Minority Report

MINORITY REPORT ON SURROGATE CHILD-BEARING

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INTRODUCTION

New Yorkers love liberty; but at times they will limit its exercise by some in order to prevent harm to others. This Task Force now weighs whether, notwithstanding its claimed benefits, surrogate child-bearing risks such frequent or serious harm to society, families, and individuals that New York ought to limit it, and – if so – how.

In 1988, this Task Force unanimously concluded that New York ought to discourage surrogate child-bearing in both its genetic and non-genetic forms, then respectively called "traditional" and "gestational" surrogacy. It recommended, again unanimously, that New York ought to declare surrogacy contracts void and unenforceable as against public policy, prohibit the payment of fees to surrogate child-bearers, and bar surrogacy brokers from operating in the state. It rejected the option of regulating surrogacy contracts, because regulation would be tantamount to endorsement. It proposed that surrogacy arrangements – though discouraged and unenforced – should not be criminalized when they are noncommercial and remain undisputed. It proposed a framework for the resolution of any custody disputes arising out of surrogacy to be resolved in the best interests of the child. In 1992, New York State enacted statutes implementing those recommendations which remain the law today.

The measurable evidence concerning the existence or absence of long-term harms caused by surrogacy is scanty, equivocal, sometimes biased, and often anecdotal. Members of the Task Force appraise that evidence differently. All agree that surrogacy risks some harms, but they weigh the nature, frequency, and severity of the harms differently. All agree that surrogacy creates some tension between adult desires and child welfare, but they disagree about the nature and consequences of that tension and how best to resolve it. All agree that it is legally permissible for New York State to regulate surrogacy and to discourage, even to ban, some forms of it, but disagree about which forms ought to be regulated and which prohibited. All agree that disputes over custody and parentage of children born through surrogacy ought to be avoided or resolved quickly, but disagree about what mix of policies will minimize, not only the harms caused by such disputes, but also the other harms risked by surrogacy.

The current Task Force unanimously supports present New York State policy regarding so-called "traditional" or genetic surrogacy. It should be discouraged, contracts to use it should remain unenforceable under state law, and its commercial forms should be prohibited. The members disagree about so-called "gestational" or non-genetic surrogacy. All propose policies meant to limit at least some of its risks, but disagree about what mix of policies will most effectively minimize those risks.

Today's majority argues that the present policy concerning non-genetic surrogacy ought to be revisited because of developments since 1988, especially those since 2011. The minority finds these developments collateral and the arguments unpersuasive. See Part 5.

Upon revisiting surrogacy, the majority believes there is insufficient evidence of harm to fully justify the current prohibition of commercial surrogacy, and proposes that New York should permit, and even enforce, compensated arrangements for non-genetic surrogacy if they meet dozens of specific regulatory conditions. We in the minority believe that there is insufficient evidence of safety to risk tampering with New York's current, well balanced policies. We find that no regulation, particularly the one proposed by the majority, can address adequately the most significant harms of surrogacy. Indeed, we think that any such regulation, while perhaps mitigating some of the rare incidental harms, would actually encourage the more frequent use of surrogacy with its attendant inherent and irremediable harms.

Accordingly, the minority recommends that in New York: (1) all forms of surrogate child-bearing, both genetic and non-genetic, compensated and uncompensated, should still be discouraged; (2) contracts for all forms of surrogacy should remain void and unenforceable as against public policy; (3) those who enter contracts for compensated surrogacy or who arrange for others to do so should continue to be subject to a monetary fine for violation; (4) voluntary, uncompensated contracts for either genetic or non-genetic surrogacy should be tolerated with neither government enforcement nor criminal penalty; and (5) in all cases of surrogacy, post-birth judicial adoption proceedings should remain New York's preferred method to resolve parentage in the best interest of the child.

A detailed statement of the minority's reasons follows. In Chapter 1, we offer general observations about parents, children, and the creation of families. In Chapter 2, we explain the terms we will use and we supplement the majority's description of surrogate child-bearing. In Chapter 3, we describe some risks and harms of surrogacy. In Chapter 4, we apply our ethical analysis to the facts we see. In Chapter 5, we discuss reasons, or lack thereof, to revisit surrogacy. In Chapter 6, we analyze the majority's proposed regulation. Finally, in our Conclusion, we summarize our findings and policy recommendations.

Chapter 1 – PARENTS, CHILDREN, AND THE CREATION OF FAMILIES

Parenting is vital to humanity as a whole. It is essential to the continued biological life of the human species, the social life of communities, and the individual life of children as they grow. Parenting is widely thought to aid the psychological and even the spiritual growth of the adults who practice it; many consider it to be sacred.

Many adults welcome or eagerly seek parenthood and in most cases it is a happy development. Many who seek to become parents – by unaided sexual intercourse, by assisted reproductive technologies (ART), or by adoption – must undertake persistent, even sacrificial efforts to do so. The failure of such efforts to unite them with a child can be heartbreaking.

We acknowledge the joy of loving adults united with a child, and – no matter how the union occurred – we hope all families will thrive. We urge society to take prudent steps to support all such families. However, because we see heightened risks for the children of surrogacy, we believe that society should discourage that method of family creation.

Parenting is vital for children, but it is not so for adults. Children need some form of adult protection in order to live to maturity; without it, they suffer and die. Adults often want to be parents; but without parenthood they can still live happily. Many prospective parents would prefer to control the timing and method of conception and birth, and to select wanted traits for their children, but compliance with such preferences is not essential to their life, health or happiness. There is a difference between desire, even intense desire, and necessity.[1]

Children are the ontological equals of adults, that is, they are individuals who are morally distinct and, in an important sense, ought to be independent of the control of others.[2] But parenting is not a relationship of equally capable persons. Children are more vulnerable than adults. They are utterly reliant on an adult woman to carry them to birth. For years after birth, children remain dependent on adults. Even as they become more self-sufficient, they require the guidance and protection of adults, to navigate the physical and social challenges of their environment. The primary and basic purpose of parenting is the nurture and protection of vulnerable children. Gratification of adults may be a happy, intermittent by-product, but it is not the fundamental purpose of parenting. Certainly adult gratification should not outweigh child protection. Adult control of children for purposes other than their protection and development is morally suspect.

Some discussions of surrogacy insist that its children have only interests, not rights, without explicit definition of the difference, but with a tacit suggestion that such interests may be more

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[1] Neither surrogacy nor parenting is necessary for any particular adult. "Childlessness is a disappointment for many but not all, a tragedy for few." Richard A. Posner, *Sex and Reason*, Harvard University Press, 1992, at page 306. Kajsa Ekis Ekman cites Swedish intellectual Nina Bjork who has written that one sign of an affluent society is having difficulty distinguishing desires from needs. Ekman argues that the longing for children becomes the right to use another woman's womb backed by the logic of profitability, which makes it too easy for the wishes of the economically strong to be transformed into self-evident rights. Kajsa Ekis Ekman, *Stop Surrogacy Before It Is Too Late*, viewed on September 1, 2016 at https://medium.com/festival-of-dangerous-ideas/stop-surrogacy-before-it-is-too-late-9910035a63f0#.pyxibsp8m.

[2] Rachel Lu, *The Perils of Surrogacy*, The Human Life Review, Summer 2014, pp. 41-43.

readily compromised than rights. We agree that children of surrogacy have at least interests in it, that is, claims to be respected. But we believe that they have more than mere interests; they have rights based in their status as human beings which rights are based on prior moral justice inherent in human nature, whether or not they are recognized by positive law.

Children have rights, both negative rights not to be manufactured, sold or unnecessarily separated from their genetic and gestational parents, and, once conceived, positive rights – where at all possible – to a familial connection with the man and woman who conceived and carried each of them. These rights are not necessarily found in explicit positive law, but like other inalienable rights, they are endowed by another source which, depending on one's view, forms the natural or transcendent order of things.[3] These rights have been at least partially recognized and outlined in different ways, including in the context of surrogacy.

Philosophical, social and religious thinkers have put it as follows. "Subordinating children from their very conception to the motives of their would-be parents (even if those motives are basically benevolent) is a violation of their dignity and of their moral freedom. It instrumentalizes them in a morally unacceptable way."[4] "Children's rights are human rights. We all have a right to know where we came from. We all have a right to be raised by our mother and father, where possible; and if it isn't possible, to have at the very least a mother and father to love, if a living parent of each sex is available, or to remember, if one has passed away. We all have a right to be born free, not bought, sold, or manufactured. … [Violation of these rights] is a violence against the family tree to which another human being is entitled by the eternal life cycle that unites all of us."[5] "Our children have the right to be procreated, not produced."[6]

Government bodies have recognized at least some aspects of such children's rights. The United Nations has said "[A] child of tender years shall not, save in exceptional circumstances, be separated from his mother."[7] The European Parliament of the European Union has called surrogacy a serious problem, noted that it constitutes exploitation of women and children, subjecting them to being regarded as commodities, and augments the trafficking of women and children.[8] The same parliament has condemned the practice of surrogacy which undermines

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[3] The United States Declaration of Independence lists three such rights, but the list is illustrative, not exhaustive.
[4] Rachel Lu, *The Perils of Surrogacy*, The Human Life Review, Summer 2014, at p. 46.
[5] Robert Oscar Lopez, *The Call of the Child*, Jephthah's Daughters, © 2015, International Children's Rights Institute, at. p. 26. In fact, Lopez and others argue that, even without racial oppression or physical abuse, the exchange of money for children who are thus separated from at least one of their biological parents is akin to slavery. See Alana Newman, *Introduction to Section I* (p. 15, *et seq.*), Rivka Edelman, *Secular Israel, Gays, and Surrogacy* (p. 143, *et seq.*), and Robert Oscar Lopez, *Slavery* (p.272, *et seq.*), all anthologized in Jephtha's Daughters, 2015.
[6] Fr. Tadeusz Pacholczyk, The Ethics of 'Correcting' Mitochondrial Disease, National Catholic Bioethics Center, September 2009, viewed on September 1, 2016 at http://www.ncbcenter.org/index.php/download_file/force/250/158/.
[7] United Nations Declaration of the Rights of the Child, Principle 6, November 20, 1959. In 1959, the UN likely did not contemplate surrogate child-bearers. But in the years since such women have appeared, the UN has not amended Principle 6. In fact, in 1989, the UN said "The child … shall have … as far as possible, the right to know and be cared for by his or her parents." United Nations Convention on the Rights of the Child, Article 7(1), November 20, 1989.
[8] European Parliament resolution on priorities and outline of a new EU policy framework to fight violence against women, at #s 20-21, adopted April 5, 2011.

human dignity.[9] The Parliamentary Assembly of the Council of Europe (PACE) has rejected a recommendation to legalize and regulate surrogacy in its 47 member nations.[10] And this very Task Force in 1988 has said, "Rather than accept [a] contractual model as a basis for family life and other close personal relationships, society should discourage the commercialization of our private lives and create the conditions under which the human dimensions of our most intimate relationships can thrive."[11]

There is no recognized moral or legal right to have a child, nor should there be. In 1988, the Task Force found that any purported right to enter into and enforce surrogate parenting arrangements was not protected by the New York or United States Constitution. Nor did the Task Force accept it as a basic moral entitlement.[12] Even current Task Force members who favor the enforcement and regulation of some surrogate child-bearing do not argue that there is any moral entitlement or constitutional right to enter or enforce such arrangements.

All persons, including children, thrive with a sense of identity, context and relationship to others, including – if possible – to their genetic and gestational parents. Yet, parenthood sometimes arises, continues or ends in less than ideal circumstances. Some parents are unwilling or unable to care for a child. Some parents separate or divorce. Some parents die.

Although healthy societies should encourage adults (including single, step, foster and adoptive parents) to support children who have suffered separations from a biological parent, societies should not encourage behaviors that lead to such separations. Acceptance of misfortune, or adaptation to it, is sometimes necessary. So New York makes foster care and adoption available for children separated after birth from their genetic and gestational parents. But it is unwise to endorse behaviors that risk such ills. So New York does not – and should not – endorse the creation of children conceived with the intent to separate them from some or all of their biological parents.

Traditionally, no more than two adults are the genetic, gestational and – usually – social parents of any child. Of course, for millennia the only way that human beings could bring a child to birth was for a man and a woman to have sexual intercourse with each other, resulting in fertilization by the man's sperm of the woman's egg in the woman's body (that is, the conception of an embryonic human being), its implantation, nourishment and growth in the woman's uterus, and the birth of a baby. Very often the same two adults who conceived the baby have stayed together to raise the infant to maturity. Many societies – for practical, economic, social, moral, or even theological reasons – have by law and custom encouraged the parents to live with each other and both to care for their children after birth. For the most part, this has worked well. Departure from such traditions risks harm to families and society. We discuss this in detail at Part 6.

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[9] European Parliament resolution on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter, at # 114, adopted November 30, 2015.

[10] *PACE rejects draft recommendation to "Children's rights related to surrogacy,"* October 11, 2016 session, viewed on October 18, 2016 at http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6355&lang=2&cat=8.

[11] NYS TFLL, Surrogate Parenting, 1988, p. 123.

[12] NYS TFLL, Surrogate Parenting, 1988, pp. iv, 61 and 116.

Society has an interest in the well-being of parents, children and families that might justify state intervention. In 1988, the Task Force found that society has a basic interest in protecting the best interests of children, shielding gestation and reproduction from the flow of commerce, and protecting and promoting those social institutions it deems primary to its collective life.[13] No current Task Force member claims that the state lacks power to intervene in family relationships for the good of parents, children, families and society. In fact, all current members think it wise to ban some surrogacy arrangements and most of them think it would be wise to regulate others. We in the minority agree that society has an interest and right to intervene, but we believe that interest is more prudently advanced by discouraging all surrogate child-bearing, rather than encouraging, enforcing or regulating some forms of it.

[13] NYS TFLL Surrogate Parenting, 1988, pp. iv and 115.

Chapter 2 – DEFINITIONS AND DESCRIPTION OF SURROGATE CHILD-BEARING

Part 2A – Definitions and Terminology

Sloppy language makes it easier to think foolishly.[14] Sometimes the jargon used to describe surrogate child-bearing is misleading, but it has become so customary that it is difficult to communicate when using objectively accurate but unfamiliar terms. Despite the difficulty, we think it worthwhile to try to write and think clearly.

No surrogate child-bearing is traditional and all such child-bearing is gestational. We will distinguish: (a) genetic, so-called "traditional" surrogacy where the child-bearing woman has also provided the genetic material of her egg; and (b) non-genetic, so-called "gestational" surrogacy where she has provided no genetic material to the embryo she bears.

Many of the gametes provided for *in vitro* fertilization (IVF), including IVF for surrogacy, are sold rather than donated.[15] We will distinguish: (a) donors: and (b) vendors, and use collective terms, like "providers" that do not imply donation when there has been a sale. We do so because we think the difference matters for many children of ART.

There is more to biology than genetics. Gestation too is biological. Yet, some call "biological" only those parents who contributed genetic material to their child and omit to call the non-genetic surrogate child-bearer a biological parent. We will acknowledge that a gestational mother is a biological parent.

Terms like "surrogate parenting" are ambiguous. In non-genetic surrogacy agreements, is the egg provider, the child-bearer, or the intended social mother the "surrogate mother?" The term "surrogate parent" could logically refer to any of the adults involved in DNA provision, gestation, or child-rearing, so we prefer not to use it. We will use terms like "gamete provider, donor or vendor" for the genetic parents, "surrogate child-bearer" or "surrogate" or "carrier" for the woman who (sometimes in place of the genetic mother and always in place of any woman who intends to raise the child) bears the child, and "intended parents" for the adults who want to become the legal or social parents responsible to raise the child. And because the child does not, and should not, substitute for anybody else, we will use terms like "child of surrogacy" or "child born through, of or by surrogacy," rather than "surrogate child."

Not all change, including technological change, is an "advance." Unless one knows where one wants to go, one cannot know, or even guess, whether a change marks or enables progress toward the goal or regression away from it.

Our quest for linguistic accuracy cannot ignore the fact that much has been written about surrogacy, including by this Task Force in 1988, by others who object to surrogacy, and by

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[14] See George Orwell, *Politics and the English Language*, 1946.

[15] George J. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, Family Law Quarterly, XIV, 1, Spring 1980, at p. ??, reprinted in Child Welfare, LX, 3, March 1981, at page 165. See also, Robert Black and Janna C. Merrick, Human Reproduction, Emerging Technologies, and Conflicting Rights, (c) 1995 Congressional Quarterly, Inc..

researchers, using terms we find potentially misleading. Accordingly, when we quote or describe those prior writings, we will use the terms they used. When we state our own views, we will use the terms we think most accurate. And sometimes we will use multiple terms to remind readers how to translate one expression to another.

