

# ADVANCING A SURROGATE-FOCUSED MODEL OF GESTATIONAL SURROGACY CONTRACTS

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## INTRODUCTION

When Helen Beasley, a 26-year-old single mother from Britain, agreed to serve as a surrogate for Charles Wheeler and Martha Berman, she considered it an opportunity to provide the American couple with a “happy ending.”<sup>1</sup> Beasley did not anticipate that several months into the pregnancy she would find herself engaged in a legal battle over the terms of the surrogacy contract.<sup>2</sup> What prompted the lawsuit was Beasley’s discovery that she was carrying twins.<sup>3</sup> This discovery led Wheeler and Berman, both lawyers in California, to terminate the contract, having paid Beasley only \$1,000 of the \$20,000 they had originally promised her.<sup>4</sup> The couple relied on the terms of the surrogacy contract, which called for Beasley to abort additional fetuses in the event of a multiple pregnancy.<sup>5</sup> When she refused to proceed with the selective reduction, Beasley filed a lawsuit against the couple, claiming that they had abandoned the children.<sup>6</sup> In response, Wheeler and Berman demanded \$80,000 in expenses, alleging that Beasley broke the terms of the surrogacy contract.<sup>7</sup> This case sparked considerable debate among bioethicists and legal scholars and shed light on the myriad legal and ethical issues concerning

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<sup>1</sup> Chris Taylor, *One Baby Too Many*, TIME, Aug. 19, 2011, <http://www.time.com/time/magazine/article/0,9171,171789,00.html>.

<sup>2</sup> The parties executed a contract which included many clauses meant to cover all possible occurrences and paid Beasley \$20,000 to carry the couple’s child. *See id.*

<sup>3</sup> Beasley traveled to California to undergo in vitro fertilization using embryos produced from Wheeler’s sperm and a donor’s eggs. Two months into the pregnancy, Beasley learned she was carrying twins. *See id.*

<sup>4</sup> *See id.* The disagreement about when and if to abort one baby caused the couple to terminate the contract. *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> *Surrogate Sues Parents Over Unborn Twins*, CNN (Aug. 11, 2001), [http://articles.cnn.com/2001-08-11/us/surrogate.twins\\_1\\_surrogacy-agreement-surrogate-mother-surrogacy-contract?\\_s=PM:US](http://articles.cnn.com/2001-08-11/us/surrogate.twins_1_surrogacy-agreement-surrogate-mother-surrogacy-contract?_s=PM:US).

<sup>7</sup> Beasley’s lawsuit asked for damages for emotional distress and breach of contract. A second suit, filed in family court, sought to revoke Wheeler’s and Berman’s parental rights. Because California law grants parental rights to the intended parents in a surrogacy agreement, Beasley was unable to seek adoptive parents for the babies. *See id.* In the end, the court ordered the couple to pay Beasley \$6500. and to continue making payments to her in the future. *See ROSEMARIE SKAINE, PATERNITY AND AMERICAN LAW 112 (2003).*

commercial surrogacy agreements. Although the majority of these agreements are carried out without conflict, the Beasley case illustrates the unique vulnerability of surrogates in the context of these arrangements.<sup>8</sup>

The social, ethical, and legal concerns surrounding commercial surrogacy have centered around the potential exploitation of gestational surrogates. These concerns are premised on the relative vulnerability of women in the context of surrogacy agreements and the inequitable bargaining power between contracting parties.<sup>9</sup> The risk of coercion and abuse inherent in these arrangements has resulted in paternalistic rulings and regulations restricting the practice of commercial surrogacy throughout the United States.<sup>10</sup> This protectionism reflects society's longstanding fear of the potential commercialization of reproduction and exploitation of women.<sup>11</sup> However, commentators have suggested that protectionist regulations impermissibly restrict women's autonomy and freedom to contract under the guise of shielding surrogates from abuse.<sup>12</sup>

