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Talking about Talking about Surrogacy

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Talking about Talking about Surrogacy

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*One . . . liberating potential connected with the women's movement was the recognition that genetic and conventional nuclear-family ties are not necessarily the most important*¹

In 1951, U.S. Supreme Court Justice Robert H. Jackson delivered the first James McCormick Mitchell Lecture at what was then known simply as the Buffalo Law School.² Karl Llewellyn followed him in 1952.³ Mitchell Lecturers in

† Professor, University at Buffalo School of Law. I thank Pat Cain and the editors of the *Buffalo Law Review* for inviting me to contribute to this special issue honoring my late friend and colleague Isabel Marcus. I thank John Beatty, Guyora Binder, Bridget Williams, and Sara Zeitler for sharing bits of UB Law history with me. For excellent research support I thank the UB Libraries, particularly the staff of the Charles B. Sears Law Library, as well as my skillful research assistants Jake Forken and Abigail Jackson.

1. Isabel Marcus, Rhonda Copelon, Ruth Hubbard, Barbara Katz Rothman & Barbara Omolade, *Looking Toward the Future: Feminism and Reproductive Technologies*, 37 BUFF. L. REV. 203, 236 (1989) [hereinafter *Toward the Future*].

2. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 103 (1951).

3. See GILBERT J. PEDERSEN, BUFFALO LAW SCHOOL 75 YEARS: 1887–1962, at 88 (1962) (noting Llewellyn's lecture on "Appellate Judging and Argument").

the next thirty years included Jerome Hall, David Daube, Lawrence Friedman, Richard Posner, Stewart Macaulay, and Derrick Bell.⁴ All great legal thinkers. All men.

That changed in 1984, when the Mitchell Lecture, recast as a daylong “conversation,” featured five prominent—now renowned—voices in and beyond legal academia: historian Ellen Dubois; civil rights attorney Mary Dunlap; psychologist and ethicist Carol Gilligan; and legal scholars Carrie Menkel-Meadow and Catharine MacKinnon.⁵ All women. And all there to talk about women, about “the women’s movement,” and specifically about “Feminist Discourse, Moral Values, and the Law.”⁶

The 1984 Mitchell Lecture was the brainchild of UB Law professor Isabel Marcus, whose opening remarks named feminism itself as her warrant for departing from the occasion’s traditional format. Choosing dialogue over monologue was, Marcus explained, good feminist practice.⁷ Moreover, the feminism that she convened her guests to discuss was, in 1984, internally riven and roiling. It was important to Marcus that the lecture, or rather the anti-

4. See Jerome Hall, *Reason and Reality in Jurisprudence*, 7 BUFF. L. REV. 351 (1958); David Daube, *The Influence of Interpretation on Writing*, 20 BUFF. L. REV. 41 (1970); Lawrence M. Friedman, *Notes Toward a History of American Justice*, 24 BUFF. L. REV. 111 (1974); Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 BUFF. L. REV. 1 (1980); Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POL’Y 149, 183 (1984); Derrick Bell, *A Hurdle Too High: Class-based Roadblocks to Racial Remediation*, 33 BUFF. L. REV. 1 (1984).

5. Isabel Marcus, Paul J. Spiegelman, Ellen C. Dubois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, & Carrie J. Menkel-Meadow, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11 (1985) [hereinafter *Conversation*].

6. From “the late nineteenth-century women’s movement . . . that won the vote” to “the modern women’s movement” that could affirm sexuality as a site of “potential autonomy and power,” “the” woman’s movement was a central concern. *Id.* at 29, 30, 31, 37, 64, 66, 67, 68, 69, 70, 78, 80, 86.

7. *Id.* at 12.

lecture, convey the variety and depth of feeling to be found “on all sides of the issues that feminism has raised,” issues she called “complicated and sophisticated and explosive.”⁸

Explosive indeed. Judging from the transcript of the event, sparks flew that day. The most dramatic moment came late in the proceedings.⁹ It begins with a pointed disagreement between Gilligan and MacKinnon. They’re talking about Gilligan’s *In a Different Voice*, published two years earlier, and they’re not mincing words about their radically divergent understandings of “Amy”—one of Gilligan’s study participants, a girl in sixth grade who embodies the distinctly feminine ethical sensibility that gives the book its title.¹⁰

MacKinnon: [You say] she is articulating the feminine. And you are calling it hers. That’s what I find infuriating.

Gilligan: No, I am saying she is articulating a set of values which are very positive.

MacKinnon: Right, and . . . calling th[ose values] hers is infuriating to me because we have never had the power to develop what ours really would be.¹¹

At just this moment, Mary Dunlap, who’d been silent

8. *Id.* at 11–12. Several panelists began their remarks by expressing gratitude for the opportunity “to have what is openly billed as a dialogue within feminism” (MacKinnon), and “to air our disagreements, to learn from them, to move on from them, and to work together from them” (Dunlap). *Id.* at 12, 20.

9. The dialogue in question appears more than 60 pages into a 74-page transcript. *Id.* at 75.

10. “Amy’s . . . understanding of morality as arising from the recognition of relationship, her belief in communication as the mode of conflict resolution, and her conviction that the solution to [a] dilemma will follow from its compelling representation . . . contain the insights central to an ethic of care.” CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 30 (1982).

11. *Conversation, supra* note 5, at 75.

throughout the afternoon session, rises to her feet. “I am speaking out of turn,” she declares. “I am also standing, which I am told by some is a male thing to do. But I am still a woman—standing. I am not subordinate to any man!” Now comes the direct attack, along with a challenge to every woman in the audience:

I am not subordinate to any man . . . , [yet] I have been told by Kitty MacKinnon that women have never *not* been subordinate to men. So I stand here [as] an exception and invite all . . . women here to be an exception and stand. Everyone who believes . . . we have never not been subordinate to men, remain seated. Everyone who believes [otherwise], stand if you can.¹²

The lecture transcript doesn’t indicate whether anyone stood up, much less how many did or who they were. But in a footnote dropped at the end of Dunlap’s diatribe, we learn that, precisely “at this point,” MacKinnon left the building “to catch a plane.”¹³

The next Mitchell Lecture, three years later, appears to have seen none of the unruliness of its immediate predecessor. Isabel Marcus, once more the program’s instigator, stayed faithful to her daylong-conversation format but now more actively moderated the discussion.¹⁴ Again she had recruited a professionally and ideologically diverse lineup: feminist lawyer Rhonda Copelon; biologist Ruth Hubbard; sociologist Barbara Katz Rothman; and Barbara Omolade, critical race feminist *avant la lettre*. The theme they convened to discuss, “Feminism and Reproductive Technologies,” was less overtly theoretical than 1984’s big questions about feminism, morality, and law, but it couldn’t have been touchier or more timely.

12. *Id.*

13. *Id.* at 76.

14. *Toward the Future*, *supra* note 1. Guyora Binder, who chaired the 1987 Mitchell Lecture Committee, remembers the occasion as “Isabel’s event.” Email from Guyora Binder to author (Nov. 6, 2022, 09:16 EST) (on file with author).

