The Legalization of Emotion:
Risk, Gender, and the Management of Feeling in Contracts for Surrogate Labor
by
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Abstract

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This dissertation combines in-depth, semi-structured interviews and content analyses of surrogacy contracts to address the interface of law and emotions. It unpacks the legal interests, risks, and social relationships that are situated at the nexus between a surrogate’s womb and the hopes of intended parents negotiated within an unsettled and ambiguous reproductive field. Whereas economic and liberal legal models depict contracting as asocial, non-emotive, and gender neutral, I argue that contracts—especially in the context of surrogacy—are social artifacts both shaped by and designed to manage emotions, as well as gender, work, and parenting roles. Specifically, I examine how emotions, identity, and relationships are managed in surrogacy, and the rationale for doing so. I explain why and how attorneys who specialize in surrogacy, with the help of matching agencies and mental health counselors, anticipate and tactically channel a variety of emotions in surrogates and intended parents before, during and after the baby is born. I establish that “feeling rules” formalized in the contract, along with informal strategies like triage, are intended to minimize attachment, conflicts, and risk amidst a highly unsettled reproductive field, made up of lawyers, organizations, and mental health professionals. These rules and strategies are diffused and institutionalized in the reproductive field, and more broadly in society. I demonstrate how contracting practices make surrogacy a site where beliefs about gender, motherhood, and work constitute, and are constituted by, the content and meaning of law. While this dissertation explores the case of surrogacy, my institutional theory on the legalization of emotions could be transposable to other exchange relationships.
Dedication

To Helen, Barbara, and Debbie, three quintessential models of motherhood, and all surrogates who mother for others...
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Chapter 1:
Managing the ‘Nexus’ in an Unsettled Legal Terrain

Is a surrogate mother really “just the oven,” a “gestational hostess” \(^1\) free from emotional attachments, delight, or resentment, even when she is motivated to assist a desperate, infertile couple willing to pay for her trouble? (Hatzis 2003) Are surrogacy contracts simply dispassionate market transactions for “services rendered,” as framed by judicial precedents, economic and liberal legal theory (Johnson v. Calvert CA 1993; Buzzanca v. Buzzanca CA 1998; Culliton v. Beth Israel MA 2001; Coleman 1986; Farnsworth 1982; Friedman 1965; Posner 1999, 2009; Williamson 1985)? Perspectives like these fallaciously depict contracting as asocial, gender neutral, and non-emotive. Yet consider the following observation from a Minnesota lawyer about the kinds of terms clients ask him to include when drafting a surrogacy contract:

Totally varies on the intended parent, and it varies on the ability of the intended parent to create a trust relationship with the carrier \(^2\). These are women who’ve had their own pregnancies that ostensibly are responsible and know how to healthily deliver a child because they did it for their kids. The presumption is they’ll do the same thing here. The worry of the parents is that they won’t. It depends on how easygoing or obsessive-compulsive the parents are.

I’ve had parents who sent groceries on a weekly basis to their carriers to make sure they were eating healthily. I’ve had parents that just never asked a question about what the surrogate was doing. So it runs the gamut from total obsession to total laissez-faire, and it’s strictly a personality issue.

But it’s a very tricky thing. You have a pregnancy that is the surrogate’s body and her pregnancy and the parents’ child and that child’s pregnancy, and they coexist at this nexus point of the surrogate’s womb, and both parties have an interest in what’s going on in there. And the parents really have no meaningful control other than contractually, which is questionably enforceable. You can make it a breach of the contract, but that isn’t going to be manifested unless there’s a problem with the child that can be related back as a direct cause to something the surrogate did or didn’t do that was in violation of the contract. And those are pretty rare cases, but they do exist… There’s a central fear – what happens if she doesn’t give the baby to me? It’s the first question all parents ask; it’s the main question that their fears circulate around and, from that, cascade down all of these others – the “Well, even if she gives me the baby, what if she drinks, what if she smokes, what if she takes drugs, what if she doesn’t eat healthily? How can I control this?” And the answer is, you can’t.

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\(^1\) Based upon the content analysis of contracts conducted for this dissertation, gestational hostess is one of several terms now used in commercial surrogacy agreements to identify the party who will carry and deliver a baby for an individual or couple that compensates her to do so, referred to as the intended parents. The phrase “just the oven” is informally used by lawyers, surrogates, intended parents, and agency representatives that coordinate their match to describe the surrogate’s role, according to interview data analyzed for this dissertation.

\(^2\) Carrier is another term used in surrogacy contracts to identify the birth mother.
You can contract about it, but nobody places a sentry at her refrigerator or her door or her place of work to monitor her behavior. You can test her for nicotine consumption; you can test her for alcohol; you can test her randomly for drugs, and you can set up a testing system every two, three, six weeks during the pregnancy if you really want. But if you’re doing that, you haven’t got the right carrier, and you don’t have the right trust relationship.

But if you need that reassurance, there is a surrogate out there that will gladly acquiesce to that. It’s just a matter of matching with the right person who’s willing to accommodate your intrusiveness and your insecurity. So can I test her to see if she’s eating Twinkies instead of broccoli? There is no test for that. And am I going to go spot myself in her kitchen and videotape that with a nanny cam? No, I’m not. (Wesley, Lawyer MN)

Wesley’s perspective as a surrogacy lawyer working in relatively new field not only captures a variety of complex dynamics explored in this dissertation, such as control over the body, cultivating trust, and expectations of privacy, but also illustrates its central argument: why and how professionals manage an exchange relationship riddled with legal uncertainty, physical risk, and emotional insecurity, among a host of other feelings experienced by clients.

Specifically, Wesley’s excerpt demonstrates how lawyers juggle several significant concerns when undertaking a task generally perceived to be a day-to-day basic business transaction: drafting a service contract. First, the “central fear” that “all parents” manage is the lynchpin of surrogacy contracting: whether or not they will become the legal parents of a child they have paid a woman to gestate. Second, even if the surrogate relinquishes custody of the baby, anxious parents seek to “control” and “monitor her behavior.” At the core of this dynamic is trust: despite having carried her own pregnancies, and presumably knows “how to healthily deliver a child,” his clients require reassurance that the surrogate will make the kinds of choices they would make if they were carrying. But they are not.

Uniquely implicated in contracts for gestational labor is a woman’s right to control her own body and lifestyle choices during a pregnancy. How does being contractually obligated to do so, when paid consideration, alter that norm? Wesley constructs the ideal surrogate as a woman who is both “willing to accommodate” considerable “intrusiveness” on her privacy and habits, as well as the “insecurity” of the intend parents with whom she is matched. In fact, he anticipates that the process will go much smoother if his clients are allowed to assert some degree of control over her lifestyle. While he might not use a “nanny cam” or place a “sentry at the refrigerator,” Wesley can manage his parents’ demands for control and vulnerability by creating formal contract rules that police the weekly grocery list, wine during happy hour, and the consumption of Twinkies instead of broccoli. According to Wesley, “parents have no meaningful control, other than contractually.”

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3 In order to protect the participant’s identity and confidentiality, I created and assigned a pseudonym to each interview subject. I will only use their pseudonym, state of residence or business, and status as a lawyer, agency representative, surrogate, intended parent, or counselor to identify participants throughout this dissertation.
Finally, but perhaps most critically, Wesley practices law in Minnesota, a jurisdiction that has no statutory or case law governing the legality of surrogacy contracting (Hinson and McBrien 2011). However, like all contract lawyers, Wesley has to meet the needs of his client by memorializing a legally binding and enforceable accord. In this case, anxious parents retain him for the purpose of forming a family through third-party assisted reproduction, a relatively novel medical and legal procedure. How does he tactically handle this uncertainty for clientele who “run the gamut from total obsession to total laissez-faire” when situated at the “nexus point of the surrogate’s womb”?

This dissertation uses semi-structured, in-depth interviews and qualitative content analyses of surrogacy contracts to address the interface of law and emotions. It unpacks the legal interests, risks, and social relationships that are situated at the gendered nexus between a surrogate’s womb and the hopes of intended parents negotiated within an unsettled and ambiguous reproductive field. Whereas economic and liberal legal models depict contracting as asocial, non-emotive, and gender neutral, I argue that contracts – especially in the context of surrogacy – are social artifacts both shaped by and designed to manage emotions and conceptions of gender, work, and parenting roles. Specifically, I examine how emotions, identity and relationships are managed in surrogacy, and the rationale for doing so. I explain why and how attorneys who specialize in surrogacy, with the help of matching agencies and mental health counselors, anticipate and tactically channel a variety of emotions in surrogates and intended parents before, during and after the baby is born. I establish that “feeling rules” formalized in the contract along with informal strategies are intended to minimize attachment, conflicts, and risk amidst a highly unsettled reproductive field, made up of lawyers, organizations, and mental health professionals. These rules and strategies are diffused and institutionalized in the reproductive field, and more broadly in society. I demonstrate how contracting practices make surrogacy a site where beliefs about gender, motherhood, and work constitute, and are constituted by, the content and meaning of law. While this dissertation explores the case of surrogacy, my institutional theory on the legalization of emotions could be transposable to other exchange relationships.

The process of surrogacy contracting offers a unique opportunity to understand how law operates to manage feelings for a variety of reasons. Scientific and medical advancements like in vitro fertilization, the cryopreservation of embryos, and success in gestational surrogacy spurred private bargaining and use of technologies in the absence of federal regulation (Crockin and Jones 2010; Kindregan and McBrien 2012). Ethical debates on the commercialization of life through gamete sales and contract pregnancy persist, but have not halted the boom in the family formation market (Goldberg 2009; Goodwin 2010). A sharp rise in demand is fueled by increases in both biological and social infertility, as well as trends in gay parenting (Id.). Within the United States, jurisdictions are still divided and undecided on the legality of paid surrogacy, which continues to be prohibited in several states and most countries around the globe (Id.).

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4 Mark Suchman encourages socio-legal research that takes an “artifactualist” approach to the study of contracts (2003).

Some states maintain that where decriminalized, surrogate labor is a dispassionate contract for “services rendered,” not the selling of children which constitutes a violation of international law (Johnson v. Calvert CA 1993; Culliton v. Beth Israel MA 2001; Crockin and Jones 2010; Kindregan and McBrien 2011). Elsewhere, commercial surrogacy is banned and void for public policy against “baby bartering” and the detached “manufacture” of children (In Re the Matter of Baby M NJ 1988; Goodwin 2010; Markens 2007). Various states treat surrogacy as an invalid attempt to circumvent state adoption laws, which provide a grace period for a remorseful birth mother to rescind termination of her rights. Baby M and its progeny provide a strong, formal declaration that emotions are legally relevant in contracts (Id.).

Recognizing the increasing and illicit use of reproductive technology, California led the opposing pack, which gives judicial deference to the “intended parent” based on the “service contract” terms, despite gestation by the surrogate that establishes her as a “natural” or “birth mother” under the Uniform Parentage Act (Calvert 1993; Kindregan and McBrien 2011; Shultz 2006). Calvert held that when the natural mother does not coincide in one woman, it is the intended parent who wins. This holds regardless of genetic connection or feelings like remorse in the surrogate (Id.; In Re Marriage of Buzzanca CA 1994; Perry-Rogers v. Fasano NY 2000). There is vast diversity among state laws on surrogacy, including total bans, disavowal of compensation, statutes that regulate the practice, and especially, absence of any law. Surrogacy remains largely unregulated and falls outside the protection of federal adoption statutes.

Given the legally ambiguous and divided landscape, surrogacy contracting has become multijurisdictional. A lawyer might be hired who lives and is licensed in California by gay intended parents who live in Arizona where commercial surrogacy is criminal, whose Wisconsin matching agency found them a surrogate who lives in Arkansas. However, legal prohibitions on commercial surrogacy contracts have not prevented parents from seeking a woman they can pay to carry a child. Also, the Internet has also made it easy to find gamete donors and surrogates for hire, despite locale or legal restrictions. Parties, lawyers, and matching agencies may, or may not, ever meet in person. Further, a growing number of international intended parents – who live in Europe, Asia, Australia, South America, or the Middle East where the practice is illegal – hire lawyers to help them create families from “surrogacy friendly” jurisdictions in the United States. This dissertation addresses the broader social consequences of these practices in the absence of guided and informed policy.

I have not only undertaken to chart a currently unmapped socio-legal terrain, I also contribute an institutional theory of law and emotions that could be applicable to other exchange relationships, and extend several literatures not generally considered together. Although feelings are present in all exchange relationships to varying degrees, liberal legal theory continues to ignore the social dimensions of contracting, clinging instead to myths of neutrality, rationality, and objectivity as critiqued by Feminist scholars (Abrams 2005; Chamallas 2003; Coleman 1986; Friedman 1965; Pateman 1988; Roberts 1995, 2011; Williamson 1985). However, contracts provide a tangible index of social practice and serve symbolic functions (Suchman 2003). While a body of literature on the sociology of work continues to examine Arlie Hochschild’s theory of emotion management in a variety of contexts, none address the role of law, nor the unique form of “deskilling” constituted through surrogacy (1979, 1983; see Barbalet
The womb arguably becomes the “shop floor,” caught between capitalism, economic necessity, and often a sincere opportunity to offer couples the chance to bear their own genetic or “intended” offspring when they are unable to physically do so.

Conversely, while foundational literature in the field of law and society does embrace the relational dimensions of bargaining “in action,” it fails to consider two quintessential aspects of social life: gender and emotions (Bernstein 1992; Blau 1968; Eigen 2012; Ellickson 1994; Esser 1996; Granovetter 1985; Macaulay 1963, 1999, 2003; Macneil 1974; Suchman 2003). Further, socio-legal scholarship on exchange relations downplays the significance of formality, instead contending that established “non-contractual” ongoing business relations, reputational bonds, and workaday norms both motivate compliance to performance and informal dispute resolution (Bernstein 1992; Ellickson 1994; Macaulay 1963). But what about contracting in a highly disparate, unsettled, legally ambiguous field in a context that does not contemplate ongoing business relationships, and in fact, typically prohibits them?

The data and theory explored in the following chapters are presented in an order that mirrors the sequential process of events in surrogacy contracting, beginning with a decision to use a surrogate through a matching agency or law firm, to final performance of the contract. Emotion management occurs at every stage of the process – even before intended parents select the surrogate with whom they hope to form a unique, intimate, and legally binding relationship.

Chapter 2 provides the theory and context that drives this dissertation, including a review of the literatures that support it. It weaves together scholarship from law and society on exchange relationships, disputing, institutional theory, law and emotions, feminist theory, and the sociology of work. Each of these is united through a framework Mark Suchman proposed for the study of contracts called the “artifactualist approach” (2003). Using that approach, Chapter 3 details the two methods employed for this dissertation: (1) content analysis of 30 surrogacy contracts sampled from eleven jurisdictions; and (2) qualitative analysis of 115 in-depth, semi-structured interviews conducted in twenty states across the United States of lawyers who specialize in reproductive technology law, agencies that match surrogates with intended parents, counselors, and the parties themselves.

Chapters 4-6 report the findings of my research. Chapter 4 uses interview data of matching agency representatives and other interview subjects to explore a tactic I call anticipatory emotion management during the process whereby professionals help intended parents match with surrogates. Technically, the only criterion for a surrogate mother is a healthy uterus. Yet matching programs, lawyers and counselors involved in screening potential surrogates and intended parents all tend to embrace a much more complex set of criteria, many of which are centered around their “emotional fitness.” I show how emotional fitness criteria have become institutionalized as critical to the matching phase of surrogacy contracting. I argue that the rationale for emotional fitness criteria is largely legal risk management, that is, efforts to reduce the likelihood of litigation by anticipating cooperation and detachment. Both potential surrogates and intended parents are screened for emotional fitness, which has given counselors
and psychologists a prominent role in the matching process. Psychologists help to institutionalize the criteria for emotional fitness across various matching agencies and settings as professionals imbued with a particular perspective who work in legal environments.

In Chapter 5, I present findings from a content analysis of surrogacy contracts to show how the concept of “emotional fitness” developed in the surrogacy field crystallizes in surrogacy contracts. I explain how lawyers attempt to manage and control emotions, as well as the identities and relationships of parties to these contracts through a series of formalized rules. It attends to the third dynamic of Suchman’s artifactualist approach to the study of exchange relationships: examining contracts from “individual transactions” (2003).

Chapter 6 presents results from my interview data to explain why and how attorneys who specialize in surrogacy, with the help of matching agencies and counselors, anticipate and tactically manage a variety of emotions in their clients throughout the pregnancy to minimize attachment, conflicts, and risk amidst the highly unsettled reproductive law field. I show that informal practices deployed by lawyers, along with the formal contract provisions identified in Chapter 5, help to contain, shape, cultivate, and handle particular emotions in order to balance the needs of the surrogate against the anxieties, joys, and demands of the intended parents. The lynchpin of surrogacy is the management of attachment from initial contact at the matching phase through completion of the transaction at birth. I demonstrate this is accomplished by the management of expectations, and intentions for parentage, which are channeled through feeling rules in contracts that are utilized by lawyers, agencies and therapists who work in their service, whether or not they are actually enforceable. Actors in the reproductive field – lawyers, matching agencies, and counselors – interact, resist, and together constitute the practice of surrogacy contracting.

Finally, Chapter 7 provides the empirical, theoretical, and policy contributions of this dissertation. It presents my conclusions of how rules in the contract combined with informal strategies by actors in the reproductive law field seek to manage the feelings of parties to surrogacy agreements as a means for managing risk given an ambiguous, multijurisdictional, disparate terrain, and how they simultaneously constitute and institutionalize social norms about gender, work and family. The legalization of emotions presented in the case of surrogacy could be generalizable to other exchange relationships.
In judicial precedent, economic and liberal legal theory, surrogacy contracts are framed as dispassionate transactions for “services rendered” under a free market model (Johnson v. Calvert CA 1993; Buzzanca v. Buzzanca CA 1998; Culliton v. Beth Israel MA 2001; Coleman 1986; Farnsworth 1982; Friedman 1965; Posner 1999, 2009; Williamson 1985). In popular media and casual conversation, surrogate mothers are “just the oven,” a detached “carrier,” or even a “rent-a-womb” (Hatzis 2003; Goodwin 2010; Contract MA; Agency WI; Surrogate TX/CA). Though now taken for granted, perspectives like these fallaciously depict contracting as asocial, gender neutral, and non-emotive. Absent is any meaningful theory of law and emotions that could provide insight into the social dynamics of exchange relationships, how their rules are constituted, and their broader institutional consequences. Yet contracts provide a tangible index of social practice and serve symbolic functions (Macaulay 1963; Suchman 2003). How and why do reproductive lawyers, with the help of matching agencies and mental health counselors, anticipate and manage the complex range of emotions surrogates and intended parents experience during the contracting process, and after the baby is born?

Following a review of scholarship from the fields of law and society, law and emotions, and the sociology of work, I propose a theory explaining how and why emotions, identity, and relationships are managed in contracting, using surrogacy as a site for study. Additionally, I
present an model explaining how individual legal practices in surrogacy contracting intersect with actors in the reproductive field to constitute, on the institutional level, the meaning of motherhood, the value of women’s labor, and family. While all exchange relations are affective in varying degrees, surrogacy provides an ideal case since maternity is enshrined in law as not only gendered, but also fraught with emotion (In Re The Matter of Baby M, NJ 1988; Gonzales v. Carhart U.S. 2007; Planned Parenthood v. Casey U.S. 1992). Surrogacy is also cast as a business contract for “services” under a free market model (Johnson v. Calvert 1993; Buzzanca v. Buzzanca CA 1998; Culliton v. Beth Israel MA 2001; Kindregan and McBrien 2011).

Also, scientific and medical advancements like cryopreservation of embryos and success in gestational surrogacy spurred private bargaining and use of technologies in the absence of federal regulation (Crockin and Jones 2010; Goodwin 2010; Kindregan and McBrien 2012). Ethical debates on the commercialization of life through gamete sales and contract pregnancy persist, but have not halted the boom in the family formation market (Goldberg 2009; Goodwin 2010). Within the United States, jurisdictions are still divided and undecided on the legality of paid surrogacy, which continues to be prohibited in several states and most countries around the globe (Id.; Markens 2007). Given the conflicted legal landscape, surrogacy practice has become multijurisdictional. Professionals in the reproductive field and parties to surrogacy agreements must cope with significant legal ambiguity and discord (Edelman 1992).

2-A. Review of the Literature and Existing Theories

This dissertation builds upon and contributes to several diverse literatures. It draws directly on a long tradition in the field of law and society of examining contracts as exchange relations but significantly extends that literature using insights from the scholarship on gender, reproduction, and work. Similarly, it advances scholarship in the field of law and emotions bringing institutional perspectives from law and society to bear on that work, including empirical studies on disputing and conflict. This dissertation also gets traction on the relationship between “emotion management” and law, as yet unexplored in the sociology of work (Hochschild 1979; 1983). This section reviews and analyzes each of these literatures and their respective intellectual contributions in relation to the theory and goals of my research.

2-A1. Rethinking Exchange Relations

This dissertation aims to systematically understand contract formation and performance beyond the traditional “law on the books” doctrinal view. The contracts-as-doctrine approach deals with the rules and ideology of contract as developed through the Restatement and case precedents (Farnsworth 1982). The traditional law of contract shares a philosophy with legal liberalism, coextensive with the “free market,” where parties are treated as individual economic units which “in theory, enjoy complete mobility and freedom of decision” (Friedman 1965). Economic legal models perceive individuals as autonomous, “rational actors” able to know their own preferences. Rational actors are “wealth maximizers” who dispassionately assess transaction costs and seek their self-interest (Williamson 1985).
The marketplace is historically a special “sphere” of transactions considered distinct from the domestic and private (Blumenthal 2006; Chamallas 2003). Liberal legal theory holds onto myths of rationality, objectivity, neutrality, and especially, that emotion is expressly distinct from the process of legal “reasoning” (Abrams 2005; Abrams and Keren 2010). Law is “conventionally regarded as a bastion of reason conceived of as the antithesis of emotion, as operating to rein in the emotionality of the behavior that gives rise to legal disputes” (Posner 1999, 309). A model of individual, rational market action keeps social hierarchies invisible, marginalized and perpetuated (Lively 2008; MacKinnon 1988; Pateman and Mills 2007; Roberts 1997). Further, individualism and privatization are mutually reinforcing elements that characterize the neoliberal paradigm, a set of practices that are simultaneously institutional and mental (Voss and Fantasia 2004).

Instead, this dissertation builds upon a hearty literature in law and society that goes beyond neoliberal doctrine to examine how parties derive, understand, and enforce the terms of their agreements. The contract-as-relation model, spearheaded by Stewart Macaulay, emphasizes that social, community, and business norms coupled with formal law help structure commercial dealings (Bernstein 1992; Blau 1968; Ellickson 1994; Esser 1996; Granovetter 1985; Macaulay 1963, 1979, 1999, 2003; Macneil 1974; Suchman 2003). Macaulay revealed that businessmen often preferred informal agreements to formal contracts, and rarely invoked formal remedies when disputes arose or there was a breach (1963). His work continues to encourage a study of contracts from the “bottom up” that gives maximum expression to relational business norms and values, attentive to power differentials in bargaining (2000; 2003; 2005).

Scholarship embracing a socio-legal view of “actual exchange relations that real people form to the actual contracts that real people write” has proliferated in the field (Suchman 2003). In another law-in- action study, ranchers often ignored formal legal rules choosing instead to use “workaday norms” to settle disagreements which ensure more efficient outcomes (Ellickson 1994). Similarly, the diamond trade creates an elaborate system of private rules and regulations of transactions in the shadow of legally enforceable contracts that rely upon the production of strong reputational bonds for function and efficiency (Bernstein 1992). Recent studies of contracts show the field continues to thrive (Ayres and Klass 2005; Eigen 2008; Plaut and Bartlett 2011), but do not respond to the empirical question, “Are contract terms associated with contractor characteristics, or contract settings?” (Eigen 2012) I examine both, while questioning whether “workaday norms” and “reputational bonds” are the primary drivers in other contracting contexts, particularly those in which law, relationships, and norms are yet undeveloped.

My analysis of the terms and exchanges between parties to surrogacy in the context of deeply embedded relationships and institutions fits well into Macaulay’s socio-legal framework, while rethinking it in significant ways. While Macaulay’s subjects spent little time planning prior to entering contracts, he opined that more planning might occur when gains of detailed contract terms outweigh the costs, where there is likelihood significant problems will arise of agreed performance over time. Surrogacy contracts are carefully planned because the potential sanction makes formality an advantage; by definition contracts are intended to ensure predictability and security. What happens to “non-contractual relations” in business when, as in surrogacy contracting, unsettled and conflicting laws make it a much more risky and less predictable
enterprise, when social norms and established “business” relationships have yet to institutionalize, and when ongoing business relationships are absent, the factor which motivates parties not to “welsh on a deal” and get “blacklisted” (Id. 14)? How does the case of surrogacy problematize now taken-for-granted socio-legal assumptions about contracting behavior?

More importantly, the impressive body of work on exchange relations fails to address the role of either emotions or gender in how parties deal with the formation, handling, or performance of the agreement. This dissertation tackles both emotion management of parties to legal agreements and questions how contracting influences gender norms. It orients towards the model of contracts as exchange relations that have extra-legal dynamics, where actors deploy contracts as a technical means of structuring their relations, as symbolic representations, and as cultural displays that inhere particular normative principles and social experiences (Suchman 2003, 100). I accept Mark Suchman’s invitation to enhance both observations of exchange relations and doctrinal interpretations of law by examining contracts using an “artifactualist” approach (Id., 92) While “contracts often emerge from the labors of specific artisans,” Suchman acknowledges that “like most artifacts, contracts necessarily bear the markings of broader social contexts” (Suchman 2003, 92). This dissertation thus studies the parties who use contracts, the “artisans” who produce them for individual transactions, and their extended social systems.

It should be noted that behavioral law and economics also challenges some assumptions from the neoliberal view, particularly surrounding risk assessment. People falsely predict the likelihood of events, creating cognitive bias (Amir and Lobel 2008). Thus, third party intervention is warranted to parcel out the difference between genuine risks and faulty ones (Id.; Jolls & Sunstein 2006). “Bounded rationality” can lead to parties bearing risks they did not fully consider, such as health, wealth and safety risks (Sunstein and Thaler 2003). Jolls and Sunstein promote “fixes” to cognitive biases that disrupt the normal operation of “rationality,” a strong counter to classical economic arguments about efficiency and autonomy (1998).

However, just because behavioral law and economics addresses “cognitive bias” and “risk” does not mean it addresses emotion. Emotions are distinct from rational, cognitive judgments, exemplified by studies on the distinct ways people behave in “hot” and “cold” states of emotion (Blumenthal 2006, 21-22). Judgments and decisions involving emotions are distinct from ones influenced by emotions at the time of judgment or decision, or what Jeremy Blumenthal labels “affective forecasting” (Id., 30). Thus, emotional and cognitive (read “rational”) processes are interrelated. Emotions are typically based on beliefs or “cognitive judgments” about the world because they require evaluation (Nussbaum 2001). How do lawyers and others working in legal environments evaluate and manage risk in a particularly emotional but classical rational form of exchange (Edelman 1992)?

2-A2. Emotions, Disputing, and Institutionalization

While past empirical research in the field of law and society has failed to couple the study of law with emotions or gender in contracts, it has addressed them in the context of disputing. Legal institutions have developed an array of techniques for containing feelings, regarding them
as disruptive to the institutional discourse of rationality. For example, courts route “garbage cases” into mediation where orderly forms of talk train parties to suppress emotion in favor of settlement (Merry 1990). Divorce lawyers push clients to be dispassionate, depending instead upon “unclouded” professional authority for sound guidance as to what is legally relevant (Sarat and Felstiner 1995). Lawyers construct the meaning of divorce by comparing their client’s feelings to “normal” cases (Id.). Similarly, legal discourse reinforces male privilege and female dependency by deeming emotions during conflict as differently appropriate based on gender (Conley and O’Barr 1998). Gendered language also polices behavior considered “emotionally intense” which does not conform to social conceptions of masculinity during conflict (Merry 2009). Relationship conflicts are acknowledged to be highly affective experiences (Bandes 1999; Henderson 1997; Maldonado 2007; Merry 1990; Sarat and Felstiner 1995).

This dissertation investigates how parties to surrogacy contracts manage relationships and conflicts, including the formal and informal strategies used by their lawyers. Scholarship on dispute resolution in the field of law and society is attentive to the social construction and transformation of disputes, from their emergence, to recognizing claims, to the lawyer’s role, to alternative and institutional processes (Edelman, Erlanger and Lande 1993; Felstiner, Abel and Sarat 1981; Galanter 1983; Mather and Yngvesson 1981; Miller and Sarat 1981; Morrill 1995; Nader 1990). Attorneys intervene as “facilitators” in business settings to absorb, suppress, and avert crucial uncertainties that might otherwise elevate transaction costs, risk, and discord (Suchman and Cahill 1996).

Literature bridging the ways disputes emerge and transform and the neoinstitutional path taken by socio-legal scholars who take a contextual, process-orientation of interactions between social actors embedded in institutions provide a foundation for this dissertation (Bisom-Rapp 2001; Edelman 1992, 2007; Heimer 1999; Morrill 1995; Morrill, Edelman, Tyson, & Arum 2011). Law is only one among a host of constraints and tools that guide decision-making, working “constitutively” rather than “instrumentally” (Edelman, Erlanger and Lande 1993; Macaulay 1963; Merry 1990; Mnookin and Kornhauser 1979; Nelson and Bridges 1999; Schultz 2003) and is “multi-dimensional” (Morrill, Edelman, Tyson, & Arum 2011). The constitutive perspective also examines how “legal consciousness” develops and influences the choices made by ordinary people as they engage with, interpret, or resist legal meanings during disputes (Albiston 2005; Ewick and Silbey 1999; Merry 1990; Silbey 2001).

Given the emotional and multi-dimensional nature of disputes, my research theorizes why contract lawyers are motivated to “facilitate” feelings and minimize conflicts. I also show how the legal field, fertility field, and mental health field intersect, overlap, and together constitute the practice of surrogacy contracting within a larger “reproductive field” (Bourdieu 1987; Edelman 2007). After all, “institutions and symbolic universes are legitimated by living individuals, who have concrete social locations and concrete social interests (Berger and Luckmann 1966).
Part of the goal of this empirical research and the theory it generates is to cultivate a fresh approach to contracts-in-action by combining it with the field of law and emotions, and a feminist perspective. Law and emotions scholars point to a fallacy of classical doctrine, but have yet to empirically test it. They argue that the consideration requirement for contracts assumes a non-emotive, “rational choice” to be legally bound, while affective ones are based “impulses” of emotion that should be contained (Abrams 2005; Bandes 1999; Keren 2005; Nussbaum 2001). The “objective measure” of consideration for bargained promises distances the market from the domestic world (Pateman 1988; Okin 1991). The commercial sphere is enforceable – traditionally a male space of public, remunerated activity – but the intimate sphere is relational, female, and private (Chamallas 2003; Ertman 2003; Pateman 1988). Ironically, detachment and remuneration are central to surrogate labor – a quintessentially gendered activity situated ambiguously between the public and private sphere.

Since the legal system is thoroughly “imbued with emotion,” it is time to move beyond “Phase I” of the debate about whether emotion belongs in the law to accept that emotional content is inevitable (Bandes 1999; Abrams and Keren 2010). Even though he eschews the false dichotomy between reason and emotion, Richard Posner asserts it “captures an important truth”: that sometimes emotion can be inefficient (1999). Posner is concerned that “emotion short-circuits reason conceived of as a conscious, articulate process of deliberation, calculation, analysis or reflection” (Id., 310). In situations that require careful reflection, emotions may “generate an inferior decision” (Id., 311). Posner separates the “emotionality of acts” that law regulates, from “law’s emotional or non-emotional response to that emotionality” (309).

The policy question for these scholars then becomes when and how we use emotion, using knowledge about positive and negative emotions as a strategic tool. Martha Nussbaum’s quest is to develop an “adequate theory of the emotions” that incorporates, rather than separates, ethical theory and law (2001). Others inquire whether and how law might affect emotion in a more purposive way to planfully shape, channel, or nurture emotions (Abrams and Keren 2010). Not only does law have the capacity to “illuminate” the affective features of legal problems, and can investigate the nature of those through interdisciplinary research, but it has the power to “integrate” these understandings into “practical, normative proposals” (Id.). There are multiple scholars who fit into this project (Calhoun 2006 on hope; Freshman 2005 on mindfulness; Henderson 1987 on empathy; Maroney 2009 on attachment; Sarat 1999 on remorse).

While normatively oriented, law and emotions has great potential to inform the law-in-action, sociological perspective on exchange relationships. Formally, statutes, case precedents, and the “four corners” of the legal instrument govern the terms of the contract, presumptively negotiated by a set of actors institutionally situated within fields (Bourdieu 1987). Both natural and social influences drive emotion, which are culturally and discursively experienced by individuals but also in the social structures within they are embedded (Bandes 1999; Bagentos and Schlanger 2007; Haidt 2001; Kahan 2008). My research fills a large gap between theorizing about law and emotions, to empirically demonstrating their relationship. Discovering how law matters in
affective relations requires uncovering why emotional vulnerabilities are anticipated by the professionals, experienced by the parties, and how they act upon them.

2-A4. The Legalization of Emotional Labor and Feeling Rules

Insights from the field of law and society compliment existing sociological literature on “emotion management” (Hochschild 1979; 1983; 2003). My institutional theory of law and emotions in contracting builds upon but reframes Arlie Hochschild’s research on how emotions are managed at work by examining the phenomenon for the first time whether in the spotlight, or the shadow, of law (Id.; Mnookin and Kornhauser 1979). This dissertation uniquely takes on the process of working as a surrogate as a particular case of emotional labor in contracted “employment” (Hochschild 1983). In The Managed Heart, Hochschild defines emotional labor as that which “requires one to induce or suppress feeling in order to sustain the outward countenance that produces the proper state of mind in others… [which] calls for coordination of mind and feeling” (Id., 7). In so doing, a worker can become alienated or estranged from an aspect of self” (Id.).

Sociological research on emotion management has offered a distinct perspective on the way capitalism “processes people,” dehumanizes through “feeling management,” and recasts the values and functions of the female body that must exercise “emotion work” as part of the “rules of the game” (Hochschild 1983; Buroway 1979). As in Hochschild’s study of stewardesses, detachment is a central rule of the game in surrogacy – violation of which may lead to breach of the contract and confusion over legal parentage. Hochschild examined institutionalized “feeling rules” associated with service, “deep acting,” and the extent to which employees are able to align their inner emotions and outward displays (Id.; Goffman 1959). Once commercialized, emotion work is transmuted from a private to a public act where feelings are directed and supervised (Id., 118-119). Feeling rules are no longer matters of personal discretion but are spelled out as rules that govern behavior, and disseminated through discourse (Id.). I view contracts as another form of discourse through which feeling rules “govern behavior.”

Several scholars have pursued “emotional labor” since Hochschild, but none address the role of law (Barbalet 2002; Clay-Warner and Robinson 2008; Collins 1984; Goodwin, Jasper and Polletta 2001; Hunter 2004, 2005; Katz 1999; McCreight 2005; Turner and Stets 2007; Wharton 2009). Care work like nursing can offer structural opportunities for the worker, which may not be “coercive” at all (Lopez 2006). Instead, some service workers derive considerable satisfaction from performing their jobs (Id. at 135), which may also be true for surrogates who report enjoying pregnancy and the attention it brings. Surrogacy could play sharp contrast to routinized, interactive service work, like the subjects working for McDonald’s and insurance context (Liedner 1993). Gestational mothers have distinct and at times, independent tasks, and may serve as a surrogate in multiple contracts, albeit over a long period of “risky service” (Talbot 1998). On the other hand, data could reveal that surrogates are “repeat players” and potentially empowered by the rules of the game, challenging existing assumptions in research (Buroway 1979; Galanter 1974).
Overall, the sociology of emotions and work is a field ripe for reexamination through a legal lens. While studies on emotion management have focused on the employer’s ability to control a worker’s emotional life and sentiments, leading to the “commercialization of human feeling,” my dissertation examines the role of law in that process, the complexity of characterizing a surrogate as an “employee,” and the broader institutional effects of channeling emotions in contracting. Surrogacy contracting exemplifies the deskilling and the re-feminization of the market for women as primarily domestic laborers, since the only requirement is the ability to carry the child in womb, rather than education or professional training (Braverman 1974; Smith 2001, 1994). Attorneys and others in the reproductive field generate multiple “feeling rules” in surrogacy contracts to manage emotions of intended parents and surrogates. Reframed, surrogacy consolidates “manufacturing” with “service work,” while contracts legalize the selling of gestational “products” on a “piece-rate” basis, child by child (Brooks 2007; SaZinger 2003). It also transgresses the public-private divide (Cott 1977).

2-A5. Reconstituting Norms for Women, Work, and Family

A sociological approach to contracts is particularly salient when examining the emergence and constitutive nature of particular social norms, in this study, surrounding gender, work, and the role of motherhood (Albiston 2005; Luker 1984; Markens 2007; Okin 1991). Contracts do not emerge in isolation, but within larger systems of social beliefs and power relations embedded in subculture (Suchman 2003). Feminist scholars assert that even “reproductive law and policy are as much about enforcing unwritten rules as to what kinds of mothers various women are, and should be, as they are about rationally solving social problems” (Ehrenreich 2008, 14). Kristin Luker’s insight that “the abortion debate is so passionate and hard-fought because “it is a referendum on the place and meaning of motherhood” might be transposed to surrogacy, with the “fight” being over the control of feelings or appropriateness of emotional expression in particular contexts (Luker 1984, 193; Morrill, Snow and White 2005).

Societal level frames about women’s capacity and “nature” contribute to individual decision-making, employment opportunities, and the performance of gender, coined the process of “doing gender” (Risman 1998; West and Zimmerman 1987). While all actors have varying degrees of agency, due to persisting inequality, women are particularly constrained by existing norms, scripts, and institutional structures that police specific gendered boundaries regarding what constitutes appropriate conduct (Albiston 2005; Ewick and Silbey 1999). Some of the existing norms that persist deal with whether Woman is a unitary category, with an essential and fixed identity distinct from men (Harris 1990). Tropes about women who are naturally inclined to the “private sphere” of the home and childbearing are deeply embedded in jurisprudence, which perpetuates the notion that women biologically are more nurturing, sensitive, fragile, and appropriate to “do the role” of domesticity then men (Bradwell v. Illinois 1872; Muller v. Oregon 1908; Hoyt v. Florida 1961; Michael M. v. Sonoma Co. 1981).

Stereotypes reappear in modern cases that continue to essentialize women as “creators” intended to “sustain” life, policed when they fail to emotionally align with social expectations (Gonzales v. Carhart 2007). Women who do not feel the “bond of love” in potential
motherhood are constructed as aberrational (*Id; Planned Parenthood v. Casey* 1992). The policy implication is that if women are appropriately playing their gender roles, they should feel “profound” sorrow, depression, grief, pain and even “loss of self-esteem” if they choose to abort or have casual sexual encounters (*Carhart* 2007; *Michael M.* 1981). Cases in this vein trigger old notions of “the weaker sex” and female incapacity to make a reliable, thoughtful, and reflective decisions. Parties in exchange relations may reject, feel ambivalence, or normalize various stereotypes, like that of the nurturing mother, the emotional, frail female, and the “inconstant” irrational one (Chamallas 2003). Maintaining the myth of the essential, unitary woman is empirically tested in this study of surrogacy contracting, which aims to find out how law and work coordinate to manage feeling in a context that is normatively considered a bastion of passion: *mothering*. The lynchpin of surrogacy is detachment from feeling “maternal.” Practices in contracting reconstruct not only motherhood, but also *fatherhood*.

Gender is socially constructed and ontological, “an ongoing discursive practice, open to intervention and resignification” (Butler 1989, 33; Franke 2001). A variety of professionals in the reproductive field – from lawyers, to matching agencies, to psychologists – contribute to the expectations and terms of the contract among the parties, including “appropriate” emotional expression. Thus, literature describing how social roles are legalized and constituted through interactions and language is another guide (Bourdieu 1987; Conley and O’Barr 1998; Pateman 1988). From a law and society perspective, gender is socially and institutionally constructed through specific processes and discourses legitimated through law (Albiston 2005; Ayres 1991; Frohmann 1997; Hagan and Kay 1999; Nelson and Bridges 1999; Risman 1998; Schultz 2003). Surrogacy contracting not only challenges the traditional alignment of mother with bonding, it reconstructs gender and family paradigms, including those for infertile and gay singles and couples who would not otherwise feel like “mothers” and “fathers.”

Most research has focused on formal employment structures and inequality in the professions, but not private contracts. The historic devaluation of women’s work as naturally “less worthy” than men’s, particularly when their domestic labor is uncompensated in the home and undervalued in care work, persists even when they enter professional workspaces (Abrams 2001; Dixon and Seron 1995; Epstein 1995; Fineman 1995; Guinier 1994; Hagan, Zatz, Arnold and Kay 1991). A study on atomized, privatized, “subcontracted” service workers like surrogates engaged in self-bargaining will contribute distinct insights into existing scholarship (Voss and Sherman 2002). The provision of gestational service may be empowering or oppressive, depending on how the individual surrogate views her other opportunities in the marketplace, her skills, or responsibilities (Colen 1995; Jacoby 1985; Schultz 2006; Smith 2001, 1994). Surrogacy may also be framed as “compassionate” service work, whereby contracts validate women’s autonomy, agency, market value, and equality (Cadoret 2009; Ertman and Williams 2005; Gostin 1991; Shalev 1989). How does the value of women’s labor, along with significant medical risk, get encoded in surrogacy contracts, diffused, and institutionalized?

There is ongoing debate among scholars of feminist jurisprudence whether commercial surrogacy is normatively “good” or “bad” for women. Some praise contract pregnancy as a progressive advancement that validates women’s autonomy, market value, and agency in the free contracting of their labor, which may also be empowering (Ertman 2008; Schultz 2006; Shalev
1989). Others argue it commodifies the female body as a “vessel” for production in a manner distinct from male alienated labor, which implicitly also has racial and class-based hierarchies built into the agreement (Charo 1992; Field 1990; Meleo-Erwin 2001; Radin 1987; Roberts 1998; Shanley 2001; Spar 2006). Some opinions hinge on whether the labor is “compassionate” rather than “commercial” (Cadoret 2009; Gostin 1988, 1991; Shalev 1989). Feminist scholars have rejected the liberal model, attending instead to power inequality between men and women (Bumiller 1987; Crenshaw 1991; Harris 1990; MacKinnon 1988; 1991).

My research tables the debate from whether surrogacy is morally right or wrong to make empirically visible a complex, relational portrait of the “freedom of contract” as it interfaces with developments in reproductive medicine and the fertility industry amidst an unsettled and divided legal terrain. Further, neither side of the debate captures what Carole Pateman describes as the repression of the “sexual contract” (1988). Feminist analysis of contracting reveals the way the liberal State simultaneously institutionalizes myths of gender neutrality and the free market, while making subordination in exchange relations invisible (Pateman 1988, 2007; Okin 1991). By definition, surrogacy contracts must be performed by women, dispelling their gender neutrality. Current empirical studies do not explain how tropes about either gender or emotion contribute to the terms of contractual agreements, or how lawyers and counselors teach surrogates how to “do” both emotions and gender (Butler 1989; West and Zimmerman 1987). I generate a new theory of law and emotions in contracting to fill that void, presented below.

2B. Generating a Theory of Law and Emotions in Contracting

There are two competing, disparate legal commitments in judicial decisions and statutes regulating the practice of surrogacy in the United States. First, there are laws exhorting freedom of contract, emotional detachment, and commercialized exchange. Free market models, embraced by case precedents, perpetuate the myth that there is a separation between rational action (male) and emotion (female), and that parties to a contract can be objective and detached. These are “surrogacy friendly” jurisdictions where the practice is legal. That liberal model of exchange suggests that law and feelings are separate, making the emotional experiences of the parties, particularly women, invisible. In doing so, it also undervalues gestational labor.

Second, there are laws that view women as irrational, emotional, and incapable of making decisions regarding use of their bodies without “emotional paternalism” or formal legal protection, per the liberal model (Blumenthal 2007; Bumiller 1987). Mothers are normatively expected to feel loving, nurturing, and attached to their fetus in utero, and bond with the babies they bare. However, commercial surrogacy, which demands detachment, counters the norm. These jurisdictions criminalize contract pregnancy, or have yet to decide how to regulate the practice, justifying women cannot be “rational” when it comes to maternity or their labor. This conception is typically critiqued for its unequal treatment of women, rather than its failure to account for emotions. Surrogacy is not only a private, market transaction, but is also an ideal place through which both gender dynamics and emotions can be observed. Both sides of the duality offered by the free market and liberal legal models are seriously flawed: they fail to embrace a socio-legal vision of contracts-in-action, or a feminist perspective.
Further, established theories of exchange relations suggest that ongoing business relations, reputational status, customs, and workaday norms are the “non-contractual” relations that exert more compliance to the contract, rather than formal rules or sanctions. None of these “non-contractual” variables are present in surrogacy exchanges, yet compliance is abundant. To the contrary, I argue that emotion management is the glue that binds parties together through performance of the agreement amidst an unsettled, ambiguous, and divided legal landscape.

This dissertation generates an institutional theory of law and emotions to explain why and how feelings, identity and relationships are managed in contracting, using surrogacy as a site for study. It is depicted below in Figure 1. Technically, the only criterion for a surrogate mother is a healthy uterus, and the only criterion to create a family is an intention to parent, along with an ability to pay for the “exchange.” However, lawyers and agencies that match surrogates with intended parents coordinate and develop a web of formal rules and informal practices intended to anticipate and manage feelings well beyond basic contract terms. I argue that emotion management rules and practices have become institutionalized as critical to every stage of the surrogacy process and are embraced by all of its players: from screening surrogates for emotional fitness and matching them with intended parents in anticipation of contracting; to drafting a variety feeling rules that get formalized in contracts; and finally, deploying emotion management strategies like triage that occur both before and after the baby is born. Emotional fitness, formalized feeling rules, and triage collectively constitute emotion management in surrogacy.

Figure 1: Institutional Model of Emotion Management in Exchange Relationships
I argue that feeling rules and emotion management techniques are deployed in exchange relationships to prevent, channel, and cultivate particular emotions in clients, in this case, in surrogates and intended parents. Construction and intervention surrounding each of these provisions is intended to promote feelings of attachment in the intended parents, and conversely encourage detachment in the surrogate. Formal rules, terms in agreements that define each party’s role, and their compensation help to manage expectations, cultivate their identity, and assess value to emotional labor and risks. However, social actors are empowered in varying degrees, leading some to resist or push back against rules and forms of control. Psychologists and other mental health professionals are uniquely incorporated into the process to assist with feeling management. Attorneys, agencies, and counselors cooperate in their effort to manage exchange relationships. At the individual level, terms, rules and provisions become formalized in agreements along with strategic practices, and are shared among professionals. Contracting thus teaches intended parents and surrogates how to “do” gender and emotions by defining and managing both, counter to a variety of social and legal norms.

Emotion management rules and practices inhere in three primary fields that interact in the context of surrogacy: the legal field, the fertility field, and the mental health field. The legal field is made up of formal law, legal institutions, legal actors, as well as parties to legal agreements, in this case, related to assisted reproduction. The fertility field is comprised of business professionals who market assisted reproductive services and provide education, including agencies that match surrogates with intended parents, fertility organizations and associations, and providers of reproductive medicine, like fertility clinics. It also includes patients and online support communities. The mental health field is made up of psychologists, social workers, and other counselors, some of whom specialize in assisted reproduction and surrogacy, as well as clients who seek therapeutic services. The legal field, fertility field, and mental health field intersect, interact, and overlap, together create the “reproductive field.”

The various techniques lawyers and matching agencies deploy to manage emotions at the individual level have a collective impact on participants in assisted reproduction, who in turn exert influence. The reproductive field is not homogenous. The legal field in particular is a contested terrain, making the process of bargaining more complex than the classical free market model. The international prohibition on “baby selling” and conflicting state laws makes the proliferation of surrogacy contracts an intriguing site for discovering how legal ambiguity makes possible the production of law both from the bottom up by individual actors, and institutionally from the top down. Business practices by lawyers, as well as matching agencies that work in legal environments, are generated, reproduced, and diffused within an unsettled and multijurisdictional legal field, creating uniformity in business models and materials. New entities are developing – “hybrid” organizational models – which blur the lines between legal services, matching services, and therapeutic services. Overlap within the reproductive field leads to institutionalization of feeling rules and informal strategies.

Professionals in the field contribute to the expectations and terms of the contract among the parties, including appropriate emotional expression and gender role performance. Together, parties and professionals normalize and legitimate the practice. While lawyers and agencies carry taken-for-granted norms surrounding a variety of social institutions, like parenting and
work, they also generate new ones. Surrogacy contracting actively constructs the meaning of motherhood, not as the woman who gives birth, but the one who sets an intention to form a family, regardless of gestation or genetics. By encouraging detachment between the surrogate and fetus, the attorney is therefore an author in the construction of what it means, fundamentally, to be a “mom.” They also normatively establish what constitutes appropriate employment by simultaneously encouraging the commodification of the body through paid gestational labor, and alienation from its “product.” Finally, legal actors help to redefine what constitutes a normative family. They encourage heterosexual infertile couples and singles, and gay men, to form intentional families through the surrogacy process, perfected through specific emotion management techniques. Not only motherhood, but also fatherhood is re-imagined.