The growing prevalence of surrogacy has the potential to generate significant externalities, both positive and negative. Proponents of surrogacy maintain that the practice increases procreative options while granting women the opportunity to contract for valuable services.<sup>13</sup> Through this lens, surrogacy serves as a tolerable solution to the problem of infertility.<sup>14</sup> In contrast, opponents contend that these arrangements contravene public policy by dehumanizing women and demeaning society as a whole.<sup>15</sup> In this vein, surrogacy directly contributes to the erosion of female reproductive autonomy and the "declining value of motherhood."<sup>16</sup> Due in part to this ethical divide, surrogacy continues to occupy an uncertain legal and moral status in the United States and abroad.<sup>17</sup> As more couples are choosing to

<sup>8</sup> The couple maintained that Beasley "was not forced to enter into a contract, she was not forced to undergo the pregnancy, [and] she was not forced to have an abortion or a reduction." Bryan Robinson, *Fetuses and Surrogacy Lose in Legal Battle*, ABC NEWS (Aug. 14, 2001), <http://abcnews.go.com/US/story?id=92627&page=1>. However, the conflict that ensued raises the question of whether Beasley received the proper counseling and guidance prior to entering the surrogacy agreement.

<sup>9</sup> See *infra* Part III.C.

<sup>10</sup> See *infra* note 134 and accompanying text.

<sup>11</sup> See Jessica H. Munyon, *Protectionism and Freedom of Contract: The Erosion of Female Autonomy in Surrogacy Decisions*, 36 SUFFOLK U. L. REV. 717, 727-729 (2003).

<sup>12</sup> See *infra* Part II.C.3.

<sup>13</sup> See Peter H. Schuck, *Some Reflections on the Baby M. Case*, 76 GEO. L.J. 1793, 1793 (1988) (contending that societal acceptance of surrogacy "will generate very large, widely distributed private and social benefits").

<sup>14</sup> See Patricia Bayer Richard, *Rights, Relationships, Class, and Gender: Issues in the Politics of Surrogate Contracts*, in POLITICS AND THE LIFE SCIENCES 211, 212 (1990).

<sup>15</sup> See *infra* Part III.C.2.

<sup>16</sup> See Richard, *supra* note 14, at 212. Many commentators have noted that surrogacy, by its very nature, challenges fundamental human relationships and long-standing institutions such as the traditional family. *See id.*

<sup>17</sup> See Kelly A. Anderson, *Certainty in an Uncertain World: The Ethics of Drafting Surrogacy Contracts*, 21 GEO. J. LEGAL ETHICS 615, 619 (2008) ("Unlike the courts' approach to Artificial

outsource surrogacy to developing countries such as India, the potential for exploitation and abuse may reach a much greater level.<sup>18</sup>

Part I of this Article explores the background of surrogacy and examines the current legal landscape. Part II unpacks the ethical considerations and common criticisms of this practice, identifying prominent feminist themes concerning the moral permissibility of surrogacy. Part III assesses the roles of the parties involved in these arrangements and identifies standard provisions contained within surrogacy contracts as well as the principles governing these unique agreements. This Part proposes conceptualizing surrogacy agreements as contracts for personal services and empowering surrogates to dictate the contractual terms. This surrogate-centered approach addresses feminist concerns regarding female subjugation and reproductive autonomy by allowing women to retain control over the use of their bodies without abrogating their contractual freedom. This discussion is intended to invite a broader dialogue within feminist jurisprudence and the legal community and to advance the notion that the law should facilitate, rather than inhibit, procreative advancements.<sup>19</sup>

### I. BACKGROUND OF SURROGACY

Surrogacy's deep historical roots distinguish it from other forms of artificial reproductive technology (ART).<sup>20</sup> Despite its longstanding presence as an alternative to conventional child-bearing, surrogacy remains one of the most controversial practices in the field of assisted reproduction. As women continue to postpone motherhood, many face difficulties conceiving children or fear the elevated risks that accompany the advancing age of the mother.<sup>21</sup> The rise in infertility, in conjunction with advances in reproductive medicine, has increased the demand for surrogates.<sup>22</sup> According to industry experts, 1,395 surrogate births occurred in the United States in 2008.<sup>23</sup> However, this figure is under-inclusive and fails to capture the continuing expansion of the surrogacy market.<sup>24</sup>

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Reproduction Technologies (ART) within marriage, which has resulted in a more or less uniform regime across states, the response to surrogacy has ranged from a total ban to regulated acceptance.”).

