

STATE REGULATORY EFFORTS IN PROTECTING A SURROGATE'S BODILY AUTONOMY

*Alexus Williams**

I. INTRODUCTION

The field of infertility and assisted reproductive technology (ART)¹ has made incredible strides throughout the last forty years. Starting with the first human born by in vitro fertilization (IVF) in 1978,² researchers of fertility treatment have made relentless efforts in adapting ART technology to meet numerous couples' unique needs.³ Just recently, in December 2017, the United States welcomed the first live birth of a baby to a woman who had a uterine transplant.⁴ Due to these major, innovative developments in ART, countless individuals throughout the world have actualized their dreams of starting a family.⁵ According to the Centers for Disease Control and Prevention's (CDC) 2016 Fertility Clinic Success Rates Report, there were 263,577 ART cycles performed,⁶ resulting in 65,996 live born infants in that year alone.⁷ "Today, approximately 1.7% of all infants born in the United

* J.D. Candidate, 2019, Seton Hall University School of Law; B.A., 2016, Rutgers University. I would like to thank Professor St. Romain for her time, energy, and advice, which had a substantial part in creating this Comment.

¹ ART is defined as "[a]ll treatments or procedures that include the handling of human eggs or embryos to help a woman become pregnant." *2015 Assisted Reproductive Technology Fertility Clinic Success Rates Report*, CTRS. FOR DISEASE CONTROL & PREVENTION 531 (2017), <ftp.cdc.gov/pub/Publications/art/ART-2015-Clinic-Report-Full.pdf>.

² S. Shivaji, *The Journey of R. G. Edwards: From a Single Cell to Louise Joy Brown*, 100 *CURRENT SCI.* 488, 488 (2011). On July 25, 1978, Louise Joy Brown became the first human to have been born after conception by IVF. *Id.*

³ See *ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/artdata/index.html> (last visited Sept. 2, 2018).

⁴ Madison Park, *Baby Is First to Be Born in US After Uterus Transplant, Hospital Says*, CNN (Dec. 4, 2017, 4:54 AM), <https://www.cnn.com/2017/12/04/health/uterus-transplant-us-baby-birth/index.html>.

⁵ See *ART Success Rates*, *supra* note 3.

⁶ "ART cycles include any process in which (1) an ART procedure is performed, (2) a woman has undergone ovarian stimulation or monitoring with the intent of having an ART procedure, or (3) frozen embryos have been thawed with the intent of transferring them to a woman." *2015 Assisted Reproductive Technology Fertility Clinic Success Rates Report*, *supra* note 1.

⁷ *ART Success Rates*, *supra* note 3.

States every year are conceived using ART.”⁸

Advancements in reproductive biotechnology have created complicated legal, ethical, and moral dilemmas.⁹ Among the myriad of fertility services, including hormonal therapy, artificial insemination, and gamete/zygote intrafallopian transfer, one of the most controversial methods of “reproduction has grown at an even greater rate than ART generally: the use of surrogate mothers.”¹⁰ This emerging area of reproductive technology has led to many surrogacy-related disputes.

Despite the growing prevalence and availability of commercial surrogacy arrangements,¹¹ the law of surrogate motherhood in the United States is currently in a state of confusion.¹² In the United States, surrogacy is governed by a hodgepodge of contradictory state laws; some enforce surrogacy contracts, some ban them entirely, and some allow them under certain circumstances.¹³ Many states, however, do not have any laws regarding surrogacy contracts.¹⁴ The patchwork of legislation pertaining to surrogacy in the United States reflects the various ethical and practical concerns associated with this reproductive practice.

There were numerous challenges to the legality of surrogacy when it first came into use.¹⁵ But now, as the practice has become more common, the legal issues have become more complex.¹⁶ Among the various problems pertaining to this form of ART, the surrogate’s decision-making authority is perhaps the most perplexing. In 2015, a forty-seven-year-old California woman named Melissa Cook executed a gestational surrogacy contract with the intended parent and genetic father, known in the court filings as C.M.¹⁷

⁸ *Id.*

⁹ See *infra* Part II. Discussion of this broad domain is well beyond the purview of this Comment, but it should be noted that the issues include topics such as the rights of fetuses, donors, and adoptive parents; the liability of physicians; patentable organisms; and other new developments in research.

¹⁰ Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS, 3 (2010), www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf; see BRETTE MCWHORTER SEMBER, *THE COMPLETE ADOPTION & FERTILITY LEGAL GUIDE* 197 (1st ed. 2004). The number of gestational surrogate cycles increased from 2,251 in 2006 to 4,725 in 2015 (a 110% increase), while the number of ART cycles performed only increased from 138,198 in 2006 to 182,154 in 2015 (a 32% increase). *2015 Assisted Reproductive Technology National Summary Report*, CTRS. FOR DISEASE CONTROL & PREVENTION 50, 53 (2017), <https://www.cdc.gov/art/pdf/2015-report/ART-2015-National-Summary-Report.pdf>.

¹¹ See *infra* Part II.B.

¹² Compare DEL. CODE ANN. tit. 13, § 8-807 (2013), with LA. STAT. ANN. § 14:286 (2016).

¹³ See *infra* Part IV.

¹⁴ See *infra* Part IV.

¹⁵ See *infra* Part II.A.

¹⁶ See *infra* Part II; see also *infra* Part III.

¹⁷ *Cook v. Harding*, 190 F. Supp. 3d 921, 928 (C.D. Cal. 2016), *aff’d*, 879 F.3d 1035 (9th

The surrogacy agreement spanned seventy-five pages and included a selective reduction clause, in which one or more of the fetuses in a multiple pregnancy could be terminated.¹⁸ Because of Cook's advanced age, the doctor implanted three male embryos into her uterus to increase the chances that at least one would prove viable.¹⁹ In this case, all embryos survived.²⁰ Fearful that he would not be able to afford triplets, C.M. attempted to invoke the agreement's selective reduction clause, asking Cook to reduce the pregnancy by one fetus.²¹ Cook, however, refused to do so, "citing her anti-abortion beliefs."²² The three babies were ultimately born and a hotly contested legal battle over parentage and the constitutionality of the California Parentage Act ensued between Cook and C.M.²³ As *Cook v. Harding*²⁴ illustrates, one of the issues plaguing surrogacy contracts is the question of decision-making. In fact, it stresses the need for heightened clarity in limiting which autonomous rights a surrogate can waive in a surrogacy agreement.

This Comment will analyze how different states regulate surrogacy issues. Specifically, it will examine how these issues are regulated to protect a surrogate's bodily autonomy. Part II of this Comment will examine the history of surrogacy. Next, Part III will discuss issues involving disputes about critical decision-making roles between the surrogate and the intended parents. Part IV will detail the current surrogacy regulatory schemes among the states. Finally, Part V will provide solutions wherever gaps or variations exist, and present a balancing test that can be implemented by the courts to determine the limitations of provisions that divest the surrogate of her autonomous, decision-making rights. This Comment will ultimately argue that legislation should impose ample restrictions on specific rights that cannot be contracted away, such as the right to an abortion, as well as provide

Cir. 2018).

¹⁸ *Id.* at 928–29.

¹⁹ *Id.* at 928.

²⁰ *Id.*

²¹ *Id.* at 928–29.

²² *Id.*

²³ *See Cook*, 190 F. Supp. 3d at 925. The California Court of Appeal affirmed the Appellate Division of the Superior Court's judgment enforcing the gestational surrogacy contract between Cook and C.M. *C.M. v. M.C.*, 213 Cal. Rptr. 3d 351 (Cal. Ct. App. 2017). The judgment cut off Cook's parental rights to the three children in accordance with CAL. FAM. CODE § 7962. *Id.* at 354. Meanwhile, as the state proceeding continued, Cook filed a complaint against C.M. in the United States District Court for the Central District of California. *Cook*, 190 F. Supp. 3d at 926. The court held that the state judicial system provided an adequate outlet to seek relief, and therefore, dismissed the claim. *Id.* at 938. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's order. *Cook v. Harding*, 879 F.3d 1035, 1043 (9th Cir. 2018).

²⁴ 190 F. Supp. 3d 921 (C.D. Cal. 2016), *aff'd*, 879 F.3d 1035 (9th Cir. 2018).

the courts with a sufficient legal framework.²⁵

II. THE HISTORY OF SURROGACY AND ITS EVOLUTION

Surrogacy is a form of ART commonly utilized by couples who desire to start families of their own, but otherwise lack the ability to do so.²⁶ The rapid pace of advancements in reproductive technology has given infertile couples, same-sex couples, and single individuals ways to build a family through surrogacy.²⁷ Surrogacy is defined as “[t]he process of carrying and delivering a child for another person.”²⁸ The term “commercial surrogacy” is defined as “a contractual relationship where compensation is paid to a surrogate and agency . . . in exchange for the surrogate’s gestational services.”²⁹ Although the term is new,³⁰ the idea of surrogacy has been practiced for years—even tracing back to biblical times.³¹

Commercial surrogacy implicates the bodily integrity of the surrogate and the rights of the intended parents to contract freely.³² This ultimately creates a tension between allowing the intended parents to make intrusive decisions for the surrogate mother, and ensuring that the surrogacy contract does not divest the surrogate of all autonomous, decision-making rights.³³ Before discussing the appropriate solution for this matter of contention, it is imperative to first explore the history and evolution of surrogacy.

