NOTES

FROM LOUISE BROWN TO BABY M AND BEYOND: A PROPOSED FRAMEWORK FOR UNDERSTANDING SURROGACY

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INTRODUCTION

Surrogacy is an issue that has polarized people since the seminal decision of *In re Baby M.*[1] While the vast majority of surrogacy contracts are completed without mishap,[2] the visceral reaction invoked when individuals end up battling for control of a child through the courts has pushed people to the extremes of the debate. Although advances in technology and people's evolving consciousness have allowed society to become more comfortable with nontraditional means of forming a family, there still remains strong pockets of opposition that consider the practice of surrogacy demeaning to women and morally reprehensible.[3] New Jersey in particular has remained steadfast in following its view, as first set forth in *In re Baby M*, that surrogacy contracts are against public policy, with the recent decisions of *A.G.R. v. D.R.H. & S.H.*[4] and *In re T.J.S.*[5] relying on outdated notions of the need to protect the bond between a woman and the child she bears to term. Moreover, despite the fact that the New Jersey Legislature subsequently passed a bill that would have updated the State's surrogacy laws,[6] the measure was vetoed by Governor Chris Christie because of a need to further study the questions raised by "arranged births."[7]

This Note argues that the time has come for the U.S. Supreme Court to recognize that jurisdictions where groups of people are denied their liberty and privacy interests in starting a family through surrogacy run afoul of the Constitution, and that statutes and common law denying people the ability to contract for reproductive services should be struck down. By recognizing a freedom of procreative choice (i.e., the ability to choose to conceive a child rather than remain childless)[8] and declaring that all medically safe and

1. 537 A.2d 1227 (N.J. 1988). Despite not being thrust into the national spotlight until the 1980s, surrogacy arrangements date back to the time of the Old Testament. The earliest account is the story of Abraham and Sarah: Sarah, who was unable to conceive her husband Abraham's child, arranged for Hagar, Sarah's handmaiden, to bear Abraham's child for the couple in her stead. FAITH MERINO, ADOPTION AND SURROGATE PREGNANCY 16 (2010).

2. Anne R. Dana, Note, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 358 (2011).

3. *See* CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 156-203 (2d ed. 2011) (stating that New York, Michigan, Indiana, and Arizona explicitly ban surrogacy as against public policy and/or fine persons who enter into surrogacy agreements).

4. A.G.R. v. D.R.H. & S.H. (*A.G.R. I*), No. FD-09-001838-07, slip op. at 5 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

5. 16 A.3d 386, 395-97 (N.J. Super. Ct. App. Div. 2011).

6. New Jersey Gestational Carrier Agreement Act, S. 1599, 215th Leg. (N.J. 2012), *available at* http://www.njleg.state.nj.us/2012/Bills/A3000/2646_R1.HTM. For an explanation of what Senate Bill 1599 would have accomplished, see SENATE HEALTH, HUMAN SERVICES AND SENIOR CITIZENS COMMITTEE, STATEMENT TO SENATE, S. 1599-215 (N.J. 2012), *available at* http://www.njspotlight.com/assets/12/0812/2205.

7. Susan K. Livio, *Governor Rejects Move to Update the Law on Surrogates: Supporters Say More Clarity Is Needed*, THE STAR-LEDGER, Aug. 9, 2012, at 29.

8. Similarly, women have a right to choose to have an abortion, not a right to obtain an

appropriate means of conceiving a child are presumptively valid, the Supreme Court can usher in a progressive era where commercial surrogacy and other forms of Assisted Reproductive Technology ("ART") are fully legitimized as viable, safe, alternative methods of forming a family.[9]

Following this introduction, Part I presents background information to frame the issue of surrogacy as it exists today. Part II argues that the groundwork for a Supreme Court ruling on the freedom of procreative choice has already been laid through the development of the Court's Due Process and Equal Protection Clause jurisprudence. Part III proposes a new regulatory framework for surrogacy that could be adopted by the courts: presuming that commercial surrogacy contracts are valid, abandoning the "best interests" standard in favor of the "endangerment" standard, and no longer utilizing adoption statutes as a means of governing surrogacy agreements. Part IV demonstrates how existing parentage statutes can be reinterpreted to grant parental rights to contracting parents. Part V argues that concerns about surrogacy promoting baby selling and the exploitation of women's bodies are unfounded. Finally, Part VI concludes with a brief synopsis, finding that a reform of surrogacy laws is well worth the undertaking.

I. UNDERSTANDING THE ISSUES

A. What Is Surrogacy?

The way we choose to define surrogacy conveys subtle messages about society's moral view of the practice.[10] One definition of surrogate that takes into account the functional realities of the situation is "a woman who agrees to serve as the birth mother to have a child for another person or couple, whether or not she is the genetic mother, and whether or not she does so for compensation."[11] Another less neutral definition of surrogacy is "[t]he act of a woman, *altruistic by nature*, to gestate a child for another individual or couple, with the intent to give said child back to his parents at birth."[12] As discussed below, the words "altruistic by nature"—while innocuous by themselves—when used in the context of surrogacy carry a powerful message that can have adverse

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abortion itself. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); Maher v. Roe, 432 U.S. 464, 469 (1977) (recognizing that the U.S. Constitution does not impose an obligation on the states to pay for indigent women to have abortions).

9. *See* JULIA J. TATE, SURROGACY: WHAT PROGRESS SINCE HAGAR, BILHAH, AND ZILPAH! 68 n.176 (1994) (recognizing the bias against people who opt to use surrogacy instead of adopting).

10. A feminist critique of surrogacy posits that "the very term 'surrogate' emphasizes the arrangement's purpose-allowing a man to be a genetic father rather than enabling a woman to become a mother: 'The woman is a 'surrogate'—a surrogate uterus or a surrogate wife-to carry his genes.'" Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 241-42 (1995) (quoting MARTHA A. FIELD, SURROGATE MOTHERHOOD 51 (1988)). The way the media frames its portrayal of surrogacy also can sway public opinion. *See* ONCOFERTILIY: ETHICAL, LEGAL, SOCIAL, AND MEDICAL PERSPECTIVES 141 (Teresa K. Woodruff et al. eds., 2010).

11. KINDREGAN & MCBRIEN, *supra* note 3, at 151.

12. *Definition of Surrogacy*, INFO. ON SURROGACY, http://www.information-on-surrogacy.com/definition-of-surrogacy.html (last visited June 10, 2013) (emphasis added).

consequences on a surrogate's health and economic well-being.[13]

There are two types of surrogacy arrangements, traditional and gestational.[14] Individuals can either contract for these arrangements privately or utilize a surrogacy agency as a third-party intermediary.[15] In traditional or "full" surrogacy, the contracting mother usually is infertile or unable to have children because of health concerns, so the surrogate agrees to provide her own egg and gestate the child created with the contracting father's sperm.[16] The resulting child is genetically related to both the surrogate and the contracting father, which raises problems when it comes to terminating the parental rights of the surrogate.[17] To complete the arrangement, the contracting mother must formally adopt the child, and the contracting father must establish paternity.[18] Despite these considerations, traditional surrogacy remains the most commonly used form of surrogate pregnancy because of "its high success rates and its low fees."[19]

In gestational surrogacy, the surrogate agrees to carry the child to term for the contracting couple but does not provide her own ovum.[20] Gestational surrogacy arrangements can take one of three forms: (1) both contracting parents provide gametes, (2) one of the contracting parents provides his or her gamete and the requisite sperm or egg is provided by an anonymous donor, or (3) neither of the contracting parents provides gametes and both the sperm and egg are obtained from anonymous donors.[21]

Since gestational arrangements fracture the birthing process, there are a

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13. *See generally* Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 303-05 (2007) (discussing how rhetoric employed by surrogacy agencies often leaves surrogates "without the power to adequately negotiate a fair surrogate contract"). The problems created by having surrogates subordinate their self-interests are discussed *infra* in Part I.C.

14. KINDREGAN & MCBRIEN, *supra* note 3, at 152; MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 103-04 (2001).

15. *See, e.g.*, *Surrogacy Agencies*, INTENDED PARENTS, INC., http://intendedparents.com/Info/Surrogacy_Agencies.asp (last visited June 10, 2013) (advertising services to guide clients through the complicated surrogacy process).

16. Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 451 (2009); Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1887 (2009).

17. *See* KINDREGAN & MCBRIEN, *supra* note 3, at 153 ("[A] traditional surrogacy agreement will likely be held unenforceable if the birth mother decides to not surrender her parental rights, since courts are reluctant to enforce the surrender provisions against a surrogate mother who is also the biological mother of the child.").

18. *See id.*

19. MERINO, *supra* note 1, at 17. *But see* MIRIAM BOLEYN-FITZGERALD, BEGINNING LIFE 31 (2010) (mentioning that *Baby M* "changed the nature of surrogacy agreements in the United States, which now almost always involve the donation of an egg from a woman other than the surrogate").

20. Hofman, *supra* note 16, at 451.

21. *See id.* (describing common surrogacy permutations).

variety of individuals who may potentially qualify as a child's parent.[22] In determining maternity, there are three potential women who can lay claim to the child: the woman who gestates the child, the woman who is genetically related to the child, and the woman who intended to have the child.[23] Determinations of paternity involve only two parties, the man who intended to have the child and the man who is genetically related to the child.[24] Although adoption proceedings are generally not necessary to establish parental rights under a gestational agreement, many couples go through the process to solidify their claim to their child.[25] Additionally, as a practical matter, the contracting parents may turn to the courts to establish parentage because of the "difficulty of getting hospital administrators to list someone other than the birth mother on the maternity record."[26]

Courts and state legislatures often assign different legal rights to the parties involved in a surrogacy agreement depending on the type of arrangement they have entered into.[27] By and large, the parties who maintain a genetic tie to the child will receive the greatest legal protections.[28] In the case of traditional surrogacy, courts view the surrogate as having a stronger claim for parental rights than the contracting mother, due to her biological connection to the child, and often will allow the surrogate to successfully challenge the original agreement she entered into.[29] In gestational surrogacy arrangements, courts tend to favor the contracting parents, who maintain the genetic tie to the child, and are "more willing to apply an intentional-parent analysis" if a dispute arises.[30] Uncertainty about legal parentage, however, still presents itself in gestational

22. Jonathan B. Pitt identifies four procreative relationships that can be used to determine parental status in a surrogacy agreement: (1) "male genetic contribution," (2) "female genetic contribution," (3) "original procreative intent," and (4) "gestation." Jonathan B. Pitt, *Fragmenting Procreation*, 108 YALE L.J. 1893, 1897 (1999).

23. Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 604 (2002).

24. *Id.* at 623.

25. *See* KINDREGAN & MCBRIEN, *supra* note 3**,** at 155 & n.17 (stating that most attorneys recommend post-birth adoption to safeguard the interests of the contracting parents, especially when the surrogate is related to one of the contracting parents).

26. *Id.*

27. *See* Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 122-23 (2009); *In re* C.K.G., 173 S.W.3d 714, 724-26 (Tenn. 2005) (recognizing the intent and genetic tests as ways for establishing legal maternity).

28. *See* Roberts, *supra* note 10, at 252. The genetic tie has assumed an almost sacrosanct status in our society. Yet "the genetic tie is inherently paradoxical. It is at once a means of connection and a means of separation. It links individuals together while it preserves social boundaries." *Id.* at 211.

29. "[F]or some courts and legislatures since, one's status as a 'natural' (which, in this instance, is taken to mean 'biological') parent has been accorded great credence." Hofman, *supra* note 16, at 453. S*ee, e.g.*, *In re* Baby M, 537 A.2d 1227, 1240-41 (N.J. 1988) (surrogacy agreement coercive because natural mother consented to surrender child before conception); R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998) (holding that the natural mother must be afforded a grace period before she can consent to custody); *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 901 (Ct. App. 1994) (holding that the natural mother must formally consent to adoption of her child).

30. Storrow, *supra* note 23, at 610.

arrangements that utilize anonymous donors.[31] In these situations courts cannot avail themselves of the convenience of the genetic tiebreaker,[32] either because none of the parties maintain a genetic tie to the child,[33] or because the biological mother is not a party to the agreement.[34]

B. The Debate

Surrogacy presents a unique challenge for judges, legislators, and the general public because it represents a confluence of moral, social, and ethical ideals coming head to head with intellectual and technological advancement.[35] Essentially, the debate boils down to: (1) whether a woman has the right to choose to enter into a surrogacy agreement or whether surrogacy agreements should be banned because they exploit women's bodies;[36] and (2) what arrangement between the contracting parties is in the best interests of the child.[37]

C. Lenses of Analysis

The lens through which we scrutinize what takes place in a surrogacy agreement colors our assessment of whether the practice is legally permissible and affects the ways acceptable transactions can be structured.[38] Typically, surrogacy agreements are viewed in terms of "gift" or "contract."[39] These views are distinguished from one another by whether or not the parties exchange money and/or whether or not the parties bind themselves contractually.[40]

Under the gift analysis, a child is viewed as a "gift[] of nature" that the surrogate altruistically decides to bestow upon an infertile couple sans any economic compensation.[41] When the child is exchanged as a gift, the entire

31. J. Brad Reich & Dawn Swink, *Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era*, 14 J. HEALTH CARE L. & POL'Y 241, 268-69 (2011); Pitt, *supra* note 22, at 1895-96.

