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Twenty-Five Years After Baby M: How Rules Can Bring Certainty To The World of Surrogacy Contracts

TWENTY-FIVE YEARS AFTER BABY M: HOW RULES CAN BRING CERTAINTY TO THE WORLD OF SURROGACY CONTRACTS

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When the legislature creates a law, that law becomes a legal directive.[1] Legal directives guide decision making—making it easier, improving the quality of the decision, and limiting the blatant discretion of the decision maker.[2] The form legal directives take, such as rules and standards, can have a direct impact on this discretion.[3] This article will present the differences between rules and standards as legal directives in the context of its application to surrogacy contracts. Part I will introduce rules and standards, and the basic characteristics of each. Part II will discuss some of the general arguments for and against both rules and standards. Part III will introduce the concept of the surrogacy contract and three different approaches to this type of contract—prohibition based on a standard of public policy as announced in *In Re Baby M*,[4] both regulation and prohibition through rules suggested in the Uniform Parentage Act,[5] and regulation through judicial standards as created in *Johnson v. Calvert*.[6] Finally, Part IV will discuss why the surrogacy contract may be better suited for rule-based regulation than standards.

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[1] Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992).

[2] Id.

[3] Id.

[4] 537 A.2d 1227 (N.J. 1988) [hereinafter Baby M].

[5] Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Parentage Act (2000).

[6] 851 P.2d 776 (Cal. 1993).

PART I: RULES AND STANDARDS DEFINED

A. Rules

Rules are generally associated with legal formality.[7] Rules are designed to limit the decision maker's response and to confine the decision to the facts without reference to arbitrary or subjective reasoning.[8] Rules take into account background social policies, such as fairness and injustice, and attempt to create a directive that can be followed on a consistent basis while, at the same time, addressing these policies.[9] However, rules are not perfect. The formality involved inevitably creates errors of over-and under-inclusiveness.[10] Thus, rules have a cost: "sacrifice in precision in the achievement" of the underlying social policy.[11] This is especially true in legal fields involving ever-changing technology and social values.[12]

Rules also reduce errors associated with judicial incompetence or bias.[13] The value of the rule is in its independent force, which the decision maker is bound to follow[14] The focus for the decision maker is to fit the decision to the rule, even when doing so creates a result that does not necessarily address the background social policy of the rule.[15]

Rules will often employ categories to define brightline boundaries.[16] Each situation is then classified as "falling on one side or the other" of the brightline boundary.[17] An example of a rule used in the field of family law is "[p]lacement of a child in an adoptive home may not be delayed or denied on the basis of race, color or national origin."[18] In this example, the background social policy for the rule is fairness and equal protection for the parents. The rule addresses this policy by setting brightlines and, thus, reduces the discretion of the decision maker.

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[7] Sullivan*, supra* note 1, at 58.
[8] Sullivan, *supra* note 1, at 58 (citation omitted).
[9] *Id.* (citations omitted).
[10] Id.
[11] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689 (1976).
[12] *See infra* Part II.A., IV.
[13] Sullivan, *supra* note 1, at note 58..
[14] *Id.* at 58.
[15] *Id.*
[16] *Id.* at 59.
[17] *Id.*
[18] Mo. Ann. Stat. § 453.005 (West 1985).

B. Standards

In contrast to rules, standards are more concerned with applying the decision to the background policy.[19] Standards give broader directives, which in turn gives the decision maker broader authority to make subjective decisions.[20] This broadening reduces errors of under-and over-inclusiveness, however, it increases the chance for error based on judicial incompetence or bias.[21] Standards allow the decision maker to consider a totality of the circumstances rather than just the facts.[22] In a legal system where two cases are rarely the same, this means that there is less of a chance that the decision made in one case will be absolutely followed in the next case.[23] Looking at the totality of the circumstances, standards take a balancing approach in the consideration of all the competing rights and interests, and weighs the rights and interests in consideration of the background policy of the standard.[24]

An example of a standard used in the field of family law is: "[t]he provisions [related to adoption] shall be construed so as to promote the best interests and welfare of the child in recognition of the entitlement of the child to a permanent and stable home."[25] On its face, this could seem like a rule. The words "shall be construed" direct the decision maker's focus; however, what is considered to be the "best interests and welfare," as well as what is a "permanent and stable home," are left undefined and up to judicial discretion.

It is important to note that rules and standards are not rigidly defined.[26] For example, a rule can be so generalized that it becomes a standard, and a standard can include so many directives that it becomes a rule. Courts will often create standards from rules and vice versa.[27] Yet, this simplified explanation does not take into account exceptions that can, and do, exist, which further blur the distinctions between rules and standards.

PART II: ARGUMENTS FOR RULES AND STANDARDS

The decision to frame a legal directive as a rule or standard will have a significant impact on the ramifications of that directive, including whether and how it will be applied by the decision maker.

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[19] Sullivan, *supra* note 1, at 58 (citation omitted).
[20] *Id.* at 59.
[21] Id.
[22] Id.
[23] *Id.* at 59 (citation omitted).
[24] *Id.* at 59–60.
[25] Mo. Ann. Stat. § 453.005 (West 1985).
[26] *See* Sullivan, *supra* note 1, at 57–58.
[27] Michael Ambrosio, *Reflections on the Appearance of Impropriety Standard*, 273-DEC N.J. LAW. 9, 12 (2011).

