

Surrogacy, 2.0

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Courtney G. Joslin, *(Not) Just Surrogacy*, __ **Cal. L. Rev.** __ (forthcoming, 2021), available at [SSRN](#).

Legal conflict over surrogacy has been with us in the U.S. for more than three decades. And yet the conversation in scholarly, legal, and policy debate remains largely centered on the question of whether to permit or prohibit the practice. In an important new article, *(Not) Just Surrogacy*, [Courtney Joslin](#) brings new and critical insights to the conversation about surrogacy—focusing on not *whether* to allow, but *how* to regulate. Joslin, one of the country’s leading legal experts on family formation through assisted reproduction, makes two especially significant contributions—one descriptive and the other normative.

Joslin catalogues how every U.S. jurisdiction regulates surrogacy. This includes whether the jurisdiction prohibits or permits surrogacy—and if it permits surrogacy, whether it includes both gestational surrogacy (in which the person serving as surrogate is not genetically connected to the child) and genetic surrogacy (in which the person serving as surrogate is genetically connected to the child). But Joslin goes well beyond these initial questions, supplying the first comprehensive review of surrogacy regulation across multiple dimensions from the perspective of both intended parents and individuals acting as surrogates.

In [my own work](#), as Joslin explains, I have focused on each state’s treatment of intended parents in gestational surrogacy arrangements—paying particular attention to whether states treat intended parents with a genetic connection to the child differently than intended parents without such a connection. Yet parentage constitutes only one of the axes on which Joslin examines intended parents. Throughout the article, and most comprehensively in Appendix B, Joslin charts what she terms “Intended Parent (IP) Protections” in each jurisdiction that allows surrogacy in some form. These protections include: whether individuals, without respect to marital status, gender, or sexual orientation, may form families through surrogacy arrangements; whether one or both of the intended parents must be genetically connected to the child; whether the intended parents can pursue surrogacy without showing that it is medically necessary to have a child; whether the intended parents can pursue surrogacy without undergoing a home study; whether the intended parents are treated as legal parents by operation of law; and whether the intended parents can secure a pre-birth order of parentage.

Joslin’s article explores not only the status of intended parents but also the status of individuals who serve as surrogates—an area that has received scant scholarly attention. In Appendix C, Joslin documents what she calls “Persons Acting as Surrogate (PAS) Protections” that might exist at various points in the arrangement. These include: whether the person acting as surrogate must be represented by independent counsel; whether the intended parents must pay for counsel for the person acting as surrogate; whether the person acting as surrogate retains the right to control her own behavior leading up to and during the pregnancy, for example, decisions about diet and exercise; whether the person acting as surrogate retains decision-making authority with respect to the pregnancy, including decisions regarding selective reduction of embryos and termination; whether the person acting as surrogate gets to select the doctor of her choice; and whether the intended parents are required to take custody of the child, such that the person acting as surrogate is not treated as a legal parent with responsibility over the child.

Joslin's descriptive work constitutes a major contribution. It will be invaluable to lawyers, legislators, and advocates working in the field. And it should inform scholarly work going forward.

Joslin's exhaustive research on existing surrogacy regimes also allows her to uncover important normative stakes. The normative debate on surrogacy has largely been framed around the decision to allow or prohibit the practice—whether it promotes or undermines equality and freedom. Joslin shows that how surrogacy is in fact regulated—once it is allowed—raises equally important questions of equality and freedom. Joslin rightly treats surrogacy as a practice that implicates the interests of multiple parties and urges us to attend to the particulars of how each party is treated. A surrogacy regime, Joslin shows, can be more or less equality- and autonomy-promoting, and that depends on how it regulates the status of the intended parents as well as the interests of the individuals who serve as surrogates.

In my own work, I have focused on surrogacy because the practice has the capacity to unsettle conventional norms governing family formation and parenthood, depending on how it is regulated. In particular, whether individuals are recognized as legal parents, regardless of their genetic connection to the child, relates to whether surrogacy disturbs, or instead reflects and perpetuates, traditional understandings of the family. If the state refuses to treat a woman who relies on both a gestational surrogate and an egg donor as a legal parent, what does that say about motherhood? If the state refuses to treat a nonbiological father in a same-sex couple who has a child through surrogacy as a legal parent, what does that say about fatherhood? Legal systems that allow surrogacy but limit the recognition of intended parents in this way may reproduce views of the family that see motherhood as a biological fact and fatherhood as a secondary, derivative status.

Joslin shows how many forms of regulation—not simply parental recognition—may destabilize or entrench traditional views of family and parenthood. States can promote equality and autonomy by allowing access to surrogacy arrangements regardless of marital status, gender, sexual orientation, or genetic connection. On the other hand, states can perpetuate views that intended parents are not *real* parents by requiring that they undergo home studies before using assisted reproduction to have children or by failing to treat them as parents by operation of law (and instead requiring adoption).

Joslin's treatment attends to the normative stakes not only in the state's treatment of intended parents but also in the state's treatment of the person acting as surrogate. The question of the interests of those serving as surrogates has, in conventional debate, been framed around two pivotal moments: the decision to serve as a surrogate and the decision to surrender the child. Opponents of surrogacy argue that women do not (or cannot) meaningfully consent to act as surrogates and that women should not be made to surrender the child if they change their mind. Proponents of allowing surrogacy criticize these arguments as paternalistic and worry that they trade on stereotypes that fuel arguments to restrict women's reproductive rights more generally. What this debate misses is the way that regulation of the practice itself has significant consequences for understandings of women's agency and reproductive autonomy.

Critically, Joslin shows how the treatment of intended parents and the treatment of persons serving as surrogates are intrinsically connected. If the intended parent can make a decision about the pregnancy—for instance, requiring multiple embryo transfer or delivery by caesarean section—then the rights of the person acting as surrogate are diminished. The grant of authority to the intended parents undermines the autonomy and equality of those who serve as surrogates. As Joslin shows, the stakes bleed well outside the bounds of surrogacy arrangements. Instead, regulations concerning the rights of the person acting as surrogate have consequences for the rights of pregnant women more generally.

The specifics of surrogacy regulation have largely escaped notice. Beyond those of us drafting

legislation of this kind, scholars and activists have paid scant attention to the concrete details of surrogacy legislation, instead continuing to focus on the question of whether to allow or prohibit the practice. Joslin's article should be a wake-up call: The regulation of reproduction is happening in legislation on surrogacy, and it matters to broader debates on autonomy and equality.

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