32. Pitt, *supra* note 22, at 1897-98.

33. *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (mentioning that the trial court reached the astounding conclusion that the child had no legal parents); Melissa B. Brisman, *Landmark Rulings in Reproductive Law*, REPRODUCTIVE LAW., http://www.reproductivelawyer.com/press_landmark.cfm (last visited June 10, 2013) (stating that intended parents are listed on birth certificate as legal parents).

34. *See, e.g.*, Cassidy v. Williams, No. FA084006951S, 2008 WL 2930591, at *3 (Conn. Super. Ct. July 9, 2008) (referring to a gay couple that entered into gestational agreement utilizing anonymous egg donor).

35. *See* TATE, *supra* note 9, at 9-10 (discussing societal views of surrogacy and motherhood).

36. Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2307-08 & n.7 (1995).

37. Browne C. Lewis, *Three Lies and a Truth: Adjudicating Maternity in Surrogacy Disputes*, 49 U. LOUISVILLE L. REV. 371, 413-14 (2011).

38. J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 361-62 (2011).

39. Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515, 521-25 (1990).

40. *Id.* at 523.

41. *Id.* at 523-24.

process—from conception, to gestation, to birth—reinforces the bonds among the contracting parents, the surrogate, and the child.[42] Often staunch opponents of for-pay surrogacy agreements adhere to this model as the only permissible way for a woman to legally provide a child for an infertile couple.[43] However, a corollary of the gift view is that "notions of altruism and gift-giving serve to obscure [surrogates'] 'economic self-interest.'"[44] "[I]f children are 'priceless gifts' and putting a price on them is distasteful, surrogates may tend to subordinate their own financial interests. This places them at a disadvantage when negotiating contract terms."[45]

Under the contract analysis, the intended parents and the surrogate enter into an economic exchange whereby a child is exchanged for money.[46] Unlike the gift view, when a child is exchanged under the contract model bonds are not formed between the contracting parties.[47] Each participant completes his or her respective obligations under the terms of the agreement and then parts ways after the birth of the child.[48] While proponents of the contract model point to the fact that structuring a transaction as a business deal makes it easier for a surrogate to disassociate herself from the child, the arms-length relationship between the parties sets them up as adversaries if a dispute arises.[49]

Further complicating matters under the contract analysis is the debate concerning whether commercial surrogacy agreements are transactions for a good or transactions for a service.[50] Generally, personal beliefs about whether commercial surrogacy is permissible coincide with whether one views the transaction as an agreement to provide gestational services or as a "baby-selling" commodity exchange.[51] Depicting paid surrogacy as involving the sale of a child typically triggers concerns about children being exploited; therefore, its opponents use this premise to argue that commercial "surrogacy itself is

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42. *Id*. at 524.

43. Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2365 (1995).

44. DiFonzo & Stern, *supra* note 38, at 361 (quoting Martha M. Eitman, *What's Wrong with a Parenthood Market? A New And Improved Theory of Commodification*, 82 N.C. L. REV. 1, 17 (2003)).

45. DiFonzo & Stern, *supra* note 38, at 361 (quoting Drabiak et al., *supra* note 13, at 305).

46. Dolgin, *supra* note 39, at 523.

47. *Id*. at 524.

48. *See id.* ("Just as people are expected to enter contracts as equal, free agents, so they are expected to complete them and go on to other things.").

49. *See id*. at 523.

50. Girardeau A. Spann, Baby M *and the Cassandra Problem*, 76 GEO. L. J. 1719, 1728 (1988).

51. Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting A Womb: Should Surrogate Mothers be Compensated for Their Services?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 547 (2007); *see also* J.F. v. D.B., 66 Pa. D. & C.4th 1, 13 (Com. Pl. 2004) ("Those states that make surrogacy expressly illegal are Delaware, Iowa, Michigan, New Mexico, New York, Oregon, Utah, Washington D.C. and Wisconsin."). But perhaps this outcry is not entirely unfounded. *See* Alan Zarembo, *Scam Targeted Surrogates as Well as Couples*, WASH. POST, Aug. 28, 2011, at A08 (detailing the demise of an international baby selling ring that targeted prospective parents in the United States).

morally wrong."[52] To alleviate these concerns about commercial surrogacy, countervailing groups claim that the surrogate is merely being compensated for her time and gestational services.[53] Under this viewpoint, gestating a child is "analogous to other forms of wage labor" and the surrogate is actually "manifestat[ing] [her] individual freedom."[54]

Still, other scholars have recognized that since women rarely serve as surrogates for purely financial or altruist reasons,[55] exclusive reliance on either the gift or contract perspectives to construct a model for regulating surrogacy agreements would be unwise.[56] A third view—that paid surrogacy is a hybrid contract for both a good and a service and therefore, incorporates elements of both gift and contract—posits that although a surrogate is being remunerated for her time, she also is being paid to relinquish whatever rights she has over the child.[57] This view is designed to assuage concerns about baby selling while simultaneously acknowledging that surrogacy agreements are more than just service contracts.[58] By establishing that a surrogate not only deserves to be recompensed for her efforts but also deserves to receive something extra for the relinquishment of any legal claim to the child,[59] this hybrid view allows a surrogate to advocate for her own economic well-being without having her efforts decried as selfish, and allows her to be recognized for her generous and altruistic service to a contracting couple.

II. CONSTITUTIONAL IMPLICATIONS OF SURROGACY AGREEMENTS

A. The Supreme Court Needs to Issue a Ruling on Surrogacy to Ensure Equal Outcomes in All Jurisdictions

Surrogacy laws in jurisdictions across the United States vary from permissive to outright hostile.[60] The patchwork and disjointed nature of these laws put the parties involved in surrogacy agreements in a position of uncertainty and unnecessarily increases the transaction costs of such

52. CÉCILE FABRE, WHOSE BODY IS IT ANYWAY? JUSTICE AND THE INTEGRITY OF THE PERSON 189 (2006).

53. *Id.*; *see also* SHANLEY, *supra* note 14, at 109 ("One ethicist argues that surrogacy is a service that is 'simply an extension . . . of baby-sitting and other child care arrangements which are very widely practiced . . . .'" (quoting LORI B. ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, & BRAVE NEW BABIES 267 (1989)) (alterations in original)).

54. SHANLEY, *supra* note 14, at 109.

55. *See* FABRE, *supra* note 52, at 191 ("[T]estimonies from surrogate mothers [indicate that] hardly any of [them] agree to act as [a] surrogate[] for financial reasons alone.").

56. *See* Dolgin, *supra* note 39**,** at 524 ("A model must be erected that safeguards elements of [both gift and contract].").

57. FABRE, *supra* note 52, at 189.

58. Epstein, *supra* note 36, at 2307-08. *See infra* notes 148-50 and accompanying text**.**

59. FABRE, *supra* note 52, at 189.

60. *See Surrogacy Laws by State*, THE SELECT SURROGATE, http://www.selectsurrogate.com/surrogacy-laws-by-state.html (last visited June 10, 2013); *see* J.F. v. D.B., 66 Pa. D. & C.4th 1, 13 (Com. Pl. 2004) (providing states' stances on surrogacy).

arrangements.[61] Moreover, some surrogacy agencies actively exploit this ambiguity for their own economic gain.[62] Accordingly, the issue of surrogacy is ripe for the Supreme Court to deliver a ruling that unifies this volatile body of law,[63] precipitating much needed structural change from the top down, much in the same way the Court kick-started social reform with its seminal decisions in *Brown v. Board of Education II*[64] and *Planned Parenthood v. Casey*.[65]

The Supreme Court has jurisdiction to issue a ruling on the validity of commercial surrogacy because of the violation of fundamental rights implicated when state governments unduly interfere with preexisting surrogacy agreements, and because of equal protection concerns created by treating infertile couples differently from those able to have children.[66] It has been longstanding precedent that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[67] This jurisprudence extends back to the *Lochner* era and has been repeatedly enunciated by the Court.[68] The Court first enumerated a

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61. The time spent structuring an agreement that will be upheld by a court as well as the time the parties spend litigating issues that arise under the agreement contributes to these costs. The uncertainty surrounding surrogacy law also nullifies any savings created by utilizing surrogate agencies. *See* Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 82 (2007) (describing the cost-cutting benefits of employing an intermediary).

62. Drabiak et al., *supra* note 13, at 301-02, 305-06; William S. Singer, *Exploring New Terrain: Assisted Reproductive Technology (ART), The Law and Ethics*, 8 RUTGERS J. L. & PUB. POL'Y 918, 932 (2011).

63. "[T]he question whether a controversy is 'ripe' for judicial resolution has a 'twofold aspect, requiring [courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 814 (2003) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967)); *see also* Texas v. United States, 523 U.S. 296, 300 (1998). "Both aspects of the inquiry involve the exercise of judgment, rather than the application of a black-letter rule." *Nat'l Park Hospitality Ass'n*, 538 U.S. at 814. The validity of surrogacy agreements is ripe for Supreme Court adjudication because lower courts have disagreed about whether such contracts are valid, and State action denying people the right to enter into such agreements violates the fundamental right to start a family protected by the Due Process Clause of the Fourteenth Amendment. *See infra* notes 64-74 and accompanying text.

64. 349 U.S. 294, 300-01 (1955).

65. 505 U.S. 833, 846 (1992). "There [are] times . . . when a constitutional question is so ripe for decision, when its resolution is so much needed, that it would be proper to decide the constitutional question even though there might be a possibility . . . that . . . some nonconstitutional question might be decided in a way that would remove the constitutional controversy . . . ." Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 224 (1960) (Black, J., dissenting). Some lawmakers have already recognized this need, repealing a provision in the UPA "offering states the option of declaring surrogacy agreements void . . . on the ground that regulation was essential because parties would continue to enter these agreements." Scott, *supra* note 27, at 123 n.89.

66. *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (establishing judicial review of state action that is in contravention of the constitution); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

67. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974).

68. *See* Joseph F. Morrissey, *Lochner, Lawrence, and Liberty*, 27 GA. ST. U. L. REV. 609, 613

cognizable liberty interest in having children in *Meyer v. Nebraska*.[69] Developing this concept in *Stanley v. Illinois*, the Court recognized that "[t]he right[] to conceive . . . one's children . . . [is] 'essential'" and that "the integrity of the family unit" is protected by the Due Process Clause, the Equal Protection Clause, and the Ninth Amendment.[70] Subsequent decisions have also recognized "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[71] By distilling a general, overarching constitutional right to procreative choice from these decisions, it is possible to frame a couple's decision to enter into a surrogacy agreement as one that is fundamental and deeply rooted in our nation's history.[72]

Additionally, as the ability to start a family has changed as a result of technological advancement, basic constitutional protections enjoyed by fertile couples must be extended to their infertile counterparts to ensure equal protection of the laws.[73] When a state interferes with surrogacy agreements, it not only disregards people's liberty and privacy interests under the Due Process Clause,[74] it also impliedly denotes what groups it believes should be allowed to raise children.[75] Many jurisdictions have laws restricting surrogacy to married and/or heterosexual couples,[76] a practice that seems increasingly archaic given awareness that arbitrary distinctions like these have no basis in any real differences between people.[77] Compounding this problem is the fact that "[p]rominent user groups [of ART] now include non-married, career heterosexual women, gay or lesbian couples, individuals, and straight single men"[78]—nontraditional family starters that have systematically been denied the

(2011) (noting that there is "strong Supreme Court support for the notion that the United States Constitution protects the rights of people generally to . . . have children").

69. 262 U.S. 390, 399 (1923).

70. 405 U.S. 645, 651 (1972) (internal citation omitted).

71. Troxel v. Granville, 530 U.S. 57, 66 (2000) (referring to *Stanley*, 405 U.S. at 651).

72. Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2804 (2005); *see also* Roberts, *supra* note 10, at 216 n.21 (detailing scholarly support for the proposition that a parent's interest in having a child that is genetically related "amounts to a constitutionally protected procreative liberty").

