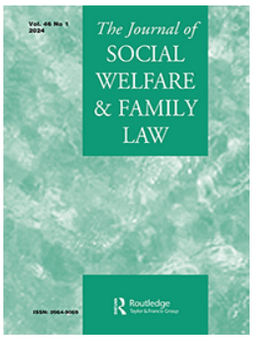

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Legal parenthood in surrogacy: shifting the focus to the surrogate's negative intention

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ABSTRACT

This paper examines how legal parenthood should be allocated in surrogacy under English law. I argue that we need to shift the focus of the discussion to the surrogate's negative intention to not be a parent as the key to move away from the current gestational model of motherhood. This has three main benefits that are explored in this paper. First, it respects surrogates' voices and construes them in terms of their autonomy and agency, rather than solely in terms of their vulnerability. Second, it provides a conceptually robust basis for recognising legal parenthood of the intended parents at birth, since the surrogate's negative intention is construed as the trigger for the application of specialised rules on parenthood. Third, it serves as a guiding principle in developing appropriate and comprehensive protections for the surrogate, including recognising the intended parents as the legal parents at birth, the parameters of the surrogate's right to withdraw consent, and further safeguarding requirements and checks before entering into a surrogacy agreement. Overall, focusing on the surrogate's negative intention allows us to view surrogacy in a nuanced way, away from false dichotomies, and contributes to a more compelling case in favour of actively facilitating surrogacy.

KEYWORDS

Surrogacy; parenthood; assisted reproduction; intention; motherhood; HFEA

Introduction

Scope and thesis

How to establish, allocate, transfer, and extinguish legal parenthood are core questions for family law. While gestation, genetics, and legal presumption (notably in the case of the marital presumption of paternity) are still the default rules for establishing parenthood in natural reproduction, intention has emerged as the driving force underpinning the recognition of fatherhood and second female parenthood in assisted reproduction under English law. By contrast to assisted reproduction techniques such as IVF and sperm donation, surrogacy is not actively facilitated under English law, meaning that legal parenthood at birth in surrogacy is not subject to specific regulation, but rather to the default rules. As such, the surrogate is the legal mother at birth, which presents

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significant challenges for all parties involved: the child, the surrogate and the intended parents (Law Commission 2023, 1.13).

This paper will focus on legal parenthood in surrogacy in the jurisdiction of England and Wales, yet taking into consideration that surrogacy is currently regulated on a UK-wide basis. I will examine the significance of the surrogate's intention to not be a parent and its underrepresented role in the legislative discussion surrounding legal parenthood in surrogacy. Building on Horsey's distinction between the '*positive*' intention of the intended parents to acquire legal parenthood and the '*negative*' intention of the surrogate to *not* become a parent (Horsey 2010, p. 466), I argue that this negative intention has a conceptually crucial role to play in the debate surrounding surrogacy regulation. By highlighting the surrogate's negative intention, we can move past a framing of the discussion on legal parenthood along a false dichotomy between the intended parents' intention and the surrogate's role in gestation and birth as the competing grounds to claim parenthood. Instead, I argue that the surrogate's *negative* intention should be given equal weight to the *positive* intention of the intended parents for ascribing legal parenthood.

Firstly, I argue that our contemporary rules on parenthood, while not presenting a coherent view on the underlying model of family (McCandless and Sheldon 2010, p. 182), demonstrate a shift towards intention as a basis for establishing legal parenthood. However, actively facilitating surrogacy would require a further leap, as gestation currently persists as the basis for ascribing motherhood in assisted reproduction (section 33 HFEA 2023). In order to render this leap possible, I argue that we need to pay close attention to the difference between the intention of the person who gestates *to be a parent* in other forms of assisted reproduction such as in vitro fertilisation (IVF) or donor insemination (DI), and the intention of the person who gestates *to not be a parent* in cases of surrogacy. Consequently, the surrogate's 'negative' intention is the key to making this conceptual leap and breaking away from the current gestation-based paradigm of motherhood.

Secondly, I argue that this would allow us to highlight the surrogate's agency as a central tenet for the regulation of surrogacy. This would enable us to move away from the current predominant conceptualisation in current law and in reform proposals of the surrogate as a 'weak' subject whose autonomy in making decisions with regard to *not* being a parent is persistently questioned under the guise of protection. This not only does a disservice to surrogates, but also presents a very narrow view of how to protect them, notably by confusing protection of the surrogate with recognising them as the legal mother at birth. Instead, in line with the Law Commission suggestions (2023) and surrogates' voices in empirical studies (Horsey *et al.* 2022), I will argue that protection should take the form of recognising the intended parents as the legal parents at birth.

After providing a brief overview of this paper's central thesis and highlighting the importance of my research question in this first part of the paper, in the second part I will look more closely into how surrogacy is regulated in the UK and in how the surrogate is conceptualised under the current law and reform proposals. I argue that the surrogate is conceived of as a 'weak' subject whose agency in making the decision to enter a surrogacy arrangement is fundamentally questioned in the law, which leads to confusion on how to better protect them. Then, in the third part, I move on to explore how legal parenthood is ascribed, as well as the role of the surrogate's

intention in regulating legal parenthood in surrogacy. I first examine the different grounds for recognising parenthood, focusing on the role of intention within assisted reproduction. I argue that our rules on assisted reproduction have moved towards an intention-based model for fathers and second female parents, yet remain firmly grounded in gestation for the mother. I then build on that discussion to examine the role of intention within surrogacy more specifically. Using Horsey's distinction between the positive intention of the intended parents and the surrogate's 'negative' intention to not be a parent as a springboard, I argue that the surrogate's negative intention is critical in providing a robust conceptual foundation to regulate legal parenthood in surrogacy that will allow English law to break away from the gestation-based paradigm of motherhood. At the same time, highlighting the surrogate's negative intention is critical in recasting the surrogate in terms of their agency in the process and in recalibrating how the law should approach protections and safeguards for surrogates.

Significance and topicality

The issue of legal parenthood in surrogacy, which this paper focuses on, is important for three main reasons: firstly, because the current law on surrogacy fails to adequately protect the parties involved and reflect their lived reality; secondly, because it relates to a complicated factual landscape where competing claims to legal parenthood can arise and thus the law needs to be clear and coherent (Brown 2020); and thirdly, due to its topicality, not only because it has important consequences for a growing number of children, surrogates, and intended parents, but also because of the current momentum as the Law Commission recently suggested surrogacy law reform (Law Commission of England and Wales & Scottish Law Commission 2023).

