

NOTE

CAN I HAVE YOUR BABY? PATERNALISM, AUTONOMY, AND MONEY IN CALIFORNIA'S "SURROGACY-FRIENDLY" STATUTORY SCHEME

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California is considered one of the most surrogacy friendly places in the world, attracting intended parents from around the globe who are seeking to avail themselves of California's laws and bustling surrogacy industry. However, California's statutory scheme overlooks the needs of intended parents who seek to have children through the traditional (rather than gestational) surrogacy route. Laws designed to facilitate commercial gestational surrogacy arrangements make traditional surrogacy arrangements difficult and more costly.

This Note discusses the history behind California's surrogacy laws. It centers the story of Roger, Huey, and Saffron (two intended parents and one prospective traditional surrogate), discussing the barriers that they and similarly situated families face in California. It dives into the (often flawed) reasoning behind California's laws, the profit motives that influence the industry as a whole, and the impact on aspiring traditional surrogates and intended parents who cannot afford (or do not desire to engage with) the more expensive gestational surrogacy process.

This Note explores the approach of the United Kingdom, where there is no legal distinction between gestational and traditional surrogacy arrangements and there are strict limitations on third parties profiting from facilitating surrogacy arrangements. While acknowledging the imperfect nature of the UK's system, the Note suggests that California might consider a similar alternative route for traditional surrogacy arrangements.

This Note fills an important gap in the academic literature by centering the lived experiences of those impacted by California's laws. Whereas much of the literature available on surrogacy focuses on gestational surrogacy arrangements

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in the commercial context, this Note considers persons who are pursuing traditional surrogacy arrangements in an altruistic context. It explores misconceptions that have led to traditional surrogacy's unpopularity and challenges the industry's paternalistic view and failure to meet the needs of the U.S.'s changing family structures.

This Note proceeds in five parts. Part I provides an overview of surrogacy and explains the terminology that will be used throughout the paper, with particular emphasis on the legal distinction between traditional and gestational surrogacy. Part II briefly describes the history of surrogacy in the United States, with particular focus on California's "surrogacy-friendly" statutory scheme. It explores the legislative history behind California's laws, including the tendency for changes in surrogacy laws to occur after major scandals. Part III describes the practical impact of California's statutory scheme for families like Huey, Roger, and Saffron, such as difficulty finding counsel, difficulty attaining medical and psychological support, and increased costs. It also discusses how traditional family structures are increasingly less common, particularly in queer communities, and explains why some practitioners are hesitant to accommodate these new structures. Part IV addresses the common argument that traditional surrogacy is more psychologically dangerous and risky, and it explains some of the risks involved in gestational surrogacy arrangements. Finally, Part V explores approaches to surrogacy in the U.K. and suggests a need for alternative systems that support altruistic surrogacy arrangements and traditional surrogates.

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PROLOGUE: ROGER, HUEY, AND SAFFRON¹

Roger and Huey live in an old cabin with their three dogs and three cats, and behind their home is a barn covered in red chipped paint and filled with materials for various unfinished projects: pieces of old furniture, piles of wood, countless knickknacks, and dusty boxes of unworn baby clothes, untouched since their last attempt at starting a family had fallen through. This time, the pregnant woman with whom they had made an adoption agreement had decided to keep the baby. It was not an honest change of heart; Roger and Huey later learned that the same woman had promised the child to another couple who were similarly left in the lurch. To make matters worse, the adoption agency that they worked with declared bankruptcy approximately two years later.² The whole ordeal cost Roger and Huey approximately \$25,000, in addition to immense emotional turmoil.³

Previous attempts at starting a family had begun over fifteen years ago, with a friend who was potentially interested in being a surrogate. Roger and Huey also attempted the foster adoptive process with the State of Louisiana. Their caseworker frequently provided inaccurate information and created artificial barriers to their being placed with a child (such as mis-measuring their home and claiming that it did not meet the requirements for housing a child). “They had issues with cucumbers in our yard but were not bothered by a 68-year-old-or-so man wanting a 16-year-old in their house,” Roger stated, referring to someone they heard about who had been placed with a child and was later arrested for abusing her. “We were, for some reason, the scary people.” In retrospect, Roger and Huey believe that it was never the agency’s intention that they would be placed with a child, especially given then-Louisiana governor Bobby Jindal’s hostility to gay adoption.⁴

Roger and Huey are not unique in terms of their struggles to start a family, as gay couples are often the targets of “state-sanctioned discrimination.”⁵ Great strides have been made in recent years to enable gay parents to adopt, but gay parents nonetheless often receive pushback.⁶ Because faith-based agencies often

1. I use the fictional names Roger, Huey, and Saffron in lieu of the real names of the subjects in this paper.

2. The closure of California-based IAC impacted over 3,200 families and individuals in various stages of the adoption process. Kate Gibson, *Adoption Agency’s Demise Sheds Light on Troubled Industry*, CBS NEWS (Feb. 28, 2017, 5:15 AM), <https://perma.cc/9J6G-XMA5>.

3. Roger and Huey had prepared a room for the child, and in the aftermath were surrounded by reminders of their shattered dreams, like many similarly situated couples. Venessa Wong, *Hundreds of Couples Have Been Devastated by the Sudden Collapse of an Adoption Agency*, BUZZFEED NEWS (Apr. 5, 2017, 4:19 PM ET), <https://perma.cc/NE4H-VGQM>.

4. Bill Barrow, *Advocates Fear Attack on Gay Adoption by Louisiana Lawmaker*, TIMES-PICAYUNE (Dec. 30, 2008, 8:00 AM), <https://perma.cc/5M57-FNVR>. Roger and Huey also faced discrimination from a religious organization that refused to serve them because they were not married under Louisiana law.

5. Julie Moreau, *LGBTQ Parents Face ‘State-Sanctioned Discrimination,’ American Bar Association Says*, NBC NEWS (Feb. 6, 2019, 1:10 PM PST), <https://perma.cc/3YTD-3HDV>.

6. Kendra Stanton Lee, *It’s Easier Now for Gay Men to Adopt. But They Still Face Lots*

play a significant role in placing children with families, gay intended parents can be subject to discriminatory policies.⁷ Although some agencies are shifting their policies in order to work with gay couples,⁸ the Supreme Court's recent decision to side with a Catholic adoption agency that refused to work with same-sex couples on the basis of religious belief suggests that this barrier is unlikely to disappear entirely in the immediate future.⁹

In recent years, Roger and Huey began to come to terms with the past. "I was really starting to be happy with the idea of becoming eccentric old gays together," Huey joked. But then Saffron, a friend and former student of Roger, approached the couple with an unexpected offer. Saffron had no desire to herself be a mother, but she had always wanted to experience pregnancy. After years of pondering the possibility, she had found the courage to pop the awkward question: "Can I have your baby?"

The proposal was a simple one. Saffron considered Roger and Huey her chosen family and wanted to perform the surrogacy altruistically, knowing that she would have a part within the family without taking on the full responsibilities of motherhood. Due to a desire to avoid any complex medical interventions, as well as a genuine curiosity to meet her biological offspring, Saffron wanted to use her own eggs rather than take the more invasive—and far more costly—gestational surrogacy route. Saffron also happened to live in California, which had a reputation as a surrogacy-friendly state.¹⁰ Roger and Huey were hesitantly hopeful.

Unfortunately, Roger, Huey, and Saffron would discover that California's "surrogacy-friendly" laws were ill-suited for (and sometimes even hostile to) their situation. Their surrogacy journey would become a fascinating and frustrating glimpse into the expansive gatekeeping role of attorneys within the family-building context and the ways in which the most "surrogacy-friendly" statutory scheme in the world falls short.

INTRODUCTION

This paper explores California's surrogacy process from the perspective of Roger, Huey, and Saffron. It discusses how California's statutory scheme is primarily designed to serve wealthy aspiring parents and commercial gestational surrogates rather than lower-income families who intend to create unique family

of *Pushback, and Weird Questions*, WASH. POST (Jan. 25, 2019), <https://perma.cc/A6SN-X8R8> (describing the high costs, issues with paternity leave, and uncomfortable commentary from strangers experienced by gay dads).

7. See Ruth Graham, *Major Evangelical Adoption Agency Will Now Serve Gay Parents Nationwide*, N.Y. TIMES (Mar. 1, 2021), <https://perma.cc/6EQE-Z97U>.

8. *Id.*

9. *Fulton v. Philadelphia*, 593 U.S. __ (2021).

10. California is often thought of as the U.S.'s surrogacy capital. Seema Mohapatra, *States of Confusion: Regulation of Surrogacy in the United States*, in *NEW CANNIBAL MARKETS: GLOBALIZATION AND COMMODIFICATION OF THE HUMAN BODY* 81, 85 (Jean-Daniel Rainhorn & Samira El Boudamoussi eds., 2015).

structures through the more affordable traditional surrogacy route. This paper will explain how California's laws, drafted by attorneys who specialize in commercial gestational surrogacy arrangements, are designed to make the process more certain for wealthy intended parents, but as a result they increase expenses and make the process feel adversarial and transactional. Profit motives can easily usurp the process; attorneys exercise substantial power beyond merely providing legal counsel and financially benefit from a provision that requires the hiring of separate counsel for intended parents and surrogates. This contrasts considerably with the approach of countries like the U.K., where there is no legal distinction between traditional and gestational surrogacies and it is illegal for third parties to profit from surrogacy arrangements.