73. *See* Dana, *supra* note 2, at 354 ("Medical and technological advances making conception without coitus possible [have] g[iven] rise to a growing number of people utilizing surrogacy arrangements as a method to procreate." (internal citation omitted)).

74. *See* Roe v. Wade, 410 U.S. 113, 152-53 (1973) (privacy protections "exten[d] to activities relating to . . . procreation."(internal citation omitted)).

75. *See infra* Part II.D.

76. Morrissey, *supra* note 68, at 629-31; Hofman, *supra* note 16, at 460.

77. *See* Florida Dep't of Children and Families v. *In re* Adoption of X.X.G. & N.R.G., 45 So.3d 79, 86 (Fla. Dist. Ct. App. 2010) ("It is difficult to see any rational basis in . . . imposing a blanket prohibition on adoption by [homosexual] persons."); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 171 (2000) ("[S]tudies find no significant differences between children of lesbian mothers and children of heterosexual mothers in anxiety, depression, self-esteem, and numerous other measures of social and psychological adjustment.").

78. Reich & Swink, *supra* note 31, at 254-55 (internal citations omitted).

ability to have children.[79] Constitutional law would be remiss if it allowed the rights of this growing collection of individuals to be restricted by antiquated, traditionalist ideals about proper family formation.

From a structural functionalist perspective,[80] because public awareness has changed since courts first addressed the issue of contractually obtaining parental rights, so too must the application of the Fourteenth Amendment.[81] Early decisions of the English courts involving persons who sought to contract away their parental responsibilities to third parties centered on the concern about downward social mobility.[82] Allowing a father of "good circumstances" to bequeath his child to a family of "the lowest and meanest estate and condition[]" deeply troubled the courts.[83] This concern simply does not exist with current surrogacy agreements, where the person or couple contracting to have the child is often financially better off than the surrogate.[84] Moreover, at least in theory, there is no class system in the United States that would trigger concerns over social mobility in the first place.

Likewise, surrogacy and alternate family formation have become more prevalent in the time since the New Jersey Supreme Court delivered its decision in *In re Baby M*.[85] Recognition of gay rights and sexual freedom has contributed

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79. Myra G. Sencer, Note, *Adoption in the Non-Traditional Family–A Look at Some Alternatives*, 16 HOFSTRA L. REV. 191, 191 (1987).

80. Application of structural functionalism to recognizing the validity of surrogacy contracts finds support in the idea of the Living Constitution. "Living constitutionalism . . . is the idea that 'in a dynamic society' the Constitution 'must keep changing in its application or lose even its original meaning. . . . If [a provision] stays the same while . . . society itself changes, the provision will atrophy.'" Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456, 1463 (2001) (quoting Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 735-36 (1963)).

81. Although a full discussion of the influence international treatment of surrogacy has on public perceptions within the United States is outside the scope of this Note, it is important to observe that India's liberal stance towards surrogacy and promoting "fertility tourism" has swayed some couples to pursue gestational services internationally. *See, e.g.*, Brock A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 525-26 (2010). On the other hand, Canada's restrictive stance towards surrogacy—not allowing surrogates to receive payment for their services—has also found favor amongst U.S. interest groups. KINDREGAN & MCBRIEN, *supra* note 3, at 156. For a general overview of international treatment of surrogacy, see *Surrogacy Worldwide*, IVF-WORLDWIDE, http://www.ivf-worldwide.com/Education/surrogacy-rw.html (last visited June 10, 2013).

82. Sarah Abramowicz, *Childhood and the Limits of Contract*, 21 YALE J.L. & HUMAN. 37, 56 (2009) ("[The] scenario of downward social mobility suggests an anxiety that the practice of allowing parents to rewrite parent-child ties would create an overly fluid social regime.").

83. *Id.* at 56-57 (quoting Hill v. Gomme, (1839) 48 Eng. Rep. 1050 (Ch.), 1053).

84. Anecdotal evidence indicates that surrogates often come from the lowest income bracket, whereas the contracting parents can afford to pay between $40,000 and $120,000 in medical bills and legal fees to complete the process. MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 26 (2010).

85. Reich & Swink, *supra* note 31, at 251-52 n.61. Demand for surrogacy services has increased because of the availability of more information about the practice, advances in technology, declining fertility rates, and economic decisions "to postpone childbirth until later" in life. Leslie Berkman, *Most Surrogacy Agreements Have Happy Endings for All*, L.A. TIMES, May 21, 1993, at A26.

to the public's willingness to adapt new social mores vis-à-vis starting a family.[86] Accordingly, as values within society remain fluid and malleable, so must the Court's interpretation of the scope of constitutional provisions.[87] Principles of liberty that safeguard people's right to have children must apply to persons who utilize surrogacy agreements.[88] The protections offered by the Constitution would be rendered meaningless if states were not required to treat similarly situated people similarly.[89]

B. Family Privacy Doctrine

Over the years, the Supreme Court has developed a family privacy doctrine, an amalgamation of privacy rights that protect matters concerning family life.[90] "Current constitutional protection for family privacy is comprised of various distinct, though related, strands of rights against the state. It includes the right to marry, to procreate or to avoid procreation, to rear children, and to cohabit with family members."[91]

Although the Court has clearly enunciated these guaranteed protections, judicial treatment of issues that fall within the ambit of the family privacy doctrine has not been consistent. The Court will either draw an expansive principle as the underlying rationale of the doctrine (i.e., that the Constitution provides "special regard [in matters] for self-governance in matters of exceptional intimacy") or will construe the doctrine narrowly, looking to whether "society traditionally has regarded the particular relationship or choice as off-limits to governmental interference."[92] Academic debates over the nature of the family privacy doctrine trace the dichotomy set up by the Court. Those scholars that advocate for an expansive view of the doctrine opine that family privacy protects the right to "come together in close consensual relationships," while their colleagues counter with the idea that family privacy traces individual

86. Note, *supra* note 72, at 2803; *see also* A.G.R. v. D.R.H. & S.H. (*A.G.R. II*), No. FD-09-001838-07, slip op. at 14 (N.J. Super. Ct. Ch. Div. Dec. 13, 2011) ("In the eyes of society and according to the law in other jurisdictions, same sex relationships are now viewed differently then [sic] they were at the time of the [*Baby M*] decision."); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that consenting adults have the liberty to engage in a private sexual relationship of their own choosing).

87. *See generally* District of Columbia v. Heller, 554 U.S. 570 (2008) (applying contemporary understanding of the second amendment to uphold citizens' rights to have private firearms in the home); David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 99-100 (2010) (stating that although *Heller* is framed as an originalist decision, it contains elements of the living constitution).

88. FABRE, *supra* note 52, at 194-95.

89. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

90. *See* David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1130-35 (2001) ("The Constitution's protection for freedom of choice in matters relating to family life has been famously murky. . . . [T]he doctrine has emerged in fits and starts from a series of cases involving, first, child rearing and marriage and, later, cohabitation, contraception, and abortion.").

91. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 532 (2000).

92. *Id.* at 535-36.

liberties and the right to be left alone.[93]

Properly construed, the family privacy doctrine has special relevance to the surrogacy debate. As Richard Storrow argues, an analysis of "family privacy cases show[s] a definite tendency [of courts] to reach results consistent with a policy not only of promoting the formation of nuclear families but also of promoting harmony within existing nuclear families."[94] If we understand "nuclear family" to denote a couple and their dependent children,[95] then the family privacy doctrine not only protects the rights of a contracting couple to enter into a surrogacy agreement, but mandates that any disputes surrounding the agreement be resolved in the contracting parents' favor. In surrogacy cases, the nuclear family requiring protection is the contracting couple and the expected child,[96] not a combination of one member of the contracting couple and the surrogate, who often has a family unit of her own.[97]

Support for this proposition can be found from the Court's decision in *Michael H. v. Gerald D.*[98] In that case, a couple had a child who was actually fathered by the next door neighbor during an adulterous relationship with the wife.[99] Despite the neighbor having an ongoing relationship with the child for almost a year, the Court protected the nuclear family and would not allow the neighbor to challenge the statutory presumption that the husband fathered the child.[100] Similarly, in gestational arrangements where the contracting parents

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93. Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 533-34 (2001) (quoting Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1102-03 (1998)).

94. *Id.* at 535-39, 550-59 (explaining that the family privacy doctrine is attributable to *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510 (1925), *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Troxel v. Granville*, 530 U.S. 57 (2000)).

95. Moore v. City of East Cleveland, 431 U.S. 494, 500 (1977).

96. *See* Michael H. Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO ST. L.J. 331, 365 (1990) ("The whole point of most surrogacy transactions is to provide a child for a nuclear family . . . ."); Alexander N. Hecht, *The Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL'Y 227, 247 (2001) ("As a modern world redefines the traditional nuclear family, some courts have applied malleable decision-making to surrogacy cases."); Mimi Yoon, *The Uniform Status of Children of Assisted Conception Act: Does it Protect the Best Interests of the Child in a Surrogate Arrangement?*, 16 AM. J.L. & MED. 525, 542 (1990) (mentioning that because surrogacy "enables a childless couple to have a child and thus a family[,] . . . surrogacy supports, rather than undermines, the family values of our society").

97. *See* Storrow, *supra* note 93, at 535 ("What appears in these cases to be the creation of privacy rights to protect individual choice . . . stems not from a concern for individual autonomy in the first instance but rather from a concern that the exercise of individual choice in any given instance may disrupt the harmony of nuclear families."); Angela R. Holder, *Surrogate Motherhood and the Best Interests of Children*, *in* SURROGATE MOTHERHOOD, POLITICS AND PRIVACY 77, 84 (Larry Gostin ed., 1990) (indicating most agencies will not hire a surrogate who has not had a child of her own because of obstetrical uncertainty).

98. 491 U.S. 110 (1989).

99. *Id.* at 113-14; Storrow, *supra* note 93, at 542.

100. *Michael H.*, 491 U.S. at 123-24; Storrow, *supra* note 93, at 542.

intend to welcome the child into their home, courts should be loath to allow a surrogate to disrupt the arranged nuclear family structure.

Given the diversity of family units that exist in today's society, it would also be appropriate to extend nuclear family protections to a broad array of domestic arrangements.[101] Any restrictive approach to the application of the family privacy doctrine would be counterproductive, and would serve only to "widen the divide between the myriad forms of the family that exist in society today and the ability of the law to protect the integrity of those families."[102] Courts have already shown a willingness to recognize that the term nuclear family may include households with a "single-parent" or "cohabiting unmarried adults."[103] It does not seem like a stretch of this development to include a contracting couple, or individual, and their genetically related child—who happens to be carried by a surrogate only because of biological complications—within the ambit of the definition.

C. We Can No Longer Rely on Outmoded Stereotypes to Justify Imposing Boundaries on What Women Can Do with Their Bodies

Surrogacy serves a unique dualistic function in society. It "emphasizes that not all women who bear children (or who have the capacity to bear children) need to be thought of as mothers, [while also] allow[ing] women who cannot bear children to assume the responsibilities of parenthood."[104] Thus, the practice of surrogacy both reaffirms and challenges conventional notions about what a woman's role is by divorcing the ability to bear children from a woman's success and permitting individuals to form nuclear families (and experience motherhood) in ways previously unimaginable.[105] Nevertheless, while courts have recognized that ideals about what proper women's behavior is cannot govern the choices they are allowed to make in other areas of reproductive rights, traditionalist rhetoric maintains a firm foothold in the realm of ART, especially as applied to surrogacy, and reifies gender stereotypes about women.[106]

Tracing the evolution of the contraception and abortion debates shows the Supreme Court's willingness, over time, to recognize that women are fully capable of making informed choices about what they want to do with their own

101. *See supra* notes 76-79 and accompanying text.

102. Storrow, *supra* note 23, at 599.

103. Doe v. Doe, 710 A.2d 1297, 1333 n.14 (Conn. 1998) (Katz, J., concurring in part and dissenting in part) (citing Martha Minnow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925, 930-32 (1991)), *superseded by statute*, CONN. GEN. STAT. ANN. § 7-48a (2011), *as recognized in* Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011).

104. SHANLEY, *supra* note 14, at 106.

105. *Id.* at 105-106.

