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IN DEFENSE OF SURROGACY AGREEMENTS:
A MODERN CONTRACT LAW PERSPECTIVE

YEHEZKEL MARGALIT*

ABSTRACT

The American public's attention was first exposed to the practice of surrogacy in 1988 with the drama and verdict of the Baby M case. Over the last twenty-five years, the practice of surrogacy has slowly become increasingly socially accepted, and even welcomed. This evolution serves to emphasize the bizarre judicial and legislative silence regarding surrogacy that exists today in the vast majority of U.S. jurisdictions. In this Article, I describe and trace the dramatic revolution that took place during the recent decades, as the surrogacy practice has drastically changed from one viewed as problematic and rejected to a socially widespread and accepted practice. As set forth below, this recent shift demands increasing the legal recognition of the legality of surrogacy contracts and the moderate regulation of their enforcement. In doing so, this Article explores the various intrinsic contractual problems of surrogacy contracts: the problem of unequal power of the contracting parties, the problem of a change of heart, and the problem of changed circumstances. As presented, the preliminary normative claim regarding these contractual problems was not properly addressed by classical contract law. However, with the development of modern contract law, we are now supplied with a well-equipped framework and doctrines appropriate for dealing with such problems. In order to demonstrate my innovation, I will represent one main solution that the modern contract law gives us for each given contractual problem. The Article concludes with an appeal to legislatures and courts for a legal framework and a suggested outline of the practical administrative-legal mechanisms for accomplishing the complete legal and social recognition of surrogacy contracts.

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INTRODUCTION

- I. THE VERY FIRST DAYS OF SURROGACY—A PROBLEMATIC AND SOCIALLY, LEGALLY, AND ETHICALLY REJECTED PRACTICE
 - II. THE VARIOUS INTRINSIC CONTRACTUAL PROBLEMS OF SURROGACY CONTRACTS
 - A. *The Problem of Unequal Power of the Contracting Parties*
 - B. *The Problem of Change of Heart*
 - C. *The Problem of Changed Circumstances*
 - III. FROM A PROBLEMATIC AND REJECTED PRACTICE TO A SOCIALLY AND LEGALLY WIDESPREAD AND ACCEPTED PRACTICE
 - IV. MODERN CONTRACT LAW AS A SOLUTION TO THE VARIOUS INTRINSIC CONTRACTUAL PROBLEMS
 - A. *General*
 - B. *Coping with the Problem of Unequal Power of the Contracting Parties*
 - C. *Coping with the Problem of Change of Heart*
 - D. *Coping with the Problem of Changed Circumstances*
 - V. IMPLEMENTING THE REQUIRED PRACTICAL ADMINISTRATIVE AND LEGAL MECHANISMS FOR ACCOMPLISHING RECOGNITION OF THE LEGALITY OF SURROGACY CONTRACTS
- CONCLUSION

INTRODUCTION

One of the most fascinating and challenging, as well as problematic, issues in family law is the question of the legality of surrogacy contracts. The practice of surrogacy is slowly becoming more accepted and welcomed, both theoretically and practically, in the U.S and various countries throughout the world.¹ However, this acceptance of the surrogacy practice and the intense public global debate regarding the ethical, social, and economic aspects of it only serve to emphasize the legal silence on this issue in the vast majority of U.S. jurisdictions. Today this silence is the source of uncertainty and many ethical and legal difficulties that block the way for those living in the U.S. and for whom this practice represents one of their last chances to become parents. As a result, time and time again, disputes regarding these legal difficulties reach U.S. courts, but unfortunately, courts are not equipped with a coherent and comprehensive framework to successfully cope with them.

Moreover, this silence also causes vagueness and additional pitfalls concerning international surrogacy contracts entered into with

1. Sarah Mortazavi, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2250 (2012).

third parties located outside of the U.S. This legal limbo concerning the legality of such surrogacy contracts or the recognition of the legal parenthood of the intending parents harms the parties to these contracts, and even more so the child who is the subject of such a contract.² Such children may consequently suffer from years of struggling with vagueness and uncertainty concerning an issue so basic as who his legal parents are, especially during his first years, when certainty and stability are so important for his development. The surrogacy laws of the various states of the U.S. that do exist vary from one state to another, and the spectrum of the opinions is very wide, from total prohibition with criminal sanctions,³ to moderate regulation to freedom of contract and recognition of the legal parenthood of the intending parents.⁴ This wide range of laws has already received the notion of “jurisdictional chaos.”⁵ The current body of research literature typically categorizes these varied jurisdictional opinions concerning the surrogacy contracts into four categories: prohibition, inaction, status regulation, and contractual ordering.⁶

A review of the various U.S. jurisdictions’ laws shows that the most common category is a policy of totally ignoring the surrogacy practice altogether. Thus, the dilemmas of the legality of the surrogacy contract and its enforceability are left to be determined by the judiciary on a case-by-case basis, and each case under its special circumstances. Therefore, the main goal of this research is to convey to legislators and judges in the vast majority of the U.S. states which have not yet addressed the urgent social and legal need the importance of giving the surrogacy contract full recognition. It is my opinion,

2. See Brock A. Patton, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 *UMKC L. REV.* 507, 528 (2010).

3. *Id.* at 514–17.

4. *Id.* at 518–22.

5. See Katherine Drabiak et al., *Ethics, Law and Commercial Surrogacy: A Call for Uniformity*, 35 *J.L. MED. & ETHICS* 300, 302–03 (2007).

6. See, e.g., Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 23 (Rachel Cook et al. eds., 2003). Even within the U.S. states that recognize freedom of contract concerning surrogacy contracts can be found different attitude towards the scope and strength of this freedom—whether the intentional parenthood of the intending parents will be recognized and if any judicial preauthorized measures are necessary. For those additional categories, see Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 *AM. J. COMP. L.* 97, 102–07 (2010) (parenthood by intent and parenthood by contract); Patton, *supra* note 2, at 514–19 (2010) (moderate regulation, judicial preauthorization, and complete ban). For those categories in the jurisdiction of states outside the U.S., see Patton, *supra* note 2, at 522–25. For slightly different categories, see Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 *HASTINGS WOMEN’S L.J.* 245, 250–57 (2012). For the purposes of our discussion the most important categories are: “surrogacy contracts are unenforceable in court” and “surrogacy contracts are legally recognized.”

as conveyed in this Article, that the time has arrived to give surrogacy contracts full legal recognition, and even enforceability, under certain circumstances as set forth in detail below.

For the clarification of our discussion, I pause here for a moment and briefly define two types of surrogacy: traditional surrogacy and gestational surrogacy. Traditional surrogacy means that the surrogate mother provides two components of motherhood: the genetic material of the ovum and the gestational contribution.⁷ The gestational surrogate provides only one component of motherhood: the gestational contribution.⁸

Both types of surrogacies may be either commercial or altruistic. In the first scenario the central incentive of the surrogate mother is the monetary consideration she receives for her part, while in the latter surrogacy the incentive is the desire to help desperate infertile couples. In the Article, I focus on commercial surrogacy since it raises the most troubling implications, which I will elaborate upon later on in my Article. I do not, however, distinguish between the traditional and gestational surrogacies since my general argument is consistent and applicable to both surrogacy types (despite the fact that there is some difference between them) because the gestational contribution of the gestational surrogate mother is so great that it creates similar complications as those that arise in a traditional surrogacy.

The issues regarding the legitimacy and enforceability of new reproductive technologies are not new. Initially, the vast majority of fertility treatments also suffered from bad “labor pains,” and the first children born of them suffered unrighteously from the stigma of illegitimacy.⁹ However, eventually society assimilated its understanding of these fertility treatments and their potential benefits, and the legal system followed in kind, reaching the conclusion that such treatments are totally legitimate and the children need not suffer due to the means their parents had chosen to bring them into the world.¹⁰ In this Article I will explore the “labor pains” that surrogacy contracts still suffer from in the vast majority of states in the U.S. These labor pains are causing harm to the contracting parties, and suffering to the resulting children who are the subject of such contracts and suffer from the stigma of illegitimacy based on how they were born into this world.¹¹

7. See Lodomato, *supra* note 6, at 247.

8. *Id.* at 247–48.

9. Richard Storrow, “The Phantom Children of the Republic”: *International Surrogacy and the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL’Y & L. 561, 565–66 (2012).

10. See Lodomato, *supra* note 6, at 247.

11. See Storrow, *supra* note 9, at 56.

Presently, there is much scholarly literature that endorses the understanding that, when faced with the dilemma of which system of law should govern surrogacy contracts, family law or contract law, the latter should prevail. This prevalent rationale is premised upon an economic analysis of surrogacy contracts,¹² as well as the claim that this must be so due to, *inter alia*, the superiority of the contractual paradigm in the surrogacy field.¹³ Yet, the central contention of this rationale is based upon the significant, yet insufficiently explored, claim that modern, and not traditional, classical contract law should govern the legality and enforcement of surrogacy contracts. The flexibility of modern contract law may successfully cope with the classical intrinsic contractual problems that opponents have argued based on classical contract law.

In building the infrastructure of my contention that surrogacy contracts should be permissible and enforceable due to the developments of modern contract law, in Part I I will recount the very first days of the surrogacy practice as a problematic and socially, legally, and ethically rejected practice. Then, in Part II, I will normatively explore the various intrinsic contractual problems of surrogacy contracts while elaborating on each of those practical problems. The problems are: unequal power of the contracting parties, change of heart, and changed circumstances. It should be noted here that while it is apparent that one may find numerous additional ethical and legal problems, those additional (and more minor) problems are outside the scope of this research. In Part III, I describe the dramatic revolution that has recently occurred in the realm of surrogacy, which has changed it from a problematic and rejected practice, to a widespread socially and legally accepted practice.

In Part IV, I explore the solution that modern contract law offers to the various intrinsic contractual problems inherent in surrogacy contracts. There, I lay out my argument that while contractual

12. See, e.g., Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2308 (1995); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 323 (1978) (arguing that a free baby market is better than the existing regulated market and it will maximize the benefit for all the sides); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 21 (1989); Richard A. Posner, *Adoption and Market Theory: The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 60 (1987) and in length RICHARD POSNER, SEX AND REASON 405–20 (1992) (opposing the common laws and rhetoric against baby selling and noting that in reality a free baby market indeed exists but is unjust and inefficient).

13. See, e.g., June Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581, 583 (1988) (arguing contract law is appropriate for surrogacy agreements); see also Elizabeth A. Erikson, Note, *Contracts to Bear a Child*, 66 CAL. L. REV. 611, 621–22 (1978) (arguing contracts to bear a child, if properly regulated, pose no serious threat to social interests and should be permitted).

problems were indeed significant based on classical contract law, modern contract law now supplies us with the necessary doctrines and a well-equipped framework essential to dealing appropriately with such problems. In demonstrating my innovation I represent one main solution that modern contract law gives us for each given contractual problem. In Part V, I then conclude this Article, articulating the required practical administrative-legal mechanisms necessary for achieving full recognition of the legality and complete social acceptance and legitimacy of surrogacy contracts and the children born of them.

I. THE VERY FIRST DAYS OF SURROGACY—A PROBLEMATIC AND SOCIALLY, LEGALLY, AND ETHICALLY REJECTED PRACTICE

The surrogacy practice, which is more a social than a medico-legal arrangement, is well documented as far back as the Biblical period and even further back to the period of the patriarchs.¹⁴ But in the modern times, this practice was only first exposed to the American public's attention approximately twenty-five years ago with the heart-wrenching verdict of Baby M. This legal dispute between the surrogate mother and the intending parents erupted into a social, legal, and media storm.¹⁵ During this period, other documented difficult surrogacy incidents occurred, including the case of Baby Cotton in England,¹⁶ as well other less sensationalized controversies in the U.S.¹⁷ In addition, the first verdicts that were given in the U.S. held that the surrogacy contracts in question were void

14. For a survey of various Biblical sources and the statement that surrogacy in this pattern was common amongst mankind during centuries, see Joseph Schenker, *Legitimizing Surrogacy In Israel: Religious Perspective*, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 243, 243 (Rachel Cook et al. eds., 2003). For a survey of different surrogacy contracts that were signed during the first half of the previous century and for the divided opinions regarding whether those contracts were indeed an adoption agreement or a child custody agreement, see Hutton Brown et al., *Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597, 645-50 (1986).

15. See *Matter of Baby M*, 537 A.2d 1227 (N.J. 1988). A testimony for the importance of this verdict can be found in the fact that this verdict is cited to by dozens of other verdicts and hundreds of academic articles. For a summary, see J. Herbie Difonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 349 (2011).

16. Diana Brahams, *The Hasty British Ban on Commercial Surrogacy*, 17 HASTINGS CTR. REPORT 16 (1987). For the negative impact of this case on British legislature in articulating the surrogacy law just after the outburst of this heart-wrenching case, see Patton, *supra* note 2, at 524.

17. For a list of several cases that have dealt with those incidents, see Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 10 n. 26 (2003). The most important ones are *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992); *Huddleston v. Infertility Ctr. of America, Inc.*, 700 A.2d 453 (Pa. 1997); *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998).

or prohibited and against the public policy due to prevailing criminal laws that prohibit any sort of trafficking of babies.

