



6-2008

# Enhancing Autonomy in Paid Surrogacy

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## Recommended Citation

Damelio, J. and Sorensen, K. (2008), Enhancing Autonomy in Paid Surrogacy. *Bioethics*, 22: 269–277. doi: 10.1111/j.1467-8519.2008.00629.x

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## **Enhancing Autonomy in Paid Surrogacy**

Jennifer Damelio and Kelly Sorensen

*Bioethics*, 2008

The gestational surrogate – and her economic and educational vulnerability in particular – is the focus of many of the most persistent worries about paid surrogacy. Those who employ her, and those who broker and organize her services, usually have an advantage over her in resources and information. That asymmetry exposes her to the possibility of exploitation and abuse.

State laws across the U.S. are still ambivalent about paid surrogacy. Many states have no surrogacy laws at all, and there is no orthodoxy among those that do. States that explicitly address the gestational surrogate's vulnerability generally do so in a crude way.

Some make paid surrogacy contracts illegal, even though this may compromise women's autonomy; others simply nullify surrogacy contracts in disputes, as New Jersey did in the well-known Baby M case. Because of her likely financial circumstances, the New Jersey Supreme Court argued that paying a gestational surrogate may 'make her decision less voluntary'.<sup>1</sup> Candidate surrogates tend to have significantly lower incomes than their employers, and so are more subject to coercion in such circumstances; for this reason, and also from concerns about the best interests of children, the Court determined that the surrogacy contract in the Baby M case was invalid.

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<sup>1</sup> Supreme Court of New Jersey. 1988. In the Matter of Baby M. 109 NJ 396, 537 A.2d 1227.

Other writers advocate making paid surrogacy explicitly legal, arguing that among a woman's reproductive rights should be the freedom to enter into contracts that pay for gestational labor. But even those who occupy this position worry about the gestational surrogate's vulnerability. One answer is to ensure that the surrogate who changes her mind and wants to keep the resulting child may do so. Modeled after adoption statutes with a similar opt-out clause, this approach leaves an important sort of power and autonomy in the hands of the surrogate.<sup>2</sup>

We want to suggest a new and additional answer to these worries – one that both protects the gestational surrogate and enhances her autonomy. We propose that states that allow paid surrogacy should require, as a minimum necessary requirement for the contract to be legal, that the surrogate participate in a short class on contract pregnancy. The content of this class, which we will discuss more below, would include information about the experience of other paid surrogates, what can and cannot legally be required of surrogates, and alternative forms of employment. The class will improve the surrogate's opportunity to make an autonomous decision and guard her right to make choices about reproduction and her body.

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<sup>2</sup> B. Steinbock. Surrogate Motherhood as Prenatal Adoption. *Law Med Health Care* 1988; 16(1): 44-50.

Policies of this sort, sometimes called ‘soft law’,<sup>3</sup> require an individual to be well-informed before pursuing activities that include some important risk. We will argue that a soft law policy in the case of paid surrogacy addresses central concerns about the gestational surrogate’s vulnerability. A legal ban forbids too much, and bald legal permission allows too much; but a soft law educational requirement strikes the right balance. A soft law approach would also enhance surrogate autonomy in place where surrogacy is already legal.

## **I. Concerns about Paid Surrogacy**

We will begin by examining concerns about paid surrogacy that focus in some way on the surrogate’s vulnerability. Some of the arguments can be answered sufficiently, as we will show, but others will persist. The legal solution we propose offers some new answers to the remaining concerns.

We will need some terms for the people involved in the contract. First, the ‘contracting couple’ is the couple who, in an attempt to have a child, wishes to employ a surrogate.<sup>4</sup> In most cases, they will become the legal parents of the child after its birth. The woman who enters an agreement with the contracting couple to carry a child in her womb is the ‘gestational surrogate’, ‘surrogate

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<sup>3</sup> The term was originally used in the context of international law for codes which have little or no binding force. Here we use it as a term for binding, enforceable laws that mandate some performance or activity in order for one to obtain a certain legal permission. We describe soft law more below.

<sup>4</sup> The contractor may be a single person instead; but for simplicity, and since the majority of arrangements involve couples, we will use the term for the more common type of case.

mother’, or ‘surrogate’ – terms we will use interchangeably. There is some concern that the term ‘surrogate’ is prejudiced against her, since it already invites the view that she occupies a less important role in the creation of the child than the contracting couple. We share this concern about the term, but it has become relatively standard, and alternative terms also have problems.

The child may have a genetic tie to the gestational surrogate; her egg could be fertilized with the sperm of the contracting father. It could also happen that the surrogate shares no genes with the child she carries; a fertilized egg could be implanted into her womb. Some discussions distinguish the two situations with different terms for the surrogate (for example, ‘traditional surrogate’ and ‘gestational surrogate’ respectively).<sup>5</sup> In the arguments we will present, it does not make a difference which of the two situations the surrogate is in, so we will not use terms that reflect the distinction.