²⁵ Because the Legislature cannot imagine every scenario in which the surrogate’s autonomous decision-making rights could be compromised by a surrogacy agreement, the balancing test will provide the judiciary with guidance during disputes of first impression.

²⁶ *What is Surrogacy?*, CIRCLE SURROGACY, <https://www.circlesurrogacy.com/pages/what-is-surrogacy> (last visited July 17, 2018).

²⁷ See *infra* Part II.B.

²⁸ *Surrogacy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²⁹ Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED. & ETHICS 300, 301 (2007).

³⁰ Modern surrogacy, as it is known today, has only been practiced for the last three decades. *About Surrogacy: From the Bible to Today: The History of Surrogacy*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/surrogacy-101/history-of-surrogacy/> (last visited Feb. 10, 2018). It was not until 1980 that the first commercial surrogacy agreement was arranged between a traditional surrogate and the intended parents. *Id.* Soon after, in 1985, the first successful gestational surrogacy was completed. *Id.* These historic developments paved the way for the contemporary notion of surrogacy. *Id.*

³¹ In the Bible, when Sarah, Rachel, and Leah were infertile, they gave their handmaids—Hagar, Bilhah, and Zilpah—to have babies for their husbands. *Genesis* 16:1–4, 15; 30:1–10.

³² See Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205, 226–27 (1992).

³³ See Alayna Ohs, *The Power of Pregnancy: Examining Constitutional Rights in a Gestational Surrogacy Contract*, 29 HASTINGS CONST. L.Q. 339, 355–56 (2002).

A. *The Two Different Types of Surrogacy Arrangements*

There are two types of surrogacy arrangements: traditional surrogacy and gestational surrogacy.³⁴ Traditional surrogacy was the first of the two procedures to be medically possible.³⁵ It is defined as “[a] pregnancy in which a woman provides her own egg, which is fertilized by artificial insemination, and carries the fetus and gives birth to a child for another person.”³⁶ Because this earlier type of surrogacy uses the surrogate’s own egg, a biological relationship is created with the child, which makes a stronger case for courts to determine that the birth mother is also the legal mother.³⁷ Such reasoning led to decisions such as the *Baby M* case, bringing widespread attention to the procedure and possible legal complications that traditional surrogacy can entail.³⁸

In 1986, surrogacy encountered its first significant legal challenge in perhaps the most famous case in surrogacy history, the *Baby M* case,³⁹ involving a traditional surrogacy arrangement. The facts of the case “riveted the attention of much of the country in the late 1980s” and exemplified why traditional surrogacy arrangements have since been avoided.⁴⁰ The case arose from a contract entered into by William Stern and Mary Beth Whitehead in February 1985.⁴¹ Mr. Stern and his wife, Elizabeth Stern,

³⁴ See Jennifer S. White, *Gestational Surrogacy Contracts in Tennessee: Freedom of Contract Concerns & Feminist Principles in the Balance*, 2 BELMONT L. REV. 269, 274 (2015); see also RICKIE SOLINGER, REPRODUCTIVE POLITICS: WHAT EVERYONE NEEDS TO KNOW 108 (2013). Surrogacy can take many forms, including: (1) a traditional surrogate mother who is both genetically related as well as carrying a child who has genetics from an intended father; (2) a traditional surrogate who uses donor sperm but is giving the child up to a different intended father and intended mother; (3) a gestational mother who has genetics from two donors but has two intended parents who will not be biologically related to the child; (4) a surrogate serving as a gestational mother who is impregnated with an intended parent’s sperm and an intended parent’s eggs; and (5) a gestational mother using genetics from one intended parent with help from a donor. See 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).

³⁵ See *About Surrogacy: From the Bible to Today: The History of Surrogacy*, supra note 30.

³⁶ *Traditional Surrogacy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

³⁷ See Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 121–22 (2009); see also *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

³⁸ *In re Baby M*, 537 A.2d at 1227; see also *In re Baby*, 447 S.W.3d 807 (Tenn. 2014); *Doe v. Doe*, 710 A.2d 1297 (Conn. 1998); A.L.S. *ex rel.* J.P. v. E.A.G., No. A10-443, 2010 WL 4181449 (Minn. Ct. App. Oct. 26, 2010).

³⁹ *In re Baby M*, 537 A.2d at 1227; *About Surrogacy: From the Bible to Today: The History of Surrogacy*, supra note 30.

⁴⁰ MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 102 (2002).

⁴¹ *In re Baby M*, 537 A.2d at 1235.

hoped to have children and start a family of their own.⁴² Mrs. Stern feared that this, however, was beyond the bounds of possibility due to her multiple sclerosis, which made pregnancy dangerous and potentially life threatening.⁴³ At first the Sterns considered adoption but became discouraged at the delays involved.⁴⁴ As an alternative, the couple decided to use surrogacy.⁴⁵

Mr. Stern and Whitehead subsequently entered into a surrogacy contract in which Whitehead agreed to be artificially inseminated by Mr. Stern's sperm and to carry the child for the couple.⁴⁶ The contract contained terms indicating that Whitehead would surrender the child and, in return, would receive a \$10,000 fee.⁴⁷ The insemination was successful; Whitehead became pregnant and gave birth to a baby girl in March 1986.⁴⁸

After turning the baby over to the Sterns, Whitehead began to experience emotional difficulty.⁴⁹ The next day, she begged the Sterns to let her temporarily take the baby, promising to return with her later.⁵⁰ Fearful that in her state of distress Whitehead might harm herself, the Sterns allowed her to take the child.⁵¹ The next week, however, Whitehead called the Sterns and informed them that she had changed her mind and would not relinquish the baby.⁵² The Sterns proceeded to sue Whitehead in New Jersey state court, seeking enforcement of the surrogacy contract.⁵³ After the judge entered an order requiring her to relinquish custody, Whitehead fled to Florida with Baby M.⁵⁴ It was not until the end of July that Florida police invaded Whitehead's home, forcibly removed the baby, and delivered the child back to the Sterns.⁵⁵

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1236. The Sterns declined to adopt for two additional reasons: (1) Mr. Stern desired his genetics to live on, particularly because most of his family had been lost in the Holocaust, and (2) the Sterns saw a potential problem arising from their age and their differing religious backgrounds. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1235.

⁴⁷ *In re Baby M*, 537 A.2d at 1235.

⁴⁸ *Id.* at 1236. Whitehead called the baby Sara; the Sterns called the baby Melissa. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1237.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *In re Baby M*, 537 A.2d at 1237.

⁵⁴ *Id.*

⁵⁵ *Id.*

When the Sterns regained possession of the child, the trial court reaffirmed the prior order requiring Whitehead to relinquish custody.⁵⁶ The trial court held that the contract, by which Whitehead had agreed to bear the child for the Sterns, was valid and that Mr. Stern was the legal parent.⁵⁷ Whitehead appealed, and the Supreme Court of New Jersey granted direct certification.⁵⁸ The Supreme Court of New Jersey invalidated the surrogacy contract on public policy grounds,⁵⁹ holding the intended payment to be illegal⁶⁰ and potentially degrading to women.⁶¹ The Court then used the legal standard of “the best interests of the child” for custody purposes, and determined that custody should be awarded to the Sterns.⁶²

In traditional surrogacy arrangements, like the contract entered into by Whitehead and Mr. Stern, the surrogate, whose egg is fertilized, is the true biological mother of the child, which makes a stronger case that she also has parental rights to the child.⁶³ In these scenarios, to officially establish the intended parents as the child’s legal parents, the surrogate’s parental rights need to be terminated, and the genetically-unrelated intended parent needs to complete a stepparent adoption.⁶⁴ Because of these additional legal complications, many surrogacy professionals stopped offering traditional surrogacy programs and instead moved toward the use of gestational surrogacy programs.⁶⁵

⁵⁶ *Id.*

⁵⁷ *Id.* at 1237–38. The trial court based a major part of its decision upon the view that custody with the Sterns was in the child’s best interests. *Id.* at 1237. The highly-publicized trial “entail[ed] six weeks of testimony and half a million dollars of legal bills.” MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 4 (1990).

⁵⁸ *In re Baby M*, 537 A.2d at 1238.

⁵⁹ *Id.* at 1246–49. Specifically, the court found that surrogacy contracts were void because they violated policies concerning the consent of the surrogate to surrender the child. *Id.* According to the court’s reasoning, “the natural mother is irrevocably committed before she knows the strength of her bond with her child. She never makes a totally voluntary, informed decision.” *Id.* at 1248.

⁶⁰ *Id.* at 1240–42.

⁶¹ *Id.* at 1249 (“On reflection . . . it appears that the essential evil is . . . taking advantage of a woman’s circumstances . . . in order to take away her child.”).

