailed recounting is not necessary here, an overview is included because feminist theory and reproductive justice intentionally engage with people's experiences to inform a policy response.

A. *Women Acting as Surrogates*

Women acting as surrogates in the United States tend to be white, of varying income, and define themselves as Christian.¹²⁰ Media in the United States have reported that a significant number of women acting as surrogates were married to men who are enlisted in the military, and act as surrogates while their husbands are deployed overseas.¹²¹ Women acting as surrogates are frequently motivated by altruism; they have

117. Marsha Saxton, *Disability Rights and Selective Abortion*, in THE REPRODUCTIVE RIGHTS READER 231, 238 (Nancy Ehrenreich ed., 2008).

118. There is also more information about the experiences of children born from surrogacy arrangements, although the data is still fairly limited. Detailed attention to the concerns of children born of surrogacy arrangements is beyond the scope of this Article. That is not to say that they are not important.

119. See generally Busby & Vun, *supra* note 44.

120. *Id.* at 42–44.

121. See, e.g., Astrid Rodrigues and Jon Meyersohn, *Military Wives Turn to Surrogacy: Labor of Love or Financial Boost?*, ABC NEWS (Oct. 15, 2010), <http://abcnews.go.com/GMA/Parenting/military-wives-surrogates-carrying-babies-love-money/story?id=11882687>.

consistently explained that they want to help someone who desperately wants to have children, and that they view surrogacy as an opportunity to do something meaningful with their lives.¹²² Some women act as surrogates for a close friend or relative, and in states like Washington, where compensated surrogacy is banned, women nonetheless decide to act as surrogates out of this sense of altruism.¹²³

In both United States and British studies, women acting as surrogates indicate that they appreciated the emotional bond with the intended parents—or were unhappy if that was lacking—and that they were comfortable, even happy, giving the baby to the intended parents after the birth.¹²⁴ They describe feeling like this pregnancy is akin to caring for someone else's child, unlike the bonding they experienced with pregnancies with children they intended to keep.¹²⁵ This was true even when they were genetically related to the children they carried; the experience of Mary Beth Whitehead is not the norm. This is not a surprising finding given that the vast majority of women who have had abortions describe feelings of relief, rather than sorrow, after the termination of their pregnancies.¹²⁶ These studies demonstrate that women experience a pregnancy differently depending on their intentions in relation to it.

Legal disputes—at least those that end up in court—between women acting as surrogates and intended parents are apparently rare.¹²⁷ Although cases involving conflict receive significant media attention, there are relatively few reported decisions involving custody and/or contract disputes between parties to a surrogacy arrangement.¹²⁸ When disputes do arise, they appear to happen when one party to the contract feels the other has not met the expectations for emotional engagement—

122. Busby & Vun, *supra* note 44, at 53–56 (citing several studies of women in the United States and the U.K. that concluded that money was rarely, if ever, the primary motivating factor for women acting as surrogates).

123. In a lovely example, that apparently confounds expectations about race, a woman acted as surrogate for her best friend, giving birth at home with her friend and their husbands, and documented by a photographer. See Melanie Monroe Rosen, *Best Friend Becomes Surrogate Mother*, PARENTING, <http://www.parenting.com/gallery/surrogate-mother?page=14> (last visited Sept. 15, 2014).

124. Busby & Vun, *supra* note 44, at 59–64; van den Akker, *supra* note 74, at 56.

125. Busby & Vun, *supra* note 44, at 68–74. Two women I spoke to in Oregon and Idaho, who had each acted as surrogates more than once, also expressed this view.

126. See Corinne H. Rocca et al., *Women's Emotions One Week After Receiving or Being Denied an Abortion in the United States*, 49 PERSP. SEXUAL & REPROD. HEALTH 122, 128 (2013).

127. Busby & Vun, *supra* note 44, at 72–73.

128. *Id.* at 36–38.

in short, United States surrogacy arrangements tend not to be arms-length, commercial-style transactions, but more complicated, emotionally laden relationships.¹²⁹

B. *Intended Parents*

The significant expense of surrogacy for the intended parents suggests that they may have more means than the women with whom they contract as surrogates.¹³⁰ However, they are not necessarily wealthy.¹³¹ Surrogacy will be more expensive for intended parents who live in a state that does not legally recognize surrogacy contracts, so presumably that prohibition acts as a barrier to people of lesser means utilizing surrogacy arrangements. Economic incentives encourage some intended parents to make surrogacy arrangements with women outside the United States, in countries like India, Mexico, and, until recently, Ukraine, where surrogacy is either explicitly legal or implicitly permitted.¹³² Similarly, intended parents in other countries where surrogacy is outlawed contract with women in the United States to act as surrogates for them.¹³³

Intended parents tend to be straight couples who have been unable to conceive children and for whom other fertility interventions have failed.¹³⁴ Even celebrity women typically tell the press that they were unable to conceive and turned to surrogacy for that reason, contrary to assumptions that they used surrogacy to avoid changes to their appearance.¹³⁵ Intended parents are also, increasingly, gay male couples

129. Laufer-Ukeles, *supra* note 4, at 1232.

130. See, e.g., Melissa Dahl, *More Couples, Like Jimmy Fallon and His Wife, Turning to Surrogacy*, TODAY (Aug. 9, 2013, 8:26 PM), <http://www.today.com/health/more-couples-jimmy-fallon-his-wife-turning-surrogacy-6C10885863> (noting the high cost of surrogacy that tends to make it a privilege of the wealthy, while describing two stories involving intended parents who borrowed significant amounts of money to pay for the surrogacy arrangement); see also Deborah L. Cohen, *Surrogate Pregnancies on Rise Despite Cost Hurdles*, REUTERS (Mar. 18, 2013, 5:40 PM), <http://www.reuters.com/article/2013/03/18/us-parent-surrogate-idUSBRE92H11Q20130318>.

131. Dahl, *supra* note 130.

132. Jennifer Kirby, *These Two Americans Want Babies Through Indian Surrogates. It's Not Been Easy.*, NEW REPUBLIC (Dec. 10, 2013), <http://www.newrepublic.com/article/115873/fertility-tourism-seeking-surrogacy-india-thailand-mexico>.

133. Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES, July 5, 2014, at A1.