106. *See A.G.R. I*, No. 09-001838-07, slip op. at 4 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) (espousing New Jersey's policy against surrogacy agreements because they "have a 'potential for devastation' to women" (quoting *In re* Baby M, 537 A.2d 1227, 1250 (N.J. 1988))); *In re* T.J.S., 16 A.3d 386, 395-96 (N.J. Super. Ct. App. Div. 2011) (contrasting the emotional investment of a surrogate to the detachment of a sperm donor).

bodies.[107] If women who serve as surrogates have the right to exercise reproductive choice when seeking to prevent conception, regardless of their motives, why question their reasons for getting pregnant at a time of their own choosing?[108]

Appeals to morality as a way of justifying prohibitions on surrogacy ring hollow in the current cultural climate. If women "are allowed to work as models in medical schools, . . . masseuses, prostitutes, and sex therapists," what rational basis is there for deciding that concern about women being exploited for the use of their bodies supports finding that surrogacy contracts violate public policy?[109] At its core then, proposed restrictions on surrogacy amount to nothing more than an entrenched belief that babies should be had in only one way. Although people are certainly entitled to hold their own opinions, unsubstantiated idealism cannot be allowed to form the contours of public policy, let alone vindicate prohibiting women from exercising their procreative liberty. Rather, the logical conclusion is to recognize that women are free to engage in any permissible form of work that is not harmful to others.[110]

D. The "Best Interests" Analysis Invariably Leads to Undue Government Interference

When parties with competing claims for parental rights breach the terms of a surrogacy agreement, custody of the child is currently determined under the ambiguous "best interests of the child" standard.[111] Although it is paramount that courts protect the rights of children conceived through surrogacy agreements,[112] the "best interests" analysis is an imprecise calculus that allows judges to import their own judgments, whether subconsciously or not, about who will make a good parent.[113] Even assuming arguendo that an unrelated gestational surrogate has standing to assert a valid child custody claim against genetically related contracting parents,[114] disputes should generally be resolved

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107. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (right for married couples to obtain contraceptives); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right for unmarried couples to obtain contraceptives); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (right for minors to obtain contraceptives); Roe v. Wade, 410 U.S. 113 (1973) (women's right to obtain an abortion); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (state may not impose an undue burden on a woman's ability to obtain an abortion).

108. *See supra* note 8 and accompanying text.

109. FABRE, *supra* note 52, at 192.

110. *See infra* Part V.

111. Elizabeth S. Anderson, *Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales*, 8 HEALTH CARE ANALYSIS 19, 20 (2000); *see also* WILLIAM P. STATSKY, FAMILY LAW: THE ESSENTIALS 325 (2nd ed. 2004) (noting that custody determinations are traditionally made according to the best interests of the child).

112. *See* SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 66-73 (2007).

113. *See* Erin Y. Hisano, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 548 (2011).

114. *See* Anderson, *supra* note 111, at 21 (arguing against the enforcement of relinquishment clauses because they deny surrogates "legal standing to bring a claim that the child would be better

according to the terms of the agreement rather than having judges rewrite provisions that were freely bargained for.[115] Only in extreme circumstances should courts allow a surrogate to seek modification of an agreement, and even then the inquiry should be conducted under an "endangerment" standard rather than according to the child's "best interests".[116]

The Supreme Court has declared that the right to procreate is "one of the basic civil rights of man."[117] Under the "best interests" analysis, however, the state is allowed to engage in a type of selective eugenics, either by enumerating certain favored parental attributes that must be weighed or by giving judges unfettered discretion to import their own favored qualities into the calculus.[118] In either circumstance the result is the same, the mechanisms of the state preordain who may not become a parent.[119] Gestational surrogacy offers the unique opportunity for infertile couples or single individuals to experience raising a child that is biologically related to them.[120] These persons have the same parental intent and desires as their fertile counterparts,[121] but because of their inability to conceive through traditional means, some states are willing to forever deny them the ability to have children.[122] The fact that these individuals might make less than perfect parents or may exhibit some of the minor deficiencies that are inherent in being human cannot serve as valid grounds for restricting their ability to have children.[123]

In a recent case in Michigan, a surrogate was able to retake custody of twin babies who had been living with the contracting parents for a month because she learned that the prospective mother "was being treated for mental illness."[124] Despite a letter from the mother's psychiatrist asserting that she

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off in her custody").

115. *See* J.F. v. D.B., 879 N.E.2d 740, 741 (Ohio 2007); *see also* Mark Strasser, *Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies*, 60 TENN. L. REV. 135, 158 (1992) (mentioning that courts are reluctant to modify surrogacy agreements "if doing so would harm the child").

116. *See infra* Part III.A.

117. Skinner v. Oklahoma *ex rel*. Williamson, 316 U.S. 535, 541 (1942).

118. *See* CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD: SUMMARY OF STATE LAWS 3 (Mar. 2010), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf ("16 States and the District of Columbia list in their statutes specific factors for courts to consider in making determinations regarding the best interests of the child.").

119. The Supreme Court already disfavors state-imposed sterilization. *See Skinner*, 316 U.S. at 541. Although the State is not physically destroying an infertile couple's reproductive capacity when it does not allow them to retain a child produced through surrogacy, it is constructively accomplishing the same result.

120. Morrissey, *supra* note 68, at 626.

121. *See* STATSKY, *supra* note 111, at 325.

122. *See* Andrews, *supra* note 43, at 2357 (mentioning that the only acceptable reason for denying individuals the opportunity to obtain a child is if the contracting parents have a "history of child abuse").

123. In fact, studies have found that infertile couples have more familial stability than fertile couples. *Id.* at 2355.

124. Stephanie Saul, *Building a Baby, With Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at

would make an excellent parent, and the fact that social services indicated that an individual is allowed to adopt or serve as a foster parent when "making regular doctor's appointments, taking medication, and demonstrating that the mental illness is clearly being managed," custody was still awarded to the surrogate.[125]

The proper avenue for disposition of similar cases where the surrogacy agreement has already been completed (i.e., child placed with the contracting parents) would be for the state to uphold the contracting parents' custody rights and, in the unlikely event that a problem arose, seek to terminate parental rights as it would with any other unfit parent.[126] "But for" biology is no longer a compelling reason to interfere with people's ability to conceive and raise their own children.[127]

Furthermore, given that under the "best interests" analysis a court must predict what will be in the child's best interests for the foreseeable future, there is no way to know with any degree of certainty whether the factors the court takes into consideration at the time of litigation will have any bearing on the child's future development.[128] At the outset a judge must decide "whether a child's best interest should be viewed from a long-term or short-term perspective."[129] Secondly, although many states have statutory guidelines about what factors are properly evaluated, judges often retain the discretion to evaluate whatever considerations they see fit.[130] Lastly, the judge must attempt to "predict[] . . . the future needs and plans of both the child and parents."[131]

If the goal of the courts is to facilitate well rounded, psychologically stable, highly functioning individuals who are able to contribute to society, then presumably the wealth and education of the contracting parents would be the

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125. S.E. Smith, *The Cautionary Tale of the Kehoe Twins: Is This About Surrogacy, or Whether or Not Disabled Women Can Parent?*, FWD (FEMINISTS WITH DISABILITIES) FOR A WAY FORWARD (Dec. 16, 2009), http://disabledfeminists.com/2009/12/16/the-cautionary-tale-of-the-kehoe-twins-is-this-about-surrogacy-or-whether-or-not-disabled-women-can-parent.

126. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 760 n.10 (1982) (describing how it is unclear whether "the State constitutionally could terminate a parent's rights without showing parental unfitness"); M.L.B. v. S.L.J., 519 U.S. 102, 103 (1996) (indicating that any case "involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association 'of basic importance in our society' is at stake" (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971))); Parham v. J.R., 442 U.S. 584, 603 (1979) ("Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.").

127. *See* JANET E. SMITH, HUMANAE VITAE: A GENERATION LATER, at xv (1991) (describing "[t]he Catholic condemnation of contraception").

128. Hisano, *supra* note 113, at 546-48.

129. *Id.* at 546.

130. *Id.* at 547; *see also* Amy B. Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 821 (2000) (noting the "historically amorphous nature of the best interests standard").

131. Hisano, *supra* note 113, at 547.

most reliable indicator of a child's future success.[132] Courts expressly disclaim relying on these factors, however, for fear of bias against the surrogate,[133] who usually does not have the same level of income as the contracting parents.[134] The *In re Baby M* court voiced the opinion that it would not distort its inquiry to fit some type of idealized lifestyle: "[A] best-interests test is designed to create not a new member of the intelligentsia but rather a well-integrated person who might reasonably be expected to be happy with life."[135] Nonetheless, critics note that courts may not be as impervious to the allure of wealth and education as they claim.[136] Concerns about the weight courts give to factors under the "best interests" analysis could conveniently be addressed by presuming that intended parents care about their children just as much as their fertile counterparts and abrogating the "best interests" inquiry for challenges to surrogacy agreements that are brought by surrogates.[137] Rather, courts should retain the "best interests" analysis only where a custody dispute arises between two contracting parents,[138] as in the case of a divorce before or after the child is born.[139]

III. A NEW REGULATORY FRAMEWORK

A. Honoring the Intent of the Parties

Despite the scholarly outcry against the freedom of contract jurisprudence

132. Under the theory of aligned ambitions, "adolescents [that] have educational and occupational goals that are complementary" have the greatest chance of being financially successful in life. BARBARA SCHNEIDER & DAVID STEVENSON, THE AMBITIOUS GENERATION: AMERICA'S TEENAGERS, MOTIVATED BUT DIRECTIONLESS 6-7 (1999). Parents are one of the primary influences in shaping children's ambitions, and the abilities to provide supplemental educational instruction or offer advice on navigating a career path from actual experience in the field are invaluable assets in leading a child to success. *Id.* at 7-8. It is no wonder that the mantra, "the distribution of wealth repeats itself," has been lamented by economists for decades.

133. *See* Abramowicz, *supra* note 82, at 99 ("[C]ourts in custody disputes understand socio-economic deprivation to limit a child's future freedom of choice and independence, but sometimes try to avoid stating this directly, out of a reluctance to countenance the view that money and other material benefits could outweigh parental love."); Hisano, *supra* note 113, at 548 ("When forced to choose between two parties, there is the danger that courts may unfairly discriminate against the party who is less educated or has fewer financial resources."); MARTHA A. FIELD, SURROGATE MOTHERHOOD 132 (expanded ed. 1990) ("[T]o take factors such as wealth into account raises an additional specter—that of the poor or uneducated being deprived of their children in order to benefit the wealthy and established.").

134. "The majority of U.S. couples who commission a surrogate pregnancy are white, with an average family income of $100,000 or more. . . . [C]ontracting mothers tend to be older, with higher levels of education." MERINO, *supra* note 1, at 41. "[S]urrogate mothers are, on average, working-class women with high school educations, families, and a mean age of 27." *Id.*

135. 537 A.2d 1227, 1260 (N.J. 1988).

136. Abramowicz, *supra* note 82, at 89.

137. Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 626-27 (2003).

138. *See id.*

139. *See, e.g.*, Brasfield v. Brasfield, 679 So. 2d 1091, 1092-94 (Ala. Civ. App. 1996) (during divorce, husband contested custody on grounds that wife was not natural mother of child born to a surrogate).

adduced by *Lochner*,[140] the reality remains that it is an integral part of a free society.[141] Moreover, as Joseph F. Morrissey notes, concerns about *Lochner* validating unfair contracts may have been overblown because people failed to "recognize that in certain circumstances the theoretical liberty of contract at stake simply does not exist."[142] Whereas in an adhesive "take it or leave it" relationship between an employer and employee, the resultant contract is not freely entered into, where the parties are equally sophisticated and informed, and do not enter into an agreement under duress, the liberty of contract should be preserved.[143] Therefore, as a general matter, the former types of arrangements are the proper subject of state regulation whereas the latter types should be left undisturbed.[144]

Applying these principles to surrogacy contracts, most agreements would fall within the latter type of arrangements—those that are freely bargained for under equitable terms.[145] Surrogacy agreements are not rushed into; they represent a significant monetary investment on the part of the contracting parents (or parent), and a significant investment of time, as well as risks to health, of the woman selected to serve as the surrogate.[146] While the state has a compelling interest in protecting women who serve as surrogates and the children they bear, properly structured surrogacy agreements address health and safety concerns and do not justify state intervention.[147]

Perhaps at this point it is best to recognize that just because commercial surrogacy should be viewed as presumptively valid does not mean that that

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140. Lochner v. New York, 198 U.S. 45, 53-54 (1905), *overruled in part by* Fergusun v. Skrupa, 372 U.S. 726, 728-29 (1963).

141. *See* Morrissey, *supra* note 68, at 653 ("The ability to enter freely into contracts allows people to achieve their personal desired balance of all that life has to offer."). When referring to the liberty of contract, Justice Peckham opined:

> The 'liberty' mentioned in [the Fourteenth] amendment . . . is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; . . . and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

142. Morrissey, *supra* note 68, at 656.

143. *Id.* at 655.

144. *See* Morrissey, *supra* note 68, at 635, 649-59 (proposing a "[m]odified Lochnerian [f]ramework for [l]iberty of [c]ontract [a]nalysis").

