

Regulating Surrogacy Agencies Through Value-Based Compliance

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I. INTRODUCTION

Since the advent of surrogacy technology, news stories of surrogacy agreements gone awry have shocked the public.¹ During the infamous Baby M case, Americans were horrified as the story of William and Elizabeth Stern unfolded in the custody battle for the child they commissioned in a commercial surrogacy agreement with Mary Beth

1. See, e.g., Tamar Lewin, *Man Accused of Killing Son Borne by a Surrogate*, N.Y. TIMES (Jan. 19, 1995), <http://www.nytimes.com/1995/01/19/us/man-accused-of-killing-son-borne-by-a-surrogate-mother.html?mcubz=0> (recounting when a single man commissioned a surrogacy and allegedly killed the consequent baby a month after birth); see also Rachel Browne, *David and Wendy Farnell demanded refund for Gammy*, SYDNEY MORNING HERALD (Aug. 10, 2014), <http://www.smh.com.au/world/david-and-wendy-farnell-demanded-refund-for-gammy-20140810-102kpn.html> (describing an Australian couple who commissioned a surrogacy, but only returned home with the healthy twin and left the twin with severe health issues in Thailand with the surrogate mother).

Whitehead.² Despite the public outcry and the consequent flurry of state legislation to restrict surrogacy arrangements,³ the surrogacy industry has flourished.⁴

However, after the initial burst of legislation in the aftermath of Baby M, little legislation has been passed even though technology has continued advancing, making surrogacy a more attractive option.⁵ Markens contributes “the legislative inertia in the [United States] surrounding surrogacy” to the “tension between those who see [surrogacy] as typifying the commodification of reproduction and those who see it as epitomizing reproductive freedom.”⁶ Thus, states fall short of treating surrogacy like a market, instead “fretting over an impending commercialization or commodification that, in fact, took place long ago.”⁷

Today, surrogacy is a billion-dollar industry⁸ that goes largely unregulated.⁹ The lion’s share of revenue goes to surrogacy intermediaries: physicians, lawyers, and surrogacy agencies.¹⁰ While the medical and legal professionals involved in the arrangement are “regulated to some extent” by the rules of their respective organization and licensing requirements, surrogacy agencies are virtually unregulated.¹¹ The “lack of law and regulation has permitted . . . agencies to take advantage of their clients to the extent of delayed or lost reproductive cycles, and, in some . . . cases . . . theft of millions of dollars.”¹² This was evident in 2012 when Theresa Erickson, a leading surrogacy attorney, was found guilty of bypassing California surrogacy laws and running a baby-selling ring.¹³

2. Robert Hanley, *Father of Baby M Granted Custody; Contract Upheld; Surrogacy is Legal*, N.Y. TIMES (Apr. 1, 1987), <http://www.nytimes.com/1987/04/01/nyregion/father-of-baby-m-granted-custody-contract-upheld-surrogacy-is-legal.html>. The agreement was a traditional surrogacy, thus Ms. Whitehead was the surrogate and biological mother of Baby M. She refused to give the baby to the Sterns after the birth. *Id.*

3. Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1285–87 (2014).

4. Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 93–94 (2014). Sanger suggests the market continued to thrive because “consumers paid more attention to its possibilities than to one case of failure,” and possibly because “the desire for a child is so consuming that in the market for baby-making, normal consumer skills and concerns do not operate normally.” *Id.*

5. *Id.* at 79. With the success of in vitro fertilization, gestational surrogacy became possible. In contrast to a traditional surrogacy when the surrogate mother also supplies the egg, gestational surrogacy means the egg used to form the embryo comes from a woman other than the surrogate. The egg could come from the intended mother or a donor.

6. Susan Markens, *Third Party Reproductive Practices: Legislative Inertia and the Need for Nuanced Empirical Data*, 3 J.L. & BIOSCIENCES 666, 668 (2016).

7. Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 41, 52 (Michele Bratcher Goodwin ed., 2010) [hereinafter Krawiec, *Price and Pretense*].

8. See generally DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* (2006).

9. Anita M. Ventrelli et al., *Report to the House of Delegates on the Model Act Governing Assisted Reproductive Technology Agencies*, 2016 A.B.A. SEC. FAM. L. REP. 112A.

10. See Nicolas, *supra* note 3, at 1245 (noting only a quarter of the cost for gestational surrogacy goes to the surrogate and egg donor).

11. Ventrelli et al., *supra* note 9, at 4.

12. *Id.* See also Tamar Lewin, *The Surrogacy Agency that Delivered Heartache*, N.Y. TIMES (July 25, 2014), <https://www.nytimes.com/2014/07/28/us/surrogacy-agency-planet-hospital-delivered-heartache.html?mcubz=0> (describing surrogacy scams).

13. Greg Moran, *Two Sentenced in Baby-selling Case*, SAN DIEGO UNION-TRIB. (Feb. 24, 2012), <http://www.sandiegouniontribune.com/sdut-two-sentenced-baby-selling-case-2012feb24-story.html>; Rory Devine & R. Stickney, *Convicted Surrogacy Attorney: I’m Tip of Iceberg*, NBC NEWS SAN DIEGO (Feb. 29, 2012,

This Note argues that by accepting surrogacy as a market, states can better address the current ethical issues manifest as market failures in the surrogacy industry. Licensing surrogacy intermediaries and encouraging a social enterprise business form, coupled with value-based compliance, will enable surrogacy intermediaries to continue playing their crucial role in the market while protecting the rights of other stakeholders in the industry—intended parents, surrogates, and the potential children.

II. BACKGROUND

First, this Part describes the role intermediaries play in the surrogacy market, and ethical concerns in the surrogacy industry in general. Next, this Part provides an overview of existing laws regulating commercial surrogacy agencies, including the ABA's proposed Model Act Governing Assisted Reproductive Technology Agencies. Lastly, this Part discusses social enterprises and value-based compliance.