A. Rules

There are two dominant advantages formal rules have over standards. The first is fairness or "the restraint of official arbitrariness," and the second is "certainty."[28] In addition, several arguments have been made that support the framing of legal directives as rules, including encouraging investment, efficiency, utility, and the advancement of democracy.[29]

Rules promote fairness by binding all decision makers, and similar cases, alike.[30] Rules "narrow the range of factors to be considered" which reduces arbitrary decisionmaking.[31] Arbitrary decisions may take into account subjective factors existing outside the facts or the purpose of the rule, such as corruption, paternalism, and bias.[32] When standards are used, it allows the introduction of these subjective factors, which can cloud the decision maker's judgment and prejudice their decision.[33] Rules negate these subjective factors by restricting the decision maker from indulging their personal preferences, giving the appearance that he or she is rendering a neutral decision.[34] "[T]he appearance of equal treatment…[a]s a motivating force of the human spirit…cannot be overestimated."[35] Rules are better for providing the appearance of justice as seen through the lens of equal protection.[36] When two cases are decided differently, it is important "not only that the later case *be* different, but that it *be seen to be so*" for the system of justice to be respected.[37] Rules clearly define the difference in these cases. For example, a law that prohibits "payment for services" clearly does not pertain to "services provided without payment." By having a "clear, previously enunciated rule that one can point to" the decision maker has a reference point to explain the disparity in their decisions—one case fell under the rule while the other did not.[38] Further, by relying on a rule, the decision maker is free to make unpopular decisions that may be contrary to the popular will. For example, it is easier for a judge to strike down a contract because the legislature has deemed it illegal than to explain why it runs counter to his notion of public policy. Standards do not have this reference point. With standards, justice, as

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[28] Kennedy, *supra* note 11, at 1688.
[29] *See* Sullivan, *supra* note 1, at 62–64.
[30] *Id.* at 62.
[31] *Id.* at 62-64 (citations omitted).
[32] Kennedy, *supra* note 11, at 1688.
[33] *See* Sullivan, *supra* note 1, at 59.
[34] Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).
[35] *See Id.* at 1178.
[36] Id.
[37] Id.
[38] Id.

fairness, is defined by the decision maker, and that explanation may not sit well with one seeking equal treatment under the law.

The reduction of arbitrary decisions creates certainty in the law that cannot be understated. The concept of *stare decisis* dominates judicial decision making by creating certainty.[39] As Justice Scalia stated, "when, in writing for the majority of the Court, I adopt a general rule, and say, "[t]his is the basis of our decision," I not only constrain lower courts, I constrain myself as well."[40] Rules can do the same. "Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."[41] When parties to a contract know the legal ramifications of their actions ahead of time, they can adjust their actions accordingly.[42] In addition, certainty helps the government promote desired behavior and encourages individuals to act with the confidence that his or her actions will not be "subject to sporadic legal catastrophe."[43] In contrast, the uncertainty of standards causes "some citizens to unknowingly violate the law and…chill[s] some desirable behavior on the part of citizens who unknowingly overcomply with the law."[44] As it pertains to contracts, when rules are clear on enforceability or unenforceability, people gain confidence, which results in the development or shutting down of new markets.[45] Although the result that the rule creator wishes to occur is inconsequential to this argument, the most important point is that the parties can act with confidence in the decision of whether or not to pursue a contract.

In conjunction with certainty comes predictability, which promotes investment.[46] The greater the probability that the decision maker will respond as expected, the more the parties will invest in communicating their intentions to the decision maker.[47] Thus, "rules encourage transactions in general."[48] So long as private parties desire to engage in certain actions, the legal system should encourage investment

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[39] *Stare decisis* is "[t]he doctrine of precendent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 672 (3d pocket ed. 2006). This doctrine creates certainty because the court must render similar decisions in similar cases.

[40] Scalia, *supra* note 34, at 1179.

[41] Scalia, *supra* note 34, at 1179.

[42] Kennedy, *supra* note 11, at 1688–89.

[43] *Id.* at 1689.

[44] Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 46 (2000) (citation omitted).

[45] Carol Sanger, Developing Markets in Baby-Making: In the Matter of Baby M, 30 HARV. J. L. & GENDER 67, 80 (2007).

[46] Kennedy, *supra* note 11, at 1697.

[47] Id.

[48] *Id.* at 1698.

prior to the occurrence of the action.[49] One could argue that standards discourage transactions, so, if a legislature wanted to prohibit certain activity, it should adopt standards rather than rules and inject uncertainty into the market. This argument is flawed for two reasons. First, clear rules that prohibit the activity would better discourage transactions than unclear standards. Second, "transactions" and "investments," as used here, are not necessarily business deals, contract formation, or monetary investments. Transactions and investments can simply be information seeking activities. If a clear rule prohibits an activity and the party still wants to engage in that activity, the rule encourages the party to seek out other venues where that activity is not prohibited. A standard on the other hand might suggest it is acceptable to engage in the activity even though that was not the legislature's intent. Additionally, with standards there is little incentive to take precautions if the outcome will ultimately be left to the whim of the decision maker because standards "'chill' private activity by making its consequences less certain."[50] Also, there is less danger from not taking precautions because of the chance that the judge will correct the parties' mistakes.[51] When parties engage in contractual obligations, especially ones that have large monetary and emotional investments, encouraging caution is vital. Thus, "there are times when even a bad rule is better than no rule at all."[52]

As a result of inherent certainty, rules promote efficiency in the justice system.[53] When the parties know the likely outcome of litigation ahead of time, the parties are less apt to rely on litigation as a remedy.[54] If litigation is involved, rules work to keep the decision maker focused on the facts at hand and discourage timely and costly fact-finding missions.[55]

From a utility standpoint, "rules necessarily produce greater net social welfare gains than do standards."[56] Certainty allows the parties to plan accordingly and productively.[57] Conversely, standards create uncertainty that discourages productive planning.[58]

Finally, rules promote the democratic system and enforce the inherent separation of powers established by the Constitution.[59] The legislature is charged with enacting laws and, in doing so, it is required