145. The fact that the vast majority of surrogacy agreements are completed without any problems illustrates that each party is able to adequately negotiate to protect its own interests. *See* Mark Hansen, *And Baby Makes Litigation: As Surrogacy Becomes More Popular, Legal Problems Proliferate*, 97 A.B.A. J. 52, 54 (2011), *available at* http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate. If surrogacy arrangements were as abusive as some critics claim, people would simple cease to enter into them.

146. *Surrogacy*, ADOPTION.COM, http://adopting.adoption.com/child/surrogacy.html (last visited June 11, 2013); DiFonzo & Stern, *supra* note 38, at 361; FABRE, *supra* note 52, at 193.

147. *See infra* notes 243-246 and accompanying text.

courts should treat surrogacy contracts as they would a normal contract for the exchange of goods and services.[148] The physiological and psychological concerns of both mother and child inject an element of humanity in surrogacy contracts that is not present in most labor agreements or commodity exchanges.[149] It would be irresponsible and inappropriate for courts to simply check for the traditional elements of bargained for exchange and consideration before signing off on such agreements.[150]

In other areas of contract involving special areas of family life, courts have been willing to apply tests of heightened scrutiny to the terms of an agreement.[151] The same principles could easily be adapted to surrogacy contracts that are challenged before the child is birthed and given to the contracting parents. While starting from the presumption of validity, courts could apply a two-step analysis to the arrangement, similar to the inquiry discussed in *Johnson v. Calvert*.[152]

Under the first prong of the analysis, the court would apply either minimal or heightened scrutiny to the agreement based on several factors, including the contractual status of the party (intended parent or surrogate) bringing the action and the genetic ties each party has to the child. When making this assessment, being an intended parent, maintaining a genetic tie to the child, and the child not being placed in a two-parent home should all weigh in favor of a court applying heightened scrutiny to the agreement. After determining the appropriate tier of scrutiny, the court's focus would shift to whether the contractual terms provided for an equitable exchange (e.g., one that fully informed the surrogate of the terms of the agreement, did not impose any unreasonable restraints on the

148. *See, e.g.*, R.R. v. M.H., 689 N.E.2d 790, 797 (Mass. 1998) ("We simply decline, on public policy grounds, to apply to a surrogacy agreement of the type involved here the general principle that an agreement between informed, mature adults should be enforced absent proof of duress, fraud, or undue influence."). Some scholars argue that sole reliance on intent may be inappropriate because "a woman's emotions attending pregnancy and childbirth may not be readily apparent to her when the parties sign the surrogacy contract and may change by the time she must relinquish the child." NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 102 (2009).

149. *See* SHANLEY, *supra* note 14, at 112; *see also* Drabiak et al., *supra* note 13, at 304 (stating that a surrogate must work "24 hours a day for nine months").

150. *See* Patricia H. Werhane, *Against the Legitimacy of Surrogate Contracts*, *in* ON THE PROBLEM OF SURROGATE PARENTHOOD 21, 23 (Herbert Richardson ed., 1987) ("[D]ecisions based on the Lochner decision make it clear that '[t]here is . . . no such thing as absolute freedom of contract' specifically when one is dealing with human health and well-being." (quoting Adkins v. Children's Hosp., 261 U.S. 525, 546 (1923), *overruled in part by* W. Coast Hotel v. Parish, 300 U.S. 379 (1937))); Andrews, *supra* note 43, at 2344 ("[C]ontract principles can bend to accommodate arrangements in which people have bonds other than just market ones.").

151. *See, e.g.*, *In re* Marriage of Foran, 834 P.2d 1081, 1085 (Wash. Ct. App. 1992) ("The validity of a prenuptial agreement is evaluated by means of a 2-prong analysis . . . ."); O'Neal v. Wilkes, 439 S.E.2d 490, 491 (Ga. 1994) (reviewing elements courts will scrutinize to uphold adoption contracts); A.Z. v. B.Z., 725 N.E.2d 1051, 1056-57 (Mass. 2000) (scrutinizing a consent form for the disposition of frozen embryos); Davis v. Davis, 842 S.W.2d 588, 597-98 (Tenn. 1992) (same).

152. *See* 851 P.2d 776, 782 n.10 (Cal. 1993).

surrogate's behavior, and reasonably compensated the surrogate for her time).

Only if the challenging party were able to invalidate the contract under the first prong of the inquiry would the court move on to the second step in the analysis. There, depending on whether the party was the surrogate or a contracting parent, the court would apply one of two tests to determine whether the proposed custody arrangement should be modified. Where the challenging party is a contracting parent seeking sole custody of the child from his or her spouse, the court should utilize the traditional "best interests of the child" standard.[153] Where the challenging party is the surrogate, however, the court should frame its inquiry under a heightened "endangerment" standard, similar to that proposed by the Uniform Marriage and Divorce Act ("UMDA").[154] Under this standard, the surrogate would have to prove "that there is reason to believe the child's [anticipated] environment may endanger seriously his [or her] physical, mental, moral, or emotional health" to warrant obtaining custody from the contracting parents.[155] Although courts generally disfavor upholding privately arranged custody agreements that have not received court approval,[156] resorting to a heightened "endangerment" standard is appropriate because of the extraordinary nature of surrogacy agreements. Once surrogacy is viewed as the functional equivalent of a traditional pregnancy, the importance of requiring that third parties seeking to divest the expectant parents of their child meet a heightened burden of proof becomes clear.

Even if the surrogate were unable to meet her burden under the second prong of the analysis, she likely would be able to modify any inequitable terms in the contract by satisfying the first prong of the inquiry.[157] It is a fundamental precept of contract law that in cases where there is evidence of fraud, duress, coercion, or vastly disparate bargaining power, the state can intervene and modify an agreement to protect the interests of all the parties involved.[158] Moreover, because of the nature of surrogacy and the fact that a surrogacy agreement results in the creation of a human being, each state could codify its own set of statutory rules to aid its courts in reaching a swift and just resolution

153. Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305, 335 n.154 (2010).

154. UNIF. MARRIAGE & DIVORCE ACT § 409(a) (amended 1973), 9A U.L.A. 439 (1970). The endangerment standard is currently used to modify child custody in Illinois and Montana. *See, e.g.*, *In re* Marriage of Oehm, 625 N.E.2d 34, 38-39 (Ill. App. Ct. 1993); *In re* Marriage of Frydenlund, 844 P.2d 58, 60-61 (Mont. 1992).

155. 9A U.L.A. 439 (1970).

156. *See, e.g.*, *In re* Marriage of Teepe, 271 N.W.2d 740, 742 (Iowa 1978); R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998).

157. Such modifications could include increased compensation, invalidating the contracting parents' behavioral or dietary requests, or increasing coverage of post-birth counseling expenses. *See* Epstein, *supra* note 36, at 2334 (listing restrictions imposed on surrogate for benefit of the child); FABRE, *supra* note 52, at 204-05 (noting the argument that surrogacy contracts grant contracting parents "rights of control over the surrogate mother's body").

158. *See* 2 JOSEPH M. PERILLO ET AL., CORBIN ON CONTRACTS § 5.15 (1995); RESTATEMENT (SECOND) OF CONTRACTS §§ 205, 208 (1981).

in these situations.[159]

Two examples may be illustrative. Take the case of a surrogate seeking to invalidate the terms of a gestational agreement where both contracting parents are genetically related to the child. Because the surrogate has no biological connection to the child, courts should apply the minimal level of scrutiny, making sure only that the provisions of the contract were freely entered into, adequately protect the surrogate's health, provide just compensation for her services, and that the surrogate made an informed decision. In another scenario, consider an underpaid surrogate who challenges a gestational agreement where none of the parties is genetically related to the child, i.e., gametes provided by anonymous donors and surrogate provides only gestational services.[160] Here it would be appropriate for the court to apply heightened scrutiny to the agreement, soliciting testimony from the parties as to their entire course of dealing, and examining the factual circumstances for considerations that dictate whether the agreement should be upheld. If the surrogate could demonstrate that she was coerced into entering the agreement, she would then be able to obtain custody of the child by proving that placement with the contracting parents would seriously endanger the child's well-being. Even if the surrogate was unable to establish that modified custody was warranted, she could still petition the court to increase her compensation to a reasonable level because she satisfied the first prong of the test.[161]

B. Adoption Laws Should Not Govern Surrogacy Agreements

In an effort to adapt existing law to address the myriad of complexities surrounding surrogacy, some jurisdictions have decided that adoption laws should govern surrogacy agreements.[162] While it is understandable that the first courts confronted with surrogacy disputes needed to look to an established body of law for guidance, sufficient time has passed to allow legislatures to act on the issue. The fact that legislatures in several jurisdictions have remained silent with regard to the legality of surrogacy agreements smacks of ensuring reelection through refusal to address controversial topics more so than latent approval of the direction some courts have chosen to go in.[163]

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159. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. . . . 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985))).

160. This was the scenario the California Court of Appeal faced in *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

161. *See* Drabiak et al., *supra* note 13, at 307 (proposing use of a federal formula setting reasonable compensation for surrogates based on cost of living).

162. *See In re* Baby M, 537 A.2d 1227, 1240-46 (N.J. 1988) (applying adoption law to invalidate a surrogacy agreement).

163. *Compare A.G.R. I*, No. FD-09-001838-07, slip op. at 4 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009) ("It was pointed out in Baby M that the Parentage Act was silent as to acknowledging surrogacy agreements and that . . . the silence . . . suggested that the Legislature chose not to recognize surrogacy. If that interpretation . . . is correct, the additional twenty-one years of silence

The truth remains that adoption and surrogacy are two fundamentally different ways to obtain a child, and laws governing the former do not necessarily apply to the latter.[164] For instance, "adoption law addresses problems of rights transfer and parental assignment, issues that do not arise when parental status is derived from biology."[165] With advances in ART, the use of gestational surrogacy has increased, whereby the surrogate does not maintain a genetic link to the child.[166] In a valid gestational agreement where one of, or both of, the contracting parents is biologically related to the child and the surrogate is not, the surrogate can have no competing claim as to parental rights over the child.[167]

At a more basic level, children obtained through surrogacy would not exist "but for" the intent of the contracting parents.[168] The surrogate does not intend to have a child of her own that she later decides she must relinquish—a factor present in some adoptions that might justify reserving the right for the biological mother to change her mind—[169]she knows the outcome of the

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as to surrogacy agreements speaks even louder." (citation omitted)), *with* J.B. v. M.B., 783 A.2d 707, 715 (N.J. 2001) ("Advances in medical technology have far outstripped the development of legal principles to resolve the inevitable disputes arising out of the new reproductive opportunities now available. . . . Without guidance from the Legislature, we must consider a means by which courts can engage in a principled review of the issues presented in such cases in order to achieve a just result.").

164. *See, e.g.*, Andrews, *supra* note 43, at 2367 ("Because of the differences between surrogacy and adoption, . . . adoption does not provide the appropriate model for assigning parental rights and responsibility."); SHANLEY, *supra* note 14, at 119 ("The[] [distinct] characteristics of surrogacy mean that th[e] practice can[not] be regulated . . . exactly like adoption . . . .").

165. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 892 (2000).

166. Although "there is no data whatsoever on the use of traditional surrogacy, between 2004 and 2008 the number of gestational surrogacy births nearly doubled." GUGUCHEVA, *supra* note 84, at 6, 12.

167. *See* Garrison, *supra* note 165, at 917.

168. *See, e.g.*, Hisano, *supra* note 113, at 537 n.124 ("[T]he position of the intended parents is unique in two ways: (1) the intended parents (i.e., the mother) are the primary cause of the reproductive relationship and the other biological parties are only involved at the invitation of the arranging party and (2) no particular biological participants are necessary, but the intended party, as the first actor, is necessary."); Dana, *supra* note 2, at 382-83 ("It is arguable that [the 'but for'] method provides children with the 'best and most committed' parents, given that those who performed the major tasks in creating the child exercised a deep desire for the child."). *But see* Johnson v. Calvert, 851 P.2d 776, 796 (Cal. 1993) (Kennard, J., dissenting) (arguing that the "but for" rationale reduces children to intellectual property).