Nineteen eighty-seven saw one of the most sensational legal spectacles in American history: the *Baby M.* case, a parentage and custody dispute between a married heterosexual couple and a surrogate who, after giving birth, couldn't bring herself to relinquish the child.¹⁵ The *Baby M.* controversy came up numerous times over the course of the conversations that constituted the 1987 Mitchell Lecture,¹⁶ and no single method of assisted procreation consumed more of the discussion than surrogacy.¹⁷ That degree of attention, noteworthy in itself, is all the more so because surrogacy's

15. At the very least, "[t]he case can easily be called the custody trial of the twentieth century." Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J. L. & GENDER 67, 68 (2007). Media attention to *Baby M.* began in the summer of 1986, continued throughout the following year, and persisted well after the New Jersey Supreme Court's decision in *In re Baby M.*, 537 A.2d 1227 (N.J. 1988). For a modest sampling of revealingly titled reports from a single newspaper, see Elizabeth Kolbert, *Surrogate Mother Seeks Baby*, N.Y. TIMES, Aug. 22, 1986, at B2; Elizabeth Kolbert, *Baby M. to Stay in Father's Care Pending Ruling*, N.Y. TIMES, Sept. 11, 1986, at B3; Robert Hanley, *Surrogate Mother Battle Goes to Trial*, N.Y. TIMES, Jan. 5, 1987, at B3; Robert Hanley, *Fight Erupts on Baby M Book and Film Rights*, N.Y. TIMES, Mar. 26, 1987, at A1; E.R. Shipp, *Father of Baby M Granted Custody; Contract Upheld; the Absence of Guidelines*, N.Y. TIMES, Apr. 1, 1987, at A1; James Barron, *Views on Surrogacy Harden after Baby M Ruling*, N.Y. TIMES, Apr. 2, 1987, at A1; *Poll Shows Most in U.S. Back Baby M Ruling*, N.Y. TIMES, Apr. 2, 1987, at 1-39; Judy Glass, *Baby M Court Case is Debated Anew*, N.Y. TIMES, Apr. 2, 1987, at L1-11; Robert Hanley, *Jersey's Top Court Hears Arguments on Baby M Case*, N.Y. TIMES, Sept. 15, 1987, at B2; Iver Peterson, *States Assess Surrogate Motherhood*, N.Y. TIMES, Dec. 13, 1987, at 1-42; Robert Hanley, *Surrogate Deals for Mothers Held Illegal in Jersey*, N.Y. TIMES, Feb. 4, 1988, at A1; Sam O. Opakuc, *New Jersey Opinion; the Aftereffects of the Baby M Case*, N.Y. TIMES, Mar. 20, 1988, at NJ-12; *Court Lets Baby M's Mother Write Book about the Child*, N.Y. TIMES, July 12, 1988, at B-2; *Portraits of the 1980s; Selections from 10 Years of History*, N.Y. TIMES, Dec. 24, 1989, at 4-2.

16. *Toward the Future*, *supra* note 1, at 227, 230, 241, 242, 250, 252, 253, 255.

17. *Id.* at 206, 210, 213-14, 219, 222-23, 225, 227, 229, 230, 238, 239, 241-45, 247, 248, 250, 252-55.

very status as a reproductive “technology” was ambiguous, even by 1987’s standards.¹⁸ Its claim to that mantle has long seemed better suited to surrogacies involving in vitro fertilization (IVF) than those involving assisted (“artificial”) insemination.¹⁹ Baby M. had been conceived through the latter method, which, as Ruth Hubbard acknowledged, “clearly is not very technological.”²⁰ (It can be done, famously, with turkey baster.)²¹ Even so, surrogacy’s unique demands on women’s bodies and emotions, so palpable in the *Baby M.* saga, lodged the practice at the heart of feminist

18. See SHERMAN ELIAS & GEORGE J. ANNAS, REPRODUCTIVE GENETICS AND THE LAW 229 (1987) (“surrogate motherhood” depends “not on new medical technology but on lawyers as brokers”); MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 34 (1988) (“For all of its social complications, surrogacy is technologically the simplest of the various alternative reproductive techniques in use today.”). For more recent statements to similar effect, see Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 LAW & INEQ. 277, 285 (2009) (“Surrogacy is not a technology per se.”); GLOBAL HEALTH WATCH 3: AN ALTERNATIVE WORLD HEALTH REPORT 306 (2011) (calling surrogacy an “arrangement” that may use reproductive technologies but that is “not a technology in itself”).

19. See, e.g., Alexander Morgan Capron, *The New Reproductive Possibilities: Seeking a Moral Basis for Concerted Action in a Pluralistic Society*, 12 L. MED. & HEALTH CARE 192, 192 (1984) (“To speak of ‘new reproductive technologies’ . . . is mostly correct, but some of the methods used are not very new (artificial insemination, for example) nor very ‘technological’ (in the sense of requiring expert assistance or complicated devices).”).

20. *Toward the Future*, *supra* note 1, at 244.

21. See Ted Fry, *The Switch: A Half-Baked Rom-Com Starring Aniston, Bateman and a Turkey Baster*, SEATTLE TIMES (Aug. 19, 2010, 5:46 PM) <https://www.seattletimes.com/entertainment/movies/the-switch-a-half-baked-rom-com-starring-aniston-bateman-and-a-turkey-baster/> (discussing the on-screen insemination depicted in *The Switch*, a film adaptation of “Baster” by Jeffrey Eugenides, and noting allusions to the baster method in *The Back-Up Plan* and *The Kids Are All Right*, two other movies released that year); see also Daniel Wikler & Norma J. Wikler, *Turkey-Baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK QUARTERLY 5, 5 (1991).

debate on what Isabel Marcus and her guests repeatedly called “the *new* reproductive technologies.”²²

A low opinion of surrogacy prevailed among feminists in 1987,²³ and that dislike came through loud and clear in Marcus’s convocation that year in Buffalo. For Barbara Katz Rothman, surrogacy was about a patriarchal investment in biological paternity; it was, she said, among the “most obvious” examples of the “preciousness” of male “seed” in establishing “the genetic tie between generations”—and the “fungib[ility]” of “biological motherhood”: “You can plant the seeds here. You can plant the seeds there. It doesn’t make a lot of difference.”²⁴ Barbara Omolade, too, located assisted procreation at the intersection of men’s “urgency to reproduce biologically” and the “continuation and expansion of . . . patriarchy”—a distinctly “racial patriarchy,” she noted, with different “agenda[s]” for white women and women of color.²⁵

Ruth Hubbard, whose morning remarks stuck to more-or-less objective scientific explanation of recent developments and approaching frontiers, in the afternoon declared her belief that the law should permit surrogacy, even paid surrogacy, but should draw the line at enforcing a

22. *Toward the Future*, *supra* note 1, at 203, 204, 217, 235, 236, 238, 249.

23. See Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. 109, 116, 130–36 (2009).

24. *Toward the Future*, *supra* note 1, at 213–17.

25. “The racial patriarch has placed biological reproduction at the top of the list and, of course, that biological reproduction is of healthy white children. . . . [And now he has] found a way to resolve the infertility issue—financing reproductive technology”). *Id.* at 217–20 (emphasis added), 229–30. It’s interesting to note on this score that, at a time when many feminists were envisioning the emergence of a “breeder class” of poor women of color, Omolade presciently took “a different position”: “I believe that white working class women are the designated wombs and surrogate mothers during this period. . . . The design for controlling black women and black people is assuming another direction.” *Id.* at 222.

surrogate's promise to relinquish any child born of the arrangement: "A so-called surrogate mother would have to get her \$10,000, or whatever the price, irrespective of outcome."²⁶ Rhonda Copelon largely agreed, with misgivings if not reluctance.²⁷ Yes, she bristled when surrogacy opponents appealed to an inevitable, and inevitably fervent, "maternal bond" between a pregnant woman and her fetus; and yes, that appeal did "deny[]the multiplicity of women's experience and acced[e] to being defined by our reproductive function."²⁸ Still, Copelon saw no way to compel involuntary relinquishments without objectifying and commodifying women to an unacceptable degree.²⁹

And what did Isabel Marcus think of surrogacy? At the 1987 Mitchell Lecture she professed a pessimistic ambivalence in which pessimism handily predominated.³⁰ One gets the same impression from her next published article, a 1990 review of ten recent books on "reproductive technologies and feminism."³¹ Marcus conceded

26. *Id.* at 203–13, 244.