Part 2B – Supplemental Description of Surrogate Child-bearing

The majority's descriptions of artificial insemination, *in vitro* fertilization (IVF), genetic and non-genetic surrogacy are mostly accurate as far as they go. So too, the majority's descriptions of the biomedical issues facing monogamous same-sex couples and infertile opposite-sex couples. But some of the majority's claims about what gestational surrogacy is, why it is desired and how it is practiced by one group or another of would-be parents, are incomplete. As a result, some arguments offered to justify surrogacy in some described cases do not necessarily apply to other undescribed cases. And some technological and social aspects of surrogacy which the majority does not mention or notes only briefly bear further discussion here. Eight examples follow.

First, the majority usually (and the minority always) defines "gestational" or non-genetic surrogacy as surrogate child-bearing where the child-bearer has no genetic connection to the child. This definition includes surrogacy where none, one or two intended parents provide gametes. But sometimes the majority suggests that in such surrogacy the child is genetically related to one or both intended parents, and then argues that such relatedness means that the intended parents are not buying the child.

Whatever the merits of the majority's argument that paying for genetically related children is not buying them (as set forth at Parts 3D, and 4B, we think it unpersuasive), it does not apply at all to cases where neither intended parent is so related to the child. Yet the majority would permit state enforcement of contracts for non-genetic surrogacy even in cases of children lacking any genetic relation, not only to the child-bearer, but even to the intended parents. Its proposed regulation would not require even one intended parent to be genetically related to the child to be implanted in, and surrendered by, the surrogate child-bearer.

Second, the majority variously claims that "many" surrogacy arrangements use gametes from one or both intended parents, that "many" use the gametes of both intended parents, and that "some" use an anonymous donor to contribute the sperm, egg, or both. These claims are based in part on "expert" estimates, but fail to note that the two selected experts qualified their responses by saying that they were, in one case, "just a guess" and, in the other case, "anecdotally" based.

Whether or not any of the Majority's claims is true for many cases, or even for many cases of opposite-sex couples, it is not true for all cases. And it cannot be true that both sets of gametes come from same-sex couples who intend to be parents, or from persons who intend to be single parents. There are biological limits to how far arguments about procreation based on notions of equity can be extended to all.

Nonetheless, the majority uses these claims about the source of gametes, claims that cannot always be true, to downplay the risks associated with anonymous gamete "donors" by claiming that in many surrogacy arrangements the embryo is created from the gametes of the intended

parents. Yet the majority would permit and enforce non-genetic surrogacy even in cases where nobody knows the identity of any gamete donor, vendor or provider.

Third, IVF, including IVF for surrogacy, typically collects and fertilizes more human eggs, and creates more embryos, than are immediately wanted for implantation and gestation.[16] By embryos, we mean individual embryonic human beings like those from which all adult writers and readers of these reports have grown. Some IVF embryos are deliberately aborted after implantation. Others, never implanted, are doomed to indefinite storage, subjection to potentially harmful research, or to accidental or deliberate destruction. Most of the minority thinks this deserves more attention than the majority gives it.

Fourth, the United Kingdom has approved a technique to treat infertility and prevent mitochondrial disease, where the nuclear DNA of one woman and the mitochondrial DNA of another woman are combined in a single egg.[17] The US FDA is considering whether to approve similar techniques.[18] If approved and effective, such techniques could lead to so-called "three-parent IVF" where a man and two women contribute DNA to the embryo. In fact, it has happened despite the current U.S. ban. Recently, after a Mexican clinic performed IVF using mitochondrial DNA transfer, a baby was born in New York to a Jordanian couple.[19]

Three-parent IVF could add to the number of persons collaborating with a surrogate child-bearer. A child could have six such parents, contributing: (1) male DNA; (2) female nuclear DNA; (3) female mitochondrial DNA; (4) a womb (5) social mothering; and (6) social fathering. In addition to the foregoing 4-mom/2-dad combination, same-sex marriage or same-sex partnering make possible 5-mom/1-dad and 3-mom/3-dad combinations. Even without three-parent IVF, a child could have five parents in a 3-mom/2-dad, 4-mom/1-dad, or 2-mom/3-dad combination. Of course social parents could total one, two, three or more.

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[16] According to: (1) the Genetics & Public Policy Center of Johns Hopkins University page on Assisted Reproductive Technologies; (2) the Society for Assisted Reproductive Technology page "ART: Step-by-Step Guide;" and (3) data presented to the Task Force by reproductive endocrinologist Dr. Howard Lieman, the average number of oocytes retrieved from an IVF patient is eight to fifteen, the average fertilization rate is about 70%, and one would be lucky to get two "perfect embryos" from that group. The minority calculates that on average five to eleven embryos are created for each patient and at least three to as many as nine such embryos are deemed less than perfect: [(8 to 15) x 70% = (5.6 to 10.5), say (5 to 11)] and [(5 to 11) – 2 = (3 to 9)]. These sources have not provided information about the disposition of those embryos deemed less than perfect. Other sources estimate that about five in six embryos created in IVF will die. See Dr. Kristina Pakiz, cited by Lindsay Steele, *Beyond IVF: Hope for infertile Catholics*, The Catholic Messenger, October 23, 2014.

[17] Dario Thuborn, *Britain authorises 'three-parent' babies*, Agence France-Presse, February 3, 2015, viewed on February 3, 2015 at http://news.yahoo.com/british-lawmakers-vote-three-parent-babies-205650783.html;_vlt=A … ; and Hannah Devlin, *Britain's House of Lords approves conception of three-person babies*, The Guardian, February 24, 2015, viewed on March 27, 2015 at http://www.theguardian.com/politics/2015/feb/24/uk-house-of-lords-approves-conception-... .

[18] Sharon Begley, U.S. FDA weighs evidence on producing 'three-parent' embryos, Reuters, February 25, 2014, viewed on September 1, 2016 at https://www.yahoo.com/news/u-fda-weighs-evidence-producing-39-three-parent-011702701—finance.html?ref=gs; and Matt Smith, FDA considering 3-parent embryos, CNN, February 27, 2014, viewed on March 4, 2014 at http://www.cnn.com/2014/02/26/health/ivf-mitochondria/index.html .

[19] Gina Kolata, *Birth of Baby With Three Parents' DNA Marks Success for Banned Technique*, New York Times, September 27, 2016.

Fifth, some heterosexual fertile women seek surrogacy for so-called "social," non-medical reasons. Cases include a photographer who did not want to disrupt her business, a physician who could not "afford" to be pregnant, a socialite who did not want to get fat, and an amateur runner who had an upcoming marathon.[20] Some unknown number of fertile single adults seek surrogacy to acquire a child whom they intend to raise alone.

Sixth, while scholars disagree about whether human sexual preference is innate (perhaps determined by genes or hormones) and more or less unchangeable,[21] or constructed by social or cultural forces and more or less malleable,[22] there is broad, though not universal, agreement that the sexual behavior of individuals can exhibit some variety, despite their preferences.[23] In other words, sexual preferences, or at least sexual behavior, need not be exclusively heterosexual or homosexual. Some number of coupled parents who identify themselves as lesbian, gay, bisexual or transgender (LGBT) have a child conceived by heterosexual intercourse by one of them. Estimates of the numbers or proportions of such couples vary, but they are higher than zero.[24] Some number of self-identified LGBT persons who wish to become parents could engage in fertile heterosexual intercourse to conceive a child,[25] or could adopt a child, but would rather not to do so, preferring instead to acquire a child by some other means, sometimes by surrogacy. We do not opine here on whether sexual preference is innate or learned, unchangeable or sometimes changing; nor do we opine on the precise portion of self-identified LGBT persons who are capable of fertile heterosexual intercourse. We do not advocate that government or society

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[20] Sarah Elizabeth Richards, Birth Rights: Inside the Social Surrogacy Debate, Elle Magazine, April 17, 2014.

[21] See, e.g., Richard A. Posner, *Sex and Reason*, Harvard University Press, 1992, at pages 87, 224, 296, 436

[22] See, e.g., David F. Greenberg, *The Construction of Homosexuality*, The University of Chicago Press, 1988, at pages 18, 110, 117, 283, 463-464.

[23] Posner, 1992, op. cit., at pages 100, 114, 436-437. Greenberg, op. cit., at pages 26, 40, 66, 463-464."

[24] Chirlane McCray (a former lesbian activist, now married to the male Mayor of New York City with whom she has two children) has said that that there is a "fluidity" to romantic and sexual attraction along a "spectrum." Katie McDonough, *Bill de Blasio's wife, Chirlane McCray, on the "fluidity of love" and the political spotlight*, Salon, May 9, 2013, viewed on July 30, 2017 at http://www.salon.com/2013/05/09/bill_de_blasios_wife_chirlane_mccray_on_the_fluidity; Ross Barkan, *'Are You Still a Lesbian?' Bill de Blasio's Wife Doesn't Have an Answer*, Observer, May 21, 2015, viewed on July 30, 2017 at http://observer.com/2015/05/are-you-still-a-lesbian-bill-de-blasios-wife-doesnt-have-an-answer/.. ; Elizabeth Daley, *Are We Beyond Sexual Labels? NYC First Lady Says Yes*, The Advocate, June 3, 2016, viewed on July 30, 2017 at http://www.advocate.com/bisexuality/2016/6/03/are-we-beyond-.
Robert Oscar Lopez (a self-described bisexual, raised by two lesbians, and now a father in a heterosexual marriage), has stated that most LGBT parents, no matter what their current patterns of sexual attraction or behavior, are or were bisexuals who engaged in fertile heterosexual intercourse. *The Lost Manifesto of Manuel Half*, Jephthah's Daughters, 2015, 36; and *Growing Up With Two Moms: The Untold Children's View*, The Public Discourse, August 6, 2012, viewed on July 13, 2016 at http:www.thepublicdiscourse.com."

[25] "Very few men, even among those who have a strong preference for homosexual over heterosexual relations, are incapable of erection and ejaculation in heterosexual intercourse." Posner, op. cit., at 100, citing Marcel T. Saghir and Eli Robins, *Male and Female Homosexuality: A Comprehensive Investigation*, Baltimore, Williams and Wilkins, 1973, at page 102.
Persons who call themselves homosexual have often had heterosexual experience. Greenberg, op. cit., at 491, citing Albert J. Reiss, *Journey into Sexuality: An Exploratory Voyage*, Englewood Cliffs, N.J., Prentice-Hall, 1986, Alfred C. Kinsey, et al., *Sexual Behavior in the Human Male*, Philadelphia, W.B. Saunders, 1948, Charlotte Wolfe, Love Between Women, New York, St. Martin's Press, 1971, Saghir and Robins, ibid., at 84-91, Alan P. Bell and Martin S. Weinberg, *Homosexualities: A Study of Diversity among Men and Women*, New York, Simon and Schuster, 1978, and Ruben Ardilla, 'La Homosexualidad en Colombia,' *Acta psiquiatrica y psicologia de America Latina* 31:191-210."

should try systematically to change those who define themselves as LGBT, and we certainly do not want such persons to be persecuted or oppressed. We simply note that some, perhaps many, persons in same-sex relationships do not need surrogate child-bearing in order to conceive and/or raise a child genetically related to one of them.

Seventh, some same-sex male couples hiring a surrogate child-bearer will mix their sperm in order to obscure to themselves and their children which of them is the genetic father.[26] Of course, DNA testing of each of them and the child would reveal which of them is the genetic father; but unless such testing is done, there is uncertainty about male genetic parentage. The practice deliberately introduces confusion (albeit remediable confusion) about the child's heritage in order to allow each adult to imagine that he might be the genetic father.

Finally, superfetation is the fertilization of an egg and subsequent development of another embryo, fetus or embryonic human being when one is already present in the uterus. It is extremely rare in humans, but apparently somewhat more likely in women who have undergone fertility treatments.[27] One such woman who entered a contract for commercial non-genetic surrogacy in California bore two boys in late 2016. One developed from an embryo created through IVF, genetically related to a Chinese couple, not genetically related to the child-bearer, and implanted with the intent that he would be surrendered to the Chinese couple. The second was thought during pregnancy to be a twin of the first, but later after post-natal suspicions arose he was shown by DNA testing to be the genetic child of the California woman, conceived after the implantation of the first and without ART. Nonetheless, at birth both boys were taken from the woman who bore them and given to the Chinese woman whose name appeared as the mother on both birth certificates. Disputes arose about custody, the birth certificate, who might have authority to put the boy up for adoption, compensation or rebates under the surrogacy contract, and claims for additional compensation to the surrogacy broker.[28] It is reasonable to believe that these events and disputes would not have happened if California had not begun to enforce contracts for commercial non-genetic surrogate child-bearing.

We note these additional facts in order to highlight the point that policy regarding surrogacy should account for more than a few idealized families. Of course, many of those seeking surrogacy are opposite-sex couples who for medical reasons cannot conceive or carry a child by themselves. Others who seek it are same-sex couples who for reasons of fundamental biology cannot conceive and carry a child by themselves. But there are others who are capable of joining with a person of the opposite sex to conceive and carry a child, but who for non-medical reasons nonetheless seek surrogacy.

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[26] Anemona Hartocollis, *And Surrogacy Makes 3*, New York Times, February 19, 2014. For a critique of the Hartocollis article, see Rivka Edelman, *The NY Times Gussies Up Reproductive Slavery*, Jephthah's Daughters, at p. 151 et seq.

[27] Khalil A. Cassimally, "Superfetation: Pregnant while already pregnant," April 27, 2011, https://blogs.scientificamerican.com/guest-blog/superfetation, viewed Nov 7, 2017.

[28] Jane Ridley, "I rented out my womb – and they almost took my own son," Oct 25, 2017, http://nypost.com/2917/10/25/i-rented-out-my-womb-and-they-took-my-own-son/ , viewed Nov 7, 2017; and "Surrogate mother of 'twins' finds one is hers," Nov 3, 2017, http://www.bbc.com/news/health-41858232 , viewed Nov 6, 2017.

We also note these facts in order to show that policy regarding surrogacy needs to account for more than the child born by surrogacy, but also for the children conceived but never implanted for surrogacy, and that policy might soon need to account for more than two female genetic parents.

Chapter 3 – THE HARMS OF SURROGACY

We will discuss the following persons who are subjected by surrogacy to risks of measurable harms: (A) the offspring born of surrogacy; (B) the embryonic and other children conceived by IVF for surrogacy; and (C) other persons including: surrogate child-bearers, intended parents, and family members of both of them. We will also discuss some of the unmeasurable harms of surrogacy.

The current evidence concerning the harms of surrogacy, or the alleged lack thereof, is scanty, equivocal, sometimes biased, and often anecdotal. Those on all sides of the debate must be careful to evaluate with care what little evidence exists. Because the evidence is incomplete, one must make reasonable guesses about what is unmeasured or even unmeasurable. Rational extrapolations are sometimes needed, but they must be used with caution.

Part 3A – Offspring Born of Surrogacy

Does commercial surrogacy, particularly non-genetic, so-called "gestational" surrogacy and subsequent social parenting as it is practiced in the US – that is, sometimes with gametes from one or two intended parents, but sometimes with gametes from one or more persons who are not the intended parents, and sometimes with gametes from one or more persons unknown, and perhaps unknowable, to the child or even to the intended parents – does such surrogacy have risks, including long-term risks, of measurable harm to the offspring of such surrogacy at rates higher than for other children, including adoptees or the children of natural conception born by their genetic mothers and raised by their genetic parents? No one knows.

We do know that some adolescent and adult children of commercial surrogacy have expressed confusion, shame, anger or feelings of loss stemming from such surrogacy.[29] One teenager said: "It looks to me like I was bought and sold. … Yes I am angry. Yes I feel cheated."[30] Another adult said: "My biological mother was paid $10,000 for her services. … I was devastated."[31]

These witnesses are often offspring of genetic "traditional" surrogacy, probably because so few offspring of non-genetic "gestational" surrogacy – a recently more popular technology – have yet lived long enough to mature and tell their stories. The reports now available tell us that some children of commercial surrogacy suffer. But no one knows at what rates or for how long they suffer, especially the offspring of commercial non-genetic surrogacy.

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[29] See, for example, Jennifer Lahl, *Anonymous Father's Day* (2012) and *Breeders: a Subclass of Women?* (2014) two films produced by The Center for Bioethics and Culture Network. The first is cited by Ann Carey, *The Who Am I? Generation*, Our Sunday Visitor, March 23, 2014. The second is discussed by Joan Frawley Desmond, *Jennifer Lahl's 'Breeders' Completes Trilogy on Reproductive Technology*, National Catholic Register, January 23, 2014. See also, Anonymous Us at http://anonymousus.org .

[30] Brian C., *Son of a Surrogate* blog, posted August 9, 2006, viewed on May 25, 2016 at http://sonofasurrogate.tripod.com .

[31] Jessica Kern, *I Am a Product of Surrogacy* blog, quoted by S. Brinkman, *Children of Surrogates Campaign Against Practice*, *Women of Grace* blog posted June 19, 2014, viewed on September 1, 2016 at http://www.womenofgrace.com.