A. Surrogacy as a Market and the Role of Intermediaries

The surrogacy industry is a market, and intermediaries play an integral role in it. A market is where buyers and sellers “interact to exchange goods or services for money.”¹⁴ In a market transaction, the parties may be constrained “by their own resources and by the rules of the marketplace,” but nevertheless the parties act of their own volition.¹⁵ At the time of the exchange, each party is happier giving up what they have for what they are getting in return.¹⁶ Without a market, people may wish to exchange something they have for something they want, but cannot otherwise get.¹⁷ Thus, “markets create value” because they “bring[] an array of buyers and sellers together” to make desired trades.¹⁸ Of course, “trades produce gains [and] people are relentless in finding ways to realize them.”¹⁹

Surrogacy is a market, in part, because there is both a supply and a demand for the opportunity to raise a child. People want children, and when procreation on their own is not possible, people may turn to assisted reproduction technology (ART)—an array of alternatives including egg and sperm donation, adoption, and surrogacy.²⁰ People who desire children are willing to give up other resources for “even the chance” to raise a child.²¹ In fact, “[c]hildless couples with means (and sometimes couples without) are often willing to pay anything.”²²

Other people are willing to give their body for a time in order to supply the chance of raising a child.²³ While the desire to have children is understandable, what motivates a woman to carry the child of another couple or person is less intuitive. Women participating

5:52 PM), <http://www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html>.

14. Sanger, *supra* note 4, at 71.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Sanger, *supra* note 4, at 71.

20. Krawiec, *Price and Pretense*, *supra* note 7, at 42.

21. Sanger, *supra* note 4, at 74.

22. *Id.* at 87.

23. *Id.* at 73.

in surrogacy often cite a desire “to help someone who desperately wants to have children.”²⁴ In conjunction with altruistic reasons, women also cite wanting to be pregnant and wanting the money, but “despite the fact of payment, they regard having a baby for a childless couple as a gift—a blessing—of the highest order.”²⁵

Surrogacy agencies act as intermediaries to bring these buyers and sellers together, thus creating a market for exchange. Like intermediaries in other markets, surrogacy agencies capitalize on the asymmetries of information between the “would-be trading partners,” and thus “save parties the time, effort, and money . . . that it would otherwise cost to find the right trading partner.”²⁶ As repeat players, surrogacy agencies are equipped to expedite the process of matching and price-setting for both intended parents and surrogate candidates.²⁷ Furthermore, surrogacy agencies “provide parties with some level of assurance about the quality of the deal.”²⁸

B. Ethical Concerns in the Surrogacy Market

Of course, the surrogacy market has some significant differences from more typical markets. First and foremost, the product of a successful surrogacy arrangement is a child, a human being with inalienable rights. Second, the buyers are often couples coping with the psychological and financial costs of infertility.²⁹ In fact, intended parents “exposed to the stress of infertility are predisposed to making decisions without sufficient information and by accepting an unreasonable paradigm of risk.”³⁰ Third, in contrast to other services with monetary compensation, “payment for commercial surrogacy is defined as a deeply emotional transaction.”³¹ As Drabiek asserts, approaching payment as incidental diminishes the bargaining power of surrogates.³² Consequently, “psychological and emotional affirmation to induce surrogacy participation” stymies surrogates’ willingness to bargain for more, despite the incredible demands of surrogacy: “a consistent physical labor commitment, 24 hours a day for nine months.”³³ Lastly, between the vulnerable intended parents and the relatively weak bargaining position of surrogates, surrogacy agencies are powerfully situated to “profit handsomely.”³⁴

24. Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1101 (2014).

25. Sanger, *supra* note 4, at 76.

26. *Id.* at 82.

27. *Id.*

28. *Id.* at 88.

29. Ventrelli et al., *supra* note 9, at 2.

30. *Id.* at 3.

31. Katherine Drabiek et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 304 (2007); *See also* Ainsworth, *supra* note 24, at 1088 (“What has concerned feminists (and ethicists) so greatly about [international surrogacy] is the huge disparity in wealth between the women acting as surrogates and the intended parents, as well as the distance between them that necessitates an arms-length transaction and third party involvement. All of these factors tend to diminish the power of the women acting as surrogates relative to the power of the intended parents.”).

32. Drabiek et al., *supra* note 31, at 304.

33. *Id.*

34. Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE. L. REV. 203, 233 (2009) [hereinafter Krawiec, *Altruism and Intermediation*].

C. Accounting for Rights in the Surrogacy Market

As Spar observes, “markets drive only toward those purposes for which they are so perfectly suited: matching supply and demand, allowing firms to produce products and maximize profits and offering customers the opportunity to buy.”³⁵ Sometimes this neutral mechanism that brings buyers and sellers together results in socially beneficial matching, and sometimes it does not.³⁶ In other words, markets are neither inherently good or bad for protecting individual rights.³⁷ Thus, examining the particular characteristics of a specific market is necessary to determine a market’s capacity to affect individual rights.³⁸

The reproductive market has “historically brought tangible benefits to the so-called consumer.”³⁹ Initial moral opposition and legal restrictions on the controversial markets for contraception, the Pill and in vitro fertilization (IVF), proved futile and sales for these products continued to thrive.⁴⁰ Legalization of contraceptives was primarily driven by the robust demand from consumers “determined not to conceive” and the enterprising private firms “arguing on commercial grounds.”⁴¹ For IVF, funding bans failed to hinder research and development, and even the steep price for in vitro fertilization “exerted little downward pressure on demand.”⁴²

The reproductive market seems to promote reproductive rights by facilitating access to the products and services “couples hoping not to conceive, individuals trying to avoid sexually transmitted diseases, and would-be parents attempting to conceive a child” want and need.⁴³ Yet, this expansion of reproductive rights was not a product of some normative intent latent in commercial markets.⁴⁴ Rather, these sectors of the reproductive market, like other markets “simply follow[ed] the course of commercial activity, bringing supply (in this case, of contraceptive devices, birth control pills and babies) to those who deeply desire them.”⁴⁵ While the rights of consumers in the reproductive market are preserved, concerns for the rights of other participants—particularly the suppliers and the resultant children—in assisted reproduction are hotly debated.⁴⁶ Many argue “that selling . . . eggs and wombs,

35. Debora L. Spar, *Free Markets, Free Choice?: A Market Approach to Reproductive Rights*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 177, 177 (Michele Bratcher Goodwin ed., Cambridge Univ. Press 2010) [hereinafter Spar, *Free Markets*].

