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## HER BELLY, THEIR BABY: A CONTRACT SOLUTION FOR SURROGACY AGREEMENTS

*Devon Quinn\**

### INTRODUCTION

Surrogacy agreements in the United States raise complex legal and ethical issues for both the parties involved and society at large.<sup>1</sup> One high-profile example is the agreement in place between Kim Kardashian and Kanye West, one of the most famous celebrity couples in America, and a surrogate mother who gave birth to their third child.<sup>2</sup> While Ms. Kardashian and Mr. West were able to

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<sup>1</sup> ALEX FINKELSTEIN ET AL., SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING, COLUMBIA LAW SCH. SEXUALITY & GENDER LAW CLINIC 3 (2016), [http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia\\_sexuality\\_and\\_gender\\_law\\_clinic\\_-\\_surrogacy\\_law\\_and\\_policy\\_report\\_-\\_june\\_2016.pdf](http://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf).

<sup>2</sup> *Kim and Kanye Hire Surrogate for 3rd Kid*, TMZ (June 21, 2017) <http://www.tMZ.com/2017/06/21/kim-and-kanye-hire-surrogate-child/>. Kim and Kanye are not alone in their endeavor to utilize a surrogate as an option to have children. Some sources estimated that in 2014, more than 2,000 babies would be born in the United States via gestational surrogacy. Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES (July 5, 2014), <https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html>. Other celebrities who have had children via surrogate include Sarah Jessica Parker and Matthew Broderick, Neil Patrick Harris, Jimmy Fallon, Tyra Banks, and Elton John. Jen Juneau, *33 Famous Families Who've Welcomed Children Through Surrogacy*, PEOPLE (Jan. 16, 2018), <https://people.com/babies/celebrities-who-have-used-surrogates/#kanye-and-kim->

legally contract with an individual to give birth to their child via surrogate in California, this surrogacy contract would be unenforceable, or even illegal, in other states.<sup>3</sup> The fact that these legal agreements lose their force beyond state lines has created inconsistencies in law, which have led to unexpected consequences.<sup>4</sup>

One example of the difficult legal questions that arise in these situations occurs when a surrogate mother decides she does not want to give up the baby she has carried to term.<sup>5</sup> Complicated custody disputes take place when surrogate mothers with second thoughts assert parental rights over the child they had previously agreed to hand over upon birth or flee to give birth in a state where the contract is unenforceable.<sup>6</sup> The complex legal landscape and high price tag associated with surrogacy in the United States has contributed to thriving surrogacy industries in other countries, such as India or Thailand, where the practice is un-regulated and fraught with fraud and exploitation.<sup>7</sup>

Many state laws prohibiting the enforcement of surrogacy contracts are the result of a combination of outdated feminist fears, far-right moralistic concerns, and a strong reaction to the infamous 1988 case of *Baby M*.<sup>8</sup> Developments in medical science and the demand for surrogacy, especially from same-sex couples, have outpaced these laws, which are unable to adequately protect the parties who enter these agreements.<sup>9</sup> Given the proliferation of

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kardashian-west. While Kim and Kanye opted for a surrogate due to medical issues, couples opt to have children via surrogate for a variety of different reasons. See *Kim and Kanye Hire Surrogate for 3rd Kid*, *supra* note 2. For example, Neil Patrick Harris and his partner are a same-sex couple who have two children born via a surrogate. Juneau, *supra* note 2.

<sup>3</sup> See *infra* Section I.A.

<sup>4</sup> See *infra* Section I.A.

<sup>5</sup> See *infra* Section I.A.

<sup>6</sup> See *infra* Section I.A.

<sup>7</sup> See *infra* Section I.B.

<sup>8</sup> See *In re Baby M*, 109 N.J. 396 (1988); see also *infra* Section I.C.

<sup>9</sup> See UNIF. PARENTAGE ACT (UPA) § 8 cmt. (NAT'L CONF. OF COMM'RS ON UNIFORM ST. L. 2002) (stating "[a]lthough legal recognition of gestational agreements remains controversial, the plain fact is that medical technologies have raced ahead of the law without heed to the views of the general public or []legislators.").

surrogacy agreements in the United States, the law should adapt to protect the vulnerable parties who enter such agreements.

In 2017, Dagan and Heller published *The Choice Theory of Contracts* which provides a framework for more effective contracts in situations such as surrogacy.<sup>10</sup> State laws which make surrogacy contracts illegal or unenforceable should be abolished. In place of federal legislation, however, this choice theory of contracts should be utilized as a more workable solution to balance the seemingly competing needs of the parties to these contracts.<sup>11</sup> The application of this theory would re-frame the contract to capture the altruistic intentions of the parties and provide specific contract mechanisms to protect each parties' unique interest—legal protection for intended parents who desperately desire a child and the surrogate mother who values the opportunity to aid them in their goal.<sup>12</sup> At the heart of the matter, a child born out of a surrogacy agreement should be entitled to clear legal status.<sup>13</sup> Enforceable, carefully drafted contracts written in accordance with the choice theory would provide this clear legal status, reflect the parties' intentions, and avoid conflict and complicated and emotional custody disputes after birth.<sup>14</sup>

Part I of this Note discusses the unintended consequences resulting from the current laws. Part I also provides background on the general debate surrounding surrogacy and the motivations and intent behind prohibiting surrogacy. Part II provides an overview of the laws as they currently stand and discusses specific laws in several states to demonstrate how dramatically the laws can vary. Part III outlines my proposed solution, the application of the choice theory of contract to surrogacy agreements.

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<sup>10</sup> HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (Cambridge Univ. Press, 2017).

<sup>11</sup> *See infra* Section III.

<sup>12</sup> *See infra* Section III.

<sup>13</sup> UPA ART. 8 cmt. (2002) (stating “One thing is clear; a child born under these circumstances is entitled to have its status clarified.”).

<sup>14</sup> *See infra* Part IV.

# I. THE UNINTENDED CONSEQUENCES OF AMERICAN SURROGACY LAW

Laws which prohibit or refuse to enforce surrogacy contracts result in unintended consequences.<sup>15</sup> Domestically, a lack of uniformity of law has led to custody disputes between surrogates and intended parents when parties have a change of heart and a lack of clarity on which party is the child's legal parent.<sup>16</sup> Legal parents have rights and responsibilities to raise and support their children which others do not.<sup>17</sup> If a surrogacy contract is enforced, the intended parents become the legal parents of the child, the surrogate mother surrenders her legal rights to the child, and the parties' intentions set forth in the contract are upheld.<sup>18</sup>

However, what happens when the contract is not upheld or parties change their mind? There may be parties to a surrogacy arrangement who resemble parents in some way or attempt to assert parental rights, such as the intended parents who originally wanted and orchestrated the agreement who may be genetically related to the subject child, the surrogate mother who carries the child and has a biological and possibly genetic connection, or any egg or sperm donors.<sup>19</sup> If a surrogacy contract is not enforced and a surrogate mother attempts to assert parental rights, should she legally be considered the child's mother? What if the child is not genetically-related to the surrogate mother? Can the court award joint-custody to the intended parents and the surrogate mother? Would the parties be effective co-parents? Would that be in the child's best interests?

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<sup>15</sup> See *infra* Sections I.A–B.

<sup>16</sup> See *infra* Section I.A.

<sup>17</sup> See UNIF. PARENTAGE ACT (UPA) § 203 (NAT'L CONF. OF COMM'RS ON UNIFORM ST. L. 2017).

<sup>18</sup> See *id.* §§ 815–816.

<sup>19</sup> See Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), <https://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html?mcubz=1> [hereinafter Lewin, *Surrogates and Couples Face a Maze of Laws*] (detailing an account of a Connecticut woman who agreed to be a surrogate for another couple, but, five months into the surrogate's pregnancy, was asked by the couple to have an abortion when complications arose; the surrogate left Connecticut for Michigan, where surrogacy contracts are unenforceable, and gave birth to said couple's biological child).

If the surrogate was awarded custody of the child, could she seek child-support from the biological father? What if the biological father was the intended parent? What if he was a sperm donor? In the alternative, what if the intended parents have a change of heart or learn that the child will have a serious disease or illness and may not survive, can the intended parents ask the surrogate mother to terminate her pregnancy? What if she refuses and carries the child to term? What if the child is not genetically related to her?

As a result of this legal confusion, another unintended consequence has been the rise of forum-shopping and surrogacy in other countries.<sup>20</sup> The historical background of state surrogacy laws and their arguments used to advance them provide insight into their legal intent.<sup>21</sup>

#### *A. Unintended Consequences in the United States*

There have been several recent instances of broken surrogacy contracts which demonstrate the issues inherent in current surrogacy laws. Intended parents invest their time, money, and hope into a surrogate mother, and surrogates invest their bodies, time, and emotions.<sup>22</sup> When parties have a change of heart, many states lack contractual requirements of surrogacy agreements which could prevent devastating consequences and leave intended parents and surrogate mothers without a viable remedy.<sup>23</sup>

In 2008, a Pennsylvania couple, Barbara and David, sought and entered into an agreement with a young woman, Jamie, to carry their child using Jamie's egg and David's sperm.<sup>24</sup> When Jamie had a change of heart, she cut off contact with Barbara and David, gave birth to the child, and began to raise it as her own.<sup>25</sup> Following a lengthy court battle, Jamie was eventually awarded primary physical

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<sup>20</sup> See *infra* Section I.B.

<sup>21</sup> See *infra* Section I.C.3.

<sup>22</sup> See *infra* Section I.C.3.

<sup>23</sup> See Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19.

<sup>24</sup> Caitlin Keating, *Heartbroken Parents Left Paying Child Support After Surrogate Keeps Their Baby Girl: 'I Spend Every Day Thinking of Her,' Says Mom*, PEOPLE (Mar. 7, 2016) <http://people.com/human-interest/surrogate-controversy-barbara-and-david/>.

<sup>25</sup> *Id.*

custody of the child, and David was ordered to pay child support.<sup>26</sup> The use of an agency to vet the parties, background checks, psychological evaluations of both parties, intervention of a licensed physician, and independent legal counsel, as Dagan and Heller suggest, could have prevented such an agonizing outcome.<sup>27</sup> Notably, Pennsylvania courts have enforced *gestational* surrogacy agreements since 2006, but in Barbara and David's case, they entered into a *traditional* surrogacy agreement.<sup>28</sup> In a gestational surrogacy agreement, the surrogate mother is not genetically related to the child because the parties use the intended mother's egg or a donor egg.<sup>29</sup> In Jamie's case, however, the parties entered a traditional surrogacy agreement where they chose to use Jamie's egg, making her biologically and genetically related to the child.<sup>30</sup> As a result, the Pennsylvania court initially divided custody between

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<sup>26</sup> *Id.*

<sup>27</sup> Ellen Trachman, *I Want to Put a Baby in You: The Surrogate Turned Baby Stealer*, ABOVE THE LAW (Oct. 12, 2016), <https://abovethelaw.com/2016/10/i-want-to-put-a-baby-in-you-the-surrogate-turned-baby-stealer/?rf=1> [hereinafter Trachman, *The Surrogate Turned Baby Stealer*] (commenting on several ways the outcome could have been prevented).

<sup>28</sup> See *J.F. v. D.B.*, 897 A.2d 1261, 1278 (2006); see also *Using a Surrogate Mother: What You Need to Know*, WEBMD, <https://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother#1> (last visited May 1, 2018) (defining "traditional surrogate" as "a woman who gets artificially inseminated with the father's sperm. She then carries the baby and delivers it for you and your partner to raise. A traditional surrogate is the baby's biological mother. That's because it was her egg that was fertilized by the father's sperm. Donor sperm can also be used.").

<sup>29</sup> *Gestational Carriers (Surrogacy)*, BABYCENTER, <https://www.babycenter.com/surrogacy> (last visited May 1, 2018) (defining "gestational surrogacy" as an arrangement in which "the baby isn't genetically related to the gestational surrogate—the egg comes from the intended mother or an egg donor, and the sperm comes from the intended father or a sperm donor.").