We are glad to hear reports from or about children of surrogate child-bearing who are thriving without any apparent ill effects arising from their surrogacy origins. But the collection of anecdotes, either pro or con, is unsystematic and does not tell us at what rates any harm might be suffered, especially long-term harm to offspring of commercial non-genetic surrogacy.

We have found no published studies of adolescent or adult offspring of commercial surrogacy, whether with anonymous or non-anonymous gametes. British studies of young children of non-commercial surrogacy do not answer questions about adolescent or adult offspring of commercial US surrogacy with sometimes anonymous gamete "donation."

For reasons we will discuss more fully in the Analysis at Part 4, we think it is useful to review some published studies of offspring of sperm "donation" or sale. Such studies, of course, are not studies of the offspring of surrogacy; in that sense they study apples not oranges. But there are reasons to think they offer some useful analogies. And because some studies compare the apples to peaches and others compare the oranges to peaches, we might make some plausible comparisons of the apples and oranges.

Neither anecdotes nor published studies directly and fully address our question about commercial, non-genetic surrogacy which sometimes uses commercially obtained gametes and sometimes uses anonymous gametes. So we will consider whether what we can reasonably know about such surrogacy (even if we cannot measure it) might be supplemented by a philosophical view of cultural anthropology outlined at Part 1 and supplemented in our Analysis at Part 4. We now turn to published studies.

Subpart 3A1 – British Studies

The majority relies (we think it over-relies) on small British studies of young children of non-commercial surrogacy for its conclusions supporting commercial non-genetic surrogacy in New York State. In its discussion of the psychological risks to surrogates, intended parents, and children of surrogacy, the majority cites a series of studies from the Centre for Family Research ("UK/CFR") in Cambridge, England, principally authored by Susan Golombok and Vasanti Jadva.[32] The authors have studied the satisfaction of some surrogates and intended parents. For

[32] Susan Golombok, et al., *Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life*, Developmental Psychology, Vol. 40, No. 3, (2004), pp. 400-411, hereafter "2004 UK Study at Age 1." Susan Golombok, et al., *Surrogacy Families: parental functioning, parent-child relationships and children's psychological development at age 2*, Journal of Child Psychology and Psychiatry, 47: 2 (2006), pp. 213-222, hereafter "2006 UK Study at Age 2."
Susan Golombok, et al., *Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3*, Human Reproduction, Vol. 21, No. 7 (2006), pp. 1918-1924, hereafter "2006 UK Study at Age 3." Susan Golombok, et al., *Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7*, Developmental Psychology, 47: 6, (2011), pp. 1579-1588, (hereafter "2011 UK Study at Age 7." Vasanti Jadva, et al., *Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins*, Human Reproduction, Vol. 27, No. 10, (2012), pp. 3008-3014, hereafter "2012 UK Study at Age 10." Susan Golombok, et al., *Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment*, Journal of Child Psychology and Psychiatry, 54: 6, (2013), pp. 653-660, hereafter "2013 UK Study at Age 10."

purposes of this argument, the findings about those adults do not concern the minority. Instead, we focus on the claims about children of surrogacy based on those studies.

The UK/CFR researchers recruited British families of four types created in 2000 to 2002: 42 surrogacy families, 51 egg "donation" families, 50 "donor" insemination families, and 80 natural conception families, each with a 1-year-old child, representing, respectively, 61%, 75%, 50% and 73% of the families who were invited to participate. By the time the child was aged 10, the study participants had dwindled to 33 surrogacy families, 30 egg "donation" families, 34 "donor" insemination families, and 55 natural conception families. Researchers administered questionnaires to the mother at home when the child was 3, 7 and 10 years old, and to teachers when the child was 7 and 10. Researchers evaluated the mother's tone of voice and facial expressions in addition to her verbal report of her relationship with her child.[33]

The majority cites these UK/CFR studies to claim that parents of children born through surrogacy had more warmth and attachment behavior toward their infants, and that the parents reported more positive family experiences and more positive parent-child relationships, than the parents of other sorts of families. It claims the studies show that the psychological adjustment of 7- and 10-year-old children of surrogacy was within normal ranges for children from other family types.

The UK/CFR authors said "Although children born through reproductive donation obtained SDQ [Strengths and Difficulties Questionnaire] scores within the normal range, surrogacy children showed higher levels of adjustment difficulties at age 7 than children conceived by gamete donation."[34] They found "The absence of a gestational connection to the [intended or social] mother may be more problematic than the absence of a genetic link."[35] The authors and the majority note that the behavior problems of surrogacy children had reduced by age 10, but no statements were made about the behavior of adolescent or adult children of surrogacy because the study subjects had not yet reached those older ages.

The UK/CFR authors note that the British sample sizes were not large, that parents most concerned about secrecy of genetic origins may have been less likely to participate, and that children's difficulties may have been under-reported by reproductive donation mothers who may have wished to present their children in a positive light as a reaction to the stigma associated with these somewhat controversial routes to parenthood.[36]

The UK/CFR studies make a poor foundation on which to build a claim that commercial, non-genetic surrogacy, sometimes using purchased anonymous gametes, does not harm the children born by it. There are at least six reasons that they do not support a claim of low long-term risk to the children of such surrogacy. First, they were done in the UK where commercial surrogacy is illegal and so they did not study its effects.[37] Second, they had an initially small sample size

[33] 2004 UK study at Age 1 and 2013 UK Study at Age 10, each first cited at n. 32 above.
[34] 2013 UK Study at Age 10, first cited at n. 32 above.
[35] 2013 UK Study at Age 10, first cited at n. 32 above.
[36] 2013 UK Study at Age 10, first cited at n. 32 above.
[37] The majority suggests at Section VII, note 212, that because the UK allows generous reimbursement of surrogates' expenses, the British version of uncompensated surrogacy is substantially similar to the American version of paid surrogacy. But it is reasonable to expect that a child born to a US surrogate who is candidly paid not only for her

which dwindled to only 33 surrogacy families as the study progressed and the children aged. Third, the studies had a selection bias in that they studied only the children of mothers who permitted their families to participate; 25% to 50% of each type of family invited to participate failed to do so. Fourth, they often allowed questions about the young children's adjustment to be answered by parents or teachers, or evaluated family relationships by assessing the mothers' tone of voice and facial expression. Fifth, they have studied children no older than 10 and to date have not reported studies of adolescent or adult children of surrogacy. Sixth, the UK/CFR studies have not been replicated by any other published studies. There may be a seventh reason. The UK/CFR families were recruited from those created before Britain banned anonymous gamete donation in 2005,[38] but we don't know how many of the ART families used anonymous gametes, so we don't know how, if at all, such anonymity might have affected the results.

Overall, the UK/CFR studies find that some young UK children of nominally unpaid surrogacy, still living at home with their mothers, have coped with their family circumstances to the satisfaction of the adults who raise, teach or study them. The mothers who participated may have been more likely than non-participants to have a good family life that they were willing to let researchers study. They may have had an emotional stake in ART or surrogate parenting that led them to paint a rosy picture. It may well be that some young UK children, maybe the lucky or the strong, have adjusted to their origins as children of surrogacy. But that sheds little light on the question whether other young children of surrogacy have failed to adjust, whether some of the youngsters will report problems when they grow old enough to be more independent, or how the studied UK families might compare with unstudied US families.

Neither the UK/CFR studies, nor anecdotes about the children of surrogacy can tell us much about what to expect as such children age into adolescents and adults who, compared with infants and young children, will have a more mature understanding of their genetic and gestational origins, and will be more independent of the adults who raised them and so will be freer to express their reactions to their origins. This is in part a function of the relative ages of the cohorts of children created with different technologies which emerged at different times. Generally, artificial insemination began in the nineteenth century and so preceded egg "donation" and surrogacy which began in the late twentieth century.[39] Accordingly, there are many children of sperm "donation" to tell anecdotes and to be studied, but not so many children of egg "donation" and very few children of surrogacy.[40]

Subpart 3A2 – Other Studies

expenses, but also for the use of her womb and the surrender of the child, would be more likely to find the arrangement distasteful and upsetting. Thus the studies of UK surrogacy (whether truly, or only nominally, uncompensated) have limited bearing on US surrogacy for pay.

[38] D. R. Beeson, et al. *Offspring searching for their sperm donors: how family type shapes the process*, Human Reproduction, Vol.26, No. 9, 2011, pp. 2415-2424, at p. 2416. See also the UK Human Fertilisation and Embryology Authority website at www.hfea.gov.uk .

[39] NYS TFLL, Assisted Reproductive Technologies, 1998, pp. 49, 76.

[40] The majority cites ASRM statistics showing that US babies born through surrogacy increased from 738 in 2004 to 2,236 in 2014, an increase of over 200% in ten years. Despite the large percentage increase, the number remains small and is less than one-tenth of one percent of the approximately 3.9 million annual US births.

There are as yet no large-scale studies without selection bias of adult or even adolescent children of commercial non-genetic surrogacy. There are reports from adolescents and adults who feel loss, abandonment, anger or shame arising out of their commercial ART conception (often anonymous sperm donation or sale). Examples follow. "The effects … vary from donor child, but the overwhelming response is that we are damaged individuals because of donor conception." "I am part of a generation of children that derive from billion dollar corporations commercializing life, corporations that sell human beings." "I hate that my dad got paid... ."[41] But neither the UK/CFR studies nor anecdotes can form a reasonable basis to predict the quantitative scale of long-term results of commercial surrogacy in New York. So, we consider whether there is any other evidence about children of ART which might give us grounds to be confident or fearful about the future for children of surrogacy.

In this setting, it is reasonable to ask whether we might extrapolate from what we know about the children of gamete "donation" to make reasonable, albeit imprecise, projections about the children of surrogacy. We turn to evidence about the children of gamete "donation."

A study by Elizabeth Marquardt and others surveyed three groups of 18 to 45 year old US adults: 485 who said their mother used a sperm "donor" to conceive them, 562 who were adopted as infants, and 563 who were raised by their biological parents.[42] The study is notable for its large, albeit self-selected, sample size, the use of comparison groups, the relatively older age of those studied, and – we presume – their relative maturity, independence and willingness to report candidly about relationships with the adults who raised them, compared with younger children still living at home.

Marquardt found that sperm "donor offspring" are 1.5 to 2 times as likely as biological offspring to report problems with the law before age 25, mental health problems, or substance abuse problems. "Donor offspring" whose parents kept their origins a secret (leaving the offspring to learn the truth in an accidental or unplanned way) were more likely to report depression or other mental health issues, struggles with substance abuse, or problems with the law. While "donor offspring" who said that their parents were always open with them about their origins fared better than those whose parents tried to keep it a secret, they still reported a higher rate of substance abuse and legal problems than biological offspring.[43] In addition to such heightened risks of delinquency, depression and drug use, Marquardt also found evidence that "donor offspring" had unique concerns about anonymous commercial gamete "donation,"[44] and

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[41] The quotations are from AnonymousUs.org and are reported by Ann Carey in *The 'Who Am I?' Generation*, Our Sunday Visitor, March 23, 2014.

[42] Elizabeth Marquardt, et al., *My Daddy's Name is Donor*, The Institute for American Values, (2010), p.5, viewed on September 1, 2016 at http://americanvalues.org/catalog/pdfs/Donor_FINAL.pdf, hereafter "2010 Marquardt Study."

[43] 2010 Marquardt Study, first cited at n. 42 above, at pp. 7-14, and in more detail thereafter.

[44] Nearly half of "donor offspring" agree, "it bothers me that money was exchanged in order to conceive me." About twice as many sperm "donor offspring" as adoptees and biological offspring agree, "It is wrong for people to provide their sperm or eggs for a fee to others who wish to have children." Depending on what question is asked, about two-thirds of grown "donor offspring" support the right of offspring to have non-identifying information about the sperm "donor" biological father, to know his identity, to have the opportunity to form some kind of relationship with him, to know about the existence and number of half-siblings conceived with the same man's sperm, and to have the opportunity as children to form some kind of relationship with such half-siblings. Almost half of "donor

experience sadness or hurt because they lack a connection to their genetic fathers.[45] They have unique worries about their relationships with the families who raised them,[46] accidental incest,[47] divorce of the parents who raised them,[48] and their ability to express themselves to the adults who raised them or to the public.[49]

Another study by Diane Beeson and others surveyed "donor-conceived offspring" registered with the non-profit US-based international Donor Sibling Registry (DSR). The authors note that DSR registration is voluntary and incomplete, and that, many, if not most, donor-conceived offspring (especially those born to heterosexual parents) are not told that they were conceived using donor gametes. They note that it is impossible to know whether or not DSR registrants are representative of all donor conceived offspring, or even of all such offspring with knowledge of their conception. After excluding a small number of offspring of egg-donation, the final sample consisted of 741 offspring of sperm donors: 458 (61.8%) of them offspring of heterosexual parents (OHETs) and 283 (38.2% offspring of lesbian parents (OLSBs). Respondents lived in the USA (80.5%) and eleven other countries (19.5%); they were 31% male and 69% female. Their reported ages ranged from 9 to over 40; 54.6% of those reporting their age were 18 or under and 47.4% were 19 or older. OLSBs were generally younger than OHETs, for example, 60% of OLSBs and 26% of OHETs were 15 years or younger. Over 93% of OHETs and 82% of OLSBs reported that they were conceived using anonymous sperm "donors" while 7% and 18% respectively reported that their parent(s) had used a known or willing-to-be-known donor. The authors studied disclosure patterns and responses as they varied with two aspects of family type: single or dual parent families and heterosexual or lesbian parent families.[50]

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offspring" have concerns about or serious objection to "donor" conception itself, even when parents tell their children the truth. 2010 Marquardt Study, first cited at n. 42 above, at pp. 7-14, and in more detail thereafter.

[45] Nearly half of "donor offspring" (compared with about one-fifth of adoptees) agree, "When I see friends with their biological fathers and mothers, it makes me feel sad." Similarly, more than half of "donor offspring" (compared with less than a third of adoptees) agree, "It hurts when I hear other people talk about their genealogical background." 2010 Marquardt Study, first cited at n. 42 above, at pp.7-14, and in more detail thereafter.

[46] More than half of "donor offspring" agree, "I have worried that if I try to get more information about or have a relationship with my sperm donor, my mother and/or father who raised me would feel angry or hurt." Almost half of "donor offspring" (compared with about one-quarter of adoptees and less than one-fifth of biological offspring) agree, "I worry that my mother [or my father] might have lied to me about important matters when I was growing up." About twice as many "donor offspring" as biological offspring agree, "I feel I can depend on my friends more than my family." 2010 Marquardt Study, first cited at n. 42 above, at pp. 7-14, and in more detail thereafter.

[47] Nearly half (46%) of "donor offspring" (compared with 17% of adoptees and 6% of biological offspring) agree, "When I am romantically attracted to someone I have worried that we could be unknowingly related." Similar percentages (respectively, 43%, 16%, and 9%) agree, "I have feared having sexual relations unknowingly with someone I am related to." 2010 Marquardt Study, first cited at n. 42 above, at pp. 7-14 and in more detail thereafter.

[48] About 27% of "donor offspring" (compared with 14% of adoptees and 25% of biological offspring) reported that their parents divorced before respondent was age 16. The authors state that the comparison between parents of "donor offspring" and the parents of adoptees is apt, because in both cases the parents would likely have turned to "donor" conception or adoption later in their marriages when marriages on average are more stable. 2010 Marquardt Study, first cited at n. 42 above, at pp. 7-14 and in more detail thereafter.

[49] More than half of "donor offspring" agree, "I have worried that if I try to get more information about or have a relationship with my sperm donor, my mother and/or the father who raised me would feel angry or hurt." Those "donor offspring" who do not support the practice of "donor" conception are more than three times as likely to say they do not feel they can express their views in public. 2010 Marquardt Study, first cited at n. 42 above, at pp. 7-14 and in more detail thereafter.

[50] D. R. Beeson, et al., *Offspring searching for their sperm donors: how family type shapes the process*, Human Reproduction, Vol. 26, No. 9, 2011, pp. 2415-2424, hereafter "2011 Beeson Study.".

Beeson found that OLSBs learned earlier than OHETs the nature of their donor conception, and that offspring in single-parent families learned it earlier than those in dual-parent families.[51] Most OHETs and almost all OLSBs learned of their origins from a parent.[52] About 25% of OHETs and 10% of OLSBs reported confusion upon learning the method of their conception; over 33% of OHETs in dual-parent households reported such initial confusion.[53] Usually, the older subjects were when they learned they were "donor-conceived," the higher the percentage of them reported initial confusion. For example, among those who "always knew" or learned by age 10, about 5% to 20% reported such confusion, while among those who learned at age 11 to 18 or older, about 35% to 45% reported such confusion.[54] Confusion about donor conception diminished over time, but significant minorities, up to 11.3% among dual-parent OHETs, remained confused at the time of the surveys.[55]

We acknowledge the limitations (chiefly self-selection of the subjects) of the Marquardt and Beeson studies for their own purposes. Furthermore, neither Marquardt nor Beeson reported any study of the impact of sperm vending compared with sperm donation. And, of course, neither Marquardt nor Beeson studied surrogacy.

