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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 finding new ways to help couples conceive.³ Just recently, in December of 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, millions throughout the world have actualized their dreams of starting a family.⁵

According to the Center for Disease Controls (CDC) 2015 Fertility Clinic Success Rates Report, there were 231,936 ART cycles⁶ performed, resulting in 72,913 live born infants in that year alone.⁷ Today, approximately 1.6% of all infants born in the United States every year are conceived using ART.⁸

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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.” CTRS. FOR DISEASE CONTROL & PREVENTION, AM. SOC’Y FOR REPROD. MED. & SOC’Y FOR ASSISTED REPROD. TECH., 2015 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC SUCCESS RATES REPORT 531 (2017), <ftp.cdc.gov/pub/Publications/art/ART-2015-Clinic-Report-Full.pdf>.

² 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, www.cdc.gov/art/artdata/index.html (last visited April 10, 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 *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.” CTRS. FOR DISEASE CONTROL & PREVENTION, AM. SOC’Y FOR REPROD. MED. & SOC’Y FOR ASSISTED REPROD. TECH., *supra* note 1.

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

⁸ *Id.*

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 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 enforcing surrogacy contracts, some banning them entirely, and some allowing 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.

When surrogacy first came into use, there were numerous challenges to its very legality.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

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; and 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). CTRS. FOR DISEASE CONTROL & PREVENTION, AM. SOC'Y FOR REPROD. MED. & SOC'Y FOR ASSISTED REPROD. TECH., 2015 ASSISTED REPRODUCTIVE TECHNOLOGY NATIONAL SUMMARY REPORT 50, 53 (2017), <https://www.cdc.gov/art/pdf/2015-report/ART-2015-National-Summary-Report.pdf>.

¹¹ See *infra* Part II Section B.

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

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *infra* Part II Section A.

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

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 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 may be terminated.¹⁸ Because of Cook’s advanced age, three male embryos were implanted into her uterus to increase the chances that at least one would prove viable.¹⁹ In this case, they all survived.²⁰ Fearing he would not be able to afford triplets, C.M. asked Cook to reduce the pregnancy by one fetus and to abide by their agreement’s selective reduction clause.²¹ Cook, however, refused to reduce, “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* indicates, one of the problematic 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 in regards to protecting a surrogate’s bodily autonomy. Part II of this comment will examine the history of surrogacy. Next, Part III will

¹⁷ *Cook v. Harding*, 190 F. Supp. 3d 921, 928 (C.D. Cal. 2016), *aff’d*, 879 F.3d 1035 (9th Cir. 2018).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 928–29.

²² *Id.*

²³ *Cook*, 190 F. Supp. 3d at 925. The California Court of Appeal affirmed the Superior Court of California’s judgment enforcing the gestational surrogacy contract between Cook and C.M. *C.M. v. M.C.*, 7 Cal. App. 5th 1118, 1118 (2017). The judgment cut off Cook’s parental rights to the three children in accordance with Cal. Fam. Code § 7962. *Id.* The following day, Cook filed a complaint against C.M. in the California Central District Court. *Cook*, 190 F. Supp. 3d. The Court held that the state judicial system provided an adequate outlet to seek relief, and therefore dismissed the claim. *Id.* at 938. The Ninth Circuit Court of Appeal affirmed the District Court’s order. *Cook*, 879 F.3d at 1043.

discuss issues that have come up 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, such as the right to an abortion, that cannot be contracted away, as well as provide the courts with a sufficient legal framework.²⁴

II. The History of Surrogacy and its Evolution

Surrogacy is a form of ART commonly utilized by couples desiring to start families of their own, but otherwise lacking the ability to do so.²⁵ 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.²⁶ Surrogacy is defined as “the process of carrying and delivering a child for another person.”²⁷ The term commercial surrogacy is defined as “a contractual relationship where compensation is paid to a surrogate and agency . . . in exchange for the

²⁴ 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.

²⁵ *What is Surrogacy?*, CIRCLE SURROGACY, www.circlesurrogacy.com/pages/what-is-surrogacy (last visited Feb. 10, 2018).

²⁶ *See infra* Part II B.

²⁷ *Surrogacy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

surrogate's gestational services."²⁸ Although the term is new,²⁹ the idea of surrogacy has been practiced for years—even tracing back to Biblical times.³⁰

Commercial surrogacy implicates the bodily integrity of the surrogate and the rights of the intended parents to contract freely.³¹ This ultimately creates a tension 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.³² Before discussing the appropriate solution for this matter of contention, it is imperative to first explore the history and the evolution of surrogacy.

A. The Two Different Types of Surrogacy Arrangements

There are two types of surrogacy arrangements: traditional surrogacy and gestational surrogacy.³³ Traditional surrogacy was the first of the two procedures to be medically possible.³⁴ It is defined as a “pregnancy in which a woman provides her own egg, which is fertilized by

²⁸ Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J.L. MED & ETHICS 300, 301 (2007).