36. *Id.* at 178.

37. *Id.*

38. *Id.*

39. *Id.* at 184.

40. Spar, *Free Markets*, *supra* note 35, at 180, 182–83.

41. *See id.* at 180–81 (“Clearly, this belated triumph for contraception was due in part to the efforts of activists . . . and the noble arguments they had raised on behalf of reproductive freedom . . . Yet it is also critical to realize that much of the legal victory in this ostensibly intimate realm was actually achieved by private firms.”).

42. *Id.* at 183–84.

43. *Id.* at 184.

44. *Id.*

45. Spar, *Free Markets*, *supra* note 35, at 184.

46. *See, e.g.*, Krawiec, *Price and Pretense*, *supra* note 7, at 53 (discussing how political, rather than market, forces should address public policy issues surrounding surrogacy); Ainsworth, *supra* note 24, at 1083–91 (discussing the pervasive fear of surrogate exploitation); and Drabiek et al., *supra* note 31, at 303–05 (arguing women participating as surrogates are economically exploited). *See also* David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry’s Global Marketing of Children*, 43 PEPP. L. REV. 265, 337 (2016) (positing the surrogacy industry “seeks a legal regime that protects the more powerful and wealthier . . . intermediaries and intended contractual parents—at the expense of the rights and interests of the more vulnerable participants, the so-called surrogates and children.”); Susan L.

places the sellers (young women) in a relationship that is inevitably exploitive.”⁴⁷ Yet, Spar observes “discussions of commodification are inherently subjective and ill defined.”⁴⁸ Thus, “the debate over reproductive components might more usefully be framed in terms of more objective and practical considerations.”⁴⁹ In other words, the interests of stakeholders are better protected by a more functional approach that acknowledges surrogate arrangements that will continue occurring regardless of whether theoretical assumptions about the parties are valid.

D. Regulating Intermediaries

There is little legislation in the United States regulating commercial transactions in assisted reproduction.⁵⁰ Although nearly half of the states have at least some legislation related to surrogacy,⁵¹ in a majority of states even the enforceability of commercial surrogacy agreements remains uncertain.⁵² Five states prohibit commercial surrogacy while 13 permit it to some extent.⁵³ For other states, legislation on commercial surrogacy does not take a position on its legality,⁵⁴ or there is neither legislation nor case law ruling on the legality of commercial surrogacy.⁵⁵ Thus, surrogacy in general is regulated by “a mere patchwork quilt of policies and laws.”⁵⁶ Surrogacy agencies specifically are addressed very little—two states prohibit surrogacy agencies, and one state requires

Crockin & Gary A. Debele, *Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys*, 27 J. AM. ACAD. MATRIM. L. 289, 346 (2015) (“[C]hildren are dramatically impacted by court proceedings that affect their placement and welfare, yet they are typically not parties and frequently their voices are not effectively heard or taken into account in [custody] proceedings that are largely about them.”).

47. Spar, *Free Markets*, *supra* note 35, at 186.

48. *Id.*

49. *Id.*

50. Ventrelli et al., *supra* note 9, at 4.

51. ARIZ. REV. STAT. ANN. § 25-218 (2017); ARK. CODE ANN. § 9-10-201(c) (2017); CAL. FAM. CODE §§ 7960–7962 (2017); COLO. REV. STAT. § 19-4-106 (2017); CONN. GEN. STAT. § 7-48a (2017); DEL. CODE ANN. tit. 13, § 8-807 (2017); FLA. STAT. §§ 63.213 (2017), 742.15 (2017); 750 ILL. COMP. STAT. 47/25 (2017); IND. CODE § 31-20-1-1 (2017); IOWA CODE § 710.11 (2017); LA. STAT. ANN. § 9:2720 (2017); ME. REV. STAT. ANN. tit. 19-A, § 1931, 1932 (2017); MICH. COMP. LAWS § 722.855 (2017); NEB. REV. STAT. § 25-21,200 (2017); NEV. REV. STAT. § 126.710 (2017); N.H. REV. STAT. ANN. § 168-B:10 (2017); N.M. STAT. ANN. § 40-11A-801 (2017); N.Y. DOM. REL. LAW § 122 (2017); N.D. CENT. CODE § 14-18-08 (2017); TENN. CODE ANN. § 36-1-102(50) (2017); TEX. FAM. CODE § 160.754 (LexisNexis 2017); UTAH CODE ANN. §§ 78B-15-801, 78B-15-809 (LexisNexis 2017); VA. CODE ANN. § 20-159 (2017); WASH. REV. CODE § 26.26.210–260 (2016); W. VA. CODE § 61-2-14h(e)(3) (2017); WYO. STAT. ANN. §§ 14-2-403(d), 14-2-901 (2017).

52. See *Gestational Surrogacy Law Across the United States: State-by-State Interactive Map for Commercial Surrogacy*, CREATIVE FAM. CONNECTIONS, <http://www.creativefamilyconnections.com/us-surrogacy-law-map> (last visited Feb. 28, 2018) [hereinafter *Gestational Surrogacy Law*] (depicting states where enforceability of surrogacy agreements is uncertain in yellow and light green).

53. *Id.*

54. *E.g.*, N.M. STAT. ANN. § 40-11A-801 (2016) (stating New Mexico “does not authorize or prohibit” gestational surrogacy agreements).

55. *Gestational Surrogacy Law*, *supra* note 52 (noting Alabama, Alaska, Colorado, Georgia, Hawaii, Idaho, Kansas, Minnesota, Mississippi, Montana, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, and Vermont do not have legislation or case law related to commercial surrogacy).

