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Commercial Surrogacy: Building Families Outside of Family Law

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ABSTRACT

Assisted Reproductive Technology continues to grow in popularity. Commercial surrogacy has proved no exception to this trend. However, lack of regulation at the international, federal, and state levels has given rise to a myriad of ethical and legal problems. This article considers the taxonomical question that any regulator must ask: Which field of law ought to be responsible for regulating this industry? It argues that although commercial surrogacy is often discussed as part of the family law rubric, on closer inspection, family law is fundamentally ill-suited to meet the needs of those involved in commercial surrogacy. By demonstrating the challenges with this regulatory paradigm, this article lays the groundwork so that scholars of other areas of law might explore this issue.

Keywords: assisted reproductive technology, families, regulation, commercial surrogacy, taxonomy

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I. INTRODUCTION

The commercial surrogacy industry is estimated to be worth about $2.3 billion worldwide.[1] Although it is unknown how many children are born each year through these arrangements, the amount spent on commercial surrogacy every year is testament to the enormous growth in this form of assisted reproductive technology since its inception in the mid-1980s, which is estimated to have risen by 1,162% globally between 2009–2013.[2] Despite this enormous growth in social use, however, legislative response has been consistently slow and vastly inconsistent. There is a dearth of international regulatory provisions,[3] and a similar absence at the federal level in the United States.[4]

At the state level, regulation is inconsistent. California, for example, is one of only eleven states to statutorily recognize the intended parents through a commercial surrogacy arrangement at the time of the child's birth.[5] Throughout the rest of the United States, state law is a hodgepodge of case law and partial statutes,[6] ranging from full prohibition of commercial surrogacy[7] to recognition of commercial surrogacy contingent on particular criteria being met. For example, some states disallow profit from commercial surrogacy,[8] require the intended parents to be married,[9] or prohibit the surrogate from being genetically related to the child.[10]

This spectrum of permissiveness to prohibition of commercial surrogacy is cross-continental.[11] Yet, as will be shown, these national and international inconsistencies have caused major ethical and legal dilemmas,

1. Jane Cottingham, *Babies, Borders, and Big Business*, 25 REPROD. HEALTH MATTERS 17, 17 (2017).

2. Mahua Sarkar, *When Maternity is Paid Work: Commercial Gestational Surrogacy at the Turn of the Twenty-First Century*, *in* WOMEN'S ILO: TRANSNATIONAL NETWORKS, GLOBAL LABOR STANDARDS AND GENDER EQUITY, 1919 TO PRESENT 340, 346 (Eileen Boris, et al. eds., 2018).

3. Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. PRIV. INT'L L. 627, 630 (2011).

4. *The United States Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, https://www.creativefamilyconnections.com/us-surrogacy-law-map (last visited Feb. 21, 2021).

5. *See The United States Surrogacy Law Map*, *supra* note 4 (for a comprehensive overview of surrogacy laws in the U.S.).

6. *Id.*

7. *See e.g.*, MICH. COMP. LAWS §722.855 (1988).

8. *See e.g.*, LA. STAT. ANN. § 1102 (2018).

9. *See e.g.*, FLA. STAT. ANN. §742.15 (1993).

10. *See e.g.*, KY. REV. STAT. ANN. § 199.590 (West 2005).

11. Jens M. Scherpe & Claire Fenton-Glynn, *Introduction* to EASTERN AND WESTERN PERSPECTIVES ON SURROGACY 1, 4–5 (Jen M. Scherpe et al. eds., 2019).

inspiring a number of leading academics in this field to call for reconsideration of the current regulatory landscape.[12]

What a suitable regulatory framework for the commercial surrogacy industry might be is currently an unanswered question. This article suggests that, at least in part, the debate has stagnated due to the common assumption that commercial surrogacy is a matter for family lawyers. Even a brief glance at the American and international literature in this field demonstrates that it is often produced by family law specialists.[13] It remains on family law syllabi at universities throughout the world and is frequently handled by such practitioners.

Although the relationship between family law and commercial surrogacy may seem so obvious as to be almost intuitive, the argument presented here is that, on deeper analysis, family law proves ill-equipped to regulate the commercial surrogacy industry. Yet, the more commercial surrogacy is assumed to be a matter of family law, the less likely it is that alternative, more productive possibilities might be explored—possibilities better-suited to the challenges of this industry which, experience has shown, is not going away. This article thus seeks to expose these challenges, thereby legitimating the move away from family law as the dominant regulatory influence of commercial surrogacy. The hope is that this analysis will pave the way for consideration of currently unexplored taxonomical alternatives, and what other, possibly less intuitive areas of law, may offer for such a regulatory framework.

II. THE NEED FOR REGULATION

Commercial surrogacy has been a matter of academic interest for decades. Since the notorious New Jersey case of *Matter of Baby M* in 1988,[14] where surrogate Mary Beth Whitehead fled the state with the child to whom she gave birth in an attempt to keep her, scholars have produced extensive literature in a diverse range of fields. At least initially, some of this literature tended strongly to favor prohibiting the commercial surrogacy industry.[15] Undeniably, there remains a strong school of thought

12. *See generally* Trimmings & Beaumont, *supra* note 3 at 647, Claire Fenton-Glynn, *Surrogacy: Why the World Needs Rules for 'Selling' Babies*, BBC (Apr. 16, 2019), https://www.bbc.com/news/health-47826356.

13. *See e.g.*, Martha Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1155 (2014), Jens M. Scherpe & Claire Fenton-Glynn, *Introduction*, *in* EASTERN AND WESTERN PERSPECTIVES ON SURROGACY, *supra* note 11, at 1.

14. *See* Matter of Baby M, 537 A.2d 1227 (1988).

15. *See* George W. Harris, *Surrogacy, Patriarchy and Contracts*, 6 PUB. AFFS. Q. 255, 266–67 (1992). *See also* Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J. L. & PUB. POL'Y 139, 145–47 (1990).

in favor of prohibition.[16] More and more, however, the problems with prohibition have been recognized. Intense theoretical debate remains regarding the morality of commercial surrogacy, including questions about commodification or where the limits of markets ought to lie.[17] However, the reality seems to be that, no matter how hard states try to prevent their citizens from undertaking these arrangements, the desperation of the intended parents,[18] combined with the ease with which this technology can be accessed in an increasingly globalized world, means these agreements continue to prosper.[19] If commercial surrogacy is inaccessible in their home state, because the law bans commercial surrogacy outright, renders prospective parents ineligible, or leaves them unable to find a surrogate by prohibiting arrangements for profit, prospective parents will simply travel to jurisdictions where these restrictions do not exist. Doing so often pushes them into the shadow of the law and has proved to be problematic on myriad counts.

For instance, commercial surrogacy tends to boom in developing nations. Though India has now closed its borders to foreign parents, it was at one time one of the most popular destinations for commercial surrogacy.[20] Now, it has been replaced by other unregulated alternative countries, including Panama, Kenya, and Ukraine.[21] For prospective parents from prohibitive nations, the only option may be to engage with surrogates in other nations, more often than not in the developing world. These surrogates often find themselves at a socio-economic, and cultural, disadvantage compared to the intended parents, thus they are operating in conditions where their choices are limited and thus leaving them more vulnerable to the imposition of undesirable or unknown terms.[22] These

16. *See generally* RENATE KLEIN, SURROGACY: A HUMAN RIGHTS VIOLATION 178 (Pauline Hopkins & Susan Hawthorne eds., 2017). *See also* MURIEL FABRE-MAGNAN, LA GESTATION POUR AUTRUI, 97 (2013) (ebook).

