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## Whole Foods for the Whole Pregnancy: Regulating Surrogate Mother Behavior During Pregnancy

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WHOLE FOODS FOR THE WHOLE PREGNANCY:  
REGULATING SURROGATE MOTHER BEHAVIOR  
DURING PREGNANCY

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Following the ruling in the well-known Baby M case,<sup>1</sup> which held contracts for surrogate pregnancies void and unenforceable under New Jersey Law,<sup>2</sup> Jeremy Rifkin, co-chair for National Coalition Against Surrogacy, predicted that “‘two years from now we will have legislation’ banning surrogacy.”<sup>3</sup> Nearly twenty years later, Mr. Rifkin’s prediction certainly has not come true. Assisted Reproductive Technology (ART) has continued to develop in the United States; although specific statistics are hard to come by, “about 1,600 babies a year in the United States are born through gestational surrogacy (which now accounts for almost all surrogacies), more than double the number in 2004.”<sup>4</sup> However, the legal frameworks affecting surrogacy agreements are as varied as the people who enter into such contracts.

Pregnancy is a risky endeavor under any circumstances, but medical technology has opened up new avenues through which people

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1. *In re Baby M*, 537 A.2d 1227, 1231 (N.J. 1988), *superceded by statute*, N.J. STAT. ANN. § 9:3-46 (2016), *as recognized in In re Adoption of Children* by G.P. B., 736 A.2d 1277, 1284–85 (N.J. 1999).

2. *Id.* at 1234.

3. Janet Cawley, *Surrogate Moms Fight the ‘Slavery,’* CHI. TRIB. (Sept. 1, 1987), [http://articles.chicagotribune.com/1987-09-01/news/8703060344\\_1\\_surrogate-mothers-surrogacy-arrangement-mary-beth-whitehead](http://articles.chicagotribune.com/1987-09-01/news/8703060344_1_surrogate-mothers-surrogacy-arrangement-mary-beth-whitehead) [<http://perma.cc/FRL28RLS>].

4. Anemona Hartocollis, *And Surrogacy Makes 3*, N.Y. TIMES (Feb. 19, 2014), [http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html?\\_r=0](http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html?_r=0) [<http://perma.cc/SA39DL9L>]; *see also* Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS, 7 (2010), <http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf>.

can use their own or donated genetic material to create their families.<sup>5</sup> Using a surrogate to carry a fetus to term involves a whole host of additional hurdles for the hopeful parent(s). For many couples, surrogacy is a last-ditch attempt at what has been an emotionally exhausting, disappointing process. No matter how the parent(s) came to choose surrogacy, the financial cost is enormous,<sup>6</sup> and the medical procedures must be perfectly choreographed and executed.<sup>7</sup>

State legislatures have struggled to keep pace with medical advancements, and as a result, there is very little statutory consensus as to a surrogate's rights and obligations.<sup>8</sup> Some states prohibit surrogacy agreements as against public policy;<sup>9</sup> others are much more willing to enforce the agreements as long as they meet certain statutory requirements.<sup>10</sup> States also vary in the types of permissible surrogacy arrangements, which demonstrates that even within the context of this single issue, different legislatures may still prioritize different policy concerns. Central to all of the legal questions prompted by surrogacy arrangements is the tension between the surrogate's bodily autonomy and the desires of the intended parents. Most of the cases arising from surrogacy agreements have disputed the resulting child's parentage,<sup>11</sup> or one party's desire to terminate

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5. Although outside the scope of this Note, it will be interesting to see whether certain states' approaches come under fire in the near future in the light of rulings that expand familial rights like *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). For example, FLA. STAT. § 742.15(2) (LexisNexis 2015) requires a physician certify that the intended mother is physically unable to bear children. Such a prerequisite seems unlikely to hold water when validly married couples consisting of two men attempt to enlist a surrogate.

6. See *Anticipated Costs for Gestational Surrogacy*, CIRCLE SURROGACY, <http://www.circlesurrogacy.com/costs> [<http://perma.cc/9SAGS8NS8>] (estimating anywhere from \$100,000 to \$150,000).

7. See *Miller v. Am. Infertility Grp. Of Ill.*, 897 N.E.2d 837, 839 (Ill. App. Ct. 2008); see also *id.*

8. See Alison Sherwood, *Surrogacy Laws in the United States*, MILWAUKEE WIS. J. SENTINEL (Aug. 4, 2012), <http://www.jsonline.com/news/health/163772546.html> [<http://perma.cc/5SY8J9Z5>].

9. See, e.g., MICH. COMP. LAWS § 722.855 (2016).

10. Compare WASH. REV. CODE ANN. §§ 26.26.240–26.26.250 (LexisNexis 2016) (declaring any surrogacy contract for compensation void and unenforceable in the state of Washington and classifying violation of related statutes as a gross misdemeanor), with NEV. REV. STAT. ANN. § 126.740(1) (LexisNexis 2015) (permitting surrogacy agreements when the surrogate has undergone medical exam and has received independent legal consultation about the contract's terms). Interestingly, despite the myriad approaches, the statutory root of many states' assisted reproduction laws is some adaptation of the Uniform Parentage Act. UNIF. PARENTAGE ACT § 803 (NAT'L CONF. OF COMM'N UNIF. ST. L. 2000).

11. This Note begins from the premise that the intended parent(s) are the legal parents of the child. Some jurisdictions treat the surrogate as the legal parent of the resulting child, and Part III of this Note argues in favor of intent as a basis for establishing legal parentage. But for consistency's sake, the woman who carries the fetus will be referred to as the "surrogate" or "gestational carrier," and the people who plan to parent that child as the "intended parents."

the pregnancy, and as a result, much of the legislation addressing surrogacy pertains to the aftermath following the child's birth.<sup>12</sup>

Yet the process begins long before the birth. The intended parent(s) often struggled with infertility for a substantial period of time prior to choosing to enlist the help of a surrogate, and have been immersed in an increasingly desperate pursuit of an expansion of their family. The narrative is not rare: approximately six percent of women ages fifteen to forty-four are unable to get pregnant after one year of unprotected sex and twice as many women experience impaired fecundity, or difficulty getting pregnant or carrying a pregnancy to term.<sup>13</sup> The surrogates likewise have already undergone medical evaluations to make sure they qualify as a potential match, and considered for themselves what the establishment of this relationship will mean to them and their own families.<sup>14</sup> The entire process is fraught with hope as well as anxiety, and all of the parties will feel the gravity of the endeavor.

This Note examines an as yet largely undefined scenario occurring prior to the child's birth. Surrogacy contracts typically contain at least some provisions related to the surrogate's expected behavior during the pregnancy.<sup>15</sup> I will analyze what causes of action may be available to parents when the surrogate breaches one of those provisions. Because of the overarching issues of personal autonomy and the liberty interests of both the intended parent(s) and the surrogate, many courts have been reluctant to treat surrogacy agreements the same as other contracts.<sup>16</sup> Even in the context of commercial contracts, specific performance, or a court requiring a party to fulfill their end of the bargain as promised,<sup>17</sup> is not a remedy available for contracts of service.

Although not strictly speaking a commercial contract, a surrogacy agreement is a contract for a service, and I will argue specific

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12. See, e.g., *T.M.H. v. D.M.T.*, 79 So. 3d 787, 801 (Fla. Dist. Ct. App. 5th Dist. 2011); *Johnson v. Calvert*, 851 P.2d 776, 779 (Cal. 1993), *superseded by statute as stated in Catterjee v. King*, 280 P.3d 283 (N.M. 2012); *In re Baby M*, 537 A.2d 1127, 1237 (N.J. 1988), *superseded by statute*, N.J. STAT. ANN. § 9:3-46 (2016), *as recognized in In re Adoption of Children by G.P. B.*, 736 A.2d 1277, 1284–85 (N.J. 1999).

13. See *Infertility FAQs*, CTR. FOR DISEASE CONTROL & PREVENTION <http://www.cdc.gov/reproductivehealth/infertility/> [<http://perma.cc/M6GLR5H7>] (last updated Sept. 16, 2015).

14. See Anna Medaris Miller, *What's it Like to be a Surrogate Mom?*, U.S. NEWS & WORLD REP. (May 6, 2016), <http://health.usnews.com/health-news/health-wellness/articles/2015/05/06/whats-it-like-to-be-a-surrogate-mom> [<http://perma.cc/FQB7FHUF>].

15. See, e.g., *Surrogacy Contract Sample*, NPR (July 2015), [http://media.npr.org/documents/2015/july/Surrogacy\\_contract\\_sample\\_070215.pdf](http://media.npr.org/documents/2015/july/Surrogacy_contract_sample_070215.pdf) (requiring, for example, that the surrogate begin taking prenatal vitamins and follow a doctor's diet and caffeine consumption recommendations).