56. Ventrelli et al., *supra* note 9, at 4. Both the American Society for Reproductive Medicine and Society for Assisted Reproductive Technology offer respected guidelines for professionals in the surrogacy industry. See generally AM. SOC’Y FOR REPROD. MED., www.asrm.org/?vs=1 (last visited Feb. 28, 2018); SOC’Y FOR ASSISTED REPROD. TECH., <http://www.sart.org> (last visited Feb. 28, 2018).

surrogacy agencies to use escrow accounts.⁵⁷

In February of 2016, the ABA introduced the Model Act Governing Assisted Reproductive Technology (the Model Act).⁵⁸ As the report states, participants in surrogacy “can become better-informed consumers” through the recommendations.⁵⁹ The Model Act requires the licensing of assisted reproductive technology agencies, including surrogacy agencies.⁶⁰

First, like other licensing regimes, the Model Act acts as a clearinghouse for individuals wishing to enter the profession. A surrogacy agent is vetted for experience with ART, previous ART business ventures and past criminal conduct, particularly offenses related to “fraud, theft, embezzlement, fraudulent conversion or misappropriation of property.”⁶¹

Second, the Model Act provides guidelines for the agencies’ interactions with the intended parents and surrogates. In general, the provisions protect the interests of the intended parents and surrogates by ensuring transparency. For example, the Model Act requires an agency to “respect the autonomy” of the intended parents, surrogate and gamete donors by “not engaging in coercion, fraud, misrepresentation, or unethical behavior.”⁶² Furthermore, an agency cannot “provide legal, medical, psychological, insurance or other advice that it is not licensed or otherwise qualified to give.”⁶³ Additionally, the Model Act delineates required provisions in the service agreement and other prerequisites before an attempt to establish pregnancy.⁶⁴

The Model Act requires agencies share certain information with the intended parents including a detailed description of the services, estimated costs, an explanation of refund and cancellation policies, and estimated timing for the services provided.⁶⁵ As for surrogates, the Model Act does not specify what information is needed to assess surrogates for matching. However, the Model Act provides that an agency cannot suggest a surrogate for matching to intended parents that the agency “reasonably know[s] or should know has not or will not pass medical and/or psychological testing or is otherwise unavailable.”⁶⁶ Thus, the Model Act provides a baseline for what surrogacy agencies may and may not do in commercial transactions.

Lastly, should a surrogacy agency operate without a license, the Model Act incorporates a state’s statutory scheme for civil penalties for unlicensed activities.⁶⁷ Similarly, should an agency otherwise violate the Model Act by negligence or breach of a service agreement, the Model Act permits private parties to bring civil suits.⁶⁸ Furthermore, should an agency knowingly or purposefully engage in misconduct, the Model Act authorizes punitive damages. Overall, the Model Act, if implemented, would function like a typical government-enforced regulatory scheme that operates on the basis of actors’

57. Ventrelli et al., *supra* note 9.

58. *Id.* at 1.

59. *Id.*

60. *Id.* at 2.

61. GOVERNING ASSISTED REPROD. TECH. §201(2)(i), (ii) (AM. BAR ASS’N 2008).

62. Ventrelli et al., *supra* note 9, at 10.

63. *Id.* at 12.

64. *Id.*

65. *Id.*

66. *Id.*

67. Ventrelli et al., *supra* note 9, at 15.

68. *Id.*

rational self-interest—actors will comply if the fear of potential punishment outweighs the potential gains.⁶⁹

E. Social Enterprises and Compliance

In addition to the external pressure imposed by a government regulatory system, like the ABA Model Act, business entities' compliance depends on internal incentives. This Part explores how different entity forms shape internal compliance mechanisms. Historically, there were two types of corporations: for-profit and not-for-profit.⁷⁰ For-profit corporations require a Board of Directors with fiduciary duties to the corporation and shareholders.⁷¹ Fiduciary duties entail shareholder primacy and profit maximization.⁷² Alternatively, not-for-profit corporations are characterized by their "tax-exempt status . . . and their central purpose . . . to promote public benefits."⁷³ To qualify for the tax-exemption, not-for-profit corporations are subject to the nondistribution constraint.⁷⁴ This entails barring "an organization from distributing any net earnings they may earn to individuals who exercise control over the organization."⁷⁵ Consequently, for-profit firms "often face pressure to abandon social goals in favour of increasing profits" and "[n]on-profit firms and charities are needlessly restricted in their ability to raise capital when they need to grow."⁷⁶

In contrast to for-profit and not-for-profit forms, a new business model has emerged: the social enterprise.⁷⁷ Social enterprises "use market-based strategies and techniques to advance a specific social mission."⁷⁸ While social enterprises "come in all shapes and sizes," every social enterprise endeavors to serve the public good in some way and is a business firm.⁷⁹ Thus, like any other firm, the social enterprise needs to "raise capital, generate income, hire talent, and train employees."⁸⁰ Yet, for social enterprises, earning returns for shareholders "comes second to an overriding goal of social performance."⁸¹

The public benefit corporation is one form of social enterprise formalized in many states' corporate law and illustrates traits of social enterprises.⁸² A public benefit corporate form requires the corporation have "a purpose of creating a general public benefit in addition to the general purpose of business corporations."⁸³ As defined in Delaware, a

69. Joseph W. Yockey, *The Compliance Case for Social Enterprise*, 4 MICH. BUS. & ENTREP. L. REV. 1, 9 (2014).

70. Kristin A. Neubauer, *Benefit Corporations: Providing A New Shield For Corporations with Ideals Beyond Profits*, 11 J. BUS. & TECH. L. 109, 111 (2016).

71. *Id.* at 112.

72. *Id.* at 112–13.

73. *Id.* at 114.

74. *Id.*

75. Neubauer, *supra* 70, at 114.

76. *Firms with Benefits*, ECONOMIST (Jan. 7, 2012), <http://www.economist.com/node/21542432>.

77. Yockey, *supra* note 69, at 9.

78. *Id.* at 2.

79. *Id.*

80. *Id.* at 3.

81. *Id.* at 6.

82. *State by State Status of Legislation*, BENEFIT CORP., <http://benefitcorp.net/policymakers/state-by-state-status?state=0> (last visited Feb. 28, 2018) (showing the number of states that have passed or are working to pass public benefit corporation legislation).