(1) Surrogacy contracts require a woman to perform nine months of gestational labor and then sever all ties to the child almost immediately after its birth. Some see surrogacy as a more subtle form of prostitution; the woman in effect sells her womb and relinquishes control of her body. Prostitution is generally not legal in the United States, and since surrogacy seems to be along the same lines, the worry goes, it should not be legal either. The argument is that a

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<sup>5</sup> J.K. Ciccarelli, & J.C. Ciccarelli. The Legal Aspects of Parental Rights in Assisted Reproductive Technology. *J Soc Issues* 2005; 61(1): 129. Note that Ciccarelli and Ciccarelli use the term ‘gestational surrogate’ more narrowly than we do.

woman should not be able to enter into a contract in which she sells her body under these circumstances.<sup>6</sup> Call this the ‘prostitution argument’.

The prostitution argument is sensitive in some ways to the gestational surrogate’s vulnerability, but it’s somewhat off target. For instance, prostitution and surrogacy have importantly different objectives. Prostitution consists in the selling of women’s bodies for sexual satisfaction; but the aim of surrogacy is to bring a child into the world. Even though both are services performed for money, the analogy is not solid – it is hard to compare prostitution and surrogacy when their purposes are so different. Another objection to the prostitution argument is that people are allowed to ‘sell their bodies’ in a broad variety of other ways. In the U.S., people can sell eggs and sperm, plasma, hair, and they can accept jobs that are known to compromise their physical health. Coal workers who know that mining poses serious health risks – they know they are potentially shortening their lives by accepting the job – are still allowed to make that decision. There is no reason to think that surrogacy is more like prostitution, an illegal form of ‘body-selling’, than it is like egg-selling, or any of the other legal forms of ‘body-selling’.

Another objection to the argument about ‘body-selling’ is that surrogacy contracts do not actually turn women’s bodies into objects of sale. There is a difference between ‘compensating a woman for her services, and paying a woman

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<sup>6</sup> S.A. Ketchum. 1992. Selling Babies and Selling Bodies. In *Feminist Perspectives in Medical Ethics*. H.B. Holmes & L.M. Purdy, eds. Bloomington & Indianapolis. Indiana University Press: 290.

for the use of her body'.<sup>7</sup> To illustrate this difference, consider lawn mowing. If I need my lawn mowed, there are two possibilities: I can pay you to use your lawnmower, in which case I would take possession of your lawnmower for an agreed period of time; or I can pay you for *you* to use your lawnmower to cut my grass – in other words I would pay you for your service of mowing my lawn. 'Any right I have here is at most a right to insist that you do with your lawnmower what you said you would. But that is not a right to your lawnmower.'<sup>8</sup> Surrogacy is more like the case of being paid for the service. The contracting couple does not gain a right to do whatever they please with the woman's body while she carries the child. The most they can do is ask that she do with her body what she agreed to do in the contract. In surrogacy, then, a woman is not 'selling her body' but being compensated for her services. Heidi Malm says there is no more commodification in paying a surrogate than 'paying a surgeon to perform an operation, a cabby to drive a car, or a model to pose for a statue'.<sup>9</sup> That's putting it too strongly – the surrogate's service is more intimate and bodily invasive than that of the surgeon, the cabby and the model – but the prostitution analogy is still misleading.<sup>10</sup>

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<sup>7</sup> H.M. Malm. 1992. Commodification or Compensation: A Reply to Ketchum. In *Feminist Perspectives in Medical Ethics*. H.B. Holmes & L.M. Purdy, eds. Bloomington & Indianapolis. Indiana University Press: 297.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid: 297.

<sup>10</sup> For more critical analysis of the prostitution analogy, see L. M. Purdy. Surrogate Mothering: Exploitation or Empowerment? *Bioethics* 1990; 3(1): 24-26.

(2) A related concern is that paid surrogacy is ‘baby-selling’. Like the prostitution argument, which argues against the sale of women’s bodies, the baby-selling argument contends that surrogacy contracts turn children into objects of sale, which devalues their lives, and maybe broader human life as well. Commodification of this sort, the argument says, is an attack on human dignity: the child’s, but also the surrogate’s, the contracting couple’s, and everyone else’s, too.