This contention was based on the following arguments:¹⁸ it is totally prohibited to pay money in exchange for child custody; there is a general prohibition against taking children away from their biological parents without any urgent need, and prior to ensuring that the biological parents agreed of their free will to the irreversible adoption of their child; surrogacy contracts contradict, on the one hand, the existing need to establish the disability or abusive nature of the biological parents prior to taking their child away from them and, on the other hand, fail to inspect the suitability and ability of the intending parents (as is necessary in the case of the adoption process).¹⁹ In other decisions, courts have concluded that surrogacy contracts are not necessarily illegal and void since there are several substantial differences between surrogacy and child trafficking, and rather that such contracts are voidable.²⁰

Thus, even today, the attitude towards the practice of surrogacy both inside and outside the U.S., unfortunately, is still ambivalent at best, and many researchers and judges oppose freedom of contract concerning this issue.²¹ Furthermore, in many countries outside the U.S. the practice of surrogacy is totally prohibited and surrogacy contracts are void, and in several countries criminal sanctions are also applied. This is true with a non-altruistic, commercial surrogacy.²²

18. See, e.g., *Doe v. Attorney General*, 487 N.W.2d 484, 486–87 (Mich. Ct. App. 1992); *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998). The court enumerated several public interests which hold that those contracts are void—avoiding the negotiability and tradability of kids as goods; the best interests of the child; avoiding the exploitation of women, etc. For a recent case that holds that surrogacy contracts are void since they against the public policy, see *J.F. v. D.B.*, 66 Pa. D. & C.4th 1, 12–16 (Ct. Com. Pl. 2004).

19. See *Baby M*, 537 A.2d at 1248; see also *Doe v. Kelley*, 307 N.W.2d 438 (Mich. Ct. App. 1981). For a survey of the cases where courts held that those contracts are unenforceable, see *Brown et al.*, *supra* note 14, at 652–57.

20. See *Matter of Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813, 817 (N.Y. Sur. 1986); see also *Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 213 (Ky. 1986) (noting public interests in promoting adoption, helping infertile couples and the surrogate's informed consent justified a constitutional justification to void the surrogate's parental rights).

21. For the argument that the majority of the academic and judicial opinions held that those contracts are voidable, see *Craig W. Christensen, Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 *CARDOZO L. REV.* 1299, 1350 nn. 303–04 (1997). For a list of leading cases where the freedom of contract to establish the parenthood of the child was rejected for several reasons, see *Belsito v. Clark*, 644 N.E.2d 760, 765 (Ohio Com. Pl. 1994); see also *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 900 (Ct. App. 1994). Following the court's rejection of the surrogacy contract, the court needed to determine who would then become the legal parents of the child. See, e.g., *Matter of Baby M*, 537 A.2d 1227 (N.J. 1988); *Syrkowski v. Appleyard*, 362 N.W.2d 211, 213 (Mich. 1985); *Doe v. Doe*, 710 A.2d 1297, 1319–22 (Conn. 1998).

22. For a survey of the negative legal attitudes towards the surrogacy inside and outside the U.S., see, e.g., *Patton, supra* note 2, at 514–15, 523. Some scholars contend

Therefore, it is not surprising that only recently some tragic international lawsuits took place when infertile citizens were forced to fly overseas in search of a friendlier jurisdiction, like India, that would allow them to use surrogacy to have a baby. However, since their home jurisdiction did not recognize the legality of surrogacy contracts, a miserable international saga was initiated regarding whether and how these couples could acquire citizenship for their child in their home country, which prohibited the practice of surrogacy in the first place, and therefore did not recognize the child as their legal child.²³

II. THE VARIOUS INTRINSIC CONTRACTUAL PROBLEMS OF SURROGACY CONTRACTS

A. *The Problem of Unequal Power of the Contracting Parties*

One of the central academic arguments against the legality of surrogacy contracts is rooted in the fear of conceptualization and ordering in terms and measures of the free commercial market in so sensitive a field as bringing a child to the world. In general, when dealing with agreements and contracts that regulate the legal parenthood of those who use fertility treatments there is often the contention that the forces of the free market in this unique context will worsen the existing racial and economic discrimination against inferior social groups.²⁴ This worry stems from the involvement of the big and “easy” money involved in such an intimate and seductive issue such that it may cause some individuals, especially women, to take on unreasonable contractual obligations that contradict their own interests due to the monetary temptation.

Furthermore, there is the claim that often in the fertility business the selling party is economically inferior compared to the buying party.²⁵ The implication of this contention in contractual terminology

that most European countries and some countries in Asia ban surrogacy and that Italy, Norway, Spain, France and Germany are among the many countries that have entirely prohibited surrogacy. See, respectively, Storrow, *supra* note 9, at 595–99; Mortazavi, *supra* note 1, at 2273.

23. Mortazavi, *supra* note 1, at 2274–77.

24. See Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, Lecture at Brasenose College, Oxford (May 11–12, 1998), in *THE TANNER LECTURES ON HUMAN VALUES* 89, 94–96 (1998). For more on this point, see I. Glenn Cohen, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 *HARV. L. REV.* 689, 690–91 (2003); see also Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 *LAW & CONTEMP. PROBS.* 109, 112–17 (2009).

25. See Sonia M. Suter, *Giving in to Baby Markets: Regulation Without Prohibition*, 16 *MICH. J. GENDER & L.* 217, 236 nn. 93–97 (2009). Concerning the worry of the exploitation of the surrogate mother by the intending parents due to the money involved in the bargain

is that the *a priori* unequal socio-economic power of the contracting parties will result in unequal and discriminative clauses against the emotionally, economically, and socially weaker party, and that this is true due to the manipulations and actions that the superior party can make during the negotiation that will end in inequity and damage to the inferior party.²⁶ This fear is even worse when we are dealing with the inferior classes of society, which in the international context means citizens of third world countries, especially India,²⁷ who may make wrong decisions due to the strong economic temptation. Thus, the existing gap between unequal bargaining powers of individuals, groups, and even different countries will be further deepened. This intensified gap may cause a draconian economic and emotional exploitation of one of the parties²⁸ that will likely fuel the existing call to make all surrogacy contracts void.

Practically speaking, in the specific context of surrogacy contracts, some researchers claim that the intending parents and the surrogate mother belong to different socio-economic classes, an argument which

that makes free will impossible, *see*, respectively, *Doe v. Attorney General*, 487 N.W.2d 484, 487 (Mich. Ct. App. 1992); *Matter of Adoption of Paul*, 550 N.Y.S.2d 815, 817 (N.Y. Fam. Ct. 1990). For a summary of this fear, *see* Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429, 1443–49 (2009).

26. *See* Molly J. Walker Wilson, *Precommitment in Free-Market Procreation: Surrogacy, Commissioned Adoption, and Limits on Human Decision Making Capacity*, 31 J. LEGIS. 329, 341 (2005) and at length Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 635 (1999).

27. For the ethical-legal problem and for the urgent need of international regulation of surrogacy contracts in order to avoid the exploitation of surrogate mothers in the third world, *see* Kristiana Brugger, *International Law in the Gestational Surrogacy Debate*, 35 *FORDHAM INT'L L.J.* 665, 670–76 (2012); Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 *BERKELEY J. INT'L L.* 412, 432–37, 441–48 (2012); Emily Stehr, *International Surrogacy Contract Regulation: National Governments' and International Bodies' Misguided Quests to Prevent Exploitation*, 35 *HASTINGS INT'L & COMP. L. REV.* 253, 266–67 (2012). For the goal of the American legislation to save the surrogate mother from any possible exploitation, *see* Uniform Status of Children of Assisted Conception Act 6, 9B U.L.A. 265 (2001) (repealed 2000) and the editors' comments therein.

28. For the problem of exploitation in general and specifically in the context of surrogacy contracts, *see* John L. Hill, *Exploitation*, 79 *CORNELL L. REV.* 631, 637–44, 691–95 (1994); *see also* Alan Wertheimer, *Two Questions About Surrogacy and Exploitation*, 21 *PHIL. & PUB. AFF.* 211, 211 (1992). For a call to invalidate any distress exploitation contract in the American contract law, *see* Shahar Lifshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 *N.C. L. REV.* 315 (2008). In the context of surrogacy contracts, feminist critics often speak about the fear of exploiting the surrogate mother as an individual and as a woman, *see* Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 *HARV. J.L. & PUB. POLY* 139, 147–48 (1990); *see also* Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 *N.C. L. REV.* 127, 128 (1986). For a summary of the same from almost twenty years ago, *see* Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 *WIS. WOMEN'S L.J.* 113, 153–55, 161–64 (1997).

may be strengthened by further empirical studies.²⁹ This reality directly leads us to the fear that the gap between the contracting parties' bargaining powers will wrongly influence the surrogate mother, since she will be exposed to strong temptations and therefore her free will and informed consent will be compromised.³⁰ Some scholars even contend that due to this issue any freedom of contract should be prohibited since the clear inequality of bargaining powers will likely lead to the obvious exploitation of the surrogate mother.³¹

In the past, this criticism was used as a mechanism to defend American minorities, such as Latinos and African-Americans,³² but recently this rationale has been applied to the flourishing surrogacy business in India, where the huge gap between the western, white, well-educated, and rich intending parents and the native, uneducated, and poor surrogate mother is well-known.³³ In any case, these fears and the related rationale preclude any private ordering of the surrogacy business from the outset. Thus, due to the economic inequity of bargaining powers and the fear that the surrogate mother will be racially, economically, and emotionally exploited by the intending parents, the conclusion follows that we should not recognize the legality of surrogacy contracts and that we cannot enforce them either.³⁴

29. For a survey of studies that document the socio-economic gap between the intending parents and the surrogate mother, see Glenda Labadie-Jackson, *The Reproductive Rights of Latinas and Commercial Surrogacy Contracts—English Translation*, 14 TEX. HISP. J.L. & POL'Y 49, 61 n. 114 (2008).

30. For a similar argument, see MARY L. SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 104, 107 (2001); see also Nicole M. Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under California Law*, 1 UCLA WOMEN'S L.J. 89, 111 n. 94 (1991). For different studies that deal with the unequal bargaining powers in the surrogacy contracts, see Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 524 n. 154 (1996).

31. For a survey of the possible problematic economic exploitation of the surrogate mother, see Labadie-Jackson, *supra* note 29, at 60–62.

32. See, e.g., Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 BERKELEY WOMEN'S L.J. 29, 48–54 (1993); see also Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER L.J. 17, 18–19 (1991).

33. See the various studies in *supra* note 27. See also Rimm, *supra* note 25, at 1430; Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 54 (2008).

34. For the problem of the unequal bargaining powers and the strong fear that the surrogate mother will be exploited in addition to other concerns, and a call to promote a surrogate-focused model in order to overcome those problems, see respectively, Catherine London, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 392 (2012); Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 479 (2011).

B. The Problem of Change of Heart

Opponents of surrogacy agreements claim that the questions regarding the legality and the enforcement of surrogacy contracts are vague due to other ramifications of unequal bargaining power, which lead to the problem of changes of heart. This criticism focuses on the monetary consideration that is paid for the surrogacy and may lead some contracting parties to compromise their free will and informed consent due to the strong temptation to earn “easy” and large sums of money for selling their procreational abilities, or even their baby.³⁵ Furthermore, opponents propound that this problem may lead to an inability to fulfill their contractual obligations later on. This is especially true, as mentioned above, if one of the contracting parties belongs to the lower socio-economic groups and takes on unreasonable contractual obligations due to the big and “easy” money she can make. Thus, this intrinsic problem may drive that individual to try and evade the contract following her initial inability to foresee her eventual emotional condition and the circumstances that will follow the performance of the contract and a possible claim for change of heart.

The problem of changes of heart is an issue that may arise in any contractual agreement, but due to the unique characteristics of long-term contracts, such as the surrogacy contracts, which are very popular in the modern era, this problem becomes even more prevalent. Every contract by its nature carries with it a level of uncertainty. However, the long-term contract raises some additional problems with special traits; the most important problem, for our discussion, is the limited cognitive discretion of the contracting parties to properly calculate and evaluate their undertakings. One can count on the following difficulties: the difficulty to properly evaluate future risks³⁶ and the difficulty in obtaining all relevant information and reasonably analyzing it.³⁷

35. See, e.g., SHANLEY, *supra* note 30, at 107–11. For the last contention, see Matter of Baby M, 537 A.2d 1227, 1245–46 (N.J. 1998).

36. See Richard E. Speidel, *Court-Imposed Price Adjustments under Long-Term Supply Contracts*, 76 NW. U.L. REV. 369, 373 (1981); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 624–29 (1982); ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD 92–94 (1988); Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 HAMLIN L. REV. 385, 386 (1989); Melvin A. Eisenberg, *Relational Contracts*, in GOOD FAITH AND FAULT IN CONTRACT LAW 291, 301 (Jack Beatson & Daniel Friedmann eds., 1995).

37. See Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 232–40 (1995) [hereinafter Eisenberg, *Limits of Cognition*]; see also Shawn J. Bayern, *Rational Ignorance, Rational Closed-Mindedness, and Modern Economic*

It is evident that when additional cognitive difficulties exist prior to the contract being signed, the fear of change of heart becomes increasingly more problematic due to the difficulties involved in performing on the contract. These unique difficulties are well known in modern contract law, which therefore supplies us with a variety of tools and doctrines dedicated to overcoming such problems.³⁸ It is worth noting that classical contract law traditionally considered neither change of heart problems nor supplied any coherent framework to deal with them. The criticism of classical contract law's illusion of the contracting parties' rationality is strengthened in light of the behavioral economics paradigm, which holds that a human being is not acting rationally, especially when the period of time for contract performance gets longer.³⁹ This is true due to the following justifications: as the time period for a contract's performance gets longer, the illusive optimisms are bigger; there is a tendency to assume that the current conditions will last in the future, but as time passes, the less likely such assumption will hold true.

