1-1-1993

Legislative Regulation of Surrogacy and Reproductive Technology

Marjorie Maguire Shultz
Berkeley Law

Follow this and additional works at: http://scholarship.law.berkeley.edu/facpubs

Part of the Jurisprudence Commons, Law and Gender Commons, and the Public Policy Commons

Recommended Citation
Marjorie Maguire Shultz, Legislative Regulation of Surrogacy and Reproductive Technology, 28 U.S.F.L. Rev. 613 (1993)
Legislative Regulation of Surrogacy and Reproductive Technology

By MARJORIE MAGUIRE SHULTZ*

ALTHOUGH JOURNALISTS and academics lavished enormous attention on the Baby M case,¹ many scholars viewed the debate about surrogacy as interesting but marginal. Despite these doubts, the outpouring of ink and passion correctly signalled that the questions implicit in surrogacy were significant indeed. Since 1988 when the New Jersey Supreme Court ruled the Whitehead-Stern agreement invalid,² the issues surrounding reproductive policy and family definition have become even more contested.

I. Rapid Scientific and Social Change

New reproductive and genetic technologies continue to arrive on the scene at a dizzying pace. Third-party assistance in procreation can now encompass donor sperm, donor eggs and donor embryos, as well as donor gestation. Moreover, as these technologies have developed, new motives for using them have also proliferated. Fetal tissue can be transferred for therapeutic purposes. Fetal eggs and even ovaries may also be transferable. The freezing of embryos and gametes makes some aspects of reproductive time elastic (e.g., gestation after menopause, biological parenthood after death). Genetically fraternal “twins” (two eggs fertilized at the same time) can be birthed years apart. Genetic screening already allows some rudimentary trait selection (e.g., sex selection, selection to prevent certain birth defects). The potential for genetic therapy to “fix” defects—although not yet realized—is clearly visible around the corner. Researchers have even announced a first step toward “cloning” of human embryos.³

* Professor of Law, Boalt Hall School of Law, University of California, Berkeley.


2. Id. at 1264.

Procreative methods and possibilities operate within a context of cultural attitudes about sex, intimacy and families. Conflicts about family structure and values, as well as sexuality and intimacy, have intensified. In addition, family groupings are far more diverse today. The legitimacy and consequences of alternative intimate alliances seem endlessly controversial. Social developments such as changing gender roles, same-sex couples, single or same-sex parenting, non-marital relationships and families reconstituted after divorce or death, increase tensions over new reproductive methods and the laws that regulate them.

Family form is not the only source of controversy. Recent debate over the rights of adoptive as compared to natural parents highlights our collective uncertainty about the desirable roles of biology, behavior and intention in determining rights and responsibilities. The biology-versus-culture theme recurs in disputes within the reproductive arena (e.g., the desirability of third-party reproductive assistance) and beyond it (e.g., the appropriateness and necessity of differentiated gender roles, the degree to which genetics rather than personal choice accounts for health status, criminal propensity, etc.). Another socially contested issue centers on how much, if any, commercialization should be tolerated in the domain of human life and intimacy. Issues ranging from payment for reproductive assistance to profit-making in the biotechnology industry illustrate how disagreements over commodification add substantive and symbolic fuel to the general conflagration surrounding reproductive and family policies.

II. The Challenge for Legislators

Individual and social stakes in these matters are exceedingly high. Although so far, much of the dissension surrounding reproductive technology has played itself out in the courts, the political and value-oriented nature of the debate will ultimately require legislative direction. Drafting statutes to govern surrogacy, and alternative reproduction generally, is therefore an enterprise well worth the considerable difficulties the task entails. All the ordinary problems of statutory drafting are present—choosing substantive scope, selecting categories, defining terms, balancing interests, assuring fairness, attaining legitimacy and achieving efficacy (both administrability and accomplishment of intended goals).

The complexity of this legislative task, however, extends beyond the ordinary. The issues implicated in reproduction cut across many different areas of law—constitutional privacy, freedom of religion and equal protection; sexual and relationship liberty; parental status, adoption, and children’s rights/welfare; contract; remedies; disability law; health and insurance law; and professional rights to practice or research, just to name a
few. Coordinating so many bodies of law is itself a daunting task. When the novelty, controversy and gravity of the subject matter are taken into account, crafting wise regulatory plans becomes a near-Herculean challenge. In addressing that challenge, drafters must resolve several overarching issues.

