(NOT) JUST SURROGACY

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ABSTRACT

Scholars have long debated whether surrogacy furthers or inhibits equality and reproductive liberty. What has gone almost entirely unremarked upon, however, is whether and to what extent the ways states regulate surrogacy further these principles. This oversight is produced and re-produced by existing scholarship which remains focused on the threshold question of whether to ban or permit surrogacy. This focus obscures critical details that lay below the surface and inhibits theoretical engagement with their normative implications. This Article fills these gaps.

This consideration is critically important. Differences in permissive surrogacy laws hold profound implications for the participants. They may, for example, determine whether a person is a parent or a legal stranger. Or they may determine whether a person can make decisions about their own body or whether they can be compelled to undergo unwanted invasive medical procedures.

The obscured details also have consequences that flow well beyond surrogacy. Surrogacy law holds the potential to challenge family law rules that remain rooted in reproductive biology. Such a system poignantly harms families who are excluded under it. It also reinforces gender-based parentage norms. The details of surrogacy law also implicate fundamental liberty interests, including the right to form families of choice and reproductive autonomy.

This Article intervenes by unearthing these heretofore hidden distinctions. Based on a meticulous survey, this Article offers a novel, more complete typology of surrogacy law. It then theorizes the normative implications of these details, both for the individual participants and for law and policy well beyond surrogacy's boundaries. Drawing from this uncovered story, this Article charts a more just path forward.

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INTRODUCTION

Scholars have long debated whether the practice of surrogacy furthers or inhibits principles of equality and reproductive liberty.[1] For example, in the 1980s and 1990s, some theorists opposed surrogacy based on concerns that it would result in exploitation of women, particularly poor women and women of color.[2] Others, by contrast, argued that surrogacy bans denied women the freedom to make choices about their bodies and interfered with the liberty interests of intended parents to form families of choice.[3]

Initially, surrogacy opponents were most persuasive. Most states either banned the practice or remained silent. But the tide turned in the mid-1990s. Every statutory scheme enacted since then has been of the permissive variety. This ever-increasing body of permissive statutory schemes is not identical; it is far from it. Few people, however, are even aware of these variations. This is true because the contemporary discussion—both mainstream and in legal scholarship—remains largely fixated on the initial threshold question of whether to ban or to permit surrogacy.[4] By keeping the focus on the ban/permit question, existing scholarship obscures critical details that lay below the surface. As a result, almost no consideration has been given to whether and to what extent *the ways in which states regulate* surrogacy further principles of equality and liberty. This Article fills these gaps.

This consideration is critically important. Variations in the law of surrogacy hold profound implications for the participants themselves. They may, for example, determine whether a person is a parent or a legal stranger.[5] Or they may determine whether a person can make decisions about their own body or

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[1] *See, e.g.*, JANICE RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM (1993) (arguing against a permissive surrogacy approach); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD, IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY (1989) (same). *Contra* Lori B. Andrews, *Surrogacy Motherhood: The Challenge for Feminists*, 16 L. MED. & HEALTH CARE 72, 72 (1998) (arguing that "the rationales that [feminists] and others are using to justify [support for bans on surrogacy] may come back to haunt feminists") [hereinafter Andrews, *Surrogacy Motherhood*]; Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1080 (2014).

[2] *See, e.g.*, Anita Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17, 30 (1991) ("Minority women increasingly will be sought to serve as 'mother machines' for embryos of middle and upper-class clients.").

[3] *See, e.g.*, Andrews, *Surrogacy Motherhood*, *supra* note 1, at 72.

[4] *See infra* Part II.

[5] *See infra* Part III.

whether they can be compelled to undergo unwanted invasive medical procedures.[6]

The obscured details also have consequences for the development of law and policy that flow well beyond the surrogacy participants themselves. Surrogacy law holds the potential to challenge family law rules that long have excluded families that departed from gender- and biology-based norms about the nature of motherhood and fatherhood.[7] Surrogacy laws' details also implicate the scope and meaning of fundamental liberty interests, including the right to form families of choice and reproductive autonomy.[8]

Consider the following scenario, based on actual fact patterns.[9]

> Andre and Bella, a different-sex unmarried couple, enter into a surrogacy agreement with Camila. Andre and Bella break up during the course of the agreement. After the resulting child is born, neither Andre nor Bella want to take custody of the child. Camila, who has three children of her own, also does not want to take custody.

That the relevant jurisdiction "permits" surrogacy agreements does not alone dictate which of the three participants are parents. This is true because permissive statutory regimes in the U.S. do not all authorize the same array of arrangements. Today, for example, many states permit surrogacy agreements *regardless* of the marital status, gender, sexual orientation, or genetic connection of the intended parents.[10] In contrast, though, laws other states limit legal

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[6] *See infra* Part III.

[7] Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2305 (2017) [hereinafter NeJaime, *Parenthood*].

[8] *See, e.g.*, Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 484 (2017) ("When viewed through a constitutional analysis that is pro-equal liberty, anti-stigma, and dynamic, marriage-only ART rules present a serious constitutional claim.") [hereinafter Joslin, *Gay Rights Canon*]; Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912 (2019) [hereinafter Joslin, *Autonomy*].

[9] In one case—*In re* Marriage of Buzzanca—the married, intended father initiated divorce proceedings shortly before the birth of the child conceived pursuant to a surrogacy arrangement. 61 Cal. App. 4th 1410, 1412 (1998). In the divorce proceeding, the intended father argued he was not a parent and had no obligation to support the child. The trial court "reached an extraordinary conclusion: [that the resulting child] had *no* lawful parents." *Id.* at 1412. This decision was reversed on appeal. *Id.* at 1429 (declaring the intended parents to be parents).

In another case, the married, intended parents refused to accept custody of one of the two children conceived pursuant to a surrogacy arrangement. *Surrogate Birth Produces Twins: Couple accepts only the girl; mother is left with boy to care for*, DALLAS MORNING NEWS (Apr. 23, 1988).

[10] *See infra* Part III. *See also* Appendix B.

protection based on the identity of the intended parents. For example, in Louisiana, surrogacy agreements are enforceable only if the intended parents are married to each other *and* each contributed genetic material.[11] The marriage requirement obviously excludes unmarried couples. The genetic material requirement essentially excludes all same-sex couples, as well as many different-sex couples.

Thus, if the agreement between Andre, Bella, and Camila was governed by the law in the former category of states, Andre and Bella would be considered the legal parents and a court could order them to take custody of the child. If the agreement was governed by the law in Louisiana, the result could be different.

Now consider another scenario, based on common practice today:[12]

> Davina agrees to act as a gestational surrogate for a different-sex married couple, Eduardo and Felicia. Davina eventually becomes pregnant through in vitro fertilization. After a smooth and successful pregnancy, the intended parents would like to schedule a cesarean section, consistent with their agreement. Davina, however, insists on a vaginal birth.

Here too, that the relevant jurisdiction "permits" surrogacy agreements does not alone dictate the outcome. This is true because another axis of variation relates to decision-making authority during the pregnancy. In some permissive jurisdictions, the agreement must allow the person acting as a surrogate to make all medical decisions during pregnancy, including decisions about labor and delivery.[13] In contrast, other permissive surrogacy schemes expressly allow for contract clauses that *require* people acting as surrogates[14] to undergo certain medical treatments even over their contemporaneous objections. Illinois is one such jurisdiction.[15] Illinois law declares that these kinds of contract clauses may be valid and enforceable.[16]

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[11] LA. REV. STAT. ANN. § 9:2718.1(6) & § 9:2718.

[12] As discussed below, it is common for surrogacy agreements to require the person acting as a surrogate to consent to future medical procedures and treatments.

Even more directly on point, one proposed model surrogacy legislation allowed for the following optional contract term: "The intended parent(s) may choose that the delivery be performed by Caesarean section." Jamie Levitt, *Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation*, 25 COLUM. J.L. & SOC. PROBS. 451, 499–500 (1992).

[13] *See, e.g.*, WASH. REV. CODE ANN. § 26.26A.715(1)(g).

[14] I use people first terminology rather than the more common terms like "surrogate carrier" or "surrogate mother."

[15] 750 ILL. COMP. STAT. ANN. 47/25(d)(1).

[16] 750 ILL. COMP. STAT. ANN. 47/25(d)(1).

As the scenarios illustrate, differences in state surrogacy law directly affect the individual participants. Surrogacy law implicates some of their most profound interests—their families and their bodies. The effects of surrogacy law, however, do not end with the participants themselves. How a state chooses to address these and other questions holds broader implications.

In the past, the person who gave birth was always considered a legal parent. Hence, children always had mothers at birth.[17] But under permissive surrogacy laws, the person who gave birth may not be the child's legal parent at birth.[18] Thus, as Douglas NeJaime explains, surrogacy law can "cleave the biological process of reproduction from the legal status of motherhood."[19] By doing so, surrogacy law challenges deeply-rooted family law principles that rest on reproductive biology. Such rules reproduce long-standing sex-based stereotypes about the nature of motherhood and fatherhood.[20] These stereotypes, and the myriad family law rules that reflect them, inflict particularly acute harm on families and individuals that defy them. For example, same-sex parent families—families that do not consist of one mother and one father—may be unprotected by rules rooted in these gender- and biology-based stereotypes.[21] But the harms are not limited to those families alone. Rules that tie motherhood to reproductive biology reinforce the view that all women are mothers.[22] "[T]hey also harm men by viewing fatherhood as derivative."[23]

Surrogacy law can also further a broader and more inclusive vision of liberty. Surrogacy laws, for example, can allow a wide array of people to form families of choice.[24] They can support principles of reproductive freedom by protecting women's choices about their reproductive capacities.

The extent to which these principles of equality and liberty are furthered, however, depends on the details. Surrogacy laws can, and in some states do,

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[17] *See, e.g.*, UNIF. PARENTAGE ACT (1973), § 3(a) (parentage "may be established by proof of her having given birth to the child.").

[18] *See* Appendix B.

[19] NeJaime, *Parenthood*, *supra* note 7, at 2305.

[20] *Id.*

[21] *See, e.g.*, In Interest of A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *1 (Tex. App. Apr. 27, 2017), *review denied* (Sept. 28, 2018) (refusing to apply rules to establish the parentage of a husband to a lesbian spouse).

Biologically-based justifications are frequently invoked to deny recognition of LGBT nonbiological parents. *See, e.g.*, Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017); Dvash-Banks v. Pompeo, No. CV 18-523-JFW(JCX), 2019 WL 911799, at *7 (C.D. Cal. Feb. 21, 2019).

[22] NeJaime, *Parenthood*, *supra* note 7, at 2329-30.

[23] *Id.* at 2330.

[24] *See, e.g.*, Joslin, *Gay Rights Canon*, *supra* note 8, at 484 (developing a broad theory of a liberty to form families of choice).

embrace families without regard to sex, sexual orientation, marital status, or genetic connection.[25] But, not all existing surrogacy laws do. Some surrogacy laws, like those in Louisiana, only protect married different-sex couples who are both genetically related to the resulting child.[26] Rather than reforming family law in more equitable ways, such rules reinforce a genetically-based, heterosexual model of the family. In doing so, they "carry forward legacies of exclusion."[27]

With respect to reproductive freedom, permissive surrogacy laws enable women to make decisions about their procreative lives and capacities. At the same time, however, some schemes include provisions that are in tension with this principle. Among other things, laws in some states permit wide-ranging control and surveillance of people acting as surrogates.[28] Take Oklahoma's recently enacted law. It allows for the inclusion of contract clauses requiring the person acting as a surrogate to submit to all recommended medical procedures.[29] This could, for example, result in a person—like Davina described above—being required to submit to an unwanted cesarean section or other surgical procedure.[30] Laws like Oklahoma's are premised on a view that pregnant women's autonomy is secondary to the interests of other people or even the fetus.[31]

Such rules are troubling when considered within the context of surrogacy. They are even more troubling when one contemplates application of the principle more broadly.[32] These collective concerns are not simply theoretical. Surveillance and control of pregnant people outside the context of surrogacy occurs today in a range of contexts.[33] Indeed, as Professor Michele Goodwin

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[25] *See* Appendix B.

[26] LA. REV. STAT. ANN. § 9:2718.1(6).

[27] NeJaime, *Parenthood*, *supra* note 7, at 2268.

[28] *See infra* Part III.C. *See also* Appendix C

[29] OKLA. STAT. tit. 10 § 557.6(D)(1).

[30] *See, e.g.*, Courtney G. Joslin, *Surrogacy and the Politics of Pregnancy*, __ HARV. L. & POL'Y REV. __, __ (forthcoming 2020) [hereinafter Joslin, *Pregnancy*].

[31] For a discussion of the use of the "fetal-rights" narrative to justify restrictions on women's reproductive autonomy, see Kimberly Mutcherson, *Fetal Rights in the Trump Era*, 95 TEX. L. REV. SEE ALSO 214, 214–15 (2017).

[32] *See, e.g.*, Joslin, *Pregnancy*, *supra* note 30, at __.

[33] *See, e.g.*, Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781 (2014); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012); Khiara M. Bridges, *Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies*, 3 NW. J. L. & SOC. POL'Y 62 (2008); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1006–07 (1999); Note, *Rethinking [M]Otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325 (1990).

explains: "legislative fetal protection efforts are on the rise, driving the creation, enactment, and enforcement of statutes authorizing … intervention in women's pregnancies."[34] In addition to longer-running practices of criminalizing pregnant women's conduct,[35] more recent efforts include "sanctioning women for refusing cesarean sections [and] forcibly confining them to bed rest."[36] Poor women and women of color disproportionately feel the effects of such policies.[37]

Another mode of variation relates to the status and treatment of the fetus. In many states, determinations of parentage do not become effective until there is a child in existence.[38] In other states, however, the law allows for such determinations prior to the birth, suggesting that the fetus is an entity to which rights attach. Such rules may impact the legal treatment of the fetus in other contexts. This is particularly true given the myriad contemporary efforts to imbue the fetus with personhood status.[39]

Despite their profound consequences—both within and without surrogacy—the details of surrogacy law remain almost entirely overlooked. This Article intervenes by unearthing these heretofore hidden distinctions. Based on a comprehensive and meticulous survey, this Article offers a novel, more complete typology of surrogacy law. This new typology considers not simply whether the law prohibits or permits surrogacy. It also delves into and categorizes surrogacy laws' many other details. The Article introduces new terms to elucidate previously masked features. In so doing, the Article provides a more complete and accurate descriptive account of current U.S. surrogacy laws.

This descriptive account reveals interesting and previously unnoticed trends. For example, states that permit control and surveillance of pregnant bodies run the political gamut—ranging from the deep blue states of California and Illinois to the deep red state of Oklahoma. This insight suggests that these and other details have gone unnoticed and untheorized. This proposition is confirmed by a review of the laws' legislative and political histories—histories which document a complete absence of engagement with these controversial provisions. This Article begins to fill this gap by exploring the theoretical and normative consequences of surrogacy law for the participants, as well as for law and policy beyond surrogacy's boundaries.

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[34] *Goodwin*, *supra* note 33, at 786.

[35] *See, e.g.*, Paltrow, *supra* note 33, *passim*. *See also* Courtney G. Joslin, *Legal Regulation of Pregnancy and Childbirth*, *in* THE CHILD: AN ENCYCLOPEDIC COMPANION (2009).

[36] Goodwin, *supra* note 33, at 786.

[37] *See, e.g.*, Paltrow, *supra* note 33, at 1006–07.

[38] *See infra* Part III.B.3.

[39] *Goodwin*, *supra* note 33, *passim*.

This intervention is not only important, it is timely. Today, approximately half the states—twenty-six (26) jurisdictions—have statutory provisions regulating surrogacy.[40] The contemporary trend strongly favors permissive statutory regimes; twenty (20) of the twenty-six (26) existing schemes are permissive ones. This trend is accelerating and likely to continue. Most of these permissive laws were enacted in the last ten years.[41] And in 2019 alone, at least six more states considered bills to permit surrogacy.[42] All of this is happening at a time in which broader questions related to equality and liberty hang in the balance. This term, the Supreme Court will decide three cases about the rights of LGBTQ people.[43] Around the country, government officials are resisting the Supreme Court's prior directives on LGBTQ equality by invoking reproductive biology. The future of reproductive autonomy and the continued vitality of *Roe v. Wade* is also on the line.[44] In short, it is critical to pay careful attention not just to whether states should allow surrogacy, but also *to how* they regulate surrogacy.

This Article proceeds in four parts. Part I begins by offering context. It tells the evolution of surrogacy advocacy and law in the U.S. Part II details what we do know about surrogacy law. It demonstrates that current descriptions of surrogacy law are woefully incomplete. Despite the enactment of many and, importantly, varied permissive surrogacy schemes in the U.S., descriptions of the law continue to skim the surface. Existing scholarship focuses almost exclusively on the initial binary question of whether states permit or ban surrogacy. In so doing, these descriptions obscure critical variations in the law.

Next, drawing from a meticulous analysis of existing law, Part III offers the first comprehensive typology of surrogacy statutes. In addition to identifying previously hidden details, this Part theorizes the consequences of these details both within and without surrogacy. Part IV considers why these details have remained hidden, despite their consequential nature both to the individuals involved in surrogacy arrangements and to the development of law and policy more broadly. Finally, Part V draws insights from this uncovered story to chart a more just path forward for the law of surrogacy and beyond.

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[40] *See* Appendix A.

[41] Twelve of the 19 permissive jurisdictions enacted their legislation in the last decade. *See* Appendix A.

[42] *See, e.g.*, 2019 Conn. Legis. H.B. 6507; 2019 Ind. Legis. H.B. 1369; 2019 Mass. Leg. S.B. 77/H.B. 139; 2019 N.Y. A.B. 1071; 2019 Penn. Legis. H.B. 243; 2019 R.I. Legis. H. 5707.

[43] Altitude Express, Inc. v. Zarda, No. 17-1623; R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Comm'n, No. 18-107; Bostock v. Clayton Cty, Georgia, No. 17-1618.

[44] June Medical Services, LLC v. Gee, No. 18-1323; Gee v. June Medical Services, No. 18-1460.

I. SURROGACY IN THE U.S.: A BRIEF HISTORY

The first surrogacy births occurred in the U.S. in the late 1970s and early 1980s.[45] At the time, there was no U.S. law expressly addressing the permissibility of these arrangements.[46] There was also no developed consensus.[47] Indeed, few people even knew about the issue. In this period, "newspaper stories about surrogacy parenting appeared only intermittently."[48]

This changed during the Baby M litigation.[49] The Baby M case was a parentage and custody dispute between the intended parents—William and Elizabeth Stern—and the woman who acted as a genetic surrogate—Mary Beth Whitehead.[50] After the child was born, Whitehead refused to relinquish custody of the child.[51] Litigation ensued. Whitehead argued that she was a parent of the resulting child and should be awarded custody. The Sterns, in contrast, asserted that the court should enforce the contract and terminate Whitehead's parental rights.[52] The case garnered considerable public and media attention.[53] In 1987, the year of the Baby M custody trial, "[media] coverage of the issue peaked."[54] The case, and the widespread media coverage of it, "etch[ed] surrogacy indelibly into the national consciousness."[55]

More attention, however, did not bring agreement on the path forward. The most vocal opponents of surrogacy at the time were religious groups[56] and some

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[45] *See, e.g.*, Garry Abrams, *A Setback for Surrogate Parenting?*, L.A. TIMES (Feb. 4, 1988); NOEL P. KEANE & DENNIS L. BREO, THE SURROGATE MOTHER 88-94 (1981).

[46] *See, e.g.*, Lori B. Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, 17 HASTINGS CENTER REPORT 31, 31 & fn. 6 & 7 (1987).

[47] *See, e.g.*, Amicus Brief, Rutgers Women's Rights Litigation Clinic, Baby M case (to the trial court) at 4 (filed Oct. 15, 1986) ("At this point society appears far from a consensus."). *See also* SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 22 (2007) (Polls [taken during the Baby M litigation] also captured the public's contradictory and ambivalent response to surrogate motherhood.").

[48] MARKENS, *supra* note 47, at 20.

[49] Matter of Baby M, 537 A.2d 1227, 1234 (N.J. 1988).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 1237.

[53] Herine Gewertz, *Surrogate Motherhood: A Wrenching Test of Ethics*, L.A. TIMES (Nov. 18, 1990) ("Surrogacy burst on the national scene in 1987" during the Baby M dispute).

[54] MARKENS, *supra* note 47, at 20.

[55] *Id.*

[56] *Id.* at 163.

women's rights advocates.[57] This "unlikely alliance[ ]"[58] raised a number of concerns. Many of the objections raised by women's rights advocates were grounded in issues of equality and reproductive freedom. One of the most commonly stated concerns was exploitation.[59] Some commentators worried that poor women of color might be turned into a "breeder class" for rich white people.[60] Critics also argued that surrogacy "commodif[ied] reproduction," and in this way, harmed not only the individual women but also the child and society as a whole.[61]

Advocates on the other side also relied on equality and liberty rhetoric. Permissive legislation, they argued, furthered autonomy and reproductive choice.[62] Permissive regimes allowed women to make decisions about their own bodies and their reproductive lives.[63] Surrogacy also facilitated family creation for the intended parents, furthering their constitutionally protected interest in

[57] *See, e.g.*, Elizabeth Scott, *Surrogacy and the Politics of Commodification*, 72 Law & Contemp. Probs. 109, 109 (2009) (noting that "[o]pponents of surrogacy [were] mostly feminists and religious groups") [hereinafter Scott, *Surrogacy*].

[58] Catherine Clabby, *Surrogate Moms on Way Out? New Law Prohibits Pregnancy Profits*, ALBANY TIMES UNION (July 26, 1992).

[59] MARTHA FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 25 (1988) ("One of the most serious charges against surrogate motherhood contracts is that they exploit [the] women [acting as surrogates]."). *See also* MARKENS, *supra* note 47, at 17.

[60] *See, e.g.*, Allen, *supra* note 2, at 30 ("Minority women increasingly will be sought to serve as 'mother machines' for embryos of middle and upper-class clients."); Khiara M. Bridges, Windsor*, Surrogacy, and Race*, 89 WASH. L. REV. 1125, 1134 (2014) (noting that some commentators "imagined a dystopic future in which there exists a 'breeder class' composed of indigent black women").