16. See, e.g., *In re Baby M*, 537 A.2d at 1247.

17. See RESTATEMENT (SECOND) OF CONTRACTS, ch. 16, topic 3, Intr. Note (AM. LAW INST. 1981).

performance should be available as an equitable remedy in a very narrow set of circumstances. Namely, specific performance should be available to intended parent(s) when the surrogate violates an express provision of the contract pertaining to her behavior during the pregnancy, so long as she still intends to carry the fetus to term. This preserves her right to terminate the pregnancy, which has been upheld in multiple jurisdictions, and also protects all parties' rights to enter into a voluntary contract with legal effect. Given the financial and emotional investment required of the intended parents, specific performance provides the intended parents with an equitable remedy for a violation of the trust they placed in the surrogate.

This Note will progress as follows: Part I summarizes the development of surrogacy within both medical and social contexts, with an overview of the current status of surrogacy laws in the United States. Part II argues in favor of legal acknowledgment and enforcement of surrogacy contracts. Part III explains why surrogacy agreements should not be analyzed under family law. Part IV explores the fetus' legal role and how a suit against it could be supported, and Part V settles upon specific performance as a viable equitable remedy in response to the surrogate's violation of behavioral provisions in a surrogacy contract. Subject to an assortment of exclusions and parameters, specific performance could provide redress to intended parents when other causes of action might be impractical or pose too high an evidentiary burden. Whether the surrogacy is traditional or gestational,<sup>18</sup> that consideration should not affect the outcome of such a dispute because the surrogate never intended to act as a parent to the resulting child regardless of whether she contributed genetic material.

## I. HISTORY AND CURRENT STATE LAWS

### A. *History*

The practice of surrogacy reaches as far back as Genesis, when Abram's wife Sarai instructed him "Go, sleep with my maidservant

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18. A "traditional" surrogate uses the ova of the woman carrying the pregnancy, while a "gestational" surrogate, which only became medically possible after the development of in vitro fertilization (fertilization of gametes in a laboratory), combines gametes from either the intended parent(s) or a donor and implants the fertilized egg into the surrogate's uterus. *In Vitro Fertilization*, NAT'L INST. OF HEALTH: U.S. NAT'L LIBR. OF MEDICINE, MEDLINEPLUS, <https://medlineplus.gov/ency/article/007279.htm> [<http://perma.cc/6FLHA UXK>] (last updated Mar. 11, 2014). The difference is that a traditional surrogate is genetically related to the resulting child, but a gestational surrogate is not.

[Hagar]; perhaps *I can build a family through her.*<sup>19</sup> Similarly, Rachel told Jacob to sleep with her servant, Bilbah, “so that she can bear children for me and that through her I too can build a family.”<sup>20</sup> Refusing to be outdone by her sister, Leah also relied on her servant, Zilpah,<sup>21</sup> and, all told, four of Jacob’s twelve immediate descendants were born via surrogate.<sup>22</sup> These family trees highlight three noteworthy points. First, surrogacy is not at all a new idea. Although in vitro fertilization (IVF) was first successfully executed in 1978,<sup>23</sup> ultimately enabling gestational surrogacy, the concept and practice of having another woman carry a baby for a married couple has been going on for centuries. Second, the Old Testament wives were the instigators of the surrogacies. Despite their lack of genetic consanguinity, the wives saw surrogacy as a legitimate way to create her *own* family; none of Jacob’s sons were considered bastards or otherwise illegitimate.<sup>24</sup> Third, the servants’ lack of consent to this arrangement exemplifies concerns still held today about exploitation of economically vulnerable women. These concerns are not entirely unfounded, but modern surrogacy occurs in a context of *de jure* equality, and accompanying social norms provide further protection of the surrogates’ rights. On slave plantations in the United States, plantation masters commonly impregnated female slaves.<sup>25</sup> In such cases, the objective was much more insidious than the Old Testament wives’ desire to improve their familial status by producing sons. The plantation owners created a self-regenerating labor force, focused entirely on property, not progeny.<sup>26</sup>

But the strong currents driving medical technology forward make surrogacy an inevitable part of our society now and in the future, and the law would better serve the potentially vulnerable participants’ interests by acknowledging its presence, increasing relevance, and regulating accordingly. In turning a blind eye to surrogacy by refusing to enforce even the most carefully crafted, equitable contracts, courts and legislatures will fall even further behind on adapting the law to current medical realities.

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19. *Genesis* 16:2 (NIV) (emphasis added).

20. *Genesis* 30:3 (NIV).

21. *Genesis* 30:9 (NIV).

22. *See Genesis* 30 (NIV).

23. Adam Eley, *How has IVF Developed Since the First “Test-Tube Baby,”* BBC HEALTH NEWS (July 23, 2015), <http://www.bbc.com/news/health-33599353> [<http://perma.cc/5YY9RKSH>].

24. *See Genesis* 30:26 (NIV).

25. Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 97 (2010).

26. *See id.*

### B. Current Approaches

Surrogacy is a prime example of states serving as “laborator[ies]” for “social and economic experiments.”<sup>27</sup> Individual states may design their own surrogacy policies; the approaches are so varied there is no clean-cut circuit split or majority-minority divide. Several states have expressly declared surrogacy contracts void as against public policy.<sup>28</sup> The reasons states void surrogacy agreements tend to arise out of concern about commodifying the surrogate or commodifying the resultant baby.<sup>29</sup>

The argument in favor of “traditional” family construction still bleeds into legal decisions about surrogacy. When New Jersey governor Chris Christie vetoed the New Jersey Gestational Carrier Agreement Act in 2012, he said “[p]ermitting adults to contract with others regarding a child in such a manner unquestionably raises serious and significant issues,” and that the ethical considerations were not conclusively researched to his satisfaction.<sup>30</sup> He vetoed the act again when the New Jersey Legislature sent it to him in June 2015.<sup>31</sup> The veto came just days after the decision legalizing same-sex marriage, *Obergefell v. Hodges*.<sup>32</sup> Because same-sex couples obviously cannot produce a child of their own, it will be interesting to see how LGBT activists attack the veto.

Meanwhile in Louisiana, even after making linguistic compromises with anti-abortion groups, backers of a bill legalizing and regulating surrogacy received a veto from Bobby Jindal in May 2014.<sup>33</sup> As with Governor Christie, this was the second veto of a proposed surrogacy law from Governor Jindal.<sup>34</sup> Supposedly, “[t]he lack of confidence in the bill’s ability to prevent ‘renting’ of bodies

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27. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

28. See *U.S. Surrogacy Law by State*, THE SURROGACY EXPERIENCE (2016) <http://www.thesurrogacyexperience.com/surrogate-mothers/the-law/u-s-surrogacy-law-by-state> [<http://perma.cc/8VEN2XCJ>].

29. See, e.g., Hugh V. McLachlan & J. Kim Swales, *Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts*, 72 LAW & CONTEMP. PROB. 91, 96–97 (2009).

30. Michael Booth, *Christie Vetoes Surrogacy Contract Bill*, N.J. L.J. 1, 1 (June 30, 2015).

31. *Id.*

32. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2584 (2015).

33. See Emily Lane, *Bobby Jindal Again Vetoes Bill Allowing For Legal Surrogacy Births in Louisiana*, THE TIMES-PICAYUNE (New Orleans, La.), May 31, 2014, [http://www.nola.com/politics/index.ssf/2014/05/bobby\\_jindal\\_again\\_vetoes\\_bill.html](http://www.nola.com/politics/index.ssf/2014/05/bobby_jindal_again_vetoes_bill.html) [<http://perma.cc/TXR5MQX8>].

34. See *id.*



was a deal breaker” that offended anti-abortion activists.<sup>35</sup> Some believe more generally that prospective parents should inherently favor adoption over assisted reproduction because so many children already in need of a stable home are lost within the foster care system.<sup>36</sup> But this condescending rhetoric denies infertile couples, same-sex couples, and unmarried people a medically possible means of building their families how they choose; it reduces these people’s family creation ability to their own biological limits.

The wide variance exists even among the states that do accept surrogacy contracts. For example, Illinois does not permit “adopted embryos,” meaning at least one of the intended parents must contribute a gamete; the resulting child will then be genetically related to at least one of the intended parents.<sup>37</sup> Meanwhile, Utah prohibits “traditional” surrogacy by excluding pregnancies using the surrogate’s ova from the definition of authorized “gestational agreements.”<sup>38</sup>

Virginia presents two options for surrogacy arrangements: one in which the parties petition the court for approval of their contract,<sup>39</sup> and one in which the court does not approve the contract ahead of time.<sup>40</sup> The obligations of the parties change somewhat depending on the route they chose to take.<sup>41</sup> A court-approved surrogacy contract involves a home visit, an appointed guardian ad litem to represent the child, and counsel for the surrogate.<sup>42</sup>

Jurisdictions with statutory schemes on surrogacy frequently require reimbursement for the surrogate’s medical care and other expenses incident to the pregnancy,<sup>43</sup> and states like Washington prohibit additional payment.<sup>44</sup> In effect, Washington and similar states have chosen to permit “altruistic” but not “commercial” surrogacy. As the names imply, the “altruistic” surrogate receives no financial compensation for the pregnancy, while a “commercial” surrogate, though she may also have pure, intrinsic motivations,

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35. *Id.*

36. See Elizabeth Eaves, Opinion, *Not the Handmaid’s Tale*, Forbes, Dec. 19, 2008, [http://www.forbes.com/2008/12/18/kuczynski-surrogacy-motherhood-oped-cx\\_ee\\_1219eaves.html](http://www.forbes.com/2008/12/18/kuczynski-surrogacy-motherhood-oped-cx_ee_1219eaves.html) [<http://perma.cc/UCM8GSRP>] (describing responses to Alex Kuczynski’s story of using a surrogate; original story is Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES MAG., Nov. 28, 2008, <http://www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html> [<http://perma.cc/KC8NYDZL>]).

