PANEL 1

Male Voice: I'm here to support my wife, but I'm, in truth, fascinated by this conversation. I have two factual questions to ask, which seem to be fairly fundamental and the first, I think, could be for Kim. And that is how do you price the labor? You said it could be six figures, but it seems to me that that's so fundamental. But if we talk about this as work and not something else, that we need to know what the range of pricing is and how people arrive at that.

And secondly, I may be obtuse about this, but I was surprised, in looking at Susan's chart, to see that women's organizations in New York State in particular were against regulating this and making this possible under New York law. And I can guess some reasons why women's organizations might be against this, but with—from Margaret's comments, in some sense, I would think that this would be quite in the interest of women's organizations as a right for women, one of the choices they could make. Why would women's organizations oppose this particular opportunity that would—might be made possible by the New York State legislature?

Those things open up to all sorts of other questions, but I thought I'd throw those out to start.

Prof. Mutcherson: All right, thank you. So I'll talk a little bit about the pricing issue and we actually have several people in the room who are even better than I am at talking about that, so if you have anything in particular you want to throw in on this question, please.

Even if you have a surrogacy arrangement that ends up costing somewhere in the six figures, a relatively small slice of that is actually the fee that you pay to the surrogate. So maybe it's $25,000, maybe $35,000. So a lot of that money is going for the medical fees, the lawyer's fees, all these other kinds of things, and then there are also costs that might come on top of

that that aren't really, sort of, factored into the price, but things like maybe you're buying particular gifts for your surrogate. I mean this is something for which one should be enormously grateful, frankly, right? And so you might find ways to say thank you for that.

One of the things that's kind of interesting to think about in terms of cost is how little of that actually goes to the surrogate. And if you think about the service that she's providing, which is, one, getting pregnant—and that could take a period of time and a lot of work—and then, two, actually carrying that baby to term and going through labor, if you're getting $25,000 or $35,000 for that, that doesn't really come out to as much money as it seems like, I mean, if you're actually sort of pricing it in terms of the hours of work that are put into it. So I think pricing in general, in the context of assisted reproductive technology, becomes very complicated.

The other area in which there are lots of issues about this is the money that people will pay for eggs, and there, I think you see a much wider range, that, "If I can get my person with perfect SATs, and she's 5'8" and model pretty, I'll pay more for that." And I don't think you see that same kind of pricing going on in terms of the surrogacy market, not in fees for the surrogates.

Robin Fleischner: Just about the pricing issue, typically, carriers get about $20,000 for a birth—not for a birth, actually, for a baby, so—and actually, if you carry twins, it would be $40,000, but, typically, $20,000. The big expense in surrogacy is the medical expense, which I'll talk about a little in my presentation, but you're talking, really, about huge medical expenses. That's the biggest, by far, the vast part of that $100,000 or whatever.

And also, the American Society for Reproductive Medicine actually sets guidelines for doctors in the field and attorneys, and I think there should be regulation of the fees in this area, and that's why we need legislation in New Jersey about this.

Prof. Mutcherson: Great. Thank you.

Dr. Markens: In terms of the women's groups and so forth, remember, this happened over 20 years ago and what I didn't discuss is that there were different ways the issue got debated. I have a whole chapter—or part of the whole chapter—looking at how this rhetoric of rights and reproductive choice was definitely part of it.

And you have to remember, *Baby M* happened 1986, 1987; this is when we started to have some of the Supreme Court decisions—*Webster*, *Planned Parenthood v. Casey*—that were chipping away at abortion rights, so the women's movements were very concerned at this point about the chipping away of women's control of their pregnancy. It was also the rise of fetal rights discourse and so forth, with crack babies with other things. And so what you saw, when I looked at the debates, is people on both sides utilize this reproductive rights discourse about choice. So those who supported it definitely said, "This is women's bodies, women's choice, surrogates should decide to deal with it." For those opposed to it, what they were really concerned about were about the contracts, that there shouldn't be contracts that women had to submit to during a pregnancy that said they gave up a child or that controlled what they did during the pregnancy. They saw it as the beginning of the end of women losing control over pregnancy. So you have to really think of the historical context in terms of when most of the laws were passed.

And then also, importantly, in terms of *Baby M*, was that she was a traditional surrogate, so she really—what was the difference between her and any other birth mother? There really wasn't, except she had entered into this contract. And so, at the time, most of the traditional organizations in New York such as NOW, there was a political coalition, there were about five main women's groups that were united on this. The main assembly sponsor of the bill in New York, and that's something I go into as well, was a woman who was part of the Women's Health Caucus. There were women who voted against it, the bill, but her organization fought for it and everything. I think that was the confluence of factors at that time.

I talked to someone right before this; not all feminists oppose surrogacy, but the loudest ones, particularly in the late

'80s, were feminists. I think as different generations have come of age, and also people who initially opposed it thought about some of the issues that Kim has thought about, there has been more of a moderated response or continuum of responses. But at that time, a lot of women's groups were thinking of this as something that could hurt women.

Donald Cofsky: I'll talk about later, when we have our panel, this issue of money and impact of insurance or lack of insurance, and what people often do. But you were giving a timeline, I think, of when certain things had occurred historically, and two questions. I'm not sure if you mentioned them. One is is there any date that people look at as to a reported first time a gestational carrier was successful, or birthed a child as a surrogate when she had an embryo transfer as opposed to a traditional surrogacy?

Dr. Markens: Is it a question to me or to...?

Donald Cofsky: Anyone.

Dr. Marsh: It's in the late 1980s when they really understood that they could freeze the embryos.

Dr. Markens: [Interposing] Well, I'll just to—I mean I think the first one did occur in the '80s—

Dr. Marsh: But that was at the beginning; I would say it didn't really take off. Remember, IVF—just to think of it historically, when IVF first happened, people were really opposed to—they were really concerned about it as well, and it was not as successful. In the early 1980s you were lucky if you had a 15%, 20% success rate, I think. It took off more in the '90s; it was the early '90s that you started to hear about it. I think some occurred in the '80s, but it wasn't common and people didn't know about it.

Dr. Marsh: There were more technologies that you had to go through besides the one that I talked about, so when Lesley Brown had the first IVF baby, Steptoe and Edwards didn't use fertility drugs. They did not "super-ovulate" the women [i.e., use fertility drugs to produce more than one ovum] because they were worried that it might produce problems with the baby.

They knew that this was going to be a really big deal, and they knew that people would question their success. So they did it—it wasn't until the 1980s that people began implanting more than one embryo using the ovulation induction drugs that had already been in existence.

It was incremental over the 1980s, and then they began to discover that they could freeze and thaw embryos—freeze them, thaw them, freeze them, thaw them. We can do this with embryos, but problems remain when they attempt to freeze only the egg, although there has been some progress. By the time they figured out how to freeze embryos and how to aspirate the ova through the vaginal wall rather than using laparoscopic surgery, it was the '90s before the technology was able to produce embryos frequently enough that you could really have this—

Donald Cofsky: [Interposing] So as a second part of that, when would you say, if you were looking to date it, that it became pretty obvious or pretty easy to say that, "Okay, we can now harvest eggs to be used"? I mean how did in-vitro? We know that. But, actually, or let's say eggs—all right, well, first of all, harvesting eggs. Secondly would be when did it become somewhat known that you could have an egg donor to be used for somebody else?

Dr. Marsh: That would be at the same time. Around the same time, late '80s into the '90s.

Donald Cofsky: All right. So and if the public would know, or people would—if this would start to become prevalent sometime in the '90s?

Dr. Marsh: Became prevalent in the '90s. I think I would say it started earlier. The ovulation induction drugs, where you can produce more than one egg, they go back to the 1960s.

Donald Cofsky: Sure. During that time I had friends with triplets.

Dr. Marsh: Yes. The ovulation inducing drugs go back to the 1960s, but the combination of the ability to induce

ovulation and to retrieve the eggs without doing laparoscopic surgery, that's the late '80s, and then they perfected their technique over the course of the early '90s.

Dr. Teman: I would say that surrogacy, gestational surrogacy, there's an anthropologist named Helena Ragone and she did her research on traditional surrogacy in the late 1980s up 'til about '92. And in her book, it's very interesting to read it now because she says, "They've started to do this new process of gestational surrogacy; I speculate that it's not going to take off."

And then by 1997, you see that pretty much, gestational surrogacy is already 95% of cases and that is when the CDC begins to collect data about gestational surrogacies in the U.S. You can actually see it jump exponentially; from 1997 until today, the number of surrogacies per year is just taking off. So I would say around 1995, I would say, would be that jump off point where it becomes routine almost to do gestational rather than traditional.

Dr. Marsh: [Interposing] And that's partly because IVF becomes so much more successful. I mean nowadays, if you have a tubal blockage and you want to become pregnant, it used to be, in the old days, they tried to fix your tubes. Nowadays, they think it's you're going to have a better chance of getting pregnant if they go right to IVF. I mean, from the early days when IVF was successful 15% of the time, to now when it's more successful than some other things, these technologies make gestational surrogacy a lot easier, technically.

Donald Cofsky: Are there any statistics for instance as to how many children were born of gestational carriers of, say, on a yearly basis, by state, by the entire country—anything like that? I mean I don't know because you can have women who are gestational carriers that go into a hospital, don't tell anybody, nobody knows. The IVF clinics may report this.

Prof. Mutcherson: Well, I don't know what year the law passed. There's very little regulation, as we talked about, but now, fertility clinics do have to report certain things like success rates. And one thing they do have to report are carriers, but the problem is carriers could be surrogates or they could be women

who use donated eggs, and there's no parsing out which is which. So that's why it's really hard to get the numbers on this. Yes, a woman doesn't have to tell the hospital, but you do need a clinic.

Donald Cofsky: Anybody have any handle on those numbers, perchance?

Dr. Marsh: You can go to the CDC.

Prof. Mutcherson: Right, I mean its part of the Fertility Clinic Success Act. They have these reporting requirements. So you have an annual report that you find on the CDC website. The problem is that that report doesn't necessarily break things down in the way that you're asking.

Audience Member: I loved your study of Israeli surrogates; it was amazing. Could you talk about what you think the differences are in American society versus Israel? Well, Israel is a much different society with regard to attitudes toward children, and toward pregnancy and birth, and I wondered if you could speak about that.

Dr. Teman: Everything that I spoke about today about Israeli surrogacy takes the human experience of surrogacy to an extreme. You have Middle Eastern people who are highly emotive, you have a society where maternity is so important—there is no social acceptance really to being "child free by choice" in Israel. There is not that real option. So everything is to an extreme.

But if you look at U.S. surrogates in comparison, I have a colleague, Zsuzsa Berend; she has now been doing ethnographic research online, on SMO—Surrogate Mothers Online, and she's been looking at what surrogate moms say in America—interesting, they call themselves surrogate "moms"—yet she sees very similar things. Surrogates want the same thing. They want acknowledgement, but it's different because the surrogate might be in California, and their couple is in New York, and their couple has no idea, really, how to relate to this person and the surrogate doesn't really know how to communicate the message

of how much contact she wants. They're not in each other's face all the time, they're not going to all the medical appointments together all the time, nobody's giving them a real map of how to relate to one another, and so you do have a lot of disappointments, but you also have a lot of meaningful relationships just like in Israel. It really depends on how open the communication is.