<sup>18</sup> See Usha Rengachary Smardon, Symposium: *The Baby Market: Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 15 (2008) (recommending the abolition of international surrogacy arrangements between U.S. couples and Indian surrogates to protect the rights of all parties involved in these arrangements).

<sup>19</sup> See Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 303 (“By embracing the emerging opportunities provided by advancing technology, the law would enhance individual freedom, fulfillment and responsibility.”).

<sup>20</sup> See Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK, Mar. 29, 2008, <http://www.newsweek.com/2008/03/29/the-curious-lives-of-surrogates.html> (discussing accounts of surrogacy dating back to 1800 B.C. and appearing several times in biblical passages).

<sup>21</sup> See Theresa M. Mady, *Surrogate Mothers: The Legal Issues*, 7 AM. J.L. & MED. 323, 324 (1981).

<sup>22</sup> See Ali, *supra* note 20.

<sup>23</sup> See MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 11 (2010), available at <http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf> (reporting that one percent of all IVF cycles within the U.S. involved the use of a

In traditional surrogacy arrangements, conception occurs by means of artificial insemination, using the surrogate's egg and the sperm of another man, typically the intended father.<sup>25</sup> In these arrangements, the intended father or third-party sperm donor and surrogate mother are the genetic parents of the child.<sup>26</sup> By contrast, gestational surrogacy is a practice whereby the intended parents are genetically related to the child, and the surrogate's role is purely gestational.<sup>27</sup> In this contractual situation, the surrogate consents to have an in vitro fertilized embryo implanted into her uterus and subsequently carries the fetus to term.<sup>28</sup> The commissioning couple in these arrangements retains a greater degree of control than the surrogate, both genetically and legally.<sup>29</sup> This dynamic has contributed to the growing popularity of gestational surrogacy in recent years, in spite of its ambiguous legal status.<sup>30</sup>

#### *A. Judicial and Legislative Recognition of Surrogacy Contracts in the United States*

The patchwork of legislation pertaining to surrogacy in the United States reflects the myriad ethical and practical concerns associated with this reproductive practice.<sup>31</sup> Some states have declared surrogacy contracts invalid by means of statute or case law.<sup>32</sup> Other jurisdictions have declined to enact legislation

gestational surrogate). ART clinics throughout the country annually report IVF cycle success rates to the Centers for Disease Control and Prevention (CDC) and the Society for Assisted Reproductive Technology (SART). *See id.* at 7. Clinics are required to report whether they provide gestational surrogacy services and indicate the percentage of IVF cycles performed on surrogates. SART reported a dramatic increase in the number of infants born to gestational surrogates, which nearly doubled from 2004 to 2008. Other figures suggest a more substantial rise in the number of infants born to gestational surrogates, reporting an 89% increase from 2004 to 2008. *See id.* at 3-4.

<sup>24</sup> *See id.* at 4. The statistics in the CDC and SART reports reflect only gestational surrogacy IVF cycles and do not factor in private surrogacy arrangements. These figures, therefore, fail to encompass the actual rates of surrogacy throughout the country.

<sup>25</sup> *See Lisa C. Ikemoto, Johnson v. Calvert: Technology, Family, and Commerce, in HEALTH LAW & BIOETHICS* 82 (Sandra H. Johnson et al. eds., 2009).

<sup>26</sup> *See Fiona MacCallum et al., Surrogacy: The Experience of Commissioning Couples*, 18 HUM. REPROD. 1334, 1334 (2003).