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[49] *Id.*
[50] Kennedy, *supra* note 11, at 1698.
[51] *See Id.* at 1697.
[52] Scalia, *supra* note 34, at 1179.
[53] *See* Kennedy, *supra* note 11, at 1689.
[54] *Id.* at 1688–89.
[55] Sullivan, *supra* note 1, at 63.
[56] Sullivan, *supra* note 1, at 63.
[57] *Id.*
[58] *Id.*
[59] *See Id.* at 64–65.

to give guidance to those branches that will enforce or interpret the law.[60] When statutes are created that contain "rules of inadequate clarity or precision," those statutes are criticized as "undemocratic" and possibly "unconstitutional—because they leave too much to be decided by persons other than the people's representatives."[61] The same can be said of standards. If too much discretion is left in the hands of a judge, it allows for "legislating from the bench," which has been highly criticized as undemocratic.[62]

Rules are not without criticism. One criticism is that rules may force the decision maker to treat cases that are similar in terms of the background policy differently because a specific distinction the rule provides for exists.[63] The use of more generalized rules can reduce this occurrence.[64] Another criticism of rules is that in the real world, when real parties are involved, the only way rules work is if the parties actually know about, and respond to, the rules, which is not always the case.[65] The parties may be unable to learn about the rules because of the investment cost, or because they are unwilling to follow the rule because it is unenforced.[66] Yet another criticism is that rules are often so rigid the judiciary is unwilling to "bite the bullet" and enforce the rules.[67] Some judges are unwilling to accept the consequence the rule demands.[68] At that point, judges will often look for counter rules that nullify the rule in question, or simply recast the rule as a standard and balance the circumstances.[69]

While rules are not perfect, the benefit of fairness is seen as outweighing these limitations, and is often preferred to the potential for bias and arbitrary decisionmaking that accompanies standards.[70] In the adoption of rules, the creator of the legal directive favors "the judgment that the danger of unfairness from official arbitrariness or bias is greater than the danger of unfairness from the arbitrariness that flows from the grossness of rules."[71]

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60 82 C.J.S. *Statutes* § 10.
61 Scalia, *supra* note 34, at 1176.
62 *See Id.* at 1176–77.
63 Id.
64 *See generally* Scalia, *supra* note 24 (urging courts not to rely upon "overarching generalizations" in order to leave "considerable room for future judges" to make his or her own determination based upon the facts of the case).
65 Kennedy, *supra* note 11, at 1699 (citation omitted).
66 Kennedy, *supra* note 11, at 1698–99 (citation omitted).
67 *Id.* at 1701.
68 *Id.* at 1700–1701.
69 *Id.* at 1700.
70 Sullivan, *supra* note 1, at 62.
71 Id.

B. Standards

As the law has evolved there has been a tendency to replace standards with rules; however, this approach "exalts the letter of the law at the expense of its spirit."[72] Looking then to the spirit of the law, the same arguments that are made for the application of rules can be applied to standards as well—standards promote fairness, flexibility, utility, equality, accountability, and transparency.[73]

While rules create fairness by ignoring factual differences and treating everyone the same, standards create fairness by recognizing factual differences and treating substantively similar situations the same.[74] Standards are similar to the common law approach, which allows the law to grow "not through the pronouncement of general principles, but case-by-case, deliberately, incrementally, one-step-at-a-time."[75] This case-by-case approach limits over-and under-inclusiveness, which is one of the biggest advantages of standards.[76] As noted above, no rule is perfect and "every rule of law has a few corners that do not quite fit."[77] "[I]t is not possible to create a system of rules that covers every form of wrong or right."[78] Forcing decision makers to fit every situation into a rule inevitably results in cases where the underlying social policy and the individuals involved are "sacrificed on the altar of rules."[79] Standards solve this problem by looking to outside factors to find dissimilar cases alike.[80]

It can also be argued that standards maximize productivity better than rules.[81] The utility of a standard is in its flexibility.[82] Rigid rules become obsolete over time—if a rule defines something and that something changes, the rule loses its value.[83] As a result, it could be argued that the decision maker in such a case may be forced to take action that does not maximize productivity because he or she is bound by the outdated rule. Conversely, standards allow the decision maker to adapt to these changed circumstances to ensure that productivity is still maximized.[84]

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72 Ambrosio, *supra* note 28, at 15.
73 *See* Sullivan, *supra* note 1, at 62–64 (explaining the arguments that are made for the application of rules).
74 Adam H. Morse, *Rules, Standards, and Fractured Courts*, 35 OKLA. CITY U. L. REV. 559, 564 (2010).
75 Scalia, *supra* note 34, at 1177.
76 *See* Sullivan, *supra* note 1, at 59.
77 Scalia, *supra* note 34, at 1177.
78 Ambrosio, *supra* note 28, at 15.
79 Sullivan, *supra* note 1, at 66.
80 Id.
81 Id.
82 Id.
83 Morse, *supra* note 74, at 565 (citation omitted).
84 Sullivan, *supra* note 1, at 66.

In addition to becoming obsolete, the static nature of rules creates incentives for exploitation.[85] For example, crafty individuals who are educated in the rules may find ways to work around the rules at the expense of the uneducated. Standards give the decision maker the authority to step in on the side of the "fools" and protect them from "sharp dealers" who have the resources to exploit these brightline rules.[86]

This raises the argument regarding equal treatment. Standards may serve equality better by discouraging the kind of manipulation that goes on in trying to work around rules.[87] Individuals tend to interpret ambiguous information in ways that benefit himself or herself.[88] Hence, unsuspecting citizens may fall prey to those individuals who try to manipulate an ambiguous standard in his or her favor. However, the very nature of the standard allows a judge, not bound by a rigid rule, to redistribute the imbalance in favor of the unsuspecting citizen.[89] In this way, utility is again maximized.