²⁹ 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*, AM. SURROGACY, www.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.*

³⁰ 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.

³¹ See Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205, 226–27 (1992).

³² See Alayna Ohs, *The Power of Pregnancy: Examining Constitutional Rights in a Gestational Surrogacy Contract*, 29 HASTINGS CONST. L.Q. 340, 355–56 (2002).

³³ 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).

³⁴ See AM. SURROGACY, *supra* note 29.

artificial insemination, and carries the fetus and gives birth to a child for another person.”³⁵ 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.³⁶ Such reasoning led to decisions such as the *Baby M* case, bringing widespread attention to the procedure and the possible legal complications that traditional surrogacy can entail.³⁷

In 1986, surrogacy encountered its first significant legal challenge in possibly the most famous case in surrogacy history, the *Baby M* case,³⁸ 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.³⁹ The case arose from a contract entered in February 1985 by William Stern and Mary Beth Whitehead.⁴⁰ Mr. Stern and his wife, Elizabeth Stern, had hoped to have children and start a family of their own.⁴¹ Mrs. Stern feared that this, however, was beyond the bounds of possibility due to her multiple sclerosis, which made pregnancy dangerous and even life threatening.⁴² At first the Sterns considered adoption but became discouraged at the delays involved.⁴³ As an alternative, the couple decided to use surrogacy.⁴⁴

³⁵ *Traditional Surrogacy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

³⁶ See Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 110, 121 (2009); see also *In re Baby M*, 109 N.J. 396 (1988).

³⁷ *In re Baby M*, 109 N.J. at 396. See also *In re Baby*, 447 S.W.3d 807 (Tenn. 2014); *Doe v. Doe*, 244 Conn. 403, 710 A.2d 1297 (1998); *A.L.S. ex rel. J.P. v. E.A.G.*, No. A10–443, 2010 WL 4181449 (Minn. Ct. App. Oct. 26, 2010).

³⁸ *In re Baby M*, 109 N.J. 396 (1988).

³⁹ 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).

⁴⁰ *In re Baby M*, 109 N.J. at 411.

⁴¹ *Id.*

⁴² *Id.* at 413.

⁴³ *Id.* 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.*

⁴⁴ *Id.*

Mr. Stern and Whitehead subsequently entered into a surrogacy contract to which Whitehead agreed to be artificially inseminated using Mr. Stern's sperm and to carry the child for the couple.⁴⁵ The contract contained terms indicating that Whitehead would surrender the child and, in return, would receive a \$10,000 fee.⁴⁶ The insemination was successful; Whitehead became pregnant and gave birth to a baby girl in March 1986.⁴⁷

After turning the baby over to the Sterns, Whitehead began to experience emotional difficulty.⁴⁸ The next day, she begged the Sterns to let her take the baby temporarily, promising to return with her later.⁴⁹ Fearful that in her state of distress Whitehead might harm herself, the Sterns allowed her to take the child.⁵⁰ The next week, however, Whitehead called the Sterns and informed them that she had changed her mind and could not relinquish the baby.⁵¹ The Sterns proceeded to sue Whitehead in New Jersey state court, seeking enforcement of the surrogacy contract.⁵² After an order was entered requiring her to relinquish custody, Whitehead fled to Florida with Baby M.⁵³ It was not until the end of July, that Florida police invaded the home, forcibly removed the baby, and delivered the child back to the Sterns.⁵⁴

When the Sterns regained possession of the child, the prior order of the court requiring Whitehead to relinquish custody was reaffirmed by the trial court.⁵⁵ The trial court held that the contract by which Whitehead had agreed to bear the child for the Sterns was valid, and that Mr.

⁴⁵ *Id.* at 412.

⁴⁶ *In re Baby M*, 109 N.J. at 412.

⁴⁷ *Id.* at 414. Whitehead called the baby Sara and the Sterns called the baby Melissa. *Id.* at 414–15.

⁴⁸ *Id.*

⁴⁹ *Id.* at 415.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *In re Baby M*, 109 N.J. at 415–16.

⁵³ *Id.*

⁵⁴ *Id.* at 416.

⁵⁵ *Id.*

Stern was the legal parent.⁵⁶ Whitehead appealed, and the New Jersey Supreme Court granted direct certification.⁵⁷ The New Jersey Supreme Court invalidated the surrogacy contract on public policy grounds,⁵⁸ and held the intended payment illegal⁵⁹ and potentially degrading to women.⁶⁰ 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.⁶¹

In traditional surrogacy arrangements, like that entered into by Mary Beth Whitehead and William 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.⁶² In these scenarios, in order 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.⁶³ Because of these additional legal complications, many surrogacy professionals stopped offering traditional surrogacy programs and, instead, moved towards the use of gestational surrogacy programs.⁶⁴

⁵⁶ *Id.* at 417. A major part of the trial court’s decision was based upon the view that custody with the Sterns was in the child’s best interests. *Id.* at 417–18. The trial took more than two months, entailing six weeks of testimony and half a million dollars of legal bills. *Id.* at 417; MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* 4 (1990).