Part I provides an overview of surrogacy and explains the terminology that will be used throughout the paper, with particular emphasis on the legal distinction between traditional and gestational surrogacy. Part II briefly describes the history of surrogacy in the United States, with particular focus on California's "surrogacy-friendly" statutory scheme. It explores the legislative history behind California's laws, including the tendency for changes in surrogacy laws to occur after worldwide scandals. Part III describes the practical impact of California's statutory scheme for families like Huey, Roger, and Saffron, such as difficulty finding counsel, difficulty attaining medical and psychological support, and increased costs. It also discusses how traditional family structures are increasingly less common, particularly in queer communities, and explains why some practitioners are hesitant to accommodate these new structures. Part IV addresses the common argument that traditional surrogacy is more psychologically dangerous and risky, and it explains some of the risks involved in gestational surrogacy arrangements. Finally, Part V explores approaches to surrogacy in the U.K. and suggests a need for alternative systems that support "altruistic" surrogacy arrangements and traditional surrogates.

I. WHAT IS SURROGACY?

Surrogacy is a method of family building, often used by people who cannot reproduce through more traditional means. It is an arrangement whereby a person (the "surrogate") bears a child for another person or persons (the intended parents), and the intended parents become the legal parents of the resulting child. Surrogacy has a complicated history within the U.S. and throughout the world, as it challenges fundamental notions about the meaning of parenthood, and motherhood in particular.¹¹ This paper uses the following terms to differentiate between the different forms of motherhood:

1. Biological mother: The person who donates the ovum.
2. Gestational mother: The person who carries the pregnancy to term and

11. I use the terms "mother" and "motherhood" for convenience, but I would be remiss, given this paper's emphasis on nontraditional families, not to note that trans people can and do fill these roles without identifying with the word "mother."

delivers the child.

3. Social mother: A person who rears the child and identifies with the term “mother.”

In a traditional nuclear family, a mother is all three, but in a surrogacy arrangement, the different forms of motherhood are distinguished, and there may be no social mother at all.¹² Surrogacy arrangements fall into two main categories: traditional and gestational. In traditional surrogacy, the surrogate is both the biological and gestational mother of the child.¹³ A traditional surrogacy arrangement typically results from the surrogate’s egg and either the intended father’s sperm or donated sperm from another party.¹⁴ In gestational surrogacy, the surrogate is not biologically related to the resulting child.¹⁵ In such an arrangement, the egg and sperm may be the genetic material of the intended parents or of donors.¹⁶ Thus, the social mother and biological mother may be the same or different people in a gestational surrogacy arrangement.

Traditional and gestational surrogacy agreements are distinguished under the laws of various jurisdictions within the U.S.¹⁷ Jeffrey A. Kasky and Marla B. Neufeld write that traditional surrogacy is actually “closer to adoption.”¹⁸ In many states, though not all, because of a traditional surrogate’s genetic link, an adoption proceeding is required to recognize intended parents without genetic links as legal parents.¹⁹ Thus, like parties in a pre-birth adoption agreement (which is not enforceable against the birth mother if she were to change her mind), intended parents in traditional surrogacy arrangements have no assurance that their pre-birth agreements are enforceable, unlike intended parents in gestational surrogacy arrangements.²⁰

The legal distinction between traditional and gestational surrogacies is an odd one, given that the aim of both kinds of surrogacy arrangements is “to obtain a pregnancy or baby for the infertile parent,” whereas the opposite is the case in adoption, where “the aim is to obtain a family for the baby or child.”²¹ Furthermore, this distinction ignores the fact that a gestational surrogate is “more than an Easy-Bake Oven,” as the resulting child “gets integral parts of its structure,

12. Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, 21 THEORETICAL MED. & BIOETHICS 153, 154 (2000).

13. *Id.* at 161.

14. Jennifer Jackson, *California Egg Toss: The High Costs of Avoiding Unenforceable Surrogacy Contracts*, 15 J. HIGH TECH. L. 230, 232 (2015).

15. Ber, *supra* note 13, at 154.

16. Jackson, *supra* note 15, at 232.

17. *See infra* Part II.

18. JEFFREY A. KASKY & MARLA NEUFELD, ABA GUIDE TO ASSISTED REPRODUCTION: TECHNIQUES, LEGAL ISSUES, AND PATHWAYS TO SUCCESS 63 (2016) (internal quotations omitted).

19. *Id.* at 64.

20. *See generally In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (1994), discussed in Part II.A.1.

21. Olga B.A. van den Akker, *Psychosocial Aspects of Surrogate Motherhood*, 13 HUM. REPROD. UPDATE 53, 55 (2007).

brain development and other features not just from the genes encoded at conception, but also from the endocrine cascade from the gestational carrier.”²² Nonetheless, as a result of the legal distinction between the two types (which is further discussed in Part II), Kasky and Neufeld—and many other attorneys who practice in this area—“do not recommend so-called ‘traditional surrogacy.’”²³ There is a strong preference within the industry for gestational surrogacy agreements, which (in some states) involve pre-birth orders that circumvent the adoption step involved in traditional surrogacy and allow for more certainty in terms of the contract’s enforcement.²⁴ By contrast, in some countries such as the U.K., there is no difference between the enforceability of traditional and gestational surrogacy arrangements.²⁵

Surrogacy arrangements can be altruistic or commercial. In an altruistic surrogacy arrangement, the surrogate carries and gives birth to the child “with the only compensation being that the intended parents pay for medical treatment, prenatal care, and any other pregnancy related costs.”²⁶ A commercial surrogacy arrangement, by contrast, involves additional compensation for surrogacy services such that the surrogate makes a financial profit from the arrangement.²⁷

In the present case study, Roger and Huey sought to form an altruistic traditional surrogacy agreement with Saffron, whereby Saffron would be artificially inseminated with Huey’s sperm and Roger and Huey would both be listed on the child’s birth certificate as the legal parents.

II. A HISTORY OF SURROGACY LAWS IN THE U.S. AND IN CALIFORNIA

Surrogacy is a controversial issue that raises questions related to power dynamics as well as the definition of motherhood. The literature on surrogacy is full of references to “baby-selling” and the “commodification” of women.²⁸ Infamous cases like that of *Baby M*, which involved a traditional surrogate who kidnapped the resulting child from the intended parents, have come to “symbolize the pernicious threat that commercialization of reproductive technology

22. James M. Gift, Note, *Breach Baby: An Argument for Equal Enforcement of Traditional and Gestational Surrogacy Contracts*, 43 U. ARK. LITTLE ROCK L. REV. 127, 140 (2020) (“From the perspective of biology, traditional and gestational surrogacy contracts are more alike than courts admit.”).

23. KASKY & NEUFELD, *supra* note 19, at 64.

24. *Id.*

25. *See infra* Part V.

26. Nick Stanley, Comment, *Freedom of Family: The Right to Enforceable Family Contracts*, 31 J. AM. ACAD. MATRIM. L. 223, 226 (2018).

27. *Id.*

28. Historically, opponents of surrogacy have included feminists as well as religious groups, who argued that the contracts are “baby-selling arrangements that exploit[] poor women who either were coerced or did not understand the consequences of their decisions.” Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 109 (Summer 2009).

pose[s] to conventional understandings of the family and of motherhood.”²⁹ The advent of in vitro fertilization (IVF) and the expansion of gestational surrogacy quelled some of the fears about surrogacy and made it more palatable, given the lack of biological connection between the surrogate and the resulting child.³⁰ Surrogacy laws in the United States—a complex web of law that differs from state to state—have developed to generally favor gestational surrogacy contracts over traditional ones.

A. Surrogacy in the United States

In the United States, there is no federal law regulating surrogacy. Instead, regulation of surrogacy arrangements is left to the individual states, resulting in a “patchwork of laws” that varies between jurisdictions.³¹ Some states explicitly outlaw surrogacy.³² Others do not address surrogacy at all, leaving intended parents without complete assurance that their arrangements will be enforceable.³³ A few states permit only altruistic surrogacy, while others (such as California) permit and regulate commercial surrogacy.³⁴ Some states allow certain surrogacy arrangements but exclude protections for same-sex couples or singles who are intended parents.³⁵ Of the states that do regulate surrogacy, most address only gestational surrogacy, leaving traditional surrogacy arrangements without any certainty of enforceability.³⁶ To make matters more complex, the laws between

29. *Id.* at 111; *see infra* Part II.A.1.

30. Scott, *supra* note 29, at 111-12.

31. Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT’L L. 412, 424 (2012).

32. Michigan is perhaps the most anti-surrogacy state in the U.S. due to its Surrogate Parenting Act of 1988, which identifies those involved in commercial surrogacy arrangements as guilty of misdemeanors or felonies and imposes severe fines. MICH. COMP. LAWS § 722.859 (1988). Michigan’s law recently came under fire when a couple who had initiated an uncompensated gestational surrogacy agreement were forced to adopt their biological children, “even though a fertility doctor said in an affidavit that the babies are the couple’s biological children” and the surrogate and her husband signed separate affidavits agreeing that the intended parents are the parents of the twins. Maria Cramer, *Couple Forced to Adopt Their Own Children After a Surrogate Pregnancy*, N.Y. TIMES (Jan. 31, 2021), <https://perma.cc/L6XW-42NK>. Arizona’s statutes also outlaw both gestational and traditional surrogacy, though they do not provide for criminal penalties, and state that a surrogate “is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child.” ARIZ. REV. STAT. § 25-218.

33. Stanley, *supra* note 27, at 233 (“Alaska, Alabama, Colorado, Mississippi, and Montana have no statute or case law prohibiting gestational surrogacy.”).

34. Michigan law only allows for altruistic surrogacy arrangements. *See supra* note 33. New York recently overturned a long-held ban on commercial surrogacy, joining the majority of states that allow for commercial gestational surrogacy arrangements. Elizabeth Chuck, *New York State, Long a Holdout Against Legalizing Surrogacy, Overturns Ban*, NBC NEWS (Apr. 3, 2020, 6:02 PM PDT), <https://perma.cc/BYS5-QW7Y>.

35. Louisiana explicitly defines “intended parents” to exclude same-sex couples and single individuals. LA. STAT. ANN. § 2718.1(6) (2016).