[61] *See, e.g.*, Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 74 (1990) (arguing that when reproduction "is treated as a commodity, the women who perform it are degraded"); Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1928–36 (1987) (discussing commodification).

[62] *Cf.* Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1293 (2014) (arguing that "laws prohibiting or restricting access to surrogacy infringe upon a fundamental right protected substantively by the Due Process Clause").

[63] *See, e.g.*, MARKENS, *supra* note 47, at 17 ("[L]iberal feminists and their supporters defend a woman's right to use her body as she chooses, even if that means being a surrogate.").

forming families of choice.[64] An even larger group remained in the middle, undecided on the issue.[65]

Initially, the "curious" alliance[66] of surrogacy opponents was the more successful contingent.[67] "By late 1988, six states had passed laws banning the agreements or declaring them void;"[68] these bans constituted the majority of enacted legislation at the time.[69] The tide soon shifted, however. In 1990 and 1991, respectfully, New Hampshire[70] and Virginia[71] became the first states to enact comprehensive statutory schemes permitting surrogacy. While one statutory ban was passed in New York in 1992, "[that] statute represents the political high-water mark of the antisurrogacy movement."[72] Every surrogacy scheme enacted in the U.S. since then has been a permissive one.[73] Thus, as Professor Richard Storrow puts it, "the legislative trend … is toward legalizing surrogacy."[74]

These permissive statutory schemes, however, are not identical. At the most fundamental level, they differ with regard to what types of surrogacy are permitted. Some permissive schemes only permit gestational surrogacy but are

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[64] *See, e.g.*, Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 3 (Larry Gostin ed. 1988, 1990).

[65] *See, e.g.*, Myrna Oliver, *Baby M: Old Story but the Legal Issues Remain Unresolved*, L.A. TIMES (Apr. 5, 1987).

[66] Scott, *Surrogacy*, *supra* note 57, at 129 (describing this coalition as "a curious one"). Susan Markens describes the groups as "strange bedfellows." MARKENS, *supra* note 47, at 163.

[67] *See, e.g.*, Oliver, *supra* note 65 (noting the "small constituency demanding laws [permitting surrogacy]").

[68] Scott, *Surrogacy*, *supra* note 57, at 117.

[69] Andrews, *The Aftermath of* Baby M, *supra* note 46, at 34.

[70] *Reproductive Technologies*, 103 HARV. L. REV. 1525, 1556 (1990) (citing 1990 N.H. House Bill 1426-FN § 168-B (later codified at N.H. REV. STAT. ANN. § 168-b) (effective Jan. 1991)). *See also* Robert L. Stenger, *The Law and Assisted Reproduction in the United Kingdom and United States*, 9 J.L. & HEALTH 135, 161 (1995).

[71] In 1991, Virginia became the first and only state to enact the permissive version of the Uniform Status of Children of Assisted Conception Act (USCACA). Walter J. Wadlington, *Contracts to Bear A Child: The Mixed Legislative Signals*, 29 IDAHO L. REV. 383, 395 (1993).

[72] Scott, *Surrogacy*, *supra* note 57, at 120.

[73] Nicolas, *supra* note 62, at 1288. Some laws permitting surrogacy also include provisions prohibiting specific types of conduct.

[74] Richard Storrow, *Surrogacy: American Style, in* SURROGACY, LAW AND HUMAN RIGHTS 193, 193 (Paula Gerber & Katie O'Byrne eds., 2015).

silent as to genetic surrogacy.[75] This is true, for example, in California.[76] In contrast, the laws in other jurisdictions permit and regulate both gestational and genetic surrogacy agreements. The District of Columbia is one such jurisdiction.[77]

Permissive laws also differ with regard to what kinds of payments are allowed. Some states, like Virginia, only permit reimbursement of expenses.[78] Other states, such as Utah, expressly allow for compensation.[79] Although they remain insufficiently theorized, these basic variations have been catalogued in the media and in scholarly literature.[80]

Other types of variations, however, remain almost entirely overlooked. Here I am referring to the ways in which the law regulates or safeguards the interests of the participants. Briefly, existing permissive, statutory regimes differ in this regard in significant ways. Take Arkansas.[81] Arkansas's one provision scheme simply declares that the intended father who contributes sperm is the legal parent of a child born as the result of a surrogacy.[82] It does not expressly address the parentage of the intended male gamete provider's unmarried partner. The statute also does not forth any requirements for the agreement to be enforceable.[83] On the other end of the spectrum are states like Washington. Washington's surrogacy scheme is longer and more comprehensive.[84] Importantly, this longer, more detailed schemes sets forth a range of requirements intended to safeguard the parties and to fulfill important policy goals.

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[75] Gestational surrogacy is where the person who acts as a surrogate does not provide the ova and is therefore not genetically related to the resulting child. Genetic surrogacy is where the person acting as a surrogate does provide the ova. COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 4:1.

[76] CAL. FAM. CODE § 7962.

[77] D.C. CODE ANN. §§ 16-401(22). Other jurisdictions that permit genetic surrogacy include: Florida; Maine (family members only); Vermont (family members only); Virginia; and Washington. FLA. STAT. ANN. § 63.212(h); ME. REV. STAT. tit. 19-A, § 1931(1)(e); VT. STAT. ANN. tit. 15C, § 801(a)(4); VA. CODE ANN. § 20-156; WASH. REV. CODE ANN. § 26.26A.700(3).

[78] VA. STAT. ANN. § 20-162(A).

[79] UTAH CODE ANN. § 78B-15-803(h).

[80] *See, e.g.*, Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 461 (2009) (charting whether surrogacy contracts are: criminalized, unenforceable, probably unenforceable, uncertain, probably enforceable, or enforceable).

[81] ARK. CODE ANN. § 9-10-201.

[82] ARK. CODE ANN. § 9-10-201(b) & (c).

[83] ARK. CODE ANN. § 9-10-201.

[84] WASH. REV. CODE ANN. §§ 26.26A.700 – 26.26A.785.

This Article uncovers these differences by setting forth a more comprehensive and accurate descriptive account of existing law. It then explores the normative consequences of these differences both from an individual and a collective perspective. These statutory variations hold profound implications for the parties. The details of the law affect who is treated as a legal parent. They also determine whether the pregnant person maintains autonomy about her own body and the course of the pregnancy. The implications of these details stretch far beyond just the individual participants.

II. EXISTING DESCRIPTIONS AND THEIR LIMITATIONS

Before presenting my novel, textured typology, this Part briefly canvases existing descriptions of U.S. surrogacy law. Despite important variations in the law of surrogacy, the contemporary conversation is largely framed around a basic binary distinction—whether the jurisdiction bans or permits surrogacy. This is true both in popular media descriptions, and in the legal literature.

In the simplest formulation, the jurisdiction's approach is designated by color. Red is often used to designate states that ban surrogacy either by designating any such agreements void, or by subjecting the participants to potential penalties.[85] Green is often used to denote states that permit at least some forms of surrogacy. Different sources characterize states differently, but that level of detail is typical.[86] Maps may also indicate *which types* of surrogacy—gestational and/or genetic, compensated and/or uncompensated—are permitted or banned by the jurisdiction.[87]

Media representations reinforce this permit/ban focus. A series of maps included in the New York Times, for example, divides states into the following categories: (1) "Statutes permit surrogacy with some restrictions," (2) "Statutes prohibit enforcement of surrogacy contracts," (3) "At least one court opinion

[85] For example, a Wikipedia map denotes Arizona, Indiana, Michigan, and North Dakota in red. Wikipedia, Surrogacy Laws by Country, https://en.wikipedia.org/wiki/Surrogacy_laws_by_country.

[86] *See, e.g.*, Creative Family Connections LLC, State-by-State Interactive Map for Commercial Surrogacy, available at https://www.creativefamilyconnections.com/us-surrogacy-law-map/(utilizing 4 categories).

[87] *See, e.g.*, Surrogacy 360, https://surrogacy360.org/considering-surrogacy/current-law/ (identifying six categories).

upholds some form of surrogacy," and (4) "There is neither a statute nor a case on surrogacy."[88] This fixation pervades legal scholarship as well.[89]

To be sure, these accounts communicate useful and important information. This basic question—whether surrogacy (or at least some form of surrogacy) is permitted within the state—is a critical piece of data. It is certainly important for potential participants to know whether their conduct will be a crime under the law of the relevant jurisdiction.[90]

Focusing only on the one-dimensional permit/prohibit question, however, can lead to a few problems. First, binary surveys can be incomplete and even misleading. This is true because in a number of jurisdictions, the law bans some forms of surrogacy but permits other forms of surrogacy. For example, North Dakota law provides that surrogacy agreements are void[91] *unless* they involve a child conceived using the sperm and egg from the two intended married parents.[92] Since most surrogacy arrangements are banned but some are not, it is difficult to accurately categorize it using a simple permit/ban designation. More fundamentally, this frame suggests that permit/ban question is the only, or at least the most important, question to be asked. In this way, it obscures a range

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[88] Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), https://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html.

[89] Jenna Casolo, Campbell Curry-Ledbetter, Meagan Edmonds, Gabrielle Field, & Kathleen O'Neill, Marisa Poncia, *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313, 330 (2019) ("States approach surrogacy contracts in different ways, ranging from near total enforcement, to criminalization, to total silence; the legal landscape may consist of statutes, case law, or both."). *See also* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 829 (6th ed. 2016) ("About half the states enacted surrogacy statutes. Some outlaw the practice, others allow but regulate it, and still others have no governing law at all."); Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1159 (2014) ("In the United States, surrogacy laws vary widely. Some states are quite favorable to the practice, while others go so far as to criminalize it."); Honorable William J. Giacomo & Angela DiBiasi, Esq., *Mommy Dearest: Determining Parental Rights and Enforceability of Surrogacy Agreements*, 36 PACE L. REV. 251, 260 (2015) (identifying "states generally considered as favoring enforceability of surrogacy agreements," "[s]tates that deem surrogacy contracts as void and against public policy," and "states [that] favor enforcing surrogacy contracts which do not require compensation" (footnote omitted)).

[90] Nicolas, *supra* note 62, at 1238–39 (explaining that he and his husband pursued surrogacy outside their home state of Washington because Washington law at the time "not only render[ed] compensated surrogacy contracts unenforceable, but actually ma[d]e[ ] it a *crime* to enter into them." (footnotes omitted)). Washington surrogacy provisions were amended in 2018.

[91] N.D. CENT. CODE ANN. § 14-18-05.

[92] N.D. CENT. CODE ANN. § 14-18-01.

of other issues that may well have a profound effect on the experiences of parties to any such arrangement and on the development of law and policy more broadly.

A few academic sources go a step farther by cataloguing some of surrogacy laws' substantive or procedural requirements.[93] Professor Peter Nicolas, for example, offers a six-category rubric. The category designations turn on the extent to which the state "overregulate[s]" the process.[94] Even these more detailed descriptions still offer only a partial picture. And this partial picture is one-sided, focusing on the intended parents.[95] For example, Professor Dave Snow ranks Canadian statutes "along a spectrum from permissive to restrictive."[96] As he puts it, "parentage policy becomes more permissive *if there are fewer legal barriers for intended parents*."[97]

This layer of additional information surely is important. As intended parents contemplate whether to enter into a surrogacy arrangement and where they may want to do so, they should understand what the process requires in the different jurisdictions. But these accounts remain incomplete; they overlook considerations related to people acting as surrogates. Thus, at best, these accounts provide a more fulsome, but still deficient descriptive account. Moreover, even the more comprehensive accounts omit a theoretical analyses of the normative implications of surrogacy law's details.

III. A NEW TYPOLOGY

This Part is the empirical core of the Article. After meticulously gathering and analyzing the statutes in all fifty states, I provide a more comprehensive and textured typology of existing U.S. surrogacy laws. My rubric begins with some basic questions that have been surveyed by others. The first table—Appendix A—charts whether the state permits any forms of surrogacy, and if so, which

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93 *See, e.g.*, *Should Compensated Surrogacy Be Permitted or Prohibited?*, Cornell Law School International Human Rights Policy Advocacy Clinic & National Law University, Delhi (2017), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2685&context=facpub.

94 Nicolas, *supra* note 62, at 1239–40.

95 *See, e.g.*, Hofman, *supra* note 80, at 460 ("[T]hree issues most sharply divide legislatures … : whether the surrogacy is traditional or gestational, whether the surrogate is compensated beyond expenses, and the marital status and sexual orientation of the intended parents.").

96 Dave Snow, *Measuring Parentage Policy in the Canadian Provinces: A Comparative Framework*, 59 CANADIAN PUBLIC ADMIN. 5 (2016), available at 2016 WLNR 12039124 (emphasis added).

97 *Id.*

ones. But, importantly, this is only the first layer of analysis, rather than the last. After plotting this basic information, I go on to assess and catalogue previously overlooked details of the existing permissive statutory regimes. This Part also offers new terminology to better identify and distinguish important elements of existing schemes. Appendix B tracks statutory variations related to the interests of the intended parents. Collectively, I call these factors Intended Parent Protections or IP protections. Appendix C assesses and catalogues criteria regarding people acting as surrogates. Collectively, I call these criteria Person Acting as Surrogate Protections or PAS protections.

A. Regulated Forms of Surrogacy

Appendix A catalogues whether the state permits or bans surrogacy and, if so, which types are permitted or banned. Because this information has been gathered by others, this section moves through this information quickly. Of the 26 jurisdictions with statutory provisions addressing surrogacy, twenty (20) permit gestational surrogacy.[98] Of these twenty (20), five (5) authorize both gestational and genetic surrogacy, and seventeen (17) permit compensation.[99] In contrast, eight (8) states civilly ban some or all forms of surrogacy.[100] Two states allow for the possible imposition of penalties—civil or criminal—on participants.[101]

B. Intended Parent (IP) Protections

Appendix B takes a deeper dive into the details of existing permissive, statutory regimes as they relate to intended parents.

1. Status-Based Criteria

The first three factors—restrictions on the identity of intended parents, medical need requirements, and genetic connection requirements—concern the inclusiveness (or lack thereof) of the intended parent eligibility criteria. A minority of states with permissive statutory regimes—4 of 20—limit enforceable agreements to those in which the intended parents are married.[102] These

[98] *See* Appendix A.

[99] *See* Appendix A. Issues related to compensation are addressed in more detail in Part II.B.3.

[100] *See* Appendix A.

[101] *See* Appendix A.

[102] LA. STAT. ANN. § 9:2718.1(b); N.D. CENT. CODE ANN. § 14-181-01(1) & (2); TEX. FAM. CODE § 160.754(b); UTAH CODE ANN. § 78B-15-801(3).

jurisdictions are Louisiana, North Dakota, Texas, and Utah. Two of the four—Louisiana and North Dakota—limit enforceable agreements to those in which both married spouses provided gametes.[103] In practice, this requirement limits the process to different-sex married couples.[104]

But the strong trend is in favor of statutes to permit any intended parents regardless of sex, sexual orientation, or marital status.[105] Eleven of the twenty permissive states have intended parent rules that expressly include all intended parents. For example, New Jersey's definition of intended parent is as follows: "The term ['intended parent'] shall include persons who are single, married, partners in a civil union or domestic partnership, and couples who are not married or in a civil union or domestic partnership."[106]

Four additional states—Arkansas, Florida, Iowa, and Oklahoma—have provisions that are expressly partially inclusive. Arkansas' law covers both married and unmarried intended parents. The rules, however, are gendered, and they seem to protect men only when they are genetic intended parents.[107] Florida permits married and unmarried couples, but its provisions use gendered terminology.[108] Oklahoma allows married couples of any sexual orientation, and

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Two other states—Arkansas and Oklahoma—have more limited restriction on the identity of intended parents. ARK. CODE ANN. § 9-10-201; OKLA. STAT. tit. 10, § 557.5(B)(4).

[103] LA. STAT. ANN. § 9:2718.1(b); N.D. CENT. CODE ANN. § 14-181-01(1) & (2).

[104] The exception to this statement would be situations involving a couple that includes a transgender person.

[105] *See, e.g.*, CAL. FAM. CODE § 7960(c); DEL CODE ANN. tit. 13, § 8-102(18); 750 ILL. COMP. STAT. ANN. 47/10; ME. REV. STAT., tit. 19-A, § 1832(12); NEV. REV. STAT. ANN. § 126.590; N.H. REV. STAT. ANN. § 168-B:1(XIII); N.J. STAT. ANN. § 9:17-62; VT. STAT. ANN. tit. 15C, § 102(14); VA. CODE ANN. § 20-156; WASH. REV. CODE ANN. § 26.26A.010(13); D.C. CODE § 16-401(16).

[106] N.J. STAT. ANN. § 9:17-62.

[107] ARK. CODE ANN. § 9-10-201(c)(1) ("[I]n the case of a [child born to a] surrogate mother, … the child shall be that of: (A) The biological father and the woman intended to be the mother if the biological father is married; (B) The biological father only if unmarried; or (C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination."). *See also* ARK. CODE ANN. § 9-10-201(b).

[108] FLA. STAT. ANN. § 742.13(2) ("'Commissioning couple' means the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents."). There are strong statutory and constitutional arguments that this language must be read in a gender-neutral manner. *See, e.g.*, McLaughlin v. Jones in & for Cty. of Pima, 401 P.3d 492, 498 (Ariz. 2017), *cert. denied sub nom.* McLaughlin v. McLaughlin, 138 S. Ct. 1165 (2018) (holding that a gendered marital presumption must be applied equally to a woman).

single individuals of any sex or sexual orientation, but does not allow unmarried couples (of any sexual orientation) to be intended parents.[109] Iowa's regulation does not expressly limit who can be an intended parent. The rule, however, only protects genetic parents. As a result, all same-sex intended parents and some different-sex intended parents will be at least partially unprotected.[110] By contrast, Connecticut's statute is also silent,[111] but the Connecticut Supreme Court held that the statute "confers parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent's genetic relationship to the children."[112] Overall, the strong trend is in towards inclusiveness and the elimination of discriminatory criteria.

Medical need requirements also impact who is recognized and protected as a parent of the resulting child. Older statutes are more likely to require proof that the intended parents have a "medical need" for surrogacy.[113] By contrast, most of the more recently enacted schemes jettison this requirement.[114] The elimination of the medical need requirement is also a means of opening up surrogacy to a wider range of potential intended parents.

Among other things, medical need requirements create barriers for male same-sex couples. This was borne out in Utah. Utah's statutory scheme includes a medical need requirement; the parties must establish that "the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child."[115] In 2017, a Utah trial court judge refused to validate a surrogacy agreement involving gay male intended parents on the ground the couple was unable to meet the law's medical need requirement.[116] On appeal, the Utah Supreme Court declared the requirement to

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[109] OKLA. STAT. ANN. tit. 10, § 557.5(B)(4).

[110] IOWA ADMIN. CODE r. 641-99.15.

[111] CONN. GEN. STAT. ANN. § 7-48a.

[112] Raftopol v. Ramey, 12 A.3d 783, 799 (Conn. 2011).

[113] *See, e.g.*, FLA. STAT. ANN. § 742.15(2); 750 ILL. COMP. STAT. § 47/20(b)(2); TEX. FAM. CODE ANN. § 160.756(b)(2); UTAH CODE ANN. § 78B-15-803(2)(b); VA. CODE ANN § 20-160(B)(8).

[114] The following states to not include a medical need requirement: Arkansas, California, Connecticut, Delaware, Iowa, Maine, Nevada, New Hampshire, New Jersey, North Dakota, Vermont, Washington, and D.C. Two recently enacted schemes do, however, include requirements related to medical need. LA. STAT. ANN. § 9:2720.3(B)(4); OKLA. STAT. tit. 10 557.10(B)(4) (requiring proof of medical or social infertility).

[115] UTAH CODE ANN. § 78B-15-803(2)(b).

[116] *See, e.g.*, Jennifer Dobner, *The couple is asking the Utah couple heads to state Supreme Court over law that prevents married gay men from having biological children through surrogacy*, SALT LAKE CITY TRIBUNE (Sept. 12, 2017),

be unconstitutional.[117] As the court explained, "a plain reading of [the medical need provision] works to deny certain same-sex married couples a marital benefit freely afforded to opposite-sex married couples."[118] Accordingly, the Court declared, "the statute violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment, under the analysis set forth in *Obergefell*."[119] Even when medical need requirements do not screen out entire classes of people based on their identity, some advocates oppose them on the ground that they unnecessarily intrude on and interfere with choices about reproduction and family creation.[120]

State law also varies with regard to whether one or both intended parents must be genetically related to the resulting child. A minority of states—Florida,[121] Illinois,[122] Iowa,[123] Louisiana,[124] and North Dakota[125]—include such requirements.[126] Two of these states—Louisiana and North Dakota—require both intended parents to be genetically related to the resulting child. Another—Iowa—does not absolutely require both intended parents to be genetic parents.[127] That said, only genetic parents are recognized as legal parents under the rule.[128] In contrast, the overwhelming majority of permissive states—15 of the 20—do not include such a requirement.[129]

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https://www.sltrib.com/news/2017/09/12/married-gay-couple-challenges-utahs-surrogacy-law-after-court-denies-petition/.

[117] *In re* Gestational Agreement, 2019 UT 40, ¶ 10, 449 P.3d 69, 74 (Utah 2019).

[118] *Id.* (footnote omitted).

[119] *Id.* (footnote omitted).

[120] *See, e.g.*, Statement of Policy on Surrogacy of the American Civil Liberties Union, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 295 (Gostin ed. 1988, 1990) ("[T]he state may not restrict the right to participate in the surrogacy arrangement based upon a diagnosis of infertility of the contracting father's partners. Decision about human reproduction should be a matter of voluntary choice free of government compulsion.") [hereinafter 1988 ACLU policy statement].

[121] FLA. STAT. ANN. § 742.13(2).

[122] 750 ILL. COMP. STAT. 47/20(b)(1).

[123] IOWA ADMIN CODE 641-99.15.

[124] LA. STAT ANN. § 9:2718.1(b).

[125] N.D. CENT. CODE ANN. § 14-18-01(1) & (2).