134. Busby & Vun, *supra* note 44, at 79.

135. As Busby and Vun explain, “[s]ome are concerned that commercial surrogacy . . . allows wealthy women to buy their way out of the burden of having to be pregnant.” *Id.* at 79. But the research on surrogacy (and, in the case of celebrities, their reports), seems to belie that notion. See, e.g., Summer Buesing, *18 Celebrities Who Used Surrogacy*, THE RICHEST (June 7, 2014),

who contribute one partner's sperm and use a donor egg (a misnomer, as egg donors are usually compensated in the United States) to create a prezygote, then contract with a woman acting as surrogate to carry the pregnancy.¹³⁶ Single people may also engage in surrogacy arrangements.¹³⁷

C. *The Problem of Brokers*

Although the Internet has allowed for the greater possibility that intended parents and surrogates can meet and make arrangements directly without third party involvement, many find each other through brokers.¹³⁸ These third parties range from individuals such as former surrogate mothers or lawyers to fertility clinics or stand-alone agencies.¹³⁹ The use of third party agencies in this setting can be analogized to adoption agencies, but a primary distinction is that adoption agencies are highly regulated entities, whereas surrogacy brokers operate almost universally free of oversight.¹⁴⁰

This lack of regulation has, unfortunately, allowed unscrupulous brokers to victimize both intended parents and women acting as surrogates.¹⁴¹ In an infamous example, SurroGenesis, a surrogacy agency in California, absconded with up to two million dollars from intended parents, leaving numerous women in the middle of pregnancies without health insurance, and the intended parents having lost all the money they had believed would be used for the pregnant woman's care and fulfillment of their part of the surrogacy contract.¹⁴²

<http://www.therichest.com/expensive-lifestyle/lifestyle/18-celebrities-who-used-surrogacy/>.

136. See, e.g., Nicolas, *supra* note 17.

137. See, e.g., Lisa Flam, *Yearning to Be Parent, Dad Is One of Few Single Men Who Turned to Surrogacy*, TODAY (July 26, 2013, 9:47 AM), <http://www.today.com/parents/yearning-be-parent-dad-one-few-single-men-who-turned-6C10744873>.

138. It appears that third parties brokered surrogacy arrangements from the beginning. See Carol Sanger, *Developing Markets in Baby-Making*: In the Matter of Baby M, 30 HARV. J. L. & GENDER 67, 83–85 (2007) (telling the story of attorney Noel Keane, who brokered the arrangement between Mary Beth Whitehead and the Sterns, and who became the “go-to guy” for people wanting to make surrogacy arrangements in the northeast).

139. See Tamar Lewin, *A Surrogacy Agency That Delivered Heartache*, N.Y. TIMES, July 28, 2014, at A1.

140. California is the one exception. See CAL. FAM. CODE § 7691 (West 2012 & Supp. 2013) (regulating non-lawyer “surrogacy facilitators” by requiring funds intended for a surrogacy agreement to be placed in escrow or in an attorney's trust account, and distributed by either an attorney or the escrow agent).

141. See Lewin, *supra* note 139.

142. Stephanie Saul, *Would-Be Parents Find Surrogacy Agency Closed*, N.Y. TIMES, Mar. 21, 2009, at A14.

The reality of people's experiences with surrogacy, and the potential for problems inherent in such a fraught context, calls for regulation to protect the humanity of those involved. Regulation in this setting is bound to be less helpful if it is ad hoc. Rather, a regulatory response to compensated surrogacy should be based on a comprehensive, if necessarily contingent, plan to further principles of gender equality, social justice, and anti-subordination.

III. PROGRESSIVE, FEMINIST PRINCIPLES FOR REGULATING SURROGACY

Because there is no one school of feminist thought, I take the liberty of referring to the principles described below as "feminist," knowing that some will object to this framing. But a project that seeks to ensure the anti-subordination of women surely fits within at least one school of feminist thought. "Feminist" is, in this case, qualified by "progressive" because a progressive vision includes both human rights to dignity and self-determination, and a recognition that the state has a role in ensuring the realization of those rights.¹⁴³ With that said, some will object that as an economic exchange, compensated surrogacy is simply an expression of capitalism and the reduction of all human endeavors, no matter how sacred, to a market transaction.¹⁴⁴ This is where the "pragmatic" feminist approach comes in.

Pragmatic feminism is described by Mary Becker as the recognition that no one "grand theory" can capture the possible manifestations of a particular problem or the efficacy of proposed solutions.¹⁴⁵ Drawing from Margaret Radin's work, Becker suggests that surrogacy is too complex to be resolved by feminist theories, such as dominance

143. See Al Yates & Anne Bartley, *Progressive Thinking: A Synthesis of American Progressive Values, Beliefs, and Positions*, AM. VALUES PROJECT 1, 20 (2012), <http://www.scribd.com/doc/131793272/Progressive-Thinking>.

144. See Barbara Katz Rothman, *Reproductive Technology and the Commodification of Life*, in EMBRYOS, ETHICS, AND WOMEN'S RIGHTS 95, 96 (Elaine Hoffman Baruch et al. eds., 1988); Brandon McGinley, *Why the Left Should Oppose Commercial Surrogacy*, THE WEEK (Oct. 21, 2014), <http://theweek.com/article/index/270139/why-the-left-should-oppose-commercial-surrogacy> (arguing that commercial surrogacy reduces women and babies to market commodities); Kathleen Parker, Op-Ed., *Kathleen Parker: The Exploitation of Surrogate Mothers*, WASH. POST (May 24, 2013), http://www.washingtonpost.com/opinions/kathleen-parker-the-exploitation-of-surrogate-mothers/2013/05/24/90bc159e-c4b0-11e2-8c3b-0b5e9247e8ca_story.html (describing an interview with Kathleen Sloan, a feminist and board member of the National Organization for Women who opposes commercial surrogacy).

145. Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303, 305 (1993).

feminism or hedonic feminism.¹⁴⁶ A pragmatic feminist response to surrogacy would, instead, consider surrogacy and its real and potential impact on women, recognizing that women are not similarly situated, and “make a best guess,” continually reassessing the impact of a particular policy solution.¹⁴⁷

Described that way, pragmatic theory echoes anti-essentialism, which recognizes that people’s lives are formed, influenced by, and lived through multiple identities. As Angela P. Harris explains, both feminist and legal theory tend to employ “gender essentialism—the notion that a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”¹⁴⁸ The result of gender essentialism is that the “essential” woman is invariably white, straight, cisgender, and not poor or an immigrant.¹⁴⁹ When policy is made using a gender essentialist framework, experience teaches that the policy will not help—and may even harm—people who do not fit the essential image.

There are multiple instances of failures of feminist lawmaking to address the experiences of women of color (and some refreshing examples of the opposite¹⁵⁰). Kimberlé Crenshaw, in her influential essay in which she introduced intersectionality theory, explored the failure of the anti-domestic violence and anti-rape movements to involve the leadership of African American women and to consider their communities’ histories of law enforcement oppression.¹⁵¹ Many feminists, activists, and survivors of violence share Crenshaw’s critique in a growing movement to reconsider the criminal response to intimate partner violence.¹⁵²

146. *Id.* at 305.

147. *Id.* at 309.

148. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

149. *Id.*

150. In one recent example, advocates from the domestic violence, LGBTQ, immigrant, and tribal communities worked together to successfully demand that Congress reauthorize the Violence Against Women Act in 2013. Advocates did not give in to Congressional pressure to agree to reauthorization without critical new protections for immigrants, LGBTQ survivors of intimate partner violence, and increased recognition of tribal sovereignty. *See, e.g., Violence Against Women Act Reauthorization*, NAT’L IMMIGRANT JUST., <https://immigrantjustice.org/VAWAReauthorization> (last visited Nov. 7, 2014).

