

## LAW AND ECONOMICS IN SURROGACY MARKETS

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**Abstract:** The concept of reproductive justice can offer a framework for complex and nuanced analyses of surrogacy, taking into account the agency of surrogates and potential vulnerability of intended parents. When we define surrogacy contracts, we mean the situation in which the fertilized egg of a married couple is inserted into the uterus of a surrogate mother and carried to term by a woman who has no genetic connection with the fetus. Surrogacy contracts offer a way to supply a genetic connection that adoption contracts cannot provide. This paper argues that surrogacy with heavy regulation is a step forward into the future because it incorporates the best legal solution to custody disputes while also attaining the most economically efficient solution. This paper argues the same about surrogacy markets becoming a standard and prudent practice because calling babies a Pareto-efficient exchange that benefits everyone at the expense of no one. Surrogacy can be an excellent option for a set of biological parents who desire a child but cannot carry a pregnancy for health reasons, with potential framework for the psychological and sociological effects of mental health and abortion. The status of surrogacy agencies within the United States allows for heavy legal and economic regulation of surrogacy markets. When the law of contracts and property are incorporated into surrogacy markets, it is easier and more “efficient” for couples to make bargains with surrogate gestational carriers.

**Keywords:** Economics; Surrogate; Surrogacy; Gestation; Pregnancy

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## INTRODUCTION TO SURROGACY

*Baby Mama* is a 2008 movie in which Tina Fey plays a successful businesswoman who discovers that she is infertile and hires a working-class woman to be her surrogate. Surrogacy may seem like a modern phenomenon, but it actually has ancient biblical origins. In the book of Genesis, when Abraham's wife Sarah discovered that she was barren, she had her slave girl, Hagar, carry Abraham's child.<sup>1</sup> However, surrogacy markets are heavily regulated because surrogacy is controversial. When we define surrogacy contracts, we mean the situation in which the fertilized egg of a married couple is inserted into the uterus of a surrogate mother and carried to term by a woman who has no genetic connection with the fetus. Adding new members to a family without procreation comes with all sorts of legal and ethical conundrums. Surrogacy contracts offer a way to supply a genetic connection that adoption contracts cannot provide. This paper argues that surrogacy with heavy regulation is a step forward into the future because it incorporates the best legal solution to custody disputes while also attaining the most economically efficient solution.

It is easier for a woman to avoid pregnancy by using a surrogate if she has a medical reason for wanting one. For example, she could be diabetic, she could be aged, or there could be something wrong with her uterine tract. These medical factors would prevent the genetic mother from carrying a pregnancy on her own. For example, a diabetic woman with uncontrolled blood sugar or a hemoglobin A1C count of greater than 6.0 might cause birth defects to her baby.

### I. GLOBAL SURROGACY MARKETS

Surrogacy is an evolving field because the process is becoming legal in a variety of states and legal protections for it are growing. Gestational surrogacy (via the in vitro fertilization method) is an expensive operation. The intended father's sperm fertilizes the intended mother's eggs, and the fertilized egg is subsequently transferred into the surrogate's uterus. The appropriate preparation of the surrogate mother involves hormones, pills, and significant lifestyle changes as prescribed by doctors. Surrogacy is more widespread, costing at least \$15,000 for a novice surrogate mother and the price can go up to \$25,000 for an experienced surrogate.<sup>2</sup>

The legal status of surrogacy changes across countries and regions. Some countries forbid it while others allow for only altruistic and not commercial surrogacy. Finally, in many countries, legal surrogacy is neither expressly prohibited nor permitted.<sup>3</sup> Because sometimes it is cheaper or easier to find an international surrogate than a domestic one, agencies often sponsor international surrogacy because they have access to untapped markets. International surrogates, specifically, are willing to carry pregnancies for much lower costs.

The surrogacy market in India is flourishing currently. The Indian surrogacy market is valued at over two billion dollars. (Shetty at 1633) Gay male couples and infertile heterosexual couples flocked to India because their own countries prohibited

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<sup>1</sup> Genesis 16:1-2, King James Version.