<sup>30</sup> See Keating, *supra* note 24; see also *J.F.*, 897 A.2d at 1265 (holding a "[A] gestational carrier lacked standing to seek custody or challenge Father's custody . . ." and awarded custody to the biological, intended father); see *Using a Surrogate Mother*, WEBMD, *supra* note 28 (defining traditional surrogacy); *infra* Section II.C (discussing how other states, such as Illinois, make distinctions between traditional and gestational surrogacy and find only gestational surrogacy agreements enforceable).

the two genetically-related parties—David and Jamie.<sup>31</sup> Had the parties used an egg donor and entered into a gestational surrogacy agreement, the court would have been more likely to treat the gestational carrier as a “third party” and grant custody to the intended parents.<sup>32</sup>

In 2015, a California woman, Melissa Cook, entered a surrogacy agreement with a would-be single father, C.M.<sup>33</sup> After being implanted with several embryos created from C.M.’s sperm and a donor egg, Cook became pregnant with triplets.<sup>34</sup> C.M., who did not intend to be the father of triplets and only had the financial means to care for two babies, instructed Cook to abort one of the babies.<sup>35</sup> Cook refused, and as her relationship with C.M. deteriorated, she questioned his ability as a deaf, single father of limited means to care for triplets.<sup>36</sup> A federal judge in Los Angeles dismissed Cook’s

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<sup>31</sup> The Pennsylvania court originally granted joint custody to David and Jamie, but it later modified the custody order and granted Jamie full-time physical custody when baby Kaylee Grace began kindergarten in Jamie’s school district. Keating, *supra* note 24.

<sup>32</sup> See *J.F.*, 897 A.2d 1261 at 1280 (holding a gestational surrogate lacked standing because she was a “third-party”). Attorney Ellen Trachman opines:

The situation described in this story is what’s known as “traditional surrogacy.” That’s where the surrogate is not just the carrier, but also the genetic “donor” or mother. Most assisted reproductive technology attorneys won’t touch traditional surrogacy arrangements with a ten-foot pole . . . In fact, many find it hard to distinguish a traditional surrogacy from something more ethically questionable, like a directed adoption where the birth mother is paid for her baby . . . By contrast, “surrogacy” generally refers to gestational surrogacy where the surrogate is not genetically related to the child she is carrying. A gestational surrogacy is much easier for the legal system to digest and reasonably determine to sever legal ties between the surrogate and the child. Regulations specifically permitting and supporting surrogacy—such as those found in Illinois and California—are only applicable to gestational surrogacy, and do not apply to traditional surrogacy.

Trachman, *The Surrogate Turned Baby Stealer*, *supra* note 27.

<sup>33</sup> See Johnny Dodd, *Surrogate Mom Melissa Cook Reacts to ‘Horrible’ Allegations About Birth Father of Her Triplets: ‘They’re Helpless’*, PEOPLE (Sept. 22, 2017), <http://people.com/human-interest/surrogate-mom-melissa-cook-horrifying-allegations-birth-father/>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*



lawsuit seeking to overturn California's surrogacy law, which enforces surrogacy contracts and considers them "presumptively valid," and refused to name her the legal mother of the triplets.<sup>37</sup> Upon enforcement of their surrogacy contract, Cook was forced to relinquish any legal rights she had to the children, and C.M., the intended father was deemed the legal father and was given custody of the triplets per their agreement.<sup>38</sup> The case has become increasingly complicated as other parties have also questioned C.M.'s ability to effectively parent the triplets and have concerns the babies live in "deplorable conditions."<sup>39</sup> The Supreme Court of the United States refused to hear Cook's appeal, and the triplets remain in the custody of their legal father and intended parent, C.M.<sup>40</sup>

In Cook's case, the parties entered into an enforceable surrogacy contract under California state law,<sup>41</sup> however, several precautions and provisions could have prevented this unfortunate outcome.<sup>42</sup> Had the broker which matched Cook with the intended father done its due diligence to visit the intended father's home and give him a psychological examination, the broker may not have deemed him a fit intended parent or Cook may have opted to be matched with a

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<sup>37</sup> *Id.*; Cook v. Harding, 190 F. Supp. 3d 921, 930–32 (C.D. Cal. 2016); *see also* Cal Fam Code § 7962 (2018) ("An assisted reproduction agreement for gestational carriers executed in accordance with this section is presumptively valid and shall not be rescinded or revoked without a court order. For purposes of this part, any failure to comply with the requirements of this section shall rebut the presumption of the validity of the assisted reproduction agreement for gestational carriers.").

<sup>38</sup> *See* Dodd, *supra* note 33.

<sup>39</sup> *Id.* C.M.'s sister has also filed an affidavit claiming C.M. was not a fit parent. *Id.*

<sup>40</sup> Margot Cleveland, *Supreme Court Refuses Surrogacy Case of Mother Forced to Abort Triplet*, THE FEDERALIST (Oct. 3, 2017), <http://thefederalist.com/2017/10/03/supreme-court-refuses-hear-surrogacy-case-mother-pressured-abortion-extra-triplet/>.

<sup>41</sup> Los Angeles Superior Court refused to enjoin the intended father from filling a §7962 petition. Cook v. Harding, 190 F. Supp. 3d 921, 930–32 (C.D. Cal. 2016); *see also* CAL. FAM. CODE § 7962 (West 2018) (setting forth the provisions for an enforceable surrogacy contract).

<sup>42</sup> *See* Trachman, *The Surrogate Turned Baby Stealer*, *supra* note 27.

different intended parent.<sup>43</sup> It is not uncommon for surrogacy contracts to contain “selective reduction”<sup>44</sup> clauses to provide for situations where surrogate mothers become pregnant with unintended multiples or the fetus has severe birth defects.<sup>45</sup> While the parties fulfilled their duty under California law to consult with independent legal counsel, counsel may not have effectively made Cook aware of the selective reduction provision in her contract, or perhaps she may have dismissed the legal advice as being too far outside of the realm of possibility.<sup>46</sup>

Unfortunately, situations such as those described above are not limited to Pennsylvania and California—unclear and inconsistent laws have led to problematic outcomes in many other states as well. In Colorado, Carrie Mathews, a mother of four, contracted with a couple from Austria to carry their twins.<sup>47</sup> While being treated for severe complications during labor and delivery, the intended parents left the United States and returned to Austria with the babies, leaving the surrogate mother with medical bills totaling more than

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<sup>43</sup> The intended father’s sister has come forward regarding her brother’s capability to parent children and described him as “paranoid,” “prone to anger fits,” and sharing his residence with a nephew who is a known heroin addict. Dodd, *supra* note 33. See also Cook, 190 F. Supp. 3d at 928 (stating “Cook does not believe that Surrogacy International or the physician who performed the embryo transfer, Dr. Jeffrey Steinberg, conducted a home study of C.M.’s living arrangements to determine his parenting capabilities.”).

<sup>44</sup> Selective reduction clauses address how and if the pregnancy should be terminated. For example, parties might opt for termination if there were unintended multiples or if the fetus showed signs of severe birth defects. Debora L. Forman, Esq., *Abortion and Selective Reproduction in Surrogacy Clauses: What Every Intended Parent and Surrogate Needs to Know*, PATH2PARENTHOOD (Nov. 24, 2014) <http://www.path2parenthood.org/blog/abortion-and-selective-reduction-clauses-in-surrogacy-contracts-what-every-intended-parent-and-surrogate-needs-to-know>.

<sup>45</sup> See Katie O’Reilly, *When Parents and Surrogates Disagree on Abortion*, THE ATLANTIC (Feb. 18, 2016), <https://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323/>.

<sup>46</sup> See Cook, 190 F. Supp. 3d at 927. “As per the surrogacy agreement, C.M. paid Lesa Slaughter of The Fertility Law Firm to represent Cook.” *Id.* at 928.

<sup>47</sup> Jessica Samakow, *Carrie Mathews, Surrogate Mother Left With \$217,000 Medical Bill, Babies In Austria*, HUFFPOST (Dec. 26, 2011), [https://www.huffingtonpost.com/2011/10/26/carrie-mathews-surrogate-\\_n\\_1032931.html](https://www.huffingtonpost.com/2011/10/26/carrie-mathews-surrogate-_n_1032931.html).

\$200,000.<sup>48</sup> The surrogacy agreement specified that in the event that Mathews could not work or take care of her children during the pregnancy, the intended parents would pay her \$250 per week.<sup>49</sup> Mathews sought the assistance of the Washington, D.C. surrogacy agency that originally brokered the arrangement, but the agency's founder and attorney had recently plead guilty to wire-fraud in connection with a baby-selling ring in the United States and Ukraine.<sup>50</sup>

In another instance, an Iowan couple, the Montovers contracted with an Iowa surrogate who became pregnant with twins via an anonymous egg donor.<sup>51</sup> The relationship between the parties deteriorated; the surrogate mother alleged the intended parents were racist while the intended parents alleged the surrogate continued to demand money beyond what was specified in their contract after becoming pregnant.<sup>52</sup> The parties were no longer in communication when the surrogate mother went into labor early with the intention of keeping the babies.<sup>53</sup> The Montovers sought legal enforcement of the surrogacy agreement, but ultimately the surrogate failed to notify them when one of the babies passed away after birth, and unilaterally chose to have the remains cremated.<sup>54</sup>

As these cases demonstrate, U.S. law is not always effective in protecting contracting parties. As in Barbara and David's case, states which do not enforce surrogacy contracts or cause parties to seek self-help leave intended parents without a legal remedy when surrogate mothers have a change of heart. As in the Mathews case, a lack of judicial oversight of surrogacy agencies and brokers can leave parties vulnerable to exploitation. Even in states which enforce surrogacy agreements, as in Cook's case, a lack of effective legal requirements can lead parties to enter agreements they otherwise

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<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *See id.*

<sup>51</sup> *See* Ellen Trachman, *Extreme Surrogacy Nightmare Heads to Iowa Supreme Court*, ABOVE THE LAW (June 28, 2017), <https://abovethelaw.com/2017/06/extreme-surrogacy-nightmare-heads-to-iowa-supreme-court/?rf=1> [hereinafter Trachman, *Extreme Surrogacy Nightmare*].

<sup>52</sup> *See id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

would not have or leave children in unfit homes. Even when there is judicial enforcement of a valid agreement, as in the Montovers' case, enforcement of the parties' contract was too late to allow the Montovers access to, or decision-making power over, their deceased child. These cases demonstrate the legal uncertainty around whether the parties' agreement will be enforced, which encourages self-help and forum-shopping among states with more favorable laws.

### *B. Unintended Consequences Abroad*

The negative effects of surrogacy laws in the United States also extend abroad.<sup>55</sup> American couples and single adults, hindered by legal challenges and the high costs associated with surrogacy in the United States, have created a demand for surrogacy abroad, and a booming "reproductive tourism" industry has arisen in response.<sup>56</sup> Americans are especially attracted to the Indian surrogacy market, which promises cheaper, faster, guaranteed gestational surrogates.<sup>57</sup> However, this surging demand coupled with a lack of regulation has created unintended, consequences.<sup>58</sup> Many Indian surrogacy clinics are full of exploited women serving as human incubators.<sup>59</sup> The pressure to produce children quickly and cheaply means that more

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<sup>55</sup> See Douglas Pet, *Make Me a Baby as Fast as You Can*, SLATE (Jan. 9, 2012), [http://www.slate.com/articles/double\\_x/doublex/2012/01/reproductive\\_tourism\\_how\\_surrogacy\\_provider\\_planethospital\\_speeds\\_up\\_pregnancies\\_and\\_lowers\\_costs\\_.html](http://www.slate.com/articles/double_x/doublex/2012/01/reproductive_tourism_how_surrogacy_provider_planethospital_speeds_up_pregnancies_and_lowers_costs_.html).