151. Kimberlé Crenshaw, *Mapping the Margins*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 357 (Kimberlé Crenshaw et al. eds., 1995).

152. *See, e.g.,* BETH RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012); LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2012).

The reproductive justice movement offers a similar anti-essentialist critique of reproductive rights activism and the “pro-choice” movement. Drawing from anti-essentialism and intersectionality theory, reproductive justice understands that people’s lives are informed by multiple identities and affected by multiple oppressions that impact their ability to make reproductive decisions, ensure their health, and parent the children they have.¹⁵³ Reproductive justice acknowledges that circumstances like mass incarceration, legacies of colonialism, and poverty limit the life chances of people and undermine the power of their communities, rendering “choice” frequently meaningless.¹⁵⁴ Movement leaders argue that the best way to ensure reproductive justice is to seek and support the leadership of the people who are most affected by social policy or practice, especially those most likely to be harmed by those practices.¹⁵⁵

Considering surrogacy through an anti-essentialist, reproductive justice lens requires, then, looking to the communities who are most affected by the practice of surrogacy, and those who are most vulnerable within it. One of the challenges of supporting the involvement of people affected in this setting is that the women acting as surrogates, who are most likely to face the possibility of economic exploitation, are not an organized or even easily identifiable group. Indeed, in Washington State, compensated surrogacy has been banned for almost thirty years, so there are either no women or no women willing to risk a misdemeanor who could share their experiences of acting as a surrogate for money.¹⁵⁶

Given that challenge, Legal Voice reached out to individual women acting as surrogates in other states, sought the guidance of reproductive justice organizations, and evaluated the available empirical evidence regarding women’s experiences of surrogacy—including the experiences of women from other countries acting as surrogates for United States couples. This is not the only strategy, and ideally much more work will

153. Jael Silliman et al., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* 4–5 (2004).

154. *Id.*

155. See, e.g., Elena R. Gutierrez, “We Will No Longer Be Silent or Invisible”: *Latinas Organizing for Reproductive Justice*, in *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* 215, 216–32 (2004).

156. It is not surprising then that in Washington State, intended parents (who contracted with an out-of-state woman to act as a surrogate) and others—but not women acting as surrogates—testified in support of proposed surrogacy legislation in Washington State in 2011. Senate Bill Report, Engrossed 2d Substitute H.R. 1267, Reg. Sess., at 4 (Wash. 2011), available at <https://app.leg.wa.gov/CMD/Handler.ashx?MethodName=getdocumentcontent&documentId=k57G43OgWwM&att=false>.

be done to consider the voices of women of color, transgender people, people with disabilities, low-income people, and others affected by the surrogacy debate. But what we learned was valuable in guiding our response to proposed surrogacy legislation, in that it clarified for us that, whatever the feminist debate over surrogacy, the practice is currently happening and its unregulated state is what is harmful right now. And additional potential harm will be borne by those with the least economic resources and the least power—including women in other countries, where legal protections for women acting as surrogates may be insufficient to ensure their health, dignity, and safety.

Unlike sex work and drug use, where criminalization itself is actively and deeply harmful,¹⁵⁷ state bans on compensated surrogacy have not led to the mass surveillance and imprisonment of intended parents or surrogates. But that does not mean that we should not advocate for decriminalization and regulation. The potential harms of surrogacy are real, and we can address these harms—both current and predictable—by crafting responsive, progressive legislation.

But, as pragmatic feminism teaches, we may not be able to determine how each part of our suggested approach will ultimately affect people. Thus, part of my proposal is that feminists own this issue in the legislative arena, not just for the first attempt at regulation but through implementation and the inevitable changes needed to address the ways that surrogacy may be, or become, problematic. Angela Harris' critique of essentialism offers a guide for considering an appropriate legislative response to surrogacy: "My suggestion is only that we make our categories explicitly tentative, relational, and unstable, and that to do so is all the more important in a discipline like law, where abstraction and 'frozen' categories are the norm."¹⁵⁸ Like the categories of identity Harris explores, the feminist response to assisted reproductive technologies must be long-term, engaged, "tentative," and ever thoughtful of reproductive justice.

Using these principles, Legal Voice determined that the ban on compensated surrogacy in Washington State is actually harmful, because it encourages intended parents in this state to go to other states or other countries. This would not necessarily pose risks if those other states or nations had robust laws that ensured the humanity and autonomy of women acting as surrogates. But that is simply not the case. In Illinois,

157. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES* § 1:1 (2014).

158. Harris, *supra* note 148, at 586.

for example, surrogacy regulation is more progressive in the sense that it does not exclude same sex couples.¹⁵⁹ Yet, it allows for the enforcement of contract provisions that restrict a pregnant woman's medical decision-making as well as life choices during her pregnancy.¹⁶⁰

The liberal feminist may argue that the woman who contracts away these rights does so knowingly, and should be respected in her decision to do so.¹⁶¹ But there is no principled way to permit intended parents in a surrogacy arrangement to make the abortion decision, for example, but to deny that same "dominion" to a husband or male partner who is the genetic father of the baby a woman carries.¹⁶² Further, it is the state enforcement of such contract terms that create for pregnant women a second-class status.

Second-class status is precisely the concern reflected in India, where intended parents from the Global North hire women to carry their babies. India's legislative policy encourages these transactions and by doing so has generated a billion dollar industry. The way these transactions are encouraged, however, is by making them attractive to potential intended parents. Part of that attractiveness has to do with the way the law and practice permit remuneration and legal recognition, without regulating the practices that undermine women's liberty or dealing seriously in any way with the power disparities inherent in these transactions.

Given the reality of this situation, Legal Voice determined that it is preferable to regulate surrogacy in Washington State, encouraging people to engage in these transactions locally, under a robust regulatory scheme. This does not undermine the primary focuses of feminist, progressive work: creating the conditions for reproductive justice for all people, addressing economic exclusion, eradicating state and individual gender-based violence, and more. Rather, local regulation of surrogacy recognizes that assisted reproductive technologies are a modern reality, with ongoing complexities that have important implications for women.

Legal Voice determined that local regulation should be informed by a set of principles, based in pragmatic and anti-essentialist feminism. The principles guiding such regulation are humanity, equality of power,

159. 750 ILL. COMP. STAT. ANN. 47 / 20(b) (West 2012).

160. *Id.* 47 / 25(d)(2).

161. See, e.g., Erin Matson, *Is Preventing Surrogacy Feminist? No, It's Anti-Choice*, RH REALITY CHECK (Apr. 11, 2014 4:56 PM), <http://rhrealitycheck.org/article/2014/04/11/preventing-surrogacy-feminist-anti-choice/>.