<sup>27</sup> In cases where a donor egg is used, the genetic mother, the gestational mother, and the intended mother are three separate women. *See Ikemoto, supra* note 25, at 84.

<sup>28</sup> *See GUGUCHEVA, supra* note 23, at 6.

<sup>29</sup> *See Ikemoto, supra* note 25, at 84 (noting that the intended parents can select both sperm and ova while eliminating the genetic link between the surrogate and the child).

<sup>30</sup> *See Anderson, supra* note 17, at 619.

<sup>31</sup> *See Judith Warner, Outsourced Wombs*, N.Y. TIMES (Jan. 3, 2008), <http://opinionator.blogs.nytimes.com/2008/01/03/outsourced-wombs>. *See also Ali, supra* note 20 (noting the enduring trend of international couples seeking surrogacy services in America, despite the recent upsurge in outsourcing to India for cheaper surrogacy options).

<sup>32</sup> *See, e.g., In re Baby M*, 537 A.2d 1227 (N.J. 1988); MICH. COMP. LAWS § 722.859(1) (2010) (“A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation”); N.Y. DOM. REL. LAW § 122 (McKinney 2010) (declaring surrogacy parenting contracts “contrary to the public policy of this state, and . . . void and unenforceable”).

regarding the legality and validity of these contracts.<sup>33</sup> In states that have adopted legislation applicable to surrogacy, legislative mandates vary from complete prohibition or criminalization of the practice to acceptance.<sup>34</sup>

At the judicial level, courts invalidating surrogacy agreements often rely on the principles underlying adoption, parentage, and “baby-selling” statutes.<sup>35</sup> Some courts have also applied contract doctrines such as unconscionability and lack of informed consent to nullify surrogacy contracts.<sup>36</sup> However, the central concern underlying these determinations is the potential for commodification and exploitation of women and children.<sup>37</sup> The lack of legal consensus has led to uncertainty and inconsistency with enforcing surrogacy contracts and considerable ambiguity regarding the parties’ rights.<sup>38</sup> Consequently, many commentators have advocated for legislative action to define and delineate the rights and liabilities of the parties involved.<sup>39</sup> However, statutory recognition of surrogacy contracts remains unpopular among lawmakers.<sup>40</sup>

### B. Surrogacy Abroad

International surrogacy arrangements have flourished in recent decades.<sup>41</sup> Each year, the United States attracts thousands of international couples in search of solutions to infertility.<sup>42</sup> These couples travel from countries with laws that are unreceptive to commercial surrogacy, such as Sweden, Spain, France, and

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<sup>33</sup> Many of these states have enacted legislation indirectly affecting the surrogacy industry, such as statutes relating to gay marriage, adoption, and gamete donation. See GUGUCHEVA, *supra* note 23, at 13.

<sup>34</sup> See, e.g., N.Y. DOM. REL. LAW § 123 (McKinney 2010) (imposing civil penalties and felony convictions for entering surrogacy agreements); N.D. CENT. CODE § 14-18-05 (2010) (declaring surrogacy agreements void and unenforceable); ARIZ. REV. STAT. ANN. § 25-218 (2010); VA. CODE ANN. § 120-156 – 120-165 (2010) (establishing standards to govern enforceable surrogacy contracts).

<sup>35</sup> E.g., *Surrogate Parenting Ass’n, Inc. v. Commonwealth*, 704 S.W.2d 209 (Ky. 1986) (applying state adoption statute to surrogacy arrangement); *Doe v. Kelley*, 307 N.W.2d 438, 441 (Mich. 1981) (holding that payments to surrogates violate state baby selling statute).

<sup>36</sup> See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (applying contract law principles to determine intent).

<sup>37</sup> See Munyon, *supra* note 11, at 725 (discussing the feminist concerns surrounding surrogacy and its potential to turn women’s wombs into commodities).

