In Defense of Surrogacy Agreements: A Modern Contract Law Perceptive

Yehezkel Margalit
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A MODERN CONTRACT LAW PERSPECTIVE

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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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CONCLUSION

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. 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

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. 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, to moderate regulation to freedom of contract and recognition of the legal parenthood of the intending parents. This wide range of laws has already received the notion of “jurisdictional chaos.” 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.

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,

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3. Id. at 514–17.
4. Id. at 518–22.
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 surro-
gacy 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 surro-
gate mother provides two components of motherhood: the genetic
material of the ovum and the gestational contribution.\(^7\) The gesta-
tional 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 infert-
tile 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 tra-
ditional 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 con-
tribution 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 under-
standing 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 suf-
der due to the means their parents had chosen to bring them into to
the world.\(^10\) In this Article I will explore the “labor pains” that sur-
rogacy 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.\(^11\)

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\(^7\) See Ladomato, supra note 6, at 247.
\(^8\) Id. at 247–48.
\(^10\) See Ladomato, 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, as well as the claim that this must be so due to, *inter alia*, the superiority of the contractual paradigm in the surrogacy field. 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


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. 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. During this period, other documented difficult surrogacy incidents occurred, including the case of Baby Cotton in England, as well other less sensationalized controversies in the U.S. 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, LEGITIMISING 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: 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). 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.

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. 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.

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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).


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. 305–04 (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.
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. 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, 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 parties that will likely fuel the existing call to make all surrogacy contracts void.


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


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


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 Cum. 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 risks\(^{36}\) 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).


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. 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. 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. 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, the desire of a pregnant woman to abort her fetus, the withdrawal of biological parents from their initial agreement for the adoption of their child.

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.

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).
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. 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. 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. 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.

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. This issue is well articulated

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
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. Some even go so far as to argue that demanding performance on the initial contract in this context is unconscionable.

III. FROM A PROBLEMATIC AND REJECTED PRACTICE TO A SOCIA LLY 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. 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).


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, federal,⁵⁷ 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).


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.


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).

Uniform Parentage Act (UPA) went so far as to fully recognize gestational surrogacy. 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, 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. In addition, Texas and Tennessee have partial surrogacy regimes that leave whether surrogacy contracts will eventually be enforced unclear. Several countries outside the U.S have also recognized the legality of both commercial and altruistic surrogacy contracts including Russia and the Ukraine. Other countries only recognize the legality of altruistic ones including Israel, Brazil, Greece, Holland, the United Kingdom, Canada, and Australia. In other countries such as India, China, New Zealand, and Thailand, legislation is silent, but in practice surrogacy is widespread. 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.

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. In addition, some seminal verdicts have

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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.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{73} The
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. The vast majority of the states’ different legal ordering laws have been legislated for the variety of spousal contracts, 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. 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).


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.\footnote{See Feinman, supra note 76, at 1285 n. 12.} 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.\footnote{See Mark Pettit, Freedom, Freedom of Contract, and the “Rise and Fall,” 79 B.U. L. Rev. 263, 299 (1999).} 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.\footnote{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).}

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.\footnote{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, 1780–1880 (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).} 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.\footnote{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.} 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.\footnote{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.\footnote{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.\footnote{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).\footnote{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, distributitional justice, reasonableness, expectation for collaboration, solidarity, mutuality, and even encouragement to renegotiate in the case of changed circumstances.\footnote{86}

In modern contract law, which is the prevailing philosophy in the Anglo-American system today,\footnote{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
various social interests, 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 doctrine 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.

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


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.\textsuperscript{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.\textsuperscript{92} In addition, there are several
specific doctrines that have developed in the modern model that
can exempt parties from their contractual responsibilities such as:
exploitation, economic duress, public policy, and frustration of pur-
pose. 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 his-
tory of contract law. It first appeared in equity but was later embedded
in common law. Some assume that its ancestor is the Roman doc-
trine 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 unconscio-
nable contracts.\textsuperscript{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 Restate-
ment (Second) of Contracts.\textsuperscript{94} Some scholars thought this doctrine to
be one of the most innovative sections of the U.C.C., the biggest change

\textsuperscript{91} See Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Proce-
dural 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

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

\textsuperscript{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 (1825). See also Dulzell
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: Uncon-
scionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance,*

\textsuperscript{94} See U.C.C. § 2-302; see also Restatement (Second) of Contracts § 208. For the wide-
spread acceptance of this doctrine in every jurisdiction in the U.S., whether by the leg-
islature 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.\textsuperscript{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.\textsuperscript{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 to some degree to justify any judicial intervention.\textsuperscript{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.\textsuperscript{98} There is no doubt that this doctrine has challenged classical contract law notions and therefore one can find both numerous opponents and supporters of the doctrine.\textsuperscript{99}