17. *See* Elizabeth S. Anderson, *Is Women's Labor a Commodity?* 19 PHILOS. PUB. AFFS. 71, 71 (1990), Kimberly M. Mutcherson, *Things That Money Can Buy: Reproductive Justice and the International Market for Gestational Surrogacy*, 40 N.C. J. INT'L L. 150, 150 (2018).

18. Intended parents are two individuals who are married and enter into an agreement providing they will be the parents of a child born to a surrogate through assisted conception.

19. Claire Fenton-Glynn, *Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements*, 24 MED. L. REV. 59, 60 (2016).

20. Virginie Rozée, et al., *The Social Paradoxes of Commercial Surrogacy in Developing Countries: India Before the New Law of 2018*, 20 BMC WOMEN'S HEALTH 234, 235 (2020), Amana Fontanella-Khan, *India, the Rent-a-Womb Capital of the World*, SLATE (Aug. 23, 2010), https://www.geneticsandsociety.org/article/india-rent-womb-capital-world.

21. Sarkar, *supra* note 2, at 345–346.

22. For instance, the difference between the economic profiles of gestational surrogates in the U.S., where agencies generally reject surrogates that are financially unstable, and the surrogates in India, where all but one reported 'acute financial desperation.' AMRITA PANDE, WOMBS IN LABOR: TRANSNATIONAL COMMERCIAL SURROGACY, 20 (2014). The consequences of this acute financial desperation are evidenced by accounts of surrogates signing contracts with a thumbprint as they could not write their name, *id.* at Appendix B, with only basic provisions translated for them, *id.* at 69.

disadvantages, combined with the international regulatory lacuna in which this industry is situated, means that domestic restrictions often shift the burden of commercial surrogacy onto women without clear rights to fall back on, further exacerbating their risk of exploitation. In addition, the possibility of black markets proliferating under such conditions cannot be ignored. Although domestic arrangements do not eliminate class or racial divides,[23] unavoidably, overall higher standards of welfare and medical regulation would at least allow for a better understanding of the risks involved and decrease the likelihood of fundamental rights violations going unchallenged.[24]

The biggest legal issues, however, arise from the private international law challenges caused by transnational arrangements in this highly globalized industry. Private international law challenges have given rise to major human rights issues regarding the children themselves.[25] As noted, the lack of international regulation allows the intended parents from restrictive states to more easily engage in "reproductive tourism," or travel to a jurisdiction where commercial surrogacy arrangements are unrestricted in order to hire a surrogate.[26] Challenges arise, however, when parents seek to return home with the baby or become registered as the baby's legal parents in a state that would not ordinarily recognize them as such.[27] This could be, for example, because the state does not permit commercial surrogacy or because the parents failed to comply with the restrictions the state imposes on domestic commercial surrogacy. Once the child is born, such states are left in an impossible position. On the one hand, recognizing the intended parents as the parents of the child severely undermines the law and further undercuts its coercive power, but on the other, to refuse to do so majorly disadvantages the infant, potentially even rendering them stateless.[28]

The extreme consequences of non-recognition mean states have frequently found ad hoc means of regulating. In the U.S., this has largely

23. Heather Dillaway, *Mothers for Others: A Race, Class, and Gender Analysis of Surrogacy*, 34(2) INT.'L J. SOCIO. FAM. 301, 312–319 (2008).

24. Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L. J. 1223, 1267–1269 (2013).

25. *See* Caitlyn Pryce, *Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem*, 23 IND. J. GLOB. LEGAL STUD. 925, 934 (2016).

26. Raywat Deonandan, *Recent Trends in Reproductive Tourism and International Surrogacy: Ethical Considerations and Challenges for Policy*, 8 RISK MGMT. HEALTHCARE POL'Y 111, 111 (2015).

27. *See e.g.*, Mennesson v. France, Eur. Ct. H.R. (2015), Labassee v. France, Eur. Ct. H.R. (2014) (both cases were heard by the European Court of Human Rights, which found the rights of the child had been violated when France, which prohibits surrogacy in all forms, refused to recognize the intended parents as the legal parents).

28. For instance, if the state where the child was born attributes citizenship only through *jus sanguinis* and not *jus soli*, and neither the destination nor the receiving jurisdiction will recognize their citizens as parents to the child.

been of the states' own volition, and in Europe, its supranational human rights court has demonstrated a willingness to step in and mandate ad hoc regulation where the interests of a child would otherwise be significantly jeopardized.[29] The comparative significance of these approaches cannot be understated.[30] The incoherency of an approach whereby the law says one thing but does another, and the consistency with which restrictions on the commercial surrogacy industry jeopardize the fundamental rights and needs of the child, are the primary sources of increasing calls for regulation.[31] Thus, this article proceeds assuming the undesirability of the current legal position.

III. ADOPTING A FUNCTIONAL APPROACH

As the need to regulate commercial surrogacy is increasingly accepted, the question necessarily becomes how best to tackle this industry. The taxonomical lens through which the law conceives of an issue and determines how it ought to be regulated is of critical importance. This lens affects the presumptions, standards, and arbitral mechanisms adopted in any given case. Despite the clear importance of having a coherent paradigm through which to structure regulation, what this paradigm should be remains unclear in the context of commercial surrogacy. Although exploration of what the correct paradigm should be is necessarily part of a far wider research question, this article adopts a narrower focus to demonstrate that the assumption that family law is the correct taxonomical framework to regulate commercial surrogacy is fundamentally problematic. Thus, United States jurisdictions must explore new avenues, with more internal taxonomical comparative work to establish whether other fields may be better suited to manage this growing market.

This article structures its analysis on Carl Schneider's seminal paper concerning what he describes as the five "functions" of family law.[32] Although it is not the only analysis available to discuss the function of family law, his exposition was chosen as the structural focus of this article because it has a myriad of advantages for the purposes of this discussion.

First, and perhaps foremost, Schneider is one of few authors to write from an American perspective, making this piece of scholarship the

29. *Mennesson* and *Labasse*, *supra* note 27.

30. *Id.*

31. RICHARD BLAUWHOFF & LISETTE FROHN, *International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law*, *in* FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW 212, 213 (Christophe Paulussen et al. eds., 2016).

32. Carl Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497 (1992).

obvious choice.[33] Though the family law paradigm impacts regulatory thinking far beyond this jurisdiction, this article focuses on the United States. Beyond this, however, Schneider's analysis is also the most useful piece for structuring an analysis of commercial surrogacy because it does not conform to the line of argument suggesting that family law has no discernible overarching goal or lacks object and purpose, and as such ought to focus instead on functionalism.[34] When asking which field ought to be taxonomically responsible for the regulation of a particular issue, a purely functionalist answer is not enormously helpful because it overlooks the importance of asking not only what the law does, but also how it does it.