<sup>2</sup> Hatzis, A. N. (2003). Just the oven: a law and economics approach to gestational surrogacy contracts. *Perspective for the Unification or Harmonisation of Family Law in Europe. Antwerp: Intersentia.*

<sup>3</sup> Hevia, M. (2018). Surrogacy, privacy, and the American Convention on Human Rights. *Journal of Law and the Biosciences*, 5(2), 375-397.

surrogacy or because it was cheaper in India. India is an ideal host country for surrogacy-it has fancy medical tourism facilities, English-speaking medical professionals, and a relatively large supply of poor women willing to provide gestational care. Surrogates are often women who do not speak English, live in slums, or are squatters. The Indian government does not monitor surrogacy, but medical professionals do.

Many fertility specialists are involved in recruiting potential surrogates through agents and brokers. Once the surrogate is identified, some fertility specialists even hire intermediaries to manage houses in which surrogates are required to stay for a few days after the embryo transfer and during the later term of the pregnancy. Surrogates are sometimes required to remain in these homes for the duration of their pregnancies. In many of those residences, surrogates are not allowed to leave. Doctors claim that requiring surrogates to live together in one place is the only way to ensure that women receive adequate nutrition, take vitamins, and avoid strenuous exercise.

Indeed, anti-commodification adherents in India argue surrogates only enter that status because of their poverty. Some people in India focus on surrogacy as an example of the problems of the capitalist system more broadly. For example, the feminist group All India Democratic Women's Association (AIDWA), which is the women's wing of the Communist Party of India (Marxist), believes that compensated surrogacy should be banned because it exploits surrogates. Specifically, poor women turn to being surrogates and carrying pregnancies for women of means because the poor women are desperate for money and compensation.

In the United States, malpractice lawsuits are prolific. By contrast, Indian professionals do not operate in a similar environment because litigation is not common. First, access to justice in India is much more difficult for poor surrogates. This is, in part, because lawyers in India cannot base their fees on the outcome of the litigation because the Bar Council of India prohibits it. , Whereas in America poor litigants can get contingency-fee lawyers. This essentially means that poor people who cannot afford lawyers' fees will never be able to bring a lawsuit. Indian courts also fail to award high punitive damage awards. Any medical negligence claim must instead be brought to consumer protection courts pursuant to the Indian Consumer Protection Act.

## II. SURROGACY CASE STUDY

The case study of celebrity couple Chrissy Teigen and John Legend demonstrates how Teigen was pregnant with her third child a few months before a surrogate named Alexandra became pregnant with Teigen's fourth child. Teigen explained in an interview that the couple learned that Alexandra was pregnant with Wren "as we crept toward the safe zone of my own pregnancy" with daughter Esti, now 5 months. "We ate hot pot to celebrate, watched *Vanderpump Rule* with our growing bellies, our families blending into one for the past year," she recalled. "Just minutes before midnight on June 19th, I got to witness the most beautiful woman, my friend, our surrogate, give birth amidst a bit of chaos, but with strength and pure joy and love." (Portee).

"But for me, I think the way I operate with anybody in our house, whether it's nannies or my mother living with us, or my friends that are in the house or security or whatever, I want an atmosphere where everybody feels really comfortable in our home and that extended to her," she explained. "I wanted her to feel like she could take off

her shoes and kick up her feet on our couch. We could watch TV together and my daughter could play with her daughter up in her room. It felt like she could come over anytime, and I feel like we do still have that relationship. It's been really wonderful." (Id.)

The couple's birth announcement chose to name their son after their surrogate. "We want to say thank you for the incredible gift you have given us, Alexandra," she wrote in the post. "And we are so happy to tell the world he is here, with a name forever connected to you, Wren Alexander Stephens." (Id.)

### III. THE SURROGACY CONTRACT

Should surrogacy contracts be regulated or prohibited by the state? How are ownership rights established in surrogacy when there is a dispute over who gets the baby? A preliminary review of the limited literature available on this novel topic demonstrates that scholars are mostly in favor of surrogacy contracts.