36. Mark Strasser, *Traditional Surrogacy Contracts, Partial Enforcement, and the Chal-*

the states are in a constant state of flux, which can make it difficult for intended parents to understand the current state of laws and act accordingly.³⁷ Legal counsel is thus a necessity for intended parents.

1. Baby M and the Aftermath

Until 1987, no states had enacted statutes that regulated surrogacy,³⁸ but the issue took the national stage with the most infamous surrogacy case in the U.S., that of *Baby M*.³⁹ The complex regulatory regime of the U.S. can be traced back to the resulting “moral panic” that swept across the nation.⁴⁰ *Baby M* involved a surrogacy contract between William Stern and Mary Beth Whitehead stipulating that “through artificial insemination using Mr. Stern’s sperm, Mrs. Whitehead would become pregnant, carry the child to term, bear it, deliver it to the Sterns, and thereafter do whatever was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child.”⁴¹ In exchange for her surrogacy services, Mrs. Whitehead would be paid \$10,000.⁴² When the child was born, however, Mrs. Whitehead realized that she “could not part with this child.”⁴³ Thus began a dramatic series of events that ultimately culminated in Mrs. Whitehead kidnapping the child.⁴⁴

The Sterns sought enforcement of the surrogacy contract, as well as possession and ultimate custody of the child.⁴⁵ The trial court held that the surrogacy contract was valid and awarded custody to Mr. Stern based on an analysis of the child’s best interests.⁴⁶ On appeal, the New Jersey Supreme Court affirmed the analysis and conclusions of the trial court on the matter of custody⁴⁷ but held that

lenge for Family Law, 18 J. HEALTH CARE L. & POL’Y 85, 113 (2015) (discussing the unpredictability involved in traditional surrogacy arrangements).

37. For example, on April 2, 2020, the Child-Parent Security Act (CPSA) passed the New York Legislature. Denise E. Seidelman & Alexis L. Cirel, *The Child-Parent Security Act is a Game Changer*, N.Y. L.J. (Apr. 28, 2020), <https://perma.cc/L7GM-RJDZ>. The CPSA, which went into effect in February 2021, “discards New York state’s antiquated ban on compensated gestational surrogacy.” *Id.* Despite this change, however, the resource Surrogate.com still listed New York as “not surrogacy-friendly,” along with Michigan, at the time of this writing. *Intended Parents: Surrogacy Laws by State*, SURROGATE.COM, <https://perma.cc/ZG7Q-AQQ9> (archived Nov. 26, 2021).

38. Scott, *supra* note 29, at 117.

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

40. Scott, *supra* note 29, at 125-26.

41. *In re Baby M*, 537 A.2d at 1235.

42. *Id.*

43. *Id.* at 1236. After giving up the child, Mrs. Whitehead became “deeply disturbed, disconsolate, stricken with unbearable sadness. She had to have her child. She could not eat, sleep, or concentrate on anything other than her need for her baby.” *Id.*

44. *Id.* at 1237.

45. *Id.*

46. *Id.* at 1237-38.

47. *Id.* at 1238.

the surrogacy contract was invalid because it directly conflicted with existing statutes as well as with the public policies of New Jersey.⁴⁸

The high-profile trial lasted over two months.⁴⁹ It drew significant attention and garnered hostility to commercial surrogacy arrangements.⁵⁰ Initially, public perception toward Mrs. Whitehead was negative, portraying her as “a woman who had entered into a contract to have a baby for money and then reneged.”⁵¹ As the drama unfolded, however, perception shifted and Mrs. Whitehead was instead seen as a victim, “exploited by people better off than she and subjected to unfair scrutiny of her family life and personality.”⁵² In response to the scrutiny of Mrs. Whitehead’s fitness to be a mother, a statement of solidarity signed by more than one hundred women—including Betty Friedan, Meryl Streep, Carly Simon, and Gloria Steinem—was released on the last day of testimony, declaring, “By these standards we are all unfit mothers.”⁵³

In late 1987, before *Baby M* was even decided, seventy bills concerning surrogacy were introduced in twenty-seven legislatures.⁵⁴ In the following year, six states passed laws banning surrogacy agreements or declaring them void.⁵⁵ Public discourse on the issue was dominated by an atypically unified front composed of feminists, religious groups, state agencies, and various other stakeholders who supported bills restricting surrogacy agreements.⁵⁶ However, by the mid-1990s, interest in the issue had dwindled, with some bills prohibiting surrogacy dying in the legislature.⁵⁷

48. *Id.* at 1240.

49. Scott, *supra* note 29, at 113.

50. *Id.* at 109.

51. Iver Peterson, *Fitness Test for Baby M's Mother Unfair, Feminists Say*, N.Y. TIMES (Mar. 20, 1987), <https://perma.cc/6M7Q-L6P2>. “The whole idea of surrogate mothers gives me the chills,” stated one Letter to the Editor. Letter to the Editor, *Baby M's Mother*, 129 TIME MAG., Feb. 9, 1987, at 9. “It does not matter whether her tears are genuine or not. Mary Beth Whitehead can blame only herself,” said another. *Id.*

52. Peterson, *supra* note 52.

53. *Id.* Among the findings of the experts who concluded that Mrs. Whitehead was unfit to be a mother were the observations that Mrs. Whitehead’s practice of dyeing her hair demonstrated her narcissism, that Mrs. Whitehead “played patty-cake improperly with her daughter,” and that she “should have provided pots and pans instead of large stuffed pandas for the baby’s play.” Paula Span, “*Baby M*” A Feminist Rejoinder, WASH. POST (Mar. 12, 1987), <https://perma.cc/6NAB-G2VV>.

54. Scott, *supra* note 29, at 117 (“It would be hard to exaggerate the impact of *Baby M* on the legislative regulation of surrogacy arrangements in the late 1980s and early 1990s.”).

55. *Id.*

56. *Id.* at 119.

57. *Id.* at 120.

2. Shifting Public Attitudes

The next shift in the regulation of surrogacy took place in 1993 in response to a California Supreme Court case, *Johnson v. Calvert*.⁵⁸ The *Johnson* case involved similar facts to the *Baby M* case (though with considerably less drama). The Calverts (intended parents) entered into a surrogacy agreement with Anna Johnson, and, as in the *Baby M* case, the surrogate ultimately sought to keep the child, leading both parties to seek declarations of parentage in their favor.⁵⁹ However, one significant difference between *Johnson* and *Baby M* resulted in a different outcome: the *Johnson* case involved a gestational surrogacy rather than a traditional surrogacy arrangement.⁶⁰

The trial court held that the surrogacy contract was legal and enforceable against Johnson, that the Calverts were the child's "genetic, biological and natural" father and mother, and that Johnson had no parental rights to the child.⁶¹ The court of appeal affirmed, as did the California Supreme Court.⁶² The California Supreme Court held that although "genetic consanguinity and giving birth" are both means for ascertaining a mother and child relationship, "when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."⁶³ Without the Calverts' "acted-on intention," reasoned the court, the child would not have been born, and Johnson's "later change of heart" could not undermine the determination that Mrs. Calvert was "the child's natural mother."⁶⁴ Despite its similarities to *Baby M*, *Johnson* sparked very little controversy by comparison, and in its aftermath, gestational surrogacy became a preferred arrangement.⁶⁵

The following year, California clarified its position by distinguishing between the enforceability of traditional and gestational surrogacy arrangements in another case: *In re Marriage of Moschetta*.⁶⁶ In *Moschetta*, a traditional surrogate changed her mind about giving up the child when the commissioning couple separated.⁶⁷ The court of appeals distinguished the case from *Johnson*, reasoning

58. *Id.* at 121.

59. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

60. *Id.* ("On January 15, 1990, Mark, Crispina, and Anna signed a contract providing that an embryo created by the sperm of Mark and the egg of Crispina would be implanted in Anna . . . The zygote was implanted on January 19, 1990. Less than a month later, an ultrasound test confirmed Anna was pregnant.").

61. *Id.*

62. *Id.*

63. *Id.* at 782.

64. *Id.* ("The parties' aim was to bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna.").

65. Scott, *supra* note 29, at 122. The aftermath of *Johnson* saw attorneys advising their clients "to enter gestational carrier surrogacy contracts to avoid the ramifications of an unenforceable traditional surrogacy contract." Jackson, *supra* note 15, at 257.

66. *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Ct. App. 1994).

67. The surrogate had learned of the couple's marital problems while in labor and only surrendered the child once the couple assured her that they would remain together. *Id.* at 895.

that because this was a traditional surrogacy arrangement, there was no “tie” to break because the surrogate was both the gestational mother and the biological mother.⁶⁸ Thus, the court declined to enforce the traditional surrogacy contract.⁶⁹

The *Moschetta* opinion acknowledged the “disquieting” result of the distinction between the enforceability of gestational and traditional surrogacy contracts:

Infertile couples who can afford the high-tech solution of in vitro fertilization and embryo implantation in another woman’s womb can be reasonably assured of being judged the legal parents of the child, even if the surrogate reneges on her agreement. Couples who cannot afford in-vitro fertilization and embryo implantation, or who resort to traditional surrogacy because the female does not have eggs suitable for in vitro fertilization, have no assurance their intentions will be honored in a court of law. For them and the child, *biology is destiny*.⁷⁰

Thus, the court identified a clear distinction between couples able to afford IVF and those who cannot, finding that only the former could expect to successfully defend their right to parentage in the courts. In its conclusion, the court flagged the need for legislative action to address the complex issues raised by the case.⁷¹ As discussed below, however, California’s statutory scheme would solidify the distinction between gestational and traditional surrogacies and deepen the divide between intended parents with and without means.