[126] Under Iowa's Administrative Code, only genetically related parents are protected. IOWA ADMIN. CODE r. 641-99.15. *See also cf.* VA. CODE ANN. § 20-160(B)(9) ("At least one intended parent is expected to be the genetic parent of any child resulting from the agreement *or* such intended parent has the legal or contractual custody of the embryo at issue." (emphasis added).

[127] IOWA ADMIN. CODE r. 641-99.15.

[128] IOWA ADMIN. CODE r. 641-99.15.

[129] *See* Appendix B.

Intuitions about the importance (or not) of genetic connections also animate statutes that limit enforceable agreements to gestational surrogacy. As shown in Appendix A, the majority of permissive states only allow gestational surrogacy arrangements. Only five of the 20 jurisdictions—specifically, Arkansas, Florida, Virginia, Washington, and D.C.—expressly permit genetic surrogacy.[130] And even among this group, all except Arkansas[131] treat gestational and genetic surrogacy differently in some respects.[132]

The potential exclusionary effects of various surrogacy requirements long have been of concern. For example, the ACLU's 1988 policy position on surrogacy states: "The state cannot discriminate against a person who seeks participation in a surrogacy arrangement on the basis of age, race, sex, sexual orientation, economic or social status, religion, marital status, or physical or mental condition."[133] More recently, feminist attorney Sara Ainsworth similarly argued: "[S]urrogacy legislation should ensure that these arrangements are open to adult people regardless of marital status, sexual orientation, or their reasons for seeking a surrogacy arrangement."[134]

The people most obviously impacted by intended parent eligibility rules are the intended parents. Eligibility rules also have consequences for the child. When intended parents are not recognized and protected, the resulting children are left vulnerable. Typically, intended parents who are not covered by the statutory scheme are not prohibited from entering into a surrogacy agreement. Instead, the effect of the exclusionary criteria is to render the parties and the

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[130] Two additional states—Maine and Vermont—allow genetic surrogacy, but only if the agreement is between family members. ME. REV. STAT. tit. 19-A, § 1931(1)(e); VT. STAT. ANN. tit. 15C, § 102(12).

[131] Arkansas' single section on surrogacy simply addresses the parentage of children born as the result of "artificial insemination." If that phrase was interpreted narrowly, it would only cover genetic surrogacy. *See, e.g.*, Patton v. Vanterpool, 806 S.E.2d 493, 496 (Ga. 2017) (holding that Georgia statute addressing the parentage of children conceived through "artificial insemination" did not apply to child conceived through in vitro fertilization). There is no Arkansas case law interpreting this provision, however.

[132] *See* Appendix A.

[133] 1988 ACLU policy statement, *supra* note 120, at 294.

[134] Ainsworth, *supra* note 1, at 1117. *See also* Center for Reproductive Rights, *Compensated Gestational Surrogacy in the United States: Baseline Guiding Principles for Proactive Policy* (2019), https://reproductiverights.org/sites/default/files/2019-09/64829505_US-HumanRights-20190910-Surrogacy-Final-NoBleeds.pdf [hereinafter *CRR Guiding Principles*].

resulting child unprotected.[135] Among other things, the result may be that the intended parents are not recognized as the legal parents of the resulting child.[136]

Intended parent criteria in surrogacy laws have implications for parentage law more broadly. Noninclusive intended parent rules reinforce stereotypes about which family forms are "best" for children.[137] These kinds of exclusionary rules historically have harmed nonmarital children,[138] as well as the children of same-sex couples.[139] In contrast, inclusive intended parent rules bolster principles that all families, including same-sex parent families, are respected and protected under the law. Inclusive intended parent rules also break down beliefs that families must all consist of one mother and one father. Such beliefs are rooted in and perpetuate gender-based notions about the nature of motherhood and fatherhood.

Similarly, rules that require genetic connection to the intended parents, or that prohibit a genetic connection to the person acting as a surrogate reinforce ingrained intuitions that biological or genetic connections are an essential aspect of parenthood. As Douglas NeJaime explains, "[b]iological connection can present itself as a natural and innocuous parenting norm, but appeals to biological parenthood can both incorporate and mask judgments about same-sex family formation."[140] Indeed, one can find numerous recent examples in which lack of biological connection was invoked to justify discrimination against same-sex couples.[141] In contrast, by jettisoning rules that require or prohibit

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[135] Prior to the enactment of its current statutory scheme, a New Jersey court held that gestational surrogacy agreements were void in New Jersey. As a result, the court held that the nonbiological married gay male intended father was not a parent of the resulting twins. *A.G.R. v. D.R.H. & S.H.*, (N.J. Super. Ct. 2009), available at https://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf.

[136] This is true, for example, in Louisiana. In Louisiana, intended parents of permissive surrogacy arrangements must be: (1) a married couple; (2) each of whom is a genetic parent of the resulting child. LA. REV. STAT. ANN. § 9:2718.1(6). Surrogacy arrangements that do not comply with those and other rules are void and unenforceable. LA. REV. STAT. ANN. § 9:2720(C).

[137] For an exploration of how these kinds of arguments were used to oppose marriage equality, see Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 82 (2011) [hereinafter Joslin, *Searching for Harm*].

[138] *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972) (striking down as unconstitutional law that treated nonmarital children less favorably).

[139] *See, e.g.*, Joslin, *Searching for Harm*, *supra* note 137, at 82.

[140] NeJaime, *Parenthood*, *supra* note 7, at 2324.

[141] *See, e.g.*, Henderson v. Box, -- F.3d --, 2020 WL 255305 (7th Cir. 2020) (rejecting State's invocation of biology as justification for refusing to list female spouse on her child's birth certificate); Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017) (same);

genetic connections, states can instead further trends in parentage law that ascribe greater significance to other factors, including intent and function. This move is necessary to vindicate principles of equality and autonomy in parentage law and beyond.[142]

2. Evaluations

Three states—Texas,[143] Utah,[144] and Virginia[145]—have home study requirements, although that requirement can be waived in Texas[146] and Utah.[147] A fourth state—Louisiana—requires criminal background checks, child abuse and neglect checks, and restraining order checks.[148]

Some advocates and scholars oppose home study or similar gatekeeping requirements on the ground that they are inappropriate in this context. Home studies are required for adoptions. Surrogacy, it is argued, differs from adoption important respects. In a surrogacy arrangement, the parties deliberately engage in a medical procedure for the purpose of bringing a child into the world, a child the intended parents intend to parent from birth.[149] By contrast, in adoption, the prospective adoptive parent enters the picture after conception. Others note that home studies can allow bias to seep into the process.[150] Indeed, in the adoption context, evidence shows that LGBTQ and other "disfavored" people, including disabled people,[151] often face bias from agency officials.[152] Home study

McLaughlin v. Jones in & for Cty. of Pima, 401 P.3d 492, 498 (Ariz. 2017), *cert. denied sub nom.* McLaughlin v. McLaughlin, 138 S. Ct. 1165, (2018) (rejecting biological mother's argument that the marital presumption cannot be applied to female spouses because female spouses cannot be biological parents).

142 NeJaime, *Parenthood*, *supra* note 7, at 2333 ("In practical terms, equality requires law to value social as well as biological contributions in recognizing parents.").

143 TEX. FAM. CODE § 160.756(b)(3).

144 UTAH CODE ANN. § 78B-15-803(2)(c).

145 VA. CODE ANN. § 20-160(B)(2).

146 TEX. FAM. CODE §160.756(b)(3).

147 UTAH CODE ANN. § 78B-15-803(2)(c).

148 LA. STAT. ANN. § 9:2720.4.

149 *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) ("Gestational surrogacy differs in crucial respects from adoption.").

150 *See, e.g.*, Ainsworth, *supra* note 1, at 1111.

151 *See, e.g.*, *id.* ("[M]ental health evaluations … may be used for the purpose of denying some people the ability to participate in [surrogacy] contracts." (footnotes omitted)).

152 For example, a 2011 study of prospective gay and lesbian adoptive parents found that nearly half of the people who responded to the survey reported that their experienced discrimination in the process. David M. Brodzinsky & Evan B. Donaldson, *Expanding Resources for Children III: Research-Based Best Practice in Adoption by Gays and*

requirements, it is also claimed, infuse inappropriate state control over what should be a private decisions about procreation and family creation.[153] Based on these and other concerns, the vast majority of permissive jurisdictions do not include a home study or similar requirement.[154]

3. Procedural Rules

Surrogacy laws vary on the timing of and procedures regarding determinations of parenthood. Half of the permissive jurisdictions—9 of the 20—clearly provide for automatic determinations that the intended parents are parents of children conceived pursuant to a compliant gestational surrogacy

Lesbians (2011). *See also* Frank J. Bewkes, Shabab Ahmed Mirza, Cailin Rooney, Laura E. Durso, Joe Krull & Ally Wong, *Welcoming All Families, Center for American Progress* (2018), https://www.americanprogress.org/issues/lgbt/reports/2018/11/20/461199/welcoming-all-families/; Rachel H. Farr & Abbie E. Goldberg, *Sexual Orientation, Gender Identity, and Adoption Law*, 56 FAM. CT. REV. 374, 378 (2018) ("Even in the context of laws allowing for adoption by LGBTQ persons, the process of adoption can involve stigma and discrimination in the context of both interpersonal and institutional interactions.").

For a discussion of some of the cases in which LGBTQ prospective adoptive parents alleged discrimination based on their sexual orientation or gender identity, see COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW §§ 2:12-2:14. For reporting on a recent such case, see, for example, Christine Hauser, *Utah Judge Orders Lesbian Couple to Give Up Foster Child*, N.Y. TIMES, Nov. 13, 2015.

Over the years, some agency officials sought to combat this type of bias. For explorations of these acts of resistance, see Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L. L. REV. 363 (2016); Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL'Y REV. 83 (2017). For an exploration of the "trajectory of LGB foster and adoptive parenting," see Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 314 (2015).

[153] *See, e.g.*, 1988 ACLU policy statement, *supra* note 120 ("Decision about human reproduction should be a matter of voluntary choice free of government compulsion.").

[154] *See* Appendix B.

agreement.[155] Four additional states have laws that are not explicit on this point, but may also provide for this result.[156]

This approach, it is argued, provides the parties with certainty and finality.[157] The benefit of automatic determinations of parentage, without the need for a court adjudication, is more obvious with respect to the intended parents. There is also a strong argument that it also benefits the child. Establishing parentage as a matter of law ensures that the child will have legal parents. Schemes that requires the parties to return to court after birth leave the child's parentage unclear for at least some period of time. That can be harmful to all parties, including the child.

Some advocates argue that rules providing for parentage as a matter of law also benefit the person acting as a surrogate. Such rules provide assurance to the person acting as a surrogate that, so long as they comply with the statutory requirements, the intended parents will be required to assume custody and responsibility for the child after the child's birth. Sara Ainsworth describes the benefits of such a rule this way: "The child is never left parentless; the intended parents are both assured of and required to assume their parental obligations; and the woman acting as surrogate knows in advance exactly what will happen when she agrees to act as a surrogate, and is never left with parental responsibility for a child she did not intend to raise."[158]

Laws providing for automatic determinations of parentage also minimize the costs, time, and procedural hurdles associated with having one or more required court appearances. These appearances can be particularly burdensome when the proceedings must occur in states other than the home state of one or more of the parties.[159]

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[155] ARK. CODE ANN. § 9-10-201; CAL. FAM. CODE § 7962(f)(2); ME. REV. STAT. tit. 19-A, § 1933(1); NEV. REV. STAT. ANN. § 126.720(1)(a); N.J. STAT. ANN. § 9:17-63; N.D. CENT. CODE ANN. § 14-18-08; VT. STAT. ANN. tit. 15C, § 803(a)(1); WASH. REV. CODE § 26.26A.750(1); D.C. CODE § 16-407.

[156] DEL. CODE ANN. tit. 13, § 8-807; 750 ILCS § 47/35; N.H. REV. STAT. ANN. § 168-B:12(I). *See also Raftopol*, 12 A.3d at 799 ("[W]e conclude that the legislature intended § 7-48a to confer parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent's genetic relationship to the children.").

[157] *See, e.g.*, Ainsworth, *supra* note 1, at 1120. *See also cf. CRR Guiding Principles*, *supra* note 134 ("Pre-birth parentage orders (PBPOs) in compensated gestational surrogacy arrangements help establish legal clarity by establishing who the future child's legal parents will be if and once the child is born.").

[158] Ainsworth, *supra* note 1, at 1120–21.

[159] *See, e.g.*, Nicolas, *supra* note 62, at 1245 (discussing challenges of working with a surrogate in a different state).

Relatedly, there is a trend in favor of statutes that permit courts to issue parentage orders prior to the birth of the child.[160] Obtaining a pre-birth order regarding parentage can be helpful to the parties. Having such an order can provide the parties with a greater degree of certainty and security over their respective statuses regarding the future child.[161] From a practical perspective, the order can facilitate a number of important steps both before and shortly after the birth of the child. For example, it can streamline issues related to securing health insurance for the resulting child. Having the order can also facilitate the completion of the child's original birth certificate.[162]

In some states, these provisions clarify that while such orders can be *issued* prior to birth, they do not become *effective* until the birth of the child.[163] The relevant Washington provision provides, for example, that a pre-birth order can "*order[ ] that parental rights and duties vest immediately on the birth of the child exclusively in each intended parent*."[164]

In other jurisdictions, however, any such orders are effective immediately, even when issued prior to the birth of the child. For example, Illinois' provision states: "[A] parent-child relationship *shall be established prior to the birth of a child* born through gestational surrogacy if [the parties comply with all of the statutory requirements]."[165]

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[160] *See, e.g.*, CAL. FAM. CODE § 7962(f)(2); 750 ILL. COMP. STAT. ANN. 47/35(a); ME. REV. STAT. tit. 19-A, § 1934(1); NEV. REV. STAT. ANN. § 126.720(4); N.H. REV. STAT. ANN. § 168-B:12(1); N.J. STAT. ANN. § 9:17-67(a) & (f); VT. STAT. ANN. tit. 15C, § 804(a)(1); WASH. REV. CODE ANN. § 26-26A-750(1)(a); D.C. CODE ANN. § 16-408(a) & (e).

[161] Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 634–35 (2005).

[162] *Id.* at 634.

[163] *See, e.g.*, ME. REV. STAT. tit. 19-A, § 1934(1)(B); NEV. REV. STAT. ANN. § 126.720(4); VT. STAT. ANN. tit. 15C, § 804(a)(1); WASH. REV. CODE § 26-26A-750(1)(a); D.C. CODE ANN. § 16-408(e)(1)(A).

The law in California is more ambiguous. The law permits the issuance of an order prior to birth "establishing a parent-child relationship." CAL. FAM. CODE § 7962(f)(2). Another provision, however, provides that while a parentage action "may be brought, [and] an order or judgment may be entered before the birth of the child, … enforcement of that order or judgment shall be stayed until the birth of the child." CAL. FAM. CODE § 7633.

[164] WASH. REV. CODE § 26-26A-750(1)(a).

[165] 750 ILL. COMP. STAT. ANN. 47/35(a). *See also* N.H. REV. STAT. ANN. § 168-B:12(I) (providing that a parentage action can be "either before, during, or subsequent to the pregnancy" and that, upon a finding of substantial compliance, "the court shall … grant the petition" and that "[s]uch parentage orders … shall conclusively establish or affirm … the parent-child relationship."); N.J. STAT. ANN. § 9:17-67(a) & (f) (providing that the action can be filed in the county in which the resulting child is

Some women's rights and reproductive rights advocates are troubled by statutory provisions that purport to establish a person's legal parentage prior to the birth of the resulting child.[166] The concern is that legislation declaring the parentage of a fetus could be understood to suggest that the fetus is a person to which rights attach.[167] Fetal rights-based arguments have been utilized as a means to chip away at women's right and access to abortion services, as well as other types of reproductive health care.[168] For this reason, at the urging of feminists and women's rights advocates, a preamble was added to the final (unsuccessful) 2019 version of the New York legislation that would have permitted and regulated gestational surrogacy. The preamble declared: "No fertilized egg, embryo or fetus shall have any independent rights under the laws of this state, nor shall any fertilized egg, embryo or fetus be viewed as a child under the laws of this state." As noted above, for similar reasons, the law in a number of states clarifies that parentage orders issued during pregnancy do not become effective until birth.[169]

Here, too, details matter. Getting pre-birth orders can be beneficial for all parties. Exactly what those orders say and do, though, can have important implications for reproductive rights more broadly.

C. Person Acting as a Surrogate (PAS) Protections

1. Independent Counsel

While there is much about surrogacy that is debated, there is general agreement that surrogacy arrangements do hold the potential for inappropriate coercion. One safeguard that is increasingly included in surrogacy legislation to guard against untoward coercion and to address the unequal bargaining power that is typical in these arrangements is the requirement of independent legal representation for all parties. Some of the older schemes do not speak to this

expected to be born, and that "[i]f the court finds that the parties have complied with the [surrogacy] provisions …, the court shall enter an order of parentage naming the intended parent as the legal parent of the child.").

166 *See, e.g.*, *CRR Guiding Principles*, *supra* note 134, at 2 ("Pre-birth parentage orders (PBPOs) … help establish legal clarity by establishing who the future child's legal parents will be if and once the child is born. … PBPOs neither grant fertilized eggs, embryos, or fetuses the status of persons under the law nor grant any party parental rights over them.").

167 *Id.*

168 *See, e.g.*, Goodwin, *supra* note 33, at 783.

169 *See supra* notes 163-164 and accompanying text.

issue.[170] Today, the majority of permissive statutory regimes do include some kind of requirement related to independent legal counsel.[171] There is some variation, however, in this regard. Some states require independent legal representation, but only for some aspects of the arrangement. For example, the California law simply requires that the parties be represented by independent counsel *prior to the execution* of the agreement.[172] In contrast, a number of other statutory require independent legal representation "throughout the surrogacy arrangement"[173] or in "all matters concerning" the agreement.[174]

The benefits of a legal advocate to guard against abuse is of limited use, however, if the person acting as a surrogate cannot afford legal counsel.[175] Accordingly, three of the more recently enacted schemes require the intended parents to pay for counsel for the person acting as a surrogate.[176] This requirement does raise the potential that the counsel may have some allegiances to the intended parents. The attorneys are, however, governed by ethical rules. These rules require the counsel to zealously advocate on behalf of their client—who is the person acting as a surrogate.[177]

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[170] *See, e.g.*, ARK. CODE ANN. § 9-10-201; FLA. STAT. ANN. § 63.213(4) (providing that if there is counsel, counsel cannot jointly represent the intended parent and the person acting as a genetic surrogate); FLA. STAT. ANN. § 741.11 (no mention of counsel); CONN. GEN. STAT. ANN. § 7-48a (no mention of counsel); TEX. FAM. CODE §§ 160.751 - 160.763 (no mention of counsel); UTAH CODE ANN. §§ 78B-15-801–78B-15-809 (no mention of counsel); VA. CODE ANN. §§ 20-165 (regulating "brokers," including attorneys, but not requiring counsel).

[171] CAL. FAM. CODE § 7962(b); DEL. FAM CODE tit. 13, § 8-807(b)(3); 750 ILL. COMP. STAT. 47/25(b)(3); ME. REV. STAT. tit. 19-A, § 1931(1)(D); NEV. REV. STAT. ANN. § 126.750(2); N.H. REV. STAT. ANN. § 168-B:11(III); N.J. STAT. ANN. § 9:17-65(a)(3); OKLA. STAT. tit. 10, § 557.6(B); VT. STAT. ANN. tit. 15C, § 802(b)(7); WASH. REV. CODE ANN. § 26.26A.710(7); D.C. CODE ANN. § 16-406(b).

[172] CAL. FAM. CODE § 7962(b). *Cf.* D.C. Code § 16-406(b) (providing that the parties "shall be represented by independent legal counsel in the preparation, counseling, and negotiation of the surrogacy agreement").

[173] WASH. REV. STAT. § 26.26A.710(7).

[174] *See, e.g.*, DEL. FAM. CODE tit. 13, § 8-807(b)(3); 750 ILCS 47/25(b)(3); ME. REV. STAT. tit. 19-A, § 1932(3)(G); NEV. REV. STAT. ANN. § 126.750(2); N.J. STAT. ANN. § 9:17-65(a)(3); VT. STAT. ANN. tit. 15C, § 802(b)(7).

[175] *See, e.g.*, Ainsworth, *supra* note 1, at 1114.

[176] ME. REV. STAT. tit. 19-A, § 1931(1)(D); VT. STAT. ANN. tit. 15C, § 801(a)(3); WASH. REV. CODE ANn. § 26.26A.710(8). Delaware law requires the intended parents to pay for counsel for the person acting as a surrogate if "requested." DEL. CODE ANN. tit. 13, § 8-806(5).

[177] June Carbone & Christina O. Miller, *Surrogacy Professionalism*, 31 J. AM. ACAD. MATRIM. LAW. 1, 36 (2018) ("Under Rule 5.4(c), a lawyer may not permit a party who

2. Bodily Decision-Making and Control During Pregnancy

Another set of key issues regarding people acting as surrogates relate to their ability to make decisions about their bodies and their behavior during the course of pregnancy. Some advocates argue that "[e]nsuring that a woman retains reproductive decision-making should be a key aspect of any regulatory scheme regarding compensated surrogacy."[178] This position is reflected in some, but far from all, permissive surrogacy regimes.

A threshold decision-making issue that is addressed in some statutes relates to the choice of the treating physician for the person acting as a surrogate. The law in two permissive states—Maine[179] and Vermont[180]—expressly require that this decision must be left exclusively in the hands of the person acting as a surrogate. New Jersey law states that the person acting as a surrogate must be permitted to be treated by a medical professional of her choice, but that this choice can be made only "after she notifies, in writing, the intended parent of her choice."[181] In contrast, the law in three other jurisdictions—Delaware,[182] Illinois,[183] and Nevada[184]—declare that the treating physician can be chosen only "after consultation with the intended parent."