Firstly, it is important to reflect on how to better regulate legal parenthood in surrogacy because the current law is not fit for purpose. As the Law Commission report (2023, 1.13) puts it, 'the current law governing surrogacy does not work in the best interests of any of the people involved: children born though surrogacy, women who become surrogates, or intended parents'. Brown's research has found that the HFEA 2008 (and its predecessor HFEA 1990) still reflect the traditional, nuclear family ideals and surrogacy law continues to rely on a binary two-parent model of parenthood (Brown 2020, p. 115, 126), which are simply ill-suited for dealing with the issues arising from surrogacy. As such, the current law on legal parenthood, which relies on the nuclear family archetype, is 'poorly designed to respond to surrogacy arrangements' (Horsey and Sheldon 2014, p. 87). This is further exacerbated by the fragmented and haphazard way in which surrogacy law has developed over the years, resulting in a 'contradictory and confusing for all' regulatory framework (Alghrani and Griffiths 2017, p. 166).

Secondly, a clear and coherent legal framework is necessary in surrogacy to efficiently address complex parent-child constellations. As Brown (2020, p. 113) explains, assisted reproduction 'can give rise to complex factual scenarios which involve competing claims of legal parenthood'. While in other assisted reproductive techniques, as we will see below, the law merely reflects the broader rule that the person who gestates is the legal mother at birth (section 33 HFEA 2008), in surrogacy this complexity is exacerbated even further by questioning this link between gestation and motherhood. As such, Brown's

(2020, p. 113) claim that in assisted reproduction cases the law needs to provide clear answers with regard to legal parenthood as 'the "correct" answer might not be readily apparent' is even more pertinent in surrogacy, where the fundamental link between gestation and legal motherhood is challenged.

Thirdly, the issue of legal parenthood in surrogacy affects a growing number of children. While the majority of children will be born through natural reproduction and thus the default rules will be appropriate in ascribing legal parenthood, the number of couples and individuals turning to assisted reproduction is steadily rising. According to data collected by the Human Fertilisation and Embryology Authority (HFEA), the UK's independent regulator of fertility treatment, in 2021 around 55,000 patients had in vitro fertilisation (IVF) or donor insemination (DI) treatment at licenced UK clinics, rising from roughly 53,000 patients in 2019, while egg storage cycles rose by 64% and embryo storage cycles by 30% from 2019 to 2021 (HFEA 2023). Unlike with other forms of assisted reproduction that are actively facilitated in law and thus fall within its regulatory oversight, there are no statistics on surrogacy provided by the HFEA. However, there is evidence that use of surrogacy has been growing in recent years (Brown 2020, p. 126) and especially foreign surrogacy (Fenton-Glynn 2015, p. 83).

The best indication for the prevalence of the practice in England and Wales is the number of parental orders applied for and made by family courts. According to data by the Ministry of Justice, 564 parental orders applications were made in 2022 related to 624 children, and 384 applications have been already made in Q1-Q3 2023 related to 429 children, with further data for Q4 2023 still pending (Ministry of Justice 2023). The same source indicates that 449 parental orders were made in 2022 and 390 in Q1-Q3 2023. The overall number of parental orders made has been steadily rising since 2011, when 117 orders were made. It is worth noting that these numbers are likely underrepresenting the total number of surrogacy cases, as many intended parents might not be aware of the need to apply for a parental order (Law Commission of England and Wales & Scottish Law Commission 2023, 1.50) or might have used e.g. an overseas birth certificate without the issue of surrogacy being addressed in the process of registering the birth. Likewise, it is important to note that this upward trend in parental order applications might not represent a corresponding rise in surrogacy cases, but merely in the number of people actually applying for a parental order, so the correlation between these two is presumed. Yet this data on parental orders is at present the best way available to capture this presumed correlation. This reasonably inferred rise in surrogacy cases is further supported when coupled with the general trends across assisted reproductive techniques that are reported by the HFEA, which show a clear growth in the number of people resorting to assisted reproduction.

Therefore, in respect of the scope of application of legal parenthood in surrogacy, the significance of the questions examined in this paper is twofold: first, the number of children to whom the current surrogacy law relates seems to be rising, and secondly, the implications of determining legal parenthood for this rising number of children, surrogates, and intended parents are significant and far-reaching (Law Commission of England and Wales & Scottish Law Commission 2023, 1.53). Legal parenthood is a legal status that typically connects parent and child for life and confers significant rights and obligations to both sides that also have an impact on other areas of law, such as citizenship, inheritance, or social security law (Boyd 2007, p. 65). As recourse to assisted

reproduction techniques is rising, the question of legal parenthood in the context of assisted reproduction has become, as Sir James Munby P put it in (Re A (Human Fertilisation and Embryology Act 2008, 2015, p. 3), 'a question of the most fundamental gravity and importance . . . emotionally, psychologically, socially and legally'. The need to examine legal parenthood is particularly topical and urgent in surrogacy cases, as the law is currently undergoing a process of change, with the Law Commission having recently concluded an ambitious six-year project examining the law and making recommendations for reform (Law Commission of England and Wales & Scottish Law Commission 2023).

Surrogacy regulation in the UK

The current law on surrogacy

Surrogacy remains the topic of intense academic debate and starkly different legislative approaches. Many arguments against surrogacy revolve around the need to protect surrogates from exploitation and commodification of their bodies, especially in commercial surrogacy (Wertheimer 1992, Berkhout 2008). This view was adopted by the Warnock Committee, which was established in the aftermath of the birth of the first child through In Vitro Fertilisation (IVF), Louise Brown, who was born in England in 1978. The Warnock Committee was tasked with examining the practical and ethical implications of assisted reproduction and making recommendations on how to regulate it. In its Report, the Warnock Committee concluded that 'even in compelling medical circumstances the danger of exploitation of one human being by another appears to the majority of us far to outweigh the potential benefits in almost every case' (Warnock Report 1984, 8.17). On the other side of the debate, arguments in favour of surrogacy range from pragmatic arguments about the need to regulate a practice that 'is here to stay' (Horsey 2019) to radical queer feminist critiques of reproductive labour and the gender binary (Lewis 2019).

Across European jurisdictions, legislative approaches to surrogacy vary considerably. France and Germany outright prohibit it, while others like Greece and Portugal actively facilitate it by recognising legal parenthood of the intended parents at birth (Fenton-Glynn and Scherpe 2019). However, prohibitive jurisdictions have been forced to deal with cross-border surrogacies, as intended parents seek recognition of their parental status with regard to a child born through surrogacy abroad. In the landmark *Mennesson* judgment (Mennesson v France, 2014) and subsequent *Advisory Opinion* (Advisory Opinion on Surrogacy, 2019), the European Court of Human Rights (ECHR) tackled France's refusal to recognise legal parenthood between a French couple and their children born through surrogacy in California, despite the foreign birth certificate recognising them as parents. The Court acknowledged the reason behind France's refusal to recognise them as parents was 'to deter its nationals from having recourse to methods of assisted reproduction outside the national territory that are prohibited on its own territory' (*Mennesson v France*, 2014, §62). However, the best interests of the child must be accommodated under French law by allowing a pathway to parenthood for the intended parents, which involved recognition for the intended father, who also had a genetic connection to the children, and

adoption for the intended mother, who lacked such a genetic connection. By contrast, the German Federal Court of Justice (Bundesgerichtshof – BGH) took a more moderate case-by-case approach and in 2014 found that a male same-sex couple should be recognised as the legal parents of a child born through surrogacy in California (BGH, Case XII ZB 463/13, 2014, p. 350).