When I read Zsuzsa's work, I say, "Wow." It shows you how things can tip this way or that way and it shows you how much communication is so important between the surrogate and the couple to make it a good experience for the surrogate and for everyone around. So I would say that the difference in Israel has a lot to do with this common background, with this common language, common culture, common value of motherhood and family that's so strong, that's shared, and vested interest of the intended mother to participate. The fact that they were so interested in everything to do with the pregnancy, I mean, if you have an intended mother who didn't necessarily want anything to do with the pregnancy and you have a surrogate who really needs somebody to kind of help her "hold" this pregnancy, then there's going to be a mismatch there and it won't work out as well.

Prof. Mutcherson: Great. I think we should leave on that note, so folks have a little time to drift before they come back here for the panel at 11, but please help me in thanking our panelists. This was a great discussion.

PANEL 2

Mr. Guglietta: Thank you, Robin. Robin, I have a quick question based on the safeguards that you have enunciated. What's the panel's consensus or difference of opinion on whether, institutionally, the legislature is better equipped to enact this, or whether the court should be the ones to revisit *Baby M* and make sure that these safeguards are enacted?

Ms. Fleischner: Let me just talk about the New Jersey adoption statute amendment process. What we ended up doing-- the New Jersey State Bar Association Family Law Committee --

we put together a committee of people on different sides of the issue to keep each other honest. And we were able to come up with a statute that addressed each other's arguments, and it worked well. And the legislature was open to passing the bill.

In terms of courts, even if you had a *Johnson v. Calvert*, a decision which says intended parents can be the parents of the child and an agreement can be enforced under these circumstances, you still need regulations to enforce how this is going to be carried out. So in the end, I don't know, realistically, if the legislature is ready for this. I don't know the answer to that. But in terms of the process, I think the best approach would be to try to come up with a real system that would be ethical, legal—humanistic. That's my feeling.

Mr. Singer: And if I can jump in on that, I agree with Robin because there's too much regulation that is actually needed. The court's not going to sit there and come up with the rules; it's too much for a court to do. And the examples—for instance, we talk about should there be screening; should there not be screening. Well, what's fascinating is that the better clinics and the practitioners in this area often require screening. They require counseling of a gestational carrier; they require counseling of the intended parents; they also all require they want each party to be represented by an attorney. That's the best practices, so that's great. But you got to make that a rule. Many people don't do it.

One of the problems we have in New Jersey, because of our marvelous Office of Licensing of Adoption agencies, they have told adoption agencies that they may not do home studies if it's an assisted reproduction. Okay? First, they said you can't do background child abuse and criminal background checks because you are only empowered to do it in connection with an adoption. But they didn't say you couldn't do the rest of the home study. Now, they're telling agencies, "No, you can't even do the rest of it." Who does that benefit? So that's got to be corrected.

And then the important thing of structuring rights by legislation is absolutely mandatory because as we make it into some of the ethical issues with something that popped up all

over the news about two weeks ago is the case of the, I think, Canadian couple that had—was using a gestational carrier, and the child was tested and had Downs Syndrome. And the couple, under their contract, wanted the baby aborted and the gestational carrier didn't want to do it. What do you do in that situation?

Now, she eventually gave in and she had the abortion, but what do you do? You need those—that's something you'd like to address; otherwise, everybody's running in to the court and you're going to get decisions all over the place. Do you enforce the contract? Don't you? And if you don't and she has the baby, who's going to be responsible to raise that child? If it's just a transferred embryo, that's one thing. What if the embryo, though, the intended parents are the genetic parents? Then what?

So, I mean, these are the ethical things and I'm sure Professor Mutcherson can—might want to use them in one of her final exams.

Donald Cofsky: No sweat. You have your whole final exam here.

Ms. Palmer: I just want to comment on that same question... I have a different perspective and have very mixed feelings about regulation, coming from the perspective of someone who represents LGBT individuals who are forming families because, usually when legislatures get involved in regulating LGBT families, their goal is restriction rather than, regulation. So I don't worry about it so much in a state like New Jersey that has a statewide nondiscrimination law that protects sexual orientation and also has civil unions. But in a state like Pennsylvania, where we have a republican legislature and, now, a republican governor, and where we don't have an assisted reproduction law at all, I could see where that state could regulate gestational surrogacy and possibly prohibit same-sex families from using that as a way to form their families. So I do have mixed feelings about government regulation.

I'm very, very, very much in favor of professional regulation, self-regulation, which is happening right now, at

least in the medical community, through organizations like the American Society for Reproductive Medicine and through—legally, through the organization that we're all members of—the American Academy of Assisted Reproductive Attorneys that have to abide by certain rules and a code of ethics.

Certainly, when you have no regulation at all, there is absolutely the potential for exploitation, for abuse, for situations to fall apart. I have had some experiences with that in Pennsylvania where we have no regulation and people, especially who engage in a lot of self-help and at-home and do-it-yourself, they don't engage the medical profession, so they are doing this at home. Especially with people who just decide to get together and want to do a traditional surrogacy without contracts, without lawyers, without doctors, without therapists, without counselors; that's where I've seen the most nightmarish situations occur, people with a lot of misinformation and a great potential for exploitation.

Mr. Guglietta: What parties are most vulnerable in that situation, and which actually have some protection with a lack of regulation? And beyond that, how do you counsel your clients in dealing with those issues when—from the beginning when they first come in, to the end when, let's say, somebody's circumstances change or when somebody's desires change?

Ms. Fleischner: I think you have to counsel people from the very beginning because I recently had a case where my clients came in when the deed was done—with a turkey baster at home—and we had a traditional carrier. It was really scary.

Everyone wanted to make it work, but it was very hairy at the end. The carrier, the traditional surrogate, took several months until she was in a place where she was ready to go into court and terminate parental rights. It was very scary. If these people had consulted with me before the turkey baster, we could've done it differently and better. So you have to start at the very beginning.

Mr. Cofsky: And every contract that's out there , that I think we all get involved with, says there's no law on this; you can't—this may not be—this is not enforceable—everything in

there. In fact, some attorneys, I think, are now not even calling them contracts; they're calling them "memorandums of understanding."

[Laughter]

Mr. Guglietta: Just because they're generally unenforceable when things go wrong?

Mr. Cofsky: Well, in New Jersey, what are you going to do? I mean all you're looking at is *Baby M* which doesn't really apply, I don't think, to gestational carriers, although I know Judge Schultz in the case that Bill was talking about thinks otherwise. I don't agree, but nevertheless, you know... So, sure, you have to counsel on that.

Mr. Singer: But it's still good to have something written of what the intention of the parties were when they entered into it, even if it's not totally enforceable.

I also agree with everything that Robin says about it would be wonderful to have these laws, but there's also the political reality. And we discussed that and, you know, given our present governor in New Jersey, I don't think that—and what we perceive to be his position on these issues, that even if we got the legislature to pass this perfect legislation that we would get it signed. And so we've been discussing maybe just doing some few piecemeal, small things rather than trying to get something comprehensive to move the process along.

Mr. Guglietta: Well, are there other statutes in New Jersey that could deal with the surrogacy relationship—?

Mr. Singer: There are no surrogacy statutes in New Jersey whatsoever.

Mr. Guglietta: No, but the issues that come up with regards to a surrogacy contract and relationship—

Ms. Fleischner: Parentage.

Mr. Singer: The Parentage Act says that the woman who gives birth is the mother and she has to wait 72 hours before she

can surrender any rights. You know, I get couples come to me and they have a New Jersey surrogate and—that some agency has found for them, and I say, you know, "Did anyone explain to you the dangers here?" No, the agency just went and said, "Oh, well, use this woman. You know, it'll be fine and blah, blah, blah."

Ms. Palmer: That's where we tell them to come across the bridge to Philadelphia. It's a short trip.

Mr. Cofsky: And also in New Jersey, where New Jersey surrogates are being told, "Oh, you can be paid for this other than your expenses because *Baby M* only applies to traditional surrogacy cases." All right? That may be a good distinction. I mean, you can say, "Hey, it shouldn't apply here and this is not a—we're not putting up a chart." Everything they talked about in *Baby M* because it's her—she's selling her reproductive rights; it's her baby—you say, "Well, we're not doing that. She's just the old, you know, womb for rent. It's all it is." So, but they're telling their gestational surrogates that that's what the law is, and that may not be.

Now, obviously, when everything works out fine and everybody's onboard, there's no problem. It's that case when someone's not happy; then, you have major problems. And where do you turn?

Mr. Guglietta: So you think there should be separate standards for the different situations, where a certain set of laws should govern completely where everything's fine, and certain things only kick in when there's a problem?

Mr. Cofsky: No, but the separate standard ties in with traditional surrogacy versus gestational.

Mr. Singer: One of the issues with using a gestational surrogate is it's considered better to use a gestational surrogate who's been pregnant and had a child. But in the case that I was talking about where they used a sister, she was 42 years old and had never been married, never had a child, and, you know, now here is her chance to have children. So she changed her mind

and she said that she had attachment to the children during the pregnancy, despite what might have happened in Israel.

Dr. Teman: But if you really look into that case, where did that start? It started with a breakdown in the relationship. She and her—

Mr. Singer: Relationship between—

Dr. Teman: They thought she wanted revenge. Her whole story about—okay, I believe a woman who has never had a child has no idea what they're getting into. But when you look at these cases when they break down, there's always a fight. There's always a surrogate feeling betrayed; a surrogate feeling like, "I'm doing this biggest thing for this couple and they—"

Mr. Singer: Don't appreciate it.

Dr. Teman: "The parents are treating me badly. I am going to show them who's the boss." That's where this starts, in my opinion. I don't know what you all think of that, but—

Mr. Singer: That's true, and that happened there and she got the backing of the Right to Life people and her evangelical parents and, you know, all the free legal.

Dr. Teman: In that case, it's her brother. She's doing something for her brother and she would expect her brother to give her the utmost respect and acknowledgement, and her brother—I don't know what happened there, but—

Mr. Cofsky: Which is interesting because if he's on the birth certificate and so is she, its incest.

Prof. Mutcherson: He's not.

Ms. Fleischner: But what if he had been?

Ms. Fleischner: —the biological brother and sister as parents to the child.

Ms. Palmer: That's why I think we get the—like that case in Michigan recently, the parents weren't the genetic parents,

but what if they were? And then, the fact we talked about that, that the surrogate mother, she had been a previous surrogate too, right? And she's been ostracized from the surrogacy community. But she felt lied to that she didn't really know about, you know, this woman's past mental health history and so forth.

Mr. Singer: In the New Jersey case where you have the two men and the sister, that's, to me, one of the ones we can look at—a three-parent family.

Ms. Fleischner: In my turkey baster case, the dads brought the baby to the biological, traditional surrogate's home every day after birth for three months so she could visit with the baby, and it was a very caring relationship. And ultimately, we were able to get her to terminate her rights because she saw that there would be a relationship. And so, I think what you're saying is true, that having the relationship, in the end, is what's going to make it work.

Dr. Teman: She can't relinquish if she doesn't have that trust that, "This baby is going to be cared for by good people." So that makes what she did something good.

Ms. Palmer: I think you have to look at other laws that are in existence that you could look to in absence of surrogacy, and when you're talking about traditional surrogacy, you have to look to the adoption act that governs, and you have to be bound by those terms because the way to create the legal relationship is to do a termination of parental rights through the adoption act, within those guidelines and those bounds. And that means when I'm talking to my clients who decide that they want to use traditional surrogacy, I reframe it for them and say, "In Pennsylvania, we're going to talk about this as an open adoption." You know, "You're conceiving a child essentially for the purpose, legally, of adoption, and we will proceed with an adoption and all the rules that govern adoption attached to that."