162. As Justice O'Connor eloquently explained when striking down Pennsylvania's spousal notification requirement for abortion, "[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992).

reproductive autonomy and health, non-discrimination, clarity, and justice. I will describe each principle below, then return to each principle in the section that follows, applying each to surrogacy regulation.

A. *Humanity*

A primary feminist objection to commercial surrogacy is that by commodifying reproduction, such transactions reduce women's bodies to mere vessels.¹⁶³ Surrogacy regulation should ensure, within the context of the compensated transaction, the human dignity of all its participants. The challenge is moving this principle from semantics, in a world that remains highly stratified by race, class, and yes, gender, to a meaningful legislative principle. Moreover, claiming such humanity does not necessarily address the arguments of feminists who would ban or discourage surrogacy. Again, the point is not to answer the critiques and resolve them, but as pragmatists, to recognize that surrogacy arrangements are a reality with which we must engage if we are to ensure the humanity of the people who bring children into the world through surrogacy.

B. *Equality of Power*

The commodification concern is echoed in the exploitation concern: that women, especially women of color, who still earn lower wages than men for comparable work in the United States,¹⁶⁴ and whose earning power has been increasingly depressed by, among other things, this pay gap and wealth inequality,¹⁶⁵ are more vulnerable to economic pressures. The fear is that women in these circumstances will decide to engage in surrogacy because of those pressures, making a decision they would not otherwise have made given different options. One way to address this through a regulatory framework is to attempt, as far as possible, to craft provisions that elevate the power of the woman acting as surrogate, so that she and the intended parents approach each other on equal footing. The hope is that this equality of power in such agreements will help avert the risks of coercion once the agreement is entered into. Again, like

163. See Rothman, *supra* note 27, at 1246.

164. See Eileen Patten, *On Equal Pay Day, Key Facts About the Gender Pay Gap*, PEW RES. CENTER (Apr. 8, 2014), <http://www.pewresearch.org/fact-tank/2014/04/08/on-equal-pay-day-everything-you-need-to-know-about-the-gender-pay-gap/>.

165. *Lifting as We Climb: Women of Color, Wealth, and America's Future*, INSIGHT CENTER FOR ECON. DEV., at 2 (Mar. 8, 2010), <http://www.insightcced.org/uploads/CRWG/LiftingAsWeClimb-ExecutiveSummary-embargoed-0303.pdf>.

the humanity principle, equalizing power within the contract does not answer the critique that the relationship itself is exploitive, but under a pragmatic approach, we are not required to resolve that question in order to address the reality of the complexity of these relationships.

C. Reproductive Autonomy and Health

The principle that the woman acting as surrogate retains her constitutional and human rights to medical decision-making, reproductive decisions, and control over her daily life regardless of whether she is pregnant serves the first two principles. It may be interesting, in the abstract, to argue over whether a person can contract away their constitutional rights,¹⁶⁶ but public policy should not countenance state enforcement of agreements that undermine the personhood of pregnant women. To do so would simply increase the already alarming state interventions in pregnant women's lives in the United States and affirm the legality of state surveillance and policing of pregnant women. And, as experience teaches, these agreements would surely be more readily enforced against women of color.¹⁶⁷ Reproductive health and decision-making for women, especially low-income women, women of color, immigrant women, women with disabilities, and transgender people, are already compromised by numerous state and federal policies.¹⁶⁸ A key feminist project, informed by principles of reproductive justice, is to fight those compromises. Thus, no legislation, in any context, should undermine reproductive autonomy or further threaten reproductive health.

This does not mean, however, that feminists should encourage or continue to engage in dialogue about surrogacy in relation to abortion by relying on disability as an argument for abortion rights. As demonstrated above, such reliance is demeaning and dehumanizing to people living with disabilities, and it adds to a public dialogue that wrongly teaches that people with disabilities lead tragic, difficult lives.¹⁶⁹ Rather, feminist law reformers should consider how regulation may discriminate against

166. Richard Epstein argued for enforcement, for example, of surrogacy contract provisions providing the intended father the authority to make the abortion decision: "allowing the surrogate to carry the child to term against the wishes of its father is inconsistent with the basic contractual design." Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2336 (1995).

167. See ROBERTS, *supra* note 24, at 246–93; Paltrow & Flavin, *supra* note 37.

168. See generally SILLIMAN ET AL., *supra* note 153; Sneha Barot, *Governmental Coercion in Reproductive Decision Making: See It Both Ways*, 15 GUTTMACHER POL'Y REV. 7 (2012).

169. See, e.g., Saxton, *supra* note 117.

or even deny the existence of people with disabilities.

D. Non-Discrimination

A law that defines the validity of a surrogacy contract will likely discriminate between people by defining some as capable of being a party to a surrogacy agreement and others incapable, as is typical in both contract law (minors, for example, are not generally considered legally competent to contract)¹⁷⁰ and family law (again, minors, although they do become parents, are frequently restricted from legal marriage until they reach a certain age).¹⁷¹ This kind of discrimination between persons may serve valid, even feminist, public policy goals, including protecting young children from early marriage or from economic exploitation.

But, all too often in the United States, laws delineate the circumstances under which a person is recognized as a parent in a harmful, irrational, discriminatory manner. In some jurisdictions, despite the significant legal gains of recent years, lesbian and gay parents are still denied the right to adopt children or to engage in otherwise legally recognized surrogacy contracts.¹⁷² Moreover, as discussed previously, people with disabilities are too often seen as incapable of parenting, and so surrogacy contracts require mental health evaluations, which may be used for the purpose of denying some people the ability to participate in such contracts.¹⁷³

A feminist principle of anti-discrimination in this setting would look carefully at any exclusions from participation in surrogacy and consider whether the exclusion either serves or undermines equality and anti-subordination. Those that undermine or further serve to subordinate groups of people should be eliminated from a regulatory scheme.¹⁷⁴

170. For a succinct overview of the development of the jurisprudence of minors' decision-making and contractual rights, see Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65, 91 (1999).

171. See Hannah Cartwright, *Legal Age of Consent for Marriage and Sex for the 50 United States*, GLOBAL JUST. INITIATIVE (Aug. 21, 2011), <http://globaljusticeinitiative.files.wordpress.com/2011/12/united-states-age-of-consent-table11.pdf>.

172. Nicolas, *supra* note 17.

173. See, e.g., ILL. COMP. STAT. ANN. 47 / 20(a)(4), (b)(3) (West 2012 & Supp. 2013).

174. The question of whether children should have rights to contract or other rights legally co-extensive with adults is another complicated question and worthy of much more discussion than I have space in this Article. The question of age restrictions in surrogacy arrangements is, in my view, less complicated than the question of age restrictions on voting, speech in the public school setting, and medical decision-making, where there are strong arguments in favor of eliminating such restrictions.