The surrogate mother must "obey all doctor's orders made in the interests of the child's health. These orders could include forcing her to give up her job, travel plans, and recreational activities. The doctor could confine her to bed, regulate her diet rigidly, and order her to submit to surgery and to take drugs."<sup>4</sup> (Epstein). To be sure, the surrogate mother has to surrender some autonomy to the biological parents. Such arise the terms of the contract, with the hope for greater gains for both the surrogate mother and the biological parents. These restrictions are so burdensome that some people would not enter into a surrogacy transaction at all. However, for some, the cost of these additional restrictions is perceived as being low enough to be worthwhile. "To argue that these contractual terms are inconsistent with the autonomy of the surrogate mother is to miss the function of all contractual arrangements over labor," argued Epstein.<sup>5</sup>

When contract and property law is invoked, theories of private property come into play. But with the market for babies, we must incorporate family law as well because babies are their own agents and we value human life and do not treat it as property. Lawrence Gostin argues for a "best interests of the child" standard because babies cannot be bought: "Judge Posner thinks about surrogacy arrangements in terms of economic liberty: The parties are in relatively free and equal bargaining positions, the arrangements are mutually beneficial, and third parties (notably the children) are not harmed."<sup>6</sup> (Gostin). According to Gostin's interpretation of Judge Posner's reasoning, surrogacy contracts yield a desirable win-win result, so they should be allowed.

In recent history, surrogacy contracts have been upheld. In 1987, an American court heard the case of *In Re Baby M*. Through the Infertility Center of New York, a surrogate and her husband gave birth to Sarah Elizabeth Whitehead and listed themselves as the birth parents on the birth certificate. When the biological parents, William Stern and his wife, named the child Melissa Stern or Baby M, they paid the

<sup>4</sup> Epstein, R. A. (1995). Surrogacy: the case for full contractual enforcement. *Virginia Law Review*, 2334.

<sup>5</sup> *Ibid.*, 2335.

<sup>6</sup> Gostin, L. O. (2001). Surrogacy from the Perspectives of Economic and Civil Liberties. , available at chrome-extension://efaidnbmnnnibpcajpcglefindmkaj/https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2833&context=facpub.

surrogate \$10,000. The New Jersey Supreme Court found the surrogacy contract over Baby M illegal and invalid.<sup>7</sup> (McEwen). Then in 1989, two bills prohibiting surrogacy failed to pass in Congress. (McEwen). Then in the 1990 California case, *Johnson v. Calvert*, the surrogate wanted to keep the child but a court found the genetic mother to be the true mother.<sup>8</sup> (McEwen). In essence, the court honored the surrogacy contract with specific performance of the contract rather than money damages as the form of relief. Without legally enforceable contracts, courts may have come to a different conclusion.

#### IV. SURROGACY AND ABORTION

If the infant is found to be seriously defective during the surrogate's pregnancy, can the parents order an abortion? One possible response is that the surrogate gestational carrier would refuse to accept this particular contract term, at which point someone has to decide who has custodial obligations to the child when it is born. "It is the father who has, under contract, the long-term obligations for the child, and it cannot be regarded as unjust or unwise that his <https://www.usccb.org/news/2024/surrogacy-injustice-all-involved-bishop-barron-says-support-pope-francisdecision> should determine whether the abortion should take place for precisely those reasons that are so important to ordinary married couples"<sup>9</sup> (Epstein.)

Regulating abortions comes with the thorny territory of American constitutional jurisprudence, such as *Roe v. Wade* and *Casey v. Planned Parenthood*, but regulating abortion within the context of surrogacy is something that must be done if we are to make surrogacy a valid option for people within the United States.

Another abortion problem that might occur is that the surrogate mother develops some sort of health complication in response to the pregnancy and wants to abort the fetus, but the biological parents want their child. There is really no ethical solution to this dilemma, but the law over the past twenty-five years allowed the surrogate mother to have an abortion because it's her body.