27. "While I am constantly arguing with myself on this subject, I feel quite certain about two things: we must both fight for the unenforceability of surrogacy contracts and oppose their prohibition." *Id.* at 243.

28. *Id.* at 238.

29. "What moves me to consider . . . prohibiting paid surrogacy is the fear that women will be commodified . . . [Refusal] to enforce surrogacy agreements that become involuntary protects a woman's basic integrity and operates as a substantial, but I think warranted, discouragement of the process. . . . Turning over the child must be a free act of will . . ." *Id.* at 242–44.

30. "If I have doubts that the availability of contraception and abortion has resulted in the transformation of relationships between women and men, I have even stronger doubts [about] alternative reproductive technologies Progress may well play a very cruel joke on us." *Id.* at 249 (acknowledging "ambivalent feelings" about reproductive technologies and making the "pessimistic" prediction that worrisome trends in the field "will accelerate").

31. Isabel Marcus, *A Sexy New Twist: Reproductive Technologies and*

hypothetically the “transformative potential” of surrogacy and other reproductive technologies, but what she was actually seeing was their “tend[ency] to reify genetics[,] family ties,” and “the socially constructed categories of male and female, father and mother.”³²

On the one hand, Marcus found it “off-putting and authoritarian” when certain feminists charged women who choose to be surrogates with false consciousness.³³ On the other, she faulted a collection of mostly upbeat accounts of real-life surrogacy arrangements for “removing the issue from its systemic context.” Not that she didn’t care about people’s lived experience. Indeed, she praised another book’s sympathetic grasp of “the anguish of . . . women who have entered into such contract[s] . . . and then tried to renounce them.”³⁴

Marcus also had mostly good things to say about a book by one of her recent guests in Buffalo, Barbara Katz Rothman’s *Recreating Motherhood*, which she praised for “important, thought-provoking analysis and critique of systemic properties and propensities.”³⁵ Rothman was one of several authors in whom Marcus discerned an admirable “concern[] with the hegemony of identifiable ideologies, their organization of knowledge and experience regarding reproduction, and the[ir] consequences for women”³⁶ In this Marcus could have been speaking of herself, of her own apprehensive fascination with reproductive technologies.

Feminism, 15 L. & SOC. INQUIRY 247 (1990).

32. *Toward the Future*, *supra* note 1, at 235–37. Marcus again highlighted the reciprocally enabling relationship between “biological reductionism” and “women’s sexuality, reproduction, and subordination” in *Many Realities, Many Words: Abortion and the Struggle over Meaning*, 69 TEX. L. REV. 1259, 1261 n.5 (1991).

33. Marcus, *supra* note 31, at 262.

34. *Id.* at 265.

35. *Id.* at 257.

36. *Id.*

Her remarks on the subject return repeatedly to the messages they send, and to the messages sent by social and legal toleration of them—messages about constituencies and concepts at the core of her life's work: children; family; kinship; women; sexuality; gender.³⁷

Closely related to this interest in *what* surrogacy communicates was Marcus's preoccupation with *how* we communicate about it. For someone who claimed to experience "an almost Pavlovian shudder [at] . . . the academically pervasive D-words[,] 'discourse' and 'decoding,'"³⁸ Marcus was remarkably attuned to semantics and symbolism. At the 1987 Mitchell Lecture, she expressed discomfort with the very "terms we use in talking about alternative reproductive technologies," and she warned that to "talk the language of rights in this context" was to risk descriptive and moral distortion.³⁹ By 1990, she had begun to formulate an alternative vocabulary. "Surrogacy agreements," unenforceable in her preferred legal regime, would be called "impregnation and gestation contracts" in her preferred lexicon.⁴⁰ "Surrogate motherhood," with its necessary implication that the person so described "is somehow less than a mother," also had to go: "I suggest we scrap the term immediately and forcefully."⁴¹

These objections, Marcus insisted, were no mere "linguistic quibbles."⁴² To the contrary, they were preliminary bids to expose and correct some of the most potent assumptions,

37. *Toward the Future*, *supra* note 1, at 235–37, 240, 249; Marcus, *supra* note 31 (passim).

38. Marcus's swipe at the jargon deconstructionism appears in an article whose very title reveals a preoccupation with semiotics. Isabel Marcus, *Many Realities, Many Words: Abortion and the Struggle over Meaning*, 69 *Tex. L. Rev.* 1259, 1264 (1991).

39. *Toward the Future*, *supra* note 1, at 235, 247, 249.

40. Marcus, *supra* note 31, at 265.

41. *Id.*

42. *Id.*

factual and ideological, guiding policy in the field of assisted procreation. Nor would these objections be Marcus's last. A fuller semantic critique was forthcoming. She was at work, she said, on a new paper: "Talking about Talking about Reproductive Technologies."⁴³

* * *

Over the next three decades of her career, Marcus continued to think and teach about "assisted reproductive technologies," a term soon shortened to "ART" or "ARTs".⁴⁴ But she never did publish "Talking about Talking about Reproductive Technologies," nor any piece fitting that general description. Who could blame her? Marcus had conceived the project just as she was succumbing to the call of feminist movement building, curriculum crafting, and policymaking outside of the United States, primarily in Eastern Europe. No doubt this work was more exhilarating than any analysis of the semiotics of surrogacy could have been. It also promised to be far more consequential.⁴⁵

43. *Id.* at 265 n.41.

44. When Marcus taught her last Family Law course in the fall of 2017, her final exam consisted of the American Bar Association's draft model legislation on assisted reproduction and a request that students "examine [the law's] details and potential consequences." I learned of this a year or two later, in a conversation with a former student about good and bad exam formats. The student placed Marcus's approach in the good column; she appreciated how it allowed each student to bring a wide and idiosyncratic range of doctrinal knowledge, theoretical learning, and policy argument to bear on a concrete legal proposal. I haven't succeeded in locating a copy of the actual exam, but that same student shared with me the essay she wrote as her answer, allowing me to roughly reconstruct the wording of Marcus's question.