Part 3B – Embryonic and Other Children Conceived by IVF for Surrogacy

IVF, including IVF for surrogate child-bearing, puts embryonic human beings at deadly risk. It uses sperm to fertilize eggs, thus creating embryonic human beings, and then implants one or more of those embryos into the uterus of a woman who will then carry the embryo as it grows into a fetus, or child. Because of the risks and difficulty of harvesting eggs, it is typical to collect and then to fertilize many at once in order to have a ready supply, first of eggs for fertilization, and then of embryos for implantation.[56]

Some implanted embryos are aborted. In order to avoid the expense and complications of multiple pregnancies, IVF professionals now recommend that fewer embryos be implanted.[57] It is unclear how widespread is compliance with such recommendations. Of course, to the extent that fewer extra embryos are implanted, it is to be welcomed that fewer embryos are aborted. Yet some embryos created by IVF are still aborted after implantation, and some portion of those are aborted in the wombs of surrogate child-bearers. Although any trend to single embryo transfer means that fewer implanted embryos are deliberately destroyed, nonetheless, some still suffer that fate.

Some embryos are never implanted. We deplore the fate of embryonic human beings created by IVF, but never implanted. Most appear doomed to indefinite storage with risk of accidental

[51] 2011 Beeson Study, cited at n. 50 above, at p. 2417.
[52] 2011 Beeson Study, cited at n. 50 above, at p. 2417.
[53] 2011 Beeson Study, cited at n. 50 above, at p. 2418 and Table I.
[54] 2011 Beeson Study, cited at n. 50 above, at p. 2419 and Figure I.
[55] 2011 Beeson Study, cited at n. 50 above, at pp. 2418-2419 and Table II.
[56] At least three to six embryos created for possible use in IVF are aborted, discarded, or stored indefinitely for each embryo brought to birth by IVF. See n. 16 above.
[57] See, for example, T. Allen Merritt, et al., *National Perinatal Association Position Statement*, Neonatology Today, March 2014.

destruction through imperfect storage techniques, subjection to research with risk of death, or deliberate destruction.

Since the Task Force reported in 1998 about Assisted Reproductive Technologies (ART), new information has appeared about the risks to babies conceived by IVF. A study of 2.5 million Swedish infants born between 1982 and 2007 who were followed for an average of 10 years found a low but statistically significant increased risk of autism or mental retardation among infants born using IVF.[58] A 2013 review of 25 papers published from 1990 to 2012 found that children born after fertility treatment (mostly IVF) were at a 33% higher risk for all childhood cancers and up to a 400% higher risk for some such cancers, than those born without such fertility treatment.[59] A study of 2.8 million Danish infants born between 1964 and 2006, found that those born to women with fertility problems and fertility treatment (mostly IVF) had an 18% higher risk of childhood cancers and a 22% higher risk of young adult cancers than those born to women without such problems.[60] The cancer rates in the last two studies were low, but the increases were statistically significant. None of these three studies was able to tell whether the increased morbidities were caused by the fertility treatments or by factors related to the underlying fertility problems. But from the perspective of the afflicted child it is unlikely to matter which cause operated. We know of no reason why IVF for surrogacy would not result in the same risks associated with IVF overall.

Part 3C – Other Persons

Anonymous gamete "donation" for surrogacy puts the grandchildren of surrogacy at medical risk for genetic diseases through accidental incest. The repeated sale or donation of gametes by a single person may produce genetic half-siblings or siblings unknown to each other, and thus cause accidental incest. The children of such incest are at risk for genetic diseases. There is at least one reported case of twins separated at birth who did not learn until after their marriage to each other that they shared a common father.[61] If it can happen to twins born to one woman, it can happen to half-siblings born to multiple surrogate child-bearers.

Transfer of newborn children from a surrogate child-bearer to intended parents could frighten the other older children of the child-bearer. There has been little research on the question whether children are frightened by their mothers' surrender of another child born for other parents. A UK CFR study has been cited for the hypothesis that most biological children did not have negative psychological impacts as a result of their mothers' being surrogate child-bearers; but that study had a small sample size, no control group and some selection bias. Even so, over 10% of the children cooperating with that study failed to report positive views of their mothers' surrogacy or of family life.[62] The study method makes it hard to know what caused the absence of such

[58] Sven Sandin, et al., *Autism and Mental Retardation Among Offspring Born After In Vitro Fertilization*, Journal of the American Medical Association, 2013; 310(1): 75-84.
[59] Marie Hargreave, et al., *Fertility treatment and childhood cancer risk: a systematic meta-analysis*, Fertility and Sterility, Vol. 100, No. 1, July 2013, pp. 150-161.
[60] Marie Hargreave, et al., *Increased risk for cancer among offspring of women with fertility problems*, International Journal of Cancer, Vol. 133, No. 5, September 2013, pp. 1180-1186.
[61] 2010 Marquardt Study, first cited at n. 40 above, at p. 35.
[62] Vasanti Jadva and S. Imrie, *Children of surrogate mothers: psychological well-being, family relationships and experiences of surrogacy*, Human Reproduction, Vol. 29, No. 1, 2014, pp. 90-96. The authors asked 34 UK

positive feelings. Until research determines that no harm is caused to such children by surrogacy, precaution suggests society should discourage it.

Surrogacy can undermine the dignity of surrogate child-bearers. The Task Force has heard evidence that surrogacy, especially commercial surrogacy, undermines the dignity of the women who agree to bear children for others.[63] The European Parliament has asked its member states "to acknowledge the serious problem of surrogacy which constitutes an exploitation of the female body and her reproductive organs;" and has emphasized that "women and children are subject to the same forms of exploitation and both can be regarded as commodities on the international reproductive market, and that these new reproductive arrangements, such as surrogacy, augment the trafficking of women and children and illegal adoption across national borders."[64] The Dutch National Rapporteur has warned against transnational human trafficking for the purpose of forced commercial surrogacy.[65]

As an economic matter, one can easily argue that surrogates are exploited for their services. If one were to allocate all of the payment typically received by a gestational surrogate (say $25,000 to $30,000) to her services during pregnancy, and allocate none of it to her pre-pregnancy services or to her surrender of the child, and if one were to divide that payment by the number of hours in a typical 37 to 42 week pregnancy (6,216 to 7,056 hours), one would calculate a payment during pregnancy of about $3.55 to $4.85 per hour. That is less than the current federal minimum wage of $7.25 per hour and far less than any of the current state minimum wages of at least $9.00 per hour for various classes of workers in New York.

Surrender of children to intended parents disrupts the relationship between the carrier and the child. The Task Force received evidence that children bond *in utero* with the women who carry them, even if the carrier is a so-called "gestational" surrogate who has no genetic kinship with the child, and the disruption of that bond by post-natal surrender of the child to another person sometimes causes emotional pain to the woman and child.[66]

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surrogate mothers (that is, women who had born and surrendered a child to others) who had children over the age of 12 years whether their child wished to take part in their study. The surrogates had a total of 105 children, 60 of whom were aged over 12 years, and 44 of whom were living at home. Only 36 children, aged 12 to 25, seven of whom were no longer living at home, took part in the study. The authors acknowledge that their sample size was relatively small and not all children took part; it is unknown what would have been the responses of the children who did not take part. Over 85%, but not all, of those studied reported positive views of their mother's surrogacy and of family life. Over 10% of those responding failed to report a positive view of their mothers' surrogacy or of their family life. Because there was no control group, the authors did not compare the rate of positive views of family life in the study group with the rates of positive views by children of non-surrogates.

[63] Kathleen Sloan, *Abuses of Women's Human Rights in Third Party Reproduction*, presented to the Task Force on October 17, 2013. Jennifer Lahl, *Breeders: A Subclass of Women?*, a 2014 film produced by the Center for Bioethics and Culture Network.

[64] European Parliament, *Resolution on priorities and outline of a new EU policy framework to fight violence against women*, April 5, 2011, at #s 20-21.

[65] Bureau of the Dutch National Rapporteur on Trafficking in Human Beings, Human Trafficking for the purpose of removal of organs and forced commercial surrogacy, 2012.

[66] In her 2012 film, Breeders: A Subclass of Women?, cited at n. 49 above, Jennifer Lahl presented comments of Nancy Verrier who spoke about the bond of child-bearers and children that forms even without a genetic connection. The 2013 UK Study at Age 10, first cited at n. 30 above, acknowledges that the absence of a gestational connection between the children of surrogacy and the mothers who raise them may be more problematic for children than the absence of a genetic link.

Surrogacy risks disputes between the surrogate child-bearers and the intended parents over custody of the children. The Task Force has heard of disputes where surrogate child-bearers, who have promised to surrender the child to the intended parents, have changed their minds and refused to do so. We have been told that this happens less often with non-genetic than genetic surrogacy, but that it still happens. And some intended parents refuse to take custody of the children they have contracted for through surrogacy.[67] It is difficult to know the frequency of such disputes, but they do happen, apparently rarely.[68] Any such dispute has the potential to cause emotional harm to the adults involved, and - if it is prolonged - serious and lasting harm to the child whose home is rendered unstable during the dispute.

Part 3D – Unmeasured or Unmeasurable Harms Risked by Commercial Surrogacy

Some harms are inherent in surrogate child-bearing and are not necessarily measurable with present techniques. No matter how carefully it is done, surrogate child-bearing always deliberately divides, before conception, the roles of parenthood, namely: conception, gestation and child-rearing. We sympathize with the suffering of spouses who cannot have children, we value human life and the special nature of the transmission of life in marriage, and we accept every child as a blessing no matter how conceived. But we disapprove of surrogate child-bearing because it sets up – to the detriment of families and children – a division between the physical, psychological, social and moral elements of families.[69]

In 1988, the Task Force found that surrogate parenting arrangements deliberately fracture the genetic, gestational and social relationships of children to their parents.[70] The current Task Force has heard arguments that surrogacy violates natural law with predictable undesirable consequences.[71] We share these conclusions.

Surrogacy unnecessarily complicates before conception the family context in which children will seek their identities. A child needs an understanding of where he or she fits into family, society and – as some of us believe – all creation, in order to form a sense of purpose essential to

[67] A notorious Australian pedophile, who with his wife contracted with a surrogate to bear twins for them, accepted one and abandoned the other. Richard Ackland, *Surrogacy is still available to paedophiles. This must change – but how?*, The Guardian, August 14, 2014, and Thomas Fuller, *Thailand's Business in Paid Surrogates May be Foundering in a Moral Quagmire*, New York Times, August 26, 2014. A US TV personality, Sherri Shepherd, who with her husband contracted with a surrogate to bear a child for them using a third woman's egg, separated from him before the child was born and refused to consent to be declared the baby's mother; as the baby neared 1 year of age, a court declared Shepherd to be the mother and ordered her to pay support. See Pennsylvania Superior Court opinion in In re Baby S., (2015, PA Super.244 (November 23, 2015).

[68] On November 20, 2014, California attorney Andrew Vorzimer orally told the Task Force that there have been about 67,000 surrogate deliveries in the US since 1979, and that his law firm is aware of about 80 US cases where the intended parents considered changing their minds about taking the child, and about 36 cases where the surrogate (25 genetic and 11 non-genetic) changed their mind about surrendering the child. Those disputes appear to us to occur at a low rate: 80/67,000 = 0.12%, 36/67,000 = 0.05%, and (80 + 36 = 116)/67,000 = 0.17%.

[69] The Roman Catholic Church holds this view. See Congregation for the Doctrine of the Faith, Donum Vitae (The Gift of Life), 1987, English translation viewed on March 5, 2014 at www.vatican.va/roman_curia/congregations/cfaith/. But it is not necessary to be Catholic in order to hold this view.

[70] NYS TFLL, Surrogate Parenting, 1988, pp. 119, 122 and 124.

[71] Rev. Tadeusz Pacholczyk, Director of Education at the National Catholic Bioethics Center spoke to the Task Force on February 25, 2014.

individual and social health. Confusion about a child's place in a family or society sometimes leads to individual distress or to anti-social or asocial behavior.[72] Unfortunately, some children of traditional conception, gestation, birth and child-rearing suffer such distress or behave in such ways. Fortunately, many children of surrogacy do not exhibit such distress or behavior. But children of surrogacy are at elevated risk for these harms.

The commercialization of gamete provision and child-bearing puts children at risk for instrumentalization and commodification. The 1988 Task Force report affirmed that society has an interest in shielding gestation and reproduction from commerce. Many members viewed surrogate parenting arrangements, including those for non-genetic or so-called "gestational" surrogacy, as indistinguishable from the sale of children. Some believed that, like pre-nuptial agreements, surrogate parenting contracts replace social relationships of care and trust with contractual relationships, and that such replacement is a change for the worse.[73]

Recent research in behavioral economics offers analogies that might explain how commercial surrogacy changes the way that adults relate to children. Such research suggests that in many facets of communal life, people can be motivated by social rewards or economic incentives, and that sometimes the introduction of external monetary incentives undermines internal social motivation. For example, monetary rewards sometimes reduce the frequency of blood donation.[74] Introduction of fines for late parental pick-up of children at day-care centers was followed by increased frequency of tardiness.[75] And an offer of compensation reduced some communities' popular support for siting of radioactive waste storage facilities in those communities.[76]

A plausible explanation for these results is that some communally useful behaviors are motivated by internal social perceptions of ourselves and our relationships with others, and that monetary incentives do not reinforce such social motivations, but instead undermine them. The foregoing research suggests that the introduction of money into the processes of conception and gestation is likely to change the motivations of parents, perhaps in unexpected and undesirable ways. In fact, there is already anecdotal evidence that commercial surrogacy changes adult attitudes toward children. For example, a disappointed customer of a failed surrogacy broker said: "It's like we paid money to buy a condo, they took the money and there was no condo."[77]

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[72] See 2010 Marquardt Study, first cited at n. 42 above, and 2011 Beeson Study, cited at n. 50 above.
[73] NYS TFLL, Surrogate Parenting, at pages 117-118 and 122-123.
[74] Richard Titmuss, in *The Gift Relationship*, 1970, argued that monetary compensation for donating blood might crowd out the supply of blood donors. A Swedish study suggested that in some circumstances it is true. Carl Mellstrom and Magnus Johannesson, *Crowding Out in Blood Donation: Was Titmuss Right?*, Journal of European Economic Association, Vol. 6, No. 4, 2008, pp. 845-863.
[75] Introduction of fines for late pick-up of children at Israeli day-care centers was followed by doubling of the rate of tardiness; the more frequent lateness persisted after the fines were removed. Uri Gneezy and Aldo Rustichini, *A Fine Is A Price*, Journal of Legal Studies, Vol. XXIX, University of Chicago, January 2000.
[76] Swiss authorities twice surveyed residents of two communities proposed for the location of low level radioactive waste storage facilities, once without mention of monetary incentives, and again after offering money to residents if the facility was sited in their community. Pre-offer rates of support fell to half after the monetary offer. Bruno Frey, et al., *The Old Lady Visits Your Backyard: A Tale of Morals and Markets*, Journal of Political Economy, Vol. 104, No. 6, pp. 1297-1313, December 1996.
[77] Tamar Lewin, *A Surrogacy Agency That Delivered Heartache*, New York Times, July 27, 2014.

The offer of money changes how an action is perceived. Consider the Swiss waste storage case. When money was offered, people suspected that there were unpleasant features of the arrangement that the offer-maker thought must be offset by money. The offer changed the respondents' focus from how the facility might benefit the broader society, to how it might harm them in ways requiring compensation.

The foregoing research suggests that children who learn that money bought the gametes by which they were conceived or encouraged women to bear them, might plausibly wonder what was so distasteful about their conception or gestation that money was used to make it happen, and might doubt their own worth. And even though we do not know with scientific certainty how it happens, we do know that significant numbers of the adult children of anonymous commercial gamete providers report deleterious effects, and do so at rates higher than adopted children and children raised by their biological parents.[78] It is reasonable to hypothesize that many children born through commercial surrogacy will face struggles similar to those of children conceived by commercial gamete "donation."

[78] See the blogs, film and research cited at Subpart 3A above.

Chapter 4 – ANALYSIS

We describe our selection and application of principles for, first factual, then ethical, analysis.

Part 4A – Factual Analysis

We repeat that the current measurable evidence concerning the long-term harms of surrogacy, or the alleged lack thereof, is scanty, equivocal, sometimes biased, and often anecdotal. Those on all sides of the debate must be careful to evaluate with care what little evidence exists. Because the evidence is incomplete, one must make reasonable guesses about what is unmeasured. Rational extrapolations are sometimes needed, but they must be used with caution.

The absence of proof of harm is not proof of the absence of harm. Moreso, the current absence of proof of measurable harm is especially not proof of the absence of long-term harm.