Lawyers who specialize in drafting surrogacy contracts, with the help of programs that match parents with surrogate mothers, become agents of institutionalization, designing agreements that reflect, reinforce, redefine, and constitute broad social norms regarding the emotions parties to contracting should perform – despite inward feeling – during pregnancy, childbirth, and beyond. However, feeling rules and practices have multiple dimensions, and are not unidirectional. Development of rules of detachment, and negotiating mutual vulnerability, is the mechanism that links law with other social systems. Violations of these rules will spark conflicts and renegotiation. The degree to which they are formalized, enacted, resisted, or resolved offers a window into how law matters when managing feelings in the context of a particularly affective and gendered exchange relation. Surrogacy relationships, therefore, become sites in which beliefs about gender, motherhood, and work shape, and are shaped by, the content and meaning of law.

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The remainder of this dissertation analyzes extensive field data to explain how and why emotion management has become embraced, crucial, and institutionalized in surrogacy contracting. First, the next chapter will describe and justify the two primary methods used to collect data for this project.
CHAPTER 3: 
RESEARCH DESIGN AND METHODS

My expedition into the world of surrogacy – a new, unsettled and as yet unmapped social, cultural and legal terrain – was to learn why and how emotions, identity and relationships are managed and channeled in a specific contracting context likely to impart an answer. I use qualitative content analysis of a sample of thirty surrogacy contracts in tandem with 115 semi-structured interviews of lawyers who specialize in assisted reproduction, surrogates, intended parents, and the agencies that match them together, “tapping into something that is reliably social and not just individual” (Luker 2008, 167). Through qualitative field research and analysis, I aim to achieve what Snow and Morrill describe as a “close approximation of the empirical world” (1993, 10). Not coincidentally, this particular empirical world is in its infancy, creating both tremendous opportunity and some challenges.

Thus, the research design and methodology used in this dissertation have a twofold purpose. First, they helped me understand the process arc from the point at which an individual or couple opts to use a surrogate as a means of becoming a parent as an alternative to adopting, all the way to final performance of the contract following the birth of a child. Second, the methods were the best way to understand the emotional and gendered dimensions of contracting – formally through the instrument and informally through social relations – necessary for the specific research questions and analysis contemplated by this dissertation. The remainder of this chapter will explain and justify the research design and methodology employed in this dissertation.

Research Design

Two primary research methods were used to collect and analyze data for this study. First, I conducted one-hundred and fifteen (115) in-depth, semi-structured interviews with four groups of subjects in twenty (20) states across the United States in order to determine how surrogacy contracting operates, how it is experienced, and how feelings are managed through formal provisions and informal practices throughout the process. I also wanted to ascertain what motivates emotion management in surrogacy contracting. Second, I conducted qualitative content analysis by systematically coding contractual language in a sample of thirty (30) surrogacy agreements from eleven (11) jurisdictions to detect patterns in the types of rules, terms and provisions developed and used by lawyers and matching agency representatives to manage emotions and otherwise govern the relationship between the surrogate and intended parents, and the degree to which language across contracts varies.

3-A. Interviews

Interviewing is among the best methods available to provide insight into how people make sense of and recount their actions, from the contracting process to handling disputes, especially in studying contexts like surrogacy where observation is highly constrained, if not impossible. Interviewing surrogates, intended parents, their matching agents and lawyers enabled me to get a
sense of meanings, feelings, anxieties, identities and expectations directly from the participants in the process (Charmaz 2006; Luker 2008). From March 2011 through April 2012, I conducted 115 in-depth, semi-structured interviews in twenty states across the United States with four primary groups of subjects: (1) attorneys who draft surrogacy contracts, most of whom specialize in assisted reproductive technology or adoption law; (2) agencies that match surrogates together with infertile or otherwise interested singles and couples; (3) women who have been either gestational or traditional surrogates; and (4) intended parents who used a surrogate to gestate their baby. I conducted a smaller number of supplementary interviews with husbands of surrogate mothers, and with psychologists and counselors who were affiliated with matching agencies who participate in mental health screening, evaluation, and therapy for parties during the process.

Since the population of subjects studied here were previously unknown, a snowball or “niche” sampling technique was used to identify respondents in particular states that were selected based on legality of surrogacy, described below, and engage them in a methodology described as intensive interviewing, which combines semi-structured interviewing using a guide of questions, listening to responses, and conversation “as it occurs naturally during the course of social interaction” (Lofland et al. 2006, 17). Thus, my interviews were semi-structured, beginning with a common set of questions with probes added as necessary to allow respondents to describe various aspects of the exchange relationship which I could later analyze for “pattern recognition” (Luker 2008). At the same time, the conversational dimension of my interviews provided open-ended opportunities to engage with the subjects and garner rich material without constraining them to select from pre-established responses (Lofland et al. 2006; Morrill 1995).

As Clifford Geertz theorized, interviews are not limited to thinking “about” subjects, but invites the researcher to think “creatively and imaginatively with them” (Geertz 1973, 23). Interviews necessarily complement the content analysis of the “law on the books” – in this case, a formal contract instrument – by providing “law in action” via nuanced reported detail about practices, coping strategies, and forms of emotional labor (Hochschild 1983; Macaulay et al. 2007; Morrill 1995). The conversational aspect of the interviews elicited unexpected responses, and encouraged my research to remain flexible to data gathering (Locke, Spirduso and Silverman 2007). However, the semi-structured nature of the interviews kept the research systematic with an eye towards data analysis.

The interviews were designed to elicit how parties to surrogacy contracts manage feelings and relationships, either through formalized contract provisions or through informal practices between the parties as facilitated by their lawyers and matching agents. A representative interview schedule is supplied in Appendix 1. Questions addressed issues such as: how the terms of the contract were developed, with special attention to terms-of-art which assign roles to the parties, rules and restrictions that effect the surrogate’s lifestyle before and during the pregnancy, and her compensation; the degree to which the parties participated in drafting the agreement, and how seriously they took the formal contract; the nature of the relationship between the surrogate, intended parent(s), and the gestating child; and what role formal contract provisions, counselors, agencies, and lawyers play in handling disputes. The interviews were designed to elicit how subjects described the emotional aspects of the contractual relationship, the development of rules
and expectations via contract provisions, and the nature of disagreements that arise during contract performance, and after the birth.


The 115 interviews with reproductive lawyers, surrogates, their spouses, intended parents, and the representatives of agencies who offer matching services were conducted in twenty (20) states. I used a practice known as “niche sampling” that requires the researcher to go “where the action is.” This type of non-probability, “purposive sampling” requires the researcher to actively seek out the relevant social settings, spatial or organizational “niches” that are most likely to uncover the range of actors to surrogacy contracts and the interactions between them (Babbie 2009: 192; Snow and Anderson 1993). This procedure requires that one sample as widely as possible within the “venues,” sites or contexts until redundancy is reached (Luker 2008, 161; Id.). This method is appropriate where the researcher cannot construct a classic sampling frame, as in this case, where little is known about the underlying population parameters. Instead, I mapped out the contexts and places where these exchange relations are initiated and performed. Since surrogacy contracting is often multijurisdictional, the sites or “data outcroppings” could be anywhere within the United States (Luker 2008; 103).

Of the twenty states in my sample, fourteen were visited in person. There are two reasons why I did not visit all the states represented. First, I initially expected to visit fewer sites, and conduct fewer interviews overall. However, my snowball sampling technique not only generated great interest among subjects in the jurisdictions I was budgeted to visit, but also interest by a number of participants located in states that for practical reasons, I could not visit in person. Second, after I returned from an in-person visit to a particular field site or region, I received emails and/or phone calls from lawyers, matching agency representatives, surrogates, and parents interested in participating in the research study upon hearing of it from a colleague or friend.

The twenty states in the sample vary by degrees of “surrogacy friendliness,” or whether the practice is legal in that jurisdiction. Divided into five regional categories, the twenty states sampled include: (1) California, Oregon, Washington, Nevada and Colorado (“West”); (2) Illinois, Wisconsin, and Minnesota (“Midwest”); (3) Texas, Georgia, South Carolina, and Florida (“South”); (4) Virginia, Maryland, and the District of Columbia (“Mid-Atlantic”); and (5) Massachusetts, Rhode Island, New York, New Jersey, and Pennsylvania (“East”). I selected several regions, each of which includes variation in state laws governing surrogacy. This allows me to hold region constant while allowing legal regime to vary within region. I wanted to determine if patterns of contracting related to regional proximity, anticipating that intended parents who live in a non-surrogacy friendly jurisdiction would be more likely to select a legal

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6 This dissertation was funded by a Doctoral Dissertation Research grant from the National Science Foundation, Law and Social Sciences Division, Award #1123500. The generous but fixed nature of my research fund made it impractical to visit field sites not contemplated by the original research design.
7 Part of this is explained by an “opt in” recruitment procedure I designed between attorneys and their clients, which is detailed later in this section. However, a number of participants found out about the research study from interview subjects in their social network. Since the level of interest in my research was so high, especially from surrogates and parents, I was unable to interview all of those willing to participate. I hope to initiate a second stage of field research to collect more data from these recruits, who are eager to share their perspectives.
one nearby, and whether they would participate in the pregnancy based on convenience. Since
many of the contract rules regulate and control surrogate behavior, contact with the intended
parents, and participation by the intended parents in aspects of the pregnancy, proximity seemed
like an important variable. The rationale for selecting these twenty states was to capture the
variation of laws on surrogacy across United States jurisdictions in order to determine whether
and how state law affects the content of agreements and nature of relationships across the entire
sample.

Patterns of contracting have yet to be mapped or studied, yet the laws on surrogacy vary and
are ambiguous. The twenty jurisdictions in the sample vary along a spectrum of “surrogacy
friendliness” of their state laws: (1) states that are considered “surrogacy-friendly” because they
explicitly have a statute regulating surrogacy, (2) have recognized judicial decisions that make
them “surrogacy-friendly,” (3) have ambiguous judicial decisions on surrogacy, (4) have no
statute or cases and are thus silent on the legality of surrogacy, and (5) explicitly ban or
otherwise prohibit surrogacy. A sign of the unsettled nature of the legality of surrogacy, there is
also variation within these five main categories of jurisdictions, for example, that surrogacy is
legal for married heterosexual couples only as governed by statute (Texas), or that only
uncompensated surrogacy agreements are valid (Washington). A map of the jurisdictions
sampled differentiated by law is on Figure 2.

Therefore, in selecting sites, I looked for clusters of states with similar laws abutting another
cluster where surrogacy is illegal and/or its status is ambiguous. I sought variation in each
state’s legal approach to surrogacy within each cluster. For example, in the “East” regional
cluster, I visited New York where paid surrogacy agreements are banned by statute as void and
unenforceable, New Jersey which may allow uncompensated gestational surrogacy but bans
traditional surrogacy by case precedents, Massachusetts which is considered surrogacy friendly
in permitting surrogacy agreements, and both Rhode Island and Pennsylvania where the law is
ambiguous. Although I initially only selected sites to locate subject participants within the
United States, I learned through my interviews that many lawyers and agencies in the sample
have international clients as parties to the contract – intended parents who live in Europe, Asia,
Australia, Africa, or the Middle East where the practice is illegal – who use surrogates from
“surrogacy friendly” states within the U.S. However, the agency coordinators and legal process
take place in the United States. Thus, a significant number of the parties to the contracts
described by attorneys and agencies that I interviewed do not reside in the jurisdictions I
sampled, although the contracts were drafted and facilitated within my sampled jurisdictions.
This simply evidences the unsettled and multijurisdictional nature of surrogacy contracting, and
the challenges of site selection. Finally, two of the states that I selected, Washington State and
New York, were in the midst of their legislative efforts to legalize paid surrogacy in their
jurisdictions during my field research.
While my site selection by state and region was purposive, my snowball sample of subjects was primarily derived through referrals from within their social network, either by direct professional connections or by reputation. Since the legality of surrogacy differs by state, surrogates and aspiring parents who live where the practice is prohibited may travel to jurisdictions where it is condoned. Not all participants in the contract – or even the professionals that facilitate it – necessarily reside in the same state. I came to understand that surrogacy contracting is increasingly multijurisdictional, and that certain states have larger concentrations of professionals who hold themselves out as surrogacy lawyers then others. The law of the jurisdiction where the baby is born determines legal parentage, including the validity of a contract.

Thus, in addition to mapping out the states I would sample from, I had to determine where, within those sites, exchange relations are initiated and performed. I started with the most obvious site: the law office. During preliminary research for this dissertation, I discovered that a nascent and somewhat elite association of attorneys who specialize in infertility, surrogacy, and gamete donation had formed called the American Association of Assisted Reproductive
Technology Attorneys (“AAARTA”). AAARTA is a sub-organization of the well-established American Academy of Adoption Attorneys, typically referred to as “QUAD A” (AAAA) by its members. I was given direct referrals to ten members of AAARTA by a policy expert in the field, nine of whom in turn provided referrals to matching agencies, clients, and other lawyers within their professional network.

My snowball sample of interview subjects began with these first ten “nodes” of attorneys with expertise in surrogacy contracting. However, as the study progressed, I complemented the direct referrals with independent research on lawyers that may not have been members of AAARTA in order to contrast their experiences and practices, as well as matching agencies that may not have been mentioned by the subjects during interviews. While snowball sampling does not preclude sampling bias, since the population I am studying is not yet known, I had to gain access to field sites and subjects for the purpose of research, as well as “to establish rapport with those studied as a way to create and extend such access” (Emerson 2001, 15; Heyl 2001, 372). In order to build a grounded understanding, and to bring the contracts “to life,” it was vital to hear directly from attorneys what their experiences mean to them (Charmaz 2006). The development of particular rules, practices, coping strategies, and forms of emotional labor would reveal themselves most vividly by engaging in complex, in-person, conversational interactions.

In addition to individual attorneys who specialize in assisted reproductive law, the subject sample consists of matching agency representatives who pair surrogates with intended parents, individual women who were contracted to be a surrogate, and intended parents that hired them. I also interviewed a small number of husbands of surrogates. Table 1 shows all the subjects I interviewed, broken down by category. My sample included: 66 attorneys, 30 matching agency representatives from 23 separate agencies, 16 surrogates, 5 husbands of surrogates, and 12 parents who used a surrogate to form a family. Some of the participants fall into more than one category, for example, were both a surrogate and operated a matching agency. The total number of participants without overlap is 115. A description of the entire subject pool is on Table 1.

The other subjects were identified using a combination of the snowball sampling strategy described above and independent online research. To find matching agency participants for my niche sample, I asked attorneys during interviews with whom they worked, who they were aware of by reputation, and who they believed I should speak to for the study, even if they had a “questionable” reputation. I asked all subjects interviewed and eventually, redundancy in data was reached (Snow and Anderson 1993; Luker 2008). Additionally, I independently located agencies that actively solicit business and advertise their matching services on the Internet. I was able to identify and interview the nearly all of the most widely used surrogate matching agencies in the United States, according to the subjects of my study, and the most widely used Internet forum Surromomsonline. I estimate that the agencies I interviewed for this study garner 90% of all professional matching business. The remaining 10% not sampled represent what would be described in interviews as “fly by night” and smaller operations, in addition to agencies that reside in states outside of my sampling frame.
Table 1: Interview Subjects by Category

*N = 115

<table>
<thead>
<tr>
<th>Subject Category</th>
<th>Number participating per category</th>
<th>Number overlapping into other categories *</th>
<th>Interviewed in person</th>
<th>Interviewed by phone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorneys</td>
<td>66</td>
<td>10</td>
<td>61</td>
<td>5</td>
</tr>
<tr>
<td>Matching Agency Representatives</td>
<td>34</td>
<td>23</td>
<td>31</td>
<td>3</td>
</tr>
<tr>
<td>Agencies Operating</td>
<td>23</td>
<td>N/A</td>
<td>21</td>
<td>2</td>
</tr>
<tr>
<td>Parents through Surrogacy</td>
<td>15</td>
<td>8</td>
<td>8</td>
<td>7</td>
</tr>
<tr>
<td>Surrogates</td>
<td>16</td>
<td>7</td>
<td>5</td>
<td>11</td>
</tr>
<tr>
<td>Husbands of Surrogates</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>5</td>
</tr>
</tbody>
</table>

*While the total number of participants is 115, some of those individuals overlap into more than one category. For example, 10 lawyers of the 66 interviewed also overlap into other subject categories, such as being a parent through surrogacy. Since agencies are entities, and not individuals, there is no possible subject category overlap. There is, however, for matching agency representatives. Also, none of the husbands of surrogates overlapped into any other category.

In order to identify surrogates and intended parents for the subject pool, I created an “opt-in” recruitment procedure intended to elicit the perspectives of those who have worked with the lawyers and agencies in the study. Following interviews with the attorneys and matching agency representatives, I requested that they contact past clients or group members through a recruitment letter on my behalf via email if they were willing to do so. That way, I did not have direct access to names of surrogate or parent clients, and with which professional they worked with, unless they voluntarily “opt in” to the study by contacting me on their own. This design was intended to maximize the potential subject’s privacy, and the attorney-client privilege. The recruitment letter described the rationale and nature of the study to the subjects, and was clear that they were not required to participate and could to opt out at any time.

The goal was to create a subject pool that most accurately reflects the actual patterns of contracting and representative experiences. I found that surrogates, intended parents, matching agency representatives – and most surprisingly, lawyers – want and need an opportunity to communicate with a non-threatening outsider their vulnerability, frustrations, tensions, excitement, ambivalence, norms, and more (Morrill 1995). I am mindful that family relationships – particularly those created through assisted reproductive technology – tend to be viewed as culturally private, and thus, required increased researcher sensitivity. Parties to surrogacy have elected that route for family formation primarily, but not exclusively, because of
either (1) long term struggles with infertility, or (2) their sexual orientation, which leaves them without an opposite-sex gamete partner and/or uterus. The subjects’ willingness to speak openly with me during the research process, which allowed me to “penetrate” in Goffman’s terms “their circle of response to their social situation,” must be based on mutual trust (Emerson and Pollner 2001, 240). The vast majority of participants appeared enthusiastic to share their experiences regarding the process, and expressed gratitude for the confidential opportunity to do so.

However, while lawyers, matching agents, and surrogates were mostly eager to participate in the study, I found that parents were slightly less so. Parents, especially those that had suffered years of frustration and disappointment over infertility, are perhaps less keen to reopen old wounds and share their experiences with an outsider, as pointed out by some attorney participants. Additionally, parents who have cut off ties with their surrogate could be more private about the experience itself. On the other hand, the surrogates I spoke with were quite enthusiastic to discuss their “journeys” – whether positive or negative – since most of them take pride in their ability to become pregnant and serve others who cannot do so.

Remarkably, I gained far more access than originally anticipated, and only seven subjects (of 125 total) solicited for an interview either failed to respond to my invitation for participation in the study, or could not make time in their schedule to accommodate me. In fact, by March 2012 when I had to stop my fieldwork, I had to decline more than 20 lawyers, surrogates and parents willing to participate in the study – some whom asked me if they could participate and were eager to do so.

3A-2. Interview and Archival Data Analysis

The interviews were audio taped with the consent of the participant and average nearly two hours in length. The digitally recorded interviews were professionally transcribed and anonymized to insure confidentiality and privacy for the participants in the study. In order to anonymize each interview, I created pseudonyms for each individual participant, for their business partners and spouses not present at the interview but named in the transcript, as well as pseudonyms for each matching agency. Generating pseudonyms for anonymization and confidentiality was a complicated process. First, I used a random-name generator to develop a list of pseudonyms for each individual. I then cross-referenced the names of each participant by category (lawyer, agency operator, surrogate, parent, or counselor) to insure that no pseudonym corresponded to another participant’s real name. Next, I invented twenty-three separate agency pseudonyms whose names are suggestive of maternity, hope, babies, blessings, conception, and “assisted” reproduction, which is a norm in the fertility industry. I employed a Google search for each of my conjured pseudonyms to make sure it did not correspond with a real business name in the industry.8 A complete list of agency pseudonyms is listed on Table 2.

The interview data were then qualitatively analyzed to develop coding categories for interpretation (Luker 2008; Snow, Morrill and Anderson 2003). I used a method called

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8 In fact, three of the agency pseudonyms I initially created turned out to be real businesses in the fertility industry, which I had not previously known about, nor were mentioned by participants during the interviews. Of course, they were changed for the study to prevent any confusion or perceived breach of confidentiality.
“grounded theory coding” to examine the interview transcripts. Grounded theory coding involves two phases: first, conducting initial coding to determine what the data suggests about surrogacy contracting, remaining open to the theoretical possibilities that might emerge; and second, using focused coding to pinpoint and develop the most salient categories I identified in them (Charmaz 2006, 42-71). The second phase was motivated by my broad research question, namely, why and how emotions are managed in surrogacy relationships, but also the categories reflected by the set of questions in my interview schedule.

I also used in vivo coding, a method that captures the participant’s words verbatim, locates terms of art in surrogacy contracting, and subjects them to both comparison and analysis (Id., at 55). In vivo coding was particularly valuable in explaining how gender and identity are constituted through specific contract terms like “gestational hostess” and “selective reduction,” to be analyzed in later chapters of this dissertation. Overall, I searched for patterns and themes to emerge inductively from the data. Coding requires the researcher to remain mindful of “the interdependence of method and substance… of assessing evidence, for evaluating the quality of both the data collected and the analysis made of that data” (Emerson 2001, 114). The interview transcripts were organized by state and subject type for each state (lawyer, agency, surrogate, parent, counselor). Additionally, the each states group of transcripts was also linked to its regional cluster (West, South, Midwest, Mid Atlantic, and East).

In addition to coding interview data, I took extensive ethnographic field notes from which I drafted a series of analytic memoranda (Emerson et al. 1995, 103; Lofland et al. 206). These memos were designed to cultivate a grounded approach to qualitative research to not merely describe the subjects and the settings I visited, but to understand the process of surrogacy as an exchange relationship in order to make a “conceptual rendering” of it as a phenomenon (Charmaz 2006, 22). While in lawyer’s offices and matching agency reception areas, I collected a number of pamphlets, brochures, forms, advertisements, and articles about infertility, assisted reproduction, counseling services, and a host of organizations, associations, and support groups in the field. The presence and contents of these materials demonstrates the intersection and overlap between the legal field, fertility field, and mental health field. Additionally, I analyzed packets acquired from agencies that include forms, fee schedules, and information for either intended parents seeking a surrogate, or surrogates applying to enter a matching program.

3-B. Content Analysis of Contractual Language

I conducted exploratory content analysis on a sample of thirty (30) surrogacy contracts from eleven (11) different jurisdictions to analyze both the nature of terms and provisions in the agreement, and the mechanism whereby specific terms, rules, and provisions seek to manage emotions. Content analysis is an inductive method that involves systematically classifying elements of the data and assigning categories to it through the process of coding (Id.; Krippendorf 2004; Lofland, Snow, Anderson and Lofland 2006). Each contract in my sample was methodically coded for content and interpretation using Atlas.ti computer-aided qualitative data analysis software (“CAQDAS”) (Friese 2012; Saldana 2009; Snow, Morrill and Anderson 2003). Qualitative coding requires attention to “the interdependence of method and substance… of assessing evidence, for evaluating the quality of both the data collected and the analysis made
of that data” (Emerson 2001, 114). I searched the text of contracts for coherent meaning structures, and identified core consistencies and patterns in the data (Patton 2002). This section will explain the method used to sample the contracts, as well as how they were coded.

Table 2: Sample of Matching Agencies

Size assessment is based on number of surrogacy matches per year defined as: (1) Small = less than 100; (2) Medium = less than 200; and (3) Large = more than 200. Each agency was assigned a pseudonym.

<table>
<thead>
<tr>
<th>Number</th>
<th>Pseudonym Assigned to Matching Agency</th>
<th>State Where Agency Operates</th>
<th>Size</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>New Dawn</td>
<td>Maryland</td>
<td>Medium</td>
</tr>
<tr>
<td>2</td>
<td>Surrogate Stop</td>
<td>California</td>
<td>Large</td>
</tr>
<tr>
<td>3</td>
<td>Infant Technologies</td>
<td>Illinois</td>
<td>Medium</td>
</tr>
<tr>
<td>4</td>
<td>Magic Maternity</td>
<td>Wisconsin</td>
<td>Large</td>
</tr>
<tr>
<td>5</td>
<td>Repro Junction</td>
<td>Oregon</td>
<td>Small</td>
</tr>
<tr>
<td>6</td>
<td>Forever Fertile</td>
<td>Virginia</td>
<td>Medium</td>
</tr>
<tr>
<td>7</td>
<td>In Service Surrogacy</td>
<td>Illinois</td>
<td>Large</td>
</tr>
<tr>
<td>8</td>
<td>Family Focus</td>
<td>Texas</td>
<td>Medium</td>
</tr>
<tr>
<td>9</td>
<td>Parent’s Helper Surrogacy</td>
<td>Oregon</td>
<td>Small</td>
</tr>
<tr>
<td>10</td>
<td>Co-Creators West</td>
<td>California</td>
<td>Large</td>
</tr>
<tr>
<td>11</td>
<td>Babies-Your-Way</td>
<td>Texas</td>
<td>Large</td>
</tr>
<tr>
<td>12</td>
<td>Family Spot</td>
<td>Oregon</td>
<td>Medium</td>
</tr>
<tr>
<td>13</td>
<td>Baby Boom</td>
<td>Florida/Washington</td>
<td>Small</td>
</tr>
<tr>
<td>14</td>
<td>Infant Quest</td>
<td>Colorado</td>
<td>Large</td>
</tr>
<tr>
<td>15</td>
<td>Gestation Depot</td>
<td>California</td>
<td>Medium</td>
</tr>
<tr>
<td>16</td>
<td>Bearing Gifts Surrogacy</td>
<td>Massachusetts</td>
<td>Large</td>
</tr>
<tr>
<td>17</td>
<td>Baby Makers, Inc.</td>
<td>Oregon</td>
<td>Small</td>
</tr>
<tr>
<td>18</td>
<td>Co-Creators East</td>
<td>Maryland</td>
<td>Large</td>
</tr>
<tr>
<td>19</td>
<td>A Fertile Find</td>
<td>Minnesota</td>
<td>Medium</td>
</tr>
<tr>
<td>20</td>
<td>All in the Family</td>
<td>Texas</td>
<td>Medium</td>
</tr>
<tr>
<td>21</td>
<td>Creating Kids</td>
<td>Illinois</td>
<td>Medium</td>
</tr>
<tr>
<td>22</td>
<td>Open Ovens</td>
<td>Illinois</td>
<td>Large</td>
</tr>
<tr>
<td>23</td>
<td>SurroCentral</td>
<td>Massachusetts</td>
<td>Large</td>
</tr>
</tbody>
</table>
3-B1. Sampling of Contracts

Surrogacy contracting is not only a relatively new, quite specialized, and uneven legal practice, but it was difficult to obtain these agreements because both attorneys and matching programs consider them highly proprietary. Attorneys and matching agency owners who used lawyers to draft their internal agreements do not post or otherwise circulate their surrogacy contracts on the Internet, to colleagues, at conferences, in professional publications, or any other context I thought to investigate. They also prohibit their clients from sharing, reusing, emailing, or otherwise disseminating their own contracts, though surrogates report reusing theirs for a second, third, or fourth surrogacy, in order to reduce costs for the intended parents with whom they have “self-matched” without the assistance of a lawyer or agency. In any case, the population of surrogates and parents who have gone through the process using a formal contract are unknown and not readily identifiable. Since the population of lawyers who specialize in assisted reproduction law is relatively small, the total number of contracts available and in circulation is itself limited. Further, some reproductive attorneys have obtained intellectual property rights on their surrogacy contracts through copyright protection in an attempt to discourage uploading and dissemination.

Due to the impossibility of constructing a sampling frame from which I could draw a random sample, I collected a “niche” or ecological sample of contracts from study participants (Luker 2008; Snow and Anderson 1993). This technique requires the researcher to purposively seek out the sources for surrogacy contracts and sample as widely as possible within the sites or “niches” for them until redundancy is reached (Id.). Purposive sampling is the most appropriate method to study a subset of a larger population where enumeration of the entire population would be nearly impossible to ascertain (Babbie 2009, 193). Therefore, I set out to collect as large a sample of contracts as possible directly from the study participants, given the underlying parameters of the population have yet to be studied.

At the end of each interview, I asked for a copy of an exemplar surrogacy contract strictly for research purposes. While many lawyers asked for time following our conversation to “think about it,” others flatly refused. It became clear over the course of the year that these trailblazing surrogacy lawyers spend endless hours writing and perfecting their contracts, and therefore were reluctant to share them. Since the practice is illegal in various jurisdictions, some were also worried that an unsupervised contract could be used in another locale where the provisions were unenforceable or did not make sense in light of differing laws about surrogacy. This might also expose the drafting lawyer to liability. Further, some lawyers vented their anger about seeing their own laboriously tailored contract provisions “stolen” and used inappropriately by colleagues in the field, especially “young lawyers” and “newbies” that “don’t know what they’re doing.” For those willing to consider providing a contract to the study sample, I detailed, in writing, a promise that the contracts would never be used, circulated, uploaded or otherwise posted in whole or significant part, and would only be analyzed for the purpose of research analysis described above, confidentially and anonymously.

Given these conditions, and the fact that this is a new and uncertain area of practice, the sample size is ample. I do not assert that a sample of 30 contracts is representative of all
surrogacy contracts, nor am I making any claims about whether the contracts drafted in different states are representative of that state’s laws or overall contracting culture. I do believe that the contracts accurately reflect the early practices of lawyers working to make sense of this emerging field, and the laws of the states in which they were drafted. I also believe the contracts reflect their efforts – combined with the wishes of their clients – to actively produce rules and norms for a field where clear, uniform policy guidelines have failed to do so.

Thus, the 30 coded contracts come from participants who reside or do business in twelve of the twenty separate states sampled for this dissertation. The contracts are categorized as coming from one of three types of jurisdictions, based upon whether they are: (1) surrogacy-friendly because they either have a statute or judicial precedents affirming the legality of surrogacy; (2) neutral or ambiguous surrogacy laws; and (3) prohibit commercial surrogacy. The sample of contracts by type of jurisdiction or “legal regime” is depicted in Table 3. However, while technically drafted by a lawyer in a particular state, many of the contracts are multijurisdictional. Thus, the intended parents, surrogate, lawyer – and even their matching agency – may reside in different states. Additionally, the sample includes a combination of gestational surrogacy agreements, where the surrogate uses the egg and sperm of a third party to gestate a child (27 of the 30 contracts), and traditional surrogacy agreements, where the surrogate uses her own egg and is thus genetically related to the child she gestates (3 of the 30 contracts). The sample is predominantly of gestational surrogacy contracts because traditional surrogacy is banned in most states across the United States where the practice is explicitly regulated.

Besides variation by state, law, and genetic connection to the surrogate, the contracts also vary by party. While most of the contracts represent an agreement between the surrogate, the surrogate’s husband, the intended mother and the intended father, other contracts represent agreements between (1) married intended parents and an unmarried surrogate; (2) homosexual and unmarried intended parents, their surrogate, and the surrogate’s spouse; and (3) a single intended father and a surrogate, whether heterosexual or homosexual. To complicate the sample even further, contracts can vary in whether one or both of the intended parents have a genetic relationship with the child, or use eggs, sperm or a purchased embryo from third party “donors.” The complexity of the sample simply reflects the novelty and diversity in family formation options enabled by assisted reproductive technology.

Table 3: Sample of Surrogacy Contracts (N = 30)

\[N = 30\]

<table>
<thead>
<tr>
<th>Type of Legal Regime</th>
<th>Number of Contracts in the Sample</th>
<th>States Represented in the Sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surrogacy-Friendly by Statute or Case Precedent</td>
<td>21</td>
<td>California (7), Florida (2), Illinois (3), Massachusetts (3), Texas (2), Multi (4)</td>
</tr>
<tr>
<td>Neutral or Ambiguous Law on Surrogacy</td>
<td>7</td>
<td>Colorado (2), Maryland (1), Minnesota (1), Oregon (2), Wisconsin (1)</td>
</tr>
<tr>
<td>Prohibits Commercial Surrogacy</td>
<td>2</td>
<td>New Jersey (1), Washington State (1)</td>
</tr>
</tbody>
</table>
I used an approach proposed by socio-legal scholar Mark Suchman that studies the “contract as a social artifact” (Suchman 2003). Suchman encourages researchers to enhance both their observations of exchange relations and doctrinal interpretations of legal doctrine by examining contracts using an “artifactualist” approach. He explains:

Like most artifacts, contracts often emerge from the labors of specific artisans; but also like most artifacts, contracts necessarily bear the markings of broader social contexts. Like most artifacts, contracts have material uses, and contract provisions often act as practical technologies; but again like most artifacts, contracts also have cultural meanings, and contract provisions sometimes act not as technologies but as symbols. Thus, contracts are at once both marketable devices and meaningful gestures, and contract regimes are at once both technical systems and communities of discourse. From this, it follows that to make sense of a contractual practice, one must understand both the economic and the cultural environments that gave it birth. At the same time, however, one must also recognize that contracts, like any artifacts, are themselves capable of affecting these environments, both culturally and economically. In short, a successful sociology of contract-as-artifact would simultaneously attend to several distinct but related dynamics. It would encompass both the private parties who use contracts and the professionals who produce contracts. It would encompass both individual transactions and extended social systems. It would encompass both practical contractual incentives and ceremonial contractual displays. And it would encompass both the influence of social environments on contractual practices and the reciprocal influence of contractual practices on social environments (Suchman 2003, 92-93).

Therefore, I examined: (1) private parties who use contracts; (2) the professionals who produce contracts; (3) the contracts themselves from individual transactions; and (4) their extended social systems. The content analysis of surrogacy contracts was intended to capture the third prong of the “artifactualist” approach, while the others were captured by the interviews, and my own analysis. In sum, since these contracts are drafted by legal actors, many with input from matching agencies who work in legal environments (Edelman 1992), and presumably incorporate the concerns and wishes of intended parents and surrogates, the interviews with the parties involved in the surrogacy process necessarily complements the content analysis of the contracts.

Because surrogacy contracting is relatively uncharted, the broader goal of the content analysis was to determine: (1) the types of clauses that are used in agreements, (2) the ways in which emotion management appears in various contract provisions, and (3) variation across the sample. Therefore, I conducted exploratory content analysis on a sample of thirty surrogacy agreements \( (N = 30) \) from eleven different jurisdictions that vary as to levels of surrogacy friendliness of law to analyze both the nature of terms and provisions, and the mechanism whereby specific terms, rules, and provisions seek to manage emotions. Those jurisdictions are: California, Colorado, Florida, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Texas, and Wisconsin. A distribution of the sample by state and type of law is depicted in Table 4. I qualitatively coded each contract in my sample for content and interpretation using Atlas.ti computer-aided qualitative data analysis software (“CAQDAS”) (Friese 2012; Saldana 2009; Snow, Morrill and Anderson 2003).
Table 4: Distribution of Surrogacy Contracts by State and Legal Regime

<table>
<thead>
<tr>
<th>State/Jurisdiction</th>
<th>N = 30</th>
<th>Legality of Surrogacy Contracting</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>7</td>
<td>Surrogacy Friendly by Case Law</td>
</tr>
<tr>
<td>Colorado</td>
<td>2</td>
<td>Silent; No Case Law or Statute</td>
</tr>
<tr>
<td>Florida</td>
<td>2</td>
<td>Surrogacy Friendly by Statute (with restrictions)</td>
</tr>
<tr>
<td>Illinois</td>
<td>3</td>
<td>Surrogacy Friendly by Statute</td>
</tr>
<tr>
<td>Maryland</td>
<td>1</td>
<td>Ambiguous Case Law</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>3</td>
<td>Surrogacy Friendly by Case Law</td>
</tr>
<tr>
<td>Minnesota</td>
<td>2</td>
<td>Silent; No Case Law or Statute</td>
</tr>
<tr>
<td>New Jersey</td>
<td>1</td>
<td>Traditional Surrogacy Banned; Gestational Surrogacy Possible Case Law; Ambiguous</td>
</tr>
<tr>
<td>Oregon</td>
<td>2</td>
<td>Silent; No Case Law or Statute</td>
</tr>
<tr>
<td>Texas</td>
<td>2</td>
<td>Surrogacy Friendly by Statute (with restrictions)</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>1</td>
<td>Silent; No Case Law or Statute</td>
</tr>
<tr>
<td>Multiple (boilerplate contract with an unnamed jurisdiction)</td>
<td>4</td>
<td>Unknown and varied, thus ambiguous</td>
</tr>
</tbody>
</table>

Three specific research questions fueled the content analysis of contracts. First, what language in surrogacy contracts attempts to manage emotions and how does that language vary across contracts? Second, how do formalized “feeling rules”\(^9\) in the contract serve to manage risk for lawyers in the reproductive field (Hochschild 1979)? Third, how are psychological evaluation and mental health professionals institutionalized in surrogacy contracts? The coding categories were derived by initially reviewing every line of each contract in the sample to understand the overall architecture of a surrogacy contract. Upon second reading, I searched for patterns, terms, and consistencies using descriptive coding, process coding, and *in vivo* coding (Saldana 2009).\(^10\) For this dissertation, I coded twelve major characteristics of the surrogacy agreements in my sample, six that broadly capture the risk management content of contracts, and another six that analyze them specifically for emotion management as a legal risk management tool. All twelve characteristics have multiple linked *subcodes* (Friese 2012).

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\(^9\) As defined by Arlie Russell Hochschild, *feeling rules* are “socially shared rules” and “guidelines that direct how we want to try to feel” (1979, 563).

\(^10\) *Descriptive coding* is used to summarize the primary topic of the excerpt which can then be categorized and linked to other codes; *process coding* searches for processes of human action, including individual tactics or strategies, and is particularly useful when searching for emotion taken in response to situations, problems, or interaction; *in vivo* coding is also called “verbatim coding” because it refers to a word or short phrase taken from the actual language found in the contract (Saldana 2009).
For example, lifestyle restrictions are a category of rules that require the surrogate to engage in – or abstain from engaging in – a specific activity, practice or habit. Contact and “intimacy restrictions” represent provisions in the contract that refer to expression of emotion, acts that could elicit emotion, and restrictions on physical contact with the baby, the intended parents, or even the surrogate’s own spouse. Compensation clauses and payment provisions reflect valuation of the service by the parties, as well as significant risks involved, and are one of the core elements of the exchange relationship. Payments are not strictly for the valuation of the gestational labor, but also a variety of supplemental fees paid, such as a fee for enduring an amniocentesis, medical insurance coverage, or the cost of a life insurance policy in the event of the surrogate’s death. Gender and parenting roles may include specific labels for the parties to the contract, which act as discursive signifiers (Conley and O’Barr 1998). Coding indicates a range of terms from the “gestational hostess,” to “embryo carrier,” to “intended mother,” each of which replaces standard dispassionate service contract terms like “employer,” “employee,” “subcontractor,” or “manager.” Determining the variation in terms, and what they mean to the parties, is important, because I believe naming practices symbolically produce a form of distancing or familiarity as a tool of emotion management, which in turn may serve to shape their identities and the nature of their relationships. While the twelve specific categories that emerged from my content coding will be analyzed in Chapter 5, examples are listed on Table 5.

The absence, presence and variety of rules, compensation provisions, and role assignments was intended to systematically identify categories and degrees of emotion management for each case, searching for patterns that emerge from all cases (Hsieh and Shannon 2005; Lofland, Snow, Anderson and Lofland 2006; Suchman 2003). I also used content analysis of contracts to compare the language between agreements by state to identify variation across contracts from different jurisdictions. Because I aim to theorize how those agreements reflect institutionalized assumptions about gender and work, content analysis of the formal instrument that governs the commercial relationship was the ideal methodology.

While contracts imply independent party “negotiations” or “mutually agreed upon bargains,” form or “boilerplate” contracts might be used by attorneys engaged to draft service agreements by intended parents. Therefore, capturing the types of contract provisions emerging in this new legal terrain is necessary to understand the degree to which emotion management is formalized when built into the contract, to be interpreted along with informal rules and practices ascertained during interviews of the parties. Content analysis will reveal whether terms are isomorphically replicated in contracts across firms or organizations, or deemed irrelevant as a matter of “form” (Edelman 1990; Macaulay 2000). Ultimately, my methods are intended to discover how contracts are developed and deployed to manage the emotions of parties to surrogacy agreements, and the process whereby social norms surrounding gender, motherhood and work become institutionalized through them.
### Table 5: Example List of Codes By Category*

#### Lifestyle Rules and Restrictions
- acupuncture
- artificial sweeteners
- caffeine
- cat litter
- chemical exposure
- chiropractor
- cleaning products
- diet
- driving
- essential oils
- exercise
- fish
- hairspray
- manicure
- massage
- microwave
- organics
- pesticides
- skiing
- smoke drink drugs
- sports
- tanning
- tattoo
- travel restrictions
- waive privacy
- vitamins

#### Compensation and Payment

**COMpensation**  
**PAYMENT**  

**FEES:**
- amniocentesis
- bed rest
- breastfeed
- childcare
- c section
- housekeeping
- insurance
- invasive procedure
- IVF
- lost wages
- maternity clothes
- miscarriage
- mock cycle
- multiples
- organ loss

**Relocation**  
**Contact and Intimacy Restrictions**
- birth
- bonding
- breastfeed
- communication
- continuing contact
- cut off
- handle baby
- labor and delivery
- name baby
- sex
- STD
- view baby

**Risk and Bodily Autonomy**
- abortion
- birth defects
- financial issues
- gender selection
- invasive procedures
- IP dies
- life support
- miscarriage
- publicity
- surrogate dies
- #fetuses

**Identity and Roles**

**TERMS:**
- Carrier, Embryo Carrier, Genetic Parents,
- Gestational Hostess, Gestational Mother,
- Gestational Surrogate, Host Uterus, Intended
- Father, Traditional Surrogate

**ATTY, AG, SUR, SUR H, IP**

**Psychological Counseling/Disputes**

**Counseling**
- PSYCH EVAL
- SUPPORT GROUP
- CONFLICTS
- DISPUTE RESO -Arbitration, Mediation Provision

*This is not a comprehensive list of codes*
This chapter was devoted to describing and justifying the research methodology used to understand how feelings are channeled, identities are created, and relationships are handled in surrogacy contracting, and the social impacts of this emotion management. In the next three chapters, I will report the findings of my data analysis. In the first, I will use the interview data to explain and analyze why and how anticipatory emotion management occurs in the matching phase preceding contract drafting. In the second, I will provide the results of my content analysis of the “feeling rules,” terms and provisions found in surrogacy contracts to show how they operate to manage emotions during and after the process. In the third, I will animate the analysis of the formal language of the legal instruments with a “contracts-in-action” analysis of the formal and informal practices deployed by lawyers and agencies to manage their clients’ emotions, and a variety of insights they provide about the development and performance of the contracts themselves.
Technically, the only criterion for a surrogate mother is a healthy uterus. Yet matching agencies, lawyers and counselors involved in screening potential surrogates and intended parents prior to contracting all tend to embrace a much more complex set of criteria, many of which are centered around “emotional fitness.” The matching phase is significant because in it much of what I call anticipatory emotion management occurs, like psychological evaluation, and gets incorporated into the formal agreement. In this chapter, I show how, even as the law remains highly ambiguous, emotional fitness criteria have become institutionalized as critical to the matching phase that precedes contracting. In the face of legal ambiguity, actors in the surrogacy field have become increasingly concerned with managing risk of litigation and liability by creating a variety of emotional fitness criteria, which have over time become institutionalized. Both potential surrogates and intended parents are screened for emotional fitness, which has given psychologists a prominent role in the matching process. Psychologists help to institutionalize the criteria for emotional fitness across various matching agencies and settings as professionals imbued with a particular perspective who work in legal environments (Edelman 1992). Thus, this chapter focuses on matching agencies as institutionalizing agents.

Based upon data derived from 115 interviews conducted for this project and archival documents collected in the field, I analyze how the parties find one another, agree to form a uniquely intimate relationship, and eventually, commit to an accord. Although there are a few different ways in which parents can find their surrogates, the focus of this dissertation is on the role of specialty businesses in the fertility industry that provide this service, called “matching agencies” or “matching programs.” Additionally, there are several distinct business models that connect matching agencies with attorneys, and thus, a few distinct routes to contracting.

Two distinct axes of screening criteria identified through interviews will be analyzed in this chapter: (1) basic fitness criteria, and (2) emotional fitness criteria. Note that all names used in this chapter are pseudonyms I created for this dissertation, including the agency business names, in order to protect the research participant’s confidentiality.

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A small number of attorneys interviewed for this project object to the term “matching agency” because agency is a legal term of art that implies a particular type of relationship and licensure. However, since the vast majority of subjects referred to the entities that facilitate the relationship between surrogates and intended parents as “matching agencies,” and because that is how they refer to themselves, I will use that term. I also acknowledge it is contested and potentially problematic. One attorney interviewed from the East region had this to say: “I think agencies are regulated entities. I think adoption agencies… are highly regulated by the state – by regulatory agencies with reporting and licensure requirements. I think other types of agencies are all regulated in license. And I think that the idea that egg donor and surrogacy programs are characterized as agencies is a way of lifting them up and over a particular barrier and giving people a false sense of comfort. And I think it’s wrong…I don’t think we should be calling them agencies, and I think we could come up with language that is not considered pejorative. And I know it’s difficult, and I know the programs bristle at it. I personally have tried out matching programs and recruiting programs and facilitators. And the courts, on at least two occasions, have called them brokers… and it leads to a tremendous amount of, I think, misplaced trust in these programs, and it’s self perpetuating.” (Joanna, Lawyer, MA)
4-A. Forming a Family By Finding A Match

How does an infertile couple that lives in New Jersey or Illinois find an ideal surrogate to assist with their quest to form a family through third-party reproduction? How does a gay couple or single man who lives in California – or Texas, or Korea, or France – find theirs? The process of finding, selecting, and hiring a surrogate mother – or being selected as a “worthy” parent by her – can be a highly complex, lengthy, and emotional process. Another layer of stress might be added to an already complicated situation when the parties live in jurisdictions where the practice is morally suspect and illegal. Not only personalities, but also fundamental values must align. For example, surrogates may feel strongly that “their” baby be raised in a Christian family, while parents may expect a surrogate to abort if Downs Syndrome is detected in “theirs.”

Although parties can match on their own through website classifieds like Surromomsonline, “independent matching” as it is known is reportedly risky for a variety of reasons. Some of those reasons include fraud, unsupervised or unanticipated health risks, and most relevantly for this dissertation, greater likelihood of emotional conflicts and disputes that could lead to litigation within a divided legal terrain. Thus, many go through professional matching programs that are paid to screen and evaluate the surrogate for emotional, physical, financial, and social stability, and to facilitate other aspects of the process during the pregnancy. They also screen parents for their motivations, criteria in selecting an ideal carrier, and their ability to pay. While multijurisdictional surrogacy contracting is still risky, parties and lawyers help institutionalize the role of agencies as helpful to reducing that risk.

While most parties to surrogacy are initially strangers, some parties connect with one another because they are what I refer to as familiars: they are family members or friends and therefore have a relationship that preexists the agreement. Examples in my interviews include a sister-in-law who carried for her husband’s infertile sister, a surrogate who carried for a co-worker unable to gestate, and a cousin who carried for her gay cousin and his partner. However, there is also variation within the category of familiars. Even though they technically “self-match,” surrogates and parents who are familiars may still use the services of a matching agency in order to go through the motions of demonstrating legality in the shadow of regulations or case decisions in their state regarding surrogacy (Mnookin and Kornhauser 1979).

For example, Parent’s Helper matching agency described their “Surrogacy Management” program. Margo, one of the operators of the program, explained:

We also have a separate program called surrogacy management, so if somebody brings in their own surrogate – i.e., a sister-in-law – the doctors’ offices and fertility centers still want all the t’s crossed and i’s dotted, so they will send them to us for an agency, and we will make sure that everybody gets their criminal background check, even though it’s a sister; we’ll help get their [medical] records, we’ll set up the escrow – that all the pieces are in place. (Agency, IL)

If these familiars do not compensate the surrogate directly for her “pain and suffering” or “inconvenience” – as in most commercial surrogacy arrangements – it is referred to in the
industry as an altruistic surrogacy. But as described above by Parent’s Helper, even in altruistic arrangements, when a matching agency and/or a lawyer is used, the costs and fees of the surrogacy are often managed through an escrow account. It is interesting to note that the legal gatekeepers described by this matching agency are not attorneys, but doctors and fertility clinics that practice medicine in the shadow of their State’s assisted reproduction laws. Thus, matching agencies, doctors, and fertility clinics each work in highly legal environments (Edelman 1992).

Still, the vast majority of my interviews described commercial, non-altruistic, non-familiar surrogacy arrangements. Therefore, I will relate the typical functions of the matching agency, and the process whereby parents find their willing carrier for the contract phase of the commercial agreement. In general, to be surrogates, programs recruit healthy women, typically between the ages of 21 to 38, who have proven their ability to carry a child to term, are parenting children at home, and match those women with individuals who cannot, or choose not to become pregnant, who yearn to be parents. Thus, matching agencies serve two clients: surrogates and intended parents. How does either party come in first contact with the agency?