45. Marcus brought her activism and teaching to Albania, Azerbaijan, Belarus, Brazil, China, Czech Republic, Georgia, India, Kosovo, Lithuania, Macedonia, Pakistan, Poland, Romania, Russia, Serbia, Slovakia, and Thailand. Since this dimension of Marcus's life and legacy is treated elsewhere in the present volume, *see, e.g.*, Elizabeth M. Schneider, *Remembering Isabel*, 71 *BUFF. L. REV.* 49 (2023), I'll limit myself to recalling one experience that impressed on me the magnitude of her impact abroad. In October 2019 I organized Marcus's retirement

* * *

On Mother's Day 1987, less than two months after UB Law School's program on feminism and reproductive technologies, William Safire devoted his "On Language" column in *The New York Times* to—what else?—the semantics of surrogacy. Titled "The Modifiers of Mother," Safire's piece traced the evolution of the word "surrogate" from its Latin etymology to its use in English ecclesiastical and admiralty courts, and from there to twentieth-century applications in psychology, politics, and, finally, human reproduction. At least nominally, Safire was writing in response to a letter from David E. Pollard, an editor at *U.S. News & World Report*, who complained that both journalists' home publications "keep referring to Mary Beth Whitehead," the woman who gave birth to Baby M., "as the surrogate mother." Pollard continued: "I say she is the mother. For hire, maybe. But a mother, nonetheless. . . . Please give us a ruling."

Safire didn't take the bait. "It's too soon for a ruling," he replied. "[C]urrent usage is clearly on the side of calling the hired carrier a surrogate, but a backlash may be developing."⁴⁶

Safire's column remains, to my knowledge, the most prominent English-language discussion of the vocabulary we use to talk about surrogacy. Who or what takes that distinction in the academic literature is a tougher call; even excluding the by-now thousands of books, chapters, and articles with introductory paragraphs that obligingly and uncritically define basic terms, there are many scholarly

celebration with Professors Carrie Bramen and Judith Olin. In the course of planning the event, we reached out to some of the foreign students and activists who had trained and worked with Marcus. All responded, eager to share their love and gratitude for our honoree. They did so remotely on Zoom or by sending notes, photos, and videos ahead of time. The effusiveness of their contributions was beautiful.

46. William Safire, *The Modifiers of Mother*, N.Y. TIMES, May 10, 1987, at 6–10.

treatments of surrogacy that, however passingly, say something interesting about the words they're using or pointedly not using. To date, though, I've encountered only one article specifically and entirely concerned with the semantics of assisted procreation: a 2015 study by sociologist Diane Beeson, epidemiologist Abby Lippman, and Marcy Darnovsky, an interdisciplinary expert on "the politics of biotechnology".⁴⁷ Framed as an investigation of "variations in terminology" about reproductive technologies in general, the lion's share of the published study is about surrogacy—a fact all the more striking for surrogacy's rarity relative to the other reproductive technologies that make fertility treatment a multibillion-dollar business.⁴⁸ Then again, such a marked focus on surrogacy makes sense in light of what I take to be the authors' main point—namely, that "virtually all terminology on this topic is value laden and . . . contested. . . . [T]hose who object strongly to the use of certain terms may nevertheless overlook the contested nature of other[s] . . .".⁴⁹ I don't believe any method of assisted procreation has provoked more terminological

47. Diane Beeson et al., *What's in a Name? Variations in Terminology of Third-Party Reproduction*, 31 REPROD. BIOMEDICINE ONLINE 805, 805 (2015).

48. Exactly how many billions is, for present purposes, beside the point, but for a recent accounting, see Pasquale Patrizio, David F. Albertini, Norbert Geicher, & Arthur Caplan, *The Changing World of IVF: The Pros and Cons of New Business Models Offering Assisted Reproductive Technologies*, 39 J. ASSISTED REPROD. & GENETICS 305, 307 (2022) (setting annual gross revenues from "infertility care" in the United States at approximately \$8 billion, or two-fifths of the global total of approximately \$20 billion). For one indication of surrogacy's relatively small share of the ART market, the CDC's latest report on American ART use states that, among all embryo transfers occurring that year—themselves some fraction of all infertility procedures—4.7% involved implantation in a surrogate. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUM. SERVS., 2018 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 9 (2021).

49. Beeson et al., *supra* note 47, at 812.

contestation than surrogacy.⁵⁰

According to Beeson, Darnovsky, and Lippman, “surrogate motherhood” was initially the “term most frequently used to describe the practice of one woman bearing a child for another.”⁵¹ That usage is said to have originated in 1976 with Michigan lawyer Noel Keane, the same man credited with launching the modern surrogacy industry.⁵² Whoever was behind the label, many commentators, including many feminists, derided “surrogate motherhood” as a “misnomer,” because “the gestating woman . . . is the child’s biological mother.”⁵³ Some suggested that

50. As Kristen Cheney observes, “the words used to describe surrogacy and its various participants has been highly , as they tend to reflect the values and ideologies that various speakers—scholars, activists, and policymakers—assign to them. . . . As in any other field, the words used to describe surrogacy are necessarily political.” Kristen E. Cheney, *International Commercial Surrogacy: Beyond Feminist Conundrums and the Child as Product*, in *FEMINISM AND THE POLITICS OF CHILDHOOD* 155, 156 (Rachel Rosen & Katherine Twamley eds., 2018).

51. Beeson et al., *supra* note 47, at 809 (noting the expression’s dominance until “the mid-1980s”).

52. DANIELA DANNA, *CONTRACT CHILDREN: QUESTIONING SURROGACY* 21 (2015). For an informative and incisive account of Keane’s practice (and its role in the *Baby M.* case), see Sanger, *supra* note 15, at 68, 76, 77, 81–97. Keane himself co-authored a book on surrogacy several years before *Baby M.* See NOEL P. KEANE & DENNIS L. BREO, *THE SURROGATE MOTHER* (1981).

53. Lisa McCauley Parles, *Introduction* to Nadine Taub, *Amicus Brief: In the Matter of Baby M.*, 14 *WOMEN’S RTS. L. REP.* 243, 244 n.6 (1992) (emphasis added); see also, e.g., SAMUEL GREEN & JOHN V. LONG, *MARRIAGE AND FAMILY LAW AGREEMENTS* 246 n.128 (1984); Iwan Davies, *Contracts to Bear Children*, 11 *J. MED. ETHICS* 61, 61 (1985); FIELD, *supra* note 18, at 4–5; THE N.Y. STATE TASK FORCE ON LIFE AND THE LAW, *SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY* 1 n.1 (1988); Robyn Rowland, *Reprotech: A Feminist Critique of the Language of Reproductive Technologies*, in *ENCYCLOPEDIA OF REPRODUCTIVE TECHNOLOGIES* 46, 48 (Annette Burfoot ed., 1999). For a rare defense of the term “surrogate mother,” see Am. Fertility Soc’y, *Ethical Considerations of the New Reproductive Technologies*, 46 *FERTILITY & STERILITY (SUPPLEMENT 1)* 62S (1986).

(in the typical case) the “more precise label would be ‘surrogate wife,’ because [the impregnated woman] performs the procreative function for [another woman’s] husband”⁵⁴ These critics—including, as we’ve seen, Isabel Marcus—heard the qualifying word “surrogate” to imply that a woman who carried and delivered a baby wasn’t really or fully a mother, when, on those facts alone, she was by definition a mother.

So stated—and it was often so stated—the gestation-equals-motherhood objection simply begs the question.⁵⁵ Equally question-begging was the objection’s companion argument that the true “surrogate mother” in these arrangements is the woman (assuming there was one) who had commissioned the pregnancy and was raising the resulting child. As Alexander Capron put it in a 1987 lecture, “[t]he term ‘surrogate mother’ is inaccurate because in ordinary parlance a woman who raises another woman’s offspring would be called their surrogate mother”⁵⁶

54. Pinhas Shifman, *The Right to Parenthood and the Best Interests of the Child: A Perspective on Surrogate Motherhood in Jewish and Israeli Law*, 4 N.Y.L. SCH. HUM. RTS. ANN. 555, 555–56 (1987); see also, e.g., FIELD, *supra* note 18, at 4; Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, 1 n.3 (1988); Katheryn D. Katz, *The Public Policy Response to Surrogate Motherhood Agreements: Why They Should Be Illegal and Unenforceable*, 60 N.Y. ST. BAR J., May 1988, at 21, 28.