B. Surrogacy in California

On September 23, 2012, California Governor Jerry Brown signed AB 1217, a bill providing guidance for surrogacy agreements.⁷² The bill was praised by one family law attorney as the “most significant surrogacy legislation ever enacted in the state of California.”⁷³ Most notably, by changing the legal definition of “intended parent” to “an individual, married or unmarried,” California effectively made it “legislatively illegal to discriminate against same sex parents both before and after their children are born from arrangements.”⁷⁴

In addition to explicitly addressing the rights of LGBTQ couples, the bill set guidelines for gestational surrogacy agreements, specifying minimum requirements for “assisted reproduction agreement[s] for gestational carriers” and requiring that such agreements be fully executed before gestational carriers undergo the embryo transfer procedure, or commence injectable medication in

However, within a few months, the couple separated. *Id.*

68. *Id.* at 896.

69. *Id.* at 901.

70. *Id.* at 903 (emphasis added).

71. *Id.* (“Once again the need for legislative guidance regarding the difficult problems arising from surrogacy arrangements is apparent.”).

72. *California Enacts Landmark Legislation Giving Same Sex Parents Via Surrogacy Equal Parenting Rights*, PR NEWswire, (Oct. 17, 2012), <https://perma.cc/XB83-BAL3>.

73. Richard Vaughn, *Governor Signs California Surrogacy Bill*, INT’L FERTILITY L. GRP. (Sept. 26, 2012), <https://perma.cc/8MP3-LLW3>.

74. *California Enacts Landmark Legislation*, *supra* note 73.

preparation for an embryo transfer for assisted reproduction purposes.⁷⁵ Significantly, the bill also required that the surrogate and the intended parent(s) be represented “by separate independent licensed attorneys of their choosing.”⁷⁶

Like many laws intended to regulate surrogacy arrangements, one major catalyst for California’s bill was a moral panic like the one resulting from the *Baby M* case. In 2011, Theresa Erickson, an attorney who represented surrogates and parents, pleaded guilty to orchestrating what prosecutors referred to as a “baby-selling scheme.”⁷⁷ The scheme involved recruiting women to be surrogates, offering them up to \$45,000, and flying them to Ukraine, where IVF is cheaper and “doctors don’t insist on seeing a surrogacy contract before attempting a pregnancy, as they do in the U.S.”⁷⁸ When the pregnancies were in their second trimester, Erickson would seek parents for the children.⁷⁹ Parents who responded to the ads were told that a previous couple had backed out of a surrogacy arrangement and that the new parents could assume the contract for \$100,000 to \$150,000.⁸⁰ Once she had struck a deal with a couple, Erickson would file fraudulent documents in court, claiming that a surrogacy arrangement had been in place prior to the pregnancy.⁸¹ The scheme ran from 2005 to 2011 and involved approximately a dozen babies, until a surrogate involved another attorney, and together they contacted the FBI.⁸²

The Erickson scandal rocked the surrogacy industry and resulted in calls for reform.⁸³ “I would hope that the case enlightens legislators in terms of the vulnerability of the parents who want children and the need for additional protection

75. CAL. FAM. CODE § 7962(a), (d) (West 2013) (requiring “[t]he date on which the assisted reproduction agreement for gestational carriers was executed,” “[t]he persons from which the gametes originated, unless donated gametes were used,” and “[t]he identity of the intended parent or parents”).

76. CAL. FAM. CODE § 7962(b) (West 2013). Victoria Ferrara, the Founder and Legal Director of Worldwide Surrogacy Specialists, LLC, emphasizes that “having independent legal counsel for each party to the contract provides assurance that the contract will be enforceable in court if a court is ever asked to weigh in.” Victoria Ferrara, *Why are Two Attorneys Necessary for Legal Matters in Surrogacy?*, MEN HAVING BABIES, <https://perma.cc/VWL8-8PCW> (archived Nov. 26, 2021) (“Even in the scenario where there is no disagreement and everyone is abiding by their obligations, courts may be asked to validate the contract in order to issue the pre-birth order of legal parentage for the intended parents.”).

77. Greg Moran, *Baby-Selling Case Sheds Light on Surrogacy*, SAN DIEGO UNION-TRIBUNE (Feb. 18, 2012), <https://perma.cc/HP9S-CYLN>; Alan Zarembo, *Officials: Women Pulled into Baby-Selling Ring*, CHI. TRIB., Aug. 19, 2011, at 21; Tony Perry, *San Diego Lawyer Pleads Guilty in Fraud Case*, LOS ANGELES TIMES (Aug. 10, 2011), <https://perma.cc/6J3E-FSMB>.

78. Zarembo, *supra* note 78; Moran, *supra* note 78.

79. Moran, *supra* note 78 (noting that the advertisements would be posted on “Craigslist and numerous surrogacy sites on the Internet”).

80. *Id.*

81. Zarembo, *supra* note 78; Moran, *supra* note 78.

82. Zarembo, *supra* note 78; Moran, *supra* note 78.

83. Moran, *supra* note 78 (“Surrogacy advocates lament the attention drawn by the Erickson case, and say that in the overwhelming number of instances surrogacy in the state has worked well and made many couples happy parents.”).

for them and the carriers and the babies,” stated Assistant U.S. Attorney Jason Forge, though he did not elaborate on what those regulations would be.⁸⁴ Judith Daar, a surrogacy expert and law professor, opined that she would like to see new state regulations requiring courts to approve initial surrogacy contracts prior to the impregnation of the surrogate.⁸⁵

AB 1217 had been introduced in February 2011, prior to the Erickson scandal, as a “kitchen sink” overhaul of Assisted Reproductive Technology (ART)⁸⁶ law in California.⁸⁷ Introduced by Assembly Member Fuentes, the bill’s stated purpose was to “establish the Model Act Governing Assisted Reproductive Technology, which would govern the provision of assisted reproduction, as defined.”⁸⁸ The bill’s scope was broad, and its proposed regulations were met with significant resistance.⁸⁹ One law professor⁹⁰ objected to the requirement that all parties in an assisted reproduction agreement undergo mental health evaluations as “oppressive and overly broad,” given that would-be parents in the agreement “are no more likely to be in need of mental health consultation than are would-be parents who procreate by means of ordinary sexual reproduction.”⁹¹ The “be-hemoth” 34-page bill “limped through” the legislative process and was ultimately whittled down to only two pages.⁹² “By mid-summer,” wrote Daar, “the bill was unlikely to be resurrected in the next legislative session.”⁹³

The Erickson scandal revived the bill and ultimately gave it the push it needed to survive. In April 2012, shortly after Erickson was sentenced to prison, the bill was overhauled to include a provision requiring that the surrogate and intended parents be represented by separate independent counsel.⁹⁴ The rationale that the involvement of more attorneys will prevent attorney misconduct is an odd one, particularly considering that Erickson had not worked alone.⁹⁵ As Daar states, “one of Erickson’s co-conspirators was also a lawyer, so there’s (sadly) no reason to think future attorneys couldn’t somehow go rogue in an effort to

84. Julie Watson, *Surrogacy Scandal Raises Questions on Regulation: Woman Used Flawed System to Broker Babies, Dupe Couples*, HOUS. CHRON., Aug. 12, 2011, at A4.

85. Moran, *supra* note 78.

86. ART is a term referring to “all fertility treatments in which either eggs or embryos are handled.” *What is Assisted Reproductive Technology?*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 8, 2019), <https://perma.cc/US3B-WDSX>.

87. Judy Daar, *California Surrogacy Bill Reacts to Lawyer Bad Acts*, BILL OF HEALTH (Sept. 17, 2012), <https://perma.cc/9Q4J-M7DZ>.

88. A.B. 1217, 2012 Leg., Reg. Sess. (Cal. 2012) (proposed Feb. 18, 2011).

89. Daar, *supra* note 88 (“[T]here was much for many around the state to rally against, and rally they did.”).

90. Grace Ganz Blumberg, UCLA LAW, <https://perma.cc/P4SX-C8WT>.

91. Grace Ganz Blumberg, *Proposed Legislation Would Establish Model Act Governing Assisted Reproductive Technology*, 2011 CAL. FAM. L. MONTHLY (Apr. 1, 2011).

92. Daar, *supra* note 88.

93. *Id.*

94. A.B. 1217, 2012 Leg., Reg. Sess. (Cal. 2012) (proposed Apr. 9, 2012).

95. Watson, *supra* note 85.

circumvent the new law.”⁹⁶ The separate counsel requirement was ultimately revised to only apply to gestational surrogacy agreements.⁹⁷

Despite the resulting fanfare, in its final form the bill did little to meaningfully change California law, aside from its mandate that a “surrogate and the intended parent or intended parents shall be represented by separate independent licensed attorneys of their choosing.”⁹⁸ According to one family law attorney, the bill primarily codified “best practices” for surrogacy arrangements that were already being implemented by experienced ART practitioners.⁹⁹ Daar noted that since “California law already recognizes the validity of gestational surrogacy arrangements and the parental relationships that flow from these agreements,” the bill “amounts to nothing more than a full-employment act for ART lawyers.”¹⁰⁰

The bill makes no mention of traditional surrogacy, other than to briefly define a “traditional surrogate” as “a woman who agrees to gestate an embryo, in which the woman is the gamete donor and the embryo was created using the sperm of the intended father or a donor arranged by the intended parent or parents,” thus distinguishing it from “gestational carrier.”¹⁰¹ As a result, it effectively leaves families seeking traditional surrogacies in an uncertain legal limbo, with no assurance that traditional surrogacy contracts will be enforceable. Given that the authors of the bill are attorneys who primarily specialize in gestational surrogacy arrangements, this omission is unsurprising. The AB 1217 effort was spearheaded by co-owners of the Center for Surrogate Parenting (CSP) and drafted with reproductive attorneys Andy Vorzimer and Dean Masserman, who are known for working with famous, wealthy clientele such as Elton John and David Furnish, parents of two children born from gestational surrogacy arrangements.¹⁰² CSP specializes exclusively in gestational surrogacy arrangements,¹⁰³ which involve significantly higher costs as well as additional medical risks for surrogates, as described in detail below.

