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A Rejoinder

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Professor Strouse assumes throughout his reply that the goal of our legislative recommendations was to better define "parental *rights* and responsibilities."[1] Second, he assumes that the New York Surrogate Act was "unfortunately worded" because it did not resolve the issue of the parental status of "genetic mothers."[2] Third, Strouse assumes in his critique of our recommendation favoring genetic mothers for estates and trusts purposes that the word "parent" should have the same definition in all legal settings.[3] I hope my brief comments on his three assumptions will amplify the differences in our approaches to legal responses to technological innovations.

First, as we devised legislation regarding *in vitro* fertilization we assumed the first question in law is, who is a parent. This is not a matter of rights, but rather a matter of determining if a person meets the law's definition for parental *status*. When several individuals perceive themselves to be "parents" of another human being, legislators must devise means of resolving those conflicts about parental status that the parties themselves cannot resolve. In framing the legislative issue in terms of parental status, we were cautioning courts *not* to engage in a "best interests of the child" analysis when surrogate arrangements fail without a prior determination of the parents of the child.

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1. Daniel S. Strouse, *Egg Donation, Motherhood and State Law Reform: A Commentary on Professor Palmer's Proposals,* 35 JURIMETRICS J. 31 (1994) (emphasis added).

2. *Id.* at 36 n.21.

3. *Id.* at 46.

Questions about who are parents in legal processes are institutional questions about family formation. In choosing to treat *in vitro* fertilization and artificial insemination as the same for legislative purposes, I was influenced by my view of legislative capacity or institutional competence, which I apologize for not making more explicit in my piece. As to those types of questions, I believe that the legislature should have a minimalist role in order to give private individuals the maximum opportunity to make their private arrangements about family matters.[4] Thus, the most important aspect of our decision *not* to deal with issues related to single women is that the legislature should not seek to regulate a single woman's access to or use of *in vitro* fertilization (or of artificial insemination for that matter).

Anecdotal evidence suggests that some single women who live below 90th Street in Manhattan or in locales with similar demographics are using artificial insemination or *in vitro* fertilization. Given my view of the relative legislative incompetence to deal with family formation,[5] I recommend simply leaving these single women and their collaborators in family formation alone rather than inquiring into their circumstances or their relationships to others for the purpose of defining their "statutory rights." With such statutory rights analysis comes the possibility of imposing obligations to children by state officials—judges—without regard to an individual woman's present, past, or future intent or wishes. This is the essence of legal parental status. We chose to place our statutory recommendations on *in vitro* fertilization in the sections that deal with support obligations when parties who agreed to marry or conceive children are trying to dissolve their legal relationships in order to emphasize that status implications drove our legislative proposals. To restate my first point: Professor Strouse is concerned about the "rights" of egg donors, sperm donors, etc. I am concerned with the issue of upon whom should the legislature confer the *legal status* of parent with its concomitant obligations, when intentions and actions of adults diverge.

When Professor Strouse assumes the New York Surrogate Parenting Act was "unfortunately drafted" in regard to the parental status of genetic mothers, I assume the legislature simply could not reach a majority

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4. *See generally* LARRY I. PALMER, LAW, MEDICINE, AND SOCIAL JUSTICE (1989).

5. This is a very incomplete form of "comparative institutional analysis" of the political process, the adjudicative process, and the "market," i.e., those private individuals who choose to have children either coitally or with the assistance of medical professionals through the use of *in vitro* fertilization. Professor Neil Komesar has been a long-time advocate of this type of institutional analysis of public policy issues. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

consensus about their parental status. Professor Strouse is thus correct in stating that I made a conscious effort to avoid what he calls a "difficult value choice" between the genetic mother and the gestational mother. I believe some value choices should not be resolved within a democratically constructed process, particularly when those choices involve the institution of family and its formation. All claims—of those who contribute genetic materials (men and women) to creating children as well as of those who provide gestational birth—are equally powerful and entitled to respect in the legislative process. Put more bluntly, when it comes to deeply intimate matters such as the meaning of our lives and our connection to the future through those we call "children," I believe the legislature can provide only a structure, and perhaps some incentives or disincentives, but not the detailed code of regulations suggested by Professor Strouse.[6]

The New York Surrogate Parenting Act provides some structure, incentives, and disincentives. The legislature provided *conscientious* lawyers with an incentive to stop representing to potential users of surrogacy arrangements that their written agreements would be enforced by courts in New York State. It provided a further incentive for these lawyers to advise parties to use adoption after the birth of the child. In my view, the legislators are not so naive as to think some surrogate arrangements might not still be made in New York or that some New Yorkers, with the means, will not travel to California for embryo donation. A declaration of public policy—which is what the New York Surrogate Parenting Act is at its core—is only a structure for lawyer, physician, and private person decision-making. It also includes a few disincentives, such as possible felony conviction for surrogate brokers who are found to have taken fees more than once.[7]

Third, we recommended establishing a rule of certainty favoring the genetic mother in wealth transfers because the word "parent" can have different meanings in different legislative contexts where the social consequences of the definition are different. The public policy question involved in devising legal rules about who is the parent for the purpose of giving away money is driven primarily by the social goal of efficient allocation of resources. Where lawyers are normally engaged with clients in

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6. *See, e.g.*, Strouse, *supra* note 1, at 46.

7. It is worth noting that the only persons subject to a criminal penalty under the New York Statute are those who take fees for their services in connection with surrogate arrangements more than once. Brokers who are found to have violated the specific prohibitions of offering the brokerage services for a fee are guilty of a felony if previously convicted of violating the prohibitions. § 123(2)(b). On the other hand, the private parties—the birth mother, genetic mother, etc.—are only subject to a civil penalty of up to $500 for violating the statute. § 123(2)(a).

planning the transfer of wealth, either rule—favoring gestational or genetic mothers—would further efficiency goals. The reasons for choosing a legal definition of parents in family formation, however, are based on attempts to achieve some complex social goals other than efficiency.[8] Except in adoption cases, these social goals are intermixed with a variety of individual goals and are achieved by individual agreements without lawyers. I would prefer that people decide to have or not have children without counseling from their lawyers. Such "planning" allows the decision to be in accordance with their own values. My goal is not to define all the rules for *in vitro* fertilization. My goal is much more modest: to affirm legislatively that *in vitro* fertilization processes can give individuals the status of parents in law.

Professor Strouse may have grandiose goals for the legislative process when he raises the possibility that any legislation that inhibits *in vitro* fertilization may be unconstitutional.[9] I disagree with his suggestion that the New York Statute on Surrogate Parenting Contracts is outside the authority of a state legislature to enact. But this is not the place either to outline a counter argument to Professor Strouse or Professor John Robertson, the leading proponent of "procreative liberty."[10] If we take seriously the institutional role of legislatures in helping us to resolve the ethical issues of family formation, we could then better address the comparative advantages and disadvantages of employing legislative, adjudicative, and administrative processes to assist individuals in forming families. When we are finished with all the "rights analysis" that Professor Strouse's approach suggests, I wonder if we will have better institutions: families that can nurture and sustain children until they are adults; legislatures that can respond to the benefits and risks of technological innovation; administrative agencies able to promote the socially constructive use of scientific processes; and courts able to articulate their role in making democratic processes, within a complex, imperfect, and pluralistic society, marginally better.

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8. *See* Komesar, *supra* note 5, at 14-50.

9. Strouse, *supra* note 1, at 40.

10. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994).