<sup>56</sup> Surrogacy in the United States can cost as much as \$150,000 and is significantly cheaper in India. Sharmila Rudrappa, *India Outlawed Commercial Surrogacy—Clinics Are Finding Loopholes*, THE CONVERSATION (Oct. 23, 2017) <http://theconversation.com/india-outlawed-commercial-surrogacy-clinics-are-finding-loopholes-81784>; see Pet, *supra* note 55.

<sup>57</sup> In March 2017, India banned commercial surrogacy. However, clinics have found loopholes, and the practice has continued. Rudrappa, *supra* note 56; Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT'L L. REV. 527, 537 (2013).

<sup>58</sup> Kindregan & White, *supra* note 57; Vice: "The Line Drawn In The Sand" / "Outsourcing Embryos", (Vice 2015), <http://hbowatch.com/vice-the-line-drawn-in-the-sand-outsourcing-embryos/> [hereinafter Vice: "The Line Drawn In the Sand"].

<sup>59</sup> Vice: "The Line Drawn In The Sand", *supra* note 58.

than one embryo is often implanted in the surrogate, and if the extra babies are not aborted, they are often sold on the black market after birth.<sup>60</sup>

High costs associated with surrogacy in the United States and increasing demand, has contributed to an international “reproductive tourism” industry fraught with issues of its own.<sup>61</sup>

### C. *The Debate*

In spite of these problems, the current state of American surrogacy laws is not inadvertent. Instead, it is the result of national outcry over the seminal 1990s surrogacy case *In re Baby M*, and a influential combination of outdated feminist fears and conservative moralistic concerns.<sup>62</sup>

#### 1. History: *In re Baby M*

*In re Baby M* generated widespread media attention and prompted several states to reevaluate their surrogacy laws.<sup>63</sup> In *Baby M*, a surrogate mother entered into a surrogacy contract for reimbursement of expenses in the amount of \$10,000, but after being impregnated with the intended father’s sperm, she refused to relinquish her parental rights to the intended parents and fled with

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<sup>60</sup> *Id.*

<sup>61</sup> Kindregan & White, *supra* note 57; see Vice: “The Line Drawn In The Sand”, *supra* note 58.

<sup>62</sup> See *In re Baby M*, 537 A.2d 1227 (N.J. 1988); *infra* Section II.C.1–2.

<sup>63</sup> Deborah Machalow, *Legislating Labors of Love: Revisiting Commercial Surrogacy in New York*, 90 IND. L.J. SUPP. 1, 10–11 (2015). Machalow notes:

In the late 1980s and early 1990s, the American public’s ire was drawn by the infamous *Baby M* case, in which a traditional surrogate decided she did not want to give the resulting child to the intended parents. The ensuing legal battle captured the nation’s attention—shaping the discussion of surrogacy and leading to public concern and resistance. This was clearly seen in New Jersey’s sister state New York, whose attempts at surrogacy regulation were as chaotic and mixed as the nation’s views on surrogacy itself.

Machalow, *supra* note 63, at 10–11; See LORI B. ANDREWS, THE AFTERMATH OF BABY M: PROPOSED STATE LAWS ON SURROGATE MOTHERHOOD, THE HASTINGS CENTER REPORT 31–40 (Oct.–Nov., 1987).

the child to Florida.<sup>64</sup> The surrogate mother and intended parents entered into a contentious custody battle in a New Jersey court.<sup>65</sup> After declaring the surrogacy agreement unenforceable and contrary to public policy, the Supreme Court of New Jersey addressed the question of custody.<sup>66</sup> Ignoring the original intent of the parties and their agreement, the court considered the question of custody based solely upon “the child’s best interest,” and awarded custody to the intended father while simultaneously restoring the surrogate mother’s status as legal mother of the child.<sup>67</sup> The case was remanded to determine visitation between the intended father and the surrogate mother.<sup>68</sup> The New Jersey court stated that “[t]he unfortunate events that have unfolded illustrate that [surrogacy’s] unregulated use can bring suffering to all involved,” and, while acknowledging the “ethical and moral issues involved,” stated that it was an issue better left to the legislature.<sup>69</sup>

In response, Governor Mario Cuomo created a New York State “Task Force on Life and the Law” (“Task Force”) to report on complex healthcare issues and “provide guidance when difficult questions arise.”<sup>70</sup> The Task Force created a report<sup>71</sup> which brought

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<sup>64</sup> *In re Baby M*, 537 A.2d at 1234–38. After declaring the surrogacy agreement unenforceable and contrary to public policy, the Supreme Court of New Jersey addressed the question of custody. Ignoring the original intent of the parties and their agreement, the court considered the question of custody based solely upon “the child’s best interest.” The potential custodial parents considered by the court were the biological parents, the surrogate mother and intended father, and the intended mother and surrogate mother’s husband’s were only really included in the Court’s analysis insofar as the child’s best interests. Almost equally relevant as the case’s outcome, however, was the court’s condemnation of surrogacy agreements with compensation. *Id.* at 1246–56.

<sup>65</sup> *See id.* at 1236–39.

<sup>66</sup> *Id.* at 1254–56.

<sup>67</sup> *Id.* at 1253, 1260–61.

<sup>68</sup> *Id.* at 1235.

<sup>69</sup> *Id.* at 1264.

<sup>70</sup> *Task Force on Life and the Law*, N.Y. ST. DEP’T. OF HEALTH, [https://www.health.ny.gov/regulations/task\\_force/](https://www.health.ny.gov/regulations/task_force/) (last visited May 1, 2018).

<sup>71</sup> Executive Summary of Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy, N.Y. ST. DEP’T. OF HEALTH, [https://www.health.ny.gov/regulations/task\\_force/reports\\_publications/#reproductive\\_tech](https://www.health.ny.gov/regulations/task_force/reports_publications/#reproductive_tech) (last updated Jan. 2011).

to light many of the controversial issues and concerns inherent in surrogacy agreements, such as commodification of children and women's bodies, the destruction of extra gametes or embryos, selective abortion, and surrogacy's long-term effects on children.<sup>72</sup> Many of the issues discussed in the report remain points of contention in the debate over legalized surrogacy throughout the United States, and the report was highly influential in the creation of New York law declaring surrogacy agreements unenforceable.<sup>73</sup>

## 2. Arguments in Opposition to Surrogacy

Unexpected allies opposing commercial surrogacy include feminists, religious groups, and conservatives.<sup>74</sup> Contemporary feminist writer Marina Terragni summarized this unlikely alliance, "[Feminists] see it as a struggle against the patriarchy, the Catholics see it as a struggle to preserve the traditional family, some anarchists see it as a struggle against capitalism—and I don't have any problem with this."<sup>75</sup> Feminists, Catholics, and conservatives have all formally argued against the enforceability of surrogacy contracts for various reasons stemming from their unique ideologies, and these arguments were highly influential in early surrogacy legislation.<sup>76</sup>

Many feminists in the late 1980s and early 1990s condemned several forms of reproductive technologies as a form of patriarchal control over women and surrogacy as a commodification of the female body.<sup>77</sup> In an *amici curiae* brief filed with the Court regarding

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<sup>72</sup> *Id.*

<sup>73</sup> *See generally id.*

<sup>74</sup> *See* Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19.

<sup>75</sup> Anna Momigliano, *When Left-Wing Feminists and Conservative Catholics Unite*, THE ATLANTIC (Mar. 28, 2017), <https://www.theatlantic.com/international/archive/2017/03/left-wing-feminists-conservative-catholics-unite/520968/>.

<sup>76</sup> *See id.*

<sup>77</sup> Elizabeth S. Scott, *Making Markets in Forbidden Exchange: Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROB. 109, 131 [hereinafter Scott, *Making Markets in Forbidden Exchange*]. Scott notes:

The prevailing feminist position opposing surrogacy was compatible, to an extent, with core feminist commitments to gender equality and control over reproduction, and with a general concern that women not be defined by their reproductive capacity. First, for many feminists, surrogacy represented yet another context in which women were valued primarily for their sexual and



the *Baby M* case, several prominent feminists, including Betty Friedan,<sup>78</sup> Gloria Steinem,<sup>79</sup> Gena Corea,<sup>80</sup> and Barbara Katz Rothman,<sup>81</sup> argued that “the commercialization of surrogate parenthood violates the Constitution and the dignity of women.”<sup>82</sup> Their concerns stemmed from a theory that a surrogate mother’s body “has been dehumanized and has been reduced to a mere ‘commodity’ in the reproductive marketplace.”<sup>83</sup> These attitudes were even pervasive in popular culture, and only two years prior to *Baby M*, Margaret Atwood’s novel *The Handmaid’s Tale* articulated these fears. In this dystopian novel, women called Handmaids are forced into sexual servitude and made to bear children for others.<sup>84</sup>

Feminists were also concerned about the exploitation of vulnerable women by wealthier and better-informed intended

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reproductive capacities rather than for their intellect and skills. One feminist compared the surrogate to ‘human potting soil for the man’s seed.

Scott, *Making Markets in Forbidden Exchange*, *supra* note 77, at 131(emphasis added) (internal citations omitted)

<sup>78</sup> Betty Friedan is the author, feminist and women’s rights activist who wrote the ground-breaking feminist text *The Feminine Mystique* in 1963. She is “remembered as one of the leading voices of the women’s rights movement of the 20th century.” *Betty Friedan*, BIOGRAPHY, <https://www.biography.com/people/betty-friedan-9302633> (last visited May 1, 2018).

<sup>79</sup> Gloria Steinem is a noted “writer, lecturer, political activist, and feminist organizer,” and is well-known for her journalism published in *Esquire*, *The New York Times Magazine*, and other publications. She helped found *New York Magazine* and currently serves as a co-editor to *Ms. Gloria Steinem*, GLORIA STEINEM, <http://www.gloriasteinem.com/about> (last visited May 1, 2018).

<sup>80</sup> Gena Corea authored many feminist nonfiction works “analyzing the treatment of women within the medical industry,” including *The Mother Machine* (1985). *Gena Corea*, GOODREADS, [https://www.goodreads.com/author/show/367333.Gena\\_Corea](https://www.goodreads.com/author/show/367333.Gena_Corea) (last visited May 1, 2018).

<sup>81</sup> Barbara Katz Rothman is a Professor of Sociology at Baruch College and the author of several non-fiction books exploring sociology, feminism, medicine, and birth. *Barbara Katz Rothman*, BARUCHCOLLEGE, <http://www.baruch.cuny.edu/wsas/academics/anthropology/brothman.htm> (last visited May 1, 2018).

<sup>82</sup> Joseph F. Sullivan, *Brief by Feminists Opposes Surrogate Parenthood*, N.Y. TIMES (July 30, 1987), <http://www.nytimes.com/1987/07/31/nyregion/brief-by-feminists-opposes-surrogate-parenthood.html>.

<sup>83</sup> *Id.*

<sup>84</sup> *See* MARGARET ATWOOD, *THE HANDMAID’S TALE* (1985).



parents.<sup>85</sup> 124 well-known feminists and activists<sup>86</sup> released a separate statement on the final day of testimony in *Baby M*<sup>87</sup> which compared surrogacy to prostitution.<sup>88</sup> Although the statement's authors could not agree on whether women should engage in prostitution in general, one feminist noted that, "there is an agreement in the feminist community about pimps," and called brokers who arranged surrogacy contracts "the pimps" of the surrogacy industry.<sup>89</sup> While contemporary feminist ideologies on many topics differ, the agreement amongst feminists against the enforceability of surrogacy agreements was a powerful and symbolic statement, and the Court took notice.

Conservatives and religious groups, especially Christian and Catholic leadership, also condemned surrogacy.<sup>90</sup> In an amicus curiae brief filed in *Baby M*, New Jersey's Roman Catholic bishops denounced surrogacy as baby-selling, arguing that "children 'are a

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<sup>85</sup> One major concern and criticism of surrogacy is the possibility of economic exploitation or coercion. Disparities in class, income, and information can leave surrogates vulnerable to exploitation, and there is the added ethical fear that the surrogate's participation is motivated by financial gain and compensation. In considering these factors together, opponents of surrogacy worry that, "these disparities [will] lead to a risk of wealthy commissioning couples exploiting poorer or less advantaged women." Emily Gelmann, "I'm Just The Oven, It's Totally Their Bun": The Power and Necessity of The Federal Government to Regulate Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents, 32 WOMEN'S RTS. L. REP. 159, 184 (2010).