⁶² *Id.* at 1256, 1260–61. The Court remanded the case to the trial court for determination on visitation. *Id.* at 1261. On remand, the trial court found that it was in the child’s best interest to have an ongoing relationship with Whitehead and, therefore, granted her “unsupervised, uninterrupted, liberal visitation” with Baby M. *In re Baby M*, 542 A.2d 52, 53 (N.J. Super. Ct. Ch. Div. 1988).

⁶³ See Scott, *supra* note 37, at 121–22.

⁶⁴ *Intended Parents: Establishing Parentage in Surrogacy*, SURROGATE.COM, <https://www.surrogate.com/intended-parents/surrogacy-laws-and-legal-information/establishing-parentage-in-surrogacy> (last visited Feb. 10, 2018).

⁶⁵ See Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER. 68, 79 (2007) (indicating that ninety-five percent of surrogacy arrangements are gestational).

Gestational surrogacy differs from traditional surrogacy in that the former is a “pregnancy in which one woman (the genetic mother) provides the egg, which is fertilized, and another woman (the surrogate mother) carries the fetus and gives birth to the child.”⁶⁶ Because the surrogate does not provide the egg, she is not biologically related to the child.⁶⁷ Therefore, it is less burdensome for courts to determine that the surrogate has no parental rights to the child.⁶⁸ This, in effect, simplifies parentage issues and makes gestational surrogacy less legally complicated than traditional surrogacy.⁶⁹ Gestational surrogacy proves to be more attractive to the parties and more palatable to lawmakers and the public.⁷⁰ Over the last three decades,⁷¹ this type of surrogacy experienced an expanding growth in popularity, which can be attributed to cases such as *Johnson v. Calvert*.⁷²

Five years after the *Baby M* decision, the enforceability of a commercial surrogacy contract was again litigated in *Johnson v. Calvert*.⁷³ By contrast, however, the dispute focused on gestational surrogacy.⁷⁴ In 1990, Anna Johnson contracted with Mark and Crispina Calvert, agreeing to be implanted with an embryo created from Mr. Calvert’s sperm and Mrs. Calvert’s egg and to gestate the fetus to term.⁷⁵ The contract stipulated the Calverts as the legal parents and required Johnson to relinquish all parental rights in exchange for three payments totaling \$10,000.⁷⁶ In the months succeeding Johnson’s in vitro fertilization, however, the relations between

⁶⁶ *Gestational Surrogacy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁶⁷ *Gestational Carrier or Surrogacy*, REPRODUCTIVEFACTS.ORG, <https://www.reproductivefacts.org/topics/topics-index/gestational-carrier-or-surrogacy> (last visited Feb. 10, 2018).

⁶⁸ Brittnay M. McMahon, *The Science Behind Surrogacy: Why New York Should Rethink Its Surrogacy Contracts Laws*, 21 ALB. L.J. SCI. & TECH. 359, 363 (2011).

⁶⁹ See Scott, *supra* note 37.

⁷⁰ See *infra* text accompanying notes 73–85.

⁷¹ *About Surrogacy: From the Bible to Today: The History of Surrogacy*, *supra* note 30.

⁷² 851 P.2d 776 (1993); see also *Gestational Surrogacy or Traditional Surrogacy? That is the Question*, SURROGACY PARENTING SERVS. (Dec. 9, 2014), <http://surrogateparenting.com/gestational-surrogacy-traditional-surrogacy-question>; see also Scott, *supra* note 37, at 122.

⁷³ In addition to *Baby M*, *Johnson* is considered another landmark surrogacy case that yields particular importance in the United States. See J. HERBIE DiFONZO & RUTH C. STERN, *INTIMATE ASSOCIATIONS: THE LAW AND CULTURE OF AMERICAN FAMILIES* 96 (2013). Although the *Johnson* decision generated little controversy, “the case had a profound impact on surrogacy practice.” Scott, *supra* note 37, at 122. Gestational surrogacy promptly became the preferred arrangement. *Id.*

⁷⁴ *Johnson*, 851 P.2d at 777–78.

⁷⁵ *Id.* at 778. Mark and Crispina Calvert had desired to have children but were unable to because Mrs. Calvert had undergone a hysterectomy, where her uterus was removed. *Id.* “Her ovaries remained capable of producing eggs, however, and the couple eventually considered surrogacy.” *Id.*

⁷⁶ *Id.*

the parties soured.⁷⁷ Johnson demanded the full balance of her payments, threatening to refuse to relinquish the child unless the Calverts complied.⁷⁸ The Calverts responded with a lawsuit to determine the parentage of the child.⁷⁹

The Supreme Court of California resolved the dilemma by looking at the intent of the parties in signing the contract.⁸⁰ The court determined that when both gestation and genetic ties “do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother.”⁸¹ The court found *intent* to be the primary determinant of parentage, reasoning that the child would not have been born but for the intention of the Calverts.⁸² The Supreme Court of California found the case to be distinguishable from the *Baby M* case because Anna Johnson, unlike Mary Beth Whitehead, had no genetic relationship to the child.⁸³ The court emphasized the importance of the biological connection between the pregnant woman and the fetus in determining parentage.⁸⁴ The court ultimately concluded that the Calverts were the genetic parents, that Johnson had no parental rights, and that the contract was legal and enforceable.⁸⁵

The difference between gestational and traditional surrogacy arrangements is an important legal distinction, central to determining the legal status of those involved. In the case of traditional surrogacy, it is clear that the surrogate is the biological mother of the child and, as such, has a claim to parental rights to the child.⁸⁶ In the case of gestational surrogacy, however, the surrogate is in no way biologically related to the child and

⁷⁷ *Id.* The relationship between the parties deteriorated after “Mark learned that Anna had not disclosed she had [previously] suffered several stillbirths and miscarriages.” *Id.* Additionally, the Calverts had agreed to buy a \$200,000 life insurance policy on Johnson’s life, but failed to do. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Johnson*, 851 P.2d at 783.

⁸¹ *Id.* at 782.

⁸² *Id.* at 783. A number of cases following *Johnson* have relied on the rule of intent to resolve surrogacy disputes. Perri Koll, *The Use of the Intent Doctrine to Expand the Right of Intended Homosexual Male Parents in Surrogacy Custody Disputes*, 18 CARDOZO J.L. & GENDER 199, 200 (2012). For further discussion of the “intent doctrine,” see *id.* at 201 (demonstrating “why courts should follow the *Johnson v. Calvert* approach in solving surrogacy disputes by awarding custody to the intended parents”).

⁸³ See *Johnson*, 851 P.2d at 782; see also *id.* at 789 (Kennard, J., dissenting).

⁸⁴ See *id.* at 782.

⁸⁵ *Id.* at 778, 787. Courts in additional cases applied similar reasoning. See *J.F. v. D.B.*, 879 N.E.2d 740 (Ohio 2007); *J.F. v. D.B.*, 897 A.2d 1261 (Pa. Super. Ct. 2006); *Nolan v. Labree*, 52 A.3d 923 (Me. 2012).

⁸⁶ *Scott*, *supra* note 37.

therefore has no parental rights to said child.⁸⁷ Hence, commercial surrogacy arrangements are typically limited to gestational surrogacy because it is less legally complicated—that is, it efficiently offers legal certainty about the parental status of all parties to the surrogacy arrangement—than traditional surrogacy.⁸⁸

B. *Trends and Reproductive Outcomes That Have Led to the Growth of Surrogacy over the Years*

The cost of gestational surrogacy arrangements can run from \$60,000 to \$150,000 when medical and legal expenses are included.⁸⁹ Despite these high costs, however, the practice of gestational surrogacy is growing rapidly.⁹⁰ Due to advancing medical knowledge and techniques, commercial surrogacy now serves the desires of couples struggling with infertility issues, as well as single individuals and same-sex couples looking to start a family of their own.⁹¹ Although there is no formal collection of statistics tracking surrogate births in the United States, estimates suggest that gestational surrogate births nearly doubled from 2004 to 2008, reaching approximately 1,400 births annually.⁹² The CDC's statistics indicate that between 1999 and 2013, gestational carrier cycles resulted in 13,380 deliveries and the births of 18,400 infants—half of which were twins, triplets, or higher-order multiples.⁹³ “In 2011, the Society of Assisted Reproductive Technology (SART) tracked 1,593 babies born in the United States to gestational surrogates . . . up from 1,353 in 2009, and just 738 in 2004.”⁹⁴

⁸⁷ McMahan, *supra* note 68, at 363.

⁸⁸ For additional commentary on how the expansion of gestational surrogacy has been an important factor in changing the way people view surrogacy arrangements, see Scott, *supra* note 37.

⁸⁹ See *Intended Parents: How Much Does Surrogacy Cost?*, SURROGATE.COM, <https://surrogate.com/intended-parents/the-surrogacy-process/how-much-does-surrogacy-cost/> (last visited Feb. 10, 2018); see also *Understanding Costs*, GROWING GENERATIONS, <https://www.growinggenerations.com/surrogacy-program/intended-parents/surrogacy-cost/> (last visited Feb. 10, 2018).