The law becomes even thornier in the wake of the *Dobbs v. Jackson Women's Health Organization* decision, because it left the abortion question up to the states. For example, abortion is legal in New York but illegal in Texas. Thus, whether a surrogate could or should abort the fetus if she wanted or needed to would depend on which state she lived in and how the state regulated those laws. The surrogate would have different rights and obligations vis-à-vis the fetus in those two states.

#### V. SURROGACY AND PSYCHOLOGY

Another reason that society needs legally enforceable contracts is that the surrogate may form emotional attachments to either the child or the intended parents. There is a close relationship between the child's biological parents and the surrogate. When the surrogate gives birth, this relationship ends.

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<sup>7</sup> Ibid.

<sup>8</sup> McEwen, A. G. (1999). So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy. *Vand. J. Transnat'l L.*, 32, 271.

<sup>9</sup> Epstein, 2336.

The surrogate may also face other psychological issues, such as postpartum depression or stress and anxiety. She may worry about the financial burdens that she faces in her everyday life, which motivated her into being a surrogate for hire. Pregnancy alone can cause things like depression to get worse. Hormones and the surrogacy environment might affect any given mental illness.

Psychologists administer the Personality Assessment Inventory (PAI) to would-be surrogates. The test assesses personality and psychopathology and is divided into 22 scales, including anxiety-related disorders, aggression, alcohol and drug problems, and more. The evaluation also requires you to speak with a psychologist, usually from the surrogacy agency. The psychologist will ask things such as why the prospective childbearer wanted to become a surrogate, aspects of the surrogacy journey, the support system, etc. The psychologist may also want to talk to the surrogate's partner or spouse.

How a couple can do right by a surrogate is an ethical question requiring psychological understanding. Surrogacy counselors or psychologists can play a crucial role in helping intended parents and surrogates understand and cope with the psychological impact of surrogacy. They provide support, education, and other guidance because they have skills and knowledge in helping people deal with their feelings.

Susan Golombok, a professor of family research and director of the Centre for Family Research at the University of Cambridge, led a team of British researchers to find that children born with the help of a surrogate may have more adjustment problems than those born to their mother via donated eggs and sperm. Their results, published in the June issue of the *Journal of Child Psychology and Psychiatry*, suggest that it's difficult for kids to deal with the idea that they grew in an unrelated woman's womb.

## VI. SURROGACY AND THE CATHOLIC CHURCH

Another objection to surrogacy comes from Pope Francis, the head of the Roman Catholic Church, who recently denounced surrogacy in the news. Bishop Robert Barron, speaking in defense of the pontiff's views, stated the following: "The commercialization of women and children in surrogacy is underlined by the belief that there is a right to have a child. The child becomes an object for the fulfillment of one's desires instead of a person to be cherished. In this way, the genuine right of the child to be conceived through the love of his or her parents is overlooked in favor of 'the right to have a child by any means necessary.' We must avoid this way of thinking and answer the call to respect human life, beginning with the unborn child."<sup>10</sup> (Barron)

Barron added, "It might be the case that couples earnestly want to have children without resorting to surrogacy, but painful and even life-threatening medical obstacles make childbirth hazardous or impossible. The serious prospect of a life without biological children has been dismissed by some, but we have a responsibility to accompany these couples in their suffering. The Church teaches that married couples are not obliged to actually have children, but to be open to any life that might be the

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<sup>10</sup> *Surrogacy is an Injustice to All Involved, Bishop Barron Says in Support of Pope Francis*, United States of Conference of Catholic Bishops (January 10, 2024), <https://www.usccb.org/news/2024/surrogacy-injustice-all-involved-bishop-barron-says-support-pope-francis>.

fruit of their union. The desire to utilize surrogacy might feel like the desire to form a family naturally, but no matter how well-intentioned, surrogacy always does grave injustice to the child, any discarded embryos (who are our fellow human beings), the commodified birth mother, and the loving union of the spouses.” This consideration of the discarded embryos is based on the fact that, according to Catholic teaching, an embryo is alive because life begins when the egg and the sperm meet at conception.