<sup>38</sup> See Mady, *supra* note 21, at 325; see also *infra* Part II.A.

<sup>39</sup> See, e.g., Abby Brandel, *Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 MD. L. REV. 488, 498 (1995) (arguing that the legislature is “the proper forum to resolve the complex issues of public policy involved in surrogacy”); Mady, *supra* note 21, at 345–51. In addition, professional organizations have promulgated model acts governing ART, which address gestational surrogacy. See, e.g., MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (2008), available at <http://www.abanet.org/family/committees/artmodelact.pdf> (text of the Model Act); <http://claradoc.gpa.free.fr/doc/129.pdf> (discussion of the Model Act).

<sup>40</sup> Ikemoto, *supra* note 25, at 84 (surveying bills to regulate surrogacy, which have been proposed and defeated in recent years).

<sup>41</sup> See generally Ellen Goodman, *Op-Ed, The Globalization of Baby-Making*, N.Y. TIMES (Apr. 11, 2008), <http://www.nytimes.com/2008/04/11/opinion/11iht-edgoodman.t.html> (describing the phenomenon of reproductive tourism as a product of our increasingly globalized world).

<sup>42</sup> See Warner, *supra* note 31.

Germany.<sup>43</sup> Even nations that permit the practice have laws that strictly regulate surrogacy.<sup>44</sup> The most striking example of reproductive tourism that has emerged in recent years is India, where surrogacy has become a \$445 million a year industry.<sup>45</sup> Modern medical technology, low-cost services,<sup>46</sup> and a permissive regulatory climate have contributed to the country's rise in popularity as a top destination for couples seeking surrogates.<sup>47</sup> However, the practice of surrogacy in India is fraught with legal and ethical uncertainties.<sup>48</sup> Several factors intersect to compound the potential for exploitation and systemic abuses and to exacerbate global inequalities.<sup>49</sup>

Despite the growing prominence of the Indian surrogacy industry in recent years, the market in India remains largely unregulated.<sup>50</sup> The Indian Council of Medical Research (ICMR) has formulated guidelines for clinics practicing ART.<sup>51</sup> However, the ICMR Guidelines are non-binding, and anecdotal evidence suggests that clinics do not adhere to these directives, potentially compromising the safety of surrogates.<sup>52</sup> In addition, the government has adopted a hands-off approach, which many claim will give rise to a black market of fertility services.<sup>53</sup> Given the lack of

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<sup>43</sup> Voters in these countries have rejected efforts to allow surrogate motherhood. See Anuj Chopra, *Childless Couples Look to India for Surrogate Mothers*, CHRISTIAN SCI. MONITOR (Apr. 3, 2006), <http://www.csmonitor.com/2006/0403/p01s04-wosc.html>.

<sup>44</sup> In nations including South Africa, the UK, and Argentina, independent ethics committees are often responsible for evaluating surrogacy arrangements on a case-by-case basis. See *Surrogacy Contracts*, SURROGATE MOTHERHOOD IN INDIA, [http://www.stanford.edu/group/womenscourage/Surrogacy/surrogacy\\_contracts.html#\\_ftn4](http://www.stanford.edu/group/womenscourage/Surrogacy/surrogacy_contracts.html#_ftn4) (last visited Feb. 18, 2011).

<sup>45</sup> See *Commercial Surrogacy and Fertility Tourism In India*, THE KENAN INSTITUTE FOR ETHICS AT DUKE UNIVERSITY, <http://www.duke.edu/wcb/kenanethics/CaseStudies/BabyManji.pdf>.

<sup>46</sup> The costs involved in procuring surrogacy services in India are notably lower than surrogacy costs in the U.S., with total prices often ranging from \$10,000 to \$35,000, an amount roughly one third of American standards. See Smerdon, *supra* note 18, at 32.

<sup>47</sup> See *id.* at 22.