By contrast, Schneider's analysis does not overlook how the law functions. This article argues that what is unique to family law are not the functions themselves, rather, it simply offers an exploration of how these functions operate in the particular context of family law and its unique norms and values. Unlike analyses structured around particular values or relationships pertinent only to family law,[35] Schneider's analysis does not preclude the potential application of these functions to other areas of law. One of the biggest challenges of commercial surrogacy regulation is that it sits at an intersection of law, human rights, science, and ethics.[36] As such, commercial surrogacy regulation raises issues from myriad regulatory spheres, with no consensus as to which discipline should be mainly responsible for it. This article argues against the mainstream approach of designating responsibility to family law. By adopting this "functional" approach, however, this article also provides a framework by which other, potentially more productive, alternatives might be considered in more practical, homogenous terms.

Schneider's analysis rests on five functions: (1) protectionist, (2) facilitative, (3) channeling, (4) arbitral, and (5) expressionist.[37] Taking each function in turn, this article will show that the traditional approaches of family law to each engender significant problems for the commercial surrogacy industry. Accepting it is unlikely that family law will lose its regulatory influence entirely, this article suggests that states must explore alternatives as they continue to grapple with regulatory challenges of the commercial surrogacy industry.

33. For example, as opposed to focusing on specific case law from England and Wales. *See generally* Alison Diduck, *What is Family Law For?* 64 CURRENT LEGAL PROBS. 287, 287 (2011), Brenda Hale, *The 8th Econ. and Soc. Rsch. Council Annual Lecture 1997: Private Lives and Public Duties: What is Family Law For?*, 20(2) J. SOC. WELFARE & FAM. L. 125, 125 (1998).

34. *See* John Dewar, *Family Law and its Discontents*, 14 INT.'L J. L., POL'Y, & FAM. 59, 80 (2000).

35. *See, e.g.*, JOHN EEKELAAR, FAMILY LAW AND PERSONAL LIFE 2 (2017) (describing how power structures within families shape the traditional family values and roles).

36. PAULA GERBER & KATIE O'BYRNE, SURROGACY, LAW AND HUMAN RIGHTS 1 (2016).

37. Schneider, *supra* note 32, at 497.

A. THE PROTECTIONIST FUNCTION

The first function of family law is protectionism or ensuring parties do not come to physical or psychological harm.[38] The involvement of systemically vulnerable groups, such as women and children, arguably heightens the importance of protectionism in commercial surrogacy. Given the well-known and clear concerns that arise with commercial surrogacy, particularly regarding exploitation and commodification, a legal paradigm responsive to such a need for protectionism may be thought particularly well-placed to manage it. The issue, however, is the paternalistic way family law has traditionally approached markets and the potential for exploitation and commodification they create.

1. Commercial Surrogacy

Traditionally, the family has been understood as diametrically opposed to markets.[39] Maintaining the separation between families and markets has been considered an important mechanism of protection.[40] Whilst the market is traditionally regarded as a selfish institution, the family and home are sanctuaries.[41] Therefore, the values these two spheres espouse are assumed to be irreconcilable. Where families conventionally promote reciprocal and unconditional love and care, markets encourage self-interest and personal gain.[42] Consequently, there is considerable concern about the implications of commercializing something as ostensibly private and intimate as procreation, with family law naturally erring strongly on the side of commercial prohibition.[43]

Different arguments have supported this prohibition. For Elizabeth Anderson, the issue with non-prohibition of commercial surrogacy is the irreconcilability of the values at stake.[44] Clearly, not all things can be measured in financial terms and there is no scale to fairly value the benefits involved in commercial surrogacy.[45] Moreover, such reductionism would not be desirable. Communities appreciate different goods through different modes of evaluation, and to deny this would be to deprive ourselves of positive valuative experiences.[46] There is no realistic and respectful means of valuing human interaction nor emotion in accordance with use value.[47]

38. *Id.*
39. Viviana Zelizer, *The Purchase of Intimacy*, 25(3) L. SOC. INQ. 817, 823 (2005). *See also* Frances Olsen, *Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983).
40. Zelizer, *supra* note 39, at 3.
41. Olsen, *supra* note 39, at 1498–99.
42. *Id.* at 1499–1500.
43. Alexander M. Capron & Margaret J. Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, 16 L. MED. & HEALTH CARE 34, 34 (1988).
44. *See* Anderson, *supra* note 17 at 72.
45. *Id.* at 77.
46. *Id.* at 72–73.
47. *Id.* at 81.

Margaret J. Radin's "domino theory" also expresses similar concerns.[48] Conceiving of human attributes as fungible, owned objects in any context, she argues, is harmful.[49] Even in transactions where money does not exchange hands, this approach runs the risk of blinding people to the other values at stake, ultimately leading to literal commodification.[50] Radin sees the harm of market values lying in their contagion and potential for proliferation, risking undermining other key aspects of human interaction, such as family and love.[51]

Clear rebuttals exist to such arguments. In response to Anderson, for instance, one could make the same remarks regarding doctors or teachers. Similarly, there is no clear evidence to support Radin's argument. Sex work, for example, one of the world's oldest occupations, does not seem to have degraded all sexual intimacy to meaninglessness. Despite this, however, the idea of such a dichotomy between the market and the family persists, exerting influence over family law. This is visible in the international resistance to paid adoption,[52] where there is notable reluctance by regulators to accept the reality that there are economic incentives involved—even in the face of clear evidence to the contrary.[53] This reluctance reflects the ideological commitment of family law to market resistance.

As previously discussed, however, prophylactic prohibition creates many problems when used as a strategy for regulation of commercial surrogacy. In addition, it is not entirely clear whether problems associated with commercial surrogacy, such as exploitation, invalid consent, or loss of reproductive autonomy, are inherent to it or whether proper regulation, along with comprehensive ex ante discussion, would make an ethical approach possible.[54] For family law to accept these arguments and embrace such a highly contractual and marketed phenomenon into its regulatory fold, however, would subvert some of its fundamental tenets. Introducing such a degree of inconsistency seems fundamentally problematic and makes responsivity more unlikely. This, again, strongly indicates the need to find an alternative legal paradigm.

48. MARGARET J. RADIN, CONTESTED COMMODITIES 99 (1996).
49. *Id.* at 88.
50. *Id.* at 101.
51. *Id.* at 9.
52. *See* Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, art. 32, May 29, 1993, 32 I.L.M. 1134.
53. *See* Michele Bratcher Goodwin, *Baby Markets*, *in* BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES 2, 4 (Michele Bratcher Goodwin ed., 2010).
54. *See e.g.*, Paul Arshagouni, *Be Fruitful and Multiply, By Other Means, If Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61(3) DEPAUL L. REV. 799, 799 (2012), Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J. L. & GENDER 391, 393 (2012),

2. Altruistic Surrogacy

One might think that a compromise might be to allow surrogacy exclusively in an altruistic form. The desirability of this approach is another live debate on which little consensus exists.[55] Although laws regarding solely altruistic forms of surrogacy have been adopted in other countries, for example in the U.K.,[56] these laws are not common in the United States. Altruistic surrogacy has been criticized for its perpetuation of the harmful idea that reproductive labor is not as difficult or valuable as traditional, productive efforts and thus is less deserving of payment or legal recognition, which has long been the target of criticism by feminists.[57] While altruistic surrogacy is often presented to ensure surrogates are not coerced due to a need for money, it is a fallacy to assume that other sources of coercion do not exist in noncommercial surrogacy arrangements. For example, surrogates are far more likely to be sourced from within the family in the absence of commercial incentive, but familial pressure can also be a source of coercion.

