Emerging Legal and Ethical Concerns in Modern Surrogacy

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Abstract

Surrogacy at its start represented a revolutionary medical advancement that could help more women start a family. But as it developed in response to incredible demand, legal regulation was forced to play catch-up. Today, surrogacy occupies a contested space in the world of reproductive autonomy. The expansion of assisted reproductive technologies has exposed unresolved ethical and legal tensions concerning bodily autonomy, exploitation, parentage, and the commodification of reproduction. This article will examine how the legal frameworks governing surrogacy affect the lives of the women who carry the fetus, and the women who pay for the service. I will delve into several regulatory approaches and explore persistent challenges, including disparities in bargaining power, cross-border surrogacy, and commodification. By situating surrogacy within broader debates about reproductive justice and market demand, this article argues that existing legal regimes inadequately address the ethical complexities of surrogacy agreements. It concludes by exploring several guiding principles for a more ethically just legal framework that protects surrogates from exploitation while respecting reproductive choice and ensuring stability for children born of surrogacy.

Introduction

In September of 2025, California venture capitalist Cindy Bi publicly accused her former surrogate of murder after she miscarried Cindy's embryo. Besides racking up hundreds of thousands of dollars in legal fees, Bi launched a virtual harassment campaign that had strangers calling for the death penalty for the surrogate, as well as the removal of her biological son. Bi had maintained close personal contact with her surrogate for the duration of the pregnancy, asking for specific updates on the health of the baby, details about the surrogate's personal life,

and providing her with specific dietary plans. After her son's death however, Bi refused to see the surrogate in the hospital, and accused her of causing the miscarriage by engaging in rough intercourse.[1] Bi's case reveals massive gaps in the surrogacy industry, constitutional rights, and labor law. Surrogacy was made possible in part by a constitutionally enshrined floor on reproductive rights, but *Dobbs v. Jackson Women's Health Organization*, the case that overturned *Roe v. Wade*, has led to variation in state laws concerning fetal personhood and access to abortion. Therefore, a renewed analysis of the multi-billion-dollar surrogacy industry becomes all the more pressing. In this article, I will examine three legal concerns in surrogacy law that are presently incoherent and insufficient to protect intended parents, babies, and surrogates. First, I will discuss the impacts of fetal personhood laws on conflicts within the surrogacy industry. Second, labor and employment regulation for surrogates and basic worker protections. Third, I will employ feminist legal theory to explore some questions of reproductive justice that the field has long attempted to answer. These debates include the topic of whether surrogacy is an example of autonomy and ownership over reproductive processes, or commodification that considers the womb and the baby as property. Finally, I conclude with discussion on wider regulatory consequences and policy recommendations.

The concerns raised in this essay require consideration by policymakers and legal scholars. Thousands of women a year serve as gestational carriers, and each one of these cases can carry health risks for the surrogate and the fetus. Pregnancy can be highly unpredictable, and carriers can suffer any number of complications without access to medical leave or workers' compensation, especially if they are working another job. In some states, the routine destruction

[1] Emi Nietfeld, *The Baby Died. Whose Fault Is It?*, WIRED (Sept. 3, 2025).

of frozen embryos can be considered murder if the court steps in. To be clear, this article does not aim to condemn surrogacy entirely. Surrogacy represents a modern, scientific answer to individuals seeking alternative pathways to parenthood. The current regulation is haphazard, and drawing on feminist legal theory, this article will present a number of solutions that may serve to keep surrogacy a viable reproductive option. These solutions are to classify surrogates as workers at the federal level- ensuring fair compensation and collective bargaining rights, to prohibit abortion clauses in states that have criminalized abortion, require that surrogates retain final say in any medical decisions concerning their health and well-being, and allow surrogacy to be governed by the laws of the state in which the contract was signed. Present inconsistencies do a disservice to intended parents, surrogates, and babies, and to the legal system itself. A state-to-state quilt of patched-together laws on reproductive rights is not sustainable, and once we confront this reality, there is an incredible opportunity for progress.