This disparity between the French and the German approach as two examples of prohibitive European jurisdictions on how to handle foreign surrogacy cases highlights two issues. First, that even jurisdictions that outright ban all forms of surrogacy domestically will have to come up with solutions on how to allocate/transfer legal parenthood in cases of children born through surrogacy abroad. Despite the lack of domestic legal recognition and moral and public policy objections that shape their prohibitive approach, both France and Germany ultimately allowed the recognition/transfer of legal parenthood to the intended parents. As Fenton-Glynn (2015) notes in the context of English case-law, 'while public policy may oppose such [surrogacy] agreements, the welfare of the child requires that they be given effect, leaving courts with little choice but to find a way to justify their approval'. Secondly, the difference in the approach taken between France and Germany highlights the difficulty of tackling foreign surrogacy cases absent a comprehensive regulatory framework that facilitates surrogacy. In *Mennesson*, the default rules were ultimately applied to recognise fatherhood through the father's genetic connection to the children and motherhood through adoption, but in the German case the court adopted a milder approach by recognising a foreign judgment and balancing the public policy considerations with the rights guaranteed under the European Convention on Human Rights. It is noteworthy, however, that in both cases one of the intended parents (the father in *Mennesson* and one of the two men in a same-sex registered partnership in the German case) was genetically connected to the child(ren).

In terms of regulating surrogacy, the approach adopted in England and Wales sits somewhere between prohibition and recognition. While surrogacy is not prohibited as a practice, it is not actively facilitated by allocating legal parenthood to the intended parents at birth. Instead, legal parenthood is allocated to the surrogate at birth, reflecting the broader rule that motherhood is based on gestation. Legal parenthood is then transferred to the legal parents through a 'parental order', a legal mechanism provided for under sections 54–55 HFEA 2008 and applying specifically to surrogacy. This transfers legal parenthood after birth to the intended parents by judicial decision. Parental orders are a less cumbersome, invasive and lengthy process than adoption under English law, where the applicants are subject to a series of assessments to be in principle approved for adoption, before the process of finding a child through an adoption agency can even begin. Parental orders also better reflect the surrogacy agreement and unique position that intended parents are in with regard to the specific child born through surrogacy to them, which under their arrangement is viewed by both them and the surrogate as *the intended parents'* child.

Under the current law, the court can evaluate parental order applications on a case-by-case basis, paying particular attention to the best interests of the child, rather than having legal parenthood of the intended parents be automatically recognised. A pre-conception assessment of the welfare of the child to be born is also carried out in order to provide assisted reproduction services under the HFEA 1990 (Section 13(5), a provision that has been criticised as violating the reproductive privacy of those undergoing fertility

treatment by subjecting them to an assessment that those having children through natural reproduction are not subject to (Jackson 2002).

Therefore, in theory, parental orders insert another welfare assessment at a stage where the child actually exists and there is a lived reality to take into account in deciding who is better placed and willing to care for them. They also provide an opportunity for the courts to consider whether the legal requirements under sections 54 and 54A HFEA 2008 have been met, such as a time limit for making the parental order application and the prohibition of payments to the surrogate other than for 'expenses reasonably incurred' (section 54(8) HFEA 2008). However, in practice English courts have little leeway in terms of rejecting surrogacy agreements that have not complied with these requirements. As Lady Hale has explained (Whittington Hospital NHS Trust v XX, 2020, p. 16), even when the intended parents have not complied with the law, the court is 'confronted with a fait accompli' where the welfare of the child 'will almost always require that he is not left legally parentless' by transferring parenthood to the intended parents, even when payments to the surrogate had been made. This was reflected, as the Brazier Report (3.5) noted, in the practice of the courts that 'showed themselves (not unsurprisingly) to be more concerned to secure the future of a particular child, than to maintain strict rules on expenses'. As Fenton-Glynn observes, this tension between the public policy requirements incorporated in the current law on surrogacy and the welfare of the child born through surrogacy 'has led to judgments in which the law has been stretched and manipulated to fit the requirements of justice, making the legislation little more than an empty shell' (Fenton-Glynn 2015, p. 83).

The conceptualisation of the surrogate under English law and reform proposals

The current approach of English law towards surrogacy can be traced back to the early negative view adopted by the Warnock Committee. The foundations of the current legal framework on assisted reproduction in the UK were set by their 1984 Report (commonly known as the 'Warnock Report'), published in 1984. A direct result of the Warnock Report was the Human Fertilisation and Embryology Act 1990 ('HFEA 1990'), which created the Human Fertilisation and Embryology Authority ('HFEA'), an independent public regulatory body that oversees assisted reproduction and research. The legislation was extensively amended with the Human Fertilisation and Embryology Act 2008 ('HFEA 2008'), which introduced legal parenthood for same-sex couples and reformed the mechanism of 'parental orders' that was first introduced under the HFEA 1990. Today, assisted reproduction is regulated mainly through the HFEA 1990 and the HFEA 2008 on a UK-wide basis.

Surrogacy is considered under Chapter 8 of the Warnock Report, where the Warnock Committee outlines argument against and for surrogacy (Warnock Report 1984, 8.10–8.16) before making recommendations on law reform (8.17–8.20). The Committee concedes that surrogacy presented 'some of the most difficult problems' they encountered (8.17) and concludes that 'the weight of public opinion is against the practice' (8.10). The arguments against surrogacy that the Committee considered included that surrogacy was 'the wrong way to approach pregnancy' and 'degrading to the child who … will have been bought for money' (8.11). Arguments in favour of surrogacy highlighted that 'there is no reason … to suppose that carrying mothers will enter into

agreements lightly' (8.14) and that surrogacy is not 'an undertaking that trivialises or commercialises pregnancy, but . . . a deliberate and thoughtful act of generosity' (8.13) which is underpinned by women's right to their bodily autonomy (8.14). Ultimately, the Warnock Committee was not convinced by these arguments and recommended rendering a crime for (both for profit and non-profit) agencies to offer surrogacy arrangement services, as well as for professionals and others 'who assist in the establishment of a surrogate pregnancy' (8.18), while keeping privately arranged surrogacy agreements outside the reach of criminal law (8.19). It also recommended explicitly clarifying in statute that surrogacy agreements are illegal and legally unenforceable by courts (8.19).