<sup>86</sup> These feminists included Betty Friedan, Nora Ephron, Carly Simon, and Meryl Streep.

<sup>87</sup> Iver Peterson, *Fitness Test for Baby M's Mother Unfair, Feminists Say*, N.Y. TIMES (Mar. 30, 1987), <http://www.nytimes.com/1987/03/20/nyregion/fitness-test-for-baby-m-s-mother-unfair-feminists-say.html>; see Elizabeth S. Scott, *Surrogacy and the Politics*, 72 LAW & CONTEMP. PROB. 109, 115–17 [hereinafter Scott, *Surrogacy and the Politics*].

<sup>88</sup> Scott, *Surrogacy and the Politics*, *supra* note 87, at 115–16; Peterson, *supra* note 87.

<sup>89</sup> Scott, *Surrogacy and the Politics*, *supra* note 87, at 115–16; Peterson, *supra* note 87.

<sup>90</sup> See Momigliano, *supra* note 75; Mark Joseph Stern, *The Surrogacy Debate Is About to Break the Christian Right Wide Open*, SLATE (Aug. 11, 2014), [http://www.slate.com/blogs/outward/2014/08/11/surrogacy\\_and\\_the\\_christian\\_right\\_the\\_coming\\_schism.html](http://www.slate.com/blogs/outward/2014/08/11/surrogacy_and_the_christian_right_the_coming_schism.html).

gift of God' and should not be treated as property or commodities."<sup>91</sup> More recently, religious groups have advanced a pro-life argument condemning surrogacy, emphasizing concerns about increases in abortions and the destruction of embryos created during the in-vitro fertilization process.<sup>92</sup> Implicitly, there was and remains an underlying fear in the Catholic church that surrogacy undermines the notion of the traditional family by creating reproductive possibilities outside of a nuclear, heterosexual couple.<sup>93</sup> While conservative, Catholic, and feminist ideologies are at odds on a variety of issues, these groups aligned strongly in condemnation of surrogacy agreements.

### 3. Arguments in Support of Surrogacy

Surrogacy offers many couples a chance to have something that may have previously been unavailable to them: children of their own.<sup>94</sup> Gestational surrogacy provides both heterosexual couples with fertility issues and same-sex couples the opportunity to have

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<sup>91</sup> See RUTH MACKLIN, *SURROGATES AND OTHER MOTHERS: THE DEBATES OVER ASSISTED REPRODUCTION* 58 (1994).

<sup>92</sup> In 2014, a surrogacy bill in Louisiana was vetoed partly due to opposition from groups such as the Family Research Council, which cited "'a significant lack of pro-life protections' for embryos created through in vitro fertilization" as a concern. Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19.

<sup>93</sup> Surrogacy would allow same-sex couples to have biological children, and the church has only recently begun to move away from a condemnation of homosexuality towards inclusion. See Susan Donaldson James, *More Gay Men Choose Surrogacy to Have Children*, ABC NEWS (Mar. 12, 2008), <http://abcnews.go.com/Entertainment/OnCall/story?id=4439567&page=1>; Sharon Otterman, *As Church Shifts, a Cardinal Welcomes Gays; They Embrace a Miracle*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/nyregion/catholic-church-gays-mass-newark-cathedral.html>; see also Momigliano, *supra* note 75 ("The fact that Catholics oppose surrogacy should not be surprising given that Church doctrine rejects the separation of sex from childbearing, and vice versa . . . Surrogacy also enables gay couples to have biological children, a prerogative that would otherwise be limited to heterosexual couples.").

<sup>94</sup> Both Anthony Brown and another intended parent, Jen Rachman, were present at the births of their children born via gestational surrogate. Samantha Lee, *In the Age of Celebrity Surrogate Families, What Exactly is Surrogacy?*, THE CUT (Sept. 14, 2017), <https://www.thecut.com/2017/09/heres-what-the-surrogacy-process-actually-looks-like.html>

biological children.<sup>95</sup> Some intended parents describe the ability to have a child that is biologically related to them as a motivating factor for choosing gestational surrogacy;<sup>96</sup> other intended parents describe surrogacy as a “more certain process” which allows for greater parental involvement throughout than adoption.<sup>97</sup> For same-sex couples, surrogacy can provide an alternative to adoption, which can be discriminatory and more complicated than for heterosexual couples.<sup>98</sup> Many intended parents and others involved in the process do not talk about surrogates in transactional terms, as feminists and Catholics and conservatives feared. Instead, they describe the relationship between intended parents and surrogate mothers as “special” and as a “team [effort] so someone can become a parent.”<sup>99</sup>

Besides providing parents the opportunity to have children, surrogates also cite many benefits of entering into a surrogacy agreement: helping someone start a family, earning money that may allow them to stay at home and care for their own children, and the possibility of maintaining relationships with the children after birth.<sup>100</sup> Many surrogates cite the emotional rewards as the most

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<sup>95</sup> Rachael Rettner, *Lucy Liu Welcomes a Baby: 4 Reasons Why Couples Use Surrogates*, LIVESCIENCE (Aug. 28, 2015), <https://www.livescience.com/52023-lucy-liu-gestational-surrogate-pregnancy.html> (“Dr. Tomer Singer, a reproductive endocrinologist at Lenox Hill Hospital in New York City, estimates that about 5 percent of the couples he sees with fertility problems use a gestational carrier.”); James, *supra* note 93 (“And in one of the last breakthroughs of the gay pride movement, more male same-sex couples are now embracing gestational surrogacy to have a biological child.”).

<sup>96</sup> Anthony Brown, intended parent of baby Nicholas, born in 2009, states, “I think that the instinct to have your own biological family transcends sexuality, and I think everyone understands that.” Lee, *supra* note 94.

<sup>97</sup> *Id.*

<sup>98</sup> James, *supra* note 93.

<sup>99</sup> Kim Bergman, Co-owner of Growing Generations, describes surrogacy as a “collaborative, intentional process . . . to be a team so somebody can become a parent.” Lee, *supra* note 94. Intended parent Anthony Brown describes him and his partner’s relationship to their surrogate as “an incredibly unique relationship.” *Id.*

<sup>100</sup> Susan Imrie & Vasanta Jadv, *The Long-term Experiences of Surrogates: Relationships and Contact With Surrogacy Families in Genetic and Gestational Surrogacy Arrangements*, 29 REPRODUCTIVE BIOMEDICINE ONLINE 424, 424–35 (2014); Beth Collins, *How I Made \$60,000 as a Surrogate Mother*, THE WEEK

meaningful aspect of the agreement.<sup>101</sup> One surrogate mother recalled the moment of birth as “euphoric,” and stated, “There you are in the middle of it, knowing you made their dreams come true. There is nothing more empowering than that.”<sup>102</sup> In opposition to feminist fears about commodification, surrogates describe their own benefits and the pride they feel in their ability to provide another family with the opportunity to have children of their own.

#### 4. Prevalence

Despite the hurdles involved in gestational surrogacy, the practice is on the rise.<sup>103</sup> Some sources estimated that in 2014, more than 2,000 babies would be born in the United States via gestational surrogacy.<sup>104</sup> Other sources report an increase of over 115 percent between 2004 and 2011, and these rates are expected to continue to rise.<sup>105</sup> However, these numbers may not truly capture the gravity of the situation.<sup>106</sup> Due to the lack of formal data collection, social stigma, or illegality of the practice, it is likely that many agreements are not reported.<sup>107</sup> Furthermore, the number of American children born to surrogates abroad is unknown, but an estimated 10,000 foreigners (including Americans) come to India each year for babies born to surrogate mothers.<sup>108</sup>

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(Mar. 21, 2015), <http://theweek.com/articles/544253/how-made-60000-surrogate-mother>; Lisa Ryan, 5 *Surprising Facts About Surrogacy*, THE CUT (Sept. 6, 2017), <https://www.thecut.com/2017/09/surprising-facts-about-pregnancy-surrogacy.html>.

<sup>101</sup> Lee, *supra* note 94.

<sup>102</sup> *Id.*

<sup>103</sup> See Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19; see also Debora L. Cohen, *Surrogate Pregnancies on Rise Despite Cost Hurdles*, REUTERS (Mar. 18, 2013), <https://www.reuters.com/article/us-parent-surrogate/surrogate-pregnancies-on-rise-despite-cost-hurdles-idUSBRE92H11Q20130318>.

<sup>104</sup> Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19.

<sup>105</sup> Cohen, *supra* note 103.

<sup>106</sup> *Id.*; Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19.

<sup>107</sup> Cohen, *supra* note 103; Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19.

<sup>108</sup> Dr. Michele Goodwin, Chancellor’s Professor of Law and Public Health at University of California Irvine, estimates that 10,000 foreigners come to India

Given the rising prevalence and demand of gestational surrogacy domestically and the increasing ethical and human rights issues arising abroad, it is illogical to continue to fail to enforce surrogacy contracts in all states. Furthermore, testimonials given by surrogate mothers and intended parents demonstrate that the fears which motivated legislation no longer have the same relevance. People want to be parents, surrogates want to help people become parents, and state law continues to stand in the way of their efforts.

## II. ANALYSIS OF CURRENT SURROGACY LAWS

One reason that surrogacy law varies so significantly by state is that family law is traditionally left to state legislatures, which have taken dramatically different approaches to the issue.<sup>109</sup> There are several reasons why states have been granted more autonomy in determining family law than other areas of the law.<sup>110</sup> The doctrine of “family law exceptionalism” provides that family law is so unique and exceptional that it should be left to states.<sup>111</sup> The doctrine originated in the 1858 Supreme Court case *Barber v. Barber*, but its dictum “gave birth to the hoary ‘domestic relations exception’ to federal diversity jurisdiction,” granting states more autonomy but resulting in a lack of uniformity between states and less federal

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each year seeking commercial surrogates. The commercial surrogacy industry comprises \$500M of India’s \$2.3B medical tourism industry. *Vice*: “*The Line Drawn In The Sand*”, *supra* note 58, at 15:18, 24:06.

<sup>109</sup> See Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. LEE L. REV. 131 (2009).

<sup>110</sup> See *id.*

<sup>111</sup> *Id.* at 134 (“The relationship between the states and the federal system vis-a-vis the family has been perennially vexed . . . A longstanding legal narrative describes family law as a quintessentially state issue. This narrative is informed by the more general phenomenon of “family law exceptionalism”: The view that the family and family law are—or should be—unique and exceptional.”).

oversight, among other issues.<sup>112</sup> A subsequent case, *Ankenbrandt v. Richards*,<sup>113</sup> reaffirmed the domestic relations exception.<sup>114</sup>

Legal scholars have suggested several reasons why the domestic relations exception continues to prevail and why it is accepted that states are better equipped to deal with family law matters.<sup>115</sup> Some scholars claim that states are implicitly better equipped to adjudicate matters of family law based on “locality,” whereas others say that family law is so unique, emotional, and vulnerable that it should be left to the individual states.<sup>116</sup> Notably, Professor Sylvia Law<sup>117</sup>

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<sup>112</sup> In a diversity action where the wife sought to enforce an alimony order against her former husband, the Supreme Court ruled it had the jurisdiction to enforce the New York state court’s decree. *Barber v. Barber*, 62 U.S. 582 (1858). Sylvia Law, New York University Law Professor, comments, “Nonetheless, in dictum, the Court observed that it “disclaimed altogether any jurisdiction in the courts of the United States” over the actual granting of divorce or alimony decrees. This dicta gave birth to the hoary “domestic relations exception” to federal diversity jurisdiction.” Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL’Y 175, 179 (2000).