A. Appropriate Scope of Statutory Law

To an unusual degree, the subject matter of the statutes proposed here continues to evolve. New developments and problems—many of them unimagined possibilities only a short time ago—continue to unfold. In the face of such high degrees of change and uncertainty, sponsors of a statute must make a difficult choice. On the one hand, they can enact an array of separate fact-specific statutes. Alternatively, they can attempt a comprehensive and open-textured approach that generalizes issues and seeks common themes to accommodate future developments. The dangers of inadequate foresight must be balanced against those of tunnel vision.

Legislation in the terrain of reproductive technology should, in my judgment, encompass a broader target than surrogacy alone. Whenever reproduction is assisted by additional persons or technologies, questions common to the array of different situations stand out. The ones identified above are obvious examples. While particular technologies and social arrangements differ, the convergence for purposes of policy is great enough to justify a unitary basic approach supplemented, as need be, by additional rules adapted to particular circumstances. If we address one fact pattern at a time, events will constantly outrun our plans. More importantly, piecemeal regulation invites detail at the expense of perspective. Questions now on the table are sufficient to allow identification of, and judgment about, essential themes. The development of a generalized and comprehensive strategy is essential to effective and principled regulation.

B. Public or Private Ordering

Proposals must consider the extent to which private decisions should structure procreative and family roles. Although paeans to the family have typically emphasized its sanctity and “privacy,” much of legal tradition and commentary has assumed that the family should be publicly regulated. Conventional morality espoused unequivocal “right” answers regarding family matters, and the law encoded them as status relations. For most of America’s legal history, family law has imposed those status prescriptions on individuals’ intimate lives (e.g., gendered sex roles in marriage, criteria and consequences of illegitimacy of children). The post-sixties decades brought a loosening of family law’s traditional directives, but a resurgent
demand for legal enforcement of “family values” has recently emerged. Evidently, many citizens still prefer a mandatory and normative family policy.\(^4\) In addition, even those who are skeptical of such policies worry that excessive private ordering might undermine the already fragile bonds of modern intimacy.

Conversely, the manifest diversity of values and cultures in American society argues that private decision making should have unusual sway where reproductive and intimate life are concerned. In contrast to the family values approach, many see sex, family and procreation as areas where individual autonomy and personal privacy should have special priority. Of course, public policy and private ordering can and typically do coexist in most arenas of human conduct. The relative mix of the two approaches, however, can vary considerably. In particular, whether the basic background assumption valorizes public or private ordering will significantly affect outcomes by influencing selection of categories and concepts, by shading interpretation and implication, and by determining the allocation of burdens of persuasion. Consequently, statutes that regulate reproductive technology must ponder these issues with care.

I place very heavy emphasis on individual autonomy and responsibility. Moreover, in this country at least, pluralism of culture and values seems to me both inevitable and desirable. Both claims—autonomy and pluralism—are strongest in the context of family and intimacy. In these domains, I favor a high degree of private ordering. The state should provide recognition and support for commitments and expectations that give structure and stability to intimate relations. But it should do so by legitimating and respecting private intentions and agreements rather than by imposing behavioral dictates of its own.

To my mind, society has its governing strategies and priorities misaligned. For example, the arguments that support a large degree of private ordering in economic matters, health, employment and housing are weaker, and the desirability of societal management and intervention stronger, than our current system reflects. By contrast, the arena of intimate relations including procreation and parenthood, should reflect a much higher degree of private ordering than has been the norm. The intimate dimensions of life seem to me the quintessential ones where society should legitimate and support individuals’ decisions and commitments.

\(^4\) For a detailed analysis of the changing patterns of public and private ordering in marital family law, see Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982).
C. Alternative Family Structures

Closely related to decisions about private as compared to public ordering are attitudes toward alternative family structures. Applications of reproductive technology extend well beyond the traditional nuclear family. These methods allow conventional heterosexual couples to design unconventional reproductive arrangements. Further, reproductive technology was initially rooted in and justified by the need for infertility treatment for heterosexual married couples, but the same methods make parenting and procreation far more accessible to single people, homosexuals, older persons and others outside the traditional family paradigm.