Two aspects of the Warnock Report are crucial for our understanding of how, in this first attempt to consider how the law should regulate surrogacy, the surrogate is primarily conceptualised as a 'vulnerable' subject in danger of exploitation. Firstly, the way the Committee's scepticism towards surrogacy is framed illuminates an approach that highlights the need to prevent exploitation of the surrogate rather than framing the question in terms of the surrogate's agency and autonomy. The Committee does not address the arguments in favour of surrogacy that approached the discussion in terms of the surrogates' 'perfect right to enter into such agreements . . . just as they have a right to use their own bodies in other ways, according to their own decision' (8.14). This consideration of the surrogates' agency in making this decision is not reflected at all in the articulation Committee's own position. Instead, their view focuses on the 'moral objection' that 'people should treat others as a means to their own ends', which becomes 'positively exploitative when financial interests are involved' (8.17). As Brown (2020, p. 125) observes, the Warnock Report adopted an 'exploitative conception of surrogacy'. The Brazier Report, a subsequent law review that will be examined below, also concluded that while the Warnock Committee considered arguments related to the welfare of the child or the sanctity of the marital relationship, 'the fundamental objection of the majority in Warnock to surrogacy rested on the dangers of exploitation of the surrogate' (Brazier *et al.* 1998, 2.5). In describing what surrogacy is, the Warnock Committee took the view that 'it generally involves some payment to the carrying mother' (Warnock Report, 8.3) which can range from reimbursement of expenses to a substantial fee, although it considered that there are instances, for example 'when one sister carries the pregnancy for another', where no money changes hands. This focus on the financial side of surrogacy is important in the Report's approach, as the Report goes on to reflect that it has been primarily concerned with 'the commercial exploitation of surrogacy' (8.17).

Secondly, the way the best interests of the child are construed under the Warnock Report, coupled with the language used to describe the surrogate, reveal a firmly rooted understanding of the birth parent as the legal mother. The surrogate is typically referred to as the 'carrying mother' in the Report. Before going on to offer its own views on surrogacy, the Warnock Report describes the 'present position' in the law, where it discusses the Court's jurisdiction over children, noting that it is independent from the contractual arrangement between the parties. In this context, the Report observes that 'the child's interests being the first and paramount consideration, it seems likely that only in very exceptional circumstances would a court direct a surrogate mother to hand over the child to the commissioning couple' (8.6). Adopting as a starting position that the child's best interests would be better served by remaining with the surrogate reveals a conceptualisation of the surrogate as the 'true' mother of the child, reinforcing the role

of gestation in recognising legal motherhood. What follows from this premise is that if the surrogate changes their mind and decide that they want to fulfil their role as the 'true' mother of the child, that should be prioritised by the court and is assumed to best serve the child's welfare. The surrogate thus should be protected not only as a 'vulnerable' subject, but also as the 'true' mother.

Six months after the Warnock Report was published, the Baby Cotton case came about and dominated public discussion on surrogacy. In that case, British surrogate Kim Cotton gave birth in January 1985 to a child through a commercial surrogacy arrangement using the intended father's sperm. The agreement was set up by a US agency based in London and care of the child after birth was given by the courts to the European intended parents, reasoning that this was in the best interests of the child. The case was reported in a negative and sensationalist light in the press at the time and the ensuing moral panic quickly led to the passing of the Surrogacy Arrangements Act 1985 ('SAA 1985') six months later (Brahams 1987, Cotton 2019). As Fenton-Glynn (2015, p. 84) observes, while the government at the time was still deliberating the Warnock recommendations, after the Baby Cotton case they stopped debating and expeditiously passed the SAA 1985. However, as the Brazier Report noted, the legislative framework (including later the HFEA 1990) did not fully incorporate the Warnock recommendations and 'rested on no coherent basis of policy' (Brazier Report, 2.24). The SAA 1985 clarified that surrogacy agreements are legally unenforceable and banned commercial surrogacy by prohibiting agencies from profiting from surrogacy arrangements. The main position of the Warnock Report that construed surrogacy as an exploitative practice which had been informed primarily by the focus on commercial surrogacy was thus reiterated in the SAA 1985.

This 'antipathetic' view (Fenton-Glynn 2015, p. 84) towards facilitating surrogacy which can be traced in the Warnock Report has persisted in how the issue was framed in the context of subsequent legislation and law reform proposals. The HFEA 1990 updated the SAA 1985 to emphasise that surrogacy agreements are not enforceable under UK law – which was also ultimately reflected under section 36 HFEA 1990– and explicitly clarified that the person who gives birth is the legal mother (section 27 HFEA 1990). This was updated and complemented by the HFEA 2008, which extended the eligibility criteria for parental orders (sections 54–55 HFEA 2008) and introduced same-sex parenthood. Therefore, we see the surrogate construed in much the same vein under the HFEA 2008: as the 'true' mother, who is recognised as the legal mother at birth, and who needs to re-affirm their consent to the intended parents being recognised as the legal parents through a parental order. The HFEA 2008 also confirmed that motherhood is construed in strictly gestational terms not only through its reiteration that that person giving birth is the mother (section 33 HFEA 2008) but also through its treatment of same-sex parenthood. The same-sex partner, who is not connected to the child through gestation, is not recognised as a second 'mother', but as the 'second female parent'. This choice of legal terminology resoundingly reiterates that there can only be one legal mother: the person who gives birth.

In between the two Acts, the government again commissioned a review of surrogacy law. In 1997 the Brazier Report was released, recommending law reform to regulate surrogacy more comprehensively and clarify the parameters of acceptable payments to the surrogate while prohibiting commercial surrogacy. These proposals were not taken

forward. For the purposes of this paper, it is useful to look into how the surrogate was conceptualised under the Brazier Report. Generally, the Brazier Report took an approach to surrogacy that was more open to regulating it, rather than the strict negative stance taken by the majority view in the Warnock Report. The Brazier Report also considered as evidence and explicitly referred to the voices of surrogates, as reflected in empirical studies that it referenced, and used overall milder language. However, it is still informed by an underlying assumption of the surrogate both as the 'true' mother and as an inherently vulnerable subject.

In terms of the language used, under the Brazier Report the surrogate is referred to mostly as the 'surrogate mother' (Annex A) although the term 'surrogate' is also used occasionally (3.1–3.2). While references to the child are typically neutral with regard to their parents, i.e. using the neutral term 'the child' instead of 'X's child', in at least one occasion the child is referred to in explicit terms as the *surrogate's* child, when the Brazier Report comments on 'ensuring that a surrogate mother could not be compelled to give up *her child* i.e. that surrogacy contracts remain unenforceable' (7.10, emphasis added).

