

Surrogacy: An Argument for Change

By Emmah Faris-Howes¹

*This article argues that surrogacy is legally unethical and difficult to contractually legitimize. I will assess the case entitled *In the Matter of Baby M*², which was the first American court case that challenged the legal validity of surrogacy, specifically within the scope of contract law. This case supports the argument that surrogates are unable to accurately gauge the extent of the impact that the surrogacy process will have on them. This case additionally delegitimizes surrogacy contracts by highlighting the lack of consent available for participating parties. When surrogates are uninformed about the ranging effects of the surrogacy process, they are unable to provide full consent, and therefore any contracts made with them should be nullified. statement rule.³ This shift reshaped principles of separation of powers, eliminating any need for Chevron deference.*

Background

Surrogacy is one of the new techniques of assisted reproduction technology in which a woman carries and bears a child for another woman. In addition to the risk of physical complications for complete surrogate mothers, the possibility of psychological complications resulting from emotional attachment to a living creature in the surrogate mother may be another injury that requires counseling and assessment prior to acceptance by infertile couples and complete surrogate mothers (NIH). There are two types of surrogacy: gestational and traditional. Gestational surrogacy is when doctors transfer an

¹ Brandeis University, Class of 2026; *Brandeis University Law Journal*

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

³ John F. Manning, *Clear Statement Rules and the Constitution*, 110 *Columbia Law Rev.* 399, 401 (2010) (a clear statement rule “insist[s] that Congress express itself clearly when it wishes to adopt a policy that presses a favored constitutional value.”).



embryo, typically created by the egg and sperm of the intended parents, to another woman. Donor eggs or sperm may also be used to create the embryo. The gestational carrier, or surrogate, carries the pregnancy but shares no genetic relationship to the child.⁴ This process typically ranges in price from \$100,000 to \$150,000, depending on the agency, with surrogates being compensated only \$30,000 to \$50,000 on average.

Traditional surrogacy is facilitated without an egg donation. The surrogate undergoes artificial insemination with the intended father's sperm. The surrogate uses her own eggs, therefore she is the baby's biological mother. Traditional surrogacy is usually less expensive than gestational surrogacy because In Vitro Fertilisation (IVF) is not involved. However, because of the associated legal and emotional complications for surrogates, this process is typically discouraged by medical professionals; furthermore, traditional surrogacy is prohibited in certain states.⁵ This process typically ranges in price from \$50,000 to \$70,000, depending on the agency, with surrogates being compensated only \$15,000 to \$30,000 on average.

The case deemed Baby M highlighted many overlooked considerations of morality, ethics, contractual boundaries, parental rights, and individual rights. In February of 1985, William and Elizabeth Stern, unable to conceive, sought assistance from the Infertility Center of New York. The Sterns were paired through the Center with Mary Beth Whitehead, who agreed to be a surrogate for them through artificial insemination, meaning that the baby would be the biological child of Ms. Whitehead and Mr. Stern. Additionally, they agreed that Ms. Whitehead would give up the child and her parental rights to the Sterns after the birth. The agreement

⁴ Yale Medicine, Gestational Surrogacy, <https://www.yalemedicine.org/conditions/gestational-surrogacy>.

⁵ UPMC, Surrogacy Options: Comprehensive Guide and Resources, <https://www.upmc.com/services/womens-health/services/obgyn/obstetrics/fertility/surrogacy>.



provided for a payment of \$10,000 to Ms. Whitehead for her participation as a surrogate.

Upon the child's birth in New Jersey, Ms. Whitehead refused to surrender the infant as the contract had dictated and fled to Florida. Authorities in Florida and New Jersey collaborated to recover the child. The Sterns sued Ms. Whitehead in New Jersey state court based on breach of contract, as well as for custody of the child, asking the court to enforce the surrogacy contract. The trial court enforced this contract quite differently from the later Supreme Court, and the Sterns were awarded full custody of the child. The court enforced the surrogate's obligation to surrender the baby, terminated Whitehead's parental rights, required that Baby M be adopted by the intended mother, upheld Whitehead's designated payment of \$10,000, and granted full legal and physical custody to the Sterns. Ms. Whitehead appealed this decision to the Supreme Court of New Jersey, specifically asking for custody of the child. The Supreme Court of New Jersey held that surrogate contracts conflicted with public policy. Specifically, the court found that the surrogate contract conflicted with laws that prescribed monetary payments for adoptions, laws that required proof of parental unfitness before the court could terminate parental rights, and laws that made surrender of custody and consent to adoptions revocable. The Supreme Court of New Jersey restored Whitehead's parental rights, nullifying the adoption that was part of the original surrogacy contract, but remanded the case to the lower court for the completion of "best interest of the child" analysis.⁶ The Supreme Court affirmed in part, reversed in part, and remanded the case back to the trial court. This case is extremely important as it was the first court ruling in the United States involving surrogacy and a surrogate-parenting agreement.