My preference for private ordering extends to my affirmation and acceptance of a wide variety of family structures and reproductive arrangements. To my mind, society's real stake is in generating intimate units capable of providing adults and children with nurturance, stability and love. Families established according to individuals' needs and values, and sustained by individuals' commitments, have the best chance of achieving that goal. Excluding and repressing chosen bonds in order to enforce specified and limited family structures seems to me to be both oppressive and counterproductive.

D. Gender Roles

A related problem arises from the need for legislative designers to choose policies that affect gender arrangements in ways they deem desirable. Because biology, as well as culture and law, situates men and women differently with regard to procreation and parenthood, regulatory plans that touch on these matters must consider their consequences for sexual politics. Discerning what is physically based and what is socially determined in human patterns is an exceedingly thorny matter. Deciding what is inevitable and what is mutable—whether in biology or culture—presents even greater difficulty. These matters sometimes seem, and may well remain, intractable. Certainly they are profoundly significant and deeply contested in our culture. Legislation regulating reproductive methods inevitably requires judgments and generates consequences with regard to gender opportunities and roles.

Any prediction about the effects on gender equity of a given approach to reproductive technology is, to understate the matter, difficult. On balance, it seems that opportunities to equalize gender roles would increase rather than diminish through the adoption of state policies that facilitate private ordering of reproductive arrangements. In my judgment, equitable gender opportunity requires legal approaches that offset biologically imposed limits on men's involvement in reproduction and childrearing, just as
the law should offset women's biologically imposed disabilities in the employment market.

Intention and biology are often mutually reinforcing in family design. When they are not, I would have the law prioritize intention and deliberative commitment over genes and gendered reproductive function. Legitimating varied private arrangements about procreation and family would enable individuals of either gender to choose and commit to roles according to their own needs and values. The law is an instrument of social design and consequence. Given that fact, private ordering of intimate life seems likely to maximize the state's contribution to justice and utility for all persons.

E. Commercialization

Interwoven through the problems already discussed is a distinct but related conflict over what risks and benefits would likely attend commodification and commercialization in intimate life. The effects of money are at the core of this concern. In addition, money is a proxy for other questions and consequences—the allocation of power and agency, the appropriateness of bargaining and enforcement models in family life, and the fear of treating persons as objects. Wise drafters of statutory regimes must grapple with all of these dimensions of reproductive arrangements. The task is especially difficult because it is deeply related to both factual and symbolic issues.

Market rhetoric and methods certainly raise worrisome concerns. Ultimately, however, I think it better to view economic value and personal value as different continua rather than opposed alternatives on a single dimension of life and experience. Dichotomization of the two elements unrealistically constrains thought and policy. Crass commercialism and sacralizing altruism are not the only possibilities.

Questions regarding gender as well as race and class overlap but are not coextensive with concerns about commodification and commercialization. People of color as well as economically powerless individuals often find themselves abused, with that abuse being justified by "the market." Many individuals' choices are constrained to the point of meaninglessness by prejudice or desperation. One thing that is clear is that women, rich and poor, white and non-white, have had their choices severely constricted by societal presumptions that they should be altruistically rather than economically motivated, particularly with regard to choices in the intimate sphere. Suspicion about such claims in this context is therefore appropriate.

Private law doctrines address problems of coercion, incapacity, changed circumstances and unfairness in voluntary agreements. Such rules can be attuned to remedy problems specific to particular contexts. For ex-
ample, special rules and applications of contract doctrine have allowed courts and legislatures to police standardized and adhesion contracts more adequately than they otherwise might. In my judgment, sensitive and vigorous adaptation of existing doctrinal constraints could go a substantial way toward confronting problems of commercial, gender and race exploitation in reproductive arrangements.

Admittedly, such rules are sometimes ignored, but they should not be. Their effective use seems preferable to making agreements for reproductive collaboration categorically illegal. The latter approach is ostrich-like and essentially pessimistic. It fails to guide and ameliorate technological development. It represents governance by nostalgia that is not only impractical but also punitive toward pluralist values. It imposes a standardized moral vision in a domain where personal values are crucial.