Like the gestational surrogate, children are vulnerable in surrogacy arrangements, and we agree that their interests should be carefully protected, although that is not our primary focus here. We also agree that there are legitimate concerns about exposing gestation to marketplace norms. But there are reasons to think that the baby-selling argument misfires. First, just as in our objections to the last argument, the purpose of surrogacy is crucial. The contracting couple want to be parents – they are not paying money to exploit the child or to make a profit from a resale. Second, in most cases the contracting father has supplied the sperm to create the child. He is genetically the father, so it seems odd to say he is buying his own child. Third, contracts that ensure that the surrogate can change her mind and keep the baby – the opt-out clause that we mentioned above – help preserve the sense that she is selling a service, not a



child. Contracts without an opt-out clause are more easily interpreted as selling a product or outcome instead of a process.<sup>11</sup>

Most remaining objections about baby selling should be directed at surrogacy brokers, rather than the gestational surrogate or the contracting couple, both of whom stand in some danger of being exploited by these brokers. And in any case, worries about third parties profiting from the contract are already present in many adoption arrangements.<sup>12</sup>

(3) Even if these first two arguments are answered, it's true that compensation is an important incentive for many gestational surrogates. Kelly Oliver only mildly overstates the situation when she says that 'very few women, if any, would perform surrogacy services without payment'.<sup>13</sup> That surrogacy arrangements would significantly diminish if paid surrogacy were illegal is itself a

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<sup>11</sup> Although our concern in this paper is with the surrogate herself, issues about child welfare are deservedly the focus of much work on surrogacy. We don't presume to answer all the concerns about the exploitation, commodification, and well-being of the child. For a collection of concerns about child welfare, see M. Brazier, M. A. Campbell, & S. Golombok. 1998. *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation. Report of the Review Team*. London: Department of Health: 29-38. We do note that, as the Brazier Report speculates, enhancing surrogacy autonomy may lower some of the risk of psychological harm to the child.

<sup>12</sup> One new worry that surrogacy does present is this: adoption concerns relinquishing an existing child, while surrogacy involves payment for the creation of a future child. Our thanks to an anonymous referee for emphasizing this point.

<sup>13</sup> K. Oliver. 1992. Marxism and Surrogacy. In *Feminist Perspectives in Medical Ethics*. H.B. Holmes & L.M. Purdy, eds. Bloomington & Indianapolis. Indiana University Press: 268.

sign that there is something wrong with the practice. Or so says the ‘compensation argument’.

If the worry is that economic factors wrongfully force women into entering these contracts, it is not clear that women are forced in this way. Many people would not do their jobs if they were not paid, not just surrogate mothers. Even people who love their work may do something else if they weren’t getting paid, simply because they need to earn a living somehow. So the fact that most surrogates want to be compensated for their services is not enough to show paid surrogacy should be illegal.

(4) Compensation aside, some think paid surrogacy should be illegal because the nature of the work is particularly unrelenting: the surrogate mother is ‘never off-duty’.<sup>14</sup> She is under contract for perpetual service, twenty-four hours a day, and ‘most people do not perform their service twenty-four hours a day, unless they are slaves’.<sup>15</sup>

But most gestational surrogates have already had at least one child and are not unaware of the pains and restrictions of gestating. And there are other jobs women perform where they are ‘never off-duty’. Actors and models are restricted in many areas of their lives – what they eat, how they dress, where they go and with whom. Public scrutiny keeps them always on-duty. It is true that the consequences are not quite the same. The actress who splurges on french fries

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

and a milkshake hurts only herself. If a surrogate mother goes 'off-duty', drinking alcohol or skipping a doctor's appointment, she risks harm not just to herself but the fetus as well. But the 'never off-duty' argument seems focused on the vulnerability of the surrogate, not the fetus, so the situations are similar enough.

Also analogous is the case of doctors. Doctors who are on call have certain responsibilities, and even when not on-call, they are never entirely off-duty. What they do in private areas of their lives can affect their work and in turn the health and safety of others. The off-call doctor who gets intoxicated, even though he knows his troubled patient may need him later, could be compromising his responsibility to his patient. Even in an ideal world, where division of physician labor were more fair, doctors would need to stay on-call for weeks to monitor the course of certain patients' progress.

Over the longer term, doctors are expected to remain informed about new medical developments. Patients should be able to trust that doctors who graduated from medical school decades earlier aren't unaware of advances in treatments and medications. Much of this information doctors will need to assimilate when they are off-duty. So even with its characteristic demands, paid surrogacy isn't the only job with limitations on off-duty life.

It's also worth noting that surrogates, actors, and doctors still retain broad freedom about what they do, even when they are not fully off-duty. Surrogates, for instance, can hold other jobs and care for their existing children.