96. Daar, *supra* note 88.

97. A.B. 1217, 2012 Leg., Reg. Sess. (Cal. 2012) (proposed Aug. 6, 2012) (narrowing the requirement to apply only to “assisted reproduction agreement[s] for gestational carriers”).

98. CAL. FAM. CODE § 7962(b).

99. Vaughn, *supra* note 74 (“AB 1217 creates clear guidance and best practices regarding surrogacy agreements. Although many of these procedures were being implemented by experienced ART practitioners, they were not required by law.”).

100. Daar, *supra* note 88.

101. CAL. FAM. CODE § 7960(f)(1).

102. *California Enacts Landmark Legislation*, *supra* note 73; *Elton John and David Furnish Create Their Family*, CTR. FOR SURROGATE PARENTING, LLC, <https://perma.cc/25ZF-XFUA>.

103. CSP’s website boasts “comprehensive surrogacy options,” but lists only three, all of which involve IVF. *Surrogacy Options*, CTR. FOR SURROGATE PARENTING, LLC, <https://perma.cc/QR5Q-UUDV> (archived Nov. 26, 2021) (listing “IVF,” “IVF and egg donation,” and “IVF and sperm donation” options).

III. NAVIGATING “SURROGACY-FRIENDLY” CALIFORNIA AS INTENDED PARENTS

California’s “surrogacy-friendly” statutory regime was drafted in the wake of an international scandal and with the gestational, commercial context in mind, leaving families like Roger, Huey, and Saffron to navigate a formidable process without much assistance. Under California’s laws (and the laws of many other states), “only those engaged in gestational surrogacy can be assured that the surrogacy agreement will be enforced, and parental rights will be given to the intended parents and not to the surrogate and her husband.”¹⁰⁴ Traditional surrogacy arrangements thus “do not benefit from the assurance of legal certainty, and stand the risk that parental rights will be given to the surrogate and her husband.”¹⁰⁵

Many attorneys and fertility clinics in California handle gestational surrogacy agreements exclusively, leaving families like Roger and Huey’s with few choices. The handful of attorneys that do handle traditional surrogacy agreements typically comply with the statutory requirements for gestational surrogacy agreements, even though this compliance does not result in assurance of legal enforceability, as in the gestational surrogacy case. The practical impact of California’s statutory scheme is that intended parents and aspiring surrogates like Saffron are discouraged from creating families through traditional surrogacy and struggle to find medical and psychological support that is readily available in gestational surrogacy arrangements. At the same time, California’s laws place gestational surrogacy arrangements out of the reach of many families who cannot afford the additional expenses imposed by the laws.

A. Scarce Legal Resources for Traditional Surrogacies

When Roger and Huey began their search for an attorney who would represent them in their traditional surrogacy agreement, they were quickly met with resistance from a state they’d been led to believe was exceptionally surrogacy friendly.¹⁰⁶ For families pursuing traditional surrogacy arrangements, success is often a matter of who you know. Roger and Huey joined Men Having Babies (MHB), a nonprofit “dedicated to providing gay men with educational and financial support to achieve parenthood through surrogacy,” hoping to find guidance on identifying an attorney willing to assist them with a traditional surrogacy

104. Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 310 (2013).

105. *Id.*

106. *California Surrogacy Laws*, FAM. TREE SURROGACY CTR., LLC, <https://perma.cc/D23L-GY4F> (archived Nov. 26, 2021) (referring to California as “[t]he world’s favored jurisdiction for surrogacy”); *California Surrogacy Laws*, MADE IN THE USA SURROGACY, <https://perma.cc/WM8U-2X5C> (archived Nov. 26, 2021) (“California is one of the easiest places to undergo the surrogacy process due to its surrogacy-friendly laws.”).

agreement.¹⁰⁷ The resources from MHB listed only one such attorney, who was supportive but insisted on them securing a separate attorney to represent Saffron in order to avoid any conflict of interest. Given that California statutes only require separate counsel for gestational surrogacy agreements, this came as a surprise to the trio, who were caught off guard when Saffron was not permitted to enter the (virtual) room for their first consultation.

Roger and Huey's attorney referred Saffron to another attorney with whom they had previously worked, but when Saffron called to schedule a consultation, she was met with resistance. The assistant quickly informed Saffron that they did not handle traditional surrogacy matters. It was not until Roger and Huey's attorney contacted the second attorney—with whom the former had worked previously—that the latter agreed to work with Saffron. The arrangement left Saffron feeling choiceless and uncomfortable.

"Most of us will not do 'traditional surrogacy' as it's incredibly risky," explains one family law attorney, adding that "[i]t's pretty universally frowned upon in the ART community."¹⁰⁸ Given the more lucrative nature of gestational surrogacy arrangements under California's statutory scheme, as described in Part III.C, it is perhaps unsurprising that many attorneys reject traditional surrogacy altogether, as such arrangements are legally riskier and generate lower fees.

B. Scarce Medical and Psychological Resources for Traditional Surrogates

Saffron also faced trouble securing psychological support, a service that is readily available for gestational surrogates, as she would discover that the medical profession has followed the lead of attorneys in preferring gestational surrogacies:

The legal preference for gestational surrogacy, apparently, has trickled to medical circles. Infertility specialists believe that gestational surrogacy is legally safer. The American Society for Reproductive Medicine's guide for patients states that traditional surrogacy is more likely to be legally complicated, while gestational surrogacy is a, legally, lower risk procedure. Warnings regarding the increased legal risk are also passed on to infertility patients through Internet fertility sources.¹⁰⁹

In gestational surrogacy agreements brokered through surrogacy agencies, gestational surrogates typically have access to ample support beyond basic medical care. Through surrogacy agencies, they are able to access counseling to navigate the complex mental health risks involved with surrogacy, networks of experienced surrogates who can provide emotional and practical support, case managers, and other medical and psychiatric professionals.¹¹⁰ In seeking out

107. MEN HAVING BABIES, <https://perma.cc/38SU-9Z78> (archived Nov. 26, 2021).

108. Email from anonymous practitioner to the author (June 8, 2021) (on file with author).

109. Bernstein, *supra* note 105, at 316.

110. *How to Become a Surrogate Mother and Help Others*, CIRCLE SURROGACY, <https://perma.cc/9XT5-VHQZ> (archived Nov. 26, 2021) ("At every stage of your surrogacy

medical and psychological support as a traditional surrogate (and one who had not had a child before), Saffron encountered resistance from mental health providers and fertility clinics who simply stated, “We don’t do traditional surrogacies.”

The repeated rejection was exhausting. “Surely I can’t be the only one who has wanted to start a family this way,” Saffron commented. “But when everyone is so quick to slam the door in my face, I start to think that there might be something seriously wrong with me.” To make matters worse, much of the publicly available information that Saffron encountered was on the websites of surrogacy agencies that not only discourage traditional surrogacies but also discourage arrangements among friends and families.¹¹¹ “The information on surrogacy websites made my efforts at research frustrating,” Saffron commented. “I had to remind myself that they have a financial incentive to get people to use their services. I had to take everything they say with a grain of salt.”

Fortunately, Huey and Roger’s attorney came to the rescue a second time and took responsibility for finding Saffron a provider. Although this was welcome support, it illustrates the power of attorneys over clients in Huey, Roger, and Saffron’s position. These clients have little choice or control over who provides them with services, and attorneys act not only as providers of legal advice but also gatekeepers to medical assistance and other non-legal resources and “emotion managers” throughout the process.¹¹²

Huey and Roger’s attorney directed Saffron to a provider who claimed to be willing to work with a traditional surrogate. However, a week after their initial consultation, the provider dropped Saffron as a client, stating that as someone who had never had a child before, Saffron was not capable of giving “true informed consent” to the reproduction plan, a position Saffron found paternalistic.¹¹³ This opposition towards traditional surrogates and surrogates who are not

journey . . . you’ll have the support and guidance of our experienced social workers and program coordinators. Plus, many women who work at Circle are experienced surrogates, who have been in your shoes and can answer any questions.”); *The Surrogate Matching Process*, WEST COAST SURROGACY, <https://perma.cc/A5JU-QB8Q> (archived Nov. 26, 2021) (“Once matched and medically cleared, you will speak with a counselor for monthly support as well as receive email support as needed, continuing until 2 months post-partum. You will have unlimited access to our online support group of surrogate mothers from the time you are matched.”); *Surrogate Mother Support: Safe, Secure, Supported*, CONCEIVEABILITIES, <https://perma.cc/59E9-E4E8> (archived Nov. 26, 2021) (describing “surrogate sisterhood,” a “community of surrogates and staff that support you with monthly check-ins, one-on-ones, and group support managed by our social workers”); *Become a Surrogate Mother*, WEST COAST SURROGACY, <https://perma.cc/6LEX-FAM5> (archived Nov. 26, 2021) (listing the various supports available to surrogates, including birth doulas, lactation consultants, insurance specialists, dieticians, and education).

111. See, e.g., *5 Reasons to Choose a Stranger as a Surrogate Over a Family Member*, MADE IN THE USA SURROGACY, <https://perma.cc/K8FK-HVLQ> (archived Nov. 26, 2021) (highlighting “less drama” and “no awkward post-birth navigation,” as well as finding “a brand-new best friend” among the benefits of having a stranger as a surrogate).

112. Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 L. & SOC’Y REV. 143, 161 (2015).

113. Email from fertility psychologist to Saffron (June 24, 2021) (on file with author).

already parents is not universal across countries that regulate surrogacy; at least one of the three nonprofit agencies in the U.K. that serve intended parents and surrogates allows women without children who do not wish to be parents to serve as surrogates.¹¹⁴ The incident left Saffron anxious and fearful that she would not be able to find adequate psychological support. Although sympathetic to the difficulties of Saffron's situation, Saffron's attorney informed her that she would similarly need to back out if Saffron and the intended parents were unable to find a provider who could provide psychological support. The interrelated nature of the provision of medical and legal services made the entire arrangement feel fragile.