<sup>113</sup> *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). In *Ankenbrandt*, the plaintiff mother brought a lawsuit against her ex-husband and his partner on behalf of her two daughters in federal court based on diversity jurisdiction. The mother sought damages for her daughters as a result of alleged sexual and physical abuse. The district court held it did not have jurisdiction to hear the case based on the domestic relations exception to diversity jurisdiction. The Supreme Court granted certiorari and determined the federal court had jurisdiction. The domestic relations law exception did not apply because the basis of the case was tort damages, not a family law exception such as custody, alimony, or divorce. *Id.*

<sup>114</sup> *Ankenbrandt*, 504 U.S. at 703 (“We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees. Given the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders.”).

<sup>115</sup> See generally Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994); Anne V. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995) (discussing why some scholars oppose the doctrine on the basis of its grounds in sexism).

<sup>116</sup> See Dailey, *supra* note 115; see also Cahn, *supra* note 115.

<sup>117</sup> Professor Sylvia Law is a professor of law, medicine, and psychiatry and New York University Law School. She is the author of several publications, including *Law and the American Health Care System*, and is regarded as a leading scholar in her field. Sylvia A. Law, NYU LAW, <https://its.law.nyu>.



suggests that the legacy of family law as a state matter has less to do with tradition and more to do with the expertise local courts have gained in adjudicating family law matters.<sup>118</sup>

One unfortunate result of the family law exception is a drastic lack of uniformity in family law, particularly within surrogacy law.<sup>119</sup> In twenty-two states, “gestational surrogacy is permitted because no statute or published law prohibits it.”<sup>120</sup> Two states have statutes that explicitly do not permit nor prohibit gestational surrogacy, acknowledging its existence but refusing to enforce a statute which takes a stance on the issue.<sup>121</sup> Of the twenty-four states

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edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=20071  
(last visited May 1, 2018).

<sup>118</sup> Law, *supra* note 117, at 182 (“On the other hand, given our particular U.S. history, states had much more experience in dealing with difficult issues of family law. The proliferation of the states’ experience, in turn, is a consequence of basic assumptions of our federal system. The federal government is one of limited powers while states possess general authority to provide for the local public welfare. The basic law of contract, tort, and criminal law, not merely women and families, remain primarily matters of state control. Family law is complex and effects, in a very personal and individual way, the most profound human relations. Further, family law disputes are abundant; family law cases constitute the largest category of filings at the state civil trial court level. Local judges, social workers, hospitals, and law enforcement officers deal every day and night with families in crisis. States, therefore, function as “laboratories in democracy,” developing new approaches to complex issues that provide models to adopt or to avoid for other states and federal authorities.”).

<sup>119</sup> See generally, Cahn, *supra* note 115.

<sup>120</sup> These 22 states include: Alabama, Alaska, Colorado, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Montana, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and Wisconsin. *Gestational Surrogacy Laws Across the United States*, CREATIVE FAMILY CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited May 1, 2018).

<sup>121</sup> These states include Tennessee and Wyoming. The Tennessee statute defines a “surrogate birth” and states as follows: “Nothing in this subdivision (50) [“Surrogate birth”] shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the general assembly.” TENN. CODE ANN. § 36-1-102(50)(A)(ii)(C) (2017). Wyoming law provides, “[t]his act does not authorize or prohibit an agreement between a woman and a man and another woman in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction, and which provides

which either have no statute in place or have in place a statute which neither prohibits nor permits gestational surrogacy, seven have case law which implicitly permits gestational surrogacy.<sup>122</sup> In one of these, Pennsylvania, “the application of surrogacy law varies greatly by county . . .”<sup>123</sup> One state, New Jersey, has no statute which prohibits nor permits surrogacy but has case law which is unfavorable in situations where the surrogate mother is compensated.<sup>124</sup> Seventeen states have statutes permitting gestational surrogacy.<sup>125</sup> Six states have statutes prohibiting

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that the man and the other woman become the parents of the child . . .” WYO. STAT. ANN. § 14-2-403 (2003).

<sup>122</sup> These states include: Idaho, Maryland, Massachusetts, Ohio, Pennsylvania, Rhode Island, and Wisconsin. *Doe v. Doe* (In re Declaration of Parentage & Termination of Parental Rights), 160 Idaho 360 (2016). In re Roberto D. B., 399 Md. 267 (2002). *Hodas v. Morin*, 442 Mass. 544 (2004). *J.F. v. D.B.*, 116 Ohio St. 3d 363 (2007). *J.F. v. D.B.*, 2006 PA Super 90 (2006); *Mid-South Ins. Co. v. Doe*. *Rosecky v. Schissel*, 2013 WI 66 (2013).

<sup>123</sup> *Gestational Surrogacy in Pennsylvania*, CREATIVE FAMILY CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/pennsylvania/> (last visited May 1, 2018) (“In practice, the application of surrogacy law varies greatly by county, and sometimes by judge, particularly when donors are used.”).

<sup>124</sup> *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. 2000).

<sup>125</sup> Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Illinois, Iowa, Louisiana, Maine, Nevada, New Hampshire, Texas, Utah, Virginia, Washington, and West Virginia. A.C.A. § 9-10-201. CAL FAM CODE § 7960, 7962. CONN. GEN. STAT. § 7-48a. 13 DEL. C. § 8-807. D.C. CODE § 16-401-412. FLA. STAT. § 742.15. 750 ILCS 47/5, 750 ILCS 47/25. IOWA CODE § 710.11. LA. R.S. § 40:46.10; 19-A M.R.S. § 1931-1939; NEV. REV. STAT. ANN. § 126.710, § 126.750, § 126.800, § 126.810; RSA 168-B:10, RSA 168-B:1, RSA 168-B:11; TEX. FAM. CODE § 160.754, § 160.753, § 160.755; § 78B.15.801-809; § 20.156-165; REV. CODE WASH. (ARCW) § 26.26.210-260; W. VA. CODE § 61-2-14h *A.H.W. v. G.H.B.*, 772 A.2d 948 (N.J. 2000).

<sup>125</sup> Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Illinois, Iowa, Louisiana, Maine, Nevada, New Hampshire, Texas, Utah, Virginia, Washington, and West Virginia. A.C.A. § 9-10-201. CAL FAM CODE § 7960, 7962. CONN. GEN. STAT. § 7-48a. 13 DEL. C. § 8-807. D.C. CODE § 16-401-412. FLA. STAT. § 742.15. 750 ILCS 47/5, 750 ILCS 47/25. IOWA CODE § 710.11. LA. R.S. § 40:46.10; 19-A M.R.S. § 1931-1939; NEV. REV. STAT. ANN. § 126.710, § 126.750, § 126.800, § 126.810; RSA 168-B:10, RSA 168-B:1, RSA 168-B:11; TEX. FAM. CODE § 160.754, § 160.753, § 160.755; § 78B.15.801-809; § 20.156-165; REV. CODE WASH. (ARCW) § 26.26.210-260; W. VA. CODE § 61-2-14h



gestational surrogacy.<sup>126</sup> Of these six states, four impose states criminal penalties.<sup>127</sup> Laws regarding the enforcement of surrogacy agreements vary widely by state, with some states explicitly prohibiting or permitting surrogacy contracts by statute and others relying on prior court decisions.

Adding to this confusion, state law which enforces contracts (or does not enforce them) varies dramatically state by state.<sup>128</sup> For example, Nevada recognizes and enforces gestational surrogacy agreements and also provides statutory requirements.<sup>129</sup> The state's statutes require that both the gestational carrier and intended parents be represented by independent counsel, reimbursement for expenses (medical and otherwise), compensation, provisions for noncompliance that "a court of competent jurisdiction shall determine the respective rights and obligations of the parties to the gestational agreement based solely on the evidence of the original intent of the parties," and remedies.<sup>130</sup> By comparison, Michigan permits compassionate surrogacy agreements, in which a surrogate mother can be reimbursed for medical and other pregnancy-related expenses but cannot receive compensation for their services.<sup>131</sup> The state criminalizes surrogacy agreements for compensation.<sup>132</sup>

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<sup>126</sup> Arizona, Indiana, Michigan, Nebraska, New York, and North Dakota A.R.S. § 25-218; BURNS IND. CODE ANN. § 31-20-1-1; MCLS § 722.855. MCLS § 722.861; R.R.S. NEB. § 25-21,200; NY CLS DOM REL § 122; N.D. CENT. CODE, § 14-18-05.

<sup>127</sup> Louisiana, Michigan, New York, Washington. 2016 LA. HB 1102; MCLS § 722.857 MCLS § 722.859; NY CLS DOM REL § 123; REV. CODE WASH. (ARCW) § 26.26.250.

<sup>128</sup> See Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19.

<sup>129</sup> NEV. REV. STAT. ANN. § 126.750 (2013).

<sup>130</sup> *Id.* at §§ 126.750–126.780.

<sup>131</sup> Brandy Thompson, *Surrogacy for Same Sex Couples in Michigan*, THE KRONZEK FIRM PLC (Aug. 5, 2016), <https://www.midmichigandivorce.com/surrogacy-sex-couples-michigan-part-1.html>; *Compassionate Surrogacy—Options for Your Family*, TIME FOR FAMILIES, <http://timeforfamilies.com/compassionate-surrogacy/> (last visited May 1, 2018) ("Compassionate Surrogacy, sometimes referred to as altruistic surrogacy, is the process where a woman, the compassionate surrogate, carries a child of the intended parents with the intention of giving that child to the parents once it is born . . . A compassionate surrogate does not receive compensation for her services.").

<sup>132</sup> Surrogate Parenting Act, MICH. COMP. LAWS § 722.859 (1988).

Equally striking is the way in which states vary when custody disputes arise out of surrogacy agreements. In Nevada, state courts apply the “original intent of the parties” standard mandated by statute.<sup>133</sup> Where the “original intent of the parties” was for the intended parents to have legal custody of the child—the usual purpose of a surrogacy agreement—the courts will award the intended parents legal custody.<sup>134</sup> In contrast, the standard for awarding custody in Michigan is based on a determination of the “best interests of the child.”<sup>135</sup> Regardless of the parties’ intentions when entering into the surrogacy contract, a surrogate mother who changes her mind, could be awarded custody of the child under this standard.<sup>136</sup>

The lack of uniformity amongst states results in several issues and is a source of confusion for intended parents, potential surrogates, and those who assist in the formation of surrogacy contracts.<sup>137</sup> Where a state prohibits or refuses to enforce surrogacy agreements, the legal status of these children is uncertain.<sup>138</sup> The

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<sup>133</sup> Nevada law provides, “[i]n the event of noncompliance, a court of competent jurisdiction shall determine the respective rights and obligations of the parties to the gestational agreement based solely on the evidence of the original intent of the parties.” NEV. REV. STAT. ANN. § 126.780.

<sup>134</sup> *Id.*; see Robert Tzall, *Nevada: A Great State to be a Gestational Carrier*, CENTER FOR SURROGATE PARENTING, INC. (Jan. 28, 2015), <http://www.creatingfamilies.com/blog/?nevada-a-great-state-to-be-a-gestational-carrier-308>.

<sup>135</sup> Surrogate Parenting Act, § 722.86 (noting that the state, “shall award legal custody of the child based on a determination of the best interests of the child.”).

<sup>136</sup> Michigan law lists the factors to be considered to apply the “best interests of the child” standard. *Id.* § 722.23 (stating, “‘best interests of the child’ means the sum total of the following factors to be considered, evaluated, and determined by the court,” and enumerates 12 considerations).

<sup>137</sup> See Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19.