With regard to the surrogate's agency, the Brazier Report adopts a more nuanced approach than the Warnock Report. This approach highlights issues of agency and autonomy, but ultimately subscribes to a conceptualisation of the surrogate that uses their vulnerability as the entry point to any discussion on regulating surrogacy and on how to protect the surrogate. The Brazier Report takes into account data from studies into the views and wishes of surrogates, giving space to many surrogates who 'have found being a surrogate an emotionally rewarding experience, with no obvious ill effects on them or their families' and warns that that the degree of risk 'should not be exaggerated' (4.26). It also observes that payment for services, even when risk is involved, does not necessarily constitute exploitation (4.24) and instead notes that *lack of payment* may actually be more exploitative (4.23). It also comments that prohibiting any form of surrogacy 'would constitute an unjustifiable violation of the procreative liberty of the commissioning couple and the surrogate's autonomy' (4.38).

Yet the authors also express concern that 'women may be entering into surrogacy arrangements without full awareness of the physical and psychological risks', focusing particularly on women who choose to become surrogates due to financial hardship (Brazier *et al.* 1998, 4.19). Ultimately, when faced with 'the fundamental question of [the surrogate's] capacity to foresee the risks entailed' (4.25), the Brazier Report concludes that surrogacy carries unpredictable risks that are not fully evident before entering an agreement and to which 'some women may be particularly vulnerable' (4.25).

While I do not by any means argue here that surrogacy (or indeed pregnancy) does not carry risks, I submit that there are different ways that these risks could be approached. An approach that would focus on the *agency* of the surrogate would examine and recommend heightened pre-agreement safeguards to ensure the surrogate formulates and expresses their will freely and accurately, such as medical screening and advice to ensure informed consent, legal advice to ensure the surrogate is aware of the legal implications, counselling to navigate the psychological and social aspects of the process etc. This is the approach taken under the Law Commission Report, as we will see below. Instead, an approach that focuses on the surrogate's perceived *vulnerability* as the entry point to the discussion would assume a broad area where the surrogate's will cannot be trusted to have been formulated autonomously.

I argue that the Brazier Report still falls within this second approach. When concerned with the topic of protection it focuses on recommending restrictions that would prevent surrogates from entering into certain types of surrogacy agreements. To explain their recommendation, the Brazier Report (4.45) highlights that it reviewed 'evidence as to the generally lower income and educational attainments of surrogates in comparison with that of commissioning couples' as well as 'accounts of a number of distressing experiences of surrogacy' to conclude that 'the potential vulnerability of surrogates justifies legal protection of their welfare'. Therefore, the Brazier Report (4.39) recommends that the law prevents 'the commercialisation of surrogacy' which they view as the cause of potential harm to surrogates, since payments might unduly influence vulnerable surrogates to enter into surrogacy agreements due to financial hardship.

However, the understanding I offer here of the approach of the Brazier Report should be contextualised with respect to their terms of reference, which were limited to reviewing the law and making reform proposals related only to payments to the surrogate and to whether surrogacy arrangements should be regulated through a recognised body. As such, the scope of their exercise did not include a comprehensive review of surrogacy and did by definition focus on whether commercial surrogacy should be permitted and to what extent.

In 2023, the Law Commission of England and Wales and the Scottish Law Commission concluded an in-depth review of surrogacy law and published their proposals for reform (Law Commission 2023). The resulting Law Commission Report can readily be viewed within this broader movement from a generally 'antipathetic' early attitude to surrogacy, evident in the Warnock Report and the SAA 1985, towards a more nuanced and positive approach, as reflected in the Brazier Report and in the HFEA 2008. The Report took a positive view on actively facilitating surrogacy by introducing a new legal pathway that would allow the intended parents to obtain legal parenthood from birth, subject to certain statutory requirements and safeguards. In November 2023, the government issued an interim response stating that the proposals would not be taken forward at the moment and that it would continue working on a full response to the recommendations.

Unsurprisingly in view of its recommendations, the language and general framing of the surrogate in the Law Commission Report signal a shift in how the surrogate is conceptualised. Firstly, the Law Commission deliberately refers to the 'surrogate' instead of the 'surrogate mother', reflecting the Law Commission's understanding that 'surrogates themselves do not, generally, like to be referred to as the mother of the child' (Law Commission 2023, p. 10). This quite intentional change in language is notable for two reasons: first, because it breaks with the paradigm of conceptualising the surrogate as the 'true' mother of the child, and secondly, because it explicitly relies on what the Commission understands to be the voices of surrogates in this respect. This second point is linked to the wider approach that is evident in the Law Commission Report which places more emphasis on the surrogate's agency through highlighting their intention. The Report observes that the current law 'does not reflect the intentions of surrogates or intended parents' and that the proposed reforms 'respect the autonomy of the surrogate', giving legal parenthood and parental responsibility to the intended parents so that 'the surrogate is not required to make decisions for a child when she does

not view herself as the parent and does not want to be responsible for those decisions' (Law Commission 2023, p. 13).

As I argue, a conceptualisation of the surrogate that relies on their agency and autonomy as the entry point to the discussion will also lead to a different conceptualisation of the safeguards needed to protect the surrogate. This is evident in the Law Commission Report. The Report focuses on the intention of the surrogate to not be a parent as a justification for reform, and thus views giving legal parenthood to the intended parents at birth as *a way to protect* the surrogate and not as *lack of protection*. In this vein, the Report explains that 'surrogates, who do not intend to raise the child as their own, are legally responsible for the child until the parental order is granted' (Law Commission 2023, 1.17) and that surrogates worry about intended parents changing their mind and leaving them responsible for the child (Law Commission 2023, 1.18).

Conclusions

In the first section of this part of my paper, I sought to provide an overview of the legislative journey of surrogacy regulation in the UK. This gradually moved from an initially wholly antipathetic view, informed by the position adopted under the Warnock review, towards a more nuanced and positive approach that seeks to facilitate transferring legal parenthood from the surrogate to the intended parents after birth through parental orders. This shift showcases the evolution of both policy and legal attitudes towards a more positive stance to surrogacy. However, current English law still subscribes to the position that, at the moment of birth, the person who gives birth is the legal mother, and the legal mother is the person who gives birth. This is true also for surrogates, who are recognised as the legal parent of a child they do not intend to parent.

In the second section, I sought to anchor this emphasis on a gestational model of motherhood to the conceptualisation of the surrogate as a subject whose agency in entering a surrogacy arrangement cannot be trusted fully, mainly due to the danger of financial pressure in the case of commercial surrogacy. I traced this conceptualisation across legal reform and reform proposals through the milestones of the Warnock Report (1984) and the Brazier *et al.* (1998) until the recent Law Commission Report (2023). The evolution of the conceptualisation of the surrogate in these milestone documents also reflects the gradual shift towards a more nuanced approach to surrogacy that gives more space to the voices and intention of the surrogates themselves. This trend culminated recently in the Law Commission Report, which recommends recognising the intended parents as the legal parents at birth.