If this is not enough, the intention, which is the foundation of the contract, is changeable by its virtue. We are always changing our minds concerning our decisions with respect to performing or not performing on contractual undertakings. When we are dealing with obligations that take place in the open market, the results of any change of heart, very often are not so draconian, since only monetary compensation is at hand.⁴⁰ However, in the intimate context, there are often very important personal and familial ramifications to a change of heart. For example: an agreement to break up and get divorced,⁴¹ the desire of a pregnant woman to abort her fetus,⁴² the withdrawal of biological parents from their initial agreement for the adoption of their child.⁴³

There is no doubt that surrogacy contracts embody this problem more than other contracts due to the special cognitive difficulty in

Formalism in Contract Law, 97 CAL. L. REV. 943, 945 (2009). For a wider view of this problem see the studies enumerated there at 943 n. 1.

38. Eisenberg, *Limits of Cognition*, *supra* note 37, at 212–13.

39. Ulen, *supra* note 36, at 386.

40. For a general survey of the right of the contracting parties to regret the first agreement, see ALLAN E. FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* (1998).

41. For the argument that if it is possible to break up the marriage, there is no justification to block the surrogate mother from breaching the surrogacy contract, especially when the child is not about to be handed to his biological parents, see Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759, 1779 n. 99 (1988).

42. See *Roe v. Wade*, 410 U.S. 113 (1973); see also *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

43. Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1769 (2007) [hereinafter Bix, *Domestic Agreements*].

foreseeing the emotional condition of the surrogate mother when she will be asked to hand over the child she carried to the intending parents. In the scholarly literature there are many psychological and physiological justifications for the surrogate mother's ability to change her mind and not fulfill her contractual obligations.⁴⁴ Similarly, there are potential circumstances when the intending parents will ask to void the contract and not take the child following their dissatisfaction in the resulting child (e.g., he was born ill, or is not perfect in their eyes for some reason).

Still, it is apparent that the issue of changes of heart is a bigger problem with respect to the surrogate mother. Thus, *inter alia*, it may be argued that there is an almost mystical bond that exists between the surrogate mother and the fetus.⁴⁵ Similarly, there is an intrinsic inability to foresee, *ex ante* when signing the contract, what the surrogate mother's emotional and physical condition will be following the delivery, which can easily make fulfillment of the contract impossible for her.⁴⁶ Therefore, for many scholars there is no *a priori* real option for the surrogate mother's free will and informed consent, which means that the legality and enforceability of surrogacy contracts are doubtful at best.⁴⁷

This problem is even worse and brings into question the possibility of enforcing the contract when the surrogate mother changes her mind and asks to keep the child.⁴⁸ This issue is well articulated

44. See Margaret F. Brinig, *A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2377, 2381, 2383–84 (1995).

45. *Id.* at 2383 n. 22.

46. *Id.* at 2388–92. For a further discussion of this problematic contention, see Walker Wilson, *supra* note 26. For more on this issue, see A.H.W. v. G.H.B., 772 A.2d 948, 953 (2000). A similar argument was brought and discussed by Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in SURROGATE MOTHERHOOD 167, 172–73 (Larry Gostin ed., 1990); see also Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 719 (2003).

47. See Scott B. Rae, *Parental Rights and the Definition of Motherhood in Surrogate Motherhood*, 3 S. CAL. REV. L. & WOMEN'S STUD. 219, 269–70 (1994); Martha A. Field, *Giving the Mother the Right to Renounce the Contract*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 97–109 (Larry Gostin ed., 1990); Mellisa Lane, *Ethical Issues in Surrogacy Arrangements*, in SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 127, 129 (Rachel Cook et al. eds., 2003).

48. This issue has been discussed in many articles and judicial opinions. See FARNSWORTH, *supra* note 40. For an additional sources, see Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 539–48 (2005); Bix, *Domestic Agreements*, *supra* note 43, at 1769. For a list of studies and cases that deal with the dilemma of enforcing a surrogacy contract on surrogate mother, see Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & LAW 183, 185 n. 3, 186 n. 5 (1995). For a list of researchers who

in all American jurisdictions that prohibit by law biological parents from agreeing to the adoption of their fetus prior to delivery. Thus, even going as far back as two decades ago, the various U.S. jurisdictions prohibited pregnant women from irrevocably agreeing to hand over their fetus for adoption before the delivery, and even before the mandatory cooling period is over.⁴⁹

Similarly, in the current body of U.S. law one can already find the implication of the understanding that due to the fear that the surrogate mother will change her mind, the surrogate contract is not enforceable, at least not until the cooling period is over. In one of the very first surrogacy cases dealt with by the U.S. court system, the court concluded that the surrogate mother's informed consent would be exceptionally problematic until the cooling period is over.⁵⁰ Moreover, in other cases that dealt with the mutual request of the contracting parties to write the names of the intending parents in the child's birth certificate before the delivery, U.S. courts have made contradictory decisions and have not always approved such requests.⁵¹

C. *The Problem of Changed Circumstances*

In addition to the two problems intrinsic to surrogacy contracts that are discussed above, there is another external, acute problem that must be addressed. This is the problem of changed circumstances, which occurs when extreme unseen circumstances not in the control of the contracting parties come into play following the contract's execution, and in some cases, causes a withdrawal of their contractual obligations.⁵² This problem becomes even more complicated when dealing with contracts that govern intimate issues such

contend the insufficiency of the contractual ordering in determining legal motherhood by surrogacy contracts and therefore feel those contracts should be void, see Healy, *supra* note 30, at 108 n. 87.

49. For the view that a surrogacy contract is indeed a pro-delivery adoption, see, e.g., Liezl Van Zyl, *Intentional Parenthood: Responsibilities in Surrogate Motherhood*, 10 HEALTH CARE ANALYSIS 165, 168–72 (2002). For a survey of those arguments, see Danny R. Veilleux, *Validity and Construction of Surrogate Parenting Agreement*, 77 A.L.R. 4th 70 (2008).

50. *Matter of Baby M*, 537 A.2d 1227, 1248 (N.J. 1998).

51. This is the reason for the refusal of the court in *A.H.W. v. G.H.B.*, 772 A.2d at 953, to approve this request in contrast to the opinion of the New Jersey Attorney General. But it is worth noting that a similar request was approved in *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1141 (Mass. 2001).

52. The problem of changed circumstances in modern contract law is well-embedded in the following central doctrines: impossibility, frustration of purpose, and impracticability. For the historical and philosophical roots of the changed circumstances doctrine, see James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 52 AM. J. COMP. L. 513, 525–30 (2004).

as surrogacy contracts, where the cognitive ability to foresee upcoming scenarios is even more limited.

Thus, extreme changed circumstances, such as the passing away of a close relative, especially that of biological child, divorce, medical problems, loss of legal capacity, and even death, are not traditionally taken into consideration. Therefore, it is not surprising that when the enforcement of the contract is at issue, the claim of changed circumstances will be heard, and that the contract may be found unenforceable.⁵³ Some even go so far as to argue that demanding performance on the initial contract in this context is unconscionable.⁵⁴

III. FROM A PROBLEMATIC AND REJECTED PRACTICE TO A SOCIALLY AND LEGALLY WIDESPREAD AND ACCEPTED PRACTICE

In stark contrast to the criticism that I just described, and in opposition to the very early days of the surrogacy practice, a look at the hundreds of legal and ethical research studies that have been published in recent decades demonstrates the recent shift and accelerated social and legal acceptance of the surrogacy practice. This dramatic change was first documented in the writings of several scholars during the nineteen-seventies, despite the fact that during this time the prevailing opinion was that surrogacy contracts are prohibited and unenforceable because they are unethical and impractical.⁵⁵ From the seventies and through today, the ethical and the legal shift is well-articulated in continually expanding academic

53. For the attempt of modern contract law to cope with the problem of changed circumstances, and for the question of the adequacy of those doctrines in handling the issues that arise within the context of fertility treatments, see Marjorie M. Shultz, *Reproductive Technology and the Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 349–52 (1990); see also Louis M. Seidman, *Baby M and the Problem of Unstable Preferences*, 76 GEO. L. J. 1829 (1988). For a call to recognize the legality of contracts dealing with frozen embryos only when the problem of changed circumstances does not occur, see Mark C. Haut, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493, 495 (1999). For a call to enforce those contracts even in case of changed circumstances or change of heart, see John A. Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407, 411 (1990).

54. For general problems with foreseeing changed circumstances in determining legal parenthood by agreement in private ordering of fertility treatments, see Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 209–14 (2005). For disposition agreements concerning the fate of fertilized ova in case of disagreement between the ex-spouses due to changed circumstances, see Shelly R. Petralia, *Resolving Disputes over Excess Frozen Embryos Through the Confines of Property and Contract Law*, 17 J.L. & HEALTH 103, 128–34 (2002).

55. Erikson, *supra* note 13, at 611.

writings, which also trace how the practice of surrogacy has become socially⁵⁶ and legally accepted.

Thus, if in the past the dilemma was whether surrogacy is an ethically and socially desirable and acceptable practice, today the question at issue is a different one. The practice of surrogacy is now permitted; however, the dilemma now centers on the question of how to execute such contracts in the best possible way in order to maximize their feasibility and durability at the state,⁵⁷ federal,⁵⁸ and international levels.⁵⁹ This shift towards the legalization of the surrogacy practice is evident not only in theoretical studies, but also in the practice of more and more states' judiciaries and legislatures aimed at abolishing or restricting the spectrum and strength of surrogacy prohibitions.

Instead, the practice of surrogacy has become more or less allowed in various jurisdictions.⁶⁰ Expert committees in various states no longer reject the practice from the outset, but instead make it possible even if it is the least-preferable option.⁶¹ A reading of the Uniform Acts also supports this conclusion. While in 1988 the Uniform Status of Children of Assisted Conception Act (USCACA) considered the enforcement of surrogacy contracts as just an option, in 2002 the

56. See Rachel Cook et al., *Introduction*, in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 1 n. 2 (Rachel Cook et al. eds., 2003); see also Heather A. Crews, *Women Be Warned, Egg Donation Isn't All It's Cracked Up to Be: The Copulation of Science and the Courts Makes Multiple Mommies*, 7 N.C.J.L. & TECH. 141, 141–42 (2005).

57. See, e.g., London, *supra* note 34, at 410–14; see also Peter H. Schuck, *The Social Utility of Surrogacy*, 13 HARV. J.L. & PUB. POL'Y 132, 136 (1990). For an opinion that recognizes intentional parenthood as standing as the base of the surrogacy contract in recognizing the dual fatherhood of two homosexuals, see Perri Koll, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parents in Surrogacy Custody Disputes*, 18 CARDOZO J.L. & GENDER 199, 201 (2011); Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 382–85 (2011); Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition as Parents*, 12 WHITTIER J. OF CHILD & FAM. ADVOC. 39 (2013).

58. See, e.g., Caster, *supra* note 34; Emily Gelmann, "I'm Just the Oven, It's Totally Their Bun": *The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN'S RTS. L. REP. 159, 161 (2011); Patton, *supra* note 2.

59. See, e.g., Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18 ILSA J. INT'L & COMP. L. 369, 371 (2012); Stehr, *supra* note 27, at 271–72; Brugger, *supra* note 27, at 686–98.

60. For the contention that even a few years ago, half the American states that have legislated surrogacy laws recognize the legality of surrogacy contracts, see, e.g., Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U.L. REV. 913, 925 n. 48 (2007).

61. See MARGARET BRAZIER ET AL., DEPT. OF HEALTH SURROGACY, REVIEW FOR HEALTH MINISTERS OF CURRENT ARRANGEMENTS FOR PAYMENTS AND REGULATION, REPORT OF THE REVIEW TEAM 68 (1998); see also BRITISH MEDICAL ASS'N, CHANGING CONCEPTIONS OF MOTHERHOOD—THE PRACTICE OF SURROGACY IN BRITAIN 7, 20–22 (1996).

Uniform Parentage Act (UPA) went so far as to fully recognize gestational surrogacy.⁶² In addition to the increased recognition of intentional parenthood, which stands as the base of the surrogacy contract as held in several California verdicts, two additional states to date, Nevada and Arkansas,⁶³ now explicitly recognize in their legislation the applicability of the contractual paradigm in legalizing surrogacy contracts.

Furthermore, several American states have recognized the legality of surrogacy contracts, albeit with some restrictions. These states include: Florida, Illinois, New Hampshire, Wisconsin, and Virginia.⁶⁴ In addition, Texas and Tennessee have partial surrogacy regimes that leave whether surrogacy contracts will eventually be enforced unclear.⁶⁵ Several countries outside the U.S. have also recognized the legality of both commercial and altruistic surrogacy contracts including Russia and the Ukraine.⁶⁶ Other countries only recognize the legality of altruistic ones including Israel, Brazil, Greece, Holland, the United Kingdom, Canada, and Australia.⁶⁷ In other countries such as India, China, New Zealand, and Thailand, legislation is silent, but in practice surrogacy is widespread.⁶⁸ Still, even in states where the contractual paradigm has not been fully recognized in determining legal parenthood following disputed or breached surrogacy contracts, courts still consider intentional parenthood, i.e., the initial intention of the parties to parent the resulting child, evinced by the entire agreement, as one of the central factors.⁶⁹

This shift toward widespread acceptance of surrogacy contracts is not only articulated in the legislative context but is also well-documented in U.S. judicial decisions. There is an increasing number of leading cases that have concluded that surrogacy contracts are legal and enforceable.⁷⁰ In addition, some seminal verdicts have

62. See USCACA § 5–9 (2001); UPA § 801 (amended 2002). The latter unified proposal explicitly recognizes the legality of surrogacy contracts, therefore § 602(7) recognizes the right of the intending parents to apply to the court for any parenthood claim proceedings.