⁹⁰ SOLINGER, *supra* note 34, at 108.

⁹¹ See FIELD, *supra* note 57, at 37; see also SHANLEY, *supra* note 40, at 106.

⁹² Gugucheva, *supra* note 10, at 4, 11–12. Currently, there are only two sources of statistics on gestational surrogacy. *Id.* at 6. Both the CDC and SART collect and report data on the success rates per ART cycle carried out in fertility clinics nationally. See *2015 Assisted Reproductive Technology Fertility Clinic Success Rates Report*, *supra* note 1. Each clinic is required to report whether it offers services to patients using gestational surrogates and what percentage of IVF cycles were performed on surrogates. *Id.* Small and new clinics are exempt from CDC reporting, and not all IVF clinics are members of SART. *Id.* Therefore, it is likely that both data sets are under-inclusive.

⁹³ *ART and Gestational Carriers*, CTNS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/art/key-findings/gestational-carriers.html> (last visited April 10, 2018).

⁹⁴ Deborah L. Cohen, *Surrogate Pregnancies on Rise Despite Cost Hurdles*, THOMSON REUTERS (Mar. 18, 2013, 5:41 PM), <https://www.reuters.com/article/us-parent->

The appeal to couples struggling with infertility issues has been an important factor in the growing prevalence of gestational surrogacy.⁹⁵ Commercial surrogacy arrangements allow infertile individuals who cannot bear children to assume the responsibilities of parenthood.⁹⁶ According to the CDC, about 12.1% of women (6.7 million) in the United States aged fifteen to forty-five have difficulty getting pregnant or staying pregnant and about 9.4% (5.8 million) of men in the United States aged fifteen to forty-five have some form of infertility or nonsurgical sterility.⁹⁷ Many infertile couples view gestational surrogacy as an appealing alternative to adoption.⁹⁸ Individuals struggling with infertility issues prefer to use gestational surrogacy rather than adoption because of their desire to create children genetically related to their family.⁹⁹

Another factor attributing to the growing prevalence of gestational surrogacy is an individual's inability to conceive based on circumstantial limitations—for example, single individuals preferring to raise a child alone, or same-sex couples seeking parenthood.¹⁰⁰ Persons in these situations are unable to give birth to a child without the assistance of reproductive technology.¹⁰¹ Therefore, with the emergence of gestational surrogacy, single individuals and same-sex couples can pursue parenthood in ways that, until now, were not possible.¹⁰² As a viable option for conception without engaging in intercourse, gestational surrogacy provides single individuals and couples in same-sex relationships the opportunity to develop their own nuclear family, while still retaining a genetic relationship with their children.¹⁰³

surrogate/surrogate-pregnancies-on-rise-despite-cost-hurdles-idUSB
RE92H11Q20130318.

⁹⁵ See SHANLEY, *supra* note 40, at 106.

⁹⁶ *Id.*

⁹⁷ Anjani Chandra et al., *Infertility and Impaired Fecundity in the United States, 1982–2010: Data from the National Survey of Family Growth*, 67 NAT'L HEALTH STATS. REPS. 1, 6 (2013).

⁹⁸ See DiFONZO & STERN, *supra* note 73, at 68. Adoption is a lengthy process that can take one to two years to complete. *See id.* (“[T]he adoption process could be costly, risky, and subject to disruption.”). Often, couples struggling with infertility issues choose surrogacy after years of failed fertility treatments or difficulty finding a child to adopt. *See ZARA GRISWOLD, SURROGACY WAS THE WAY: TWENTY INTENDED MOTHERS TELL THEIR STORIES* 138 (2006).

⁹⁹ See Koll, *supra* note 82, at 202.

¹⁰⁰ See DiFONZO & STERN, *supra* note 73, at 72; *see also* SEMBER, *supra* note 10, at 160–61.

¹⁰¹ See SEMBER, *supra* note 10, at 160–61.

¹⁰² DEAN A. MURPHY, *GAY MEN PURSUING PARENTHOOD THROUGH SURROGACY: RECONFIGURING KINSHIP* 22 (2015).

¹⁰³ See DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 69–96 (2006) (discussing the historical evolution of surrogacy); *see also* Erica Davis, Note, *The Rise of Gestational Surrogacy and the Pressing*

Same-sex male couples, in contrast to same-sex female couples, however, have no other option than gestational surrogacy if they wish to have a biological connection to their child.¹⁰⁴ Although there is no formal tracking on the number of same-sex male couples having babies through the means of gestational surrogacy, observers say that the numbers are growing.¹⁰⁵ An unofficial study conducted by Fertility IQ on behalf of the *Chicago Tribune* suggests that more same-sex male couples in the United States are turning to surrogacy than in previous years.¹⁰⁶ The study, involving data from fertility clinics in ten different cities, found that “10 to 20 percent of donor eggs are going to gay men having babies via [gestational] surrogacy, and in a lot of places the numbers are up to 50 percent from five years ago.”¹⁰⁷ Gestational surrogacy is seen as an appealing option for same-sex male couples seeking to have children with some of their own genetic material rather than adopting.¹⁰⁸

The decision to enter into a commercial surrogacy arrangement is not an easy decision for prospective parents; however, couples struggling with infertility issues, single individuals, and same-sex couples are willing to go through various medical procedures, sign a variety of legal documents, and pay significant sums of money simply to experience the joy of having

Need for International Regulation, 21 MINN. J. INT’L L. 120, 122 (2012).

¹⁰⁴ See Koll, *supra* note 82, at 202; see also Wendy Norton, Nicky Hudson & Lorraine Culley, *Gay Men Seeking Surrogacy to Achieve Parenthood*, 27 REPROD. BIOMEDICINE ONLINE 271, 272–73 (2013), https://ac.els-cdn.com/S1472648313001806/1-s2.0-S1472648313001806-main.pdf?_tid=c180b25c-a126-4623-8a65-ae0b3daee604&acdnat=1538670459_e4985e106e0819d12a32477cce1af1d3 (“Gay men wishing to become fathers are limited by biological possibilities and therefore always require a ‘facilitating other.’”). The number one reason same-sex male couples chose surrogacy is to have a biological connection to their children. Arlene Istar Lev, Commentary, *Gay Dads: Choosing Surrogacy*, 7 LESBIAN & GAY PSYCHOL. REV. 72, 74 (2006) (“Scott, who is partnered with Eduardo and the father of 18-month-old twins . . . says, ‘We wanted the biological connection with a child.’”).

¹⁰⁵ See, e.g., DAVID STRAH, GAY DADS: A CELEBRATION OF FATHERHOOD 56–57 (2003); Nara Schoenberg, *Gay Men Increasingly Turn to Surrogates to Have Babies*, CHI. TRIB. (Nov. 23, 2016, 8:59 AM), www.chicagotribune.com/lifestyles/health/sc-gay-men-having-babies-health-1130-20161123-story.html.

¹⁰⁶ Schoenberg, *supra* note 105.

¹⁰⁷ *Id.*

¹⁰⁸ See Koll, *supra* note 82, at 202. With the growing prevalence of commercial surrogacy, it should be noted that same-sex couples may look outside of the United States for arrangements but should be cognizant of the potential limitations. For example, in India and Russia, same-sex marriages are strictly prohibited—in fact, they are punishable by incarceration. Evie Jeang, *Reviewing the Legal Issues that Affect Surrogacy for Same-Sex Couples*, L.A. LAW., Jul.–Aug. 2016, at 12. The increased practice of same-sex male surrogacy in India ultimately led to a same-sex surrogacy ban, which contributed to the country imposing a national commercial surrogacy ban. See Izabela Jargilo, *Regulating the Trade of Commercial Surrogacy in India*, 15 J. INT’L BUS. & L. 337, 345 (2016). Therefore, same-sex couples may not have an option to enter commercial surrogacy arrangements everywhere internationally.

biologically-related children.¹⁰⁹ As the availability of commercial surrogacy arrangements continues to grow, individuals are becoming increasingly more aware of its potential as a viable option to obtain parenthood.¹¹⁰

C. *Feminist Legal Theory: Surrogacy Through the Lenses of Various Schools of Feminism*

It was through the *Baby M* case that commercial surrogacy was first scrutinized as an issue of social, political, and legal interest.¹¹¹ Not only did the case garner national attention, but it also produced a feminist split on the issue of surrogacy.¹¹² At the time of the proceedings, a group of well-known feminists joined with the Foundation on Economic Trends to file an amicus curiae brief in the case.¹¹³ The brief argued that the commercialization of surrogate parenthood violated the dignity of women.¹¹⁴ In response to this critique, however, other feminists argued that commercial surrogacy ensured women's right to self-determination.¹¹⁵ Even the New Jersey Chapter of the National Organization for Women (NOW)¹¹⁶ failed to reach a consensus on

¹⁰⁹ See *supra* text accompanying notes 89–99.