83. *Corporate Purpose*, §46:2, in MARVIN HYMAN, 3 CORPORATION FORMS (2015).

public benefit corporation is a for-profit corporation “intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner.”⁸⁴ For example, Warby Parker, a company selling glasses, is a public benefit corporation founded to promote better eye-care in developing countries.⁸⁵ For every pair of glasses purchased, Warby Parker donates a pair to someone in need.⁸⁶ Patagonia, another public benefit corporation, donates one percent of its annual revenue to grassroots environmental groups working to protect the planet’s natural ecosystems.⁸⁷

Directors of public benefit corporations are tasked with balancing the financial interests of stockholders, the stakeholders affected by the corporation’s conduct, and the public benefit(s) established in the firm’s certificate of incorporation.⁸⁸ In practice, this culture of corporate responsibility permeates the decision-making of public benefit corporations.⁸⁹ Furthermore, the formality of forming as a public benefit corporation ensures the founders maintain socially responsible objectives and practices through leadership and economic changes.⁹⁰

The preeminence of socially-driven objectives in social enterprises, like public benefit corporations, provides an opportunity to build a value-based compliance regime stemming from individuals’ personal commitment to those objectives.⁹¹ In contrast to more traditional compliance regimes stressing “risks of detection and sanction,” value-based compliance focuses on “developing an internal culture that encourages agents to identify and internalize a desired set of values, ideals, and practices.”⁹² Thus, instead of using looming external authority to enforce compliance, value-based compliance entails training employees to see compliance as an “organic extension of their own identity and the organization’s purpose”⁹³ Value-based compliance is cheaper and enables employees to respond “instinctively and proactively” to uncertain situations.⁹⁴

While the benefits of value-based compliance are easily apparent, achieving value-based compliance is more difficult. Yet, as Yockey asserts, social enterprises are particularly conducive to value-based compliance because social enterprises naturally possess the right characteristics: integration of purpose and culture.⁹⁵

First, value-based compliance requires an integrated purpose: a centralized objective that pervades the firm’s structures and processes.⁹⁶ In contrast to the inaccurate perception

84. DEL. CODE ANN. tit. 8, § 362(a) (2015).

85. *History*, WARBY PARKER, <https://www.warbyparker.com/history> (last visited Feb. 28, 2018).

86. *Id.*

87. *Patagonia’s Mission Statement*, PATAGONIA, <http://www.patagonia.com/company-info.html> (last visited Feb. 28, 2018).

88. DEL. CODE ANN. tit. 8, § 362 (2015).

89. *See, e.g., Culture*, WARBY PARKER, <https://www.warbyparker.com/culture> (last visited Feb. 28, 2018) (“Our customers, employees, community and environment are our stakeholders. We consider them in every decision that we make.”).

90. *B Lab*, PATAGONIA, <http://www.patagonia.com/b-lab.html> (last visited Feb. 28, 2018) (“Benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership, by institutionalizing the values, culture, processes, and high standards put in place by founding entrepreneurs.”).

91. Yockey, *supra* note 69, at 18.

92. *Id.*

93. *Id.*

94. *Id.* at 19.

95. *See id.* at 19–26 (describing purpose and culture within context of social enterprises).

96. Yockey, *supra* note 69, at 20.

that firms only focus on maximizing shareholder profit, many firms also consider the interest of other stakeholders. Whether firms account for stakeholders' interests because negatively treating employees and third parties leads to loss of share value or because consumers favor more socially responsible companies, many firms recognize the value of considering the impact of the firm's action on other stakeholders besides shareholders.⁹⁷ Nonetheless, discrepancies in firm leaders' conduct between maximizing shareholder profit and protecting stakeholders' interest may cause employees' sense of values to fragment.⁹⁸ Consequently, without totally reinventing itself, an existing firm may struggle to integrate a new central purpose to its endeavors.

In contrast, the social enterprise bypasses the concerns of a typical firm because, from its inception, the social enterprise has established "a mission-centric purpose."⁹⁹ When a typical firm moves toward social consciousness, it may enact new policies specific to one area of the business, such as manufacturing, thus, employees in other areas "will not necessarily discern the value" of socially-driven objectives "in other facets of corporate activity."¹⁰⁰ Social enterprises, however, should avoid this problem because the socially-driven objective permeates every facet of business activity.¹⁰¹ Thus, the founding objective of a social enterprise provides "a tighter lens through which to filter decisions."¹⁰² Competing stakeholder interests, including shareholder interests, may be balanced when a firm has a distinct set of values permeating the organization enabling it to consider more than just who gets "the biggest piece of pie."¹⁰³

Second, value-based compliance requires "developing a corporate culture that reinforces" the purpose and values embodied in the firm's "distinct integration of purpose."¹⁰⁴ Culture entails the "formal and informal organizational practices, positions, and routines that collectively influence employees' behavior."¹⁰⁵ Beginning with integration of purpose, the social enterprise's values and "mission-plus-profits" goal provide "cultural cues and expectations" guiding employees' decision-making.¹⁰⁶

In typical firms, an overarching goal to make profit may incentivize employees to cut corners in order to make more money. In a social enterprise, "success is measured by other factors than money," thus giving employees room to make more appropriate decisions based on other objectives, like "the well-being of others, the quality of goods produced, and the sense of dignity and accomplishment one feels in being part of the organization."¹⁰⁷ Thus, employees may view their job as the inversion of the "means end relationship between product."¹⁰⁸ In other words, "[t]he production of a product . . . should not be viewed as a means to the end of profits, but rather profits should be viewed as a means to

97. *Id.*

98. *Id.* at 22.

99. *Id.*

100. *Id.* at 23.

101. Yockey, *supra* note 69, at 23.

102. *Id.*

103. *Id.*

104. *Id.*

105. Gary R. Weaver, *Encouraging Ethics in Organizations: A Review of Some Key Research Findings*, 51 AM. CRIM. L. REV. 293, 302-03 (2014).

106. Yockey, *supra* note 69, at 24.

107. *Id.* at 26.

108. Ronald J. Collombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 72 (2012).

the end of production.”¹⁰⁹

III. ANALYSIS

This Part analyzes (1) to what extent the ABA’s licensing framework regulates the information asymmetries of the surrogacy industry, and (2) to what extent social enterprise business model form could foster value-based compliance to protect vulnerable parties in the surrogacy industry.