63. See Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 *DRAKE L. REV.* 605, 624 (2003). This understanding is well documented in Arkansas' legislation—A.C.A. § 9-10-201 (2005)—and explicitly in § 2 of Nevada's legislation, *NEV. REV. STAT. ANN.* § 126.045 (2007).

64. Larkey, *supra* note 63, at 629–30.

65. For a full overview, see Caster, *supra* note 34, at 485–91.

66. Mortazavi, *supra* note 1, at 2272.

67. *Id.* at 2270–71.

68. For a broader survey, see *id.* at 2270–73.

69. See Ardis L. Campbell, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 *A.L.R.* 5th 567, 580 (2000).

70. See *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993). A bigger innovation one can find in this conclusion is that intentional parenthood can be established even where there is no genetic connection between the intending parents and the child, see *In re Marriage*

concluded that the coerced legal motherhood of the surrogate mother and her inability to prove that she is not the biological mother of the child, as opposed to a man's parallel ability, is unconstitutional and contradicts the Equal Protection Clause.⁷¹ This means that the surrogate mother can now prove that she is not the legal mother of the child, and it opens the gate for the claim of the intending mother that she should be recognized as the legal mother.

It is fair to conclude that from any point of view the practice of surrogacy has become more accepted by society, ethicists, and even the legal system. Furthermore, it should be noted that some scholars from the school of the economic analysis of the law strongly assert that it is very economically efficient to enable a free market regime and to fully legalize surrogacy agreements, as in the field of adoption.⁷² However, such unfettered and unregulated freedom of contract may prove to be very dangerous and detrimental to the women and children who are involved in surrogacy agreements. Thus, it is my conclusion that surrogacy agreements should be seen as legitimate and enforceable, but premised upon a regulated, narrower notion of freedom of contract in order to protect the public interest.

IV. MODERN CONTRACT LAW AS A SOLUTION TO THE VARIOUS INTRINSIC CONTRACTUAL PROBLEMS

A. General

Modern family law and modern contract law have respectively gone through processes of specification and classification.⁷³ The

of Buzzanca, 72 Cal. Rptr. 2d 280, 291 (1998). For a similar but less innovative decision reached by the court, see *Jaycee B. v. Superior Court*, 49 Cal.Rptr.2d 694, 703 (1996). In another case the court concluded that there is no problem with \$14,000 surrogacy fee contract, see *Matter of Adoption of Baby A*, 877 P.2d 107, 107-08 (Or.App. 1994). In a similar case the court invalidated a commercial surrogacy contract but agreed to validate it under some restrictions, see *Matter of Adoption of Paul*, 550 N.Y.S.2d 815, 818-19 (N.Y. Fam. Ct. 1990). In another case the court found that the contract does not contradict public policy, see *J.F. v. D.B.*, 879 N.E.2d 740, 741-42 (Ohio 2007). The courts in other states have legalized surrogacy contracts, holding that the intending mother is the legal mother of the child, see *Doe v. New York City Bd. of Health*, 782 N.Y.S.2d 180, 184 (2004); see also *In re Adoption of K.F.H.*, 844 S.W.2d 343, 344 (Ark. 1993).

71. See *Soos v. Superior Court*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994); *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1296 (2002); *In re Roberto D.B.*, 923 A.2d 115, 122 (Md. 2007).

72. See the various sources enumerated in *supra* note 13. For a similar understanding, see *Lori B. Andrews, Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2354 (1995). For an updated overview of this dilemma, see *Walker Wilson, supra* note 26, at 333-34.

73. See *Jay M. Feinman, The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 675 (1989). Regarding the classification of modern contract law, many studies were published,

specification of family law is well-illustrated by the reality that in many states family law is no longer considered just another branch of the legal system, rather it is allotted special treatment due to its unique and intimate character (e.g., the existence of family law courts). This new treatment of family law issues has in turn led to the special legislative ordering in articulating special laws concerning the spousal relationship. Similarly, in the western hemisphere, it is very common to contend that this relationship fits well into contractual ordering due to its egoistic and personal traits.⁷⁴ The vast majority of the states' different legal ordering laws have been legislated for the variety of spousal contracts,⁷⁵ and in the research literature many articles deal with the descriptive and normative aspects of this special ordering.

The classification of contract law is well-outlined despite a special characteristic of modern contract law which gives special emphasis to the unique traits of each contract and to developing individualized contract laws. But before going deeply into the description of modern contract law's characteristics, I want to briefly describe the historical and normative background for the layperson who is not familiar with the nuances of the varied contract theories and the shift from classical to modern contract law.⁷⁶ Classical contract law developed

therefore I will mention only one classification concerning classical, modern, and relational contract law that I will elaborate upon further in the remaining discussion, *see* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U.L. REV. 854, 873 (1978) [hereinafter Macneil, *Contracts*].

74. For a criticism of this point and for the fear that it will badly damage the children specifically, and the familial realm in general, *see* MARGARET BRINIG, FROM CONTRACT TO COVENANT, BEYOND THE LAW AND ECONOMICS OF THE FAMILY 1–14, 18–25, 83–109 (2000).

75. Amongst the leading articles that endorse private ordering of spousal relationship, *see* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 146 (1998) [hereinafter Bix, *Bargaining in the Shadow*]; Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891–92 (1997); Bix, *Domestic Agreements*, *supra* note 43, at 1763–67; Brian H. Bix, *The Public and Private Faces of Family Law*, 2004 U. CHI. LEGAL F. 295, 303–18 (2004); Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 271–73, 297–99 (1987); LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW 249–50 (1981); Marjorie M. Shultz, *Contractual Ordering of Marriage: A New Model For State Policy*, 70 CAL. L. REV. 204, 243–44 (1982).

76. For the overlapping meaning of modern contract law and neoclassical contract law, *see* Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1285 (1990). Some scholars contend that classical contract law is the starting point for any further theoretical discussion; therefore, I open my discussion with a description of classical contract law. For those statements, *see* PATRICK S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 7 (1995) [hereinafter ATIYAH, INTRODUCTION]; *see also* Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U.L. REV. 805, 805 (2000) [hereinafter Eisenberg, *No Law*].

in the eighteenth century and is identified with the period of Holmes, Williston, and the Restatement (First) of Contracts.⁷⁷ In the nineteenth century and during the first half of the twentieth century, more accurately around the year 1870, classical contract law reached what some call the “golden age” of contract law.⁷⁸ This classical model spoke about the sanctity of the contract and its monolithic character, totally ignoring any special characteristics of a given contract, such as the unequal power of the contracting parties.⁷⁹

Due to the understanding that the only way to respect the contracting parties as rational individuals was as autonomous agents, the legal involvement of the legislative body and the judiciary was very limited, except with regard to the enforcement of contracts.⁸⁰ The notion of the private and free will of contracting parties was wholly accepted, and dictated the entire spectrum of the respective parties’ contractual obligations and rights.⁸¹ Any special external characteristics, such as a gap between parties’ bargaining powers, were considered irrelevant, and no restrictions were considered necessary. Since the contracting parties were treated as rational agents with sufficient measures to properly calculate their actions, the courts were given very narrow discretion, and their ability to intervene was similarly limited. Only in very rare cases did a court adjust a contract in order to account for changed circumstances. Instead, courts would refrain from examining contracts’ components with substantial scrutiny, thereby avoiding the invalidation of any contract based on the public policy justification for enforcing contracts as much as possible.⁸²

With the passage of time, at the end of the nineteenth century and in the beginning of the twentieth century, different social and

77. See Feinman, *supra* note 76, at 1285 n. 12.

78. See Mark Pettit, *Freedom, Freedom of Contract, and the “Rise and Fall,”* 79 B.U. L. REV. 263, 299 (1999).

79. See GRANT GILMORE, *THE DEATH OF CONTRACT* 6 (1974); Melvin A. Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1108 (1984); GOOD FAITH AND FAULT IN CONTRACT LAW 7–12 (Jack Beatson & Daniel Friedmann eds., 1995). For a historical description, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 367 (2d 2005).

80. See PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 217–568 (1979) [hereinafter ATIYAH, *RISE AND FALL*]; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1997); K.M. Sharma, *From “Sanctity” to “Fairness”: An Uneasy Transition in the Law of Contracts?*, 18 N.Y.L. SCH. J. INT’L & COMP. L. 95, 95–110 (1999).

81. See ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 11 (1997). For the importance that the American system showed for narrowing the judicial enforcement only to the initial agreement of the contracting parties, see FRIEDMAN, *supra* note 79, at 533; see also ATIYAH, *RISE AND FALL*, *supra* note 80, at 408.

82. For the first aspect, see Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 373, 497 (David Kairys ed., 1990).

economic changes lead courts to abandon the sanctity of the freedom of contract following the understanding that there was no longer the option of relying solely on the free will of the contracting parties. These changes were connected to economic shifts that hurt free market competition due to the usage of adhesion contracts in contexts where the inherent gap between the bargaining powers prevailed. It was concluded that permitting unfettered freedom of contract merely widens the gap and should not continue.⁸³ Confronting many market regulation pitfalls, it was clear that judicial intervention would strengthen, not weaken, genuine freedom of contract. This new contention prevailed in the legislative and judicial decisions during the twentieth century, which sought to rein in and narrowly apply the concept of freedom of contract.⁸⁴

Thus, modern contract law is sensitive to the special characteristics of any given contract. Following the understanding that not intervening in the contractual relationship may perpetuate the inequality between sides, modern contract law expects that the contracting parties will honor social values and especially consider the other party's needs (collectivism).⁸⁵ Due to the modern notion that often there is really no freedom of contract in choosing whether to enter into a contract to begin with, or with whom to enter into such a contract, today the judiciary practices scrutiny and intervention in contract stipulations in order to preserve fairness for both sides. Courts no longer blindly follow the initial agreement, but conceptualize the contract in public terms while inserting social and communal values, such as promoting fairness considerations, distributive justice, reasonableness, expectation for collaboration, solidarity, mutuality, and even encouragement to renegotiate in the case of changed circumstances.⁸⁶

In modern contract law, which is the prevailing philosophy in the Anglo-American system today,⁸⁷ there is a sort of withdrawal from freedom of contract toward increasing paternalistic principles and obligatory legislation. Courts have wide discretion and a free hand to intervene while educating the parties and even to insert

83. ATIYAH, *RISE AND FALL*, *supra* note 80, at 409.

84. For a description of those political, social and economic shifts, *see* ATIYAH, *RISE AND FALL*, *supra* note 80, at 572, 578; *see also* Pettit, *supra* note 78, at 300. For the description of the death of the contract in American law, *see* GILMORE, *supra* note 79.

85. For the general historical development until the appearance of the modern contract in the U.S., *see* Kevin M. Teeven, *A History of Legislative Reform of the Common Law of Contract*, 26 U. TOL. L. REV. 35, 77–78 (1994). For the description of modern contract law, *see, e.g.*, GOOD FAITH AND FAULT IN CONTRACT LAW, *supra* note 79, at 1, 7–12; *see also* HORWITZ, *supra* note 80, at 34–35.

86. Eisenberg, *No Law*, *supra* note 76, at 817–18.

87. *Id.* at 813.

various social interests,⁸⁸ such as the responsibility of one contracting party to the other. This modern shift, which enables substantial scrutiny of contract stipulations and imposes obligations on the parties to promote their mutual contractual interest with cooperation, is well-articulated in the increasing use of the unconscionability doctrine⁸⁹ and the willingness to adjust the terms of a contract to changed circumstances.

Since the existing scholarly literature describes in length the transformation of classical contract law into modern contract law, I will only briefly focus on the most relevant aspects of the shift embodied in the modern model to our discussion regarding surrogacy contracts. Modern doctrines can serve as proper infrastructure for refuting the criticisms against the legitimacy of surrogacy contracts surveyed above in Part II. The essence of my arguments is that the flexibility and complexity of the modern model supplies us with better tools to cope with procedural and substantial intrinsic contractual problems. In stark contrast to classical contract law, the modern model permits more flexibility and fairness in the ordering of the family realm, and especially in this intimate relationship.⁹⁰ In the second half of this Article I base my contention that the traditional antagonism of the legislators, courts, and scholars against any contractual ordering of surrogacy is derived from the justified fear of applying classical contract law, as outlined above.

B. Coping with the Problem of Unequal Power of the Contracting Parties

There is no doubt that classical contract law fails in its inability to cope properly with the problem of the inequity of power between the contracting parties, and instead merely focuses on implementing

88. See, e.g., ATIYAH, INTRODUCTION, *supra* note 76, at 27–34; E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203, 218 (1990); THE LAW OF CONTRACT 5 (Laurence Koffman & Elizabeth Macdonald eds., 5th ed. 2004); Patrick S. Atiyah, *Freedom of Contract and the New Right*, in ESSAYS ON CONTRACT 355, 361 (2d ed. 1990).

89. On cooperation and mutual consideration, see GILMORE, *supra* note 79, at 94–96; ATIYAH, INTRODUCTION, *supra* note 76, at 121, 300–01; DAVID GAUTHIER, MORALS BY AGREEMENT 113 (1986). I will elaborate on the unconscionability doctrine *infra*. In the meantime, see, e.g., “Unconscionability” As Ground for Refusing Enforcement of Contract for Sale of Goods or Agreement Collateral Thereto, 18 A.L.R.3d 1305, 1307 (1968). For a survey of the comparative legal systems concerning the implication of this doctrine in the U.S., see, e.g., Ralph J. Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1188–89 (1995).