In the following and final part of the paper, I will turn to examine intention as a basis for ascribing legal parenthood. In the first section, I will show that this gestational model of motherhood that is still prevalent in our surrogacy law mirrors the general rule of establishing motherhood in both natural and assisted reproduction. In the second section, I take a brief detour from the discussion on surrogacy to highlight how this model is also challenged in the case of trans parenthood. In the third section, I will argue that this gestational model is not suitable for regulating surrogacy, as it overlooks a fundamental difference to both natural reproduction and other forms of assisted reproduction besides surrogacy: that the surrogate *does not intend to be the parent of the child they give birth to*. Therefore, building on the distinction between positive and negative intention articulated

by Horsey (2010, p. 466), I argue that we need to afford more attention to the negative intention of the surrogate as the foundation of the conceptual leap that will allow us to justifiably break away from the gestational paradigm of motherhood and protect surrogates effectively.

Legal parenthood and intention

How we ascribe legal parenthood

Parenthood is not just a legal, but also a social concept. Its legal definition is fluid and reflects the broader social, political, economic and cultural background within which it develops and operates (Day Sclater *et al.* 1999). As Diduck puts it with regard to fatherhood, what we often think of as 'natural elements' of parenthood are those elements that 'law has identified as important in a particular temporal and social context' (Diduck 2007).

The default rules (*lex generalis*) for parenthood in natural reproduction under English law, as with all European jurisdictions, rely on the gestational link for motherhood (Ampthill Peerage, 1977) and on the genetic link for fatherhood, with the marital bond commonly now perceived as a proxy for the father's genetic link to a child through the marital presumption of paternity (Barton and Douglas 1995, p. 53). In other words, gestation, genetics, and legal presumption – at least partially premised on a presumed genetic link – make up the core grounds upon which legal parenthood is established in non-assisted reproduction.

Beyond presumptions, the biological (gestation) and the genetic link (provision of sperm), intention has also been widely recognised over time and across jurisdictions as a basis for ascribing legal parenthood in adoption (Parkin 2018, p. 88). Under English law, the Adoption and Children Act 2002 considers both the intention of the adopter and the intention of the existing parent, who must provide consent to the adoption process (unless certain requirements are met that allow the court to proceed without their consent).

More recently, intention has also emerged as a basis for ascribing legal parenthood in assisted reproduction. In the context of the HFEA 2008, while gestation is still the basis upon which motherhood is established (section 33 HFEA 2008), the recognition of fatherhood or second female motherhood (in the case of female same-sex couples) is fragmented and underpinned by intention as its basis. This is framed either in terms of the 'consent' of the mother's spouse/civil partner (sections 35 and 42 HFEA 2008), the lack of which must be shown to challenge parenthood in those cases, or in terms of an 'agreement' under the agreed fatherhood/second female parenthood conditions (sections 36–37 and 43–44 HFEA 2008). Intention, again framed as 'consent' to gamete donation and a corresponding lack of intention to be a legal parent will prevent sperm donors from becoming legal parents despite their genetic connection to the child (section 41 HFEA 2008). The same is true for egg donors (section 47 HFEA 2008), although this would be true in any case due the gestational premise of motherhood.

One key aspect to consider when discussing the tension between biology and intention in the context of legal parenthood, is that biology can incorporate different components. While in the case of the father biology refers to the genetic connection through providing

the sperm, in the case of the mother it can refer to either gestation (giving birth) or genetics (providing the egg). In the effort to understand the origins of the default rules on parenthood it is important to acknowledge that this was not always the case. It is due to relatively recent medical developments that egg donation and mitochondrial donation are possible. In the past, the person who gave birth was also necessarily the person who provided the egg. As Scott Baker J put it in *Re W (Minors) (Surrogacy)* (1991, p. 386), until recently it was not envisaged that the genetic mother and the carrying mother could be other than one and the same person. The advent of IVF presented law with a dilemma: whom should the law regard as the mother?.

This invites the question: why does the law still focus on gestation? In other words, when it became possible to split gestation and provision of the female gametes, why did family law not switch over to genetics as the basis for assigning motherhood, as it does with fatherhood? One approach is to assume that up until this split became possible, gestation was simply a proxy for the female genetic contribution (Lowe *et al.* 2021, p. 390), while another approach would be that gestation was always the primary basis for ascribing motherhood regardless of genetics, recognising gestation as the primary reproductive labour. McCandless and Sheldon (2010, p. 193) take that approach, explaining that gestation has intrinsic significance, rather than merely being a proxy for the genetic link. Gestation is also considered as the main locus of bonding between mother and child according to the bonding theory, an approach adopted by the Warnock Report (1984, p. 8) and which is rebutted by Horsey (2010, p. 460). Especially in the context of surrogacy, studies have shown that surrogates show less attachment to the foetus and experience pregnancy differently (Horsey 2010, p. 462). The focus on gestation has, however, allowed English law to require less adjustment is regulating egg donation. While the attitude towards surrogacy was negative in the Warnock Report, it was much more sympathetic towards gamete donation (Warnock Report 1984, pp. 4, 6 and 7) which is allowed and regulated under English law.

Uncoupling gestation and motherhood?

The current approach taken under English law is unequivocal: the legal mother is the person who gives birth, and the person who gives birth is the legal mother. I argue that surrogacy regulation should break away from the first prong of this core thesis that underpins the current legislative framework. Taking a brief pause from this paper's focus on surrogacy, I will also briefly outline how the second prong is also challenged through the diversity of experiences of pregnancy across the gender spectrum.

Finn argues that under English law gestation is perceived as a necessary ('all legal mothers are birth parents') and sufficient ('all birth parents are legal mothers') condition for motherhood. As Mahmoud and Romanis argue, English law 'views a pregnant person as if they already are a mother' by conflating gestation and mothering (Mahmoud and Romanis 2023, p. 110). Yet the 'sufficient' component of the test for motherhood is challenged by contemporary modalities of parenthood, as there are birth parents who would not espouse the term 'mother'. Trans men, non-binary and non-gender conforming persons may also be able to gestate and give birth, and many of them would not prefer the use of the word 'mother'.

Yet in the recent case of McConnell (R (McConnell and YY) V Registrar General 2020a), English courts construed the term 'mother' as describing a role in the reproduction process that can be delinked from gender. In that case, McConnell, a trans man who gave birth, wished to be registered as 'father' or 'parent' or 'gestational parent', as he felt those terms – unlike the term 'mother'– were reflective of his experience of parenthood. He considered 'mother' a gendered term that would be at odds with his gender identity. However, he was told that he was only able to register as the child's 'mother', a decision upheld by the High Court (R (On the Application of TT) V Registrar General for England And Wales 2019a) and later by the Court of Appeal. The High Court judgment (2019, para 280) adopted the view that the terms 'mother' and 'father' are 'not necessarily gender-specific, although until recent decades it invariably was so'.