Part I: Fetal Personhood

The Supreme Court made *Dobbs v. Jackson Women's Health Organization* a question concerning the constitutional right to abortion, as opposed to the constitutional right to bodily autonomy. Justice Alito, joined by Justices Thomas, Gorsuch, Kavanaugh, Brrett, and Roberts then applied the Glucksberg Test to this already narrow framing to conclude that abortion is "not deeply rooted in the nation's history" nor necessary for "ordered liberty."[2] Before *Dobbs*, abortion rights during the first trimester were guaranteed. Without constitutional protections for reproductive assistance, states could ban the practice entirely. In LePage v. Center for Reproductive Medicine, the Alabama Supreme Court described frozen embryos as minors under the Wrongful Death of a

[2] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

Minor Act. The case was brought by James and Emily LePage, a couple whose embryos were accidentally destroyed in a fertility clinic when a patient went into the storage freezer and dropped them.[3] Alabama Code § 6-5-391 classified unborn children as minors, and the court held that an unborn child did not necessarily require that the fetus be in a womb.[44] This meant that frozen embryos could be considered minors. This decision caused several fertility clinics in the state to halt IVF services entirely, concerned with potential legal liability, leaving intended parents confused and scrambling for alternatives.[5,6,7] In response, Alabama introduced emergency legislation to give immunity to clinics that provided IVF services, but they did not overturn the *LePage* decision. Over a dozen states have introduced some level of personhood laws for embryos and/or fetuses.[8] Predictably, these are often the same states that have the strictest restrictions on abortion. This decision is emblematic of a post-*Dobbs* world and reveals an incoherence in how the law treats surrogacy law. In this section, I highlight some key moments of the development of fetal personhood laws and explore some provisions, clauses, and cases that may be threatened by the current status of fetal personhood.

Feticide laws are not novel, statutes have been enacted in several states dating back to the 1980's, but these were meant to act alongside a nationwide right to abortion that was established in *Roe v. Wade* in 1973 and *Planned Parenthood v. Casey* in 1992. Prior to *Dobbs,* states were not

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[3] *LePage v. Ctr. for Reprod. Med.*, No. SC-2022-0579 (Ala. Feb. 16, 2024).
[4]ALA. CODE § 6-5-391 (2024).
[5] Alice Miranda Ollstein, *Alabama Ruling Highlights How Far States Can Take Fetal Personhood*, POLITICO (Feb. 29, 2024)
[6] Josephine Ross, *Legal Consequences of the Fetal Personhood Movement*, 34 CORNELL J.L. & PUB. POL'Y 1 (2025).
[7] Planned Parenthood Action Fund, *The Growing Threat of Fetal Personhood Measures Across the Country* (2024).
[8] Ryland Barton, *Lawmakers in More Than a Dozen States Are Considering Fetal Personhood Bills*, NPR (Feb. 28, 2024).

able to extend complete legal personhood to embryos, because doing so would violate the right to abortion.[9,10] The Supreme Court eliminated constitutional limits on personhood laws while implying a reevaluation of other precedents. Melissa Murray, a professor at NYU Law, asserts that *Dobbs* endangers due process.[11] She points out that Justice Clarence Thomas invites a reconsideration of cases that protect access to contraceptives (*Griswold v. Connecticut)*, marriage (*Obergefell v. Hodges)*, and sexual relations (*Lawrence v. Texas)*. Surrogacy relies on due process guarantees that Justice Thomas suggests we dismantle entirely. While the *Dobbs* decision does not criminalize abortion, it does allow state courts to make their own rulings on the issue of fetal personhood. Some states have changed their own constitutions to protect access to abortion while others have enacted varying levels of abortion bans.[12] The emergence of conflicting state approaches compounds the already divergent state legislation on surrogacy. Some agencies encourage people to choose from a list of states that are more "friendly" to surrogacy contracts, but there is wide variation even within that list.[13] Contractual clauses on anything from medical authority to selective reduction may be treated kindly in one state, or as a serious crime in another. States including Idaho, Texas, and Alabama have passed laws that ban out-of-state travel for abortion, and the framework of extraterritorial crimes can be applied by those states for surrogacy arrangements. While judges might be able to avoid finding a constitutional answer in individual cases, the gaps in regulation will only grow, and with them, the necessity to find answers to a few primary questions. These include if an embryo should be treated as a person in the case of a wrongful death suit, or property, and if it can be treated as both, what motivations