F. Caveats and Consequences

Before commenting on the proposals by Professor Davis’ students, a disclaimer is in order. The questions under discussion in this symposium are so new, so complex and so difficult that my views (and, I suspect, those of the student drafters as well) continue to evolve. My conclusions are provisional, yet they are the product of considerable thought. For purposes of this Commentary, I have only briefly summarized conclusions that I have thoroughly elaborated elsewhere.

If my views were adopted, the fundamental agenda for policy would shift. Rather than debating whether individual choices and agreements are tolerable, we would accept their presumptive validity. Rather than exhausting ourselves in “moral panic,” the essential task would become to carefully assess which publicly determined requirements or limits on private ordering are justified. A degree of publicly determined limits is compatible with a predominance of private control. For example, the emphasis on private decision making in sales of goods or leases of real estate has not eradicated protection of consumer rights or residential habitability. With regard to reproductive technology, analogous questions will arise. For example,

5. See, e.g., Restatement (Second) of Contracts § 211 (1979) (courts may delete unfairly surprising terms from standardized agreements).
assuming legitimation of surrogacy arrangements, discussion should move to other issues: Should surrogates be over a certain age? Should they have had a prior child? Should they have undergone psychological evaluation? Should some persons (e.g., post-menopausal women? single persons? gays and lesbians?) be denied access to reproductive techniques? In the broader terrain of reproductive technology generally, should efforts to affect genetic trait selection of offspring be allowed? If so, which interventions might nonetheless be deemed impermissible? What information (e.g., costs, success rates) should commercial brokers or providers of relevant services make available to prospective users in order to aid their deliberation and decisions?

I describe a system in which overarching public policy would defer to and reinforce private commitments. Public limits and requirements would be established parsimoniously—if justified and essential. Indexed from the outset as matters appropriate for private ordering, reproductive agreements would be viewed through different lenses and assessed by different norms. The most significant change would flow from reversing the baseline norm. A shift from presumed public ordering to presumed private ordering would reallocate the burden of persuasion when policy is to be set and disputes are to be resolved.

The approach I suggest would also allow parties considering the use of new technologies and arrangements to be more adequately informed. Instead of going underground into a black market of unacknowledged and unregulated activity, parties could begin to get good legal, medical and psycho-social advice regarding their options and preferences. They could learn how to predict, avoid or resolve potential complications. Categorical resistance to private ordering prevents such expertise from developing. Consequently, even readily foreseeable problems often go unaddressed.

Finally, people’s desire for these arrangements means they will be made whether or not they are recognized by the state. Exploitation is more likely in a black or grey market. Harm flowing to parties involved in these arrangements is likely to be intensified by the aura of illegitimacy and uncertainty that still surrounds them. The task of designing appropriate facilitative regulation is before us.

III. Student Drafters’ Proposed Answers

The statutes proposed by these drafters, like those considered in various state legislatures, display varied strengths and weaknesses as well as divergent approaches to basic problems. In terms of the broad issues identified above, Proposal 1 conclusively rejects private ordering of surrogacy. It views such reproductive arrangements as a serious threat to women’s inter-
ests and bases its rejection of them on that premise. While it does not make such agreements illegal, it does refuse enforcement whether or not there is monetary exchange.

This proposal, which broadly invalidates surrogacy contracts, reflects the moral viewpoint of a substantial group of people. It has the advantages of clarity and simplicity, although it begs some important questions and fails to see others. For example, in describing and justifying its position, the draft statute asserts the unlawfulness of “forcing” a woman to “unwillingly abandon her child.” It announces the impermissibility of requiring that a woman unwillingly gestate a child which the state will not recognize as hers. The problem with such pronouncements is their uncritical appropriation of the language of coercion. The Baby M variant of surrogacy (surrogate gestates her own egg fertilized by artificial insemination with donor father’s sperm) pits the surrogate’s choice at Time 1 against her choice at Time 2. How is one to decide which expression of her will should control? Moreover, in assuming that all surrogacy disputes involve taking a child from an unwilling surrogate, the author fails to consider that it may be the surrogate who seeks to enforce the agreement against intending parent(s) who now resist.