37. Nancy Ford, *The New Illinois Gestational Surrogacy Act*, 93 ILL. B.J. 240, 245 (2005).

38. UTAH CODE ANN. § 78B-15-801(7) (LexisNexis 2015).

39. VA. CODE ANN. § 20-160(A) (2015).

40. VA. CODE ANN. § 20-159(B) (2015).

41. *Id.*

42. VA. CODE ANN. § 20-160(A) (2015).

43. See, e.g., VA. CODE ANN. § 20-160(B)(5) (2015).

44. WASH. REV. CODE ANN. § 26.26.230 (LexisNexis 2016).



receives payment for carrying the child.<sup>45</sup> States subscribing to that distinction do so in an effort to dodge worries about exchanging money for babies or incentivizing women to sell (or perhaps a better term is “lease”) their bodies.<sup>46</sup>

As the market for surrogate pregnancies has grown, facilitators of the process have also developed their own internal regulations to protect parties’ interests. Possibly because the primary arbiters are medical and legal professionals, self-imposed ethical standards are rapidly emerging. The American Medical Association notes the potential ethical issues head on in the AMA Code of Medical Ethics: “Surrogate motherhood may commodify children and women’s reproductive capacities, exploit poor women whose decision to participate may not be wholly voluntary, and improperly discourage or interfere with the formation of a natural maternal-fetal or maternal-child bond.”<sup>47</sup> However, “most surrogacy arrangements are believed by the parties involved to be mutually beneficial, and most are completed without mishap or dispute.”<sup>48</sup>

The American Academy of Assisted Reproductive Technology Attorneys has its own ethical code for representation, covering such topics as conflicts of interest, legal fees, and the scope of representation.<sup>49</sup> Their directory provides contact information for well over a hundred attorneys across the country,<sup>50</sup> indicating that this field is quickly expanding, and that professionals are collaborating on establishing norms and standards in spite of the non-uniform legal frameworks.

At the federal level, Congress began requiring fertility clinics to report their success rates beginning in 1992.<sup>51</sup> The Center for Disease Control and Prevention now has fairly comprehensive data about different assisted reproduction methods for each year, although the usual difficulties of monitoring people’s reproductive choices still somewhat limits the research results.<sup>52</sup>

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45. *Surrogacy*, FERTILITY CONNECTIONS, <http://www.fertilityconnections.com.au/surrogacy> [<http://perma.cc/PP62GDYG>].

46. See *Surrogacy: Wombs for Rent?*, NOW: ON PBS (Sept. 18, 2009), <http://www.pbs.org/now/shows/538> [<http://perma.cc/RUC2ESGE>].

47. AM. MED. ASSOC., CODE OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION 2.18 (2010).

48. *Id.*

49. AM. ACAD. OF ASSISTED REPROD. TECH. ATT’YS, AAARTA ETHICS CODE, <http://www.aaarta.org/aaarta/academy-info/ethics-code> [<http://perma.cc/LY97ZDPB>].

50. *Find an Attorney*, AM. ACAD. OF ASSISTED REPROD. TECH. ATT’YS, [http://www.aaarta.org/aaarta\\_directory](http://www.aaarta.org/aaarta_directory) (searchable by map or name) [<http://perma.cc/B55383RB>].

51. Fertility Clinic Success Rate and Certification Act of 1992, Pub. L. No. 102-493, 106 Stat. 3146 (1992).

52. See *2013 ART Fertility Success Rates*, CTR. FOR DISEASE CONTROL 1, 1 (2015), <http://www.cdc.gov/art/reports/index.html> [<http://perma.cc/3LT3CL2R>].

## II. SURROGACY CONTRACTS SHOULD BE LEGALLY ENFORCEABLE

Surrogacy contracts inhabit a unique intersection of family, contract, and property law. But these different legal areas do not necessarily cohabit seamlessly. For example, contractual agreements are a core feature of marriage, and can give rise to lifetime liability for spousal support.<sup>53</sup> Historically, marriage was, in essence, a property-based transaction: “marriage was an arrangement of property for the propertied.”<sup>54</sup> And of course, common law places high value on the transfer of property downward through familial generations, most generally through patriarchal inheritance and devises.<sup>55</sup> Children “were the conduits for family wealth.”<sup>56</sup> Thus, reproductive capacity is inextricably linked to familial structure, but in many ways the history of laws affecting families abut modern notions of what family means, both in structure and in motive.<sup>57</sup> As one commentator points out, “[t]he trend towards independence and self-sufficiency for women . . . has made clear . . . that traditional marriage is not well-adapted to dual-career couples.”<sup>58</sup>

This tension between law and social norms also appears in the surrogacy context. Despite the longstanding economic underpinnings of marriage, many courts are extremely wary of adding any commercial element to producing children.<sup>59</sup> Indeed, that fear of commercialization is the primary policy basis for courts to void surrogacy contracts.<sup>60</sup> This overt disavowal of “baby-selling” or any indicia of commodifying the reproductive process leads to the conclusion that surrogacy contracts are entirely classifiable as contracts for personal service, despite the literal “production” of a human being. The

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53. See UNIF. MARRIAGE & DIVORCE ACT § 308 (NAT’L CONF. OF COMM’R ON UNIF. ST. L. 2015), although the trend in many jurisdiction tends to favor temporary, or rehabilitative, spousal maintenance. *Contra id.*

54. Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 350 (1979).

55. *Id.*

56. *Id.*

57. See, e.g., the Married Women’s Property Acts, adopted by numerous states in the mid nineteenth century, in light of the fact that in 2014, women comprised 46.8% of the U.S. workforce; MO. REV. STAT. §§ 1167–69 (1880); PA. ACT 21 MAR. 1841 § 3. P.L. 106; PA. ACT 11 APR. 1848, §§ 1–6. P.L. 536; PA. ACT 9 APR. 1849, §§ 10–12. P.L. 526; PA. ACT 25 APR. 1850, § 37. P.L. 575; PA. ACT 11 APR. 1858, § 1. P.L. 315. DEP’T. OF LABOR, CHART: LABOR FORCE BY SEX, 2014 AND PROJECTED 2022, [http://www.dol.gov/wb/stats/latest\\_annual\\_data.htm](http://www.dol.gov/wb/stats/latest_annual_data.htm) [<http://perma.cc/DBA6FBBC>].

58. Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2090 (2000).

59. See Hon. Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL’Y 21, 28 (1989).

60. See *id.*

classification matters for determining the types of remedies usually available in the event of a breach, but surrogacy involves such a unique set of interests, certain small deviations from those norms may be appropriate.

Enforcing surrogacy agreements in general preserves central tenets of contract law. By intervening either to declare a contract void for public policy or to eliminate particular provisions, courts place an undue value judgment on the parties, restricting the parties' freedom to enter into voluntary agreements. In the context of women's reproductive choice, voiding surrogacy contracts "reinforce the anti-feminist stereotype summed up in the slogan, 'biology is destiny.'"<sup>61</sup> In addition, the quality or equity of the bargain is outside the court's purview,<sup>62</sup> absent fraud, duress, or unconscionability. As an ancillary recommendation, all parties to a surrogacy contract should be entitled to independent legal counsel.<sup>63</sup> The presence of attorneys levels the playing field between parties of potentially disparate levels of legal sophistication and insulates against potential future allegations of procedural unconscionability.<sup>64</sup>

Substantial rhetoric exists arguing that surrogacy takes advantage of economically vulnerable women; although worthy of consideration, this concern has likely been exaggerated.<sup>65</sup> A study conducted in 1994 found the average family income of surrogates was several thousand dollars above the national median.<sup>66</sup> This held true for both unmarried and married surrogates, respectively,<sup>67</sup> so there does not appear to be a disproportionate effect on single women, a statistically more economically vulnerable population in general.<sup>68</sup>

Economic interests of all parties, including the surrogacy agencies that match surrogates and intended parents, present some safeguards against taking advantage of financially vulnerable women. To reiterate the importance of organizations like AAARTA, "[a]lthough

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61. *Id.*

62. *See, e.g.,* Petroleum Refractionating Corp. v. Kendrick Oil Co., 65 F.2d 997, 998–99 (10th Cir. 1933).

63. Some jurisdictions do require legal counsel for all parties. *See, e.g.,* VA. CODE ANN. § 20-160 (2016); NEV. REV. STAT. ANN. § 126.740 (LexisNexis 2015).

64. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

65. *See* Posner, *supra* 59, at 25 ("Interviews with surrogate mothers indicate not only that they are not poor . . . [w]hen asked what they plan to do with the [compensation they receive from intended parents], they give standard middle class answers.").

66. *See* HELENA RAGONÉ, SURROGATE MOTHERHOOD CONCEPTION IN THE HEART 54–55 (1994).

67. *See id.*

68. *See* Alexandra Cawthorne, *The Straight Facts on Women in Poverty*, CENTER FOR AMERICAN PROGRESS (Oct. 2008), <https://www.americanprogress.org/issues/women/report/2008/10/08/5103/the-straight-facts-on-women-in-poverty> [<http://perma.cc/R2QRTXU2>].

the absence of price discrimination is in part grounded in law, it is primarily a result of self-regulation by the fertility industry.”<sup>69</sup> Many surrogacy agencies will not accept surrogates who use governmental assistance like welfare and Section 8 housing.<sup>70</sup> Even when the surrogate receives additional compensation, surrogacy is not as lucrative as critics make it out to be. Different payment schedules obviously would beget different pay rates, and a true assessment of the money earned would also consider the intensity of the individual surrogate’s literal and figurative labor, but even generous estimates will garner well below minimum wage.<sup>71</sup> For international surrogacies where the exchange rate strongly favors the United States,<sup>72</sup> there may be more room for an economic argument, but states could easily regulate compensation policies for surrogacies within their own borders. Although “[a]buses in surrogacy likely exist . . . the characterizations of tangible harm to surrogate mothers do not comport with the empirical evidence.”<sup>73</sup>

Treating surrogacy agreements through an exclusively contract law approach would confine disputes to the people who actually signed the agreement, rather than opening a cause of action for the as-yet-unborn fetus. Only parties to a contract have standing to recover for a breach. In a surrogacy arrangement, the intended parent(s), the surrogate, and the surrogate’s spouse or partner, if she has one,<sup>74</sup> are the relevant parties. A fertility clinic or other medical professionals may also be involved in the contracting process, but they play only a minimal role in the potential causes of action

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69. Peter Nicholas, *Symposium Essay: Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1253 (2014).

70. See, e.g., *Frequently Asked Questions for Surrogates*, CIRCLE SURROGACY, <http://www.circlesurrogacy.com/surrogates/surrogates-requirements-faqs> [<http://perma.cc/4RED25EG>]; *Surrogacy Requirements*, CONCEIVABILITIES, <https://www.conceiveabilities.com/surrogates/surrogate-requirements> [<http://perma.cc/H9WX6XEX>]. It is not clear whether these agency-level policies were a response to criticisms about low-income surrogates. Circle Surrogacy explains that the requirement intends to protect surrogates from becoming ineligible for services as a result of payments they receive from the intended parent(s). Regardless of the true rationale, surrogacy does not appear to be a viable means of gaming the government aid system or achieving so-called “welfare queen” status.

71. See Elizabeth Eaves, *Want to Work for \$3 an hour? Try Surrogate Motherhood*, FORBES MAG., (July 24, 2009), <http://www.forbes.com/2009/07/23/surrogate-motherhood-minimum-wage-opinions-columnists-elizabeth-eaves.html> [<http://perma.cc/DVZ8R3ZA>].

72. *Id.* (noting that in India, for example, a \$20,000 payment would be wildly above market; well-paid surrogates there are more likely to receive closer to the equivalent of \$6,000).

73. Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U. J. GENDER SOC. POL’Y & L. 555, 560 (2013).

74. For obvious reasons, the surrogate is usually required by the contract to forgo sexual intercourse with male partners during the relevant ovulation and fertilization time periods.

described here.<sup>75</sup> Arguably, the fetus could be considered a third-party beneficiary of the contract.<sup>76</sup> A third-party beneficiary is not a party to the contract but is a person who has standing to bring suit and enforce the contract because he stands to benefit from the contract's performance.<sup>77</sup> However, this opens up all the questions raised with fetal causes of action in general.<sup>78</sup> It would present a conundrum in light of the fact that the surrogate retains the right to terminate the pregnancy; her choice to do so would not only eliminate the third party's benefits, it would extinguish the third party from physical existence.

### III. FAMILY LAW SHOULD NOT GOVERN SURROGACY CONTRACTS

Some commentators have argued that family law is the best framework to address the legal issues surrogacy presents,<sup>79</sup> but the relationship between the parties does not align with the reasoning behind certain family law doctrines, particularly during the pregnancy. Although surrogacy pertains to the creation of a family, the parties to a surrogacy contract such as the surrogate and the intended parent(s), are not forming a family. Rather, the intended parents are forming their *own* family; the surrogate merely enables or facilitates that endeavor.

#### A. *Best Interest of the Child*

The best interest of the child standard is inappropriate for disputes arising during pregnancy because the fetus is not yet born and because the surrogate is not serving a purely parental purpose. Specific elements of a child's best interest vary by jurisdiction, but they often include such factors as the child's health and age, his or her relationship with each parent, and the parents' ability to provide and care for the child.<sup>80</sup> Many of these factors cannot reasonably

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75. However, many surrogacy contracts do instruct the surrogate to follow the instructions of medical professionals consulted during the course of the pregnancy. See, e.g., *Sample GS Contract*, ALL ABOUT SURROGACY, [http://www.allaboutsurgacy.com/sample\\_contracts/GScontract1.htm](http://www.allaboutsurgacy.com/sample_contracts/GScontract1.htm) [<http://perma.cc/H5KMN6B9>].

76. See RESTATEMENT (SECOND) OF CONTRACTS § 302(1)(b) (AM. LAW INST. 1981).

77. *Id.*

78. Fetal causes of action are discussed in more depth *infra* Part IV.

79. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 799 (Cal. 1993), *superceded by statute as stated in* *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012), (Kennard, J., dissenting); A. M. CAPRON & M. J. RADIN, CHOOSING FAMILY LAW OVER CONTRACT LAW AS A PARADIGM FOR SURROGATE MOTHERHOOD, *reprinted in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 59–76 (Larry Gostin ed., 1990).

80. See Unif. Marriage and Divorce Act § 402 (UNIF. LAW COMM'N 1970).

apply to a child too young to have formed a real bond to any adult serving a parental role. The best interest of the child standard most often takes affect in disputes between two parents in the divorce and custody context.<sup>81</sup> Unless one parent is proven unfit, or in cases involving “extraordinary circumstances,” both parents are presumed to love their child and care about their child’s well-being with equal force.<sup>82</sup> Even though custody determinations occur within state courts, parents have a fundamental liberty interest in the Constitution protecting their freedom to procreate and raise their children how they choose.<sup>83</sup> By contrast, third parties who want custody of a child do not have the same protections.<sup>84</sup> Thus, even though an action against a surrogate’s behavior during the pregnancy is not a dispute about parentage, identifying the parent(s) sets the starting point for the analysis.<sup>85</sup> If the surrogate is a parent, she has more latitude to make decisions for the resulting child. Conversely, if she is not a parent, then the intended parent(s) should receive greater deference, even to the exclusion of the surrogate’s desires.

The seminal case of *Baby M* applied the best interest of the child standard to determine the child’s custody because the New Jersey Supreme Court found surrogacy contracts unenforceable for public policy reasons.<sup>86</sup> The court held that Mary Beth Whitehead, the surrogate in that case, was the natural mother of the child.<sup>87</sup> The surrogacy contract itself assumed her parentage by providing clauses for the termination of such rights, but because the court held the contract unenforceable, it also would not permit Whitehead to elect to terminate her parental rights outside the context of a child welfare agency.<sup>88</sup>

The California Supreme Court also dealt with the Uniform Parentage Act in *Johnson v. Calvert* but came to a different result.<sup>89</sup> The case involved gestational surrogacy so unlike Whitehead, surrogate Anna Johnson was not genetically related to the child she

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81. *Id.*

82. *See Painter v. Bannister*, 140 N.W.2d 152, 154 (Iowa 1966).

83. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

84. *McDermott v. Dougherty*, 869 A.2d 751, 770 (Md. 2005); *see also* Unif. Marriage and Divorce Act § 401(d) (UNIF. LAW COMM’N 2002).

85. *See, e.g., Johnson v. Calvert*, 851 P.2d 776, 799 (Cal. 1993), *superseded by statute as stated in Chatterjee v. King*, 280 P.3d 283 (N.M. 2012), (Kennard, J., dissenting).

86. *In re Baby M*, 537 A.2d 1227, 1261 (N.J. 1988), *superseded by statute*, N.J. STAT. ANN. § 9:3-46 (2016), *as recognized in In re Adoption of Children by G.P.B.*, 736 A.2d 1277, 1284–85 (N.J. 1999).

87. *Id.* at 1234.

88. *Id.* at 1242.