4-A1. Contacting the Matching Agency and Operational Models

Women interested in being surrogates actively seek out agencies as if they are looking for “employment,” typically by conducting Google searches, and then submitting an initial contact form online with a specific matching program in their region. Many surrogates are referred into a matching program through experienced friends who successfully carried with that agency in the past. Still others are lured by recruitment efforts, such as “display ads out there in different magazines… anything family-related” (Cassie, Creating Kids, IL), as well as “Internet advertising – Google, Facebook, Craigslist, and then referrals from other carriers, (Jeffrey, Bearing Gifts, MA). Thereafter they will be screened for a number of criteria, some of which are developed to meet specific legal requirements, such as a minimum age of 18 or 21, to ensure a woman is legally competent to enter into a contract as a surrogate. The screening process following a surrogate’s initial outreach to a matching program is described in the next section.

By contrast, intended parents typically come into first contact with an agency following direct referral from a reproductive endocrinologist or fertility clinician. Therefore, matching agencies work to develop relationships with particular doctors and clinics both regionally and in jurisdictions where surrogacy is prohibited in order to get on the prized referral list of agencies given to intended parents just after they have been informed they need a third party to conceive and gestate a child. As Maribel of In Service Surrogacy explains, “I wouldn’t have this business if it weren’t for the physician’s referrals,” although she added that the Internet has made the professional outreach somewhat less critical. Similarly, Jeffrey from Bearing Gifts Surrogacy said, “Probably 80-some-odd percent of the clients that we work with are referred to us by the IVF doctors themselves” (Agency, MA).

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12 According to Helen from Magic Maternity in Wisconsin, “Surrogates find us 90% of the time through Google or a search engine.” I am not able to say whether her experience is fully representative.
By the time couples or singles have reached an infertility specialist, they have already had trouble conceiving, suffered miscarriages, or have what is referred to as “unexplained infertility.” This is a diagnosis given once the doctor has ruled out other causes like: (1) low sperm count, mobility, or motility; (2) low number of or unhealthy eggs; (3) the presence of diseases which prevent fertilization or gestation; or (4) dysfunctional or absent uterus. When the issue lies with the quality of sperm and eggs, but not carrying to term, individuals are able to purchase gametes from egg, sperm, and embryo “donors.” However, if the issue is in fertilizing and gestation, the doctor may then recommend surrogacy. Since such news is traumatic according to the interviewees, having resources to reach out to when feeling desperate is critical. As a result, fertility clinics are a key site for referrals to matching agencies.

Of course, the doctor may also suggest adoption, or provide the patient with a list of attorneys with whom they can discuss the spectrum of legal options they have for forming a family, including foster care, adoption, and surrogacy. Intended parents who have no reason to visit a fertility clinic, such as gay couple who need a surrogate uterus, report finding matching agencies through “word of mouth” within their social networks, by doing online research and visiting agency websites, and through attorneys who specialize in assisted reproduction. Nearly 5% of agencies interviewed explicitly and predominantly cater their family formation services to the gay and lesbian community, although 94% serve all clientele, regardless of sexual orientation (SurroCentral, MA). Only 1% in my sample does not match their surrogates with gay intended parents (Family Focus, TX). There are also a number of regional, national and international organizations and support groups that offer information on third party reproduction outside of the doctor’s office, law firm, or agency doors.

The international intended parent market cannot be overlooked, and is a growing segment of matching agency clientele. All but 4 programs in my sample, or 83% of agencies, serve international intended parents in addition to domestic ones, who get matched with surrogates who live in the United States. However, of that 83%, it appears close to 1/3 are agencies that dominate the international surrogacy market, based upon number of pregnancies annually, by reputation, and by online popularity. These also coincide with their status as “large” agencies in the size assessment listed on Table 2, agencies that report greater than 200 matches per year. For example, In Service boasts parent clientele who come from across the globe:

Maribel: They come from England a lot. They come from France. They come from Scandinavia. Oh, it’s all over. It’s Mexico. It’s Brazil. It’s Argentina. Australia. I mean they really do come from around the world. China. We have clients from the Middle East. Middle East is a little bit trickier… We’ve had Saudi Arabia. We’ve had Jordan. And we’ve had Israel. Africa.

Interviewer: So you would say that this is definitely not a localized process, that this is something where people can come from anywhere and get your services?
Maribel: Absolutely. Now, wherever they come from, they do need to be careful because the laws in their own country maybe different from the laws here.

Although accounts of oppressed surrogates from India and the Ukraine serving elite couples in the United States capture media attention, the United States is actually the central source for surrogates, not just parents, internationally. Lara of Co-Creators West sums it up nicely: “Right now, I would say we’re about 50/50 international versus American couples, and we’re probably about 40 percent gay, 60 percent not gay, which is quite a big change for our program” (Agency, CA). By contrast, a medium-sized operation in Massachusetts estimated, “If I took a current snapshot, probably 15 to 20 percent are international” (Jeffrey, Bearing Gifts Surrogacy). Incidentally, the fee for matching agency services at Co-Creators West is $20,000 for a domestic, and $22,000 for an international couple. First time surrogates for that program are paid $20,000 (Eliza, Co-Creators East). Thus, agencies can be paid as much as, or even more, than the surrogate who is bearing the risk – and the child.

In addition to direct referrals from infertility clinics, intended parents may decide to visit an attorney first, and come upon the matching agency referral through them. Not only do attorneys have lists of matching agencies they trust and team with to provide to clients, but also the inverse is true. Agencies often refer parents to particular lawyers after they determine surrogacy is their preferred method, and in many cases, have already matched with the surrogate. In those cases, they go to the lawyer strictly for drafting – rather than decision-making – purposes. If the intended parent(s) signs with a matching agency before a lawyer consult, conflicts can arise during the contracting phase of surrogacy; agencies often have pre-set compensation and fee amounts, in addition to specific contract terms, they demand that attorneys incorporate into the parties’ contract.

It became evident from interviews across twenty states that there are multiple organizational models for the businesses that offer matching services, and thus, degrees of affiliation and coordination between agencies and lawyers. Some agencies are run separately from law firms that provide reproductive services, while others are what I call hybrid operations. A hybrid operation is one in which the business offers both matching services and legal services for drafting the parties’ contract as a “one stop shop.” Seven of the twenty-three agencies sampled for this project, or 30%, are hybrid operations, sited in five different surrogacy-friendly states. There is much controversy among legal practitioners in the field of family formation – especially those who were adoption lawyers first – whether it is an unethical conflict of interest to simultaneously screen surrogates, coordinate matches, and ultimately, be paid by the intended parents who become “the client” for the legal side of the equation: contracting. Therefore, some lawyers will provide matching services, but not for clients they eventually represent; 4 of the 7 hybrids in my sample satisfy these criteria.

Other models are less overt, but nonetheless, suggest a business relationship and may be perceived as such by potential clients generally unfamiliar with the business side of surrogacy. For example, the lawyer may have their office down the hall or downstairs from the agency, but not technically have a legal business affiliation. In my sample, in addition to the seven hybrid
operations that claim separation, another three agencies make the segregation de facto by either office proximity or financial ties with the law side of the practice. As a result, attorneys can assert that they have no formal, legal association with the matching agency, averting accusations of questionable representation or judgments about preying on vulnerable populations – couples desperately seeking a gestational hostess for their genetically related child-to-be, willing to pay $50,000 to $180,000 for the opportunity to do so.

In any case, lawyers receive a steady flow of referrals from particular matching agencies and fertility doctors, who in turn receive referrals from lawyers with whom they have established relationships. Certain surrogacy-friendly jurisdictions across the United States tend to have higher concentrations of matching agencies. In my sample, these include California, Illinois, Maryland, Massachusetts, Oregon, and Texas. A handful of agencies get a solid share of the total matching business in the United States, particularly from the international parent-seeking market. This is reportedly based upon their years of trusted experience in the field, reputation within a niche market like “gay friendly,” or having celebrity and high-profile parents as clients (SurroCentral, MA; Co-Creators West, CA). However, one high-volume California agency with a down-the-hall affiliate law firm proved itself “popular,” despite recent investigations revealing shady and fraudulent practices (Surrogate Stop, CA). Based upon the interview, and as compared to the practices of the other study subjects interviewed, 4 of 23 agencies in my sample (17%) had questionable practices, measured by lack of adherence to guidelines established by the American Society for Reproductive Medicine (“ASRM”), The National Infertility Association (“RESOLVE”), or some other legal violation.

Nevertheless, the majority of agencies interviewed for this study (83%) earnestly communicated that they were committed to following ASRM and other associational guidelines for ethics and best practices. Thus, associations like ASRM play a critical role in institutionalizing best practices into the matching phase, then carried over into formal surrogacy agreements. Agencies and attorneys have a strong, mutual incentive to work hard towards maintaining positive reputations precisely because policies and public opinion regarding the morality and legality of paid surrogacy remains unsettled and uneven. They also report caring about: (1) the wellbeing of surrogates; (2) insuring their online reputation garners them new business; and (3) a desire to assist those who want genetically related children, but cannot carry. In fact, 57 of the 66 attorneys interviewed for this study (86%) do not provide matching in addition to legal services, and 50 of those 57 were firmly opposed to it. This number correlates strongly to membership in AAARTA, which is not surprising. To become an AAARTA member, a lawyer undergoes a lengthy and rigorous review process, as described by several interview subjects. Those accepted into the association promise to adhere to professional guidelines which may exceed, or are at least clearer than, their own state’s requirements. This is a result of the unsettled legality of surrogacy, its multijurisdictional character, and the aspiration for eventual federal uniformity, such as was achieved by the Uniform Parentage Act for gender-neutral custody laws and adoption status. As states like New York and Washington are in the midst of legislative debates that considering legalizing the practice, agencies and lawyers have a major stake in making sure legislators are persuaded it is safe and protective of those involved. Given legal ambiguity, agencies and lawyers play a vital institutionalizing role.
Finally, it is important to report that many agencies are run either by women who were formerly surrogates themselves, or by men or women who became parents through surrogacy. In my sample of matching agency representatives, 13 of 34 (38%) had this background and of those, 7 of 34 (20.5%) were former surrogates, while 6 of 34 (17.5%) were parents through surrogacy. A significant percentage of lawyers who specialize in assisted reproduction have become parents through surrogacy, although many who came to the field through their experience as adoption lawyers have themselves adopted, rather than used a surrogate to bear their children. Since this chapter emphasizes the matching process, I will focus on why personal experience with surrogacy, prior to professional experience in the field, makes a difference when discussing the practices and perceptions of the individuals who run these matching programs, especially as it relates to emotion management.

4-A2. Matching Program Entry and Screening Criteria

Both intended parents and surrogates are screened by the agency, but criteria are different. Additionally, based upon my interviews, I assess the process for intended parents to be less rigorous than for surrogates.

4-A2 (a) Parent Screening

While surrogates go through more comprehensive mental health evaluations, the intended parent psychological “screening” is meant to determine their ability to work with others, especially their selected carrier, and to manage expectations. They do not go through the kind of rigorous review required of adoptive parents, either. As will become clearer in my analysis of the surrogates’ psychological evaluation process, Eliza at Co-Creators East distinguished what it means to “screen” intended parents. She offered:

And one of the reasons for doing a lengthy consultation and the role of the counselor’s participation in that is to determine not, “Are you going to be good parents,” which is what an adoption agency is doing, but, “Are you going to be comfortable in this program with somebody else. You have to trust somebody else, and you have to not be in control.” And that can be a stumbling block for somebody who’s viewing this as a business arrangement. And we’re not going to work with them. (Agency, MD)

Outside of compatibility with the program, parents are primarily screened for: (1) demographic criteria, like age, marital status, and where they reside; (2) their criminal background; (3) financial stability, employment, and ready access to sums large enough required for escrow; and (4) a history of major physical and psychiatric illness. Representative of my interviews of matching agencies, “average” intended parents are described as “a couple, probably hovering somewhere in their early 40s, white, professional, white-collar professional,” (Maribel, In Service, IL). Whether the agency will serve interested parents that are single or married, heterosexual or homosexual, foreign or domestic, young or old, Jewish or Muslim, unable to carry or do so by preference, want traditional or gestational surrogates, varies by agency. This reflects differences in the values, biases, and preferences of the agency operators, as well as law.
Some state surrogacy statutes, such as Texas and Florida, require the intended parents to be married to each other, and to use a gestational surrogate to whom the child will bear no genetic relationship (Texas Family Code Sec. 160.754; Florida Domestic Relations Code Sec. 742.15). Thus, while Texas and Florida do have statutes regulating surrogacy, agencies will not be quick to match gay intended parents who live there with the surrogates in their programs, given gay marriage is not recognized in either jurisdiction. By contrast, the Illinois statute allows either single or married intended parents enter into surrogacy contracts, but has its own hurdle: it requires they use a gestational surrogate, and that at least one of the intended parents be genetically related to the child (750 Illinois Compiled Statutes 47). As a result, even though Illinois has a streamlined statutory process for surrogacy contracting, it does limit agencies from making certain matches for contracts that will take place in Illinois, such as for a gay couple that opts to use a traditional surrogate. That couple may thus prefer contracting in California, where traditional surrogacy is not prohibited by either statute or case law.

Nonetheless, agencies across the United States, despite the laws of the jurisdiction in which they operate, find a variety of ways to serve intended parents in their state who do not necessarily fit into the statutory qualifications. For example, they may decide to do the match, and find an attorney to coordinate additional legal processes – such as a formal adoption – following the birth of the child, even if a statute like that in Illinois would not require it of a married couple. By contrast, Rhonda of Infant Quest will “only recruit in states where we can do pre-birth orders 13. I think that from a psychological perspective, it’s very challenging for intended parents to go through the adoption procedures of their own children. And so we only recruit in states where we’re able to do that” (Agency, CO). By avoiding a match that would be “psychologically challenging” for parents, Rhonda is engaged in anticipatory emotion management. While strategic, it also limits the types of parents selected by her program.

There is clearly variety among agencies in terms of risk-averseness. Some agencies will arrange to temporarily relocate a surrogate or parents to a surrogacy-friendly jurisdiction until after the birth of the child (Forever Fertile, VA; Surrogate Stop, CA), while others steer clear of those practices (Infant Quest, CO; New Dawn, MD). As Aileen of Infant Technologies asserted, “We don’t work with anybody from Michigan. We won’t work with anyone from Arizona – any of the states that prohibit – or New York or Washington State – any of the states that prohibit surrogacy I’m just not getting involved with” (Agency, IL). However, my sense from the interviews overall was that programs regularly coordinate matches for intended parents who live anywhere, if the surrogacy contract is executed in a state without those limitations. As Helen from Magic Maternity summarized, “People have come from Japan, France, Mexico, New York, Michigan, Wisconsin, Minnesota – so most places where surrogacy is illegal or criminal or not safe… they really come from all over” (Agency, WI).

13 A “pre-birth order” is a relatively new legal procedure that allows intended parents in surrogacy cases to legally establish their parentage before the baby is born, while the fetus is gestating in the surrogate’s uterus. These orders trump the Uniform Parentage Act rule that the gestational mother is the “natural” or “birth mother.” State courts have increasingly recognized pre-birth parentage orders, especially in cases where the surrogate is carrying a fetus genetically related to the intended parents, or using donor gametes (Crockin and Jones 2010, 214).
While some agencies are open to serving intended parents from wherever they live and whatever their status, others draw lines as to the type of “personality” they are willing to match with their surrogates. For example, one agency representative advised a carrier against matching with a single man who wanted three women simultaneously impregnated with his sperm, ensuring his babies would be born close in time. Per the hesitant surrogate, Alana:

Alana: Yeah. He wanted – he wanted like four or five kids, I think I remember, and he wanted them all within months of each other. And he was going to have a nanny and have all this help, and he was a single dad, and he was very adamant on him being close in age with his siblings, so he wanted all his kids to be that way. But you’re talking like bam – six months on top of each other.

Interviewer: Well, thank you for sharing that. So you and [the matching agency] and your husband just kind of decided no, that wouldn’t be the direction you’d want to go?

Alana: Mostly [Sophie from the matching agency]. She was not going to allow it.

Interviewer: That’s interesting that she screened you for that in the first place. Did you have any thoughts about that?

Alana: No. She just – she, of course, has a lot of nice families that need babies, or want babies, and she – the surrogates are more in demand in that clinic than – they just can’t supply enough for all the families that they have.

Alana went on to confess that she “thought that was kind of weird,” and that the matching agency justified refusing the match by saying, “we have so many nice families out there, we cannot have one person having three surrogates - you have to skip him” (Sophie, Parent’s Helper, IL). Similarly, Monica of Gestation Depot rejected a single intended parent candidate by anticipating some potential emotional conflicts. She justified:

I will refund people’s money if I think that they’re – I mean look, most people are a little crazy when they get to this point. There’s a lot of emotions; there’s a lot of trust; there’s a lot of finances. I expect some level of crazy – but this was crazy. He also didn’t have a cell phone; he was a pharmacist; he lived upstairs with his mother. All this stuff started coming out, and I was like, “No.” (Agency, CA)

While acknowledging that most people can get “a little crazy” once they commit to surrogacy, the fact that he had some red flags disqualified him from her matching program, despite the fact that his wealthy mother was willing to pay for the process.

Further, while some agencies serve older clientele, others have age limits for intended parents. Maribel of In Service said that they will match intended parents as long as “their combined age does not exceed 110… so if the husband is 60, the wife can be 50” (Agency, IL).
Per my agency interviews, homosexual intended parents tend to be younger than heterosexual ones, who have already tried and failed to conceive on their own, accounting for the delay. Heterosexual intended parents tend to be in their 40’s and 50’s, following both establishing careers and attempts to bear children, while homosexual intended parents start in their 30’s to 40’s, after establishing their professional lives (Erik, SurroCentral, MA; Brendon, Lawyer, CA).

4-A2 (b) Surrogate Screening

Surrogates are screened for what I identify as two distinct axes of criteria: first, a series of criteria I will call basic fitness, and second, I will call emotional fitness. Primarily, surrogates are screened for a number of basic fitness criteria for the program, including: (1) age; (2) citizenship; (3) race; (4) religion; (5) state of residence; (6) marital status; (7) if she owns a car; (8) evidence of healthy births; (9) employment; (10) financial status; (11) number of children at home; (12) her medical history and physical health; (13) history of drug, tobacco, or alcohol use; (14) criminal background; (15) her body mass index (BMI); and (16) diet and exercise information. If she is married, the surrogate’s spouse will also be screened for many of these criteria as a signatory to the contract.

There may be other basic screening criteria, like having medical insurance with maternity coverage. However, agencies disagree whether they will accept surrogates who do not have their own assured maternity coverage under a private health insurance plan, since some intended parents who can afford to do so are willing to purchase a policy for the contract period. In fact, some agencies reported that the past trend of using military wives in their surrogate programs is starting to decline now that the major health insurer for veterans – TriCare – caught on that maternity coverage was being used for commercial pregnancies. Insurers not only started excluding these claims, but have also sued surrogates for reimbursements (Darren, All in the Family, TX; Lara, Co-Creators West, CA). Still, agencies and lawyers in Texas, Virginia and California reported that military wives make ideal surrogates (Brendon, Lawyer, CA; Claire, Lawyer, TX; Corinne, Family Focus, TX; Craig, Lawyer & Your Genetic Marketplace, CA; Dalia, Surrogate, CA/TX; Ingrid, Lawyer, VA; Lara, Co-Creators West, CA).

Basic screening criteria appear to primarily manage the physical or medical risks of a third-party pregnancy, such as child-bearing age, evidence of a healthy birth, medical or substance abuse history, BMI, and diet. But others, like religion, race, marital status, state of residence, and financial status overlap with what I call emotional fitness criteria detailed in section 4-B, below. Since physical risks can lead to problems in contracting, both basic fitness and emotional fitness criteria manage legal risk. However, the interview data describing the latter best evidence the theory posited in this dissertation. Therefore, the next section will analyze a number of other screening qualifications which I argue are critical anticipatory emotion management strategies that precede the contracting phase of surrogacy.
4-B. Anticipatory Emotion Management: Screening for Emotional Fitness

In addition to the basic fitness markers identified above, this section will report findings that describe a series of anticipatory emotion management strategies presenting themselves as a series of rules and assessments for emotional fitness, prior to the formal contracting phase. Agencies vary as to how rigorously they screen for emotional fitness criteria, in addition to the basic ones. Based upon the interviews with surrogates, parents, and lawyers, failure in adequately screening and matching on emotional criteria can lead to hurt feelings and conflicts, and therefore, legal risk exposure. These additional criteria include: (1) her mental health history and a psychological assessment; (2) her emotional and practical support system, most often, a spouse; (3) whether she is currently or has parented children at home, despite demonstrating healthy births; (4) her values, including religiosity, views on abortion, homophobia, and racism; (5) her motivation for becoming a surrogate; and (6) degree of contact she envisions with the intended parents during the pregnancy, and with the child and the intended parents, following the pregnancy. Emotional fitness criteria demonstrate an applicant’s general potential to be a good candidate to keep in the database among a pool of other candidates, but also provide strategic information regarding which intended parent(s) they would most likely compliment for a specific formal arrangement. In this way, screening and matching serve an anticipatory emotion management function.

My interviews with matching program representatives suggest that they believe the better job they do in screening out and handling more vulnerable candidates, the smoother the process will go, minimizing legal risks. They also take cues from and defer to mental health professionals, demonstrating they critical way psychological ideas infiltrate the field logic. The more closely the values and vision of surrogates can be aligned with those of intended parents, the lower the likelihood for “hard feelings” and conflicts (Cassie, Creating Kids, IL). Since nearly 40% of the agency representatives in my sample have either used surrogates to form their own families, or been surrogates themselves, their subjective experiences with the feelings – and emotion work – the process are in the forefront when matching and anticipating the formal legal relationship (Hochschild 1983).

4-B1. Psychological Screening

The psychological screening of a surrogate initially takes place through intake forms when she applies to enter into a matching program online, but gets personalized when she meets with the agency staff and the professional counselor who performs a more formal psychiatric assessment. Psychological concepts and practices are transposed into the reproductive field during the screening process. The questions are intended to gauge the applicant’s mental health history, such as: Have you ever been to see a psychiatrist, psychologist, or any other mental health professional? Have you ever been prescribed psychiatric medications? Have you (or your spouse) ever suffered from depression? Do any of your children have behavioral problems? (Agency CA; Agency IL; Agency OR; Agency WI) If she answers, “yes” to one of these questions, the matching agent may follow-up and probe for more details, or simply reject her outright as unqualified. As Helen of Magic Maternity explained, “We do extensive screening on
the surrogate before she’s even invited to our office to interview with us” (Agency, WI). Of course, screening is not a purely objective process, especially when it comes to psychological and emotional fitness. The success and strength of a matching program can rest on the degree to which they subjectively anticipate emotional red flags that could become attachment, post-partum, or other issues during the process.

What is the purpose of mental health screening? I argue that psychological screening during matching has become diffused and institutionalized in the reproductive field as an anticipatory emotion management strategy (DiMaggio and Powell 1983, 1991; Edelman 1992). The unique integration of psychologists into the process is part of a comprehensive set of legal risk management tools lawyers and agencies use in an unsettled and ambiguous legal field (Edelman 1992). Reproductive lawyers and matching program coordinators defer to the judgment of psychologists licensed to perform tests relied upon to gauge the subject’s emotional stability and social skills. Much of this deference occurs because medical association guidelines – referred to in the absence of legal regulations – recommend psychological assessments of surrogates. Therapists are viewed as neutral and capable of weeding out potentially problematic candidates. Practices in the mental health field like psychological screening are embraced by actors in the fertility field and legal field and incorporated into formal contracts. In this way, the legal, fertility, and mental health fields intersect and overlap, and their practices institutionalized (Bourdieu 1987; Edelman et al. 2001).

First, fertility clinics often require proof of a psychological evaluation prior to performing an in vitro fertilization procedure or embryo implantation as directed by ASRM guidelines (Betsy, Baby Boom, WA; Marsha, Magic Maternity, WI). One of the standards is that a licensed professional administer particular psychological exams, such as the Minnesota Multiphasic Personality Inventory (MMPI) or the Personality Assessment Inventory (PAI). Second, interview subjects believe psychological screening enables an agency to gauge how a candidate might emotionally react to the rare situation in which she not only carries, but relinquishes custody of a baby to a third party who has been involved in the process. To the extent she has a history of depression, trouble relating well with others, or a variety of interpersonal issues linked to trust, control, anxiety, or dependency, the agency will be wary of her fitness as a candidate.

Technically, a surrogate only requires a healthy uterus. But in addition to proving a live birth, to go well, agencies and lawyers believe surrogacy also demands a relatively healthy psyche. According to the interview subjects, a “good” candidate demonstrates a degree of emotional stability, cooperation, patience and tolerance. Of course, agencies are far from equal in their efforts to find both technically and emotionally good candidates; some psychological screens are more rigorous than others. Further, despite best efforts, sometimes their judgments are wrong. While it is impossible to predict how a woman will emotionally react to such an extraordinary situation, the agency’s goal is to minimize risk by weeding out those who present as less than psychologically ideal before they even begin.

Furthermore, surrogacy is distinct from adoption. In surrogacy, the intended parents will be involved, to varying degrees, in the carrier’s life before, during, and sometimes following the
pregnancy. In adoption, intended parents do not expect to, nor typically have an opportunity to control multiple aspects of the pregnant woman’s life and choices. Psychological screening is the first stage in which parents get control over the pregnancy vis-à-vis the surrogate. Anticipating a surrogate’s emotional fitness helps manage the risk of the process; since adoption statutes give birth mothers a “remorse period” prior to permanent relinquishment of their parental rights, the main draw of surrogacy is increased certainty, and thus, decreased anxiety. In fact, in interview after interview, agencies report that a primary reason seeking parents choose surrogacy over adoption outside of their desire to have a genetic relationship with their child is to have control over the pregnancy even before conception (A Fertile Find, MN).

Two large agency operations – Co-Creators East and Co-Creators West – give a sense of how the psychological evaluation phase weeds out candidates based upon anticipatory emotion management profiling. A large matching agency with an international reputation might get hundreds of applicants each month. How many actually make the cut into the surrogate pool? According to Eliza of Co-Creators East:

We get approximately 400 requests a month from women who are interested in being a surrogate in our program, the majority of them coming through our website. We get some interest from radio ads or print ads that you don’t do too much of, personal referrals. They watch a TV show, and so they do a search online for surrogacy…Out of the 400 that I mentioned, by the time we’ve completed all the screening – which is what we do – we may have 15 approved candidates. So we’re very particular. (Agency, MD)

Being “particular” about which applicants they choose is based not only upon the basic fitness criteria explored in the previous section, but also their emotional fitness. In fact, Lara of Co-Creators West emphasizes the degree to which the agency staff, and even its owners, defer to the judgment of the professional counselor who is performing the psychological evaluation.

Did she get past the background screening? Did she get past my staff – did she respond nicely? Was she pleasant to them? So my staff makes a certain amount of decisions, and then it gets to the point where now it’s 100 percent psychologist, and we never contradict our counselors. They have the absolute final say. So if they say, “You know what? There’s something about her –” even if they’re wrong and I lose a candidate, I would rather do that than risk taking a candidate that they were right on because they really do have the skills that are far better than any skills I would have. (Agency, CA)

Being “pleasant” to others, or having a gut feeling that there was just “something about her” may seem like vague rationale. However, agencies argue it points to the surrogate’s fundamental social skills and ability to handle the stresses that inevitably accompany the process.

I argue that agency deference to mental health professionals they view as “neutrals” is created by the uncertainty of the legal field. The logic of psychology, represented by emotional fitness, comes to dominate the field through practices during the screening process, and beyond.

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14 These agencies size assessment corresponds to their measure as a “large” program defined by coordinating more than 200 matches per year as listed on Table 2 in Chapter 3.
The logic of psychology thus creates a form of social order in what is a legally unsettled and risky terrain. Psychological evaluations are recommended under ASRM guidelines, associational norms in the medical field created in the absence of legal regulation. While advancements in reproductive medicine make third-party pregnancy possible, law has failed to catch up. The unsettled and ambiguous terrain makes surrogacy legally risky, though medically possible. Deference to psychologists as well as their evaluations becomes institutionalized for risk management. Essentially, the surrogate needs to have “a psychological assessment which shows that she’s thinking clearly and there aren’t other issues that are clouding,” as well as demonstrate that she is “mentally mature” (Marsha, Magic Maternity, WI; Daphne, Repro Junction, OR). If non-neutral, unlicensed professionals make this assessment, it could lead to conflicts during the contracting phase, resulting in litigation. The institutionalization of psychologists into a preliminary stage of a medical treatment also demonstrates overlap between the legal, mental health, and fertility fields, the last of which includes physicians who specialize in reproductive medicine (Heimer 1999).

Corinne, the owner and operator of Family Focus in Texas, tries to explain what “good material” is, psychologically speaking. She described the psychological screening process, and the kind of reasons she might exclude an applicant from her matching program:

Corinne: [T]here have been a few that we’ve declined not for medical reasons but just because we didn’t feel that they were – not necessarily worthy but – what’s the word I am looking for – good material –

Interviewer: A good candidate?

Corinne: Yes, and not just for medical reasons – just for social reasons or psychological reasons would be a good one.

Interviewer: What kinds of psychological reasons, or what do you mean by that?

Corinne: That maybe they’re on anti-depression meds and we’re not saying that people don’t need depression meds but we typically will turn them away not only because – you can’t take certain depression meds when pregnant, but what if for some reason they don’t take their medicines anymore and they became depressed ... That would be one reason. Anxiety meds, horrible relationships, having no support from a family member.

I had one young lady come in and saying that she wanted to do this but her husband was against it. Well, then, we have to have his consent. We can’t have you be a candidate and carry a child for someone and your husband is there completely not supportive and giving you stress and tension the whole time. So we’ve had to turn away women because of that or other women, believe it or not, would come in and say “Well, do we have to tell my husband about this?”
Corinne declined this candidate because a history of depression suggested she might not be able to handle the emotional aspects of surrogacy, and the applicant wanted to keep the surrogacy a secret from her husband. The agency believed this demonstrates her dishonesty, and questionable relationship skills. It also suggested to the agency she would not have the practical and emotional support of her spouse, another emotional fitness criteria used for screening out less than ideal candidates, described below. Naomi of Magic Maternity emphasizes that psychological screening is not just about “personality testing,” but managing expectations to avoid high emotions. She clarifies, “the psychological assessment is about – to make sure that everyone is on the same page about what the intent is and that the woman who is seeking to be the gestational carrier truly understands what’s happening” (Agency, WI).

Psychological screening is not only an emotion management strategy used by agencies that occurs prior to the contracting phase between the parties, but is almost universally incorporated as an explicit term into their formal agreement by attorneys. Thus, psychological screening of surrogates has now become diffused and institutionalized in the reproductive field (DiMaggio and Powell 1983, 1991; Edelman 1992). Further, it shows that the use of emotion management as a tool for legal risk management occurs at each stage of the process. Other emotional fitness criteria, including willingness to terminate a fetus, as well as the amount of contact expected with the parents and child during and following the pregnancy, might also become terms transferred into and formalized in the contract. Therefore, the surrogate’s responses during screening are not just used for matching compatibility – they are legalized.

4-B2. Support System

The second emotional fitness screening criteria I identified during my field research is whether the surrogate has an emotional and practical support system. I argue that having a support system is another way agencies attempt to manage legal risk amidst an ambiguous, multijurisdictional field of practice (Edelman 1992). The requirement that the surrogate have a support system has become diffused and institutionalized as an anticipatory emotion management technique during the screening and matching process (DiMaggio and Powell 1983). While it could be argued that having practical support while pregnant is distinct from emotional support, I show that using support as a criteria during screening conflates the two. Evidence of a support system can coincide with an applicant’s class status, discussed in section 4-B5.

The key indicator in this category is presence of a spouse, which is why marital status of the surrogate is often more important to an agency then that of the intended parent(s). While many programs still require surrogates to be married to participate, others will waive this criterion as long as the surrogate can demonstrate domestic security and some financial stability emanating from a partner, family member or friend – if not a husband. Agency coordinators, especially those who have been through the process first hand, anticipate a surrogate’s need for continuous emotional and social support. Margo of Parent’s Helper has noticed an industry shift, explaining, “Surrogates are what I call diamonds in the rough…when the state became very surrogate friendly, the perfect surrogate was married, 2.5 children, stay-at-home mother, loved
being pregnant. But with the economy, almost everybody works now, so we do look for our standard is somebody who’s got a great support system and is a very stable person” (Agency, IL). Not all agencies share that more flexible criteria perspective. In any case, the screening requirement that a woman must be either married or have a “great support system” is an anticipatory emotion management technique intended to insure that as life becomes more complicated for the surrogate, she can handle it.

The complexity ranges along a spectrum from intense to mundane: assessing medical risks, such as the risk of death from pregnancy-related complications, the physical experience of pregnancy, needing extra help with childcare when placed on bed rest, and attending doctor’s appointments, like the ultrasound. Each of these inevitably trigger the surrogate’s feelings, whether anxiety, pleasure, pride, frustration, or stress. Without both physical and emotional support from those around her, she is not considered a good candidate. How then do agents describe the typical, “good” surrogate candidate? Maribel who runs a large agency in Illinois describes both demographic and emotional fitness criteria for her program:

Maribel: Yeah. The average surrogate is a young mother. I’d say she hovers around the age of 30, very stable, married.

Interviewer: Stable, how?

Maribel: Stable in her relationships, in her home environment, financially stable.

Interviewer: Okay.

Maribel: And again, an [In Service] surrogate is, I think, a cut above the rest. And I’m very frank in my belief in that. We’ve created a program to be really the gold standard in this industry. So our surrogates are not typical of the industry, but they’re typical of [In Service]. So by and large, married, they’re all financially stable. They all have good home lives. They have excellent support systems and friends.

Emotional fitness for Maribel’s agency emphasizes stability, marriage, and having “excellent support systems and friends.” According to Aileen of Infant Technologies, stability is not the only quality they seek in a candidate. She admits, “Some people are very particular and they’re looking for an attractive surrogate – someone who’s very stable, married. All the surrogates that we work with are stable. They’re not all married – certainly not all attractive in what people would term attractive. They’re not all skinny. And sometimes a thin surrogate isn’t good because pregnancy can be risky” (Agency, IL).

Rhonda of Infant Quest in Colorado clearly depicts an unsuitable surrogate candidate and contrasts her with the kind of woman they want in their matching pool, but presents why anticipating stability and compatibility are key to a better match. She elaborates:
One of the things that really horrified me at [another agency] were these surrogates that were coming from various agencies. They were 21-year-old single parents with two and three children, and I wouldn’t necessarily describe them as the most stable individuals. They were in more chaotic points in their life, and not that they weren’t good women that wanted to do this for the right reasons; I just don’t know that they had the profile that was going to make this go as smoothly as possible.

And so the women that I recruit tend to be a little bit older on the scale. Although we technically will accept anyone from 21 to 39, the majority – I don’t think I’ve ever accepted anyone under 25. I’d say the majority of our surrogates are 28 to 34, typically married, educated, middle-class women that are confident and communicative because I think that their confidence level in relation to the intended parents changes the dynamic.

For example, let’s say we have intended parents that are 49 years old and educated professionals versus this 21-year-old with a high school education. It sets up this dynamic where this surrogate is oftentimes intimidated by her intended parent or puts the intended parent almost in a parental role. And I think that that makes it really challenging for all parties.

So if we can kind of push everyone together and find the more mature, responsible, confident gestational carriers, I think it just smooths the process quite a bit.

Anticipatory emotion management is all about “making this go as smoothly as possible” not only by weeding out single, younger surrogates that have an unstable and “chaotic life,” but also coordinating a complimentary match. Since technically the only requirement to have a baby for a third party is a healthy uterus, using other criteria, such as having a support system, serve a different function. Agencies use, diffuse, and institutionalize their criteria for surrogates as a legal risk management technique. Agencies define “ideal” surrogates in an attempt to anticipate and minimize conflicts that could lead to big problems during contracting. The ideal of a “married, educated, middle-class” and “confident” woman satisfies an agency’s emotional fitness criteria, or at least, their perception of stability, given the stakes.

4-B3. Parenting Children at Home

A third emotional fitness criteria I recognized throughout my field work considers whether an applicant is currently, or has recently parented children at home, despite demonstrating she has carried at least one child to term. Thus, many agencies minimally require surrogates to have at least one child living with them. This is an anticipatory emotion management technique I believe agencies use to decrease the likelihood of bonding and attachment with the child. The lynchpin of surrogacy is establishing legal parentage in a third party who did not gestate the child. Given the unsettled and divided laws on surrogacy, agencies are highly motivated to minimize the risk of emotional attachment between the surrogate and the child she carries. Attachment is the primary legal risk faced in a field that, according to several jurisdictions, allows a remorseful birth mother to keep the child, voiding the contract.
Several agencies justified the rule that surrogates not only demonstrate their physical ability to deliver, but have a child at home. Sophie it is crucial she “know what its like to have a baby and have the baby live with her – to parent” (Parent’s Helper, IL). The fear is that if a woman successfully carried a child to term – thereby proving her ability to have a healthy pregnancy – but then either gave up the child for adoption or lost custody, she may be more likely to grow emotionally attached to the fetus during the pregnancy. That would be risky.

Cassie from Creating Kids in Illinois echoes why it is important “on a psychological level” that “they’re a parent themselves.” She reflects:

Interviewer: And why is that important?

Cassie: I think just – if you’re going through a pregnancy, and then you go through giving up that child for somebody else, even though it’s not genetically related to that surrogate, they definitely need to have a child of their own.

Interviewer: Because it might be hard to give up their child?

Cassie: Right. And then just for the future. You just don’t ever want them resenting or having hard feelings or just having a rough time doing that if they didn’t have a child of their own. You have that bonding moment of the pregnancy.

Interviewer: The physical bonding of the gestation?

Cassie: Right. Even though they know going into it that the child is not biologically at all their child, I just think that could be an issue down the road if they didn’t have a child of their own.

Thus, to avoid potential attachment, or what Cassie describes as the “bonding moment of the pregnancy,” agencies establish a screening criterion that there are already children in her household. Presumably, she will be less tempted to want another. Screening out women who have not had their own parenting experience – even if they have proven healthy gestation – is an anticipatory emotion management technique designed to minimize risk by policing attachment between the surrogate and child, resentment between the surrogate and parents, or “hard feelings” experienced by the surrogate. However, it is less clear whether already having at least one child to parent necessarily makes giving over the next one less of a “rough time.” A future research project might measure the extent to which this predictive strategy is actually effective. Clearly, agencies believe that anticipatory emotion management techniques, combined with active feeling management during the process, work to reduce prospective “hard feelings.”

Anticipatory emotion management strategies are also visible in agency questionnaires. One question in particular appears to gauge an applicant’s potential for emotional attachment with the new baby, especially if she is a first time surrogate. Creating Kids’ “Surrogate Questionnaire” included the following query:
“How do you think you will feel on an emotional level, carrying and delivering a baby that will not be your own? How can we and your Intended Parent(s) be certain that you are not going to form a “maternal” attachment to the baby or babies you are carrying as a Surrogate?” (Agency, IL)

To the extent a surrogate can answer the question appropriately – by demonstrating her ability to emotionally detach from the pregnancy because she already has children at home – the more likely she will become selected for a matching program. However, some questionnaires include “trick” questions. For example, several agency screening forms ask, “Are you willing to nurse or pump breast milk?” Marsha of Magic Maternity noted, “if there was a concern that the carrier was really planning to breastfeed and attached to that idea and required it, that would be an issue to deal with in the psych eval… you’d want to sort out why it was that she was so attached to the concept of breastfeeding” (Agency, WI). Even if she is currently parenting children of her own at home, she may still be interested in breastfeeding a newborn surrobaby. Thus, the emotional fitness screening criteria are imperfect; they serve to reduce rather than eradicate risk of emotional attachment. Whether or not that anticipatory strategy is effective is a separate inquiry.

4-B4. Values

The fourth emotional fitness criteria I identified can be classified as a values category: religiosity, views on abortion, homophobia, and racism. Although it makes light of what in other contexts are constitutional rights violations, several agency representatives and parties likened the process of matching a surrogate with hopeful parents to “dating,” which requires personality and values compatibility. Jessica, a surrogate from Florida described her experience of getting screened and matched by the agency. She said, “So with all that, I filled out a really large application that, by the end, probably asked me more questions than I would have ever thought of asking myself… So it was kind of like a dating service. They ask you a whole bunch of questions and match you with the people that come close to your specifications on your application.” Like dating, a new and entangled relationship is formed in which each party relies upon the preferences, choices, and availability of the other. But unlike dating, a surrogacy contract is a legally enforceable “entangled” exchange relationship. If conflicts arise, the stability of an agreement privatized to avoid the unsettled legal field is disrupted. Like the other three emotional fitness criteria, values matching is diffusing and becoming institutionalized.

An incompatible match is one in which fundamental religious and moral values collide. As Eliza of Co-Creators East explains:

We take all the appropriate issues into consideration that we know – legal status of the state she lives in, the wish list of the intended parents, their point of view, both parties, regarding terminating the pregnancy or reducing a triplet pregnancy, preferences regarding race, their sexual orientation, all the kinds of things that go into making them comfortable with each other.
To the extent a matching program can anticipate where the parties’ values align, the less likely conflicts and high emotions will occur. This is especially true for disputes over the termination of fetuses, and the racial preferences of either intended parents or surrogates. When it comes to religion, some surrogates want to make sure the baby they gestate goes to a “nice Christian family,” while others clearly do not care, as long as it appears to be a stable, happy home. Corinne of Family Focus in Texas finds, “Most of them just say, ‘I want them to believe in God’... no atheists.”

That said, Corinne says her own Christianity plays a big role in her matching services, and her clientele respond to it. She conveys:

And I take my faith into my business. I tell them all the time, “It’s God’s will; it’s his control, and if it’s God’s will for you to have a child, it will happen. You just have to have the faith and believe, and if it’s not meant to be, there is a reason for it. Just ask for guidance through it.” I don’t even ask sometimes if these couples are religious when I first meet them. But I am, and that’s the way I run my business. I leave everything in God’s hands. (Agency, TX)

Throughout our interview, Chelsea expressed her deep connection to clients, the emotional support she provides for those going through the process, and believes that helping parties through surrogacy is her “calling,” as it is for the surrogates she selects. Even if “at first” she does not ask if the couples are religious, her intake forms ask parents and surrogates to indicate religious preference for matching purposes, especially their views on abortion.

At Baby Makers, Inc. in Oregon, Chelsea finds a particular religion is not as important as “somebody that believes in God – that’s a big thing – God versus not God.” Lacey and Paige at New Dawn in Maryland echoed this sentiment. Although Paige admits, “We’ve had families a couple of times come in and say, ‘It’s very important to us that our surrogate be a Christian.’ And then we’re like, ‘Okay,’ and we’ll find that person,” she finds that demanding a specific religion is “less likely.” Lacey adds, “We had someone say, ‘Not Wicca,’” which seems to imply that what parents prefer is some belief in God, and nothing out of the ordinary. Rhonda of Infant Quest in Colorado sums up that parents are looking for “on average, non-denominational Christians.” Thus, based on interviews from the South, West and East regional samples, it appears that belief in God, at least, tends to be important for pairing.

However, there are important reasons for carefully matching up religious affiliation. According to agency representatives, highly Christian surrogates tend to oppose abortion, and may also object to homosexuality. Therefore, a surrogate may refuse to carry for gay intended parents. Jeffrey of Bearing Gifts clarifies how religion is often correlated to views on abortion. In his experience, “Sometimes it has more to do with the termination issue, and people who are very religious will want to work with a carrier who’s also very religious – that kind of thing. But they don’t tend to typically express that to us, but you can tell what’s going on in their selection process” (Agency, MA). Views on abortion are also tightly related to the number of fetuses a surrogate is willing to carry, or “selectively reduce.” Assisted reproductive technology increases the likelihood for multiples, based upon the number of embryos implanted, and whether they
split (Suderam et al., CDC, 2012). Thus, carrying multiples is not just a medical risk assessment, since carrying multiples is physically riskier for gestating women (Id.), but is also an assessment of whether they are willing to take a risk for another family when they have a family of their own who may be jeopardized by decisions made at choice points throughout the pregnancy. If she opposes the termination of an abnormal pregnancy, or selective reduction of fetuses, then she may endure a triplet pregnancy despite the risks.

I asked Margo and Sophie of Parent’s Helper to detail the process of values matching, how it relates to religion, and why it is important. They jointly replied:

Margo: Yes. We’ve definitely had some surrogates who will not abort under any circumstances.

Sophie: Um huh.

Interviewer: But you can match with intended parents?

Margo: Right, we would match with intended parents who feel the exact same way.

Sophie: Predominantly very Christian.

Interviewer: Okay. Yeah, so there’s the mirroring – that’s what you meant by philosophies?

Margo: Yeah.

Sophie: Um huh. You have to make sure everybody’s on the same page, which is why when we – we meet with them both. I meet with the surrogates, find out where they are. We even have it on our questionnaire: will you selectively reduce, will you terminate? Margo gets what the intended parents want – what they would prefer. They meet with a psychologist. Both of them meet with a psychologist individually; then they meet with a psychologist together and go over it again, so it’s –

Margo: Which is something a little bit different about us, too – we always have a psychologist present to facilitate the meeting…

Sophie: He hits all those hot buttons – yeah, he’s met with each of them individually, and then he meets with them all together. He facilitates the meeting; we’re not in on it.

At this Illinois agency, the issues are so emotional and consequential – “hot buttons” – that they entrust the morality screening to their professional psychologist. If she opposes abortion, the surrogate has a constitutional right to refuse the intended parent’s request to selectively reduce multiple fetuses, or terminate if abnormalities like Downs Syndrome are detected through an amniocentesis (Roe v. Wade U.S. 1973). The skill of matching is in anticipatory emotion
management: the extent to which an agency can “mirror” the parties “philosophies” to make sure “everybody’s on the same page” as a conflict and risk avoidance strategy.

According to Helen of Magic Maternity, religious ideology might exclude an applicant out of the matching program entirely. “Extreme” religious views and values demonstrate emotional unfitness during the screening. Helen relates the following story:

Ideally for us, we like surrogates who are open-minded and not too religious. I don't mean to sound like I'm prejudiced, but if you get someone that's too far right on the religious spectrum, they get very conservative with respect to selective reduction and abortion – picky about who they'll work with. And for us, it makes it a harder match. So when we're making this investment in somebody, once we have all this information and everything looks good and we think they might be a good candidate for our program, we'll bring them in here for an interview and then meet with our psychologist.

We don't want to make that investment – we had one woman – just as an example – this is years ago – called up and we asked, “Under what circumstances are you willing to agree to an abortion or selective reduction?” And she says, "None." Okay, that's not a black and white issue; that’s very gray. So I called her up, and she had three kids of her own. She goes, "I just don't agree with abortion." I go, "Well, if there's a threat to your lives, there's not a question." She was like, "I couldn’t agree to that." And I go, “Well, then you can't be in our program because there's no intended parent that would allow that knowing you have three children at home and that you're going to sacrifice your life, your own personal life because you don't agree with abortion. That's too extreme.” So she wasn't in our program. (Agency, WI)

Anticipating critical differences between values, in advance of the formal contract, is a top priority for matching agencies. They want to avoid high emotions and high conflicts, should such fundamental clashes reveal themselves during contract performance. Thus, screening for religion, perceived by agencies as linked to willingness to abort, is a key emotional fitness criterion when matching.

In screening and matching, views on religion, race, and sexual orientation are critical. They are part of the emotional fitness criteria used in selecting the right surrogate, in this case, based upon values. Since an ample number of surrogates either have some affiliation with the military, are actively Christian, or racist, some agencies inform Muslim intended parents that they might not be able to match them, or they need to be patient. As Lara says:

Unfortunately, I’ve got to say to many of my Muslim clients, “You are less likely to be chosen because so many surrogate families are either in the military or have a family member in the military. And right now, America doesn’t really understand that there’s good and bad religious people. There’s very, very bad Catholics, and there’s very, very bad Muslims, but there’s some very, very good Catholics and very, very good – and they just don’t get it. So more than 70 percent or so of my program’s not going to choose you just based on that alone.” And I have to be honest with my clients because that’s the right thing to do by them. (Co-Creators West, CA)
Certain surrogates are against assisting intended parents of a specific race or religion – according to Lara, “more than 70%,” at least when it comes to “Muslims.” Sometimes the tables are turned when intended parents are against using a surrogate of a different race.

Are these discriminatory practices abided? Bearing Gifts in Massachusetts seems to struggle with this dilemma. Jeffrey admitted a conflict between his perspective and his staff’s:

And I sort of take the position it’s part of the matching process. I’m not going to judge the parents on who they’re comfortable working with. Some other members of the staff are just like, “We should not be working with these people if they’re really that racist.”