⁵⁷ *In re Baby M*, 109 N.J. at 419.

⁵⁸ *Id.* at 434–39. 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 the bond with her child. She never makes a totally voluntary, informed decision.” *Id.* at 437.

⁵⁹ *Id.* at 423–32.

⁶⁰ *Id.* at 439 (“On reflection . . . it appears that the essential evil is . . . taking advantage of a woman’s circumstances . . . in order to take away her child.”).

⁶¹ *Id.* at 452–53, 461–62. The Court remanded the case to the trial court for determination on visitation. *Id.* at 463–64. 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. *Matter of Baby M*, 225 N.J. Super. 267, 269 (Super. Ct. 1988).

⁶² Scott, *supra* note 36.

⁶³ *Intended Parents: Establishing Parentage in Surrogacy*, AM. SURROGACY, www.surrogate.com/intended-parents/surrogacy-laws-and-legal-information/establishing-parentage-in-surrogacy (last visited Feb. 10, 2018).

⁶⁴ 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 surrogacies arrangements are gestational).

Gestational surrogacy differs from traditional surrogacy in that it 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.”⁶⁵ Because the surrogate does not provide the egg, she is not biologically related to the child.⁶⁶ Therefore, it is less burdensome for courts to determine that the surrogate has no parental rights to said child.⁶⁷ This, in effect, simplifies parentage issues and makes gestational surrogacy less legally complicated than traditional surrogacy.⁶⁸ Gestational surrogacy has proven to be more attractive to the parties and more palatable to lawmakers and the public.⁶⁹ Over the last three decades,⁷⁰ this type of surrogacy has experienced an expanding growth in popularity, which can be attributed to cases such as the *Johnson v. Calvert* case.⁷¹

Five years after the *Baby M* decision, the enforceability of a commercial surrogacy contract was again litigated in *Johnson v. Calvert*.⁷² By contrast, however, the dispute focused on gestational surrogacy.⁷³ 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.⁷⁴ The contract stipulated that the child was to be considered the

⁶⁵ *Gestational Surrogacy*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁶⁶ *Gestational Carrier or Surrogacy*, AM. SOC’Y FOR REPROD. MED., www.reproductivefacts.org/topics/topics-index/gestational-carrier-or-surrogacy (last visited Feb. 10, 2018).

⁶⁷ Brittney M. McMahon, *The Science Behind Surrogacy: Why New York Should Rethink Its Surrogacy Contracts Laws*, 21 ALB. L.J. SCI. & TECH. 359, 363 (2011).

⁶⁸ See Scott, *supra* note 36.

⁶⁹ See *infra* text accompanying notes 72–84.

⁷⁰ AM. SURROGACY, *supra* note 29.

⁷¹ *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).

⁷² *Id.* This case is considered the second most important surrogacy case in the United States. See J. HERBIE DIFONZO & RUTH C. STERN, *INTIMATE ASSOCIATIONS: THE LAW AND CULTURE OF AMERICAN FAMILIES* 96 (2013). Although its decision generated little controversy, the case had a profound impact on surrogacy practice. Scott, *supra* note 36 at 122. Gestational surrogacy promptly became the preferred arrangement. *Id.*

⁷³ *Johnson*, 5 Cal. 4th at 87.

⁷⁴ *Id.* Mark and Crispina Calvert had desired to have children but were unable to because Crispina 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.*

Calverts' and that Johnson would relinquish all parental rights in exchange for three payments totaling \$10,000.⁷⁵ In the months succeeding Johnson's in vitro fertilization, however, the relations between the parties became strained.⁷⁶ Johnson demanded the full balance of her payments, threatening that she would refuse to relinquish the child unless the Calverts complied.⁷⁷ The Calverts responded with a lawsuit to determine the parentage of the child.⁷⁸

The Supreme Court of California resolved the dilemma by looking at the intent of the parties in signing the contract.⁷⁹ 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."⁸⁰ 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.⁸¹ 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.⁸² The importance of the biological connection between the pregnant woman and the fetus to determine parentage was evident.⁸³ The court

⁷⁵ *Id.*

⁷⁶ *Id.* at 87–88. The relationship between the parties deteriorated after "Mark learned that Anna had not disclosed she had [previously] suffered several stillbirths and miscarriages." *Id.* at 87. Additionally, the Calverts had agreed to buy a \$200,000 life insurance policy on Anna's life, but failed to do. *Id.* at 87–88.

⁷⁷ *Id.* at 88.

⁷⁸ *Id.*

⁷⁹ *Johnson*, 5 Cal. 4th at 95.

⁸⁰ *Id.* at 93.

⁸¹ *Id.* at 95. 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.* (demonstrating why courts should follow the *Johnson* approach in solving surrogacy disputes by awarding custody to the intended parents).