Standards create accountability by affirming—rather than denying—responsibility.[90] The argument that rules allow a decision maker to lean on an established pillar for his or her decision also works against the rules.[91] Rules encourage the decision maker to abdicate responsibility, whereas standards force the decision maker to explain his or her decision.[92] Standards put the decisionmaking process out into the open for all to scrutinize, which makes the decision makers more accountable.[93] The decision maker is prevented from "passing the buck and claiming to be applying a neutral rule[.]"[94] This also decreases the chance for bias to be used by the decision makers in the reasoning process, which is a major criticism of standards.[95] If the decision maker knows his or her "predispositions [will be] subject…to the test of reason," he or she will be less likely to rely on such predispositions.[96] This accountability forces the decision maker to act carefully, judiciously, and rationally in the pursuit of justice.[97]

Just as rules have been argued to promote democracy, so too have standards. The establishment of legal directives is often a balancing

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85 See Id.
86 Sullivan, *supra* note 1, at 66.
87 *Id.* at 67.
88 Korobkin, *supra* note 44, at 46 (citation omitted).
89 Sullivan, *supra* note 1, at 66.
90 *Id.* at 69.
91 *See Id.* at 67.
92 *Id.*
93 *Id.* at 67–68.
94 Morse, *supra* note 74, at 566 (citation omitted).
95 *See* Sullivan, *supra* note 1, at 62.
96 Sullivan, *supra* note 1, at 68 (citing Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825–26 (1962)).
97 Ambrosio, *supra* note 28, at 16.

test of competing ideas, elements, and factors.[98] Just as politicians must consider the effect of legal directives on their constituents, standards force the decision maker to consider the common good.[99]

Standards promote the value of society better than rules. The flexibility of standards preserves the integrity of the law.[100] The integrity of the law depends on the ability of a judge to take into account the social policies of justice, fairness, and due process, and to ensure that a situation is decided fairly.[101] Rules separate law and morality, which hinders the judge's ability in this respect.[102] Standards, which take in a much broader picture of society and examine a greater number of factors, are better suited for promoting social values.[103]

Finally, standards are beneficial to the "losers" as well as the "winners" because of the transparency that must accompany a decision based on standards.[104] Accordingly, the explanation that accompanies a standard helps clarify why a case was decided the way that it was, more so than, "you didn't follow the rules." This transparency also promotes dialogue that can be crucial to advancing social issues. The decision in *In Re Baby M*, discussed below, was based on a public policy standard and it started a nationwide dialogue on surrogacy contracts that would last for years.[105]

The biggest criticism of standards is the potential for introducing legal error.[106] Things like paternalism, corruption, prejudice, bias, as well as personal education and experience are always lurking in the background.[107] However, for those in favor of standards, this danger is justified by the possibility of more substantively accurate decisionmaking.[108]

PART III: SURROGACY CONTRACTS

Surrogacy contracts govern the relationship created between two parties—a surrogate mother and a person who wants to have a child

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98 Sullivan, *supra* note 1, at 67–68.
99 *Id.* at 68.
100 Ambrosio, *supra* note 28, at 15 (citing DWORKIN, LAW'S EMPIRE 223 (Harvard Univ. Press 1986))..
101 *Id.*
102 Id.
103 *See* Sullivan, *supra* note 1, at 66.
104 *Id.* at 69.
105 *See infra* Part III.A.
106 Morse, *supra* note 74, at 564 (citation omitted).
107 *See generally* Arthur, L. Corbin, *The Interpretations of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965) (noting decisions are formed by and wholly based on the personal education and experience of the decision maker regardless of their attempts to focus on the issue at hand).
108 Morse, *supra* note 74, at 564 (citation omitted).

through surrogacy.[109] A surrogate mother is a woman who has agreed to conceive and carry the child of another person.[110] There are two major types of surrogacy—traditional and gestational surrogacy.[111] Traditional surrogacy:

> [R]efers to a contractual situation whereby a woman agrees to become impregnated, typically by artificial insemination (AI), using her own egg and the sperm of another man, usually the intended father of the baby. She agrees to carry the child to term and thereafter relinquish her parental rights to the child. Because the surrogate uses her own egg, she is considered the biological, genetic and gestational mother of the resulting child.[112]

Gestational surrogacy refers to a contractual situation whereby the arrangement with the intended father is the same as in traditional surrogacy; however, the egg is provided by the intended mother or by a third party.[113] No genetic link exists between the surrogate and the child, even though the surrogate is the child's birth mother.[114] This is also known as "host" surrogacy.[115] As in traditional surrogacy, the gestational surrogate also agrees to relinquish her parental rights to the child.[116] Because gestational surrogacy can provide a genetic connection to the child for both parents, it is desired over traditional surrogacy as well as over adoption.[117] Currently, an estimated ninety-five percent of all surrogacies are gestational surrogacies.[118]

There is no federal law in the United States that governs surrogacy; thus, regulation is accomplished at the state level, if it is addressed at all.[119] In 2000, the National Conference of Commissioners on Uniform State Laws approved an updated Uniform Parentage Act

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109 NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/p/index.php?title=Surrogacy&oldid=938980 (last visited Apr. 30, 2013).
110 *Id*.
111 *Id*.
112 Magdalina Gugucheva, *Surrogacy in America*, Council for Responsible Genetics, 6 (2010), http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf.
113 RESOLVE, THE NATIONAL INFERTILITY ASSOCIATION, http://www.resolve.org/family-building-options/surrogacy.html (last visited Apr. 30, 2013).
114 *Id.*
115 New World Encyclopedia, *supra* note 109.
116 Gugucheva, *supra* note 111, at 6.
117 *See* NEW WORLD ENCYCLOPEDIA, *supra* note 109.
118 Diane S. Hinson & Maureen McBrien, *Surrogacy Across America*, 34 Fam. Advoc. 32, 33 (2011).
119 *Id.* at 32.