I believe the main reason Jeffrey chooses not to “judge” parents is because he is anticipating and avoiding what is likely to be an uncomfortable and emotional contracting process. At the same time, Bearing Gifts’ staff wonders if a racist surrogate should not just be screened out as lacking the values criteria of the kind of carrier they want represented in the program. However, what about the surrogate’s perspective? Alana, a Caucasian surrogate from Wisconsin conveyed her own dilemma when it came to racial preference questions during her screening. She recalled:

Interviewer: I’m sure this is dusting off your memory from a couple of years ago – but now that you’re reflecting on it, you would have said no to carrying for someone if their children were a different race. What was your sense of why? What were you concerned about or what would that make you uncomfortable about?

Alana: More so just my family, they’re very old school, close-minded. And it was already going to be hard enough to explain to them what I was doing. Then also saying carrying for whatever ethnicity or race it is, and then having to listen to them deal with that, too. And it’s more so like my mom, my dad, my uncle, my grandma – you know, people that just – they’re not very cultured.

Alana recalled that during her screening, she opted against carrying for a couple of another race, or a couple using the gametes from a donor of another race. While it is possible Alana was simply hiding her own racism, her main rationale was to avoid the emotions and conflicts that were likely to result from her family’s disapproval. Not only was it “hard enough” to explain her decision to be a surrogate, but she also anticipated that “having to listen to them deal with” the race of the parents or child would be too taxing.

However, I do not want to convey that racism is rampant across agencies in the matching process. Lynette, surrogate from Illinois, was carrying for a Korean couple at the time of our interview. Before I was aware she was pregnant with twins for a second surrogacy, she said:

Interviewer: Would you have considered carrying for a couple of another race or another religion?
Lynette: Yeah, as long as it wasn’t anything extremist religious, something like that, then yeah, absolutely. And then, as far as other race, I’m – actually, right now, a couple that I’m working with is Korean. So I’m carrying two little Korean babies right now.

For Lynette, that the parents not be “extremist religious” was a more important criterion than their race. In fact, Betsy of Baby Boom believes it is even “helpful if the surrogate gives birth to a baby of a different race” (Agency, WA). In assessing her emotional fitness to carry, a surrogate might be less likely to identify, and thus bond, with a differently raced baby.

Screening and matching is thus a process of anticipating and aligning the values of both the surrogate and intended parents. According to a representative interview:

We have no criteria one way or the other in regards to who we accept into our program. Some intended parents and some surrogates, most I would say, say they don’t have a preference. They don’t require the match to be somebody of the same race. Occasionally, we will. Since it’s almost entirely gestational surrogacy, genetically, it doesn’t really matter.

So it’s not really a big issue. We’ve had African American intended parents matched with a white surrogate and vice versa. So it’s unusual for one or the other of them to express a preference. Gay, I would say there are occasions where surrogate mothers are simply more religious and, for their own personal reasons, aren’t comfortable or their husband isn’t comfortable. But race isn’t a big deal; race isn’t a big issue. (Eliza, Co-Creators East, MD)

Sometimes homophobia is more strongly expressed then religion, race, or views on abortion. The owner of Repro Junction in Oregon sums up the values screening nicely. Daphne surmises, “I would just say religious preference is the most common. Honestly, intended parents check almost every available box. “I don’t care if they’re a different – race, different country. I don’t care if they’re single or married. I don’t care if they’re lesbian. I don’t care – I just want them to be healthy.” To the extent a matching program can screen for surrogates who are open and flexible regarding the traits and values of the parents they carry for, the more smoothly the process will go. Interview after interview, it was clear that what most surrogates and parents want is a healthy pregnancy, and a healthy birth.

4-B5. Motivation

As part of their risk assessment, agencies inquire why a woman would choose to carry a baby for another person or couple. Screening for an applicant’s motivation for becoming a surrogate is a key emotional fitness criterion, also diffusing and becoming institutionalized in the reproductive field. To the extent an agency can assess a woman’s inclination towards surrogacy, it can anticipate potentially emotional situations, and manage expectations of all involved. For example, if a surrogate’s primary motivation is financial, she may get angry, impatient, resentful, or shocked if there are delays in payment, unusual demands placed on her lifestyle, and more
seriously, medical complications from the pregnancy that exceed the value of her compensation. Worse yet, in the case of permanent organ damage, loss of reproduction function, and death – each of which was reported during my interviews for this study – then the pain, injury and suffering of the surrogate and her family is immeasurable. Disagreements and conflicts can and do arise, as do a range of feelings in parents, including jealousy, anxiety, helplessness, and power. Communication problems can also ensue if expectations are not met, making matters worse. Thus, assessing motivation is an anticipatory emotion management strategy meant to minimize legal risks within an unsettled field.

Based comprehensively upon my analysis of the interview transcripts, I find the primary reasons a woman would choose to be a surrogate include: (1) they enjoy the experience of being pregnant; (2) they want to serve or help others that cannot get pregnant; (3) they need and/or desire the money; (4) they have had a personal experience with infertility through a family member or friend; (5) surrogacy enables them to stay at home with their own children while earning money; (6) they believe it is a “calling”; (7) they want to be proud, empowered, and valued for their gestational skills; (8) they want to feel special or to do something unusual with their lives; and (9) they were inspired by a television program, talk show, magazine, or other media story about surrogacy. Any single reason, or a combination of reasons, motivates women to have babies for third parties.

For example, Corinne of Family Focus, a Texas agency, emphasized the service aspect of surrogacy, and the experience of pregnancy. She screens for women who communicate this rationale to determine their fitness. Corinne related:

They are caring young women, someone that wants to give back, that feels that – I’ve had several that say, “This is what God has for me to do. He has blessed me with children and happy, wonderful, healthy pregnancies, and we’re complete with our family.” And most of them enjoyed being pregnant. There are a few that would say they would not necessarily enjoy it, but they feel they were blessed with good pregnancies, so therefore they’d like to give back and help couples.

While philanthropy might be some surrogates’ driving motivation, it is atypical in commercial contracting. Only one of the surrogates in my sample expressed a purely altruistic motive, but she carried for a family member and was not paid. Since the focus of this chapter deals with commercial, non-altruistic surrogacy, money cannot be overlooked as a critical motivation. However, money as motive typically finds itself in combination with another.

Capturing the interconnectedness and multiple motives of surrogates, here is what Erik of SurroCentral in Massachusetts had to say about his screening process as a large agency:

And the remarkable thing is I have something like 300 women who apply to us every single month to be surrogates, of which we accept, like, 10, 15. And it doesn’t mean that every one of them isn’t pretty similarly motivated by this incredible desire. It’s not just about $25,000 – $20,000, $25,000. It’s about really feeling like this would be the greatest thing they could do in their entire lives. …And I used to also think that there
was a drug of pregnancy – that the hormones that rage through your body that made you feel like a woman, like a powerful person, like those sorts of things – were the secondary motivating factor. And it’s still the secondary motivating factor, but I’ve reversed my order and said money is last. And number one is the calling, the Joan of Arc words that I hear over and over again: the calling. That somehow, “Since I was 16, before I even had children, I knew I wanted to do this. When I saw it on television on a Lifetime movie; I met a gay couple; I have a sister who’s infertile – or a friend, whatever it was – I thought, ‘I can do that. I’ll be good at it.’ And when I get pregnant because I sit next to my husband in a car when he’s home for a three-day furlough from Afghanistan, and I get pregnant, I know I’m – and I deliver my children in three hours and on the toilet, basically, I know that I can do this.” This is really empowering.

When determining a surrogate’s fitness to enter the program beyond the basic criteria, Erik believes that “the calling” is first, the empowering hormones or “drug of pregnancy” comes second, and money comes last on the list. He also mentions that being good at pregnancy, having a personal experience with friends or family, and being inspired by a media portrayal of surrogacy also play a role. As another agency described, many surrogates want to “pay it forward” (Magic Maternity, WI). Of course, the more the applicant is “good at it” or finds it easy to get pregnant, the less likely she would be to complain or struggle, decreasing the overall tension. Screening for surrogates who are good at pregnancy and do it because they find it easy is an anticipatory emotion management technique applied by agencies to varying degrees.

Helen from Magic Maternity in Wisconsin provides a detailed explanation of why women choose to become surrogates. How they respond during psychological evaluation determines their basic and emotional fitness to enter the program. Helen articulates:

Okay, the surrogate is someone who loves being pregnant. We always laugh when they say, “I love being pregnant, and I really want to help somebody.” And we know right there that’s a person we want in our program. She’s middle-class. She’s financially stable. She may or may not be educated beyond high school level. Some are high school level educated; some are beyond that. Compensation is not the primary motivation for why they do this. The first reason is they love being pregnant, and they want to help someone.

The second reason is they know somebody where fertility has affected them whether it was their own parents and they might be adopted, or they have an uncle who’s gay or somehow someone that’s had a roadblock to fertility. Or they’ve had their own fertility issues. It wasn’t an issue of carrying, but it’s like, “Carrying was easy for me. I couldn’t get pregnant right away. I want to give back.”

The third reason – we usually find that the third reason is the compensation, and it’s not because they need to buy food for their family. It’s because maybe they are a stay-at-home mom, and this allows them to stay home another year. Or maybe they want to start a college savings for their three kids, and they don’t have any other way or means of doing that. Or maybe it just helps them feel like they’re getting ahead a little in the rat race of being in your 30s with three little kids and trying to make ends meet but not to the
point where they’ve got debt that they can’t handle. It’s not that. If they were that way – if they weren’t, they would not be participants in our program because it’s really important to us that our carriers are financially stable because when you don’t have financial stability, it can create stress in relationships specifically with your husband. And you don’t want that environment for someone who’s carrying a baby for somebody else. So that’s a really critical component to the surrogates. (Agency, WI)

Helen predicts that a surrogate who is primarily motivated by money is less financially stable, which directly relates to the “support system” criteria described in 4-B2. She anticipates financial instability at home “can create stress in relationships,” especially between the surrogate and her husband. She believes having a stressful home environment will in turn negatively impact the surrogacy. By anticipating emotional stresses and conflicts, this agency screens out an applicant who claims money as a primary motivation for surrogacy.

Corinne, the owner of Family Focus agrees. She makes sure to select women who are in it for “the right reason.” She says:

But these women are just warm hearted and you can generally tell through their interview if they are in it for the right reason, or if they are just in it for the money. And not that they are not good candidates if they’re in it for the money, but if you know a woman that thinks that she’ll go through a pregnancy just for the money, then you really, really know that it is not just that issue because no one is just going to get pregnant because of the money I would hate to think. (Agency, TX)

On the other hand, an emotionally detached surrogate in it for the money might be a perfect candidate. Helen of Magic Maternity mildly contracts herself later during our interview. She says, “The way the surrogates look at it is they're just an oven” (Agency, WI). It will be much easier to manage a surrogate motivated to simply do the job and not become emotionally attached. The screening process helps her detect those fit candidates.

There is widespread agreement among established agencies that a surrogate cannot be on public assistance, which they assert indicates instability, irresponsibility, and signifies a more financial motivation to be a surrogate. Of course, refusing on the basis of federal aid presumes that middleclass, non-indigent surrogates are not also primarily financially motivated. It also may flag concerns Dorothy Roberts has expressed about race and class-based discrimination in assisted reproductive technology and the fertility industry (2011; 1997). It may seem counter-intuitive that a surrogate could be screened out of the process based upon lower class status, since public perception is that poor women are more likely to commodify their bodies and turn to options like surrogacy when they lack skills to make money in other ways (Meleo-Erwin 2001). Zoe Meleo-Erwin has critiqued the use of poor women by wealthy intended parents for surrogacy as “bioslavery” (Id.)

However, according to agencies, the surrogate needs to be poor enough to be motivated to have a child for another family, but not too poor as to imply “desperation.” Betsy of Baby Boom explained, “We would never accept anybody that was on Medicaid. I think that kind of gives you an idea of the income, unlike India and some of the foreign countries where they need the money
that desperately that they’re willing to sell their bodies. These women are not. We would consider those women not qualified… if you’re desperate for money, this is not the fast way to get money,” (Agency, WA). While there are exceptions, in general agencies say a surrogate cannot be homeless, must have her own basic health coverage, must have enough money to purchase the kind of food deemed an appropriate diet for a pregnant woman, must have access to a car to drive to medical appointments, and cannot be tied to too many social welfare programs that are psychologically stressful or taxing. According to the interview subjects, each of these “poverty” indicators shows instability, risk and therefore, a lack of fitness.

4-B6. Degree of Contact Desired

The sixth and final emotional fitness criterion I identified during my interviews that reveal anticipatory emotion management is screening a surrogate for the degree of contact she envisions with the intended parents during and following the pregnancy. If the surrogate wants to establish a close and continuing relationship with the intended parents, and perhaps the child, she will feel rejected, hurt, confused, disappointed, and more if the parents “cut her off” once she hands over the baby (Molly, Open Ovens, OR). That could lead to trouble, and cause her to breach the contract. Therefore, agencies that do more anticipatory emotion management spend time screening her potential to be emotionally detached, no matter the outcome. Can detachability be predicted? Not necessarily. However, based upon my research it appears attachment can be managed. If an agency can match a surrogate with intended parents who, at least in advance, might consider a future relationship if she wants one, then they attempt to do so. How the relationship will eventually play out, despite best intentions, is highly individualized.

Surrogate and Intended Parent Questionnaires ask the following questions about contact, which may also be posed during a psychological evaluation and screening process:

*How involved do you want the IP’s to be during the process – at every doctor’s appointment?*

*How often do you expect to communicate?*

*How much contact would you like with your Intended Parents throughout the pregnancy?*

*Do you expect to have contact with your Intended Parents, or the Child, after the pregnancy?*

Making sure the parties align in desired degrees of contact is a technique used for managing expectations for the relationship in advance. Complementing preferences is not necessarily unusual in regular “employment” situations, or even in dating, as was alluded to earlier. However, it has been established by adoption jurisprudence and studies that gestating and

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15 These representative questions regarding contact come from Surrogate Questionnaires provided by Infant Technologies, IL; Magic Maternity, WI; Repro Junction, OR; and In Service Surrogacy, IL.
relinquishing a baby to a third party can add a unique emotional layer that does not exist in typical employment and personal relationships (Crockin and Jones 2010; Hollinger 2004).

Alana, a surrogate from Wisconsin, described the screening and matching process as it relates to a common emotion in surrogacy: fear in the intended parents. Fear expresses itself over two major concerns parents’ express regarding contact. First, anxiety about the amount of contact she expected to have with them, and second, fear about whether she would grow attached to the baby, and keep it. In this case, Alana was assessed to be an emotionally fit surrogate by the agency conducting her evaluation, because she was able to respond appropriately to both fears. The agency anticipated the intended parent’s fears could be effectively managed. This is how Alana recalled her vetting process:

Alana: Just like – I guess she was concerned, too, about having a relationship with us after, like “Well, what are you looking for? Are you looking for a best friend? Are you looking for us to not really call you?” Just stuff that we didn’t get too much into detail with at the initial meeting. But the biggest concern for her was she wanted to make sure that, I guess we were emotionally stable and weren’t going to try and keep the baby.

Interviewer: And how did you answer those concerns?

Alana: We pretty much just told her that if we wanted to have another baby, we would just have a baby that was our own. We wouldn’t go out and get somebody else’s egg and somebody else’s sperm and then try and keep that baby. It just seemed – I mean I was 27, 28 at the time, so it’s not like I was having fertility issues or anything. I already had two kids, and I just kind of like explained to her, I said, “You know, I have my family. I have my boy, I have my girl. We have already went through the emotional process of this stuff of having a third kid. And it came out that we just were not that kind of family. We’re a family of four, and that’s how we’re happy. Financially this is all we can do. And we’re not looking to take somebody’s kid that we don’t – that isn’t related to us.” I mean it was crazy.

Thus, Alana was able to reassure the agency – and the intended parents – that she would not demand a continuing relationship with either them, or the child she birthed. Alana presented herself as “emotionally stable,” the kind of surrogate the agency could predict as less risky, and capable of detaching from the child. After all, she is already “happy” as a “family of four.” She neither wants nor can afford to take on another child.

On the other hand, agencies that do a poorer job of screening and matching for desired levels of contact appeared to have more conflicts, and surrogates had more hurt feelings. In a particularly teary interview, Lily, an Illinois surrogate, became overwhelmed immediately following her delivery at the hospital. She explained:
So I remember having that fear at the hospital, thinking, “Okay. Well, this is – I worked. I did this. Two years of my life I’ve given up, and now they’re going to get him, and they’re just going to leave.” Because we had become so close, I felt like [the intended father] was my best friend. So I not only had that fear, I had my emotions going on about [the baby], but then I also had – I was an emotional wreck thinking I was losing my best friend. So that last hour was very, very emotional. I just remember I broke down.

In fact, it was common for agencies and surrogates to report that based upon past experience, hurt feelings, and high conflicts, it was harder to detach from the parents then the baby. Several surrogates and agency representatives reported managing terrible feelings about losing their new “best friend,” as did Alana with her gay intended father. An agency representative seconds Alana’s perspective, saying, “She doesn't miss being pregnant per se or miss the baby at all. She misses her relationship with the intended parents. And what happens is they have a baby, and their lives are consumed with the newborn and sleepless nights and blah, blah, blah. They don't have time for the surrogate anymore. And it's not that they're being dismissive, but they've gone on with their lives now” (Helen, Magic Maternity, WI).

Betsy of Baby Boom takes matching for desired levels of contact very seriously, to avoid hurt feelings or miscommunications. Screening a surrogate for “commonalities” will also help cultivate a continuing relationship between the parties, rather than the baby. Betsy shared:

Betsy: Whenever I was matching people, I thought that it was great when we could find some commonalities where they had other things to talk about, other things to focus on, which really made a huge impact on the whole relationship, and that’s when people still remain friends or at least feel comfortable emailing and calling once a year or meeting once a year or whatever.

Interviewer: And so it sounds like in several of these situations, there’s a continuing relationship. Is that a continuing relationship that you find between the surrogate and the parents or one of the parents in particular and/or the child that she’s given birth to?

Betsy: It’s more – in some cases, yes, the child is involved, but I think during the whole surrogacy process, the relationship and bond is made between the intended parents and the surrogate. The baby is not the main focus as far as the relationship is concerned because you’re not having a relationship with this unborn baby; you’re having it with the intended parents. You’re responding to what makes them happy or anxious or nervous, and you are there to, oftentimes, hold their hand because you’re the one that’s been pregnant before.

Despite tensions that can arise between surrogates and jealous intended mothers, they too can grow very close, like “best friends,” having gone through such a life-changing and intimate experience together. Betsy portrays the surrogate as a source of emotion management for anxious parents, the one to “hold their hand.” Matching programs believe that the better job they
can do in screening for surrogates who meet the contact needs of their parents, the smoother it will go. They anticipate emotions in order to manage legal risks.

But the relationship can extend beyond feeling comfortable emailing or “calling once a year” (Id.). Fern, an intended mother in Washington, shared the kind of relationship she expected to have with her California surrogate before the baby was born. As Fern recalled, “It was that we would always stay in touch, and I would try to visit once a year and give her a lot of pictures so she could watch him grow up and also so he could know her” (Intended Parent, Washington). However, as it turns out, they became very close friends. Fern continues,

We love to see her and her kids. I’ve watched her kids grow up. I know her kids, and it’s just – she is really a close, close friend. I love to see her any time, and she comes to visit. And a year ago, her husband also came. Her daughter is getting married; I’m going down. It’s been great.

Not only do they regularly talk, visit, and participate in major life events in each other’s family lives like weddings, but they also vacation together. Fern said with delight, “I went to Las Vegas with she and another friend in October just for girl-time!” Further, Fern’s surrogate and the child are also quite close. This degree of closeness appears atypical in commercial surrogacy agreements, according to the lawyers. Agencies seem to have a more positive perspective. However, even Betsy admits it is more typical for desired continuing contact to be “one-sided.”

The tables can be turned when an intended mother becomes a legal mother, bringing relief from the fear the surrogate would keep the baby. However, the parent might miss the relationship she cultivated with the surrogate, want a continuing relationship, and feel confused about their status once the process ends. In one case, the parties did not have clarity at the matching phase about whether there would be ongoing communication between them after the birth of the child. Miranda, a parent who used a Florida surrogate but lives in Illinois, described:

Miranda: No. I would call her a friend of mine for sure. I don’t know that she would call me that. I have never asked her, but we still talk today. So we still have an ongoing relationship.

Interviewer: Maybe you can tell me about that.

Miranda: Yeah, it’s pretty good. The birth was amazing, and we really – we had developed a good relationship prior to the birth, but the birth was a really amazing experience, and we just got very close during that time period. And I got to know her children pretty well, and my mom met her kids, and Dad knew her kids and my best friends – so we got to be pretty close during that process. And I don’t know. I think I’ll always have a relationship with her and her kids.

Despite Miranda’s reiteration that they got “very close” and “still talk today,” she seems ambivalent about how her surrogate perceives their relationship. Was the surrogate screened for her openness to have continuing contact with her intended parents and the baby?
In an inverted case, a surrogate from Wisconsin had to give birth in California for various legal reasons. Shoshana exemplifies one surrogate’s perspective on the adequacy of screening, and her ambivalence regarding the nature of the relationship. She told me about their contact:

**Interviewer:** So how often would you … chat by phone, by text, email, Skype, something else, maybe not related to these legal issues but just informally? Did that happen?

**Shoshana:** Not a lot. No, no, I would say less than five times. I feel like the legal stuff and all the formalities just overshadowed everything. It consumed us. So no, it was very, very far and between that we actually could just relax and talk about things. I would say maybe three, four times that we went out for breakfast or lunch or over to the house. It was not a lot.

**Interviewer:** And is that what you envisioned, or had you hoped to establish some kind of relationship with her or with him?

**Shoshana:** I think I went in pretty open minded. I wasn’t in it for a new best friend. I was in it for the baby process and stuff. So I think that I understood that it was probably much more of a harder decision for her to welcome me into her world than vice versa. So I was willing to accept whatever type of relationship they wanted with me. I was fine by that.

Thinking of that in hindsight, I still feel okay with that decision. But it’s kind of hard to leave it so open like that. I think I would have rather had more of a definite answer like, “Yes, we will stay in contact,” or “No, we absolutely won’t,” because now I find myself wondering and waiting for something that may not happen. And I’m okay with it if it doesn’t happen, but I wish I would know so that – you know what I mean?

(Shoshana, Surrogate, CA/WI)

Shoshana’s experience demonstrates why matching for the amount of future contact desired is an important emotional fitness criterion, and why agencies have come to diffuse and institutionalize it as an anticipatory emotion management strategy. Some surrogates find it makes it harder to move on, while others celebrate and welcome it. It was the uncertainty surrounding how much contact she would have with her intended parents during and after the process, rather than an absence of contact itself, that Shoshana struggled with. After all, initially she was “open-minded” and “wasn’t in it for a new best friend.” Had her agency done a better job at vetting, matching and managing her expectations for contact before the process began, it might have reduced her hurt feelings. Shoshana, like Lily, shed many tears during our interview.

Finally, like the psychological evaluation, expectations for contact before, during and after the pregnancy are not only used for screening and matching, but are frequently incorporated as a formal provision in the surrogacy contract. The default is that there will be no contact with either the parents or child following the birth. This is an emotion management technique designed to limit expectations, and thus, disappointments.
4-C. Conclusion

The process of finding a compatible match for a surrogate pregnancy is a critical and somewhat complex phase that precedes formal contracting, with several models. In it, much of what I have called anticipatory emotion management occurs – the matching agency’s attempt to not only screen out unsuitable surrogates, but also set up the relationship in a way to minimize a range of feelings that lead to personal and legal conflicts. When conflicts ensue, it increases the likelihood of breach of contract and litigation for enforcement, which is risky given the disparate legal terrain that is surrogacy law. As will be shown in the next chapter, many of the basic and emotional fitness criteria are not only strategies used by agencies to screen and match prior to the contracting phase between the parties, but are almost universally incorporated as an explicit term into their formal agreement by attorneys. Thus, emotional fitness criteria like the psychological screening of surrogates, willingness to abort or selectively reduce fetuses, as well as the amount of contact expected during and following the pregnancy, also become terms transferred into and formalized by the contract.

Psychological screening during matching has become institutionalized as an anticipatory emotion management strategy, and is part of a comprehensive set of legal risk management tools lawyers and agencies use in an unsettled and ambiguous legal field (Edelman 1992). Reproductive lawyers and matching program coordinators defer to the judgment of psychologists licensed to perform tests relied upon to gauge the subject’s emotional stability and social skills. Much of this deference occurs because medical association guidelines – referred to in the absence of legal regulations – recommend psychological assessments of surrogates. Practices in the mental health field like psychological screening and evaluation are embraced by actors in the fertility field and legal field and incorporated into formal contracts. In this way, the legal, fertility, and mental health fields intersect and overlap (Bourdieu 1987; Edelman et al. 2001).

Finally, in addition to provisions like psychological evaluation of surrogates that get incorporated into the formal agreement, contracts between the parties may also include psychological counseling provisions. These go beyond simply screening and taking psychological exams, such as the MMPI or PAI personality tests, but as the contract is under performance, insures that parties to surrogacy have a safety net of resources for help in managing the emotional experiences and conflicts that arise that are particular, individualized, and less predictable throughout the pregnancy. However, there is wide variation in whether agencies require, or simply suggest, counseling during the contracting phase, and whether their agency employs in-house counselors, or refers clients out. Given legal ambiguity, matching programs do much more than screening surrogates for parents – they serve as important institutionalizing agents. They play a key role in highlighting legal risk by promulgating emotional fitness as the logic for matching to create a form of social order amidst uncertainty, which then gets crystallized in the contract. Findings regarding psychological counseling provisions, among many other formalized terms discovered through a content analysis of contracts, is discussed in Chapter 5.
CHAPTER 5:
CONTENT ANALYSIS OF ‘FEELING RULES’ IN SURROGACY CONTRACTS

This chapter shows how the concept of “emotional fitness” developed in the reproductive field for the matching phase is crystallized in surrogacy contracts. I use content analysis of contractual terms and provisions to show how lawyers attempt to manage and control their clients’ emotions, as well as the identities and relationships of parties to these contracts. I demonstrate how myths of rationality pervasive in economic and liberal legal models of contracting are acutely represented in formal surrogacy agreements.

Therefore, this chapter attends to the third dynamic of Suchman’s artifactualist approach to the study of exchange relationships: examining contracts from “individual transactions” (2003). Ultimately, I show how formal rules in the contract combined with lawyers’ informal strategies manage the feelings of parties to surrogacy agreements, and how they both reflect and redefine institutionalized assumptions about gender and work. I argue that the unsettled, ambiguous, highly affective nature of surrogacy motivates lawyers in the reproductive field to institutionalize “feeling rules” in contracts in their quest to minimize risk and uncertainty in their practice (Edelman 1992; Hochschild 1979, 1983). Especially in surrogacy, “law is, in reality,” “obscure, fragmented and highly ambiguous, “malleable, contested, and socially constructed,” and “symbolic, discursive and constitutive” (Suchman and Edelman 1996, 929). The rules and provisions analyzed in this chapter are not necessarily rational, but offer a risk management solution through formalized emotion management (Id.; Edelman et al. 1999).

The unit of analysis for this chapter is the contract. I conducted exploratory content analysis on a sample of thirty surrogacy agreements (N = 30) from eleven different jurisdictions that vary as to levels of surrogacy-friendliness of law to analyze both the nature of terms and provisions, and the mechanism whereby specific terms, rules, and provisions seek to manage emotions. Those jurisdictions are: California, Colorado, Florida, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Texas, and Wisconsin. A distribution of the sample by state and type of legal regime is depicted in Table 4 (reprinted below). I qualitatively coded each contract in my sample for content and interpretation using Atlas.ti computer-aided qualitative data analysis software (“CAQDAS”) (Friese 2012; Saldana 2009; Snow, Morrill and Anderson 2003). Because surrogacy contracting is relatively uncharted, the broader goal of the content analysis was to determine: (1) the types of clauses that are used in agreements, (2) the ways in which emotion management appears in various contract provisions, and (3) variation across the sample. I searched for patterns of action and consistencies using descriptive coding, process coding, and in vivo coding (Saldana 2009).
Table 4: Distribution of Surrogacy Contracts by State and Legal Regime

<table>
<thead>
<tr>
<th>State/Jurisdiction</th>
<th>$N = 30$</th>
<th>Legality of Surrogacy Contracting</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>7</td>
<td>Surrogacy Friendly by Case Law</td>
</tr>
<tr>
<td>Colorado</td>
<td>2</td>
<td>Silent; No Case Law or Statute</td>
</tr>
<tr>
<td>Florida</td>
<td>2</td>
<td>Surrogacy Friendly by Statute (with restrictions)</td>
</tr>
<tr>
<td>Illinois</td>
<td>3</td>
<td>Surrogacy Friendly by Statute</td>
</tr>
<tr>
<td>Maryland</td>
<td>1</td>
<td>Ambiguous Case Law</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>3</td>
<td>Surrogacy Friendly by Case Law</td>
</tr>
<tr>
<td>Minnesota</td>
<td>2</td>
<td>Silent; No Case Law or Statute</td>
</tr>
<tr>
<td>New Jersey</td>
<td>1</td>
<td>Traditional Surrogacy Banned; Gestational Surrogacy Possible Case Law; Ambiguous</td>
</tr>
<tr>
<td>Oregon</td>
<td>2</td>
<td>Silent; No Case Law or Statute</td>
</tr>
<tr>
<td>Texas</td>
<td>2</td>
<td>Surrogacy Friendly by Statute (with restrictions)</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>1</td>
<td>Silent; No Case Law or Statute</td>
</tr>
<tr>
<td>Multiple (boilerplate contract with an unnamed jurisdiction)</td>
<td>4</td>
<td>Unknown and varied, thus ambiguous</td>
</tr>
</tbody>
</table>

Three research questions fueled the content analysis of contracts. First, what language in surrogacy contracts attempts to manage emotions and how does that language vary across contracts? Second, how do formalized “feeling rules”\(^\text{16}\) in the contract serve to manage risk for lawyers in the reproductive field (Hochschild 1979)? Third, how are psychological evaluation and mental health professionals institutionalized in surrogacy contracts? For this dissertation, I coded twelve major characteristics of surrogacy agreement in my sample, six that broadly capture the risk management content of contracts, and another six that analyze them specifically for emotion management as a legal risk management tool. All twelve characteristics have multiple linked subcodes (Friese 2012).

To begin, I reviewed every line of each contract in the sample to understand the overall architecture of a surrogacy contract. I then developed six broad coding categories and their subcodes to identify: (1) setting and context, like the state or jurisdiction; (2) the subject and their status; (3) terms of art, processes, or issues reflecting legality; (4) the nature of the exchange, or consideration for the accord; (5) the duration of the relationship; and (6) work and

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\(^\text{16}\) As defined by Arlie Russell Hochschild, feeling rules are “socially shared rules” and “guidelines that direct how we want to try to feel” (1979, 563).
employment terms. Each of these categories is linked to legal risk management, which is the comprehensive code family (Friese 2012). The fact that legal risk management frames the entire agreement makes sense given the purpose of contracting in general: insurance for the parties in case of breach (Macaulay 1963; Macneil 1978; Suchman 2003). These six broad categories and their subcodes enabled me to map to the major contents of surrogacy agreements.

Next, I coded an additional six categories of rules and provisions that I predicted were related to emotion management, including: (1) lifestyle rules and restrictions; (2) contact rules and “intimacy” restrictions, such as rules related to handling the newborn, breastfeeding, or continuing contact; (3) terms in the contract that label the parties and create their role identity; (4) compensation and fee provisions; (5) psychological counseling and dispute resolution provisions; and (6) bodily autonomy and assumption of risk provisions. Each of these six crucial coding categories also has multiple linked families of subcodes (Id.). Detailed analytic memorandum linked to particular codes during the content coding bolster the findings reported in this chapter (Charmaz 2006).

My purpose was to uncover the nature, function and construction surrounding each of these categories, which I identified as related to feelings and various emotional aspects of contract performance and legal risk management. The absence, presence and variety in the content of rules, compensation provisions, role assignments, and risk clauses was to systematically identify categories and degrees of emotion management for each case, searching for patterns that emerge from all cases (Hsieh and Shannon 2005; Lofland, Snow, Anderson and Lofland 2006; Suchman 2003). I also used content analysis of contracts to compare the language between agreements in the sample to identify variation across contracts. Content analysis of the formal instrument that governs the commercial relationship is the best methodology for examining how those agreements reflect institutionalized assumptions about gender and work.

5-A. Architecture of a Surrogacy Contract

I begin with the architecture of a surrogacy contract, which has yet to be mapped in sociolegal research. First, the contract between the intended parent(s), the surrogate, and the surrogate’s husband if she is married is known in the industry as the “direct agreement,” “surrogacy agreement,” or “the contract.” I will use these terms interchangeably. Second, there are many terms and provisions in surrogacy agreements that will not be analyzed for the purposes of answering the research questions posed by this dissertation. However, those elements are vital to the legality of the process, and thus, helpful to understand in general. Not surprising, surrogacy contracts tend to contain the same broad provisions that are required of all contracts, including the essentials: offer, acceptance, mutuality, and consideration (Farnsworth 2008). Of course, these unique agreements also contain unique provisions.

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17 For example, when coding for the setting and context of a contract in the sample, I used the code JURISDICTION to indicate a “code family” with linked subcodes like CA or WI as abbreviations, or International for non-domestic parties (Friese 2012).
I have identified twenty-four (24) major provisions that make up the skeletal structure of surrogacy contracts based upon patterns across the entire sample (N = 30). These provisions are depicted in Figure 3. First, as in all contracts, surrogacy agreements introduce the parties and establish jurisdiction. As predicted, surrogacy contracts typically establish their jurisdiction where the laws are relatively surrogacy-friendly: they either have case decisions or statutes permitting surrogacy. However, in my sample, the laws of Colorado, Minnesota, Oregon and Wisconsin are silent as to the enforceability of surrogacy contracts. In the absence of law, these states appear to mimic and embrace language found in contracts from the most surrogacy friendly jurisdictions, like Illinois, Massachusetts, and California, to manage risk. Also, there was one jurisdiction that has ambiguous case decisions on surrogacy and a history of hostility towards the practice: New Jersey. Thus, the vast majority of contracts in my sample (90% or 27 contracts) had in common a clear, opening statement communicating the intent of all parties that the surrogate would not at any time have custody or responsibility for the child once it was born, was paid for her gestational labor as consideration, and the named intended parent(s) were in all but a few circumstances to be regarded as the parents of the child born of the agreement.

The remainder of the introductory section contains a set of definitions, as well as the intent and spirit of the agreement, usually in a statement or several statements that describe the offer, acceptance and consideration. Another set relate to the “representations” or “recitals” made by the parties. These include legal risk management provisions that ensure competency to enter into a binding accord, such as age or marital status, critical for surrogacy contracting.

The representations and recitals contain strong statements by both parties regarding the ultimate custody and control of the child, for example, that the intended parents “shall assume all legal and parental rights and responsibilities for the Child” (Contract CO) adjacent to an inverse claim that the surrogate and her husband agree to “relinquish any and all rights, responsibilities, and claims with respect to the Child” (Contract CA). In so doing, they forecast legal parentage by establishing this intention before conception. In fact, 100% of the contracts in my sample contain a provision mandating that both legal and physical custody shall go to the intended parents. Since obtaining legal parentage of a child gestated by a third party is the lynchpin of a surrogacy agreement, perfect uniformity across the sample hardly a surprise. The interview data analyzed in the next chapter will demonstrate how contract rules that channel expectations for

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18 New Jersey was considered a surrogacy-hostile jurisdiction after the famous case In Re the Matter of Baby M. (NJ 1988) was the first to ban traditional commercial surrogacy as an unethical and illegal form of “baby bartering,” and a fraudulent attempt to circumvent the federal adoption law system. Some lawyers draft gestational surrogacy agreements there as a modern exception. However, the contract in my sample from New Jersey is a recent traditional surrogacy agreement. Having a current contract from a historically surrogacy-hostile state enriches my sample.

19 For example, the intended parents may represent they are a married couple, or that they are unable to conceive and carry a child without third party assistance, if the contract is drafted in Illinois or Texas where martial status and infertility are prerequisites pursuant to a statute regulating surrogacy. The surrogate may represent in turn that she is beyond the age of majority with legal capacity to consent, or warrant that “based on her belief...[she] is capable of carrying and bearing healthy, normal children” (Contract CA).
parentage are critical to developing party identity early on. They also manage legal risk within a reproductive field that does not universally embrace the enforceability of surrogacy contracts.\textsuperscript{20}

\textbf{Figure 3: Architecture of a Surrogacy Contract}

\begin{center}
\begin{tabular}{|c|c|c|c|}
\hline
Parties and Mutual Promises & Definitions & Purpose and Intent & Physical and Psychological Exams \\
\hline
Representations of Intended Parent(s) & Representations of Surrogate and her Husband & Conception, Transfer, and Embryos & Abstinence and Conduct \\
\hline
Counsel, Attorneys Fees, and Costs & Custody/Establishment of Parentage & Birth, Abortion, Reduction, and Death of Fetus & Guidelines and Rules for the Pregnancy \\
\hline
Assumption of Risk & Payment of Expenses and Fees & Insurance: Health and Life & Future Contact \\
\hline
Breach & Death or Divorce of Intended Parents & Life Support and Death of Surrogate & Duration and Termination of Agreement \\
\hline
Privacy and Confidentiality & Dispute Resolution & Severability, Warranties, Voluntary & Signatures of Parties, Attorneys, and Notary \\
\hline
\end{tabular}
\end{center}

\textsuperscript{20} A related but separate provision anticipating what the parties will do in the event of intended parent’s divorce, and the death of either one or both of the parents prior to the child’s birth, are also quite common. Regardless of separation, divorce, or death of the intended parents, 76\% or 23 contracts bind the parents to retain the child. Out of those, 21 or 70\% also provide for a guardian named in the surrogacy contract. The sample contained two exceptions (6\%), which were traditional surrogacy contracts. Thus, both a New Jersey and a California contract contained a “right of first refusal” for a traditional surrogate to keep the baby she not only was paid to carry, but also is genetically related to. In either case, I argue that establishing the legal disposition and custody of a child born through “intention” in a surrogacy contract – despite death or divorce – is a way to manage the surrogate’s risk of being named the legal parent of a child she did not want and was paid to have.
Notwithstanding these custodial intentions, 70% of the sample (21) had an explicit statement acknowledging that surrogacy is a new and “unsettled area of law,” even in friendly jurisdictions, like California, and that the contract may be unenforceable. For example:

Gestational Care is a new and unsettled area of the law, and for that reason, no warranties have been made as to the ultimate liability or obligations of the Parties that may result from judicial process as a result of the conduct contemplated herein. (Contract, MD)

Parties understand that there is currently no law in Colorado regarding surrogacy arrangements. Parties further understand that in some other states, surrogacy arrangements are illegal, and in some states criminal. Parties understand that the law could change during the time that this Agreement is in effect. A change in the law may necessitate further agreements, or may void this Agreement entirely. (Contract, CO)

All parties acknowledge that third party reproduction is a new and unsettled area of law. This Agreement may be held unenforceable in whole or in part as against public policy. (Contract, MN)

Despite these acknowledgements, the contracts contain a strong, adjacent statement, sometimes in bold that “Parties are entering into this Agreement with the intention of being fully bound by its terms ... notwithstanding any subsequent change in the law” (Contract CA). The fact that contracts overtly claim the unsettled, legally ambiguous nature of contracting evidences the drafter’s motivation to minimize litigation, insuring the parties knowingly assume the risk.

The next set of common provisions relate to medical procedures, psychological evaluation, and physical conduct prior to or during conception, including provisions related to the in vitro fertilization procedure and the disposition of remaining embryos following clinical procedures. Somewhere the contract will also contain statements of legality, especially regarding independence of counsel, rules directing payment of attorney’s fees, rules and legal procedures. Other sections of surrogacy contracts will explain whether the surrogate’s own health insurance policy will cover the pregnancy-related expenses, or whether the intended parents will purchase a separate policy for maternity. Since the next four major provisions relate to emotion management – rules governing the surrogate’s conduct, her compensation, contact with the parents and child, and her bodily autonomy – their findings will be discussed separately and in detail in sections 5B, 5C, 5E and 5F, below.

The final six provisions are fairly standard in contracting, but uniquely framed for the circumstance of commercial pregnancy. These include: (1) rules surrounding breach of the agreement; (2) rules for termination and the duration of the agreement; (3) privacy and confidentiality provisions; (4) dispute resolution provisions; (5) the warranties provided, statements of voluntariness, and the severability of the agreement; and (6) signatures by the intended parent(s), surrogate, surrogate’s husband, and the attorney(s), notarized in the jurisdiction governing the agreement. Out of these miscellaneous and common provisions, I found the rules of privacy and confidentiality distinctively crafted for surrogacy.
Privacy provisions require all parties to keep the fact of surrogate pregnancy secret and confidential from stated audiences, especially the media, to manage legal risk. In my sample, “publicity” clauses were found in 93% or 27 of the contracts. However, there is variation as to the scope of the publicity. For example:

**No Disclosure Without Prior Consent** …The Parties agree that they shall not provide any information about this agreement or any actions or experiences relating to their time under contract with each other to the public, other agencies, news media, web sites, chat rooms, blogs, any internet or social networking medium or any other individual or group regarding their involvement in this Agreement, any identifying information about the Parties, or any details regarding this Agreement without prior written consent of all Parties hereto. The Parties further agree that they shall not provide interviews of any kind relating to this Agreement without express prior written consent of all Parties. Failure to adhere to this section shall be a breach of contract and contract will terminate. (Contract TX; emphasis added)

**Privacy/Confidentiality:** The Parties, recognizing the potential of the performance of any controversial medical procedure to attract media attention, and agree that in the interest of privacy and preservation of family values, none of the Parties shall communicate with any media entity regarding the events which shall occur pursuant to this Agreement without the express written consent of all Parties named in this Agreement… (Contract, Multi)

46. …Traditional Surrogate may not disclose the identity of the Intended Parents or their Child, their motives for participating in traditional surrogacy, where they reside (including their residence state) or any information about them or their family without the written consent of both the Genetic Father and the Intended Father. (Contract NJ)

Thus, some are strict, even prohibiting Facebook postings and blogs, while others allow media publicity as long as names are kept confidential. Some justify their strict policies, as the example above, for the “preservation of family values” which might presumably be tarnished should surrogacy be socially normalized. I argue that privacy clauses, especially those that deflect media attention away from “controversial medical procedures” are legal risk management efforts to prevent identification of the parties within a multijurisdictional, uncertain terrain.

I now turn to the findings of my content analysis of six categories of provisions that specifically relate to emotion management. I predict that these categories of rules in surrogacy contracts are intended to prevent emotional attachment, resentment, or alienation in the surrogate and handle feelings like vulnerability, anxiety, and jealousy in the intended parents. They also establish critical expectations for the relationship and role identity. Rules and restrictions enable intended parents to exert levels of control over a third-party pregnancy they do not carry themselves. Given the ambiguous and unsettled legal field, lawyers are motivated to manage detachment in the surrogate through rules and provisions, as well as reassure the intended parents they will eventually become the legal parents of a healthy child, despite a risky landscape. Thus, they serve both emotion and legal risk management functions. The six categories of emotion management provisions include: (1) lifestyle rules and restrictions; (2) contact rules and
“intimacy” restrictions; (3) terms in the contract that label the parties and create their role identity; (4) compensation, payment and fee provisions; (5) psychological counseling and dispute resolution provisions; and (6) bodily autonomy and risk provisions.

5-B. Lifestyle Rules

Lifestyle rules and restrictions are a category of provisions I have identified across my sample of contracts that require the surrogate to engage in – or abstain from engaging in – a specific activity, practice or habit. Using the interview data, I will demonstrate in the next chapter the ways in which these formalized lifestyle rules and restrictions are a key emotion management strategy deployed by lawyers on behalf of distraught, anxious, and demanding intended parents that cause them to not only assert greater degrees of control over the carrier, but also cultivate attachment in the baby they cannot, or choose not, to carry themselves.

Some of these rules are commonly circulated among pregnant women, not just surrogates, based on scientific studies that indicate certain practices or substances can endanger the health and welfare of a fetus. One basic example would be rules against habitual drinking intended to prevent fetal alcohol syndrome (Bertrand et al. 2004). Thus, recommendations for maintaining a healthy pregnancy get diffused from the fertility field into the legal field, which overlap in a larger reproductive field (Bourdieu 1987; Edelman 2007). However, it is clear that surrogacy contracts vary greatly as to the nature of and degree to which they contain rules and restrictions controlling the surrogate’s choices and behavior during contract performance. This suggests rules serve a function far beyond the mere health of the pregnancy, which I will assert is risk management through emotion management given the dicey legal environment. The rules contained in lifestyle provisions range along a spectrum from most vague, such as generally “maintaining good health” or “following doctor’s orders,” to long lists of detailed rules related to diet, exercise, exposures, and common practices like going to the beauty salon, driving, or cleaning the house with Windex. My content coding of contracts unearthed a total of 127 lifestyle rules and restrictions. The sheer variety of rules coded across the sample is depicted in Figure 4.

Since the lifestyle rules are too numerous to discuss individually, I have selected key examples for analysis that appear to be the most common, are diffusing, and based upon the variation of the sample, contested. These include rules concerning the surrogate’s (1) diet; (2) physical activity; (3) day-to-day practices; and (4) use of household items. I expect to find that lifestyle rules are intended to manage emotions like anxiety in the intended parents, who use rules to police a pregnancy they are not carrying on their own. These rules are becoming institutionalized in the reproductive field.

A review of the list of lifestyle rules and restrictions from Figure 4 reveals that ten of them relate to eating, drinking and dietary requirements. Among these include rules requiring the surrogate to consume only organic foods, refrain from eating fish, halt the use of artificial sweeteners, limit caffeine intake, prohibit fast food, take prenatal vitamins, avoid herbal
supplements, and of course, curtail her consumption of any alcoholic beverages. Some dietary restrictions are quite detailed. For example, the contract might specify the surrogate may not eat certain cheeses, luncheon meats, tuna, or in some cases, follow a vegetarian or vegan diet. While 100% of the sample contained rules against alcohol, smoking, and taking illicit drugs, 60% (21 contracts) contained additional restrictions on the surrogate’s diet. Among multiple examples of dietary rules provisions, a few are representative:

The Surrogate agrees to maintain healthy and well balanced eating habits and a healthy lifestyle during the term of this Agreement, and to closely follow all dietary restrictions (including but not limited to the avoidance of unsafe foods including but not limited to any raw meat, raw fish, raw shellfish, raw eggs, deli meat, fish with mercury, smoked seafood, unpasteurized cheeses, unpasteurized milk, pate, and unwashed fruits and vegetables) and instructions provided to her by the IVF Physician, Obstetrician and High-Risk Specialist. The Surrogate agrees to see a nutritionist if requested. (Contract CA)

She will limit her intake of caffeinated beverages and diet soda… (Contract WI)

Regarding nutrition, Carrier agrees to eat foods high in Folic acid (leafy green vegetables, fruits, nuts, cereal and supplements) throughout her pregnancy with a special emphasis during weeks 2-8 of her pregnancy. Carrier agrees, throughout her pregnancy, to increase her iron intake by 1000 mg. (Contract, CO)

The Surrogate further agrees not to …drink alcoholic beverages [or] drink caffeinated beverages in excess of one (1) eight (8) ounce cup per day. (Contract CA)

GC will refrain from knowingly or recklessly eating: (a) raw fish (including sushi), tuna (in excess of 6 ounces per week), shark, or any other fish known to GC to be high in mercury; (b) artificial sweetener except as allowed by MP or GC’s prenatal care providers; (c) any food or consumable expressly forbidden by MP or by any of GC’s prenatal care providers; (d) any food or consumable specifically designated by IP in writing and agreed in writing by MP or by any of GC’s prenatal care providers to create a significant risk of harm to the child. (Contract OR)

It is not unusual to find contracts that restrict the consumption of coffee, diet coke, deli meats, sushi or even “unwashed fruit.” How these contract provisions are policed is a separate inquiry, given the typical surrogate is a mother to other young children who might eat ham sandwiches, non-organic fruits, and Sprite for lunch, if not McDonald’s. Although some of these rules may come from medical guidelines in the fertility field, many exceed what is uniformly accepted in the scientific community, which are also ambiguous. They appear to be efforts by intended parents and their lawyers to control and micromanage the pregnancy – and their own anxiety.