55. See RITA ARDITTI, RENATE KLEIN, & SHELLEY MINDEN, *TEST-TUBE WOMAN: WHAT FUTURE FOR MOTHERHOOD?* xvii (with new pref. ed., 1989) (“We put ‘surrogate’ in quotes because . . . it is a misnomer; ‘surrogate mothers’ are mothers in every sense of the word.”); *Anonymous v. Anonymous*, No. P-8572/91, 1991 WL 228555, at *1 n.1 (N.Y. Fam. Ct. Oct. 1, 1991) (“The Court finds the use of the term ‘surrogate’ in this context to be inaccurate and euphemistic. In fact, the [so-called ‘surrogate’] is the mother of the child.”). See generally sources cited in *supra* notes 52–53.

56. Alexander M. Capron, *Alternative Birth Technologies: Legal Challenges*, 20 U.C. DAVIS L. REV. 679, 679 n.1 (1987); see also Margaret Mead, *Some Theoretical Considerations on the Problem of Mother-Child Separation*, 24 AM. J. ORTHOPSYCHIATRY 477 (1954) (referring to a

American judges and attorneys had been using the term that way for years, typically but not only in child-custody cases involving grandmothers, aunts, step-moms, sisters—often legal strangers—who, having once “stepped in” for a child’s birth mother, went on to walk in those maternal shoes for a long time to come.⁵⁷ Even a surrogacy and reproductive-technology enthusiast like law professor John Robertson had to admit in 1983 that, according to then-standard English usage, “surrogate mother” was indeed “a misnomer,” for “it is the adoptive [read: intended] mother who is the surrogate mother, since she parents a child borne by another.”⁵⁸

Capron’s and Robertson’s once-conventional meanings of “surrogate motherhood” described situations of substitute care—circumstances, or a subset of circumstances, in which a woman assumes parental responsibility for a child who is neither biologically nor legally hers. This superseded understanding of “surrogate motherhood” hardly ignores biological and legal definitions; hence the word “surrogate.” But the composite phrase “surrogate mother” described a functional or “kinetic” relationship; it posited a motherhood that consists of deeds, a motherhood realized through the quotidian and often gendered work of parenting.⁵⁹ On first

“mother or mother surrogate”).

57. See, e.g., *In re Guardianship of Lyons*, 379 P.2d 869, 870 (1963); *Bennett v. Jeffreys*, 356 N.E.2d 277, 287 (1976) (Fuchsberg, J., concurring); *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979); *Tovar v. Immigr. & Naturalization Serv.*, 612 F.2d 794, 796 (3d Cir. 1980); *Custody of a Minor*, 452 N.E.2d 483, 491 (1983); *Burke v. Pope*, 531 A.2d 782, 786 n.4 (Pa. Super. Ct. 1987). For more recent examples, see *Ochoa v. Davis*, 50 F.4th 865, 893 (9th Cir. 2022); *Angulo v. State*, 191 N.E.3d 958, 965 (Ind. Ct. App. 2022); *Ex parte J.C.*, 196 So. 3d 279, 280 (Ala. 2015) (Moore, C.J., dissenting).

58. John A. Robertson, *Surrogate Mothers: Not So Novel After All*, 13 HASTINGS CTR. REP. 28, 28 (1983).

59. On “kinetic” kinship, see Elizabeth Freeman, *Queer Belongings: Kinship Theory and Queer Theory*, in *A COMPANION TO LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDIES* 295, 305 (George E. Haggarty & Molly McGarry eds., 2007) (relating Corrine Hayden’s

glance this functional or kinetic notion of motherhood looks diametrically opposed to the conviction that, *prima facie*, the biological processes of pregnancy and childbirth make a mom. But here's the thing: those biological processes, especially pregnancy, obliterate the distinction between nature and nurture. Pregnancy is a doing, one deed and thousands of deeds. It's work. It's labor, whether or not it ends in labor.

Many feminists saw in surrogacy—many still see—a deprecation and alienation of the work of gestation and parturition, of maternal care and exertion, of the very idea of motherhood. And they heard in the phrase “surrogate mother” a ratification of that cheapening and alienation.⁶⁰ It could only have added insult to injury when, in the media maelstrom around *Baby M.*, the term was increasingly abbreviated to one word: “surrogacy.”⁶¹ Expurgating express reference to maternity, this vaguely euphemistic truncation enacted literally, in language itself, the same erasure that the very practice of surrogacy was said to effect symbolically.⁶²

juxtaposition of “genetic” and “kinetic” kinship to David Schneider’s “statement that kinship consists of ‘doing’ rather than ‘being’”) (citing Corrine Hayden, *Gender, Genetics, and Generation: Reformulating Biology in Lesbian Kinship*, 10 *CULTURAL ANTHROPOLOGY* 41, 51, 53 (1995) and DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 23–24 (2d ed. 1980)).

60. OLGA B.A. VAN DEN AKKER, *SURROGATE MOTHER FAMILIES* 17 (2017) (describing the perspective of those who argue that consignment to “surrogate” status demeans [that person’s] role as mother and deligitimises her rights to a continuing relationship with her baby”) (internal citations omitted).

61. Beeson et al., *supra* note 47, at 809.

62. *See id.* at 808 (noting that terms like “surrogate, surrogate carrier, gestational carrier, gestational surrogate [and] gestational host . . . erase the maternal dimension of the relationship of the birth mother”) (internal citations omitted).

* * *

Flash forward thirty years and the rhetorical situation is nearly flipped. In many circles, not least among most participants in the reproductive-technology market, the problem with “surrogate mother” isn’t “surrogate”; it’s “mother.”⁶³ Where Isabel Marcus and likeminded feminists had condemned the expression for implying that pregnancy and childbirth, in and of themselves, might not qualify a woman as a mother, today’s practitioners and defenders of surrogacy—including, it should be emphasized, most surrogates—are more likely to bristle at the implication that gestators and childbearers are mothers in any sense worth mentioning.⁶⁴ Better to call the pregnant and birthing

63. See, e.g., Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, If Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 814–15 (2012) (arguing that gestational surrogacy contracts should be enforceable without prior judicial approval and tying such requirements “directly back to the false presumption found in the terminology of ‘gestational mother’”).