<sup>138</sup> The UPA of 2002 states:

In states rejecting gestational agreements, the legal status of children born pursuant to such an agreement is uncertain. If gestational agreements are voided or criminalized, individuals determined to become parents through this method will seek a friendlier legal forum. This raises a host of legal issues. For example, a couple may return to their home state with a child born as the consequence of a gestational agreement recognized in another state. This presents a full faith and

criminalization or legal uncertainty of surrogacy agreements in some states encourages forum-shopping by motivating intended parents to enter into agreements in states with friendlier laws.<sup>139</sup> Finally, there is a full faith and credit issue—how should a state which prohibits or criminalizes surrogacy agreements treat children born of legal agreements in other states?<sup>140</sup>

#### A. New York (Least Permissive)

Surrogacy agreements are not enforceable in New York.<sup>141</sup> Article 8 Section 122 of the Domestic Relations Law provides, “Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.”<sup>142</sup>

Shortly after *Baby M*, a New York family court ruled on *In re Adoption of Paul*.<sup>143</sup> Analogous to the facts of *Baby M*, the parties entered a contract where a surrogate mother agreed to be inseminated with the intended father’s sperm and surrender the child for the purpose of adoption by the intended parents in exchange for \$10,000 and reimbursement of expenses.<sup>144</sup> However, when the surrogate mother attempted to execute the adoption to the intended parents, the court declared the surrogacy agreement invalid.<sup>145</sup> The court’s reasoning was that the agreed-upon compensation of \$10,000 was in violation of public policy and a New York statute

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credit question if their home state has a statute declaring gestational agreements to be void or criminal.

UNIF. PARENTAGE ACT (UPA) § 8 cmt. (NAT’L CONF. OF COMM’RS ON UNIFORM ST. L. 2002).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> N.Y. DOM. REL. LAW §122 (McKinney 1992).

<sup>142</sup> *Id.*

<sup>143</sup> *In re Adoption of Paul*, 146 Misc. 2d 379, 380 (1990).

<sup>144</sup> *Id.* at 379.

<sup>145</sup> *Id.* at 384 (“My analysis of the clear language of the statutes governing adoption, together with the policy of this State as articulated in case law, leads me to the conclusion, as stated by the New Jersey Supreme Court in *Matter of Baby M*, that the contract at bar provides for “the sale of a child, or, at the very least, the sale of a mother’s right to her child” (*citing In re Baby M*, 537 A.2d 1248 (1988), in contravention of the law of this State. Such contracts are, therefore, void under the law of the State of New York as it exists at present).

which prohibited payment associated with the adoption of a child.<sup>146</sup> The purpose of the statute, the court stated, was to prevent child trafficking.<sup>147</sup>

In 2014, another New York court addressed surrogacy in *Matter of J.J.*, and emphasized that the existence of a surrogacy contract did not prevent an agreed-upon adoption from taking place.<sup>148</sup> While *Matter of J.J.* created a narrow exception to New York State law prohibiting surrogacy contracts, the State's insistence on prohibition, as opposed to regulation, only encourages parties to go abroad, go to other states, or seek self-help and enter into contracts where the parties' interests are not protected. It would be better public policy to provide parties who desire to enter into these agreements in their home state provisions which protect their interests.

#### B. California (Most Permissive)

California's laws are more permissive than any other state, resulting in a booming surrogacy industry.<sup>149</sup> California Family Code § 7613 provides the "intended parent is treated in law as if he or she were the natural parent of a child thereby conceived."<sup>150</sup> California Family Code § 7962 sets out the provisions of a legal and enforceable surrogacy agreement.<sup>151</sup>

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<sup>146</sup> *In re Adoption of Paul*, 146 Misc. 2d at 382–83 ("Like New Jersey, New York's adoption statutes prohibit the request, acceptance, receipt, payment or gift of 'any compensation or thing of value, directly or indirectly, in connection with the placing out or adoption of a child or for assisting a parent, relative or guardian of a child in arranging for the placement of the child for the purpose of adoption' by any person other than an authorized agency") (citing N.Y. Soc. Serv. Law § 374(6) (McKinney 2009)).

<sup>147</sup> *Id.* at 383.

<sup>148</sup> *Matter of J.J.*, 44 Misc. 3d 297, 304 (2014).

<sup>149</sup> "California has the most permissive law, allowing anyone to hire a woman to carry a baby and the birth certificate to carry the names of the intended parents. As a result, California has a booming surrogacy industry, attracting clients from around the world." Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19.

<sup>150</sup> Uniform Parentage Act, CAL. FAM. CODE § 7613(a) (2017).

<sup>151</sup> *Id.* § 7692.

California provides numerous statutory provisions to protect the intent of the parties, including requirements for independent counsel, notaries, and procedural requirements of what must be included in their contract.<sup>152</sup> Furthermore, California law considers surrogacy agreements “presumptively valid” and enforceable, reflecting the intent of contracting parties.<sup>153</sup>

*C. Illinois (Other Approaches, More Commercial)*

Illinois law also enforces surrogacy agreements and seeks to protect parties entering surrogacy agreements and their children.<sup>154</sup> The Illinois law sets forth several unique and progressive requirements including mental health screenings for both parties, independent legal consultation for both parties, and a minimum age requirement for the surrogate mother.<sup>155</sup> The most striking aspect of the Illinois law, however, is that it only enforces *gestational surrogacy* agreements, not *traditional surrogacy* agreements.<sup>156</sup>

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<sup>152</sup> California law sets out what a surrogacy agreement must contain (identity of intended parents, surrogate mother, and gamete donors; date executed; disclosure of how medical expenses will be covered) and procedural requirements (signed, notarized with a witness). The law requires that the surrogate and intended parents be “represented by separate independent licensed attorneys of their choosing.” *Id.* § 7962. The law sets out disposition of funds. *Id.* § 7961.

<sup>153</sup> *Id.* § 7962(i) (“An assisted reproduction agreement for gestational carriers executed in accordance with this section is presumptively valid and shall not be rescinded or revoked without a court order. For purposes of this part, any failure to comply with the requirements of this section shall rebut the presumption of the validity of the assisted reproduction agreement for gestational carriers.”).

<sup>154</sup> 750 ILL. COMP. STAT. ANN. 47/5 (2005) (stating “The purpose of this Act is to establish consistent standards and procedural safeguards for the protection of all parties involved in a gestational surrogacy contract in this State and to confirm the legal status of children born as a result of these contracts. These standards and safeguards are meant to facilitate the use of this type of reproductive contract in accord with the public policy of this State.”).

<sup>155</sup> *Id.* at 47/20.

<sup>156</sup> *Id.* at 47/75; *Gestational Surrogacy in Illinois*, CREATIVE FAMILY CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/illinois/> (last visited May 1, 2018) (“Traditional Surrogacy in Illinois is permitted because no statute or published case law prohibits it. In practice, Traditional Surrogacy is treated like a stepparent adoption in Illinois (so long as

Unlike traditional surrogacy where the surrogate is impregnated either through In Vitro Fertilization (hereinafter “IVF”) or artificial insemination using her own egg, a gestational surrogate is implanted with embryos created from an egg from either an intended mother or donor.<sup>157</sup> As a result, a gestational surrogate has no genetic connection to the child that she carries.<sup>158</sup> This eliminates some concern regarding “designer babies” and provides some additional protection for intended parents.<sup>159</sup> Illinois legislature has implemented some provisions to surrogacy contracts which finds them enforceable but also includes provisions which protect parties, an example each state should take in its approach to surrogacy law.

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the Intended Parent provides the sperm). Consequently, the Traditional Surrogate cannot relinquish her maternity rights prior to 72 hours after the child’s birth.”).

<sup>157</sup> 750 ILL. COMP. STAT. ANN. 47/10 (“‘Gestational surrogacy’ means the process by which a woman attempts to carry and give birth to a child created through in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational surrogate has made no genetic contribution.”); *In Vitro Fertilization*, BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014), available at Westlaw BLACKS (“A procedure by which an egg is fertilized outside a woman’s body and then inserted into the womb for gestation”); *Using a Surrogate Mother*, WEBMD, *supra* note 28.

<sup>158</sup> *Using a Surrogate Mother*, WEBMD, *supra* note 28.

<sup>159</sup> Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19; Sarah Ly, *Ethics of Designer Babies*, THE EMBRYO PROJECT ENCYCLOPEDIA (Mar. 31, 2011), <https://embryo.asu.edu/pages/ethics-designer-babies>. “Designer Babies” are defined as:

A baby genetically engineered *in vitro* for specially selected traits, which can vary from lowered disease-risk to gender selection. Before the advent of genetic engineering and *in vitro* fertilization (IVF), designer babies were primarily a science fiction concept. However, the rapid advancement of technology before and after the turn of the twenty-first century makes designer babies an increasingly real possibility. As a result, designer babies have become an important topic in bioethical debates, and in 2004 the term ‘designer baby’ even became an official entry in the *Oxford English Dictionary*. Designer babies represent an area within embryology that has not yet become a practical reality, but nonetheless draws out ethical concerns about whether or not it will become necessary to implement limitations regarding designer babies in the future.

Ly, *supra* note 159.

*D. Other Approaches*

Like Illinois, Louisiana law limits surrogacy to gestational surrogacy, but, unlike Illinois, compensation for the surrogate mother is prohibited.<sup>160</sup> This practice is otherwise known as “altruistic surrogacy.”<sup>161</sup> An altruistic surrogate receives no compensation beyond the reimbursement of expenses, and as a result, is oftentimes already a close relative or friend of the intended parents.<sup>162</sup> While some believe this approach helps to limit the commercialization of surrogacy, others have concerns that close relationships between surrogates and intended parents are more vulnerable to conflicts and custody disputes.<sup>163</sup> As an expert opined, “It crosses a lot of lines to bring family members into your reproductive life . . . If the surrogate or the donor is a relative and something goes amiss, it can affect family relationships forever after.”<sup>164</sup>

In addition, the Louisiana law provides additional, onerous requirements which could be construed as discriminatory, especially against same-sex couples.<sup>165</sup> The law limits the statutory definition of “intended parents” to a married couple “who each exclusively contribute their gametes to create their own embryo,” a de facto exclusion of same-sex couples who would not be able to provide both male and female gametes.<sup>166</sup> The law also requires approval of

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<sup>160</sup> H.B. 494, 1102 Leg., 42<sup>nd</sup> Sess. (La. 2016).

<sup>161</sup> *What is Altruistic Surrogacy?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-altruistic-surrogacy/> (last visited May 1, 2018).

<sup>162</sup> *Id.*

<sup>163</sup> Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19. (stating, “[b]ut many lawyers and doctors say such [altruistic surrogacy] arrangements are actually the most likely to fall apart, given the difficulty of maintaining comfortable boundaries and the risk of intrusiveness, or coercion, souring relationships that seemed solid.”).

<sup>164</sup> *Id.*

<sup>165</sup> The law states, “the legislature has restricted the range of enforceable gestational surrogacy agreements to those in which the parties who engage the gestational surrogate not only are married to each other, but also create the child using only their own gametes.” H.B. 494, 1102 Leg., 42<sup>nd</sup> Sess. (La. 2016).

<sup>166</sup> *Id.*



the agreement before in utero embryo transfer.<sup>167</sup> Significantly, the law prohibits agreements which require a surrogate mother to consent to termination of the pregnancy “for any reason” including prenatal diagnosis of a serious health condition.<sup>168</sup>

*E. Biased Approaches*

Like Louisiana, Utah law also creates a de facto exclusion for same-sex couples—the law’s requirement that the intended couple provide medical evidence that the intended mother is “unable to bear a child” excludes same-sex male couples from having a child via surrogate.<sup>169</sup> These requirements could be considered onerous to heterosexual couples and discriminatory to same-sex couples, and one couple denied a petition to enter a surrogacy agreement in Utah has challenged the law on constitutional due process and equal

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<sup>167</sup> *Id.* (“Prior to in utero embryo transfer, the intended parents or the gestational carrier and her spouse, if she is married, may initiate a summary proceeding in the court exercising jurisdiction over the adoption of minors where the intended parents or the gestational carrier reside, seeking to have the court approve a gestational carrier contract.”).