E. Clarity

Clarity is probably the most mundane of the principles addressed here, but when achieved it too serves the other principles. Unambiguous rules ensure that people understand precisely what they stand to gain or lose when engaging in surrogacy agreements. Lack of legal clarity also opens judicial-decision making to the influence of bias—and, in the surrogacy context, that bias may reflect antiquated views of women and motherhood. In the *Baby M* case, for example, it is understandable that the trial court, without legislative guidance, struggled to determine how to apply the law to this set of circumstances. Yet, it appears that the trial court based much of its analysis on whether or not Mary Beth Whitehead would be as good a parent as the Sterns, and drew on offensive stereotypes in drawing its conclusions.¹⁷⁵ Thus, clarity for its own sake may serve a social good in the setting of surrogacy, hopefully preventing the breakdown of relationships between the intended parents and the woman acting as surrogate, and minimizing judicial bias when courts are called upon to resolve disputes.

F. Justice

Finally, justice—the true meaning of which is a debate beyond the scope of this Article¹⁷⁶—should be an overarching principle that guides the development of surrogacy legislation. In many ways, it is the principle that urges feminist engagement with surrogacy regulation in the first place, as it is unfair treatment of people, especially women acting as surrogates, that counsels a legislative response.

IV. APPLICATION OF PRINCIPLES TO SURROGACY LEGISLATION

The principles identified above help guide advocacy for a regulatory response to surrogacy; in the paragraphs that follow, I revisit each principle and suggest its application to compensated surrogacy regulation. Of course, like all guidelines, they suggest rather than direct, and sometimes raise more questions than they answer. Thus, the recommendations set out below should be viewed as a starting point for an ongoing, robust, inclusive dialogue—including but not limited to

175. *In re Baby M*, 537 A.2d 1227, 1259–60 (N.J. 1988) (noting that the trial court and experts “harshly judged” Ms. Whitehead).

176. See, e.g., MICHAEL SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO (2010).

academic discourse—about surrogacy regulation.

A. *Humanity*

One seemingly simple proposition for ensuring people's humanity is to change the way we talk about human beings. From reclaiming racial and gender slurs to movements naming and defining themselves, there is significant understanding that humanizing language is progress.¹⁷⁷ It may not help resolve a conflict in court, but, on the other hand, having to use statutory language that honors people's humanity may, arguably, have an influence on judicial decision-making.¹⁷⁸ To that end, Legal Voice recommended, and the legislative sponsor of Washington State's legislation accepted, replacing the terms surrogate, gestational surrogate, etc., with "woman acting as surrogate."¹⁷⁹ This mouthful of words may lack elegance, but it brings to the foreground the human being who is at the center of this transaction. With this as our starting point, humanity (like justice) becomes an overarching goal when regulating surrogacy.

B. *Equality of Power*

The fear that most women acting as surrogates will be low-income women coerced by economic circumstances into acting as surrogates for the wealthy has not materialized in the United States.¹⁸⁰ Nonetheless, economic power is typically skewed toward the intended parents in a surrogacy agreement. Thus, a way to minimize the possibility of such exploitation is to use the legal framework to create incentives for the parties to view each other as full human beings and to equalize power in these relationships.

This is easier said than done through a legislative scheme (and is, surely, inadequate to address the economic disparities created by

177. See, e.g., Dorceta E. Taylor, *The Rise of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses*, 43 AM. BEHAV. SCI. 508, 508 (2000) (explaining the use of framing as a social justice organizing tool in the context of environmental issues); see also Ashley Parker, *Reclaiming the Words that Smear*, N.Y. TIMES, Apr. 12, 2014, at SR5 (describing women in politics' coopting gender-based slurs to advance their own agendas).

178. A discussion of semiotics—the study of both linguistic and other signs and their structures and processes—is beyond the scope of this paper; for an example of the application of semiotics to law, see generally Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621 (2004).

179. See H.R. 1267, 62d Leg., Reg. Sess. § 1(32) (Wash. 2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1267.pdf>.

180. Busby & Vun, *supra* note 44, at 22.

economic policy driving the dramatic income inequality¹⁸¹ in the United States). But some gains can be achieved by providing for redistribution in the form of the intended parents paying for independent legal counsel for the woman acting as surrogate, and paying for her health insurance and all costs of prenatal care and the woman's health needs during pregnancy.¹⁸² Further, the knowledge on the part of the intended parents that the woman acting as surrogate will retain all health care decision-making incentivizes them to treat the woman with respect, and to consider in advance whether they share similar values about pregnancy, childbirth, abortion, and long-term relationships between the intended parents, the child, and the woman acting as surrogate.

C. Reproductive Autonomy and Women's Health

Ensuring that a woman retains reproductive decision-making should be a key aspect of any regulatory scheme regarding compensated surrogacy. Legislation should expressly hold void and unenforceable any contract provisions that purport to control a pregnant woman's decisions during pregnancy—from her constitutionally protected decisions to the more mundane decisions of daily life, such as whether, when, and how to exercise, what to eat, and which doctor to see. Surrogacy contracts should not become another mechanism to undermine the health and rights of pregnant women.

Surrogacy legislation is also an important place to reaffirm in state law the fundamental right to decide whether or not to continue a pregnancy. Affirmation of the abortion right expressly in the law—as included in the surrogacy regulation bill, House Bill 1267, proposed in Washington State in 2011¹⁸³—gives clear guidance to courts, intended parents, and women acting as surrogates. Moreover, the law should not be a vehicle for undermining abortion rights by according legal status to the fetus; thus, surrogacy legislation should not allow parentage to be determined prior to the birth of a child.

181. See Drew DeSilver, *U.S. Income Inequality, on Rise for Decades, Is Now Highest Since 1928*, PEW RES. CENTER (Dec. 5, 2013), <http://www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928/>.

182. Of course, such requirements would help place surrogacy out of reach for people with less means, who are already less likely to be able to afford surrogacy arrangements.

183. "Nothing in this chapter may be construed to limit or constrain the right of the woman acting as surrogate to make all health and welfare decisions regarding herself and her pregnancy, including the right whether or not to terminate the pregnancy as protected by law." H.R. 1267, 62d Leg., Reg. Sess. § 57(6)(a) (Wash. 2011), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1267.pdf>.

Further, as explained above, if women's health is a priority, then surrogacy regulation should not insist upon gestational—as opposed to traditional—surrogacy, as traditional surrogacy imposes fewer health risks on the pregnant woman. The opposition to allowing traditional surrogacy is based in a belief that the lack of genetic relationship will make it easier for the women acting as surrogate to give up the child, and will make it easier for the intended parents to establish their legal relationship to the child. These are untenable assumptions, in that the first is not borne out by the experiences of women acting as surrogates, and the second has nothing to do with the law as it should be, but only the law as it is. Further, as explained above, traditional surrogacy may best protect women's health. For these reasons, and because progressive feminism recognizes that genetic relationship is not determinative of bonds of love and affection between people, traditional surrogacy should be recognized in the regulation of compensated surrogacy.