169. State adoption laws generally impose a mandatory grace period between the birth of the child and the relinquishment of parental rights wherein the mother is allowed to change her mind. *See, e.g.*, Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 541-42 (2005); Surrogate Parenting Assocs. v. Commonwealth *ex rel*. Armstrong, 704 S.W.2d 209, 212-13 (Ky. 1986) (holding that five-day consent period before surrogate could terminate parental rights), *superseded by statute*, KY. REV. STAT. ANN. § 199.590(4) (West 2011), *as recognized in* R.R. v. M.H., 689 N.E.2d 790, 794 (Mass. 1998); Hindman v. Bischoff, 534 So. 2d 743, 745 (Fla. Dist. Ct. App. 1988) (mentioning states with a "cooling-off" period include Georgia, Michigan, and Illinois).

arrangement before she agrees to become pregnant.[170] Indeed, studies have shown that surrogate mothers do not report experiencing the same "psychological trauma" that some women experience when giving their child up for adoption.[171] Moreover, allowing a surrogate to renege on her agreement with a contracting couple may be tainted by the paternalistic perspective that women are controlled by their hormones and are incapable of making rational decisions about the disposition of a child while, or before becoming, pregnant.[172]

Connecticut and Illinois are two jurisdictions that have afforded contracting parents the ability to establish parental rights without having to resort to an adoption proceeding.[173] The Connecticut Supreme Court acknowledged that a valid surrogacy agreement establishes parentage, regardless of whether or not the contracting parents are genetically related to the child, and that the necessary paperwork should reflect this reality.[174] Illinois, by statute, enables the contracting parents to a court-approved gestational agreement to obtain parental rights immediately upon the birth of the child without having to go through an adoption proceeding.[175] By implementing similar legislation nationwide, states would be able to streamline the surrogacy process and relieve an already overburdened family court system.[176]

C. A Ruling by the Supreme Court Would Spur State Legislatures into Action

As it stands, the indeterminacy surrounding surrogacy agreements leads to hardships on the part of all parties involved, resulting in protracted, costly litigation and the potential devastation of losing a child that was painstakingly planned for.[177] A Supreme Court ruling upholding contractual surrogacy as presumptively valid would allow individuals to orchestrate agreements that protected each party's interests because of the certainty about the respective rights and responsibilities that would attach.[178]

Furthermore, each state, through its police power, could focus on its own constituents' concerns about surrogacy, and enact appropriate regulations that safeguard the rights of its citizenry and address moral and ethical concerns

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170. *See* Spann, *supra* note 50, at 1728.

171. Rosemarie Tong, *Surrogate Motherhood*, *in* A COMPANION TO APPLIED ETHICS 369, 373 (R.G. Frey & Christopher Heath Wellman eds., 2003).

172. *See* MERINO, *supra* note 1, at 11.

173. 750 ILL. COMP. STAT. 45/6(a), (c), 47/15(b)(4) (2011); Raftopol v. Ramey, 12 A.3d 783, 793 (Conn. 2011). *Contra* A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000); *In re* T.J.S., 16 A.3d 386, 392-94 (N.J. Super. Ct. App. Div. 2011).

174. *Raftopol*, 12 A.3d at 793 (interpreting CONN. GEN. STAT. § 7-48a (2011)).

175. 45/6(a), (c), 47/15(b)(4).

176. MARY E. COOGAN, ACJN SPECIAL REPORT, OPEN ADOPTION: THE EXCEPTION – NOT THE RULE 2-3 (2000), *available at* http://www.acnj.org/admin.asp?uri=2081&action=15&di=81&ext=pdf&view=yes; William Glaberson, *In New Guidelines, Officials Affirm that State's Family Courts Are Open to Public*, N.Y. TIMES, Dec. 21, 2011, at A32.

177. *See* Hodas v. Morin, 814 N.E.2d 320, 326-27 (Mass. 2004) (holding off the determination of parentage because of confusion about which forum's law to apply).

178. *See* Andrews, *supra* note 43, at 2368-69; Hisano, *supra* note 108, at 537-38.

surrounding the practice.[179] Apprehensions about poor women being exploited as a "breeder class" by wealthy contracting couples, for example, could be ameliorated by setting a minimum contract payment and requiring that at least one of the contracting parents be infertile.[180] Other appropriate regulations would include pre-agreement mental health assessments, and post-birth counseling to help the surrogate deal with the transaction and the possibility of postpartum depression ("PPD").[181] Serving as a pushback mechanism on the states' regulation of surrogacy would be the constitutionally protected liberty to start a family.[182] While achieving equipoise between the rights of the individual and those of the state might take some time, the undertaking is a worthy one and is certainly preferable to the uncertainty surrounding surrogacy at the present.

Some jurisdictions have already attempted to regulate surrogacy contracts through statutes,[183] but initial efforts have produced mixed results.[184] Other jurisdictions, while not affirmatively validating contractual surrogacy, have vetoed legislation that would declare the practice illegal.[185] Still, other jurisdictions have chosen to criminalize surrogacy contracts outright.[186] The arbitrary nature of states' boundaries should not serve as the demarcation of whether or not a couple can legally enter into a surrogacy agreement. Promoting a uniform federal policy on the legality of surrogacy contracts would prevent couples from having to resort to more unorthodox measures of obtaining a

179. *See* Gonzales v. Oregon, 546 U.S. 243, 271 (2006) ("Even though regulation of health and safety is 'primarily, and historically, a matter of local concern,' there is no question that the Federal Government can set uniform national standards in these areas." (quoting Hillsborough Cnty. v. Automated Med. Laboratories, Inc., 471 U.S. 707, 719 (1985))); Byrn & Vainik Ives, *supra* note 53, at 323 (arguing that the state can create parent-child relationships through its *parens patriae* power).

180. *See generally* SHANLEY, *supra* note 14, at 102-24 (arguing that surrogacy contracts may exploit economically vulnerable women); *see also* Watson, *supra* note 51, at 553-54 (proposing that a reasonable "ceiling" be set for surrogacy services).

181. 750 ILL. COMP. STAT. 47/20(a)(4), (b)(3) (2011); *Surrogacy and Postpartum Depression*, INFERTILITY ANSWERS, http://infertilityanswers.org/surrogacy_and_post partum_depression (last visited June 11, 2013).

182. *See supra* notes 66-72 and accompanying text.

183. *See* ARK. CODE ANN. § 9-10-201 to -202 (2005); FLA. STAT. §§ 63.212-.213, 742.15-.16 (2012); 750 ILL. COMP. STAT. 45/6, 47/10-47/70 (2011); NEV. REV. STAT. § 126.045 (2004); N.H. REV. STAT. ANN. § 168-B:1-B:32 (2005); TEX. FAM. CODE ANN. §§ 160.751-.763 (West 2012); UTAH CODE ANN. §§ 78-45g-801-809 (LexisNexis 2011); VA. CODE ANN. §§ 20-156-165 (2005).

184. *See* Soos v. Superior Court *ex rel*. Cnty. of Maricopa, 897 P.2d 1356, 1360-61 (Ariz. Ct. App. 1994) (holding that the statute granting surrogate mother status as legal mother was unconstitutional because it allowed contracting father to prove paternity but did not permit contracting mother to prove maternity); J.R. v. Utah, 261 F. Supp. 2d 1268, 1283 (D. Utah 2002) (holding that the state statute granting a gestational carrier surrogate the status of legal mother was constitutional as applied to genetic/biological parents to the extent it would have preclusive/conclusive effect in state court proceedings).

185. South Dakota recently repudiated a bill proposing to ban surrogacy. *See* Megan Luther, *Ban on Surrogacy Dies in S.D. House Committee*, ARGUS LEADER, Feb. 15, 2011.

186. *See* Doe v. Attorney Gen., 487 N.W.2d 484, 486-89 (Mich. Ct. App. 1992) (upholding the constitutionality of MICH. COMP. LAWS §§ 722.855, 722.859 (1988) banning surrogacy agreements); Itskov v. N.Y. Fertility Inst., 813 N.Y.S.2d 844, 845 (N.Y. App. Div. 2006) (finding that surrogacy contracts are void pursuant to N.Y. DOM. REL. LAW §§ 121(4), 122 (McKinney 1992)).

child,[187] and would simplify resolution of the parental statuses of individuals to such agreements.[188]

IV. ESTABLISHING THE LEGAL RIGHTS OF CONTRACTING PARENTS

A. Establish Parentage of Contracting Parents Based on Gender-Neutral Interpretations of Existing Statutes

Each state has its own parentage statutes, some of which are modeled after the Uniform Parentage Act ("UPA"), promulgated by the National Conference of Commissioners on Uniform State Laws.[189] Because each state retains the ability to adopt all of, portions of, or none of the UPA,[190] and applies different interpretive methodologies to the language of its statutes, determining legal parentage in surrogacy cases is a confusing process that leads to conflicting outcomes.[191] Fortunately, these discrepancies can easily be rectified by using gender-neutral interpretations of existing parentage statutes and vesting parental rights in contracting parents upon conception of the child (i.e., zygote created from intended parents' gametes).[192]

Jurisdictions that choose not to interpret their parentage statutes in a gender-neutral fashion may be relying on stereotypical notions about women and their role in society when they elect not to extend to infertile women the same rights as their male counterparts. In *In re T.J.S.*, for example, a New Jersey appellate court, while claiming to "scrutinize . . . distinctions when they are based on archaic, invidious stereotypes about men and women," chose not to adopt a gender-neutral interpretation of the state's Parentage Act because "presumptions [of parenthood] are intended to facilitate the flow of benefits from the father to the child."[193] In addition, the court noted that allowing an infertile male to claim parental rights over a child he was not genetically related to did not pose a problem because "the sperm donor's lack of temporal, physical, and emotional investment in the child's creation . . . stands in sharp

187. *See* Elizabeth Leland, *Turkey Baster Gets the Job Done for Good Measure, Surrogate Mother Stood on Her Head*, CHARLOTTE OBSERVER, Apr. 21, 1993, at 1C (discussing how a wife's sister agreed to serve as surrogate, and inseminated herself with her sister's husband's sperm by using a turkey baster and standing on her head for a half hour).

188. *See* Drabiak et al., *supra* note 13, at 302 ("[G]reater specificity, uniformity, and enforcement of legislation would reduce the necessity and frequency of adjudication and provide clearer more consistent guidance for courts that are called upon to render decisions on the fate of surrogate contract participants.").

189. UNIF. PARENTAGE ACT, 9B U.L.A. 295 (2012).

190. *See* Megan Pendleton, *Intestate Inheritance Claims: Determining a Child's Right to Inherit When Biological and Presumptive Paternity Overlap*, 29 CARDOZO L. REV. 2823, 2844 (2008).

191. *Compare In re* T.J.S., 16 A.3d 386, 390-91 (N.J. Super. Ct. App. Div. 2011) (finding no equal protection violation where New Jersey statute allowed intent to establish parentage for men but not for women), *with* Elisa B. v. Superior Court, 117 P.3d 660, 666-67 (Cal. 2005) (finding that California parentage statutes should apply in a gender-neutral fashion).

192. *See* 750 ILL. COMP. STAT. ANN. 47/15(b)(4) (West 2011) (vesting parental rights in contracting parents upon *birth* of the child).

193. *In re* T.J.S., 16 A.3d at 393 (citation omitted).

contrast to the [investment of the] surrogate mother."[194]

On appeal, the New Jersey Supreme Court split 3-3, thereby affirming the appellate court's decision.[195] Writing in concurrence, Justice Hoens observed that New Jersey courts need not "scrutinize gender distinctions that are based on real physiological differences to the same extent [they] would scrutinize these distinctions when they are based on archaic, invidious stereotypes about . . . women."[196] Justice Hoens went on to opine that men and women should not be treated as "infertile people" under the state's Parentage Act because of their biological differences and the presence of the surrogate, a consideration that called for weighing an additional set of rights and which Justice Hoens believed was not commensurate to ART utilizing a sperm donor.[197] Writing in dissent, however, Justice Albin recognized the inherent unfairness of not interpreting the Parentage Act neutrally and thereby allowing infertile men, but not women, to avoid the "cost and delay involved in adoption."[198] Instead, Justice Albin would treat infertile men and women the same once the surrogate "knowingly and voluntarily surrenders her parental rights."[199] Justice Albin recognized the danger inherent in allowing "arbitrary gender classification . . . [to] masquerade as legitimate public need."[200] While neither opinion is precedential, the ultimate result of this decision is that New Jersey courts may still improperly rely on outdated ideas about women's emotional well-being and socioeconomic status under the guise of preserving valid physiological distinctions.

Other jurisdictions may simply adopt a narrow view of what a gender-neutral interpretation is—for instance, the idea that a child can have only one presumed mother—and dismiss a party's claim as being invalid under the existing language of their parentage statutes.[201]

Allowing courts and legislatures to make assumptions about the respective contracting parties' temperament and socioeconomic roles can lead to bizarre outcomes.[202] Disallowing an infertile wife to claim parentage over a child created from her husband's sperm, for example, may force parentage on a surrogate that willingly relinquished all claims to parental rights over the child.[203] If the child has health complications before a formal adoption

194. *See id*. at 396.