Proposal 2 compromises on the issue of private or public ordering by suggesting that private agreements will be enforceable only when approved by a social services agency in accordance with a variety of requirements and limitations. This proposal seems ambivalent about its scope of governance. It uses the language of surrogacy agreements at some points, but employs more general descriptions at others. The proposal’s aspirations of inclusiveness and its openness to alternative family structures are reflected in its title: Extended Partnership Act. Proposal 2 specifies that the opportunity to be “intended parents” shall not be limited by marital status, sexual orientation or gender. Yet its stated desire is to empower people who wish to rear a child but are unable for biological reasons to do so. Would lesbians be allowed to make such agreements under this statute? The answer seems uncertain, and likely not what the drafter intended. Moreover, in terms of sex and gender issues, this proposal seems written primarily from a woman’s point of view. For example, the proposal does not really address the rights and obligations of men who contribute semen but desire to exclude their parenthood. Nor does it clarify the status of men who intend to raise a child but who are not the source of the sperm (e.g., if both intending parents are infertile).

Proposal 3 adopts a different middle course with regard to the public/private axis. It seeks to empower private agreements, directing that they be governed primarily through existing bodies of doctrine. Yet the proposal
requires that the terms of such agreements be consistent with the welfare of children. In order to heighten the state's capacity to protect children, the proposal creates incentives (in the form of a presumption that honors the agreed terms while adjudication of any disputes is pending) for individuals to seek the blessing and supervision of state agencies. It does not, however, condition the legality and enforceability of agreements on their doing so.

This third draft statute is notable for its effort to coordinate surrogacy policy with other established bodies of law. It also attempts to enlarge the subject matter coverage beyond the confines of surrogacy. It states, for example, that parties would retain property interests in their bodies to at least the extent that they may contract with other parties for their genetic and biological reproductive capacity. While this leap is not consistently followed in the statute as a whole, it reflects a laudable awareness that surrogacy is only one variant among a broad array of emerging techniques.

These proposed statutes also illustrate a range of particular points about surrogacy legislation. An adequate vocabulary with which to describe relevant issues and procedures is still evolving. Definition of terms, not to mention analysis of concepts, remains a vexing problem. For example, various commentators have lamented the use of the term "surrogate," arguing that it begs the question about who is the "real" mother. The statutes proposed here have analogous difficulties of definition that go beyond meaning to purpose. Proposal 1, for example, defines two categories of surrogate parenting agreements. These categories seem to turn on the question of whether the female roles of gestation and genetics are united or split. In dealing with the former circumstance, the language addresses gestation of the gestational mother's ovum fertilized by the sperm of a known donor (the genetic father). Does the author intend to omit coverage of pregnancies that arise from an unknown donor's sperm? For example, if a woman used sperm from a sperm bank to conceive a child for an infertile gay male, the agreement seems not to be covered by the statute as now written. Does it make sense then, that if the sperm came from the gay male himself, this arrangement would be covered?

Proposal 2 defines eligibility of intended parents as not being limited by marital status, sexual orientation or gender, but excludes anonymous sperm or ova donors. Before this provision can be used to determine parental rights, however, we must discover to whom such donors must be anonymous (to doctors? other gamete providers? intending parents?), and when their anonymity should be assessed (at the time of donation? fertilization? implantation? birth?). When Proposal 3 prescribes who shall have standing to sue regarding a surrogacy agreement, it limits that group to government agencies, the children born and parties in privity under a surrogacy contract.
Yet who are the “parties” to the contract? The draft identifies “as many as” six potential parties, one of whom is a spouse of the gestational mother. Does that mean that non-spouse partners of gestational mothers are excluded? What about the spouse of a sperm or egg donor? For that matter, what about the donor of ovaries as opposed to eggs—especially if that “donor” is a fetus? These issues are partly definitional and partly conceptual. They are also, in part, an outgrowth of problems about scope in an area of rapid change and hard-to-envision possibilities. Because these proposals emphasize surrogacy, their scope is limited. The ability to recognize rational and principled categories for regulation seems to have been hampered by that narrowness of focus.