(5) The previous arguments don't exhaust concerns about exposing gestation to the marketplace. She is neither a prostitute nor a baby-seller, and she is not a slave; but some argue that the gestational surrogate is mistreated by the very nature of paid surrogacy arrangements. On the 'mistreatment argument', paid surrogacy turns women's bodies into commodities and means of production. 'In general, within the surrogacy arrangement, the "surrogate" is treated as a machine whose services can be exchanged for money.'<sup>16</sup> Gender bias and economic inequality make this sort of abuse inherent in the practice. The contracting couple simply uses her womb and controls her life. Gestational labor is alienated labor, and the law should protect candidate surrogates from that.<sup>17</sup>

This argument overstates the power contracting couples have over surrogates. When the gestational surrogate signs the contract, she makes an agreement to perform certain specific duties, but some state laws and court decisions have wisely limited the breadth of control contracting couples can exercise, as does legal precedent in general contract law. The couple cannot use the surrogate's body in any way they please; they can only expect that she carry out the specific expectations set forth in the contract. And again, although the surrogate mother is never 'off-duty', she can anticipate the restrictions that healthy gestation will impose on her behavior; if she does not wish to submit

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<sup>16</sup> Ibid: 275.

<sup>17</sup> Kelly Oliver claims that surrogacy belongs in an especially invidious category of alienated labor: "estranged labor." But Oliver seems unclear about what qualifies certain labor as estranged. Ibid: 274-276. See also G. Corea. 1985. *The Mother Machine*. New York: HarperCollins; C. Overall. 1987. *Ethics and Human Reproduction*. Boston: Allen & Unwin.

herself to these restrictions, she does not have to sign the contract. Even more traditional jobs restrict people's behavior in one way or another.

It is true that the surrogate is generally not on an equal footing with the contracting couple. She is usually less economically well off and less educated than the couple,<sup>18</sup> and so she enters surrogacy arrangements more vulnerable to mistreatment than the contracting couple. But the stronger form of the mistreatment argument overstates both the level and risk of damage to the surrogate.

(6) Some argue that surrogacy makes unfair predictive demands on women. During gestation, it is common for a woman to develop strong feelings towards the fetus growing in her womb. Contracts that demand that she harbor these feelings and then give up the child she has grown attached to are unreasonable. Surrogacy asks a woman to decide how she will feel towards a child she carries but doesn't intend to keep; but the extent and kind of connection she will feel is too difficult to predict. It's wrong, the 'demanding prediction argument' says, to require that she commit to a process whose effect on her is in principle impossible to foresee.

To address this particular sort of surrogate vulnerability, many laws and brokers require her to have given birth to another child before being allowed to enter into a surrogacy contract. But this provision may not be enough to answer the worry – when she was pregnant before she did not carry the fetus with the expectation of having to give it up after birth.

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<sup>18</sup> See the data presented in argument seven below.

Another way to address this vulnerability is to allow the gestational surrogate to change her mind and keep the child. On this view, surrogacy arrangements should be more like most adoption arrangements. But even if she can opt out, she has introduced expectations in the couple, and it may be painful for her to violate these expectations. And some states (California, for instance, as suggested by the *Calvert* decision<sup>19</sup>) do not necessarily allow surrogates to opt out of the contract in this way. Those states need some other way to address this particular vulnerability.<sup>20</sup>

(7) Some think surrogacy contracts are unfair to women for a different reason: because women enter into these contracts under coercion. The thought is that the surrogate's choice process is burdened by circumstances that make it very difficult to resist agreeing to something she does not really want to do. Call this – a more subtle relative of the compensation argument above – the ‘coercion argument’.

On the simplest view of coercion, this argument doesn't make sense. Paradigmatic cases of coercion involve limiting or removing an option, but surrogacy contracts actually present women with an additional option. So how can it be that they are coerced into these contracts, when they have in fact *gained* another choice? One answer is that the simple view of coercion isn't correct: a

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<sup>19</sup> Supreme Court of California. 1993. *Johnson v. Calvert*. 851 P.2d 776.

<sup>20</sup> The demanding prediction argument is defended in S. Dodds & K. Jones. Surrogacy and Autonomy. *Bioethics* 1990; 3(1): 1-17, and challenged in J. Oakley. Altruistic Surrogacy and Informed Consent. *Bioethics* 1992; 6(4): 269-287.

new option can instead leave someone less free than she was before. These are what some call ‘coercive offers’.

To see this, consider the simpler, paradigmatic cases of coercion first. In these cases, the coercer pushes a target person to act in the way the coercer wants instead of the way the target wants, usually through threatening something horrible. Some option formerly open to the target is either removed, or, more often, its appeal is severely limited. Say an armed man approaches someone walking home from work and demands, ‘Give me your wallet or I’ll shoot’. Before the gunman appeared, the walker had a variety of open options. The gunman has made exactly one of these options strongly compelling: giving up the wallet. Technically, there are still multiple choices the walker can make: relinquishing his wallet, attempting to seize the gun, running away. But the risk of being shot and perhaps killed in any but the first option is high. The gunman has coerced the walker by making the alternative to giving up his wallet very costly. So even in straightforward cases of coercion, the target can be left with other choices, but they are severely unappealing.