("UPA"), which expressly addresses surrogacy contracts.[120] However, only nine states have adopted the provisions of the UPA.[121]

A. Baby M

Artificial Insmenination (AI) was available as far back as the 1950s.[122] However, it was not until the law regarding paternity caught up to the technology that it became widely utilized.[123] This trend continued as more couples began to look to AI as a way to have children even though the law was slow to acknowledge the changing landscape.[124] The increase in AI and the lack of regulation culminated in the seminal case of *Baby M* that was decided in 1988.[125]

In *Baby M*, Mary Beth Whitehead agreed to be a surrogate carrier for Mr. and Mrs. Stern.[126] The parties lived in New Jersey, which had no laws regarding surrogacy contracts at the time of the agreement.[127] Yet, a surrogacy contract was drafted and signed by the parties.[128] However, after the baby was born, Mrs. Whitehead changed her mind and decided to keep the baby.[129] She fled to Florida and hid out for three months before police forced her to return the child.[130] The case eventually landed in front of the New Jersey Supreme Court.[131] The court took strong issue with the fact that Mrs. Whitehead was paid for her services as a surrogate and equated the contract with commercial transactions, specifically "baby selling."[132] The court found that the contract disregarded the best interest of the child, exploited the surrogate, and, ultimately, held that the contract was void for public policy.[133] The court used a "best-interest-of-the-child" standard to award custody to the Sterns.[134]

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120 Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 5.
121 UNIFORM LAW COMM.: LEGISLATIVE FACT SHEET – PARENTAGE ACT, *available at* http://uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act (stating that Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, Wyoming have enacted the UPA; however, it is important to also note that Maine will be introducing the UPA in 2013) (last accessed Apr. 30, 2013).
122 Sanger, *supra* note 45, at 80.
123 Id.
124 Sanger, *supra* note 45, at 80.
125 Baby M, 537 A.2d 1227 (N.J. 1988).
126 *Id*. at 1235.
127 *Id*. at 1234–35.
128 *Id*. at 1235.
129 *Id*. at 1236–37.
130 *Id*. at 1237.
131 Baby M, 537 A.2d 1227, 1238 (N.J. 1988).
132 *Id*. at 1241–42.
133 *Id.* at 1240–42.
134 *Id*. at 1263–64.

B. *Moving Away from Baby M*

The New Jersey Supreme Courts framing of *Baby M* as an illegitimate commodification contrary to public policy had far-reaching effects on legal regulation.[135] At the start of the case in 1987, no state regulated surrogacy contracts.[136] However, in the years following the case, many states enacted laws prohibiting or severely restricting surrogacy agreements.[137] The biggest opponents lobbying against surrogacy were religious groups, child-welfare advocates, feminists and liberals.[138] The flourish of political activity that followed *Baby M*[139] was dominated by activists who were pushing the anti-surrogacy movement.[140] It was hoped that the movement would sweep the country; however, like most movements that follow high-profile cases, interest was hard to sustain and by the mid-1990s advocates had moved on to different issues and legislative activity ceased.[141]

As the political and social meaning of surrogacy contracts changed, the initial hostility to these transactions diminished.[142] New players have emerged in the world of surrogacy that have financial interests at stake, the traditional notions of family structure have changed, and advances in reproductive technology have contributed to the change.[143].

Studies have now been conducted that refute the New Jersey Supreme Court's fears that impoverished women would be exploited; for example, the transaction is now framed as "altruistic surrogates (contractually bound and compensated nonetheless) provid[ing] the 'gift of life' to deserving couples who otherwise would be unable to have children."[144] Surrogacy has become big business. An estimated ten

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135 Elizabeth S. Scott, Show Me the Money: Making Markets in Forbidden Exchange: Surrogacy and the Politics of Commodification, 72 LAW & CONTEMP. PROBS. 109, 110 (2009).

136 *Id.* at 117.

137 Scott, *supra* note 135, at 110 (citation omitted).

138 *Id.* at 118.

139 *Id.* at 117. It is important to note that before Baby M was even decided, twenty-seven states had introduced bills regarding surrogacy and by the time the case was over, six states had passed laws banning surrogacy contracts or declaring surrogacy contracts void. *Id.*

140 *Id.* at 120.

141 *Id.*

142 *Id.* at 110.

143 Angie Godwin McEwen, So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy, 32 VAND. J. TRANSNAT'L L. 271, 273 (1999).

144 Scott, *supra* note 135, at 110; *See also* CREATIVE FAMILY CONNECTIONS, https://www.creativefamilyconnections.com/surrogates.html (last visited Apr. 30, 2013) (advising potential surrogates that "[g]estational [s]urrogacy allows a woman, like yourself, to help [i]ntended [p]arents who could otherwise not have a family to fulfill that dream."); THE SURROGACY EXPERIENCE, http://www.thesurrogacyexperience.com/surrogates.cfm (last visited Apr. 30, 2013)

million women spend approximately three billion dollars every year in an attempt to have a child through means such as AI.[145] This has further contributed to the diminishing hostility towards the potential exploitation of impoverished women.[146]

One reason for the change has been the rise of gestational surrogacy, which has eliminated the surrogate's genealogical link to the baby.[147] Another big reason for the change in attitudes has been the shift in the groups advocating for surrogacy—feminist groups and civil libertarians who started such advocacy in the 1980s, and argued against surrogacyhave been replaced by attorneys and brokerswho have a greater financial stake, and parents' groups arguing for surrogacy today.[148] More importantly, the early legislative action aimed at punishment and prohibition has been replaced "by the pragmatic objective of providing certainty about parental status and protecting all participants, especially children."[149] This is not to suggest that opposition no longer exists. Social and religious conservatives still lobby against surrogacy and many states have been reluctant to change its initial opposition to surrogacy.[150] Consequently, the landscape of legal directives across the nation is "a smattering of statutes and case law to which there appears to be no rhyme or reason," if there are any legal directives at all.[151]

C. Current Legal Directives

The realm of surrogacy contracts is largely practiced at the family law court level.[152] This is understandable as the issues largely deal with traditional family law issues such as paternity, adoption, custody, and parental rights.[153] Because family law is almost exclusively governed by individual states, the law can vary greatly depending on the state in which the contract is drafted. A recent fifty-state summary of surrogacy law compiled for the American Bar Association showed that twenty-eight states and Washington D.C. have statutory regulation in

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(explaining that "[f]or many women, giving the gift of a child to another family can be a deeply rewarding experience.").