## VII. LAW AND ECONOMICS

Law and economics is an emerging field that transitions us from the existing literature of “what is” to the idea of “what should be” or “what could be” in an ideal world. The idea is that we can use efficiency to find the best outcome. Law and economics scholarship employs two different kinds of analysis, positive (descriptive measures of what is) and normative (an “ought” analysis of what should be). Normative analysis explains what should happen, which is that surrogacy markets should be heavily regulated and surrogacy contracts should come with the force of law. With respect to positive economic analysis of legal issues, the question is that if this policy is adopted, what predictions can we make about the likely economic impacts?

In predicting these behavioral responses, a positive analysis will assume that most individuals are motivated by rational self-interest to maximize utility. But with surrogacy, legislators, executives, and judges measure the interests of not just the bargaining parties but also that of the third party, the baby. Pareto efficiency would ask of any transaction or policy: will this transaction make somebody better off while making no one worse off? Kaldor-Hicks efficiency, by contrast, would ask whether this collective decision would in terms of cost benefit analysis generate sufficient gains so that they could compensate the losers sufficiently to render them indifferent to it but also have gains left over for themselves? (Trebilcock and Keshvani).<sup>11</sup> Positive analysis explains what happens with contract and property law in surrogacy disputes.

Economic analysis of contract law in particular has offered a theory on which promises should be enforced. Under this approach, a contract should be enforced when it makes two people better off, without making anyone worse off.<sup>12</sup> This is known as a Pareto-efficient exchange. Surrogacy contracts meet the criteria of improving everyone’s welfare without harming anyone, but there is a commodification argument that says that women shouldn’t be able to trade their inalienable parental rights for money. The argument says that the value of giving up an emotional attachment to the child and the costs of laboring are less than the value of being compensated for carrying the child. However, the Pareto-efficiency argument would respond that carrying the child and compensation for it does not make anyone worse off. The only people who would disagree are highly moralistic thinkers.

Making promises requires deferred exchange rather than instantaneous exchange. If exchange were instantaneous, there would be no reason for promises. The agency game demonstrates why we need contracts to buttress these promises: In this game, the first player might be an investor in a business, a consumer buying goods, a bank account holder, or the purchaser of an insurance policy. If the first player hands over

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<sup>11</sup> Trebilcock, M. J., & Keshvani, R. (1991). The role of private ordering in family law: a law and economics perspective. *U. Toronto LJ*, 41, 533.

<sup>12</sup> *Ibid.*, 283.



the asset to within the second player's control, "the second player decides whether to cooperate or appropriate. Cooperation is productive, whereas appropriation is redistributive." Productivity could take the form of realized gains such as the profit from investment, the surplus from trade, or the interest from a loan. The parties divide the product of cooperation between them, so both of them benefit from having played the game or made the contract. By contrast, appropriation redistributes the asset from the first player to the second player – this is the result of "finking."

Without contracts to enforce promises, people would be inclined to break their promises and not cooperate in order to redistribute funds. An innovator in Silicon Valley might ask a business guru to invest \$1 million in a start-up fund to develop a new computer chip. By developing the chip, the innovator can turn \$1 million into \$2 million. The innovator promises to develop the chip and share the profits of \$1 million equally with the investor.<sup>13</sup> Instead of developing the chip, however, the innovator might try to take the investor's \$1 million and self-deal. An enforceable promise to develop the chip will prevent the innovator from appropriating the money; so, the investor will trust the innovator and invest the money. Contract law makes promises more trustworthy.

Commitment is achieved by foreclosing the opportunity to appropriate (to take the money and run). The opportunity to appropriate is foreclosed by the high price of liability for breach. A commitment is credible when the other party observes the foreclosing of the appropriation opportunity. In terms of surrogacy contracts, surrogate mothers might be inclined not to give over the babies to which they gave birth. Therefore, surrogacy invokes the law of contracts to be a sustainable process. When prospective parents find a surrogate through an accredited agency, they sign a contract that is backed up by a credible commitment.