There is another type of circumstance in which options can be made very costly – not by a demand enforced by a threat as in the walker and the gunman situation, but through an offer. These ‘coercive offers’ are made to a target in some vulnerable situation such that she may believe that she cannot act in another way. Like the gunman’s threat, these are offers that cannot be refused without great cost. On a simple view of coercion, offers would always increase freedom: the target is presented with a new option that she did not have before, and she

does not lose any options that she had before; but certain cases make this simple view untenable.

Consider, for instance, the case of the lecherous millionaire. ‘B’s child will die unless she receives expensive surgery.... A, a millionaire, proposes to pay for the surgery if B will agree to become his mistress.’<sup>21</sup> In this example, B is presented with a new option; she can become A’s mistress and acquire the means to pay for the surgery that will save her child’s life. However, from B’s point of view, there is seemingly no choice: either she sleeps with the millionaire, or her child dies. So A has made B’s option of choosing not to be his mistress extremely costly. She can refuse the offer – that choice is technically open to her – but the cost severely limits its appeal. B’s inability to pay for life-saving surgery for her child puts her in a position such that A’s offer seemingly can’t be refused. A put B into a situation comparable to that of the walker confronted by the gunman. The walker was coerced into giving the gunman his wallet because the gunman made the cost of noncompliance too high. The walker *could* choose not to comply with the gunman, but this option is so unappealing that it can be said he was coerced into giving up his wallet. B’s situation is analogous: the cost of her ‘non-compliance’ with A’s offer is so high that we are justified in thinking she was coerced.

Of particular importance is that B is in a position where she is very vulnerable to A’s offer. We wouldn’t be concerned about B’s options if she did not have a child who would die without an expensive operation, or if B had other

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<sup>21</sup> A. Wertheimer. 1997. *Coercion*. Princeton: Princeton University Press: 229.



reasonable means to raise the money. Therefore, an important factor in the idea of coercive offers is the vulnerability of the party being coerced.

In a similar way, some argue that paid surrogacy is a new but coercive option for many women. There are women who may feel that there is no other way for them to make money. Perhaps being a surrogate mother is not an attractive idea to them, but they feel that their other options are even more unappealing. More than just unappealing, these other options are so costly that the women cannot seriously consider them. By entering into a surrogacy contract, a mother who already has children can make a comparatively good amount of money and be able to stay at home with her other children while she works. In this way, legal surrogacy contracts, although expanding numerically their options, seem to coerce women into making a choice they do not prefer, yet cannot refuse because the price of refusal is too high.

One response to the coercion argument is that some women enjoy being pregnant; whatever their economic situation, surrogacy may not be a coercive offer for them.<sup>22</sup> A second response is this: most surrogates may not be economically vulnerable enough for paid surrogacy to count as a coercive option. The best available data indicates that most gestational surrogates are married and have household incomes between \$25,000 and \$50,000 per year.<sup>23</sup> This data does

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<sup>22</sup> J.A. Robertson. Surrogate Mothers: Not So Novel After All. *Hastings Cent Rep* 1983; 13(5): 29.

<sup>23</sup> Office of Technology Assessment. 1988. *Infertility: Medical and Social Choices*. Washington, D.C. Government Printing Office: 273-274. This is the largest study of gestational surrogates in the U.S. The study provides income amounts in 1988 dollars; we have adjusted these to 2005 dollars. There is very little more recent data on surrogate demographics, especially with the large

not show that the poorest women are entering into paid surrogacy contracts in substantive numbers. Most surrogates are not so desperate for money that we should think of them as coerced. Still, even few cases of possible coercion are morally worrisome.<sup>24</sup>

All of these arguments concern, directly or indirectly, the vulnerability of the surrogate. We have shown that some fail in straightforward ways – in particular, the (1) prostitution, (2) baby-selling, (3) compensation, and (4) never off-duty arguments. But the (5) mistreatment, (6) demanding prediction, and (7) coercion arguments all still carry important weight. The risk to the surrogate of exploitation and abuse is not as severe as these arguments claim, but they do show that there is still plenty to worry about.

One response to the real vulnerability that these last arguments expose is to make surrogacy contracts illegal. And indeed some states have done so, most often because of concerns about children, but also to protect candidate surrogates, our focus here. But banning paid surrogacy buys protection at a very high cost: it deprives women of a deeply personal decision. Most generally think people should be free to make choices that concern their own lives, and that the choices relevant to the most intimate parts of their lives – what they think and believe,

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sample size of the 1988 data. A problem with all such data is that does not include the many surrogacy arrangements that are informal and unrecorded.