A few other jurisdictions expressly protect the right of the person acting as a surrogate to make a wider range of health care decisions during her pregnancy. Washington State law, for example, provides that the surrogacy agreement must permit the person acting as a surrogate "to make *all health and welfare decisions regarding herself and her pregnancy*, and not withstanding any other provisions in this

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pays the lawyer's fees or recommends the lawyer to in any way influence or direct the professional judgment of the lawyer in rendering the services." (footnote omitted)).

178 Ainsworth, *supra* note 1, at 1114. The Center for Reproductive Rights endorsed a similar principle, declaring: "Consistent with human and constitutional rights, a person acting as a gestational surrogate controls all decisions about their body throughout a compensated gestational surrogacy arrangement, including during attempts to become pregnant, pregnancy, delivery, and post-partum." *CRR Guiding Principles*, *supra* note 134.

179 ME. REV. STAT. tit. 19-A, § 1932(3)(J)(3) ("The gestational carrier has the right to use the services of a health care provider of her choosing to provide her care during her pregnancy.").

180 VT. STAT. ANN. tit. 15C, § 802(b)(12) ("The gestational carrier shall have the right to use the services of a health care provider or providers of the gestational carrier's choosing to provide care during the pregnancy.").

181 N.J. STAT. ANN. § 9:17-65(b)(1)(c).

182 DEL. CODE ANN. tit. 13, § 8-807(c)(3).

183 750 ILL. COMP. STAT. 47/25(c)(3).

184 NEV. REV. STAT. ANN. § 126.750(4)(c).

chapter, provisions in the agreement to the contrary are void and unenforceable."[185] This language ensures that the person acting as a surrogate gets to make all medical decisions during her pregnancy. This would include, presumably, the choice of doctor. This provision also protects the right to make many other decisions that may arise during the course of the pregnancy, such as whether to have a particular invasive test or a cesarean section. Other states that have similar statutory language include Vermont,[186] Virginia,[187] and the District of Columbia.[188]

Three other states—Maine,[189] Texas,[190] and Utah[191]—have statutes with somewhat more limited language regarding general medical decision making. Maine law, for example, provides that "the agreement may not limit the right of the [person acting as a surrogate] to make decisions to safeguard her health or the health of an embryo."[192] This language clearly protects the right of the person acting as a surrogate to make at least some medical decisions during her pregnancy. It is possible, however, that a court could interpret the "safeguard" language in way that allows for enforcement of some provisions related to medical decisions that do not impose any risks to the health of the person acting as a surrogate. Under this interpretation, a court might, for example, approve the inclusion of contract clauses under which the person acting as a surrogate agrees not to engage in a range of behaviors such as smoking or drinking, or maybe even strenuous exercise.

Another group of states have multiple provisions regarding the bodily autonomy and integrity of the person acting as a surrogate that appear to be in tension with one another. For example, Florida law provides that the intended parents must agree "that the gestational surrogate shall be the sole source of

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185 WASH. REV. CODE ANN. § 26.26A.715(1)(a) (emphasis added).

186 VT. STAT. ANN. tit. 15C, § 802(e).

187 VA. CODE ANN. § 20-163(A) ("[Person acting as a surrogate] shall be solely responsible for the clinical management of the pregnancy.").

188 D.C. CODE ANN. § 406(4)(C) ("[S]urrogate shall maintain control and decision-making authority over the surrogate's body."). *See also* D.C. CODE § 16-406(c) ("A surrogacy agreement may not limit the right of the surrogate to make decisions to safeguard the surrogate's health or that of the embryo or fetus.").

189 ME. REV. STAT. tit. 19-A, § 1932(5) ("[Agreement] may not limit the right of the gestational carrier to make decisions to safeguard her health.").

190 TEX. FAM. CODE ANN. § 160.754(g) ("[A]greement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo.").

191 UTAH CODE ANN. § 78B-15-808(2) (providing that the agreement "may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryo or fetus.").

192 TEX. FAM. CODE ANN. § 160.754(g).

consent with respect to clinical intervention and management of the pregnancy."[193] A different subsection of Florida law, however, provides that the person acting as a surrogate must agree "to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health."[194] It is not clear how a court would interpret these arguably conflicting provisions in cases where the person acting as a surrogate made a reasonable decision regarding treatment related to the management of her pregnancy that departed from the instructions provided by a medical professional. Louisiana has two similar provisions.[195]

Another group of permissive statutory schemes take a very different approach. The laws in these jurisdictions permit contract clauses that *limit* or *override* the medical decision-making authority of the person acting as a surrogate with respect to her own body. For example, Oklahoma law expressly allows for the inclusion of agreement clauses that require the person acting as a surrogate to "undergo all medical examinations, treatments and fetal monitoring procedures recommended for the success of the pregnancy by the physician providing care to the gestational carrier during the pregnancy."[196] Three other states—Delaware, Illinois, and Nevada—have similar provisions expressly permitting such clauses.[197] Oklahoma law goes a step farther and expressly declares that these clauses themselves "shall be enforceable."[198]

The schemes in other permissive regulatory jurisdictions—including laws in Arkansas, California, Connecticut, Iowa, New Jersey, and North Dakota—do not expressly address contract clauses regarding the decision-making authority of the person acting as a surrogate.[199] While these statutes do not expressly condone such clauses, they also do render them void either. Evidence suggests that attorneys in at least some of these jurisdictions routinely include such clauses in their agreements.[200]

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193 FLA. STAT. ANN. § 742.15(3)(a).

194 FLA. STAT. ANN. § 742.15(3)(b).

195 LA. REV. STAT. § 9:2720.2(B)(2) ("[G]estational carrier has sole authority with respect to medical decision-making during the term of the pregnancy consistent with the rights of a pregnant woman carrying her own biological child."); LA. REV. STAT. ANN. § 9:2720.2(A)(2) ("[Person acting as a surrogate must agree] to reasonable medical evaluation and treatment during the term of the pregnancy, to adhere to reasonable medical instructions about prenatal health, and to execute medical records releases…").

196 OKLA. STAT. tit. 10 § 557.6(D)(1).

197 DEL. CODE ANN. tit. 13, § 8-807(d)(1); 750 ILL. COMP. STAT. 47/25(d)(1); NEV. REV. STAT. ANN. § 126.750(5)(a).

198 OKLA. STAT. tit. 10 § 557.6(D).

199 *See* Appendix C.

200 *See* Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 LAW & SOC'Y REV. 143, 156–57 (2015).

These kinds of clauses have been included in surrogacy agreements from the early days.[201] Despite some early predictions to the contrary,[202] they remain basic features of the contracts today.[203] Their continued presence is due at least in part the express condonation of them by a number of states.

A related issue is whether the agreement can include clauses that *regulate the daily behavior* of the person acting as a surrogate. These kinds of clauses tend to be features rather than tics of surrogacy contracts today. For example, in her study, Hillary Berk reviewed 30 surrogacy contracts. Based on this work, Berk reports:

> lawyers insert extensive lists of rules the surrogate must follow . … Contract rules may include the degree of an intended parents' surveillance over the surrogate, restrictions on the surrogate's daily activities, or requiring the surrogate to consume solely organic foods and supplements while prohibiting caffeine, sugar, or fast food throughout the pregnancy. Some rules require that the surrogate engage in a particular activity--like acupuncture or going to the gym--or prohibit her from doing so--such as bans on microwaves, hairspray, manicures, or changing cat litter.[204]

Arguably, the broad statutory language protecting the right of the person acting as a surrogate to make *all health and welfare decisions* would preclude such clauses.[205] This may not be the case in states with provisions protecting only the right to make decisions to "safeguard" her health,[206] or her right to make

[201] Katie Marie Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263, 282-83 (1981) (including such a clause).

[202] Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2373–74 (1995).

[203] *See, e.g.*, Berk, *supra* note 200, at 156–57.

[204] *Id.* at 156–57.

[205] *See supra* notes 185–188 and accompanying text for a discussion of states with this type of statutory provision.

[206] *See, e.g.*, ME. REV. STAT. tit. 19-A, § 1932(5); TEX. FAM. CODE ANN. § 160.754(g); UTAH CODE ANN. § 78B-15-808(2). D.C. has a provision with similar language. D.C. CODE § 16-406(c). Another provision, however, provides that "the surrogate shall maintain control and decision-making authority over the surrogate's body." D.C. CODE ANN. § 406(4)(C).

"medical decisions"[207] or to control the "clinical management" of the pregnancy.[208]

These kinds of contract clauses are expressly *condoned* by the statutes in a number of other states. Four states—Delaware, Illinois, Nevada, and Oklahoma—have statutory schemes that permit the agreement to include contractual clauses requiring the person acting as a surrogate 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."[209] These clauses could cover things like illegal drug use. Their scope, however, can sweep much more broadly. They could cover—and very often do cover—issues as far ranging as kind of food the person acting as a surrogate must eat, whether she can use a microwave, and whether and how much she can exercise.[210]

A number of statutory schemes do not directly address these kinds of behavior clauses. These states include Arkansas, California, New Hampshire, New Jersey, and North Dakota.[211] Arguably, in these states, the agreement is enforceable so long as it otherwise complies with the statutory requirements and do not violate other principles of law. But what this may mean in practice is that, despite the statutory silence, such behavior clauses may indeed be enforceable in these states.

To be sure, there are serious questions about whether contract clauses of this type are enforceable and if so, how. Some scholars argue in favor of "full contractual" enforcement of surrogacy agreements, including provisions about invasive medical treatment and abortions.[212] Others, in contrast, argue that, at a minimum, clauses that require the person acting as a surrogate to have an

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[207] LA. REV. STAT. § 9:2720.2(B)(2) ("[G]estational carrier has sole authority with respect to medical decision-making during the term of the pregnancy consistent with the rights of a pregnant woman carrying her own biological child.").

[208] VA. CODE ANN. § 20-163(A) ("[Person acting as a surrogate] shall be solely responsible for the clinical management of the pregnancy.").

[209] DEL. CODE ANN. tit. 13, § 8-807(d)(2) (providing agreement "shall be enforceable even" it contains such a clause); 750 ILL. COMP. STAT. ANN. 47/25(d)(2) (providing agreement "shall be presumed enforceable" if it contains such a clause); NEV. REV. STAT. ANN. § 126.750(5)(b) (providing agreement "is enforceable even if it contains" such a clause); OKLA. STAT. ANN. tit. 10, § 557.6(D)(2) (providing that such a clause "shall be enforceable").

[210] *See, e.g.*, Berk, *supra* note 200, at 157.

[211] *See* Appendix B.

[212] *See, e.g.*, Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2336 (1995). *See also* Deborah S. Mazur, *Born Breach: The Challenge of Remedies in Surrogacy Contracts*, 28 YALE J. L. & FEMINISM 211 (2017) (arguing lawyers should "consider liquidated damages for tragic breaches [of surrogacy agreements], and that courts ought to honor these clauses").

abortion or that preclude her from having an abortion are unenforceable.[213] Some also argue that clauses about other medical interventions during the pregnancy are likewise unenforceable.[214]

In any event, laws that even purport to allow these kinds of contract provisions are deeply troubling.[215] In the context of individual surrogacy arrangements, such clauses diminish the rights and interests of pregnant people and allow their bodies and their lives to be subordinated to the wishes and interests of others. Moreover, that person may experience the effects long after the arrangement has ended. If, for example, a person acting as surrogacy is forced to undergo an unwanted cesarean section, she might experience reduced fertility or other complication of the surgery throughout her lifetime.[216]

The impact of state condonation of these kinds of clauses is felt not just by participants to surrogacy arrangements. Applied more broadly, such an approach inhibits women's ability to achieve full equality. Viewed through this lens, these types of surrogacy rules can be seen as contributing to efforts to curtain women's bodily autonomy and reproductive freedom. Such curtailments have the potential to impact all aspects of women's lives. As the Court itself has explained, reproductive freedom:

> crucially affects women's health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions that this society no longer believes fair to enforce, yet is unwilling institutionally to redress.[217]

3. Consent

Most permissive statutory schemes clearly provide (or at least seem to provide) that compliant gestational surrogacy agreements become enforceable

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213 *See, e.g.*, Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 338 (1985).

214 *See, e.g.*, Andrews, *Beyond Doctrinal Boundaries*, *supra* note 202, at 2372–73 ("If a court, under traditional contract principles, is not going to grant specific performance to force an opera singer to sing, it seems highly unlikely that a court would enforce the abortion, cesarean section, or medical provisions of the surrogacy contract.").

215 Joslin, *Pregnancy*, *supra* note 30.

216 Elizabeth Kukura, *Obstetric Violence*, 106 GEO. L.J. 721, 754–55 (2018) (discussing some of the short-term and long-term consequences of cesareans).

217 Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 819 (2007).

and binding at the time a successful embryo transfer has occurred. For example, Washington law provides that a party to a compliant gestational surrogacy agreement "may terminate the agreement, at any time before an embryo transfer, by giving notice of termination in a record to all other parties. If an embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent embryo transfer."[218] Maine,[219] Vermont,[220] and Virginia[221] have similar provisions. Other states have provisions that seem to have a similar effect, although the provisions do not expressly address the issue of contract termination. These jurisdictions include Arkansas,[222] California,[223] Delaware,[224] New Hampshire,[225] New Jersey,[226] Nevada,[227] North Dakota,[228] and the District of Columbia.[229]

In contrast, other states require the parties to appear in court after the child is born. In most of these jurisdictions, however, at least with regard to gestational surrogacy, it is unclear what the effect of an attempted withdrawal of consent at that point would be. It is unclear because these same states typically require the parties to go to court *prior to pregnancy* as well. In that pre-pregnancy proceeding, the court typically will issue an order declaring that the intended parents will be the parents of the resulting child upon birth.[230] Thus, in practice, it seems like compliant gestational agreements become binding after pregnancy has been achieved.

A minority of jurisdictions also permit genetic surrogacy agreements. In these states, the rules regarding genetic surrogacy typically do allow the person acting as a genetic surrogate to withdraw her consent either at some point fairly late in the pregnancy[231] or, more commonly, within a certain number of days after the child's birth.[232]

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218 WASH. REV. CODE ANN. § 26.26A.735(1).

219 ME. REV. STAT. tit. 19-A, § 1936(1).

220 VT. STAT. ANN. tit. 15C, § 806(a).

221 VA. CODE ANN. § 20-161(A).

222 ARK. CODE ANN. § 9-10-201.

223 CAL. FAM. CODE § 7962(i).

224 DEL. CODE ANN. tit. 13, § 8-807(a) & (b).

225 N.H. REV. STAT. ANN. §168-B:7.

226 N.J. STAT. ANN. § 9:17-63(1).

227 NEV. REV. STAT. ANN. § 126.720(4).

228 N.D. CENT. CODE ANN. § 14-18-08.

229 D.C. CODE ANN. § 16-411(a)(1).

230 *See, e.g.*, TEX. FAM. CODE § 160.756; UTAH CODE ANN. § 78B-15-803(1).

231 VA. CODE ANN. § 20-161(B) ("Within 180 days after the last performance of any assisted conception ….").

232 FLA. STAT. ANN. § 63.213(1) (48 hours after birth); WASH. REV. CODE ANN. § 26.26A.765(1)(b) (same); D.C. CODE ANN. § 16-411(4) (same).

Whether some post-birth period for withdrawal of consent by the person acting as a surrogate is a provision that benefits people acting as surrogates is a matter of debate. Some advocates and scholars argued and some continue to argue today that the person acting as a surrogate must be permitted to withdraw her consent until some period after the birth of the child.[233] For example, the ACLU's 1988 policy position on surrogacy provides: "A gestational mother's waiver of parental rights prior to the birth of the child is … unenforceable. This is true whether or not she is also the genetic mother. Waiver of parental rights is enforceable only if the waiver occurs after the rights have come into existence, i.e. after the birth."[234] A number of scholars and advocates have asserted a similar position in more recent years.[235]

Others, including some feminists, argue that people acting as surrogates also generally prefer certainty about their status. For example, after carefully considering the matter and speaking to people who had acted as surrogates, the women's rights advocacy group Legal Voice determined that it supported "surrogacy legislation that unequivocally recognizes the parental rights of the intended parent immediately upon the birth of the child, with no revocation period for the woman acting as surrogate."[236] Writing about that process, Sara Ainsworth explained that "[t]his decision was not reached without controversy, and it may be one of the hardest questions for feminist law reformers to resolve, once they decide to engage in regulating surrogacy."[237] The questions are hard because the answers hold implications not just for the lives of people acting as surrogates, but also for reproductive freedom and justice more broadly.

Some argue that surrogacy rules that make the agreement binding on all parties, including the person acting as a surrogate, resist long-standing stereotypes that women generally and pregnant women specifically are incapable

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233 *See, e.g.*, Nadine Taub, *Surrogacy: Sorting through the Alternatives*, 4 BERKELEY WOMEN'S L.J. 285, 296 (1989) (advocating for a "cautious approach … under which a woman's consent to relinquish her child would not be valid unless given after a designated period following birth" (footnotes omitted)); FIELD, *supra* note 59, at 97 (suggesting a possible approach under which "[the person acting as a surrogate] would not be bound until she turned over the child").

234 1988 ACLU policy statement, *supra* note 120, at 295.

235 *See, e.g.*, Julie Shapiro, *For A Feminist Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1346 (2014) ("[T]he law should be restructured so that a surrogate is recognized as a legal parent of the child." (footnote omitted)). *See also* Testimony of Prof. Nancy D. Polikoff, regarding proposed D.C. legislation (arguing that a "woman who bears a child should have a brief period of time after the child is born to assert a claim of parentage"), http://lims.dccouncil.us/Download/33209/B21-0016-CommitteeReport1.pdf, at 73.

236 Ainsworth, *supra* note 1, at 1119.

237 *Id.*

of making rational decisions about themselves and their bodies. As the California Supreme Court, for example, explained: "The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law."[238]

Rules providing for automatic determinations of parentage also challenge long-standing family law rules rooted in reproductive biology. Historically, the person who gave birth was always recognized as a parent. Permissive surrogacy rules that do not allow for post birth revocation defy this paradigm. On the other hand, some women's rights advocates are troubled by policies that treat pregnant women and fetuses are separate and severable from each other. What is clear is that a judgment either way has broader collateral consequences.

4. Compensation

In addition to those included in Appendix C, another important variant relates to compensation. As detailed in Appendix A, nine of the 20 permissive jurisdictions expressly allow for compensation.[239] Two additional states—Maine[240] and New Jersey[241]—expressly permit "reasonable expenses," but do not expressly address compensation. The provisions in another six jurisdictions—Arkansas, California, Connecticut, Iowa, North Dakota, and Texas—omit any mention of payment or reimbursement. At least in California, this omission is understood to allow for the payment of compensation.[242] Three

[238] Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993).

[239] DEL. CODE ANN. tit. 13, § 8-807(d)(3); 750 ILL. COMP. STAT. 47/25(d)(3); NEV. REV. STAT. ANN. § 126.750(5)(c); N.H. REV. STAT. ANN. §§ 168-B:11(IV)(d); OKLA. STAT. ANN. tit. 10, § 557.6(D)(3); UTAH CODE ANN. § 78B-15-803(2)(h); VT. STAT. ANN. tit. 15C, § 802(d); WASH. REV. CODE ANN. § 26.26A.715(2)(a); D.C. CODE ANN. § 16-406(d); D.C. CODE ANN. § 16-401(1).

[240] ME. REV. STAT. tit. 19-A, § 1932(4) (permitting reasonable expenses).

[241] N.J. STAT. ANN. § 9:17-68(b) (permitting "reasonable expenses").

[242] *See, e.g.*, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING, Report of the Columbia Law School Sexuality & Gender Law Clinic 9 (2016) ("California also allows compensation for the surrogate."), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf.

permissive jurisdictions—Florida,[243] Louisiana,[244] and Virginia[245]—expressly ban compensation. All three states, however, do permit the intended parents to reimburse the person acting as a surrogate for at least some incurred expenses.[246]

Compensation is controversial. For many who oppose about surrogacy, it is compensation that makes it most concerning. Some advocates support compensation, but on the condition that compensation cannot be "dependent on a termination or waiver of parental rights."[247] There are two main concerns that are raised about the compensation. First, some opponents argue that allowing for compensation increases the possibility of economic exploitation of people acting as surrogates, particularly of low-income women of color acting in this capacity. For example, Barbara Katz Rothman, argued: "You have only to look at the poor women of color tending their white affluent charges in the playgrounds of every American city to understand which women will be carrying valued white babies in their bellies as a cheap service."[248] Some raised a more general concern about the harms to society of the commodifying reproduction.[249] For example, the 1988 New York Task Force on Life and Law reported: "Critics … believe that the exchange of money for possession or control of children is degrading. It also threatens to erode the way society thinks about and values children and, by extension, all human life."[250]

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243 FLA. STAT. ANN. § 742.15(4).

244 LA. REV. STAT. ANN. § 9:2720.5(B)(3). Some "actual" expenses are allowed though.

245 VA. CODE ANN. § 20-162.

246 FLA. STAT. ANN. § 742.15(4) ("[T]he commissioning couple may agree to pay only reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartial and postpartial periods."); LA. REV. STAT. ANN. § 9:2720.5(B)(3) (allowing some "actual" expenses); VA. CODE ANN. § 20-162(B)(3) (providing that the agreement must include "[a] guarantee by the intended parent for payment of reasonable medical and ancillary costs …").

247 Gostin, *supra* note 64, at 13. *See also* 1988 ACLU Policy Statement, *supra* note 120 (providing that the person acting as a surrogate can be compensated so long as the agreement does not "condition[ ] payments to the gestational mother on her termination of parental rights").

248 Barbara Katz Rothman, *Daddy Plants a Seed: Personhood Under Patriarchy*, 47 HASTINGS L.J. 1241, 1246 (1996). *See also* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1849 (1987).

249 Martha A. Field, *The Case against Enforcement of Surrogacy Contracts*, 8 POLITICS & LIFE SCI. 1999 (1990) (arguing that "the consequences of commercialization [of surrogacy] would be widespread and would be felt in diverse ways"). *See also e.g.*, MARGARET JANE RADIN, CONTESTED COMMODITIES 64 (1996).