⁶ Pace Univ. Sch. of Law Library, In the Matter of Baby M – Surrogacy Research Guide, <https://libraryguides.law.pace.edu/c.php?g=452971&p=3156877>.



Surrogacy: An Argument for Change

The topic of contractual surrogacy raises many arguments and considerations regarding human dignity, legal and ethical complexities, parental rights, and one's constitutional rights. This paper argues against surrogacy due to the factors surrounding it: the effects it has on children, the contractual exchange of monetary compensation, the mutuality of surrogacy, and the ethical dilemma of whether infants can be commercialized.

A critical flaw in the concept of surrogacy is the emotional effect that can be had on both the child and the surrogate mother, once the child becomes aware of his or her own birth process. Upon contractually agreeing to be the surrogate mother, specifically if someone has never gone through a pregnancy and birth, it is nearly impossible to understand the volume of emotions one may endure after birth. However, this lack of awareness is not the only potential emotional damage. As discussed by Richard Posner, surrogacy can indeed be seen as a form of exploitation of low-income women.⁷ When an individual is potentially in desperate need of money, the idea of surrogacy, no matter the implications, can seem far more enticing than it might be when presented to someone of means. Nevertheless, Posner contests the idea that surrogacy improperly targets lower-income communities by claiming that surrogacy is a form of empowerment for women over their bodies, giving them the choice to participate in the surrogacy process. This position is deeply flawed, because most surrogates, specifically those who have not given birth before, cannot truly understand the magnitude of a pregnancy and the emotional response they will endure post-birth. This is exemplified by the Baby M case.

⁷ Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, *U. Chi. L. Rev.*, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2809&context=journal_articles.



Gestational surrogates, on average, are more likely to be first-time carriers (65.2% vs. 23.5%).⁸ Any contract made with a woman who has not yet experienced birth is built upon a foundation of uninformed consent and therefore should be voided. Additionally, Posner recognizes that it is difficult to validate surrogacy agreements based on common contract principles.⁵ He acknowledges that the emotional and personal nature of a pregnancy brings inherent uncertainties about a surrogate's consent to give away a child prior to experiencing childbirth itself. When a surrogate agrees to carry a child as part of a contract, they may not realize how directly impacted they may be emotionally by the process. The varying experiences of surrogates create a difficulty in regulating the practice legally. Further, Posner discusses how the so-called mutuality of surrogacy contracts often cannot bear humane emotional burdens and ethical considerations.

When disputes between the surrogate mother and the intended parents arise, legal action may be necessary to find a resolution. These legal processes are typically lengthy, as seen in the Baby M case, which lasted about two years before a final decision. Baby M was not able to decide for herself. Although the Court sought to uphold the child's welfare, its ruling ultimately undermined that goal. From the moment she was born, Baby M was the subject of a contractual dispute. This meant Baby M never experienced a stable custodial environment in infancy, a period courts recognize as critical for bonding and development. The Court resolved important legal and policy questions with clarity and careful attention to precedent, but did so at a high cost to the child. The Supreme Court recognized the child's pressing need for stability and security, but in failing to extinguish Whitehead's parental rights and giving her visitation rights, the court ensured that Baby M's chances at stability were diminished. While the court

⁸ Erika L. Fuchs & Abbey B. Berenson, Outcomes for Gestational Carriers Versus Traditional Surrogates in the United States, 27 *J. Women's Health* 640 (2018), <https://pmc.ncbi.nlm.nih.gov/articles/PMC5962328/>.



settled the current custody issue, as is true of all custody cases, the result is continuously subject to modification during the course of the child's minority. Given the contentious history of this case and the parties' conflicting interests, an ongoing tug-of-war seemed inevitable for Baby M.