<sup>24</sup> For more on coercive offers and undue inducements, see Dodds & Jones, *op. cit.* note 20; Purdy, *op. cit.* note 10; and E. J. Emanuel. Undue Inducement: Nonsense on Stilts? *Am J Bioeth* 2005; 5(5): 9-13 (note also the follow-up articles in the same issue).

with whom they form relationships, and what they do with their bodies – should be protected the most strenuously. To make it legally impossible for the surrogate to perform gestational labor, even commercial gestational labor, is to limit her autonomy too much. Even if the surrogate is vulnerable to some exploitation, respect for her autonomy means not wholly removing paid surrogacy as one of her options. Otherwise, she is wronged: nothing less than bodily autonomy is at stake here.

Making paid surrogacy legal isn't just an unfortunate capitulation that autonomy demands. Contracts, including the right sort of surrogacy contracts, can enhance and extend freedom in significant ways. Marjorie Maguire Shultz writes that:

Where arrangements involve several persons, where the opportunity for planning and deliberation exists, where reliance is weighty, where expectations are substantial and their validation is personally and socially important – as is true of reproductive agreements – contracts offer a means of arranging and protecting these various interests.<sup>25</sup>

Shultz adds that contracts are a crucial resource for 'projecting intention and choice into the future'. Contracts make possible choices that wouldn't be possible otherwise – they extend freedom and power. Surrogacy contracts have this capability as well.<sup>26</sup> The contracting couple gains the ability to have a child who

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<sup>25</sup> Cited in N.R. Elster. *Assisted Reproductive Technologies: Contracts, Consents, and Controversies*. *Am J Fam Law*. 2005; 18(4).

<sup>26</sup> Contracts are not an ideal model for many of the most crucial and intimate of human relationships, as feminist ethicists such as Virginia Held have argued (V. Held. 1987. *Feminism*

is (at least in part) genetically theirs, or at the very least the ability to initiate a pregnancy. The gestational surrogate also gains freedom and power: a new opportunity for paid labor, and the experience of playing a crucial role in bringing new life into the world, without all the antecedent costs of child-raising.

So the dilemma is clear: the surrogate is vulnerable in important ways, but autonomy prevents a ban, and even positively supports the enhanced choice that surrogacy contracts make possible. If surrogacy contracts are made illegal, women are wronged. However, we saw earlier some unanswered concerns that surrogacy contracts themselves wrong women – by allowing them, the law seems to be failing to protect women in important ways. We want to argue that there is an important and untapped legal tool that, short of a ban, addresses the most important vulnerability arguments. We turn to that proposal now.

## **II. A ‘Soft Law’ Solution**

At present, the fifty U.S. states have varying laws (or no direct laws at all) regarding surrogacy. Six states allow individuals and couples to enter into surrogacy contracts, and ten prohibit them in all or some instances. The other thirty-four states have mixed or unclear laws and case rulings on whether or not surrogacy contracts are allowed. Utah, in a recent and unexpected development, legalized some paid surrogacy arrangements in 2005.<sup>27</sup> But almost without

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and Moral Theory. In *Women and Moral Theory*. E.F. Kittay & D.T. Meyers, eds. Totowa, NJ: Rowman & Littlefield: 111-128). But we believe that in certain limited domains, including surrogacy, contracts can be autonomy protecting and freedom enhancing.

<sup>27</sup> Utah bill S.B. 14, signed into law 16 March 2005.

exception these laws are too crude. What they miss is a particular form of ‘soft law’.

‘Soft law’ is that part of law concerned not with crimes and torts, but instead *permissions*. Soft law mandates performances or activities that must occur before some sort of status change – performances and activities designed to protect some substantive state interest, such as public safety. Driver’s license tests, marriage license procedures, and medical license procedures are all soft law. Sometimes soft law protects others (medical licenses); sometimes it protects the person seeking the status change as well: the driver’s license process certainly protects the driver, and in principle the marriage license process can protect not just possible offspring from disease, but also the couple from unknown health conditions and factual misrepresentation. Protection of the vulnerable from harm is the most common justification of soft law.

Consider another, less familiar example of soft law. In the state of Connecticut, any couple with a child/children under the age of eighteen that seeks a divorce is required by the state to attend ‘Parenting Education Classes’.<sup>28</sup> These

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<sup>28</sup> Information in this section on Connecticut’s ‘Parenting Education Program’ is from the following two websites. For the full text of the Connecticut divorce statute outlining the ‘Parenting Education Program’, see: State of Connecticut General Assembly. Section 46b-69b Parenting Education Program. Hartford, CT: State of Connecticut. Available at: <http://www.cga.ct.gov/2005/pub/Chap815j.htm#Sec46b-69b.htm> [Accessed 9 Jul 2007]. For further state-issued information on the program, see: State of Connecticut Judicial Branch. 2005. Parenting Education Programs. Hartford, CT: State of Connecticut. Available at: <http://www.jud2.state.ct.us/webforms/forms/fm151.pdf> [Accessed 9 Jul 2007].