250 New York Task Force on Life and the Law, *Surrogate Parenting: Analysis and Recommendations for Public Policy* 76 (1988) (footnote omitted),

Others, however, argue that it is *prohibitions* on compensation that are more troubling. To the extent coercion is the main concern, some argue that allowing uncompensated surrogacy might exacerbate this potential. Lori Andrews is in this camp.[251] If compensation is banned, she argues, "infertile couples will only be able to have a child through this arrangement by pressuring friends or relatives into being a surrogate."[252] Such a person may be more vulnerable to coercion as compared to a stranger who is represented by counsel and being paid.[253] "A woman in an arm's-length transaction with a stranger, represented by her own lawyer," Andrews argues, "would likely have more ability to refuse than a friend or relative."[254] Moreover, if the relationship between the parties devolves, the situation can be more complicated if the person acting as a surrogate is a family member.[255]

More fundamentally, some argue, acting as a surrogate is an endeavor that involves substantial health risks, as well as significant bodily intrusions for an extended period of time.[256] Women should be entitled, it is argued, to be compensated for providing this important and valuable service.[257] Furthermore, allowing women to act as surrogates, but, at the same time, barring them from receiving compensation for those essential services reinforces gender-based stereotypes that women are expected to provide these kinds of reproductive services based on their compassionate and caring nature.[258] For example, Lori

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https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogate_parenting.pdf.

[251] Andrews, *Beyond Doctrinal Boundaries*, *supra* note 202, at 2365–66 (stating that she is "even more concerned about coercion in the unpaid surrogacy situation").

[252] *Id. See also* Lewin, *supra* note 88 ("[M]any lawyers and doctors say such [uncompensated surrogacy] arrangements are actually the most likely to fall apart, given the difficulty of maintaining comfortable boundaries and the risk of intrusiveness, or coercion, souring relationships that seemed solid.").

[253] Andrews, *Beyond Doctrinal Boundaries*, *supra* note 202, at 2365–66.

[254] *Id.* (footnote omitted).

[255] *See, e.g.*, Lewin, *supra* note 88 (quoting an expert who stated: "If the surrogate or the donor is a relative and something goes amiss, it can affect family relationships forever after.").

[256] For a discussion of some of these risks, see Joslin, *Pregnancy*, *supra* note 30, at __.

[257] *See, e.g.*, Gostin, *supra* note 64, at 10 ("They are entitled to economic gain for the physical changes in their bodies, the changes in lifestyle, the work of carrying a fetus, and the pain and medical risk of labor and parturition."). *See also* Taub, *supra* note 233, at 294 ("There is something suspicious about a society's sudden and vociferous concern with payment now that women propose to take compensation. …").

[258] *See, e.g.*, April Hovav, *Producing Moral Palatability in the Mexican Surrogacy Market*, 33 GENDER & SOCIETY 273 (2019) ("The rhetoric of altruism as a feminine virtue enables surrogacy agencies to cultivate a docile workforce that cannot advocate for their own financial gain."). *See also* Andrews, *Beyond Doctrinal Boundaries*, *supra* note 202, at

Andrews argues that "allowing unpaid rather than paid surrogacy … perpetuates the devaluation of women's activities in a society that is based on a market system."[259]

Finally, a number of jurisdictions that ban "compensated" surrogacy, nonetheless allow for some payment—usually reimbursement of "expenses." Studies in other counties have found that "the money received by 'altruistic' surrogates … is roughly equivalent to that received by compensated surrogates in the U.S."[260] Thus, some argue, allowing uncompensated surrogacy does not avoid the exchange of money. Instead, some argue, the true effect of such bans is to reduce the bargaining power of the person acting as a surrogate. For example, sociologist April Hovav argues that schemes that permit only "altruistic surrogacy" may not be in the best interests of people acting as surrogacy. Such schemes, she argues, "enable[ ] surrogacy agencies to cultivate a docile workforce that cannot advocate for their own financial gain."[261]

IV. ACCOUNTING FOR THE OMISSIONS

This Article carefully and meticulously uncovers a range of material differences among existing permissive surrogacy schemes in the U.S.[262] These differences, however, remain almost entirely obscured in and by contemporary conversations about surrogacy both in the media and in the legal scholarship.[263] To intervene in this cycle of erasure, it is helpful to understand the forces that contributed to these omissions. This Part identifies and examines some of the forces.

A. Historical Perspective

Before doing so, though, it is helpful to point out that it has not always been this way. In the early years of surrogacy practice in the U.S., surrogacy emerged as a hot political issue. Significant media attention was devoted to the *Baby M* litigation in New Jersey.[264] Unsurprisingly, much consideration focused on the basic question of whether surrogacy should be permitted. For example,

2365–66 ("[I]t is disturbing that, in most instances, when society suggests that a certain activity should be done for altruism, rather than money, it is generally a woman's activity. This perpetuates the devaluation of women's activities in a society that is based on a market system.").

[259] *Id.* at 2366.

[260] Shapiro, *supra* note 235, at 1371.

[261] Hovav, *supra* note 258.

[262] *See supra* Part II.B.

[263] *See supra* Part II.A.

[264] *See, e.g.*, MARKENS, *supra* note 47, at 20–22.

numerous books were written at the time taking one side or the other in this debate regarding whether to ban or permit surrogacy.[265] Importantly, however, the discussion at the time *also* engaged with the details of permissive regimes.

With respect to rules regarding intended parents, for example, scholars and advocates discussed whether permissive schemes should limit enforceable agreements to married couples. The Uniform Law Commission answered that question in the affirmative in 1988.[266] Others opposed this marriage-based limitation. For example, the ACLU's 1988 policy on surrogacy provides: "The state cannot discriminate against a person who seeks participation in a surrogacy arrangement on the basis of race, race, sex, sexual orientation, economic or social status, religion, marital status, or physical or mental condition…"[267] The 1988 ABA Family Law Section's Model Surrogacy Act (which was never approved by the ABA)[268] incorporated an inclusive rule regarding intended parents.[269] The early models also took varied approaches with regard to "medical need" requirements.[270]

There was also scholarly engagement with the rules related to people acting as surrogates. During this period, issues about control of pregnancy women's bodies were very much on the forefront. In 1992, *Roe*'s future was on the line.

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265 Books arguing that surrogacy should be banned include: JANICE RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM (1993); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD, IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY (1989); FIELD, *supra* note 59; PHYLLIS CHESLER, THE SACRED BOND: THE LEGACY OF THE BABY M CASE (1988); GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS (1985). Books arguing that surrogacy should be permitted include: LORI ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, & BRACE NEW BABIES (1989).

266 USCACA, § 1(3) ("'Intended parents' means a man and woman, married to each other, who enter into [a surrogacy] agreement under this [Act] … ").

267 1988 ACLU policy statement, *supra* note 120, at 294. *See also id.* ("[T]he state may not limit surrogacy arrangements to married couples."); *id.* ("[T]he ACLU would oppose any law limiting access to surrogacy arrangements to heterosexuals.").

268 Audrey Wolfson Latourette, *The Surrogate Mother Contract: In the Best Interests of Society?*, 25 U. RICH. L. REV. 53, 72 (1990).

269 1988 ABA-FLS Model Act, § 2(c) ("Intended Parent: The individual or individuals who enter into a surrogacy agreement with a surrogate with the intent to become the legal parent or parents of the child born to the surrogate.").

270 USCACA requires proof of medical need. USCACA § 6(b)(2) (providing that "the intended mother is unable to bear a child or is unable to do so without unreasonable risk to an unborn child or to the physical or mental health of the intended mother or child, and the finding is supported by medical evidence."). The 1988 ABA Family Law Section Model Act did not. 1988 ABA-FLS Model Act, § 5.

Ultimately, the core principles of *Roe* narrowly survived that challenge in *Casey*.[271] And in the years leading up to and following that decision, the Court slowly chipped away at women's access to abortion. Not unrelatedly, this period saw a rise in the rhetoric of so-called "fetal rights."[272] In a range of contexts, so-called fetal rights were invoked to justify control over pregnant women. As the Harvard Law Review wrote in 1990: "Regulation of women's conduct during pregnancy represents a new variation in the continuing debate over fetal rights and women's reproductive freedom."[273] Women's rights advocates expressed alarmed about this trend.[274]

Discussions about surrogacy often reflected these concerns. Scholars writing in this period noted that surrogacy contracts often contained clauses regulating the decision making and behavior of people acting as surrogates.[275] Scholars may have been particularly attentive to this issue given that the contract in the *Baby M* case contained such limitations.[276] Among other things, the contract declared that Whitehead would "not abort the child once conceived except, if in the professional medical opinion of the inseminating physician, such action is necessary for [her] physical health" or if the fetus was "physiologically

[271] C. Steven Bradford, *What Happens If Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 88 (1993).

[272] Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 605 (1986) ("The creation of fetal rights that can be used to the detriment of pregnant women is a very recent phenomenon … .").

[273] Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 193 HARV. L. REV. 1325, 1325 (1990).

[274] *See, e.g.*, Mutcherson, *supra* note 31, at 214–15.

[275] *See, e.g.*, R. Alta Charo, *Legislative Approaches to Surrogate Motherhood*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 93 (Larry Gostin ed., 1988) (noting that "surrogacy contracts typically prohibit the mother from smoking, drinking alcohol, and taking illegal drugs. She must also agree to abide by physicians orders … ."); Karen H. Rothenberg, *Surrogacy and the Health Care Professional: Baby M and Beyond*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 210 (Larry Gostin ed., 1988) (noting that "[t]ypical contractual provisions create limitations on the surrogate's behavior and control during pregnancy" (footnote omitted)). *See also* Thomas Wm. Mayo, *Medical Decision Making During a Surrogacy Pregnancy*, 25 HOUSTON L. REV. 599 (1988) (noting that most surrogacy contracts at the time included clauses regulating the behavior and medical decision making).

[276] The contract required Mary Beth Whitehead to "adhere to all medical instructions given to her by" doctors. Matter of Baby M, 537 A.2d 1227, 1268 (N.J. 1988). It also required her "to follow a prenatal medical examination schedule …." *Id.*

abnormal." The contract further required Whitehead to have an abortion "upon demand of" the intended father.[277]

Abortion clauses like these triggered a scholarly debate about whether they were enforceable. Professor Laurence Tribe, for example, argued in the negative, on the ground that the right to terminate a pregnancy is inalienable.[278] Professor Richard Epstein, in contrast, took the position that any agreement clause including, although not limited to, abortion clauses should be enforceable.[279] Scholars also debated whether contract clauses that limited other kinds of medical decisions during pregnancy were enforceable.[280] Larry Gostin, who served as chair of the ACLU's Special Committee on Surrogacy Parenting, for example, argued that these kinds of clauses were impermissible: "The rights to choose one's lifestyle and medical treatment are among the most private aspects of human life."[281] "Since the government cannot reach into that intensely private domain, it is difficult to envisage a private party having the power to do so based upon contractual obligation."[282] Lori Andrews also raised normative concerns about provisions that required the person acting as a surrogate to "'to obey all doctor's orders."[283] Others argued to the contrary.[284]

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[277] *Id.* at 1268. Other "sample" contracts available at the time included similar provisions. *See, e.g.*, Brophy, *supra* note 201; NOEL P. KEANE & DENNIS L. BREO, THE SURROGACY MOTHER 294 (1981).

[278] Tribe, *supra* note 213, at 338 (arguing that "the rights of women to terminate unwanted pregnancies are … inalienable"). *See also* Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1937 (1986) (arguing that "courts should hold specific performance of the promise not to abort unconstitutional").

[279] Epstein, *supra* note 212, at 2336 ("[I]t cannot be regarded as unjust or unwise that [the intended father's] decision should determine whether the abortion should take place for precisely those reasons that are so important to ordinary married couples.").

[280] *See, e.g.*, Mayo, *supra* note 275.

[281] Gostin, *supra* note 64, at 14.

[282] *Id. See also id.* at 15 ("Pregnancy . . . should not become a license for denying women their basic right to be left alone to make the health decisions they choose.").

[283] Andrews, *Beyond Doctrinal Boundaries*, *supra* note 202, at 2372.

These concerns, however, were allayed by Andrews' conclusion that other laws and social forces would militate against the future inclusion, or at least the enforcement of, these kind of provisions. *Id.* at 2372–74. It appears that Professor Andrews might have been wrong in this regard. Existing studies suggest that these kinds of provisions remain common in surrogate agreements. *See, e.g.*, Berk, *supra* note 200, at 156-57 (detailing common contract provisions).

[284] *See, e.g.*, Epstein, *Surrogacy*, *supra* note 212, at 2335 ("To argue that these contractual terms are inconsistent with the autonomy of the surrogate mother is to miss the function of all contractual arrangements over labor.").

These debates influenced the development of model and uniform laws on surrogacy produced in this period. The American Bar Association ("ABA") Family Law Section approved a Model Surrogacy Act in 1988.[285] The same year, the Uniform Law Commission approved the Uniform Status of Children of Assisted Conception Act ("USCACA").[286] Both Acts, for example, allow for compensation,[287] and both Acts provide that people acting as surrogates must be permitted to make decisions about their bodies during their pregnancy.[288] In sum, in the early years of surrogacy practice, there was a fairly robust conversation not just about the practice of surrogacy per se, but also with regard to the details of permissive statutory schemes.

Fast forward to 2020. There are now many more jurisdictions with permissive statutory schemes in place. Twenty to be precise. Despite numerous and varied models out there, public and scholarly engagement with the details of these schemes has all but disappeared.

Take Illinois. When Illinois' surrogacy scheme was approved in 2004, there were "few opponents—and no women's groups—[that] spoke against [the legislation]."[289] There was little to no legislative opposition either. The final votes in the House and the Senate were unanimous.[290] This was true even though Illinois' statutory scheme includes a number of provocative and controversial provisions. For example, as discussed above, Illinois law provides that the agreement may include contract clauses that limit and regulate the bodily autonomy and decision making of people acting as surrogates.[291] The law also appears to allow for an enforceable determination of parentage prior to the birth

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[285] H. Joseph Gitlin, *Family Law Section Approves Model Surrogacy Act: A Comment*, 22 FAM. L.Q. 145 (1988).

[286] Mimi Yoon, *The Uniform Status of Children of Assisted Conception Act: Does It Protect the Best Interests of the Child in a Surrogate Arrangement*, 16 AM. J.L. & MED. 525 (1990). USCACA was approved by the American Bar Association in 1989. *Id.* USCACA is available in Appendix III of GOSTIN, SURROGATE MOTHERHOOD, *supra*.

[287] 1988 ABA FLS Model Surrogacy Act, *supra*, § 3(b); USCACA, *supra*, § 9(a).

[288] The ABA FLS Model Act provides that the agreement must "[s]tate that the surrogate shall be the sole source of consent with respect to the clinical management of the pregnancy, including termination of the pregnancy." 1988 ABA FLS Model Surrogacy Act, *supra*, at § 5(k). USCACA provides that the "surrogacy agreement may not limit the right of the surrogate to make decisions regarding her health care of that of the embryo or fetus." USCACA, *supra*, § 9(b).

[289] Scott, *Surrogacy*, *supra* note 57, at 124 n. 94.

[290] Jeremy J. Richey, Comment, *A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy Act*, 30 S. ILL. U. L.J. 169, 178 (2005) ("On its third reading in the Illinois House, the bill received 113 yeas and zero nays. Similarly, during its third reading in the Illinois Senate, the bill received fifty-three yeas and zero nays." (footnotes omitted)).

[291] 750 ILL. COMP. STAT. 47/25(d).

of the child. But, again, despite these controversial provisions, there was no public or legislative opposition to the bill. There was also surprisingly little coverage of the legislation in the news or in legal scholarship.[292]

A similar pattern occurred in California in 2012 when California finally enacted surrogacy legislation after many years of previously unsuccessful attempts.[293] The legislative history reports no known opposition to the legislation.[294] Not one member of the legislature voted against the legislation.[295] Even though issues related to surrogacy were in the news in California in 2012, a search of news sources during that time did not turn up a single article on the legislation prior to its arrival on the Governor's desk.[296] Again, this absence of political opposition or engaged analysis is particularly striking given the content of California's surrogacy law. California's scheme, like Illinois' includes controversial provisions, although they are less obviously so. California's statutes do not expressly allow contractual clauses that limit the bodily and decision-making autonomy of the person acting as a surrogacy.[297] But they also do not expressly prohibit them either. Anecdotal evidence suggests that clauses regulating the decision making and behavior of people acting as surrogates are regular features of agreements in that state.[298]

There has also been a surprising lack of attention to these issues by scholars. To be sure, there are some examples of scholarship that consider whether and the extent to which state surrogacy law embraces LGBTQ families.[299] But even

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[292] A westlaw news search for: "DA(aft 01/01/2004) and DA(bef 01/01/2005) and Illinois and surrogacy" produced 0 news stories on the Illinois legislation.

[293] For discussions of some of the prior unsuccessful efforts to enact surrogacy legislation in California, see MARKENS, *supra* note 47.

[294] *See, e.g.*, Assembly Judiciary Report (5/2/11) (reporting no known opposition), & Senate Judiciary Report (7/2/12) (reporting no known opposition), available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201120120AB1217.

[295] *See, e.g.*, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201120120AB1217 (Assembly floor vote: 76-0, 4 abstentions (5/19/11); Senate Judiciary vote, 4-0, 1 abstention (7/3/12); Senate vote, 37-0 (8/28/12)).

[296] A westlaw search of news sources in 2012 did not turn up a single article about the legislation prior to passage by both chambers of the legislature, and only one article that discusses the legislation after it was signed into law. *See, e.g.*, *California Enacts Landmark Legislation Giving Same Sex Parents Via Surrogacy Equal Parenting Rights*, PR Newswire (Oct. 17, 2012).

[297] CAL. FAM. CODE § 7962.

[298] *See, e.g.*, Berk, *supra* note 200, at 156–57.

[299] In his exploration of the evolution of parentage law more broadly, Professor NeJaime explores the extent to which surrogacy law embraces LGBT parent families. NeJaime, *Parenthood*, *supra* note 7.

here, examples are few in number. A grand total of *three* law review articles cite Louisiana's law that requires the intended parents to be married to each other and to each provide gametes.[300]

There is also a striking lack of attention to issues related to people acting as surrogates. Consider engagement with some of the most controversial surrogacy provisions regarding people acting as surrogates—those that authorize control over medical decision making and daily behavior. A Westlaw search reveals a total of nine law review articles that discuss the statutory language allowing contract clauses that require the person acting as a surrogate to "undergo all medical exams [or examinations], treatments and fetal monitoring procedures." Of the nine law review articles, six were written by students,[301] and one is simply a reprint of the 2008 version of ABA Model Act which includes this language.[302] The other two articles simply cite the relevant language without any substantive analysis of it.[303]

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[300] Tara Richelo, Student Note, *Continuing to Resolve Surrogacy Uncertainties in A Post-Baby M Modernity*, 71 RUTGERS U.L. REV. 857, 902 (2019) (described in Appendix C); Courtney Megan Cahill, *After Sex*, 97 NEB. L. REV. 1, 31 (2018); NeJaime, *Parenthood*, *supra* note 7, at 2324.

[301] Emma Cummings, Comment, *The (Un)enforceability of Abortion and Selective Reduction Provisions in Surrogacy Agreements*, 49 CUMB. L. REV. 85, 89 (2019); Alexus Williams, Comment, *State Regulatory Efforts in Protecting A Surrogate's Bodily Autonomy*, 49 SETON HALL L. REV. 205, 227 (2018); Brock A. Patton, Note, *Buying A Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507 (2010); Michelle Ford, Student Article, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 81 (2008); Jeremy J. Richey, Comment, *A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy Act*, 30 S. ILL. U. L.J. 169 (2005); Jamie Levitt, Student Author, *Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation*, 25 COLUM. J.L. & SOC. PROBS. 451 (1992).

[302] *American Bar Association Model Act Governing Assisted Reproductive Technology February 2008*, 42 FAM. L.Q. 171 (2008) (full text of the Model Act).

[303] Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 264 (2010) (quoting ABA Model Act); Nancy Ford, *The New Illinois Gestational Surrogacy Act*, 93 ILL. B.J. 240, 245 (2005) (quoting Illinois law).

In addition, a number of the student written pieces also simply cite the language without any substantive engagement. *See, e.g.*, Brock A. Patton, Note, *Buying A Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507 (2010); Michelle Ford, Student Article, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 81 (2008); Jeremy J. Richey, Comment, *A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy*

Likewise, only ten law review articles quote statutory provisions allowing surrogacy agreements that require the person acting as a surrogate to "abstain from any activities" that are perceived to be harmful to the pregnancy or the fetus. One of these articles simply reprints the 2008 ABA Model Act on Reproductive Technology from which this statutory text is drawn.[304] Of the other nine articles, five simply cite the language with no discussion or engagement;[305] and seven of the nine were written by students.[306] Only one of the nine law review articles is both written by a non-law student and does more than simply quote the relevant statutory language.[307] It is particularly interesting that there has been little recent engagement with regard to the ways in which U.S. regulate and protect people acting as surrogates, in light of the fact that this is a, if not the, key issue in conversations about *international* surrogacy.[308]

Act, 30 S. ILL. U. L.J. 169 (2005) (describing the provisions as "interesting" without further examination or consideration).

[304] *American Bar Association Model Act Governing Assisted Reproductive Technology February 2008*, 42 FAM. L.Q. 171 (2008) (text of the act).

[305] Emily Urch, *Putting All of North Carolina's Eggs in One Basket: The Case for Comprehensive Surrogacy Regulation*, 37 N.C. CENT. L. REV. 31, 37 (2014); Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA's Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 265 (2010) (quoting language from ABA Model Act); Brock A. Patton, Note, *Buying A Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 533 (2010) (includes IL statutes in an appendix); Michelle Ford, Student Article, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 107 (2008); Nancy Ford, *The New Illinois Gestational Surrogacy Act*, 93 ILL. B.J. 240, 245 (2005).