89. *Johnson*, 851 P.2d at 778.



carried.<sup>90</sup> However, under *Johnson's* intent approach, no distinction need be made for traditional and gestational surrogates because parentage turns on who entered the agreement intending to raise the child.<sup>91</sup> Because the Uniform Parentage Act provided that birth or genetic testing may each establish maternity,<sup>92</sup> the California Supreme Court used the intent of the parties to find in favor of the intended parents over the surrogate.<sup>93</sup>

### *B. Intent-Based Parentage*

Intent as a prerequisite for a parent-child relationship also comes into play when determining paternity. The biological connection a man has with his child born out of wedlock gives him an "opportunity . . . to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship . . . ." <sup>94</sup> Same-sex couples are also inherently affected by intent to become parents, because whether or not one partner contributes a gamete, the other will necessarily have no genetic relation to the child. Couples consisting of two women can more closely emulate "traditional" pregnancy than those consisting of two men, however, by fertilizing ova of one partner and implanting it into the other. The importance of adequate representation and information exchange during the contracting process is highlighted by *K.M. v. E.G.*, where one partner nearly lost custody of a child she created with her egg and her partner's womb because she signed an agreement that by its terms waived her right to legal parentage.<sup>95</sup> The appellate court ultimately restored parental rights of the partner who contributed the egg.<sup>96</sup> Extrinsic evidence in the women's living situation supported the claim that they intended to raise the child together, but the trial court attempted to analogize the woman whose egg was used to a sperm donor, who would be presumed not to have parental rights.<sup>97</sup> The court in *K.M.* did try to limit the *Johnson* intent test to the issue presented in that particular case:

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90. *Id.*

91. *Id.* at 782.

92. Unif. Parentage Act § 201 (UNIF. LAW COMM'N 2000).

93. *Johnson*, 851 P.2d at 782.

94. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

95. *K.M. v E.G.*, 117 P.3d 673, 682 (Cal. 2005).

96. *Id.*

97. *Id.* Note that the *K.M.* court distinguished the case from *Johnson* because rather than determining which woman was the child's mother, the court held that *both* women could be the child's mothers. *Id.* at 681.



“[W]hether there is evidence of a parent and child relationship under the UPA does not depend on the intent of the parent. For example, a man who engages in sexual intercourse . . . is the father of a resulting child, despite his lack of intent to become a father.”<sup>98</sup> While true that intent is not a necessary condition to incur parental obligations, it should be sufficient. The intent to become a parent should be marked at the time the parties enter into the surrogacy agreement. As one commentator argued for the less invasive procedure of artificial insemination, states “should take the approach of allowing the parties’ preconception intent to govern paternity.”<sup>99</sup>

Statutory ambiguity can elicit creative arguments toward recognition of intent-based parentage. The appellants in *In re Roberto d. B.* wanted the gestational surrogate’s name removed from the resulting child’s birth certificate.<sup>100</sup> Nobody disputed that the surrogate did not intend to be the child’s mother, and she was not genetically related to the child.<sup>101</sup> The appellants argued that Maryland’s paternity statutes violated the state’s Equal Rights Amendment because although there was a legally recognized process for establishing and disputing paternity, no such option existed for a woman seeking to dispute maternity.<sup>102</sup> The court found for the appellants largely for pragmatic reasons: the Maryland Department of Vital Records did not take issue with modifying this protocol, and such a holding reflected the intent of these parties as well as those entering into future agreements, wherein the surrogate “had a reasonable expectation that her role in the lives of these children would terminate upon delivery of the children.”<sup>103</sup>

Pennsylvania may soon set a precedent within their case law bolstering intent-based parentage in the high-profile custody dispute between television personality Sherri Shepherd and her ex-husband Lamar Sally. While they were still married, Shepherd and Sally hired a gestational surrogate using a donor egg, but the couple separated midway through the pregnancy.<sup>104</sup> Shepherd was not

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98. *Id.* at 682.

99. Lori B. Andrews, *Legal and Ethical Aspects of New Reproductive Technologies*, 29 CLINICAL OBSTETRICS & GYNECOLOGY 190, 200 (1986).

100. *In re Roberto d.B.*, 923 A.2d 115, 118 (Md. 2007).

101. *Id.* It is possible that the court will encounter future disputes under similar facts because all language within the holding refers to the surrogate’s intent *and* her lack of genetic relationship, but the court’s rationales in finding for the appellants imply that a traditional surrogate would still receive the same outcome.

102. *Id.* at 119–20.

103. *Id.* at 117–18.

104. Emily Strohm & Diane Herbst, *Inside Sherri Shepherd’s Surrogacy Ruling: What Happens Next*, PEOPLEMAG. (Apr. 22, 2015), <http://www.people.com/article/sherri-shepherd-legal-mother-surrogate-baby-lamar-sally> [<http://perma.cc/4E4U5DMV>]. The results of

genetically related to the child, was not present for his birth, and fought to keep her name off his birth certificate.<sup>105</sup> Nevertheless, the trial court found her liable for \$4,100 per month in child support<sup>106</sup> as the child's legal mother, a decision affirmed by the Pennsylvania Superior Court on the reasoning that at the time Shepherd entered the agreement, she intended to parent the resulting child.<sup>107</sup> The surrogate of course agreed to carry the child in reliance on the promise that she would not incur the responsibilities of being the child's legal parent,<sup>108</sup> and as the owner of the facility Shepherd and Sally used pointed out, "Surrogates don't want to feel that someone could want a baby and then just back out. The surrogate is not the mother."<sup>109</sup>

Because the best interest standard generally seeks to resolve custody and visitation arrangements, it would make little sense under an intent-based parentage framework. Were we to analyze the surrogacy arrangement through a very literal family law lens, the surrogate obviously has sole physical custody of a fetus in utero, but the intent-based parentage determination, à la *Johnson*, would preclude her from having legal custody. Such a result is intuitively bizarre; it is hard to imagine a court entrusting primary caretaking responsibilities to a parent and simultaneously barring that parent from making decisions about the child's life.

Although those who favor a family law approach to surrogacy might argue that enduring the pregnancy counts as accepting responsibility for the child's future, the extent of the relationship between the surrogate and the child after birth can easily be delineated in the terms of the contract. Some surrogates may want to visit with the child after it is born, others may prefer just seeing photographs and periodic updates on the child's well-being, and still others may be content with no further contact after the birth. Intended parents' preferences could span an equally wide spectrum.<sup>110</sup>

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the case are sealed, so the currently available information comes primarily from celebrity news sources.

105. Emily Strohm, *Lamar Sally Says Court Battle with Sherri Shepherd Over Surrogacy is 'Heartbreaking'*, PEOPLEMAG. (Mar. 11, 2015), <http://www.people.com/article/sherri-shepherd-surrogacy-court-battle-lamar-sally-custody> [<http://perma.cc/LJ92L8VN>].

106. Maryclaire Dale, *Court Rules Sherri Shepherd Must Support Her Son Born to Surrogate*, USA TODAY (Nov. 24, 2015), <http://www.usatoday.com/story/life/tv/2015/11/24/court-rules-sherri-shepherd-must-support-her-son-born-surrogate/76346498> [<http://perma.cc/K64N3485>].

107. Strohm, *supra* note 105.

108. *Id.* Jessica Bartholomew, the surrogate, said "I'm just frustrated that I'm the mother of the baby, but hopefully when we come back again all that will change." *Id.*

109. Dale, *supra* note 106.

110. For Susan de Gruchy, discussed later in this section, geographic separation from the surrogate was a top priority even during the pregnancy, but she later found that the

One study of surrogate mothers' experiences found primarily harmonious relationships between surrogates and intended parents, despite some variability in the level of contact before, during, and after the pregnancy.<sup>111</sup> Among surrogates previously known to the intended parents, about half played some "special role" in the child's life; the others maintained their prior relationship to the family.<sup>112</sup> As for surrogates who were previously strangers to the intended parents, some played a "special role," but approximately two-thirds of those surveyed merely continued some smaller quantum of contact with either the family or the parents exclusively.<sup>113</sup> The divide between contact with the whole family versus just the parents indicates that even within the spectrum of people willing to continue a relationship with the surrogate, some intended parents are more comfortable being the people in control of the scope of the relationship. Due to the varying gradations of parties' personal preferences and comfort levels, providing for the post-birth relationship within the contract will more reliably ensure a meeting of the minds on that front.

#### IV. POTENTIAL CAUSES OF ACTION AGAINST THE SURROGATE

##### A. *Fetal Cause of Action*

Prior to the mid-20th century, many jurisdictions also adhered to immunity doctrines for suits between parents and children so as not to disrupt family harmony and unity by encouraging litigation between family members.<sup>114</sup> Most jurisdictions have since done away with parental immunity doctrines,<sup>115</sup> but a jurisdiction willing to recognize a surrogacy contract would probably not apply the immunity to the surrogate anyway because the nature of the agreement is her forfeiture of presumed or genetic parental rights upon the child's birth.<sup>116</sup>

However, there is case law supporting recovery by a fetus for prenatal injuries. Recovery for prenatal injuries due to a third party's negligence is most often available to parents when the fetus is at or

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distance only increased her anxiety. Thus, she eventually began taking almost weekly trips from Boston to Baltimore to visit her surrogate. *Infra* note 137.

111. Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUMAN REPROD. 2196, 2199–200 (2003).

112. *Id.* at 2201.

113. *Id.*

114. See Lemmen v. Servais, 158 N.W.2d 341, 333–34 (Wis. 1968).

115. 78 A.L.R.4th 1082. See also Elias v. Collins, 237 Mich. 175, 177 (1926), overruled by Plumley v. Klein, 199 N.W.2d 169 (Mich. 1972).

116. See, e.g., Unif. Parentage Act § 807 (UNIF. LAW COMM'N 2002).

beyond the age of viability.<sup>117</sup> Viability refers to the point of development at which the fetus could survive outside of the womb, and can occur as early as twenty-one weeks into the pregnancy, though each child is different and the average is closer to twenty-four weeks.<sup>118</sup> *Roe v. Wade* applied viability as the point at which the state's interest in protecting the potentiality of human life became so compelling the state could legislate against abortions except in cases where the mother's life or health was in danger.<sup>119</sup> Individual states have also used viability as a line for the availability of prenatal tort recovery.<sup>120</sup> At the time of the surrogacy contract's execution, the child-to-be was either still two separate gametes or a laboratory-preserved zygote, and thus not covered by any personhood definition that would garner standing to sue in court.<sup>121</sup>

Cases in which a parent is held liable for their own child's prenatal injury are rarer, probably in part because the person usually suing on behalf of the fetus is the fetus' other parent. As a practical matter, a parent is already obligated to provide for their child's support,<sup>122</sup> so an award of damages against a parent would be unlikely to make a substantial difference in the child's life. Some courts have expressly rejected such a cause of action. In *Stallman v. Youngquist*, a child born alive could not bring an action against her mother when the child sustained injuries in a car accident while in utero.<sup>123</sup> Part of the reasoning derived from Oliver Wendell Holmes' analysis of *Dietrich v. Northampton* in 1884,<sup>124</sup> that a fetus could not have a cause of action against any third party because it "was a part of the mother at the time of the injury, [and] any damage to it which was not too remote to be recovered for at all was

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117. *But see* VA. CODE ANN. § 8.01-50 (2016) (permitting recovery for "fetal death," which, per VA. CODE ANN. § 32.1-249(2) (2016) can occur "regardless of the duration of pregnancy").

118. *What does Viable Pregnancy Mean?*, BABYMED, <http://www.babymed.com/prematurity/pregnancy-viability-what-does-it-mean> [<http://perma.cc/23PGWYJZ>].

119. *Roe v. Wade*, 410 U.S. 113, 163 (1973), *overruled in part by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

120. *See, e.g.*, *Kandel v. White*, 663 A.2d 1264, 1265 (Md. 1995) (holding that there is no cause of action for a nonviable fetus who was stillborn).

121. *Miller v. Am. Infertility Grp. of Ill., S.C.*, 897 N.E.2d 837, 839 (Ill. App. Ct. 2008) (finding no cause of action under Illinois's Wrongful Death Act for when an embryo was negligently destroyed prior to uterine implantation).

122. Child support by noncustodial parents is among the few domestic law issues governed at the federal, rather than the state level, partially to ensure jurisdiction over parents living in different states. *See* *Failure to pay legal child support obligations*, 18 U.S.C.S. § 228 (2016); Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement, 42 U.S.C.S. § 666 (2016) (requiring all states adopt the Uniform Interstate Family Support Act).

123. *Stallman v. Youngquist*, 531 N.E.2d 355, 355 (Ill. 1988).

124. *Deitrich v. Northampton*, 138 Mass. 14, 14 (1884).

recoverable by her.”<sup>125</sup> Some courts have since permitted a fetal cause of action against a third party.<sup>126</sup>

As to the cause of action against the fetus’ mother, a Michigan case *Grodin v. Grodin* offers a thought-provoking example.<sup>127</sup> In *Grodin*, the child was born with discolored teeth as a result of a drug the mother took during the pregnancy.<sup>128</sup> To reconcile the mother’s role as a parent against her role as an independent adult, the court asked whether her continuing to take the drugs was “[reasonable] parental authority and discretion.”<sup>129</sup> Although the court remanded the case to determine the reasonableness of the drug use, it added that:

[J]ustice requires . . . that a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.<sup>130</sup>

This analysis could apply to a surrogacy case as well; the “parental” role could be divined from, but also limited to, the biological role she plays in the fetus’ development. As a matter of behavioral economics, the surrogate does not have quite as strong an interest in protecting the fetus, since her role ends when she gives the baby to the intended parents. Especially for a commercial surrogate, rather than a so-called altruistic surrogate, the relationship may well end at the baby’s birth, so a standard of “reasonability” might be different for her than for a pregnant woman who plans to raise the child she is carrying.

### *B. Negligence*

A claim by the intended parent(s) might find more success than a claim brought by the fetus, but the evidentiary burdens of negligence make a contract breach argument easier to prove. By deriving the surrogate’s elevated standard of care from the terms of the contract,<sup>131</sup> we can alleviate some of the speculation about how the

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125. *Id.* at 17; *see also* Stallman, 531 N.E.2d at 356.

126. *See* Kandel v. White, 663 A.2d 1264 (Md. 1995).

127. *Grodin v. Grodin*, 102 Mich. App. 396 (1980).

128. *Id.* at 397.

129. *Id.* at 399.

130. *Id.* at 870 (quoting *Smith v. Brennan*, 31 N.J. 353, 365 (1960)).

131. *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

so-called reasonable person would have acted in similar circumstances. The language of Illinois' Gestational Surrogate Act illustrates the inherent difficulty of imposing a bright-line rule for pregnancy conduct.<sup>132</sup> Illinois will presume the enforceability of a surrogacy contract "even though" it contains the gestational surrogate's agreement

to abstain from any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child, including, without limitation, smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the gestational surrogate's pregnancy, exposure to radiation, or any other activities proscribed by a health care provider . . .<sup>133</sup>

In this example, the legislature chose to enumerate some of the more well-known pregnancy dangers, but did not attempt to create a comprehensive or exclusive list. The presumption in favor of the contract "even though" it contains such a provision serves as a nod to the parties' freedom to contract, but it does not require the parties negotiate so thoroughly. To be sure, it would not be easy for the intended parents to anticipate every possible contingency or habit the surrogate might exhibit, but requiring a clause in the contract addressing the parties' behavioral expectations would aid the creation of more airtight contracts with a more thorough meeting of the minds. Intended parents would be incentivized to plan ahead and consider possible future conflicts, and if the surrogate does not agree to the terms, the parties become aware at the outset that they will not make a good match and can alter their plans accordingly.

Proscriptions against smoking, drinking alcohol, and using drugs comprise the most obvious restrictions,<sup>134</sup> but other recommendations for optimal pregnancy practices are continually in flux as more research emerges.<sup>135</sup> Intended parents may also just want

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132. GESTATIONAL SURROGATE ACT, 93-921 § 15 (Ill. Legis. Serv. 2004).

133. *Id.* § 10(d)(2).

134. See NAT. INST. OF CHILD HEALTH AND HUM. DEV., *What Are the Factors That Put Pregnancy at Risk?*, (June 17, 2013), <https://www.nichd.nih.gov/health/topics/high-risk/conditioninfo/Pages/factors.aspx#lifestyle> [<http://perma.cc/CXR7MKBB>] (listing only the use of alcohol and cigarettes under the heading of "Lifestyle Factors" that could negatively impact a pregnancy).

135. See, e.g., Katherine Kam, *The Top 7 Pregnancy Myths*, WEBMD, <http://www.webmd.com/baby/guide/top-7-pregnancy-myths?page=2> [<http://perma.cc/4AW9G74B>] (reviewed by Jennifer Robinson, MD, FACOG); Katharine K. McKnight, MD, *Lifestyle Changes for a Healthy Pregnancy: Caffeine, Exercise, and More*, CONTEMPORARY OB/GYN (Apr. 1, 2013), <http://contemporaryobgyn.modernmedicine.com/contemporary-obgyn/news/user>



to express certain lifestyle preferences; for example, a vegetarian couple might find it very morally important whether their surrogate eats meat while pregnant with their child. Dietary restrictions are an example of the grayer area in pregnancy behavior, in that the fetus probably will not be adversely affected by minor deviations in the surrogate's behavior, but intended parents are likely to want the surrogate to adhere to conduct that minimizes risk. It is easy to empathize with the intended parents' desires: the path to the creation of their family was probably already filled with anticipation dashed by disappointment, surrogacy is an extremely expensive procedure, and their ability to have another child if the surrogacy fails may be very limited or completely absent.<sup>136</sup>

Susan de Gruchy articulated these concerns when Whitney Watts, the surrogate carrying de Gruchy's twins, began experiencing cervical complications midway through the pregnancy.<sup>137</sup> Doctors ordered Watts on bed rest for nearly two months, and the medical uncertainty, combined with the distance between the parties, made the ordeal emotionally difficult for de Gruchy. "'Here I am in Boston and I'm having to trust that she's not going up and down stairs' . . . 'I became a little consumed with that.'"<sup>138</sup> This case has a happy ending; Watts gave birth to the de Gruchys' two boys,<sup>139</sup> but the nearly obsessive anxiety of the intended parent(s) follows naturally from the financial and emotional turmoil the intended parent(s) have already experienced in their attempts to have children.