⁸² See *Johnson*, 5 Cal. 4th at 93, 104.

⁸³ *Id.*

ultimately concluded that the Calverts were the genetic parents, that Johnson had no parental rights, and that the contract was legal and enforceable.⁸⁴

The difference between gestational and traditional surrogacy arrangements has become an important legal distinction. 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.⁸⁵ In the case of gestational surrogacy, however, the surrogate is in no way biologically related to the child and therefore has no parental rights to said child.⁸⁶ 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.⁸⁷

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

The cost for gestational surrogacy arrangements can run from \$60,000 to \$150,000 when medical and legal expenses are included.⁸⁸ Despite these high costs, however, the practice of gestational surrogacy is growing rapidly.⁸⁹ Due to advancing medical knowledge and techniques, commercial surrogacy is now being used to serve the desires of couples struggling with infertility issues, single individuals, and same-sex couples to start a family of their own.⁹⁰ Although there is

⁸⁴ *Id.* at 88, 101. *See also* 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).

⁸⁵ Scott, *supra* note 36.

⁸⁶ McMahan, *supra* note 67.

⁸⁷ 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 36.

⁸⁸ *See Intended Parents: How Much Does Surrogacy Cost?*, AM. SURROGACY, www.surrogate.com/intended-parents/the-surrogacy-process/how-much-does-surrogacy-cost (last visited Feb. 10, 2018); *see also Understanding Costs*, GROWING GENERATIONS, www.growinggenerations.com/surrogacy-program/intended-parents/surrogacy-cost (last visited Feb. 10, 2018).

⁸⁹ SOLINGER, *supra* note 33, at 108.

⁹⁰ *See* FIELD, *supra* note 56, at 37; *see also* SHANLEY, *supra* note 39, at 106.

no formal collection of statistics that tracks surrogate births in the United States, estimates suggest that gestational surrogate births doubled from 2004 to 2008, reaching approximately 1,000 births annually.⁹¹ The CDC 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.⁹² In 2011, the Society of Assisted Reproductive Technology (SART) tracked 1,593 babies born in the United States to gestational surrogates, up from 1,253 in 2009, and just 738 in 2004.⁹³

The appeal to couples struggling with infertility issues has been an important factor in the growing prevalence of gestational surrogacy.⁹⁴ Commercial surrogacy arrangements allow infertile individuals who cannot bear children to assume the responsibilities of parenthood.⁹⁵ 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.⁹⁶ Many infertile couples view gestational surrogacy as an alluring alternative to

⁹¹ GUGUCHEVA, *supra* note 10. 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* CTRS. FOR DISEASE CONTROL & PREVENTION, AM. SOC'Y FOR REPROD. MED. & SOC'Y FOR ASSISTED REPROD. TECH., 2015 ASSISTED REPRODUCTIVE TECHNOLOGY FERTILITY CLINIC SUCCESS RATES REPORT (2017), <ftp.cdc.gov/pub/Publications/art/ART-2015-Clinic-Report-Full.pdf>. Each clinic is required to report whether it offers services to patients using gestational surrogate 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.

⁹² *ART and Gestational Carriers*, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/art/key-findings/gestational-carriers.html (last visited April 10, 2018).

⁹³ Deborah L. Cohen, *Surrogate Pregnancies on Rise Despite Cost Hurdles*, THOMSON REUTERS (Mar. 18, 2013, 5:41 PM), www.reuters.com/article/us-parent-surrogate/surrogate-pregnancies-on-rise-despite-cost-hurdles-idUSBRE92H11Q20130318.

⁹⁴ *See* SHANLEY, *supra* note 39, at 106.

⁹⁵ *Id.*

⁹⁶ ANJANI CHANDRA ET AL., NO. 67, NATIONAL HEALTH STATISTICS REPORTS 6 (2013), www.cdc.gov/nchs/data/nhsr/nhsr067.pdf.

adoption.⁹⁷ 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.⁹⁸

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.⁹⁹ Persons in these situations are unable to give birth to a child without the assistance of reproductive technology.¹⁰⁰ Therefore, with the emergence of gestational surrogacy, single individuals and same-sex couples can pursue parenthood in ways that, until now, were not possible.¹⁰¹ 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.¹⁰²

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.¹⁰³ Although there is no formal tracking on the number of same-sex male couples having babies

⁹⁷ See DiFONZO & STERN, *supra* note 72, at 68. Adoption is a lengthy process that can take one to two years to complete. See *id.* (“the 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).

⁹⁸ See Koll, *supra* note 81, at 202.

⁹⁹ See DiFONZO & STERN, *supra* note 72, at 72; see also SEMBER, *supra* note 10, at 160–61.

¹⁰⁰ SEMBER, *supra* note 10.

¹⁰¹ DEAN A. MURPHY, GAY MEN PURSUING PARENTHOOD THROUGH SURROGACY RECONFIGURING KINSHIP 20 (2015).