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[9] 1986 Minn. Laws ch. 388.
[10] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).
[11] Melissa Murray, *Dobbs and Democracy*, 137 HARV. L. REV. 2 (2023).
[12] Ctr. for Reprod. Rights, *Abortion Laws by State* (2025).
[13] Hatch Surrogacy, *Best States for Surrogacy* (2025).

exist for the state to enable surrogacy, how can they protect fetal life *and* surrogates from exploitation. The position that an embryo has full personhood but is also considered property in the reproductive industry is irreconcilable, and makes contracts in many states unenforceable. Until these contradictions are resolved, surrogacy will be legally unsustainable, as it relies on already shaky foundations that Justice Thomas invites us to tear down. Legal oversights concerning reproductive labor manifest in exclusion from necessary protections.

Part II: Labor Law

Surrogates make a small fraction of the profit generated from surrogacy services and are usually classified as contractors, which limits the protections they have access to. One important and efficient way to protect surrogates is to ensure that they receive employment protections. Surrogacy is an expensive service, and over 1,000 births a year occurring via gestational surrogacy.[14] Socially conditioned understandings of the role of women and mothers in childbearing characterize surrogacy as a selfless gift or act of service. Anthropologist Elly Teman writes in her article, Surrogacy and the Politics of Commodification, about how researchers tend to sustain the assumption that women are naturally inclined to childbearing and motherhood.[15] This characterization does not have to be inaccurate in every case, but it takes away from the reality of surrogacy as productive and demanding work. Surrogacy contracts tend to exert control that is typical of a strict employer/employee relationships, including limits on travel, social media use, alcohol/drug use, etc.. The work is demanding, carriers cannot clock in or out, and have to maintain their contractual agreements constantly, in ways that impact daily life substantially. The

[14] Ctrs. for Disease Control & Prevention, *Assisted Reproductive Technology (ART) National Summary Report—2021*(2023).
[15] Elly Teman, *The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood*, 67 SOC. SCI. & MED. 1104 (2008).

economic realities test, applied under the Fair Labor Standards Act (FLSA), challenges if a surrogate is dependent on an employer. The economic realities test, established after *United States v. Silk,* asks the court to consider six key factors when distinguishing between employees and independent contractors.[16] These are: "Opportunity for profit or loss depending on managerial skill, investments by the worker and the employer, degree of permanence of the work relationship, nature and degree of control, extent to which the work performed is an integral part of the employer's business, and skill and initiative".[17] Surrogacy arrangements are made by an agency, a surrogate does not receive an increase in their pay proportional to an increase in skill or experience, and their work is an integral, *the* integral, part of the industry. This means that surrogates are misclassified as independent contractors.

To reflect the nature of their work, I advocate for minimum compensation rates that reflect both the work done by surrogates during the pregnancy and the recovery time required after. This should be achieved by amending the Fair Labor Standards Act to include surrogates, and multiplying the federal minimum wage by the hours of a complete work year (2,080 hours), as well as recovery compensation to cover incidentals related to the birth. This would add up to a little over $15,000, which is below what most surrogates already make. This modest proposal would simply establish a minimum compensation floor to prevent gross exploitation. At the state-level, there need to be licensing requirements for agencies that establish minimum standards including maintaining an appropriate relationship between parents and surrogates, escrow accounts, and insurance. Parents should not be able to arbitrarily decide to halt payments, so the