In order to find that a cause contributes to an effect, one need not find that the cause always produces the effect or that no other cause ever produces the effect. We are thankful that surrogacy does not always result in measurable harm. And we acknowledge that an end to surrogacy would not end all the harms of which it is one cause. Yet we find that surrogacy creates a heightened risk of harms sufficient to justify a public policy to discourage it.

Scientific measurement always involves some error rate. And the ability to detect a pattern in reality depends on how regular or variable is the reality studied. So even without bias, scientific findings are less likely to be true: (1) the smaller the samples studied, (2) the smaller the effect sizes, (3) the greater the number and the lesser the selection of tested relationships, or (4) the greater the flexibility in designs, definitions, outcomes, and analytical modes.[79]

Human biology and behavior are more variable than the subjects of hard sciences like inorganic chemistry or astrophysics. The descriptions of soft sciences like sociology and psychology are more flexible and their measurement tools are more imprecise than those of the hard sciences. There are reasons to be skeptical about research findings in the social or psychological fields, even when those findings are not biased, and especially when they are not replicated.

Peer review does not correct all false research findings. It lacks common standards for what it is or how it is done; it is subjective and inconsistent.[80] Moreover, it is often ineffective. Experimenters modified a paper accepted for publication by the British Medical Journal (BMJ) by introducing eight errors in study design, methodology, data analysis, and interpretation of results, and submitted it to 420 BMJ reviewers. None of the 221 reviewers who reported back caught all of the errors; on average they caught about two; and only 30% recommended that the

[79] John P. A. Ioannidis, *Why Most Published Research Findings Are False*, PLOS Medicine, 2005 Aug; 2(8): e124.
[80] Richard Smith, *Peer review: a flawed process at the heart of science and journals*, Journal of the Royal Society of Medicine, 2006 Apr; 99(4): 178-182.

intentionally flawed paper be rejected for publication.[81] It has been said "If peer review is good at anything, it appears to be keeping unpopular ideas from being published.[82]

We find no credible studies showing that commercial, non-genetic "gestational" surrogacy risks no long-term harm to the children it produces, especially, but not only, when – as it often does in the US – it uses anonymous or commercially obtained gametes. As explained above, we specifically deny that the UK/CFR studies prove the absence of such risks.

The studies are all limited but:

> (1) Beeson found that a significant minority of sperm "donor" offspring reported confusion when they learned of their genetic origins;[83]
> (2) Marquardt found that many (often about half) of the offspring of anonymous sperm "donors" had concerns about anonymous commercial gamete "donation" and/or accidental incest, felt sadness or hurt because they lacked a social connection to their genetic fathers, and worried about trust and stability in the families that raised them;[84]
> (3) Marquardt found that sperm "donor" offspring are 1.5 to 2 times as likely as biological offspring to report problems with the law before age 25, mental health problems, or substance abuse problems;[85]
> (4) both Beeson and Marquardt found that large portions of sperm "donor" offspring (up to one-quarter and one-half respectively) have concerns about expressing their feelings about "donor" conception to their social parents or the public; and
> (5) the 2013 UK/CFR Study at Age 10 found "The absence of a gestational connection to the [intended or social] mother may be more problematic [for the child] than the absence of a genetic link."[86]

Taken together, these studies suggest the following transitive logical possibility, or even probability. If (per the UK/CFR study) children of surrogacy might be worse off in some respects than some children of gamete donation, and if (per Marquardt) some children of gamete donation are worse off in some respects than children of natural conception, then it is plausible to posit that children of surrogacy might be worse off in some respects, and at higher rates, than children of natural conception.

Of course, this suggestion is not proven by any scientific study, nor – so far as we know – has it even been systematically studied. It certainly has not been proven false. And of course, before its truth or falsity could be proven, one would want to investigate the relative contributions of paid surrogacy, paid gamete "donation," anonymous gamete "donation," for both male and female gametes. We see no obvious reason to expect that offspring of paid surrogacy or paid egg "donation" would be entirely free of the problems associated with offspring of paid sperm "donation." One would also want to follow the studied offspring long enough to know what are the long-term consequences of each form of surrogacy. We think it a plausible hypothesis worthy

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[81] Fiona Godlee, et al., *Effect on the Quality of Peer Review of Blinding Reviewers and Asking Them to Sign Their Reports*, Journal of the American Medical Association, 1998: 280(3): 237-240.
[82] William A. Wilson, *Scientific Regress*, First Things, May 2016, pp. 37-42.
[83] 2011 Beeson Study, cited at n. 50 above.
[84] 2010 Marquardt Study, first cited at n. 42 above.
[85] 2010 Marquardt Study, first cited at n. 42 above.
[86] 2013 UK/CFR Study at Age 10, first cited at n. 32 above.

of investigation. Anecdotal reports from offspring of surrogacy reinforce our belief that this hypothesis could be proven true. Yet no one has systematically studied it.

A reasonable forecast emerges. Some, perhaps many, offspring of US commercial surrogacy will live to adulthood without reporting feelings of maladjustment (like confusion, shame, anger, depression or loss) or misbehaviors (like delinquency, or drug abuse). But some offspring of such surrogacy, especially, but not exclusively those created with one or more anonymous or commercially obtained gametes, will suffer such maladjustments and will engage in such misbehaviors. They will do so perhaps at rates comparable to those of adoptees or the offspring of anonymous sperm vendors, and probably at rates greater than those of children conceived and born naturally and raised by their genetic parents. Society will pay a social and fiscal cost for some of those maladjustments and misbehaviors. We are ready to connect those dots, even if others are not.

In addition to the measurable (but as yet unmeasured) long-term harms to which the children of commercial surrogacy are subjected by the adults who arrange for such surrogacy, there are also unmeasurable harms to such offspring. If the fact of commercial surrogate gestation is kept secret from the child, it disrespects the child and risks a bad reaction. If it is revealed to the child, it reveals facts which will cause some children to believe that they were bought and sold, or to wonder what was so distasteful about their gestation that a woman was paid to undertake it.

To the extent that surrogacy uses commercially obtained gametes (and we believe their use is widespread in the US), it risks reactions of confusion, shame, and anger among its offspring arising from their conception even before their gestation.

To the extent that surrogacy uses anonymous gametes (and we believe their use is widespread in the US), it risks: social, psychological or medical harm to children, including accidental incest; and genetic diseases harming the children of accidental incest who are the grandchildren of surrogacy by anonymous gamete "donation."

In the US, surrogacy is virtually always practiced with IVF with the deliberate creation of more embryonic human beings than will be implanted, carried to term and raised after birth, thereby predictably leading to the indefinite storage, pre-implantation destruction, or post-implantation death by abortion of many of those embryonic or fetal human beings.

IVF, including IVF for surrogacy, is associated with higher rates of autism, mental retardation, childhood cancers, and young adult cancers. See Subpart 3B.

As surrogacy is often, but not always, practiced in the US, it risks:

(1) the subjection of other children of the surrogate child-bearer to the fear that they too might be surrendered or otherwise abandoned by their mother;

(2) undermining the dignity of women who are paid to bear and then surrender the child to another;

(3) requiring the woman who carries the child to agree before birth, or even before implantation or conception, that she will surrender the child to others, regardless of the

mutual attachment she and the child may form during and immediately after pregnancy; and
(4) child custody disputes between the intended parents and the surrogate child-bearer.

Not all of these risks have or will become real in every case, but they are possible in many cases and sometimes have become real.

Part 4B – Ethical Analysis

Our thinking has often originated with principles of Judeo-Christian thinking. Yet the following analysis is based on reasons, and expressed in terms, that can appeal to all rational persons of good will and open mind, even to non-religious persons. It is possible for those applying different principles to reach the same conclusions.

Subpart 4B1 – Motive and Method

The laudable intent to create and love a child is not enough to assess the morality of the means by which the child is to be created. Some have argued that a good end justifies even bad means to attain it. But this Machiavellian argument is not universally accepted; in fact it is widely despised.[87] No current Task Force member claims that every means to create a child is acceptable. For example, we daresay all members would discourage incest or statutory rape of minors (who though otherwise consenting to sexual intercourse are deemed by law to be too young to consent), even if the couple intend to love the resulting child. In assessing whether New York should continue to discourage surrogacy, one must assess not only its intended benefits, but also its likely risks, both those inherent in surrogacy no matter how it is done, and those that are contingent depending on how surrogacy is done.

A child of surrogacy has written: "It looks to me like I was bought and sold. … My biological father and adoptive mother were very good to me and I know they loved me. I love them too very, very much. But they did some things that were inexcusable and made me feel horrible. … Yes I am angry. Yes I feel cheated. Yes I feel that my parents and my mother did not take my feelings into consideration when they entered into this arrangement, but I feel that they are all good people just really misguided and did not stop to think of the ramifications. It's a shame and it sucks for me. … It looks like you [the surrogates and the intended parents] are all good people with good intentions and a lot of love but all the good intentions and love in the world wont [*sic*] change the defenition [*sic*] of right and wrong. It won't change how the kids feel."[88]

[87] Although he did not say precisely that the end justifies the means, Niccolo Machiavelli is correctly associated with the substance of that saying. See Of the Things for Which Men, and Especially Princes, Are Praised or Blamed, and In What Way Princes Must Keep Faith, The Prince, ~1532, Chapters 15 and 18, English translation by The New American Library of World Literature, Inc. 1952. This is not the place to discuss different systems of ethics. It suffices to say that the adjective "Machiavellian" suggests expediency, deceit or cunning.
[88] Brian C., Son of a Surrogate blog, posted August 9, 2006, viewed on May 25, 2016 at http://sonofasurrogate.tripod.com .

The existence of a child, a fact to be celebrated, is not enough to assess the morality of the means by which the child was conceived. To tell a child of surrogacy "You should be glad to be here" can be perceived as disenfranchising the child's grief over family connections lost.[89]

We do not judge the motives of most adults who enter into surrogacy arrangements. We certainly have no wish to stigmatize the children born of surrogacy; they had no say in how they were created. We are thankful that many children of surrogacy report no distress about their origins and appear to be well adjusted to their families and to society. But some significant number of children of surrogacy report feelings of confusion loss, anger or shame; and we have reason to think that some children of commercial surrogacy will suffer delinquency, depression or drug abuse at rates higher than those of the general population. Our sympathy with the motives of most adults who want to create children by surrogacy, does not outweigh our sympathy for the children who suffer because of it.

Subpart 4B2 – Autonomy, Beneficence and Justice

Surrogate child-bearing creates a tension between autonomy for adults and beneficence for children, which should - in justice - be resolved in favor of children. The 1979 Belmont Report identified three basic ethical principles accepted in our cultural tradition: (1) respect for persons, that is: (a) individuals should be treated as autonomous agents, and (b) persons with diminished autonomy are entitled to protection; (2) beneficence, that is, making efforts to secure persons' well-being by: (a) doing no harm, and (b) maximizing possible benefits and minimizing possible harms; and (3) justice, that is, the avoidance of unfair: (a) denial of benefit, or (b) imposition of burden.[90]

There has been much debate about whether embryonic human beings are persons who are entitled to respect and, if so, what sort of respect. We conclude that they are entitled to respect as human persons, but acknowledge that not all Task Force members agree. Yet there can be little doubt that if embryonic human beings are persons, their personal autonomy is diminished compared with that of adults.

Without doubt, children are human beings and natural persons, and their autonomy is diminished compared with that of adults. By federal law, children born in the United States and subject to its jurisdiction are citizens.[91] Legal purposes aside, there is widespread agreement that children are persons for moral purposes and they deserve our respect.[92] We believe that in case of conflict, the Belmont principle of respect for persons supports more protection for the best interests or rights of vulnerable children than for the desires of autonomous adults.

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[89] Jessica Kern in *Jennifer Lahl interviews Jessican Kern*, April 18, 2015, viewed on May 25, 2016 at www.cbc-network.org/2015/04/a-product-of-surrogacy-interview-video/ .

[90] The Belmont Report; Ethical Principles and Guidelines for the Protection of Human Subjects of Research, The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, 1979, at pp. 22-28. Although the Belmont Report applied these principles to human subject research, their broad cultural acceptance makes them relevant to analyses of othr moral issues, including surrogate child-bearing.

[91] U.S. Constitution, Amendment 14, §1; and 8 U.S.C., §1401.

[92] See, for example, the sources cited in Part 1.

The principle of beneficence obliges adults and governments to avoid harm to persons, but particularly to vulnerable children who cannot otherwise protect themselves.[93]

For the reasons set forth in Part 3, we are convinced that it is often a benefit for a child to be raised by the same adults who provided the gametes with which the child was conceived and who carried the child to birth. We are also convinced that it is often a burden on a child for the functions of parenting to be deliberately separated before conception. We conclude that, to avoid unfair denial of benefits and unfair imposition of burdens – that is, as a matter of justice – New York State should discourage families from seeking children by surrogate child-bearing.

Even utilitarian libertarians understand that individual autonomy is not boundless. It may be limited by society or government in order to prevent harm to others.[94]

There is no legal or moral right to government help to acquire a child by surrogacy. Any claimed freedom to invoke state enforcement of surrogacy contracts is tantamount to a claim that there is a right to have a child by surrogacy, that society has no interest in family formation sufficient to justify state intervention to discourage surrogacy, and/or that adult desire for a child is enough to justify creation of a child by surrogacy despite the child's best interests based on beneficence and justice. But there is no such right.

Moreover, even democratic governments, including New York State, limit the freedom of their citizens for the broader good. In order to improve our communal lives together, governments have legitimately limited their citizens' freedom to contract, even if the parties are otherwise competent by age and mental capacity to do so. In addition to the area of surrogacy, New York has done so in other fields in order to protect the contracting parties from one another,[95] to protect non-parties,[96] and to discourage certain disfavored activities.[97] It has made void the purported waiver of certain rights, for the protection of both individuals and society.[98] The remedies New York has chosen to discourage surrogacy are neither unique nor unreasonable.

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[93] The Belmont Report, op. cit.

[94] See, for example, John Stuart Mill, On Liberty, 1859, reprinted by Prometheus Books, 1986, at p. 16.

[95] New York General Obligations Law (GOL) makes certain contracts void and unenforceable, even if the parties are otherwise competent to enter them. Examples follow: (1) contracts where an employee agrees either to join a company union or not to join a labor organization – GOL §5-301; (2) contracts exempting from liability for negligence various contractors, such as: (a) lessors of real property – GOL §5-321, and (b) operators of pools, gymnasiums or places of public amusement – GOL §5-326; and (3) consumer credit contracts where a consumer waives a reciprocal right to recover attorneys' fees for breach – GOL §5-327.

[96] New York voids any restrictive covenant in a contract, mortgage, lease or deed affecting real property that limits the sale, lease, use or occupancy of real property because of race, creed, color, national origin or ancestry – GOL §5-321. Limits on the power of a husband and wife to contract to alter or dissolve their marriage or to relieve either of his or her liability to support the other (GOL §5-311) appear to be for the benefit of the adult parties to the marriage, but perhaps also for the protection of their children.

[97] All contracts for money or property wagered on unlawful bets are void – GOL §5-401 to §5-423. This appears to apply whether it is a bookie or a bettor seeking to collect an illegal gambling debt.

[98] An agreement purporting to waive a data subject's rights under the Personal Privacy Protection Law, for example, the subject's right of access to a state agency's record pertaining to the subject, is void as against state policy. Public Officers Law, §98. The New York State Court of Appeals has held that a sentencing court must comply with the command of Criminal Procedure Law, §720.20(1) that, where a defendant is eligible to be treated as a youthful offender, the court must determine whether he or she is to be so treated, even where the defendant has purported to waive that right. People v. Reece Rudolph, 21 NY 3d 499 (2013). The State has made the right to be considered for

Subpart 4B3 – Precautionary Principles

Those who propose societal endorsement of a dramatic departure from long-held and nearly universal norms for the creation of families have, pursuant to a precautionary principle, the burden to persuade society that the change has no significant risks. There are many formulations of precautionary principles, including "Better safe than sorry," "Look before you leap," and "An ounce of prevention is worth a pound of cure." The Hippocratic Oath and the Belmont Report enjoin, respectively, physicians and policy-makers to "Do no harm."

Precautionary principles have been adopted in the context of the environment,[99] human health,[100] and food supply.[101] There are strong and weak versions of precautionary principles. Strong precaution requires a safe choice even when the risk is small or unlikely, the evidence is speculative, and the cost of safety is high. Weak precaution allows, but might not require, a safe choice if the damage would otherwise be serious or irreversible, and then only if the action is reasonable in proportion to the risk.