¹⁰² See DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 94 (2006) (discussing the historical evolution of surrogacy); see also Erica Davis, Note, *The Rise of Gestational Surrogacy and the Pressing Need for International Regulation*, 21 MINN. J. INT’L L. 120, 144 (2012).

¹⁰³ See Koll, *supra* note 81, at 202; see also Wendy Norton, Nicky Hudson & Lorraine Culley, *Gay Men Seeking Surrogacy to Achieve Parenthood* 27 REPROD. BIOMEDICAL ONLINE 271, 272–73 (2013), dx.doi.org/10.1016/j.rbmo.2013.03.016 (“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.’”).

through the means of gestational surrogacy, observers say that the numbers are growing.¹⁰⁴ 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.¹⁰⁵ 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.”¹⁰⁶ 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.¹⁰⁷

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 biologically related children.¹⁰⁸ 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.¹⁰⁹

¹⁰⁴ See DAVID STRAH, *GAY DADS: A CELEBRATION OF FATHERHOOD* (2003); Nara Schoenberg, *Gay Men Increasingly Turn to Surrogate to Have Babies*, CHI. TRIBUNE (Nov. 23, 2016, 8:59 AM), www.chicagotribune.com/lifestyles/health/sc-gay-men-having-babies-health-1130-20161123-story.html.

¹⁰⁵ Schoenberg, *supra* note 104.

¹⁰⁶ *Id.*

¹⁰⁷ See Koll, *supra* note 81, 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*, 39 L.A. LAW. 12 (2016). 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.

¹⁰⁸ See *supra* text accompanying notes 88–98.

¹⁰⁹ 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 Tiger, *19 Celebrities Who Used Surrogates*, MERIDITH CORP., www.parents.com/parenting/celebrity-parents/moms-dads/celebrities-who-used-surrogates (last visited Feb. 10, 2018); see also Melody Chiu et al., *Kim Kardashian and Kanye West Expecting Baby No. 3 via Surrogate!*, PEOPLE (Sept. 6, 2017, 11:29 AM), www.people.com/babies/kanye-west-kim-kardashian-expecting-third-child-surrogate-

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.¹¹⁰ Not only did the case garner national attention, but it also produced a feminist split on the issue of surrogacy.¹¹¹ 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.¹¹² The brief argued that the commercialization of surrogate parenthood violated the dignity of women.¹¹³ In response to this critique, however, other feminists argued that commercial surrogacy ensured a women's right to self-determination.¹¹⁴ Even the New Jersey Chapter of the National Organization for Women (NOW)¹¹⁵ failed to reach a consensus on the issue.¹¹⁶ 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."¹¹⁷

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*, CONCEIVE ABILITIES (Nov. 16, 2016), www.conceivabilities.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.*

¹¹⁰ See *supra* Part II A.

¹¹¹ RUTHER MACKLIN, *SURROGATES AND OTHER MOTHERS: THE DEBATE OVER ASSISTED REPRODUCTION* 60 (1994).

¹¹² 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, at 1; see also Joseph F. Sullivan, *Brief by Feminists Opposes Surrogate Parenthood*, N.Y. TIMES, July 31, 1987, at A1.

¹¹³ Sullivan, *supra* note 112.

¹¹⁴ See Iver Peterson, *Baby M Trial Splits Ranks of Feminists*, N.Y. TIMES, Feb. 24, 1987, at B1.

¹¹⁵ NOW is the largest organization of feminist activities in the United States. *Who We Are*, NAT'L ORG. FOR WOMEN, www.now.org/about/who-we-are (last visited Feb. 10, 2018). Since its founding in 1966, NOW's goal has been to take action to bring about equality for all women. *Id.*

¹¹⁶ MACKLIN, *supra* note 111.

¹¹⁷ *Id.*

After the *Baby M* case, the division in the varying feminist schools of thought on commercial surrogacy continued to be a topic of contention.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ 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.¹²¹ 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.¹²² In their view, the key idea is freedom of choice.¹²³ For example, Hugh V. McLachlan argues that prohibiting “mothers from making . . . particulate interpretations of their pregnancies” would violate their right to autonomy, ultimately reinforcing the negative

¹¹⁸ ALEX FINKELSTEIN ET AL., *SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING* 32–37, 52 (2016).

¹¹⁹ *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 CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 246–48 (1989).

¹²⁰ MACKLIN, *supra* note 111.

¹²¹ 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.

¹²² RONIT IRSHAI, *FERTILITY AND JEWISH LAW: FEMINIST PERSPECTIVES ON ORTHODOX RESPONSA* Literature 151–52 (Joel A. Linsider trans., 2012).