¹¹⁰ An increasing number of high-profile celebrities have also helped contribute to the popularity of couples choosing to use commercial surrogacy to start a family. See Lindsay Tigar, *19 Celebrities Who Used Surrogates*, MEREDITH CORP., <https://www.parents.com/parenting/celebrity-parents/moms-dads/celebrities-who-used-surrogates/> (last visited Feb. 10, 2018); see also Melody Chiu & Jen Juneau, *Kim Kardashian and Kanye West Expecting Baby No. 3 via Surrogate!*, PEOPLE (Sept. 6, 2017, 11:29 AM), <https://people.com/parents/kanye-west-kim-kardashian-expecting-third-child-surrogate-pregnant/>. With the help of celebrities showing a positive side to surrogacy, many people have been inspired to start families of their own using this method of reproduction. *The Celebrity Influence on Surrogacy*, CONCEIVEABILITIES (Nov. 16, 2016), <https://www.conceiveabilities.com/about/blog/the-celebrity-influence-on-surrogacy>. Celebrities have been influential in surrogacy becoming widely accepted, generating a larger discussion about the “modern family.” *Id.*

¹¹¹ See *supra* Part II.A.

¹¹² RUTH MACKLIN, SURROGATES AND OTHER MOTHERS: THE DEBATES OVER ASSISTED REPRODUCTION 60 (1994).

¹¹³ MARY BRIODY MAHOWALD, WOMEN AND CHILDREN IN HEALTH CARE: AN UNEQUAL MAJORITY 108 n.56 (1993) (citing Brief for the Foundation of Economic Trends et al. as Amici Curiae Supporting Petitioners, *In re Baby M*, 109 N.J. 396 (1988) (No. FM-25314-86E)). The feminists joining the brief included Betty Friedan, Gloria Steinem, Gena Corea, Barbara Katz Rothman, Lois Gould, Michelle Harrison, Kathleen Lahey, Phyllis Chesler, and Letty Cottin Pogrebin. *Id.*; see Elizabeth Mehren, *Feminists Fight Court Ruling in Baby M Decision: Steinem, Friedan, Chesler, French Among Supporters*, L.A. TIMES (July 31, 1987), http://articles.latimes.com/1987-07-31/news/vw-147_1_gloria-steinem; see also Joseph F. Sullivan, *Brief by Feminists Opposes Surrogate Parenthood*, N.Y. TIMES, July 31, 1987, at B3.

¹¹⁴ Sullivan, *supra* note 113.

¹¹⁵ See Iver Peterson, *Baby M Trial Splits Ranks of Feminists*, N.Y. TIMES, Feb. 24, 1987, at B1.

¹¹⁶ NOW is the largest organization of feminist activities in the United States. *Who We Are*, NAT'L ORG. FOR WOMEN, <https://now.org/about/who-we-are/> (last visited Feb. 10, 2018).

the issue.¹¹⁷ The head of the chapter was reported to have said: “We do believe that women ought to control their own bodies, and we don’t want to play big brother or big sister and tell them what to do But on the other hand, we don’t want to see the day when women are turned into breeding machines.”¹¹⁸

After the *Baby M* case, the division among the various feminist schools of thought on commercial surrogacy continued to be a topic of contention.¹¹⁹ Today, while some feminist scholars and commentators view commercial surrogacy in a positive light—as a technology that gives women the ability to make use of their reproductive capacity—other feminists argue that surrogacy is an exploitative tool that undermines bodily autonomy and integrity.¹²⁰ One commonality among the varying feminist viewpoints on this issue, however, is that the intended parents should not have an unfettered right to control or limit the surrogate’s behavior during the pregnancy by provisions in a surrogacy contract.¹²¹ The majority of feminists are in agreement that the underlying purpose of the feminist movement is to allow women more control over their reproductive choices.¹²² It is important to explore the arguments in favor of commercial surrogacy as well as the arguments against commercial surrogacy in order to find an appropriate solution.

On one hand, feminist proponents of commercial surrogacy argue that it gives women more reproductive options, thus granting women control over the biological processes that have historically defined them.¹²³ In their view, the key idea is freedom of choice.¹²⁴ For example, Hugh V. McLachlan

Since its founding in 1966, NOW’s goal has been to take action to bring about equality for all women. *Id.*

¹¹⁷ MACKLIN, *supra* note 112.

¹¹⁸ *Id.*

¹¹⁹ ALEX FINKELSTEIN ET AL., COLUMBIA LAW SCH. SEXUALITY & GENDER LAW CLINIC, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 32–37, 52 (2016).

¹²⁰ *Id.* Feminist scholars in favor of surrogacy argue that the right to enter into commercial surrogacy arrangements is a natural extension of the right to personal autonomy. Liezl van Zyl & Anton van Niekerk, *Interpretations, Perspectives and Intentions in Surrogate Motherhood*, 26 J. MED. ETHICS 404, 404 (2000). Other feminists, in contrast, view commercial surrogacy as a contractually regulated pregnancy that restricts the surrogate to terms and conditions binding over her body, constraining her bodily autonomy and bodily integrity. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 246–48 (1989).

¹²¹ MACKLIN, *supra* note 112.

¹²² See Norma Juliet Wikler, *Society’s Response to the New Reproductive Technologies: The Feminist Perspectives*, 59 S. CAL. L. REV. 1043, 1051 (1986); see *infra* Part III.A for an extensive analysis on well-established reproductive rights.

¹²³ RONIT IRSHAI, FERTILITY AND JEWISH LAW: FEMINIST PERSPECTIVES ON ORTHODOX RESPONSA LITERATURE 151–52 (Joel A. Linsider trans., 2012).

¹²⁴ *Id.*

argues that prohibiting “mothers from making . . . particulate interpretations of their pregnanc[ies]” would violate their right to autonomy, ultimately reinforcing the negative stereotype of women as incapable of full, rational agency.¹²⁵ And on the other hand, feminists that oppose commercial surrogacy view it as a form of slavery or prostitution in which the surrogate is exploited and controlled through her reproductive capacities.¹²⁶ Many believe that it is a form of oppression that divests the surrogate of all autonomous, decision-making rights.¹²⁷ Feminists arguing against commercial surrogacy focus on the concept of control and free choice.¹²⁸ From this perspective, commercial surrogacy is “a process meant to control women and their procreative powers for the benefit of men.”¹²⁹ Therefore, in formulating the appropriate solution, one should keep in mind that the middle ground between these two viewpoints is the encouragement of the surrogate’s freedom of choice—which is to say, the majority of feminists agree that the intended parents should not have an unfettered right to control or limit a surrogate’s behavior.

III. THE COMPOSITION OF A STANDARD SURROGACY CONTRACT

Commercial surrogacy arrangements are anomalous in that they involve one or more persons contracting for the provision of labor that implicates the bodily integrity of a third party.¹³⁰ Contractual provisions in the commercial surrogacy agreement regulate the surrogate’s conduct during pregnancy.¹³¹ Each contract will be slightly different, but generally speaking, a standard surrogacy agreement imposes obligations on the surrogate “to visit the doctor, to eat healthy, and to refrain from consuming substances such as drugs, alcohol, and cigarettes that could harm the developing fetus.”¹³² Because the potential life engenders some degree of

¹²⁵ Hugh V. McLachlan, *Defending Commercial Surrogate Motherhood Against Van Niekerk and Van Zyl*, 23 J. MED. ETHICS 344, 346 (1997). McLachlan is a professor of applied philosophy at the School of Law and Social Sciences at Glasgow Caledonian University. *Id.* at 348.

¹²⁶ See MACKINNON, *supra* note 120. For an expansive comparison of commercial surrogacy and prostitution, see ANDREA DWORKIN, *RIGHT-WING WOMEN* 181–82 (1983). Andrea Dworkin offers the most radical and scathing formulation of the critique by offering two models to describe how women are socially controlled and sexually exploited: the brothel and the farm. *Id.* The brothel model relates to prostitution, and the farm model relates to women as a class planted with the male seed and then harvested. *Id.*

¹²⁷ Lieber, *supra* note 32, at 205–06.

¹²⁸ *Id.*

¹²⁹ IRSHAI, *supra* note 123, at 207.

¹³⁰ Lieber, *supra* note 32, at 212–13, 226–27.

¹³¹ *Id.* For a sample gestational surrogacy contract, see *Sample Gestational Surrogacy Contract*, SURROGATE MOTHERS ONLINE, www.surromomsonline.com/articles/gcontract.html (last visited Feb. 10, 2018).

¹³² FIELD, *supra* note 57, at 66; see *infra* Part III.B.

social concern, these provisions appear to have reasonable restrictions; however, issues arise when these provisions divest the surrogate of all autonomous, decision-making rights.¹³³ For example, most commercial surrogacy contracts regulate when, and with whom, the surrogate can engage in sexual activity, and also contain abortion and selective fetal reduction clauses.¹³⁴ Thus, it is important that the autonomous rights of the surrogate are “reaffirmed so as to prevent intended parents from believing that by virtue of carrying a fetus for them, a surrogate is surrendering her constitutional rights to make decisions about her own body.”¹³⁵ Before discussing the appropriate limitations, however, it is necessary to first closely examine the public policy and constitutional concerns raised by these intrusive decision-making provisions in commercial surrogacy contracts.