And in Pennsylvania, that means that you cannot give money, even for living expenses, so that creates a real conflict for people who want to do a traditional surrogacy and want to

pay their surrogate because you cannot basically pay anything in order to get a woman's consent, to consent for that adoption to go forward. So that creates a real difficult situation, but I think if people think about it in terms of when you're doing traditional surrogacy, that you really are doing an open adoption, that kind of makes everyone step back and really understand, legally, what the framework is.

Mr. Cofsky: And I was representing two men who were going to do a traditional surrogacy with a friend, you know—with a friend of theirs. And what I basically advised them, I ended up saying with the turkey baster, the whole thing—is that, "Here's your worst case: She wants to keep the child, she gets custody of the child, and you have the ability, the honor, of paying child support forever."

Ms. Palmer: That's right.

Mr. Cofsky: All right? Maybe you'll get some visitation and that's about it, you know? I said, "So knowing that, decide what you want to do."

I have a question, actually, for the panel. In talking about same-sex couples, and let's say you'd be in New Jersey or any other place, you get this parentage order and you get the birth certificate issue, but they're thinking of moving to another state and that state may have, you know, under DOMA, or may have a constitutional thing about the same-sex. We've already had fights and had to go to federal court to get other states to recognize adoption decrees from sister states with their same-sex partners. Now, they go to another state, and even though they're carrying a birth certificate, that's just an indicia of parenthood; that doesn't mean you're a parent. So the question—which I'm litigating that one too, now—but the question, then, comes as what do you counsel your clients who may be going to another state, if that state says, "Well, fine, you're on that decree, but did you adopt?" If it's—

Mr. Singer: We always tell them to adopt. We always tell them to do a second-parent adoption because that would be given full faith and credit. There are cases already out there that—where, for example, two women who were from

Washington state and one was the bio mom, and they did a second-parent adoption and they moved to Florida. And then, the bio mom went—when they split up—went to court and said, "Well, in Florida, a gay person can't adopt—" at that point. "And so, therefore, you shouldn't recognize the Washington decree." And the Florida court said, "No, we have to."

And one of the advantages that we have here is the adoption tax credit. Congress allows people to write off on their taxes, get a tax credit, for the cost of an adoption. Now, if a man and woman were married, and they had a child and the man died, and the woman subsequently remarried and the stepdad wanted to adopt, that would not be entitled to the adoption tax credit because that's an in-family adoption. But because of the federal Defense of Marriage Act and the federal government does not recognize same-sex relationships as a family, our families, same-sex families, can take advantage of the adoption tax credit. So as a result, I tell my clients, "You must do this and Uncle Sam will pay the cost of it, and then you'll be protected." So when you go to—

Ms. Palmer: One of the few perks.

Mr. Singer: Right. When you go to another state, you pull out your—you don't pull out the birth certificate; you pull out the adoption order.

I also want to say there was a case recently in New York State, which prohibits surrogacy, where two men from New York had gone to California and done a surrogacy and got a order saying that they were both the parents, and their names on the birth certificate. They came back to New York and then they split up, and the non-bio dad tried to get out of having to pay court-ordered child support, saying, "Well, we're from New York and this should not—surrogacy's not allowed here." Court said, "It was done in California; we are going to uphold the California order."

Mr. Cofsky: So then, the question comes up if you're dealing with same-sex couples—I know and I've heard it time and time again, "We want that pre-birth order. We want to go on as soon as possible."

Mr. Singer: Pre-birth orders, no. You don't get the adoption tax credit with a pre-birth order.

Mr. Cofsky: No, of course not. But then, the question is why even bother doing it if you're dealing with a same-sex couple, because of the inherent problems that could come—they could face down the road? And—

Ms. Palmer: Well, you'd have to do it in order to have a gestational carrier's name not on a birth certificate because, unless you can show the order at the time the birth certificate information is filled out at the hospital, her name will automatically go on and that could attach parental rights for her that would then result in having to do a termination. So having the pre-birth order will prevent her from being on there.

We've done situations where we've done a pre-birth order and then an adoption too—we call it an "adoption to confirm parental rights." They already have a decree or an order, and then we're just confirming it again. Sometimes, of course, the Court asks, "Well, why are you doing this," you know? But it's kind of the "belt and suspenders" approach. Not every client wants to do it. I mean, that's what we recommend and it's more expensive, and they think it's just a way for us to make extra money. But really, it is an additional legal protection that they can have

Mr. Singer: Also, I want to say about the birth certificate, if you have two men or two women on the birth certificate, that doesn't say that they—those two parents—are in any way related to each other or in a relationship; all it confirms is their relationship to the child. So it doesn't say they are a married couple or they are in a... All it just says is, "These two adults are both the parents of this child." It says nothing about their relationship.

Ms. Fleischner: By the way, that also is an answer to one of Pasquale's earlier questions, which was whose rights need to be protected in these situations? And you know in our discussions, fellow attorneys, we have not mentioned enough the best interest of the child, because we need to keep the children who are created by these arrangements at the highest part of our

consciousness. We have to protect their rights as the human beings resulting from surrogacy.

Mr. Guglietta: That got lost in the shuffle of this discussion.

Ms. Fleischner: Yes.

Mr. Guglietta: Does anybody in the audience have any questions?

Prof. Ann Freedman: Sure. My question is any creative ideas about how we could all do all these wonderful things that you're suggesting we do, and simultaneously learn from the Israeli experience about facilitating the acknowledgement? Because it seems as though there's an enormous tension between trying to terminate the gestational carriers' rights as early as possible, with as much certainty as possible, and the same time trying to create a cultural framework in which the gestational carrier gets to feel that she is making a contribution and is appreciated.

And it seems to me that the attorneys are in a position to think—especially since we can't get legislation quickly—to think about how we could create this kind of ritualized thing, given that we have so much of a commodification going on and so much of a legalization going on, and all these professionals screening and everything. And the human part of it, especially with the distance, it just seems enormously complicated. And I'm drawing for this question, in part, on my familiarity with the challenges around open adoption and how confused people are—who are surrendering parents—about the fantasies that people have about still being a parent. And while I understand some people may have affirmatively chosen to have three-parent families or four-parent families, I think there are—most situations where a couple is trying to have a child, they aren't looking to have a three-parent family or four-parent family. And so the question of how we would ever create rituals or frameworks, given that they're not going to come out of cultural homogeneity...

You know, they're not going to come out—in our regions, we don't have any source of this frame of reference, and institutions that are most likely to provide that sort of resource, like the Catholic church and so on, are pretty unenthusiastic and aren't going to be facilitating this any time soon. So I'm interested in whether this is something that any of these organizations might take on or whatever, or thoughts about how we could do it, or whether people are trying to do things along these lines.

Ms. Palmer: I could speak to that a little bit, about what we do in our practice, because most all of our clients are LGBT so they're creating—they're involving someone else into their reproductive process in conceiving their child. A lot of times, that known person is a gestational carrier, or for lesbians, it can be a known sperm donor. Even though their legal rights are going to be terminated; there's still potentially a psychological and emotional connection that can continue on with that individual. And how do you integrate that into the story of the family? And how do you tell the child about their conception, their creation?

Obviously, the child is a child of same-sex parents; they can't just presume that they were the product of those two people. They're going to ask questions at some point when they realize that there was a missing piece there from the beginning, and who provided that. So we always refer our clients who are choosing to use a known donor or gestational carrier to a family therapist who specializes in nontraditional family formation. She initially started specializing in open adoption arrangements and has integrated assisted reproduction into her practice for nontraditional family formation. And having those conversations prior to conception about what kind of continuing relationship the people would want, because that can also be a deciding factor in who you choose, if you don't want to have a long, continuing relationship with a sperm donor, and a sperm donor wants to be involved in family functions or on a regular basis or have, like, an uncle role to the child, that needs to be figured out before you make that choice of the donor, so everybody's on the same page.

And these are relationships that can change over time. You know, maybe this is your best friend now who's going to be the sperm donor, but maybe he gets involved with someone, you lose touch; you know, 18 years from now, that might not be the case. These are also evolving, so it's good to have someone that you can—that the parties can go back to and revisit things as things come up, or as their child asks questions, or, you know, if their 13-year-old is like, "I hate my gay moms; I want to go live with my dad/sperm donor." And how do you deal with these things, especially as the child's own emotional needs start to come into the picture as well, as they get older and understand the situation of their conception.

Mr. Singer: I put, in our agreements, goals. I mean I have everyone sign an agreement. What are the goals here? You know, is there going to be contact with the sperm donor? How often? And what's going to happen if both moms die? But not as hard and fast that, "This is what will happen," but "What are their goals?" so there's some discussion.

Prof. Freedman: I like that. That sounds good.

Mr. Cofsky: Two things. One would be just as a little follow-up or the ... my great confidence and trust in the state of New Jersey. In the case that we have told you about that's up on appeal, during the course of oral argument, after the first session but before the second, that weekend, what did my clients get in the mail but a birth certificate with both their names on it? So at the conclusion of my oral argument the next day when they brought this in to me, I think made a comment that the deputy attorney general apparently doesn't talk to her own client, because Mr. Komosinsky's already signed the birth certificate; here it is.

Well, everything stopped; judge pulled us aside and said, "Hey, why don't you go talk to your client back there? Why don't you forget about this one?" All right, we stopped it. A week later, we get this very intelligent and well-thought-out response: "Well, we discussed it, we want to go forward, and here's how we want to deal with that birth certificate that's been issued with both their names. We're going to seal that birth certificate and then we're going to send them—issue a new one,

but just with his name on it. And then, after she does her step-parent adoption and gets fingerprinted and child abuse clearances and goes to court, then we'll seal that one and then we'll issue a new one with both their names on it." Taxpayer money at work. All right? Just great.

And one thing that sort of struck me in one of the cases, I think it was the Robinson case, but that was quoting something about the Uniform Parentage Act which I thought summed things up, was saying that—and we were talking about the importance of what this is, best interest of the children. And that's where we have to keep our eye on. It says, "We must recognize the obligations of parents in any possible combination and permutation of marriage, of the parents, method for conception of the child, and arrangements that intended parents make to have children." And then, in bold, "Otherwise, we have children for whom nobody has responsibility. It is necessary law for the new century." That says it all.

Mr. Singer: And the judge wasn't reappointed.

[Laughter]

Prof. Mutcherson: So I'm going to take prerogative, since nobody else got up, and ask a couple of questions, actually. I have questions for all of you, but I'll save some of them for later.

One of the questions is actually a follow-up on Pasquale's question that he asked before, which was are there benefits to actually not having a regulatory scheme. So can you imagine that the world in which we live in now, where the legislature hasn't spoken and we have *Baby M*, but we—as you saw from Don's example—we actually do see judges getting around that, where they want to, right? We've had some roadblocks there, but it's possible. So are there some reasons why we might think we're actually better off where we are now than we might be if the legislators started to poke their nose into this?

Mr. Singer: I'm always afraid of what the legislators might do. It might be very counterproductive to what we want,

and so, I mean that's why I go very slowly with anything, legislatively.