[16] *United States v. Silk*, 331 U.S. 704 (1947).
[17] U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA).*

timing of pay is also an important consideration; this is where an agency or even a union could step in. Surrogates who suffer long-term consequences should receive compensation proportional to the damages, and the financial security of their family should be guaranteed in the event of death. Surrogates, especially if allowed to unionize, can organize to demand better conditions, as well as more regulation on the parent-carrier relationship. An increase in minimum standards will not price out middle class parents any more than the industry already does. Surrogacy is an expensive service, but when intermediated by agencies, a large chunk of the amount paid by the intended parents goes to the agency, not the surrogate.[18] Surrogacy is labor and should be classified as such. The basis for this argument can be found in feminist legal theory, and this simple change can ensure that surrogates and the work they do are treated with dignity and high standards of protection.

Part III: Feminist Theory

The law does not always consider systemic hierarchies, but it is often a reflection of them. This is where legal theory can step in. Theory is not a distraction, it is generative, and it helps us think about who these laws serve, and how legal reform can employ the ethical considerations that philosophers have been writing about for centuries. Feminist thinking has led to concrete policy change concerning marital rape, sexual harassment, and domestic violence. In addition, fairer outcomes can be derived from analysing lived experiences, and help us look beyond the limits and contradictions of the formal law.

[18] Sensible Surrogacy, *Surrogacy Costs* (2024).

In *Dialectic of Sex*, Shulamith Firestone writes that "childbirth is at best necessary and tolerable. It is not fun."[19] Firestone studies the origins of the word "family," tracing it back to *famulus*, a word meaning house slave or domestic servant. She sets up several arguments for revolutionary feminism, one of which is that modern technology should try to eliminate the necessity for natural female gestation. She imagines a future where the use of artificial wombs is normalized. Around one decade after Firestone's book was published, the first American woman to be compensated for surrogacy, Mary Beth Whitehead, gave birth in exchange for $10,000.[20] We'll return to Whitehead's story to demonstrate where feminist scholars take issue with the practice of surrogacy. But modern surrogacy is likely not what Firestone had in mind when she wrote about artificial wombs. While the original goal of separating pregnancy from the mother's body is achieved, the humanity of the surrogate should not be denied. This relatively new practice raises the question of whether outsourcing pregnancy is liberation, exploitation, or a murky combination of the two. This section draws on theoretical and philosophical thought to advance the feminist dialogue on surrogacy and to address some ethical concerns. There is a diversity of thought that considers surrogacy to be anything from a radical expression of bodily autonomy to oppressive patriarchal control.

In surrogacy, the 'gift of life' is not necessarily treated as a gift by the state, arrangements can take shape as contracts or family arrangements, and these differences in phrasing have massive legal implications, including determining what protections are in place for the carrier.

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[19] SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970).
[20] Univ. of Va. Sch. of Law, *Surrogate Mother Mary Beth Whitehead Decides Not to Give Up Baby Despite Controversial Reproductive Technology Agreement*, Law Library Archives.

Feminist theory asserts that the law is not neutral in its treatment of women. To answer whether surrogacy is a service, gift, or contract also helps us answer whose humanity is at the forefront. Feminist legal scholar Catharine MacKinnon compares surrogacy to prostitution. She asserts that both practices require the purchase of a body (typically a woman's) in a socio-economically unbalanced dynamic, the transformation of an otherwise intimate experience into a transaction, and consent that cannot be considered freely given since it operates under repressive conditions.[21] There is, to an extent, objectification of the surrogate who agrees to submit to various forms of control, including invasive medical procedures, potentially sudden termination of the pregnancy, and to refrain from or agree to consume certain food and drink. If MacKinnon is correct in thinking that surrogacy is structurally commodifying and unsustainable, this would mean public policy should render surrogacy contracts null and void. Additionally, if we assume that consent cannot be voluntary if given under oppressive economic conditions, then contracts involving surrogates living below the poverty line warrant higher judicial scrutiny.