A. *Abortion and Selection Fetal Reduction Clauses*

In general, commercial surrogacy contracts contain stipulations that either compel or restrict a surrogate to have an abortion.¹³⁶ The provision typically reads as follows:

The Surrogate agrees that she will not abort the child once conceived except, if in the opinion of the inseminating physician, such action is necessary for the physical health of the Surrogate or the child has been determined by said physician to be physiologically abnormal. In the event of either of these two (2) contingencies, the Surrogate desires and agrees to have said abortion.¹³⁷

Controversial cases surrounding the enforcement of these abortion clauses in commercial surrogacy agreements have garnered widespread attention in recent years. In 2012, Crystal Kelley, a gestational surrogate for an infertile couple, refused to terminate a fetus with severe abnormalities.¹³⁸ Twenty-one weeks into the pregnancy, medical tests indicated that the fetus had a

¹³³ See Ohs, *supra* note 33.

¹³⁴ Jennifer Lahl, *Contract Pregnancies Exposed: Surrogacy Contracts Don't Protect Surrogate Mothers and Their Children*, THE WITHERSPOON INST. (Nov. 1, 2017), www.thepublicdiscourse.com/2017/11/20390; see *infra* Part III.A.

¹³⁵ Ohs, *supra* note 33, at 351.

¹³⁶ Carmina Y. D'Aversa, *The Right of Abortion in Surrogate Motherhood Arrangements*, 7 N. ILL. U. L. REV. 1, 4 (1987).

¹³⁷ *Id.* (quoting Katie Marie Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263, 280 (1981)).

¹³⁸ Elizabeth Cohen, *Surrogate Offered \$10,000 to Abort Baby*, CNN (Mar. 6, 2013, 2:58 PM), <https://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/index.html>; Kevin Dolak, *Surrogate Mother Flees Halfway Across US to Save Baby From Intended Parents*, ABC NEWS (Mar. 6, 2013), abcnews.go.com/UD/surrogate-mother-flees-halfway-us=save-baby-intended/story?id=18668498.

cleft palate, a heart abnormality, and Down Syndrome.¹³⁹ The intended parents demanded that the child be aborted immediately.¹⁴⁰ Although the surrogacy contract contained a clause giving the intended parents the right to terminate the fetus at any time if it had severe and debilitating abnormalities, Kelley refused to have an abortion.¹⁴¹

Another case arose in 2016 after a surrogate, Melissa Cook, refused to selectively reduce a high-risk triplet pregnancy.¹⁴² Because of Cook's advanced age, multiple embryos were transferred to increase the chances that at least one would prove viable.¹⁴³ Fearing he would not be able to afford triplets, the intended father asked Cook to reduce the pregnancy by one fetus and abide by their agreement's selective reduction clause.¹⁴⁴ Cook, however, refused to do so, "citing her anti-abortion beliefs."¹⁴⁵

In 2001, Helen Beasley entered into a surrogacy agreement with Charles Wheeler and Martha Berman.¹⁴⁶ The contract contained numerous clauses providing for nearly every possible contingency—including the requirement that Beasley would have to honor the couple's decision to have a selective reduction in the chance of a multiple pregnancy.¹⁴⁷ After Beasley discovered that she was carrying twins, however, she refused to proceed with the selective reduction.¹⁴⁸ A battle ensued, with Wheeler and Berman unwilling to parent the two fetuses Beasley carried.¹⁴⁹ Because Beasley failed to comply with the contract, she faced the possibility of becoming a mother.¹⁵⁰ These cases reveal important constitutional concerns surrounding

¹³⁹ Cohen, *supra* note 138.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* The child was born with severe health issues and was later given up for adoption to another family. *Id.*

¹⁴² Cook v. Harding, 190 F. Supp. 3d 921, 928–29 (C.D. Cal. 2016); *see also* Michelle Goldberg, *Is a Surrogate a Mother?*, SLATE (Feb. 15, 2016, 5:00 PM), www.slate.com/articles/double_x/doublex/2016/02/custody_case_over_triplets_in_california_raises_questions_about_surrogacy.html.

¹⁴³ Cook, 190 F. Supp. 3d at 928.

¹⁴⁴ *Id.* at 928–29.

¹⁴⁵ *Id.* The three babies were ultimately born prematurely and remained in the neonatal intensive care unit for two months. *Id.* at 929. Thereafter, a hotly contested legal battle over parentage and the constitutionality of the California Parentage Act ensued between Cook and C.M. *See supra* Part I.

¹⁴⁶ Beasley v. Wheeler, No. CGC-01-401717 (Cal. Super. Ct. June 4, 2002); Chris Taylor, *One Baby Too Many*, TIME (Aug. 19, 2011), <http://content.time.com/time/magazine/article/0,9171,171789,00.html>; *Nightline: World News Now* (ABC television broadcast Aug. 29, 2001), *available at* LEXIS, News Library, ABCNEW File.

¹⁴⁷ Taylor, *supra* note 146.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ The resolution of the conflict is unknown because the court proceedings were sealed. *Helen Beasley v. Charles Wheeler Et Al*, PLAINSITE,

commercial surrogacy arrangements.¹⁵¹ In each situation, the intended parents attempted to abrogate the surrogate's constitutional rights with the use of contractual provisions.¹⁵²

This area of contention surrounding the decision to reduce the pregnancy of a surrogate necessarily implicates *Roe v. Wade*.¹⁵³ In *Roe*, the Supreme Court held that, prior to fetal viability, a woman has the constitutional right to decide whether or not to terminate her pregnancy.¹⁵⁴ Justice Blackmun, writing for the majority, stated that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or . . . the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁵⁵ The Court noted, however, that the State has a compelling interest in potential life, which must be balanced against the pregnant woman's liberty rights.¹⁵⁶

The ruling in *Roe* appears to be applicable to the surrogacy situation as well. Privacy is protected in all abortion cases, up until the first trimester, notwithstanding whether or not the woman is a surrogate. The surrogate, in carrying the child, is the person who undergoes several aspects of pregnancy recognized in *Roe* that support a woman's constitutional right to abortion.¹⁵⁷ This is not without acknowledging the fact that the State has a compelling interest in protecting the desires of the intended parents, which must be balanced against the surrogate's privacy rights.¹⁵⁸ *Roe*'s constitutional principles provide a surrogate with the basis upon which she can claim sole right to decide whether or not to abort the developing fetus that she is

<https://www.plainsite.org/dockets/wd8kdctj/superior-court-of-california-county-of-san-francisco/helen-beasley-v-charles-wheeler-et-al/> (last visited Sept. 2, 2018); see ROSEMARIE SKAINE, PATERNITY AND AMERICAN LAW 112–13 (2003).

¹⁵¹ It should be noted that while these cases received press attention, there are likely others across the country that have gone unnoticed, yet dealt with similar situations.

¹⁵² See *supra* text accompanying notes 138–149.

¹⁵³ 410 U.S. 113 (1973).

¹⁵⁴ *Id.* at 153–55, 164–66.

¹⁵⁵ *Id.* at 153.

¹⁵⁶ *Id.* at 150, 156, 162–63.

¹⁵⁷ See *id.* at 153–55. The Court recognized that "specific and direct harm medically diagnosable even in early pregnancy may be involved" and that "mental and physical health may be taxed by child care." *Id.* at 153 (referring to the distress associated with the unwanted child). Some of these aspects of pregnancy are applicable to the interests of the surrogate, while others are confined to "regular" pregnancy, which was the focus of *Roe*. With that being said, however, the Court addressed numerous rights pertaining to motherhood that transcend the plights of "regular" pregnancy and, ultimately, encompass surrogacy as well.

¹⁵⁸ See Krista Sirola, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & L. 131, 145–46 (2006).

carrying for another.¹⁵⁹

In the context of abortion rights, commercial surrogacy agreements are analogous to spousal consent requirements. In *Planned Parenthood of Central Missouri v. Danforth*,¹⁶⁰ the Supreme Court struck down a Missouri requirement of a husband's written consent for an abortion during the first twelve weeks of pregnancy.¹⁶¹ The Court held that a "State does not have the constitutional authority to give a third party an absolute . . . veto over" the abortion decision.¹⁶² In assessing the constitutional validity of the consent-clause, the Court balanced the "interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying" and the woman's right to terminate her pregnancy.¹⁶³ The Court concluded that since the woman "is [] more directly and immediately affected by the pregnancy . . . the balance weighs in her favor."¹⁶⁴ As such, if it is unconstitutional to require a husband's consent before a wife terminates her pregnancy, then, analogously, the constitution forbids the intended parents' lack of consent as prohibitive. A woman's right to decide whether to continue pregnancy or to have an abortion falls within the scope of bodily autonomy and privacy protections that *Roe v. Wade* made clear forty-five years ago.¹⁶⁵

The selective fetal reduction clauses within the surrogacy contracts cited in the cases above clearly exemplify the unconstitutional nature of commercial surrogacy arrangements when an intended parent attempts to make intrusive decisions for the surrogate mother. Thus, the constitutional implications of these provisions should favor the surrogate, and, in addition, courts should not enforce a contractual provision requiring a surrogate to abort a fetus against her will or prevent her from obtaining an abortion that she has decided is in her best interest.