195. *In re T.J.S.*, 54 A.3d 263 (N.J. 2012).

196. *Id*. at 265 (Hoens, J., concurring) (quoting State v. Chun, 943 A.2d 114, 143 (N.J. 2008).

197. *Id*. at 266.

198. *Id*. at 269 (Albin, J., dissenting).

199. *Id*.

200. *Id*. at 278.

201. *See* White v. White, 293 S.W.3d 1, 9 (Mo. Ct. App. 2009) (substituting "mother" for "father" in the statutory language and dismissing the plaintiff's claim because there was no dispute over who the presumed mother was).

202. *See* Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133, 1137 (Mass. 2001) (according to the Massachusetts statute, if the gestational surrogate was married at time of conception, her own husband, rather than the contracting husband, would be the presumed father).

203. *See id.* at 1136 (mentioning that the trial judge denied petition by contracting parents and surrogate for a pre-birth order listing the contracting parents as the legal parents).

proceeding can be completed, the surrogate may then be obligated to contribute financially to the child's medical care.[204]

By simply vesting parental rights in the contracting parents under a gender-neutral interpretation of parentage statutes,[205] concerns about the welfare of surrogate children would be alleviated.[206] While rights and obligations under a surrogacy agreement could be negotiated preconception,[207] once the child is conceived parental rights and obligations should vest in the contracting parent as they would in any other biological pregnancy.[208] If one party seeks a divorce before the child is delivered, he or she would still be held responsible for support obligations in a court proceeding.[209] Furthermore, the child would be entitled to receive inheritance benefits if one of the contracting parents died.[210] This outcome would eliminate the prospect of having the estate in limbo while adoption proceedings or contested parental rights disputes were being hashed out in court.[211]

Moreover, granting parental rights to a contracting couple upon conception of the child does not mean that they could arbitrarily control the surrogate's behavior. Surrogates still retain the right to simply withdraw from an agreement at any time before being implanted with the contracting parent's zygote if the interests of the parties become divergent.[212] The contracting parents could not likely seek specific performance of the contract,[213] and would be limited to

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204. *See* Scott, *supra* note 27, at 123 ("[C]ostly uncertainty can result when the intended parents . . . decline to accept the child, perhaps because the baby is born with a medical condition or disability.").

205. This was the approach taken by the Maryland Court of Appeals in *In re Roberto d.B.* when it allowed a gestational carrier to challenge the presumption of maternity under a statutory provision that traditionally was used to deny paternity. 923 A.2d 115, 124 (Md. 2007). As a result of that decision, "laws drafted to cover male paternity, may now, as a result of gender equality, apply to female maternity." CAHN, *supra* note 148, at 106.

206. *See Culliton*, 756 N.E.2d at 1139 (recognizing the need to establish the "rights and responsibilities of parents" as soon as is practically possible).

207. *See supra* Part IV.A.

208. *See* Dara E. Purvis, *Of Financial Rights of Assisted Reproductive Technology Nonmarital Children and Back-Up Plans*, 84 S. CAL. L. REV. POSTSCRIPT 1, 7 (2011) (mentioning that there is some focus on "conception as the point at which parentage accrues").

209. *See, e.g.*, Brown v. Brown, 125 S.W.3d 840, 844 (Ark. Ct. App. 2003) (holding husband liable for support obligations for children created through artificial insemination). Courts that have addressed parental obligations in similar situations "have assigned parental responsibility . . . based on conduct evidencing the [parent's] consent to the artificial insemination." *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 286 (Ct. App. 1998) (citation omitted). Principles of common law estoppel prevent parties to these contracts from attempting to avoid liability for support obligations. *Id.* at 287-88.

210. *See* Pendleton, *supra* note 190, at 2824-26 (questions of parentage create issues under intestacy).

211. John C. Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 ME. L. REV. 523, 525-26, 548 (2001).

212. *See id.* at 541 (citation omitted) (mentioning that a surrogate's claims to retain the child has less force after she voluntarily enters into the surrogacy agreement); Yoon, *supra* note 96, at 549.

213. Andrews, *supra* note 43, at 2370, 2372-73 (noting that courts are unlikely to enforce specific performance post-conception).

obtaining the costs of finding a replacement surrogate, if they are entitled to any damages at all.[214]

B. Gender-Neutral Interpretations Have Already Been Adopted to Grant Parental Rights to Same-Sex Couples

The evolving nature of family relationships also mandates that courts interpret parentage statutes in a gender-neutral fashion.[215] As of 2007, married couples with their own children made up only twenty-three percent of all households in the United States.[216] Accordingly, courts must be willing to adapt their understanding of existing statutes to accommodate this shift in domestic structure. Adopting this jurisprudence would enable parental rights to immediately attach to contracting parents who are not biologically related to their children. This would enable same-sex couples and infertile single parents who elect to start a family using donor gametes to enter into gestational agreements with the same confidence as parents who maintain a genetic link to their child.

The recent decisions of *Elisa B. v. Superior Court*[217] and *Miller-Jenkins v. Miller-Jenkins*[218] serve as illustrations of state courts prepared to apply functional interpretations of parentage statutes to accommodate the reality of the situations they were faced with.

In *Elisa B.*, the California Supreme Court faced the challenge of sorting out the parental rights and support obligations of a lesbian couple who separated after having twins through in vitro fertilization ("IVF").[219] Parsing section 7650 of California's Parentage Act, which correlates to section 106 of the general UPA, the court observed that "provisions [of the title] applicable to determining a father and child relationship sh[ould] be used to determine a mother and child relationship '[i]nsofar as practicable.'"[220] Because paternity could be presumed if a man received a child into his home and openly held the child out as his own, the court followed precedent and applied the same inquiry to determine the parental status of the partner who did not birth the twins.[221] Finding that the woman had given the children her surname, claimed the children as dependents on her tax returns, and informed an employer that she

214. ROBIN FOX, REPRODUCTION AND SUCCESSION: STUDIES IN ANTHROPOLOGY, LAW, AND SOCIETY 60-63 (1993).

215. *See* Megan C. Calvo, *Uniform Parentage Act—Say Goodbye to Donna Reed: Recognizing Stepmothers' Rights*, 30 W. NEW ENG. L. REV. 773, 773-75 (2008) (stating that media portrayals and statistics reflect the changing American family).

216. ROSE M. KREIDER & DIANA B. ELLIOTT, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2007, 4 (2009), *available at* http://www.census.gov/prod/2009pubs/p20-561.pdf.

217. 117 P.3d 660 (Cal. 2005).

218. 912 A.2d 951 (Vt. 2006).

219. 117 P.3d at 663-64.

220. *Id.* at 665 (quoting CAL. FAM. CODE § 7650 (West 2005)); UNIF. PARENTAGE ACT § 106, 9B U.L.A. 308 (2000).

221. *Elisa B.*, 117 P.3d at 667.

had children, the court ruled that she held the children out as her own and therefore was a presumed parent under the statute.[222]

Similarly, in *Miller-Jenkins*, the Vermont Supreme Court was called upon to determine the parental rights of a lesbian couple who separated after having a child through artificial insemination.[223] Abandoning the strict statutory language of the Vermont Parentage Act, the court observed that "the term 'parent' is specific to the context of the family involved."[224] Examining the circumstances leading up to the birth of the couple's child, the court drew upon the fact that "[i]t was the expectation and intent" of both women to be parents, and that each had "participated in the decision" to beget a child using ART.[225] The court equated the ex-partner with a hypothetical husband and awarded her parental rights, which included visitation.[226] The court reasoned that "holding [otherwise] would cause tremendous disruption and uncertainty to some existing families who have conceived via artificial insemination or other means of reproductive technology."[227]

The concerns addressed by both courts are equally applicable to surrogacy and justify granting immediate rights to contracting parents. Moreover, to uphold statutes that allow infertile men to establish parentage in different ways than infertile women mayamount to gender discrimination.[228] Courts should not be so cavalier as to discount the significance of the intent to create a nuclear family,[229] and should simply allow individuals to formally obtain the parental responsibilities that they have already constructively assumed.

V. ADDRESSING SOCIAL CONCERNS CREATED BY SURROGACY AGREEMENTS

A. Surrogacy Does Not Necessarily Exploit Economically Vulnerable Women

One of the most common arguments against paid surrogacy is that economic disparities will naturally allow wealthy infertile men and women to exploit poor fertile women as a subjugated breeder class.[230] Proponents of this

222. *Id.* at 669-70.

223. Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 956-57 (Vt. 2006).

224. *Id.* at 969.

225. *Id.* at 970. Interestingly, the court intimated that its desire to allow the child to have two parents was a factor that influenced its decision. *Id*. Had there been a competing claim for parental rights from a third-party—i.e., the surrogate—the court may have reached a different outcome. *See id.* ("Finally, there is no other claimant to the status of [the] parent, and, as a result, a negative decision would leave [the child] with only one parent.").

226. *Id.* at 970-71.

227. *Id*. at 967.

228. Petition for Certification for Review, *In re* T.J.S., 54 A.3d 263 (N.J. 2012) (No. 067805). *But see In re* T.J.S., 54 A.3d at 264-65 (stating such "gender-based differentiation . . . may withstand a constitutional attack if the difference is one grounded in an actual physiological distinction between men and women").

229. *See supra* Part II.B.

230. Watson, *supra* note 51, at 544; Tong, *supra* note 171, at 371; BOLEYN-FITZGERALD, *supra* note 19, at 29.

position argue that by creating an economic market for surrogacy services, women who serve as surrogates will become targeted for their "race, beauty, [health,] or intelligence."[231] Indeed, some agencies already have directories that "display photographs of and vital information (height, hair color, racial origins) about women willing to be hired to gestate a baby."[232] Unnerving empirical evidence in the realm of adoption, where charging higher operation costs based on the desirability of children's physical characteristics seems to be the norm, also corroborates this concern.[233]

Furthermore, because the financial incentive to carry a child for a contracting couple will appeal most strongly to women from lower economic brackets, commercial surrogacy will necessarily disproportionately affect poor black and Hispanic women.[234] In addition, there remains the potential for contracting couples to purposely seek out gestational surrogates from a different ethnic background than their own.[235] These couples may speculate that if a dispute over parentage arises, a court would be more willing to place a child with the contracting parents who are of the same race than with a surrogate of a different race.[236] The likely disparity in economic resources between poor black and Hispanic surrogates and white contracting couples also means that a surrogate who found herself in this situation would be less able to vindicate her rights in a custody dispute.[237] At least one author cynically notes the ease with which society seems to have already accepted this arrangement: "Black women have, after all, always raised white children without acquiring any rights to them . . . . Now they can breed them, too."[238]

Another economic concern is the possibility that competition for

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231. Watson, *supra* note 51, at 544. Contracting parents who opt to use traditional surrogacy usually attempt to match the donor to themselves, choosing a surrogate "with the same racial features, physical build, and hair color" as the contracting mother. SHANLEY, *supra* note 14, at 119.

232. Dorothy Roberts, *Race and the New Reproduction*, *in* THE REPRODUCTIVE RIGHTS READER: LAW, MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 308, 308 (Nancy Ehrenreich ed., 2008).

233. MERINO, *supra* note 1, at 21-22; *see also* Twila L. Perry, *Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community*, 26 B.C. THIRD WORLD L.J. 25, 43-44 (2006) (observing that the fee schedule for one adoption agency priced white infants at $7500, bi-racial infants at $3800, and black infants at $2200).

234. *See* MERINO, *supra* note 1, at 40-41 (mentioning that a surrogacy director remarked that you do not see CEOs serving as surrogates); *In re* Baby M, 537 A.2d 1227, 1249 (N.J. 1988) ("[I]t is unlikely that surrogate mothers will be as proportionately numerous among those women in the top twenty percent income bracket as among those in the bottom twenty percent."); Roberts, *supra* note 7, at 244-45 (detailing the racial discrepancies between people who use surrogacy services).

235. Roberts, *supra* note 7, at 263.

236. *See* SHANLEY, *supra* note 14, at 121; *see, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). In *Johnson*, Anna Johnson, the surrogate, was black, Crispina Calvert, the contracting mother, was Filipina, and Mark Calvert, the contracting father, was white. The media chose to focus on the ethnicity of the surrogate and portrayed the child as white instead of mixed-race. Roberts, *supra* note 232, at 310.

237. Roberts, *supra* note 232, at 311-12.

238. *Id.* at 312 (quoting Katha Pollitt, *Checkbook Maternity: When Is a Mother Not a Mother?*, THE NATION, Dec. 31, 1990, at 825, 842).

reproductive services will lead to a "race to the bottom," where women undercut one another and affect the overall marginal rates for providing gestational services.[239] While this problem could be remedied by setting a mandatory floor for commercial surrogacy compensation,[240] it might result in the outsourcing of reproductive labor to third world countries such as India,[241] where surrogates are typically paid between $6000 and $10,000,[242] similar to the business models adopted by other sectors of the American service economy.