classes, a total of six hours in length, are intended to educate parents about the effects of divorce on children. They also teach dispute resolution and offer advice on how to deal with the upcoming new family circumstances. All of this is intended to reduce a negative effect of divorce: that which it has on children who must adapt to a new living situation. Connecticut is not the only state to carry these requirements for divorcing parents. Missouri's 'Focus on Kids' program has similar rules and aims.<sup>29</sup>

A soft law approach to paid surrogacy can address the vulnerability arguments above while guarding a woman's reproductive freedom. We propose that states offer 'Surrogate Education Classes', completion of which is required of those who intend to enter legal paid surrogacy contracts. The class would feature information about the surrogacy process: what contracts can and cannot legitimately demand of women, what past surrogates have said about their experiences, what other employment opportunities are open to women, and so

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The Connecticut program is successful: 'Over 90% rate the course very beneficial in the initial evaluation and two-thirds continue to see benefits from the course six to twelve months later' (Connecticut Council of Family Service Agencies. Parenting Education Program (PEP). Hartford, CT: State of Connecticut. Available at: <http://www.ctfsa.org/programs/pep.html> [Accessed 9 Jul 2007]).

<sup>29</sup> For further information on Missouri's 'Focus on Kids' program, see: University of Missouri-Columbia (UM-C). 2006. Focus on Kids. Columbia, MO: UM-C. Available at: <http://missourifamilies.org/fok/> [Accessed 9 Jul 2007]. For more on divorce soft law, see: E. Biondi. Legal Implementation of Parent Education Programs for Divorcing and Separating Parents. *Fam Concil Courts Rev* 1996 34(11): 82-95.

forth.<sup>30</sup> The aim in all of this is to decrease the surrogate's vulnerability – to help her be an informed, deliberate choice maker.

Some specific ways surrogacy classes answer the remaining vulnerability worries are these. First, information about what is and is not legitimate in contracts is important because of the 'mistreatment argument' (argument five above). We saw that even though the contracting couple's control over the surrogate is restricted by some specific surrogacy laws and by legal precedent, the couple and surrogate are still on an unequal footing. Contracting couples are generally better educated than gestational surrogates, and they are more likely to be informed about their rights and limitations in a contractual arrangement. The surrogacy class can address some of this inequality. Surrogates should learn that, for instance, while responsible gestation requires her to eat healthily, she retains control over crucial choices that affect her own body. Surrogates should also learn about whatever other specific rights – such as the option to keep the child after birth – the specific state does or does not allow.<sup>31</sup> For instance, class

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<sup>30</sup> There are similar solutions outside the U.S. context, our focus in this paper. Some states in Australia already use a soft law approach for other assisted reproductive technologies; in Victoria, for example, people who seek IVF treatment are required to obtain pre-treatment counseling about the treatment's risks and benefits. In the U.K., the required counseling already provided by the HFEA could be expanded to include surrogate education. (We thank two anonymous referees for these suggestions.)

<sup>31</sup> Legal limitations on what contracts can demand of surrogates, and the idea of an opt-out clause that lets the surrogate change her mind about keeping the child, can also help address the

members in California would learn that, at least in circumstances like those in the *Calvert* case, a surrogate who changes her mind may *not* keep the child. Educated surrogates are less likely to be commodified and mistreated.

Second, class participants should hear the experiences of others who have worked as paid gestational surrogates. Ideally, class members should meet former surrogates themselves directly; at a minimum, they should hear both statistical information – health, demographic, and other data – and personal stories written or recorded by past surrogates. This element of the class helps address the ‘demanding prediction argument’ (argument six above). Former surrogates are in an ideal position to convey what it is like to gestate, with the intent not to raise, a being to whom they are either partly or not at all genetically related; they are the authorities on the sort of attachment that gestational surrogates come to feel. Candidate surrogates may have gestated their own children before, but this does not mean they will be able to accurately predict how they will feel in a surrogacy arrangement. By hearing the experiences of others, their prediction will be better grounded and more cautious.

A third basic element of the class is information about other forms of employment. The ‘coercion argument’ (argument seven above) suggested that even though paid surrogacy presents some women with a new opportunity, their socioeconomic circumstances may make it an encumbered, problematic opportunity. While statistically surrogates do not tend to be among the absolutely

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vulnerability arguments. But even so, we argue that required surrogacy classes are indispensable: these other approaches are useless if the surrogate doesn’t know about them.



worst off, they are still women whose circumstances are not entirely comfortable. Some may think that paid surrogacy is the only way they can earn additional money. Some women, especially single women, may see surrogacy as a way to work while still taking care of their own existing children. They may not be aware of what the surrogacy class can tell them: there are other jobs that can be done at home or jobs with subsidized day care and/or flexible hours. Some of this information should be dispensed in written form (pamphlets, job resource contacts and phone numbers, etc.), and individual personal counseling, outside the class, may be important, too. The more informed women are about genuine alternatives like these, the less vulnerable they are to coercion.