<sup>48</sup> See *Understanding and Evaluating the Effects of Gestational Surrogacy on Women's Health and Rights*, SURROGATE MOTHERHOOD IN INDIA, <http://www.stanford.edu/group/womenscourage/Surrogacy/index.html> (last visited Feb. 18, 2011) (exploring commercial surrogacy in India through the lens of economic development, psychological effects, women's rights, and ongoing moral and ethical concerns).

<sup>49</sup> See Smerdon, *supra* note 18, at 51 ("[S]urrogacy in the international context involves overlapping issues of neocolonialism, classicism, and racism but to a more extreme degree.").

<sup>50</sup> Commercial surrogacy has been legal in India since 2002. See Amelia Gentleman, *Couples Turn to India for Surrogate Mothers*, N.Y. TIMES (Mar. 4, 2008), <http://www.nytimes.com/2008/03/04/world/asia/04iht-mother.1.10690283.html>.

<sup>51</sup> See Indian Council of Med. Research, Nat'l Council of Med. Sciences, Nat'l Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India § 3.2.7 (2005), available at [http://www.icmr.nic.in/art/art\\_clinics.htm](http://www.icmr.nic.in/art/art_clinics.htm).

<sup>52</sup> See Smerdon, *supra* note 18, at 45 (indicating that many clinics "regulate themselves based on their own principles of ethics"); see also The SEED(S) Have Been Planted!, <http://ourjourneytosurrogacyinindia.blogspot.com/searchupdated-max=2008-08-28T17%3A55%3A00-07%3A00&max-results=25> (April 17, 2008, 7:15 EST) (describing a commissioning couple watching as an Indian doctor transferred five embryos into a surrogate to increase the probability of success).

<sup>53</sup> See Iris Leibowitz-Dori, Note, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 343 (1997).

regulatory oversight, surrogates in India have minimal legal recourse if disputes arise.<sup>54</sup> For these reasons, Indian surrogates bear significantly greater risk than surrogates in more regulated countries.<sup>55</sup>

Some commentators have suggested that surrogacy expands economic opportunity and thereby enhances Indian women's autonomy, agency, and self-determination.<sup>56</sup> However, many opponents question the morality of these arrangements in which poor women from rural, largely uneducated Indian villages "rent their wombs"<sup>57</sup> to western couples who agree to pay a fraction of the price they would in more regulated countries. This outsourcing of reproductive technology, they argue, will inevitably give rise to "baby farms" in poverty stricken areas.<sup>58</sup> Women in India who choose to become surrogates often do so under extreme economic and social pressures.<sup>59</sup> The limited educational and economic opportunities available for these women call into question the notion of free choice in such arrangements.<sup>60</sup> The dire economic conditions, as well as the social and ethical issues involved, have led to claims that surrogacy embodies the abusive reproductive practices that were historically carried out against impoverished women in countries such as India.<sup>61</sup> In a free market with minimal regulatory

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<sup>54</sup> No legal mechanism exists to protect the surrogates, who are required to sign away their rights to the children. See Smerdon, *supra* note 18, at 41-42 (discussing the observers and government officials who have expressed the need for surrogacy legislation to address the issue of exploitation of surrogates).

<sup>55</sup> See *Surrogacy Contracts*, SURROGATE MOTHERHOOD IN INDIA, [http://www.stanford.edu/group/womenscourage/Surrogacy/surrogacy\\_contracts.html#\\_ftn4](http://www.stanford.edu/group/womenscourage/Surrogacy/surrogacy_contracts.html#_ftn4) (last visited Feb. 18, 2011).

<sup>56</sup> See *Moral and Ethical Implications*, SURROGATE MOTHERHOOD IN INDIA, <http://www.stanford.edu/group/womenscourage/Surrogacy/moralethical.html> (last visited Feb. 18, 2011) ("Supporters of surrogacy . . . highlight the overwhelming economic opportunities for these women in light of their educational background and social circumstances.").