90. For the mainstream of researchers who contend that modern contract law can successfully resolve the pitfalls of classical law contracts, see Feinman, *supra* note 76, at 1288.

formal contractual principles.⁹¹ In contrast, the modern model serves to minimize this problem of the inequity of power. The modern model does so through a variety of doctrines, the most relevant being: trust, fairness, reasonableness, good faith, increased disclosure obligation, consideration of the reliance interest of the other party and his individual needs, and unconscionability.⁹² In addition, there are several specific doctrines that have developed in the modern model that may exempt parties from their contractual responsibilities such as: exploitation, economic duress, public policy, and frustration of purpose. These standards and doctrines often serve to assist in resolving various intrinsic contractual problems.

In this subpart I focus on the doctrine most relevant to the surrogacy contract: the doctrine of unconscionability. This doctrine is based on public values and standards of appropriate behavior. Here, I explore its application in the general commercial contract context, the spousal context, and the relevant surrogacy context, which is the recognition of the legality of the surrogacy contract. The doctrine of unconscionability is well-rooted in the ancient history of contract law. It first appeared in equity but was later embedded in common law. Some assume that its ancestor is the Roman doctrine of *Laesio Enormis* and the Middle Ages' theory of the fairness consideration doctrine, which was very common in the American judiciary and is the basis upon which courts invalidated unconscionable contracts.⁹³

In the modern era this doctrine was anchored into law by the Uniform Commercial Code (U.C.C.) in 1954 and later in the Restatement (Second) of Contracts.⁹⁴ Some scholars thought this doctrine to be one of the most innovative sections of the U.C.C., the biggest change

91. See Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925, 931 (2006); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 106 (1982); Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 776–84 (1985).

92. See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 186, 195 (2005).

93. See *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Ch. 1750). Another and earlier decision is *Emanuel College v. Evans*, 21 Eng. Rep. 494, 495 (1625). See also *Dalzell v. Dueber Watch-Case Mfg. Co.*, 149 U.S. 315, 325 (1893); *Deweese v. Reinhard*, 165 U.S. 386, 389 (1897); *Hume v. United States*, 132 U.S. 406, 410 (1889). For a survey of cases before the enactment of the U.C.C., see RICHARD A. LORD, WILLISTON ON CONTRACTS § 5:15 (4th ed. 2003); see also Melvin A. Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1415 n. 4–5 (2009) [hereinafter Eisenberg, *Role of Fault*].

94. See U.C.C. § 2-302; see also Restatement (Second) of Contracts § 208. For the widespread acceptance of this doctrine in every jurisdiction in the U.S., whether by the legislature or the judiciary, see Eisenberg, *Role of Fault*, *supra* note 93, at 1415 n. 6–9.

in contract law, and even its most valuable clause.⁹⁵ In its modern form this doctrine enables courts to directly inspect unconscionable bargains, without any need to use one of the rigid classical doctrines, and if necessary, intervene into the conditions of the contract.⁹⁶

Using this doctrine, courts weigh the fairness of the bargain when the contract was signed from both procedural and substantive aspects. According to the vast majority of courts, it is necessary that both aspects be unconscionable in some degree to justify any judicial intervention.⁹⁷ When a court concludes that a contract is unconscionable, it may prevent its enforcement, invalidate the problematic clauses, or otherwise restrain the unconscionable implication of the problematic stipulations.⁹⁸ There is no doubt that this doctrine has challenged classical contract law notions⁹⁹ and therefore one can find both numerous opponents and supporters of the doctrine.¹⁰⁰

Many scholars try to justify the unconscionability doctrine in light of philosophical¹⁰¹ and contractual theories,¹⁰² while others tried

95. See, ALLAN E. FARNSWORTH, *CONTRACTS* § 4.28, 307 (3d ed. 1999); DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW* 57 (1996); Karl Llewellyn, *Study of the Uniform Commercial Code* in REPORT OF THE LAW REVISION COMMISSION FOR 1954, at 121 (1954).

96. See Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819, 1829 n. 64 (1994).

97. See Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 155–61 (2005).

98. *Id.* at 50.

99. For this statement and for a survey of many studies that outline the challenges of this doctrine, see Lifshitz, *supra* note 28, at 330 n. 45.

100. The literature is enormous, therefore I will mention only the following seminal articles: Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 461 (1995); Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates under the Unconscionability*, 31 HOUS. L. REV. 721, 742–45 (1994); Evelyn L. Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability has Become a Relic*, 105 COM. L.J. 287, 306 (2000); Arthur A. Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 354–57 (1969); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293 (1975).

101. For basing the doctrine on the theories of Aristotle, Hegel and Kant, see, respectively, James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1604–11, 1633–37 (1981); Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1080 (1989); Robert Wisner, *Understanding Unconscionability: An Essay on Kant's Legal Theory*, 51 TORONTO U. FAC. L. REV. 396, 398 (1993). For more on the philosophical aspects of the doctrine, see Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513, 1514 (2003).

102. See Horacio Spector, *A Contractarian Approach to Unconscionability*, 81 CHI.-KENT L. REV. 95, 99 (2006) (a contractarian approach); see also Larry A. DiMatteo & Bruce L. Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U.L. REV. 1067, 1070 (2006) (a consent theory).

to reshape it into a more concrete and practical model.¹⁰³ Nevertheless, *prima facie*, the vast majority of the modern literature, at least in the U.S., supports its existence. Amongst the claims there are the following justifications: in the commercial world, where the adhesion contracts are very common this doctrine is very important,¹⁰⁴ its wide spectrum provides a very useful tool in court's hands where other objective doctrines have failed,¹⁰⁵ during the years the courts have agreed on a unified and clear framework of when and how to use it.¹⁰⁶ Even adherents of the economic analysis of law are inclined to impose some restrictions on the freedom of contract precisely from the motivation to strengthen the welfare policy inside the free market.¹⁰⁷

Despite the criticisms against the doctrine, over the years courts have widened and deepened the usage of this doctrine with flexible implications, and today it is applied in the commercial context and in a wide range of other contexts.¹⁰⁸ As of the year 1995, every state in the U.S. has anchored the doctrine in its jurisdiction.¹⁰⁹ Moreover, the majority of research studies agree on its necessity¹¹⁰ and today it is an inherent part of the common law.¹¹¹ In the last decade there have been vast legal writings regarding its implementation, as in

103. See, e.g., Bender, *supra* note 100; Bridwell, *supra* note 101; and in the other articles enumerated at Darr, *supra* note 96, at 1831 n. 76.

104. See Carol B. Swanson, *Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M.L. REV. 359, 359 (2001). For a comparison of adhesion contract and unconscionability and for the need to see them as completing each other, see Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 748 nn. 1, 3 (2009).

105. See Swanson, *supra* note 104, at 386–87; see also Morant, *supra* note 91, at 940. For a survey of cases that were given especially due to the flexibility and the comfort of this doctrine, see Barnes, *supra* note 97, at 159–60 n. 175.

106. This is the conclusion of the following researchers: Darr, *supra* note 96, at 1848 (arguing that consistent and predictable patterns emerge from judicial interpretation of unconscionability); Daniel T. Ostas, *Predicting Unconscionability Decisions: An Economic Model and an Empirical Test*, 29 AM. BUS. L.J. 535, 541–42 (1992).

107. See Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 284 (1995). For the justification of this doctrine from an economic analysis of law perspective, see F.H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33, 37–64 (1990); see also Russell Korobkin, *A "Traditional" and "Behavioral" Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441, 462–68 (2004) (discussing economic analysis of unconscionability claims).

108. See Swanson, *supra* note 104; Darr, *supra* note 96, at 1832; DiMatteo & Rich, *supra* note 102, at 1084.

109. See SLAWSON, *supra* note 95, at 5.

110. See Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 793, 793 n. 132 (2004).

111. For an overview of many articles that document the widespread acceptance of this doctrine, see Prince, *supra* note 100, at 462 n. 12; Swanson, *supra* note 104, at 362 n. 29.

the context of arbitration.¹¹² There are claims that with the growing use of arbitration the usage of the unconscionability doctrine will be increased.¹¹³

The potential implication of this doctrine in the private ordering of spousal relationships has been explored by some scholars¹¹⁴ and it was found that from the very first days of the Anglo-American system, the notion of freedom of contract, especially in equity, was restricted due to the notions of best interests of the child and intrinsic unconscionable characteristics such as fairness ideals.¹¹⁵ In the wider context of determining legal parenthood by agreement, this doctrine of unconscionability has not been sufficiently explored in theory or in practice.¹¹⁶ One can thus find only sporadic and basic discussions of its implication such as in the case of two lesbians, where one had donated the ova when signing the agreement, and the other donated the gestation.¹¹⁷

In this unique case, the court maintained that enforcing the agreement as it is with its embodied conclusion that the donor would not be considered an additional legal mother is unconscionable.¹¹⁸ Similarly, some studies claim that even dispositive agreements concerning the fate of fertilized ova are procedurally and substantively unconscionable because of the inherently unequal gender powers between men and women.¹¹⁹ In addition, there exists only a preliminary

112. Stempel, *supra* note 110, at 860 (“The rediscovery of unconscionability has softened the rougher edges of the Supreme Court’s arbitration formalism and made both the judicial and arbitration systems more effective.”); Susan A. Fitzgibbon, *Teaching Important Contracts Concepts: Teaching Unconscionability Through Agreements to Arbitrate Employment Claims*, 44 ST. LOUIS L.J. 1401, 1401–07 (2000).

113. See Susan Randall, *Judicial Attitudes toward Arbitration and the Resurgence of Unconscionability*, 52 BUFFALO L. REV. 185, 194–98 (2004).

114. See, e.g., Barbara A. Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 128–29 (1993); Carol Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 233 (1994); Paul B. Marrow, *Squeezing Subjectivity from the Doctrine Of Unconscionability*, 53 CLEV. ST. L. REV. 187, 206–10 (2005–2006); Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J. L. FAM. STUD. 1, 7 (2003).

115. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 112–33 (3d ed. 1990); Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 253–54 (1991).

116. For a contention that the American courts have not yet discussed the implication of the unconscionability doctrine in the context of fertility treatments a decade and half ago, see L. Kuo, *Lessons Learned from Great Britain’s Human Fertilization and Embryology Act: Should the United States Regulate the Fate of Unused Frozen Embryos?*, 19 LOY. L.A. INT’L & COMP. L. REV. 1027, 1033–34 (1997).

117. *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136, 146–47 (Cal. App. 1 Dist. 2004).

118. See *id.*

119. See Ellen A. Waldman, *Disputing over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897, 925–30 (2000).

discussion regarding whether the enforcement of IVF agreements, especially when a dispute is centered around the fate of fertilized ova, is fair. In any case, this existing discussion is premised on the preliminary question of the fairness of the agreement and does not yet deal with the implementation of the unconscionability doctrine *per se*.¹²⁰

Because there are no clear criteria regarding how the doctrine of unconscionability should be implemented in the context of surrogacy contracts, plenty of room remains for use of this doctrine in order to both proactively and even retroactively prevent the signing of any unconscionable contracts. This may in turn lead to a better means to invalidate problematic conditions, and in the worst case scenarios, invalidate entire problematic agreements. The implementation of this doctrine is even more important in light of the increasing criticism that the entire surrogacy practice is unconscionable due to its obvious inclination towards the intending parents and fertility clinic at the expense of the surrogate mother.¹²¹ According to this contention, the stipulations of any given surrogacy contract (when viewed in light of strong notions of freedom of contract) are inherently unconscionable.¹²²

Certainly, if a court were to find that unconscionability exists due to one of the following defenses: fraud, lack of capacity, undue influence, or duress, then the contract becomes voidable.¹²³ Therefore, courts should proactively inspect surrogacy contracts for any unconscionable procedural or substantive terms.

Procedural unconscionability can be found in the following cases: gross inequality of bargaining power, inability to read or understand the provisions of the contract, significant gap in age intelligence or education, fraud, unfair surprise, and the like.¹²⁴ One example is an instance where the surrogate mother has to sign the contract with her fingerprint because she does not have basic reading and writing abilities necessary to understand the contract's terms and sign her name. In the most problematic incidents such circumstances may justify the invalidation of the entire contract, even if the stipulations of the contract have been explained to her orally. Another

120. See Robertson, *supra* note 53, at 418–20. Robertson nonetheless concluded that this fear should not overcome the importance of enforcing the contract. See also Mark C. Haut, *Divorce and the Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493, 519–22 (1999) (describing the role of contract defenses in embryo disputes).

121. See Coleman, *supra* note 30, at 513.

122. See Susan Ince, *Inside the Surrogacy Industry*, in FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW 104–12 (Martha Minow ed., 1993). For acceptance and rejection of the conclusion of her claims, see Coleman, *supra* note 30, at 511–14; Denise E. Lascarides, *A Plea for the Enforceability of Gestational Surrogacy Contracts*, 25 HOFSTRA L. REV. 1221, 1255–58 (1997).