We can think about reproductive justice in terms of rights (where a right is a "just claim," as the philosophical definition goes) and their protections. To preserve rights, we can start by using property law as a tool. Aristotle espouses a system of private property: "Property should be in a certain sense common, but, as a general rule, private; for, when everyone has a distinct interest, men will not complain of one another, and they will make more progress, because everyone will be attending to his own business" (Aristotle in Epstein.)<sup>14</sup> Private property comes with the labor theory of value, where the man who goes to pick the apple will be considered as owning it and having the right to eat it because he did the work for it and his property interest should properly be called a right.

Law is unnecessary and undesirable where bargaining succeeds, but necessary and desirable where bargaining fails. (Cooter).<sup>15</sup> Bargaining occurs through communication, but communication comes with certain costs. These include renting a conference room, hiring a secretary or notetaker and clearing schedules to set up a meeting time. These costs are called transaction costs.

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<sup>13</sup> Ibid., 285.

<sup>14</sup> Epstein, R. A. (1995). Surrogacy: the case for full contractual enforcement. *Virginia Law Review*, 2305-2341.

<sup>15</sup> Cooter, 81.

Should babies count as private property of their genetic parents or of the surrogate mother? The answer is that babies, because they are human beings and because we no longer allow ownership of human beings in this country, are their own agents and so courts should use the “best interests of the child” standard common in family law cases. When courts face a custody dispute between the biological parents and the surrogate mother, they should examine factors like financial stability, emotional health and household composition to see who can provide a better home for the child.

It’s not that fairness requires the party who causes harm to pay for it, which is often the legal standard, but rather a question of efficiency that the damages be least, which is the economics standard. The Coase theorem sums it up: “When transaction costs are zero, an efficient use of resources results from private bargaining, regardless of the legal assignment of property rights.”<sup>16</sup> A corollary to the Coase theorem says when transaction costs are zero, an efficient use of resources results from private bargaining, regardless of the legal assignment of property rights.<sup>17</sup> In the case of surrogacy, transaction costs are not zero but actually high because it costs around \$20,000 to hire a surrogate in America and agencies have to act as an intermediary by performing background checks, finalizing the in vitro fertilization treatments with hospitals and doctors, and putting together a surrogacy contract. So according to Coase theorem and its corollary, a private bargain for a surrogate to carry a fetus does not necessarily result in the most economically efficient outcome because transaction costs are high. Rather, there should be some governmental regulation of surrogacy markets.

Damages are more efficient than injunctions as the remedy to a property breach when transaction costs are high. Cooter gives the example of laundry and the electric company. If damages perfectly compensate the laundry when the electric company pollutes, assuming no transaction costs, its profits are the same. An injunction by contrast forces the electric company to abate and not pay damages, so the electric company has no choice in the matter. When transaction costs are high, damages are a better remedy. When transaction costs are low, injunctions are a better remedy. Injunctions and other kinds of specific performance would not apply to surrogacy contracts because transactional costs are high in surrogacy markets, where damages would be the better remedy. So even though courts have historically provided specific performance, a form of injunctive relief, in surrogacy contracts by requiring that the surrogate gestational carrier hand over the baby to the genetic parents, Coase theorem would suggest that damages yield a more efficient outcome. In this way, courts could require that if a surrogate mother got attached to the child and wanted to keep it, she could as long as she repaid the genetic parents with the \$15,000 they were going to pay her for the child. However, Coase theorem is limited in its applicability because it does not recognize moral externalities involved in letting a surrogate mother keep the child. For example, a surrogate mother couldn’t provide a blood transfusion to her child because she would not necessarily have the same blood type. That’s one biological problem with the “efficiency” solution of damages and courts not awarding specific performance. This paper argues that governments should therefore regulate surrogacy contracts with specific performance rather than with damages, and thus these contracts would have legal weight.

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<sup>16</sup> Ibid.

<sup>17</sup> Ibid., 85.