A. *The ABA Model Act for Governing ART and Regulation*

As a regulation framework, the Model Act lays some foundation for regulating the surrogacy industry as a market, but, as illustrated below, falls short of approaching the industry overall as a market. The Model Act licensing framework addresses some information asymmetries to facilitate “predictability and accountability” between the agency and the intended parents, but overlooks significant information disadvantages of the intended parents and the surrogate.¹¹⁰

1. *Information Asymmetries and the Intended Parents*

The Model Act addresses some of the intended parents’ information disadvantages with the agency, but says little about the degree of transparency between the intended parents and the surrogate. First, before an agreement is made with intended parents, the Model Act requires licensed agencies to describe the services they provide, give estimated costs of the services, explain the refund and cancellation policies and give “the estimated timing of services to be provided.”¹¹¹ The agreement must be in writing and include, again, the information related to the cost and process of services.¹¹² Through this information the intended parents may learn about the parameters of the transaction, and may better understand the financial investment and time the transaction entails.

However, intended parents may not be fully informed because the ABA Model Act does not require agencies to provide the intended parents with “the relevant success rates” of the surrogacy arrangements.¹¹³ Consequently, agencies may forego sharing this information with intended parents, or worse, provide misleading success rates, e.g. “the average rates of IVF success over all ages if the patient is forty-two, [instead of] the rates of success for forty-two-year-olds.”¹¹⁴ Thus, the ABA Model Act fails to address this crucial information asymmetry between the agency and intended parents.

Second, under the ABA Model Act, the agency is prohibited from presenting a surrogate candidate to intended parents that the agency “reasonably know[s] or should know has not or will not pass medical and/or psychological testing or is otherwise unavailable.”¹¹⁵ This provision helps avoid scenarios where the intended parents believe

109. *Id.*

110. Ventrelli et al., *supra* note 9, at 2.

111. ABA MODEL ACT § 303(1)(d) (2016).

112. ABA MODEL ACT § (1)(a)–(b).

113. Debora Spar & Anna M. Harrington, *Building a Better Baby Business*, 10 MINN. J.L. SCI. & TECH. 41, 63 (2009).

114. *Id.*

115. ABA MODEL ACT § 302(5) (2016).

an appealing, but otherwise risky candidate is fit for surrogacy.¹¹⁶ Thus, the Model Act addresses what the intended parents do not need to know. Yet the Model Act does not say what information about the surrogate the intended parents are entitled to.¹¹⁷ As for the relationship between the intended parents and the surrogate, the Model Act only states the two parties must sign a direct agreement.¹¹⁸ Consequently, it is unclear to what extent intended parents may know about a surrogate's medical or social history, or to what extent the parties can contract for and monitor the surrogate's lifestyle during the pregnancy.¹¹⁹

2. Information Asymmetries and the Surrogate

In general, the Model Act says little about the surrogate and her role in the transaction, and thus does not directly address any of the surrogate's information disadvantages. For example, many surrogates want to know why the intended parents are pursuing surrogacy. Often, surrogates choose to carry someone else's child as a service to a couple who could not otherwise have children.¹²⁰ As Sanger analogizes, “[i]n a sense, ascertaining the fertility status of the couple might be viewed like a background finance report. Before entering the deal, the seller wants to know whether the buyer has (or in this case does not have) the means.”¹²¹ Furthermore, the Model Act does not address surrogates' desire to know whether the intended parents' relationship is stable. “[T]he status of the intended parents' relationship may change, causing one or both to seek to avoid the contract, and leaving the surrogate with an unwanted child”¹²² Thus, similar to the intended parents, the Model Act also fails to address what information about the intended parents the surrogate is entitled to.

B. The Social Enterprise Business Model and Compliance

The value-based compliance approach in social enterprises proffers a business form that may address the underlying ethical concerns of the surrogacy industry. The integrated purpose and firm culture imbued in social enterprises maps on to the preexisting ideals of many surrogacy agencies, while facilitating firm compliance with regulations protecting the intended parents, surrogates, and the child.

116. See Sanger, *supra* note 4, at 90 (describing how the agency in the Baby M case knew psychological examination revealed Mary Beth, the surrogate mother, would likely have difficulty giving up the baby).

117. In terms of information about either the intended parents or the surrogate, the Model Act defers to the agency, stating “Nothing [in the act] shall inhibit the ART Agency's ability to accept or decline prospective Participants based on its own policies and screening procedures.” ABA Model Act § 302(1) (2016).

118. ABA MODEL ACT § 304 (1)(c) (2016).

119. See Krawiec, *Altruism and Intermediation*, *supra* note 34, at 236. (“[O]nce the intended parents have contracted for a surrogate's services, they have an interest in her behavior, which will affect the child's health. For example, they want her to refrain from smoking, alcohol, and drugs, and want her to eat and rest properly.”).

120. Sanger, *supra* note 4, at 76.

121. *Id.* at 93. (“[P]utting charges of false consciousness aside, the role of altruism in this decision to act as a surrogate seems undeniable. The value and meaning of this work diminishes if the couple were simply risk averse or too busy to have their own baby. Under such circumstances, the good will and the bodies of surrogates seem exploited, even to the surrogate.”).

122. Krawiec, *Altruism and Intermediation*, *supra* note 34, at 236. In one recent case, the intended parents of a surrogacy agreement had a falling out and the intended mother refused to sign the paperwork for the court order declaring parentage. While pregnant with the child, the surrogate petitioned to enforce the agreement and the court ultimately held the agreement was enforceable. *In re Baby S*, 128 A.3d 296 (Pa. Super. Ct. 2015).