<sup>168</sup> *Id.* The law also states that:

No person shall enter into a gestational carrier contract that requires the gestational carrier to consent to terminate a pregnancy resulting from in utero embryo transfer for any reason, including a prenatal diagnosis of an actual or potential disability, impairment, genetic variation, or any other health condition or a discrimination based on gender, or for the purposes of the reduction of multiple fetuses. Any such provision in a contract executed in the state of Louisiana or any other state shall be absolutely null and unenforceable in the state of Louisiana as contrary to public policy.

*Id.*

<sup>169</sup> UTAH CODE ANN. § 78B-15-803 (West 2008). In upholding the state law, the Utah Supreme Court held, “But a child is not an entitlement that can be claimed, and a woman is not an object for effectuating the desires of others for a child, regardless of whether those seeking the child are in an opposite-sex or same-sex relationship. The Constitution cannot justifiably be read to create that result.” William C. Duncan, *William C. Duncan: A Child is Not an Entitlement, and a Uterus is Not a Commodity*, THE SALT LAKE TRIBUNE (Sept. 23, 2017), <http://www.sltrib.com/opinion/commentary/2017/09/23/william-c-duncan-a-child-is-not-an-entitlement-and-a-uterus-is-not-a-commodity/>.



protection grounds.<sup>170</sup> While the fact that the law was written before the legalization of same-sex marriage in Utah may suggest legislative intent was not discriminatory, the legislature's failure to amend the law and the Utah trial and appeals courts' refusal to apply a gender-neutral reading of the statute suggests the legislative intent was a discriminatory, de-facto exclusion of same-sex couples.<sup>171</sup>

The lack of uniformity in surrogacy law in the United States goes beyond prohibiting or enforcing surrogacy agreements. The varying statutes and case law provide for dramatic differences in the requirements for enforcement as well as different legal standards for custody when disputes arise. This lack of uniformity results in unclear legal status for children born from surrogacy agreements, the encouragement of forum-shopping, and full faith and credit clause issues.

### III. PROPOSED SOLUTION

#### *A. The Choice Theory of Contracts*

Given the lack of uniformity in state law, wherein some fail to enforce surrogacy agreements while others lack protective statutory requirements, and the biases evident in others, a different approach is required which allows for greater protection of the parties which enter such agreements. The Choice theory of Contracts provides a workable standard for each state to implement the protective

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<sup>170</sup> Jennifer Dobner, *Utah Couple Heads to State Supreme Court Over Law that Prevents Married Gay Men From Having Biological Children Through Surrogacy*, THE SALT LAKE TRIBUNE (Sept. 12, 2017), <http://www.sltrib.com/news/2017/09/12/married-gay-couple-challenges-utahs-surrogacy-law-after-court-denies-petition/>.

<sup>171</sup> See Ben Winslow, *Utah Supreme Court Considers Challenge to Surrogacy Law From Gay Couple*, FOX13 (Sept. 13, 2017), <http://fox13now.com/2017/09/13/utah-supreme-court-considers-challenge-to-surrogacy-law-from-gay-couple/>. Justice John Pearce noted the law pre-dated Utah's adoption of same-sex marriage stating, "Here the legislature passed the statute at a time when Prop. 3 (Amendment 3) was a part of the constitution . . . Can we say, looking backwards, that a gender-neutral reading of the statute would conform to the manifest intent of the legislature? It seems to me we have to resolve this on constitutional grounds." *Id.*

requirements appropriate for its citizens while allowing states the opportunity to maintain autonomy over their family laws.

Hanoch Dagan and Michael Heller recently published *The Choice Theory of Contracts* outlining this new approach to contract law while rejecting traditional contract theory and provides a new and workable standard for altruistic contracts such as surrogacy agreements.<sup>172</sup> *The Choice Theory of Contracts* argues that traditional contract theory has detrimentally limited its focus on rationales such as individual autonomy or economic efficiency.<sup>173</sup> In terms of autonomy, many traditional theories are based on an outdated assumption about freedom of contract, that freedom of contract allows people to bargain for contract terms.<sup>174</sup> In this day and age, however, spending time and energy dickering over terms and worrying about whether or not we will be taken advantage of is unrealistic in a “click and agree” era.<sup>175</sup> Dagan and Heller state, “Free people are defined in part by the attractive choices they reject, not just those they select.”<sup>176</sup> Furthermore, the emphasis traditional contract theories put on economic efficiency overlooks the fact that people don’t always enter into agreements for economic reasons—contracts are often chosen for community-related or altruistic purposes.<sup>177</sup>

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<sup>172</sup> DAGAN & HELLER, *supra* note 10. Hanoch Dagan is a leading private law theorist. He is a professor and former dean of the Tel Aviv University Faculty of Law. Michael Heller is a leading authority on property and a professor and former Vice Dean at Columbia Law School. *Id.* at xi–xii.

<sup>173</sup> *Id.* at xi–xii.

<sup>174</sup> *Id.* at 2.

<sup>175</sup> See *id.* at 2–3. Dagan and Heller state: “In large measure, freedom means pursuing the valuable ends of our lives, not spending our resources dickering over contract terms and worrying whether others are taking advantage of us.” *Id.* at 3.

<sup>176</sup> *Id.* at 4.

<sup>177</sup> Dagan and Heller state:

Much of contract law is, and should be, driven by efficiency concerns . . . Autonomy and community concerns cannot be banished altogether, if, for example, you oppose slavery and endorse marriage . . . choice theory solves this puzzle. It shows how contract can enhance individual autonomy while at the same time providing people with the economic and social benefits they seek . . . at the same time, we note that people usually do not enter contracts to become freer. Sometimes, people contract to achieve “utility” . . . other times, they seek ‘community . . .’

As a solution to these issues, Dagan and Heller suggest that contract formation and enforcement should not be driven by a single value or approach.<sup>178</sup> Rather, there should be a contract framework available for every different type of contract, and “the contract types within a single sphere offer individuals choices among divergent values.”<sup>179</sup> Traditional assumptions about contracts should not be applied uniformly in purchasing a car versus transplanting an organ, for example, and states can provide contract mechanisms for protecting parties who enter into altruistic agreements.

Dagan and Heller argue the “state” should play an affirmative role in shaping these distinct contract “types.”<sup>180</sup> Because people are driven to enter contracts for a variety of reasons — community, autonomy, etc. — we cannot expect these legal changes to be market-driven.<sup>181</sup> Dagan and Heller suggest several solutions, “one approach is to encourage states to adopt successful types from other states or countries . . . another is to encourage them to support rather than squash emerging and utopian types for which there is already some level of demand . . . ”<sup>182</sup> In the context of surrogacy law, this approach would require re-framing surrogacy contracts as an

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social benefits of contracting distinct from utilitarian ones . . . ensure that people can make effective choices among these values when they so choose.  
*Id.* at 5.

<sup>178</sup> *Id.*

<sup>179</sup> Dagan and Heller state:

Accordingly, we reject the notion that any single value -- utility, community, or even autonomy-- suffices for a coherent general theory. Instead, we relocate most of the normative (and doctrinal) discussion to a more correct and productive level-- relating to the diverse values that animate each type and the recurring dilemmas common to each sphere . . . the contract types within a single sphere offer individuals choices among divergent values.” And “ . . . for every sphere of potential contracting activity, the state should provide a robust menu of choices.

*Id.*

<sup>180</sup> Dagan and Heller state: “The State’s Affirmative Role-- By contrast, choice theory shows why a state committed to human freedom must actively enable people’s relationships by shaping distinct contract types.” *Id.* at 6.

<sup>181</sup> Dagan and Heller state: “Challenges arise when the parties’ overriding goal moves away from wealth maximization. Then, there is less reason to expect market demand to drive creation of sufficient types.” *Id.* at 15.

<sup>182</sup> *Id.*

altruistic agreement and providing a “menu” of unique provisions for parties to choose from when forming their contracts.

Surrogacy agreements are an ideal example of the application of the choice theory of contracts.<sup>183</sup> At first glance, the parties appear to have competing interests where providing for the protection of both parties seems impossible—the intended parents’ interest in having a child compared to the surrogate’s interest in the child, her body, and compensation. However, the choice theory of contracts recognizes that the contract is more than a commercial transaction, but it is also a community and altruistic agreement.<sup>184</sup> Moving away from treating the contract like a commercial agreement—intended parents pay surrogate, surrogate produces child—and towards a more community-based goal—“to be a team so somebody can become a parent”—re-frames the contract’s purpose and reconciles the previously competing interests of the parties.<sup>185</sup> Furthermore, framing the contract as “a team so somebody can become a parent” is a more accurate reflection of the motivations of the parties.<sup>186</sup>

Applying this theory would require each state to offer a surrogacy “type” of contract with different mechanisms to protect the parties and achieve their common goal.<sup>187</sup> The following are some suggestions for mechanisms, many of which are the current laws of some states, suggestions from the Uniform Parentage Act, or are norms which have developed over time.

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<sup>183</sup> Dagan and Heller state: “Choice theory is at its strongest in analyzing new and emerging contract types – in areas as diverse as gestational surrogacy, employment in the sharing economy, and the partnership structure of law firms.” *Id.* at 6.

<sup>184</sup> *Id.* at 14.

<sup>185</sup> See sources cited *supra* note 99.

<sup>186</sup> See sources cited *supra* note 99.

<sup>187</sup> DAGAN & HELLER, *supra* note 10, at 14. These “mechanisms” can derive from state legislatures, judges, other states’ laws, and model legal codes, such as the American Law Institute. *Id.* at 15 (“Implementing choice theory thus devolves into a study of comparative institutional competence of actors including the state legislatures and judges, the American Law Institute (ALI) and the Uniform Law Commission (NCCUSL), along with public interest groups, law firms, and lobbyists . . . [o]ne approach is to encourage states to adopt successful types from other states or countries . . . [a]nother is to encourage them to support rather than squash emerging and utopian types for which there is already some level of demand.”).

One contract mechanism is a requirement that a surrogate be compensated and a limit on the amount of compensation provided. By requiring compensation, states would eliminate compassionate surrogacy, and concerns regarding surrogates who carry children for close friends or family members would be minimized.<sup>188</sup>

In terms of adequate compensation, the 2002 UPA provides that the amount of compensation should be “reasonable,” and the 2017 UPA permits “payment of consideration and reasonable expenses.”<sup>189</sup> “Reasonable” compensation would probably reflect the industry norm of anywhere between \$35,000–\$45,000.<sup>190</sup> The going-rate for compensation for a surrogate mother in the United States is only about \$45,000 even though wealthy intended parents (including Kim Kardashian and Kanye West) would be willing to pay more.<sup>191</sup> This amount of money, experts say, provides enough incentive to surrogate mothers to carry children while still aiding to ensure they are being a surrogate for the right reasons, because they enjoy being pregnant and want to provide another with the opportunity to have a child, whereas a higher amount of compensation would more closely resemble coercion.<sup>192</sup> While opponents might argue that parties should be free to contract for any

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<sup>188</sup> Lewin, *Surrogates and Couples Face a Maze of Laws*, *supra* note 19. (“But many lawyers and doctors say such [altruistic surrogacy] arrangements are actually the most likely to fall apart, given the difficulty of maintaining comfortable boundaries and the risk of intrusiveness, or coercion, souring relationships that seemed solid.”).

<sup>189</sup> UNIF. PARENTAGE ACT (UPA) § 803(b)(5) (NAT’L CONF. OF COMM’RS ON UNIFORM ST. L. 2002). ; UNIF. PARENTAGE ACT (UPA) § 804(b)(1) (NAT’L CONF. OF COMM’RS ON UNIFORM ST. L. 2017).

<sup>190</sup> Allie Jones, *Here’s Why Kim Kardashian’s Surrogate Is Making Only \$45,000*, THE CUT (Sept. 13, 2017), <https://www.thecut.com/2017/09/kim-kardashian-pregnancy-surrogate-third-child.html>.