New York State has used a precautionary approach to public policy-making. In December 2014, the state Department of Health recommended that high-volume hydraulic fracturing ("HVHF" or "fracking"), a technique for oil and gas extraction, should not proceed in New York. The acting commissioner said: "I have considered all of the data and find significant questions and risks to public health which as of yet are unanswered. I think it would be reckless to proceed in New York until more authoritative research is done. I asked myself, 'would I let my family live in a community with fracking?' The answer is no. I therefore cannot recommend anyone else's family to live in such a community either."[102]. He said there was insufficient evidence to affirm the safety of fracking, and "We cannot afford to make a mistake. The potential risks are too great. In fact, they are not even fully known."[103] As a result, the state Department of Environmental Conservation has undertaken to prohibit fracking in New York State,[104] rather than to permit it subject to regulation.

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youthful offender status non-waivable, not just for the benefit of the defendant, but also for the good of society, which has an interest in the social development of young persons despite their otherwise criminal acts.

[99] "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." *Rio Declaration on Environment and Development*, United Nations Environment Programme, 1992, Principle 15.

[100] "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically." Science and Environmental Health Network, *Wingspread Statement on the Precautionary Principle*, 1998.

[101] "Lack of scientific certainty due to insufficient relevant scientific information … shall not prevent the Party of import, in order to avoid or minimize such potential adverse effects, from taking a decision, as appropriate, with regard to the import of the living modified organism in question. *Cartagena Protocol on Biosafety*, [United Nations] Convention on Biological Diversity, 2000, Article 11, §8.

[102] Acting Commissioner of Health, Howard A. Zucker, *New York State Department of Health Completes Review of High-volume Hydraulic Fracturing*, New York State Health Department website, December 17, 2014, viewed on April 3, 2015 at http://www.health.ny.gov/press/releases/2014/2014-12-17_fracking_report.htm .

[103] Thomas Kaplan, Citing Health Risks, Cuomo Bans Fracking in New York State, New York Times, December 17, 2014.

[104] New York State Department of Environmental Conservation, *Final Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program [for HVHF]*, June 2015.

We take no position here on HVHF. We simply note that in a field where NYS saw that the potential risks of an activity proposed to be permitted and regulated were both serious and not fully known, NYS deemed it appropriate to apply a precautionary principle and to ban the activity, rather than to regulate it.

Surrogacy, like other issues of public health, is appropriately subject to a precautionary principle. We note its great risks, not fully known, and the insufficiency of evidence to affirm its safety, especially for the long-term adjustment of offspring of surrogacy. We would discourage it rather than explicitly permit and enforce it subject to regulation. The psycho-social health of children, parents and families is important enough, the heightened risk of harm to children of surrogacy appears irreversibly serious enough, and the refusal to enforce commercial surrogacy arrangements is proportionately reasonable enough, that even a weak precautionary principle would justify extreme caution before departing from New York's policy of discouraging surrogacy. Of course, a strong precautionary principle would even more surely justify such caution before experimenting with the welfare of children.

Based on published studies, including the UK/CFR studies, we do not know the extent of commercial, non-genetic surrogacy's long-term psycho-social risks for its offspring. This alone should spur caution about permitting, let alone even enforcing, contracts for such surrogacy. To this knowledge we add the reports of a few such offspring, the analogous reports of many more offspring of commercial or anonymous gamete donation, and the statistical knowledge of the enhanced risks of autism, mental retardation and cancer for the offspring of IVF, including IVF for surrogacy, and the risks of accidental incest or custody disputes. This additional knowledge gives New York no reason to relax its vigilance. Precaution requires us to continue the ban on commercial surrogacy of all kinds, and the refusal to enforce contracts for surrogacy.

Subpart 4B4 – Surrogacy and Adoption

Society has an interest in encouraging the creation of families by means that either avoid unnecessary problems or mitigate pre-existing problems. It is rational for New York to discourage surrogate child-bearing, and instead to encourage the creation of families by other means, including adoption. It is fair for society to ask whether the desire of adults to create "their own" children through surrogate parenting is more worthy of state facilitation than satisfaction of the need of numerous children to find stable homes through adoption.[105]

Adoption is a process that responds to the needs of children already born who, for whatever reason, now need parental support from someone other than two genetic parents one of whom bore the child. By contrast, surrogate child-bearing by its very nature divides parental functions

[105] During the twelve months ended September 30, 2013, there were 2,184 New York foster children adopted. US Department of Health and Human Services (HHS), Administration for Children and Families (ACF), Children's Bureau (CB), *Adoption of Children with Public Child Welfare Agency Involvement by State FY 2004-FY2013*. On September 30, 2013, there were 5,843 New York foster children awaiting adoption. US HHS, ACF, CB, *Children in Public Foster Care on September 30th of Each Year Who Are Waiting to be Adopted FY 2004-FY2013*. Both viewed on April 14, 2015 at https://www.acf.hhs.gov/programs/cb . There were additional New York children who were never in foster care, either adopted or waiting adoption, but their numbers are unknown to the minority.

among three, four or more adults, usually does so before the child is conceived and always before the child is born, and then separates the child from at least one of those adults.[106]

Adoptees sometimes suffer from the knowledge that their biological parents surrendered them, confusion about who is or is not a member of their family, or from unfulfilled curiosity about the identity, character, personality or genetic history of those parents.**[107]** They are more likely than children raised by their biological parents to have problems with the law, mental health problems, or struggles with substance abuse.[108] But these problems occur almost or even more frequently among anonymous sperm "donor" offspring.[109] and we fear they will be at least as frequent among children of surrogacy once they become old enough to exhibit such behaviors and independent enough to report frankly.

Yet adoption is importantly different from third party reproduction like gamete "donation" or surrogate child-bearing. Adoption finds parents for children who need families. But surrogacy creates children for adults who want, but do not need, them. The similarities between the struggles of adoptees and those of offspring of third-party reproduction should prompt caution about using surrogacy to deliberately and unnecessarily take from children before they are born the chance to grow up with their biological parents.

Children of surrogacy are in some ways worse off than children of adoption. Both adoptees and the offspring of third-party reproduction, including by surrogate child-bearing, can take comfort from knowing that they were wanted by the parents who raised them. But both risk the pain of thinking that at least one of the parents who made and bore them apparently did not want them. The children of adoption can dream that their biological parents might have struggled with the decision to give up their child. But the children of third-party reproduction, particularly commercial third-party reproduction, struggle with the knowledge that their biological and/or gestational parents sold what was needed to make the child, and often have no further contact with that child.[110]

The hurdles of adoption law are meant to protect children. Adoption can be expensive, time-consuming and frustrating for those seeking to adopt a child.[111] But child welfare should outweigh adult frustration.

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[106] "Of course there will always be children who are raised under sub-optimal circumstances. We can't control for every tragedy and every irresponsible parental choice. Nevertheless, we can insist that our laws and customs with respect to family formation should be ordered primarily towards the good of children and not the desires of adults." Rachel Lu, The Perils of Surrogacy, The Human Life Review, Summer 2014, p. 45.

[107] 2010 Marquardt Study, first cited at n. 42 above, at pp. 7-14.

[108] 2010 Marquardt Study, first cited at n. 42 above, at pp. 7-9 and 115.

[109] 2010 Marquardt Study, first cited at n. 42 above, at pp. 14, 71-72 and 115.

[110] 2010 Marquardt Study, first cited at n. 42 above, at pp. 71-72.

[111] At least one of the demographic groups of intended parents for whom surrogacy advocates claim adoption is too expensive, namely, male-male married couples, in fact is better positioned than most couples to bear the costs of adoption. A recent Internal Revenue Service analysis of the adjusted gross income (AGI) of married couples filing joint tax returns in 2014 shows: opposite-sex couples reported AGI averaging $113,115; female-female couples reported AGI averaging $123,995; and male-male couples reported AGI averaging $175,590. Male-male-joint returns that included deductions for at least one dependent child reported AGI averaging $274,855. See, IRS Office of Tax Analysis, Working Paper 108, August 2016.

Subpart 4B5 – Prohibition and Regulation

Since all fair-minded observers must admit, and all current Task Force members acknowledge, that commercial surrogate child-bearing arrangements pose some risks to the adults who enter them and to the children who result from them, one must address the claim that the proposed regulation and enforcement of some surrogacy contracts will cause less harm than the current policy of banning all commercial surrogacy and refusing to enforce surrogacy contracts. There are at least four reasons to believe that the current policy is less harmful.

First, although some surrogates still bear children for New Yorkers, the current New York policy is working to discourage much surrogacy. The 1988 Task Force report, acknowledged that a policy of discouragement would not eliminate all surrogacy in New York, but predicted that such a policy would "significantly" or "greatly" reduce it.[112] Of course, the effectiveness of that policy should not be judged by whether surrogacy has decreased since the enactment of the policy in 1992, but instead by whether surrogacy now occurs less frequently than it would have without the policy. This cannot be experimentally measured. To the extent there are any statistics, surrogacy under present New York policy remains rare.[113] Proponents of surrogacy complain that the current policy makes surrogacy so difficult in New York that those contemplating it either leave the state or abandon their efforts to find a surrogate child-bearer.[114] We conclude that New York's policy of discouragement is working, and that a change in policy risks an undesirable increase in the incidence of surrogacy.

Second, some of the harms of surrogacy are inherent in the arrangement and cannot be regulated away. No matter how carefully surrogacy is arranged, and even if there is no post-natal custody dispute, surrogacy always deliberately divides the functions of parenthood among more than two adults. It thus risks confusing children's identity and sense of place in their own families, and undermining society's notion of the family. No matter how carefully done, commercial surrogacy is tantamount to baby-selling and so undermines the intrinsic value of children both in their own eyes and in the eyes of society.

We think commercial surrogacy is tantamount to the purchase and sale of babies. When a surrogacy contract provides that a lower fee is paid to the surrogate when the child is stillborn than when he or she is born alive, or when it provides that some fees otherwise due are withheld until the surrogate surrenders the child to the intended parents, it is hard for an objective observer

[112] NY TFLL, Surrogate Parenting, 1988, at pp. v, 129 and 139.

[113] The American Society for Reproductive Medicine has reported to Task Force staff that the number of "gestational babies" born live to non-genetic surrogates in the US during each of eleven years from 2004 to 2014 ranges from 738 to 2,236. If those national numbers are even close to accurate, then the number of such babies intended to be raised by parents in New York is probably much lower, and the number of such babies born in New York is certainly much lower than the national figures. According to the US Census Bureau, New York has about 19.8 million (6.2%) of the country's 309 million people. http://quickfacts.census.gov/qfd/states/36000.html. If we apply that 6.2% to the 2,236 "gestational" babies born nationwide in 2014, we get about 139 such babies born in 2014 to be raised in New York. Because commercial surrogacy is banned in New York, its share might be lower than 6.2%. But even if New York's share of such babies is as high as 10%, we get only about 224 such babies, a low number.

[114] All invited witnesses who testified at a New York State Legislative Public Forum on the Child-Parent Security Act, held on April 1, 2014, opposed New York's present policy, but they at least implicitly, and often explicitly, acknowledged that it is working to discourage some New Yorkers from entering surrogacy arrangements.

to say that all of the payments are for the surrogate's services during pregnancy and that no money is paid for the surrender of a live child.[115] Perhaps more importantly, it gives the children of surrogacy grounds to think they were bought and sold.[116]

Third, regulation is unlikely even to try to reduce some of the contingent harms of surrogacy. Three such harms come to mind: (1) creation of more embryonic human beings than will be brought to birth or natural miscarriage; (2) commercial gamete procurement; and (3) anonymous gamete "donation." Present IVF practice, including IVF for surrogate child-bearing, entails creation of more embryonic human beings than are likely to be implanted in the surrogate and brought to birth, thus intentionally creating human beings who are likely to be stored indefinitely, subjected to harmful research, destroyed without implantation, or killed by post-implantation abortion, so-called "fetal reduction." Commercial gamete "donation" inflicts on some offspring a sense of confusion, shame or anger arising from the exchange of money used to conceive or gestate them. Anonymous gamete "donation," including for surrogacy, often leaves the identity of the gamete "donor" unknown to the child so conceived and even to the intended parents of that child, thus risking the harms of procreation with anonymous gametes. Because New York State now tolerates these consequences of IVF and commercial or anonymous gamete "donation," and because the majority does not sufficiently appreciate the risks to children so conceived, no foreseeable regulation of surrogacy will eliminate, or even substantially reduce, these risks that we find unacceptable.

Fourth, although it might reduce some of the contingent harms of surrogacy, even well-intentioned regulation is likely to be ineffective, arbitrary and/or intrusive. There is an inherent tension between protecting the best interests of children and providing government assistance to help adults become parents regardless of their circumstances. To the extent a regulation better protects children, it will impinge on adults' privacy and state-enforced access to parenthood. To the extent it respects adult autonomy, it will often risk harm to children. And however it might balance those competing concerns, it will – at least at the margins – be arbitrary. We believe this is likely for any foreseeable regulation. We will illustrate it in our discussion at Part 6 of the regulation proposed by the majority.

New York should not – by endorsing surrogacy – encourage even a marginal increase in IVF and its attendant risks for embryonic human beings. We acknowledge, with dismay, that New York has accepted IVF and its predictable consequences for embryos, and we acknowledge that surrogacy contributes only a minor portion of the women who will carry an IVF embryo. Nonetheless, we believe that New York should go no further down that road by encouraging any form of surrogacy through state enforcement of surrogacy contracts.

New York should continue to discourage surrogate child-bearing which often uses anonymous or commercially obtained gametes. This would protect children pursuant to a precautionary principle.

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[115] Robert Blank and Janna C. Merrick, Human Reproduction, Emerging Technologies, and Conflicting Rights, Congressional Quarterly, Inc., 1995, at p. 110.
[116] Brian C., Son of a Surrogate blog, first cited at n. 88 above.

Chapter 5 – WHY REVISIT SURROGACY?

The majority cites three post-1988 developments in support of revisiting surrogacy: (1) a shift away from genetic "traditional" surrogacy and the growing practice of non-genetic "gestational" surrogacy; (2) changing perceptions of parenthood and family which do not conform to "the rigid heterosexual nuclear family model;" and (3) a revolution in marriage equality marked by the 2011 enactment of New York State's Marriage Equality Act and the 2015 United States Supreme Court decision in *Obergefell v. Hodges*. The majority claims "Equity must be a driving principle if all families are to enjoy the opportunity to welcome children into their family."

The first two "developments" actually pre-date the Task Force's 1988 report, and in any event are not enough to warrant a change in the 1988 conclusions. The third is new, but also insufficient to justify a new result.

Non-genetic "gestational" surrogacy existed before the Task Force issued its 1988 report. That report explicitly addressed it, urging New York to discourage both genetic and non-genetic surrogacy, mentioning non-genetic or "gestational" surrogacy at least half a dozen times.[117] Even a post-1988 increase in the frequency or proportion of non-genetic surrogacy does not change the applicability of the 1988 report's unanimous, well-supported, and still valid conclusions on the subject. Indeed, non-genetic surrogacy was widely practiced for decades outside New York while this Task Force did not return to the subject.

Most of the 1988 arguments concerning "traditional" genetic surrogacy remain relevant to "gestational" non-genetic surrogacy. The only 1988 arguments against genetic surrogacy that non-genetic surrogacy avoids are those based on the genetic relationship of the "traditional" surrogate with the child. To the extent that a genetic relationship is the sole cause of the child-bearer's distress upon surrender of the child, such distress would be absent from non-genetic surrogacy. However, the Task Force has received evidence that child-bearers and children bond through the experience of gestation even without a genetic connection and such bonds are disrupted by the surrender of the child after birth.[118] Moreover, any risks in genetic surrogacy to the well-being of the child-bearer's husband and her pre-existing children arising from bearing and surrendering a child for and to another, also exist in non-genetic surrogacy with little or no diminishment. Most importantly, the harms inherent in all paid surrogacy – deliberate pre-conception division of the functions of parenthood among more than two adults, and commercialization tantamount to baby-selling – pose risks for society, families, women and the children born of surrogacy, whether genetic or non-genetic. What is more, non-genetic surrogacy has problems of its own.

Non-genetic surrogacy aggravates or creates harms in ways that genetic surrogacy does not and so should be discouraged for those additional reasons. Genetic surrogacy usually divides the functions of parenthood among up to three to four adults, namely: (1) a child-bearer who is also the genetic mother; (2) an intended mother who has no genetic or gestational link to the child;

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[117] NYS TFLL, Surrogate Parenting, 1988, pp. v, 23-24, 31, 47, 103, 125 and 139

[118] In her 2014 film, *Breeders: A Subclass of Women?*, Jennifer Lahl presented the remarks of psychotherapist Nancy Verrier who spoke about the emotional bond of child-bearers and children that forms even without a genetic connection. See also 2013 UK Study at Age 10, first cited at n. 30 above.

and (3) either: (a) one man who is both the genetic and intended father, or (b) two men, one to "donate" sperm and the other to raise the child.