B. *Other Areas of Intrusive Decision-Making*

In addition to termination and selective fetal reduction clauses, commercial surrogacy agreements attempt to control and restrict other areas pertaining to the surrogate's decision-making abilities.¹⁶⁶ For example, surrogacy contracts can contain clauses that regulate the surrogate's diet, exercise, living arrangements, when and with whom the surrogate can

¹⁵⁹ *See id.*

¹⁶⁰ 428 U.S. 52 (1976).

¹⁶¹ *Id.* at 67–68, 83–84.

¹⁶² *Id.* at 74.

¹⁶³ *Id.* at 70–71.

¹⁶⁴ *Id.* at 71.

¹⁶⁵ *See id.* at 60–61.

¹⁶⁶ *See* FIELD, *supra* note 57, at 66.

engage in sexual activity, and even end-of-life decision making.¹⁶⁷ Terms of the agreement providing that the surrogate must not smoke or drink alcoholic beverages or that the surrogate mother abstain from sex for a short period after insemination are reasonable restrictions.¹⁶⁸ Terms of the agreement, however, stipulating that the surrogate mother must consume a vegan diet and eat only organic foods or that the intended parents will control all medical treatment decisions are not reasonable restrictions, thus violating constitutional principles derived from *Roe*.¹⁶⁹ Therefore, it is necessary to find the extent to which these provisions can impinge the bodily integrity of the surrogate.

There is, in fact, broad agreement “that while fetal life deserves respect, its protection cannot take priority over the rights of the pregnant woman.”¹⁷⁰ The protection of a surrogate’s bodily autonomy should include her right to make medical decisions, which not only encompasses abortion, but also the “freedom to care for one’s health and person” and the “freedom from bodily restraint or compulsion.”¹⁷¹ The right to control one’s medical treatment is highly personal.¹⁷² For example, in *In re Baby Boy Doe*, a pregnant woman was informed that if she failed to have an immediate cesarean section, her child could be born dead or with severe mental defects.¹⁷³ Because of religious beliefs, the woman refused to consent to the procedure and instead elected to deliver naturally.¹⁷⁴ The court confirmed her right to make such a decision, stating, “[a]ppplied in the context of compelled medical treatment of pregnant women . . . a woman’s right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy.”¹⁷⁵ This ruling, again, appears to be applicable to the surrogacy situation. There is no reason to distinguish between mothers who give birth naturally and surrogates who carry

¹⁶⁷ Lahl, *supra* note 134.

¹⁶⁸ *See id.* (“Contracts also regulate when the surrogate can engage in sexual activity and with whom.”).

¹⁶⁹ *See id.* (“Most contracts explicitly control the surrogate’s diet, exercise, living arrangements, travel, and activities.”).

¹⁷⁰ Emily Jackson, *Abortion, Autonomy and Prenatal Diagnosis*, 9 SOC. & LEGAL STUD. 467, 467 (2000) (citing RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION AND EUTHANASIA* (1993)).

¹⁷¹ D’Aversa, *supra* note 136, at 10 (quoting *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring)); *see Roe v. Wade*, 410 U.S. 113, 166 (1973) (“[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision.”).

¹⁷² *See In re Baby Boy Doe*, 632 N.E.2d 326 (1994).

¹⁷³ *Id.* at 327.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 332; *see also Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990) (holding that competent, dying persons have the right to direct the removal of life-sustaining medical treatment).

developing infants unrelated to them—both implicate personal rights related to autonomous decision-making.

Contractual provisions dictating the surrogate's conduct throughout the pregnancy create a tension between allowing the intended parents to make decisions for the surrogate mother in the hopes of protecting their developing fetus and ensuring that the surrogacy contract does not divest the surrogate of all autonomous decision-making rights. By using the *Roe* framework, as well as the *In re Baby Boy Doe* decision, there are well-established constitutional rights that protect the surrogate mother from unfettered bodily intrusion.¹⁷⁶ It should of course be acknowledged that this robust commitment to respecting a surrogate's right to make her own decisions extends only to constitutional rights and what she has not waived in the surrogacy contract. Therefore, courts should not enforce contracts that compel waiver of constitutional rights and states should legislatively impose restrictions on which aspects of decision-making can or cannot be waived.

IV. THE CURRENT REGULATORY SCHEME AMONG THE STATES

Despite the growing prevalence and availability of commercial surrogacy arrangements,¹⁷⁷ the law of surrogate motherhood in the United States is still in a state of confusion.¹⁷⁸ Surrogacy laws are determined by each state, and states have widely differing laws; some enforcing surrogacy contracts, some banning them entirely, and some allowing them under certain circumstances.¹⁷⁹ Many states, however, do not have any laws regarding surrogacy contracts.¹⁸⁰ As a result, courts are often left to decide contractual disputes when they arise, and have a range of approaches by which to do so.¹⁸¹

An important starting position that states need to consider in determining their surrogacy laws is to focus on the surrogate. This section will examine how different states with surrogacy laws handle contracts that include intrusive decision-making provisions that affect the bodily integrity

¹⁷⁶ See *supra* text accompanying notes 153–165, 173–175.

¹⁷⁷ See *supra* Part II.B.

¹⁷⁸ See *Gestational Surrogacy Law Across the United States: State-By-State Interactive Map for Commercial Surrogacy*, CREATIVE FAMILY CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> (last visited Sept. 2, 2018).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* There are 15 states that permit surrogacy (e.g., California and Connecticut); 5 states that prohibit surrogacy (e.g., New York and Arizona); 11 states that allow some form of surrogacy (e.g., New Jersey and Pennsylvania); and 19 states that have neither enacted statutes nor published a case on surrogacy (e.g., Vermont and Georgia). *Id.*

¹⁸¹ See, e.g., *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011); *In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59 (Ind. Ct. App. 2010); *St. Mary v. Damon*, 309 P.3d 1027 (Nev. 2013).

of the surrogate. It is imperative to assess the various ways in which states address this matter of contention in order to find an appropriate solution to ensure that the surrogacy contract does not divest the surrogate of all autonomous, decision-making rights.

A. *State Statutes Limiting Intrusive Decision-Making Provisions in Surrogacy Arrangements*

Some states have already adopted statutes that restrict the extent to which a surrogacy contract can define the decision-making rights of a surrogate. Maine,¹⁸² Texas,¹⁸³ and Utah¹⁸⁴ have enacted provisions that protect the surrogate's autonomous rights in a broad sense. They all state in a similar manner that the surrogacy agreement cannot limit the right of the gestational surrogate to make decisions to safeguard her health.¹⁸⁵ The legislatures from these states, however, failed to define what decisions fall within the "to safeguard her health" scope.¹⁸⁶ As a result, an argument can be made that the scope would include the right to choose whether or not to have an abortion or a cesarean section—but the bounds are unknown. This ambiguity will eventually lead to disputes attempting to discern which provisions constitute a decision to safeguard a surrogate's health.

On the other end of the spectrum are states, such as Indiana,¹⁸⁷ Louisiana,¹⁸⁸ and Florida,¹⁸⁹ which have enacted provisions that protect the surrogate's autonomous, decision-making rights in a narrow sense. For example, Indiana finds it against public policy to require a surrogate to do any of the following: "consent to undergo or undergo an abortion," "use a substance or engage in activity only in accordance with the demands of another person," or "waive parental rights or duties to a child."¹⁹⁰ Louisiana and Florida have similar provisions that prohibit a surrogacy agreement from containing termination or selective fetal reduction clauses.¹⁹¹ These states

¹⁸² ME. REV. STAT ANN. tit. 19-A, § 1932 (2016).

¹⁸³ TEX. FAM. CODE § 160.754 (West 2003).

¹⁸⁴ UTAH CODE ANN. § 78B-15-808 (West 2005).

¹⁸⁵ § 1932(5) ("A gestational carrier agreement may not limit the right of the gestational carrier to make decision[s] to safeguard her health."); § 160.754(g) ("A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo."); § 78B-15-808(2) ("A gestational agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryo or fetus.").

¹⁸⁶ See *supra* notes 182–185 and accompanying text.

¹⁸⁷ IND. CODE ANN. § 31-20-1-1 (West 1997).

¹⁸⁸ LA. STAT. ANN. § 14:286(D) (2016).

¹⁸⁹ FLA STAT. § 63.213 (2012).

¹⁹⁰ § 31-20-1-1.

¹⁹¹ § 14:286(D)(4) ("It shall be unlawful for any person to . . . induce any gestational carrier, whether or not she is party to an enforceable or unenforceable agreement for genetic

leave a significant degree of latitude for the intended parents to control other areas of intrusive decision-making for the surrogate mother.