Another category of lifestyle rules either limits or encourages physical activity for the surrogate. These rules are related to family of activities coded from this sample of contracts, including participating in sports and exercise programs, skiing or snowboarding, mountaineering, using a sauna or hot tub, swimming or scuba diving, and attending amusement parks. They also include rules governing daily activities like driving, walking, lifting objects and sleeping. Twenty-one contracts, or 70% of the sample had rules concerning physical activities during fertilization and pregnancy. While surrogacy agreements are quite detailed in banning lists of
Figure 4: List of 127 Codes for Lifestyle Rules and Restrictions

The following is a list of lifestyle practices, habits, activities, or household items that are specifically restricted, encouraged or otherwise regulated within the surrogacy contract.

abstinence  
acupuncture  
activities  
alcohol  
amusement parks  
amimals  
appointments  
artificial sweetener  
association  
beauty product  
bed rest  
bills  
birthplace  
bonding  
brace  
caffeine  
chemical exposure  
chiropractic  
choose doctor  
cleaning products  
communication  
condom  
confidentiality  
control  
esthetic surgery  
counseling  
crime  
delivery  
diet  
disease  
doctor  
driving  
drs appointments  
drs orders  
drug testing  
electro stimulation  
enail  
ential oil  
exercise  
fetus  
financial issue  
fish  
fuel  
funeral  
gag order  
hair dye  
hairspray  
hazardous substances  
herbs  
HIV  
hospital  
hot tub  
invasive pro  
IP access  
IP participation  
iron  
kitty litter  
labor  
liability  
lifting  
manicure  
massage  
media  
medical  
medication  
microwave  
monogamy  
ointments  
organic  
OTC drugs  
oven cleaner  
paint  
perm  
pesticides  
pets  
phone  
physical activity  
physical evaluation  
piercing  
privacy  
psych  
publicity  
pumping milk  
radiation  
rage  
relocation  
RX  
sauna  
screening  
scuba  
second hand smoke  
second opinion  
sex  
skiing  
skydive  
sleep  
smoke drink drugs  
snowboard  
sports  
STDs  
steroids  
support group  
supplements  
sur cooperation  
sur divorce  
sur H habit  
sur H cooperation  
sur H participation  
sur identity  
sur married  
sur risk  
surveillance  
tanning  
tattoo  
teeth whitening  
testing  
timing counseling  
transportation  
travel  
travel restriction  
vitamins  
waive privacy  
wakling  
website  
weight  
weights  
X-ray
activities, others are more realistic. For example, a contract from Wisconsin reads, “Carrier shall not be limited from engaging in her usual activities of daily living which could be dangerous, such as driving or riding in a car, crossing the street, walking outside during the winter, or similar activities, as long as she exercises reasonable care and takes reasonable precautions.” A less realistic example comes from a Colorado contract which states, “Gestational Carrier also agrees not to lift, carry or care for animals weighing more than 15 pounds after the embryo transfer.” If the surrogate has toddlers at home, a promise not to lift more than 15 pounds of any living thing seems highly unrealistic.

Other kinds of day-to-day practices were also found through the content coding of contracts, appear to be symbolic, and hard to enforce. Some contracts include clauses that require the surrogate to refrain from using a variety of everyday beauty products like hairspray, hair dye, teeth whitening products, and essential oils. Similarly, they are prohibited from getting manicures, perms, or going to the tanning salon. While some contracts are quite specific, like restrictions on tattooing and body piercing, others are vague, such as a ban on “cosmetic surgery.” Still other rules concern forms of bodywork like massage, chiropractic care, and acupuncture treatments, which are both encouraged and prohibited, depending on the lifestyle of the intended parents.

For example, a California contract mandates, “She shall not remain in close proximity to cat litter, microwaves while in operation, second hand smoke, non “green” cleansers and oven cleaners, pesticides, or other aerosol sprays during and through the end of the pregnancy.” Thus, I coded for a series of rules identifying “hazards,” including exposure to household cleansers, chemicals, pesticides, paint, microwaves, radiation, and the most popular, cat litter. Nearly half the sample, or 46% (14 contracts) formally prohibit the surrogate’s contact with or exposure to cat litter, demonstrating its institutionalization.

Despite the challenges of policing, contracts also contain provisions regarding breach of the lifestyle rules that are named. Therefore, laundry lists of prohibited practices, once formalized, have legal consequences beyond sheer control. For example:

**Handicap Resulting from Surrogate’s Activities** …in the event a child is born with a handicap without forewarning and it is determined by two physicians that the handicap is a result of drug or alcohol use, cigarette smoking, or poor nutrition during the pregnancy, and/or negligence, Surrogate shall reimburse the Genetic Father any expenses already paid on her behalf and shall also be responsible for the costs of delivery of the child, medical expenses, as well as, in the event Genetic Father do not wish to parent the Child, foster care expenses and other expenses until a suitable relinquishment and adoption can take place. In the event Surrogate chooses to parent said handicapped child, Genetic Father shall not be responsible under contract for child support payments but understands he may be held responsible under applicable state law. (Contract Multi)

**BIRTH DEFECTS.** In the event that the child is stillborn, or is born with mental, physical, or congenital defects (“defects”) proximately caused by voluntary acts of the Gestational Carrier contrary to the instructions of the physician or the obstetrician, including but not limited to, her consumption of alcoholic beverages, non-prescribed drugs other than nonprescription drugs authorized by the obstetrician, or her contraction of sexually transmitted diseases, including HIV, this shall be a material breach on the part
Thus, if the child is born with some defect, the intended parents could sue for breach of contract if they can prove she engaged in negligent lifestyle habits in violation of the agreement. Given the serious threat of a negligence claim, lifestyle restrictions are more than symbolic for a surrogate obligated to follow them. The rules that enable intended parents to control the pregnancy through their third party carrier might relieve anxiety about the health and welfare of the child-to-be, but cause it in the surrogate who bears an additional looming risk.

5-C. Contact Rules and Intimacy Restrictions

Contact rules represent provisions in the contract that refer to expression of emotion, intimate acts that could elicit emotion, and restrictions on physical contact with the baby, the intended parents, or even the surrogate’s own spouse. I expect to find that contact restrictions in contracts are intended to manage feelings of attachment in the surrogate during and following the pregnancy as a legal risk management strategy deployed by lawyers in an unsettled and divided legal field. A surrogate’s emotional attachment to the child can unfurl the lynchpin of the agreement: establishment of legal parentage in the party who commissions, rather than carries, the child to term. Since jurisdictions are divided on whether a remorseful birth mother can be forced to relinquish her parental rights in advance of delivery by surrogacy contract, lawyers are eager to find ways to manage attachment throughout the process. This is affirmed by the interview data analyzed in the next chapter.

Contact rules and restrictions in surrogacy contracts capture the essence of “feeling rules” because they call for the inward management of the surrogate’s emotions and her outward affective displays during contract performance (Hochschild 1979, 1983). I have labeled provisions in agreements that limit physical contact between the surrogate and a number of other people intimacy restrictions. These others include rules for contact with the surrogate’s own spouse or partner, the intended parents, and of course, the child. There are countless examples of intimacy restrictions throughout the sample of surrogacy agreements. Given the constraints of this chapter, I will introduce a few related to the following key provisions: (1) sexual contact, (2) communication and contact with the intended parents, (3) breastfeeding, (4) viewing and handling the newborn and (5) continuing contact with the parents and child after the birth, and the exchange relationship.

5-C1. Sexual Contact

There are a variety of contact rules and intimacy restrictions governing sexual contact between the surrogate and her partner, if she is coupled, or potential partners if she is single. These rules range from abstinence, to monogamy, prophylaxis, sexually transmitted disease testing, monitoring, and prohibitions on new relationships while under contract. It is nearly uniform for contracts to contain a provision requiring the surrogate abstain from sex with her spouse or any other intimate partner prior to and during the insemination or embryo transfer
process. In fact 97%, or all but one contract in the sample, contained abstinence provisions during the insemination window, through confirmed pregnancy. Such contact restrictions seem justified, since the intended parents need to insure that the surrogate gets pregnant with a child they are genetically related to, or in the case of purchasing gametes, that they selected. If the surrogate is sexually active during fertility treatments and insemination, there is a clear risk she will become pregnant with the wrong gametes. Eighteen contracts in the sample (60%) had a provision related to breach of the agreement if paternity testing established a surrogate’s spouse or other partner as the father, demonstrating her sexual contact during the forbidden contract period. However, such a discovery may also be actionable under the general “material breach” provisions, which exist in 100% of the sample, unless it was due to a doctor’s mistake.

However, less common are intimacy restrictions that direct the surrogate’s sexual expression and behavior after pregnancy is already confirmed. Common provisions include required condom use throughout the contract period, abstaining from sex throughout the pregnancy, and rules on intimate relationships with non-marital partners. In these representative contracts:

Gestational Carrier acts in a manner unfavorable to the well being of the unborn Child by failing to follow the directions of her Physician or Obstetrician …having unprotected intercourse when not advised by the Physician or Obstetrician or incurring a sexually transmitted disease during the pregnancy. (Contract CO)

The CARRIER shall not engage in any high risk sexual activity that could result in any sexually transmitted disease being contracted by the CARRIER and passed on to the CHILD. (Contract MA)

The most common sexual contact provision was the rule intending to prevent the transmission of sexually transmitted diseases. Even though a surrogate can contract a disease through donor insemination, contracts tend to be skewed as more protective and less invasive of intended parents then surrogates. For example, only 10 of the contracts in the sample (33%) contain a provision either requiring intended parents obtain screening for sexually transmitted diseases, or confirming with medical records that had already occurred. By comparison, provisions monitoring the surrogate’s sexual activity, her husband’s promise to be monogamous, and precautions related to the contraction of sexually transmitted diseases during contract performance appear in 83% of the contracts in the sample.

Intimacy restrictions and contact rules are a key area in surrogacy agreements which apply to surrogate husbands, not just the surrogate. A surrogate’s husband, as a signatory to the contract, must promise to be monogamous, is subject to testing for sexually transmitted diseases, and may be asked to abstain from sexual contact for certain periods during, or even throughout the pregnancy. A California contract requires the surrogate husband’s “cooperation” when it comes to intimate conduct. It says, “Such cooperation shall include but not be limited to abstaining from sexual intercourse with my wife.” Similarly, and Oregon contract states:

GC and GC’s Husband will use condoms during sexual intercourse. GC will not engage in sexual intercourse with any person who has not been tested by or at the direction of MP and found to be free of sexually transmitted diseases. GC and GC’s Husband agree to remain monogamous throughout the term of this agreement. (Contract OR)
In my sample, 63% of contracts (19) had rules that applied to the surrogate husband’s sexual conduct, and not just her own.

Sometimes non-signatories to the contract are caught in the surrogacy net. The surrogate may promise to inform the agency, her lawyer, or the parents if a new intimate partner comes into her life. If so, they may be asked to submit to testing, use condoms, or commit to monogamy. For example, a Texas contract requires the surrogate to “disclose any current sexual partners other than parties to this agreement to [the agency] so they may be tested.” Since intimacy restrictions are hard to enforce as a practical matter, and legally unenforceable, they must also serve symbolic functions. I expect to find that a function of sexual contact provisions is to enable control by the intended parents over a pregnancy they physically cannot control themselves. Sexual contact provisions are of course practical, but they also serve as feeling rules to manage anxiety in the intended parents, and detachment in the surrogate. Analysis of the interview data will analyze the predictions made surrounding the function of these contract provisions in the next chapter.

5-C2. Communication and Contact with the Intended Parents

Contracts are also designed to monitor and control a pregnancy through rules determining the degree of contact the parties will have and expectations for how and when the surrogate will communicate during the process. I expect to find that communication and contact rules function to manage intended parents’ anxiety and vulnerability surrounding the pregnancy they do not physically control, among other emotions. Reciprocally, these rules require the intended parents will be connected to the pregnancy as a strategy lawyers use to cultivate their attachment, and new identity as parents-to-be. Communication rules serve a conflict avoidance and hence, legal risk management strategy. Chapter 6 will bring the provisions analyzed below “into action.”

In my sample, 80% contained communication provisions. Examples of rules regulating degrees of contact and communication expected of the surrogate vary more than most within my sample of contracts. Some are broad and vague, such as, “PARTICIPATION OF INTENDED PARENTS: The Gestational Carrier shall keep the Intended Parents fully apprised of her physical and psychological condition as her pregnancy progresses,” (Contract CO) while others are specific yet simple, “The Surrogate further agrees to promptly (within 24 hours) respond to all contact initiated by the Intended Parents,” (Contract CA). Among the varied communication rules include less simple ones:

The parties agree to remain in communication at least weekly from the date of this Agreement until either the birth of CHILD, the death of CHILD, or the earlier termination of this Agreement. Failure of either party to communicate with the other shall be a material breach of this Agreement if the parties have not communicated for a period of one (1) month. (Contract MA)

Communication and Providing Information: The Parties agree and understand that good communication and timely information is essential to their full collaboration and cooperation under this agreement. Accordingly, the Parties agree to attempt to maintain regular communication with each other. Each Party will promptly return calls or messages from the other. If communication is not available through one method, each Party will continue trying to reach the other Party by other available methods. The
Parties agree that “regular communication” means communication that is reasonably necessary and not overly burdensome in frequency or duration… The Parties agree that cell phone and email communications among and between the Parties are useful and permissible. (Contract OR)

Communication. The parties agree to maintain ongoing communication directly with each other during any ongoing IVF/ET cycle, during the pregnancy, and through the time of delivery regarding the IVF/ET cycle and pregnancy, and agree to communicate with each other at least once per week. The parties also agree to use their best efforts to respond to each other’s voicemails and emails within twenty-four (24) hours, each party taking into consideration that situations may arise where an immediate response may not be possible. (Contract MA)

Some contracts target their obligations to the intended parents, rather than the surrogate. For example, “Intended Parent(s) agree to... Keep in touch with the Surrogate approximately weekly over the course of the time from the initial phone conversation until two weeks post birth (unless excused through vacation without cell phone or internet access, illness or permission by the Surrogate and Agency),” (Contract TX).

To avoid conflict, some contracts provide that agencies take an active role in managing the relationship. In this Texas contract:

Management. Agency shall manage the surrogacy process by providing the following services:

a. Respond to messages or emails from Intended Parent(s) or Surrogate within 72 business hours or less throughout the process, unless extenuating circumstances exist,

b. Agency will guide and support both Intended Parent(s) and Surrogate through the entire surrogacy arrangement and will provide ongoing personal care, aid, encouragement, support and attention. Agency will be available by both phone and email to answer the Intended Parent’s questions about the surrogacy arrangement.

c. Agency shall oversee the payment by Intended Parent(s) of all expenses incurred by the Surrogate related to the Surrogacy Agreement,

d. Agency shall provide Surrogate with support from a licensed mental health professional, if necessary.

Note that the contract not only provides that the agency will "oversee the expenses," and promise to return calls within "72 business hours,” but also that the agency will manage their clients’ feelings, offering “ongoing personal care, aid, encouragement, support and attention" throughout the arrangement. This provision is even titled "Management,” outlining the emotional, financial and logistical service the agency will provide for the contract period.

Finally, nearly every contract in the sample has a provision regarding the degree to which intended parents will participate in doctor’s appointments, especially the ultrasound. In my sample, 100% (30 contracts) required the surrogate to waive her privilege of confidentiality, giving intended parents the right to participate in medical appointments, view all medical records, and speak with her providers throughout the process. While 20 contracts (66%) specified parent participation in the labor and delivery, 83% had general terms for contact in medical appointments like the ultrasound.
In fact, for parties less frequently in contact, if the intended parents choose to attend, the ultrasound one of the few important times they will interact with their surrogate. A typical rule is that, “the Intended Parents shall have the right to attend and be present at all doctor visits including ultrasound examinations of any kind, as well as the birth of the Child,” (Contract CA). Similarly, others provide:

[Gestational Carrier will] invite the Parents to be present at the birth of the Child. (Contract MD)

Carrier agrees that Parents are welcome to take part in Carrier’s appointments with her physician, including ultrasound and similar testing. (Contract WI)

CARRIER and CARRIER’S HUSBAND agree that INTENDED PARENTS may attend all doctors’ appointments and ultrasound appointments and the birth of the CHILD… Notwithstanding the forgoing, INTENDED PARENTS agree to respect any of CARRIER’S privacy requests during all appointments. (Contract MA)

Sometimes, the rule is simply that the “Gestational Carrier agrees to send (email is acceptable) sonogram/ultrasound photos to the Intended Parents within five (5) days of each appointment,” if they do not actively participate in the pregnancy (Contract CO). In any case, there is variation as to expected degrees of contact and communication between the parties during the pregnancy, but whatever they are get memorialized, and are clearly institutionalizing as both control strategies and rules intended to cultivate the parents-to-be attachment in the pregnancy.


One of the key intimacy restrictions found in contracts are those related to breastfeeding or the pumping of breast milk. I expect to find that formalized rules against nursing are intended to avoid the potential for emotional bonding between the surrogate and the newborn, especially since the surrogate’s body is technically no longer needed to sustain the baby’s life. Rules policing emotional attachment between the surrogate and newborn demonstrate how lawyers seek to minimize risk by managing emotions in an unsettled legal terrain. Attachment between the surrogate and newborn could derail the entire agreement, whose enforceability is uncertain. Prohibitions on nursing likely diffused and carried over from adoption practices. However, these agreements vary; while they contain detailed rules surrounding how breast milk shall be provided, they do not universally prohibit it. The interview data reveal a relationship between bans and whether the carrier is a traditional surrogate using her own egg, a gestational surrogate, and whether or not the parents have struggled with infertility. As for the sample of contracts analyzed for this chapter, 13 contained rules related to expressing breast milk following birth.

21 According to Joan Heifetz Hollinger, an expert in the field of adoption law, practices surrounding breastfeeding have varied over the past century, but have not necessarily been codified in adoption statutes. Instead, homes for unwed mothers like Gladney, The Cradle, and Bethany Homes probably had internal customs that birth moms who plan to relinquish are discouraged from breastfeeding as well as from any other kind of early bonding. Even though there are histories on adoption practices and homes for unwed mothers, like Barbara Melosh’s *Strangers and Kin*, and Ann Fessler’s *The Girls Who Went Away*, neither discusses nursing prohibitions as a means to prevent bonding between the birth mother and her newborn.
Because breast milk is a quintessential, universal symbol of nurturing, bonding, and motherhood (Blum 2000; Hausman 2003; Yalom 1998), provisions in surrogacy agreements related to the practice are especially intriguing. Nursing provision are perhaps the single most important way the formal language of a contract acts to manage not only emotional detachment between the surrogate and newborn, but also her identity as a “mother.” They also serve to actively cultivate bonding between the newborn and its non-gestational parents. For example:

Carrier acknowledges the importance of immediate bonding between the Child(ren) and the Commissioning Couple and agrees to assist in every way possible to strengthen that bonding including but not limited to Carrier agreeing not to breast feed the Child. (Contract FL)

The Traditional Surrogate further agrees that because she is entering into this Agreement with the intention of providing a service to the Genetic Father and Intended Father, it is in the best interests of the Child…[t]he Traditional Surrogate will not nurse the Child. (Contract NJ)

CARRIER represents that she will not form nor attempt to form a parent-child relationship with any CHILD she bears pursuant to the provisions of this Agreement. All parties understand that under no circumstances may CARRIER ever breast feed CHILD. (Contract MA)

To avoid formation of a “parent-child relationship” or to encourage “immediate bonding” between the contracting parents and the child, these contracts prohibit nursing. However, bans on breast milk itself are not universal. In fact, 10 of 13 contracts with breast milk provisions sanction the practice. A Wisconsin agreement views it as a “benefit”:

BREAST MILK. The parties recognize the benefits to the Child associated with the availability of breast milk. Carrier will use her best efforts to express breast milk after the Child is born and to provide such breast milk to Parents. Carrier, alone, will determine what is a reasonable amount of breast milk and a reasonable time frame for providing it. If a treating health care provider advises against the use of Carrier’s breast milk (e.g., because of illness or medications), or advises Carrier that she should not express her breast milk, then she shall not do so. (Contract WI)

In contrast to the samples above, this contract entrusts the surrogate to make various decisions surrounding nursing and what is “reasonable,” for the welfare of the child.

Further, it is not uncommon for parents to request the pumping of breast milk for an agreed-upon period of time, with contracts delineating fees as payment for the service and reimbursements to her for shipping costs. The exact terms of the agreements vary:

For a reasonable time after delivery, to pump and deliver breast milk to Genetic Parents, with Genetic Parents’ concurrence, at Gestational Carrier’s sole discretion and Genetic Parents’ sole expense, for the purpose of feeding the newborn Child. (Contract MN)

Breast Milk. In the event the Surrogate agrees and Intended Parents request for Surrogate
to pump breast milk after the birth, Intended Parents shall pay for all costs associated with the pumping, to include but not limited to the cost of the rental of a breast pump, shipping costs, breast pads, supplies and breast feeding bras. In addition, the Surrogate shall be entitled to an additional allowance of $100.00 per week for up to six weeks after the birth. Surrogate shall not be entitled to any reimbursement for these expenses listed above until she provides an actual receipt (or copy) for such expense, as well as a copy of such payment made via personal check or money order only. (Contract CA)

Breast Milk: The parties have agreed that the Gestational Carrier will pump breast milk if requested by the Intended Parents. In such event, Carrier will be reimbursed $400.00 per week plus the cost of supplies purchased by Carrier. (Contract CO)

If requested by the Intended Parents and agreeable to the Surrogate, the Surrogate shall pump colostrum and breast milk for the benefit of the Child, for such period of time as mutually agreed among the parties. The Intended Parents shall pay the costs of all pumping supplies, the rental of a hospital grade breast pump, pads, and all shipping and other supplies. The Surrogate shall avoid alcohol and all illegal drugs, and shall following all dietary restrictions provided by the Obstetrician, during the period whereby breast milk is provided by the Surrogate. The Surrogate and the Intended Parents have the right to be able to terminate the pumping of breast milk at any time. (Contract CA)

The interview data analyzed in the next chapter provide fascinating insights on how breast milk rules and provisions are deployed in surrogacy contracting in order to manage emotions.

5-C4. Rules for Contact at Birth of the Child

Another critical intimacy restriction I predict is used to manage emotions, most notably attachment, are rules governing the surrogate’s contact with the newborn upon delivery, including holding or viewing. Some agreements contain intentions and expectations for the delivery process, including creation of a “hospital plan.” In other cases, the practices have become routinized, though not always formalized. Based on the contracts in the sample, 70% have rules surrounding permitted contact between the surrogate and child upon birth. Here are contact provisions strictly managing the surrogate’s handling and viewing of the newborn:

GESTATIONAL CARRIER CONTACTING AND VIEWING OF CHILD AND POST-PARTUM CONTACT: Upon delivery of the Child, the Child shall be placed with the Intended Parents so that they can hold and care for the Child. Intended Parents shall be exclusively entitled to feed, change and take care of the Child. Gestational Carrier will be permitted to contact and view the Child as solely determined by Intended Parents. The parties agree that any additional post-partum contact between themselves must be mutual Agreement in writing and may be terminated by either party at any time without penalty. (Contract CO)

Gestational Carrier and Gestational Carrier’s Spouse shall voluntarily surrender custody to Genetic Parents immediately upon birth of Child pending confirmation of the foregoing factors by a court in the relevant jurisdiction after the birth of Child. If hospital policy permits, Child shall be discharged directly to the sole care and custody of Genetic Parents. Child will then be taken immediately into the home of the Genetic Parents and raised by them without interference by Gestational Carrier or Gestational
The Carrier agrees that she will cooperate fully in allowing the Biological Parents to bond with take custody of the child immediately upon birth. (Contract CA)

The phrases “upon birth” or “upon delivery” occurred in 60% of the sample contracts (18). Other contracts contemplate viewing the newborn following delivery, but not after. A multijurisdictional contract states, “After Birth Contact. Embryo Carrier can see the child while in the hospital, but the child will be in the care of Genetic Parents from birth forward. After Genetic Parents take the child from the hospital, Embryo Carrier and Embryo Carrier’s Husband agree not to try to view or contact the child.”

Contracts can include the surrogate’s family in limited, post-birth contact. A California agreement specifies, “Upon delivery of the child, if medical considerations permit, Intended Parents shall allow Surrogate and her immediate family to visit with the child for up to one hour before the child is discharged from the hospital.” Although the surrogate is formally permitted to spend time with the newborn upon delivery for “up to one hour” before discharge, the interaction is highly controlled. It also allows the “immediate family” to do so with her. While this emotion management provision is likely intended to prevent bonding between the surrogate and the newborn, it does allow for family “closure,” which considers the feelings of all parties affected by the arrangement.

In fact, another contract embraces the holistic approach to contact rules following birth. A Florida agreement states, “All parties to this Agreement acknowledge that the successful outcome of this Agreement is the birth of the Commissioning Couples’ Child(ren) and as such plan a joint time of celebration for all parties and the Child(ren) to spend time together both at the hospital and up to the time of discharge of the Child(ren) from the hospital.” However, other contracts make less of an effort to anticipate feelings, such as a Maryland contract that says despite the surrogate’s medical condition or getting closure, “Gestational Carrier agrees to execute any necessary hospital documents to enable the Child to be discharged directly to Parents at the earliest point medically appropriate for the Child, regardless of whether Gestational Carrier remains hospitalized or is herself then released.”

5-C5. Continuing Contact with the Parents and Child

The final set of contact and intimacy provisions are rules that govern the amount of continuing contact contemplated between the surrogate, the parents, and the child following birth, and contract performance, found in 56% of the sample (17). I predict that these rules are among the most important ways emotions are managed in the exchange relationship, since severing any bond that has formed between the parties – or the baby – is the cornerstone of third party reproduction. Surrogacy would not be commercially viable if carriers consistently expressed remorse. Instead, they are asked to manage their inward feelings and their outward displays of emotion. Specific examples will be analyzed in the next chapter.

There is wide variation among the contracts in my sample as to degrees of continuing contact prearranged by formal agreement. While contracts anticipate and formalize the severing of ties,
continuing contact may in fact occur informally, once the surrogate pregnancy ends on friendly terms. However, “on the books,” continuing contact is the exception and formal severing is the rule. These exceptions demonstrate a true gap between the formal law in a contract and the party’s practices, just as Macaulay theorized in the 1960’s (Macaulay 1963). The significant difference is that Macaulay’s informal, non-contractual relations in business were the rule, rather the exception. The inverse is true for surrogacy. As this Massachusetts contract demonstrates, continuing contact is not the rule, and is solely as a matter of discretion by the intended parents:

The CHILD is to be taken into the home of the INTENDED PARENTS and raised by them without interference by the CARRIER and CARRIER’S HUSBAND…the extent of any future contact between the parties and/or between the CARRIER and/or CARRIER’S HUSBAND, on the one hand, and the INTENDED PARENTS and/or the CHILD, on the other hand, will be determined by the INTENDED PARENTS in their sole discretion. If the INTENDED PARENTS determine that it is in the best interest of the CHILD for the CARRIER to meet the CARRIER and/or CARRIER’S HUSBAND in the future, the CARRIER and CARRIER’S HUSBAND will abide by that request.

In the same spirit, a much simpler provision in a Texas contract states, “After the birth of the child, the Carrier waives the right to visitation with the child except with the consent of the Commissioning Couple.” A stricter, multijurisdictional example plainly says, “After Genetic Parents take the child from the hospital, Embryo Carrier and Embryo Carrier’s Husband agree not to try to view or contact the child.”

Rules regarding future contact require the surrogate to manage her feelings before gestation. As another contract posits, “Carrier agrees to surrender custody of CHILD to INTENDED PARENTS immediately upon birth of CHILD, and represents that she does not desire to have any communications with CHILD after the birth,” (Contract MA). The surrogate agrees to perform the emotion work necessary to show she “does not desire” to have contact or communication with a child she has yet to meet, no matter her inward feelings. Perhaps those feelings will be perfectly aligned with the terms of the agreement. In a thorough and flexible example, an Oregon contract offers different scenarios for continuing contact, along a spectrum of “friendly” to “more businesslike” and “even more restrictive.” It provides:

OPTION #1 FRIENDLY Without intending at this time to create any binding obligation with regard to post-birth contact, the Parties agree that it is their current hope and intention for IP to provide GC and GC’s Husband with periodic email, telephone, and other updates, including current photographs, of any child born as a result of this agreement, and the Parties are interested in exploring additional future contact.

OPTION #2 MORE BUSINESSLIKE Any contact or communication between the child and GC or GC’s Husband subsequent to the child’s discharge from the hospital will be the subject of an optional, separate, informal agreement between the Parties. Absent an agreement among the Parties, contact after the child’s birth and discharge from the hospital is subject to the discretion of IP. None of the Parties is obligated to have further
contact with any other Party, and IP is not required to provide GC with information about
or access to the child, unless all affected Parties mutually agree otherwise in writing.

THE FOLLOWING IS OPTIONAL EVEN MORE RESTRICTIVE LANGUAGE GC
and GC’s Husband agree that, in the absence of any written agreement to the contrary,
and in the best interest of the child, neither will seek to view, contact, communicate with,
or form a relationship with the child at any time following the child’s birth, except with
the prior consent of IP unless such a relationship is desired by the child at a later date
when the child is at least 18 years of age and is able to make an informed decision to
form such a relationship.

The "Friendly" version – while not a “binding obligation – is much more relationally oriented,
foreseeing the possibility for limited continuing contact. It contemplates managing the surrogate
and her husband’s feelings through "periodic email, phone, and other updates, including current
photographs." It later even anticipates that the child, after it turns 18, may make an "informed
decision" about forming a relationship with its birth mother.

While the Oregon contract is unusually detailed, other contracts also contemplate limited
communication and photos, at the intended parent’s discretion. For example:

FUTURE CONTACT The Parties agree that future contact between the Parties after the
birth of the Child shall include the Intended Parents sending of a minimum of two letters
and photographs per year for a period of five years following the birth of the Child,
unless the Parties agree otherwise. The Parties further agree that they will not intervene in
each other’s lives, and that the Surrogate and her Husband will not seek to contact the
Child or obtain any information concerning the Child, unless otherwise agreed by any of
the Parties in writing. (Contract CA)

Genetic Parents intend to keep Embryo Carrier informed by sending a picture and a letter
about the child’s progress at least on an annual basis, if Embryo Carrier wishes. Embryo
Carrier agrees that she will be reasonably available if child has questions about his/her
birth mother. (Contract Multi)

I expect to find that information via letters and photos, though limited forms of future contact,
serves to reassure the surrogate that her gestated child is alive and well. Even though she cannot
be physically in contact or otherwise form a relationship, reassurance guaranteed by an
enforceable contract provision is a form of emotion management. As a testament to the great
variation in the content of continuing contact terms, a New Jersey example generously provides,
"Without it consisting any alienation of Genetic Father’s rights… it is Genetic Father intention to
allow Surrogate to visit the Child freely, after having previously set an appointment for such
visit. All the visits shall be in the presence of the Genetic Father.”

5-D. Naming and Labeling Practices

In addition to lifestyle rules, contact and intimacy restrictions, terminology that names the
parties also serves to manage emotions. Contracts include specific labels for the parties to the
contract, which act as discursive signifiers as to gender and parenting roles (Conley and O’Barr
1998). Coding indicates a range of terms used in contracts for the woman giving birth, her
spouse, the individual or couple paying her to give birth, the baby born of the contract, and even, the contract itself. The extensive variation in surrogacy contract terminology is depicted in Figure 5. Each of these labels replaces standard dispassionate service contract terms like “employer,” “employee,” “subcontractor,” or “manager.” I predict that naming practices symbolically produce a form of distancing or familiarity as a tool of emotion management, which in turn may serve to shape their identities and the nature of their relationships.

What the Uniform Parentage Act defines as a “birth mother” or “natural mother” is reframed a “gestational surrogate,” “embryo carrier,” or “gestational host womb” in the text of the binding agreement, while the couple or single purchasing the labor is labeled the “parent(s),” “mother,” “father,” or “intended parents” regardless of genetic or gestational connection.

**Figure 5: Varied Terms and Labeling Practices in Surrogacy Contracts**

<table>
<thead>
<tr>
<th>Terms for the Surrogate:</th>
<th>Terms for the Parents:</th>
<th>Terms for the Baby:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carrier</td>
<td>Biological Father</td>
<td>Child, Children</td>
</tr>
<tr>
<td>Carrier Couple</td>
<td>Biological Mother</td>
<td>Embryo</td>
</tr>
<tr>
<td>Embryo Carrier</td>
<td>Commissioning Couple</td>
<td>Fetus</td>
</tr>
<tr>
<td>Gestational Carrier</td>
<td>Father</td>
<td>Unborn Child</td>
</tr>
<tr>
<td>Gestational Host Womb</td>
<td>Genetic Father</td>
<td></td>
</tr>
<tr>
<td>Gestational Mother</td>
<td>Genetic Mother</td>
<td></td>
</tr>
<tr>
<td>Gestational Surrogate</td>
<td>Genetic Parents</td>
<td></td>
</tr>
<tr>
<td>Host Uterus</td>
<td>Intended Father</td>
<td></td>
</tr>
<tr>
<td>Surrogate</td>
<td>Intended Mother</td>
<td></td>
</tr>
<tr>
<td>Surrogate Mother</td>
<td>Intended Parents</td>
<td></td>
</tr>
<tr>
<td>Third Party Assistant</td>
<td>Mother</td>
<td></td>
</tr>
<tr>
<td>Traditional Surrogate</td>
<td>Natural Father</td>
<td></td>
</tr>
<tr>
<td>Uterine Host</td>
<td>Natural Mother</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Parents</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Terms for the Surrogate’s Spouse:</th>
<th>Terms for the Contract:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carrier’s Husband</td>
<td>Agreement</td>
</tr>
<tr>
<td>Embryo Carrier’s Husband</td>
<td>Carrier Agreement</td>
</tr>
<tr>
<td>Gestational Carrier’s Husband</td>
<td>Contract</td>
</tr>
<tr>
<td>Gestational Carrier’s Spouse</td>
<td>Gestational Agreement</td>
</tr>
<tr>
<td>Gestational Surrogate’s Husband</td>
<td>Gestational Carrier</td>
</tr>
<tr>
<td>Gestational Surrogate’s Partner</td>
<td>Service Agreement</td>
</tr>
<tr>
<td>Husband</td>
<td>Gestational Surrogacy Agreement</td>
</tr>
<tr>
<td>Husband of Gestational Surrogate</td>
<td>Gestational Surrogacy Contract</td>
</tr>
<tr>
<td>Surrogate’s Husband</td>
<td>Parentage Agreement</td>
</tr>
<tr>
<td>The Surrogate Couple</td>
<td>Surrogacy Agreement</td>
</tr>
<tr>
<td></td>
<td>Surrogacy Contract</td>
</tr>
</tbody>
</table>
I was not able to detect a pattern that could link naming practices to a specific region or jurisdiction in my content coding. However, only 3 contracts in the sample use the word “mother” in designating the role of the surrogate – two from Texas, and one from Colorado. Those agreements call her a surrogate mother (TX) and gestational mother (TX, CO), mimicking the language of the Texas Family Code, explaining its presence in contracts. The purchasing parent is distinguished as the intended mother (TX). However, the vast majority of the contracts in the sample – 90% – disassociate the word mother from the party who gestates and gives birth.

Emerging terms of art across agreements have significant social consequences. I expect to find that terms that name and label the parties help to cultivate detachment in the surrogate, and attachment in the parents-to-be. By formally replacing the word “mother” with one like “embryo carrier,” surrogacy contracts actively redefine the social meaning of motherhood. Clinical terms like “gestational host womb” also make pregnancy easier to commodify as they create a distance between the role of a birth mother and the role of an incubator. In this way, naming practices are also tied to valuation of women’s labor, especially her gestational services.

5-E. Compensation Provisions

Compensation, fees and payment clauses reflect valuation of surrogacy by the parties, as well as significant risks involved, and are one of the core elements of the exchange relationship. They are highly emotional as well as symbolic. Lawyers draft provisions that not only specify the price to be paid for gestational labor, but also what the anguish of bed rest, guilt over miscarriage, mourning over permanent loss of her own reproductive organs, or the anxiety over a c-section is worth. Money is therefore tied to law and feelings. Precedents do not exist for the valuation of gestational labor and what selective reduction of a fetus is worth. I will use the interview data in the next chapter to show how, in an unsettled and nascent field, contract lawyers turn to what they do best: managing risk by rationalizing and commodifying the process, taking cues from other practice areas like torts which assess values for “pain and suffering.”

Surrogacy contracts frame compensation as a service, inconvenience, or even “pre-birth child support.” Here are notable examples:

As consideration for the risks, responsibilities, inconveniences, and expenses incurred by the Carrier, hereunder, as well as support for the Child(ren) carried, and for so long as Carrier and her husband are not in breach of this Agreement, the Commissioning Couple agree to pay the Carrier compensation in the total amount of $25,000.00. (Contract FL)

The Biological Parents agree to pay the Carrier as compensation for the services provided the sum of Twenty One Thousand Dollars ($21,000.00) (hereinafter the “Main Compensation”) payable to Carrier as full compensation to Carrier for her assistance provided for herein, as well as for time spent, personal discomfort and other personal inconveniences to Carrier, and risks assumed by the Carrier, in connection with her performance pursuant to the terms of this Agreement. (Contract CA)
INTENDED PARENTS hereby agree to reimburse CARRIER for her inconvenience, pain and suffering, and for her assumption of all medical and psychological risks as set forth herein in accordance with the payment schedule attached hereto as Exhibit D. (Contract MA)

Rationale for compensation in a surrogacy agreement varies by jurisdiction, corresponding to the law of the state in which it was drafted. For example, the California contract above specifies payment is “compensation for services,” which comes directly from the language of Johnson v. Calvert (CA 1993), the case decision affirming the legality of surrogacy in that jurisdiction. Similarly, Illinois is among the states that regulate commercial surrogacy by statute. That statute not only frames third party gestation as a “service,” but also acknowledges the effort and risk involved in the process (750 ILCS 47, 2005). An Illinois contract in my sample makes clear she is being paid "for her effort, risk, and work" related to "her service as a gestational surrogate,” as well as her effort in "nurturing and sustaining the Intended Parent’s child.” Since contracts must avoid characterizing surrogacy as “baby selling,” the Illinois contract plainly affirms compensation is not for "the outcome of the pregnancy.” States that have no case law or statutes regulating surrogacy tend to cover their bases, paying not only for the “service” and “medical risks, but also “as an expression of Intended Parents’ appreciation” for the “pain and suffering, discomfort and inconvenience Gestational Carrier will experience” (Contract CO).

While the interview data will offer insight into the going rates for first, second and third time surrogates, the content of the contract sample indicate that base compensation, or what the California contract above calls “main compensation,”” ranges from $18,000 to $50,000. However, $50,000 was an outlier and was found in only one contract from Texas. The average for all contracts exempting the outlier was $23,000. Note that half the sample had blanks or zeros adjacent to the compensation line, indicating the amounts were negotiable. Of course, those could not be included in the calculations. Other than the compassionate contracts in my sample, which did not include a base pay, the lowest compensation came from Oregon.

In addition to base compensation, surrogates receive fees for a number of specified items. A comprehensive list of the 78 different fees coded from the content of the contract sample appears on Figure 6. Thus, payments are not strictly for the valuation of the gestational labor, but also constitute a variety of supplemental fees, such as a fee for enduring an amniocentesis, a pleasurable bonus for getting a massage, or the security of a life insurance policy in the event of the surrogate’s death. These fees are becoming institutionalized in the reproductive field.

I provide a few examples of fee provisions from the content analysis to offer a sense of the variety of ways experiences and risks are valued, above the main compensation. As an Oregon agreement states, “In the event that a cesarean section is ordered to deliver the child(ren), the Gestational Surrogate will be paid an additional $1500.” What is loss of reproductive function worth? Apparently in both Massachusetts and California, $3,000:

The sum of Three Thousand Dollars ($3,000.00) if the Carrier suffers a loss of any reproductive organ(s) herein that renders the Carrier unable to conceive or carry a child of her own. (CA)

22 750 ILCS 47, Sec. 10, Definitions: “As used in this Act: ‘Compensation’ means payment of any valuable consideration for services in excess of reasonable medical and ancillary costs.”
**Loss of Reproductive Parts.** In the event that CARRIER suffers a loss of any reproductive organ as a result of the IVF process, pregnancy and delivery contemplated under this Agreement, the INTENDED PARENTS shall pay CARRIER $3,000.00. This paragraph shall not apply to any elective medical procedures. (MA)

What about the experience and risk of carrying twins, or an amniocentesis procedure?

Two Thousand Dollars ($2000.00) in the event of a twin pregnancy, to be paid in four payments of Five Hundred Dollars ($500.00). Three Thousand Dollars ($3000.00) in the event of a multiple pregnancy higher than a twin pregnancy, to be paid in four payments of Seven Hundred Fifty Dollars ($750.00) every four weeks (Contract IL).

The Sum of Five Hundred Dollars ($500.00) for an amniocentesis or CVS procedure regardless of the number of fluid draws per individual procedure. (Contract CA)

The content coding revealed valuation for a number of medical procedures and risks, including fees for abortion, induction, bed rest, ectopic pregnancy, transfers, *in vitro* fertilization, invasive procedures, hysterectomy, mock cycles and more. Contracts were inconsistent as to how many and the kinds of fees would be paid, in addition to their amounts.

*Figure 6: List of 78 Codes for the Types of Fees Paid to Surrogate*

The following is a list of codes that describe the process, activity, loss, or item that is to be paid by the intended parents to the surrogate under the terms of the contract. These fees supplement, and are distinct from, the surrogate’s compensation for gestation.

<table>
<thead>
<tr>
<th>abortion</th>
<th>flat rate</th>
<th>multiples</th>
</tr>
</thead>
<tbody>
<tr>
<td>acupuncture</td>
<td>food</td>
<td>organ loss</td>
</tr>
<tr>
<td>agency</td>
<td>housekeeping</td>
<td>OTC</td>
</tr>
<tr>
<td>amniocentesis</td>
<td>housing</td>
<td>per diem</td>
</tr>
<tr>
<td>attorneys fees</td>
<td>hysterectomy</td>
<td>pet care</td>
</tr>
<tr>
<td>bed rest</td>
<td>incidentals</td>
<td>phone</td>
</tr>
<tr>
<td>breastfeed</td>
<td>induction</td>
<td>post 30 weeks</td>
</tr>
<tr>
<td>c section</td>
<td>injectable meds</td>
<td>post partum</td>
</tr>
<tr>
<td>cancelled cycle</td>
<td>injections</td>
<td>preemie</td>
</tr>
<tr>
<td>cap</td>
<td>insurance</td>
<td>psych screening</td>
</tr>
<tr>
<td>car</td>
<td>invasive procedure</td>
<td>psych testing</td>
</tr>
<tr>
<td>caregiver</td>
<td>IUI</td>
<td>relocation</td>
</tr>
<tr>
<td>childbirth class</td>
<td>IVF</td>
<td>screening</td>
</tr>
<tr>
<td>clothing</td>
<td>legal process</td>
<td>selective reduction</td>
</tr>
<tr>
<td>complications</td>
<td>life insurance</td>
<td>stillbirth</td>
</tr>
<tr>
<td>counseling</td>
<td>life support</td>
<td>support group</td>
</tr>
<tr>
<td>cycle</td>
<td>lost wages</td>
<td>SUR H</td>
</tr>
<tr>
<td>D&amp;C</td>
<td>massage</td>
<td>SUR H lost wages</td>
</tr>
<tr>
<td>defect</td>
<td>maternity clothes</td>
<td>termination</td>
</tr>
<tr>
<td>dietician</td>
<td>mediation</td>
<td>termination K</td>
</tr>
<tr>
<td>disability</td>
<td>medical</td>
<td>transfer</td>
</tr>
<tr>
<td>disability insurance</td>
<td>medications</td>
<td>transport</td>
</tr>
<tr>
<td>ectopic</td>
<td>mileage</td>
<td>travel</td>
</tr>
<tr>
<td>embryo transfer</td>
<td>miscarriage</td>
<td>triplets</td>
</tr>
<tr>
<td>escrow</td>
<td>mock cycle</td>
<td>twins</td>
</tr>
<tr>
<td></td>
<td>monthly allowance</td>
<td>vitamins</td>
</tr>
</tbody>
</table>
Other types of payments are applied to non-medical incidentals such as housekeeping, child care, maternity clothes, special diets, lost wages, and travel expenses, to name a few. Trying to handle a household of your own while pregnant with other people’s children can be stressful, which these fees acknowledge through payment. For example, a “household helper” is offered at “$100 per week (paid monthly in advance) in the case of a multiple pregnancy or high-risk pregnancy” to manage the additional pressures the pregnancy brings (Contract OR). Fees can also be paid to the surrogate’s husband for his lost wages and travel, when he supports his wife in performing the contract.

Additionally, intended parents may emotionally manage the pregnancy by paying for the cost of individual psychological counseling or support groups for surrogates. Here are two representative provisions from Wisconsin and California:

The Intended Parents shall pay for all professional fees and costs associated with the psychological review, evaluation, attendance of support group meetings and/or individual counseling sessions; provided, however, unless otherwise agreed by the Parties in a separate writing executed by the Parties subsequent to the date of this Agreement, the Intended Parents shall only be financially responsible for one (1) session per month, as well as $100.00 per month payable to the Surrogate for her attendance at in person sessions only…The Surrogate represents that she will attend all monthly support group meetings as may be requested by the Intended Parents or Agency. (WI)

In the event psychological counseling and/or therapy is provided to the Surrogate pursuant to the terms of the Agreement, the Intended Parents shall pay the professional charges of a mental health professional for up to the sum of $1,200 (i) during the term of this Agreement and (ii) up to two months after a delivery or termination of this Agreement (whichever occurs first). (CA)

As discussed in the previous chapter describing the matching process, agencies and lawyers anticipate the emotional nature of the surrogacy experience and thus, encourage counseling. These provisions account for the cost of therapy, paid by the intended parent(s). However, contracts vary as to the limitations or caps they apply to the counseling fee, such as $100 per month or up to $1,200. Is that quantity enough to effectively manage the surrogate’s feelings?

Additionally, counseling is not always covered as a fee. A New Jersey agreement contends, “The Genetic Father and the Intended Father shall not be responsible for: (1) Any expenses relating to emotional or mental conditions or problems of the Traditional Surrogate, whether or not usually connected to the Traditional Surrogate’s pregnancy.” In contrast, to the provisions above, there is an absence of emotion management, unless the surrogate pays it herself. This especially surprising given it is a traditional surrogacy contract, which In Re the Matter of Baby M institutionalized as “fraught with emotion” in that very same state (NJ 1988).

5-F. Psychological Counseling and Intervention

In addition to lifestyle rules, contact restrictions, naming practices, and compensation provisions, contracts formalize the use of counseling professionals to manage the emotional aspects of the agreement before, during, and after the birth of the baby. They are the clearest
indicators that lawyers use emotion management, and conflict containment, to minimize legal risks amidst an uncertain and multijurisdictional legal field. Contracts include clauses for psychological evaluation by a licensed counselor before a match, referral to therapists for intervention during the process, participation in a surrogate support group, post partum consultations, and for conflicts – mediation. As mentioned in the last chapter, some agencies employ in-house therapists, while others have referral lists of experts in infertility and surrogacy. In any case, psychological screening and counseling provisions are transferred from the matching phase into the direct agreement between the parties. They are the best evidence that exchanges are relational, and confirm the importance of feeling management in contracts.

In my sample, 100% of contracts contain provisions that require the surrogate undergo psychological screening and evaluation, demonstrating the unique way that counseling is relied upon, integrated and institutionalized into the reproductive law field. It also shows overlap between the legal field, fertility field, and mental health field. Variation lies in whether additional counseling – either individual, joint, or via support group – is also offered or even required. A particularly generous example from an Oregon agreement embraces “private, non-group counseling with a qualified counselor of her choosing...up until...six months after the birth of any child.” Contracts typically cut off benefits two or three months after the birth. Evidencing the unity, rather than separation between law and emotion, it also states:

5.1 GC understands and agrees that stress, anxiety, and depression may negatively affect an otherwise promising pregnancy and accepts that it is solely her responsibility to plan and manage the conditions of her life in order to minimize and quickly address issues relating to stress, anxiety and depression. In this regard, GC agrees to maintain an open and honest dialogue with IP and to make use of counseling and mental health resources available to her under this agreement and otherwise. (Contract OR)

This contract specifically acknowledges the surrogate’s obligation to "plan and manage" her stress, anxiety, and depression through counseling, and to "maintain and open and honest dialogue" with the intended parents. Clearly, this contract concedes that feelings can "negatively affect an otherwise promising pregnancy” (Contract OR). While contracts tend to formalize counseling for surrogates, intended parents may be included. Samples include Maryland where “All Parties agree it is very important for each and all of them to receive psychological counseling” or California where “Any party may require all other parties to attend a joint counseling session to be conducted by a mutually agreed upon counselor.”

An example from Illinois illustrates emotion management not only through the evaluation process, but counseling offered to the surrogate, her husband and children “for up to three (3) months after the Child’s birth.” The relevant portion reads:

PSYCHOLOGICAL EVALUATION AND COUNSELING All Parties represent that they have received and completed a psychological evaluation and consultation from [name] a licensed clinical psychologist, prior to deciding to enter into a prior Gestational Surrogacy Arrangement and a second consultation with Dr. [name] Ph D., a licensed psychologist, prior to entering into this Traditional Surrogacy Arrangement. All Parties further agree to participate in further joint or individual counseling with Dr. [name] or another mental health professional (if such choice is mutually agreed by the Parties), should concerns relating to this Traditional Surrogacy Arrangement arise. (Contract IL)
The contract later provides further emotional support through alternative dispute resolution:

The Parties agree that they will make every reasonable effort to resolve any disputes that may arise in the course of this Traditional Surrogacy Arrangement amicably, informally, and immediately, including but not limited to seeking and cooperatively participating in psychological counseling and/or mediation…The Parties agree that in the event the Parties for any reason cannot amicably resolve any dispute or disagreement among them, any Party may request mediation of such dispute. All Parties agree to cooperatively participate in such mediation, and to use their individual best efforts to ensure that such mediation occurs within ten (10) days of the date of the mediation request. (Contract IL)

This Illinois agreement included both a counseling provision and one for dispute resolution. Relationship conflicts are considered to be highly affective and gendered experiences (Bandes 1999; Huntington 2008; Maldonado 2007; Merry 1990, 2003; Sarat and Felstiner 1995; Silbey 2001). Twenty-three of the agreements in the sample or 77% provide for psychological counseling separate from the initial evaluation for screening, demonstrating the institutionalization of rules and overlap of the mental health and legal fields.