Traditional surrogacy gives little consideration to the rights of a resulting child, who, in many cases, will be intentionally separated from at least one biological parent. This includes potential half-siblings in cases where the commissioning parents are using egg or sperm donors in conjunction with the surrogacy arrangement. In cases of anonymous egg or sperm donations, children have been denied part, or in some cases all, of the details of their biological origins. Genealogical bewilderment and adjustment difficulties among surrogate-born children are well documented.⁹

Parallels are often drawn between adoption and surrogacy, and in fact, this was the deciding factor in the Baby M case by the New Jersey Supreme Court.⁷ However, many factors cause this comparison to stand questionably. In many cases, traditional surrogacy intentionally creates a situation in which a child will be denied his or her biological parent-child relationship. In most circumstances, children of surrogacy arrangements are deliberately separated from their biological mother the moment they are born. Adoption, in contrast, responds to this separation rather than creates it. This raises a significant moral and ethical issue, creating a potentially traumatic experience for both the surrogate mother and the child as a result.

Introducing monetary compensation for human life inherently reduces the child to a commodity in a commercial transaction. It also commodifies the body of the surrogate mother, and all risks, including death in tragic cases, are borne

⁹ Grace Melton, How Surrogacy Harms Women and Children, Heritage Found., <https://www.heritage.org/marriage-and-family/commentary/how-surrogacy-harms-women-and-children>.



by her. By its very nature, surrogacy monetizes both the woman's body as well as that of the child. The women who are targeted to become surrogates by the fertility industry are often persuaded by the opportunity to make tens of thousands of dollars, which is relatively low, in exchange for renting their bodies. In some cases, a surrogate arrangement is altruistic - perhaps the surrogate mother wants to help a friend or family member who desperately wants a baby, and she does not profit financially from the arrangement. Nevertheless, regardless of the circumstances, in a surrogacy arrangement, a woman's body is used as a conduit for a transaction that provides a baby for someone else, and the risks for both her and the baby are significant.¹⁰

The ability to carry out a surrogacy contract ethically contradicts 42 U.S. Code § 274e: the prohibition of organ purchases. As a society, the United States legally prohibits the sale of almost all body parts, except for those deemed "harmless," like human eggs, skin, bone marrow, and sperm.¹¹ However, if selling one's womb to another party is seen as a form of empowerment, why is freely selling one's kidney not? The common argument is that the government would not want to promote a society in which low-income individuals are willing to sacrifice their health for money. This, however, is the exact system we have set up for surrogacy. Individuals who pay for surrogacy rent a woman's womb and simultaneously purchase a human life, as a result of this agreement. The most profound ethical issue raised by the Baby M case and exemplified in many surrogacy transactions is whether it is morally permissible to commercialize the creation and transfer of human life. Surrogacy's contractual nature diminishes the infant to an object of exchange rather than a person with intrinsic worth. It violates basic ethical principles, like personal autonomy, by allowing the child's welfare to be forsaken and relegated to the terms of a financial transaction.

¹⁰ Melton, *supra* note 6.

¹¹ 42 U.S.C. § 274e.



In *Babies for Sale*, Robin Fox emphasizes the importance of ethical standards in child welfare by advocating for stricter regulations to protect children and vulnerable individuals involved in the processes of adoption and surrogacy.¹² If surrogacy remains legal, it must be governed by rigorous regulations designed to prevent harm to all parties involved, including the child, the surrogate mother, and the intended parents. Although there are many benefits to surrogacy, it is evident that the often-seen consequences, such as emotional trauma, outweigh any possible benefits. Although surrogacy allows individuals who are unable to biologically reproduce to have children, there are too many possible contractual discrepancies and effects on surrogates to be beneficial to society.

By allowing this practice to continue, the government is allowing harm to fall upon the involved parties, and it must take paternalistic legal measures to ensure protection for the surrogates, who are vulnerable. Paternalism is defined as the law's intentional interference with a person's autonomy justified by the claim that it protects their welfare, safety, or best interests. These measures may look like instituted policy regulations on who may become a surrogate mother and what experience they must have before entering into a surrogacy contract. If we, as a society, frame surrogacy as a market transaction, it allows us to affirm the ideology that children can be sold, bought, or given a financial value. It goes against the core moral societal understanding that human life is priceless and has to be protected from the forces of the market. In the *Baby M* case, the rights and needs of children involved in surrogacy contracts will remain secondary to the desires of the adults involved. The government regularly uses paternalistic justification for laws such as this, allowing the government to deem what exact actions violate moral principles and code. Our government carries the responsibility of protecting its people,

¹² Robin Fox, *Babies for Sale*, Scribd, <https://www.scribd.com/document/19455270/11-Robin-Fox-Babies-for-Sale>



so stronger policy changes revolving around the process of surrogacy must be instated. I challenge the allowance of surrogacy, considering that many find the practice and process to be unethical.