The judgment has been rightly criticised as not appreciating the degree of dissonance this interpretation creates between the legal meaning of the 'mother' and its common understanding as a 'highly (socially) gendered term' (Fenton-Glynn 2020), as well as for not taking stock of 'lived experiences of fatherhood' for trans men (Margaria 2022). In insisting that the person who gives birth must always be designated as the legal mother, the law lacks any flexibility for accommodating experiences of parenthood that are not comfortably reflected in the heteronormative underpinnings of this premise. Beyond the justification provided by the court, we must also interrogate the foundations of this underlying reluctance to break with the gestational model of motherhood. To further probe into this, we might want to turn our attention to a case decided almost thirty years before the McConnell. In 1992, the Registrar General had refused to register a trans man as the *father* of the child born to his partner through artificial insemination by a donor, reasoning that 'only a biological man could be regarded as a father for the purposes of registration' (*X, Y and Z v the United Kingdom*, 1997, p. 17). It seems that whether they become parents through giving birth or through their partner giving birth, trans men just cannot win. Whatever the link between trans men and gestation, they can never count as fathers – or, at least not in the initial wave of cases where courts are being first confronted with the lived experiences of trans men.

It is outside of the scope of this paper to expand further on trans fatherhood, but the example serves to illuminate a general trend of reluctance when the law (either through statute or case law) is forced to grapple with realities that cannot be neatly accommodated within our existing gestational model of motherhood. Trans fathers challenge one premise of this model, namely that 'all birth parents are legal mothers'. Surrogacy fundamentally challenges both that and the inverse premise that 'all legal mothers are birth parents'.

Positive and negative intention

This paper so far has sought to illuminate the tension between gestation and intention as potential grounds for ascribing legal motherhood, which is central in the debate on how to regulate legal parenthood in surrogacy. I would now like to turn to my argument that this discussion needs to be reframed to construe intention on more nuanced terms. Rather than focusing primarily on the intention of the parents or conflating the varying intentions of both the intended parents and the

surrogate when discussing a broadly construed 'intention', it is important to distinguish between the *positive* intention of the intended parents to acquire legal parenthood and the *negative* intention of the surrogate to *not* become a parent (Horsey 2010, p. 466).

I discuss this distinction in the context of a surrogacy system that would recognise surrogacy and allocate legal parenthood to the intended parents at birth. While this is not the current position in English law, it is the position advocated for by the recent Law Commission proposals (Law Commission of England and Wales & Scottish Law Commission 2023). Under the surrogacy law reform suggested by the Law Commission Report, a new pathway to parenthood would be introduced that would allow intended parents to acquire legal parenthood at birth without having to apply for a parental order. In such a system, this distinction between the positive and negative intention is crucial for three reasons.

First, it allows explicit space in the debate on surrogacy for the surrogate from an *active* viewpoint, rather than a passive one. That the spotlight is so often on the intended parents' intention in this debate lends legitimacy to the fact that concerns about protecting the surrogate revolve around exploitation and ensuring the surrogate can *retain* legal parenthood. Instead of construing the surrogate in reductive terms as a fundamentally vulnerable subject whose decision-making cannot be fully trusted (which has been the predominant conceptualisation of the surrogate in current law and in law reform proposals, as shown in the second part of this paper), highlighting the role of the surrogate's own negative intention in the allocation of legal parenthood focuses on their *agency*.

Second, it provides a conceptually comprehensive basis for allocating legal parenthood to the intended parents. Instead of immediately focusing on the positive intention of the intended parents, the examination of how to allocate parenthood should start with the surrogate. The idea of focusing on the surrogate's intention as the starting point for regulation has been raised before, but not fully interrogated. As Mahmoud and Romanis (2023) observe '[a]n intention-based parenthood model does not necessarily displace the gestating individual's central role in the creation of a new human entity', further arguing that they 'see no reason why an intention-based model would not start from the gestating person's intention'. In the same vein, I argue that the surrogate's *negative* intention should be viewed as the normative trigger for the application of *lex specialis* in the context of surrogacy arrangements.

This approach can reframe the issue away from the false analytical dichotomy of a tension between the *intention* of the parents and the *gestation* of the surrogate as the grounds for parenthood. Or, even less helpfully, between the intended parents' *intention* to become legal parents and the surrogate's perceived '*right*' to be the legal mother, premised on a conceptualisation that views the surrogate as the 'true' mother, as explored above in the second part of this paper. Not least, and this is linked to my first point about an *active* perception of the surrogate, this would move the debate away from another false dichotomy between the intended parents viewed from the perspective of their *autonomy* – manifested in *claiming* parenthood *because of* their intention – and the surrogate viewed from the perspective of their *vulnerability* –manifested in *being given* legal parenthood *despite* their intention. Instead, both the intended parents and the surrogate should be recognised as simultaneously autonomous and vulnerable subjects. The comparison between them would then take place on the same plane: in terms of their autonomy, it

is their respective *intentions* that should be considered, and this exercise is better served by highlighting the surrogate's negative intention.

Thirdly, this approach is helpful not only in refining the discussion in terms of the surrogate's *agency* and *autonomy*, but also in terms of their *vulnerability*. In other words, focusing on the distinction between positive and negative intention also allows us to ensure more appropriate and comprehensive protection for the surrogate. On a conceptual level, this would enable us to discuss the vulnerability of the surrogate – but also that of the intended parents – as a distinct issue that warrants separate attention. On a practical level, it would serve as a guideline to identify the specific ways in which the surrogate should be protected by giving effect to their *negative intention*.

Under a system that focuses on the surrogate's negative intention, this objective of protecting the surrogate would primarily be achieved in two ways. First, by recognising the intended parents as the legal parents at birth, thus responding to surrogates' concerns about being responsible for the child and about the consequences if the intended parents change their mind and withdraw from the arrangement (Horsey *et al.* 2022, Law Commission of England and Wales & Scottish Law Commission 2023). Secondly, by putting in place mechanisms that would help ensure that the surrogate's intention is formulated and given in a free and informed manner, thus safeguarding their agency. There are three mechanisms in the recent Law Commission proposals that are particularly apt in ensuring that the surrogate's negative intention is formulated freely and with knowledge of the consequences. First of all, the provision of independent legal advice that will allow the surrogate to better understand their position and their rights throughout the process (Law Commission of England and Wales & Scottish Law Commission 2023, 2.39). Secondly, having implications counselling, both jointly with the intended parents and individually. This will allow, as the report explains, the parties to 'explore the nature of surrogacy and how they will deal with the emotional and practical consequences' (Law Commission 2023, 2.37). Third, the requirement that written surrogacy agreements are arranged through licenced and regulated surrogacy organisations. This creates oversight and ensures minimum standards across the assisted reproduction field. In order to ensure that these minimum standards are implemented in practice, periodic checks should be conducted, including surveys across surrogates where they can flag potential shortcomings and issues.