Finally, the health consequences to the woman acting as surrogate — particularly the risks posed by multiple embryo transfer in gestational surrogacy arrangements—should be addressed. Multiple embryo transfer poses health risks to the woman, increasing the likelihood of a multiple pregnancy.¹⁸⁴ The pressure to produce a pregnancy may induce physicians and intended parents to insist on multiple embryo transfer,¹⁸⁵ despite the American Society of Reproductive Medicine's recommendations to limit the numbers of attempts as well as the numbers of embryos transferred to the woman's uterus.¹⁸⁶ To address this, surrogacy legislation should—like proposed Washington State House Bill 1267—require surrogacy contracts to ensure that the health care providers involved in the surrogacy process follow the guidelines of the American Society for Reproductive Medicine.¹⁸⁷

D. Non-Discrimination

Putting the non-discrimination principle into practice in crafting

184. See The Practice Comm. of the Am. Soc'y for Reprod. Med. & the Practice Comm. of the Soc'y for Assisted Reprod. Tech., *Criteria for Number of Embryos to Transfer: A Committee Opinion*, 99 FERTILITY & STERILITY 44, 45 (2013) [hereinafter *Criteria for Number of Embryos to Transfer*].

185. See, e.g., Lewin, *supra* note 133, at A1 (reporting on a California surrogacy lawyer who was approached by a client from outside the United States, who wanted the woman acting as surrogate to have six embryos transferred; the lawyer refused to work with him).

186. See *Criteria for Number of Embryos to Transfer*, *supra* note 184.

187. H.R. 1267, 62d Leg., Reg. Sess. § 57 (3)(a)(i) (Wash. 2011), available at <http://lawfilesexternal.leg.wa.gov/biennium/2011-12/Pdf/Bills/House%20Bills/1267.pdf>.

progressive surrogacy legislation raises some challenging questions. Surrogacy laws in the United States contain a variety of restrictions on eligibility to participate as intended parents and as surrogates. Both parties generally must be adults to participate.¹⁸⁸ It is typical to require both parties to have a mental health evaluation, and for the woman acting as surrogate to have a physical health evaluation as well.¹⁸⁹ Washington's proposed legislation would have limited eligibility to act as a surrogate to women who have already given birth to at least one child.¹⁹⁰ Other laws allow only married couples to become intended parents,¹⁹¹ or limit surrogacy to those who can demonstrate that they are either medically or socially infertile.¹⁹²

Some of these restrictions are very troubling from a feminist perspective. The most obvious discrimination is against LGBTQ parents, in those states that limit availability of surrogacy arrangements to legally married couples and where marriage equality is not yet recognized. But it is similarly demeaning of single people, regardless of sexual orientation, to suggest that they should not have access to this route to procreation. It also undermines reproductive autonomy to restrict the reasons that a person may engage in surrogacy, i.e., by restricting its availability to people that are "infertile." Feminists should be gravely concerned when a legal restriction is based on stereotypes of women, as this one certainly is, suggesting that some women have vacuous, trivial, or wrong-headed reasons for their procreative decisions.¹⁹³

188. The Supreme Court of Connecticut considered surrogacy laws in various jurisdictions in *Raftopol v. Ramey*, 12 A.3d 783, 802 n.40 (Conn. 2011) ("For example, Florida requires that both the gestational carrier and the intended parents be eighteen years or older. Fla. Stat. Ann. § 742.15(1) (West 2010). Illinois requires that the gestational carrier must be at least twenty-one years of age. 750 Ill. Comp. Stat. Ann. 47 / 20 (a)(1) (West 2009). New Hampshire requires that all parties to the contract must be at least twenty-one years of age. N.H. Rev. Stat. Ann. § 168-B:17 (I) (2002).").

189. *Id.* at 803 n.46.

190. Wash. H.R. 1267 § 56 (1)(b).

191. *Raftopol*, 12 A.3d at 802 n.38. As of 2011, Florida, Nevada, and Texas expressly required intended parents to be married; Arkansas law requires marriage, in effect, by permitting only a biological intended father to have parental rights through a surrogacy arrangement, unless he was married; in that case, his wife would have parental rights regardless of biological relationship. *Id.*

192. *Id.* at 802 n.39.

193. See, e.g., Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 225 (2009) ("In no other area of healthcare does the State override a competent adult's right to consent to a medical procedure that falls within the bounds of proven and accepted medical practice, and in fact may be *physically* safer for the patient, based on the State's unsubstantiated view that the treatment will be *psychologically* harmful to the patient. The law only subjects the gender-specific abortion decision to this kind of doubt about patient decision-making capacity, therefore denying that women have the same ability as men to

Thus, surrogacy legislation should ensure that these arrangements are open to adult people regardless of marital status, sexual orientation, or their reasons for seeking a surrogacy arrangement. The more challenging issues are whether age restrictions, health restrictions, and experiences of previous childbirth are valid restrictions. Applying our guidelines discussed above, the question is whether these restrictions either advance or undermine equality and principles of anti-subordination.

Age restrictions are a common feature of United States law and jurisprudence. Feminist law reformers attempt to balance the procreative autonomy of teens and young girls and their rights not to be treated or seen in law as property of adults, with protection from the vulnerabilities imposed by the dependency of children on adults.¹⁹⁴ Surrogacy, as many commentators have explained, is an unusual mix of contract and family law, in a context of evolving technology and lack of regulation.¹⁹⁵ Reconsidering rules that protect children from exploitation is not within the scope of this Article, but the question is an important one. Legal Voice, in its work on the proposed Washington State surrogacy legislation, determined to accept the twenty-one and over age restriction, recognizing (pragmatically) that evolution in this area may require reevaluation.

Similarly, Legal Voice accepted a restriction that required a woman acting as surrogate to have had one prior birth. Again, this was a pragmatic decision based on what appears to be the practice of women acting as surrogates. The women we talked with, the women in empirical studies, and the women whose experiences are reported in case law and in the media, usually came to the decision to act as a surrogate after having had at least one child of their own.¹⁹⁶ Nonetheless, we approached this provision with some hesitation, seeing it as potentially essentializing (only women who have had children could understand what it means to act as a surrogate) as well as paternalistic (women's thought processes are emotional and the only way they can know whether they can give up a child through surrogacy is through having

make informed healthcare decisions." (emphasis in original)).

194. See, e.g., Katheryn D. Katz, *The Pregnant Child's Right to Self-Determination*, 62 ALB. L. REV. 1119, 1162 (1999) (critiquing parental involvement in abortion laws as impositions on minors' medical decision-making and suggesting different standards for judicial bypass of parental notice in the states that require parental involvement).