5-G. Bodily Autonomy and Risk Provisions

Finally, a series of rules and provisions in contracts govern the amount of autonomy a surrogate is asked to give up over her body while pregnant, and the level of risk she is willing to assume for a third party when paid to do so. Using the interview data, I will demonstrate in the next chapter the ways in which these rules are an emotion management strategy deployed by lawyers on behalf of anxious intended parents who seek veto power over key decisions normally made by a birth mother that impact the ultimate goal of the contract: a healthy baby. Bodily autonomy and medical risk provisions manage the intended parents desire to control not only the quality of the baby, but also the quantity of children the desire.

My content analysis of the contract sample revealed three striking areas in which this is the case. The first are rules surrounding what is called “selective reduction” and “termination,” or choosing which fetuses to abort in the case of (1) abnormalities and defects, (2) gender selection, and (3) multiple unwanted fetuses. The second area is in the case of serious complications, where the surrogate’s body must be maintained on life support equipment in order to incubate the fetus. The third might be described as the essence of a surrogacy agreement: assumption of the risk. To the extent conflicts arise over crucial decisions affecting the outcome of the pregnancy, lawyers use contracts to manage significant legal as well as physical risks. Bodily autonomy provisions serve vital emotion management functions, evidenced by the fact they are anticipated by agencies during the matching process, and transferred into the contract.

Even when a surrogacy contract contains strong statements of intent regarding custody of the child in the recitals and representations section, there is typically a separate provision describing in detail who will have legal custody, and who will have physical custody of the child. Legal custody includes statements in surrogacy agreements that the intended parents have a right to make medical decisions regarding the fetus prior to and after birth, whereas physical custody implies the right to have control of them upon birth. Given political efforts by religious lobbies
towards greater “fetal rights” (Freedman and Weitz 2012), the emergence of contract provisions that establish rights to parentage while the child is in utero are troubling. For example:

WAIVER OF GESTATIONAL SURROGATE'S PARENTAL, CUSTODIAL, AND RELATED INTERESTS All Parties agree that the purpose of this Agreement is to establish Intended Parents as the legal and natural parents of the Child from and after the moment of conception, and Intended Parents therefore should be legally recognized as such, and that Gestational Surrogate and Husband do not in fact have any parental rights to the Child, and no such rights should be recognized. (Contract IL)

This contract establishes parentage “from the moment of conception” as a symbolic accord between the parties, since fetal personhood statutes do not exist in my sampled jurisdictions, and maternity is attributed by the fact of gestation prior to birth under the Uniform Parentage Act. Thus, provisions describe how parentage will be legally established, which vary by jurisdiction. In some states, the surrogacy contract will direct the surrogate and her spouse to cooperate in obtaining a pre-birth order that establishes parentage in the intended parents while the fetus is in utero. In others, post-birth legal procedures are required, as in adoption.

Perhaps the most complicated and unsettled provision related to bodily autonomy is a clear and separate one describing intentions for the termination and selective reduction of fetuses, rules for carrying of multiples, abortion when abnormalities are detected following amniocentesis, and what to do in the event of a miscarriage or stillbirth. The contracts, no matter the jurisdiction, frequently contain a statement that despite the intent of the parties to give control over the decision whether to terminate a fetus to the intended parents, that Roe v. Wade (US 1973) remains the law of the land. In my sample, 83% of the contracts (25) plainly state that the surrogate retains her fundamental constitutional right to carry, or not carry, a pregnancy to term. In two representative examples, one appearing in all capital letters per the original:

NOTWITHSTANDING THE PROVISIONS OF THE SECTION (ABORTION/SELECTIVE REDUCTION) ABOVE, OR ANYTHING TO THE CONTRARY, ALL PARTIES UNDERSTAND THAT A COURT MAY DETERMINE THAT A PREGNANT WOMAN HAS THE ABSOLUTE RIGHT TO ABORT OR NOT ABORT ANY FETUS SHE IS CARRYING AND ANY PROMISE TO THE CONTRARY MAY BE UNENFORCEABLE. TO THE EXTENT THAT THE SURROGATE CHOSES TO EXERCISE HER RIGHT TO ABORT, OR NOT ABORT, IN A MANNER INCONSISTENT WITH THE INSTRUCTIONS OF THE INTENDED PARENTS, IT IS UNDERSTOOD THAT SUCH ACTION MAY BE DETERMINED TO CONSTITUTE A BREACH OF THIS AGREEMENT. (Contract CA)

23 A “pre-birth order” is a relatively new legal procedure that allows intended parents in surrogacy cases to legally establish their parentage before the baby is born, while the fetus is gestating in the surrogate’s uterus. These orders trump the Uniform Parentage Act rule that the gestational mother is the “natural” or “birth mother.” State courts have increasingly recognized pre-birth parentage orders, especially in cases where the surrogate is carrying a fetus genetically related to the intended parents, or using donor gametes (Crockin and Jones 2010, 214).

24 Evidencing the unsettled and complex nature of abortion provisions in the contract, on March 5, 2013 CNN.com and multiple networks broadcast the story of Crystal Kelley, a gestational surrogate who fled to Michigan to give birth to a baby she refused to abort against demands by the intended parents. At 20 weeks, the fetus was known to have severe abnormalities. Kelley’s surrogacy agreement drafted in Connecticut contained a provision promising to terminate the pregnancy under these conditions. She changed her mind. Since surrogacy is a crime in Michigan, giving birth there established Kelley as the legal mother, voiding the contract (Cohen 2013; see also http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/index.html).
**Voluntary Termination of Pregnancy (Abortion)** Gestational Carrier and Genetic Parents understand that the United States Supreme Court cases of Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833 (1992), grant constitutional protection to a woman’s right to elect an abortion. Notwithstanding the foregoing, it is Gestational Carrier’s express intent to contractually waive, and she does hereby expressly contractually waive, that constitutional right, and Gestational Carrier hereby expressly grants Genetic Parents the exclusive right and sole discretion whether to terminate a pregnancy by abortion or continue a pregnancy. Gestational Carrier expressly agrees to execute any necessary addenda, waivers, consents, or other related documents to reaffirm her contractual waiver of this constitutional right and to make this waiver effective once a pregnancy is confirmed. All parties expressly acknowledge that it is unclear whether this contractual waiver will be enforced as intended by a court of competent jurisdiction. (Contract MN)

While contracts expressly acknowledge that a surrogate retains the ultimate right to control decisions over her body, even as regards termination of a fetus she is carrying for another person by contract when they object, she may be asked to waive that right. Whether such a waiver is legally enforceable is a separate issue, demonstrated by recent cases like that of gestational surrogate Crystal Kelley (Cohen 2013).

Even in the absence of a waiver, exercising that right may constitute a breach of contract for which there are serious consequences. As described in the last chapter, matching intended parents with surrogate’s views on abortions is an anticipatory emotion management technique intended to avoid conflicts, legal risks, and is key to evaluating their emotional fitness for the process. Selective reduction and termination provisions are carried over from the matching phase by lawyers and crystallized in the formal agreement.

Life support provisions require a rare commitment, and appear to be diffusing in the field. Contracts coded from California, Massachusetts, Florida, Wisconsin and Illinois have “carrier incapacity” provisions that detail the conditions under which a surrogate will be maintained on life support to gestate the fetus. An exemplar California contract reads:

Section 32.01. Surrogate agrees that in the event she suffers a life-threatening injury or illness while pregnant, Surrogate agrees she will be sustained with life-support equipment to protect the fetus(es)’s viability so long as she has reached 25 weeks of gestation at the time of the injury and/or illness. Surrogate’s treating physician in consultation with the Obstetrician shall determine when the optimal time for birth will be. This provision shall supersede any and all other documents prepared for and/or wishes made known by the Surrogate to the contrary; this provision shall only apply during the term of this Agreement.

Life support provisions invoke the long-held fear of critics that surrogacy has unique gendered impacts: a woman’s body becomes, quite literally, a vessel for reproduction. Contracts require both the surrogate and her husband to bind themselves to life extension at the request of the intended parents in consideration for her service fee of $25,000, “superseding” any other. An incubation period beginning at 25 weeks while the surrogate is a “host uterus” will inevitably be an emotionally challenging period for the surrogate’s husband and children.
In addition to life support provisions, 73% of contracts (22) provide the surrogate with life insurance coverage for her spouse and children if she dies from pregnancy-related complications. However, the contracts vary as to the maximum amount the intended parents are required to spend on her behalf. In my sample, the amount of money allotted towards the purchase of a life insurance premium ranged from $250.00 to $500.00 as an annual cap. Those premium costs translate to a policy value that ranges from $100,000 to $350,000 to be paid to the surrogate’s family in the event of her death. Valuation of the surrogate’s life is itself a highly symbolic provision, formalizing an assessment of what gestational labor, exclusively performed by women, is worth. Insurance provisions are further related to “assumption of the risk” provisions, which are universal in surrogacy contracting.

Most strikingly, the plain language of surrogacy contracts simultaneously calls for specific feeling management in the face of grave risks, and use the rational choice, liberal legal model that require a surrogate to assume those risks only upon “careful, unemotional reflection” (Contract MA; emphasis added). I found such phrasing in 33% of the sample. Representative provisions include a California contract where, “The Parties to this Agreement represent and warrant that the decision to enter into this Agreement is a fully informed decision, made after careful and unemotional reflection,” and in Minnesota where, “The decision of Gestational Carrier to enter into this Gestational Carrier Agreement is a fully-informed one, made after careful, objective, and unemotional reflection on all aspects of this arrangement.” Terms like these in surrogacy reinforce the myth that contracting is asocial, gender neutral, and non-emotive, critiqued by Feminist legal scholars (Abrams 2005; Bandes 1999; Chamallas 2003; Nussbaum 2001).

This dissertation fundamentally challenges traditional economic and liberal legal views of a “free market” where autonomous “rational actors” bargain to maximize their preferences – encoded in provisions like these that call for “objective” and “unemotional reflection” (Johnson v. Calvert 1993; Coleman 1986; Friedman 1965; Williamson 1985). It embraces a sociolegal perspective, which stresses the limits of the formal model of contract and emphasizes broader exchange relationships that exist both through and around formal contracts (Macauley 1963; Ellickson 1994; Suchman 2003). Further, law and emotions scholars point to the fallacy of classical contract doctrine, asserting that the consideration requirement for contracts assumes a non-emotive, “rational choice” to be legally bound, while affective ones are based “impulses” of emotion that should be contained (Abrams 2005; Bandes 1999; Keren 2006; Nussbaum 2001). Liberal theory holds on to myths that emotion, historically aligned with women, is distinct from the process of legal “reasoning” (Abrams 2005; Posner 1999).

Further, the “objective measure” of consideration for bargained promises distances the market from the domestic world (Okin 1991; Pateman 1988). The commercial sphere is enforceable – traditionally a male space of public, remunerated activity – but the intimate sphere is relational, female, and private (Chamallas 2003; Ertman 2003). Ironically, detachment and remuneration are central to surrogate labor – a quintessentially gendered activity situated ambiguously between the public and private sphere.
In sum, contract provisions governing bodily risk perfectly capture the mythology of surrogacy contracting as non-emotive and gender neutral. By definition, only women can perform gestational labor. How women’s labor is valued and diffused within a reproductive field that makes their gender invisible through neutral and objective language merits inquiry (Pateman 1989). Further, it perpetuates a fiction that assuming the risk to carry another person’s child – or making any business decision – could be made without emotion. Even if it were possible, would it be desirable? Agreements in the sample simultaneously warn that, “the short-term and long-term psychological effects of Surrogacy Arrangements on the Parties or on the Child are not predictable” (Contract IL). Ironically, they call for parties to calculate unknown emotional risks free from emotion.

The next chapter will demonstrate, through analysis of the interview data, just how emotional, gendered and social exchange relationships actually are by highlighting these contracts “in action” (Macaulay, Friedman and Stookey 1995).
CHAPTER 6:
CONTRACTS-IN-ACTION – MANAGING EMOTIONS, MANAGING RISK

I mean I do know that they grieve, and they’re sad... one of the big things that I talk to the carriers about is, “How much contact do you want to have in the hospital with the baby? Do you want to see it once? Do you not want to see it? Do you want to be able to go into the NICU or the nursery as often as you feel it’s appropriate? The intended parents are not going to want you to have any contact or may not want you to have any contact, so let’s talk about this. What about breast milk? Are you going to be pumping breast milk? How are you going to deal with not pumping breast milk?”

That’s a very good gauge for me when I’m talking to them about that contact and making sure – I use that as a gauge for me about, “Is this carrier thinking through to the other side of the process?” if it’s a first-time carrier, and/or even if it’s not, it gives me a sense of what kind of emotional connection she’s going to have to the pregnancy.

– Reproductive Lawyer, New York

This chapter will analyze my interview data in light of the content of contracts to explain why and how attorneys who specialize in surrogacy, with the help of matching agencies and counselors, anticipate and tactically manage a variety of emotions in their clients throughout the pregnancy. I frequently use the voices of surrogates and intended parents to illustrate the spectrum of feelings they experience. Emotion management is deployed to minimize attachment, conflicts, and risk amidst the highly unsettled reproductive law field. I show that informal practices deployed by lawyers, along with the formal contract provisions identified in Chapter 5, help to contain, shape, cultivate, and handle particular emotions in order to balance the needs of the surrogate against the anxieties, joys, and demands of the intended parents. The lynchpin of surrogacy is the management of attachment from the initial contact at the matching phase through completion of the transaction at birth. I demonstrate this is accomplished by the management of expectations, and intentions for parentage, which are channeled through a web of feeling rules in contracts that are utilized by lawyers, agencies and therapists who work in their service, whether or not they are actually enforceable. Attorneys and agency coordinators call in counselors to assist when emotions run high. I illustrate how the legal field, organizational field, and mental health field intersect, overlap, and together constitute the practice of surrogacy contracting within a larger “reproductive field” (Bourdieu 1987; Edelman 2007).

The end goal of a surrogacy agreement – as in all exchange relationships – is to avoid disputes and ensure smooth performance of the contract (Macaulay 1963; Suchman 2003). The purpose of channeling feelings is to avoid risk when contracting in a disparate and unsettled legal field. Even after the contract is in place, when faced with feelings like resentment, anxiety, fear, distrust, and more, lawyers perform what I call “triage” to keep feelings at bay. While conflict avoidance is a primary goal in all exchange relations, surrogacy is an ideal site for studying how lawyers use feeling rules and informal strategies to cope with significant legal ambiguity and
clashes between jurisdictions, especially in an area reputedly steeped in emotion. Proof of that reputation is underscored by the field’s unique and pervasive reliance upon counseling professionals, including their formal integration in the contract terms. Risks must be contained given the stakes in this exchange relation are huge: at minimum, the life of a new child. Over time, provisions and practices in surrogacy law are diffused, generating new norms that become institutionalized in the reproductive field, and more broadly, in society (Edelman et al. 2001).

The first section of this chapter will extend my findings from Chapter 4 on anticipatory emotion management during the matching phase to show why and how intention and expectations are channeled well before and throughout the contract period. The remainder of the chapter will detail how these emotions are managed, both through the formalization and enforcement of “feeling rules” and provisions, along with informal practices I call “triage,” deployed by lawyers to avoid risk. I will highlight the role of therapists as emotion managers who work in service lawyers and matching agencies, especially when a conflict triggers the psychological counseling and dispute resolution provisions in the formal agreement.

6-A. Informal Management of Intention and Expectations

As Chapter 4 made clear, anticipatory emotion management is used during the matching phase to screen and evaluate parties as to their compatibility for this unique accord. A crucial piece of screening and matching is using emotional fitness criteria to predict a surrogate’s motives, as well as her ability to be detached, stable and cooperative. Gauging intentions and expectations for the relationship is part of the vetting process as a form of front-end risk management. But channeling expectations does not cease once a surrogate is officially matched with her intended parent(s).

No matter what the jurisdiction, lawyers and agencies have a united voice when it comes to the lynchpin of surrogacy agreements: managing their client’s intention and expectations for a temporary and formalized relationship despite the intimate nature of the transaction. From the moment of first contact with either an agency or an attorney through contract completion, their job is to make sure each party understands that the ultimate goal of surrogacy is to establish legal parenthood in the individual or couple seeking to form a family. A Minnesota lawyer affirms the fundamental task in surrogacy contracting as distinct from adoption, saying:

The ultimate goal on these contracts is to establish parentage. I mean what you’re trying to do with a gestational carrier arrangement – why we lawyers are even involved at all is that because somehow we have to get a court order that does two things: one that says that these intended parents are the legal parent of this child, and it directs somebody to put their name on a birth certificate…otherwise, you are doing an adoption. (Lawyer MN)

In commercial pregnancy, the surrogate is compensated for her service, inconvenience, and bodily risk toward that end. The label “intended parent,” standing alone, clearly establishes the expectation. Achieving this goal is not simple, given legal ambiguity surrounding the practice,
and its criminality in various countries – including some U.S. states – around the world. Of course, it is easier to accomplish that goal in a jurisdiction where surrogacy is regulated by statute, or sanctioned by case decisions. However, the relative novelty of surrogacy combined with multijurisdictional practice still makes it risky, drawing intended parents from regions where the practice is illegal. More importantly, contracting is social, including the reality and unpredictability of human emotion.

A lawyer in California explains why he believes managing intention throughout the process impacts a surrogate’s ability to feel detached, especially at birth. He contrasts surrogacy to his years of experience with adoption cases, attributing the difference to intentions and expectations. Representative of many interviews across regions, the lawyer explains:

> What I’ve learned over these years is that surrogates – the vast majority – do not experience the similar or same problems – emotional – with detachment or giving up that child to the other, meaning, intended parents. And the reason I can attribute to that is that it’s based on their expectations that have been established from the very get-go. Now are there exceptions to that where you have some bonding issues? Sure there are, and there will be. There are human emotions that you’re dealing with, and that’s inevitable. But…from the very beginning, [a surrogate’s] mindset is, ‘This is not my child,’ and don’t develop any form of attachment.

> Now to contrast that with adoption…you do have difficulty with birth mothers – the vast majority of them, and it’s almost the flip side of this – they do have problems with separation, detachment, giving up. They may do it, but they’re going to experience a loss. And largely, I attribute that they didn’t go into this with the expectation…they were already pregnant, and they had to arrive at a decision to place the child versus a surrogate that starts from that position. (Lawyer CA)

Even though both are birth mothers relinquishing their rights, lawyers help set up a “mindset” and “expectations” surrounding intention to parent “from the very get-go.” (Id.) Doing so, according to this practitioner, makes it easier to be emotionally detached when the time comes. Of course, the theory that intention can successfully be managed to prevent emotional attachment also serves the field’s interest in advancing the legality of surrogacy.

Surrogates in the study agreed with this logic, with some ambivalence. A seasoned Florida surrogate advised that in order to get through the process, “You have to be willing to be unattached to the children. You have to be willing to give up your body and your frame of mind and everything for somebody else.” Although clearly proud of her ability to accomplish a detached “frame of mind” after three surrogate deliveries, she also admitted “there’s a lot of feelings involved.” With her intended mother in mind, a Texas surrogate would remember, “I’m pregnant for you; I’m not pregnant for me.” She added that having everyone involved in the medical procedures “just kind of provided that natural detachment like, ‘Okay, this is theirs.’” Likewise, an Illinois surrogate related how her detachment was cultivated from the “get go”:
I knew from the get-go that they were not mine. I think you have so much time to prepare yourself as far as just the matching, the meeting them, the appointments, preparing your actual physical body to carry them. You just know they are not yours… It’s a long, drawn out process, really, that you have lots of time to process and think about. So I think most surrogates are definitely very well prepared for what’s going to happen.

She also described certain provisions negotiated during the drafting phase of the contract that felt unfair, given the intended parents high expectations. Recounting the negotiations with her lawyer she noted, “I remember the contract part taking forever. Although looking back, it was only about three weeks, but it felt like forever” (Surrogate IL).

That surrogates “don’t develop any form of attachment” when intentions and expectations are managed from the “get go,” in contrast to adoption, is not quite accurate. In fact, the same California lawyer quoted above admitted later in the interview that despite the logic, “I’ve had some surrogates and worked with them that they clearly had issues separating. And not that it’s ever been an issue that we haven’t been able to overcome, but it was an extremely emotional undertaking for them.” Also, the three-time Florida surrogate revealed that even though she never “expected” to keep the baby, and had gone through the process before, she found the third time a bit tougher. “When he was born,” she confessed, “I used to go in the nursery and see him a lot – I held him more and stuff” (Surrogate FL). Thus, just because surrogates are willing to relinquish their parental rights, and set their intention from the beginning, does not necessarily mean they will be emotionally indifferent.

Accounts like these lead me to surmise that managing expectations and intentions from the beginning are one major tool in channeling emotions, especially bonding or attachment. But once that happens in a particular case, lawyers may call upon agency counselors and psychologists to help their client’s through the process. Of course, after they complete performance of the contract by giving birth, some surrogates do not actually access therapeutic resources to help them process the loss. One surrogate admitted that counseling “was never offered to me…I just talked to my friends and stuff and my family” (Surrogate FL).

I believe that lawyers circulate the myth that surrogates are able to detach from their emotions if instructed to in advance because it serves the larger goal of normalizing surrogacy in an unsettled legal terrain. It also perpetuates economic and liberal legal models of contracting that separate and privilege rational action (male) from emotion (female), and that parties to a contract not only can, but should be objective and detached (Abrams 2005; Chamallas 2003; Coleman 1986; Ertman 2003; Friedman 1965; Posner 1999; Williamson 1985). The reality “on the ground” suggests that as emotional subjects, social actors both internalize and push back against these rules and modes of control. Finally, by characterizing surrogacy as emotionally distinct from adoption, lawyers are able to justify their practices in order to legalize surrogacy where it is currently prohibited. Lawyers and agencies serve the hopes and desires of parents desperate to use commercial pregnancy to form their families.
Even if we assume they can be minimized, it is abundantly clear that emotions cannot be separated from the contracting process. As a Maryland lawyer points out, “I mean they are nurturing this baby while it’s in utero… this isn’t just a business relationship, and that’s how we want them to feel.” This is true not only for surrogates, but also for the parents who hire them. As a counselor for Infant Quest points out:

I worked as an infertility counselor for … years, and you can’t take the emotions out of this…it’s depressing; it’s anxiety provoking; it’s difficult. And I can really provide that psychological support and help the surrogates to understand what the intended parents are going through. Understanding that feeling of being out of control and the history of loss that they might have coming to surrogacy…I can kind of be the interpreter between the surrogate and the intended parent. (Agency Counselor, CO)

Thus, part of managing expectations requires the agencies and counselors involved, along with the lawyers, to play the role of “interpreters” and offer psychological support when emotions interfere with the ideal of intention management. Both parties require emotional attention, even those initiating the process in order to create a family. As the counselor at Infant Quest concludes, “having licensed helpers on staff allows us to do that – to provide that support, that we have people that can be there for them, help them feel – to guide them through… to hold people’s hands from beginning to end” (Counselor, AG, CO).

A California lawyer without previous experience in adoption emphasizes the emotional nature of the transaction. This is equally true for intended parents. Despite managing his client’s expectations about the enforceability of the agreement, he reassures them they will get a baby in the end. Like the agency counselor from Colorado who plays the role of interpreter, this lawyer performs “triage” when emotions run high:

You become that person that they talk to about the excitement, the worries because they don’t really want to tell anybody because they’re really worried that it’s not going to happen because they’re people who’ve experienced loss and things that were promised them… Then what I say is basically – we just kind of do like triage – triage, and then we just basically – we send them out. So we try to get them back together, stable, and then I’m here should people show up. Whether it should be the agency or a therapist or whatever it is to help you out, deal with all these issues.” (Lawyer, CA)

Not only does he acknowledge the prevalence of emotions that range from excitement to worry, and fear of disappointment, but also to manage those feelings he performs triage when those emotions pose a risk to the smooth operation of the process. While he might be the first to encounter an issue, he both (1) “sends them out” to the agency or therapist to “help out,” and (2) gets them “back together” and “stable” when they are ready to do so. While this form of triage is not new to the practice of law, the stakes in surrogacy – as well as the emotions – are considerably high. Throughout the next section, I will use the terms “interpreter” and “triage” to describe the informal techniques and practices that professionals in the reproductive field use to manage emotions in tandem with drafting and enforcing formal contract provisions.

Like all contracts, rules in surrogacy represent efforts to anticipate the “worst case scenario” to avoid risk (Lawyer CA), or as a Wisconsin lawyer describes, “disaster-plan”:

Everybody thinks surrogacy is simple until we go through the 37-page contract. And sometimes they get annoyed at that process and think, “Oh, it’s ridiculous that we have to put this all in here!” And as a lawyer, we say, “My job is to help you disaster-plan. You know what? I hope you never have to look at clause 47-b again, but if you ever do, I want it to be right.”

Likewise, a colleague in Pennsylvania who caters to gay and lesbian family formation explains that her state has “sort of a no man’s land of law.” In her view, the lawyer’s job is to “try to help people form their family however they want as long as they… know the risks.” In Maryland, an attorney describes with concern “Russian roulette states where on its face, the statute says it’s prohibited by law, and lawyers do it anyway… this is like somebody’s child!” Given the consequences, she was determined to research “all the cases that make it to the news like what horrible thing can happen.” What she later called the parade of horribles became formalized in her contracts which, “tend to be long – attorneys on the other side whine about it” (Lawyer MD). Even in surrogacy-friendly California, a lawyer confesses that she works hard to “explain the risks” and draft a “thorough” contract because surrogacy practice is still “scary.”

But lawyers’ efforts go far beyond anticipating potential conflicts for risk management. Where the law is uncertain and the stakes are high, risk management goes hand in hand with emotion management. I find that the web of formal restrictions in contracts, along with informal practices, are developed and deployed by lawyers in collaboration with matching agencies to prevent emotional attachment, resentment, or alienation in the surrogate mother and handle feelings like vulnerability, anxiety, and jealousy in the intended parents. Legal actors also work to intentionally cultivate particular emotions like gratitude and excitement. Even when not realistically enforceable, these rules are still influential, symbolic, and institutionalizing.

The six main categories of rules and restrictions created, deployed and enforced by lawyers and agencies to channel feelings complement and mirror those identified in the content analysis of surrogacy contracts. They include: (1) lifestyle rules and restrictions; (2) contact rules and intimacy restrictions, like sexual contact, viewing the newborn, breastfeeding, and future relationships; (3) terms establishing the parties’ role identity; (4) provisions determining compensation to be paid for surrogate labor and the value of risks; and (5) psychological counseling and dispute resolution provisions. Construction and intervention surrounding each of these provisions is intended to promote feelings of attachment in the intended parents, and conversely encourage detachment in the surrogate in the name of managing risk with an eye towards smooth performance of the contract.

Further, free market models ignore the ways in which contracting constitutes gender through the language of neutrality (Okin 1991; Pateman 1988; Pateman and Mills 2007). To demonstrate the ways in which contracting constitutes gender in tandem with feeling rules, I also show that
terms that define each party’s role and compensation helps manage expectations and cultivate their identity. Surrogates perform by enacting in ways contrary to norms for a birth mother when guided by lawyers and professionals in the reproductive field. Managing intention allows lawyers to reduce hurt feelings, making the practice distinct from the emotional experience of adoption. Professionals in the reproductive law field thus teach intended parents and surrogates how to “do” both gender and emotions by managing both (West and Zimmerman 1987).

6-B1. *Lifestyle Rules and Restrictions*

Across jurisdictions, lawyers reported the need to not only ensure the emotional stability of the surrogate, but to regularly manage the intended parents’ anxiety and control. As described in Chapter 5, when drafting surrogacy contracts, lawyers insert extensive lists of rules the surrogate must follow based upon past experience, and particular demands of the intended parents. Rules in the agreement may include the degree of an intended parents’ surveillance over the surrogate, restrictions on the surrogate’s daily activities or routine, or requiring the surrogate consume solely organic foods and supplements while prohibiting caffeine, sugar, or fast food throughout the pregnancy. Some rules require that the surrogate engage in a particular activity – like acupuncture or gym memberships – or prohibit her from doing so – such as bans on microwaves, hairspray, manicures, or changing cat litter. The interview data highlight the ways in which contract provisions serve as a tool for feeling management.

I find that lifestyle rules and restrictions are a key strategy deployed by lawyers on behalf of distraught, anxious, and demanding intended parents. Feelings like fear, anger and vulnerability in the intended parent(s) cause them to not only assert greater degrees of control over the carrier, but with the help of lawyers, also cultivate attachment in the baby they do not carry themselves. A Minnesota lawyer identifies feelings of sadness, worry, and anxiety in his surrogacy cases, noting that it makes for “very demanding” clients. He reveals:

> After they get through the sadness piece and then after they get going and the contracts are in place and they’re getting it, then there’s nervousness. And that’s when they’re calling constantly to make sure everything is in place. ‘Can you assure me that this is absolutely going to work? What do I need to be worrying about now?’ So they go from sadness to worry… We find a lot of that very demanding. And I also think that’s part and parcel of the clientele… When you deal with lawyers and accountants and engineers and these high-powered professionals who have been very successful in every area of their life and they feel like they’re a failure because this most basic human thing that one can do – they, for whatever reason – can’t. (Lawyer MN)

A West coast lawyer agrees, noting, “you’re dropping fairly controlling and accomplished people in an area where, by definition, they have no control” (Lawyer CA). The demanding client tends to control the surrogate with rules because they feel vulnerable. For a Pennsylvania lawyer:

> I think with intended parents, there’s certainly a vulnerability and a need to control that comes out because they’re – some else is basically physically carrying, literally, their child and is away from them. And that is a vulnerable situation to be in. And I think
that’s where crazy fish restrictions come in. That’s sort of their – an expression of their need to control the situation. But the reality is you’re never going to be able to control this person’s every move. (Lawyer PA)

The “crazy fish restrictions” refers to the list of prohibited foods in contracts that are getting long and more detailed. But not all professionals in the industry comply. As one lawyer asserted, “You have to be reasonable…to put a complete ban on [nail polish] and the hair dye – most doctors will tell you now it’s okay to get your hair highlighted” (Lawyer CA). While she “hates to be harsh,” this lawyer resists demands for those rules by soliciting empathy in intended mothers, persuading, “in a perfect world [if she] could get pregnant, she would probably realize that at seven and a half months pregnant, the greatest thing ever would be to lay in a chair and get a pedicure” (Id.). Still, some of those rules are inserted not by clients, but by other lawyers.

The most extreme examples include parents who, presumably driven by lack of control over the physical pregnancy, request that their surrogates move in for 24-7 monitoring. While agreeing to an organic food diet, yoga classes, and daily texts, a Wisconsin surrogate drew the line at in-home surveillance. She described it this way:

So [the intended mother] kept saying, “Well, I want you to come live with me,” because she wanted me to be in Chicago. And I said, “I cannot come live with you. I have a family to take care of. I have two little kids; they go to school. I have a husband. I have a whole life. I can’t just leave to come live with you”… The doctor actually called me, and we were on the phone, and she’s like, “Oh my god.” Yeah, try and deal with it on a daily basis. (Surrogate WI)

In this case, the lawyer was asked to step in to manage the parent’s expectations about the surrogate’s availability and limitations, noting she had rejected the request during formal contract negotiations. Similarly, a California lawyer explained that “it is not unusual” for clients to request “nanny cams” for “more access” to police the rules. However, also he refuses to put surveillance in the formal contract, advising his clients “that’s way over the line.” One agency owner in Florida reported searching for a surrogate willing to live with the intended parents and follow a vegan diet, even though she believed the request was “unreasonable.” Similarly, a lawyer from New York expressed concern that their “overall sense of the contract was very intrusive and very overbearing.” The lawyer went on to explain:

Well, I did have that intended parent who literally wanted to be able to drop in out of the sky without notice like, “I can check up on you whenever I want to. I have the right to knock on your bathroom door, open your bathroom door, and come in and check to see what you’re doing in the bathroom.” That was the attitude that was conveyed. (Lawyer NY)

Lawyers and agents may dutifully remind the surrogate of her contractual obligations, since she is paid to provide particular services, including following “overbearing” rules. Breaches are often reported to lawyers who are expected to enforce the terms of the agreement, who respond by diffusing conflicts on their own, or by enlisting the support of agencies and counselors.
The interviews also revealed a perceived difference between the emotional-profile of heterosexual versus homosexual intended parents. A Texas lawyer with diverse clientele depicts surrogacy as an “emotional roller coaster,” particularly when infertility plays a role:

You know, the fear – fear of the unknown is just huge. The timing, the intended parents’ debt, just – their emotional level is they’re on a roller coaster. They’re so excited that this is going to finally happen, but then they’re terrified that something’s going to happen medically or that something is going to go wrong. There’s just so many things, and it’s not just the legal, and that’s the thing. I only deal with a little part of it, but the medical, I think, is where they have much more of that emotional roller coaster.

So it’s a – and whether you’re dealing with a same-sex couple who’s doing this as an adventure, a journey, to get where they want to go and – exciting, happy, everything’s falling into place; this looks really good – or somebody who’s coming from an infertility background where I think there’s even a more heightened sense of fearfulness and anticipation that something’s going to go wrong. (Lawyer TX)

While the experience can be fraught with terror, fear, and uncertainty, it can also be “an adventure, a journey.” Others add envy to the mix, especially for intended mothers. As one lawyer puts it, “There’s also then the jealous component about the fact that the surrogate can carry the baby and she can’t. It’s called womb envy… And so some of the carriers would rather work with a gay couple because they have no baggage; they have no womb envy” (Lawyer MD). Since she was “scared that women can be jealous,” a California surrogate preferred to carry for two “very sincere gay guys,” even though “one was HIV positive” which to her was “less of a big deal” than a controlling or jealous intended mother.

These subjects are not alone in observing a difference between gay and heterosexual parent clientele in terms of their emotional profile and demands for control through lifestyle rules. A California lawyer states candidly:

Some of the smoothest cases I’ve had have been involving my same-sex couples, especially gay men. They come into surrogacy knowing exactly what their issue is and why they need a surrogate…I’ve seen it many times where the surrogate becomes pregnant, and all of the guilt and all of the inadequate feelings that the intended mother has struggled with come to the forefront. There’s then a resentment against the surrogate. (Lawyer CA)

Lawyers are motivated to avoid risk and keep cases running smoothly, explaining the preference for same-sex clients. Another lawyer concurred, “it’s certainly no secret that a gay couple… need to bring someone else into the process to have a family. There’s no shame about that” (Lawyer PA). A surrogate from Illinois who carried for a gay couple agreed:

I thought it would be easier to deal with men, and I think knowing what I do now, I still like – I would work with men again. And I think it would be neat to work with an intended mother, but I like the part of dealing with the men. They’re so easygoing, and they’re not as – I don’t know how to explain – how some intended mothers can be – bitter, jealous. (Surrogate IL)
And yet, the legal risks for homosexual clients are much greater, since even surrogacy-friendly jurisdictions by statute limit benefits to married, heterosexual couples.\textsuperscript{25} Further, gay adoption and gay marriage are far from universally recognized. Clearly, when lawyers are committed to serving anyone that wants to form a family, the value of emotion management outweighs a simple “risk management” calculation.

While the interviews reveal a pattern of perceived difference between gay intended parents, dashed feelings and vulnerability are not the only motivators for control through rules. Wealth and power also play a role, not to mention individual personalities and life experiences. In fact, other subjects dispelled the “easygoing gay dads” stereotype. While it is true gay intended fathers do not have to manage disappointment over infertility, never having expected to carry, they can still be demanding of their surrogates. Control and power is evidenced through their policing of lifestyle rules and restrictions. As a lawyer who has served a large number of “wealthy” gay clients recalls:

It was just like needing the check-ins, having to be available 24-7. If she didn’t return a phone call within an hour, he freaked out, where thank God his partner is even-steven. Towards the last trimester when she was so at her wit’s end, it was like, ‘He’ll take over. You don’t have to deal with him anymore.’ Just wanting to know every little detail – just the whole thing. And he’s also one of those where he’s very wealthy, so it’s kind of like, ‘I’ll just pay you more money if you shut up about it.’ And it’s like okay, at a certain point, that doesn’t work anymore. (Lawyer CA)

Just as this lawyer drew a line on his client’s demands on the surrogate, and for her benefit switched to the more “even” partner, others use emotion management and honesty when intended parents exert too much control. This lawyer acknowledges the emotional nature of the relationship, an intervenes to keep it in balance:

Basically it’s about a child; it’s about a relationship, so you’re trying to manage a two- or three-year relationship with the surrogate. It’s not just one-sided. You can’t have it one-sided because that’s not fair, and the surrogates will get hurt and walk away. So if you want to piss her off, have her walk away, like maybe have the agency walk away, that’s fine. But that’s what’s going to happen… I have to be honest with clients… ‘That’s one-sided. It’s likely to hurt feelings.’ This is an emotional relationship.” (Lawyer CA)

In this case, triage included managing the demands of the intended parents to ensure the surrogate’s emotions – whether anger, hurt, or resentment – do not cause the relationship to unfurl. This lawyer appears quite aware that his role is to keep the peace, given the stakes.

No matter their sexual orientation, this “micromanagerial” approach can backfire. I heard several reports of overly managed surrogates who, when offended, cut off communication with the intended parents as a push back form of control (Surrogate FL; Surrogate TX; Lawyer CA; Lawyer CA). They, after all, carry the baby, and thus hold many proverbial cards – arguably, the deck. Then lawyers have to intervene after a conflict erupts to do “damage control,” as one.

\textsuperscript{25} Texas Family Code Ann. §§ 160.754, 762; FL Stat Ann. § 742.15.
attorney from Massachusetts described the triage. That lawyer fielded a call from a cut-off intended parent who frantically demanded, “We need a pre-birth order immediately because our carrier’s not talking to us and not letting us go to doctor’s appointments anymore!” Even an intended parent from California, who matched independently with a surrogate online to avoid the cost of agency fees, admitted, “it got to the point where she just stopped responding to us because we were in her face too much and asking her to do crazy things.” This is one reason experienced reproductive lawyers continue to argue against on-line matching, downloading of contracts online, and entering agreements without legal representation. Their role as emotion managers – and effectiveness at it – can make, or break, a surrogacy relationship.

Even if a surrogate does not walk away from the contract, excessive control at the very least makes the relationship with the intended parent challenging, causing conflict. How do surrogates react to these restrictions and invasions of privacy? Here’s what a Texas surrogate who gave birth to triplets had to say about the enforcement of lifestyle rules, like swimming and doctor’s appointments:

Dalia: I don’t really know how to describe it. I guess it was more that she was very overly cautious. Like for my birthday, they made arrangements so that my husband and my children and I – we could go stay in a room at the hotel that she worked at and just kind of relax there for the weekend.

Interviewer: Oh.

Dalia: And after I left my doctor’s appointment, she snuck off to go talk to the doctor, and she asked the doctor, is it okay if I can go swimming? I know that it’s okay I can go swimming, but she didn’t want to trust my judgment. She wanted to make sure with the doctor that the doctor gave me permission to go swimming.

Interviewer: I see.

Dalia: So it was just constant things like that. I mean I remember we had – because there was triplets, we had to go to high-risk doctors and high-risk ultrasounds, and my husband would always join us for these, and at one point, they would always check the size of your cervix. And they didn’t say anything at this one appointment, and she goes, “Um, excuse me. You didn’t tell me the size of her cervix. How does her cervix look?” And I was like, “Whoa, lady. Whoa. That’s my stuff.” (Surrogate TX)

This surrogate handled the invasiveness better than others. She attributed her ability to contain her inner feelings – frustration and resentment they did not “trust her judgment” – by cooperating with the emotion rules and “venting on a blog” (Id.). While she successfully performed on the contract, she admits, “at this point, there really – sadly – is no relationship with them” (Id).

While surrogates like Dalia behave or resort to self-help, others call upon their lawyers or agencies for intervention. In turn, lawyers and counselors provide emotion management.
strategies like triage as a push back against the demands of their clients, to diffuse tensions. According to one agency counselor, “I really encourage the intended parents to keep it as basic as possible because the surrogates don’t want to feel micro-managed. They want to feel as if they trust them, and I encourage intended parents to remember that ‘you have complete control over who you choose to be your gestational carrier, but once she’s pregnant, you have to let go of some of that control’ (Infant Quest CO). Thus, lawyers and agencies try to cultivate trust in the intended parent(s), encouraging them to release some control. Addressing their fears and desire for control is achieved through emotion management, with an eye towards smoother relations given the risky and unsettled character of the reproductive law field.

6-B2. Contact Rules and Intimacy Restrictions

Aside from lifestyle, I have identified a number of other “feeling rules” (Hochschild 1983), a cluster of which I have coined “intimacy restrictions.” These are provisions in agreements that limit physical contact between the surrogate and a number of “others” – either her spouse/partner, the baby, or the parents themselves. I find that contact restrictions deployed in contracting alleviate fear and vulnerability in the intended parents that the surrogate will refuse to relinquish the baby, the crux of the contract. Formalized rules are presumed, conversely, to prevent bonding and emotional attachment in the surrogate. There are countless examples of intimacy restrictions throughout the 115 interviews, described by all parties and professionals. To mirror the content analysis of contracts, I will introduce examples related to the following provisions: (1) sexual contact, (2) breastfeeding, and (3) viewing, handling, and future contact with the parents and child. These examples will demonstrate the ways in which intended parents, through their lawyers, exert degrees of control as a way to manage their own anxiety that the surrogate might bond with – and thus refuse to relinquish – the baby. Lawyers establish feeling rule to contain clients’ emotions as part of a larger strategy to contain risk. The contract itself anticipates potential emotional traps, but informal practices like triage lead an attorney, agency or counselor to intervene when called upon to diminish risk.

6-B2. (a) Sexual Contact

As the content analysis revealed, it is nearly uniform for contracts to contain a provision requiring the surrogate abstain from sexual contact with her spouse prior to and during the insemination or embryo transfer process. Of course, the practical rationale is to secure the intended genetic relationship in a planned pregnancy, whether or not the contracting parents use their own, or donor, eggs and sperm. However, once the surrogate is confirmed pregnant, why might she be required to abstain from protected forms of intimate contact usual during non-contract pregnancies, which are not prohibited by an obstetrician? As one attorney said flatly, “we usually have language in there that they agree to not have sexual relationships with anybody during the term of the contract” (Lawyer MD). Thus, contracts contain intimacy restrictions that go beyond the practical consideration of ensuring genetic ties, for the duration of the agreement.
Some colleagues resist such blanket prohibitions. For example, “I’ve had a couple request that the surrogate agree that she would not have any sexual contact with her husband during the entire term of the agreement, and I just said, ‘Wrong!’” (Lawyer CA). While he thought, “it may be a good thing,” ultimately a lawyer compromised on a rule that “she had to abstain from sexual intercourse with her husband throughout the entire pregnancy” (Lawyer CA). After he asked, “how do you monitor?” they agreed to random STD testing instead. Obviously, whether sexual intimacy restrictions are enforceable is another matter. As yet another California lawyer pointed out, even if he was willing to have a “no sex” rule in the contract, it would be impractical, noting “we’re not going to have a camera at her house like in her bedroom.” Requests for “nanny cams” were made by several of his clients (Ild.).

There are a variety of other intimacy restrictions related to sex imposed on the surrogate and her male partner, if she is coupled. The surrogate’s husband is not only a party to the contract as a signatory, but must undergo screening and a background check. He must also make a contractual promise to be monogamous. Common provisions include required condom use throughout the contract period, random paternity and STD testing, and prohibitions on intimate relationships with non-marital partners. As a Maryland lawyer explains:

Now if they are single with no significant other at the time, we usually have language in there that they agree to not have sexual relationships with anybody during the term of the contract or if they begin dating somebody that they will let the intended parents know, let the attorneys know because we want that person tested before they have sexual intercourse. (Lawyer MD)

Since getting a non-party to comply with a contract provision – like getting STD testing before intercourse with a single surrogate – is unrealistic, the rules clearly serve other purposes.

In the same way lifestyle rules represent attempts to manage intended parents’ anxiety, rules against sexual contact are a means of exerting control over the surrogate’s private life, made “public” by the contract. They also demonstrate attempts to prevent intimate feelings between the surrogate and her partner in relationship to the gestating fetus. The presumed fear is that sex and less intimate contact may create an emotional association between the pregnancy and the partner, and thus, a bond or attachment. For example, unlike with his own children’s pregnancies, a surrogate’s husband from Florida even refused to feel his wife’s “tummy” when the baby’s kicked, explaining, “I didn’t feel connected with the babies themselves, and maybe had a little bit of concern about her being too connected” (Surrogate’s Husband FL). While it is possible that physical touching between spouses during pregnancy could trigger feelings of connection, I assert these rules are created and diffused by lawyers operating in an ambiguous and multijurisdictional legal environment, in an effort to reduce risk and cope with uncertainty (Edelman 1992). Feeling rules are techniques lawyers develop to keep their client’s emotions at bay. Effective or not, sexual intimacy restrictions are becoming institutionalized.
6-B2. (b) Breastfeeding Provisions

The ambiguous, affective, and consequential nature of surrogacy practice also allows for the institutionalization of rules for breastfeeding, a unique form of intimate contact. I find that feeling rules against nursing are intended to avoid the potential for more emotional bonding between the surrogate and the newborn, especially since the surrogate’s body is technically no longer needed to sustain the baby’s life. As stated in Chapter 5, prohibitions on breastfeeding likely diffused and carried over from early adoption law practices. However, agreements vary, mostly depending on the nature of the relationship that has developed between the surrogate and her intended parent(s). It is not uncommon for parents to request the pumping of breast milk for an agreed-upon period of time, with contracts delineating fees as payment for “service” and “inconvenience,” and reimbursements for shipping costs (see Chapter 5).

As the content analysis indicated, contracts can include formal provisions regarding whether breast milk will be provided upon birth. Some surrogates agree to nurse or pump in order to deliver colostrum to the baby following delivery, or for some specified period of time. However, the interviews revealed that informal arrangements are often made as the emotional dynamics of the relationship unfold over the course of the pregnancy. Opining, “it’s a highly personal decision,” a Texas lawyer’s experience is that the parties formalize in the contract that the parents will “pay the cost for pumping” breast milk, but informally has also seen breastfeeding post-delivery in the hospital. Sometimes informal agreements to breastfeed, despite the contract terms, causes angst in their lawyers, who work hard to employ emotion management for risk management. As a Massachusetts lawyer vented:

My attitude is that when the women have the baby, from the beginning, they say this is their baby. If you allow them to breastfeed, then you’re going to connect. You’re going to start that bond with her and the baby. It’s going to be so much harder for her, and it’s not fair to her. So if you want breast milk, have her pump, have her ship. That’s a non-issue; just don’t have her breastfeed.

I do have people who violate that. It upsets me, but as long as it works, it’s okay. I just want to say when that happens, “You’re going to pay me for the very first-ever lawsuit I have to deal with where a surrogate is trying to keep a kid. She’s not going to win, but it’s still going to be hell on earth for you, so it isn’t worth it.” The pumping versus the actual feeding is pointless.

This lawyer believes breastfeeding yields connection and bonding with the baby, risking the goal of the contract: establishment of legal parentage. While he tries to prevent physical bonding by delineating pumping in the formal agreement, parties behave as they like in reality. Surrogacy contracting is thus a quintessential “exchange relationship” (Macaulay 1963; 2000). “On the ground,” parents manage the tension between their anxiety over bonding, legal risk, and their desire to provide nutrition to the baby – assuming they feel anxious at all.

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26 See footnote 21, Chapter 5 infra.
Whether such emotion management is justified is less clear; according to a lawyer from Virginia, “some carriers are able to breastfeed and stay disattached.” In fact, plenty of accounts of cooperative and friendly arrangements where jealousy, anxiety, and control fall away, or never existed. Lawyers and agencies were eager to report that surrogates and parents often have a mutually supportive and endearing relationship, “working together for team baby” (Agency Counselor CO). An agency owner and surrogate in Oregon described her experience:

Molly: So they took him and they dried him off, and [the father and mother] went over and “ooh’d and ah’d” over him, and they had their time. And after a little bit of time, they brought him over to me and let me hold him and I actually nursed him for –

Interviewer: Breastfed?

Molly: I breastfed, um huh, because I had told them I would send them breast milk, so I nursed him in the hospital –

Interviewer: Oh, okay.