[306] Alexus Williams, Comment, *State Regulatory Efforts in Protecting A Surrogate's Bodily Autonomy*, 49 SETON HALL L. REV. 205, 227 (2018); Alexus Williams, Comment, *State Regulatory Efforts in Protecting A Surrogate's Bodily Autonomy*, 49 SETON HALL L. REV. 205, 227 (2018); Teresa Donaldson, Note, *Whole Foods for the Whole Pregnancy: Regulating Surrogate Mother Behavior During Pregnancy*, 23 WM. & MARY J. WOMEN & L. 367, 394 (2017); Emily Urch, *Putting All of North Carolina's Eggs in One Basket: The Case for Comprehensive Surrogacy Regulation*, 37 N.C. CENT. L. REV. 31, 37 (2014); Brock A. Patton, Note, *Buying A Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 533 (2010); Michelle Ford, Student Article, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 107 (2008); Jamie Levitt, Student Author, *Biology, Technology and Genealogy: A Proposed Uniform Surrogacy Legislation*, 25 COLUM. J.L. & SOC. PROBS. 451, 500 (1992).

[307] Ainsworth, *supra* note 1, at 1083.

[308] *See, e.g.*, Ruth Zafran & Daphna Hacker, *Who Will Safeguard Transnational Surrogates' Interests? Lessons from the Israeli Case Study* (forthcoming) (manuscript on file with author); Jamie Cooperman, Comment, *International Mother of Mystery: Protecting Surrogate Mothers' Participation in International Commercial Surrogacy Contracts*, 48 Golden

B. What Changed?

Given the growth in permissive statutory schemes, the variations among these laws, and, importantly, the potential implications of these differences, why has there been so little attention? This Part explores that question.

1. Binary Framing

One force that impedes robust engagement with the details of surrogacy laws is the tendency in the media, legal literature, and elsewhere to limit surrogacy discussion to the threshold binary question: to prohibit or to permit. As discussed in Part II.A, this tendency permeates almost all discussions of surrogacy. This framing remains resilient despite the enactment of increasing numbers of and increasing variations between permissive schemes.[309] By continuing to focus on the permit/ban issue, the existing discourse hides and in turn *discourages* consideration of other questions, including *the ways in which* states permit and regulate surrogacy, as well as the implications of those variations.

2. Advocates and Advocacy

The relative lack of modern attention to the details of surrogacy schemes also reflects and is the product of changes in advocacy regarding surrogacy. In the early years—a time when few permissive schemes were enacted—feminists and women's rights advocates were some of the most active participants in the discussion.[310] Some feminists and women's rights groups opposed surrogacy altogether.[311] For example, in the early years of surrogacy, a group of feminists declared: "The enforcement of surrogacy contracts victimizes women physically, emotionally, and economically. The surrogacy contracts represents a unique

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Gate U. L. Rev. 161, 178 (2018) (arguing "the international community should redirect its focus to protecting surrogate mothers from a potentially exploitive process"); Xinran "Cara" Tang, Note, *Setting Norms: Protections for Surrogates in International Commercial Surrogacy*, 25 MINN. J. INT'L L. 193 (2016); Izabela Jargilo, *Regulating the Trade of Commercial Surrogacy in India*, 15 J. INT'L BUS. & L. 337, 349 (2016); Yehezkel Margalit, *From Baby M to Baby m(Anji): Regulating International Surrogacy Agreements*, 24 J.L. & POL'Y 41, 75 (2015) (arguing that "the convention must ensure that the surrogate mother is not abandoned, coerced, or required to accept draconian terms").

309 *See supra* Part II.A.

310 *See, e.g.*, Scott, *Surrogacy*, *supra* note 57, at 129–30. *See also* MARKENS, *supra* note 47, at 164. To be sure, opposition to surrogacy was more robust in some jurisdictions and less robust in others. *See, e.g.*, *id.* at 34.

311 *See supra* Part I.

form of exploitation of women's bodies and will lead to the full-scale commercialization of women's reproductive organs and genetic make-up."[312] Other feminists and women's rights groups supported permissive regimes.[313] While there was no consensus, there was often robust engagement, including engagement with the particulars of proposed permissive schemes.[314]

Over time, though, women's rights groups and feminists tended to be less publicly involved in the conversations about surrogacy.[315] As lawyer and advocate Sara Ainsworth put it: "It's rarer [now] than it was in the '80s and '90s to see feminists flat-out opposing surrogacy."[316] Some organizations "felt they could not weigh in [in more recent policy discussions] because they had policy positions opposing surrogacy."[317] Other organizations had not yet established their position on surrogacy. As Ainsworth explains: surrogacy is "complex and there's a lot of discomfort surrounding the issue, so many women's groups have not taken a formal position."[318] Thus, for example, in the 1990s, a number of California-based women's rights groups did not take positions on pending legislation that would have permitted and regulated surrogacy.[319] "A lobbyist for Planned Parenthood" explained that "their membership was split fifty-fifty on the issue."[320] "As a result, the organization did not take an official position on the bill."[321] In short, "[while m]any organizations have backed off from their opposition stance, … many remain internally conflicted about the best policies for which to advocate."[322]

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312 MARKENS, *supra* note 47, at 60 (quoting Betty Friedan et al, Feminists on Commercialize Childbearing: Adopted from a Friend of the Court Brief in the Baby M Case).

313 For example, in the late 1980s, California NOW opposed legislation that would have banned surrogacy arrangements based on their position that women ought to be able to control their own bodies. *Id.* at 58.

314 *See, e.g.*, Andrews, *Beyond Doctrinal Boundaries*, *supra* note 202; Taub, *supra* note 233. *See also supra* Part IV.A.

315 *See, e.g.*, Scott, *Surrogacy*, *supra* note 57, at 121 ("Attorneys, brokers, and parents' groups have become active advocates for supportive laws, while women's groups and civil-liberties organizations have withdrawn from the political arena.").

316 Lewin, *supra* note 88.

317 Joslin, *Pregnancy*, *supra* note 30.

318 Lewin, *supra* note 88.

319 Cal. Leg. 1992, S.B. 937 (Watson).

320 MARKENS, *supra* note 47, at 160.

321 *Id. See also id.* at 161 ("[M]ost California women's and women's rights groups did not take official positions due to a lack of consensus within their organizations."). This was not true of all women's rights organizations. California NOW opposed S.B. 937, and did so based on concerns about the details of the regulatory scheme. *See id.*

322 Shayna Medley, *Regulating Surrogacy: In Whose Interest?*, ON LABOR (May 12, 2017).

At the same time that some women's rights organizations and advocates stepped away from the debate, organized support for surrogacy increased. Initially, supporters were relatively few in number.[323] Over time, however, the number of families created through surrogacy, and the number of attorneys and agencies serving them, increased. This growing group became strong advocates for permissive statutory regimes.[324] Due at least in part to their efforts, public support also grew.[325] LGBTQ organizations joined the push in support of permissive surrogacy regimes, as inclusive approaches to surrogacy "offer a way for all people—regardless of sex, sexual orientation, or marital status—to form and protect families."[326]

In sum, support expanded at the same time that organized opposition withdrew. During this period, a number of states enacted permissive surrogacy schemes with little to no public opposition and little engagement by women's rights organizations.[327] As noted in Part III.A, this was true even in states, like Illinois and California,[328] where the schemes included controversial provisions.[329]

3. Legislative Process

Another influence is the contemporary legislative drafting process.[330] For the most part, legislators "do not write the text of statutes, nor do they focus in particular on the text."[331] Rather, legislators typically focus on "concepts" or

[323] *See, e.g.*, MARKENS, *supra* note 47, at 167 ("One informant said that the 1992 [NY] bill [to ban commercial surrogacy] was successful only because a limited group of people actually cared about surrogate motherhood, and this group did not have much political clout." (footnote omitted)).

[324] *See, e.g.*, Scott, *Surrogacy*, *supra* note 57, at 121 ("Attorneys, brokers, and parents' groups have become active advocates for supportive laws ...").

[325] *See, e.g.*, MARKENS, *supra* note 47, at 113-24 (describing the effectiveness of the framing of surrogacy as a response to the "plight of infertile couples").

[326] Joslin, *Pregnancy*, *supra* note 30, at __ (citing Family Equality Council, Statement from Family Equality Council regarding a press conference on the issue of legalizing gestational surrogacy in New York (May 13, 2019)).

[327] *See supra* Part III.A.

[328] *See supra* notes 289-298 and accompanying text.

[329] *See* Appendix C.

[330] Articles that shed light on this process include: Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002) (noting that "[l]ittle has been written" about the "legislative drafting process."); Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291 (2019); Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 90–91 (2015).

[331] Oei & Osofsky, *supra* note 330, at 1334–35.

general policies.[332] This focus on big policy questions can fuel a tendency to keep the conversation limited to those overarching concepts, like whether to permit or prohibit surrogacy. Moreover, participants in the legislative process routinely note the challenges of "time pressure and limited resources."[333] These challenges make it difficult in practice for legislators to be familiar with the finer-grain details of all of the legislation under consideration.

There is less empirical data about legislative drafting *at the state level*—where surrogacy legislation is drafted and enacted.[334] Nonetheless, there is reason to believe that these findings might be *even more prevalent* at the state level. At the federal level, lawmaking is the legislator's full-time job. Federal legislators also have fairly large staffs to assist them. In contrast to members of Congress, the occupation of a state legislator is often not a full-time job. There are a few states—typically some of the bigger ones—where state legislators "are paid enough to make a living without outside income."[335] But in many states, this is not the case; in the majority of states, legislators do not receive "enough [compensation] to make a living without another source of income."[336] Indeed, in some states, the position is only the equivalent of a half-time job, for which they "receive minimal compensation."[337]

These state legislators—often working only part-time as legislators—typically have fewer staff people as compared to members of Congress.[338] On top of all that, state legislators often consider and enact much more legislation as compared to members of Congress. For example, the Illinois legislature recently enacted 2,381 bills.[339] By way of comparison, Congress typically enacts between 150 and 225 statutes per year.[340] Taken together, this makes it even harder for state legislators to be familiar with legislative details. This is no less true with surrogacy legislation. As a result, even co-sponsors of surrogacy

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[332] *Id.* at 1336 ("In particular, we too found that Members only engage in drafting at a policy level, rather than engaging in the actual drafting of statutory text." (footnote omitted)). *See also* Nourse & Schacter, *supra* note 330, at 585 ("Most staffers indicated that, as a general rule, senators themselves did not write the text of legislation."); *id.* at 586; Sitaraman, *supra* note 330, at 90–91 ("The overall picture that emerges … is that [members of Congress] are not drafters but rather decisionmakers.").

[333] Oei & Osofsky, *supra* note 330, at 1323.

[334] Grace E. Hart, *State Legislative Drafting Manuals and Statutory Interpretation*, 126 YALE L.J. 438, 442 (2016) (footnotes omitted).

[335] *Id.* at 445.

[336] *Id.*

[337] *Id.*

[338] *Id.*

[339] *Id.*

[340] *Statistics and Historical Comparison*, https://www.govtrack.us/congress/bills/statistics.

legislation may be unfamiliar with all of its the details; many may know little more than whether the legislation permits or bans surrogacy. Although, to be sure, this is not always the case.[341]

As drafting by legislators has declined, drafting by outside groups has increased.[342] For some of the reasons noted above, this is particularly true at the state level. As one scholar recently put it: "The influence of private lawmaking … at the state level[ ] is profound."[343] So-called "private lawmaking" is not necessarily a bad thing. There are benefits to having outside groups involved in legislative drafting. Outside groups often bring a high level of expertise and knowledge about a particular issue.[344] Outside lobbyists may have strong relationships with the relevant constituency groups, which can help garner support for the initiative.[345]

At the same time, though, there can be downsides of private lawmaking. Before discussing some of the potential downsides or dangers, it is important first to clarify that there are different types of outside legislative drafters. "Some private lawmakers are apolitical organizations that are not affiliated with specific interest groups. They work to clarify, modernize, and improve the law, while maintaining some level of transparency regarding their processes."[346] The

[341] The primary sponsor of the legislation in Washington was Senator Jamie Pedersen. Pedersen also chaired the UPA Drafting Committee. *See* Joslin, *Preface to the UPA (2017)*, 52 FAM. L.Q. 437, 443 (2018).

[342] Nourse & Schacter, *supra* note 330, at 583 ("Our respondents uniformly reported that lobbyists are regularly involved in drafting the text of bills in this committee."). Sitaraman, *supra* note 330, at 103 ("[S]cholars have long understood that outside groups sometimes provide first drafts of legislation." (footnote omitted)); Oei & Osofsky, *supra* note 330, at 1354 ("[A] decline in Legislative Counsel dominance has coincided with more private sector interests providing legislative language[.]"); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 848 (2014) ("[I]n recent years it has become much more common for lobbyists, especially big law firms, to present drafts of a potential bill or amendment to a bill." (footnote omitted)).

[343] Barak Orbach, *Invisible Lawmaking*, 79 U. CHI. L. REV. DIALOGUE 1, 1-2 (2012).

[344] *See, e.g.*, Shobe, *supra* note 342, at 848 ("Lobbyists have unique knowledge of how statutes will affect their clients and the resources to closely follow how court cases affect statutes." (footnotes omitted)). *See also* Nourse & Schacter, *supra* note 330, at 611 ("Lobbyists are the closest to the people who will be affected by the bill, explained one staffer.").

[345] *See, e.g.*, Sitaraman, *supra* note 330, at 113 ("When an issue is particularly important or complex, the need for external drafting and stakeholder input will likely be greater …").

[346] Orbach, *supra* note 343, at 2.

Uniform Law Commission (ULC) is one such organization.[347] The ULC is "comprised of state commissions on uniform laws from each state and since 1892 has been providing states with model legislation designed to increase uniformity and clarity in state law."[348] Each Act is drafted by a group of commissioners who bring varied experience and perspective to the issues.[349] In addition, the process is open to the public. Materials are publicly available and interested stake holders and organizations are permitted and indeed encouraged to participate in the process.[350] While Commissioners are appointed by a state official, they are not accountable to that state in any meaningful way. "Their theory is that the lack of accountability insulates the laws the Conference promulgates from political pressure."[351] Some existing surrogacy legislation is based on Uniform laws.[352]

Another type of outside drafter is an interested stake holder. Sometimes these interested stake holders are "legislative arms of interest groups."[353] "Unlike apolitical private lawmakers (like the ALI or [ULC]), IPLs are in the business of advancing narrow interests."[354] Interested stake holders can also consist of groups of practicing attorneys with expertise in the area. For example, surrogacy attorneys who represent intended parents were the primary drafters of the legislation in Illinois[355] and in California.[356]

Again, there can be a great benefit to having practicing attorneys assist with the drafting process. They are intimately familiar with the underlying legal issue. They likely have close ties to the affected stake holders and can bring those voices and experiences to bear on the process. Nonetheless, as with other

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[347] For more information about the ULC drafting process, see, for example, Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 126 (1993); Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 MINN. L. REV. 861, 866 (1995).

[348] Orbach, *supra* note 343, at 2.

[349] *See, e.g.*, Courtney G. Joslin, *Preface to the UPA (2017)*, 52 FAM. L.Q. 437, 443 (2018).

[350] Miller, *supra* note 347, at 868.

[351] Patchel, *supra* note 347, at 92.

[352] The surrogacy laws in Washington and Vermont are two recent examples.

[353] Orbach, *supra* note 343, at 2.

[354] Orbach, *supra* note 343, at 9.

[355] *See, e.g.*, Desai & Miller, Attorney Profiles (noting that Nidhi Desai was "one of the principal authors of the Gestational Surrogacy Act"), http://www.familybuildinglaw.com/profiles.html; Scott, *Surrogacy*, *supra* note 57, at 124 n. 94.

[356] Andrew Vorzimer & David Randall, *California Passes The Most Progressive Surrogacy Bill In The World*, http://www.path2parenthood.org/blog/california-passes-the-most-progressive-surrogacy-bill-in-the-world.

private lawmaking, there are vulnerabilities as well. These practicing attorneys may be approaching the issue from a particular perspective. Because the involvement of outside groups is often "relatively invisible,"[357] this perspective may not be obvious to others. As a result, legislation may not get the kind of careful consideration of the details that is warranted. And then, as discussed above, in recent decades, there have been less engagement on the issue from outside advocacy groups. And, yet again, the focus on the surface question and away from the details is repeated.

4. Neoliberalism

Another force at play is the influence of neoliberal theories. As described above, some of the recently enacted surrogacy legislation purports to allow for serious curtailments of the day-to-day behavior and medical decision making of people acting as surrogates. Those defending these provisions may invoke arguments that reflect neoliberal or laissez-faire principles. While a woman has a right to make decisions about her body, she also has the right to waive that right, one might argue.[358] Particularly where she was represented by counsel, the law should respect and specifically enforce her choices in that regard.[359] Respecting the terms of the contract, the argument goes, is necessary in order to respect the autonomous decision making power of the parties.[360]

This kind of reasoning reflects and is reflective of neoliberal theories have come to infuse many areas of family law.[361] As Meredith Harbach explains, "[n]eoliberalism prescribes a model citizen-subject based on a marketized society: The neoliberal subject is a rational actor, *homo economicus*, who engages

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[357] Orbach, *supra* note 343, at 15 (footnote omitted).

[358] *See, e.g.*, Epstein, *Surrogacy*, *supra* note 212, at 2335 ("To argue that these contractual terms are inconsistent with the autonomy of the surrogate mother is to miss the function of all contractual arrangements over labor."); Julia Dalzell, Student Author, *The Enforcement of Selective Reduction Clauses in Surrogacy Contracts*, 27 WIDENER COMMONWEALTH L. REV. 83, 88 (2018) ("[L]ike many other constitutional protections, [a woman's right to terminate a pregnancy] is a protection that can be voluntarily, knowingly, and intelligently waived.").

[359] For a particularly fulsome articulation of this argument, see Epstein, *Surrogacy*, *supra* note 212, at 2335.

[360] *Id.*

[361] Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 25 (2014) ("Neoliberalism permeates U.S. family law."). *See also* Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 218 (2017) (critiquing "the current narrow vision of the role of government expressed in recent law, sometimes known as "neoliberalism," based on the wellbeing of families").

in cost-benefit analysis to make choices and is then responsible for those choices."[362] Under this approach, parties are responsible for any agreement into which they choose to enter.[363] The state's primary role is to stay out and to allow these private agreements to flourish with little to no intervention or oversight.[364] Indeed, under this theory, state intervention in private ordering is viewed with skepticism.[365]

This influence of these theories is not limited to surrogacy legislation. Laissez-faire ideology is reflected in a range of contemporary family law rules.[366] Take premarital and post-marital agreements. Historically, even if the parties both agreed to the contents of the agreements, premarital agreements were considered void as a violation of public policy. States gradually abandoned this flat prohibition in favor of "limited enforceability" with significant caution and oversight.[367] Over time, this more cautious approach gave way to a phase in which some states "treated premarital contracts similarly to conventional contracts."[368] In these jurisdictions, courts apply a largely hands-off approach, leaving the parties to their own devices. In some states, this hands-off approach is applied even in situations where there was significant imbalances of power at the time of execution.[369]

Consider, too, the rules governing the economic rights of nonmarital couples. Upon dissolution, these couples are obligated to share property accumulated during their relationships only if they agreed to do so.[370] States continue to adhere to this rule even though very few couples enter into such agreements, and this approach often produces unfair results.[371] In these areas, the law largely leaves people responsible for the "choices" they make. The law provides little in the way of oversight or intervention.

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[362] Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL'Y REV. 459, 471 (2019) (footnote omitted).

[363] *Id.*

[364] *Id.*

[365] Alstott, *supra* note 361, at 25.

[366] *Id.*

[367] Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317, 332 (2016).

[368] *Id.*

[369] *See, e.g.*, Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990) ("We are reluctant to interfere with the power of persons contemplating marriage to agree upon, and to act in reliance upon, what *they* regard as an acceptable distribution scheme for their property.").

[370] *See, e.g.*, Courtney G. Joslin, *Family Choices*, 51 ARIZ. ST. L.J. 1285 (2020); Aloni, *supra* note 367, at 353.

[371] *See, e.g.*, Joslin, *Autonomy*, *supra* note 8, at 931. *See also* Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1020 (2018).

Applied to surrogacy, the critical policy question is that original basic binary one: whether the state should permit or prohibit surrogacy. The view suggests that the answer should be in the affirmative. And after so answering the question, this perspective then suggests that the legislation should largely leave the parties to their own devices. Indeed, the law in some states does just that. California, for example, permits surrogacy and imposes very few parameters on the contours of the arrangements.[372] Doing so, however, has real consequences for the participants and beyond.

V. RECONSIDERING JUST SURROGACY LAWS

It is not enough to contemplate *whether* to permit surrogacy. Careful consideration must also be given to *how* to regulate surrogacy. These details hold profound consequences, both from the perspective of the individual and from the collective. But for too long, these details and their normative implications have remained hidden in plain sight. As chronicled here, existing scholarly analyses of U.S. surrogacy law not only fail to identify, but also largely obscure, important differences in existing law. Having failed to identify these differences, the existing scholarship also lacks theoretical engagement of the potential variations. This Article seeks to reverse this trend.

A. Identifying the Issues

First, this Article uncovers and carefully identifies axes of variations to which policy makers, advocates, and scholars must attend. By carefully identifying and disaggregating the axes of variation, this Article sets forth a blueprint for moving forward in a more attentive and just way. In addition to considering whether to allow surrogacy and, if so, which types, stakeholders must also contemplate a range of issues related to intended parents and to people acting as surrogates. As set forth in Appendix B, questions related to intended parents include, among others, which intended parents should be protected; whether the law should protect them automatically or whether court oversight is required; and whether the law should permit enforceable determinations of parentage during pregnancy. Appendix C details issues related to people acting as surrogates. These include whether counsel should be required; whether to ensure that people acting as surrogates retain control over their behavior and decision-making during pregnancy; whether they can withdraw consent to the arrangement after pregnancy has been achieved; and whether compensation is permitted. My more fine-grained descriptive account

[372] For an argument that the state should play a greater oversight role with respect to family-based arrangements, see, for example, Joslin, *Family Choices*, *supra* note 370.

suggests that, in the past, many of these questions have been elided by policy makers. It seeks to challenge these oversights by setting forth a blueprint to shape policy making going forward.