Developing a network with other surrogates can be another important result of the course. Introducing the potential surrogate to others considering the same choice, as well as women who have already been surrogate mothers, will let her talk first hand with other women who may have, or once have had, the same concerns as she does. If a surrogate mother has support, and is able to talk to other people who have gone through or are going through the same experiences, it will make the process easier on her.

Many of the details about the course can be left to the discretion of individual states, but we argue for the following additional structural elements. First, this should be a multi-session instead of a single-session course. Retention will be higher if there are multiple sessions, and the (modest) time period between sessions will give the candidate surrogate a chance to reflect on her choice and bring her own questions back to the group.

Next, the total class time need not be long – six to eight hours of instruction and dialogue should be sufficient. But at least two of these hours should consist of a one-on-one meeting between the candidate surrogate and a counselor. The counselor can help the woman be reflective about the reasons for which she is entering the contract. And time alone with each potential surrogate will allow the counselor to address specific concerns. Without being in front of a large group of people or worrying about time constraints, the candidate surrogate is more likely to voice her own independent questions and concerns.

A third issue concerns the cost of the classes. There are four obvious candidate payers here: (1) the state, (2) one of the contracting parties' health insurance plans, (3) the potential surrogate, or (4) the contracting couple. Because the course will not be cheap to run (it involves a paid instructor as well as someone qualified to provide one-on-one counseling), and because surrogacy is not a medically necessity (and so health insurance does not usually cover any fees related to the contract and procedure), it is difficult to justify obtaining the funds from either of the first two sources. Also, because the surrogate is most often economically not well-off, it is unfair to ask her to pay for the class. So the best option seems to be to include it in the costs a contracting couple will have to pay for the entire surrogacy process. It is normal that a contracting couple foot the bill for the medical expenses, maternity clothes, and other pregnancy-related costs incurred by the surrogate. It seems, then, most natural that the contracting couple subsidize the course as well.

Fourth, a required separate class session for the contracting couple may be important as well. They too can benefit from hearing from former participants in surrogacy contracts, both so that their own expectations are realistic, and because the more sympathy and understanding they have for the experiences of gestating surrogates, the less vulnerable the surrogate herself.

Finally, a candidate surrogate need only complete the program once, not every time she wants to enter a contract. Childcare should be provided for class members – after all, some women choose surrogacy exactly because it allows them to work without being away from their children.

It's important to emphasize that the surrogacy course is not intended to steer women away from surrogacy. Potential surrogates should be assured that the training and counseling is to help them, not hinder them. In order to present the sort of information described above as neutrally and objectively as possible, care must go into choosing educators and counselors. These class leaders should be familiar with surrogacy law and the surrogacy experience, or at the very least be able to marshal presenters who are. It is important that they announce themselves as advocates for the women in the program. They are not trying to scare or to prohibit candidate surrogates from making their own decisions. The counselors and educators, rather, are working as proponents of the surrogate; they are trying to create a favorable and fair environment for the contracts to take place. Upon completing the class, some may indeed decide not to become

surrogates.<sup>32</sup> Those who do will be able to make a more reflective personal decision.

This last point – that surrogacy courses are intended and structured to enhance, not restrict, the autonomy of the surrogate – is crucial. It distinguishes our approach from other soft law approaches that, either explicitly or as revealed by the shape of the policy, simply attempt to discourage some behavior. For instance, a state law that requires women seeking an abortion to first view pictures of the remains of aborted fetuses is unlikely to be aimed at enhancing their autonomy. Soft law policies of the sort we defend here do exact costs (in time, energy, and other resources), and any benefits that don't accrue to those who pay these costs, or any moral constraints that asymmetrically handicap them, demand special justification. Our proposal meets this test in a way that other soft law approaches often do not: enhancing the candidate surrogate's autonomy is both the explicit and structural aim of the surrogacy classes.

And this proposal offers a way out of the dilemma that confronted us earlier – ban paid surrogacy, or respect a surrogate's autonomy to expose herself to possible exploitation and abuse. A ban wrongs women, because choices about what one does with one's body are deeply personal and crucial; and legalizing crude paid surrogacy wrongs women, because of the asymmetric vulnerability of

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<sup>32</sup> If they do decide against paid surrogacy, the Baby M case suggests that both the candidate surrogate *and* the contracting couple will be better off – and fewer children will face the sort of parental limbo that Baby M herself faced.

candidate surrogates. We've described a neglected third way – a legal tool that honors and expands autonomy.