Practically speaking, the problems of legal inconsistency and uncertainty in prohibition also cannot be ignored. For instance, in the U.K. the law states that a parental order should be refused if the money exchanged exceeds reasonable expenses.[58] However, this has not been followed in practice.[59] The prevailing rationale is that to deny the intended parents legal status over their child under these circumstances would be to significantly disadvantage the child in a way states cannot reconcile with their obligations to protect them.[60] Rather than imposing this compromise on the courts, therefore, it may be preferable to seek an entirely fresh approach to regulation outside of family law.

B. THE FACILITATIVE FUNCTION

Schneider defines the facilitative function as the law's responsibility to provide legal mechanisms by which people can organize their lives as they see fit.[61] Parties should have a clear means by which they can express their autonomy, and have such values and decisions respected and enforced by

55. *See* Capron & Radin, *supra* note 43, Ruth Walker & Liezl Van Zyle, *Beyond Altruism: A Case for Compensated Surrogate Motherhood*, *in* BIOETHICS BEYOND ALTRUISM: DONATING AND TRANSFORMING HUMAN BIOLOGICAL MATERIALS 165, 165–66 (Rhonda Shaw ed., 2017).

56. Walker and Van Zyle, *supra* note 55.

57. MARILYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS 5 (1988).

58. Mary Welstead, *International Surrogacy: Arduous Journey to Parenthood*, 9 J. COMP. L. 298, 318 (2014).

59. *Id.*

60. *Id.*

61. Schneider, *supra* note 32, at 507.

the state.[62] Once more, however, it is not clear that family law can provide this facilitative function in the commercial surrogacy context.

Although very few factors unify how commercial surrogacy operates across the globe, these arrangements are facilitated almost invariably through contracts. Even in states where these contracts are not enforceable, it is still assumed that there will be some form of written document to which the parties can refer.[63] In many ways, this is unsurprising and should certainly be encouraged. Contracts play a vital role in the social ordering of almost all spheres, and in many ways, contracts are well-suited to facilitate the smooth execution of commercial surrogacy arrangements.

1. Flexibility

The primary benefit of a contract is its flexibility. Whilst there is no obligation to enter a contract, legally competent people can bind themselves however they see fit within law and public policy boundaries.[64] Commercial surrogacy arrangements are often highly bespoke and intricate in nature. For instance, some include details on the diet the surrogate is expected to follow.[65] The legal regulatory mechanism therefore requires scope for flexibility according to the specific needs of the parties, despite a background of uniform rules. This specification of needs seems to be the very essence of a contract.

Such flexibility can also recognize that different parties will want different things from their commercial surrogacy relationship. The classic contractual presumption is that if the benefits to a party do not outweigh the risks and problems, they would not have entered the agreement. This presumption is measured subjectively absent problems such as fraud or duress.[66] Given their different circumstances and motivations, the balance of what surrogates are willing to sacrifice, and what they expect to receive in return, can vary significantly. Contracts are designed to manage this variance. Although the state may be competent to manage common questions, such as those concerning insurance, many issues demand negotiation by the parties themselves—for example, striking a complex balance of what the surrogate is willing to submit to, and for how much. Again, the legal regulatory mechanism requires scope for flexibility and divergence according to the specific needs and desires of the parties, despite

62. *Id.*

63. Claire Fenton-Glynn, *England and Wales* from *The Tolerant Approach*, *in* EASTERN AND WESTERN PERSPECTIVES ON SURROGACY, *supra* note 11, at 118.

64. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 568–69 (1982).

65. *Top 10 Things You Might Not Realize Are in A Gestational Carrier Agreement*, SOUTHWEST SURROGACY, https://southwestsurro.com/blog/2018/1/30/top-10-things-you-might-not-realize-are-in-a-gestational-carrier-agreement (last visited Dec. 21, 2021).

66. Kennedy, *supra* note 64, at 577.

the application of uniform rules. Once more, this facilitative mechanism seems to be the very essence of a contract.

2. Certainty

A secondary benefit of contracts is their certainty, something those experiencing the turbulence of infertility may crave. The parties can have confidence in what they have agreed on, and so long as the provisions are lawful, they will be enforced in accordance with the parties' wishes, rather than be subject to the potentially prejudicial opinions of a judge. This allows the parties to plan more effectively in advance and feel secure in their undertaking. The possibility of contractual recourse ensures that the surrogate will not be left unpaid or with a baby she did not want, nor will the intended parents be empty-handed at the end of a long and costly process. This provides peace of mind. It also reduces the risk of opportunism, such as parties attempting to push the boundaries of demands against the other or exploiting the reluctance to litigate when the outcome is unknown.

It seems that any regulatory paradigm designed to regulate the commercial surrogacy industry must be willing to recognize the legitimacy of contracts and the critical facilitative role they play. Bitter experience has taught that the contracting process itself is vital to the smooth execution of commercial surrogacy arrangements.[67] Comprehensive ex ante discussion of thorny issues is the most likely way of avoiding disputes later down the line. A pro-life surrogate, for instance, should not enter into an arrangement with the intended parents who would prefer not to bring the pregnancy to full term in the case of a disabled child. Although attitudes towards these questions can be easily established through comprehensive discussion before the contract is signed, when the parties could easily part ways, once the surrogate is actually pregnant, these issues become intractable. Thus, although commercial surrogacy contracts are often demonized, their facilitative role is vital. This form of arrangement must be encouraged and recognized by any regulatory paradigm.

3. Contracts in Family Law

However, the necessity of contracts in commercial surrogacy presents a fundamental incompatibility with family law. Traditionally, family law has been hostile to the notion of private ordering because of its protectionist cornerstones.[68] Institutions such as marriage and parentage, for instance, have largely been assumed unadjustable. Though one must consent to enter them, parties adopt terms set by the state and not themselves. To suddenly introduce a phenomenon so intensely individualized and contractual,

67. London, *supra* note 54, at 421–22.

68. *See* Marcia Neave, *Resolving the Dilemma of Difference: A Critique of the Role of Private Ordering in Family Law*, 44 U. TORONTO L.J. 97, 97 (1994).

therefore, does not seem to fit naturally with what is expected of family law.