145 Gugucheva, *supra* note 112, at 26.

146 *See* Godwin McEwen, *supra* note 143, at 273.

147 Scott, *supra* note 100, at 121.

148 Id.

149 *Id.* (citation omitted).

150 *Id.* at 124 (citations omitted).

151 Hinson, *supra* note 118, at 32; *See also* Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 5, at 68 (explaining that a study in 2000 revealed that "eleven states allow gestational agreements by statute or case law; six states void such agreements by statute; eight states do not ban agreements per se, but statutorily ban compensation to the gestational mother; and two states judicially refuse to recognize such agreements.").

152 Hinson, *supra* note 118, at 32.

153 *See generally* Baby M, 537 A.2d 1227 (N.J. 1988) (addressing various family law issues in relation to the surrogacy contract).

place, or precedent case law, that touches on surrogacy contracts.[154] The other twenty-two states exist in a legal "vacuum" where no statute or published case exists regarding the interpretation of surrogacy contracts.[155] Studies show that surrogacy is on the rise. For example, in just four years, from 2004 to 2008, the number of children born to gestational surrogates grew eighty-nine percent.[156]

As more people turn to surrogacy as a viable childbearing option, lawmakers have begun to realize the potential harms that are posed by the lack of regulation.[157] The appropriate legal response is to create legal directives that clearly establish parental status.[158] As noted above, the National Conference of Commissioners on Uniform State Laws approved an updated UPA in 2000 to address technological changes that had occurred since its inception.[159] Thus, the law for determining the parents of children is modernized by the UPA. [160] Article 8 of the UPA deals specifically with gestational agreements, but makes the enactment of Article 8 *optional* for the states because of the various views on these agreements.[161] Further, the 2002revision recognized that parties would continue to enter into these contracts, which makes regulation essential.[162] Thus, the UPA offers two rule-based alternatives: either regulation through a judicial approval process, or finding that "nonvalidated gestational agreements are unenforceable (not void)[.]"[163] The judicial review process calls for the validation of surrogacy contracts by a court prior to their enforceability.[164] This process is similar to how an adoption is judicially approved,[165] and all parties to the contract must consent to the terms.[166] The UPA is a good example of a set of rules that have been created to address the surrogacy contract because it uses general language that allows it to encompass

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154 Hinson, *supra* note 118, at 34.
155 Id.
156 Gugucheva, *supra* note 112, at 3. The estimated number of children born through surrogacy during those four years is 5,238. *Id.* at 7.
157 Scott, *supra* note 135, at 123.
158 *Id.* (citation omitted).
159 UNIFORM LAW COMMISSION, PARENTAGE ACT SUMMARY, *available at* http://www.uniformlaws.org/ActSummary.aspx?title=Parentage Act (last visited Apr. 30, 2013).
160 UNIFORM LAW COMMISSION, PARENTAGE ACT SUMMARY, *available at* http://www.uniformlaws.org/Act.aspx?title=Parentage Act (last visited Apr. 30, 2012).
161 Uniform Law Commission, Parentage Act Summary, *supra* note 159 (emphasis added).
162 *Id*.
163 Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 5, at 69.
164 *Id.* at 72.
165 *Id.* at 73.
166 *Id.* at 72.

changing technology, and provides two different options for states—regulation or prohibition.[167]

In contrast, the state of California has taken a different approach to surrogacy contracts, allowing case law to give the legal directive in *Johnson v. Calvert*.[168] In this case, the California Supreme Court set up an "intent test" standard by which surrogacy contracts are judged.[169] At the time, California had a version of the UPA; however, it did not address surrogacy disputes.[170] In this case, the Calverts desired a child, but Ms. Calvert was unable to conceive naturally.[171] One of her eggs was fertilized by Mr. Calvert and implanted in the surrogate who eventually gave birth to a child.[172] In contrast to the New Jersey Supreme Court in *Baby M*, the California court first held that the agreement did not violate California's public policy.[173] Next, the court felt that both women "presented acceptable proof of maternity," thus, it looked to the "parties intentions as manifested in the surrogacy agreement."[174] The court concluded, "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[175] Accordingly, the child was given to the Calverts.[176] The dissent argued for the "best interest of the child" standard.[177] This was rejected by the majority because it was a more unstable analysis to use.[178]

The range of legal directives regarding surrogacy contracts falls somewhere in between the UPA and *Calvert*—some legislatures prohibit or regulate these contracts, some leave it up to the courts, and some doing nothing at all.[179] Whether future legal directives take the form of rules or standards will be up to these decision makers.