Prof. Mutcherson: Yeah, yeah. Oh, wait—so let me ask my second question, too. So my second question—and this is sort of one of the things that I've thought about in my writing and in more theoretical ways, but there are obviously really practical questions here, too—which is do we want these types of assisted reproductive technologies to be treated under the same rubric as adoption? I mean, I think that you can think of some serious distinctions to be drawn between what obligations are created when a child is in the world and needs a home, versus what obligations are created when two people, three people, however many people come together with the purpose of creating a child. Maybe there are no distinctions there, but I think we could certainly argue that there are some.

So are we comfortable with the idea that we should treat all of these arrangements the same way that we treat an adoption paradigm, which, I think, starts in a different place in a lot of ways?

Ms. Fleischner: I think that we can't treat them the same way we treat adoption because these are intentional arrangements by adults to create life, and I think that's very different than a scheme where you're talking about protecting the rights of a child who is in existence already, or who's about to be in existence. So I think, as I argued, there are positive pieces of the adoption regulation which are applicable to this process, but we can't use all of them., Even the best interest of the child is different in surrogacy versus adoption. I look at *Baby M*, and basically what the court ruled was she would have three parents who were at war with each other. And in the end, you know what? She chose. She ended up choosing what family worked for her and what felt like her family.

Mr. Singer: And didn't she, when she became 18, do an adult adoption?

Ms. Fleischner: Yes, she did. Betsy Stern did ultimately adopt her. So I think there are very positive aspects of the adoption statute and regulation that we should apply to

surrogacy, and there are parts of it that we can't apply because it's a very different animal.

Mr. Cofsky: True. And in addition, I think one of the things that we've been focusing on—because there's two aspects—one is how are you going to regulate it as far as qualifications go. That ties in with the adoption statute. But the other side of it is—and should we have something or not—is that as long as it works fine, it works fine; we don't need any rules. It's that what do you do in the case when it doesn't? And then who makes that decision? How do you keep them consistent? How can you counsel your clients when you say, "Okay, yes, the court will enforce this"? "No, the court won't enforce this"? "No, you're going to be financially responsible"? "No, you are"? I think it's more those things I know that I'm focusing on more so than having everybody counseled, and home studied, and so forth.

Ms. Palmer: Just with respect to speaking on that regulation issue again, because I am practicing in a state that really doesn't have any regulation, that actually affords us a lot of ability to be creative in getting the kind of families that my clients want to conceive. So with this situation that I spoke of with lesbians where they both want a biological connection in what is essentially the gestational mother and one is the genetic mother, we have been able to file and get pre-birth orders that determine that both of them are the legal parents from the moment of conception, essentially. And the original birth certificate is issued in both names, and we have a final order and decree that states so. That, in many ways, is better than getting an adoption because, if we had to do an adoption, the wrong person would be adopting essentially because the birth certificate would be issued in the name of the gestational mother. And then the genetic mother would be then adopting to try to get her name on there, and she's already the genetic mother. So, really, it should be reversed because, under a DNA testing, the genetic mother really is the mother under the law.

So both of them have an argument, legally, under the law, as to why they each have a claim to parenthood. At least even though we don't have a parentage statute in Pennsylvania, we don't have an assisted reproduction statute; each of them have

their own individual claim as to why they're a legal mother and—certain judges will issue orders stating that. Some judges will not, but we can basically have people deliver in the county that will issue that type of order. So because we don't have regulation, we have choice.

Mr. Singer: And New Jersey will allow that in a pre-birth order where... The time that they oppose it is when the parent who's seeking to be put on the birth certificate has no genetic connection. So in these co-maternities, I've been able to get pre-birth orders without any problem. But Don's case, you know, he had a party who wanted to be on a pre-birth order that didn't have a genetic connection.

Ms. Fleischner: And, of course, the reason that I want a statute is because I practice both in New York and New Jersey. And actually, I'm about to be admitted in Pennsylvania because I can't take it anymore. But I feel my clients now have to—if they want to do a surrogacy, they have to shop around and look for states where they can do this. Whereas in adoption, my New York and New Jersey families, if they find a birth mother in New York or New Jersey, can proceed with the adoption closer to home. Why should families in New York and New Jersey have to go to California to find a carrier? Or Kansas?

Mr. Singer: Or India.

Ms. Fleischner: Well, God forbid, which they do. But I feel as though this practice is not going away, and if New Jersey wants to take part in the national conversation and the national and international movement to create families through surrogacy, we have to take a stand.

Prof. Mutcherson: Well, I think that's a great place to end. Thank you to all of our panelists and to all of you for participating in today's conversation.

Dr. Elly Teman

Dr. Elly Teman: So we've heard, now, a historical perspective, and we've heard about some of the stories that are emergent in the popular media about surrogacy, and the theme of Baby M and its effects has come up. And what I'm going to talk about today is about the experiences of surrogates and intended parents who I spoke with during my anthropological research on surrogacy. And the theme that I'm going to talk about is how the *Baby M* story has created a lot of misperceptions in popular culture about what we think surrogates feel and what we think goes on in surrogacy contracts. One of these misperceptions is that we think surrogates bond with the baby, since the Baby M story was about a surrogate who refused to relinquish the child because she said she bonded with the baby.

Another issue is that we feel strange about is the question of, "Who's the mother here?" We're always talking about, "Can we really force a surrogate to relinquish her maternal rights to this baby? She's the mom." A third issue is we wonder how contentious these relationships are between surrogates and intended parents. We think about this kind of instinctively as a subjugation of the surrogate—exploitation of the surrogate.

Well, what I'm going to talk about here might make people feel uncomfortable, but what I want to talk about is what the surrogates are actually saying. And in the interviews with these surrogates, if you take what they say at face value, then these all emerge as cultural myths. We could talk through Susan's framing theory about why we need to believe in these cultural myths and why these ideas perpetuate until today. But first, I would just like everybody to hear how the surrogates speak about these issues: bonding, who's the mother, and exploitation. ...

So I just want to give a little background on my study. It was done in Israel. I spoke with surrogates and intended parents, mostly intended mothers. I did approximately one hundred interviews with different participants in surrogacy and

I followed surrogates and intended parents throughout their whole surrogacy journey.

Israel took a completely different approach to the policy inertia that Susan talks about. Israel is the first place to make a complete law devoted just to surrogacy in which the state controls each and every contract. If you want to do surrogacy in Israel, you go before a board of state-appointed officials who decide whether this contract is legal or not. And if the contract is approved by the state committee, it is a fully legal contract that will be upheld in a court of law. So there is no question about the validity of these contracts, and Israeli surrogacy is very restrictive.

I am saying its restrictive because intended parents have to be screened; surrogates have to be screened. They're screened medically, physically, psychologically. Intended mothers need to prove that they require surrogacy to have a child that's genetically related to their husband or to themselves. These are only heterosexually parent couples. These are people who are married or who are legally bound. The intended mother has to prove she has no other way of having a genetic child of her own. She has to prove she has no uterus. She has to prove she's done at least eight IVF attempts, or had a similar number of miscarriages.

Now, in Israel, there's state-funded fertility treatments through the social medicine system, so some of the women I spoke with, who are intended mothers, did 20, 25 IVF attempts before they finally set aside the idea that they'd be pregnant on their own and chose to do surrogacy. And then, they had to convince the state committee to let them hire a surrogate.

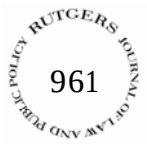
The surrogates, because of some interesting things I can't go into about Jewish law, all had to be single. All of the surrogates also had to be gestational surrogates only. They could not provide the egg and they could not be related to the couple in any way, by any degree. All these things were put into the law so that the rabbis who are sitting in the government would approve of surrogacy. And, really, it's amazing how this law passed so quickly in such a religious country. But Israel is such a pro-natalist country, and a country where people are very

familial—both the Jewish and Muslim cultures are so familial in Israel. It is amazing how quickly this law passed. Usually, the rabbis and the secular government officials are busy fighting with each other about everything. This law went through really quick. Everyone was amazed how everyone got along because they all believed in this plight of the infertile couples, which, as soon as it's spoken about, it's taken for granted in Israel that you will do anything to make a woman into a mother, to make a family into a parent family, and that's where I'm going to begin.

So let's take the first myth: bonding. We wonder all the time about the prenatal bonding which supposedly occurs in pregnancy. It's some kind of innate essentialist approach we have, and the surrogate's going to bond with the baby, and, "Oy vey, we're going to take the baby away from her." Well, none of the surrogates I have ever spoke with—the 26 surrogates who I did in-depth interviews and repeat interviews with, the tons of surrogates who I knew through surrogacy support groups—surrogates I've known for ten years, nobody remotely bonded with the baby.

Statistically, there's no good statistics on surrogacy, really, in the world. But if you look at the handful of cases that have reached a court of law in the United States, and you look at the 25,000 or so surrogacies that have happened, that have occurred, you think, "Are surrogates really bonding with these babies, or is bonding just a cultural myth?" Okay, now how did surrogates go through this pregnancy and deal with this idea that a woman should bond with the baby during pregnancy? Because the surrogates also believed that pregnant women 'normally' bond with their babies. This is what they grew up thinking. And here, they're dealing with this idea that they have to be pregnant and try and not bond.

Well, the surrogates were very focused on this. They would say things all the time like, "I'm only the incubator." We think about the mechanistic metaphors that, in the 1980s, the radical feminist groups rallied about women as factories; well, the surrogates use this subversively as a tool to say, "Look at me. I'm not bonding because this is not the 'natural' self. This is not me in 'nature'. This is my relationship, mechanically, to this baby." They would say, "It's not mine and that's why I didn't



have the feelings you'd expect. With my kids, I love them right away. But with this child, it was like I was the babysitter." They would always speak through a biogenetic frame. Genetics--- sperm and eggs--- was on their mind all the time. "I'm only the womb. I'm only the hostess. I'm only the innkeeper. It's not my sperm and egg, so I feel nothing toward the baby."

As one surrogate said to me, "I'm a guesthouse for nine months. I'm the innkeeper. It's not my egg, so I have no connection to this child." I call the process that surrogates used to map the boundaries between what is them and what is not them during surrogacy "body mapping." The surrogates created a body map and they would say things like, "During the pregnancy, this was me, this wasn't me, and this was me, and anything here was just disconnected." They strategically convinced themselves so much that there was a division, that this helped them keep their sense of self during this time when their body was occupied by a couple, by a baby, by "not them."

Surrogates were so intent on believing this body mapping that sometimes they would say things to me like, "I felt like the pregnancy was alongside me, but not in my body." Or they had this kind of idea that the pregnancy was somehow connected to their intended mother rather to themselves. So one surrogate, I was standing at a surrogacy party with her and she says to me, "During the pregnancy, I feel like the pregnancy isn't here. It's over there with her," and she pointed to the intended mother.

Second idea I want to talk about is the idea of the maternal rights. Who's the mother? We're always talking about, "Can we say that this surrogate is not the mother? Can we say that the intended mother is the mother?" Well, while we're all debating these things theoretically, these women are on the front lines of figuring this out in practice. So what do they do? I have never spoken to a surrogate who wanted to be known as the mommy of this child. Surrogates are very concerned about their entitlement to be known as the mommy of this child. The surrogates I spoke with called themselves "innkeeper" or "host carrier," which is the popular idiom in Hebrew for surrogate.

Prof. Mutcherson: Could you say what the Hebrew word is?