In addition to identifying important questions for future policy makers, my typology uncovers past trends that have heretofore gone unnoticed and unexamined. As illustrated by Appendix B, permissive surrogacy regimes have become more inclusive and protective of intended parents over time. Today, surrogacy laws are more likely to protect all intended parents—regardless of sex, sexual orientation, or marital status—and to jettison genetic connection requirements rooted in reproductive biology.[373] Recently enacted laws are less likely to require a home study or other outside approval of the intended parents.[374] They are also more likely to eliminate the need for court appearances and to provide for parentage as a matter of law.[375]

A more complicated evolution emerges, however, when one turns to considerations regarding people acting as surrogates. As illustrated by Appendix C, more recently enacted permissive schemes are more likely to require independent counsel for all parties.[376] This requirement can help protect the interests of people acting as surrogates, and address potential imbalances of power. At the same time, many permissive regimes, including some recently enacted ones, omit protections regarding the bodily autonomy and integrity interests of people acting as surrogates.[377] Indeed, some schemes expressly allow for the curtailment of autonomy rights in this regard, and others do implicitly.[378]

My typology also reveals *where* these trends are emerging. This geographical map is particularly interesting. Among other things, states that permit control and surveillance of pregnant bodies run the political gamut—ranging from deep blue states like California and Illinois to the deep red state of Oklahoma.[379] This insight as well as a review of the legislative histories in these states confirm that the enactment of these provisions went entirely unnoticed and completely untheorized.[380] This oversight is troubling given the profound normative implications of these legislative choices, both for the participants as well as for law and policy beyond surrogacy's boundaries. By identifying and mapping the

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373 *See* Appendix B (15 of 20 permissive states omit medical need requirements, and that 15 of the 20 omit any genetic connection requirement).

374 *See* Appendix B (15 of the 20 permissive states omit a home study or similar requirement).

375 *See* Appendix B.

376 *See* Appendix C.

377 *See* Appendix C.

378 *See* Appendix C.

379 *See* Appendix C.

380 *See supra* Part III.A.

questions on the table, this Article seeks to prevent that kind of lapse in the future.

B. Advancing Theoretical Consideration

In addition to mapping the critical questions that ought to be asked, this Article facilitates deeper normative consideration of them. This Article does so by theorizing the consequences of different potential paths—both for the participants to the surrogacy agreements, and more broadly. By embracing same-sex parent families and single-father families, inclusive surrogacy law promote a vision of the family that challenges long-standing sex-based stereotypes. By protecting women's choices about their bodies and their lives, surrogacy law can vindicate liberty and autonomy principles.[381] The extent to which principles of equality and liberty are furthered by surrogacy, however, depends on its details.

Surrogacy law impacts the participants in profound ways. For example, which law applies may be the difference between an intended parent being recognized as a legal parent, or as a legal stranger. It can also be the difference between a person acting as a surrogate having protection to make decisions about her body during her pregnancy or being required to follow the direction of others. Taken alone, these consequences are profound and deserve careful attention.

But the consequences do not stop there; the ripples travel much father. Surrogacy law is shaped by and in turn shapes the broader rules that regulate families and reproduction. Surrogacy law can challenge long-standing family law rules rooted in sex-based reproductive biology, or it can replicate and reinforce them. Inclusive intended parent rules can vindicate principles of equality by expressly including and protecting all families formed through surrogacy, without regard to sex, sexual orientation, or marital status.[382] For example, surrogacy statutes with inclusive intended parent rules facilitate the formation of "famil[ies] that exclude a mother."[383] In this way, these schemes can "position fathers as primary parents" and challenge traditional gender-based stereotypes about the nature of parenthood.[384] In addition, by jettisoning genetic connection requirements, inclusive surrogacy rules also support the development of family law rules that value social parental relationships.[385] Rules that recognize and

[381] *See, e.g.*, Joslin, *The Gay Rights Canon*, *supra* note 8, at 484; Joslin, *Autonomy*, *supra* note 8.

[382] *See supra* Part II.B.

[383] NeJaime, *Parenthood*, *supra* note 7, at 2330.

[384] *Id.* at 2329–30.

[385] *Id.* at 2270.

protect social parenthood promote and protect same-sex parent families. In the past, these families were excluded by traditional marriage- and gender-based family law rules.[386] In this way, surrogacy laws can promote the liberty of all people to form families of choice and further equality within and between families.[387]

Not all states have inclusive intended parent surrogacy rules, however. Some statutes, like those in Louisiana, cover and protect only married intended parents, each of whom contributed genetic material.[388] In addition to excluding all unmarried intended parents, the genetic contribution requirement excludes all same-sex couples—married and unmarried—as well as many different-sex couples. These types of requirements reinforce stereotyped views about the nature of parenthood, views that venerate different-sex married families as well as biological parents, and, simultaneously, denigrate other family forms.[389] Rather than reforming family law principles, surrogacy rules like those in Louisiana "carry forward legacies of exclusion."[390]

Another point of variation relates to the inclusion of genetic surrogacy. Most states exclude or disincentivize genetic surrogacy arrangements.[391] This choice too holds both narrow and broad implications. Genetic surrogacy tends to be less expensive than gestational surrogacy. This is true because genetic surrogacy eliminates the need for in vitro fertilization (IVF). As a result, it may be financial accessible to more potential intended parents. In addition, again, because it does not require IVF or ova harvesting, it involves less medical risk for the person acting as a surrogate. Shifting from the individual to the collective, rules that exclude or disincentivize genetic surrogacy reinforce traditional beliefs about the importance of genetic connections (or lack thereof) in determining parenthood. This belief harms the many families, including many LGBT parent families, that consist of one or more non-genetic parents.

Surrogacy law also implicates reproductive rights and justice. Surrogacy law, for example, can affirm and protect the right of pregnant people to control and make decisions about their own bodies. It can do so by expressly declaring that the person acting as a surrogate must be permitted to make all health and welfare

386 *See, e.g.*, In Interest of A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *10 (Tex. App. Apr. 27, 2017), *review denied* (Sept. 28, 2018) ("The substitution of the word 'spouse' for the words 'husband' and 'wife' [in the parentage statutes] would amount to legislating from the bench, which is something that we decline to do.").

387 *See, e.g.*, Joslin, *Autonomy*, *supra* note 8; Joslin, *The Gay Rights Canon*, *supra* note 8.

388 LA. STAT. ANN. § 9:2718.1(b).

389 *See, e.g.*, Joslin, *The Gay Rights Canon*, *supra* note 8, at 484; Joslin, *Autonomy*, *supra* note 8.

390 NeJaime, *Parenthood*, *supra* note 7, at 2268.

391 *See* Appendix A.

decisions about her body and the pregnancy.[392] Or it can reinforce trends seen in other areas in which the interests of pregnant people are diminished in the interest of the fetus or other parties. Surrogacy law can do so by allowing widespread surveillance and control of pregnant people and their bodies. The law of surrogacy can reflect and support the position that the fetus is not an entity to which rights attach, by, among other things, clarifying that parentage is not established until a child has been born. Or it can do the opposite. Moreover, deferral often is not a viable option. For example, when the state does not expressly protect the right of a person acting as a surrogate to make medical decisions, the effect of that omission may be to allow that decision-making authority to be contracted away.[393]

As this Article sets forth, when states choose to regulate surrogacy, decision makers must attend to a range of important questions. The way these questions are answered often hold profound normative implications, viewed both narrowly and broadly. This Article fosters and facilitates more careful consideration of these normative implications and, therefore, more thoughtful and just policy making.

C. Urgency of Intervention

This Article comes at a critical moment. The strong trend with regard to surrogacy legislation favors permissive statutory regimes. Twenty (20) of the twenty-six (26) jurisdictions with statutory schemes have permissive ones. And the much of this shift occurred very recently;[394] thirteen (13) of the twenty (20) states with permissive schemes enacted them in the last decade. This trend is likely to continue. Indeed, surrogacy legislation has been introduced in at least four states in the month of January 2020 alone.[395]

It is also a moment when principles of equality and reproductive freedom and justice more broadly hang in the balance. The Supreme Court is poised to decide three cases about the right of LGBT people.[396] The Court will also revisit

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[392] *See supra* notes 185–188 and accompanying text.

[393] *See supra* note 200 and accompanying text.

[394] Thirteen of the 20 permissive jurisdictions enacted their legislation in the last decade. *See* Appendix A.

[395] The four states include Indiana, New York, Rhode Island, and South Dakota. In 2019, permissive surrogacy legislation was introduced in at least six states. *See, e.g.*, 2019 Conn. Legis. H.B. 6507; 2019 Ind. Legis. H.B. 1369; 2019 Mass. Leg. S.B. 77/H.B. 139; 2019 N.Y. A.B. 1071; 2019 Penn. Legis. H.B. 243; 2019 R.I. Legis. H. 5707.

[396] Altitude Express, Inc. v. Zarda, No. 17-1623; R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Comm'n, No. 18-107; Bostock v. Clayton Cty, Georgia, No. 17-1618.

and could possibly overrule *Roe v. Wade*.[397] In addition to these high-profile cases, battles are being waged every day at the state and local level. According to the Guttmacher Institute, "nearly half of the 58 new [state] abortion restrictions enacted in 2019 would ban all, most or some abortions."[398]

It is critical to be attentive to how the law of surrogacy implicates these broader struggles for liberty and equality. As more states consider such legislation, careful attention must be paid, not just to whether states should allow surrogacy, but also *to how* they regulate surrogacy.

CONCLUSION

Scholars have long debated whether the practice of surrogacy itself furthers or inhibits principles of equality and liberty. States are increasingly staking out a position on this issue; they are increasing choosing to permit surrogacy. But they are doing so in widely varied ways. The details of surrogacy law hold profound consequences both for the participants and for law and policy more broadly. Despite this reality, there remains no comprehensive account of *the ways in which* states regulate surrogacy. There is also a striking absence of theoretical analyses of whether and to what extent these varied efforts further normative goals of equality and autonomy.

This Article seeks to intervene and reverse this oversight. Surrogacy law will not become more just unless policy makers pay careful consideration to its details. Drawing from a meticulous analysis of existing state law, this Article offers the first comprehensive typology of surrogacy statutes. In addition to identifying previously hidden details, this Article also theorizes the consequences of these details both within and without surrogacy. The Article concludes by using this uncovered story to chart a more just path forward for the law of surrogacy and beyond.

[397] June Medical Services, LLC v. Gee, No. 18-1323; Gee v. June Medical Services, No. 18-1460.

[398] *State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back*, https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back.

APPENDIX A
All states with statutory or administrative provisions regarding surrogacy[399]

Key
✓ = yes
Ø = no

Jurisdiction	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
AZ (1989)[400]	Ø	Ø	Ø	✓ ARIZ. REV. STAT. § 25-218 (civil ban)[401]
AR (1985)	✓ ARK. CODE ANN. § 9-10-201[402]	✓ ARK. CODE ANN. § 9-10-201[403]	✓ ARK. CODE ANN. § 9-10-201[404]	Ø
CA (2012)	✓ CAL. FAM. CODE. §§ 7960(f)(2); 7962	Ø	✓ CAL. FAM. CODE § 7962[405]	Ø
CT (2011)	✓ CONN. GEN. STAT. § 7-48a[406]	Ø [407]	✓ CONN. GEN. STAT. § 7-48a[408]	Ø
DE (2013)	✓ DEL. CODE ANN. tit. 13, § 8-102(16)	Ø	✓ DEL. CODE ANN. tit. 13, § 8-807(d)(3)	Ø
FL (1988, 1993)	✓ FLA. STAT. ANN. § 742.11 et seq.	✓ FLA. STAT. ANN. § 63.212[409]	Ø FLA. STAT. ANN. § 742.15(4) (gestational); FLA. STAT. ANN. § 63.212(1)(h) (genetic)[410]	Ø

[399] Some commentators list a few additional jurisdictions as states with statutes regarding surrogacy. This chart does not include statutes that simply declare the state has no policy authorizing or prohibiting surrogacy. *See, e.g.*, N.M. STAT. ANN. § 40-11A-801(A) (providing that the "New Mexico Parentage Act does not authorize or prohibit" surrogacy); TENN. CODE ANN. § 36-1-102(51) (defining "surrogacy birth" and providing that nothing in the definition "shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the general assembly"); WYO. STAT. ANN. § 14-2-403(d) ("This act does not authorize or prohibit [surrogacy agreements] …").

[400] This chart indicates the year or years the provisions were enacted.

[401] Arizona civilly bans compensated and uncompensated gestational and genetic agreements.

[402] Arkansas' single section on surrogacy simply addresses the parentage of children born as the result of "artificial insemination." If that phrase was interpreted narrowly, it would only cover genetic surrogacy. *See, e.g.*, Patton v. Vanterpool, 806 S.E.2d 493, 496 (Ga. 2017) (holding that Georgia statute addressing the parentage of children conceived through "artificial insemination" did not apply to child conceived through in vitro fertilization). There is no Arkansas case law interpreting this provision, however.

[403] *See supra* note 402.

[404] Compensation is neither expressly permitted, nor expressly prohibited. ARK. CODE ANN. § 9-10-201.

[405] Compensation is neither expressly permitted, nor expressly prohibited. CAL. FAM. CODE § 7962.

[406] Although this statute only expressly addresses the completion of birth certificates, the Connecticut Supreme Court ruled that this statute also effected a substantive change in the law regarding parentage. Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011) ("On the basis of our analysis of both the text of the statute, as well as its legislative history, we conclude that the legislature intended § 7-48a to confer parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent's genetic relationship to the children.").

[407] *See, e.g.*, CONN. GEN. STAT. ANN. § 7-36(16) (defining "Gestational agreement" to mean "a written agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent or intended parents, which woman contributed no genetic material to the child …").

While Connecticut statutes do not expressly authorize genetic surrogacy agreements, it also does not expressly prohibit them. That said, people acting as genetic surrogates are not automatically treated as nonparents. *See, e.g.*, Doe v. Doe, 717 A.2d 706 (Conn. 1998).

[408] Compensation is neither expressly permitted, nor expressly prohibited. CONN. GEN. STAT. ANN. § 7-48a.

[409] The rules, however, differ depending on the type.

[410] However, reimbursement of some expenses is permitted. FLA. STAT. ANN. § 742.15(4) (gestational); FLA. STAT. ANN. § 63.212(1)(h) (genetic).

IL (2004)	✓ 750 ILL. COMP. STAT. ANN. 47/5; 750 ILL. COMP. STAT. ANN. 47/10	Ø	✓ 750 ILL. COMP. STAT. 47/25(d)(3)	Ø
IN (1997)	Ø	Ø	Ø	✓ IND. CODE ANN. § 31-20-1-1 (civil ban)[411]
IA (2012)	✓ IOWA ADMIN. CODE r. 641-99.15	Ø [412]	✓ IOWA ADMIN. CODE r. 641-99.15[413]	Ø
KY (1988)	Ø	Ø	Ø	✓ KY. REV. STAT. § 199.590(4) (civil ban on compensated only)[414]
LA (2016)	✓ LA. REV. STAT. ANN. § 9:2718.1	Ø	Ø LA. REV. STAT. ANN. § 9:2720.5(B)(3)[415]	✓ LA. REV. STAT. ANN. § 9:2719 (civil ban on genetic only)
ME (2015)	✓ ME. REV. STAT. tit. 19-A, § 1931(1)(e)[416]	Ø	✓ ME. REV. STAT. tit. 19-A, § 1932(4)[417]	Ø
MI (1988)	Ø	Ø	Ø	✓ MICH. COMP. LAWS § 722.855 (civil);[418] § 722.859(2) (penalties; participants); § 722.859(3) (penalties; third parties)
NB (1988)	Ø	Ø	Ø	✓ NEB. REV. STAT. § 25-21,200(1) & (2) (civil ban on compensated only)
NV (2013)	✓ NEV. REV. STAT. ANN. § 126.580	Ø	✓ NEV. REV. STAT. ANN. § 126.750(5)(c)	Ø
NH (2015)	✓ N.H. REV. STAT. ANN. § 168-B:1(IX)	Ø	✓ N.H. REV. STAT. ANN. § 168-B:11(IV)(d) & § 168-B:1(III)	Ø
NJ (2018)	✓ N.J. STAT. ANN. § 9:17-62	Ø	✓ N.J. STAT. ANN. § 9:17-68(b)[419]	Ø
NY (1992)	Ø	Ø	Ø	✓ N.Y. DOM. REL. LAW § 122 (civil ban);[420] § 123(2)(a) (penalties; participants); § 123 (2)(b) (penalties; third parties)[421]

[411] Indiana civilly bans compensated and uncompensated gestational and genetic agreements. *See also, e.g.*, IND. CODE ANN. § 31-9-2-126 (definition of "surrogate").

[412] Genetic surrogacy is neither civilly nor criminally banned in Iowa. *See, e.g.*, IOWA CODE ANN. § 710.11 (exempting surrogacy from the statute criminalizing the "purchase or sale of an individual"). However, Iowa law only recognizes intended parents as legal parents without the need for an adoption when they are also genetic contributors. *See, e.g.*, IOWA ADMIN. CODE r. 641-99.15.

[413] Compensation is neither expressly permitted, nor expressly prohibited. IOWA ADMIN. CODE r. 641-99.15.

[414] Kentucky civilly bans compensated agreements only. KY. REV. STAT. § 199.590(4). The civil ban may only apply to genetic surrogate. *Id.* (refers to "artificial insemination").

[415] However, reimbursement of some expenses is permitted. LA. REV. STAT. ANN. § 9:2720.5(B)(3).

[416] Maine allows genetic surrogacy only if the person acting as a surrogate "is entering into an agreement with a family member." ME. REV. STAT. tit. 19-A, § 1931(1)(e).

[417] The statute expressly allows for reimbursement of reasonable expenses. ME. REV. STAT. tit. 19-A, § 1932(4). Compensation is neither expressly permitted nor expressly prohibited.

[418] Michigan civilly bans compensated and uncompensated gestational and genetic agreements. MICH. COMP. LAWS § 722.855; MICH. COMP. LAWS § 722.853(i) (definition of "surrogate parentage contract").

[419] The statute expressly allows for reimbursement of "reasonable expenses." N.J. STAT. ANN. § 9:17-68(b). Compensation is neither expressly permitted nor expressly prohibited.

[420] The civil ban only applies to compensated agreements. *See also* N.Y. DOM. REL. LAW § 121(4) (definition of "surrogate parenting contract").

[421] The provision allowing for the imposition of civil and criminal applies to compensated agreements only.

ND (1989, 2005)	✓ N.D. CENT. CODE ANN. § 14-18-01(2)	Ø	✓ N.D. CENT. CODE ANN. § 14-18-01[422]	✓ N.D. CENT. CODE ANN. § 14-18-05 (civil ban on most agreements)[423]
OK (2019)	✓ OKLA. STAT. ANN. tit. 10, § 557.2(8)	Ø	✓ OKLA. STAT. ANN. tit. 10, § 557.6(D)(3) & § 557.17(B)	Ø
TX (2003)	✓ TEX. FAM. CODE § 160.754(c)	Ø	✓ TEX. FAM. CODE ANN. § 160.756(b)(6)[424]	Ø
UT (2008)	✓ UTAH CODE ANN. § 78B-15-801(7)	Ø	✓ UTAH. CODE ANN. § 78B-15-803(2)(h) & § 78B-15-808(1)	Ø
VT (2018)	✓ VT. STAT. ANN. tit. 15C, § 102(12)[425]	Ø	✓ VT. STAT. ANN. tit. 15C, § 802(d)	Ø
VA (1991)	✓ VA. CODE ANN. § 20-156	✓ VA. CODE ANN. § 20-156[426]	Ø VA. CODE ANN. § 20-162	Ø
WA (2018)	✓ WASH. REV. CODE ANN. § 26.26A.700(3)	✓ WASH. REV. CODE ANN. § 26.26A.700(3)[427]	✓ WASH. REV. CODE ANN. § 26.26A.715(2)(a)	Ø
D.C. (2017)	✓ D.C. CODE ANN. § 16-401(22) & § 16-404	✓ D.C. CODE ANN. § 16-401(22) & § 16-404[428]	✓ D.C. CODE ANN. § 16-406(d)[429]	Ø

[422] The statute expressly allows for payment of "reasonable health care expenses associated with the pregnancy." TEX. FAM. CODE ANN. § 160.756(b)(6). Compensation is neither expressly permitted, nor expressly prohibited.

[423] North Dakota civilly bans all surrogacy agreements except gestational surrogacy agreements in which the married intended parents both provide gametes. N.D. CENT. CODE ANN. § 14-18-05.

[424] Compensation is neither expressly permitted, nor expressly prohibited.

[425] New Hampshire allows genetic surrogacy only if the person acting as a surrogate is "a family member." VT. STAT. ANN. tit. 15C, § 102(12).

[426] The rules governing termination of the contract, however, differ depending on the type. VA. CODE ANN. § 20-161(A) & (B).

[427] The rules governing parentage and withdrawal of consent, however, differ depending on the type. WASH. REV. CODE ANN. § 26.26A.740 (parentage; gestational); § 26.26a.770 (parentage; genetic); § 26.26A.735 (withdrawal of consent; gestational); § 26.26a.765 (withdrawal of consent; genetic).

[428] The rules governing parentage and withdrawal of consent, however, differ depending on the type. D.C. CODE ANN. § 16-407 (parentage); D.C. CODE ANN. § 16-411 (withdrawal of consent).

[429] The statutes expressly allow for reimbursement for "reasonable medical and ancillary expenses." D.C. CODE ANN. § 16-406(d). The provisions also provide for a broad definition of "ancillary expenses" to include, among other things, "compensation for risk, inconvenience, forbearance, or restriction." D.C. CODE ANN. § 16-401(1).