123. See Restatement (Second) of Contracts §§ 164, 175, 177, 208.

124. See Restatement (Second) of Contracts § 208 cmt. a, b, d (1981).

example is the instance where a contract has a “hold harmless” clause, which means that despite the nature of the circumstances the surrogate mother has agreed to not sue the fertility clinic for any sort of negligence.¹²⁵

Substantive unconscionability can be found in any circumstances where the surrogate mother receives monetary consideration substantially below what is considered the prevailing reasonable value of her surrogacy service.¹²⁶ In addition, this sort of substantive unconscionability can emerge anywhere where there are obviously oppressive terms that are unreasonably favorable to one party at the expense of the other. For example, a provision that requires the surrogate mother to use only the medical and psychological services chosen for her and provided by the fertility clinic, e.g., a contract that includes language such as: “[Surrogate mother must] follow the advice of the attending physician, even if it meant undergoing . . . a caesarean delivery [or other medical procedure].”¹²⁷ Similarly, the following problematic clause is substantively unconscionable: “Surrogate mother and her husband must sign all documents provided by the (company) including but not limited to the surrogate mother agreement and contract.”¹²⁸

C. Coping with the Problem of Change of Heart

In contrast to classical contract law, where human beings are treated as rational agents, in the modern model the conception is more realistic and human beings are treated as individuals with cognitive limitations and therefore, at times need judicial intervention to protect themselves from their own self and from others.¹²⁹ The problem of change of heart in the realm of enforcing surrogacy contracts is relevant in cases where the surrogate mother insists on keeping the child in her custody and, in rare incidents, where the intending parents are not interested in taking the child into their custody. It should thus generally be known that changing one’s mind is not necessarily possible in every case and “[t]he risk of subsequent regret is the price we pay for our commitment to personal autonomy and responsibility in the face of uncertainty.”¹³⁰

125. See Coleman, *supra* note 30, at 513.

126. *Id.* at 514.

127. *Id.* at 513.

128. *Id.*

129. See Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471, 479 (1985); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 236 (1998).

130. Peter H. Schuck, *Some Reflections on the Baby M Case*, 76 GEO. L.J. 1793, 1799 (1988).

The huge emotional, physical, and economic efforts and investments that are involved in the surrogacy agreement justify the understanding that the contract will be eventually enforced. In addition, in any case where the intention and will of the contracting parties were deliberate and explicit, their agreement should be enforced for the sake of keeping the stability and certainty of the entire process of the surrogacy practice; the knowledge that this agreement is irreversible may minimize any thought of withdrawing from the initial agreement. The cognitive inability to foresee some future developments should not totally abolish the important option of proactive private ordering at the time when the sides are close to each other, as when negotiating the agreement, and later on when enforcing their agreement.

My contention that the surrogate mother cannot be totally exempted from her contractual obligations is supported by the arguments of many other scholars who maintain that because the surrogate mother has the most important information about her own ability to serve as surrogate, she should control her emotions or otherwise not enter into a surrogacy agreement.¹³¹ In addition, others hold that even if the surrogate mother has a change of heart and we as a society do not enforce the contract, the surrogate mother should then be asked to compensate the intending parents by returning the consideration or even paying additional compensatory damages.¹³²

This understanding is consistent with several leading U.S. decisions where the courts concluded that a mere change of heart should not exempt the surrogate mother from fulfilling her contractual obligations.¹³³ This is true in view of the fact that all sides, and foremost the surrogate mother, have access to make an informed decision prior to signing the contract. We want to avoid condoning the perpetuation of future change of heart claims.¹³⁴ Here it should be noted that I return to this issue at the outset of the next Part where I suggest the implementation of administrative mechanisms in order to ensure that the parties genuinely give their informed consent. As a

131. See Shultz, *supra* note 53, at 349–51.

132. For the first and second options, see, respectively, Cook et al., *supra* note 56; MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 56 (1993).

133. See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993); Tanya Feliciano, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 349 n. 354 (1993). For courts' attitude towards the initial intentional parenthood of the intending parents as the prevailing factor, see Janet L. Dolgin, *Solomon's Dilemma: Exploring Parental Rights: The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261, 1294 (1994).

134. For a similar argument, see Louis M. Seidman, *Baby M and the Problem of Unstable Preferences*, 76 GEO. L. J. 1829, 1829 (1988).

final note on the matter, a review of U.S. courts' holdings reveals that in most cases a typical surrogate mother's change of heart is often rejected by the courts as a valid basis for invalidating, or not upholding in totality, a contract except in the rare cases where some visitation rights were granted to the surrogate mother.¹³⁵

With respect to these general arguments that *a priori* surrogacy agreements should be enforced, I want to lay out an additional doctrine that modern contract law offers us—the theory of relational contract. This theory may assist us in specific incidents where a surrogacy contract needs to be adjusted due to change of heart or changed circumstances. This theory emerged during the last century in the nineteen-seventies and as a reaction to classical contract law's limits; some even argue that this theory is the “mirror image” of the old contract model and is the answer to the real world situations that arise.¹³⁶ The relational contract theory was fueled by the criticism of Ian R. Macneil following empirical studies on the gap that exists between the initial contractual rights and obligations and those that are eventually applied during the contract's performance.¹³⁷

Many sociologists and psychologists also contend that there are extrinsic contractual factors that influence the contract's performance, the central of which, for the sake of our discussion, is the importance of keeping promises, consideration the other's needs, and the parties' readiness to cooperate.¹³⁸ This is true not as much when dealing with short-term discrete transactional contracts rather with long-term contracts between two stable contracting parties, which embody a long-term extra-contractual relationship that develops mutual interests, expectations, and interdependency. The unique long-term relationship, which may be driven by public values, such as justice, solidarity, interdependency and fairness, requires close cooperation and even altruistic motivations.

135. See *Matter of Baby M*, 537 A.2d 1227 (N.J. 1988). For another legal dispute following a surrogate mother's change of heart, see *J.F. v. D.B.*, 66 Pa. D. & C.4th 1, 12–16 (Ct. Com. Pl. 2004) and the other verdicts enumerated in Marla J. Hollandsworth, *Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom*, 3 AM. U. J. GENDER & L. 183, 186 n. 5 (1995).

136. See Eisenberg, *No Law*, *supra* note 76, at 812.

137. Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 570 (1985).

138. For the phrase ‘mirror image,’ see Eisenberg, *No Law*, *supra* note 76, at 812. For a further discussion, see Ewan McKendrick, *The Regulation of Long-Term Contracts in English Law*, in GOOD FAITH AND FAULT IN CONTRACT LAW 305, 312 (Jack Beatson & Daniel Friedmann eds., 1995); see also Stuart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55, 57 (1963). For empirical studies, see, e.g., Gordon, *supra* note 137, at 560. For an evaluation of the importance of Prof. Macneil's writing in promoting the development of the relational contract theory, see Mary Keyes & Kylie Burns, *Contract and the Family: Whither Intention*, 26 MELB. U. L. REV. 577, 585 n. 51 (2002). For an updated survey of sociological and psychological researches, see the writings of Stewart Macaulay.

According to the common relational contract theory, the interdependency of the parties causes them to give less weight to the initial planning and documentation of the contract and its stipulations, while giving more weight to the flexible, reciprocal, and soldierly behavior of the two sides. That means that the agreement is dynamic and should not be inspected solely at the moment of execution, but during its performance as well. When changed circumstances occur, the sides should consider each other's needs, and should not insist on following the initial agreement. Instead, they should adjust the agreement to new circumstances while recognizing the dynamic and flexible characters of the modern contract.

Furthermore, it is very difficult to speak today about one singular relational contract theory since one can find in the research literature a variety of theories developed by scholars.¹³⁹ Similarly, the prevailing contention is that in every given contract one can find some aspects of the relational contract and while we are getting closer to the relational contract's special characters, we should treat it in a more communal and public manner.¹⁴⁰ Scholars disagree as to whether the relational contract deserves special regulation in addition to the classical and modern law models¹⁴¹ or whether it fits into the latter model.¹⁴² Scholars also disagree on how *de facto* this sort of contract should be operatively implemented.¹⁴³ In spite of the vast amount of scholarly literature, the relational contract theory still has yet to reach its full maturity and so far, is used mostly in the long-term contract realm. Some scholars anticipate nonetheless that this theory will gain more influence and its ethical influence will increase.¹⁴⁴ Today it is already true that many practical implementations of this theory can be found in various legal relationships in general, and specifically in the fields of insurance, employment, and arbitration.¹⁴⁵

139. For a further discussion on the various relational contract theories in Prof. Macneil's writing, see Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U.L. REV. 877, 881 (2000) [hereinafter Macneil, *Relational Contract Theory*].

140. See Ian Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 738–40 (1974) [hereinafter Macneil, *The Many Futures*]; Macneil, *Contracts*, *supra* note 73; IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* 28 (1980); IAN R. MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* (David Campbell ed., 2001).

141. See the opinion of Eisenberg, *Limits of Cognition*, *supra* note 37, at 251 and Ian R. Macneil in his various articles.

142. See the opinion of McKendrick, *supra* note 138, at 332; Eisenberg, *No Law*, *supra* note 76, at 806; Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U.L. REV. 847, 848 (2000).

143. See Jay M. Feinman, *The Insurance Relationship as Relational Contract and the "Fairly Debatable" Rule for First-Party Bad Faith*, 46 SAN DIEGO L. REV. 553, 554 (2009).

144. See Gordon, *supra* note 137, at 566.

145. For a similar modern implication, see *id.* at 556–59.

In the recent legal literature one can also find an increasing conceptualization of the spousal relationship as a relational contract. It is worth noting that in his early articles Professor Macneil conceptualized the marriage contract as a relational contract.¹⁴⁶ Professor Macneil's conceptualization is accurate due to the following arguments: the spousal relationship is long-term and dynamic while the economic aspects are not central to the contract, the spousal relationship is characterized by economic interdependency, cooperation, and altruistic motivations, and the spousal relationship includes explicit and implicit public values and social interests.¹⁴⁷ Indeed some scholars have applied this theory in various spousal relationships—i.e., private ordering of the monetary aspects of married couples or cohabitants and even of gay couples.¹⁴⁸

Still, it is only recently that scholars have begun to explore the potential embedded in the application of the relational contract theory to the family realm, and it is in the opinion of this research that the relational contract theory should be applied to surrogacy contracts as well. The special relationship embodied in the surrogate relationship, which includes contracting parties who are not necessarily married spouses, is very subjective, complex, close, and intimate. Many surrogates and intending mothers have very close and warm relationships during the pregnancy, and at times this relationship is considered even stronger than the spousal relationship of the intending parents.¹⁴⁹ Similarly, this unique and complicated relationship may be long-term, since very often it is not clear

146. See Macneil, *Contracts*, *supra* note 73, at 857–58. *But see* Macneil, *Relational Contract Theory*, *supra* note 139, at 13. For the conceptualization of the relational contract theories in terms of marriage in the writings of Macneil and Macaulay, see Gordon, *supra* note 137, at 569.

147. See Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1230–32 (1998); Robert Leckey, *Relational Contract and Other Models of Marriage*, 40 OSGOODE HALL L.J. 1, 2 (2002); John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUD. 93, 94 (2000).

148. For the implementation of this theory in the context of same-sex marriage, see Christensen, *supra* note 21, at 1334–38, 1348. See Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U.L. REV. 219, 228–29 (1995). For a survey of the common denominator between the relational contract and feminist theories, see Peter Linzer & Patricia A. Tidwell, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791, 794–800 (1991); see also Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1257–59 nn. 550–59 (1999). For the contention that feminism and contractual theories have a lot in common, see Martha M. Ertman, *Book Review: Legal Tenderness: Feminist Perspectives on Contract Law*, 18 YALE J.L. & FEMINISM 545, 570–71 (2006).

149. For the intimacy and the unique relationship that were common in many surrogacy contracts, see generally ELLY TEMAN, *BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF* (2010).

when it will expire, whether it will achieve its goal, and when exactly it will do so. There is even the possibility that if this agreement is successful, the sides will agree on a second one.

A strong argument can be made that the surrogacy contract conforms to the typical characteristics of the relational contract theory and therefore should be treated as a relational contract. In addition, the contracting parties may not be well trained or aware of all the various nuances of the contract and the difficulties inherent in the fertility treatment process, the pregnancy process, and the delivery. Moreover, often the surrogate mother may be not represented by a lawyer and is blindly relying on the adhesion contract dictated by the fertility clinic. A flexible and just contractual theory that accounts for the special and subjective characteristics of the contracting parties, the possibility of change of heart, the possibility of changed circumstances, and all the other extra contractual or legal factors may be appropriate for the contractual ordering of the surrogacy.¹⁵⁰

This innovation may be strengthened in almost all the following parameters: the surrogacy contract may encounter strong difficulties such as the intending parents' splitting up or divorce, loss of legal capacity, passing away of one of the parties, or the intending parents' unexpected success in achieving a child from natural intercourse. Mutual expectations, obligations and reliance on the contract may vary in the long run since it impossible to foresee all the possible changed circumstances, which may easily cause a change of heart. The essence of a surrogacy contract is to privately order a very personal and complicated relationship that is not a usual economic bargain by its nature, and embodies substantial personal, social, and psychological needs. It is very difficult to evaluate and estimate its full and appropriate consideration. The contractual obligations are not always transferable to someone else and they are supported by a social support system with very important values, such as the right of procreation. The importance of cooperation is therefore substantial and there is even a readiness for altruism.

Because the relational contract theory holds that at the initial contract execution stage there is no real ability to foresee and formulate the accurate obligations and rights that the contractual relationship will render, the *de facto* performance of the contract should be mandatory only in specific cases where it is ultimately deemed necessary.¹⁵¹ The relational contract theory may support and even

150. See Flavia Berys, *Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour*, 42 CAL. W. L. REV. 321, 346–47 (2006).

151. See Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091–92 (1981).

strengthen the notion that the parties may resign from one, or more, of the contractual obligations embodied in the surrogacy contract. This is true not only after the contract's execution and prior to the beginning or success of the fertility treatments, where the balanced interests still enable one of the sides not to fulfill his contractual obligations, but I also contend that this option is crucial, especially for the surrogate mother, and applicable even after the pregnancy begins or the child is born.