Dr. Teman: The Hebrew word is actually pundekait [poon-deh-kah-eet], which means "innkeeper." It's very interesting terminology.

The law relates to surrogates as carrier mothers. No surrogates related to themselves with the word "mother" or "carrier." They called themselves "innkeepers," and they liked that idea that they are just carrying these two parents and baby toward their goal—these weary travelers on the road to their own "home"—creating their happy family.

So they held fast to this mantra of "I'm not the mom; this is not my kid," and were always calling the intended mother "the mom." Intended mothers, on the other hand, were so intent on becoming a mother. They had tried for so long to become mothers. They had tried for so long to become pregnant that they wanted to transition to motherhood through this relationship with the surrogate. Intended mothers would often identify so closely with the surrogate and with the pregnancy that some of them actually would develop symptoms of pseudo-pregnancy. They would go through a type of vicarious pregnancy. Six of the intended mothers—I actually observed this—they gained, like, 20 pounds during their surrogates' pregnancies.

Part of what I would like to call our attention to is that this kind of bodily sympathy is also an actual rite; it's a ritual of claiming. It's a way of claiming their entitlement to the motherhood stamp, to this crown of motherhood through the body.

A third idea that I want to talk about is the relationship. Surrogacy makes us wonder about this relationship, how do these people relate to one another? Well, the surrogates and the intended mothers I spoke to, they all share the same religion, the same cultural background, the same language. They lived in a tiny country where the furthest away they lived from each other was two to four hours by car. The surrogates were accompanied to every medical appointment by the intended

mothers; the intended mothers were almost all present during the birth. These people spoke to each other all the time on the phone.

The intensity depended on the people involved, but in almost every case, this intensity built up during the process, progressively from the initial committee screening through the embryo transfers and the pregnancy. The women would often say this was the most intimate relationship they had had in their life, even more than their husband. They called it an intimacy between women. They didn't know how to categorize it. They would say things like, "We're like sisters." They'd say, "We're like twins." They'd say, "We're like lovers." They'd say, "We're like a married couple." They didn't know what to call it. A lot of them would end up talking about their relationship saying, "We are two who are one. We are like one body carrying this pregnancy together." This kind of merging was the product of the surrogate's distancing, the intended mother's sympathy pains and her trying to attach this experience and the label of maternity to herself, and through this kind of relationship that actually happens in a type of an incubation period—this very intense period.

Finally, what I'd like to talk about is the issue of exploitation. Surrogacy has every potential to be exploitative. Women are medicalized, commodified, technologically 'assisted'. In Israel, they are also controlled by the state.

But what do surrogates say about this issue of exploitation? Are surrogates traumatized by their experience? I must say that, in my opinion, what comes out of the interviews is that it all depends on acknowledgement. The surrogate is paid so much attention to during the pregnancy; she is at the center of everything. Once the baby is born, surrogates are looking for signs of whether or not they still mean something to this couple after they have received what they have contracted for. Surrogates want what they have done to be acknowledged as a gift, not as a business transaction. And surrogates, when I would speak to them in the ninth month, close to the time that they would give birth, they would be really worried that they would lose the companionship of the intended mother, that the couple would forsake them, would not want to continue to be

their friend. That's what they were looking for. They did care about the money, but it had become something more. The money is important, but they have invested much more. They saw themselves as investing a million times more than what they had been paid.

And this is where it comes to a head. If a couple acknowledges the surrogate with a meaningful type of acknowledgement to the surrogate—it can be an emotional thank you letter, it can be some kind of words like I have written here that one intended mother, when she said this to her surrogate it was the type of acknowledgement that has meaning. She said to her surrogate, "I say my mother gave birth to me the first time, and you gave birth to me again." If the surrogate has received that intense acknowledgement then even if I talk to her eight years later, that surrogate is still going to tell me about surrogacy being the most important thing that happened during her life. It is like she has won a trophy, she has put it on the shelf—it might be dusty, she might have not spoken to the couples for, I don't know, six of the eight years, she might not have seen the child for so long—but she will take down that trophy; she'll shine it off and tell me her story, and the story she'll tell me about her relationship with the intended mother is like the one that you tell about your best friend from high school, or your comrade in arms from the army. So what I'm saying is we can talk about exploitation, and definitely, surrogacy has the potential for exploitation, but the surrogates often see it as a very empowering and meaningful thing in their lives. Thank you.

Dr. Margaret Marsh

Dr. Margaret Marsh: Let me begin by reminding everyone that I'm a historian whose expertise is in the history of reproductive medicine and in gender and the family. I'm not an expert on contemporary surrogate motherhood. But I believe that we need to understand the past in order to make sense of the present.

That means I would argue that we can't understand the emergence of surrogacy in the late 20th century unless we understand its roots in both the development of reproductive technology and the changing ideas about the idea of family. My goal this morning is to illuminate a set of historical contexts for the development of modern surrogacy.

Let's begin by considering hormonal contraception (the birth control pill and all its subsequent iterations), reproductive technologies, and surrogacy. All three of them represent the ultimate de-coupling of the long-standing link between sex, or at least heterosexual intercourse, and reproduction. Take a pill every morning, have intercourse without fear of pregnancy whenever you choose. Many Americans consider foolproof contraception a right. And if hormonal contraception, taken correctly, can virtually guarantee that a woman won't become pregnant while she earns her Ph.D., makes partner in a law firm, completes her medical residency, or acquires her first million, then, we might ask, why shouldn't modern reproductive technology be able to make it possible for her to choose to conceive whenever she's ready?

We must also consider others, as well: the young woman robbed of her ovaries or her uterus by disease, another who marries at forty, or who never marries at all, gay men and lesbians creating their own families and wanting children to be part of those families. Many of them also may feel entitled to experience pregnancy, or in some other way to be able to have biological offspring, children with a genetic link to at least one of the partners in the relationship.

In terms of contemporary surrogacy, two reproductive technologies are most important: donor insemination and in-vitro fertilization, or IVF. When the first cases of surrogacy reached the public's attention in the United States in the early 1980s, the couples who made the news were married heterosexuals, couples in which the wife could not, for one

reason or another, experience a pregnancy. In technical terms, all that was really needed was for the male partner's sperm to be inseminated into the woman whose egg, they hoped, would be fertilized and who would carry the baby to term.

Donor insemination is a pretty simple technology, one that has been used in the United States for about a century and a half. Edward Bliss Foote, an 1858 graduate of the University of Pennsylvania Medical School, was a popular medical advice writer. We might think of him as the 19th century's "Dr. Oz." Dr. Foote helped to popularize artificial insemination in the mid-to-late 19th century, having developed and marketed a device called the "impregnating syringe." Most couples buying the impregnating syringe, he believed, would use the husband's sperm, but he did inform his readers that if the husband's sperm was inadequate, then "the male germs," as he referred to sperm, would have to be obtained from someone other than the husband.

Dr. Foote sold the impregnating syringe, complete with instructions, by mail for five dollars. And even if a couple didn't have the five dollars to buy the device, it was possible to figure out how to get a facsimile of one just by reading Dr. Foote's advice book.

The impregnating syringe was designed for vaginal insemination and for use by the couples themselves. Physicians had an alternative technology, the intrauterine syringe. This instrument was invented by the controversial gynecologist J. Marion Sims in the mid-19th century. He performed artificial insemination only with the sperm of the husband. However, within a few years other physicians began to use donor sperm. In 1884 William Pancoast, a professor at Jefferson Medical School in Philadelphia, is said to have performed donor insemination on the wife of a sterile businessman, using the semen of one of his medical students. When she conceived, Dr. Pancoast told the husband, but the wife never knew. Birth control pioneer Robert Latou Dickinson began performing donor inseminations in the 1890s. By the 1930s, the practice [of donor insemination] was made more predictable because doctors had a better understanding of the female reproductive cycle, and the national media began to pay attention. One couple, Manhattan garage worker Salvatore Lauricella and his wife Lillian, were so proud of their twins conceived through donor insemination that Mrs. Lauricella agreed to be

photographed with the babies for *Newsweek* shortly after their birth in 1934.

The technology of donor insemination had been used since the late 19th century and had become somewhat acceptable by the 1930s. Theoretically, it could have facilitated traditional surrogacy even at that time, but it did not -- not until the 1970s and 1980s. Gestational surrogacy, on the other hand, requires in-vitro fertilization, and IVF is a much more recent development.

The first human IVF was reported in 1944 by John Rock and his research assistant Miriam Menkin. John Rock is known today principally as the co-developer of the birth control pill, but in the 1940s he was better known as this country's most prominent infertility specialist. I'd like to show you an original photograph of one of the first four human eggs Rock and Menkin fertilized in vitro.

Rock and Menkin didn't carry their studies any further than the creation of these early embryos. They didn't try to grow them beyond the two or three cell stage, because they wanted only to understand the earliest stages of human fertilization. Others took up where they left off. There is a long and interesting history of experiments in IVF through the 1950s and 1960s, but I'm going to jump ahead to the pivotal year of 1969. That was when British embryologist Robert Edwards and his gynecologist collaborator, Patrick Steptoe, published an account of human IVF that left little doubt that their intention was to enable a child to be born through this technology. (Edwards would belatedly win the Nobel Prize for this work in 2010). In the 1970s, IVF generated major controversy. In England, Steptoe and Edwards were forced to fund their own research. And in the United States, the vocal anti-abortion movement succeeded in shutting down American IVF research in the mid-1970s. (One of the reasons why reproductive medicine is still largely unregulated in the United States has to do with this continued ban. Federal funding for human embryo research has been banned now for more than forty years.)

After the federal government declared that it would not fund IVF research, university medical centers in the United States were unwilling to fund it themselves. Unlike Steptoe and Edwards, American researchers were timid about self-funding. They stepped back.

Then, in 1978, Steptoe and Edwards actually succeeded in an IVF birth. They knew that both the medical profession and the public would be skeptical that they had succeeded, so they carefully documented on film every step of the procedure. The world's first IVF baby was Louise Brown, born in August, 1978. American researchers, after she was born, started to think, "Well, now the federal funding agencies are going to relent. The baby was born, the baby was healthy; they're going to relent." So right after the birth of Louise Brown medical centers around the United States geared up again for research. Couples such as John and Mary Patton who were on the waiting list at Vanderbilt for IVF, to potentially become the first American parents of an IVF baby, became very optimistic. But it was not to be, because the federal government continued to refuse to act.

Lack of federal funding meant that the first American IVF birth occurred at a little-known medical school that was willing to fund the research itself. Eastern Virginia Medical School had just recruited star fertility researcher Georgeanna Jones and her gynecologist husband Howard Jones, who had to retire from Johns Hopkins Medical School when they turned sixty five. Eastern Virginia promised the Joneses that they could pursue whatever research they wanted, and they decided to focus on IVF. Elizabeth Jordan Carr, America's first IVF baby, arrived in 1981. Once the Joneses succeeded, other American medical centers started their own IVF centers, still without federal funding.

There is one more reproductive technology that needs to be mentioned here, one that is less well known. In the 1890s, a physician named Robert Tuttle Morris developed a procedure called "ovarian transplantation," which might be seen as a forbear of egg donation. In 1895, Dr. Morris devised a procedure to take part of the ovary of one woman and implant it into the pelvic area of another woman. When he reported a successful pregnancy by using this procedure, women clamored to have this operation. His own musings about the ethics of his research are interesting. He believed that "some women might object to carrying a piece of ovary from another woman, as the child would have treble parentage." Perhaps surprisingly, he didn't believe that the women who were giving up part of their ovary would object because he thought that they could spare, for another woman, "a segment of ovary as large as a pea without suffering any real loss." The issues Morris considered seem

similar to those that surrounded traditional surrogacy more than eighty years later.