PART IV: WHY SURROGACY CONTRACTS MAY BE BETTER SUITED FOR RULE-BASED REGULATION

The decision to have a child is a highly personal and a highly emotional one. The days following the birth of a child should be cause

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167 *See* Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 5, at 69; UNIFORM LAW COMMISSION, PARENTAGE ACT SUMMARY, *supra* note 159.
168 851 P.2d 776 (Cal. 1993).
169 *Id.* at 782.
170 *Id.* at 778–79.
171 *Id.* at 778.
172 *Id.*
173 *Id.* at 785.
174 Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).
175 *Id.* (footnote omitted).
176 *Id.*
177 *Id.* at 782 n.10.
178 Id.
179 *See generally* Hinson, *supra* note 118 (describing the legal status of surrogacy contract throughout the United States).

for celebration, not litigation. However, the desire to have a child can lead parents to take legal risks they normally would not consider taking.[180] These risks include investing a large amount of money[181] and time,[182] and entering into agreements that may or may not be enforceable.[183] For the surrogate, there are considerable health risks involved with multiple pregnancies and fertility drugs, as well as the risk of not being compensated for their trouble—or goodwill.[184] One of the ways to reduce risk is to increase certainty, and rules have an advantage over standards in this respect. Uniform State Laws, like the UPA, bring clarity and stability to critical areas of state statutory law.[185] The UPA recognizes that surrogacy agreements are going to continue being used and that the legal parenthood of a child should not be in doubt.[186]

The UPA also provides uniformity to the states and "addresses the modern needs and concerns involved in parentage that have developed due to advances in science and developments in the law over the years."[187] It recognizes that the law continues to fall behind the fast-pace developments of medical science.[188] This is a situation that could normally be addressed with standards that allow for recognition of new technologies; however, the UPA addresses this situation by using general language in its rules, and, at the same time defining what is covered and

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[180] *Id.* at 32.

[181] Gugucheva, *supra* note 112, at 5 (highlighting that "costs to intended parents can range from $40,000 to $120,000).

[182] The pregnancy period alone is nine months, not counting the time invested beforehand to find an attorney, a clinic, a willing surrogate, negotiate and enter into the contract, as well as the time it takes for the surrogate to become pregnant. *See* Pet, Douglas, *Make Me a Baby As Fast As You Can*, SLATE.COM (Jan. 9, 2012, 7:15 AM), http://www.slate.com/articles/double_x/doublex/2012/01/reproductive_tourism_how_surrogacy_provider_planethospital_speeds_up_pregnancies_and_lowers_costs_.html (providing an eye-opening look at how one company has reduced the time a couple has to wait for a pregnancy; for example, in India, the company implants two surrogates at the same time to increase the chance one will become pregnant).

[183] *See generally* Hinson, *supra* note 118 (describing the legal status of surrogacy contract throughout the United States).

[184] Gugucheva, *supra* note 112, at 17–23.

[185] *See* UNIFORM LAWS COMMISSION, DIVERSITY OF THOUGHT, UNIFORMITY OF LAW, *available at* http://www.uniformlaws.org/Default.aspx (last visited Apr. 30, 2013).

[186] http://www.uniformlaws.org/ActSummary.aspx?title=Parentage Act

[187] UNIFORM LAW COMMISSION, WHY STATES SHOULD ADOPT UPA, *available at* http://www.uniformlaws.org/Narrative.aspx?title=Why States Should Adopt UPA (last accessed Apr. 30, 2013).

[188] *See Id.*

what is not covered, in order to give direction to decision makers.[189] Using this language, the UPA minimizes areas of uncertainty. Although states do not have to adopt the UPA, states should consider adopting the rule-based language used in the UPA because its generality provides for flexibility to address changing technology while at the same time giving direction for interpretation.

In addition to technological change, the notion of family itself is also changing.[190] Flexible standards may allow the decision maker to better acknowledge this change where static rules would be left behind. However, this argument fails to recognize that evolving concepts are limited by actual social values, which are reflected in the legal directives already in place.[191] Generally, categorical rules can be created to mirror society's larger values.[192] Within the boundaries of these categorical rules, social concepts like family are free to grow, shift, and evolve. If that concept goes beyond the established boundary, one can surmise it is outside societal values at that time and, therefore, not something that should be encouraged.

Further, where standards are reactive by responding to change, rules are proactive by anticipating change. The legislature, as the voice

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[189] *See* Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 5, at 3–4:

> (3) "Alleged father" means a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined. The term does not include:
>
> (A) a presumed father;
>
> (B) a man whose parental rights have been terminated or declared not to exist; or
>
> (C) a male donor.
>
> (4) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse. The term includes:
>
> (A) intrauterine insemination;
>
> (B) donation of eggs;
>
> (C) donation of embryos;
>
> (D) in-vitro fertilization and transfer of embryos; and
>
> (E) intracytoplasmic sperm injection.

[190] Angie Godwin McEwen, *supra* note 143, at 273.

[191] Scalia, *supra* note 24, at 1184.

[192] *See Id.*

of the people, is equipped with enormous resources to anticipate change and create rules that will not run the risk of obsolescence. The legislature has the ability to balance competing interests, provide open debate, and weigh all the factors before creating a new legal directive. As the notion of what a family is and, more importantly, how a family is created changes, rules can be promulgated through this process to anticipate and reflect the larger societal values, which in turn will direct the change.[193]

If clearly defined rules are in place, a couple seeking a child through surrogacy will also have a better understanding of what to expect from the legal system. If the state that the couple lives in allows surrogacy contracts and regulates these contracts using rules, the couple can enter into one with greater assurance that if they follow the rules they will have a child of their own.[194] If the state prohibits surrogacy, the couple can look to a legal forum with more favorable rules.[195]

Situations involving third parties should also involve rules. When only two parties are negotiating at arms-length, ambiguous standards may work because the parties have the ability to interact and understand one another. The inclusion of the third party, however, creates a situation where rules are needed so everyone is on the same page. As the number of parties grows, so does the need for rules. Surrogacy contracts usually involve more than just the two couples; it also includes attorneys, doctors, clinics, labs, and donors.[196] Rules help to define everyone's role in the process and to send clear messages as to what is expected. Also, rules that specifically punish third parties deter exploitation of the situation.[197] For example, an attorney who is subject to rule-based sanctions will be less likely to stretch the law when it contains a standard open to interpretation or creative contract making.[198]

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193 *See* Sanger, *supra* note 45, at 73–75 (providing a summary of changing notions of parenthood from the 1950s to today).