### C. Other Pregnancy Interventions

There is also some precedent for state intervention in the conduct of a pregnant woman. Wisconsin courts have exclusive original jurisdiction over:

an unborn child alleged to be in need of protection or services which can be ordered by the court whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled

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-defined-tags/pregnancy/science-based-answers-prenatal-lifestyle-questio?page=full [http://perma.cc/YQZ94CZQ].

136. See Kuczynski, *supra* note 36. See also *Staying Positive and Calm During an IVF Cycle with a Gestational Surrogate*, FERTILITY SOURCE COMPANIES, <https://www.fertilitysourcecompanies.com/staying-positive-calm-ivf-cycle-with-gestational-surrogate> [http://perma.cc/AY9K8SL5].

137. Jennifer Ludden, *Ties that Bind: When Surrogate Meets Mom-To-Be*, NPR, (Apr. 13, 2012 5:53 PM), <http://www.npr.org/2012/04/13/150563803/ties-that-bind-when-surrogate-meets-mom-to-be> [http://perma.cc/ABN92Y56].

138. *Id.*

139. *Id.*



substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control. The court also has exclusive original jurisdiction over the expectant mother of an unborn child described in this section.<sup>140</sup>

This statute grants Wisconsin fairly broad power to intervene in a woman's pregnancy when there are concerns about the use of controlled substances.<sup>141</sup> Since substance abuse often also carries criminal liability, the state interest is readily apparent. The problem presented by such statutes, however, is that they label the fetus essentially as a victim of a crime or civil infraction before the fetus has unequivocally obtained legal personhood.<sup>142</sup> When the offender against the fetus is a negligent third party, for example, allowing recovery by the fetus seems fairly reasonable. In contrast, when the health and autonomy of the mother (or the gestational carrier) prompted the harmful result to the fetus, the state's intervention feels more intrusive. A surrogacy agreement occupies somewhat of a middle ground between the two scenarios.

It is also important to distinguish this proposed cause of action from "wrongful life" and "wrongful birth" suits. Although these actions share some factual overlap with the hypothetical negligent surrogate, "wrongful life" and "wrongful birth" come from philosophically different roots. Wrongful birth lawsuits involve parents of a disabled or diseased child suing their medical practitioners for failing to warn them of the risk of the child's disability while wrongful life actions are brought by (or on behalf of) the disabled child.<sup>143</sup> Courts may grant relief to the parents to compensate them for additional medical and caretaking expenses,<sup>144</sup> but these cases, and particularly wrongful life cases, pose troubling public policy questions. Essentially, the plaintiff tries to prove that nonlife would have

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140. WIS. STAT. ANN. § 48.133 (2015).

141. Despite this relatively zealous statutory protection of the fetus, Wisconsin law is almost completely silent on the subject of surrogacy, not expressly outlawing or permitting it, and only ruling on a couple of surrogacy cases. See *In Interest of Angel Lace M. v. Terry M.*, 516 N.W.2d 678, 678 (Wis. 1994); *L.M.S. v. S.L.S.*, 312 N.W.2d 853, 853 (Wis. Ct. App. 1981).

142. See *Miller v. Am. Infertility Grp. of Ill., S.C.*, 897 N.E.2d 837, 840 (Ill. App. Ct. 2008).

143. Deanna A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 327 (2004).

144. See *Rich v. Foye*, 976 A.2d 819, 836 (Conn. Super. Ct. 2007).

been preferable to disabled life, and courts are hesitant to grant relief on that reasoning.<sup>145</sup> The arduous process of forming and executing a surrogacy arrangement diminishes the chances of a successful claim for wrongful life or birth because it would amount to a radical switch in the intended parents' demonstrated desire to have a child no matter the cost. In addition, the implication in wrongful birth is that the mother might have sought an abortion had she known of the child's abnormalities, but jurisdictions that permit surrogacy reserve the right to abort the pregnancy exclusively for the surrogate.<sup>146</sup> A version of the wrongful life or birth action that sues a surrogate rather than a doctor would likely not be cognizable even in a jurisdiction that recognizes surrogacy contracts or wrongful life actions.

## V. SPECIFIC PERFORMANCE

Contract law generally precludes specific performance as a remedy when the contract was for personal service.<sup>147</sup> But the comments to the second Restatement describe the preclusion as an offshoot of the more general bar against ordering specific performance when doing so would compel actions repugnant to public policy.<sup>148</sup>

A court of equity will not require specific performance, as a matter of course. It will evaluate the conduct of the parties, the circumstances and the equities of each particular case. It will not use its discretion to grant the remedy unless its exercise will subserve the ends of justice and the result of its assistance is fair, just and reasonable.<sup>149</sup>

Interestingly, the Restatement does permit specific performance when the breached contract duty was one of forbearance.<sup>150</sup> The kinds of disputes contemplated in this Note are just that: forbearing alcohol, unhealthy food, or risky activities.

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145. *But see* *Curlender v. Bio-Science Laboratories*, 165 Cal. Rptr. 477, 489 (Cal. Ct. App. 1982) (recognizing a wrongful life cause of action but limiting the child's recovery to special damages).

146. *See* FLA. STAT. § 742.15(3)(a) (West 2016) (requiring a gestational surrogacy contract contain a provision stating "[t]he commissioning couple agrees that the gestational surrogate shall be the *sole source of consent* with respect to clinical intervention and management of the pregnancy") (emphasis added).

147. *See* RESTATEMENT (SECOND) OF CONTRACTS § 367 (AM. LAW INST. 1981).

148. *Id.* at cmt. a; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 365 at cmt. a (AM. LAW INST. 1981).

149. *Zouck v. Zouck*, 104 A.2d 573, 577–78 (Md. 1954).

150. RESTATEMENT (SECOND) OF CONTRACTS § 357(2)(a) (AM. LAW INST. 1981).

The reasons for offering specific performance as a remedy in certain other circumstances can also align with the policy interests served in a surrogacy agreement. Specific performance may be ordered when other remedies such as monetary damages, would be inadequate, and when the good promised by the contract is unique.<sup>151</sup> The uniqueness of the product is what renders the monetary damages insufficient; in an alternative scenario, the promisee may relatively easily obtain a basic widget from another producer. Hence, specific performance is most often employed for contracts for the sale of land, because in spite of its omnipresence in legal hypotheticals, there is only one Blackacre. Likewise, there is only one child that could possibly result from a given embryo, and the emotional and financial cost of attempting subsequent fertilizations and implantations is incredibly high.

Delaware has one of the more comprehensive statutory schemes regarding gestational surrogacy.<sup>152</sup> In the section on available remedies for breach of the agreement, the legislature specifically excludes specific performance “for a breach by the gestational carrier of a gestational carrier agreement term that requires her to be impregnated.”<sup>153</sup> However, that section also provides for “all remedies available at law and equity” for either the surrogate or the intended parent(s) depending on which party breached the agreement.<sup>154</sup> Delaware also accounts for the substantive provisions of the contract; similar to Illinois, the contract will be enforceable even if it includes agreement

[T]o abstain from any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child, including, without limitation, smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the gestational carrier’s pregnancy, exposure to radiation, or any other activities proscribed by a health care provider.<sup>155</sup>

The statute thus places primary weight on the opinion of the medical practitioner supervising the pregnancy, which could act as a safeguard against unconscionable behavioral requests by the intended parent(s). Combined with the requirement that the surrogate receive independent legal counsel prior to entering the contract,<sup>156</sup>

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151. RESTATEMENT (SECOND) OF CONTRACTS § 360, cmt. c (AM. LAW INST. 1981).

152. See DEL. CODE ANN. TIT. 13 §§ 8-804–813 (West 2016).

153. DEL. CODE ANN. TIT. 13 § 8-810(c) (West 2016).

154. DEL. CODE ANN. TIT. 13 § 8-810(a–b) (West 2016).

155. DEL. CODE ANN. TIT. 13 § 8-807(d)(2) (West 2016).

156. DEL. CODE ANN. TIT. 13 § 8-806(a)(5) (West 2016).

Delaware provides sufficient safeguards of the surrogate's interest to render the specific performance exclusion unnecessary.

Specific performance also provides redress for scenarios where, as here, the requirements of negligence or other torts would be difficult to meet. Evidentiary burdens would likely be the biggest hurdle for the intended parents under a standard negligence allegation. By contrast, a contract claim would not require the intended parents show that the surrogate breached a duty she owed either to the intended parents or potentially the fetus, that the fetus was harmed, and that the surrogate's conduct was the actual and proximate cause of the harm the fetus sustained. In essence, the specific performance option addresses the principle of holding the surrogate accountable for promises she made to the intended parents.