When courts can remedy the victim of a broken promise, contract law is enforceable. “People continually make promises: sales people promise happiness; lovers promise marriage; generals promise victory; and children promise to behave better. The law becomes involved when someone seeks to have a promise enforced by the state.”<sup>18</sup> The bargain theory of contracts says there needs to be a bargained-for exchange, also known in legal terminology as consideration. There must be a *quid pro quo* (consideration), as well as an offer and an acceptance. In surrogacy contracts, a healthy child is exchanged for money to carry a pregnancy.

## CONCLUSION

The emerging technology involved in surrogacy is expanding rapidly: it will eventually be more cost-effective such that surrogacy becomes commonplace for infertile and LGBTQ couples. Life insurance was once viewed as a form of trafficking in human life. But as traditional understandings of law evolved into more modern ideas, life insurance became a standard and prudent practice. The same reasoning applies to surrogacy, that it was once seen as wrong but is now seen as a good practice.

A framework of legal regulation could thwart some of the harms of exploitation that could happen in American surrogacy markets. We have used the example of the Indian surrogacy market to show that surrogacy could be easier than it is when laws step in to regulate humans. The Founding Fathers of America said, “If men were angels, no government would be necessary.” In this way, government and the future legal landscape could step in to protect all of the stakeholders in surrogacy markets, including the surrogate, the biological parents, the lawyers, the doctors, the agencies, and the fertility specialists.

The concept of reproductive justice can offer a framework for complex and nuanced analyses of surrogacy, taking into account the agency of surrogates and potential vulnerability of intended parents. This paper argues the same about surrogacy markets becoming a standard and prudent practice because calling babies a Pareto-efficient exchange that benefits everyone at the expense of no one. Surrogacy can be an excellent option for a set of biological parents who desire a child but cannot carry a pregnancy for health reasons, with potential framework for the psychological and sociological effects of mental health and abortion. The status of surrogacy agencies within the United States allow for heavy legal and economic regulation of surrogacy markets. When the law of contracts and property are incorporated into surrogacy markets, it is easier and more “efficient” for couples to make bargains with surrogate gestational carriers but the Coase theorem’s efficient solution of awarding damages rather than specific performance when surrogacy contracts are breached does not work with existing legal structures at enforcing contracts. This paper would invite skeptics of surrogacy markets to keep up with modern times.

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<sup>18</sup> Ibid., 276.

## BIBLIOGRAPHY

1. Barron, Robert. (Jan. 10, 2024). United States Conference of Catholic Bishops Office of Public Affairs Statement, available at <https://www.usccb.org/news/2024/surrogacy-injustice-all-involved-bishop-barron-says-support-pope-francis>.
2. Carroll, Linda. (2013). New study tracks emotional health of surrogate kids, available at: <https://www.today.com/health/new-study-tracks-emotional-health-surrogate-kids-6c10366818>.
3. Cooter, R., & Ulen, T. (1988). Law and economics.
4. Epstein, R. A. (1995). Surrogacy: the case for full contractual enforcement. *Virginia Law Review*, 2305-2341.
5. Gostin, L. O. (2001). Surrogacy from the Perspectives of Economic and Civil Liberties, available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2833&context=facpub>.
6. Hatzis, A. N. (2003). Just the oven: a law and economics approach to gestational surrogacy contracts. *Perspective for the Unification or Harmonisation of Family Law in Europe*. Antwerp: Intersentia.
7. Hevia, M. (2018). Surrogacy, privacy, and the American Convention on Human Rights. *Journal of Law and the Biosciences*, 5(2), 375-397.
8. Kalantry, Sital (2018) "Regulating Markets for Gestational Care: Comparative Perspectives on Surrogacy in the United States and India," *Cornell Journal of Law and Public Policy*: Vol. 27 : Iss. 3 , Article 8. Available at: <https://scholarship.law.cornell.edu/cjlpp/vol27/iss3/8>.
9. King James Version Bible, 2022 online version at Bible Gateway.
10. McEwen, A. G. (1999). So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy. *Vand. J. Transnat'l L.*, 32, 271.
11. Trebilcock, M. J., & Keshvani, R. (1991). The role of private ordering in family law: a law and economics perspective. *U. Toronto LJ*, 41, 533.