One could criticize this argument as an outdated presentation of family law attitudes. Though familial institutions were long organized as a matter of status rather than personal arrangement, their legal regulation evolved as their social purpose did. Academics have asked whether it is legitimate for the state to debar adult parties from amending the terms of their private relationship,[69] particularly given the historical use of institutions such as marriage to deprive women of their property and control, rather than protect, them.[70]

The late Twentieth Century did, to an extent, see a contractualization of family law, and a shift away from a status model.[71] The implications of this contractualization continue to be discussed and developed today.[72] Naturally, this shift is jurisdiction dependent, and the legal manifestations of the debate vary, however a particularly notable example is the recognition of private contracting between consenting adults in pre-nuptial agreements. Although not absolute, where enforced they mark an obvious shift away from a status-based approach to family law towards one that is far more contractual in nature.[73] Other examples of contracts in family law exist, for instance, separation agreements or agreements to arbitrate.[74] Though subject to public policy restrictions like any other contract, these arrangements allow parties to lay out, in some considerable detail, how they wish their property to be managed and distributed in case of separation. It might be questioned, therefore, whether it is truly the case that family law could not facilitate a commercial surrogacy contract with the extensive and bespoke terms it so often entails.

The involvement of a child is, however, the major difference between commercial surrogacy arrangements and most other forms of adult private ordering. Allowing parties to privately contract when children are involved often receives far more suspicion than pure property questions.[75] The obligations of parenthood are essentially inviolable. Not only is it for the state to define how the status of mother or father is to be attributed, but

69. *See* Stephen Cretney, *The Family and the Law—Status or Contract?*, 15 CHILD & FAM. L. Q. 403, 404 (2003).

70. Jana Singer, *Legal Regulation of Marriage: From Status to Contract and Back Again*, *in* FAMILY IMPACT SEMINAR, STRATEGIES TO STRENGTHEN MARRIAGE: WHAT DO WE KNOW? WHAT DO WE NEED TO KNOW?: PAPERS PRESENTED AT A FAMILY IMPACT SEMINAR ROUNDTABLE MEETING IN JUNE 129, 129–30 (1997).

71. Frederik Swennen, *Private Ordering in Family Law: A Global Perspective*, *in* CONTRACTUALIZATION OF FAMILY LAW: GLOBAL PERSPECTIVES 3 (Frederik Swennen ed., 2015).

72. *Id.*

73. Brian Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. L. 249, 266 (2010).

74. *Id.* at 249.

75. *See id.* at 260.

other than in exceptional circumstances, such as adoption, parties cannot opt out of the consequences of parenthood. For instance, it remains the parents' legal responsibility to care for the child, or to pay child support. Though issues like guardianship or parental responsibility can be adjusted, this requires judicial, not private, ordering.[76] The fear that allowing unsupervised arrangements would jeopardize the best interests of the child, particularly when they cannot speak for themselves, prevents the absolute contractualization of family law. Similarly, it likely would preclude the full recognition of these arrangements in commercial surrogacy.

Since one of the primary benefits of using contracts in the context of commercial surrogacy is certainty, this is unlikely to be achieved if family law is the regulatory paradigm. Although one is not yet even conceived at the time of contracting, the entire arrangement revolves around the possibility of a child. The idea that private ordering should be permitted to govern this phenomenon, therefore, appears questionable at best because of how rarely these arrangements are accepted and enforced.

Even to the extent that the relationship is recognized to be one that primarily operates between two adults, when contracts in this area are often subject to judicial oversight or adjustment, there is also a clear risk of uncertainty or even prejudice, once more undermining some of a contract's primary facilitative benefits.[77] The unsteady balance between contract and status in family law, therefore, seems problematic for an industry clearly in need of an approach rooted in the former. Although using contracts as a facilitative mechanism does not require leaving the parties entirely to their own devices, commercial surrogacy would seem better suited to a regulatory field that recognizes the dual importance of flexibility and protectionism and adopts different mechanisms of prevention. This further indicates that an alternative paradigm may be better suited to ensure commercial surrogacy's effective management.

C. THE CHANNELING FUNCTION

Before family law is entirely dismissed for its facilitative shortcomings, however, it should be determined how family law organizes and regulates its institutions if it does not rely on private ordering. The fact that the commercial surrogacy industry presently operates almost universally in contractual form does not mean that alternatives should not be explored, in fact, some of these alternatives may even be preferable. To examine this

76. *Id.* at 274.

77. Christopher Bailey, *Twenty-Five Years After Baby M: How Rules Can Bring Certainty to the World of Surrogacy Contracts*, 1(1) CHILD AND FAM. L.J. 1, 20 (2013), Anne Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 358 (2011).

question, therefore, it is necessary to introduce what Schneider describes as the channeling function of family law.[78]

The eponymous function of Schneider's analysis is closely linked to the concept of legal facilitation.[79] According to Schneider, the channeling function arises as the law creates and supports social institutions designed to serve desirable ends.[80] Though people are not forced to enter these social institutions, they are often incentivized to do so.[81] Conduct is prepatterned and expected.[82] Marriage and parenthood, for example, represent two such institutions. When the state lays out such clear and formally recognized boundaries, Schneider argues, people can organize their lives by entering institutions with clear and uniform consequences.[83] It is argued here, however, that in the context of commercial surrogacy, channeling does not provide a viable alternative, and thus cannot be used to support the traditional family law paradigm. Therefore, the conclusion remains that some form of contractual approach ought to be preferred.

1. Adoption Channel

Once the context of social institutions is considered, the reluctance to permit private ordering becomes clear: To allow such bespoke arrangements would be to undermine these fixed channels, and thus the protection and certainty they provide. If these clearly defined concepts are the framework in which family law operates, however, it is unsurprising that the field has struggled to manage the new issue of commercial surrogacy. Commercial surrogacy deliberately subverts traditional definitions of parentage, making it hard to see how these arrangements might be channeled effectively. Even channels that seem analogous, such as adoption, on closer inspection have proved unhelpful.[84]

Manifestly, commercial surrogacy and adoption are similar in that they propose alternative solutions to the question of infertility, and extensive international provisions already exist regarding the latter.[85] The Hague Conference on Private International Law did, however, consider the possibility of incorporating commercial surrogacy into its adoption regulation, concluding such an approach was not feasible.[86] Its rationale rested on the purposes of adoption and commercial surrogacy, which

78. Schneider, *supra* note 32, at 498.
79. *Id*. at 507.
80. *Id.* at 498.
81. *Id.*
82. *Id.* at 511.
83. *Id.* at 509.
84. Katherine Voskoboynik, *Clipping the Stork's Wings: Commercial Surrogacy Regulation and Its Impact on Fertility Tourism*, 26 IND. INT'L & COMP. L. REV. 336, 375–76 (2016).
85. *See e.g.*, RADIN *supra* note 48.
86. Voskoboynik, *supra* note 84.

although at first glance are very similar are, in reality, very different. Adoption, unlike surrogacy, is not a premeditated contractual arrangement.[87] As noted, the Convention also does not allow adoption for profit.[88] Additionally, there are significant demographic differences. Surrogates are likely to have more control over their reproductive choices when they are not constrained by the pressures of an existing pregnancy,[89] acting at least in part out of altruism toward the intended parents,[90] rather than out of a belief they cannot care for the child. They are also not necessarily related to the child.[91] These reasons, among many others, make it increasingly clear that commercial surrogacy cannot be straightforwardly transplanted into the regulatory channel of adoption—or indeed, any pre-existing disciplinary channel given the rigidity of traditional familial definitions.