195. See Stark, *supra* note 82.

196. Busby & Vun, *supra* note 44, at 22 ("Women who decide to embark on surrogacy often have completed a family of their own and feel that they wish to help a couple who would not otherwise be able to become parents." (quoting Vasai Jadva et al., *Surrogacy: The Experience of Surrogate Mothers*, 18 HUM. REPROD. 2196 (2003))).

had their own child). It also suggests that the potential for regret should be the basis of public policy, an idea that is also deeply paternalistic and strongly echoes the troubling views of women's decision-making demonstrated in abortion jurisprudence.¹⁹⁷ Ideally, this provision would not be included, to deter the view of women as incapable of making informed decisions.

Finally, the mental and physical health evaluation requirements for all parties or just the surrogate, present in many state laws, troubled us as well. First, if the tests are required simply to give the parties information about each other, such an exchange could be helpful. But the purpose of these provisions are unclear: are the provisions intended purely for the information of the parties, or are they intended to weed out from surrogacy people with certain mental health or physical conditions? Legal Voice settled on agreeing to mutual screening provisions that seemed designed to give the parties information, but arguing against a provision that expressly excluded women with mental health diagnoses from participation as surrogates, because such provisions stigmatize people with mental health conditions—a stigma to which women are particularly vulnerable.¹⁹⁸

E. Clarity

The provisions above tend to increase clarity, but this principle is most important when considering one of the most controversial aspects of surrogacy legislation: whether the law should recognize the intended parents as the child's parents at birth, without giving the woman acting as surrogate a designated time period in which to change her mind and void that aspect of the contract. Many argue that surrogacy legislation, if it is to exist at all, should treat surrogacy like adoption: the intended parents must pass a home inspection, like those required for adoptive parents; and the woman acting as surrogate has the right, typically within forty-eight hours of the birth of the child, to change her mind and retain

197. The problem, of course, is that a person may regret any number of life decisions, but it is only women's decisions that are the subject of regulation. *See Planned Parenthood of Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1045 n.12 (D. Neb. 2010) ("The most important choices have consequences, and no matter how well-reasoned and fully deliberated, those decisions can lead to remorse. That is part of the price we pay for our freedom. (Only Edith Piaf was without regret. Had she been sober, she, too, might have had second-thoughts.)").

198. *See* Levent Kuey, *Stigma, Women, and Mental Health*, in *OXFORD TEXTBOOK OF WOMEN AND MENTAL HEALTH* 3, 5 (Dora Kohen ed., 2011) ("Being a woman with mental ill health puts the person under a double burden of discrimination.").

legal rights to the child.¹⁹⁹ Others note, correctly, that parents who can conceive a child with a partner bear no such burdens; there are no controls on the quality of their home, and they are not required to undergo evaluations. Those who make this argument suggest that people having children through surrogacy are similarly situated to those parents, rather than to adoptive parents.²⁰⁰

Those arguing on behalf of the woman acting as surrogate argue that her motherhood is a reality, and that parental rights—that she may voluntarily extinguish—should attach to the child born through a surrogacy arrangement, whether or not the woman acting as surrogate contributed the gametes for conception. Thus, the law should recognize both sets of rights—her own and the intended parents’—to potential parenthood, and create a system that either allows them to keep these rights coextensively, or terminates one set in favor of the other.²⁰¹ Typically, the proposed system is much like the adoption scheme described above, where the woman has a statutory waiting period in which to decide whether to voluntarily terminate or maintain her parental rights.

Legal Voice determined, and this Article recommends, supporting surrogacy legislation that unequivocally recognizes the parental rights of the intended parent immediately upon the birth of the child, with no revocation period for the woman acting as surrogate. This decision was not reached without controversy, and it may be one of the hardest questions for feminist law reformers to resolve, once they decide to engage in regulating surrogacy. All sides offer persuasive arguments based in sound feminist principles.²⁰² Again, Legal Voice rested its decision on a pragmatic feminist approach, relying on the evidence so far gleaned from people who have engaged in surrogacy arrangements, and from an assessment of the various risks and responsibilities that each type of regulatory response would entail.

That evidence indicates—as can be extrapolated from the relatively low number of reported legal disputes in surrogacy arrangements—that the vast majority of women acting as surrogates voluntarily, and most often, happily, plan to and do give the child to the intended parents.²⁰³

199. See Shapiro, *supra* note 84.

200. *Id.*

201. *Id.*

202. *Id.*

203. See Andrews, *supra* note 11, at 2350–52 (showing her interviews with numerous women acting as surrogates revealed a sense of satisfaction and little conflict with the intended parents); *supra* Part II.A. But see Janet Cawley, *Surrogate Moms Fight the “Slavery,”* CHI. TRIB., Sept. 1,

Women acting as surrogates generally do not see themselves as having parental ties or rights, although they do retain a belief that they have a special connection to the child and may want to maintain some kind of ongoing relationship.²⁰⁴ Throughout the pregnancy, they actively maintain an emotional distance, perhaps better characterized as a unique emotional relationship to the pregnancy.²⁰⁵ Thus, as a practical matter, a revocation period is typically not necessary.

But a revocation period could be potentially harmful to the woman acting as surrogate (and the child). Since most women acting as surrogates do so with no intention of having to care for and raise the child, the waiting period in which they have parental rights to the child places them at risk of the intended parents changing *their* minds, and leaving them with that unintended and unwanted responsibility. As noted above, the unrelenting negative discourse directed at having and or raising a baby with a disability poses the risk—apparently very real²⁰⁶—that the intended parents would balk at raising a child with a disability out of misinformation and fear, and decide not to invoke their potential parental rights. Although it is not just new babies with disabilities that could be left with women acting as surrogates—a change in the circumstances of the intended parents, such as a death or divorce, could also lead them to change their mind about raising the baby. Although this scenario is a very uncommon, it is just as likely as the very uncommon scenario in which the woman acting as surrogate changes her mind.²⁰⁷

In my view, the rights of all parties, including the child, are better protected when the law is unequivocal about parental rights and responsibilities upon the child's birth. The child is never left parentless; the intended parents are both assured of and required to assume their parental obligations; and the woman acting as surrogate knows in

1987, at 1–2 (reporting on the formation of a national coalition against surrogacy, led by a man and joined by three women, including Mary Beth Whitehead, who had been surrogates, regretted it, and opposed legal enforcement of surrogacy contracts).

204. Busby & Vun, *supra* note 44, at 67–73.

205. *Id.*

206. See, e.g., Beth Greenfield, *California Couple Shares Surrogate Story in Wake of Thailand Controversy*, YAHOO! HEALTH (Aug. 19, 2014), <https://www.yahoo.com/health/california-couple-shares-surrogate-story-in-wake-of-95207128652.html> (reporting the story of Keston and Andrea Ott-Dahl, a California couple who had agreed that Andrea would be a surrogate mother for another lesbian couple who were having trouble getting pregnant. When that couple learned that the baby would be born with Down Syndrome, they balked and refused to go through with the agreement. Andrea refused to abort the baby, with her partner's agreement, and they kept and are raising the child).