I previously mentioned the first legal surrogacy arrangement to be completed in the United States, this case is an important one to return to because it reveals the objectification necessary for surrogacy. Mary Beth Whitehead had agreed to carry a child for William and Elizabeth Stern, and she signed a contract that waived her parental rights and willingly surrendered the baby, 'Baby M', after its birth. Around one week later, Whitehead begged for Baby M to be returned to her, threatening to take her own life if refused. With no pre-existing surrogacy regulation, the New Jersey Supreme Court made its decision based on the best interest of Baby M, which was understood as full custody with the biological father, and visitation rights

[21] CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

for Whitehead.[22] The uncomfortable reality of this case was that in surrogacy, the carrier has to be alienated from the process happening within them and of them. The claim over the process is not only surrendered to the medical system, but it is also legally surrendered, the carrier is no longer the primary subject of their own pregnancy.

The question of consent varies from person to person. Even if we narrow the scope of our conversation to cisgender American women, they are not a monolith. Here, intersectionality can help us make sense of the nuances. Coined by Kimberlé Crenshaw, intersectionality frames how we think about identities like gender, race, class, and ability, and how overlap in these identities can lead to distinct forms of inequality.[23] Reproductive justice has long been tied to racial inequality in the United States. It's been well-documented that Black mothers have a higher mortality rate, in large part due to the archaic belief that Black people can handle more pain than other races. Concerns with how medicine treats members of other races or classes must be a part of the surrogacy reform effort. Anthropologist Shellee Colen describes these differences in a concept called "stratified reproduction."[24] This history goes back to coercive sex practices that forced enslaved women to have children that could then be bought and sold, essentially treated as a breeding program. Throughout the twentieth-century, seemingly opposite forms of control were used as poor, Black, and Indigenous women were sterilized. Surrogacy disproportionately targets women in lower socio-economic conditions to be carriers. Understanding how systems have

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[22] *In re Baby M*, 537 A.2d 1227 (N.J. 1988).
[23] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.
[24] Shellee Colen, *"Like a Mother to Them": Stratified Reproduction and West Indian Childcare Workers and Employers in New York*, in *CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION* 78 (Faye D. Ginsburg & Rayna Rapp eds., 1995).

encouraged some women's reproductive health while at the same time restricting reproductive rights for others clarifies how surrogacy can be a breeding ground for race and class-based exploitation. This is a familiar aspect of capitalism that has to do with the physical body, and how that body can be deployed in the service of a typically affluent consumer. Therefore, it has significant regulatory impacts on what it means to consent and what a fair contract looks like. The recognition of complete bodily autonomy for surrogates could establish renewed reproductive justice. If federal law recognizes that surrogates cannot contractually waive their autonomy, medical decision making will be easier for all pregnant persons. To mitigate the potential for exploitative practices, there need to be prohibitions on targeted recruitment of vulnerable populations, and a higher minimum pay requirement so that more money is going into the hands of surrogates themselves.

There are certainly schools of feminist thought that are more supportive of surrogacy, but even these have a certain amount of scrutiny for current practices. If we choose to take women's choices on the conditions of their own bodies seriously, then it follows that we would allow them to choose surrogacy, as carriers or donors. So long as a woman provides freely given consent and is aware of the potential risks, should the state refuse her decision? While there is perhaps an unavoidable commodification and objectification of the body in surrogacy, it is worthwhile to explore the nuances of operating ethically within these assumptions. Critics may assert that any attempt at reform legitimizes the objectification of women, but the humanity of the surrogates is better recognized when they are protected as workers, not when their work is criminalized. Many natural processes can be commodified, but they can also resist complete commodification. Then

the question of protection is a question of how the non-market dimensions of surrogacy can be safeguarded from exploitation.

Part IV: The Path Forward

The three parts of this essay document a dilemma that courts will be unable to resolve alone. Structural contradictions concerning the personhood of embryos call for a structural solution. The path forward requires changes in both state and federal law. This final part includes two sections, the first concerns guiding principles for reform, and the second includes concrete policy recommendations at the state and federal level.