B. Expenses Involved in Surrogacy Arrangements

Surrogacy is an expensive process, particularly in the gestational surrogacy context, where enforceability is more certain. As stated by Jennifer Jackson, "enforceable surrogacy contracts are limited to wealthier intended parents, meaning intended parents of more modest means are not able to secure an enforceable contract for the birth of a child."¹¹⁵ According to U.S. News and World Report, the cost of a gestational surrogacy ranges from \$100,000 to \$150,000.¹¹⁶ In California, the cost of surrogacy is often even higher.¹¹⁷ The high cost is due to agency fees, a surrogate fee (often \$30,000 to \$50,000), medical fees, insurance costs, legal fees, and miscellaneous expenses.¹¹⁸ For finding the egg donor and helping coordinate that process, agencies may charge intended parents as much as an egg donor earns; for matching the surrogate with the intended parents, they may also charge as much as the surrogate herself earns.¹¹⁹ The number can rise further if multiple attempts at IVF are required. A single attempt at IVF using a surrogate "can cost \$20,000, more than double that if an egg donor is used. It often takes a few attempts."¹²⁰

The regulatory scheme thus enriches an industry of intermediaries, placing gestational surrogacy arrangements out of the reach of intended parents who are

114. See *infra* note 174 and accompanying text.

115. Jackson, *supra* note 15, at 233.

116. Susannah Snider, *The Cost of Using a Surrogate—And How to Pay for It*, U.S. NEWS & WORLD REP. (Nov. 24, 2020), <https://perma.cc/FC2K-PEBC>.

117. Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1161 (2014).

118. Snider, *supra* note 117.

119. Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 476 (2015).

120. Zarembo, *supra* note 78; Morrissey, *supra* note 120, at 476 ("Many people hoping to start a family have gone through repeated IVF treatments at great expense and never had a live birth result. Even if the IVF process ultimately is successful, intended parents may have to go through several IVF cycles that are not successful. The intended parents need to be prepared for the emotional roller coaster that is associated with that process. Some intended parents manage to get pregnant and have their first child from the very first IVF cycle. Others have to undergo several cycles of IVF before being successful. Having to go through multiple cycles is far more costly and far more emotionally taxing.").

not wealthy. Although traditional surrogacy agreements have fewer costs involved, California attorneys who practice in this area generally still comply with the statutory requirements for gestational surrogacy arrangements, as there is no alternative statute governing traditional surrogacy arrangements. Thus, intended parents like Roger and Huey bear some of the additional costs, such as that of hiring separate counsel, without reaping the benefits of assured legal protection.

C. Resistance to Nontraditional Family Structures

Most households in the U.S. depart from a “nuclear family” model consisting of a married heterosexual couple and their biological children.¹²¹ This departure from traditional family structures has a long history within queer¹²² communities due to the exclusion of queer individuals from the conventional “family” structure.¹²³ Departures from traditional family structures are also common and increasingly visible in polyamorous families.¹²⁴ Recent years have also seen “a noticeable shift” towards elective co-parenting, which Andrew Vorzimer describes as “meeting up in order to raise a family together while maintaining their own separate lives.”¹²⁵

Progress has been made in some jurisdictions to create laws that reflect today’s diverse family structures. For example, California allows for more than two parents to be listed on birth certificates.¹²⁶ Despite these shifts, however, ART practitioners express concern towards arrangements that accommodate

121. An analysis of Census Bureau data in 2020 shows that only 18.4 percent of American households follow the traditional nuclear family structure. Lindsay Mahowald & Diana Boesch, *Making the Case for Chosen Family in Paid Family and Medical Leave Policies*, CTR. FOR AM. PROGRESS (Feb. 16, 2021), <https://perma.cc/XH8M-NSBW>.

122. I use the term “queer” as an umbrella term that encompasses sexual and gender minorities who are not heterosexual and/or are not cisgender.

123. Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1096-97 (2016).

124. “Though nonmonogamy seems to be on the rise—or at least society is more open about it than ever before—families consisting of three or more parents can face challenges that are in some ways different from, and similar to, those faced by divorced parents, single parents and L.G.B.T.Q. parents.” Cynthia McKelvey, *The Challenges of Polyamorous Parenting*, N.Y. TIMES (Aug. 4, 2020), <https://perma.cc/T5TF-28L6>.

125. Andrew Vorzimer, *Mishaps, Mistakes, and Malfeasance: Ethical Approaches to Problems in Assisted Reproduction*, 15 WHITTIER J. CHILD & FAM. ADVOC. 165, 173-74 (2016).

126. Faith Karimi, *Three Dads, a Baby and the Legal Battle to Get Their Names Added to a Birth Certificate*, CNN (Mar. 6, 2021), <https://perma.cc/H35P-AYTP>. California is also making strides to adjust its family medical leave policies to include “chosen family” so that the laws better serve the needs of diverse families. See Monika Dymerski, *Protecting Chosen Families & Caregivers: 2 California Bills Making Waves*, EQUAL RTS. ADVOC. (Apr. 20, 2021), <https://perma.cc/38TZ-29HK>. Changes to accommodate nontraditional family structures are also occurring in other states. In June 2020, for example, a city in Massachusetts passed an ordinance to give “polyamorous groups rights that are typically only given to two-parent couples.” McKelvey, *supra* note 125.

nontraditional family structures, particularly when more than two parents are involved. When presented with a hypothetical where intended parents wanted a contract clause giving the surrogate a right to visit the child, one practitioner stated that he would tell the intended parents that they were mistaken about their intentions because “the last thing you want is anything in this agreement that looks like any parental rights for the surrogate.”¹²⁷ Another practitioner commented that her concerns about traditional surrogacies are amplified in California precisely *because* California recognizes three parents, thus further opening the door for contested parentage issues.¹²⁸

Practitioners also indicate a preference toward “legitimate” forms of family building due to concern about ensuring the survival of the surrogacy industry. One practitioner expressed concern that a traditional surrogacy case with contested parentage could be the perfect vehicle for extreme conservative groups.¹²⁹ The practitioner reasoned that such a case could be a “backdoor” to attack women’s rights and reverse *Roe v. Wade* if today’s conservative Supreme Court were to find that embryos have a constitutionally protected right to a relationship with their biological mothers.¹³⁰ Vorzimer describes the “Pandora’s box” being opened by the increasing prevalence of co-parenting agreements:

One can imagine . . . the condemnation that will surely be received, as these practices become more prevalent and mainstreamed . . . It is these kinds of arrangements that typically cause a knee jerk reaction by opponents, such as Jennifer Wall and lawmakers, regarding exploitation notoriety when it comes to assisted reproduction. I always worry that they will use this exploitation to justify broad and overreaching bans in legitimate methods of elective family building, including surrogacy.¹³¹

Given the history of the laws governing surrogacy, many of which are traced back to public scandals and heart-wrenching stories like that of *Baby M*, the fear of practitioners seems justified. From a historical perspective, the surrogacy industry is fragile and volatile. Yet coercing families toward structures that are at odds with their stated goals hardly seems an appropriate solution. Particularly egregious is when attorneys deny services entirely, given that attorneys are tasked with more than merely providing legal advice and drafting contracts but act as gatekeepers for medical and psychological services available to both intended parents and surrogates.

IV. RISKS INVOLVED IN SURROGACY

The most common argument against traditional surrogacy is that traditional surrogates are more likely to develop a strong attachment to the child due to the

127. Philip De Koster, ART: Surrogacy and the Right to Parent (June 15, 2021), in ABA FAM. L VIRTUAL SPRING CLE CONF., at 21-22.

128. Telephone Interview with anonymous practitioner (June 18, 2021).

129. Zoom Interview with anonymous practitioner (June 18, 2021).

130. *Id.*

131. Vorzimer, *supra* note 126, at 174-75.

biological connection.¹³² This argument, illustrated by infamous cases such as *Baby M*, is often used to justify laws that distinguish the two surrogacy types, assuring enforceability for gestational surrogacy agreements while leaving traditional surrogacy arrangements unregulated. However, upon closer examination, it is not clear if this widely held belief is substantiated.¹³³ Even if it were true that traditional surrogates are more likely to form stronger emotional attachments, the question remains whether pressuring surrogates and intended parents into gestational arrangements is ethical, given that gestational surrogacy involves more medical risks than traditional surrogacy.

A. Surrogates Changing Their Minds

The *Baby M* case illustrated the biggest fear of many intended parents: a surrogate refusing to relinquish a child to the intended parents. Many surrogacy agencies state on their websites that traditional surrogates are much more likely to develop a stronger emotional bond, which makes it difficult to relinquish the child.¹³⁴ However, given that these agencies have a strong financial incentive to support gestational surrogacy arrangements, this claim requires further investigation.

In fact, there is “no clear evidence to suggest a greater failure to relinquish in [traditional] surrogates,” as compared with gestational surrogates¹³⁵ because there is minimal data available on traditional surrogacies.¹³⁶ Unlike gestational surrogacies, traditional surrogacies do not require intervention, practically speaking. Artificial insemination does not require the intervention of a health care provider, as is the case in IVF, and counseling (both legal and psychological) may not be sought by parties entering into a traditional surrogacy agreement.¹³⁷ As a

132. See *infra* note 135 and accompanying text.

133. See *infra* Part IV.A.

134. American Surrogacy, which only offers services for gestational surrogacy, states that “by maintaining a biological connection to the baby, the surrogate is at a much higher risk of struggling with feelings of strong attachment. Of course, this is natural when you are carrying a child who is biologically yours.” *The Legal and Emotional Risks of Traditional Surrogacy*, AM. SURROGACY BLOG (Jan. 27, 2020), <https://perma.cc/RT3T-8FUA>. Similarly, Southern Surrogacy offers only gestational surrogacy and states that “[b]ecause the surrogate is the biological mother of the child in a traditional surrogacy, she may be more likely to emotionally bond with the baby, making it more difficult to hand him or her over to the intended parents.” *Understanding the Differences of Gestational vs. Traditional Surrogacy*, S. SURROGACY LLC, <https://perma.cc/2PJK-N9RC> (archived Nov. 26, 2021).