APPENDIX B

Intended Parent (IP) Protections
Permissive jurisdictions only

Jurisdiction	Inclusive IP rules	No Genetic Connection Requirement	No Medical Need Requirement	No Home Study Requirement	Parentage as a Matter of Law	Pre-Birth Orders
AR (1985)	Partially. ARK. CODE ANN. § 9-10-201[430]	✓ ARK. CODE ANN. § 9-10-201	✓ ARK. CODE ANN. § 9-10-201	✓ ARK. CODE ANN. § 9-10-201	✓ ARK. CODE ANN. § 9-10-201	Not addressed.
CA (2012)	✓ CAL. FAM. CODE § 7960(c)	✓ CAL. FAM. CODE § 7962	✓ CAL. FAM. CODE § 7962	✓ CAL. FAM. CODE § 7962	✓ CAL. FAM. CODE § 7962(f)(2).	✓ CAL. FAM. CODE § 7962(f)(2)
CT (2011)	✓ CONN. GEN. STAT. ANN. § 7-48a(b)[431]	✓ CONN. GEN. STAT. ANN. § 7-48a(b)[432]	✓ CONN. GEN. STAT. ANN. § 7-48a(b)[433]	✓ CONN. GEN. STAT. ANN. § 7-48a(b)[434]	✓ CONN. GEN. STAT. ANN. § 7-48a(b)[435]	Not addressed.
DE (2013)	✓ DEL. CODE ANN. tit. 13, § 8-102(18)	✓ DEL. CODE ANN. tit. 13, § 8-806(b)	✓ DEL. CODE ANN. tit. 13, § 8-807	✓ DEL. CODE ANN. tit. 13, § 8-807	Probably. DEL. CODE ANN. tit. 13, § 8-807	Not addressed.
FL (1988, 1993)	✓ FLA. STAT. ANN. §742.13(2)[436]	Ø FLA. STAT. ANN. § 742.13(2) (gestational)[437]	Ø FLA. STAT. ANN. § 742.15(2)	Ø (genetic only)[438]	Ø FLA. STAT. ANN. § 724.16(1)[439]	Ø FLA. STAT. ANN. § 724.16(1)[440]
IL (2004)	✓ 750 ILCS 47/10	Ø 750 ILCS § 47/20(b)(1)[441]	✓ 750 ILCS § 47/20(b)(2).	✓ 750 ILCS § 47/25	Probably. 750 ILCS § 47/35[442]	✓ 750 ILCS § 47/35

[430] Arkansas law recognizes married and unmarried male genetic intended parents, but the provisions are written in gendered language. ARK. CODE ANN. § 9-10-201.

[431] The Connecticut statute is silent on the identity of the intended parents, CONN. GEN. STAT. ANN. § 7-48a, and the Connecticut Supreme Court has ruled that intended parents can be legal parents "irrespective of the intended parent's genetic relationship to the children." *Raftopol*, 12 A.3d at 799.

[432] The Connecticut statute is silent on the identity of the intended parents, CONN. GEN. STAT. ANN. § 7-48a, and the Connecticut Supreme Court has ruled that intended parents can be legal parents "irrespective of the intended parent's genetic relationship to the children." *Raftopol*, 12 A.3d at 799.

[433] The Connecticut statute is silent on the issue. CONN. GEN. STAT. ANN. § 7-48a.

[434] The Connecticut statute is silent on the issue. CONN. GEN. STAT. ANN. § 7-48a.

[435] Although the statute only expressly addresses the completion of birth certificates, the Connecticut Supreme Court ruled that this statute also effected a substantive change in the law regarding parentage. Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011) ("On the basis of our analysis of both the text of the statute, as well as its legislative history, we conclude that the legislature intended § 7-48a to confer parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent's genetic relationship to the children.").

[436] The intended parent provision is marital-status neutral, but it uses gendered language. FLA. STAT. ANN. §742.13(2)

[437] The gestational surrogacy provisions require gametes from at least one of the intended parents. FLA. STAT. ANN. § 742.13(2)

[438] Genetic surrogacy is treated as an adoption. Hence a home study is required.

[439] The statute requires a hearing within 3 days after birth, although it is unclear if the failure to have such a hearing would affect the parentage determination. FLA. STAT. ANN. § 724.16(1).

[440] A hearing is required after birth. FLA. STAT. ANN. § 724.16(1).

[441] The intended parents must contribute at least one gamete. 750 ILL. COMP. STAT. § 47/20(b)(1).

[442] Parentage is assigned to the intended parents if the attorneys submit certifications. 750 ILL. COMP. STAT. § 47/35. Although it is unclear if the failure to submit such certifications would affect the parentage determination.

IA (2012)	Ø IOWA ADMIN. CODE r. 641-99.15[443]	Ø IOWA ADMIN. CODE r. 641-99.15[444]	✓ IOWA ADMIN. CODE r. 641-99.15	✓ IOWA ADMIN. CODE r. 641-99.15	✓ IOWA ADMIN. CODE r. 641-99.15[445]	Not addressed.
LA (2016)	Ø LA. REV. STAT. ANN. § 9:2718.1(b)[446]	Ø LA. REV. STAT. ANN. § 9:2718.1(b)[447]	Ø LA. REV. STAT. ANN. § 9:2720.3(B)(4)	Ø LA. REV. STAT. ANN. § 9:2720.4(A)[448]	Ø LA. REV. STAT. ANN. 9:2720(B) (pre-transfer); § 9:2720.13(A) (post-birth)[449]	Ø LA. REV. STAT. ANN. § 9:2720.13(A)
ME (2015)	✓ ME. REV. STAT., tit. 19-A, § 1832(12)	✓ ME. REV. STAT., tit. 19-A, § 1832(12)	✓ ME. REV. STAT. tit. 19-A, § 1932	✓ ME. REV. STAT. tit. 19-A, § 1932	✓ ME. REV. STAT. tit. 19-A, § 1933(1)	✓ ME. REV. STAT. tit. 19-A, § 1934(1)
NV (2013)	✓ NEV. REV. STAT. ANN. § 126.590	✓ NEV. REV. STAT. ANN. § 126.590	✓ NEV. REV. STAT. ANN. § 126.750	✓ NEV. REV. STAT. ANN. § 126.750	✓ NEV. REV. STAT. ANN. § 126.720(1)(a)	✓ NEV. REV. STAT. ANN. § 126.720(4)
NH (2015)	✓ N.H. REV. STAT. ANN. § 168-B:1(XIII)	✓ N.H. REV. STAT. ANN. § 168-B:1(XIII)	✓ N.H. REV. STAT. ANN. § 168-B:11	✓ N.H. REV. STAT. ANN. § 168-B:11	Probably. N.H. REV. STAT. ANN. § 168-B:12(I)	✓ N.H. REV. STAT. ANN. § 168-B:12(1)
NJ (2018)	✓ N.J. STAT. ANN. § 9:17-62	✓ N.J. STAT. ANN. § 9:17-62	✓ N.J. STAT. ANN. § 9:17-65	✓ N.J. STAT. ANN. § 9:17-65	✓ N.J. STAT. ANN. § 9:17-63	✓ N.J. STAT. ANN. § 9:17-67(a) & (f)
ND (1989, amended 2005)	Ø N.D. CENT. CODE ANN. § 14-18-01(1) & (2)[450]	Ø N.D. CENT. CODE ANN. § 14-18-01(1) & (2)[451]	✓ N.D. CENT. CODE ANN. § 14-18-01(1) & (2).	✓ N.D. CENT. CODE ANN. § 14-18-01(1) & (2).	✓ N.D. CENT. CODE ANN. § 14-18-08	Not addressed
OK (2019)	Partially. OKLA. STAT. tit. 10 § 557.5(B)(4)[452]	✓ OKLA. STAT. tit. 10 § 557.5(B)(4)	Partially. OKLA. STAT. tit. 10 § 557.10(B)(4)[453]	✓ OKLA. STAT. tit. 10, § 557.6	Ø OKLA. STAT. tit. 10, §§ 557.7(A) & 557.12(A)[454]	Ø OKLA. STAT. tit. 10 § 557.12(A)
TX (2003)	Ø TEX. FAM. CODE § 160.754(b)[455]	✓ TEX. FAM. CODE § 160.754	Ø TEX. FAM. CODE § 160.756(b)(2)	Ø TEX. FAM. CODE § 160.756(b)(3)[456]	Ø TEX. FAM. CODE §§ 160.756 & 160.760(a)[457]	Ø TEX. FAM. CODE § 160.760(a).

[443] Only recognizes and protects intended genetic parents. IOWA ADMIN. CODE r. 641-99.15.

[444] Intended parents are protected only if they contribute a gamete. IOWA ADMIN. CODE r. 641-99.15.

[445] Intended parents are only automatically recognized as legal parents if they are genetic contributors. IOWA ADMIN. CODE r. 641-99.15. Otherwise, they must complete an adoption.

[446] The intended parents are protected only if they both are married to each other and each contributes gametes. LA. REV. STAT ANN. § 9:2718.1(b).

[447] Both intended parents must contribute gametes. LA. REV. STAT ANN. § 9:2718.1(b).

[448] While the statute does not require a "home study" per se, it does require a criminal background, child abuse and neglect check, and protective order check. LA. REV. STAT ANN. § 9:2720.4(A).

[449] Pre-pregnancy and post-birth court appearance are required. LA. REV. STAT ANN. § 9:2720(B) (pre-transfer); LA. REV. STAT ANN. § 9:2720.13(A) (post-birth).

[450] The statute only protects married intended parents each of whom contribute gametes. N.D. CENT. CODE ANN. § 14-18-01(1) & (2).

[451] The statute requires both intended parents to contribute gametes. N.D. CENT. CODE ANN. § 14-18-01(1) & (2).

[452] The statute covers and protects single intended parents and married couples, but not unmarried couples. OKLA. STAT. tit. 10 § 557.5(B)(4).

[453] The statute requires either medical or social infertility. OKLA. STAT. tit. 10 § 557.10(B)(4).

[454] Pre-pregnancy and post-birth court proceedings are required. OKLA. STAT. tit. 10, §§ 557.7(A) & 557.12(A).

[455] Provides that the intended parents must be married. TEX. FAM. CODE § 160.754(b).

[456] A home study is required unless waived by the court. TEX. FAM. CODE § 160.756(b)(3)

[457] Pre-pregnancy and post-birth court appearances are required. TEX. FAM. CODE § 160.756 (pre-pregnancy) & § 160.760(a) (post-birth).

UT (2008)	Ø UTAH CODE ANN. § 78B-15-801(3)[458]	✓ UTAH CODE ANN. § 78B-15-801	Ø UTAH CODE ANN. § 78B-15-803(2)(b)	Ø UTAH. CODE ANN. § 78B-15-803(2)(c)[459]	Ø UTAH CODE ANN. § 78B-15-802(1) & §78B-15-807(1)[460]	Ø UTAH CODE ANN. § 78B-15-807(1)
VT (2018)	✓ VT. STAT. ANN. tit. 15C, § 102(14)	✓ VT. STAT. ANN. tit. 15C, § 102(14)	✓ VT. STAT. ANN. tit. 15C, § 802	✓ VT. STAT. ANN. tit. 15C, § 802	✓ VT. STAT. ANN. tit. 15C, § 803(a)(1)	✓ VT. STAT. ANN. tit. 15C, § 804(a)(1)
VA (1991)	✓ VA. CODE ANN. § 20-156	✓ VA. CODE ANN. § 20-160(B)(9)[461]	Ø VA. CODE ANN. § 20-160(B)(8)	Ø VA. CODE ANN. § 20-160(B)(2)	Ø VA. CODE ANN. §§ 20-160(A) & 20-160(D)[462]	Not addressed
WA (2018)	✓ WASH. REV. CODE ANN. § 26.26A.010(13)	✓ WASH. REV. CODE ANN. § 26.26A.010(13)	✓ WASH. REV. CODE ANN. § 26-26A-710	✓ WASH. REV. CODE ANN. § 26-26A-710	✓ WASH. REV. CODE ANN. § 26.26A.750(1) (gestational only)	✓ WASH. REV. CODE ANN. § 26-26A-750(1)(a) (gestational only)
D.C. (2017)	✓ D.C. CODE § 16-401(16)	✓ D.C. CODE § 16-401(16)	✓ D.C. CODE § 16-406	✓ D.C. CODE § 16-406	✓ D.C. CODE § 16-407 (gestational only)	✓ D.C. CODE § 16-408(a) & (e) (gestational only)

APPENDIX C

Person Acting as Surrogate (PAS) Protections
Permissive jurisdictions only

Jurisdiction	Counsel Required	IPs must pay for counsel for PAS	Protects PAS's right to control own behavior	Protects PAS's decision-making authority	Protects PAS's choice of doctor	Requires IPs to accept custody
AR (1985)	Ø	Ø	Ø	Ø	Ø	Unclear
CA (2012)	✓ CAL. FAM. CODE § 7692(b)	Ø CAL. FAM. CODE § 7692(b)	Ø	Ø	Ø	Probably. CAL. FAM. CODE § 7962.
CT (2011)	Ø	Ø	Ø	Ø	Ø	Unclear
DE (2013)	✓ DEL. FAM. CODE tit. 13, § 8-807(b)(3); 8-§ 806(a)(5) (PAS); § 8-806(b)(2) (IPs)	Ø DEL. CODE ANN. tit. 13., § 8-806(5)[463]	Ø DEL. CODE ANN. tit. 13, 8-§ 807(d)(2)	Ø DEL. CODE ANN. tit. 13, § 8-807(d)(1)	After consultation with IPs. DEL. CODE ANN. tit. 13, § 8-807(c)(3)	✓ (probably.) DEL. FAM. CODE tit. 13, § 8-807
FL (1988, 1993)	Ø	Ø	Ø FLA. STAT. ANN. § 742.15(3)(b)	Unclear. FLA. STAT. ANN. § 742.15(3)(b); *but*	Unclear. FLA. STAT. ANN. § 742.15(3)(b); *but*	Unclear.

[458] Provides that the intended parents must be married. UTAH CODE ANN. § 78B-15-801(3).

[459] A home study is required unless waived by the court. UTAH CODE ANN. § 78B-15-803(2)(c).

[460] Pre-pregnancy and post-birth court appearances are required. UTAH CODE ANN. § 78B-15-802(1) (pre-pregnancy) & § 78B-15-807(1) (post-birth).

[461] VA. CODE ANN. § 20-160(B)(9) (providing that "[a]t least one intended parent is expected to be the genetic parent of any child resulting from the agreement *or such intended parent has the legal or contractual custody of the embryo at issue*" (emphasis added).

[462] Pre-pregnancy and post-birth court appearances are required. VA. CODE ANN. §§ 20-160(A) (pre-pregnancy) & 20-160(D) (post-birth).

[463] Payment of counsel fees is required only if "requested" by the PAS. DEL. CODE ANN. tit. 13., § 8-806(5).

				see § 742.15(3)(a)[464]	*see* § 742.15(3)(a)[465]	
IL (2004)	✓ 750 ILL COMP. STAT. 47/25(b)(3).	Ø	Ø 750 ILL. COMP. STAT. 47/25(d)(2)	Ø 750 ILL. COMP. STAT. 47/25(d)(1)	After consultation with IPs. 750 ILL. COMP. STAT. 47/25(c)(3).	✓ 750 ILL. COMP. STAT. 47/30.
IA (2012)	Ø IOWA ADMIN CODE r. 641-99.15	Ø IOWA ADMIN CODE r. 641-99.15	Ø IOWA ADMIN CODE r. 641-99.15	Ø IOWA ADMIN CODE r. 641-99.15	Ø IOWA ADMIN CODE r. 641-99.15	Ø IOWA ADMIN CODE r. 641-99.15
LA (2016)	Ø	Ø	Ø LA. REV. STAT. ANN. § 9:2720.2(A)(2)	Unclear. LA. REV. STAT. ANN. § 9:2720.2(A)(2); *but see* § 9:2720.2(B)(1)[466]	Unclear. LA. REV. STAT. ANN. § 9:2720.2(A)(2); *but see* § 9:2720.2(B)(1)[467]	Unclear.
ME (2015)	✓ ME. REV. STAT. tit. 19-A, § 1931(1)(D)	✓ ME. REV. STAT. tit. 19-A, § 1931(1)(D)	Unclear	✓ ME. REV. STAT. tit. 19-A, § 1932(5)	✓ ME. REV. STAT. tit. 19-A, § 1932(3)(J)(3)	✓ ME. REV. STAT. tit. 19-A, § 1933(1)
NV (2013)	✓ NEV. REV. STAT. ANN. § 126.750(2)	Ø	Ø NEV. REV. STAT. ANN. § 126.750(5)(a) & (b)	Ø NEV. REV. STAT. ANN. § 126.750(5)(a) & (b)	After consultation with IPs. NEV. REV. STAT. ANN. § 126.750(4)(c)	✓ NEV. REV. STAT. ANN. § 126.720(1)(a)
NH (2015)	✓ N.H. REV. STAT. ANN. § 168-B:11(III)	Ø	Unclear. *Cf.* N.H. REV. STAT. ANN. § 168-B:11(e)[468]	Ø *Cf.* N.H. REV. STAT. ANN. § 168-B:11(IV)(1)[469]	Ø	✓ N.H. REV. STAT. ANN. §168-B:11(IV)(c)
NJ (2018)	✓ N.J. STAT. ANN. § 9:17-64(a)(6) (PAS) & (b)(2) (IPs) & § 9:17-65(a)(3)	Ø N.J. STAT. ANN. § 9:17-64(a)(5)	Ø	Ø	After written notice to IPs. N.J. STAT. ANN. § 9:17-65(b)(1)(c)	✓ N.J. REV. STAT. ANN. § 9:17-63(a)(1)
ND (1989, 2005)	Ø	Ø	Ø	Ø	Ø	Unclear

[464] Florida has provisions that appear to be in tension with one another. FLA. STAT. ANN. § 742.15(3)(b) provides that the PAS must agree "to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health." But another provision, FLA. STAT. ANN. § 742.15(3)(a), provides that "[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."

[465] *See supra* note 464.

[466] Louisiana has provisions that appear to be in tension with one another. LA. REV. STAT. ANN. § 9:2720.2(A)(2) provides that the PAS must agree "to reasonable medical evaluation and treatment during the term of the pregnancy, to adhere to reasonable medical instructions about prenatal health, and to execute medical records releases…" *But see* LA. REV. STAT. ANN. § 9:2720.2(B)(1) provides that the IPs must "acknowledge that the gestational carrier has sole authority with respect to medical decision-making during the term of the pregnancy consistent with the rights of a pregnant woman carrying her own biological child."

[467] *See supra* note 466.

[468] Although not expressly addressed, New Hampshire law allows claims for breaches of the contrary that "cause[ ] harm to the child." N.H. REV. STAT. ANN. § 168-B:11(e). Such breaches may relate to the behavior of the person acting as a surrogacy during her pregnancy.

[469] Providing that agreement must include "how decisions regarding termination of the pregnancy shall be made." N.H. REV. STAT. ANN. § 168-B:11(f).

OK (2019)	✓ OKLA. STAT. tit. 10 557.6(B).	Ø	Ø OKLA. STAT. tit. 10 § 557.6(D)(2)[470]	Ø OKLA. STAT. tit. 10 § 557.6(D)(1)[471]	Ø	✓ (if validated). OKLA. STAT. tit. 10 557.11(A)
TX (2003)	Ø	Ø	Ø	✓ TEX. FAM. CODE § 160.754(g)[472]	Ø	✓ (if validated). TEX. FAM. CODE § 160.756(c)
UT (2008)	Ø	Ø	Ø	✓ UTAH CODE ANN. 78B-15-§ 808(2)[473]	Ø	✓ (if validated). UTAH CODE ANN § 78B-15-803(1)
VT (2018)	✓ VT. STAT. ANN. tit. 15C, § 802(b)(7)	✓ VT. STAT. ANN. tit. 15C, § 801(a)(3)	✓ VT. STAT. ANN. tit. 15C, § 802(e)	✓ VT. STAT. ANN. tit. 15C, § 802(e)	✓ VT. STAT. ANN. tit. 15C, § 802(b)(12)	✓ VT. STAT. ANN. tit. 15C, § 803(a)(1)
VA (1991)	Ø	Ø	Ø	✓ VA. CODE ANN. § 20-163(A)[474]	Unclear. VA. CODE ANN. § 20-163(A)[475]	✓ (if validated). VA. CODE. ANN. § 20-158(D)
WA (2018)	✓ WASH. REV. CODE ANN. § 26.26A.710(7)[476]	✓ WASH. REV. CODE ANN. § 26.26A.710(8)	✓ WASH. REV. CODE ANN. § 26.26A.715(1)(a)	✓ WASH. REV. CODE ANN. § 26.26A.715(1)(a)	✓ WASH. REV. CODE ANN. § 26.26A.715(1)(a)	✓ WASH. REV. CODE ANN. § 26.26A.705(1) (gestational); § 26.26A.770(1) (genetic)
D.C. (2017)	✓ D.C. Code Ann. § 16-406(b).	Ø D.C. Code Ann. § 16-406(b)	✓ D.C. Code Ann. § 16-406(4)(C); § 16-406(c)	✓ D.C. Code Ann. § 16-406(4)(C); § 16-406(c)	✓ D.C. Code Ann. § 16-406(4)(C); § 16-406(c)	✓ D.C. Code § 16-407(a)(1) (gestational); D.C. Code § 16-407(b)(1) (genetic)

[470] Permitting inclusion of provisions requiring the PAS "abstain from any activities that the intended parents or the physician providing care to the gestational carrier during the pregnancy reasonably believed to be harmful" to the pregnancy or the health of the future child, and providing that such clauses are "enforceable." OKLA. STAT. tit. 10 § 557.6(D)(2).

[471] Permitting inclusion of provisions requiring the PAS to "undergo all medical examinations, treatments and fetal monitoring procedures recommended for the success of the pregnancy by the physician providing care to the gestational carrier during the pregnancy" and providing that such clauses are "enforceable." OKLA. STAT. tit. 10 § 557.6(D)(1).

[472] This protection is, however, somewhat limited. The "agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo." TEX. FAM. CODE § 160.754(g).

[473] This protection is, however, somewhat limited. The agreement "may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryo or fetus." UTAH CODE ANN. § 78B-15-808(2).

[474] VA. CODE ANN. § 20-163(A) (providing that the person acting as a surrogate "shall be solely responsible for the clinical management of the pregnancy.").

[475] *Id.*

[476] Requiring representation "throughout the surrogacy arrangement." WASH. REV. CODE ANN. § 26.26A.710(7).