<sup>57</sup> See GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMB 215 (1985). See also Trevor Allis, *The Moral Implications of Motherhood by Hire*, 5 INDIAN J. MED. ETHICS (1997), available at <http://www.issuesinmedicalethics.org/051mi021.html> ("What we may see in the future is a class of breeder women, probably poor women, who rent their wombs to wealthy people.").

<sup>58</sup> Warner, *supra* note 31 ("Images of pregnant women lying in rows, or sitting lined up, belly after belly, for medical exams look like industrial outsourcing pushed to a nightmarish extreme.").

<sup>59</sup> Deepali Gaur Singh blogs about women's rights in India, and provides the following discussion of the ethical complexities surrounding the "choice" of Indian women who are confronted with the option of becoming surrogates:

The women renting their womb[s] are in it for their own set of reasons. One woman became a surrogate to pay for her daughters' dowries. How do you accept and legitimize something like that when dowry is illegal, yet still one of the core widely-used and socially-sanctioned tools of exploitation of women and their families? At the other end of the spectrum is the desperation of another woman to cover the medical expenses of an ailing child. Many of these women have spent endless years in low-paying, back-breaking, physically and economically exploitative and hazardous work conditions. Not surprising then that...for them pregnancy seemed a less exploitative option.

Deepali Gaur Singh, *Rent-A-Womb: Surrogacy in India on the Rise*, RH REALITY CHECK (Jan. 25, 2008, 9:53AM), <http://www.rhrealitycheck.org/blog/2008/01/25/rent-a-womb-surrogacy-in-india-on-the-rise>.

<sup>60</sup> These women face the prospect of obtaining substantial salaries that equate to \$150,000 to \$200,000 to serve as surrogates for wealthier couples. See Smerdon, *supra* note 18, at 54.

<sup>61</sup> See *id.* at 53 ("Historically, corporations, states, and international aid agencies have perpetuated

oversight, the parties that stand to lose the most are the surrogates who possess the least bargaining power.

## II. ETHICAL CONSIDERATIONS AND THE FEMINIST PERSPECTIVE

The rise in surrogacy has prompted considerable commentary on the ethical implications and societal consequences of this practice. Opponents of surrogacy contend that it undermines public policy and exerts pernicious effects on society by exploiting poor women and children, often drawing parallels to baby selling.<sup>62</sup> Prohibitions on surrogacy reflect the compelling interest in protecting these vulnerable populations, even when such prohibitions may abridge a woman's reproductive freedom and a couple's right to procreate.<sup>63</sup> Feminists remain deeply divided over whether surrogacy enhances or subverts women's reproductive freedom.<sup>64</sup> This tension reflects the moral and ethical complexity of the surrogacy debate. This Part unpacks feminist criticisms and explores the moral reservations that impede the practice of surrogacy.

### *A. Baby-selling and Commodification*

The commodification of women and children has emerged as a central focus of the contemporary surrogacy debate. Statutes in many states prohibit the purchase and sale of children and often preclude the formation and enforceability of commercial surrogacy contracts.<sup>65</sup> Although payment in these arrangements compensates the surrogate solely for rendering services, there is a claim that reimbursement for services is merely a pretense, given that payment is typically contingent upon surrendering custody of the infant.<sup>66</sup> This practice thereby creates the appearance of baby-selling and arguably establishes a market for children.<sup>67</sup>

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abusive reproductive practices such as sterilization, conditioning aid on population control programs, and unregulated testing of birth control devices."); see also Jyotsna Agnihotri Gupta, *Women's Bodies: The Site for the Ongoing Conquest by Reproductive Technologies*, 4 ISSUES IN REPROD. & GENETIC ENG'G 93 (1991) (describing the history of reproductive abuses that were carried out against women in India).

<sup>62</sup> See, e.g., Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139 (1990).

<sup>63</sup> Keith J. Cunningham, *Surrogate Mother Contracts: Analysis of a Remedial Quagmire*, 37 EMORY L.J. 721, 738-40 (1988).