1. Integrated Purpose

As discussed in Part II, “The tendency to see social, stakeholder, and financial objectives as related-but-separate raises several issues for value-setting.”¹²³ Like other firms, surrogacy agencies “risk fragmenting their agents’ sense of values” as these three objectives come into conflict.¹²⁴ Unsurprisingly, the social objective of helping others create a family seems to be a driving force in the creation of many surrogacy agencies.¹²⁵ Nonetheless, as the case of Theresa Erickson shows, even those who enter the surrogacy industry with the intention of helping people, may lose sight of their original objective to the detriment of all involved parties.¹²⁶

Furthermore, the role of stakeholders in surrogacy agencies is especially of concern because of the unique role of the industry’s suppliers and the product itself—the surrogates and resultant children. Like other firms, agencies are motivated to treat their suppliers well to avoid “adverse public relations, labor unrest, declining sales, greater regulatory scrutiny, [or] . . . loss of share value.”¹²⁷ The need to treat its surrogates well is accentuated because by neglecting to account for the needs of its surrogates, an agency possibly risks endangering the woman’s health, not only during pregnancy but in the long-term.¹²⁸

Additionally, the resultant children, arguably the most important stakeholders in surrogacy arrangements, have no say in the transactions impact on their lives. Typically the surrogacy transaction focuses wholly on the intended parents as customers contracting for a service.¹²⁹ Thus, “the rights of the prospective parent predominate,” and “[w]hat is lost in this equation is the product—the child—that results.”¹³⁰ Children from some of the first surrogacy arrangements are coming of age now, and the needs of the stakeholders in a surrogacy arrangement, particularly the resultant children, are acute.¹³¹

Lastly, surrogacy agencies are for-profit firms and some agencies are incorporated, thus bringing the primacy of the shareholder into the equation. Consequently, surrogacy agencies face the same dilemma of balancing social, stakeholder, and financial objectives that other industries face. Like other business ventures focusing on a social good, the goal

123. Yockey, *supra* note 69, at 21.

124. *Id.* at 22.

125. See, e.g., CIRCLE SURROGACY, <http://www.circlesurrogacy.com> (last visited Feb. 28, 2018) (“Family is our inspiration.”); SURROGATE MOTHERS, <https://www.surrogatemothers.com> (last visited Feb. 28, 2018) (“Bringing a child into the world and into the arms of a loving family is our most sacred mission.”); FERTILITY SOURCE COMPANIES, <https://www.fertilitysourcecompanies.com/about/> (last visited Feb. 28, 2018) (“Fertility SOURCE Companies’ mission is to provide individuals who are unable to conceive with the assistance they need to become parents.”); see also CTR. FOR SURROGATE PARENTING, <http://www.creatingfamilies.com/> (last visited Feb. 28, 2018) (“CSP was established because we strongly believe that Intended Parents or (Intended Parent) who are ready and willing to take on the responsibility of parenthood deserve that opportunity.”).

126. See Devine & Stickney, *supra* note 13 (lamenting her participation in a baby-selling ring, Erickson stated, “I somehow lost my way and failed to stop these things from ever happening”).

127. Yockey, *supra* note 69, at 20.

128. See, e.g., Ainsworth, *supra* note 24, at 1115 (“The pressure to produce a pregnancy may induce physicians and intended parents to insist on multiple embryo transfer, despite the American Society of Reproductive Medicine’s recommendations to limit the numbers of attempts as well as the numbers of embryos transferred to the woman’s uterus.”).

129. Spar & Harrington, *supra* note 113, at 56–57.

130. *Id.*

131. See, e.g., Madeline Feingold, *Fact Sheet Series: Disclosure Issues*, RESOLVE (July 2007), http://familybuilding.resolve.org/site/DocServer/61A_Disclosure_Issues.pdf?docID=5708 (discussing ways to address issues children born from ART may experience upon learning of their origin).

to help create families in the surrogacy industry seems conducive to the social enterprise approach, but still poses the risk of mission drift.¹³² Thus, the “tighter social lens through which to filter decisions”¹³³ that integration of purpose offers may ameliorate some of the ethical concerns of the industry.

2. Culture

Of course, to implement the integrated purpose in day-to-day decisions of employees, the surrogacy agency must foster a culture that “reinforces that purpose and the values it embodies.”¹³⁴ Many surrogacy agencies employ individuals who experienced infertility personally or have otherwise participated in the process as a donor or surrogate.¹³⁵ This suggests individuals are drawn to the industry because of some personal commitment to the process and to help others navigate the journey of surrogacy.¹³⁶ Once again, the “pre-existing values and . . . ability to appreciate the need for balance and contemplation that is essential in promoting” the dual mission of helping make families and make a profit seems inherent in the surrogacy industry’s culture.¹³⁷

As Yockey observes, however, “people who work for [social enterprises] are not transcendently good; they may be admirably drawn to the firm to solve a social ill, but we cannot infer that their ‘goodness’ extends to every aspect of their lives.”¹³⁸ For some individuals in the surrogacy industry, the aspect missing that “goodness” may be the urge to cut corners and make more money, or to cater entirely to the needs of the intended parents and neglect the needs of the surrogate and potential child. Thus, surrogacy agencies still stand to benefit from the inversion of the “means-end relationship between product.”¹³⁹ Instead of focusing on producing children for money, surrogacy agencies should focus on money as the ends to creating new families through the potential of producing a child.

IV. RECOMMENDATION

In light of the powerful role surrogacy agencies play and the interests at stake for intended parents, surrogates and potential children in surrogacy arrangements, surrogacy agencies should be regulated. First, state governments should require the licensing of surrogacy agencies. Second, as an extension of surrogacy agencies’ demonstrated record

132. See Yockey, *supra* note 69, at 6 (“[O]ne of the biggest challenges for a social enterprise is avoiding so-called mission drift, where the pursuit of profit starts to overshadow the pursuit of public benefit.”).

133. *Id.* at 23.

134. *Id.*

135. Nicolas, *supra* note 3, at 1248; see, e.g., *Our Family Creation Team*, CONCEIVEABILITIES, <https://www.conceiveabilities.com/about/our-family-creation-team> (listing employee profiles that include phrases such as “[a]fter building her own family through the generous gift of surrogacy,” “her own journey though infertility” or “as a gestational carrier”).

136. See, e.g., *About our Agency*, CIRCLE SURROGACY, <http://http://www.circlesurrogacy.com/about> (“I understand the frustration of thinking I would never have a child of my own . . . and I know from personal experience how wonderful it can be for a child to be able to know how he or she came into the world, and to meet all those who made his existence possible.”) (statement by the President of Circle Surrogacy).

137. Yockey, *supra* note 69, at 34.

138. *Id.* at 13. Again, consider the case of Theresa Erickson. Devine & Stickney, *supra* note 13 and accompanying notes.