194 *See* Hinson, *supra* note 118, at 34 ("Illinois is as good as it gets. It is the single state that not only permits surrogacy, but also sets forth all the enabling rules of the game, too. If you play by these rules, you get the golden ticket: a declaration of legal parentage for the intended parents and a birth certificate listing the parents as the sole legal parents without court involvement.")

195 *See* Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 5, at 68.

196 *See* Baby M, 537 A.2d 1227 (N.J. 1988) (providing an example of the number of parties that can be involved in situations involving a surrogacy contract).

197 *See* Sullivan, *supra* note 1, at 66.

198 D.C. Code § 16-402(b) (1981) ("Any person or entity who or which is involved in, or induces, arranges, or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation, or other remuneration, or otherwise violates this section, shall be subject to a civil

Standards leave too much discretion in the hands of the decision maker. The parties involved in surrogacy contracts will inevitably become close to each other. Surrogacy contracts have been known to include provisions regulating everything from eating habits of the surrogate to when, and how often, she may have sex.[199] The nature of the transaction practically demands this closeness. It is unreasonable to think the parties would leave their fate to the decision of a third party who knows nothing of the time, money, and emotional investments made over nine months of pregnancy. In reality, the two parties would want to make the decision themselves by following the rules laid out in their chosen state.

Specific standards, such as balancing tests, the "intent test," and public policy, do not solve the uncertainty problem because "balancing tests inevitably become intertwined with the ideological predispositions of those doing the balancing[.]"[200] The balancing test in surrogacy contracts is often focused on the best interests of the child.[201] Forcing two parties to plead their positions in front of a judge in the hopes that the court will find the interests of the child are best served with them is completely unreasonable. Presumably, the parties involved both have stable homes, surrogates are usually mothers themselves and go through a screening process, and the other party has the money to provide for a child. Asking a judge to balance the competing interests leaves way too much discretion in judge's hands. This was the test used in *Baby M* and was rejected by the California Supreme Court in *Calvert*.[202]

The test adopted in *Calvert*—the "intent test" —is not much better.[203] The *Calvert* court looked to the contract to ascertain intent.[204] But even when the parties' intent is stated in the contract, it is very possible that intentions can change. It is the very reason litigation in these cases arises. There are normally two sets of couples involved in surrogacy cases, which means that there is a potential for four different intentions. In some cases, the surrogate's partner may not be as attached

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penalty not to exceed $10,000 or imprisonment for not more than 1 year, or both.").

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200 Sullivan, *supra* note 1, at 97.

201 *See* Baby M, 537 A.2d 1227, 1238, 1263–64 (N.J. 1988) (relying on the best interest of the child standard to determine custody of the child).

202 Baby M, 537 A.2d 1227, 1238, 1263–64 (N.J. 1988) (relying on the best interest of the child standard to determine custody of the child); *Johnson v. Calvert*, 851 P.2d 776, 782 n.10 (Cal. 1993) (rejecting the application of the best interest of the child standard in determining custody of the child).

203 Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

204 *Id.*

to the pregnancy and/or the child as the surrogate.[205] Without the bond that is created while carrying a child for nine months, the surrogates partner may balk if the surrogate changes her mind and wants to keep the child. Further, it is not just the surrogate whose intentions may change. The commissioning husband and wife may not enter the contract with equal enthusiasm.[206] There is also the problem of a child who is born handicapped or with some ailment that suddenly makes them less attractive to one or both sets of parents. Ascertaining true intent in the face of all these variables creates too much uncertainty.

Public policy rationale, like that used in *Baby M*, is also uncertain. In general, the legislature is the policy-making branch.[207] The courts are ill equipped to engage in public debate or hear the public input that is needed to make public policy decisions because they lack both the time and financial resources to needed to shape public policy. Because of *stare decisis*, when courts do engage in public debate, the judiciary's version of public policy is imposed on individuals who are not even parties to the lawsuit.[208] In contrast, when the legislature makes these decisions in the normal course of legislative sessions, the general public is put on notice. Seemingly, if two parties enter into a surrogacy contract, in their mind, the contract does not run counter to public policy. Again, if rules clearly prohibit this outcome, if the parties know to look for a different forum, and if the rules allow it, the rule should define what is acceptable and what is not acceptable. Judicial public policy determinations do not give this kind of direction and, thus, should be avoided.

CONCLUSION

Rules and standards as legal directives have advantages and disadvantages that will work best in different situations. In the context of surrogacy contracts, the biggest problem facing parties who wish to enter into these contracts is uncertainty. Rules hold more promise than standards in reducing uncertainty and, thus, are better suited for application to surrogacy contracts. Therefore, current and future legal

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[205] Sanger, *supra* note 45, at 76 n.43 (citing Anne Taylor Fleming, *Our Fascination with Baby M*, N.Y. TIMES, Mar. 29, 1987, § 6 (Magazine), at 33) (quoting a surrogate'ss boyfriend who stated that "[t]he baby means absolutely nothing…we're in it for the money[.]").

[206] Sanger, *supra* note 45, at 7 n.52 (citing *See Generally* GAY BECKER, THE ELUSIVE EMBRYO: HOW WOMEN AND MEN APPROACH NEW REPRODUCTIVE TECHNOLOGIES (2006))..

[207] 82 C.J.S. *Statutes* § 10.

[208] Peter, A. Bisbecos, *Regulation and the Role of the Courts: Drawing a Line in a Sandstorm*, 19 No. 24 ANDREWS TOBACCO INDUS. LITIG. REP. 12, 1 (2004) (citation omitted).

directives aimed at regulating this area of the law should take the form of rules.