Many scholars try to justify the unconscionability doctrine in light of philosophical and contractual theories,\textsuperscript{100} while others tried

\begin{small}
\begin{itemize}
\item \textsuperscript{96} See Frank P. Darr, \textit{Unconscionability and Price Fairness}, 30 \textit{Hous. L. Rev.} 1819, 1829 n. 64 (1994).
\item \textsuperscript{98} Id. at 50.
\item \textsuperscript{99} For this statement and for a survey of many studies that outline the challenges of this doctrine, see Lifshitz, \textit{supra} note 28, at 330 n. 45.
\item \textsuperscript{101} Id. at 50.
\end{itemize}
\end{small}
to reshape it into a more concrete and practical model. 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, its wide spectrum provides a very useful tool in court’s hands where other objective doctrines have failed, during the years the courts have agreed on a unified and clear framework of when and how to use it. 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.

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. As of the year 1995, every state in the U.S. has anchored the doctrine in its jurisdiction. Moreover, the majority of research studies agree on its necessity and today it is an inherent part of the common law. 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.
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. 555, 541–42 (1992).
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.
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. There are claims that with the growing use of arbitration the usage of the unconscionability doctrine will be increased.

The potential implication of this doctrine in the private ordering of spousal relationships has been explored by some scholars 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. In the wider context of determining legal parenthood by agreement, this doctrine of unconscionability has not been sufficiently explored in theory or in practice. 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.

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. 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. 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).


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).


118. See id.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{121.} See Coleman, supra note 30, at 513.


\textsuperscript{123.} See Restatement (Second) of Contracts §§ 164, 175, 177, 208.

\textsuperscript{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.  

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. 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].” 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.”

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. 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.”

125. See Coleman, supra note 30, at 513.
126. Id. at 514.
127. Id. at 513.
128. Id.
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.\(^\text{131}\) 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.\(^\text{132}\)

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.\(^\text{133}\) 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.\(^\text{134}\) 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


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).


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.\footnote{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).}

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.\footnote{See Eisenberg, No Law, supra note 76, at 812.} 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.\footnote{Robert W. Gordon, Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law, 1985 Wis. L. Rev. 565, 570 (1985).}

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.\footnote{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. Sociol. 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.} 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.
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 soldiery 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

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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].
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).
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. 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. 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.

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. Similarly, this unique and complicated relationship may be long-term, since very often it is not clear

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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.


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

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.\textsuperscript{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.\textsuperscript{154}

\textit{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

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

\textsuperscript{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.\footnote{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. 475, 504–09 (2008).} 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.\footnote{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).} However, the modern model supplies us with several tools that help deal with such problems. One significant tool—adapting 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.\footnote{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.} 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.\footnote{158. See ALL, *Principles of the Law of Family Dissolution: Analysis and Recommendations* 982–83, 987 (2000).} Thus, many research studies recommend that the contract should be inspected in light of the new and not the original circumstances.\footnote{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.} 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.\footnote{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. 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. However, today in several European countries, the modern contract model and this doctrine are so common that it is even a mandatory obligation.

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, 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

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).
the contract\textsuperscript{165} 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.\textsuperscript{166} Accordingly, in recent years this doctrine has become increasingly popular in various commercial contracts.\textsuperscript{167} As compared to in the past, some scholars now contend that in light of the privatization of the family\textsuperscript{168} this doctrine is applicable even in the spousal realm and the spousal obligations and rights are therefore renegotiable.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.
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

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occurred and this shift will not damage the child’s best interests.\textsuperscript{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.\textsuperscript{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

\textsuperscript{174} See, \textit{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. \textit{See, \textit{e.g.}}, \textit{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, \textit{Baby M. and the Question of Parenthood}, 76 GEO. L.J. 1811, 1820, n. 24 (1988).

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;\(^\text{176}\) (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

the eventual enforcement of the surrogacy contract, and avoid future disputes.\textsuperscript{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.\textsuperscript{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

\textsuperscript{177} See Blumenthal, supra note 54, at 210–11.

\textsuperscript{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.\textsuperscript{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,\textsuperscript{180} while in Virginia and New Hampshire, this practice is mandatory.\textsuperscript{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”).\textsuperscript{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.\textsuperscript{183} This process allows for the

\textsuperscript{179} For a similar argument, see Lascarides, supra note 122, at 1257–58.
\textsuperscript{180} See 750 ILL. COMP. STAT. 47/25 (2005); see also TEX. FAM. CODE ANN. § 160.751-63 (West 2002 & Supp. 2005).
\textsuperscript{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).
\textsuperscript{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. 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.