139. Collombo, *supra* note 108.

of self-regulation, surrogacy agencies should choose the social enterprise business model to fortify compliance with the regulatory regime.

A. Surrogacy Agencies Should Be Licensed

The ABA Model Licensing Act provides a foundation for a licensing regime, particularly for protecting the intended parents.¹⁴⁰ However, the Model Act fails to address the key concerns of intended parents and to ensure surrogates and potential children involved in a surrogacy transaction are also protected. Thus, any framework for licensing surrogacy agencies may incorporate the basis proffered by the ABA, but needs to include additional parameters guiding surrogacy agencies' relationships with intended parents, surrogates, and the potential children.

B. Licensing Surrogacy Agencies Protects Intended Parents

A licensing regime should facilitate transparency in surrogacy transactions between both the intended parents and the surrogacy agency itself and the intended parents and the surrogates. Transparency in surrogacy agencies, as in other commercial transactions, will best serve the intended parents as buyers by enabling intended parents to make an informed decision. As discussed above, the ABA Model Act presents a good start for regulating the relationship between the intended parents and the surrogacy agency.¹⁴¹ A licensing regime, as the Model Act does, should require the surrogacy agency to give the intended parents detailed information about the services provided, estimated costs of the services, refund and cancellation policies, and an estimated timeline of services.¹⁴² Additionally, the agencies should explain the payment process and use of escrow accounts. Lastly, the intended parents should have access to relevant success rates of the agencies' surrogacy arrangements.¹⁴³ This requirement was not included in the ABA Model Act. Whether the surrogacy agency gives the relevant success rates directly to the intended parents or publishes its success rates for general public access, intended parents need to know the success rates of an agency to make an informed decision.

For the sake of intended parents making an informed decision, a licensing regime should also address the relationship between intended parents and surrogates. To what extent the intended parents may know about the surrogate's medical or social history should be regulated. A licensing regime may regulate this flow of information by providing surrogacy agencies with appropriate parameters in disclosing the surrogate's personal information to the intended parents.

Furthermore, to what extent the intended parents may control the surrogate's lifestyle during the pregnancy should be regulated. The ABA Model Act requires a direct agreement between the intended parents and the surrogate, thus the parties may address the intended parents' access to the surrogate's past medical or social history and the intended parents' power to manage her lifestyle during the pregnancy. The intended parents' attorney, if experienced in surrogacy arrangements, may be familiar with acceptable terms of

140. See discussion *supra* Part II.D (describing the Model Act's provisions).

141. *Supra* Part III.A.1 (discussing information asymmetries between the surrogacy agency and intended parents).

142. ABA MODEL ACT § 303(1) (2008).

143. See Spar & Harrington, *supra* note 113 and accompanying text (discussing the ABA Model Act's failure to require agencies to inform intended parents with accurate success rates).

information exchange. Nonetheless, the parameters spelled out in the agency's licensing requirements would give guidance for both the intended parents and their attorney on what the intended parents may know and what they can manage about the surrogate's life.

C. How Licensing Surrogacy Agencies Should Protect Surrogates

As the intended parents need transparency in the surrogacy transaction, so does the surrogate. A licensing regime will protect the surrogate's interests in the transaction by ensuring she has sufficient information to make an appropriate choice. Of course, surrogates should be well informed about the medical and psychological risks entailed with surrogacy. The medical professionals involved should inform the surrogate of the possible risks, guided by the licensing requirements and regulation of their own profession.¹⁴⁴

The licensing regime should also regulate to what extent the surrogate may know the circumstances of the intended parents—i.e. why the parents are pursuing assisted reproduction, how the intended parents' relationship is doing throughout the process, and what kind of parents they will be for the child. Again, the surrogate and the surrogate's attorney could use the parameters provided in the agency's licensing requirements for guidance on what the surrogate may know about the intended parents.

D. Licensing Should Protect the Potential Children

In a surrogacy transaction, the potential children bear the consequences of the surrogacy arrangement, yet the children have no choice in the transaction. As discussed above, this reflects an externality in the surrogacy industry. Like other markets, internalizing the externality would best address the possible negative impact on children produced through surrogacy arrangements. In other words, the active participants in the market—the surrogacy agency, intended parents and the surrogate—should be responsible for any damage done to the child. Accordingly, the parties should contract for the potential damage at the outset of the transaction.

At this point in the surrogacy industry's existence, valuing the possible damage to the child is challenging. Although children from the first surrogacies are coming of age, there still is insufficient information about the effects of surrogacy on the child.¹⁴⁵ Consequently, more research about the effects of surrogacy on the child needs to be done.

E. Surrogacy Agencies Should Choose to Form as Social Enterprises and Implement Value-Based Compliance

Surrogacy agencies can better protect the parties involved in a surrogacy transaction through value-based compliance. An integrated purpose to help create families and a company culture that engenders compassion and integrity would fortify agencies' commitment to serve the intended parents, respect the surrogates, and account for the potential children's interest. Additionally, surrogacy agencies choosing to form specifically as public benefit corporations could pursue public benefits such as research on infertility and research on the effects of assisted reproduction on children, or contribute

144. See *supra* note 56 and accompanying text (noting American Society for Reproductive Medicine's guidelines surrogacy arrangements).

145. See Markens, *supra* note 6, at 669–71 (describing the lack of empirical data on third-party reproductive practices).

part of the agency's profit to support infertile couples of limited means to pay for assisted reproduction.

By formalizing the company's purpose to help create families, a surrogacy agency provides an extra check on its conduct. Whether agencies are held accountable through public benefit corporation statutes or their reputation for helping infertile couples and fostering good in the community, the public enterprise proffers a business form that will facilitate compliance and help protect the vulnerable parties in surrogacy transactions.

V. CONCLUSION

By treating the surrogacy industry as a market, lawmakers can better address the needs of intended parents, surrogates, and the potential children. Licensing surrogacy agencies, encouraging agencies to form as social enterprises, and implementing value-based compliance regimes will allow surrogacy agencies to continue playing their crucial role in the industry while protecting the stakeholders at risk in the surrogacy industry.