The Law Commission Report also recommends that the surrogate retains the right to withdraw their consent up to six weeks after birth, in line with international practice in jurisdictions where surrogacy is actively facilitated. In Portugal the surrogate is allowed to withdraw consent until the time that the child is delivered to the intended parents (Teixeira Pedro 2019, p. 251), while in Greece consent can be withdrawn within six months (Zervogianni 2019, p. 152) and in South Africa sixty days after birth (Sloth-Nielsen 2019, p. 191). I recognise that, especially in light of similar international practice, the right to withdraw consent will likely be part of any pragmatically-minded surrogacy law reform proposal that aims to optimise chances of drumming up public and parliamentary support. It is also connected to a wider discussion on enforceability of surrogacy agreements, which is outside of the scope of this paper.

However, I would be remiss not to observe a dissonance between such a right to withdraw consent and this paper's focus on the agency of the surrogate as the entry point to the discussion. On the one hand, recognising a right to withdraw consent seems to honour the core of my argument which is premised on the

negative intention of the surrogate, by halting the process when the surrogate no longer holds that negative intention. On the other hand, the right to withdraw consent reinforces the idea that the surrogate's initial decision to enter the surrogacy agreement cannot be fully trusted and needs to be interrogated again at different stages, including after birth. This underlying distrust has been addressed as early as the Warnock Report, where the Committee noted that one of the arguments in favour of surrogacy underscored that 'there is no reason ... to suppose that carrying mothers will enter into agreements lightly' (Warnock Report, 8.14). A similar point was considered in the Brazier Report, which concluded that surrogates may be entering into surrogacy arrangements without full awareness of the risks (Brazier *et al.* 1998, 4.19). More recently, the Law Commission of England and Wales and Scottish Law Commission (2023, 2.71) rejected the idea that the surrogate should again give affirmative consent after birth, noting that this would suggest that 'the surrogate's consent before conception is not adequate, which does not respect her autonomy'. Under a system that would duly ensure that surrogates enter such agreements with full awareness of the legal, medical, emotional, and social implications and risks involved, and where safeguards would be in place to ensure that they do not do so out of coercion or pressure, such underlying distrust in the surrogate's agency seems less justified.

One way to helpfully interrogate this – especially in light of the above caveats with regard to the pragmatic conduciveness of such a right to withdraw consent towards achieving law reform, as well as to its conceptual entanglement with the negative intention of the surrogate that is at the core of my argument – is to focus on the *parameters* and *effect* of exercising this right. Here is where the discussion shifts towards vulnerability, and needs to be framed not only in terms of the vulnerability of the surrogate, but also of the intended parents, and strike a balance between the need to protect both. Despite the centrality of the surrogate's negative intention, the consequences of withdrawing consent should not in every case lead to automatic acquisition of legal parenthood by the surrogate with no possibility for the intended parents to challenge this.

A good example of a potential suitable balance is found in the recent Law Commission Report. If the surrogate withdraws their consent before birth, then their negative intention as the trigger for the application of the *lex specialis* with respect to legal parenthood upon birth no longer holds. In that case, under the Report's proposals, we fall back on the default rules for allocating legal parenthood and the surrogate, as the person who gives birth, is the legal mother at birth. As a measure of protection for the intended parents, they can apply for a parental order and ask the court to transfer parenthood to them according to the best interests of the child. If, however, the surrogate withdraws their consent within six weeks after the child is born, then the *lex specialis* that applies at the moment of birth takes precedence and the intended parents are the legal parents. The surrogate can then apply for a parental order to claim legal parenthood. This approach is conceptually consistent with highlighting the negative intention as the trigger for the application of specialised rules, and with the broader fundamental position that the law – and not private parties – determines how parenthood is to be allocated. Allowing the surrogate to withdraw consent after birth and claim parenthood without interjecting a judicial evaluation would tip the balance too far, as it would effectively allow them to determine retroactively which rule should have applied at birth.

Conclusions

In this part of my paper, I first sought to provide an overview of how legal parenthood is ascribed and how the default rules on this are challenged through contemporary modalities of parenthood, arguing that the current law is premised on a gestational model of motherhood. Yet, in the context of assisted reproduction, intention has emerged as the main basis for allocating fatherhood and second female parenthood. I argue that while assisted reproduction techniques such as IVF can readily be regulated under the current gestational model of parenthood, since gestation and the positive intention to be a parent coincide in the same person, the *negative* intention of the surrogate to not be a parent should serve as the conceptual basis to break away from the gestational model of motherhood. Finally, I explored the benefits of this approach, including how it would allow a more appropriate and comprehensive set of protections for the surrogate, notably recognising the intended parents as the parents at birth.

Conclusion

The debate on how to regulate legal parenthood in surrogacy often revolves around the need to protect the surrogate. Yet the surrogates' wishes and needs are often assumed in these discussions, guided by a construction of the surrogate as the 'true' mother and as an inherently vulnerable subject whose agency cannot be fully relied upon. However, empirical studies that have explored surrogates' voices reveal that they mostly support allocating legal parenthood to the intended parents at birth. Surrogates worry about having full responsibility for the child, especially if the intended parents change their mind (den Akker 2003, Law Commission of England and Wales & Scottish Law Commission 2023). A study on UK surrogates revealed that they find it unfair that intended parents genetically connected to the child do not automatically get legal parenthood (Jadva 2016). More recently, a 2021 survey of UK surrogates showed that they generally do not view themselves as the mother and support proposals for reforms to ascribe legal parenthood to the intended parents at birth (Horsey *et al.* 2022).

This paper has argued that bringing the surrogate's *negative* intention, which is often overlooked, to the forefront takes note of surrogates' voices and contributes to the debate in three ways. First, it construes the surrogate not only in terms of their vulnerability, to which much of the current debate and conceptualisation of the surrogate is dedicated, but primarily in terms of their agency and autonomy. Second, it provides a more conceptually robust basis for allocating legal parenthood, where the surrogate's *negative* intention is construed as the trigger for the application of specialised rules on parenthood. This allows us to move away from a false dichotomy between the intended parents' autonomy and the surrogate's vulnerability, as examined above. Third, it serves as a guiding principle in developing safeguards for the surrogate, including the parameters of their right to withdraw consent and safeguarding requirements such as provision of legal advice, counselling, as well as regulation and oversight of the surrogacy industry. Overall, focusing on the surrogate's negative intention allows us to view the problems and challenges posed by surrogacy in a nuanced way that will contribute to a more compelling case in favour of recognising and actively facilitating surrogacy.

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