64. A Google search for “surrogacy terminology” yields countless results. Those at the top tend to fall into two categories: repeat corporate and legal actors in the surrogacy market and entities offering ostensibly gratuitous advice to people who are thinking of becoming or hiring a surrogate. For the most part, these pages express a preference for, or simply steer clear of, terminology that can be construed to impute motherhood to women who act as surrogates. The website of Hope Surrogacy, “a full-service . . . agency” in Madison, Wisconsin, provides an especially pointed example. Its list of “Surrogacy terms to know (and one to forget)” ends, yes, with “surrogate mother,” a relegation explained as follows:

While many people also use the term *surrogate mother* to describe the woman who carries a baby for another parent or parents, we’ve found that in our community, the term *surrogate mother* doesn’t fit. Most surrogates will tell you that they don’t want to ever use the term *surrogate mother* for themselves because simply put—they are not the moms. So, we stick with *surrogate* and leave the term mother for the woman who will raise the baby! We can go ahead and forget the . . . term *surrogate mother*. ;)

Surrogacy Terms You Need to Know, HOPE SURROGACY (Feb. 21, 2019),

woman a surrogate—or a “host” or “carrier.”⁶⁵

American law has reflected and ensconced these lexical developments. Early surrogacy legislation, whether permitting or prohibiting the practice, used terms like “surrogate mother,” “gestational mother,” or indeed just “mother.”⁶⁶ The arrangements those statutes allowed or forbade were designated “parentage” or “parenting” contracts⁶⁷—ambiguous words that might’ve suggested more extensive “collaboration” than parties to the contact

<https://hopesurrogacy.com/surrogacy-terms-you-need-to-know/>; see also Jérôme Courduriès, *Ce que fabrique la gestation pour autrui* [What Surrogacy Produces], 144–145 J. DES ANTHROPOLOGUES 53, 54 (2016) (Fr.) (citing anthropologists and sociologists who report that most surrogates “do not consider themselves mothers of the children that they are bearing on someone else’s behalf”); INTERNATIONAL SURROGACY FORUM 2019, at 17 (Univ. Cambridge et al. eds., 2019) (describing a surrogate who “generally prefers the term ‘surrogate’ or ‘gestational carrier’ and who believes “that ‘surrogate mother’ is not an appropriate term because she is not and does not want to be considered a ‘mother’ to the children”).

65. See Cheney, *supra* note 50, at 157 (noting the deliberate use of terms that make no reference to maternity—terms like “gestational host [or] carrier” and “contract pregnancy”—to “obviate any potential legal claims to motherhood by commercial surrogates”).

66. Arkansas’s permissive statute of 1985, ARK. CODE ANN. § 9-10-201, and Michigan’s prohibitive statute of 1988, MICH. COMP. LAWS § 722.855, both refer to a “surrogate mother.” Virginia’s largely permissive statute of 1991 referred to a “gestational mother” (as does its amended statute of 2019). See 1991 Va. Acts 600; VA. CODE ANN. § 20-156. Arizona’s prohibitive statute, held unconstitutional under the state constitution in 1994, states that “[a] surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child”; it further provides that, “[i]f the mother of a child born as a result of a surrogate contract is married, her husband is [rebuttably] presumed to be the legal father of the child.” ARIZ. REV. STAT. ANN. § 25-218; see *Soos v. Superior Ct.*, 897 P.2d 1356 (Ariz. Ct. App. 1994).

67. See ARIZ. REV. STAT. ANN. § 25-218; MICH. COMP. LAWS § 722.855; Surrogate Parenting Contracts Act of 1992, 1993 D.C. Stat 219; Surrogate Parenting Contracts, 1992 N.Y. Laws 308.

generally sought.⁶⁸ Newer legislation eschews such explicit reference to mothers and motherhood, parents and parentage, wherever there's a chance that an untrained or lazy reader might take them to refer to the surrogate, unambiguously identified as a "gestational carrier" in the majority of laws enacted since 2012.⁶⁹ For instance, in 1989, Iowa legislators, stopping well short of legalization, saw fit to clarify that "a surrogate mother arrangement" does not fall within the state's criminalization of the "purchase or sale of [an] individual"; in 2012, the state's legislators passed detailed rules for identifying the legal parent or parents of a child born pursuant to a "gestational surrogacy arrangement."⁷⁰ Where New York's 1992 surrogacy ban protected a "birth mother" from any contractual duty of relinquishment, the state's 2020 repeal legislation provides that "a person acting as a surrogate" normally must fulfill her end of the bargain.⁷¹

Note how changes in surrogacy's statutory idiom have

68. The term "collaborative reproduction" is regularly applied to "situations in which someone other than one's partner provides the gametes or gestation necessary for reproduction." JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 119 (1994).

69. See CAL. FAM. CODE § 7960 (West 2020); Surrogacy Agreements, 2012 Cal. Legis. Serv. Ch. 466 (WEST); DEL. CODE ANN. tit. 13, § 8-102 (2013); LA. STAT. ANN. § 9:2718.1; ME. REV. STAT. ANN. tit. 19-A, § 1932 (West 2016); NEV. REV. STAT. ANN. § 126.750 (West 2013); N.H. REV. STAT. ANN. § 168-B:1 (2015); N.J. STAT. ANN. § 9:17-62 (West 2018); N.D. CENT. CODE § 14-18-08 (2005); OKLA. STAT. ANN. tit. 10, § 557.2 (West 2019); 15 R.I. GEN. LAWS § 15-8.1-802 (2021); VT. STAT. ANN. tit. 15C, § 102 (2018); see also Memorandum from Courtney Joslin, Reporter, Unif. Parentage Act Drafting Comm., to Uniform Parentage Act Drafting Committee 5 (Feb. 8, 2016) (explaining that, notwithstanding explicit statutory definitions to the contrary, the term "surrogate mother" could be read to suggest that the surrogate is the legal mother.).

70. IOWA CODE § 710.11 (1989); IOWA ADMIN. CODE r. 641-95.1 (2020).

71. Surrogate Parenting Contracts, 1992 N.Y. Laws 308; N.Y. FAM. CT. ACT § 581-401 (McKinney 2021).

correlated with changes in legal substance.⁷² Almost without exception, states that adopt the now-dominant terminology are those choosing to regulate and regularize surrogacy, sometimes (like New York) overriding existing statutory prohibitions. Often this is described as a “trend . . . toward legalization”—an understandable characterization, but only partly true.⁷³

Overwhelmingly, what more recent legislation regulates and regularizes is so-called “gestational surrogacy,” an arrangement in which the surrogate is impregnated through IVF and bears no genetic relation to the embryo implanted in her uterus. What the newer statutes usually do *not* reach are situations where the surrogate is impregnated through artificial insemination and is therefore a gestational as well as a genetic parent.⁷⁴ These latter scenarios are usually

72. *Cf.* 1988 Fla. Sess. Law Serv. 88-143 (West) (permitting only “nonbinding preplanned adoption agreement[s]” and giving the surrogate, called a “volunteer mother,” seven days after the child’s birth to rescind her consent to place the child); FLA. STAT. ANN. § 742.15 (West 1993) (permitting “a binding and enforceable gestational surrogacy contract . . . between [a] commissioning couple and [a] gestational surrogate”).

73. Richard F. Storrow, *Surrogacy: American Style*, in SURROGACY, LAW AND HUMAN RIGHTS 193, 198 (Paula Gerber & Katie O’Byrne eds., 2016); *see also* Jenna Casolo et al., *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313, 337 (2019) (“The trend towards legalizing surrogacy is likely to continue.”); Emma Cummings, *The (Un)enforceability of Abortion and Selective Reduction Provisions in Surrogacy Agreements*, 49 CUMB. L. REV. 85, 91 (2019) (“the legislative trend . . . is toward legalizing surrogacy where it is illegal or providing a statutory framework where the industry operates without legal regulation”) (citation omitted); Eric A. Feldman, *Baby M Turns 30: The Law and Policy of Surrogate Motherhood*, 44 AM. J.L. & MED. 7, 10 (2018) (likewise noting a trend “toward legalizing surrogacy”); V. Noah Gimbel, *Fetal Tissue Research & Abortion: Conscriptation, Commodification, and the Future of Choice*, 40 HARV. J. L. & GENDER 229, 279 (2017) (“Despite some state laws banning surrogacy arrangements, the national trend decidedly favors legalization.”).