135. Pip Trowse, *Surrogacy: Is it Harder to Relinquish Genes?*, 18 J.L. & MED. 614, 615-16 (2011).

136. “[H]igh quality research comparing demographic characteristics and outcomes for gestational carriers and traditional surrogates in the United States has been sparse. This may be due to difficulty in obtaining data from traditional surrogates as these arrangements may be made outside of a medical setting.” Erika L. Fuchs & Abbey B. Berenson, *Outcomes for Gestational Carriers Versus Traditional Surrogates in the United States*, 27 J. WOMEN’S HEALTH 640, 642 (2018).

137. Trowse, *supra* note 136, at 616.

result, the surrogacy industry has very little experience with traditional surrogacy arrangements and little data to back up claims comparing traditional and gestational surrogacies. Intended parents and surrogates involved in traditional surrogacy agreements may never have a need to seek legal counsel, except in cases where there is a dispute between the surrogate and the intended parents, thus skewing what little data is available on these arrangements.

Any difference in the likelihood that traditional or gestational surrogates will change their minds is further confounded by additional variables. The fact that traditional surrogacies are often arranged without legal or medical counsel because the intended parents and traditional surrogates are unable to find providers willing to serve them likely contributes to any differences.¹³⁸ The refusal of mental health providers to work with traditional surrogates for fear that they might form attachments to the child and renege on the contract may even create a sort of self-fulfilling prophecy.¹³⁹

Despite the widespread fear of surrogates reneging on their contracts, the risk of this is small. Most surrogacy agreements (both traditional and gestational) are completed without the surrogate contesting parentage.¹⁴⁰ Furthermore, evidence shows a higher probability that intended parents will renege on the contract.¹⁴¹ Andrew Vorzimer, who helped draft California's statutory scheme, stated in 2016 that intended parents not taking their child home is "the biggest risk in this industry."¹⁴² Yet rather than addressing the more widespread issue of intended parents reneging on their contracts, California's laws are designed to quell an irrational fear of traditional surrogates reneging on their contracts by discouraging traditional surrogacies altogether.

138. "[Gestational surrogacy] has to be undertaken within a health care context and hence contact with mental health professionals is likely and counselling may be available. [Traditional surrogacy] can be undertaken informally. This . . . may increase the risk of problems which could have been averted had mental health professionals been involved." R.J. Edelman, *Surrogacy: The Psychological Issues*, 22 J. REPROD. & INFANT PSYCHOL. 123, 125 (2004).

139. See van den Akker, *supra* note 22, at 56 (noting that differences between gestational and traditional surrogates may emerge because gestational surrogates "benefit from the 'full panoply of regulation (as it is)' involving organizational control and support provisions, while genetic surrogates operate 'in a moral and psychological twilight.'"); Fuchs & Berenson, *supra* note 137, at 643 (explaining that a finding that traditional surrogates are more likely than gestational surrogates to suffer from depression may be the result of lack of screening).

140. Vorzimer, *supra* note 126, at 168 ("[W]e have had over 68,000 surrogate deliveries in the United States since 1979. There have only been eleven cases of gestational carriers trying to keep the child, and twenty-four situations involving traditional surrogates who have done that, so we are looking at thirty-five cases out of more than 68,000.").

141. See generally Brianne Richards, Note, "Can I Take the Normal One?" *Unregulated Commercial Surrogacy and Child Abandonment*, 44 HOFSTRA L. REV. 201 (2015) (describing incidents of child abandonment in surrogacy agreements and proposing that surrogacy clinics implement preventative procedures).

142. Vorzimer, *supra* note 126, at 168 ("We have now had eighty-two cases of intended parents, at some point in time in the process, trying to walk away from their own child.")

B. Medical Risks of Gestational Surrogacies

Even if it were the case that a traditional surrogacy arrangement is slightly more likely to result in a stronger emotional bond between the surrogate and the child, it is important to note that gestational surrogacy is not a perfect alternative. The high cost of the IVF process places the safety of the gestational surrogate in contention with the financial interests of the intended parents. Any pregnancy that results from IVF or related procedures is considered an “at-risk pregnancy,”¹⁴³ and the heightened risk is primarily due to the greater chance of multiples in post-IVF pregnancies, which can result in “high blood pressure, preeclampsia, growth retardations and bleeding” as well as a higher chance of intrauterine death of the fetus.¹⁴⁴ The increased chance of multiples is an “easy-to-avoid complication” that results from the practice of transferring multiple embryos in a single IVF cycle.¹⁴⁵ However, intended parents in gestational surrogacy arrangements seeking to avoid paying for multiple rounds of expensive IVF may want the assurance that increasing the number of embryos can bring (i.e., a higher chance that an IVF cycle results in a pregnancy), despite the greater risk to the gestational surrogate.

This practice of increasing the number of embryos per IVF cycle began in the mid-1980s to “achieve public confidence in assisted reproductive technology,” but concerns about the growing number of IVF multiple births due to a series of “high-profile multiple births” ultimately led to legislative changes in several countries.¹⁴⁶ In Quebec, Belgium, and Sweden, where ART is regulated and publicly financed, single-embryo transfer is mandated, with rare exceptions for the transfer of two or more embryos.¹⁴⁷ In the U.K., the Human Fertilisation and Embryology Authority established a 15% multiple-birth target, which has been attained, in spite of legal challenges by fertility clinics.¹⁴⁸ In the U.S., however, “professional guidance rather than legislation governs the embryo transfer practices,” and there are no penalties for non-compliance except in extreme cases.¹⁴⁹ One study revealed that from 2007 to 2014, the recommended number

143. Ursula Zollner & Johannes Dietl, *Perinatal Risks After IVF and ICSI*, 41 J. PERINATAL MED. 17, 17 (2013).

144. *Id.*

145. *Id.*

146. Pamela M. White, “One for Sorrow, Two for Joy?”: *American Embryo Transfer Guideline Recommendations, Practices, and Outcomes for Gestational Surrogate Patients*, 34 J. ASSISTED REPROD. & GENETICS 431, 432 (2017) (noting that “the transfer of three to six embryos was not uncommon” at this time). The birth of eight babies in 2009 as a result of the transfer of twelve embryos resulted in international media coverage and “reopened debates about the need for national legislation, raised questions about soft governance mechanisms, and exposed tensions regarding reproductive autonomy and best interests of ART-conceived children.” *Id.*

147. *Id.* (discussing Quebec, Belgium, and Sweden).

148. *Id.*

149. *Id.* at 432, 439.

of embryos was exceeded in 89 to 55 percent of all national surrogate cycles and in 87 to 64 percent of surrogate cycles in California.¹⁵⁰

No pregnancy is completely risk-free, and both gestational surrogacies and traditional surrogacies involve unique legal and medical complexities. The choice of whether to pursue a gestational or traditional surrogacy when building a family is a deeply personal one. In Saffron, Roger, and Huey's case, they had no desire to involve additional parties. Once they began to navigate the legal scheme involved in surrogacy arrangements, however, they felt that their personal preference was heavily scrutinized. Some ART attorneys will not only refuse to assist intended parents and surrogates in traditional surrogacy arrangements, but they will actively counsel families considering the arrangement to pursue a gestational arrangement instead.¹⁵¹ Saffron felt as if practitioners were coercing her into a medically invasive and risky alternative, an experience she described as patronizing and anti-choice.

V. LESSONS FROM THE U.K.

Although a thorough international comparison is not within the scope of this paper, a critique of California's surrogacy laws would be incomplete without a discussion of some alternatives embraced by other countries.¹⁵² Approaches to surrogacy vary considerably across the globe.¹⁵³ Some countries explicitly outlaw the practice.¹⁵⁴ France, for example, makes all surrogacy agreements void and imposes penalties for commercial surrogacy arrangements in the form of one year's imprisonment and a fine.¹⁵⁵ The same penalty applies under German law for third parties who facilitate surrogacy arrangements.¹⁵⁶ Other countries ban only commercial surrogacy arrangements, though they often do not explicitly regulate or enable altruistic surrogacy on a practical level.¹⁵⁷ In the Netherlands, for example, it is illegal to facilitate a surrogacy arrangement or advertise the

150. *Id.* at 436.

151. Telephone Interview with anonymous practitioner (June 18, 2021).

152. The purpose of the paper is not an international comparison of surrogacy laws, but additional research in this area would be fruitful and may inform attempts to amend California's statutory scheme.

153. See generally Valeria Piersanti et al., *Surrogacy and "Procreative Tourism": What Does the Future Hold from the Ethical and Legal Perspectives?*, 57 *MEDICINA* 47 (2021) (describing the results of a global survey of surrogacy laws).

154. *Id.*

155. CODE CIVIL [C. CIV.][CIVIL CODE] art. 16-7 (Fr.); CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 227-12 (Fr.).

156. *Germany: Federal Court of Justice Rules on Legal Motherhood of Surrogate*, LIBR. OF CONG. (Apr. 29, 2019), <https://perma.cc/AAW4-F4QK>.