Conversely, advocates for contract pregnancy argue that surrogacy is no more exploitive than any other form of necessary wage labor.[243] Furthermore, they suggest that safeguards could be implemented to ensure that surrogates are adequately protected during the course of their employment.[244] The salient concerns involving surrogacy include the availability of adequate pre-pregnancy screening, medical risks associated with artificial insemination and in vitro fertilization, the risk of multiple pregnancies, and general financial and legal risks.[245] Proposed protections against these perils include allowing only women who have previously had a child to serve as surrogates, requiring parties to a surrogacy contract to undergo counseling throughout all stages of the process, and allowing only women "with a certain level of financial resources" to serve as surrogates.[246]

While the federal government cannot control the use of international reproductive services, the states could greatly improve the character and quality of domestic surrogacy by implementing more "open programs."[247] In an open program, agencies match surrogates to contracting couples based on personal compatibility rather than just reproductive acumen.[248] The degree of personal contact between the parties ranges from e-mails to personal visits and is aimed

239. *Id.* at 311; Scott B. Rae, *United State Perspectives on Assisted Reproductive Technologies*, in THE ANNALS OF BIOETHICS: REGIONAL PERSPECTIVES IN BIOETHICS 21, 34 (John F. Peppin & Mark J. Cherry eds., 2003).

240. *See* Drabiak et al., *supra* note 13, at 307 (proposing a federal regulatory scheme that calculates reasonable compensation for surrogates based on cost of living).

241. Reich & Swink, *supra* note 31, at 249 n.47.

242. BOLEYN-FITZGERALD, *supra* note 19, at 38.

243. *See generally* H.E. Baber, *FOR the Legitimacy of Surrogate Contracts*, *in* ON THE PROBLEM OF SURROGATE PARENTHOOD: ANALYZING THE BABY M CASE 31, 36-39 (1987) ("[T]here is no compelling reason to regard surrogate parenting arrangements as exploitative."). The argument for legally enforcing compensated contractual pregnancy is best summed up in the words of one surrogate: "'Why am I exploited if I am paid, but not if I am not paid?'" SHANLEY, *supra* note 14, at 109 (quoting ANDREWS, *supra* note 53, at 259)).

244. REBECCA A. CLARK ET AL., PLANNING PARENTHOOD: STRATEGIES FOR SUCCESS IN FERTILITY ASSISTANCE, ADOPTION, AND SURROGACY 39 (2009).

245. GUGUCHEVA, *supra* note 84, at 17-24.

246. SHANLEY, *supra* note 14, at 107.

247. MERINO, *supra* note 1, at 19-20; *San Diego Surrogates and Egg Donors by Select Surrogate*, SELECT SURROGATE, http://www.selectsurrogate.com/#open_ surrogacy (last visited June 13, 2013); *General Information*, SURROGATE MOTHERS, INC., http://www.surrogatemothers.com/info.html (last visited June 13, 2013).

248. CLARK ET AL., *supra* note 244, at 38.

at fostering a healthy working relationship.[249] Upon the birth of the child, the surrogate's contacts are scaled back to avoid complicating the relationship between the intended parents and the child.[250] Open programs also advocate that contracting parents inform their children about the nature of their origin as soon as possible.[251] Research has demonstrated that these programs do work better than closed ones—where the contracting parents and surrogate maintain no personal contact—with reported "higher rates of success, satisfaction, and repeat business."[252] In addition to providing additional protections that prevent surrogates from being exploited,[253] the open nature of these programs helps to remove the stigma of infertility.[254] Although states cannot mandate the use of open programs, they could incentivize their proliferation by offering subsidies and tax breaks to organizations that adopt this model.[255]

B. Compensated Surrogacy Does Not Amount to Baby-Selling

Despite the fact that both the UPA and the American Bar Association's Model Act Governing Assisted Reproductive Technology permits surrogates to receive reasonable compensation for their services,[256] many critics denounce commercial surrogacy as nothing more than baby selling.[257]

One of the easiest ways to combat public concern about baby selling is to recognize that although surrogacy contracts do set the terms by which a child is exchanged, it does not necessarily follow that the child is being treated as chattel property.[258] It is clearly not the intention of the surrogate, who must carry the child, nor that of the contracting parents, who have an even stronger emotional investment due to prior inability to conceive,[259] to do any harm to a

249. MERINO, *supra* note 1, at 19.

250. *See id.* at 20.

251. *See* Helena Ragoné, *Surrogate Motherhood and American Kinship*, *in* KINSHIP AND FAMILY: AN ANTHROPOLOGICAL READER 342, 357-58 (Robert Parkin & Linda Stone eds., 2004) (noting that contracting parents in open programs often utilize the "broken tummy" theory).

252. MERINO, *supra* note 1, at 19.

253. *See* Ragoné**,** *supra* note 251, at 358.

254. *See* Roberts, *supra* note 10, at 239-40 (mentioning the stigma of infertility influences women to turn to in vitro fertilization).

255. *See* William P. Gunnar, *The Fundamental Law That Shapes the United States Health Care System: Is Universal Health Care Realistic Within the Established Paradigm?*, 15 ANNALS HEALTH L. 151, 175-76 (2006) (explaining that state governments encourage hospitals to serve the poor and indigent by providing tax relief).

256. KINDREGAN & MCBRIEN, *supra* note 3, at 156-57 (citations omitted); *see also* Reich & Swink, *supra* note 31, at 260 (stating the UPA has clarified that commercial surrogacy is not baby selling).

257. Garrison, *supra* note 165, at 875.

258. FABRE, *supra* note 52, at 190-91; *see also* Surrogate Parenting Assocs. v. Commonwealth *ex rel*. Armstrong, 704 S.W.2d 209, 212-13 (Ky. 1986) (observing "that there are fundamental differences between . . . surrogate parenting procedure[s] . . . and the buying and selling of children"), *superseded by statute*, KY. REV. STAT. ANN. § 199.590(4) (West 2011), *as recognized in* R.R. v. M.H., 689 N.E.2d 790, 794 (Mass. 1998).

259. Epstein, *supra* note 36, at 2320-21.

child produced by a surrogacy agreement.[260] Additionally, under a more formalistic analysis, "whether an entity is properly conceived of as a commodity depends on the rights one has over it."[261] An examination of existing laws and cultural norms demonstrates that children produced by surrogacy agreements are already adequately protected from being exploited as property. "[O]ne does not have rights to use, enjoy, and treat a child as permitted by the norms of the market (for example, by selling her to the highest bidder), from which it follows that one cannot regard her as a commodity."[262] Rather, children are singled out for heightened protection because of their vulnerability—cherished and safeguarded as "gifts of nature."[263]

Contrasting transactions where an individual sells a part of his-or-her-self (i.e., organ donation or prostitution) to transactions where a child is exchanged also reinforces the idea that the child is not being commoditized.[264] Whereas when individuals sell themselves, they willingly relinquish to the buyer the right to not be treated as a commodity; when a child is exchanged, one transfers only "whatever rights one [had] over that child"—which, as already stated, does not include the right to treat the child as a commodity.[265]

One surrogate offers a simple, yet effective formula to recognize when a surrogacy-type arrangement should trigger baby-selling concerns: "[Intended Parents] and their embryos + surrogate = SURROGACY[.] Surrogate - [Intended Parents] + random embryos + adoptive parents = baby selling."[266] The important aspects of this formula are the presence of the intended parents, whose commitments legitimize the agreement and protect the interests of the surrogate and child,[267] the use of embryos provided by the contracting parents,[268] and the fact that the agreement is entered into before the child is conceived.[269] Because a "surrogate signs the contract before conceiving, she is

260. *See* Andrews, *supra* note 43, at 2354 (stating that surrogates generally are concerned about the child's well-being); Baber, *supra* note 243, at 34 (mentioning no evidence that contracting parents will regard the child as a mere possession).

261. FABRE, *supra* note 52, at 190; *see also* Tong, *supra* note 171, at 372. Commodities are characterized by "the perfect substitutability of one unit for another" and "are typically meant for consumption." Epstein, *supra* note 36, at 2326-28.

262. FABRE, *supra* note 52, at 190.

263. Dolgin, *supra* note 39, at 521-22.

264. FABRE, *supra* note 52, at 190-91.

265. *Id*.

266. Kelly Rummelhart, *Erickson Baby Selling NOT Surrogacy!*, NEXT FAMILY (Aug. 15, 2011), http://thenextfamily.com/2011/08/a-surrogates-opinion-on-baby-selling.

267. Epstein, *supra* note 36, at 2316-18; Dawn, *What Is "Baby Selling" and When Does Surrogacy Cross the Line?*, CREATING A FAMILY (Aug. 16, 2011), http://www.creatingafamily.org/blog/infertility-fertility-trying-to-conceive-ivf-donor-egg/baby-selling-surrogacy-cross-line.

268. "Making the embryos can be done many ways: using the [intended parents'] own eggs, own sperm, using donor eggs or donor sperm, or a combination of any of those. But regardless of how the embryo is created, the fact remains that the [intended parents] claim ownership of them." Rummelhart, *supra* note 266.

269. *See* Surrogate Parenting Assocs. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209, 211-13 (Ky. 1986), *superseded by statute*, KY. REV. STAT. ANN. § 199.590(4) (West 2011), *as*

presumably not desperate and . . . [is] far from destitute as well."[270] Therefore, it is not likely that she entered into the agreement for purely financial reasons.[271] As previously mentioned, contracting parents want nothing more than to welcome a much sought after child into their home;[272] there is no indication that they are seeking a child for abusive reasons.[273] As such, absent extraordinary circumstances, properly structured surrogacy arrangements should not trigger moral concerns about the well-being of the child.[274] A practical examination of the motives of the parties involved only confirms that claims of baby selling are superfluous.

VI. CONCLUSION

The time has come for the Supreme Court to rule on the legality of commercial surrogacy and to usher in a new era of reproductive choice. Individuals must have their liberty interests in forming families protected,[275] and the validity of surrogacy contracts should be unassailable, regardless of whether compensation is exchanged.

By acknowledging a right of procreative choice, presuming that commercial surrogacy contracts are a valid means of exercising this fundamental right, and requiring heightened proof to warrant modification of the terms of such agreements, the Court can effectuate the intent of contracting parties while still giving states the ability to craft provisions that will protect the health and safety of children and surrogates.[276] An accompanying shift from the "best interests" standard to the more stringent "endangerment" standard is one way for legislatures to guarantee that the rights of all parties to surrogacy agreements (i.e., contracting parents, surrogate, and child) will be properly balanced and would ensure that custody arrangements created through surrogacy agreements are not arbitrarily disrupted.[277] Moreover, adopting presumptions in favor of the contracting parents would not result in an upheaval of the parties' contractual expectations; the majority of surrogacy agreements are already completed without problems.[278] By vesting parental rights in contracting parents upon conception of the child, legislatures will merely streamline a private process that has been twisted into media fodder and instill

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recognized in R.R. v. M.H., 689 N.E.2d 790, 794 (Mass. 1998).

270. Holder, *supra* note 97, at 78.

271. Drabiak et al., *supra* note 13, at 303-04; Sanger, *supra* note 61, at 76-78.

272. Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 165 (1997).

273. Of course, there will always be outliers, but the exception does not warrant a blanket prohibition. *See* Tamar Lewin, *Man Accused of Killing Son Borne by a Surrogate Mother*, N.Y. TIMES, Jan. 19, 1995, at A16 (describing a single man who employed a surrogate and then beat his five week old child to death).

274. *See* S.N. v. M.B., 935 N.E.2d 463, 470-71 (Ohio Ct. App. 2010).

275. *See supra* Part II.A-B.

276. *See supra* Part III.A.

277. *See supra* Part II.D.

278. *See supra* note 2 and accompanying text.

certainty in the creation of nuclear families.

Lastly, respect for the mysteries surrounding life, birth, and motherhood does not mean that we must proscribe surrogacy agreements and prevent women from providing a generous service for infertile individuals. As time has taught, the freedom of reproductive choice and the ability to engage in labor of one's choosing are hard fought liberties that should not be flippantly disregarded.[279] While the legal ramifications of surrogacy may be complex, it is important not to lose sight of what is at stake in such arrangements: a previously unimagined opportunity to raise one's own biological children. It is hard to imagine any undertaking that is more worthy of appropriate legal protections.

279. *See supra* Part II.C.