It is, of course, possible that family law could create a new channel to respond to changed social norms and reflect the increasing use and legitimation of this form of assisted reproduction. Indeed, it is highly likely that this will be necessary to deal with the question of attribution of parentage as this industry continues to grow. It is not clear, however, that such a channeled approach is suitable to manage the relationship between the adult parties involved.

2. Standard Form Contracts

Despite the purported rejection of contractual facilitation by family law, it seems that a fair analogy might in fact be drawn between what Schneider describes as the channeling function,[92] and a standard form contract. The adhesion, or standard form contract, refers to those contracts where arrangements are mass produced and universal. They are often established at industry level and bear clear similarities to a pre-defined channel.[93] Just as familial constructs such as marriage or adoption bring with them fixed obligations,[94] standard form contracts also represent arrangements with little scope for contracting out or rendering the contracts

87. Seema Mohapatra, *Adopting an International Convention on Surrogacy—A Lesson from Intercountry Adoption*, 13(1) LOY. U. CHI. L.J. 25, 38–39 (2015).

88. RADIN, *supra* note 48.

89. Elly Teman, *The Social Construction of Surrogacy Research: Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood*, 67 SOC. SCI. MED 1104, 1108 (2008).

90. Janice Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61(1) J. SOC. ISSUES 21, 30 (2005).

91. Mohapatra, *supra* note 87.

92. Schneider, *supra* note 32, at 498.

93. They are particularly common, for instance, in the construction industry. Luke Farley, *Anatomy of a Standard Form Construction Contract*, A.B.A. (July 1, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/summer/anatomy-of-standard-form/.

94. For instance, obligations regarding asset distribution or responsibility for the protection of the child's welfare.

more bespoke.[95] With both, the choice is to enter the arrangement—not the terms on which it operates.

It is true that a critical way of ensuring the smooth execution of commercial surrogacy arrangements is to make sure that all the potential issues are addressed ex ante. The parties need to know what they will do regarding genetic testing, for instance, or their response in the face of an adverse outcome. A channel akin to a standard form contract would be a clear way of ensuring that no such risks were overlooked or missed. It is not just important, however, that all these issues are addressed. The solutions must also reflect their shared values and the way in which the parties hope the process is likely to evolve. As such, terms need to be set autonomously by the parties themselves.[96]

This is particularly so when the sensitivity of commercial surrogacy is taken into consideration. Surrogacy raises questions surrounding abortion, selective reduction, and personal decisions about how the intended parents want their baby to be gestated and to what extent the surrogate is willing to accommodate them. On such questions, whether these be the right to life or simply the diet of the surrogate, there is no objectively correct answer or widespread consensus on which the state could rely to set the channel. Commercial surrogacy contracts involve highly specific, intensely private, ethical, and potentially religious determinations into which the state should not intrude, much less by establishing a channel that purports to answer these questions for them.

Only a genuinely mutual agreement, therefore, will represent the legitimate exercise of autonomy necessary to validate these often highly intrusive contracts. Parties need to discuss their views between themselves and reach solutions that reflect their subjective perspectives on such matters, rather than have terms and solutions imposed on them. Thus, the objectivity of a channeled or standard form arrangement is unlikely to prove effective. Although a possible alternative could provide for states to lay out the provisions to be included in the contract, with the precise terms determined by the parties themselves, this is also not usually a feature of family law, which commits itself to monolithic channels.[97] Once more, the practical mechanisms offered by family law seem to fall short of what the commercial surrogacy industry needs. Whether described as a channel or in standard-form contract terms, if there is a limited scope for the parties to individualize these arrangements, family law cannot be a suitable or effective paradigm. Thus, the conclusion that a form of contractual regulation is most likely to be effective withstands and the shortcomings of family law remain a concern.

95. *What Are Standard Form Contracts*, FAIR CONTRACTS, https://faircontracts.org/what-are-standard-form-contracts/ (last visited Dec. 20, 2021).

96. London, *supra* note 54, at 402.

97. Schneider, *supra* note 32, at 500.

D. THE ARBITRAL FUNCTION

The arbitral function is relatively simple: It posits that the law ought to give parties a means of resolving disputes.[98] This involves the provision of a forum in which to do so and provides clear standards for making such decisions.[99] If family law requires that commercial surrogacy contracts be considered invalid, as this article suggests should be the case, basic contract law dictates that courts will not have jurisdiction over them. This would present a key issue if disagreements were to arise between the parties, as they would not be able to enforce any terms or protections agreed therein.[100]

The analysis here, however, goes further. The traditional arbitral standard of the family law court, which was turned to in *Matter of Baby M*, the first legal case of a surrogate refusing to relinquish a child,[101] is the "best interests of the child" test.[102] Many academics have written in favor of ensuring this test's centrality in any regulatory approach adopted for commercial surrogacy.[103] However, it is ill-equipped to manage the unusual context of surrogacy. The standard protects only in name and not in substance, thus, its abandonment does not seem concerning. Indeed, the problems it creates seem to support that we ought to look for an alternative regulatory field with new ways of meeting the arbitral function.

1. The Unsuitability of the "Best Interests" Test

i. Non-relinquishment Dispute

Two main forms of disagreement may arise between the parties regarding a surrogacy arrangement. First is the rare risk that the surrogate will feel unable to relinquish the child. Courts have dealt with this before, as evidenced by the *Matter of Baby M* case, and it is certainly something that any regulatory paradigm would have to be able to grapple with.[104] Under the family law model, resolution of this issue would require application of the best interest test. This test is a cornerstone of international customary and family law throughout the world, so would be the obvious arbitral standard to make this determination.[105] This does not mean, however, that it is well-equipped for these unusual circumstances.

98. Schneider, *supra* note 32, at 497.
99. *Id.* at 505.
100. Jennifer Jackson, *California Egg Toss: The High Costs of Avoiding Unenforceable Surrogacy Contracts*, 15(2) J. HIGH TECH. L. 230, 238 (2015).
101. *See e.g.*, Matter of Baby M, *supra* note 14.
102. CHILD WELFARE INFO. GATEWAY & CHILD.'S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf.
103. Annika Keys Boyce, *Protecting the Voiceless: Rights of the Child in Transnational Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT'L L. REV. 649, 669 (2013).
104. *See e.g.*, Jackson *supra* note 100, Johnson v. Calvert, 851 P.2d 776, 778 (1993).
105. Article 3 of the United Nations Convention on the Rights of the Child states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests

Despite its clear sentiment, widespread use, and supposedly determinative nature, "best interests" tests have long been subject to criticism.[106] Major apprehension arises as to how such a vague notion can be applied to constructively make such significant decisions about a child's life.[107] Though it might be felt that this discretion is justified if it protects both the child and surrogate, before this claim can be made it is clearly necessary to consider what it is that the courts are actually taking into consideration when making this determination. Significant concerns, as expounded below, can be expressed in this regard.

In executing their discretion, it is axiomatic that the courts must remain within the boundaries of legitimacy. Over the years, there has been some clarification on what factors can be legitimately considered when applying this standard. For instance, while the psychological needs of the child, their preferences, and the stability of a prospective home will all be taken into consideration, social stereotypes, parental demands, or cultural traditions should not.[108] As with any judicial ruling, the personal views and prejudices of a court should also be disregarded.