Morris's words take me back to where I began -- to the relationship of reproductive technologies to our ideas about family formation. Reproductive technology and surrogacy have both helped to promote the idea that adults have a "right" to children -- biological offspring, if possible, or if not, as close to it as possible. In some ways, their history parallels the late 19th to mid-20th century history of adoption, which was transformed from a way to provide homes for children without them into a facsimile of the biological family.

In the late 19th century, single women, married couples beyond their reproductive years, and women in the long-term same-sex relationships (often called "Boston marriages"), were able to adopt successfully and create families of their own. This practice overlapped our earliest reproductive technologies -- donor insemination and ovarian transplantation. But then, by the 1920s, there was a backlash against these kinds of family formation and a growing insistence both on placing children with married couples and on "matching," as they called it, adoptive parents and children in terms of appearance, and if possible, intelligence. By the middle of the 20th century, the married couple with children who looked like them, whether they acquired those children through conventional reproduction or adoption, became the norm. That image still dominates, although it is changing.

We now have technologies that make it possible for surrogacy to be accomplished more easily, including ovulation induction techniques, in vitro fertilization, and the ability to freeze embryos. Heterosexual couples in which the woman cannot conceive or carry a pregnancy to term, if they have the financial ability, can have a child with a biological relationship to at least one parent, perhaps both. Lesbian couples can create families with genetic ties to at least one of the parents; gay male couples can have access to a donor egg to be fertilized with the sperm of one of the partners and carried by a gestational surrogate. Today, although we may have expanded our ideas of what kinds of couples should have the right to create a nuclear family, couples of all kinds often still want children that are their very own or as close to it as possible. Surrogacy is one of the ways that can happen. It is a legacy, both of ideas about family formation that began to take shape more than a century ago,

and of the technologies that have enabled us to put those ideas into practice. Thank you.

RESOURCES

Margaret Marsh and Wanda Ronner, *The Empty Cradle: Infertility in America from Colonial Times to the Present* (Baltimore: Johns Hopkins University Press, 1996).

Margaret Marsh and Wanda Ronner, *The Fertility Doctor: John Rock and the Reproductive Revolution* (Baltimore: Johns Hopkins University Press, 2008).

Julie Berebitsky, *Like Our Very Own: Adoption and the Changing Culture of Motherhood* (Lawrence: University Press of Kansas, 2000).

Dr. Susan Markens

Dr. Susan Markens: The title of the conference, I was told, was "Making Sense of Surrogacy," so I titled my talk "Making Sense of Surrogacy: A Social Problems Perspective." This is a particular perspective in sociology which I will be introducing to you today.

I did a study on surrogacy. In a way, I'm picking up around where she [Dr. Marsh] left off, but once again, I am not a lawyer or a legal scholar although, in a way, I'll be talking about the law. But I don't know all the details. The second panel, I think, will get into the nitty-gritty of this.

What I'm going to be presenting today is what I wrote about in my book, "Surrogate Motherhood and the Politics of Reproduction," basically looking at the immediate aftermath of Baby M and the political and cultural landscape. So mostly, today, I'm going to be reviewing some of the basic findings from my book in a very broad, sketched-out, and rushed way. And then, because of all the recent discussions about surrogacy, I've been looking at recent media attention to surrogacy and I will sort of speculate what's going on now and what that might mean legislatively, but it's all speculation at that point.

As a sociologist, I'm interested in the political, and social, and cultural landscapes. And often, sociologists ask "why" questions. Why do certain things happen? We got a very nice overview of the different developments in the last talk and somewhat about some of the cultural things that I'm actually going to bring up right now.

Just to push us towards the topic of surrogacy, Kim introduced Baby M, but I just want to reiterate, in this period of mid- to late-1980s is really when people began to know about surrogacy. There was some news coverage of it in the early '80s, but Baby M really introduced people to the issue. In my book, I talk about this. There are hundreds and hundreds of articles written about it in newspapers, a lot of news coverage, and this is what really introduced people to surrogacy. I call it a particular type of "horror story" in terms of what went on.

And in the wake of this is when legislatures—so this is something, as lawyers, you might be interested in —started paying more attention to it. And lots of bills were introduced, even at the Congressional level. But as Kim mentioned at the beginning, we're still in a weird flux in the United States. And

this is just my brief overview—the legal scholars might end up correcting me and my interpretation of the law, but this is the immediate, what I call, post-Baby M legislative response. Within five years of Baby M, hundreds of bills were introduced into state legislature, but only 15 states actually passed any sort of laws; most stalled.

As I characterized this in my book most of them, but not all of them, took the response that most of Western Europe did, which was to ban surrogacy, and not recognize the contracts. But a third of the state bills that passed did, in some way, allow it, permit it, regulate it in various ways. This was and is very unusual considering most of the world's response. And that's pretty much where we're at now.

Since then —and this is where the legal scholars might correct me—my understanding is there's only been two other laws that have actually been passed by state legislatures, so the majority of states still do not have laws on this, although New Jersey is an interesting case, and I'll talk about its case law. So there are certain case laws that are very important, and that's something we can talk about more. But two things to take away from this are just the lack of response, which I'll come back to at the end, and the other thing to take from this is that there's no consensus.

And so, in some ways, I'm picking up where she [Dr. Marsh] left off. But in some ways, I'm saying we don't all agree about what's going on. And so this is where my question comes in. That is, what's going on here that there are so many different types of responses? And Kim alludes to this—that still, in your classes, there's a lot of "hmm," and debate, and so forth. So what I did in my study, which was originally my dissertation, is I asked one of these "why" questions. I looked particularly at 1992, which was the end of the wave of legislation.

And in 1992, New York State, which is right across the Hudson River from where the Baby M case took place, passed a law banning commercial surrogacy, saying they weren't going to recognize surrogacy contracts in New York. New York is a big state with a "professionalized legislature," and historically we often find legal trends beginning in New York. California is also a state that is considered a bellwether state. Yet in that same year the California legislature passed through one of the most extensive regulatory bills at the time in terms of regulating surrogacy and allowing for it to occur – a very different type of

law. It did get passed by the legislature although it was vetoed by the governor; there were abortion politics involved if you want to know more about those details. In the end, they never did pass the law in California, but we can talk about case law that has made it one of the most accepting places of surrogacy in the world.

But this, to me, as a sociologist, introduced my puzzle, my question for my work, which is, why? Why different legislation? Why were two different states that we think of as liberal states and so forth approaching this "social problem" very differently? And that is the question I asked in my book. How did different stories about surrogacy emerge? And I use the word "stories" because I'm not looking at the law, questioning is it family law? What type of law? It's what precedes law that I examine. It's that people—whether as laypeople, as infertile people, as legislators—we start to tell stories, and these stories shape our ideas about what we think needs to be done in terms of laws.

So the way I approached this question is what I call a "social problems perspective," a constructionist approach, meaning a social problem does not have any inherent meaning to it; we have to construct meaning. In fact, it means we have to construct it as a problem in the first place so that Baby M becomes constructed as a social problem. And what I analyzed, the key thing I'm going to be talking about today, is what's called framing analysis—that we use frames and narratives to tell these stories, and that's very much part of the political process. That the way we talk about things shapes how we think about them and what we do.

This is a definition about framing from another political sociologist. He does it much better than I would: "A frame is a central organizing idea or storyline that provides meaning to an unfolding strip of events, weaving a connection among them. The frame suggests what the controversy is about, the essence of the issue" (Gamson & Modigiliani 1987). So what it's saying is you have characters. That you have to create the plot, and you might tell that story in different ways. And what I did is I looked at an array of materials. I examined the media, but I also looked at transcripts of legislative debates and letters written to legislators and so forth, and I analyzed what people were saying. And I'm not saying they always believed what they said, but how were they framing it, because sometimes it was strategic as well. They're trying to say, "It's this type of issue; this is what you

should be doing about it." And in my book what I identified were two competing frames—what I labeled "baby selling" or "the plight of infertile couples" which is what we heard more about, I think, in the first talk.

This is just one example to see how this framing played out. This quote is from the New York Times in 1987, which is when the Baby M trial was going on. "Proposed laws generally fall into two categories. While some would ban surrogacy as a form of baby selling, others would legalize it as a protection of what some say is a couple's constitutional right to procreate" (Kolbert, Elizabeth. 1987. *New York Times*. February 15) Two competing frames, two types of stories and cultural ideologies in America that have resonance and so forth.

And here is a table that you'll see a couple of times in my talk. This is how I outlined how these frames tell different stories. That baby selling is about commodified reproduction. This is about economics intruding into the family. The family is not supposed to be about commercial enterprises, and thus narratives, rhetoric, that tell the story, tells a story that we must discourage it. This isn't something we want, we need to ban it, and so forth.

The plight of infertile couples, meanwhile, is about reproductive freedom. We all have a right to procreate and it's important, that right. People want families. The problem, then, is not about economic intrusions; it's about there's no law, which is sort of where this conference is. We need to get laws in place to make sure things go smoothly. It needs to be permitted, but it also needs to be regulated and so forth.

And so those were the two frames I identified, and what I'm going to give you right now is a little flavor of the discursive strategies that were used to create these different storylines. And these storylines, I argue, are very important in shaping how people think that, legally, the state should respond.

So starting with the baby selling frame, quite clearly, as you saw in the first clip that I showed you, it's calling it "baby selling." There's a lot of "its baby selling," "its baby buying," and so forth. So that's a rhetorical discursive strategy. Since it's baby selling, then in terms of trying to really get people worked up about it, it's comparing children to commodities for those who are critical about it. So people would say about surrogacy, children are becoming "televisions or tennis rackets" or "commodities, like corn or wheat, things which can be

purchased on the futures market." And there are many, many examples of people saying, "This is what children become like," in a very disdainful and critical way.

Then, on the flipside, there is the surrogate mother. So what are women becoming like? They're becoming factories. And so what you hear in the discourse is that they're becoming "surrogate mother mills" and "it's reducing childbearing into an occupation, and transforming maternity wards into showrooms." This is telling a story about a commercial enterprise and that's not what family making should be about.

And then finally, no insult to anybody here, it's about what they refer to as the "mercenary role" of brokers and a lot of those famous brokers at the time—I don't know what is going on now—were lawyers. So the rhetoric is really disdainful of these intermediaries who were arranging it. So, for instance—once again, no insult intended—a columnist in the 1980s wrote, "The whole business has been a boon to lawyers who found yet another way of making money."

And these were various discursive strategies, the stories that were told to get people riled up, to say, "This is not something we want. We need to get rid of it." But those were not the only stories being told.

People who supported surrogacy didn't want to be associated with that. They knew that that was powerful rhetoric, so they distanced themselves from it. But they also created another story, what I call "the plight of infertile couples." And most poignantly, it's about telling their stories. So in many hearings, people would come and tell their stories and sob. Or they would've gotten the child and talked about how it changed their lives and they'd be quoted all the time. In one story, the woman says, "It is a basic human drive to have your own biological child"—we'll go back to this biological part—"and it's intensely painful and frustrating when you can't." So this real sympathy for the infertile in the storytelling, "Oh, this is so horrible, the poor couples." And it is mostly focused on couples, heterosexual couples, at this point.