The relational contract theory may create parental obligations, rights, and even the grant of parenthood status itself due to an implied agreement following *de facto* guardianship. My contention generally means that the implication of the relational contract theory may require, if necessary, flexible adjustment of the contractual obligations *ex-post* in addition to the initial obligations that were agreed upon *ex-ante*. These potential adjustments and the need for flexibility may then allow for change to the initial agreement where there is a change of heart or changed circumstances and the *de facto* performance of the contract by both sides, explicitly or implicitly, indicates that the parties agree to change the initial agreement.

Putting aside the above discussion regarding who should be recognized as the legal parent of the resulting child (i.e., who has the right to the contract in a zero sum game), I also seek to introduce a novel idea that the relational contract theory permits us to explore: splitting the scope of parental rights in accordance with the scope of the parties' fulfillment of parental obligations. In other words, in a case where a gestational surrogate mother, despite not being biologically related to the child, fulfills, *de facto*, the various parental obligations towards that child. In that case, she may then be given parental status or at least several parental rights such as visitation.

To elaborate, I contend here that in accordance with the tool of relational contract theory, legal parentage (in whole or in part) should be given to every individual who intends, wishes and agrees to become a legal parent of the child. If the individual intends to acquire full legal parentage, he or she will be given full status and rights. However, if it is that party's intent to acquire only partial legal parentage, he or she could be granted a partial legal parental status in accordance with the initial surrogacy agreement. In the latter scenario, that party will then acquire the exact range of parental rights in accordance with the acceptance of his parental obligations. This accurate determination of the party's parental status includes the derived obligations and rights that should be determined by a mutual private agreement that is subordinated for public review.¹⁵²

152. See Margalit, *supra* note 57, at 26.

In doing so, we can then create an a-gender incentive that would not depend on sexual inclination or on marital status. Instead and in the truest form of what is the best interest of the child, only an individual who fulfills the needs of the child will enjoy full parental rights. A parent, the surrogate mother in our context, who chooses to partially accept his parental obligations, will receive partial parental rights, and an individual, the intending parent in our context, who prefers not to undertake any parental obligation accordingly will not acquire any legal status or parental rights. After accepting that legal parentage status is not monolithic and binary but is more diverse, this novel differentiation enables the parties to contract for acquiring full or partial legal parentage status. Therefore, we should *ex-ante* distinguish between three potential legal parentage statuses: *full parentage*, which includes the full range of legal obligations and rights; *partial parentage*, which entails the acquisition of partial parental obligations and rights in accordance with their fulfillment; and *non-parentage*, which exempts the party from any parental obligations and rights.

The last option of non-parentage is similar to the common legal practice and based upon the same fundamental best interest of child determination. Here, a parent who does not want to or is unable to fulfill his parental obligation loses his legal parentage along with the custody of the child. In my opinion, this differentiation between those three stages of legal parentage fits well with our well-established best interests of the child standard. In doing so, we would provide a clear incentive for parents to undertake their full parental obligations in order to receive full parental status and corresponding rights. The shift from a parent's interests and rights in favor of the welfare and best interests of the child will probably strengthen and not weaken the welfare and the best interest of child.

This innovation expands our legal options and gives the child an important option for preserving the existing child-parent relationship with his gestational mother, who may give him additional emotional support without forcing her to accept full legal parentage. It is worth noting that the current legal system does not currently recognize this intermediate status; therefore potential intended parents are forced either to surrender their legal parentage or to accept unwanted full parentage, which may be detrimental to both sides under the given circumstances.

Moreover, with respect to the intending parent, it may be the case that changed circumstances such as a divorce, loss of legal capacity or death, or *de facto* non-performance of parental obligations or neglect may then cause the party to lose his legal parenthood.

However, since we are dealing with changing the initial agreement, especially when it was judicially preauthorized, we should enable this withdrawal only by receiving judicial permission. It is obvious that this special permission should be granted only in rare cases where extreme changed circumstances are at hand and there is not merely an unjustified change of heart, as is required in the Israeli Surrogate Motherhood Agreements Law.¹⁵³ In any case, when the child was already taken from the surrogate mother and handed to the intending parents, significant time has passed, and the child is now attached to the parents, the parents no longer have the option of returning the child back to the surrogate mother. The narrow exceptions are very extreme cases that require the court's special permission.¹⁵⁴

D. Coping with the Problem of Changed Circumstances

The last substantial problem inherent in surrogacy contracts that was not addressed by classical contract law but is addressed by the modern model is the problem of changed circumstances. The classical model does not differentiate between short-term agreements and long-term agreements, despite the fact that in the latter context changed circumstances is a substantial problem. By its nature, the long-term contract is more exposed to the possibility of unforeseen incidents, which thereby expose the parties to additional dangers which increase in proportion with the duration of the contract. These problems derive from intrinsic factors that are inherent to the contract, its enforcement, and other extrinsic factors.

The difficulties of contractual ordering increase when a long-term contract is at issue because the justification for not enforcing the agreement in its original form is strong. The essence of this contention is that in the case of a long-term agreement, the sides are often interested in leaving open or flexible the ordering of their contractual risks, obligations, and rights for the next stages. Recognizing their inability to foresee all future scenarios, the parties believe that if any circumstances change after the execution of the agreement, they will cooperate later on and work together to find the right solution.

The modern contract model is very sensitive to the uniqueness of different types of contracts, especially with the unique characteristics

153. See, e.g., Abraham Benshushan & Joseph G. Schenker, *Legitimizing Surrogacy in Israel*, 12 HUM. REPROD. 1832, 1833 (1997).

154. See Andrea E. Stumpf, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 206 n. 74 (1986); see, e.g., MARTHA A. FIELD, SURROGATE MOTHERHOOD 151 (1998).

of a long-term contract. Thus, one can find much scholarly literature that deals with the economic and legal aspects of the long-term contract.¹⁵⁵ The cognitive inability to anticipate all future scenarios worsens in the spousal context; thus, in this intimate realm, rigidity of enforcement will often directly lead to unjust results.¹⁵⁶ However, the modern model supplies us with several tools that help deal with such problems. One significant tool—adjusting the contract to changed circumstances—is set forth in the writings of Lenore J. Weitzman and enables the implementation of the contractual paradigm in the spousal contract's realm.¹⁵⁷

The American Law Institute (ALI) concludes that in the familial context it is inherently more difficult to foresee changed circumstances, therefore there is an urgent need to adopt a policy that allows for the adjustment of contracts to the changed circumstances.¹⁵⁸ Thus, many research studies recommend that the contract should be inspected in light of the new and not the original circumstances.¹⁵⁹ Practically speaking, the implementation of the changed circumstances doctrine in the familial context may be found in child support and prenuptial agreements. This doctrine is justified on the grounds that spouses, in contrast to businessmen, typically do not have the benefit of constant continuous legal counsel and therefore room must be left for changing and updating spousal agreements in accordance with changed circumstances.¹⁶⁰

155. On the failure of the classical law contract to enable flexibility in any given long term contractual relationship, see Macneil, *The Many Futures*, *supra* note 140, at 763–65; see also Ian Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 592–93 (1974). On the ability to withdraw from a contractual obligation due to changed circumstances, see U.C.C. 2-615(a), c. 1; Restatement (Second) of Contracts 261–72. For an initial discussion of these doctrines, see Richard E. Speidel, *Contract Excuse Doctrine and Retrospective Legislation: The Winstar Case*, 2001 WIS. L. REV. 795, 800–01 (2001); James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 52 AM. J. COMP. L. 513, 525–30 (2004); Nancy Kim, *Mistakes, Changed Circumstances and Intent*, 56 U. KAN. L. REV. 473, 504–09 (2008).

156. See, e.g., Bix, *Bargaining in the Shadow*, *supra* note 75, at 186–88; Shultz, *supra* note 75, at 291–307 and in the research enumerated in Naomi R. Cahn, *Parenthood, Genes, and Gametes: The Family Law and Trusts and Estates Perspectives*, 32 U. MEM. L. REV. 563, 569 n. 24 (2002).

157. See WEITZMAN, *supra* note 75, at 249–50. On the new model's flexibility and therefore suitability for the familial intimate realm, see Shultz, *supra* note 75, at 292–93.

158. See ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 982–83, 987 (2000).

159. See Thomas J. Oldham, *Premarital Contracts Are Now Enforceable Unless . . .*, 21 HOUS. L. REV. 757, 775–76 (1984); see also Atwood, *supra* note 114, at 139, 140, 148–49.

160. For a discussion of the changed circumstances doctrine in the context of child custody and maintenance, see Cheri L. Wood, *Childless Mothers?—The New Catch-22: You Can't Have Your Kids and Work for Them Too*, 29 LOY. L.A. L. REV. 383, 393–96 (1995); see also Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 893 n. 270 (2000).

Thus, this understanding is already well embodied in the modern contract model doctrine which resolves the problem by allowing for adjustment of the initial agreement following renegotiation. This is at least true when dealing with long-term contracts that, based upon an explicit or implicit agreement between the parties, will minimize the negotiation in the initial agreement and allow for renegotiation in the future if necessary.¹⁶¹ This ability to update a contract was rejected by the classical contract model because it was contrary to the well-accepted notion of freedom of contract and it created uncertainty.¹⁶² However, today in several European countries, the modern contract model and this doctrine are so common that it is even a mandatory obligation.¹⁶³

Moreover, existing modern contract law research already sets forth claims regarding the importance of this doctrine in the modern era. For instance, Richard E. Speidel claimed that the inherent obligation to renegotiate a contract is substantial thereby enabling the courts' power to adjust a contract to changed circumstances (which is best achieved following the results of the sides' renegotiation). His argument is premised on the notion of efficiency and that adjusting the contract to the later circumstances may better serve the contract's purpose. Moreover, it is well known that the contracting parties are best situated to find the most efficient solution to the new circumstances,¹⁶⁴ and the parallel ability of the court, which does not have at its disposal the same information, is much narrower. Similarly, the modern model has assimilated the notion that the contract is not perfect at the time of execution and during its performance the parties must therefore be required to act in consideration of each others' interests and even assist the counterparty in case of hardship.

Furthermore, Robert A. Hillman maintains that this notion of cooperation and good faith renegotiation in order to accommodate hardships is the foundation of the relational contract. He claims that a refusal to renegotiate may therefore be treated as a breach of

161. See Gidon Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567, 568, 572–73 (1983).

162. See Speidel, *supra* note 36, at 404; Ian Ayres, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881, 892–93 (2003).

163. See Denis Tallon, *Hardship*, in TOWARDS A EUROPEAN CIVIL CODE 499, 502-04 (Arthur S. Hartkamp et al eds., 3d ed. 2004) (articulating that even in the states where this obligation doesn't exist, courts may punish such a refusal to a good faith renegotiation).

164. See Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law*, 1987 DUKE L.J. 1, 19 (1987); Trakman, *supra* note 129, at 490; John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U.L. REV. 1, 17–18, 36 (1984).

the contract¹⁶⁵ and that any legal system that exalts fairness in enforcing contracts should endorse renegotiation as part of the general obligation of the contracting parties to cooperate.¹⁶⁶ Accordingly, in recent years this doctrine has become increasingly popular in various commercial contracts.¹⁶⁷ As compared to in the past, some scholars now contend that in light of the privatization of the family¹⁶⁸ this doctrine is applicable even in the spousal realm and the spousal obligations and rights are therefore renegotiable.¹⁶⁹

This shift in legal thinking is reasonable due to our abandonment of the traditional permanent marriage status and adoption of broader freedom of contract ideals that teach us that the marriage agreement includes the ability for renegotiation.¹⁷⁰ This concept is supported by economic theories that hold that marriage is no longer a durable and sustainable relationship and is therefore subject to renegotiation by the parties.¹⁷¹ It is worth noting the contradictory development directions of modern contract theory and modern family law. While the majority of agreements in the first context are basically adhesion and non-negotiable contracts,¹⁷² in the latter context we can trace the dramatic shift towards giving more freedom of contract, including renegotiation.

Thus, in my opinion, the changed circumstances doctrine fits well into the contractual ordering of surrogacy where extreme changed circumstances may occur and should be properly considered. Because surrogacy contracts deal with elementary human rights, which are of high personal and social importance, any rigid enforcement of such contracts or total withdrawal from them may cause damage

165. For an offering of this normative model for contract interpretation, see Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1287–92 (1999). For the last contention, see Hillman, *supra* note 164, at 4.

166. See Hillman, *supra* note 164, at 7, 12–14; see also PATRICK S. ATIYAH, *PROMISES, MORALS AND LAW* (1981).

167. See Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 633–36 (1988); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179, 185–86 (2002); Stewart Macaulay, *Renegotiations and Settlements: Dr. Pangloss's Notes on the Margins of David Campbell's Papers*, 29 CARDOZO L. REV. 261, 281 (2007).

168. See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1460–61 (1992).

169. See Christensen, *supra* note 21, at 1326 nn. 149–50.

170. See Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1984 (2000).

171. See Ann L. Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 522–23 (1995).

172. See Bix, *Domestic Agreements*, *supra* note 43, at 1766–67 and his other studies at *supra* note 75.

that is detrimental to the sides. Similarly, every other considered solution, such as monetary refund or compensation, which may be appropriate in the commercial context, is irrelevant in the intimate context of surrogacy contracts since the sole goal of the agreement is the birth of a child and the establishment of that child's legal parenthood. Likewise, we should not forget that the subject of such agreement is a child whose interests and rights could be badly damaged should the parties be unable to reach a just compromise. Lastly, since there is often a close and intimate relationship between the parties, it is the parties—not the courts—that are best situated to know what is the best compromise for them.