Non-genetic surrogacy typically divides those functions among three to five adults, namely: (1) a child-bearer who is neither the genetic nor intended mother; (2) either: (a) one woman who is both the genetic and intended mother, or (b) two women, one to "donate" an egg and the other to raise the child; and (3) either: (a) one man who is both the genetic and intended father, or (b) two men, one to "donate" sperm and the other to raise the child. If female mitochondrial DNA transfer becomes both legal and feasible, non-genetic surrogacy could divide parental functions among up to six adults.

The pre-conception parental fracture inherent in all surrogacy with attendant risks for society, families, women and children can be aggravated in non-genetic surrogacy by dividing parenthood among even more adults. And a recent study acknowledges that the absence of a gestational connection between the children of non-genetic surrogacy and the mothers who raise them may be more problematic for children than the absence of a genetic link.[119]

Families that do not conform to the "heterosexual nuclear family model" ("rigid" or otherwise) are not new. Non-conforming families, that is, those other than two opposite-sex adults raising one or more children that they conceived together and bore, also pre-date the 1988 report. The sexual revolution, the rise in divorce, and the rise in never-married single-parent families all began before the Task Force was created and continued for decades after 1988 without the Task Force returning to surrogacy.

The third and final ground cited for revisiting the 1988 conclusions regarding surrogacy is, in fact, a new development since 1988, namely: the 2011 legalization of same-sex marriage statewide by New York State and nationwide in 2015 by the US Supreme Court. This legal development has been followed by claims that "marriage equity" requires the state government to assist married couples to get children by enforcing contracts for commercial non-genetic "gestational" surrogate child-bearing, or even that some broader notion of equity requires the state to enforce such contracts for adults other than married couples.

Of course, equity on this issue could be achieved by banning commercial surrogacy and refusing to enforce contracts for any adults, couples or singles, no matter their sexual attractions or behavior, married or not. Equity achieved this way would not sacrifice children on an altar of false equity.

The reasons to discourage surrogate child-bearing for opposite-sex couples have no less validity for same-sex couples or for single persons who want to be parents.

In New York, same-sex couples share many of the rights and privileges of opposite-sex couples. No matter what family arrangements we prefer for ourselves or others, all compassionate people acknowledge the joy of loving adults united with a wanted child and wish only good things for all such families. After all, they are our relatives, friends, and neighbors. Those good wishes apply whether the parents are single or a couple, whether married or not, and whether same-sex

[119] 2013 UK Study at Age 10, first cited at n. 32 above.

or opposite-sex. Such good wishes apply whether the family was created by natural conception, adoption, ART or even surrogate child-bearing. We acknowledge too the disappointment, even the heartbreak, of adults who want to love a child but cannot create a family.

However, because we see heightened risks for the children conceived for surrogacy, we believe society should discourage that method of family creation.

Same-sex couples have no more moral or legal right to a child than opposite-sex couples have. No matter what other rights positive human law may give same-sex couples, it is a natural fact of life that they – like infertile or sterile opposite-sex couples – cannot by themselves create a child. They – like opposite sex couples – have a right to try to create a family by means society deems licit, including by adoption or – to the dismay of some of us - by IVF. Of course, adoption does not guarantee to a couple a child genetically related to either of them. And simple IVF does not work for same-sex male couples because they lack both eggs and wombs.

Lesbians, gays, bisexuals and transgender (LGBT) persons speak with many voices; some have expressed misgivings about families created by surrogate child-bearing. For example, two gay men, Italian fashion designers Domenico Dolce and Stefano Gabbana are reported to have criticized IVF and surrogacy, saying "No chemical offsprings [*sic*] and rented uterus: life has a natural flow, there are things that should not be changed," and "I am gay, I cannot have a child. I guess you cannot have everything in life. Life has a natural course, some things cannot be changed. One is the family."[120] An American professor, Robert Oscar Lopez, who describes himself as a queer bisexual son of a lesbian, and now a father to a child whom he is raising with his wife, agrees that surrogate child-bearing for same-sex couples is harmful to children.[121]

A leading New York LGBT advocacy group, Empire State Pride Agenda (ESPA), recently disbanded, announcing that its policy priorities had been accomplished. Of course, some LGBT persons believe that surrogate child-bearing ought to be made easier for them. But the leadership of ESPA apparently believed that state enforcement of surrogate child-bearing contracts is not important enough to continue its advocacy on the issue.[122]

One can sympathize with the frustration of same-sex male couples who want a child genetically related to one of them, but cannot create one by themselves. But their wants, like those of infertile opposite-sex couples, do not justify government enforcement of surrogacy contracts. If,

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[120] Terry Marocco, *Figli e famiglia, la verita di Dolce e Gabbana*, Panorama Magazine, March 16, 2015 viewed on April 7, 2015 at http://www.panorama.it/news/cronaca/dolce-gabbana-lunica-famiglia-quella-tradizionale/ . See two English translations of the original Italian remarks by Victoria Ward, *Sir Elton John boycotts Dolce & Gabbana after row over same-sex families*, The Telegraph, March 15, 2015, and by Leigh Weingus, *Dolce & Gabbana Face Outrage After Controversial Comments About Gay Families*, Huffington Post, March 15, 2015, updated March 16, 2015, both viewed on April 7, 2015 at http://www.telegraph.co.uk/news/celebritynews/11473198/Sir-Elton-John-calls-for-Dolce-and-Gabbana-boycott-after-row-over-same-sex-families.html and http://www.huffingtonpost.com/2015/03/15/dolce-and-gabbana-gay-families_n_6872710.html, respectively.

[121] Robert Oscar Lopez, Truth, Mataphor, and Race in the Marriage Debate, The Public Discourse, February 11, 2013, viewed on April 7, 2015 at http://www.thepublicdiscourse.com/2013/02/7871; and Synthetic Children, First Things, March 18, 2015, viewed on March 22, 2015 at http://www.firstthings.com/web-exclusives/2015/03/synthetic-children .

[122] Jesse McKinley, *Empire State Pride Agenda to Disband, Citing Fulfillment of Its Mission*, New York Times, December 12, 2015.

as we have argued throughout this minority report, in order to protect children it is good public policy to discourage surrogate child-bearing for opposite-sex couples, then it is no less good to discourage it for same-sex couples.

Chapter 6 – COMMENTS ON THE MAJORITY'S PROPOSED REGULATION

An attempt to regulate surrogacy as the majority recommends is likely to result in surrogacy on terms that even the majority does not favor. The majority proposes to treat six kinds of surrogacy in three different ways. It would enlist state power of enforcement and pre-birth judicial validation of parental rights for only one kind of surrogacy, and then only if it meets (or substantially meets) over thirty terms that the majority favors. Those terms appear primarily designed to protect the adult participants, and only secondarily and incompletely to protect children. The majority conditions its recommendation that New York permit and regulate some forms of commercial surrogacy upon compliance with all (or substantially all) thirty terms. The majority does not explain which terms are essential and which inessential to its recommendation. We believe it is unrealistic to expect the state legislature and bureaucracy to implement all of the majority's terms.

The majority proposes a complex regulatory scheme that would treat six kinds of surrogacy in three different ways. It proposes that the Domestic Relations Law should continue to ban contracts for compensated "traditional" or genetic surrogacy, and contracts for compensated "gestational" or non-genetic surrogacy that do not comply with the majority's proposed terms. It proposes that state law continue to permit, but refuse to enforce, contracts for uncompensated surrogacy, both genetic and non-genetic. It proposes to permit and, for the first time, to enforce certain contracts for compensated, non-genetic surrogacy that comply with the thirty terms, and to let a judge determine parental rights before implantation. It proposes that existing state law should continue to permit state courts to approve post-natal adoptions by the intended parents of the children of surrogacy. This chart illustrates the overall scheme.

	Uncompensated	**Compensated**
"Traditional" Genetic Surrogacy	Permitted Unenforced Post-Birth Adoption	Banned and Fined Unenforced Post-Birth Adoption
"Gestational" Non-Genetic Non-Compliant Surrogacy	Permitted Unenforced Post-Birth Adoption	Banned and Fined Unenforced Post-Birth Adoption
"Gestational" Non-Genetic Compliant Surrogacy	Permitted Unenforced? * Post-Birth Adoption	Permitted Enforced Pre-Implantation Order or Post-Birth Adoption

* We do not know whether or not the majority would enforce contracts for uncompensated, but otherwise compliant, non-genetic surrogacy. We guess that, because majority might deem the amount of compensation (namely: zero) to be unreasonable, it might not enforce them.

The proposed regulation would favor compensated, "gestational," non-genetic, surrogacy so long as it complies with all (or substantially all) thirty-some terms. It is only in that sort of surrogacy that New York would determine parental rights before birth and enforce the child-bearer's promise to surrender the child.

The majority proposes that the parties to a compliant compensated contract for non-genetic surrogacy could seek a pre-implantation order from a New York state court that would establish the intended parents' rights to the child of the proposed surrogacy. Those pre-implantation rights would be subject to rescission during the pregnancy or after the birth only upon clear and convincing proof of exceptional circumstances. The exceptions are not defined.

The majority proposes over thirty terms for a compensated contract for non-genetic surrogacy, compliance with which would make it eligible for state enforcement. The terms would govern the eligibility of the parties, the provisions of the contract, and the qualifications of any broker.

The majority wants intended parents to meet four (sometimes five) conditions, namely:

(1) they must be legal residents of New York State for at least six months before the order is sought;
(2) they must be at least 21 years old;
(3) they must undergo a mental health screening to determine if they are prepared to be parents, if they are entering the contract for valid motives, and what they would expect for the child if one or both of them were to die or if they were to separate;
(4) they, and anyone over age 18 residing in the home where the child will be raised, must undergo a background check to determine if there is a history of crimes that would disqualify any of them to reside with the child; and
(5) if the intended parents are providing any of the gametes, they should undergo blood and STD testing as a physician deems appropriate.

The majority does not say what motives or crimes might be disqualifying.

The majority wants the surrogate child-bearer to meet six conditions, namely:

(1) she must be a legal resident of New York State for at least six months before the order is sought;
(2) she must be at least 21 years old;
(3) she must have given birth previously to at least one child;
(4) she must undergo a medical screening by a physician to determine if she is physically capable of sustaining an uncomplicated, successful pregnancy;
(5) she must undergo a mental health screening to determine if she is psychologically prepared for surrogacy, pregnancy and surrender of the child upon birth; and
(6) she must undergo a credit and background check to determine if she is under financial duress or if she has engaged in criminal or other activity that would make her a poor candidate for surrogacy.

The majority wants contracts to meet nineteen conditions, namely:

(1) the compensation to be paid to the surrogate must be reasonable in the judgment of the court;

(2) the contract must provide, if the surrogate has not already provided, for health insurance covering her medical expenses for the duration of the pregnancy plus some weeks;
(3) it must provide, at no expense to her, for life insurance and disability insurance to pay her family in the event of her death or disability during the surrogacy;
(4) it must require the intended parents to carry life insurance, without specific minimum coverage, to care for the child and pay legal and other expenses to determine custody and guardianship of the child;
(5) it must provide for separate and independent legal counsel licensed in New York, paid by the intended parents, to represent those parents and the surrogate during both the contract negotiations and any subsequent dispute;
(6) it must provide that any physician screening or treating the surrogate or delivering the child must be licensed in New York, knowledgeable about surrogacy, and not have cared for the intended parents;
(7) it must provide that the obstetrics provider(s) be chosen, not by the surrogate alone, but by the surrogate and the intended parents;
(8) it must choose New York law to resolve any dispute;
(9) it should provide that the intended parents agree to accept custody of any children born from the surrogacy, regardless of sex, number, prematurity, physical or psychological health;
(10) it must permit either the intended parents or the surrogate to terminate the contract if the surrogate is not pregnant;
(11) it must set forth how all the parties (not just the surrogate) agree they (not she alone) would address the "reduction" of the number of embryos or fetuses, the termination of the pregnancy, or medical decisions regarding the pregnancy;
(12) it cannot require the surrogate to travel to another state or country for any purpose, including childbirth;
(13) it cannot require specific performance;
(14) it should provide for an escrow agent to hold and disburse funds to be paid to the surrogate;
(15) it cannot permit the intended parents to recover money damages for breach of contract in excess of the amount already paid to the surrogate;
(16) it should provide that the death of one or both intended parents does not void the contract after the surrogate becomes pregnant;
(17) it must require the intended parents to name a guardian for the child in the event that they both die after the surrogate becomes pregnant;
(18) it should not permit any divorce of the intended parents to void the contract; and
(19) it must make funds available for counseling or mediation in the event of any dispute among the parties.

The majority wants brokers to meet six conditions, namely:
(1) the broker must be registered in New York;
(2) the broker must be licensed in New York (there is no existing process for New York licensure of such brokers; it would have to be created) and must pay a registration fee;
(3) the broker must carry liability insurance of at least $1 million;

(4) any loans made by the broker to intended parents must comply with reasonable terms, including interest rates and reserve requirements, to be set by New York;
(5) the broker must be subject to minimum disclosure and restrictions against false or misleading advertising; and
(6) the broker must report to the state the number of surrogacy contracts arranged, the number of births that result, and adverse events, both legal and medical. It is not explained how the broker is to learn the number of births or adverse events.

Most of the conditions that the majority proposes to require for judicial approval of a surrogacy contract are designed to protect the intended parents and the surrogate, but not the child of surrogacy. All six requirements for brokers, nine to thirteen of sixteen for the contract terms, three of six for the surrogate, and one of six for the intended parents offer no protection for the child. We acknowledge that the majority proposes some protections for the child. The minimum age for intended parents and surrogate, the mental health screenings for those adults, contingent blood tests for the intended parents, and the requirement that the surrogate previously deliver a child, are designed to make it more likely that the surrogate will surrender the child of surrogacy to the intended parents and so avoid a custody dispute that might harm the child. The minimum age, required mental health screening and criminal background check for the intended parents are designed to provide some minimum standards for the maturity and capacity of the intended parents to provide a safe home for the child. The requirement that the intended parents carry life insurance and name a guardian for the child in the event of their deaths is meant to provide some security to the child. But most of the proposed requirements are oriented toward the adults, not the child.

Insofar as the proposed requirements are oriented toward the needs of the child, they try to protect against rare risks, but not the risks that are inherent in all surrogacy or in surrogacy as it is commonly practiced. The proposed regulation provides substantial protection against the possibilities that the adults will engage in a protracted child custody dispute, that the home of the intended parents will include an adult with a criminal record that jeopardizes the child's safety, or that a stranger will become the guardian of the child upon the intended parents' death. These are rare risks.[123] In our view, the proposal is insufficiently concerned about the risks to the children of surrogacy that arise even when there is no custody dispute, even when the intended parents offer a safe home to the child, and even when they live until the child's maturity.

The majority fails to propose regulatory terms that would better protect children.

The proposal omits to minimize the risk that intended parents will die before their children reach maturity. It omits: (1) to specify a maximum age for intended parents, or (2) to require intended parents to undergo a medical screening to determine if they have a life-threatening illness that

[123] "The Center for Surrogate Parenting reported in 1993 that there had been approximately 4,000 surrogate births since the late 1970s and that only 11 of them had given rise to custody litigation." Robert Blank and Janna C. Merrick, Human Reproduction, Emerging Technologies, and Conflicting Rights, 1995, Congressional Quarterly, Inc., at p. 110. We calculate the rate of such disputes to be under 0.3%. See also, November 20, 2014 remarks of Andrew Vorzimer, first cited at n. 66 above, indicating that the rate of dispute may have declined to under 0.2%.

might kill them before the child matures beyond infancy. Children of natural conception[124] and adoption[125] are better protected against such risk.

To explain its first omission, the majority claims that "ART and IVF do not suggest age limits for their services." But we are not surprised that the multi-billion dollar ART and IVF industries omit any upper age limits for their customers. The majority offers no explanation for its second omission. We doubt that the majority bases its conclusion that intended parents by surrogacy need not be subject to medical screening on the fact that parents by unaided sexual intercourse are not subject to such medical screening. We doubt it because, although parents by unaided intercourse are not subject to either mental health screenings or criminal background checks, nonetheless the majority would require such screenings and checks for intended parents by surrogacy. If mental screenings and criminal checks are appropriate, then why not medical screenings too?

Concern for children should prompt an upper age limit and/or medical screening for the life expectancy of intended parents who seek state approval of their chosen desire to employ a surrogate child-bearer. Reluctance to do so illustrates the pitfalls of embarking on state enforcement of some contractual arrangements for family creation by complex and artificial means.

The proposal omits to require investigation of the physical environment in which the child will live. It fails to require any visit to the intended parents' home to assess any risks or to make suggestions for improved safety. Adopted children are better protected.[126]

The proposal would not require that gamete donor/vendors be known or disclosed to intended parents, much less to children.

The proposal would permit any adult resident of New York to seek state enforcement of a surrogacy contract for any reason. Most of the adults now seeking surrogate child-bearing are same-sex couples or infertile opposite sex couples. But there are some single adults and fertile couples who seek it, some for what any objective observer must call non-medical or even frivolous reasons.[127] which bode ill for their understanding of and commitment to good parenting. The majority's regulation does not exclude such persons.