207. See Busby & Vun, *supra* note 44, at 35–38.

advance exactly what will happen when she agrees to act as a surrogate, and is never left with parental responsibility for a child she did not intend to raise. At the same time, the arguments for recognizing pregnancy as a meaningful relationship to the child are also valid; for this reason, surrogacy legislation should provide for an acknowledgement to the child of its parentage and birth, and the right of the woman acting as surrogate to maintain some level of connection to the family and the resulting child.²⁰⁸

F. Justice

Finally, we reach the most difficult question: how do we ensure justice in surrogacy regulation when social and economic realities constrain the procreative lives of so many? As Dorothy Roberts explains, “[p]rocreative liberty cannot be separated from concerns about equality. In fact, the very meaning of reproductive liberty is inextricably intertwined with issues of social justice.”²⁰⁹ We must be extremely careful when government sanction, legal rules, economic inequality, and the meaning of parenting, family, and motherhood collide.

One method, suggested by Dorothy Roberts, is to increase access to reproductive technologies, and to devote resources to addressing the root causes of infertility. Progressive feminists should work to create a world in which people’s reproductive health is valued and supported, and surrogacy decisions, when they happen, are reached in a context of equality between intended parents and the woman acting as surrogate. Unfortunately, it remains the case that communities of color and those with fewer resources are more likely, for a variety of reasons, to experience problems with infertility, but are the least likely to have the resources to employ assisted reproductive technologies.²¹⁰

Progressive surrogacy regulation would attempt to engender equality by creating systems for increasing resources to the communities that need access to these technologies. For example, a surrogacy bill could include funding for a legislative mandate to increase research on environmental causes of disparate fertility rates, and to support programs

208. I recognize that this is a bald statement that begs additional analysis. From a reproductive justice perspective, this question is best answered by considering the experiences of women acting as surrogates and the children born of surrogacy arrangements, as well as the needs of intended parents raising those children.

209. ROBERTS, *supra* note 24, at 287.

210. See Tanzina Vega, *Infertility, Endured Through a Prism of Race*, N.Y. TIMES, Apr. 25, 2014, at A12 (explaining that married black women are twice as likely as married white women to face infertility, but significantly less likely to access fertility services).

that research and respond to the reproductive health care disparities—including maternal mortality, rates of miscarriage and stillbirth, and premature birth—experienced by women of color. Efforts to regulate compensated surrogacy should be accompanied by policies that provide for maternal mortality reviews, increase funding to map access points to prenatal and neonatal care, ensure prenatal care for immigrants, and improve culturally aware services and language access.²¹¹

Arguably, regulating surrogacy in the states will also help increase justice for women in other countries, by encouraging surrogacy to take place locally. Local surrogacy will allow for closer monitoring and study of its effects on women acting as surrogates (and other parties and children, too). It is hard to predict whether and how that will increase protections for women in other countries—it could, in the short term, have the effect of making women agree to engage in surrogacy for even less compensation if there are fewer intended parents seeking their services. But it is not surrogacy that is at the root of Global North exploitation of Global South countries, people, and women's bodies.²¹² Reproductive tourism is but a highly visible symptom of a much greater problem—a problem that is also a feminist and progressive imperative to address.

Finally, there is a local injustice that local surrogacy regulation can readily address: the problem of third party brokers,²¹³ who, with few exceptions, are entirely unregulated. Lawyers and doctors are subject to ethical rules that limit, somewhat, their ability to freely broker these kinds of exchanges, but brokers who lack professional licenses face no such limitations.²¹⁴ As explained above, this has led to situations in which brokers have stolen from or made false assurances to people,

211. See, e.g., FLEDA MASK JACKSON, JOINT CTR. POLITICAL & ECON. STUDIES HEALTH POLICY INST., RACE, STRESS, AND SOCIAL SUPPORT: ADDRESSING THE CRISIS IN BLACK INFANT MORTALITY 7 (2007) (recommending policies that promote cultural competence, access, and improve and fund necessary research); NAT'L WOMEN'S LAW CTR., REFORM MATTERS: HEALTH REFORM: AN OPPORTUNITY TO REDUCE HEALTH DISPARITIES AMONG WOMEN (2008), available at <http://www.nwlc.org/sites/default/files/pdfs/Health%20Reform%20An%20Opportunity.pdf> (reviewing health disparities and outlining several strategies to reduce inequality of health and access to health care); *Access to Healthcare*, BLACK WOMEN'S HEALTH IMPERATIVE, <http://www.bwhi.org/issues/healthcare/access-to-healthcare/> (last visited Sept. 15, 2014) (highlighting the importance of initiatives that increase access to health care and health insurance).

212. Rather, legacies of colonialism, trade policies, and other conditions have helped spur the reproductive tourism market. See, e.g., *Birthing a Market*, *supra* note 26, at 8 (“As pointed out in the Global Health Watch 3 Report, the lopsided free trade mandate brushes aside all ethical questions in the expanding ‘bio-capital’ industry.”).

213. See Sanger, *supra* note 138.

214. See Lewin, *supra* note 139.

putting women's health at risk. Progressive legislation should require government regulation of third party brokers in order to decrease their economic incentives and limit their ability to exploit the parties to these arrangements. There are several ways to accomplish this end: prohibiting payment to third parties, licensing them in the manner of adoption agencies, or regulating their conduct short of licensing. Thus far, in all states where surrogacy is legal save California, surrogacy law does not address the role of brokers in surrogacy arrangements.

Ultimately, progressive surrogacy legislation, guided by the principles outlined above, would: include respectful language and provisions that allow for both traditional and gestational surrogacy; be inclusive of LGBTQ people and non-stigmatizing towards people with mental health conditions or disabilities; impose regulations on brokers that prevent abuse; directly address social conditions that increase health disparities, especially maternal health; ensure clarity by recognizing the parental rights of intended parents upon the birth of the child; and ensure women's health, medical, and reproductive decision-making.

CONCLUSION

Progressives have many pressing concerns—including addressing unchecked income inequality, protecting our democracy from purchase, ending mass incarceration and the violent and unjust policing of communities of color, and achieving justice for immigrants. Surrogacy affects fewer people, but if progressives ignore the issue and leave ownership to others, women's voices are coopted and legislatures and courts may enact harmful rules that undermine reproductive justice.

Having a baby for someone else in exchange for money is—and will be seen as—a women's issue. Women's rights leaders in the legal and legislative arenas should take leadership and work to pass legislation that honors women's humanity, recognizes reproductive autonomy, affirms the rights of all people to form loving families and attachments, and directs resources at health care disparities. In the process, feminist leaders can move the conversation away from dehumanizing people with disabilities and essentializing women, to an inclusive framework that recognizes the complexities and intersecting identities of all. These ideas for progressive surrogacy legislation are a call to feminist law reformers to take ownership of surrogacy regulation, both despite and because of its complexities, and lead the way to reform that is pragmatic and grounded in principles of reproductive justice.