74. “Most of the states that permit surrogacy by comprehensive statutory scheme explicitly permit only gestational surrogacy.” A handful

called “traditional surrogacy” (a term in decline) or “genetic surrogacy” (the term in ascendance). Only one state, Colorado, draws no statutory distinction between gestational and genetic surrogacy.⁷⁵

Legislation of the past fifteen years tends either to prohibit genetic surrogacy contracts outright or consign them to a statutory vacuum.⁷⁶ Either way, the predictable effect is to discourage them. Other jurisdictions deter genetic surrogacy through grudging permission.⁷⁷ Colorado aside, the handful of states with statutes purporting to allow genetic surrogacy saddle it with restrictions that many aspiring parents can be expected to find impossible or intolerable. Three states (Maine, Rhode Island, and Vermont) require that a genetic surrogate be a relative of a contracting parent.⁷⁸ In the three remaining jurisdictions where genetic surrogacy is authorized by statute (D.C., Virginia, and Washington), the biological mother may renege on the deal within some period of time after she has conceived or given birth.⁷⁹

of jurisdictions—Connecticut, the District of Columbia, Maine, Rhode Island, Vermont, and Washington—”permit[] and regulat[e] both types.” Courtney G. Joslin, *Statutory Provisions Regarding the Permissibility and Enforceability of Surrogacy Agreements*, in *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 4:2 (Oct. 2022 Update).

75. COLO. REV. STAT. §§ 35-1-410 et seq.

76. New York, for example, explicitly prohibits genetic surrogacy; California is “silent” on the matter. Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CAL. L. REV. 401, 413 (2021).

77. *Id.* at 458 (“Most jurisdictions exclude or disincentivize genetic surrogacy arrangements.”).

78. See ME. REV. STAT. ANN. tit. 19-A, § 1832(10) (West 2022); 15 R.I. GEN. LAWS § 15-8.1-102(13); VT. STAT. ANN. tit. 15C, § 801(a)(4) (2018).

79. D.C. CODE § 16-411(4) (2017) (allowing surrogate to withdraw consent “within 47 hours after the birth of the child”); VA. CODE ANN. § 20-161(B) (2019) (allowing surrogate to terminate agreement “within 180 days” (roughly six months) “after the last performance of any assisted conception”); WASH. REV. CODE § 26.26A.765(b) (2019) (allowing 47 hours after birth).

The precise rationales for legally distinguishing between genetic and gestational surrogacy are rarely stated.⁸⁰ Occasionally one comes across the suggestion that genetic surrogacy contracts shouldn't be legalized because a surrogate with a genetic tie to her offspring would have a stronger claim to legal parentage—a patently circular argument considering that the law of parentage is exactly what's on the table.⁸¹ Otherwise the moral or political import of the genetic/gestational distinction is left to speak for itself, in which case it speaks most clearly in jurisdictions that permit both forms of surrogacy but craft different relinquishment rules for each. When legislators in Washington, for example, allowed genetic surrogates just under two days after birth to withdraw their consent to a prior agreement with the intended parents, they likely had two motivations: (1) a fear that genetic relationship increases the likelihood that the surrogate will want and perhaps fight to keep a baby promised to another; and (2) greater

80. “[J]ustifications for the legal preference for gestational surrogacy are rarely offered, much less examined.” Julie Shapiro, *For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1360 (2014).

81. One author writes: “Because the surrogate carrier has no biological connection to the child, she therefore has no parental rights to said child. Laws that have a blanket prohibition on surrogacy agreements ignore this critical fact.” Brittnay M. McMahon, *The Science Behind Surrogacy: Why New York Should Rethink Its Surrogacy Contracts Laws*, 21 ALB. L.J. SCI. & TECH. 359, 363 (2011); see also Laura L. Kimberly, Megan E. Sutter & Gwendolyn P. Quinn, *Equitable Access to Ectogenesis for Sexual and Gender Minorities*, 33 BIOETHICS 338, 342–43 (2019). (“Most countries allowing surrogacy require that the embryo to be carried should come from gametes unrelated to the carrier. This requirement is meant to prevent the carrier from having any legal rights to the future child.”); N.Y. ST. TASK FORCE ON LIFE & L., REVISITING SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY ON GESTATIONAL SURROGACY 56 (2017) (“New York should continue to discourage . . . arrangements in which the surrogate has a genetic relationship to the child . . . because [assigning] parentage [in such situations] is a complicated multiparty matter.”).

sympathy, among themselves and the publics they represent, for a genetic surrogate who feels that way than for a gestational surrogate who does. Permeating both reasons is the idea that, if gestation alone makes a surrogate, gestation plus genetics make a mother.⁸²

The inescapable maternity ascribed to genetic but not gestational surrogates is vividly expressed in terminological tendencies and developments of the past quarter-century. By far the best examples are texts distinguishing not between “gestational surrogacy” and “genetic surrogacy” but between “surrogate motherhood” and “gestational surrogacy.” This practice has largely disappeared from academic writing,⁸³ but it’s alive and well in popular discourse and surrogacy marketing materials.⁸⁴ More broadly, gestational

82. See Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of Art*, 51 U. RICH. L. REV. 419, 434 (2017) (“delineating between traditional and gestational surrogacy” bolsters the image of surrogates as “deviant mothers . . . break [an] indelible bond and violate a sacred relationship”).

83. See, e.g., Chaim Povarsky, *Regulating Advanced Reproductive Technologies: A Comparative Analysis of Jewish and American Law*, 29 U. TOL. L. REV. 409, 410–11 (1998) (“[S]urrogate motherhood generally involves the artificial insemination of a surrogate mother with the sperm of the male ‘adoptive parent,’ [whereas] . . . ‘gestational surrogacy [involves] . . . implanting into the uterus of the surrogate mother a zygote created in a laboratory . . .”); Erika Hessenthaler, *Gestational Surrogacy: Legal Implications of Reproductive Technology*, 21 N.C. CENT. L.J. 169, 169 (1995) (“Gestational surrogacy differs greatly from the more widely known practice of surrogate motherhood.”); Jeffrey M. Place, *Gestational Surrogacy and the Meaning of ‘Mother’: Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), 17 HARV. J.L. & PUB. POL’Y 907, 907 (1994) (“Gestational surrogacy, in which the gestating mother receives an embryo formed in vitro from the gametes of the intended parents, differs from surrogate motherhood in that the gestator is not genetically related to the baby she carries.”); Alice Hofheimer, *Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy*, 19 N.Y.U. REV. L. & SOC. CHANGE 571, 573 (1992) (“A ‘surrogate mother’ supplies the egg from which the child develops. . . . In contrast, a ‘surrogate gestator’ carries and delivers a child to whom she is genetically unrelated.”).