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[124] "[B]iology does some real work in 'suggesting' promising family structures. … [A]t least it favors the young and healthy, thus increasing the likelihood that parents will have life and energy enough to see their offspring to adulthood." Rachel Lu, *The Perils of Surrogacy*, The Human Life Review, Summer, 2014, at p.41.

[125] New York State has health requirements for prospective adoptive parents. They "shall be in such physical condition that it is reasonable to expect him/her to live to the child's maturity and to have the energy and other abilities needed to fulfill the parental responsibilities." A recent report of a physical examination, including a tuberculosis screening, must be filed. See, Office of Children and Family Services regulations concerning adoption study criteria, at 18 NYCRR, §421.16(c)(1) and (2).

[126] New York State requires at least one visit to the prospective adoptive parents' home. See, Office of Children and Family Services regulations concerning adoption study process, at 18 NYCRR, §421.15(a). The home visit allows the investigator to observe and make suggestions about smoke detectors, fire extinguishers, unsecured pharmaceuticals, or unsecured firearms. Marie Dolfi, LCSW, Adoption: Where Do I Start, Adoptive Families of the Capital Region workshop at Colonie Town Library, attended by the author on April 7, 2015.

[127] Women seeking surrogacy for so-called social, rather than medical, reasons have included a photographer who did not want to disrupt her business, a physician who could not "afford" to be pregnant, a socialite who did not want

Some parenthood that begins for superficial reasons or no reason turns out well. But it must be feared that women who think they do not have time for pregnancy are less likely to devote the time and attention needed for post-natal parenthood.

Most single parents work very hard at parenthood and many successfully raise well adjusted children. However, children of single-parent families face some difficulties and risk some undesirable outcomes at rates higher than those in two-parent families do. Single-parent families are generally poorer than two-parent families.[128] Even when one controls for income level, the children in single-parent families, compared with those in two-parent families, have higher rates of delinquent or criminal behavior.[129] Children living with one parent have lower educational achievement,[130] and poorer physical and mental health,[131] than children living with two parents.

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to get fat, and an amateur runner who had an upcoming marathon. Sarah Elizabeth Richards, *Birth Rights: Inside the Social Surrogacy Debate*, Elle Magazine, April 17, 2014. However a reader might appraise the seriousness or frivolity of the reasons offered in these four examples, each reader can foresee surrogacy motivated by a frivolous or even abhorrent reason.

[128] The U.S. Census Bureau figures for 2016 show that children under 18 living with one parent only are, compared with children under 18 living with both parents, more than three times as likely to be in families that live in poverty (37.6% to 11.7%), receive food stamps (41.5% to 11.8%), and receive public assistance (7.3% to 1.4%). By these three measures, children living with fathers only (21.7% - 22.3% - 2.3%) are less often poor than those living with mothers only (40.4% - 44.9% - 8.1%), but even those living with fathers only are more often poor than those living with both parents, whether married or not (11.7% - 11.8% - 1.4%). U.S. Census Bureau, *Table C8 Poverty Status, Food Stamp Receipt, and Public Assistance for Children Under 18 Years by Selected Characteristics: 2016*, Current Population Survey, 2016 Annual Survey and Economic Supplement, viewed July 30, 2017.

[129] Areas with higher percentages of single-parent households also have higher rates of violent crime; the relationship is so strong that controlling for family configuration erases the relationship between race and crime and between low income and crime. Daniel Patrick Moynihan, *Defining Deviancy Down*, The American Scholar, Vol. 62, No. 1 (Winter, 1993), pp. 17-30, at p. 24, citing Smith and Jarjoura. Boys in stepfamilies or single-mother families at age 10 were more than twice as likely to be arrested by age 14 as children with two biological parents in residence; the association is clear even after controlling for other variables, including socioeconomic status. Chris Coughlin and Samuel Vuchinich, *Family Experience in Preadolescence and the development of Male Delinquency*, Journal of Marriage and Family, Vol. 58, No. 2 (May, 1996), pp. 491-501, at p. 498. Adolescents are at higher risk for delinquency if: (a) they live in a single-parent family, or (b) if they attend school where a higher proportion of adolescents live with only one parent, or (c) both. Amy L. Anderson, *Individual and contextual influences on delinquency: the role of the single-parent family*, Journal of Criminal Justice 30 (2002), pp.575-587.

[130] Among U.S. states, there is a high correlation between the percentage of eighth graders living in two-parent families and the average mathematics proficiency. Moynihan, *op. cit*., at p. 23. U.S. children under age 18 living with single mothers or with mothers and step fathers were more likely than those living with both biological parents to have repeated a grade of school, or to have been expelled. Deborah A. Dawson, *Family Structure and Children's Health and Well-Being: Data from the 1988 National Health Interview Survey on Child Health*, Journal of Marriage and Family, Vol. 53, No. 3 (Aug., 1991), pp. 573-584, esp. Table 4, at p. 578. Children who live in single-parent families tend to perform more poorly on standardized tests, and are less likely to complete high school or to attend college. Suet-Ling Pong, *Family Structure, School Context, and Eighth-Grade Math and Reading Achievement*, Journal of Marriage and Family, Vol. 59, No. 3 (Aug., 1997), pp. 734-746.

[131] Children who live with their own two married parents have better physical health on average than do children in other family forms, including single-parent families. W. Bradford Wilcox, et al., *Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences*, Second Edition, Institute for American Values, 2005, at p.23, citing Ronald Angel and Jacqueline Woroby, 1988, *Single Motherhood and Children's Health*, Journal of Health and Social Behavior 29:38-52, and Jane Mauldon, 1990, *The Effects of Marital Disruption on Children's Health*, Demography 27: 431-446. On average, having an unmarried mother is associated with an approximately 50% increase in the risk of infant mortality; even after controlling for age, race and education, children born to unwed mothers generally have higher rates of infant mortality. Wilcox, et. al., *op. cit*., at p. 24. Teens in single-mother families have higher

Although the mechanisms of cause and effect are complex and debatable, the associations are clear. Society and government pay a fiscal, as well as a social, cost for the poverty, delinquency, crime, illness and injury associated disproportionately with single-parent families.

We acknowledge that some two-parent families face the same difficulties and outcomes described above, and we are thankful that not all single-parent families face them. New York State should and does provide prudent assistance (for example, with nutrition and medical care) to both two-parent and single-parent poor families created without state collaboration; it has no compassionate alternative. But, because of the higher risk of these difficulties and poor outcomes in families headed by single persons. New York should not encourage single persons to become parents in the first place by enforcing their contracts to hire a surrogate child-bearer.

The proposal relies on a mental health screening to assess, or perhaps to allow the reviewing court to assess, whether intended parents are entering the arrangement for valid reasons. But it does not define what would be valid or invalid reasons, and it believes that the judge should have no discretion to disapprove a contract that meets all the majority's requirements. There is little point to such mental health screening if the proposed regulation does not provide guidance for the reviewing court, and in fact denies to the court any discretion of its own to act on warning signs revealed by the screening. In these respects, the proposed regulation abdicates responsibility to assess the motives and qualifications of intended parents who seek the state's approval of their contract for surrogate child-bearing and surrender of a child to them, and thus inadequately protects children.

The majority conditions its recommendation that New York permit and regulate some forms of commercial surrogacy upon compliance with all its proposed conditions, including the politically doubtful condition that New York create, staff and fund a new regulatory program to license surrogacy brokers. We might wish that, if the State refuses to commit resources to the regulation of brokers, it would respect the majority's preference for an all-or-nothing approach, and so refuse to permit and enforce any contracts for surrogate child-bearing. But it is more realistic to fear that New York, like California, would permit new forms of surrogacy without regulating brokers or without some other protections that the majority deems essential to its overall recommendation. Once state government begins to consider a legislative and regulatory scheme as complex as that proposed by the majority, we are likely to get surrogacy with many, even most, of its risks, including unregulated brokers, but without all the protections the majority wants.

Although it might reduce some of the contingent harms of surrogacy, even well-intentioned regulation is likely to be ineffective, arbitrary or intrusive. See Part 4B.

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rates of abuse of alcohol, marijuana, or tobacco than teens living with their married parents. Wilcox, et. al., op. cit., at p. 24. Compared to children living with both biological parents, U.S. children living with a divorced mother experienced an increased risk of accidental injury, and those living with a single mother were at increased risk of asthma. Dawson, ibid., Table 3 at p. 577. Even after adjustments for socioeconomic status and parents' addiction or mental disease, Swedish children in single-parent households had increased risks compared with those in two-parent households for psychiatric disease in childhood, suicide attempt, alcohol-related disease and narcotics-related disease. Gunilla Ringback Weitoft, et al., *Mortality, severe morbidity, and injury in children living with single parents in Sweden: a population-based study*, Lancet, 2003; 361, pp. 289-95.

The majority's description of non-genetic surrogacy often stresses the comparative ease with which non-genetic surrogates might surrender the children they have carried, and predicts that disputes between intended parents and surrogates seeking custody of such children will be rarer with non-genetic surrogates than with genetic surrogates. Both the majority and the minority deplore the harm to children caused by such custody disputes. The majority's proposed regulation appears designed first to minimize the frequency and duration of custody disputes between the adult parties to surrogacy contracts, second to protect the medical and financial interests of surrogate child-bearers, and only third to address the needs of the children of surrogacy. The proposed regulation fails to address the harms inflicted on the children of surrogacy even when there is no custody dispute, and even when the child is well cared for by the intended parents.

We believe that the majority both overemphasizes the frequency of custody disputes and also fails sufficiently to appreciate the risks to children of surrogacy even when there are no such disputes. Thus, by permitting surrogacy and trying by regulation to minimize a relatively rare consequence of it (no more than scores of custody disputes nationwide), while failing to address adequately the other more frequent harms to children (potentially hundreds or even thousands of cases of psychological loss or maladjustment as children mature), the majority's proposal would do more harm than good. No regulation that permits surrogacy can address adequately the harms to children that are either inherent in all surrogate child-bearing or common in permitted forms of such surrogacy.

If New York policy-makers are convinced, as we are convinced, that surrogacy risks unacceptable harm, they can rationally decide to discourage it even if the policy will not eliminate it, and even if other states permit it. New York has done so with other practices it deems harmful that are permitted in other states. For example, New York continues to forbid prostitution even though some New Yorkers go to other jurisdictions to participate in it legally and others engage in it clandestinely in New York. If New York policy-makers believe that surrogate child-bearing is - on balance - harmful to New Yorkers, then New York should continue to discourage it, even if other states permit it. The experience of such other states and countries gives little support to the view that surrogacy is harmless. While some participants seem to emerge unscathed, there are numerous examples of intended parents, surrogate child-bearers, and – most of all – children who have suffered harm, both harms arising from the way it was done, and harms inherent in surrogacy no matter how it was done.

In 1988, the Task Force rejected the option of upholding surrogacy contracts under regulatory models, because that would put the state's imprimatur on such arrangements and use legislative and judicial authority to uphold the contracts, thus enmeshing the state in the problems of the practice.[132] The proposed regulation illustrates some of the problems in which it would enmesh the State.

[132] NYS TFLL, Surrogate Parenting, 1988, at pp. v and 126.

In 1988, the Task Force believed that enactment of its proposals for invalidating surrogate parenting contracts and prohibiting fees for surrogates and brokers would significantly reduce, but not eliminate surrogacy in New York State.[133] We agree and approve.

[133] NYS TFLL, Surrogate Parenting, 1988, at pp. v, 129 and 139.

CONCLUSIONS

Both genetic and non-genetic surrogate child-bearing - no matter how carefully done - inherently undermine families and can often confuse children. They do so by deliberately and unnecessarily dividing before birth or even conception, the functions of parenthood, namely: the conception, gestation and rearing of children.

Surrogate child-bearing – depending on how it is done – contingently risks additional harms, especially to embryonic human beings and children. It can do so by: (1) deliberately creating more embryonic human beings than will be implanted, carried to term and raised after birth, thereby predictably leading to the indefinite storage, pre-implantation destruction, or post-implantation death by abortion of those embryonic human beings; (2) obscuring the identity of one or more of the gamete providers, thereby causing social, psychological or medical harm to children, including accidental incest, and possible genetic disease in grandchildren of such providers; (3) subjecting children born by commercial gamete "donation" or commercial surrogacy arrangements to the risk of psycho-social harm (see Part 3A) arising from the knowledge or belief that they were bought and sold; (4) subjecting other children of the surrogate child-bearer to the fear that they too might be surrendered by their mother; (5) undermining the dignity of women who are paid to bear the child of another; (6) requiring the woman who carries the child to agree before birth that she will surrender the child to others, regardless of the attachment she and the child may form with each other during and immediately after pregnancy; and (7) risking disputes between the intended parents and the woman who bears the child. Not all of these risks will become real in every case, but they have become real in some cases and are possible in many cases.

Surrogate child-bearing may well be desirable to some adults, even intensely so. But it, indeed parenting of any kind, is not necessary to adult flourishing. Although we can glimpse some of commercial surrogacy's long-term and other harms, they are not carefully studied and they are not fully known. Precaution compels us to urge the continued prohibition and non-enforcement of contracts for commercial surrogacy of any kind.

New York State enforcement and regulation of contracts for surrogate child-bearing would endorse and encourage such surrogacy and so, despite the intent to reduce harm, would do more harm than good.

New York State should continue to: (1) discourage the practice of surrogate child-bearing; (2) refuse to enforce contracts to bear and surrender a child, (3) prohibit compensation in connection with surrogate parenting contracts or arranging for such contracts, and (4) penalize by monetary fines those who enter or broker such contracts for paid surrogacy.

For over twenty years, New York's policy to discourage surrogacy has not gone so far as to criminalize or otherwise prohibit such arrangements when they are non-commercial and undisputed. While some believe that this policy goes too far (and others, not far enough), we all believe that this position strikes a reasonable balance between discouraging inherently risky surrogacy and invoking criminal penalties against a controversial and risky practice that some New Yorkers nonetheless believe to be justified.

New Yorkers who, despite state barriers to surrogacy, nonetheless arrange for women to bear children for them, already have reasonable ways to adopt those children, without resort to a new scheme for pre-natal determination of parental rights. New York law permits adoption by the intended parents in such circumstances.[134] Not all the typical time and expense of adoption is necessary for the post-natal adoption of a child of surrogacy. While some believe such adoption is too complex, time-consuming and expensive, we believe that it is a reasonable option for adults who – despite the policy to discourage surrogacy – nonetheless arrange for children to be born with the help of a surrogate child-bearer.

We acknowledge that most of our Task Force colleagues disagree with us about what policy New York ought to follow regarding non-genetic or so-called "gestational" surrogacy. Of course, on this topic, it is difficult to balance the competing values of autonomy for adults, beneficence for children, and justice for all. Reasonable minds differ.

Surrogacy provokes not only reasonable debates, but also engages the emotions and political-cultural views of virtually all the debaters. We attribute good will to all our Task Force colleagues throughout our discussions of surrogacy. We in the minority hope that we have not let our own emotions or our politics get the better of our reason. Readers of the report can judge for themselves whether or not we have succeeded.

However, we must rebut the majority's "particularly strong objection" to five passages in the minority report which the majority believes are "unfounded and unnecessarily provocative and do not advance this important debate." We think those characterizations are unreasonable.

The different terms used by the majority and the minority are both politically charged; our terms are descriptive, rather than euphemistic, and we explain the reasons why we (and sometimes others) prefer our terms. Without minimizing the desire of many adults to have children, we do say that adults, including same sex couples, do not "need" to have children, including children by surrogacy, and we cite some self-identified LGBTQ persons who agree, sometimes for reasons unique to LGBTQ persons. We do not equate the dangers of surrogacy with the dangers of fracking, but we do argue that the precautionary principles by which New York State has approached its decision to prohibit – rather than regulate – fracking are the same sort of principles by which it ought to approach surrogacy. We do argue that the children of surrogacy are in some ways worse off than the children of adoption and we explain why, citing some sources who agree. Finally, while we do argue that New York should not encourage single persons (or indeed any other persons) to become parents in the first place by enforcing their contracts to hire a surrogate child-bearer, the reasons are not so simple as the majority has described them. While it is true that single-parent families are generally poorer than two-parent families, we have also cited research showing that even when controlling for income level, the children in single-parent families, compared with those in two-parent families have higher rates of delinquent or criminal behavior, lower educational achievement, and poorer physical and mental health. These are not outcomes to be encouraged, even inadvertently, by state policy.

[134] New York Domestic Relations Law, Article 7.

The minority report may be persuasive or not; readers will decide for themselves. But the five passages to which the majority objects, and indeed the entire report, are founded on stated reasons and cited authorities. We admit that they are controversial, but not unnecessarily so; rather, they are meant to provoke thought. Readers will decide if they advance this important debate.