157. Brazil's ban on commercial surrogacy is rooted in its constitution, which prohibits the sale of organs, and no legislation regulates altruistic surrogacy. CONSTITUIÇÃO FEDERAL [C.F.][CONSTITUTION] art. 199 (Braz.); Piersanti, *supra* note 154. Only altruistic surrogacy is legal in Canada, though recent years have seen some movement to allow surrogates to be compensated. Jessica Murphy, *Canada Politician Seeks to Decriminalise Payment for Surrogacy*, BBC NEWS (May 30, 2018), <https://perma.cc/7TCT-HAZ8>.

availability of a surrogate, and violators may be punished by one year of imprisonment or a fine.¹⁵⁸ Although altruistic surrogacy is legal in the Netherlands, “few hospitals provide related services in the country, with strict rules to get access, which has resulted in many Dutch couples traveling abroad to seek it.”¹⁵⁹ Some countries—such as Denmark, Belgium, and Japan—have no legislation targeted to any surrogacy arrangements whatsoever.¹⁶⁰

Among the countries that do regulate surrogacy through legislation, some restrict who may avail themselves of the opportunity, limiting its use to married heterosexual couples or individuals with specific medical conditions.¹⁶¹ In Russia, for example, surrogacy is permitted only for certain medical situations, such as “absence of uterus; uterine cavity or cervix deformity; uterine cavity synechia; somatic diseases contraindicating child bearing; and repeatedly failed IVF attempts.”¹⁶² Among the various approaches globally, the U.K. is fairly unique, as it both outlaws commercial surrogacy and creates a clear pathway for intended parents and surrogates who seek to engage in altruistic surrogacy arrangements. This section will briefly discuss the U.K.’s approach, highlighting how it differs from California’s laws and how California might learn from it.

The U.K. does not make a legal distinction between gestational and traditional surrogacy arrangements.¹⁶³ Entering into either kind of arrangement is legal, but the terms are unenforceable.¹⁶⁴ An agreement between intended parents and a surrogate is thus understood to be “a statement of intention about how the arrangement will work and the commitment that each party is making to the other in advance of the surrogacy commencing.”¹⁶⁵ Typically, after the child is born,

158. Artikel 151b para. 1-2 SR.

159. Piersanti, *supra* note 154.

160. *Id.*

161. India imposes both of these restrictions. Although once a destination for international surrogacy arrangements, India banned surrogacy for foreign nationals outright in 2015 and has limited altruistic surrogacy considerably. Shonotra Kumar, *India’s Proposed Commercial Surrogacy Ban Is an Assault on Women’s Rights*, THE WIRE (Nov. 9, 2019), <https://perma.cc/77RJ-MAZS>. India’s proposed Surrogacy Regulation Bill 2020 denies surrogacy arrangements to “LGBTQ+ persons, live-in couples, and single parents,” and requires “those included within its ambit . . . to have a ‘certificate of essentiality’ stating that it is biologically impossible for the person(s) to have a child in any other way.” Eeshan Sonak & Sanvi

Bhatia, *India’s New Surrogacy Regulation Bill Falls Short of Protecting Bodily Autonomy and Guaranteeing Reproductive Liberty*, LONDON SCH. OF ECON. & POL. SCI. (Apr. 21, 2021), <https://perma.cc/249E-LCM4>.

162. Konstantin Svitnev, *Legal Regulation of Assisted Reproduction Treatment in Russia*, 20 REPROD. BIOMEDICINE ONLINE 892, 893 (2010).

163. *See generally* Trowse, *supra* note 136, at 624-25 (detailing how U.K. law applies consistently across traditional and gestational surrogacy arrangements).

164. Surrogacy Arrangements Act 1985, c. 49 (U.K.), <https://perma.cc/93QM-DM99> (archived Nov. 26, 2021) (“No surrogacy arrangement is enforceable by or against any of the persons making it.”).

165. DEPARTMENT OF HEALTH & SOCIAL CARE, THE SURROGACY PATHWAY: SURROGACY AND THE LEGAL PROCESS FOR INTENDED PARENTS AND SURROGATES IN ENGLAND AND WALES, 2019, at 9 (UK) [hereinafter SURROGACY PATHWAY].

the intended parents apply for a parental order, which transfers legal parenthood from the surrogate (and the surrogate's spouse or civil partner, if applicable) to the intended parents.¹⁶⁶ This order can only be made with the surrogate's consent, and contested parentage, although rare, is resolved by a court through a determination of the child's best interest.¹⁶⁷ Attaining legal advice is recommended but not mandatory, and anticipated legal costs for intended parents who do attain services are significantly lower than legal costs for similar arrangements in the U.S.¹⁶⁸

Interestingly, the U.K. explicitly forbids third parties from profiting from surrogacy arrangements; it is an offense under the Surrogacy Arrangement Act for anyone other than the surrogate and the intended parents "to arrange or negotiate a surrogacy arrangement as a commercial enterprise."¹⁶⁹ In lieu of the for-profit surrogacy agencies in the U.S., nonprofit organizations in the U.K. aid families. The three main organizations are Childlessness Overcome Through Surrogacy (COTS), Surrogacy UK (SUK), and Brilliant Beginnings (BB).¹⁷⁰

Attitudes among surrogacy practitioners in the U.K. are strikingly different from those among practitioners in the U.S. In contrast to the U.S. websites that encourage forming contracts with strangers,¹⁷¹ SUK describes its ethos as "surrogacy through friendship."¹⁷² The nonprofit agencies also appear to be more open to more diverse surrogates, as there is no screening process.¹⁷³ While agencies in the U.S. do not accept surrogates who have not had a child of their own before, COTS accepts "women who have chosen never to have a child themselves," like those in Saffron's situation.¹⁷⁴ Rather than having attorneys for separate parties draft the contracts, these nonprofit agencies have mediators who assist the intended parents and surrogates in drafting their agreements.¹⁷⁵

166. *Id.* at 19.

167. *Surrogacy Disputes*, NGA LAW, <https://perma.cc/35B8-NKRE> (archived Nov. 26, 2021).

168. SURROGACY PATHWAY, *supra* note 166, at 11 (explaining that "[l]egal costs can vary from a few hundred pounds upwards.").

169. SURROGACY PATHWAY, *supra* note 166, at 7; *see also* Emily Jackson, *UK Law and International Commercial Surrogacy: "The Very Antithesis of Sensible,"* 4 J. MED. L. & ETHICS 197, 200 (2016) ("In the UK, it is an offence for anyone other than the surrogate and the [intended parents] to facilitate or negotiate a surrogacy arrangement 'on a commercial basis.'").

170. SURROGACY PATHWAY, *supra* note 166, at 6.

171. *See supra* note 112.

172. SURROGACY UK, <https://perma.cc/SCL7-7CS5> (archived Nov. 26, 2021).

173. Edelman, *supra* note 139, at 127.

174. *Surrogates are Truly Amazing*, CHILDLESSNESS OVERCOME THROUGH SURROGACY, <https://perma.cc/ES3R-NMNB> (archived Nov. 26, 2021).

175. *UK Surrogacy Pathway*, BRILLIANT BEGINNINGS, <https://perma.cc/E4YN-W8VB> (archived Nov. 27, 2021) ("Our qualified in-house specialist mediator has designed (and oversees) a professionally-managed agreement process to ensure you have thought through and discussed all the issues you need to and have agreed the detail clearly in writing."); *How Does It Work?*, SURROGACY UK, <https://perma.cc/UE9Q-3KA4> (archived Nov. 26, 2021) ("After the Getting to Know, all parties take part in an Agreement Session with a Surrogacy UK me-

The U.K.'s approach is not without its flaws. It leaves much to be desired in terms of assurances of enforceability, and it presents difficulties because it is illegal in the U.K. to advertise surrogacy services, thus making it difficult to match intended parents and surrogates.¹⁷⁶ Some wealthy intended parents from the U.K. prefer to come to California because its statutory scheme gives them greater choice in terms of surrogates and a higher assurance of enforceability.¹⁷⁷ Nonetheless, for intended parents and surrogates who have already connected and are not interested in the commercial gestational surrogacy route, a pathway similar to the U.K. model would be more appropriate than California's approach. The U.K. thus demonstrates one alternative to California's model. Rather than strictly regulating surrogacy to avoid scandals such as Erickson's "baby-selling" ring, the U.K. removes commodification entirely from the process, instead emphasizing relationships and altruism rather than transactions and financial benefit.

CONCLUSION

The surrogacy journey of Huey, Roger, and Saffron illuminates the difficulties faced by nontraditional families seeking to expand through traditional surrogacy and has raised questions about the financial incentives and the role of attorneys within the industry. Under California's statutory scheme, attorneys exercise considerable power over clients, not only as legal counselors but as gatekeepers with the ability to deny legal counsel and, by extension, medical and psychological support.

The history of surrogacy in the U.S. is fraught with moral panic and reactive lawmaking, and reverberations from *Baby M* and the Erickson scandal can still be felt in today's laws. The irony of California's statutory scheme is that although it stemmed from a fear of "baby-selling," it spawned commodification of a different kind, enriching third parties, particularly lawyers and surrogacy agencies that exercise considerable influence over intended parents who are desperate to start families. Although California's approach has enabled some families to pursue surrogacy arrangements, not all families are able to benefit equally, as the industry favors wealthier families and more traditional family structures. As other areas of the law begin to recognize nontraditional family structures, so too should surrogacy laws and the attorneys that abide by them.

diator. The mediator will talk through every eventuality with all parties and ensure that everyone understands and is in agreement with everything.").

176. Natalie Gamble, *Made in the U.S.A.—Representing U.K. Parents Conceiving Through Surrogacy and ART in the United States*, 46 FAM. L. Q. 155, 156 (2012).

177. Nicola Scott, a lawyer with a U.K. family law firm, says that about one quarter of her firm's clients go to the U.S. because they feel it is safer. Helier Cheung, *Surrogate Babies: Where Can You Have Them, and Is It Legal?*, BBC NEWS (Aug. 6, 2014), <https://perma.cc/Q27C-LC6H>; see also Gamble, *supra* note 177, at 155-57 (explaining the factors that lead many intended parents in the U.K. to prefer to seek surrogacy arrangements in the U.S.).

At the time of this writing, the surrogacy journey of Huey, Roger, and Saffron is still in progress. I believe that someday Roger, Huey, and Saffron will finally have a child to fill the baby clothes in the barn. The only question is whether they will find the support they seek in one of the most surrogacy-friendly jurisdictions in the world.