In addition to imposing restrictions on specific rights that cannot be contracted away, state legislatures should provide courts with a general framework to determine whether to enforce contractual provisions that impose obligations on the surrogate. But before discussing the appropriate framework, it is important to see which autonomous rights states allow surrogacy agreements to control.

B. *State Statutes Allowing Intrusive Decision-Making Provisions in Surrogacy Arrangements*

Some states have adopted statutes that specifically define which provisions can be contained in a surrogacy contract without hindering its enforceability. Nevada,¹⁹² Delaware,¹⁹³ and Illinois¹⁹⁴ have enacted legislation that allows a surrogacy agreement to waive certain decision-making rights of the surrogate. For example, Nevada's surrogacy laws provide that a surrogacy agreement will be upheld even if it contains the following terms:

- (a) The gestational carrier's agreement to undergo all medical examinations, treatments and fetal monitoring procedures recommended for the success of the pregnancy by the physician providing care to the gestational carrier during the pregnancy.
- (b) The gestational carrier's agreement to abstain from any activities that the intended parent or parents or the physician providing care to the gestational carrier during the pregnancy reasonably believes to be harmful to the pregnancy and the future health of any resulting child, including, without limitation, smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the pregnancy, exposure to radiation or any other activity proscribed by a health care provider.¹⁹⁵

Although these provisions would limit the autonomous rights of the surrogate, they appear to be reasonable restrictions.¹⁹⁶ The potential life engenders some degree of social concern, and as such, some of the surrogate's decision-making rights will need to be subdued by the

gestational carrier or gestational carrier contract, to consent to an abortion."); § 63.213(3)(b) ("A preplanned adoption agreement shall not contain any provision . . . [r]equiring the termination of the volunteer mother's pregnancy.").

¹⁹² NEV. REV. STAT. § 126.750 (2013).

¹⁹³ DEL. CODE ANN. tit. 13, § 8-807 (2013).

¹⁹⁴ 750 ILL. COMP. STAT. 47/25 (2005).

¹⁹⁵ § 126.750(5)(a)–(b).

¹⁹⁶ See discussion *supra* Part III.

commercial surrogacy agreement between her and the intended parents. Therefore, it is necessary to find the extent to which these provisions can impinge the bodily integrity of the surrogate, striking a balance between allowing the intended parents to make intrusive decisions for the surrogate mother, and ensuring the surrogacy contract does not divest the surrogate of all autonomous decision-making rights.

V. EVALUATING POSSIBLE SOLUTIONS TO ADDRESS GAPS AND VARIATIONS

One of the main concerns pertaining to commercial surrogacy focuses on the belief that the intended parents should not be able to use provisions in a surrogacy contract to have an unfettered ability to control or limit the surrogate's behavior during the pregnancy.¹⁹⁷ Commercial surrogacy arrangements are anomalous in that they involve one or more persons contracting for the provision of labor that implicates the bodily integrity of a third party.¹⁹⁸ As a result, the surrogate mother is unable "to exercise a substantial amount of control over [her] performance of the contract."¹⁹⁹

Although there is a well-recognized legal doctrine that allows parties to contract freely, and as such, waive some of their constitutional rights, the nature of commercial surrogacy is more permanent and personal than a typical contract.²⁰⁰ Therefore, legislation should impose restrictions on which aspects of decision-making can or cannot be waived. As noted, in states such as Maine, Texas, and Utah, which have adopted broad limitations, these restrictions need to provide courts with a particularized framework to determine whether to enforce contractual provisions that impose obligations on the surrogate.²⁰¹ In addition, as exemplified in states such as Indiana, Louisiana, and Florida, this framework needs to take into account some degree of social concern for the developing infant.²⁰²

The proposed solution for this matter of contention is to provide a balancing test where courts should weigh various factors in order to determine the enforceability of contractual provisions that divest the surrogate of her autonomous, decision-making rights. The first factor that courts should take into consideration is the constitutional right of privacy and liberty expressed in cases such as *Roe v. Wade*.²⁰³ Due to the permanent

¹⁹⁷ See *supra* Part II.C.

¹⁹⁸ See Lieber, *supra* note 32, at 226–27.

¹⁹⁹ Keith J. Cunningham, *Surrogate Mother Contracts: Analysis of a Remedial Quagmire*, 37 EMORY L. J. 721, 742 (1988).

²⁰⁰ See *id.*

²⁰¹ See *supra* Part IV.A.

²⁰² See *supra* Part IV.B.

²⁰³ See *supra* Part III.

2018]

COMMENT

229

and intense nature of surrogacy arrangements, a surrogate mother should not be able to waive her constitutional rights—including, but not limited to, the right to decide whether or not to terminate her pregnancy and the right to control her medical treatment.²⁰⁴ As illustrated through case law, a surrogate mother may change her mind or disagree with the intended parents on decisions that she failed to contemplate prior to entering into the surrogacy agreement.²⁰⁵ Thus, if a surrogate mother refuses to comport with the requests of the intended parents, courts should contemplate the constitutional rights of the surrogate as a factor in the balancing test in order to decide whether to enforce the particular contractual provision.

The second factor focuses on the safety concerns presented for the surrogate compared to the safety concerns presented for the developing fetus. Considering there are potentially higher safety concerns for the fetus compared to that of the surrogate, contractual provisions imposing obligations on the surrogate “to visit the doctor, to eat healthy, and to refrain from consuming substances such as drugs, alcohol, and cigarettes that could harm the developing fetus”²⁰⁶ appear to be reasonable. If the safety concerns are comparably close, however, the court should err on the side of the surrogate. This factor takes into account the degree of social concern for the developing infant, but continues to place the primacy on the surrogate’s autonomous rights.

The third factor urges the courts to examine the degree and nature of the intrusion. If the provision bears ample impingement on the surrogate’s bodily integrity then the court should not command its enforcement. As noted, most commercial surrogacy contracts regulate when and with whom the surrogate can engage in sexual activity.²⁰⁷ This level of intrusion on privacy interests is justifiable for the first two weeks before and after embryo transfer; however, after this extent of time has passed, it would no longer be as compelling of a demand. This factor provides a safeguard to ensure that intrusion upon the surrogate’s autonomous, decision-making rights is minimized.

The fourth factor contemplates the burden placed upon the surrogate mother to conform to the obligations contained in the surrogacy agreement. Courts should find fault with provisions that are cumbersome for the surrogate to comply with. The analysis should weigh the minimal benefit to the fetus against the burden imposed on the surrogate. For example, terms of an agreement stipulating that the surrogate mother must consume a vegan diet and eat only organic food can place an objectionably high burden on the

²⁰⁴ See *supra* Part III.

²⁰⁵ See *supra* Part II.A; see also *supra* Part III.A.

²⁰⁶ FIELD, *supra* note 57, at 66; see *supra* Part III.B.

²⁰⁷ Lahl, *supra* note 134.

surrogate, and courts should not enforce such terms.²⁰⁸

The last factor that courts should take into consideration is the bargaining power of both parties at the time they entered into the agreement. To enforce a surrogacy contract, there should be a representation of meaningful choice and informed consent on the part of the contracting parties. Locking a surrogate into rigid constraints entered into at the formation of the contract is to ignore the social and psychological realities of commercial surrogacy. Strictly applying contractual provisions can conflict with issues of bodily integrity by attempting to confine a surrogate who failed to receive proper counseling or full disclosure before entering into the surrogacy agreement. This would be contrary to public policy, and therefore, is an important factor for courts to consider.

Courts should weigh the aforementioned factors against one another to determine the appropriate remedy if a dispute were to arise between the intended parents and the surrogate over a provision within the surrogacy contract. Courts should recognize that a surrogate mother is placed in a unique situation where she is expected to submit to extremely precise, restrictive clauses that control nearly every aspect of her personal life without having the ability to stop performance in the middle of the contract.²⁰⁹ This balancing test provides a standard that allows courts to weigh the burdens of bodily intrusion against the benefits to the fetus. Intended parents should not have an unfettered ability to control or limit the surrogate's behavior during the pregnancy by provisions in a surrogacy contract. For example, the surrogacy agreement should not be able to force a surrogate to have an abortion. The surrogate should retain the ability to do so, however, if it is in the best interest of her health. Ultimately, this framework is designed to protect a surrogate's bodily autonomy and her decision-making rights.

VI. CONCLUSION

In conclusion, states need to regulate surrogacy issues in order to protect a surrogate's bodily autonomy during her pregnancy. It is important that the autonomous rights of the surrogate are "reaffirmed so as to prevent intended parents from believing that by virtue of carrying a fetus for them, a surrogate is surrendering [all of] her constitutional rights to make decisions about her own body."²¹⁰ As an important starting position in determining their surrogacy laws, states need to focus on the rights of the surrogate. Legislation should impose ample restrictions on specific rights that cannot

²⁰⁸ See *supra* Part III.B.

²⁰⁹ See *supra* Part III.

²¹⁰ Ohs, *supra* note 33, at 351.

2018]

COMMENT

231

be contracted away, as well as provide courts with a legal framework to determine the limitations of provisions that divest the surrogate of her autonomous, decision-making rights.