¹²³ *Id.*

stereotype of women as incapable of full rational agency.¹²⁴ 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.¹²⁵ Many believe that it is a form of oppression that divests the surrogate of all autonomous, decision-making rights.¹²⁶ Feminists arguing against commercial surrogacy focus on the concept of control and free choice.¹²⁷ From this perspective, commercial surrogacy is “a process meant to control women and their procreative powers for the benefit of men.”¹²⁸ 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.¹²⁹ Contractual provisions in the commercial surrogacy agreement regulate the surrogate’s conduct during pregnancy.¹³⁰ 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

¹²⁴ 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.*

¹²⁵ See MACKINNON, *supra* note 119. 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 farming model relates to women as a class planted with the male seed and harvested. *Id.*

¹²⁶ Lieber, *supra* note 31, at 205–06.

¹²⁷ *Id.*

¹²⁸ IRSHAI, *supra* note 122, at 146–47.

¹²⁹ Lieber, *supra* note 31, at 226–27.

¹³⁰ *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).

developing fetus.”¹³¹ Because the potential life engenders some degree of social concern, these provisions appear to have reasonable restrictions; however, issues arise when these provisions divest the surrogate of all autonomous, decision-making rights.¹³² For example, most commercial surrogacy contracts regulate when the surrogate can engage in sexual activity and with whom, and also contain abortion and selective fetal reduction clauses.¹³³ 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 all of her constitutional rights to make decisions about her own body.”¹³⁴ 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 typically contain stipulations that either compel or restrict a surrogate to have an abortion.¹³⁵ The provision may read as follow:

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.¹³⁶

Controversial cases surrounding the enforcement of these abortion clauses in commercial surrogacy agreements have garnered widespread attention in recent years. In 2013, Crystal Kelley, a gestational surrogate for an infertile couple, refused to terminate a fetus with severe

¹³¹ FIELD, *supra* note 56, at 66; *see infra* Part III B.

¹³² *See* Ohs, *supra* note 32.

¹³³ 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.

¹³⁴ Ohs, *supra* note 32, at 351.

¹³⁵ Carmina Y. D'Avera, *The Right of Abortion in Surrogate Motherhood Arrangements*, 7 N. ILL. U. L. REV. 1, 4 (1987).

¹³⁶ *Id.*

abnormalities.¹³⁷ Twenty-one weeks into the pregnancy, medical tests indicated that the fetus had a cleft palate, a heart abnormality, and Down syndrome.¹³⁸ The intended parents mandated that the child be aborted immediately.¹³⁹ 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.¹⁴⁰

Another case arose in 2016 after a surrogate, Melissa Cook, refused to selectively reduce a high-risk triplet pregnancy.¹⁴¹ Because of Cook's advanced age, multiple embryos were transferred to increase the chances that at least one would prove viable.¹⁴² Fearing he would not be able to afford triplets, the intended father, known in the court filings as C.M., asked Cook to reduce the pregnancy by one fetus and abide by their agreement's selective reduction clause.¹⁴³ Cook, however, refused to reduce, "citing her anti-abortion beliefs."¹⁴⁴

In 2001, Helen Beasley entered into a surrogacy agreement with Charles Wheeler and Martha Berman.¹⁴⁵ The contract contained numerous clauses providing for nearly every possible contingency—including the requirement that Beasley would have to honor the couple's decision

¹³⁷ Elizabeth Cohen, *Surrogate Offered \$10,000 to Abort Baby*, CNN (Mar. 6, 2013, 2:58 PM), 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.

¹³⁸ Cohen, *supra* note 137.

¹³⁹ *Id.*

¹⁴⁰ *Id.* The child was born with severe health issues and was later given up for adoption to another family. *Id.*

¹⁴¹ 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.

¹⁴² Cook, 190 F. Supp. 3d at 928.

¹⁴³ *Id.* at 928–29.

¹⁴⁴ *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.

¹⁴⁵ Beasley v. Wheeler, No. CGC-01-401717 (Cal. Super. Ct. June 4, 2002); Chris Taylor, *One Baby Too Many*, TIME, Aug. 19, 2011, at 55; *Nightline: World News Now* (ABC television broadcast Aug. 29, 2001) (transcript on file with LEXIS).

to have a selective reduction in the chance of a multiple pregnancy.¹⁴⁶ After Beasley discovered that she was carrying twins, however, she refused to proceed with the selective reduction.¹⁴⁷ A battled ensued, with Wheeler and Berman unwilling to parent the two fetuses Beasley carried.¹⁴⁸ Because Beasley failed to comply with the contract, she faced the possibility of becoming a “mother.”¹⁴⁹ These cases reveal important constitutional concerns surrounding commercial surrogacy arrangements.¹⁵⁰ In each situation, the intended parents attempted to abrogate the surrogate’s constitutional rights with the use of contractual provisions.¹⁵¹

This area of contention surrounding the decision to reduce the pregnancy of a surrogate necessarily implicates *Roe v. Wade*.¹⁵² 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.¹⁵³ 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.”¹⁵⁴ 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.¹⁵⁵

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 the woman is

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ The resolution of the conflict is unknown because the court proceedings were sealed. ROSEMARIE SKAINE, *PATERNITY AND AMERICAN LAW* 112–13 (2003).