In addition, in rare cases there is a chance that eventually unforeseen changed circumstance will cause one of the sides to change his mind and desire to withdraw from the contract. In such cases, I suggest that we do not strictly seek to follow or enforce the terms of the agreement as originally executed due to public policy, the difficulties in trying to force parenthood on an unwilling person, and potential damage to that individual. This was concluded several times in leading U.S. cases in spite of the fact that the intending parents will be left without the ability to fulfill their desire to become parents.¹⁷³

As the modern model teaches us, we should enable one of the sides to then withdraw from the agreement. Thus, a mandatory "cooling period" (I recommend here two weeks' time) should be enacted should one of the parties have a change of heart or circumstances, upon which the parties would be asked to renegotiate. If then, for any reason, the renegotiation does not result in an agreeable compromise, a party may withdraw from the agreement if that party has a reasonable justification, i.e., has encountered extreme changed circumstances. However, if it is merely a change of heart, only upon judiciary intervention and permission would such withdrawal be permitted on a case-by-case basis.

It should be emphasized that this unique option of withdrawal is supported by the prevailing legal practice in almost every country that endorses the legality of the surrogacy contract, such as Israel and the U.K. Both Israel and the U.K. allow a surrogate mother to withdraw from a surrogacy contract following her change of heart. While in the U.K. it is possible only during the 6-week cooling period, in Israel it is possible only when a significant change in circumstances

173. See *Matter of Baby M*, 537 A.2d 1227, 1240 (N.J. 1988); see also Becky A. Ray, *Embryo Adoptions: Thawing Inactive Legislatures with a Proposed Uniform Law*, 28 S. ILL. U. L. J. 423, 426 (2004).

occurred and this shift will not damage the child's best interests.¹⁷⁴ In the U.S., Florida and New Hampshire have enacted a post-birth, cooling period during which a surrogate mother may change her mind before the child is taken from her. In addition, to ensure clear instruction, I recommend the adoption of Nevada and Florida's practices, which require that the parties insert each side's rights and the status of the child into their agreement in the case of any future disagreement.¹⁷⁵

However, even under this doctrine, if for some reason an extreme changed circumstances takes place and the parties are unable to reach an agreement through renegotiation, then we may fall back upon the second solution of allowing the court to adjust the contract to the new circumstances, as offered by the modern model of contract law.

V. IMPLEMENTING THE REQUIRED PRACTICAL ADMINISTRATIVE AND LEGAL MECHANISMS FOR ACCOMPLISHING RECOGNITION OF THE LEGALITY OF SURROGACY CONTRACTS

As set forth above, the central argument embodied in this Article is that modern contract doctrines and theories often serve to improve the contractual ordering of the surrogacy contract. In every natural pregnancy risks exist, and no one can guarantee that a healthy child will be born. Similarly, with every contract, especially surrogacy contracts, there are many ethical and legal challenges. As I outlined in Part III, society and the legal system are slowly but surely gravitating toward completely recognizing the legality of surrogacy contracts. However, we are not quite there yet and in order to achieve the full recognition of surrogacy contracts, we should implement some additional mechanisms. To this end, I set forth below suggested mechanism and how these additional mechanisms would work in practice once enacted.

The purpose of such mechanisms is to proactively ensure that both parties are minimally exposed to the problems of unequal bargaining power and the cognitive inability to foresee potential changes

174. See, e.g. Human Fertilisation Act, 38 Eliz., 2, 1990, c. 37, § 30 (Eng.) (enabling the surrogate mother to withdraw from the contract during the first six weeks after the child is born). The option of the cooling period is commonly supported by many legal scholars. See, e.g., Swift, *supra* note 60, at 928, 954 (enumerating the cooling period option as one of the three pillars of legalizing surrogacy contracts); Vicki C. Jackson, *Baby M. and the Question of Parenthood*, 76 GEO. L.J. 1811, 1820, n. 24 (1988).

175. See NEV. REV. STAT. ANN. § 126.045 1(B) (2008); FLA. STAT. § 742.17 (2008); Abby Brandel, *Gender, Law and Health Care: Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 MD. L. REV. 488, 504–05 (1995).

in circumstances related to pregnancy and the delivery and thereby maximize the chances that the contract will fit within our concepts of public policy and be enforced.

In order to ensure the fairness of the surrogacy contract and the possibility that it will be enforceable, administrative mechanisms should be employed as early as the contract negotiation period. In order to strengthen the initial agreement while evading the various pitfalls of intrinsic contractual problems, we should act to strictly adhere to the following prerequisites and ensure that: (i) the contracting parties are receiving independent, sufficient, and reasonable legal counseling and a thorough and comprehensive medical explanation about the chances and risks, including the fact that there a greater likelihood that a perfectly healthy baby may not be born;¹⁷⁶ (ii) both sides are receiving social and psychological and any other needed support; (iii) the parties contract for various possible scenarios including, but not limited to, the birth of a "sick" child, the divorce of the intending parents, or the death of one of the parties; and (iv) the gap in economic strength and ability of each of the parties, especially that of the selling party, is not interfering with that party's free will (i.e., ensure that the monetary incentive does not cause that party to undertake unreasonable contractual obligations).

In addition, specific prerequisites should be required for those who want to be deemed fit as a potential surrogate mother. First, a woman should not be permitted to act as surrogate mother unless she already has a child through natural birth and thereby is better situated to understand the implications of her actions and the deep meaning of pregnancy and delivery. Second, a potential surrogate mother must undergo a psychological evaluation to determine that she is fit for the challenge. Third, the potential surrogate mother must submit a physician's affidavit stating that the physician examined her and deemed her to be mentally and physically fit for surrogacy and was informed of the physical and psychological medical implications of doing so. Finally, the potential surrogate mother should be required to undergo independent legal counseling with a surrogacy contract expert as well any additional needed counseling at the expense of the intending parents.

Only by enacting these suggested precautions may we properly address the criticisms set forth above, minimize the possibility of the surrogate mother's change of heart during the pregnancy, assure

176. For the first proposal, see Sara Fovargue, *Re R (IVF: Paternity of the Child): Assisting Conception for the Single Infertile*, 18(3) CHILD & FAM. L.Q. 423, 437-39 (2006). For the second offer, see WARREN FREEDMAN, LEGAL ISSUES IN BIOTECHNOLOGY AND HUMAN REPRODUCTION: ARTIFICIAL CONCEPTION AND MODERN GENETICS 28 (1991).

the eventual enforcement of the surrogacy contract, and avoid future disputes.¹⁷⁷ In addition, enacting these prerequisites will confirm that the informed consent is as full, accurate, and as deliberate as possible since common sense and past experience teaches us that increasing awareness of the different chances and risks of unforeseen scenarios will minimize intrinsic contractual problems.¹⁷⁸ Thus, the process of informing all potential parties should in practice be very effective in reducing possible problems. Further, the following additional administrative measure should be implemented: medical information should be organized and divided into definitive categories and sufficient time should be given to allow the potential parties to evaluate and assimilate the information they have received prior to signing the contract. The best way to put such actions into practice is to train professional consultants to make such determinations on a case-by-case basis.

In order to avoid the possibility of future litigation, informed consent of the contracting parties' spouses, especially of the surrogate mother, is imperative. The surrogate mother's husband should further be made aware that if something goes wrong, they might then end up being the parent of the child according to the prevailing laws. The expectation and hope is that the party's spouse's signature, premised upon a more complete informed consent, will serve to confirm the fairness of the process and decrease the possibility of encountering unforeseen scenarios and thereby the difficulties associated with coping with unforeseen changed circumstances. This in turn will likely minimize the parties' fear of each others' change of heart as well.

Moreover, in order to save the contracting parties from the problems that I enumerated above in Part II, we should also confirm the fairness and completeness of the contract at the time of execution. This is especially true because the abovementioned preconditions and mechanisms, which focus on the negotiation period, may be insufficient. Therefore, at the time of execution we should carefully inspect the contract and confirm that the preconditions have sufficiently yielded a fair contract that does not involve exploitation, economic or emotional duress, or unconscionability. Furthermore, prior to signing the contract we should inspect the standard surrogacy contracts that the fertility clinics and the brokerages use on an

177. See Blumenthal, *supra* note 54, at 210–11.

178. See Brandel, *supra* note 175, at 517–20; see also John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 997–98, 1007, 1046 (2001).

ongoing basis in order to confirm that they do not damage either party's rights.¹⁷⁹

Similarly, we should confirm that the agreement accounts for various potential circumstances dictating explicitly what should occur if such circumstances arise. This really is the only way to proactively confirm that any future changed circumstances will not lead to the invalidation of the contract following any change of heart or changed circumstances. Thus, I suggest that state and federal legislatures create and publish an accepted comprehensive form of standard surrogacy contract that includes mandatory stipulations in order to avoid (to the extent possible) any acute contractual problems that would abolish the legality and enforcement of surrogacy contracts.

However, the reality is that until my call to the legislators is answered, especially at the federal level, it is safe to assume that there is no choice other than to inspect agreements at the level of judicial scrutiny. Therefore, as an interim measure, I recommend that all states and countries adopt the prevailing legal practice of several states of the U.S.—mandatory judicial preauthorization for each surrogacy agreement on a case-by-case basis. In Texas and Illinois, this preauthorization is a voluntary option,¹⁸⁰ while in Virginia and New Hampshire, this practice is mandatory.¹⁸¹ Moreover, this legislation can be found in prominent legislation proposals and Uniform Acts, such as the USCACA, the UPA and recently the Model Act Governing Assisted Reproduction Technology (hereinafter: "Model Act").¹⁸²

A similar practice is also used in the U.K, where it is possible to get a "parental order" from the court, which determines the mutual legal parenthood of spouses who used surrogate mother for bringing their child to the world.¹⁸³ This process allows for the

179. For a similar argument, see Lascarides, *supra* note 122, at 1257–58.

180. See 750 ILL. COMP. STAT. 47/25 (2005); see also TEX. FAM. CODE ANN. § 160.751-63 (West 2002 & Supp. 2005).

181. See VA. CODE ANN. §§ 20-159, 20-160 (2010); see also N.H. REV. STAT. ANN. 168-B:20 to B:24 (West 2013).

182. For a survey of the required judicial preauthorization by those proposals, see USCACA §§ 5–9. For a survey of the implementation of UPA §§ 801(a), 803, see Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 661 n. 446, 663 nn. 453–57, 677 n. 575 (2002). For the importance of this implementation, see Robert E. Rains, *What the Erie "Surrogate Triplets" Can Teach State Legislatures About the Need to Enact Article 8 of the Uniform Parentage Act (2000)*, 56 CLEV. ST. L. REV. 1, 33–35 (2008). Similarly, Model Act § 6 enables the intending parents to apply to the court to receive some parental rights. For the modern legislative proposal, see American Bar Association Model Act Governing Assisted Reproductive Technology Alternative A (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf> (embodying Model Act § 7).

183. See HFEA § 30; see also Human Fertilisation and Embryology Act, 56 Eliz. 2, 2008 c. 37, § 54 (Eng.) (articulating the parental orders). Following this procedure, the

monitoring of surrogacy agreements for any unconscionable stipulation and makes sure that the required information is appropriately given to both parties while minimizing as much as possible the exposure to the contractual pitfalls. Only after the court is satisfied that the agreement is appropriate will it legalize and validate a particular agreement in advance of execution.¹⁸⁴ This interim method is the only way to allow for freedom of contract and flexibility, but also preservation of fairness and avoidance of exploitation or duress. This precautionary process will also prove to always be friendlier, cheaper, and faster than resolving through legal process.

CONCLUSION

The practice of surrogacy is gaining more and more legitimacy in many of the states of the U.S. as well as among additional other countries throughout the world. While I cannot deny that this practice is imbued with challenges and a variety of complicated legal-ethical dilemmas, there is a feeling that nonetheless the negative exposure that the surrogacy practice received in its early days, especially following the unfortunate Baby M case, the tide is turning and it is time to focus on and enact appropriate regulations. This is especially true because giving full and unregulated freedom of contract, as some economic law scholars contend, is especially dangerous for the economically inferior party. Imposing strict restrictions, however, is also dangerous and may only lead to fueling the black market both inside and outside the U.S. and may similarly lead to damaging the economically inferior party.

This Article focuses on three intrinsic contractual problems, among the many intrinsic and extrinsic problems that surrogacy contracts raise to the surface. The essence of this Article's innovation is the contention that those difficulties, while indeed very problematic under the realm of the classical contract law, are no longer problematic due to the developments of the modern contract law. Modern contract law today supplies us with doctrines and theories that are needed to better cope with those problems and minimize them to the extent practicable. To defend the surrogacy contract from those problems, this Article offers specific practical administrative-legal mechanisms that must be put into effect.

intending parents will be treated as the legal parents of the child and he will be treated as a legitimate child.

184. For a similar claim in the research literature, see Fink & Carbone, *supra* note 114, at 57–64; see also John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 923–25 (1996).

The legal limbo concerning the practice of surrogacy that exists today in the vast majority of the states of the U.S. is extremely detrimental and causes huge damage to its parties and the child who is the subject of the agreement. As the practice of surrogacy gains more and more popularity, the lack of appropriate state or federal regulation is emphasized and increasingly damages more and more individuals, some of whom are turning to surrogacy as a last resort to becoming parents. Therefore, I suggest that legislators should fully legalize surrogacy agreements and properly define their terms. The time has arrived for the legal realm to follow the social acceptance already in place to recognize the legitimacy of the surrogacy contract and to even follow suit with enforcement under the appropriate circumstances. This Article thus outlines the appropriate blueprint for ordering surrogacy agreements in a complicated and complex modern era in the hopes of moving one step closer to the full recognition of surrogacy contracts.