There is concern, however, that this has not always been respected in the context of surrogacy and that U.S. judges have manipulated the flexibility of the best interest test to incorporate their prejudices.[109] Kelly Oliver suggests that implicit in judges' reasoning is the belief that surrogates, who are generally of a lower socio-economic status than the intended parents, are less capable of caring for a child.[110] For example, scholars posit that in the *Matter of Baby M* case, the relative financial instability of the surrogate and their contempt for the conventionally middle-class practice of psychotherapy, played a strong role in the unfavorable decision against them.[111] The likelihood of those less financially advantaged being able to afford experts to support claims of prejudice against them is also slim, once again leading to suggestions that the system is pitted against them. If true, these prejudices should not be camouflaged and justified through the best interests test. These criticisms also arise with the best interests test in conventional custody cases,[112] however, the risks are heightened within commercial surrogacy, where

of the child shall be a primary consideration." United Nations Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3.

106. Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 228 (1975).

107. *Id.* at 229.

108. Christina Fox, *Contracting for Arbitration in Custody Disputes: Parental Autonomy vs. State Responsibility*, 12(2) CARDOZO J. CONFLICT RESOL. 547, 549 (2010).

109. Kelly Oliver, *Marxism and Surrogacy*, 4(3) ETHICS & REPROD. 95, 98 (1994).

110. *Id.* at 100–101.

111. *See* Matter of Baby M, *supra* note 14, at 458.

112. Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L. Q. 815, 821 (1999).

there is no shared pool of assets and there commonly is an economic imbalance between the parties.

Some scholars have also taken this analysis beyond the boundaries of class. A judicial inclination to enforce gestational surrogacy can also be viewed to represent racial bias.[113] Should a surrogate of color change their mind, Muriel Fabre-Magnan argues that judges are inclined to find against them since they generally will not share the child's ethnic profile.[114] The visual difference between races, Fabre-Magnan posits, further reduces the likelihood that the judge will perceive the surrogate as the true parent.[115] This reflects societal beliefs that still see race prejudicially, and supports the suggestion that the best interests test is not currently being applied fairly in all jurisdictions.

Problems with prejudicial implementation do not necessarily justify the abandonment of the test as an arbitral standard. Rather, the focus should be defining which factors to take into account, and whether the test can be meaningfully applied to avoid these issues. Because surrogate born children are a blank slate, however, the difficulties with this test seem inescapable. Even without prejudice, there is no clear way to establish what is in their 'best interests'.

Compared to ordinary custody proceedings, a non-relinquishment dispute between a surrogate and the intended parents is much more likely to arise at, or shortly after, birth. This is simply a product of the nature of these arrangements. Though of course a surrogate could experience doubt or regret about her decision at any point in life, they are most likely to pose a challenge to the intended parents' custody at the moment they are confronted with relinquishment of the child and its realities.

If properly applied, the best interest test can be effective for older children, who already have clear routines and established relationships. They can express their opinion if they are old enough, and even where they are not, a *guardian ad litem* or equivalent can assess them *in situ* and provide expert opinion as to where they appear most settled or happy.[116] By contrast, it is almost impossible to determine where a new baby would be best placed, no matter how expert or experienced a family law judge may be in applying the test. This is due to a myriad of reasons. For instance, the child's bond with both the intended and surrogate parent(s) is likely to have suffered disruptions as a natural byproduct of the surrogacy process. In addition, although the surrogate is the one who gives birth to the child,

113. FABRE-MAGNAN, *supra* note 16, at 1.
114. *Id.*
115. *Id.*
116. Karen Saywitz, et al., *Interviewing Children in Custody Cases: Implications of Research and Policy for Practice*, 28 BEHAV. SCI. & L. 542, 542 (2010).

lactation therapy, which is known to facilitate emotional security, makes it possible for the intended mother to breastfeed the infant.[117]

Although it is legitimate to take the child's future potential happiness into account, there would also be a very fine line, if one can be drawn at all, between providing the child with resources they need to live comfortably and succumbing to the prejudices described above. Even if the intended parents are more affluent, and able to afford opportunities the surrogate may not, this does not necessarily mean that the child will be happier or more well-rounded with them. Child psychologists often comment that whilst parents may get somewhat carried away with the material provisions they make for their children, children need love more than anything else.[118] There is no way to know whether richer parents will provide a better life for a child. While the surrogate's home and surrounding circumstances could be assessed to determine the child's wellbeing, unless the intended parents have already used surrogacy in the past, there is no way of doing so for them.

ii. Disagreement Between the Parties

The second form of dispute that surrogacy contracts risk generating concerns the very terms of the arrangement. The emotionally charged and highly sensitive nature of the undertaking makes it highly likely that there may be disputes or disagreements during the pregnancy. In this regard, the traditional attitudes of family courts toward interventionism could prove problematic. In addition, the mischaracterization of the surrogate-parent relationship under family law could render this field ineffective for surrogacy regulation.

Traditionally, family law discourages citizens from having recourse to the legal system to resolve their disputes and disagreements.[119] It is not suggested here that parties to these contracts should rely on the law to resolve every minor challenge, but it is also critical that parties are not distanced from these rights. Using family law as the regulatory paradigm for commercial surrogacy poses a risk of distancing surrogates from their rights because the preservation of the family as a private sphere means the law interferes only when absolutely necessary. Often, a more hands-off approach is preferred, assuming that the parties are best equipped to resolve the issues themselves. There is a reluctance to adopt such formalism into

117. Nicole Else-Quest et al., *Breastfeeding, Bonding, and the Mother-Infant Relationship*, 49 MERRILL PALMER Q. 495, 512–13 (2003).

118. Robert Winston & Rebecca Chicot, *The Importance of Early Bonding on the Long-Term Mental Health and Resilience of Children*, 8(1) LONDON J. PRIMARY CARE 12, 13 (2016).

119. This is visible, for instance, in the cross-jurisdictional popularity of mandatory mediation within family law. Noel Semple, *Mandatory Family Mediation and the Settlement Mission: A Feminist Critique*, 24 CAN. J. WOMEN & L. 207, 210–211 (2012).

the family relationship until it has broken down beyond repair.[120] If there is a chance that the vestigial bonds between the parties can resolve the issue, rather than the courts, family law prefers such a mechanism for dispute resolution.[121]

Of course, the law should not become a substitute for love and trust within familial relationships. This would be a loss to society and traditional familial institutions such as marriage. To use a field rooted in this premise to regulate commercial surrogacy, however, is to misconceive the nature of the surrogacy relationship. Particularly in its commercial form, surrogates and the intended parents are often strangers prior to the commencement of the process. They are introduced precisely to start a surrogacy journey together. Though some form close bonds with their the intended parents, and indeed may feel akin to a family, there is no formal relationship between them. There is no customary expectation of love and loyalty as between family members. Though this might be encouraged by the surrogacy agency or brokers, it is not supported by strong social norms or practice.