¹⁵⁰ 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.

¹⁵¹ *See supra* text accompanying notes 137–148.

¹⁵² *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁵³ *Id.* at 153–55, 164–66.

¹⁵⁴ *Id.* at 153.

¹⁵⁵ *Id.* at 150, 156, 162–64.

a surrogate or not. The surrogate, in carrying the child, is the person who undergoes several aspects of pregnancy recognized in *Roe* to support a woman’s constitutional right to abortion.¹⁵⁶ 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 balance against the surrogate’s privacy rights.¹⁵⁷ *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 carrying for another.¹⁵⁸

In the context of abortion rights, commercial surrogacy agreements are analogous to spousal consent requirements. In *Planned Parenthood of Central Missouri v. Danforth*,¹⁵⁹ the Supreme Court struck down a Missouri requirement of a husband’s written consent for an abortion during the first twelve weeks of pregnancy.¹⁶⁰ The Court held that a “State does not have the constitutional authority to give a third party an absolute . . . veto over” the abortion decision.¹⁶¹ In assessing the constitutional validity, the Court balanced “a man’s right to father children” and woman’s right to terminate her pregnancy, and concluded that since the woman “is more directly and immediately affected by the pregnancy . . . the balance weighs in here favor.”¹⁶² As such, if a husband’s consent is not required before a wife terminates her pregnancy, then the consent of the intended parents should not constitutionally be required either. A women’s right to decide whether

¹⁵⁶ *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” (i.e. distress associated with the unwanted child). *Id.* Some of these aspects of pregnancy are applicable to the interests of the surrogate, while others are confined to “regular” pregnancies, 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.

¹⁵⁷ *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 (2006).

¹⁵⁸ *See id.*

¹⁵⁹ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

¹⁶⁰ *Id.* at 67–68, 83–84.

¹⁶¹ *Id.* at 74.

¹⁶² *Id.* at 90.

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.¹⁶³

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.¹⁶⁴ For example, surrogacy contracts can contain clauses that regulate the surrogate's diet, exercise, living arrangements, activities, when the surrogate can engage in sexual activity and with whom, and even end-of-life decision making.¹⁶⁵ 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.¹⁶⁶ 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 and also violate constitutional principles derived from *Roe*.¹⁶⁷ Therefore, it is

¹⁶³ *Id.* at 60.

¹⁶⁴ See FIELD, *supra* note 56, at 66.

¹⁶⁵ Lahl, *supra* note 133.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

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.”¹⁶⁸ 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.”¹⁶⁹ The right to control one’s medical treatment is highly personal.¹⁷⁰ For example, in *In re Doe*, a pregnant woman was informed that if she failed to have an immediate cesarean section, that her child could be born dead or with severe mental defects.¹⁷¹ Because of religious beliefs, the woman, instead, elected to deliver naturally and refused to consent to the procedure.¹⁷² The court confirmed her right to make such a decision, stating, “Applied 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.”¹⁷³ 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 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

¹⁶⁸ Emily Jackson, *Abortion, Autonomy and Prenatal Diagnosis*, 9 SOC. & LEGAL STUD. 467, 467 (2000) (quoting Ronald Dworkin).

¹⁶⁹ D’Avera, *supra* note 135, at 10; *see Roe v. Wade*, 410 U.S. 113, 155 (1973) (“[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision”).

¹⁷⁰ *See People v. Doe (In re Doe)*, 260 Ill. App. 3d 392 (1994).

¹⁷¹ *Id.* at 393.

¹⁷² *Id.*

¹⁷³ *Id.* at 401. *See also Cruzan v. Director, Mo. Health Dept.*, 497 U.S. 261 (1990) (holding that competent, dying persons have the right to direct the removal of life-sustaining medical treatment).

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 v. Wade* framework, as well as the *In re Doe* decision, there are well-established constitutional rights that protect the surrogate mother from unfettered bodily intrusion.¹⁷⁴ It should of course be acknowledged that this robust commitment to respecting a surrogate's right to make her own decisions extends only to 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,¹⁷⁵ the law of surrogate motherhood in the United States is still in a state of confusion.¹⁷⁶ 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.¹⁷⁷ Many states, however, do not have any laws regarding surrogacy contracts.¹⁷⁸ 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.¹⁷⁹

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

¹⁷⁴ See *supra* text accompanying notes 152–163, 171–173.

¹⁷⁵ See *supra* Part II B.

¹⁷⁶ 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 April 15, 2018).