The rationale for not forcing a surrogate to continue a pregnancy she wishes to terminate are (hopefully) obvious: a requirement that a surrogate carry a pregnancy against her will would flagrantly violate her bodily autonomy.<sup>157</sup> These policy concerns are wholly valid, and surrogacy contracts have adapted to deal with potential disputes about total nonperformance. To the extent that surrogacy contracts have acquired "boilerplate" language, the surrogate's right to terminate the pregnancy even when there is no imminent danger to her health has become part of the standard form,<sup>158</sup> and she is generally not liable for terminating the agreement prior to the embryo transfer.<sup>159</sup>

If narrowly construed, specific performance could be effectively employed as a remedy for when the surrogate breaches a term of the contract regarding her behavior during the pregnancy. This suggested framework would *only* apply to events during the pregnancy, to protect from overreach into the surrogate's bodily autonomy. As a threshold matter, specific performance should only be available when the surrogate intends to bring the pregnancy to term. It would also only extend to express terms within the surrogacy agreement, so that neither the court nor the surrogate becomes legally obligated to anticipate the unarticulated desires of the intended parents. By so confining the reach of the liability, the parties will realize incentives for careful and thorough drafting of their surrogacy contracts,

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157. See *Roe v. Wade*, 410 U.S. 113, 129 (1973), *overruled in part* by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); Unif. Parentage Act § 801(f) (NAT'L CONF. OF COMM'R ON UNIF. ST. L. 2002) (reserving plenary power for the surrogate to make determinations about her health).

158. See *Surrogacy Contract Sample*, *supra* note 15.

159. See, e.g., Unif. Parentage Act § 806(d) (NAT'L CONF. OF COMM'R ON UNIF. ST. L. 2002).

and clearly delineated terms put the surrogate in a better position to give informed consent.

The classic case *Hamer v. Sidway* provides some useful analogies.<sup>160</sup> In *Sidway*, an uncle promised his nephew \$5,000 for five years abstention from drinking alcohol, smoking, and other activities the uncle believed were immoral.<sup>161</sup> Although the uncle died before the five years had passed, the nephew was able to sue his estate and claim the money he “earned” through his good behavior.<sup>162</sup> Although the main holding of that case was that forbearance can serve as sufficient consideration to validate a contract, the likely motivations of the parties are informative for surrogacy contract requirements. What the uncle wanted from the nephew was his *conduct*; the nephew’s lack of indulgence in any of those vices would not be life-threatening, or even dangerous at all (quite the opposite). Similarly, intended parents express a valid desire to exercise control over the fetus the way they would if they were carrying the child themselves. The validity of that desire is not altered by the fact that the conduct the surrogate wishes to engage in might not be immediately or quantifiably harmful to the fetus.

Another analogy that may make this proposed remedy more palatable is to that of a daycare provider. During the time a child spends in a daycare facility, those in charge of that facility have sole control over the child’s well-being, but that does not eliminate the parents from the picture. If the parents want their child to eat non-genetically modified snacks after naptime, they can provide alternative food for their own child, and could reasonably take issue with the daycare providers for acting directly against the parents’ wishes. So too, if the surrogate undertakes the pregnancy for a particular family, she should abide by the reasonable and expressly delineated desires of the intended parent(s).

Today’s courts also consistently support judicial discretion in family dissolution matters like determining alimony and child custody.<sup>163</sup> As described above in the discussion of family law, many state statutes include a non-exhaustive list of factors to be considered in these matters,<sup>164</sup> and a judge does not necessarily need to explain his or her precise rationale for the conclusion they reach. Specific performance by its nature is an equitable remedy. A judge could treat this variety of contract breach through a similar case-by-case

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160. *Hamer v. Sidway*, 27 N.E. 256, 256 (N.Y. 1891).

161. *Id.*

162. *Id.*

163. *See L.M.S. v. S.L.S.* 312 N.W.2d 853, 854 (Wis. Ct. App. 1981).

164. *See, e.g.*, FLA. STAT. § 742.15(2) (West 2016).

analysis, without necessarily treating the dispute as a domestic one, despite the roles of the parties.

Restricting the use of specific performance to cases where (1) the surrogate intends to bring the pregnancy to term and (2) her behavior violates an express provision of the contract will not infringe upon her physical autonomy because it is merely a temporary forbearance and the fact finder has the discretion to deny a petition for specific performance if it would be unduly burdensome on the surrogate. For the kinds of scenarios this Note anticipates, however, specific performance would most likely amount to an impermanent, relatively minor lifestyle adjustment. Including this equitable remedy as an option could afford the intended parents sufficient control over the process of building their family, and it preserves the parties' freedom to contract and to have those contracts legally acknowledged by the courts when a dispute arises.

#### CONCLUSION

The future of surrogacy depends on the momentum of legal and social acceptance. The myriad legal approaches among the states do not offer an obvious direction, but it is hard to imagine that inconsistent legal treatment alone would halt or substantially stall the progress of medical research. Legal treatment is inextricably entrenched in a community's social values. Even as the demand for assisted reproductive technology rises, there are sizeable populations of people vehemently opposed to surrogacy or any other interference with pregnancy. The backlash speaks to the inherently emotional nature of pregnancy and the spiritual and moral implications bound up in reproduction.

Model Christine Teigen recently shared on Twitter that she and husband John Legend were pregnant through in vitro fertilization and that they had chosen to implant a female embryo, many of the responses she received cast aspersions about her family and IVF in general.<sup>165</sup> After fielding so many negative responses Teigen tweeted, "I [sic] think I [sic] made a mistake in thinking people understood the process better than they do."<sup>166</sup>

But the openness of public figures may work toward dismantling misinformation and stigma surrounding assisted reproduction.

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165. See, e.g., Elizabeth Collin (@Baby\_C\_69), Twitter (Feb. 24, 2:17 PM), <https://twitter.com/chrisseyteigen/status/702618297754263552> ("maybe you weren't supposed to have a kid since there is [sic] so many kids without parents") [<http://perma.cc/2FS236WL>].

166. Christine Teigan (@chrisseyteigan), Twitter, (Feb. 24 10:56 PM), <https://twitter.com/chrisseyteigen/status/702749017734709248> [<http://perma.cc/2FS236WL>].

At the very least, media depictions of nonnuclear families and families utilizing assisted reproductive technologies initiates cultural dialogue about these issues. In the past decade, several well-known movies featured plotlines involving assisted reproduction. “The Kids Are Alright”<sup>167</sup> and “Delivery Man”<sup>168</sup> explored (with different ratios of comedy to drama) the rights of sperm donors, and “Baby Mama” featured Tina Fey and Amy Poehler in a scenario much like that envisioned in this Note.<sup>169</sup> Although the surrogate’s circumstances in “Baby Mama” raise concerns about the voluntariness of her involvement in the contract,<sup>170</sup> films prompt viewers to imagine themselves in the place of the characters, and thus bring these reproductive issues into the cultural consciousness.

In light of the legalization of same-sex marriage, surrogacy is likely to become an even more prevalent way for people to build their families. With more people seeking this procedure, courts are likely to encounter more disputes raising as-yet unanswered legal questions. Because many jurisdictions still have no statutory scheme addressing surrogacy,<sup>171</sup> courts are also in a position to color the law so as to protect the interests of all parties to a surrogacy contract, including the hopeful parents who put their trust and their genes in the hands of their surrogate. When courts encounter disputes about the surrogate’s behavior during the pregnancy, they should take into account the import of the promise the surrogate made, and consider specific performance as an equitable remedy for the intended parents. However, as one commentator who built their family through a surrogate points out,

these sorts of concerns only come into play when things go wrong, and in the overwhelming majority of surrogacy arrangements, everything goes smoothly, even in states where surrogacy occurs in the shadows. Indeed, the absence of cases addressing the enforceability of surrogacy contracts . . . is a sign that surrogacy arrangements in those states have thus far gone smoothly, since it is typically only when disputes arise between surrogates and intended parents that either appellate court decisions are published or corrective legislation enacted.<sup>172</sup>

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167. THE KIDS ARE ALL RIGHT (Focus Features 2010).

168. DELIVERY MAN (DreamWorks Pictures 2013).

169. BABY MAMA (Universal Pictures 2008).

170. *Id.*

171. See *Gestational Surrogacy Law Across the United States*, CREATIVE FAMILY CONNECTIONS, <http://www.creativefamilyconnections.com/#!/surrogacy-law-by-state/f49jq> [<http://perma.cc/5ZJDFVEA>].

172. Nicholas, *supra* note 69, at 1247.



Legislative schemes and remedial consequences for breaching a surrogacy agreement will help incentivize fair dealing throughout the process; surrogacy is not a zero-sum game. Much of what makes surrogacy so legally fraught is also what makes it so often successful: the emotional nature of the arrangement, the degree of sacrifice and investment on both sides, and the fact that a new life may result should also, in most cases, incentivize compassionate and cooperative behavior by the people involved.

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