That is one way it gets constructed. And then also, thinking about why it's so painful, it's emphasizing the extent of infertility as an issue with statements like "Fifteen percent of all American couples are infertile," or "over three million couples are infertile". And also, the fact that—especially at this time, we still hear it now—this idea that it's an epidemic, that these rates

are increasing. So it's a growing problem. And alongside this is the idea that there's an adoption crisis, that there are fewer and fewer babies, and healthy babies, to adopt. So you'll have quotes like, "Fewer and fewer children are available for adoption, and more and more couples report fertility problems." So this is why surrogacy is an issue in this context, and these are the sort of stories that are told as well.

The last thing I want to point out is about why there's a "plight" for the infertile and why surrogacy is an important option. This is about what I call an assumed preference for both biogenetic kin, and—I'll talk about this—racially similar kin. So adoption doesn't become an option because don't we all want a "biological kid," right? So people are saying things like, "She and her husband had ruled out adoption, in part because of the shortage of available infants, but more important because they wished to have some genetic link to their child." So surrogacy gets framed as it's helping people to fill this "natural" need.

I have some inflammatory quotes that I'm not going to provide—I would say a lot of the genetic language is a coding for race as well, and sometimes it's said very explicitly. This one was at a Congressional hearing in 1987 talking about why couples needed the option of surrogacy: "The hopes and desires of infertile couples are the same as those who have been fortunate enough to bear child without any assistance. They would like a healthy infant who is not only racially same as they are, but genetically related to their marital unit." So really getting at that racial and genetic similarity.

And that's just my brief overview, then, of the main ways these stories were told. And going back to this nice little chart, not to say there weren't other discourses going on, but I saw so much of this wherever I read transcripts, or I read newspaper accounts, and so forth, that these were the main competing narratives, and in the end, they resulted in different policies being pushed.

Now, as a sociologist, I do think culture and discourse matters. It's part of your resources. But, obviously, there are other things that go on. What I'm not going to discuss here is that "why" question: why do some states pass some laws and not the others? This table highlights what I found in terms of what affected which discourse became more prominent in each state.

For instance, I looked at the media—and maybe more people today will talk about this—Baby M is an important precedent setting case, but *Johnson v. Calvert* is actually probably one of the more important ones now in terms of how most state legislatures—or courts, if there is a dispute, and there are actually very few disputes. But in terms of how that has affected the stories that are told.

I also looked at the local surrogacy centers and what reputation they had. Then, there were different task forces and I looked at what sort of recommendations they made. And then, the role of women's rights groups and the stances they take because feminists are often associated with these issues. And actually, formally, the coalitions they can make because there are multiple perspectives on this. And it's not on exact party lines. It's not a Democrat or Republican issue; it's a very interesting issue in terms of the hodgepodge of people who get together on this.

We could talk about how these factors may still play a role. Here are my speculations for the future, then. As I mentioned, you might all be aware that there seems to be a lot of fascination in the last few years about surrogacy once again, at least in the media, with the international surrogacy trade, particularly focusing on India. This is a picture from Judith Warner's blog from January of 2008 in which she wrote a column, "Outsourced Wombs." [reference to Power Point slide.] This was a picture from the front page of The New York Times later that year. [reference to Power Point Slide]. Alex Kuczynski wrote an article about her experiences with infertility, "Her Body, My Baby." This got a lot of press and we'll talk about that. And then, Newsweek that year also wrote a story called "The Curious Lives of Surrogates" focusing on surrogates, but the big hook was focusing on military wives, making a claim that they were a huge portion of surrogates, and there was debate about that.

Looking at these articles, as well as others, let's see what's being said now in the 21st century about surrogacy. This is from Judith Warner's article: "Images of pregnant women lying in rows or sitting lined up belly after belly for a medical exam look like industrial outsourcing pushed into a nightmarish extreme." And this really does represent the worst feminist fears from the 1980s, or at least some feminists who said at the time, "We're going to exploit all the brown and black women," and so forth.

But here we also see Alex Kuczynski writing in her story. "At that moment, having a biologically-related child felt necessary. What began as a wistful longing in my twenties had blistered into a mad desire. I couldn't argue myself out of my desire."

So what do we see here? We see that obviously these two frames, I would argue, are still quite prevalent. I can talk about the changes that have occurred as well, but these two competing frames are still quite prominent. As Newsweek put it, "It is an act of love..." right? Love because you help a family, "but also a financial transaction." Which one is it? Or is it both? And there's still this tension among many people about this.

So what does this all mean for any potential surrogacy legislation in the 21st century? And this is where I'm just going out on a limb and speculating. But given the fact that there still isn't this clear cultural consensus in the United States, there's disagreement, and that people actually can see both sides, part of my speculation is it's going to remain mostly the way it is. It's still going to remain largely unregulated in the U.S. because it's very hard. As I mentioned, post-*Baby M*. lot of bills were introduced, and it took five years for both California and New York to get as far as they did after many bills were introduced. I would suspect, given the fact that there's still this uneasiness and ambivalence that for the most part, barring any unexpected surprises—and we can talk about that—it will remain largely unregulated. I also think there's case law conducive to surrogacy so that a lot of people who support surrogacy aren't going to push for legislation.

On the other hand, I will say if there's a push — some other articles in the New York Times have been talking about the lack of laws, and that was one theme that came up in the 1980s as well — I do think if there's more regulation, it'll probably be more permissive than the two-thirds that tried to ban it in the late 1980s and the early 1990s. As you saw, the two laws that passed since then regulated it, and this is where I pick up. IVF, I think, has a huge role in this. Now that the surrogate mother is usually not the genetic mother, I think that transforms the way people are thinking about it. It makes people uncomfortable. But if it's a heterosexual couple's sperm and egg, I think most people will consider that their child, given how we geneticize kinship relationships. I think it might take a court case where

their rights are challenged to really get people riled up. I don't think you're going to get that over a gay couple, which is what's happening now. But that's my speculation—that not much will change because there are really very few cases that go to court. I think things will go on as is because there's not a huge group of people who are going to push for it. The infertility community is a small community. In the end, surrogacy really doesn't affect many people.

That's why, going back to my book, it represents something to us, right? Why do we care so much about a thing that affects very few people every year? It says something about our culture in terms of the things that we're concerned about, and I hope I introduced some of this today. And then, I'll leave the empirical work to Elly, who actually talked to surrogates. Thank you.

Dr. Pasquale Guglietta

Mr. Pasquale Guglietta: Hi, everybody, thank you for sticking around 'til the second portion on this. My name is Pasquale Guglietta; I am a Rutgers Law School graduate myself and I am not a specialist in this area by any stretch. I haven't practiced family law; I don't focus on reproductive rights and things like that. I actually am very fortunate to only have to practice part-time and I do appellate work most of that time.

One of the benefits of that for me is that it exposes me to a number of different, very interesting issues. One of those issues came to me through Don Cofsky, one of the panelists today. He'll speak in more detail about this, the case that we're working on. But basically, it involves a constitutional challenge to the artificial insemination statute.

Being that it involved constitutional law, I decided to contact the premiere constitutional state law scholar in the area, Professor Williams, since I had him as a professor. And we discussed the issue and we kind of discussed ideas, and he put me in touch with Professor Mutcherson, who has put an incredible amount of work into making this symposium come together. She's done a fantastic job. And it appeared to me and, I think, to Professor Mutcherson as well that this is one of those kind of ideal issues where academic principles and theories very much intersect with practical real world issues that attorneys, like the panelists here, face on a day-to-day basis. And, to me, it epitomizes what the Rutgers law community's all about; it's kind of this fusion of classical instruction with a very practical, clinically focused education.

So, to that end, we brought together four fantastic practitioners in the area of reproductive rights who will each touch on a separate subject. First, Donald Cofsky will speak about the use of pre-birth orders from the state of New Jersey and the current state of the law. Second, Tiffany Palmer will talk about family building and the use of assisted reproductive technology for same-sex couples, as well as some international issues that we face. William Singer will speak about overarching ethical issues that New Jersey attorneys must consider. And then, fourth, Robin Fleischner will discuss what a model

surrogacy statute would look like and the necessary policy determinations that go into that.

After the presentations, I'll lead the discussion with some questions to the panelists, and then we'll all join in and see where we go from there. Don?

Ms. Robin Fleischner

Ms. Robin Fleischner: Thank you, Bill. This is a perfect lead-in for why we need legislation in New Jersey.

My name is Robin Fleischner; I'm an attorney with offices in New York and New Jersey, and I've devoted my life to adoption. I became an adoption attorney after adopting two kids at birth who are now 25 and 26, 6'1" and 6'5". And I was pulled into the area of assisted reproduction because my clients wanted to participate. The bottom line is that there has to be a way for people to safely, legally, and ethically take advantage of the amazing new medical technology out there to form families. And legislation, in my opinion, is the answer.

An anecdotal note about empirical evidence, about the kids who are the product of surrogacy, my younger son went to college with Baby M and they dated for a year. And, you know, they were both very out there; he about his adoption, she about her being Baby M, and that's how they met at a bar. She's beautiful. She's very open about being Baby M and totally devoted to the family that ended up having custody of her: William Stern, her genetic father, and Betsy Stern, who had no genetic link to her. It's been a wonderful family for her. She doesn't have much relationship right now with the surrogate, but she looks like her. She's gorgeous, as was the surrogate.

I would like to propose some safeguards for legislation in New Jersey. In *Baby M*, the New Jersey Supreme Court held that contracts for traditional surrogacy conflicted with the New Jersey adoption statute existing, at that time, because they involved the payment of money for a child, finding that such contracts were void as a matter of public policy. The "Baby M" case was decided in 1988 when the New Jersey adoption statute made payment of a birth mother's living expenses in a private adoption illegal.

In response to an outcry from New Jersey adoptive parents, our statute—our adoption statute—was substantially amended in 1993. Two of the major amendments are relevant to surrogacy. First, a new provision permits payment of a birth mother's living expenses in private adoptions, and second,

persons and entities other than licensed adoption agencies—and this speaks to Bill's idea about, you know, regulating surrogacy facilities—including attorneys are allowed to refer birth parents and adoptive parents to each other.

I sat on the New Jersey State Bar Association Committee, which drafted the amendments. We succeeded in the passage of a new adoption statute by including safeguards against abuse, which were raised by our opponents. In the case of a birth mother's living expenses, the amendment requires disclosure to the court in which the adoption proceeding is filed. And in order to refer birth parents to adoptive parents, attorneys and other entities other than licensed agencies must ensure that the adoptive parents are qualified in a home study by a licensed agency and may not charge a "placement fee," a fee for the referral, but lawyers are only allowed to charge legal fees in adoptions.

It's time to adopt an Assisted Reproductive Technology or ART statute in New Jersey, which includes procedures for enforcement of gestational carrier agreements. The Uniform Parentage Act (UPA) in several states incorporates safeguards in connection with surrogacy agreements which address the concerns of the Supreme Court in *Baby M* and, like the amendments to the New Jersey adoption statute, can provide a legal and ethical framework for surrogacy.