¹⁷⁷ *Id.*

¹⁷⁸ There are 17 states that permit surrogacy (i.e. California and Connecticut); 5 states that prohibit surrogacy (i.e. New York and Arizona); 7 states that allow some form of surrogacy (i.e. Ohio and New Jersey); and 21 states that have neither enacted statutes nor published a case on surrogacy (i.e. Vermont and Georgia). *Id.*

¹⁷⁹ See, e.g., *Raftopol v. Ramey*, 299 Conn. 681 (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).

laws handle contracts that include intrusive decision-making provisions that affect the bodily integrity 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 restrict the decision-making rights of a surrogate. Maine,¹⁸⁰ Texas,¹⁸¹ and Utah¹⁸² 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.¹⁸³ The legislatures from these states, however, failed to define what decisions fall within the "to safeguard her health" scope.¹⁸⁴ As a result, an argument can be made that it 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.

¹⁸⁰ ME. REV. STAT tit. 19-A, § 1932 (2015).

¹⁸¹ TEX. FAM. CODE § 160.754 (2003).

¹⁸² UTAH CODE § 78B-15-808 (2005).

¹⁸³ § 1932 ("A gestational carrier agreement may not limit the right of the gestational carrier to make decision to safeguard her health."); § 160.754 ("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 ("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.").

¹⁸⁴ See *supra* notes 180–183 and accompanying text.

On the other end of the spectrum, are states, such as Indiana,¹⁸⁵ Louisiana,¹⁸⁶ and Florida,¹⁸⁷ which have enacted provisions that protect the surrogate’s autonomous, decision-making rights in a narrow sense. For example, Indiana holds 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.”¹⁸⁸ Louisiana and Florida have similar provisions that prohibit a surrogacy agreement from containing termination or selective fetal reduction clauses.¹⁸⁹ These states 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,¹⁹⁰ Delaware,¹⁹¹

¹⁸⁵ IND. CODE ANN. § 31-20-1-1 (1997).

¹⁸⁶ LA. REV. STAT § 14:286 (2016).

¹⁸⁷ FLA STAT. § 63.213 (2012).

¹⁸⁸ § 31-20-1-1.

¹⁸⁹ § 14:286 (“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 gestational carrier or gestational carrier contract, to consent to an abortion”); § 63.213 (“A preplanned adoption agreement shall not contain any provision . . . [r]equiring the termination of the volunteer mother’s pregnancy.”).

¹⁹⁰ NEV. REV. STAT. § 126.750 (2013).

¹⁹¹ 13 DEL. C. § 8-807 (2013).

and Illinois¹⁹² 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 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.¹⁹³

Although these provisions would limit the autonomous rights of the surrogate, they appear to be reasonable restrictions.¹⁹⁴ 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 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 have an unfettered ability to control or limit the surrogate's behavior during the pregnancy by provisions in a surrogacy contract.¹⁹⁵ Commercial surrogacy

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

¹⁹³ § 126.750.

¹⁹⁴ See discussion *supra* Part III.

¹⁹⁵ See *supra* Part II C.

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.¹⁹⁶ As a result, the surrogate mother is unable “to exercise a substantial amount of control over [her] performance of the contract.”¹⁹⁷

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.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰

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*.²⁰¹ Due to the permanent 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

¹⁹⁶ Lieber, *supra* note 31, at 226–27.

¹⁹⁷ Keith J. Cunningham, *Surrogate Mother Contracts: Analysis of a Remedial Quagmire*, 37 EMORY L. J. 721, 742–45 (1988).

¹⁹⁸ *See id.*

¹⁹⁹ *See supra* Part IV A.

²⁰⁰ *See supra* Part IV B.

²⁰¹ *See supra* Part III.

control her medical treatment.²⁰² 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.²⁰³ 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 looks at the safety concerns presented for the surrogate compared to the safety concerns presented for the developing fetus. For example, 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”²⁰⁴ appear to be reasonable considering there are potentially higher safety concerns for the baby compared to that of the surrogate. 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 the surrogate can engage in sexual activity and with whom.²⁰⁵ 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

²⁰² *See id.*

²⁰³ *See supra* Part II A; *see also supra* Part III A.

²⁰⁴ FIELD, *supra* note 56, at 66; *see supra* Part III B.

²⁰⁵ Lahl, *supra* note 133.

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 the agreement stipulating that the surrogate mother must consume a vegan diet and only eat organic foods can place an objectionably high burden on the surrogate that should not be enforced.²⁰⁶

The last factor that courts should take into consideration is the bargaining power of both parties at the time the agreement was made. 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 formulation of the contract is to ignore the social and psychological realities of commercial surrogacy. Applying contractual provisions strictly 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 these 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.²⁰⁷ This balancing test provides a standard that allows courts to weigh the burdens

²⁰⁶ *See supra* Part III B.

²⁰⁷ *See supra* Part III.

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 her best health interest. 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 is "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."²⁰⁸ An important starting position that states need to consider in determining their surrogacy laws is to focus on the surrogate. Legislation should impose ample restrictions on specific rights that cannot 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.

²⁰⁸ Ohs, *supra* note 32, at 351.