84. *Gestational Carrier vs. Surrogate Mother: What’s the Right Term?*,

surrogacy's increased prevalence and legal solicitude surely help to explain why phrases like "surrogate mother" and "gestational mother" are being surpassed by "carrier" and "surrogate."⁸⁵ Once genetic surrogacy ceased to be the dominant form, statistically and in the cultural imagination,

AM. SURROGACY, <https://surrogate.com/surrogates/becoming-a-surrogate/gestational-carrier-vs-surrogate-mother/> (last visited Feb. 1, 2023) (observing that, although "gestational carrier" and "surrogate mother" "are used interchangeably online and in daily conversation, many surrogacy professionals will use the former term in cases of gestational surrogacy and the latter in cases of traditional surrogacy"); *see also, e.g., 5 Things You Need to Know About Using a Gestational Carrier*, CAROLINAS FERTILITY INST., (Mar. 16, 2020), <https://carolinasfertilityinstitute.com/things-need-know-using-gestational-carrier/> ("In traditional surrogacy, . . . [t]he surrogate mother provides her own egg. . . . A gestational carrier is sometimes called a gestational surrogate. In gestational surrogacy, both the sperm and egg are provided by the intended parents (or donors)."); Kristin Marsoli, *What is the Difference Between a Surrogate vs a Gestational Carrier?*, CIRCLE SURROGACY & EGG DONATION: SURROGACY BLOG (June 3, 2022), <https://www.circlesurrogacy.com/blog/circle-surrogacy/what-is-the-difference-between-a-surrogate-vs-a-gestational-carrier/> ("A traditional surrogate mother shares DNA with the baby A gestational carrier . . . does NOT share any DNA with the baby."); *Gestational Surrogacy Can Be the Right Path Forward to Build Your Dream Family*, REPROD. GYNECOLOGY & INFERTILITY, <https://www.rgiohio.com/gestational-surrogacy> (last visited Feb. 1, 2023) ("A surrogate mother . . . uses her own egg . . . [whereas i]n gestational surrogacy, both the sperm and egg are provided by the intended parents (or donors).").

85. A March 2016 letter from the Society of Assisted Reproductive Technology (SART) and the American Society of Reproductive Medicine (ASRM) to the Drafting Committee of Uniform Parentage Act provides an unusually clear example of the relationship between the practice, the law, and the terminology of surrogacy. Having urged the Committee to replace the 2002 UPA's references to "gestational mother" with either "gestational carrier" (preferred) or "gestational surrogate," the letter proceeds to "strongly endorse . . . clear distinctions between . . . gestational and traditional surrogacy[, because the latter,] . . . with its combination of genetic and gestational roles, . . . is . . . too closely aligned to a birth mother to allow binding pre-conception or pre-birth agreements." Memorandum from Susan Crockin, Representative, Soc'y of Assisted Reprod. Med. & Am. Soc'y of Reprod. Med., to Uniform Parentage Act Drafting Committee 2 (Mar. 8, 2016).

“surrogate motherhood” give way linguistically (again, in some circles) to “gestational surrogacy”—even to the point that the latter term, first formulated in contradistinction to “genetic surrogacy,” is occasionally used to encompass both.⁸⁶

Of course it’s not wrong to call a genetic surrogate a “gestational carrier.” She does, after all, gestate a child. Nonetheless, it’s her chromosomal contribution to that child that accounts for her usual designation as a “genetic surrogate” and, in most states, for her drastically different treatment from surrogates who make no such contribution. Above I suggested two possible rationales for that policy choice. Are they good reasons? Are there other reasons? Are the reasons based on evidence? On principle? Intuition? What other values and outcomes are at stake in the genetic/gestational distinction, and how do all of the competing considerations stack up against one another? These aren’t easy questions, and they deserve a lot more discussion than they’ve received to date.

Going into that discussion, we’d do well to think critically about the vocabulary we bring to it. If we’re to have honest and evenhanded debate on the genetic/gestational distinction and its place, if any, in public policy, we need honest and evenhanded words to describe that distinction.⁸⁷ What this means most urgently is that we must start calling “genetic surrogacy” what it really is: genetic *and* gestational surrogacy. When we name a woman who provides both ovum

86. See, e.g., *In re John*, 103 N.Y.S.3d 541, 545 (N.Y. App. Div. 2019) (using “gestational surrogate” in connection with a New York statute that did not use the term and drew no distinction between genetic and gestational surrogates); Me. Rev. Stat. Ann. tit. 19-A, § 1832(10) (West 2022) (defining “gestational carrier” to include a surrogate “who carries a child for a family member using her own gametes”).

87. Beeson et al., *supra* note 47, at 812 (urging terminological choices that “sustain dialogue between those with possibly different positions,” beginning with the avoidance of “some terms . . . on . . . grounds of inaccuracy”).

and uterus a “genetic surrogate” and a woman who provides a uterus but no ovum a “gestational surrogate,” we accept from the get-go that what differentiates the two is more important than what they share. And to be perfectly clear: reducing the first woman to a “genetic surrogate” doesn’t devalue her hereditary contribution to the baby-making project. It devalues the far more laborious and protracted contributions that she *and* her non-genetic counterpart make through pregnancy and childbirth. “Gestational surrogacy,” we are to understand, is just and only that—simply gestational, merely gestational. One doesn’t have to be Barbara Katz Rothman to think this shows contempt for “the unique nurturance [and] long months of pregnancy,” for a woman’s “intimate connections with the baby as it grows and moves inside her body [and] passes through her genitals.”⁸⁸

Any number of alternatives could serviceably replace the reductionist, prejudicial, and ultimately misogynist misnomer that is “genetic surrogacy.”⁸⁹ We could keep things

88. Marcus, *supra* note 31, at 257.

89. Readers familiar with the lingo of this field may wonder about another set of terms we might favor over “gestational” and “genetic”: “full” and “partial”. I see at least four difficulties with these alternatives, of which the first two seem decisive. To begin with their facial inscrutability: Which is which? We need terms that more plainly say what we mean. Second, and relatedly, some people understand “full surrogacy” to mean genetic surrogacy, presumably because supplying both ovum and uterus is a “fuller” contribution to the enterprise; but other people understand “full surrogacy” to mean gestational surrogacy, presumably because a woman who hasn’t supplied genetic material is more “fully” a surrogate—i.e., less of a “mother”. The same dynamic obtains, *mutatis mutandis*, for “partial surrogacy.” Compare Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1887 & n.4 (using “full” to mean genetic and “partial” to mean gestational) and Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 WASH. U.L. REV. 1807, 1827–28 (2022) (same) with Susan Imrie & Vasanti Jadva, *The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements*, 29 REPROD. BIOMEDICINE ONLINE 242, 425 (2014) (using “full” to mean gestational

simple, if clunky, and call it genetic-gestational surrogacy. Or we could adopt a portmanteau whose clunkiness might diminish with repeated use—*gestagenetic*, say, or *genegestational*. Whatever word or words we choose in lieu of “genetic surrogacy,” basic accuracy, rhetorical fair play, and feminist ethics demand something new. “Genetic surrogacy” is unacceptable. “I suggest we scrap the term immediately and forcefully.”⁹⁰

and “partial” to mean genetic) and Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMPAR. L. 97, 98–99 (2010) (same). Complicating matters further is “partial” surrogacy’s sometime contradistinction not from “full” or “genetic” but from “straight”, a singularly unfortunate designation for a procedure so strongly identified with gay men. See Beeson et al., *supra* note 47, at 809, 810; Imrie & Jadvá, *supra*, at 425. Finally there’s Sophie Lewis’s much-read *Full Surrogacy Now*, which uses “full surrogacy” to mean something far more complex and interesting than either of the two meanings just described. SOPHIE LEWIS, FULL SURROGACY NOW 19–20 (2019).

90. Marcus, *supra* note 31, at 265.