<sup>191</sup> *See id.*

<sup>192</sup> *See id.*; Stephanie Caballero, a surrogacy attorney from California explains, “Here’s the thing . . . if you pay a surrogate, let’s say who’s giving birth for Kim and Kanye, \$100,000, that looks like coercion. I mean anybody, you would raise your hand and say, ‘Sure, six figures? I’ll carry your baby!’ And you don’t want somebody to come forward like that. You want a woman who has raised her hand and said, ‘This is something that I want to do. I have uneventful pregnancies; I love being pregnant. I want to help somebody and give them a baby.’”. *Id.*

negotiated amount or the market may dictate compensation in excess of this recommendation of \$45,000, this compensation requirement and cap help to ensure the surrogate mother participates for the right reasons and helps prevent coercion.

Some states which allow for the enforcement of surrogacy agreements require that the surrogate mother consult with independent legal counsel paid for by the intended parents.<sup>193</sup> This mechanism helps to ensure that the surrogate mother truly understands her obligations and the term of the contract and makes fraud, duress, coercion, or unconscionability less likely.<sup>194</sup> Furthermore, more sensitive provisions regarding what happens in the event that a disability or birth defect are detected in utero or what happens in the event of unintended multiples can be discussed and possibly negotiated. In the very least, parties should be acutely aware of these and similar provisions as opposed to treating them as boilerplate language.

Another mechanism would require both parties to undergo independent psychological consultations. For the intended parents, this helps to ensure that the surrogate is mentally healthy and perhaps less likely to change her mind and seek parental rights over the child. For the surrogate mother, knowing that the intended parents are mentally healthy reassures her that the child she carries will be adequately cared for. To be sure, this requirement might be criticized as discriminatory against individuals with mental or emotional struggles; however, the Cook case demonstrates what can occur when the conditions of both parties are not fully disclosed.<sup>195</sup> When both parties are knowledgeable of and confident in the mental health of the other party, disputes regarding the ability to carry or care for the child are minimized.

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<sup>193</sup> For example, California law sets out requirements for an enforceable surrogacy contract, including a requirement that the surrogate and intended parents be “represented by separate independent licensed attorneys of their choosing.” CAL. FAM. CODE § 7961–7962 (West 2016).

<sup>194</sup> See *Understanding Surrogacy Contracts*, SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/understanding-surrogacy-contracts/> (last visited May 1, 2018).

<sup>195</sup> See generally *supra* Section II.E–D (analyzing the surrogacy statutes in both Louisiana and Utah and their possible discriminatory effects concerning same sex couples).

For many of the same reasons that an independent psychological consultation would be a beneficial requirement, requiring a home study of the intended parents would be an appropriate mechanism. An intended mother, like Melissa Cook, would be less likely to have a change of heart or decide not to enter the agreement if she was aware of the intended parents' home situation prior to entering the agreement.<sup>196</sup> The state has an interest in ensuring that children are in safe, appropriate environments, and this mechanism protects the child's interest as well. In addition, the UPA explicitly requires the intended parents "meet the standards of suitability applicable to adoptive parents," which provides for a clear, tested, workable standard for enforcing this mechanism.<sup>197</sup>

States should enforce *gestational* surrogacy agreements but not *traditional* surrogacy agreements. Traditional surrogacy is generally avoided by current practitioners in favor of gestational surrogacy.<sup>198</sup> Gestational surrogacy would mean that the surrogate would be impregnated via IVF with an egg that was not her own, and as a result, the surrogate mother would not be genetically related to the child.<sup>199</sup> The surrogate's lack of genetic connection to the child could assist the intended parents in rebutting an assumption that the surrogate was the intended parent and demonstrate the original intention of the parties.<sup>200</sup> In addition, a gestational arrangement would "decrease the possibility that a genetic gestational mother

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<sup>196</sup> *Cook v. Harding*, 190 F. Supp. 3d 921 (C.D. Cal. 2016), *aff'd*, 870 F.3d 1035 (9th Cir. 2018) (stating "Cook does not believe that Surrogacy International or the physician who performed the embryo transfer, Dr. Jeffrey Steinberg, conducted a home study of C.M.'s living arrangements to determine his parenting capabilities.").

<sup>197</sup> UNIF. PARENTAGE ACT (UPA) § 803(b)(5) (NAT'L CONF. OF COMM'RS ON UNIFORM ST. L. 2002).

<sup>198</sup> UPA art. 8 cmt. (stating "[t]hat combination [traditional surrogacy] is now typically voided by a majority of ART [artificial reproductive technology] practitioners in order to decrease the possibility that a genetic/gestational mother will be unwilling to relinquish her child to unrelated intended parents.").

<sup>199</sup> "'Gestational surrogacy' means the process by which a woman attempts to carry and give birth to a child created through in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational surrogate has made no genetic contribution." 750 ILL. COMP. STAT. ANN. 47/10 (2005); *Using a Surrogate Mother*, WEBMD, *supra* note 28.

<sup>200</sup> See source cited and accompanying text *supra* note 198.



will be unwilling to relinquish her child to unrelated intended parents.”<sup>201</sup>

Another mechanism could be requiring that a surrogate has already given birth to a healthy child. A woman who has been pregnant before knows that her body is capable of carrying a child to term, avoiding the possibility that the intended parents waste time, money, and energy implanting an embryo into a surrogate who has unexpected, underlying fertility issues or high-risk or complicated pregnancies.<sup>202</sup> On an emotional level, a woman who has children of her own already is more likely to be motivated by altruism, to provide another family with the opportunity she has had to have a child, and her familiarity with the pregnancy and birth process ensures she knows what she is getting herself into and less likely to change her mind.<sup>203</sup>

The UPA, as well as several states, require judicial enforcement of surrogacy contracts prior to insemination.<sup>204</sup> This encourages parties to seek judicial intervention which ensures the agreement is reasonable and fair to both parties, comports with statutory requirements, and is not the result of fraud, duress, etc.<sup>205</sup>

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<sup>201</sup> UPA art. 8 cmt..

<sup>202</sup> *Can I Become a Surrogate if I Haven't Had Children of My Own?*, SIMPLE SURROGACY, <https://www.simplesurrogacy.com/can-become-surrogate-havent-children/> (last visited May 1, 2018).

<sup>203</sup> *Id.*

<sup>204</sup> UPA § 801, 803. Pre-birth orders are granted in the following states: California, Connecticut, District of Columbia, Delaware, Maine, New Hampshire, Nevada, Rhode Island. *Gestational Surrogacy Laws Across the United States*, *supra* note 120.

<sup>205</sup> UPA § 803 cmt. states:

This pre-conception authorization process for a gestational agreement is roughly analogous to prevailing adoption procedures in place in most states . . . The Act is designed to protect the interests of the child to be born under the gestational agreement as well as the interests of the gestational mother and the intended parents . . . The interests of all the parties are protected by subsection (b)(3) [‘all parties have voluntarily entered into the agreement and understand its terms;’], which is designed to protect the individuals involved from the possibility of overreaching or fraud. The court must find that all parties consented to the gestational agreement with full knowledge of what they agreed to do.

*Id.*



Intervention prior to insemination protects each party from the resources, time, money, and emotional investment which would be lost if a dispute arose after insemination or birth.<sup>206</sup> Finally, this early intervention protects the child by providing clarity to the child's legal status prior to insemination and birth.<sup>207</sup> While this court intervention might require additional judicial resources, the practice would alleviate costly custody litigation for these parties in the event of a dispute.

In some jurisdictions, courts issue a "pre-birth order" which "assigns legal parentage to the child."<sup>208</sup> Unlike the requirement for early judicial intervention, a pre-birth order is executed after the surrogate mother becomes pregnant,<sup>209</sup> and this order instructs vital records offices to list the intended parents as the parents of the child as opposed to the gestational mother.<sup>210</sup> Pre-birth orders, like requirements for early judicial intervention, provide reassurance to the parties and protects the interests of the intended parents

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<sup>206</sup> UPA § 802 cmt. states:

Sections 802 and 803, the core sections of this article, provide for state involvement, through judicial oversight, of the gestational agreement before, during, and after the assisted reproduction process. The purpose of early involvement is to ensure that the parties are appropriate for a gestational agreement, that they understand the consequences of what they are about to do, and that the best interests of a child born of the gestational agreement are considered before the arrangement is validated.

*Id.*

<sup>207</sup> UPA art. 8, cmt. (stating, "[o]ne thing is clear; a child born under these circumstances is entitled to have its status clarified.").

<sup>208</sup> Teo Martinez, *What is a Pre-Birth Order?*, GROWING GENERATIONS, <https://www.growinggenerations.com/surrogacy-resources-for-intended-parents/what-is-a-pre-birth-order/> (last May 1, 2018) (Defining "pre-birth orders" as "[p]re and post-birth orders are items of extreme interest in gestational surrogacy. Both assign parentage to the intended parents and remove any rights or obligations from the surrogate . . . In simplest terms, a birth order is a legal document assigning parentage to a child.").

<sup>209</sup> *Id.*

<sup>210</sup> See *Gestational Surrogacy in Connecticut*, CREATIVE FAMILY CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/connecticut/> (last visited May 1, 2018).

regarding the child's legal status.<sup>211</sup> In addition, the pre-birth order is a document which could be used to demonstrate the original intention of the parties if a later dispute arose.<sup>212</sup> While a pre-birth order would also require additional judicial resources, the money and efforts spent to change birth certificates after birth or the challenge of finding supporting documentation expressing the parties' original intentions would be well worth the intervention.

In order to discourage forum-shopping in the event that states do have conflicting laws, a residency requirement should be adopted. The 2002 UPA requires that either the mother or the intended parents have been residents of the state where they seek to enforce the surrogacy agreement for at least ninety-days.<sup>213</sup> The 2017 UPA is a more lenient, requiring that at least one medical appointment occur in that state if no parties are residents.<sup>214</sup> While a uniform federal law would help to discourage forum-shopping, federal law policing surrogacy agreements would undermine the autonomy states assert over their family laws.

The constitutionality of denying surrogacy agreements to same-sex couples is a topic for another paper. However, several states have requirements which create a de-facto exclusion for same-sex couples (requiring the couple be "married," or that the gametes used come from the intended parents, for example).<sup>215</sup> While the UPA does not require the intended parents to be married, it explicitly states, "the man and the woman" when referring to intended parents,

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<sup>211</sup> *Establishing Parentage in Surrogacy*, SURROGATE.COM, <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/establishing-parentage-in-surrogacy/> (last visited May 1, 2018).

<sup>212</sup> *See id.* (stating "[w]hen surrogacy is completed legally and the correct process is followed, the surrogate has no parental rights or responsibilities to the child she carries.").

<sup>213</sup> UNIF. PARENTAGE ACT (UPA) § 802(b)(1) (NAT'L CONFERENCE OF COMM'RS 2002).

<sup>214</sup> UNIF. PARENTAGE ACT (UPA) § 803(1) (NAT'L CONFERENCE OF COMM'RS 2017).

<sup>215</sup> *See* H.R. 1102, 42d Reg. Sess. (La. 2016) (requiring that the couple be "married" and that they provide the gametes for the child). *See also* Hearing to Validate Gestational Agreement, Utah Code Ann. § 78B-15-803 (West 2008) (requiring that the couple submit evidence to the court that the wife is unable to bear a child).

creating a de facto exclusion of same-sex couples.<sup>216</sup> To avoid explicit and de-facto exclusion of same-sex couples, state laws should not require the couple be married, the couple be a man and a woman, or the couple to provide their own gametes, etc, and states which impose de facto same-sex discrimination should be declared unconstitutional. Surrogacy agreements provide same-sex couples the opportunity to have children when they otherwise may not be able, and the law should not discriminate against a group who stands to benefit so tremendously from the enforcement of these agreements.

#### IV. CONCLUSION

Many state laws prohibiting the enforcement of surrogacy agreements are the legacy of outdated political debates and fail to acknowledge medical advances, changes in modern society, and have created unintended consequences. If each state adopted the choice theory of contracts approach in enforcing surrogacy contracts and provided a framework for this contract type, it would better serve the parties, the community at large, and most importantly, provide legal clarity around the status of children born subject to such agreements.

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<sup>216</sup> UPA § 801 cmt.