Here are some of the provisions that should be considered: The first would be court approval of the gestational carrier agreement. Through legislation and case law, a number of states and the UPA provide for judicial oversight of gestational carrier agreements. The best practice is a mechanism prior to birth of the child for the court to approve the gestational carrier agreement and to be able to issue an order declaring the parentage of the intended parents and terminating the rights of the carrier. Issuance of an order only after the birth, like the New Jersey court's current procedure, deprives the parties of certainty and is not in the best interest of the children who are created through gestational surrogacy.

The Illinois statute provides a less interventionist approach without court oversight, but rather provides for a

regulatory procedure for recognition of gestational surrogacy. The intended parents complete forms and submit them to the hospital and to the Illinois Department of Vital Records. With additional safeguards, this would be an alternative to court supervision of these arrangements.

My second suggestion would be counseling and legal representation, requiring that all parties to the arrangement have independent legal counsel and receive counseling, which is imperative, and I think it should be part of a statute.

The third and fourth safeguards are controversial, but should still be considered. They would be requiring home studies and a genetic connection to the child. Mandating home studies by a licensed agency or that one of the intended parents be the genetic parent of the child raises questions about reproductive freedom, the constitutional right to reproduce. People on the farther of that issue might claim anybody can have a child. Why should intended parents have to be studied? Why should they have to go through an agency clearance, a criminal clearance? In the normal course of things through coital reproduction, families don't have to do that.

As to the question of a genetic connection to a child, some of us might say, "Well, why would anyone want to go through a surrogacy if they are not even going to have a genetic connection to a child? Why don't they just adopt a child?" An argument for total reproductive freedom would mean that people would not have to have any genetic connection to a child. My instinct is to require it, but there are certainly arguments against that. Some statutes specifically preclude traditional surrogacy in which the carrier's egg is used because of the legal and ethical concerns presented by enforcing a contract to terminate the parental rights of a carrier who is also the genetic mother.

And the fourth area is one Kimberly spoke about—payment of carriers' expenses. Most statutes and case law permit and often require that the intended parents be responsible for the carrier's medical expenses. Indeed, the medical expenses in the surrogacy are often the biggest expense, as the in vitro fertilization, gamete donation, and implantation

expenses are not covered by the intended parent's insurance and some insurance carriers now specifically exclude obstetric care benefits for surrogacy. The *Baby M* court balked at payment of a fee to a surrogate and payments remain a controversial area in case and statutory law, as well as in the public perception of surrogacy.

Today, most gestational carrier arrangements provide for payment of a $20,000 fee to a carrier. Some courts and statutes permit a reasonable fee to carriers, while others have reached a compromise and permit payment, not of a fee, but of a carrier's living expenses during the pregnancy. Permitting a reasonable fee to a carrier, particularly if it is disclosed in the course of court approval of the gestational carrier agreement, is a worthwhile statutory provision.

I would just like to conclude with some policy arguments for surrogacy. The purpose of gestational surrogacy is the fulfillment of one of our deepest longings, a genetic child. Most carriers are idealistic women who dream of helping childless individuals become parents, and payments to them are paltry as opposed to the risks, discomfort, and hardship they incur. Surrogacy is an anguished second-choice option for women and heterosexual couples who cannot conceive and bear a child, and the realization of a dream for gay men who could not otherwise be biological parents. New Jersey needs fair, ethical legislation aimed at a legitimate path to parenthood through gestational surrogacy.

Ms. Tiffany Palmer

Ms. Tiffany Palmer: Good morning, my name is Tiffany Palmer and I am an attorney at Jerner & Palmer; it's a small firm in Philadelphia. It's a boutique firm where we specialize in LGBT family formation and dissolution. We like to say we make and break gay families, not, obviously, for the same couples because of conflict reasons. I'm also a fellow of the American Academy of Assisted Reproductive Attorneys and I've been doing more and more in this area with respect to family formation and assisted reproduction as it relates to LGBT individuals and same-sex couples.

My perspective on the issue of surrogacy and assisted reproduction comes, not from the infertility situation, but from representing same-sex couples. Everyone knows you need a few ingredients to conceive a child: You need an egg, you need a sperm, and you need a uterus. Obviously, if you have a same-sex couple, they're missing something there. Lesbian couples are missing some sperm; gay male couples are missing both an egg and a uterus. So, when gay men use surrogacy, they have to involve two other people in that process- an egg donor and a gestational surrogate.

I'm going to talk about surrogacy from the perspective of LGBT people and the legal complexities that can arise from inter-state and international issues and arrangements when laws conflict, which has a particular impact on LGBT individuals. and I'm also going to talk about a few examples from my practice.

As we heard in the first part of the panel discussion today, many surrogacy arrangements involve intended parents from one state who are then matched with a surrogacy or gestational carrier from a different state or a different country. And the primary reason for that is because the laws really vary around the country from state to state, jurisdiction to jurisdiction, , , where surrogacy is regulated, where it's not regulated, and where it's even criminalized. Obviously, if you have intended parents from a state where surrogacy is illegal or not possible, they're going to want to seek out a match with a

surrogate from a state where it is possible and either has regulation of surrogacy that would permit them to become parents, or has no regulation at all, which would permit them to become parents.

I practice in Pennsylvania. We have absolutely no statutory regulation of assisted reproduction in Pennsylvania. We do not have an assisted reproduction statute. We do have some case law, which is developed from certain factual scenarios, but we do not have a statutory scheme. In the absence of a statutory scheme, our Division of Vital Records and Department of Health have come up with their own internal administrative regulations, which is how we go about getting pre-birth orders in Pennsylvania for all sorts of different kinds of assisted reproduction arrangements, but those are usually issued at judicial discretion on a county-by-county basis. So even within one state, clients have different procedures available to them, county to county, even within the same state. We have to be very careful in our practice as to not only what states are we interacting with in surrogacy arrangements, but what counties are going to be involved as well, as that could also change the outcome. As you can imagine, the outcome could be very difficult if the outcome means that you're not going to be a legal parent to the child that you're conceiving.

With respect to, looking at surrogacy arrangements and the different laws that regulate surrogacy and assisted reproduction around the country, LGBT people have another consideration which is really critical, and that's looking at laws that limit or prohibit relationship recognition for same-sex partners. And, specifically, the DOMA statutes, or Defense of Marriage Act, and constitutional amendments which limit recognition or rights for same-sex couples. This can impact parental rights in a number of different ways.

First of all, opposite-sex couples who are obtaining parentage orders in many states often have the fallback of a marital presumption that assists them in attaining their parental rights in certain states. That is not necessarily going to be available for same-sex couples, especially when you're dealing with a state that has a statute that prohibits recognition of same-sex relationships. That may mean that the state may prohibit

the issuance of a birth certificate with two people of the same sex on it. Not necessarily always the case because we have a Defense of Marriage Act in Pennsylvania; however, we have an adoption case which says that despite the fact that we have a Defense of Marriage Act, birth certificates can be issued in the names of two parents of the same sex. So even though we have a Defense of Marriage Act, we can still get two parents of the same sex on a birth certificate. That's not the case for all states that have DOMAs and constitutional amendments.

Just as an example, if a gay male couple from New York State where surrogacy is prohibited is matched with a surrogate in Ohio where surrogacy is not prohibited—and oftentimes, heterosexual couples, married couples will be matched with a surrogate in Ohio—it would be a very different result for the same-sex couple because Ohio has a very restrictive constitutional amendment that not only limits recognition of a same-sex marriage, but also any rights that would flow from that. And often, having two parents on the same birth certificate could mean that. So a match with an Ohio surrogate for a gay couple in New York would be a bad choice. So for same-sex couples, it's critical not only to look at the laws around the country that regulate assisted reproduction, but also those that regulate and prohibit relationship recognition for same-sex couples.

I would like to address what happens if attorneys don't fully explore all of those statutes involved in the states involved in the surrogacy arrangement prior to the birth, you could end up with a situation where you have a conflict of laws between two different states, which could affect the birth certificate and the rights of the individuals involved.

I'm seeing, more lesbians who are using a form of surrogacy in conceiving their children and how that can impact the laws and the rights of the parties as well. I'm - seeing a lot of cases in my practice where lesbians will conceive children in a way that they both have a biological connection to the child. So they are conceiving the child where one party is the genetic mother and she goes through an egg harvesting procedure. Those eggs are then fertilized with sperm from an anonymous donor and then those embryos are implanted in her partner. So

then, her partner is going to be the gestational mother and is the genetic mother. So one is the birth mother, but has no genetic connection, and the other is the genetic mother. So in this situation, they're both sharing in the biology, but how their rights are determined depends on where they live and where that child is born, and what procedures they go through, pre-birth, to establish their rights.

I recently had a case where a lesbian couple did this. They were a New Jersey couple, New Jersey residents, and they had a New Jersey civil union. Presumably, all the laws that affect married couples should apply to them. They conceived their children this way, but then they did not consult any attorneys and they decided because the one worked in Pennsylvania and the OB/GYN was closer for her, they decided that they would go ahead and deliver their baby in Pennsylvania rather than in New Jersey. Then, they were told by their fertility doctor because they conceived their children this way and they had a civil union, that both their names would be listed on the birth certificate as parents. They could just put both their names on the birth certificate as a married couple in New Jersey who had a civil union, without going through an adoption or doing anything else, and the original birth certificate would be issued in both names. This would have been true if they had delivered the child in New Jersey. But they chose to deliver the child in Pennsylvania.

In Pennsylvania, we have a Defense of Marriage Act. They can't use that New Jersey civil union marital presumption in Pennsylvania; therefore, they tried to put both names on the birth certificate in Pennsylvania; that was rejected by the Department of Health and the birth certificate was issued only in the name of the gestational mother, who was the birth mother. So the genetic mother's name did not appear. And in that situation, that could have been avoided if they had consulted with an attorney who was aware of all the ramifications beforehand, but they didn't. In addition to that, they also delivered in a county which had never issued a birth order for same-sex parents, and refused to issue such an order in this factual situation.

So we were left in the position of having to go back to the state of New Jersey and filing their case as an adoption, and then presenting the adoption decree to Pennsylvania in order to amend the birth certificate to get both their names on it as parents., This took nine months and it cost them a lot more money than it would have if they had just consulted with an attorney beforehand. So that's just one example of how the difference in the laws between the two states can really have an impact on the result.

I also just want to speak briefly about how this can also impact international arrangements. I've been recently working on some cases where people from other countries are coming to the U.S. to take advantage of our laws regarding surrogacy, and especially gay couples who live in countries where surrogacy and adoption for same-sex couples is outlawed.

I recently worked with a gay couple from Italy who was using a gestational carrier in Pennsylvania. And even though we could have gotten both their names on the Pennsylvania birth certificate through Pennsylvania law, we opted not to because we also had to look at the laws in Italy and the laws regarding citizenship, and getting Italian citizenship for the baby that was conceived. And realizing that if they went back to Italy with a birth certificate that had the names of two men on it, that that would immediately alert the Italian authorities and potentially prohibit them from getting citizenship for their baby, and possibly even getting through immigration to get back into their own country. So even though we were able to potentially give them what would've been the best protection for their family with both men being legal parents to the child conceived, we had to proceed with only the biological father's name being the sole name on the birth certificate, going back to Italy with only one of them being a legal parent. And then they'll have to figure out in Italy how they're going to protect the other parent's rights.

So that's just a little bit about same-sex parents and the different laws, internationally and around the country, and how those conflicts can affect an outcome regarding parentage. I look forward to talking more about this when our presentations are done. Thanks.