Section 1

The ethical conclusions drawn from present evidence are important to keep in mind when pursuing policy change. The first of these is that a surrogate should never be required to waive their bodily autonomy. Following with the constitutional right to refuse medical treatment under the fourteenth amendment, unwanted medical procedures are independent of the reproductive rights foundations that *Dobbs* has disrupted. This means that abortion requirements should be unenforceable. Instead of criminal liability, refusal to comply with medical intervention could result in damages. The next conclusion is that surrogacy is labor, and is entitled to protections. Labor and pregnancy are physically demanding, and carry significant risk for complications. Labor and employment law has built in protections both for the people purchasing a service and the people providing that service. Therefore, surrogates should be classified as employees of either the agency that represents them or the intended parents (if there is no agency involved). Next, fetal personhood cannot be unlimited for surrogacy to be sustained. If an embryo is a legal person, it cannot at the same time be part of a commercial transaction as property. If a state

adopts fetal personhood laws, they should create specific exemptions of assisted reproductive procedures. Finally, interstate variation on abortion, surrogacy, and personhood law establish a need for federal intervention. Congress can pass legislation that establishes minimum standards for employment and criminal liability protections. In the following section, I will expand on these recommendations to provide more concrete legislative recommendations.

Section 2

A method to establish minimum standards is an act that applies to all surrogacy arrangements in the country. This resolves cases where the surrogate and intended parents reside in different states, or if the state where the contract is signed differs from the state where pregnancy and/or birth occurs. The act would mandate the following: a)minimum compensation standards no less than federal minimum wage for a full year of work, this prevents cases of extreme exploitation. Overtime pay would apply for medical complications, bed rest, incidentals including travel expenses, and any extraordinary demands of the pregnancy and/or birth process. Surrogacy agencies or intended parents would be required to provide insurance and workers compensation, and it would be illegal to freeze, reduce, or withhold payment unless decided on by a court. Also, a surrogate cannot be fired by their primary employment *because* of their status as a surrogate. b) Surrogates have the right to refuse medical procedures, and cannot waive their medical autonomy. Consent for intervention should be properly documented, and can be withdrawn at any point before the procedure, and medical information should be kept private from intended parents unless directly relevant to the fetus. Intended parents should be required to disclose relevant medical history to a surrogate prior to the signing of a contract, and no contract can *require* abortion in any case, this is particularly important in states where abortion access is

severely limited or criminalized. c) Embryo status at the federal level can not be “persons,” or “children,” for any purposes concerning wrongful death or criminal law. This section of the act confronts state sovereignty, so the basis would rely on the Commerce Clause to solve the interstate issue and on the Fourteenth Amendment to maintain personal liberties. The enforcement mechanism would be through the Department of Labor, and freedom for surrogates to pursue legal action against violators, which allows them to enforce the protection of their own rights.[25,26] d) Agencies would have to comply with minimum standards to obtain a federal license, including providing medical and psychological screening of surrogates and intended parents and not engaging in any coercive practices, including targeted recruitment. At the state level, there can be minimum requirements for licensure beyond the federal minimums, which New York has already adopted.[27] Although family law is traditionally regulated at the state level, these suggestions allow for state decision making over increased protections. The size of the surrogacy industry calls for federal minimums and a response to the current reality of fragmentation. These are modest proposals and therefore do not resolve all the ethical tensions of surrogacy. Conditions for women’s reproductive rights continue to be repressive in the United States, and the overturning of *Roe v. Wade* only hindered progress more. In recognizing the humanity of women who perform reproductive labor, we find feasible paths forward under the current crisis of constitutional law. The surface problem is incoherence, and it is not a complicated fix. But left unchecked, courts will likely not be able to interpret their way out of every case. The question of legislators now is if they will continue to tolerate the current framework, or reform the law to ensure equity for parents and reproductive laborers.

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[25] *Overview of Commerce Clause*, CONSTITUTION ANNOTATED.
[26] *Fourteenth Amendment, Section 1*, CONSTITUTION ANNOTATED.