Molly: – with [the mother] by my side. I wanted him to get her smell and her scent as he was nursing just so he knew that this was Mommy. So she sat by me while I nursed him, and then I would give him right over to her to snuggle and burp and all that so that they could do their bonding thing. She stayed in my room with me the whole time I was in the hospital. And then they left. And that was probably one of the hardest things, too. (Open Ovens, OR)

Rather than believing nursing would create a bond between her and the baby, as an agency owner, Molly consciously joined the infant’s new mother into the experience so they could bond. Clearly, Molly was willing to play for “team baby.” At the same time, she managed her inward feelings to accomplish the job at hand, admitting that saying goodbye to the family “was probably one of the hardest things, too” (Id.). There is no doubt that emotions abound evening in successful legal arrangements. Perhaps integrating mom and dad into the mix minimized the legal risks, in this case.

Sometimes parties refuse to commit to breast milk provisions during the contract negotiation phase, but agree to a “flexible” clause that it will depend upon how they feel at the time of delivery. While she initially agreed to breastfeed in the hospital, a Wisconsin surrogate declined because “it was very painful.” Sometimes the intended parents change their mind. An Illinois surrogate who delivered twins said that the intended father initially wanted her to pump, but the intended mother grew anxious about it and switched the plan. She expressed:

It was important for [the intended father] for me to not nurse but to pump for them. [The intended mother] felt as though that would take away from her bond and her bonding with the babies. So that was not something that we ended up them wanting me to do, actually, which was a little difficult for me just because I’m very pro-breastfeeding and I
knew all the benefits of it. But at the same time, too, I didn’t want to get in the way of [the intended mother] bonding with her babies. So I was fine with the fact that they chose not to have me do it. (Surrogate IL)

This compliant surrogate put aside her own opinions about the benefits of breast milk in order to respond to the intended mother’s feeling it would “take away from her bond” with the newborn.

According to lawyers, rules against breastfeeding are intended to prevent attachment, and manage the ultimate intention of the contract: to establish parentage. Otherwise, a Texas lawyer notes, “the intended mothers feel that that would be creating a parent-child relationship.” One Wisconsin lawyer with prior experience in adoption will not agree to “put that in a contract.” Even though she knows “carriers who’ve agreed to do it only because they know how good it is for the child,” as a legal risk manager she tells them, “You don’t want it; it’s not worth it” (Id). She lays out her reasoning:

I think there’s a risk. That’s even a more intimate act – I know that sounds surprising, but it really is. The child is born at that point, the child – that is a mother-child act that is really designed for bonding and attachment. And maybe that’s my bent from adoption, but any birth mom who decides to breastfeed – she’s keeping that child. (Lawyer WI)

Surrogates who have successfully provided breast milk and handed over the baby to its new parents would disagree. There are two sides to that coin; not only lawyers, but also surrogates engage in emotion and risk management. In another case, it was a surrogate who refused to nurse, asserting, “I do not want to breastfeed someone else’s kid” (Surrogate FL). Intimacy restrictions, especially those related to breastfeeding, are efforts to manage the emotions of their clients as lawyers to tackle the uncertainty of the reproductive law field.

In fact, a key emotion management strategy used by lawyers to counter the intended parent’s fear of bonding, or jealousy, is to encourage intended mothers to induce breast milk to nurse the baby. In other words, lawyers simultaneously try to prevent emotional bonding between the surrogate and the newborn, while actively cultivating it between the newborn and its new parents. According to one attorney, “There is a lot of evidence to show that there is a considerable amount of emotional bonding that occurs during breastfeeding. So intended parents want to do that, and there are devices now that you can have a fake breast and do it” (Lawyer CA). In one representative example, a California surrogate for twins described that her intended mother, “induced lactation and nursed the babies in the hospital… They had her on hormones, I think, for eight weeks – more than that. I think it was probably eight to 12 weeks before the babies were born to try and help stimulate the hormones in her body to produce milk.” She also admitted that not nursing made it easier to “detach” and solidified her role as “the babysitter” by reminding her “these are their children” (Surrogate CA). Similarly, while confessing “I don’t have any medical background, so I’m not sure how they’re able to do this,” a Texas lawyer says her intended mothers are “able to breastfeed even though they didn’t carry the child.” Cultivating the bond between a baby gestated by a third party and its new parents is not only a way to establish intent to parent for legal purposes, but an emotion management strategy.
Since breast-feeding is a quintessential symbol of maternity, rules against nursing not only manage bonding on the individual level, but on the institutional level also disconnect a surrogate from her social identity as a *mother*. In fact, “appropriate” emotional expression for a surrogate is both policed and performed, especially during delivery. One traditional surrogate from Illinois painfully recalled how hard it was not to express her true feelings upon the birth of her singleton. Full of tears, she described the day after delivery in the hospital:

> And then as each hour went by that day, I felt myself breaking down emotionally. And one of my best friends was there with me, but she didn’t know that I was his birth mom. She’s thinking I’m just the carrier. So it was really hard to explain how I was feeling because I couldn’t tell her. But she was there, and she wouldn’t leave. You know she thought that she was doing the right thing by staying there with me because my husband had to leave and go home to get our kids, but I just wanted her to leave so bad so I could just break down. (Surrogate IL)

This surrogate was compelled to perform what she believed was the appropriate way a surrogate is supposed to feel when completing delivery: emotional detachment. She was afraid to express her real feelings – “sadness” and “guilt” – because she was supposed to be “just the carrier.” In this case, she was also the egg donor. She was coached to believe that the act of gestation does not justify grief. She thought appropriate role performance – showing the emotion of a birth mother struggling with the experience – would violate newly encoded norms about what surrogates are supposed to feel, reinforced by contract.

The inverse is also true. Intended parents – especially intended mothers – who do not perform their new roles in socially expected ways are policed into doing so. This is especially so if she does not demonstrate emotions normatively associated with motherhood. In response, attorneys encourage clients to start connecting with the idea of parenthood early on, even if they do not induce lactation. A fundamental strategy used to cultivate feelings in a parent is to advise them to play an active role in doctor’s appointments, especially ultrasounds. An intended mother from California struggled to cultivate an attachment before the child was born. She admitted:

> When my surrogate was pregnant, I could forget for long periods of time [until the doctor’s appointment] that a baby was on the way. It’s a different feeling, and you don’t form the bond. You don’t have it inside of you. It’s like you’ve eaten a sandwich; I can’t form a bond with the sandwich that’s in your stomach. If I eat a sandwich, I can form a bond – not an emotional – but I feel it. I feel satiated or whatever. So until that child comes out – there’s an emotional bond with the idea of being a mother, but there is not an emotional bond with the physicality of being pregnant… It is not a part of you. Even if it is your biological material, it isn’t an emotional – it’s a bond with an idea. (Intended Mother CA)

Afraid of bonding, this intended mother did not want her surrogate to pump. Nor did she want to induce lactation. However, attending the doctor’s appointments and seeing the fetus, as directed by her lawyer, helped her to connect with the pregnancy, and the “idea” of motherhood.
This was not an isolated report. Further, several intended mothers had more trouble emotionally connecting to a pregnancy than their male partners. Another California mother said:

In contrast to [my husband] I feel like he was very emotional during the pregnancy part, and I was not… there’d be weeks where we didn’t see her, often it would sort of slip my mind that she was even pregnant. I’d be like, “Oh, let’s go on a trip.” And he would say, “Oh, but we have babies coming.” Sometimes I would forget. (Intended Mother CA)

This case was especially interesting, because the parents were both college professors, and their rationale for using a surrogate was not infertility but job security. The couple was concerned that taking time off to get pregnant “would hurt her career.” They also did not use lawyers or an agency. Thus, there were no specialists guiding or reminding her to keep in contact with the surrogate, and to cultivate a sense of motherhood before the baby arrived. In this case, the husband sought out a therapist to help him cope with anxiety about becoming a father. He also admitted to feeling “a little bit weird about it,” and “that it’s kind of bourgeois for us to be paying someone to carry our child.”

6-B2. (c) Rules on Viewing, Handling or Continuing Contact

The final intimacy restriction used to manage attachment is the practice of preventing the surrogate from holding or even viewing the newborn following delivery, which extends into future contact with the family. The same rationale that applies to breastfeeding – rules to minimize legal risk by inhibiting emotional bonding – applies here. Feeling rules related to degrees of contact are attempts by lawyers, in the face of uncertainty, to channel their clients toward the ultimate goal of establishing parentage. Educated by a psychologist who specializes in adoption, a Minnesota lawyer believed it crucial to “break that bond.” Assuming “what she has to say is true,” the lawyer explained, “I think all the more reason why you want to take precautions to know that the carrier that you’re dealing with can follow through and do what she has committed to do” (Lawyer MN). Since bonding and future relationships could interfere that “follow through” in a multijurisdictional legal environment, lawyers heed therapeutic advice.

While some of the contracts analyzed in Chapter 5 contain intentions and expectations for the delivery process or a “hospital plan,” in many cases informal practices have become routinized, though not always formalized, like in breastfeeding. An especially vivid example of the formal application of a contact restriction comes from a Texas surrogate who carried triplets for a couple that viewed the relationship as more “transactional.” She explained:

So they were all crying, and they pulled out each baby, and then they got to go hold them. The parents walked with the babies to the NICU, and the first time I held them was – they were a week, two weeks old… They immediately held them, and they got to hold them in their arms, walk out to show them to all of their family that was overflowing the waiting room, and then take them to the NICU… I would have liked to have held them at the very beginning. I think that would have been a nice closure, but I didn’t get that. Nobody offered it to me, and it just went on. (Surrogate TX)
While she did get to see the triplets a week or two following delivery, she did not see them again; the intended parents cut off contact with her. This was particularly upsetting for the surrogate, since she had serious complications following pregnancy, nearly bled to death, and lost her uterus as a result. Not only was she not compensated for the medical expenses, pain, and permanent loss – they did not visit her either in the hospital, or during her six months of bed rest.

However, there are differences in the degree to which intended parents monitor the surrogate’s contact with the baby following delivery, or how much she wants. A Wisconsin surrogate who delivered in California shared her own birth experience. Although she did not get to hold the infant following the delivery, the new mother brought him into her hospital room later. With pride, the surrogate recalled:

> When she came back into the room with the baby and showed him to me and I held him, it was like I was congratulating her on having a baby. And of course, I just gave birth to him. And usually, I guess, the congratulations should come to me. And it was just kind of funny how you do that. It was nice to do it, though. It was awesome to say like, “Congratulations on your family,” but I’m the one laying in the hospital. So it was just funny. (Surrogate WI/CA)

In this case, the parents asked her to do their second surrogacy, guaranteeing their continuing contact. A lawyer from Wisconsin describes the spectrum of contact in her practice:

> [The birth] is interesting. Some of them really are happy the baby is born and happy and healthy and blabbity blah, and it’s been great, and looking forward to getting the pictures, but really are sort of dispassionate – like a friend – how I feel about my friend’s kids. Others are definitely more like – they feel like more of an aunt-type role or a godparent-type role. “I played a part in your life.” (Lawyer WI)

While some surrogates are “dispassionate” after delivery, others will go on to play a role.

Additionally, the image of the jealous intended mother was dispelled by more than one interview. For example, a Washington intended parent shared her positive “birth” story:

> The doctor said, “Well –” This was their first surrogate birth, I think, for the OB, and she said, “I usually have the baby lay on the mother’s tummy at this point. Is that okay?”

> And I said, “Sure.” So as soon as he was born, he laid on [the surrogate]’s tummy, and I was just right there. And then – I mean I didn’t care who held him first. I know this is kind of an issue for some IP moms because they talk about it a lot on the chat boards and everything, but I didn’t care who held him. And then I eventually got him…

> Oh, I was just – my heart was pounding. I felt great and was – he was nine pounds, and he had a head full of platinum blonde hair, and I was not expecting a blonde baby! (Intended Mother WA)

Subjects also reported crying with joy, taking group photographs with the intended parents and the newborn, and having “alone time” with the baby and her own children before discharge from
the hospital for “closure” (Surrogate IL; Surrogate FL; Parents IL; Agency OR; Agency WI). A Texas lawyer explained that giving the surrogate and her family the opportunity for “alone time” and “closure” was recommended by social workers:

Most of the social workers – that’s what they ask the birth mothers to do, but some don’t want that, and so when they say, “No,” then we don’t push it. But that’s what’s encouraged is for them to have some opportunity to have alone time with the child, to tell the child whatever it is that they need to say so that they don’t have this feeling, “I wish I could’ve said,” even though the baby doesn’t necessarily understand it yet. (Lawyer TX)

Not only are professionals like social workers and psychologists incorporated into the screening, evaluation, and formal counseling provisions in contracts, but also informally, lawyers use their advice to avoid hurt feelings or remorse to achieve full performance of the agreement.

Still, the entire process requires inner feeling management, the outward performance of which might crack after delivery. While still glad she did it, an Illinois surrogate admitted:

I didn’t realize this until after I had him, but during the pregnancy, I totally put up a wall. I did not let myself bond with him whatsoever. I didn’t get excited about the things that I would have with my own. I – even though there’s a baby growing inside of me, I never thought of him as my own or like mine – a part of me. I think I was just blocking – subconsciously blocking that whole connection, and I felt guilty somewhat, throughout the pregnancy, for not really caring about him like I should have or like I would have my own. But I think subconsciously, I was doing that, and it didn’t hit me until after I had him at the hospital. It totally hit me like a ton of bricks. (Surrogate IL)

Contact rules and intimacy restrictions with the newborn following birth are intended to protect against precisely this type of situation where the feelings do not “hit” until after the delivery. Lawyers try to minimize the risk by managing chances for attachment, especially after the surrogate’s uterus has completed its task by giving birth. Ironically, a California lawyer pointed out that “only one time has the surrogate changed her mind, although I’ve had intended parents change their mind…at least 10 times.” If most surrogates follow through with the contract, it shows they succeed at their “emotion work” (Hochschild 1983).

This relates to the degree to which the surrogate will have an ongoing relationship with the parents – or the baby – after the contract has terminated. As shown in the content analysis, contracts overwhelmingly provide intended parents exclusive rights to determine future contact, with the default proscribing any continuing relationship. As soon as parentage is legally established, they are entitled to withhold contact from the surrogate. At that point, the exchange relationship is officially over, as is the opportunity for emotion management. Per an upset Florida surrogate, “they don’t want to talk to the surrogate – it’s a business agreement. They just want them to carry the baby, have the baby, and be gone.” Thus, agency representatives and lawyers commonly manage their clients’ fear of being “ditched” or “dropped” (Id.). A surrogate from Illinois revealed “a fear that they would ditch me once they got their baby, and that was a fear that I’d had from the get-go, once we got close.” A California lawyer has experienced “postpartum depression” in her surrogates, “because usually, the intended mother is sort of
controlling and yucky” following birth, wishing “she could just make the surrogate go away” (Lawyer CA). When drafting the agreement, a New York lawyer believes the “biggest issue is, I would say, future contact.” Her role is to make sure “everybody’s on the same page” to avoid any hurt feelings that could lead to conflicts (Lawyer NY).

Therefore, many lawyers and matching agents actively encourage their intended parent clients to express particular, positive emotions towards the surrogate, like awe, gratitude, and reassurance. Experienced practitioners warn against “abandonment,” which leads to feelings of loss, anger, and alienation described by the surrogates above. Even when the parents do not want the carrier to see the baby post-birth, some lawyers push them to allow it, despite a contract provision. A lawyer from Massachusetts explains:

Because she is carrying the baby for nine months and she’s – the women who do this – they’re doing it primarily because they want to help somebody. They want to see the parents hold that baby and feel that sense of, “I did something great.” That’s really what its about. So then post-birth, I tell parents, “We want you to check in with your carrier. Send her an email with some photos of the baby after you’re home. So you may email her and call her two or three times that first week. That second week, maybe it’s once. And then your relationship – because you don’t have a need to be in touch anymore, your relationship will start to die down naturally. (Lawyer MA)

Other strategies developed by lawyers to cultivate gratitude include persuading the parents send her gifts, spa packages, birthday wishes to the surrogate’s own children, treat them to meals in restaurants, and more. Each of these makes her feel “appreciated” rather than resentful, used, or alienated, according to lawyers and agencies. That her parents said “Thank you, thank you for my babies!” made an Illinois surrogate’s delivery “probably one of the best days of my life!”

For example, a Texas lawyer had to perform triage after a resentful and hurt surrogate who carried for a single intended father threatened, “she may not sign her relinquishment document” (Lawyer TX). The surrogate felt “very unappreciated” and “was really panicked about the fact she wasn’t going to have an opportunity to say goodbye” when the father wanted to have the baby discharged on the day of delivery. To handle the surrogate’s strong feelings:

I really went into female mode, and I told him he needed to go get her flowers and a card and that baby was to stay there and that he needed to recognize that she had done this wonderful thing for him. Emotionally she needs to feel appreciated. She’s had hormones raging and that he needed to respect that she needed closure as well. And so he did all that. [Laughs] And the baby stayed at the hospital. (Lawyer TX)

This lawyer’s strategy for legal risk management was targeted emotion management, finding ways to ensure the surrogate felt more appreciated and even had some closure. Although as a legal matter the new father was free to cut ties with his surrogate, doing so could be risky. To contain emotions, a California lawyer will just try “to talk them off the ledge and calm them down…the reality is when you’re dealing with a surrogate, there’s hormones at play.”
Finally, lawyers and agencies were eager to dispel a common belief that the surrogate’s bond is primarily with the baby, rather than the parents she has come to know. One lawyer explains, “the attachment really does appear to be between the adults – the respect they develop” (Lawyer TX). Many surrogates reported a combination of joy at seeing their intended parent’s faces, pride in their own accomplishment, and at the same time, alienation when the baby is born and she is no longer “useful” or “needed.” In the experience of a Virginia lawyer:

> Usually, it’s up to the intended parents whether they want to continue to have contact. But to me, it’s becoming – just like in adoptions, where the trend has been more and more birth parents want to have pictures, letters, and have ongoing contact…we’re seeing more and more the need for – yes, are there the carriers out there that can deliver and then put the kid out of their mind and say, “I don’t need any more contact?” Yes, there are a few of those, but for the most part, what we’re seeing is we’re seeing carriers that want, just like a birth mother – even though it might not be their biological child, but they want to know – and even though they were paid, technically, or they received reimbursement or whatever you want to call it – they’re still curious.

While some parties have limited continuing relationships, others are “cut off” once the baby is born, as surrogates from Wisconsin, Illinois, Florida, and California reported. However, it is not necessarily the role of mother the surrogate mourns – it is the role of closely needed personal friend to the intended parents, and most often reported, the intended mother. As one Maryland attorney put it, “What surrogates will tell me time and time again – they do not miss that baby; they miss the couple, or they miss the intended parent because they’ve had this close relationship…and then all of a sudden, that’s gone.”

This aligned with another surrogate’s opinion. She vividly recounts:

> So I remember having that fear at the hospital, thinking, “Okay. Well, this is – I worked. I did this. Two years of my life I’ve given up, and now they’re going to get him, and they’re just going to leave.” Because we had become so close, I felt like [the intended father] was my best friend. So I not only had that fear, I had my emotions going on about [the baby], but then I also had – I was an emotional wreck thinking I was losing my best friend. So that last hour was very, very emotional. I just remember I broke down. I think – they will tell you – they were very – they were really emotional, too, and they were both crying.

And [the intended father]’s parents were there, too, and I didn’t know what they were thinking. I didn’t know if they’re – they said they were upset because they knew I was upset. But I’m sure [they] probably thought, “Oh, great. Here we go. She’s going to keep the baby.” I kind of got the impression that they were thinking that. I didn’t know if the guys felt like that, or if they really felt bad.

But I remember [the intended father] went down to get the car – pull it up – and that’s when I broke down. I couldn’t hold back my – I couldn’t hold it back anymore. I just broke down, and [the other intended father] – I just remember he was hugging me. (Surrogate IL)
Thus, surrogates can form strong bonds with the intended parents, and have long-term contact not only with the adults, but also with the children they bear. Similarly, a Washington intended parent reported, “We love to see her and her kids. I’ve watched her kids grow up. I know her kids, and it’s just – she is really a close, close friend. I love to see her any time, and she comes to visit. And a year ago, her husband also came. Her daughter is getting married; I’m going down. It’s been great.” A spectrum of closeness and continuing contact was reported in the interviews, from no future contact, to occasional calls and photo updates, to attendance at birthday parties, to taking group vacations – even abroad.

Overall, it is important to remember that the contract almost uniformly provides intended parents the power to discontinue the relationship upon establishment of parentage. Some parents even keep the surrogacy confidential from the children born of it, making an ongoing relationship out of the question. In those cases, “When it’s done, it’s done” (Lawyer TX). That is why counselors encourage lawyers “at the very beginning help them to understand that they may or may not talk to this couple again after the delivery” (Counselor CO). Thus, one primary difference between commercial surrogacy and the kinds of “non-contractual relations in business” studied by Macaulay and his progeny is that ongoing relationships are not contemplated by the formal agreement as a strategy for legal risk management. If ongoing contact occurs, it will only be after the exchange relationship – performance of the surrogacy contract – has legally ended, removing the risk. Further, examining contracts as exchange relations requires the kind of examination of emotions, gender and family roles engaged by this dissertation, thus far absent in socio-legal literature.

6-B3. Naming and Labeling Practices

In addition to lifestyle rules and intimacy restrictions, terminology that names the parties not only operates to manage emotions, but also serves as a tool for establishing roles for each of the parties to the contract. I assert that terms that name and label the parties help to cultivate emotional detachment in the surrogate, and inversely, attachment in the parents-to-be. It also makes intent to establish legal parenthood explicit as legal actors meander an unsettled terrain. By formally replacing a phrase like “birth mother” with “embryo carrier,” surrogacy contracts actively redefine the social meaning of motherhood. Clinical terms like “gestational host womb” also make pregnancy easier to commodify as they create a distance between the role of a birth mother and the role of an incubator. In this way, naming practices are also tied to valuation of women’s labor, especially her gestational services. Further, these terms de-gender and denaturalize the woman giving birth. In an effort to manage risk and cope with uncertainty within an ambiguous legal field, lawyers deploy terms in contracts, diffuse, and institutionalize them. Thus, emerging terms of art across agreements have significant social consequences.

Naming practices symbolically produce a form of distancing or familiarity as a tool of emotion management, which in turn serve to shape their identities and the nature of their relationships. Content coding in Chapter 5 revealed a range of terms used in contracts for the woman giving birth, her spouse, the individual or couple paying her to give birth, the baby born
of the contract, and even, the contract itself (see Figure 6). Each of these labels replaces standard dispassionate service contract terms like “employer,” “employee,” “subcontractor,” or “manager.” Clinical, gender-neutral, non-parental terms like “gestational carrier” also manage emotions; they alleviate the purchasing parents’ fear that the surrogate will refuse to relinquish the baby by defining her limited role as carrier. “To me,” a Wisconsin lawyer explains, “a carrier is somebody who is simply providing a womb and caring for herself and her child – and the child, shall I say – as if it was her own in the meantime.” Revealing her error in referring to the surrobaby as “her child,” this lawyer redirects to “the” child, a more detached identifier.

Terms and labels in contracts act as discursive signifiers as to gender and parenting roles (Conley and O’Barr 1998). What the Uniform Parentage Act defines as a “birth mother” or “natural mother” is reframed a “gestational surrogate,” “embryo carrier,” or “gestational host womb” in the text of the binding agreement, while the couple or single purchasing the labor is labeled the “intended parent(s),” “mother,” “father,” or “receiving parents.” The label “intended parent” also has legal force, since it demonstrates the ultimate goal of establishing parentage. In Minnesota, a lawyer asserted, “I like the word “intended parent.” Who is the intended parent? But for the actions of this woman and this man, who want to parent a child, this child wouldn’t be here.” Conversely, lawyers consciously disassociate the word mother from the party who gestates and gives birth.

Referring to a “surrogate mother” in a contract is generally no longer tolerated, even though several subjects reported that the term hostess “makes them feel like they’re not a person.” One attorney from Maryland elaborates:

If you call a surrogate a host uterus, there’s nothing they hate more than that… You’re not just dealing with robots. You’re dealing with people. You’re not just dealing with a host uterus. You’re dealing with a person... And they are a person, and they have feelings, and sometimes you have to take yourself out of your own person and say, “Okay, wait. What are they feeling in this?” because that’s really hard to do. The parents are in their place, and the surrogate’s in her place, and sometimes they’re not thinking about each other and how is whatever is happening making them feel.

Nonetheless, the terms “mother” and “father” are reserved for the intended parents in the contract, prior to the in vitro transfer, and whether or not they are genetic contributors to the embryo. Beyond their legal significance, it appears these terms serve to emotionally distance the surrogate from the fetus and detach her from a formal acknowledgement of birth motherhood, while ensuring the intendeds are defined as parents early on to cultivate their emotional attachment and identity as parents, regardless of genetic relationship. Sometimes terms in contracts reflect the language used in statutes or cases for security, but not necessarily; a Texas lawyer pondered, “the actual statute does say gestational mother, so I’m not entirely sure where I got carrier.” The institutionalization of carrier is based on emotion management (detachment from motherhood) as well as risk management (establishing parentage).

While she believes “surrogate is just a warmer term” then “gestational carrier,” the latter is in a Maryland lawyer’s contract. Reflecting on the term “rent-a-womb,” a Minnesota lawyer
reasoned, “[the genetic mother] is paying her to literally house it.” Per another lawyer, “When we use the word carrier, it connotes two things. One is a disease, and the other is mail” (Lawyer CA). A Texas lawyer defends the term “carrier,” suggesting, “Of course, she is the carrier of the baby. She has the embryo transferred into her womb, and so she is essentially allowing her body to be used as a human incubator for someone else’s baby.” What strikes me about the characterization of the surrogate’s role and the normalization of these terms is that they both denaturalize and de-gender birth. After all, only a woman can be a “human incubator.”

Lawyers also say that informally, surrogates refer to themselves as “I’m the babysitter; I’m the nanny” (Lawyer MD). Even professionals informally describe the surrogate’s role as “the babysitter for their baby in utero” (Agency CO) and “the daycare provider” (Lawyer MN). However, “babysitting” both infantilizes and devalues not only the labor a surrogate actually performs, but also the level of medical risk she undertakes. Three California lawyers in separate practices and a Virginia lawyer admitted a surrogate died from pregnancy complications during contracting.

Informally, surrogates are part and parcel of redefining gender and parenting terms, characterizing their labor, and in tandem with law, institutionalizing both. For example, I asked a Florida surrogate to describe herself or her role in the process. Here is our exchange:

Camille: Well, there’s all kind of things you could call yourself: host, gestational carrier, gestational surrogate, the oven – I mean there’s all kinds of little things you can call yourself. But basically, when I say host, I just mean the baby’s renting out your space.

Interviewer: The baby’s renting out your space?

Camille: Yeah. You’re just baking the baby, and giving it away – giving it back.

Interviewer: You’re baking the baby? Is that what you said?

Camille: Yeah.

Interviewer: [Laughs] So that’s what you mean by the oven. You’re baking the baby in your oven.

Camille: Yeah, yeah.

Interviewer: Okay, okay.

Camille: Bun in the oven.

Interviewer: Bun in the oven. Is there any other way that you would describe yourself other than – did you have little catchphrases for yourself? Did you call yourself a surro mom? Did you call the babies your surro son or surro daughter or anything like that?
Camille: Yeah, I did... Yeah, I would just call them my surrogate kids – my surrogate son and my surrogate daughter. The babies – I always had nicknames for them when I was pregnant with them. And then I would tease about the parents. If, say, [the intended father] called me, I'd be like, “Oh, yeah. That was my baby daddy.”

[Laughter]

In a sense, Camille’s self-referent terms for surrogate motherhood seem endearing, such as “baking” the “bun in the oven.” Dalia, a surrogate from Texas, also appropriates the “baking” metaphor to describe her role: “I've never really used ‘carrier’ before this contract, actually. I just tell people I was the gestational surrogate, and while I was pregnant, I would just say, “I'm just growing them for the parents who can't do it on their own. Basically, I'm just the oven.” Appropriating and defining the role she plays is arguably empowering, especially since online communities like surromomsonline.com have a shared subculture that provides support, education, and social structure (Hebdige 1979). They also offer emotion management: much venting and processing occurs there, according to the interviews. However, terms mirrored in law like “gestational carrier” and “host” is problematic for the reasons described above.

Naming practices in contracting are part of popular culture and the media (Agency CO), found on website message boards like surromomsonline.com, Facebook pages, and various social and business sites. Terms are found in a number of newly minted children’s books marketed to surrogates and parents to assist in the education and emotion-management of their own kids and the “surrobabies” they bear. These naming practices include, “Kangaroo Mommy,” “Auntie Sue,” “The Babysitter,” “SurroNanny,” and “Your Carrying Mommy.” Stories are cultivated and circulated based upon age-appropriateness and emotional need. For example, a recurring tale introduces children to a “Princess” who helped out because “mommy's tummy is broken” (Agency CA). Phrases printed on mass-marketed t-shirts and household items include: “Their Bun, My Oven,” “Womb for Rent,” “Proud SurroMom,” “Not the Mom – Just the Stork,” and “I Make Families – What’s Your Superpower?” which instantiate in the public sphere new gender and family categories, especially motherhood. They also demonstrate some resistance to exclusion from the category of “mother” and often communicate empowerment, rather than oppression. Surrogate husbands are also managing a range of emotions and redefining their new role in relation to the other family; one popular t-shirt advertises, “She’s Not Having Our Baby!”

Despite these positive and humorous media depictions, names, labels and roles are often contested at the birth of the child and have legal force. Nearly twenty years since Johnson v. Calvert ruled that intention determines who obtains the label of “mother” and its now wider acceptance, the interviews indicate that much feeling management is still required. Attorneys and agency representatives describe the time the surrogate goes to the hospital for delivery as requiring significant emotional attention, not to mention, administrative and legal coordination surrounding naming. Several lawyers describe their role as a “hand-holders,” which is not a new role for attorneys (Sarat and Felstiner 1986). Divorce lawyers invest considerable effort in “client management activities” when anger becomes an emotional barrier to settlement (Id. at 131). In this Virginia lawyer’s case:
No matter how you slice it, in my experience, it’s not easy for a woman to say goodbye to a child to whom she has given birth. That’s one thing that’s clear. Whether it’s adoption, whether it’s a woman who is placing a child in foster care, whether it’s surrogacy – traditional or gestational – it’s not easy… I preface it by saying that it’s not strictly legal services, kind of hand holding, I would say… some attorneys are hand-holders. But then the real issue comes with the birth certificate, as I’m sure you know, because a woman gives birth in a hospital, and the hospital says, ‘Well, this child emerged from you. You are the mother of this child.” (Lawyer VA)

Many hospitals and their staff have yet to relinquish their understanding of maternity as the act of giving birth. Depending on state law, the lawyer may have a pre-birth order that directs the hospital to place the intended parent’s names on the birth certificate, a birth plan that provides them with a room, exclusive viewing privileges, and wristbands that confirm them as “mother” and “father.” Even so, conflicts can arise in a hospital that has fewer surrogate deliveries when they place the surrogate birth mother’s name on the certificate. In other states, the surrogate is still labeled “mother” as a matter of law, which must later be amended in a court hearing. According to the interviews, a surrogate may feel ambivalent about her role as someone both formally referred to as the “gestational hostess” and as a “mother” after her labor.

Naming practices are also tied to valuation of a surrogate’s labor. While it is clear that many surrogates feel informed, experienced, and empowered, I assert reframing or making light of maternity makes it easier to commodify, and falls prey to the free market, liberal model of bargaining that perpetuates the myth of objectivity and rationality in law. When I asked “What is a surrogate to you? How would you describe what it is that she does?” a California lawyer bluntly replied, “She is a biological vessel.” A “vessel” is a term that is asocial, gender neutral, and non-emotive. Lawyers, like this one from Oregon, report that surrogates describe themselves by repeating, “I’m just the surrogate; I’m just the carrier; I’m just the incubator – Rent-a-womb is kind of crass, I guess, but kind of funny too.” When one is just a surrogate, it devalues the gestational contribution, as Dorothy Roberts and other feminist scholars have argued (Field, 1988; Roberts 1998; Shanley 2001).

Terminology also manages intentions towards the establishment of parentage through labeling. When I asked an intended parent how she referred to the twins before they were born, without hesitation she said, “My kids.” When I asked how the surrogate referred to them she said, “Their kids.” Also, a way to screen surrogates to determine “if their motives are pure” is whether “they’ve talked in terms of their child…we need to keep a really clear line all the way through as to who is responsible for this child” (Lawyer WI). Labels also serve an emotion management function for surrogates. While she also disliked carrier, one traditional surrogate from Illinois revealed, “I don’t like calling myself a surrogate mother. Maybe it’s my way of disconnecting that part of me.”

Thus, naming and labeling practices manage expectations for parenting as contemplated by the exchange relation, and the surrogate’s detachment from her role as a birth mother. In this relatively new, ambiguous and emerging field of reproductive technology law, formal contract terms and informal practices are generating new social norms about gender, family and the value
of women’s work. Even though she felt “carrier sounds colder to me,” an agency owner in California admitted that, “if all of a sudden everybody in the industry agreed carrier was what they were using, I wouldn’t be making a stink.” A lawyer in California resists the term carrier on behalf of his surrogate clients who “feel like that’s too much removal, like they’re just kind of an oven because of – not have a personal connection and not a personal relationship.” In the end, when not resisted, naming practices at the individual level become formalized in agreements, shared among other professionals in the field, and eventually alter collective conceptions of primary social institutions, like motherhood and work.


Intended parents are typically older, more educated, and wealthier than the surrogates they hire, which empowers them in a variety of ways – not to mention that they are the party who pays the lawyer drafting the agreement, and the agency who facilitates it. Compensation provisions are highly emotional, as well as highly symbolic. Lawyers draft provisions that not only specify the price to be paid for the surrogate’s labor, but also what the anguish of bed rest, guilt over miscarriage, mourning over permanent loss of her own reproductive organs, or the anxiety over forced termination of selected embryos is worth. Since precedents did not exist for the valuation of the numerous fees analyzed in the content coding – not to mention surrogate labor and risk – how do lawyers determine the prices encoded in contracts? I argue that in an unsettled legal terrain, lawyers and now matching agencies turn to what they do best: manage risk by rationalizing and commodifying the process, seeking uniformity across jurisdictions.

During interviews, lawyers emphasized that surrogacy was not a “job,” nor were the intended parents “employers.” That characterization would have legal ramifications like taxation and worker’s compensation. Further, surrogacy cannot be equated with sales contracts, since there are international bans on markets in children. Instead, surrogates are compensated for “inconvenience,” “pain and suffering,” or as one Texas lawyer characterized it, “wear and tear on the female body.” Thus, contracts predict torts by formalizing in advance what the consequence of negligence will be. Attorneys are now beginning to characterize payments for surrogacy as “pre-birth child support,” “because [the intended parents] are required to support the child,” especially for medical costs, in utero (Lawyer TX). In the face of legal uncertainty and to minimize risk, I argue lawyers take sanctioned and institutionalized practices from family law and torts and transpose them to surrogacy. After all, “you have to be very careful about any exchange of money to somebody who you’re asking to relinquish parental rights” (Lawyer TX). While compensation figures partly transferred from adoption law, the range of fees provided in surrogacy contracting go beyond those in adoption. The nature of contracting for costs and fees, in advance of a confirmed pregnancy, is also quite distinct.

Valuation can create contentious negotiations, feelings of shame, insult, but also gratitude when a surrogate is connected to more generous intended parents. In other cases, a surrogate will accept what she is offered, and in fact, agency contracts may prevent her from receiving more than a maximum sum. One Wisconsin gestational surrogate who was paid the cap of $25,000 for
her services admitted that, "$50,000, in retrospect, would be more fair." Another surrogate had to haggle during her contract negotiations, arguing "being a young person, I felt that loss of reproductive organs was important and later down the line, we’ll find out how that was important. So the standard for that is usually $2,500. Mine was put a little bit higher. It was put at $7,500" (Surrogate IL). In fact, she had serious complications following an in vitro fertilization procedure, and lost her fallopian tube. Curiously, the lawyers battled over paying out the sum she negotiated; the intended parents only ended up giving her $3,250.

Besides the stress of the legal process, the Illinois surrogate was very emotional. In tears she recalled, “I just felt like a failure…and I felt like I set out to do something so great, and now it’s ending so wrong. And now here I am putting my health at risk” (Id.). She added that her husband was “sitting in the hospital while his wife has internal bleeding – and now he is worried about his children not having a mother.” That kind of injury, risk, and collective fright has value, justifying provisions in the coded surrogacy contracts that pre-establish claims for intentional infliction of emotional distress in the case of breach. However, that clause typically favors the intended parent(s) in anticipation of the kind of “anguish” and “loss” they would feel if the surrogate refused to cooperate fully in performance of the contract.

Price tags placed on the inconvenience and risks inherent in surrogacy are arguably empowering, given the historical failure to commercially value women for their domestic labor, let alone, their gestational services (Field 1990; Shalev 1989). Outside risk valuation, payment also serves specific emotion management functions, like detachment. In fact, the act of paying a surrogate distinguishes her from all other birth mothers, never formally compensated for their labor. Not only might that enable emotional distancing, compensation is a way for lawyers to channel expectations. When I interviewed a California lawyer, she revealed:

| Annette: | A first-time surrogate I would say nowadays the low start fee is probably $20,000, and I’ve seen a first-time go up to $28,000, and that’s the base fee. And then there’s usually an addition for twins that’s usually anywhere from $3,000 to $5,000 if you carry multiples. There’s often allowances for – if you have to have a C-section, it’s like $1,500. Loss of reproductive organs is another fee. |
| Interviewer: | How much is that loss of reproductive organs worth? |
| Annette: | It’s ridiculous. It’s anywhere from $1,500 to $5,000 depending on – |
| Interviewer: | Cost of a computer. |
| Annette: | Yeah, exactly. And I think – it’s funny. The more I talk about this stuff out loud, the more it just does sort of make me kind of feel sick inside because it is – I do feel like it’s being – I view it as much more of a commodification now than I ever did before. I mean it’s like putting a price on these things, and that’s what I have to tell my clients. |

Like, “We’re going to request a loss of reproductive organs only so that everyone understands it’s a consideration. The money they’re going to give you is never
going to compensate you for what you’re going to lose or what you could lose or the hormone therapy or anything else that you’re going to have deal with,” but it’s more or less to get, in my view – to have people understand that there’s a risk.

Thus, delineating fees in the formal agreement also serves to manage expectations, mentally prepare clients for the medical risk, and elicit informed consent. Although Annette views surrogacy as “much more of a commodification now” which makes her “kind of feel sick inside,” ultimately it does not detour her from accepting the fees becoming standardized in her professional field.

On the other hand, intended parents not only face their strong desire form a family, but a possible six-figure price tag. Contract negotiations can be challenging for the intended parent(s), and their lawyers. Sometimes a savvy surrogate will cause stress, anxiety, and anger in the parents, especially those who feel desperate following infertility or miscarriage. In those cases, lawyers and agencies step in to triage a contentious situation. Describing a recent contract, a lawyer in California illustrates:

[U]sually, the emotions tend to be rich or not so rich about small amounts of money …before you walked in, I’m in the midst of a case that’s been very difficult to negotiate. I’ve been extremely disappointed and frustrated by the way it’s gone because they’ve got an experienced surrogate on the other side who knows better, and she’s pushing the wrong way. And I’m kind of pissed.

And I was very frank with these clients that basically said, “Thank you so much, we appreciate that information so much. We are totally on the same page with you. We feel the same way, but you know what? We’re going to be rock stars. We’re going to swallow it. We’re going to take the high road. We’re going to give her the $2,500 because at the end of the day, I’ve got $110,000 price tag on this. And so if you’re telling me I’m about to lose my fantastic, amazing surrogate over $2,500, yeah, I’m pissed off, too. But thanks for checking, but we’re going to go ahead and swallow that.” And I’m going to try and make them look like heroes because they will, and they deserve that.

This lawyer contains the situation, and her own frustration, in a few ways. First, she reassures her clients that she believes the surrogate is being unreasonable. The intended parents then re-frame their identity as “heroes” and “rock stars” – rather than suckers – for being agreeable when it comes to money, diffusing the conflict. More importantly, she manages risk through emotions by absorbing the feelings and the fight. When “all the love and the support and wanting to help each other sometimes gets broken down,” she explains, “I try and let that roll off my back. If they do go after me, that’s great. What I don’t like to see, obviously, is people going after each other. And better me than them” (Lawyer CA).

The class disparity may show itself through demands and power, triggering emotional responses. If they are not asking the surrogate to cut her fees, and perhaps are even paying her generously, they expect to have more control in return. According to one Virginia lawyer:
Occasionally, during the whole process, there is – there are misunderstandings and there are resentments. That’s where I think the lawyers need to intervene and try to smooth things over…at least in the Washington, D.C. area are couples where both spouses earn good money; they’re well-educated; they have usually reached certain milestones in life. It’s usually people in their late 30s or maybe early 40s would be the typical age range whereas the typical surrogate tends to be younger than that. The typical surrogate might be 25. And so you have an age disparity, and so you have a disparity in life experience. And once in a while, you have an attitude on the part of the intended parents, “Well, we’re footing the bill for all of this, and it’s a damned expensive proposition, so we should get what we want. And therefore, we can impose certain contentions upon the surrogate.” And that’s where, I think, the condescension comes in.

That “attitude” of the intended parents as described by the Virginia attorney was commonly reported by each of the four subjects in this study – including from parents themselves. A couple from California, on one hand joking their surrogate was the oven “cooking” their babies, ambivalently struggled that “she was sort of like a commodity or this machine or something,” noting “it took a while for me to be a peace with using a surrogate… I don’t know how great like surrogacy is to the world.” On the other hand, subjects in each interview category reported that surrogacy is less about the money, and more about enjoying the experience of pregnancy, and the attention it brings. Pride also has value.

Given the potential for complications during pregnancy, how is the risk of death managed in contracting? As described in Chapter 5, “Carrier Incapacity” provisions detail the conditions under which a surrogate will be maintained on life support to gestate the fetus. As a Texas lawyer simplifies, “if the carrier is married, her husband agrees not to pull the plug as long as the baby is viable.” Life support provisions invoke the long-held fear of critics that surrogacy has unique gendered effects: a woman’s body becomes, quite literally, a vessel for reproduction. The surrogate and her husband agree to formally bind themselves to life extension at the request of the intended parents in consideration for her base compensation, which is on average $25,000. But to accept the benefits of surrogacy, the risk of terminal incapacity must be anticipated.

Handling that part of the contract, along with selective reduction and abortion provisions, can be emotionally dicey. In a California attorney’s experience:

Brendon: You get to know each other a little bit during this meeting as well, but you cover important things like what are your feelings about abortion and reduction and medical emergencies and life support and all the really high, intensely emotional things that could happen and hopefully never do. But you talk about them so that you are on the same page, but you also get to know each other… Oh, yeah. Those are the bigger issues.

Interviewer: Those are the bigger issues.

Brendon: Life support is another one. It gets some additional attention during the contract negotiation stage. I’ve never – thankfully [knocks on wood] never had a situation actually arise where life support was necessary. I think it’s
extremely rare, but the typical contract provision would say that if the surrogate’s life is so severely threatened that she may need to be – she’s not going to survive unless she goes on life support, if there’s an option medically to save the baby, the contract would say that if the parents wish – if they request it at the time, then you agree to be put on life support, so you and your husband both agree to save the baby and its’ life – if she’s not going to make it, at least try to save the baby.

That’s the general concept, so most people are fine with that, but every once in a while you get somebody very sensitive about the idea of life support, and the surrogate approaches it from the point of view of, “How long am I going to be on life support, and how long will my family have to grieve and not have closure, and I don’t know how I feel about that, and do I have religious viewpoints on this, too.”

Interviewer: So you’re talking about life support for the surrogate, not necessarily a preemie birth where there’s some issue surrounding the –

Brendon: No, yeah, yeah, yeah, yeah.

Interviewer: I see – very interesting.

Brendon: For the surrogate – very complicated emotional issue, and we try to handle it in the contract because it is so complicated. We try to give them a roadmap to follow in the event of this extremely unlikely situation. And the people who are paying a lot of attention to the contract and thinking through it carefully that have issues with it will discuss it and we’ll maybe have to work with the language in that provision.

An incubation period beginning at 25 weeks while the surrogate is a “host uterus” will inevitably be an emotionally challenging period for the surrogate’s husband and children, and scenario where a lawyer like Brandon will bring in qualified therapists under the counseling provision. While he perceives it is “rare,” complications during pregnancy do occur, including several cases of death and serious injury reported previously. Life support provisions are not merely one of the “high, intensely emotional things” lawyers and their clients must handle, but also symbolize a level of control and commodification unusual in other “labor” or service contracts. It is also possible that emotions like compassion, love, and hope for another family’s new beginning will override feelings of grief, resentment, and remorse over the carrier’s end of life. In either case, Brendon’s strategy is to meet to inform of the risk, talk through the provisions, broach it again during contract negotiations, and offer a “roadmap” for the parties to “think through it carefully.”

Note there is variation in compensation, aside from “compassionate” contracts or “gift surrogacy.” Surrogates who have been through one, two, or more prior surrogate pregnancies command the most remuneration no matter what region, having demonstrated they can successfully gestate, and hand over, the baby in the end. Increased payment is also symbolically correlated to decreased anxiety in the parents, who believe if she’s given up one baby, she is likely to give up another. However, of all the “actors” involved in a surrogacy agreement – from
reproductive endocrinologists, to hospitals, to lawyers, and matching agencies – it is most often
the surrogates who get “nickel and dimed” in the words of a surrogate from South Carolina.
Their compensation is the easiest place to “cut the fat” (*Id.*).

Of course, there are many parents so thrilled to have a baby that they would never withhold
payments, or require – as a Massachusetts lawyer put it – the surrogate submit individual receipts
from the Whole Foods store as a means of controlling the process. Still, a Maryland lawyer with
adoption experience expressed concern that new law school graduates entering the field do not
fully appreciate the nature of this highly “commodified” exchange:

> I don’t think you can just read the laws and understand what you’re doing. There’s such
> a personal aspect to it, and there’s really these underlying ethical codes you have to be
> aware of. We’re dealing with people; we’re dealing with babies; we’re dealing with
> lives. We’re not dealing with a commodity. “Oh here’s a car. Am I going to sell it for
> less or more?” or something like that. (Lawyer MD)

Even when parents acknowledge the tremendous “gift” the surrogate is giving them – which the
interviews suggest they do – they might be simultaneously “respectful, but micromanaging”
since they are paying, which are not, according to a lawyer in Oregon, “mutually exclusive.”

6-B5. *Psychological Screening, Counseling Provisions, and Triage*

The final category of formalized feeling rules in surrogacy agreements relate to
psychological screening and counseling provisions. However, the entire chapter has
demonstrated the ways attorneys informally call upon agency counselors and therapists to assist
when emotions run high. Risk management in the face of legal ambiguity is accomplished by
the management of emotions, which are channeled through feeling rules in contracts that are
utilized by lawyers, agencies and therapists who work in their service. Formal counseling
clauses as well as informal tactics like triage demonstrate that surrogacy contracts are neither
objective nor asocial: they are exchange relations (Macaulay 2003). The legal field, fertility
field, and mental health field interact, overlap, and together constitute the practice of surrogacy
contracting in a larger reproductive field (Bourdieu 1987; Edelman 2007).

To enforce the lifestyle rules, intimacy restrictions, and compensation provisions, lawyers
lean on counseling professionals to manage feelings before, during, and after the birth of the
baby. Chapter 4 detailed the psychological screening and evaluation during the matching phase
as a form of anticipatory emotion management and risk assessment. As Chapter 5 showed, many
contracts also contain provisions for counseling as needed during the process. Both of those
provisions are codified as feeling rules in the agreement. Additionally, lawyers informally refer
clients to therapists for intervention during the process, or for post-delivery coping. Some
agencies employ in-house therapists, or have referrals lists of the experts they regularly call upon
for treatment in a surrogacy situation. According to a California attorney, “Every agency has a
relationship with someone in the mental health field. The doctor’s offices do as well. I have a
handful that I really trust.” The legal field overlaps with the mental health field, as well as the
collection of organizations that make up the agency field.\textsuperscript{27} I assert their shared norms and evolving practices make up the reproductive field, which are institutionalizing (Edelman 2007).

Per the content analysis, virtually all contracts contain provisions that require the surrogate undergo psychological screening, in addition to supplemental counseling at the discretion of the parents, but do not typically require the inverse. However, I spoke with a trailblazing lawyer in Oregon who plans to formally require counseling sessions to manage both parties’ feelings, not only the surrogate’s, which is the current model. More than just fear of attachment or remorse by the surrogate is at stake. As the lawyer said, “I don’t think that she’s exclusively the one that’s going to have emotional problems, especially in a gestational surrogacy. I think the intended parents could utilize counseling, too.”