In reality, surrogates are more like an adjunct to a pre-existing family unit rather than a fully integrated member. There is an anomalous financial relationship between them and the surrogate; the knowledge that even if they have become family-esque, they were brought together for a short time by a specific, essentially instrumental, purpose. The responsibility and acute emotional vulnerability of both sides make it difficult to fully characterize this relationship as familial. It is hard to forget that they are fundamentally tied to contractual demands and a rigidity of obligation that sets the relationship apart from any genuine familial bond. It is open to question whether it is fair to subject them to a sphere that is reluctant to protect their rights formally on this basis or attempts to mold their relationship into something it is not.

Kellie Carter Jackson's narrative of her grandmother's experience of being a domestic worker in an affluent household illustrates these concerns.[122] Domestic work is another example of a role in which the line between commercial employee and family member becomes blurred. Because of this, Jackson argues that the disadvantages that her grandmother faced were disguised.[123] For example, her commitment and diligence was assumed to be a product of quasi-maternal altruism, rather than understood as a result of problematic working conditions.[124] By conflating workers

120. *Id.* at 209–210.
121. Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 42 (2006).
122. Kellie Carter Jackson, *"She Was a Member of the Family": Ethel Phillips, Domestic Labor, and Employer Perceptions,* 45 WOMEN'S STUD. Q. 160, 160 (2017).
123. *Id.* at 170.
124. *Id.*

with family members, they are burdened with expectations of altruism and selflessness—with no obligation on their employer to reciprocate.[125]

The implicit power imbalance in the surrogate-intended parent relationship rests on the fact that the surrogate is being paid by the intended parents and may be rejected by them following the birth of the child. Yet, this issue is overlooked by family law. Family law disempowers and distances surrogates from their legal rights by assuming the relationship between the surrogate and the intended parents extends beyond the commercial, when it may do so with little other than a label, or not at all. It also assumes that all surrogates desire a relationship with the intended parents so intimate as to be potentially familial, when this is not always the case. It therefore may be contrary to the surrogate's interests to force themselves to be viewed as some extended family member or to attempt to legitimate their autonomous decisions through pre-existing but falsely representative family structures. Though states may wish to encourage a positive relationship between the surrogate and the intended parents, they ought to be cautious about how far they are willing to make this a matter of law.

Moreover, using family law as the arbitral paradigm risks placing a surrogate in a difficult position. The traditional reluctance of courts to interfere in these relationships is largely based on the assumption that wherever possible, the state should not interfere in private family affairs.[126] By making these arrangements unenforceable or informalized in the name of protecting the family, however, the surrogate becomes trapped in a vicious cycle. She is not a family member and, therefore, cannot necessarily fall back on the presumed mutual respect and transparent discussion that the courts assume exists in traditional families. However, by refusing to enforce these arrangements, family law also prevents surrogates from accessing legal means of recourse and, as such, may feel hesitant to try to enforce their rights.

Family law's preference for non-intervention simultaneously overlooks the distinctive features of the surrogacy relationship that sets it apart from ordinary family and leaves surrogates without formal remedy. If the law is meant to protect these parties, this should not be overlooked. An arbitral paradigm, therefore, needs to more aptly characterize the surrogacy relationship and respond accordingly, and provide a label and institution that more closely captures the reality of the relational dynamic.

125. Anna Olsen, *Are Domestic Workers Really Just "One of the Family"?*, ILO (May 26, 2015), https://news.trust.org/item/20150526085246-vd6jn/.

126. Hamilton, *supra* note 121.

E. THE EXPRESSIVE FUNCTION

The final function of Schneider's analysis is the expressive function.[127] According to Schneider, there are two strands to this function within family law: (1) giving citizens a voice by which they may speak, and (2) molding citizens' behavior to fit with social expectations and norms.[128] Taking these arguments into consideration, coupled with the idea detailed throughout this article that family law requires the rejection of surrogacy in its commercial form, would appear to create a worst case scenario for protecting surrogates' rights.

One of the main reasons why commercial surrogacy regulation is increasingly being introduced in states around the world is because people have demonstrated that they will not comply with prohibition. Prospective parents clearly enter surrogacy arrangements despite the risks, and, contrary to the assumptions of the expressive approach, experience suggests the law will not stop them. Under this scenario, the outcome will be the perpetuation of problematic situations where citizens are not being heard and are also clearly not being molded in accordance with the values of the state. Regulators seek to move away from this manifestly unsatisfactory status quo, but family law norms appear to fetter them from being able to do so. The challenges of this function thus bring the argument of this article back full circle, emphasizing the need to find an alternative regulatory paradigm to adequately manage the commercial surrogacy industry.

IV. COMPLETE ABANDONMENT OF FAMILY LAW?

Despite the arguments presented here, it is important to accept that family law is unlikely to be entirely abandoned. The final, and to some extent most important, stage of these arrangements is the transfer of custody to the intended parents. Even in states where these contracts are prima facie enforceable, such as California, it is necessary to acquire a pre-birth order from family court in order to do so.[129] This requirement exists due to the fact that attribution of parentage is a matter for state sovereignty and cannot be relinquished through a private law mechanism, even with the consent of both sides. It is difficult to imagine that the resolution of any dispute arising at this stage would be left to any court other than family court.

As argued above, it is critical not to assume that the surrogate-intended parent arrangement will result in a genuinely familial relationship, or that family law is the correct paradigm to regulate the commercial surrogacy process in its entirety. Family law can retain a vestigial role without

127. Schneider, *supra* note 32, at 498.
128. *Id.*
129. CAL. FAM. CODE §7962 (West 2013).

exercising jurisdiction over the entire commercial surrogacy arrangement. Similarly, the inability of other spheres of law to deal with this issue should not deter scholars and practitioners from considering what they might have to offer regarding regulation of other aspects of the surrogacy process. More expansive, collaborative legal thinking is necessary to making progress in effectively managing this industry. The goal of this article has been to lay the groundwork for a cross-disciplinary approach.

V. CONCLUSION

Commercial surrogacy is an industry lacking consensus at almost every level: morally, socially, and legally. The risk of a state violating the fundamental rights of any of the parties involved must be mitigated and the current regulatory scheme's legal inconsistencies must be addressed. However, this article has argued that the answer to that question rests on finding which legal paradigm ought to regulate this industry. Traditionally, family law has been assumed to be a primary contender for this role. Through a functional analysis, however, this article has argued that it is fundamentally ill-suited to regulate commercial surrogacy.

To the extent that regulatory thinking is confined to family law, legally incoherent or unsatisfactory solutions seem inevitable. Though leaving behind a paradigm of thought that has dominated the academic literature in this field for so long may seem daunting, it is not only desirable, but necessary. Other fields traditionally overlooked or side-lined in commercial surrogacy regulation, such as labor, tort, or medical law, should be explored. Only with creative thinking will a satisfactory and functional solution to the challenge of regulating this field be achieved to provide surrogates with the protection they sorely need. The functional model of analysis adopted here provides considerable scope for this much needed internal comparative work. This article has argued for future taxonomical discussion to not be so constrained by family law norms and presumptions. Instead, regulators must look to the wider legal discipline to consider whether alternative approaches may facilitate more satisfactory solutions for the regulation of commercial surrogacy.