I found especially interesting those aspects of the proposed statutes that reflect their authors’ awareness of the uncertainty and changeability of the situations they sought to address. To cope with that reality, the drafters wisely propose various experimental approaches that have not often been considered in the current debate. Proposal 3’s inclusion of a sunset provision mandating affirmative reenactment before continuation of the proposed statutory scheme seems a valuable idea. Proposal 2’s chronologically-based allocation (as between birth parents and intended parents) of decisional prerogatives and responsibilities during pregnancy seems a helpful basis on which to begin discussion. The issue of authority during conception and gestation is highly significant but inadequately addressed in the public debate thus far. Although control over abortion is often mentioned, allocations of authority for a host of additional decisions—genetic testing and intervention, fetal treatment or surgery, methods of delivery, donation of fetal remains for research or therapeutic use—will also require careful consideration. The timeline approach in Proposal 2 has the advantage of clarity and simplicity. But as would be illustrated in a situation where the method of delivery was disputed (e.g., vaginal versus caesarean birth), giving a birth parent control over the first six months of pregnancy, and the intended parent(s) control over the later stages, may not adequately adjust their various and conflicting interests.

Proposal 2 also grapples with a related and very significant issue—that of potential liability for harm to the fetus during pregnancy. The connection between authority, just discussed, and this question of responsibility is clear. The difficult problem of liability for prenatal harm has not yet been resolved even in the context of ordinary procreation. It is, therefore, not surprising that although Proposal 2 spotlights this important issue, its suggested solution is not yet adequate to resolve this quandary. To note but

one problem, the draft requires an administrative agency to certify that the
birth parent would not expose the child to physical, psychological or envi-
ronmental factors which would place the child at risk—a tall order in terms
of both administrability and scientific knowledge. At a minimum, some
level of culpability (negligence? intent?) would need to be specified. Even
more importantly, prevention of undue intrusion into the body and the
choices of a gestating surrogate would also be essential.

Proposal 2’s creation of incentives for private-public cooperation pro-
vides another interesting suggestion, as do its proposals to appoint guardi-
ans ad litem to protect fetus’ and children’s interests, to require counselling
of the parties and to mandate provision of health insurance for the surro-
gate. Proposal 2’s identification of a point up to which rescission would be
allowed (before implant and therefore before substantial reliance) contrib-
utes another helpful approach. The proposal should also specify whether
any remedies would be forthcoming if the contract were rescinded.

Proposal 1 also suggests some interesting innovations. Its section on
remedies provides that a child born through surrogate parenting may have a
right of action against the parties for emotional or other harm arising out of
any prolonged dispute as to the custody, parentage or status of the intended
child. This is a provocative idea worthy of discussion, particularly given
that fears about children’s interests are a major source of resistance to re-
productive technology. This particular proposal has a certain Solomonic
ring; it provides an incentive for adults to behave in ways that would mini-
mize the child’s distress.

Proposal 2 characterizes monetary exchange in surrogacy arrange-
ments as arising from lost opportunity and incurred detriment rather than
from payment for services. The approach is reminiscent of allowing pro-
spective adoptive parents to pay a pregnant woman’s medical expenses
without triggering charges of baby selling. The attempt to diminish com-
mercialism and preserve some aura of altruism in such agreements is in-
triguing. Some will wonder whether an incompatibility of values is simply
obscured with rhetoric. But rhetoric itself reflects and shapes judgment.
Because commodification and commercialism are a focal point of concern,
the effort to alter perception through redesign of language might help to
allay those fears.

Interesting, too, is Proposal 3’s suggestion that the intentions of the
parties would presumptively control the legal outcome, but that the pre-
sumption could be rebutted by evidence that the terms of the agreement
were inconsistent with the “reasonable welfare of the fetus/child.” Many
fear that the interests adults seek to protect in reproductive agreements will
conflict with the interests of the resulting children. The author gives that
debate a nice twist by expressly incorporating both concerns. Proposal 3 also adjusts the conventional “best interests” standard (with all its potential for uncontrolled judicial discretion and hyper-litigiousness) toward a possibly more manageable criterion—“the reasonable welfare” of the child. This approach remains subject to the objection that switching labels may simply mask rather than solve problems. However, the proposed emphasis might reduce problems inherent in the traditional but largely porous “best interests” standard for decisions about children.

Conclusion

Both as a matter of substantive learning and as a matter of skill development, attempts at statutory drafting seem a useful educational exercise for students. This extraordinarily complex and controversial subject matter generates keen interest but also makes clarity and comprehensiveness exceedingly difficult. Like the students who drafted these proposals, legislators and courts are finding it hard but essential to come to grips with the reproductive revolution that is upon us.