To show the degree to which the reproductive law field overlaps with the mental health field, this attorney believes intended parents should also be compelled to obtain counseling in a contract provision. He elaborates on the complexity of these exchange relationships:

There’s a fair amount of resentment on the part of the single mother. And they tend to treat the surrogates poorly and the relationships don’t go well... there are too many unspoken expectations and needs that aren’t fleshted out as well as they are in arms-length transactions. People just think that they’re best friends and this is going to be great. And that could well be true, but they need to talk it through a lot more than they do… There is a degree – and the degree varies – of anxiety in most intended parents. Sometimes, the degree is really substantial. And I’m asked – I’m peppered with questions constantly: what’s this, how’s this happen, and what’s going to happen after this and what does this mean? And that’s probably the most common – if you characterize that as an emotion – the most common emotion. But underlying that is this – sometimes a sense of desperation, sometimes a very sweet hopefulness and excitement… Some of them are more of a pain in the ass to deal with than others. But they’re all fun and they’re all – they’re just feelings. They can’t help it. (Lawyer OR)

Lawyers and agencies across the United States consistently reported the emotional difficulty infertile parents – especially intended mothers – have when entering the exchange relationship. Much of this frustration, if not well managed, gets directed at the surrogate. Concurring, a Texas lawyer explained how emotions are managed in her practice:

So if they have an issue about the carrier personally, then that will get directed right back to the agency. There are therapists that are involved in the process. Primarily, we think of them as being needed for the carrier, but it’s really not accurate because it’s a pretty touchy process for everybody. And so everybody, at some point, can jump out and needs to be able to have somebody to talk to and to help them get back in. (Lawyer TX)

\textsuperscript{27} While not analyzed for this dissertation, a future project will examine the role of the medical field in surrogacy contracting, and the reproductive physicians and fertility specialists who clearly operate in legal environments (Edelman et al 2001; Heimer 1999).
Both the Texas and Oregon attorneys are going against the existing stereotype of the remorseful surrogate by acknowledging all parties to these agreements could use emotion management by a licensed professional.

When emotions run high, lawyers call upon agency coordinators or psychologists to step in and handle the fray as a containment strategy. Both California and Colorado psychologists described their crucial roles as “interpreters” for parties, especially when attachment is an issue. In one case, attachment was cultivated in intended parents who failed to communicate with their surrogate, leading the surrogate to feel rejected and hurt when they failed to “get excited” and “walked out of the room” following the ultrasound. The counselor related:

They weren’t emotionally present. It was too difficult for them emotionally to get attached or excited at the idea of a pregnancy because of their post-traumatic stress from what they had been through. And the surrogate was somewhat – she didn’t understand…She goes, “Do you think that they don’t want the baby?” And I had to assure her that, “No, that’s not the case;” and “I don’t think that’s it, but why don’t we all get together?” And the intended parents were luckily able to verbalize to her, “We are excited. It’s just so scary.” I needed to almost interpret their behavior for her.

(Counselor CO)

Not only does the therapist assuage the surrogate’s fear that the parents are detaching from the pregnancy, and might breach, but she also patches up the relationship by facilitating communication and “interpreting” the behavior. Doing so contains legal risk.

With or without psychologists, there is wide variation in the degrees to which lawyer’s cultivate particular emotions, mutual respect between the parties, diffuse conflicts, and meet their clients’ emotional needs. For example, lawyers prevent rage, resentment, and frustration by instructing their client’s to direct all calls relating to money – which tend to be emotional – to them. A representative report came from a California agency owner who, in collaboration with the lawyers she works with, encourages the parties to “develop their own relationship,” and asks that they “don’t talk about contracts or money with each other.” She shares her rationale:

Well, because I think that contracts are a very emotional period or document that brings up all the possible negative things. There are a lot of financial aspects to it. I don’t want the surrogate saying, “Oh, I really need more money,” or the intended parent going, “This is so expensive. I can’t afford it.” It’s not fair to either party. If you have those issues, they should be talking to the agency. It makes people feel bad when you talk about money, and that’s really the bulk of – and the contracts too… and I was like, “Unacceptable.” If your surrogate or intended parent ever start talking money, you say the agency asked us on that very first phone call not to do it. Please call them.

This owner created a clear policy that all negotiation should take place only “through the agency and through the lawyer,” especially if it deals with “finances.” Such policies are strategies for emotion management – anticipation, and hopefully avoidance of, conflicts and hurt feelings.
Reproductive lawyers also diffuse tensions using conflict management techniques, tag teaming with the agency, or insuring the intended parents pay for professional counseling as provided by the contract. As a Nevada attorney explained:

Some of them have a hard time and they need counseling. And one of the biggest things that I require in all my contracts is that there’s post-pregnancy counseling available for the surrogate because yes, they’re coming down off hormones. The baby’s not in their arms. That’s a natural human reaction of you’re missing something; something’s not there. And you want to keep them stable. (Lawyer NV)

Keeping them “stable” by managing their feelings through counseling is a risk management strategy. A colleague in California agrees, but from the intended parents’ perspective:

[T]here was one surrogate that I had who was really not cooperating with the intended parents and sharing information with them about the status of the pregnancy. The intended parents were overseas, and they were extremely anxious; they’d had a child die before, so they were really, really, really anxious. And I think it was a combination of a little bit of defiance on the surrogate’s part and a little bit of neurotic control on the intended parents’ part. But essentially, it got to a point to where they weren’t speaking to each other, and there were issues with the pregnancy – not life threatening but things that had to be monitored.

So in that particular case, what I did – and this is where it sucked to be solo – I looked at the contract again, and I noticed that the agency can require psychological support and counseling throughout the term of the pregnancy. And a lot of this particular surrogate’s issues revolved around not being heard, not being understood, wanting it her way, blah, blah, blah.

So I called up the agency, and I said, “I recommend – I’m not your attorney, but we work together; I recommend that you invoke this clause. I think you will find it beneficial for you going forward in the event there’s something that happens, and B, I think it would be extremely beneficial for my client to be able to discuss and release some of this pressure.” And just that alone resolved a lot of the conflict, and it eventually came around. (Lawyer CA)

Good lawyers are characterized by their degree of responsiveness and triage when emotions flare, and coordination with the overlapping reproductive field professionals: the agency and the psychologist. This attorney actually used the formal contract to trigger the counseling provision.

By contrast, a bad lawyer or agency is characterized by their failure to attend to their client’s emotional needs and financial rights. One year after her surrogacy, an uninsured surrogate from Wisconsin continues to suffer from depression and health problems, despite informing the agency of her troubles, including unpaid bills. Even though there was a counseling provision in her surrogacy agreement, both the agency and lawyer ignored it. Despite this story, lawyers and agencies interviewed for this study eagerly defended the value of their services, particularly compared to “self-matched” or “pro se” cases. As a Pennsylvania lawyer surmises, “do-it-yourself stuff is just fraught with disaster. The only times I’ve ever seen situations really break
down and fall apart is when people do it themselves.” Many interview subjects agreed with a surrogate in Wisconsin who “liked having them as a mediating between us.”

In fact, lawyers like having a mediator, too. Rather than tackling conflict on their own, some lawyers outsource emotion management. According to one, “I think it’s hard when you get sort of sucked into that emotional piece…as far as the day-to-day drama of the managing of the relationship – that’s why I don’t do divorces anymore…that’s why I’m not a psychologist” (Lawyer PA). Another lawyer advises her clients, “I’m here to help you through the legal process…but if you’re having difficulty communicating with them or if you’re having difficulty on other pieces, I really encourage you to use the provision that are in the counseling clause” (Lawyer WI). Surrogacy is unique in its pervasiveness and integration of therapeutic professionals not only into the day-to-day practice of law, but also into the formal contract. No better alliance demonstrates the degree to which attorneys anticipate and tactically manage a variety of emotions in their clients throughout the pregnancy to minimize attachment, conflicts, and risk amidst a highly uncertain legal landscape. Lawyers admit being “happy” when they know an experienced counselor is involved. As a California lawyer confessed, “my shoulders can relax if I know it’s [a therapist] who’s been involved in the field a really long time.” The integration of psychologists into surrogacy contracting plainly dispels the myth that exchange relations are asocial and non-emotive.

6-C. Summary of Findings

This chapter used the experiences and feelings of surrogates and intended parents to show how and why reproductive lawyers, with the help of matching agencies, anticipate and tactically manage a variety of emotions in their clients throughout the pregnancy. I used the interviews of surrogates and intended parents to highlight the kinds of feelings experienced in the process. By managing intentions, expectations, and emotions, both the parties and the professionals manage risk. A primary goal is to minimize attachment and conflicts within a multijurisdictional, disparate, and ambiguous legal field. In addition to agency coordinators, psychologists in the overlapping mental health field play a unique role in handling the emotional dynamics that permeate these arrangements. It detailed five categories of feeling rules along with informal emotion management techniques deployed in surrogacy contracting that serve a legal risk management function.

First, lifestyle rules and restrictions are a key strategy deployed by lawyers on behalf of distraught, anxious, and demanding intended parents. Feelings like fear, anger and vulnerability in the intended parent(s) cause them to not only assert greater degrees of control over the carrier, but with the help of lawyers, also cultivate attachment in the baby by connecting them directly to the gestational process. They also meet the intended parent(s) need for control over a pregnancy they cannot carry themselves. Running along a spectrum of “overbearing” and “unreasonable” to less demanding and more trusting of the surrogate’s judgment surrounding diet, habits, and activities, lifestyle rules are both symbolic and policed to varying degrees. Tension over the rules and restrictions can spark resentment and hurt feelings in the surrogate, risking conflict.
Second, intimacy and contact restrictions are intended to manage the risk of bonding and attachment between the surrogate and child, which has the potential to derail the lynchpin of the entire agreement: establishment of legal parentage in the intended parents. Rules against viewing, handling, breastfeeding, or future contact with the child – even the intended parents – not only police detachment, but instantiate in the surrogate her role as gestational laborer rather than “family member” or “friend.” Variation in contact restrictions often corresponds to how much fear, pain, or jealousy has to be managed for intended mothers as compared to gay intended fathers. However, I have shown power and forms of control exerted through rules are gender-neutral, even if their motivations are distinct. While agreements formally prohibit future contact between the parties and the newborn, informally relationships can develop.

Third, naming and labeling practices manage expectations for parenting as contemplated by the exchange relation; calling a surrogate a term like “gestational carrier” detaches her from the role of a birth mother using gender-neutral language. Further, “intended mother” or “intended father” makes abundantly clear expectations regarding who are the “real” parents as a legal matter, minimizing confusion and thereby, risk. The surrogate’s role as a worker, providing the service of “carrier,” is constituted through the language of contracts.

Fourth, compensation and fee provisions in the formal agreement serve to manage expectations, mentally prepare clients for the medical risk, and elicit informed consent from the surrogate. They also formally determine the price to be paid for gestational labor, the value of serious physical risks, and a variety of inconveniences. Compensation provisions literally define woman’s worth, especially evident when the fee is for abortion, maintenance on life support, or an insurance policy for surviving children. Valuation can create contentious negotiations, feelings of shame, insult, but also gratitude when a surrogate is connected to more generous intended parents. Thus, lawyers and agencies discourage discussions about money between the parties, and avoid potential conflicts by channeling the payments through escrow accounts. In an unsettled legal terrain, lawyers and now matching agencies manage risk by rationalizing and commodifying the process, seeking uniformity across jurisdictions.

Finally, psychological counseling and mediation provisions in contracts are the quintessential way in which feeling rules are formalized, but also enacted through the informal practices of triage and interpretation. When emotions run high, lawyers and agencies call upon counselors to contain the conflict, and thus, the risk of the agreement unraveling. Most importantly, integrating counseling into the process of surrogacy contracting not only evidences the emotional nature of exchange relations, but also demonstrates overlap between the legal, fertility, and mental health fields. Together, surrogacy matching, contracting, medical procedures, and post-partum counseling constitute the reproductive field.

By examining the role of law in structuring the emotional aspects of exchange relationships, I generate a socio-legal model about the practice, dynamics, and broader institutional effects of surrogacy contracting and the professionals who coordinate them. Given a highly ambiguous and uncertain legal environment, the legal field has increasingly turned to a psychological logic.
that emphasizes emotional fitness and feeling management as a means of creating social order amidst uncertainty. The actors involved throughout the process turn to contracts as a way of regulating emotional attachment and risk associated with surrogacy relationships. The concluding chapter will detail the theoretical, disciplinary, and policy contributions I am making through this dissertation.
Surrogacy contracting is a relatively new, unsettled and until now, unmapped terrain on which little socio-legal research has been conducted. In the face of legal ambiguity and discord among jurisdictions, attorneys who specialize in surrogacy, in tandem with agencies and counselors in the reproductive field, use specific contract provisions and informal emotion management practices to contain feelings, channel intentions, and guide expectations in their clients to minimize attachment and manage significant risks. My qualitative research shows the ways in which contracts created in the reproductive field become sites of contestation, management, and norm generation. Within this field, private parties exchange gestational labor as commodity through a distinctive form of “subcontracting” not yet uniformly sanctioned in law. I demystify economic and liberal legal presumptions that contracts are neutral transactions between two rational, objective actors. Surrogacy contracts are by definition gendered: only women can perform this form of service work. According to case precedents, media, and personal accounts it is also a highly emotional transaction. The affective dimension of surrogacy contracting is underscored by the field’s unique and pervasive reliance upon psychologists, including their formal integration into the contract terms. How does a lawyer, whether motivated to help a client form a family or protect the interests of the woman carrying that pregnancy, cope with the uncertainty in the “Wild West” that is surrogacy?

Further, the stakes in this particular exchange relation are huge: at minimum, the life of a new child. After all, located at the “nexus” between the surrogate’s womb and the interests of the parents are the interests of a child born of intention, facilitated through a legal instrument. My field research establishes that people are willing to undertake grave legal, physical, and personal risks, travel almost anywhere, and pay significant amounts of money to participate in the creation of a family using a third party surrogate. It also establishes that women are willing and able to provide this service, no matter their motivation. This dissertation has demonstrated that emotions abound and play a crucial part in each and every stage of the process, tightly bound with gender and family identity, by strategically channeling clients into the roles of “mother” and “father” against centuries of social norms. In managing risk and intention for parentage through the formal legalization of emotion management, actors in the reproductive field actively redefine and constitute broader social norms about gender, family, and the value of the labor required to do so. In other ways, they reify old stereotypes about women, maternity, and domesticity.

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28 This title is a nod to Arlie Hochschild’s groundbreaking perspective on the “commercialization of human feeling” in The Managed Heart (1983). However, her work and its progeny have yet to address the role of law in emotion management, discussed throughout this dissertation and in more detail in this conclusion.

29 Several interview subjects described the unsettled terrain of surrogacy contracting as the “Wild West,” including Gestation Depot in California, All in the Family (a hybrid operation) in Texas, “Tamera” and “Melinda” who are lawyers in Maryland and Nevada, and “Monica,” a parent through surrogacy in California.

30 See Chapter 1; Interview of Wesley, Lawyer MN.
Before I summarize the empirical, theoretical, and disciplinary contributions of my research, along with policy implications of the results, I will analyze the generalizability of this study, given my findings on the case of surrogacy.

7-A. Generalizability and the Case of Surrogacy

Is a case study about surrogacy and the institutional theory of law and emotions derived from it transposable to other types of exchange relationships, or is it too “gendered,” “emotional,” and “unsettled” as to make it unique? I demonstrate that gender, emotions, and legal certainty are variables, present in differing degrees along a continuum in surrogacy contracting. Surrogacy is one type of exchange relationship selected for study precisely because it highlights each of these variables in a particularly overt way. However, I do not seek to re-instantiate an anti-feminist paradigm that aligns women and emotions in a “separate” and “private” sphere outside of public, commercial life. Rather, I aim to illustrate through a particular case, which highlights these variables in action, just how “relational” and social contracting really is. Both emotions and gender have been neglected dimensions of exchange relations. While the generalizability of the institutional theory of law and emotions must be tested in different contexts in the future, I predict that gender, emotions, and legal certainty are variables present in other types of exchange relations in varying degrees.

How might surrogacy be a representative case, generalizable to other cases? Like all contracts, interested parties hire a lawyer, make an offer, provide consideration through payment, and most importantly, get acceptance from a willing partner for the exchange relationship. Even though the bargain is “private,” transactions must be as legal as feasible because they have a publically enforceable dimension, especially given the contested and ambiguous nature of the legal field generally, albeit in varying degrees (Edelman 2007). While the majority of subjects interviewed for this study had separate counsel for review, in practice, some individuals – in surrogacy or any other context – do not. Attorney and institutional expertise decreases the likelihood of legal risks, including criminal sanctions or litigation, and increases chances for winning, one reason why the “haves come out ahead” (Galanter 1974). This is true in a variety of contexts, and especially demonstrated in this study of surrogacy. Additionally, it is not unusual for business transactions to include brokers and other organizational actors who contribute to legal processes and add services, like the matching agencies featured in this study.

Further, all contracts include a variety of rules and restrictions to govern the exchange relationship and enforce the promise. Just like surrogacy, contracts include rules about communication, privacy and confidentiality, payment provisions, and dispute resolution clauses.

31 While I can claim that most, though not all surrogates, have a lawyer review their contract, I am unable to claim at this time that their representation is adequate.
32 The nature of my research method, snowball sampling, may have created some bias in this regard. Most of the lawyers in my study require that a surrogate have a contract reviewed prior to signing. Since the “opt-in” recruitment procedure enabled lawyers to anonymously recruit clients into the study, there is a bias in my sample of surrogates who had separate legal counsel.
Part of being social, relational — and human — is to experience and express feelings. All contracts seek to manage risk to some degree. While perhaps relatively more consequential, the risks surrogates, hopeful parents, and their loved ones are willing to endure are categories of risk present in other contexts, including complicated processes, errors in “service delivery,” potentially “defective” products, and exposure to legal sanctions. Further, those risks are assigned specific commercial values. All exchange relationships include valuable consideration for the bargain, a core principle of contract law. Thus, all commercial transactions require payment of fees for goods and services. Just like other contexts, some surrogates perform compassionate, uncompensated labor. But the focus of this dissertation has been on the enforceability of commercial contracts, rather than gratuitous promises memorialized in agreements. In any case, an accord can famously be made with a “mere peppercorn” of consideration.  

Having explained how the case of surrogacy explored in this dissertation is applicable to other exchange relationships, I now turn to synthesizing my findings to highlight the variables introduced in the institutional theory I have proposed: gender, emotions and legal ambiguity.

First, in contrast to gender-neutral and informal “non-contractual” business relations, the formality of an abortion provision that asks a surrogate to terminate in the case of fetal abnormalities, against other legal norms that guarantee her that right to choose, are critical to the outcome of the entire pregnancy. Further, having a hospital plan, and set expectations surrounding breastfeeding and other intimate post-birth contact between a surrogate and the newborn, are consequential. Bonding and attachment could unravel what is the lynchpin of the entire agreement: establishing legal parentage, despite a surrogate’s legal status as a birth mother, let alone, her feelings. Whether those feeling rules are effective, unnecessary, or largely symbolic is a separate inquiry. No matter the answer, this dissertation takes the first step at establishing the fact of legalizing emotion management and its pervasiveness in a particular contracting context. It also tackles why and how that feeling management is occurring.

Second, surrogates are neither detached “gestational hostesses” nor one-dimensional “carriers.” They too come to the table with a set of conflicting emotions, obligations, and relationships that require coherence to and cooperation with a private legal process, given the stakes. No matter what her inward feelings, a surrogate’s contract and the practices that surround its performance channel her to exert emotional labor; she is obliged to perform the duties she is assigned, obey rules and restrictions intended to minimize maternal bonding, and align her feelings with a outward display of detachment. A surrogate’s ability to do so is managed all along the way: from the time she is screened for her emotional fitness to be hired during the matching phase, to how she negotiates the feeling rules in the contract, to its full performance: relinquishing the baby. Since all individuals are unique, how much emotional labor will be required of a particular surrogate will vary. Some surrogates will find it much easier to

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33 Courts generally do not second-guess the adequacy of consideration, in the absence of fraud or misrepresentation. If it induces an exchange, nominal consideration is sufficient. Having compassion can motivate a surrogacy exchange — or any exchange, but to be a contract requires nominal consideration to represent something of value. See the Restatement of Contracts, Second.
cooperate, or be more susceptible to techniques deployed by professionals intended to manage their detachment, among other sentiments. Where there is resistance, there is conflict, requiring triage by lawyers to contain risks. Tamping down a surrogate’s emotions is the top priority.

Third, while intended parents’ feelings must also be managed, as the “employers” who pay for gestational labor, they do not perform emotion work. They are not constrained to align their inward feelings with their outward displays. In fact, they are free to express them, exert control, and authentically participate. Instead, attorneys, matching agency coordinators and counselors will work towards cultivating particular emotions in the intended parents, like gratitude and excitement for the baby-to-be. They might also actively diffuse levels of control by reminding their clients how controlling behavior could trigger resentment, causing conflicts. The complicated power dynamics clearly present in surrogacy should be analyzed in more detail in a future project, and are considered in section 7B, below.

Although they do not perform emotion work, intended parents still have to be emotionally managed. Lawyers and fertility professionals will step in to deflect tensions in the face of intended parents’ high emotions and control, like jealousy and despair experienced by intended mothers who suffer “womb envy,” as described in Chapter 6. Sometimes attorneys and matching agents perform triage to diffuse tensions or communications back on track. While intended parents are not performing emotional labor, they are experiencing a spectrum of emotions that could potentially derail the process. Attorneys manage the ultimate fear of all intended parents: whether a remorseful or spiteful surrogate might refuse to relinquish custody of “their” baby within a legal terrain that sometimes protects her choice not to. Conversely, attorneys manage the surrogate’s greatest fear: that she might get “stuck” with a baby she did not intend to add to her own family.

In sum, while surrogacy is a highly emotional and legally consequential exchange relationship taking shape in a multijurisdictional landscape, the theory of emotion management proposed in this dissertation may be transposable to a variety of other contexts, which should be tested in future research. Parties to all exchange relations, in differing degrees, experience emotion. The extent to which feelings are managed depends on several variables, like the level of uncertainty or ambiguity in a particular legal field; the level of conflict between the laws of jurisdictions; and the level of risk parties and professionals in a particular legal terrain are willing to take to accomplish performance of an agreement, no matter what the context.

I will conclude this dissertation with a summary of the empirical, theoretical, and disciplinary contributions of my research, along with policy implications of the results.

7-B. Empirical and Theoretical Contributions

This is the first socio-legal empirical study of the process of surrogacy contracting. Thus, I make two distinct but significant contributions. First, I provide a map of this relatively new, multijurisdictional terrain, charting the contours of the reproductive field using the
“artifactualist” approach to the study of exchange relations encouraged by Mark Suchman that includes the contract instruments from individual transactions, the observation of actors in those relations, and social contexts (2003). I used in-depth interviews to all key parties in the relationship, and across twenty legally diverse jurisdictions – in addition to examining the language of the contracts themselves through extensive content analysis. Instead of just interviewing lawyers, or surrogates, parents, or agencies, it achieves a holistic picture of the actual experiences of the participants across the four corners of the agreement from each perspective, what precedes that formalization, and what follows the birth. I supplement those data with other key players involved in the process, including psychologists, agency counselors, and surrogate husbands, also heavily impacted by their wives’ third-party pregnancies.

More importantly, I show how the emotional aspects of relationships are managed through contractual language and in the broader exchange relationships that surround contract formation. The end goal of a surrogacy agreement – as in all exchange relationships – is to avoid disputes and ensure smooth performance of the contract. Therefore, the purpose of channeling feelings is to avoid conflicts and risk given the high stakes of surrogacy contracting in an ambiguous, disparate and unsettled legal field. I argue that lawyers and others working in legal environments anticipate, evaluate and manage risk in exchange relations by managing emotions through three primary emotion management strategies: assessing emotional fitness as an anticipatory emotion management technique, through feeling rules, and through triage.

First, anticipatory emotion management criteria are used in two phases: primarily, to assess emotional fitness during the matching phase to screen through, psychologically evaluate and appropriately pair surrogates with parents; and next, to manage expectations for the relationship between the parties during and following contract performance, especially expectations surrounding the lynchpin of surrogacy contracts: the parties’ intention to establish legal parentage in the individual or couple who hires the surrogate for gestational labor. As professionals imbued with a particular perspective, psychologists help institutionalize the criteria for emotional fitness across various matching agencies and settings. In significant ways the legal field, fertility field, and mental health field intersect and overlap. Evidence of that is found in three places: (1) in the ways psychological evaluation provisions are carried over from the matching process and crystallized in the formal contract document, (2) that hybrid agency-legal operations are in business across the United States, and (3) that fertility clinics, reproductive endocrinologists, counselors, and law firms have referral lists to one another, jointly constituting a larger reproductive field.

Second, by generating specific feeling rules in contracts to manage the emotions of intended parents and surrogates, formalizing those rules and diffusing values for the labor women provide, medical risks they take, and fees for a variety of “inconveniences.” I demonstrated that a web of formal restrictions in contracts are developed and deployed by lawyers in collaboration with matching agencies to prevent emotional attachment, resentment, or alienation in the surrogate mother and handle feelings like vulnerability, anxiety, and jealousy in the intended parents. Lawyers, agencies, and counselors also work to intentionally cultivate particular emotions like gratitude and excitement. My analysis revealed five clusters of feeling rules, including: (1)
lifestyle rules, such as restrictions on diet, physical activities, and habits; (2) rules governing contact, like sexual intimacy between the surrogate and her spouse, viewing the newborn, breastfeeding, and future relationships; (3) terms establishing the parties’ role identity, such as “gestational hostess,” “gestational carrier,” or “intended father”; (4) provisions determining compensation to be paid for surrogate labor, fees, and the value of risks; and (5) psychological counseling and dispute resolution clauses. Construction and intervention surrounding each of these provisions is intended to promote feelings of attachment in the intended parents, and conversely encourage detachment in the surrogate.

Along with feeling rules, I showed that terms that define each party’s role and compensation help to manage expectations and cultivate their identity as women, workers, and parents. Surrogates perform the terms of their contracts, their gender, and their emotional labor by acting in ways contrary to norms for a birth mother when guided to do so by lawyers and professionals in the reproductive field. Channeling expectations for legal parentage – or managing intention before conception – allows lawyers to reduce hurt feelings at birth, making the practice distinct from the emotional experience of adoption. Specific contract language used to identify the parties and their roles before and throughout the relationship point out the sharp divide between being a “gestational carrier” and “intended parents” who will perform motherhood and fatherhood. Terms in contracts thus redefine and constitute the institution of family and its social actors. Professionals in the reproductive law field thus teach intended parents and surrogates how to “do” gender, family, and emotions by managing both.

Third, lawyers and matching agents perform triage as an informal conflict management strategy when feelings erupt, and invoke the psychological counseling provisions in the contract for necessary interventions and legal risk management. Once they step in, psychologists, social workers, and other counselors deploy an “interpretation” strategy to cultivate empathy between the parties. Counselors use interpretation to prevent a spiral of misunderstandings, resentment, jealousy, anxiety and a variety of other hurt feelings, and mostly, to encourage communication. Sometimes provisions for post-partum counseling are offered to surrogates in the formal agreement, though typically capped by number of sessions, weeks following labor and delivery, or by cost. In those cases, lawyers will continue to manage their clients emotionally, especially when surrogates are feeling abandoned or “cut off,” following official contract performance: establishment of legal parentage and relinquishment of physical custody in the child.

Over time, these types of emotion management provisions and practices in surrogacy contracts appear to have diffused across the reproductive field, creating uniformity in business models and materials. As the content analysis showed, despite the fact that surrogacy is still a nascent and unsettled terrain, a variety of rules, restrictions, terms, valuation, and practices are found across the contracts sampled. I observed early stages of the process of institutionalization in the legal field (Edelman et al 2001). Institutional theory emphasizes the processes through which ideas, practices, and rituals come to be taken-for-granted, subtly shaping the behavior of social actors (Powell and DiMaggio 1991). My data suggest that parties to contracts, their lawyers, and fertility professionals that guide them become agents of institutionalization, unwittingly producing and diffusing socially constructed ideas about gender, motherhood, and
work (cf. Edelman 1992). Thus, the “Wild West” of surrogacy has to some extent been tamed by a highly institutionalized set of rules about how surrogacy relationships are to be managed. The logic of psychology in particular comes to dominate the reproductive field through each stage of the surrogacy process as actors strive to create a form of social order in an otherwise tenuous arena.

As a result, two different kinds of institutionalization appear to be occurring, forming the broader reproductive field. On the one hand, the law is unsettled and not institutionalized, per the “Wild West” model, characterized by the differing laws of surrogacy, its legal uncertainty, and multijurisdictional practices. On the other hand, there is social institutionalization of various practices and organized structures engaged in normative regulation of the legal field. The broader reproductive field forms and is internally regulated under these conditions. Overall, my analysis shows that lawyers use contracts, informal strategies, and law more broadly to manage the emotions of both their clients and those of the opposing party. In so doing, lawyers generate new norms that become institutionalized in the reproductive field, and more broadly in society. As I explain below, the institutional theory of law and emotion management in exchange relationships that I have developed in this dissertation could have important implications for other contexts beyond the “Wild West” of surrogacy.

7-C. Contributions to Multiple Areas of Scholarship

The analysis in this dissertation has important implications for several diverse literatures that are not generally considered together. First, my analysis offers a novel perspective to the study of exchange relations in the field of law and society not only by integrating both emotions and gender into the analysis, but also by encouraging scholars to rethink the relative importance of formal contract language to contexts that are unsettled, risky, and new. When customs in the industry, business norms, and reputational bonds do not yet exist to coerce contract performance, how do exchange relationships evolve and lead to the generation of new customs? In contrast to much social-legal literature that emphasizes the importance of ongoing relationships to contracting (Macaulay 1963), I show that in the surrogacy context, the goal is to formally discourage or even prohibit ongoing relationships. Yet parties regularly perform their agreements; if surrogates did not relinquish custody, the field would not be viable. While a surrogate may carry a second pregnancy for the same family, it is typically not foreseen during initial contract performance. Thus, in the surrogacy context, prospects of a future relationship are unlikely to induce compliance. Instead, I show that, at least in an unsettled legal field, emotion management rules exert significant force towards performance of the accord. Thus, my analysis of surrogacy contracts brings scholarship on emotions and gender to bear on the socio-legal understanding of contracts as exchange relationships. Until now, the socio-legal literature has largely overlooked the important ways in which contracting helps to institutionalize social norms surrounding gender, work, and family, especially motherhood (Luker 1984).
Beyond contracting, my research illustrates another aspect of the “law in action” (Macaulay 1963; Friedman 1975): despite formal laws banning surrogacy in domestic and foreign jurisdictions, people who want to create children using a third party surrogate find ways around the law. Further, I find that the emotion management practices of reproductive lawyers are in some ways similar to, but in other ways distinguishable from the divorce lawyers in Sarat and Felstiner’s landmark study (1986). As in the surrogacy context, divorce lawyers help their clients reach their settlement goals, “despite being trapped in a system laced with uncertainties” (Id. at 128). Divorce lawyers engage in “client management activities” in an effort to keep their clients’ anger from becoming “obstacles to closure” (Id., 128-131).

However, the divorce lawyers in Sarat and Felstiner’s study are “cynical realists” who try to minimize time validating clients’ emotions by reminding them that the settlement of their property issues will be derailed if they fail to keep their feelings – especially anger – under control. They distinguish themselves from “counselors.” In anticipation of some predictable emotional struggles, agencies and lawyers in surrogacy openly acknowledge and thus embrace emotion by channeling it during the matching phase, drafting, and contract performance. Since emotions cannot be separated from the legal process, they generate specific feeling rules and informal strategies, including psychological counseling, triage, and interpretation. Whereas the strategy of the divorce lawyer is separating law (cynical realism) from emotion, the strategy of the surrogacy lawyer is to legalize feelings into the process. While the means of achieving it differ, both strategies are designed to manage risk.

Second, this dissertation contributes to gender, work, and reproduction in both the law and society and feminist jurisprudence literatures. It tables debates within feminist jurisprudence over whether surrogacy is “good” or “bad” for women by presenting a novel framework of how interactional social practices in the context of surrogacy contracting intersect with legal institutions and actors in the fertility field to define, on the macro-institutional level, the meaning of motherhood, the value of women’s labor, and how we conceive the family. Debates about the normative consequences of the practice of surrogacy can now proceed with a greater understanding of how law affects both surrogates and intended parents.

My intention is not to reverse gains made by feminism by pushing women back into separate, private sphere of domesticity outside the bounds of public life. Instead, I show that emotions are everywhere, including stereotypically “rational” free market transactions. The body of data corralled for this dissertation establishes that contracting is clearly social, gendered, and highly emotional, filled with complexities across a spectrum of human feeling. This includes intended fathers, intended mothers, surrogates and their husbands. Lawyers and agencies situated in the reproductive field – in concert with surrogates and parents – use emotion management strategies that ultimately redefine and institutionalize cornerstone social norms. These techniques actively construct the meaning of motherhood, not as the woman who gives birth, but the one who sets an intention to form a family, regardless of gestation or genetics. By encouraging detachment between the surrogate and fetus, the attorney becomes an author in the construction of what it means, fundamentally, to be a mother.
Feminist scholars may struggle between viewing surrogacy as universally oppressive and commodifying, and their commitments to equality regardless of sexual orientation. In fact, I have shown that legal actors help to redefine what constitutes a normative family. They assist heterosexual infertile couples and singles, gay men, and lesbian women, to form intentional families through the surrogacy process, while actively cultivating the hope, joy, and bonding that would come “naturally” to others. Thus, they also constitute a new norm for fatherhood. Overall, the data demonstrate a high degree of gendered performance — including playing the role of “father” or “mother,” or negating it — and efforts to align that role with appropriate emotional expression. Development and policing rules of detachment between a birth mother and her child runs counter to long-held social norms about maternal bonding. Is this “good” or “bad” for women and men?

Surrogacy certainly contributes in significant ways with the reinstitutionalization of women into the domestic sphere, particularly as it relates to the valuation of women’s gestational labor. However, power dynamics between the parties to the bargain run along a spectrum of oppressive for the inexperienced surrogate who goes without legal counsel, to fully informed and empowered surrogate who finds parents at her mercy. She may even have multiple support groups both online and in her community, which educates and empowers her. Thus, contracting is not purely “domination” as in Pateman’s model (1988; Pateman and Mills 2007), nor simply another form of sexual oppression. In fact, some surrogates exert a good deal of bargaining power when engaged with desperate, infertile, or womb-less gay parents who rely upon them to gestate a child they ache to have. Surrogacy thus requires negotiating mutual vulnerability. Contract violations will spark conflicts and renegotiation. The degree to which they are formalized, enacted, resisted, or resolved offers a window into how law matters when managing feelings in the context of surrogacy, a particularly affective and gendered exchange relation.

Third, this dissertation contributes to existing sociological analyses of emotion management in the sociology of work that overlook the role of law. I offer an institutional theory for how emotions, gender identity, and relationships are managed in surrogacy contracts, a particular kind of exchange for services. Those who serve as surrogates report they are motivated by economic, as well as compassionate reasons. They also enjoy being pregnant and the attention it brings. However, surrogates work in service to matching agencies that facilitate her “employment” contract and cap her pay, or directly to hopeful parents who offer a wage as brokered by reproductive lawyers, while situated in a particular legal consciousness (Ewick and Silbey 1998). The formal and informal rules emerging from the agreement that characterize surrogate labor and each of the party’s roles may be said to consolidate “manufacturing” with “service” work. Laboring through surrogacy offers a brand new dimension to typical scholarship in the Sociology of Work, since selling your gestational “product” extracts the ultimate cost on a “piece-rate” basis, child by child (Brooks 2007; Salzinger 2003).

The womb arguably becomes the “shop floor,” caught between capitalism, economic necessity, and often a sincere opportunity to offer couples the chance to bear their own genetic or “intended” offspring when they are unable to physically do so. From this perspective, surrogacy exemplifies the deskilling and the re-feminization of the market for women as primarily
domestic laborers, since the only requirement is the ability to carry the child in womb, rather than education or professional training (Braverman 1974; Smith 2001, 1994). Surrogacy is therefore susceptible to instantiating the divide between the public and private sphere, reason and emotion. Under the guise of “free contract” and non-emotive “labor,” surrogacy may revert women back into the domestic sphere, but with a commercial twist: their gestational labor is now paid. Surrogacy contracts normatively establish what constitutes appropriate employment by simultaneously encouraging the commodification of the body through paid gestational labor, and alienation from its “product.”

Further, emotion management occurs at every stage of the process – even before intended parents select the surrogate with whom they hope to form a unique, intimate, and legally binding relationship. Anticipatory emotion management and emotional fitness criteria are then formalized through specific terms, rules, and provisions embedded in contracts and diffused through the reproductive field. In demonstrating the relationship between contract rules and emotion management, I legalize Hochschild’s feeling rules (1983). However, it is also possible that for some, the imposition of “intimacy restrictions” via contract impose non-feeling rules. Rather than controlling “natural” maternal feelings, contracts for surrogate labor may challenge long-held stereotypes about women as “essentially” more emotional, nurturing, and feeling, thus requiring “management.” These findings would align with perspectives that both gender and affect are performed in social context and not innate, but empirically demonstrate that phenomenon. Since employment and conflicts are affective, this study of the intersection between law and emotion management in the case of surrogacy can also be used to understand the processes at work when “feeling rules” are negotiated in other exchange relations, and their broader social implications. Lawyers have a common goal: to establish parentage in the intended parents and get the surrogate the compensation she earns – with as little emotion management and conflict as possible.

In conclusion, I offer a socio-legal, institutional, and feminist view of contracts and contracting that, in contrast to liberal legal theory, portrays contracts as sites in which emotions and their management is at the forefront. Surrogacy relationships are clearly sites in which beliefs about gender, motherhood, and work shape, and are shaped by, the content and meaning of law. While this dissertation explores the case of surrogacy, my institutional theory of the legalization of emotions should be transposable to other exchange relationships. Further empirical research can test its generalizability.

7-D. Policy Implications

From a policy perspective, the findings of this project have critical significance for the surprisingly unstudied world of surrogacy contracting on multiple levels. Advances in reproductive medicine, growing infertility, and trends in gay parenting have fueled a sharp rise in surrogacy contracting worldwide. Within the United States, jurisdictions are still divided on the legality of commercial surrogacy, which continues to be banned in most countries around the globe. There is vast diversity among state laws on surrogacy, including absence of any
regulation, total bans, disavowal of compensation, and statutes that provide an administrative framework. Surrogacy remains largely unregulated and legally ambiguous, and falls outside the protection of federal adoption statutes that prevent a remorseful birth mother from terminating her parental rights. Ethical debates on the commercialization of life through gamete markets and contract pregnancy persist, but have not halted the boom in the family formation market. In fact, scientific and medical success in the cryopreservation of embryos and gestational surrogacy has spurred private bargaining and use of technologies in the absence of federal regulation and state enforcement.

One critical finding with public policy implications is that legal prohibitions on surrogacy contracts have not prevented parents from seeking a woman they can pay to carry a child. Thus, there is significant legal risk. Also, the Internet has also made it easy to find donors and surrogates for hire, despite locale or legal restrictions. Parties and their agents may, or may not, ever meet in person. In fact, surrogacy contracting is now multijurisdictional. In my sample, a lawyer might be hired who is licensed in California by homosexual intended parents who live in Washington D.C. where commercial surrogacy is criminal, whose Wisconsin matching agency found them a surrogate who lives in Illinois. Further, a number of attorneys have international clients – intended parents who live in Europe, Asia, Australia, South America, or the Middle East where the practice is illegal – but use carriers from “surrogacy friendly” states within the United States.

The findings in this dissertation can inform policy decisions in the areas of reproductive medicine, health, family law, and discrimination. These findings also provide insight into the struggle for law to keep up with advancements in science and technology, especially when those technologies are already in social practice without oversight (Jasanoff 1995). The findings in this dissertation are also timely, given legislatures were in the midst of considering legalizing the practice during my fieldwork, including the states of New York and Washington. Further, the characterization of surrogacy as a dispassionate contract for “services rendered” in jurisdictions where it is legal do not consider both the emotional aspects of these arrangements for all parties concerned, and the difference between gestating and other forms of labor.
REFERENCES

Books and Articles


**Cases Cited**


INTRODUCTION: Hello, my name is Hillary Berk. As you know, I’m conducting research at the University of California, Berkeley, studying how people connect and manage their relationships when choosing to have a baby for another person through a surrogacy agreement. As I think I mentioned before, today I’d like to talk to you about your experiences, thoughts, and opinions about drafting and facilitating surrogacy contracts, a bit about the types of clients you represent, and your perspective on developments in this practice area. I want you to know just how much I appreciate your time and your perspective on this topic. Your insights are really valuable.

INFORMED CONSENT PROCESS

I. Background

1.) First, let me begin by asking you about your decision to go into this practice area, with a specialization in handling surrogacy contracts.
   a) Probe for details about how they got interested in it
   b) Probe for details about when started
   c) What types of things motivated you to enter this field?

2.) How long have you been practicing law? Probe for areas of professional practice to now. Do they work with a firm or solo practitioner? Do they have a sense of the number of other attorneys in the field (if solo or specialty firms) or noticeable shifts?

3.) Ask some demographic questions or have them record on a background face sheet:
   a) What is their marital status; partnered; single; etc.
   b) Do you have any children?
   c) If not, would you like to in the future? Curious if they would they choose surrogacy for themselves?

II. Connecting with the Parties/ Establishing the Relationship

1.) How do you come to know your clients?
   a) From where do they get referrals? (From other clients; other lawyers; etc.)
b) Probe for if they have fertility organizational affiliation or connection
   c) Probe for whether they advertise, frequency and where
   d) Do they have a website that advertises a “specialty” in surrogacy contracts?

2.) Is there a particular type of client you tend to serve?
   a) Probe for represents surrogates; represents parents; or both
   b) Probe for if the other party is separately counseled
   c) Do they tend to serve or target a particular community (gay couples; infertile couples; single
      women; etc.)?
   d) If so, why do they target a particular kind of client? Probe for personal and/or professional
      rationale

3.) I’m interested in knowing more about the process and how it unfolds, from connecting with a
    potential client to actually getting a signed contract in place with the parties. Could you tell me, in
    broad terms, the steps involved to help me get a sense of the progression of your work?

4.) Are there any other types of professionals involved with the surrogacy agreement, for example, a
    fertility organization, a support group, psychologist who performs an assessment by referral, an
    escrow trust company, physicians, or others?
   a) Probe for whether they have special relationships with fertility groups.
   b) Probe for if a third-party professional was involved, what role did they play

5.) How do you view and characterize the relationship between the parties to the contract?

6.) I assume a lot has changed in terms of legal rules since famous cases like Baby M. or Johnson v.
    Calvert. Can you help me understand how things work in terms of the legality of surrogacy contracts
    today? Do the laws differ by State?
   a) Have you done cross-state surrogacy contracts? Any international contracts?
   b) Probe for whether clients (parent or surr) can have different jurisdictions
   c) Do they accept referrals from clients from out of State? Country? Why?

III. The Agreement

1.) I’d now like to find out a bit more detail about how surrogacy contracts are developed from inception
    to signing. Later we can talk about if you’ve ever had situations that required a dispute over the
    contract terms or a breach.

    First, I’m wondering if we can go through a sample written contract and talk about some of the terms
    and provisions together, and what purpose they serve.
    a) Probe for general chronology of how the agreement gets developed; their process
    b) Who are the typical parties to an agreement

2.) How do you decide on the terms of the agreement?
   a) Probe for where the terms come from
   b) Do they use a “boilerplate” format and work from there?
   c) Probe for who came up with the initial language of the format if it is a boilerplate (they came up
      with it; another professional passed it along; a legal association has a model; website; etc.)
   d) What role, if any, do the parties play in drafting the contract language?
3.) I’d like to ask about “terms of art” that are found in surrogacy contracts. How do you refer to each of the parties in the agreement? (Probe for labels identified)
   a) Probe for how those terms derived or passed along
   b) What is the function of using particular terms versus others?
   c) How would you characterize the nature of the roles of each party (business deal; employment relationship; compassionate exchange that is formalized; etc.)?

4.) Do you draft provisions relating to payment? How are the couched?

5.) Are there special clauses you think are essential to a surrogacy contract? Why?

6.) How do surrogacy contracts refer to the child-to-be?

7.) Are there specific provisions or clauses that are typically inserted into surrogacy agreements?
   a) Probe for what those are and what they refer to
   b) Probe for what purpose they serve; why the attorney would make sure it is in there

8.) What is typical “consideration” in a surrogacy agreement, i.e., what does the contract specify the surrogate gets; what do the intended parents get?
   a) Probe for whether money, housing, health care, etc. given as consideration
   b) Probe for intangible and tangible things they got from the exchange
   c) Probe for how surrogacy contracts are legal (i.e., it’s a payment for service, not “baby selling”)
   d) How about when things go wrong (e.g., miscarriage or prematurity)?

9.) How did you come to know and understand the law about surrogacy or this kind of process?

10.) Have you noticed a change, or initiated a change in the contract terms, over time? Are certain terms becoming more common than when you first began this practice area?

11.) What legal authorities do you rely on in your professional practice in terms of surrogacy? Are you in a special professional network of other specialists that exchange information? How do you keep abreast of changes in case decisions?

12.) Are they willing to let you have a copy of a sample written contract with names redacted?
   a) Try to get a sample of early versions of a contract to the most recent
   b) Try to get a sample of a typical versus atypical versions

13.) Once the baby is born, are there other legal processes that have to take place besides just the signed contract? For example, does the lawyer have to do a separate process, like a formal adoption? How does the “exchange” work, legally?

IV. Emotion Management

1.) Can you describe a bit about the insemination process? Is that part of the contract?
   a) Probe for how pregnancy proceeds clinically (uses own egg; insemination; embryo; etc.)
   b) Probe for the emotional aspects of the early part of the process from lawyer’s perspective

2.) Are there any typical “rules” the parties need to follow included in the contract?
   a) Probe for what the rules are and their purpose
b) Probe for how rules enforced or followed  
c) If in an intimate relationship, any prohibitions on intimacy or contact with partner?

3.) Is either party asked to change any habits during the pregnancy term (like diet, drinking, smoking, intimacy, living arrangement)? If so, is this formalized in the contract? Why?

4.) Are there specific terms, provisions or requirements in these contracts you would characterize as related to emotions, feelings, or psychological welfare? Are there provisions you have developed to help anticipate or manage the parties’ emotions? What about informal practices?

5.) What do you recommend to clients in terms of a relationship with the parties during and after the pregnancy?  
   a) Probe for how involved the “parents” should ideally be and why  
   b) Probe for degree of privacy versus intrusion: how frequently in contact or together  
   c) Are you concerned about the surrogate’s potential emotional attachment to the baby?  
   d) Do you have particular advice to parents regarding issues of vulnerability or control? Specific examples?

6.) Can you think of informal rules and practices between the parties that are not included in the formal contract, but you are aware of from past experience?

7.) What is the most unusual contract provision(s) that you recall putting into surrogacy agreements that stand out in your memory?

8.) Are there particular emotions you have found crop up for either of the parties? Do they express issues with particular emotions? Which?

9.) Does a typical contract formalize rules surrounding the birth of the child?

10.) Are there rules about breast-feeding the baby? Why or why not?

11.) Are there any rules about interacting with the baby immediately after the birth?

12.) Are there rules about continuing relationships between the parties and the baby?  
   a) Probe for contact provisions  
   b) Probe whether any agreement about continuing relationship not according to terms  
   c) In your experience, does a surrogate want a relationship with the child even if prohibited?

13.) How seriously do you think the parties take the written contract? Is it more of a formality?

V. Conflicts or Issues During Contract Term

1.) Have you ever handled misunderstandings, miscommunications, or disputes with clients over the terms of the agreement, after it is signed?  
   a) Probe for what it was  
   b) Probe for how they handled, coped, or managed it  
   c) What role does the formal contract play in resolving disputes?  
   d) Do you have conflict management clauses in your contracts?
2.) What kinds of issues arise for the parties during the contract term?
   a) Probe for example(s): what happened; any “rules” broken (breach)
   b) Probe for how it was resolved, if at all
   c) Can you think of a situation where a party was asked to do anything that made her feel concerned or uncomfortable, even though she or he previously agreed to it by contract?

3.) What is the proportion of your agreements you would characterize run “smoothly” versus face some “speedbumps?”

4.) Do you handle the dispute resolution for the parties?
   a) Probe if clients seek formal assistance from the contract lawyer
   b) Probe for whether lawyer perceives they handle it themselves
   c) Does the lawyer send them to a neutral third-party, like a mediator or counselor?

5.) Have you had to enforce the terms of a surrogacy contract for any party in court?

6.) Have you ever represented parties that had second thoughts about the process?

7.) Have you noticed a change in the number of clients over time? What about the type of clients you serve?

8.) How do you feel about surrogate motherhood in general?

9.) Do you do any community outreach, education, or CLE’s for other attorneys on the subject of surrogacy contracts?
   a) If so, what/how?
   b) Are they affiliated with support groups, bar association, legal education, write articles, website, etc.?

10.) Can you refer me to a colleague who also drafts surrogacy contracts or are otherwise involved in the process you might refer me to?

ADDITIONAL INFO: Can you think of anything you think I might like to know that I didn’t ask you about?

____________________________________________________________________________________

CLOSING: I really appreciate your time and your willingness to share this interesting but personal experience with me. You have been very helpful, and it’s been a pleasure to talk with you. After I review my notes of our conversation, if I have any questions, I may need to call you for a brief clarification. If you think of anything after this interview you’d like to share or add, please feel free to call me at (phone number redacted) or send me an email at hberk@berkeley.edu. If you call me, I can call you right back, so that you do not incur any telephone charges.