<sup>64</sup> See Munyon, *supra* note 11, at 723-728 (examining conflicting feminist perspectives on gestational surrogacy).

<sup>65</sup> See, e.g., KY. REV. STAT. ANN. § 199.590(2) (West 2010) ("A person, agency, institution, or intermediary shall not sell or purchase or procure for sale or purchase any child . . ."). These laws are remnants from the 19th century practice of selling children into slavery and were intended to prevent parents from selling their children due to economic pressures. See Cunningham, *supra* note 63, at 724-28. However, Brandel posits that the economic pressures which caused parents to sell their children are absent from surrogacy arrangements, given that surrogates intend to become pregnant specifically for the purpose of transferring a child. See Brandel, *supra* note 39, at 502.

<sup>66</sup> See Alexander Capron & Margaret Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 L. MED. & HEALTH CARE 34, 37 (1988).

<sup>67</sup> See *id.* at 36 (positing that the inevitable result of validating such a practice is a society in which

Some courts, however, have identified fundamental differences between surrogacy procedures and the buying and selling of children.<sup>68</sup> These courts note that the societal concerns that prompted baby-selling statutes are absent in surrogacy, a practice that is intended to promote, rather than harm, the family unit.<sup>69</sup>

Opponents of surrogacy also condemn it for relegating women to the status of commodities.<sup>70</sup> These commentators perceive the practice as a form of reproductive slavery.<sup>71</sup> Such arguments underlie the societal aversion to commercial surrogacy, which is perceived as ethically distinct from its altruistic form.<sup>72</sup> A similar phenomenon exists in the context of organ donation, which is permitted only as an altruistic gesture in the United States.<sup>73</sup> Public antipathy to commercial arrangements of this nature reflects the view that commercializing reproduction contravenes important social values.<sup>74</sup> By contrast, arrangements that are motivated by altruism are considered less objectionable because they avoid placing women's reproductive capacities into the economic marketplace.<sup>75</sup> For these reasons, opponents and state legislatures continue to denounce commercial surrogacy and endorse the proposition that society is weakened by these arrangements.<sup>76</sup>

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all personal attributes are assigned a monetary value).

<sup>68</sup> See *Surrogate Parenting Assocs., Inc. v. Commonwealth*, 704 S.W.2d 209, 211-215 (Ky. 1986) (noting "the central fact in the surrogate parenting procedure is that the agreement to bear the child is entered into before conception," distinguishing the arrangement from a situation in which a baby broker "overwhelm[s] the parents of a child with financial inducements to part with [an existing] child").

<sup>69</sup> See *In re Baby Girl L.J.*, 132 Misc. 2d 972, 977 (N.Y. Sur. Ct. 1986).

<sup>70</sup> See, e.g., James Bopp, Jr., *Surrogate Motherhood Agreements: The Risks to Innocent Human Life*, in BEYOND BABY M. 201, 202-03 (Diane M. Bartels et al. eds., 1990); Carolyn McLeod, *For Dignity or Money: Feminists on the Commodification of Women's Reproductive Labour* in THE OXFORD HANDBOOK OF BIOETHICS 258, 259 (Bonnie Steinbock ed., 2007); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1932 (1987).

<sup>71</sup> See Allen, *supra* note 62.

<sup>72</sup> In many altruistic surrogacy arrangements, the surrogate is a relative or friend of the commissioning couple. See MacCallum, *supra* note 26, at 1334. The majority of surrogacy arrangements, however, involve parties who are strangers. *See id.* at 1337 (finding that 69% of couples surveyed had not known the surrogate mother prior to entering the arrangement). However, for the couples that secure a surrogate through an agency, the parties meet an average of six times before attempting to conceive. *See id.*

<sup>73</sup> See generally MICHELLE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 57-83 (2006) (discussing the nuances and legal limits of altruism in the context of organ donation).

<sup>74</sup> See Capron & Radin, *supra* note 66, at 36. Societal norms surrounding altruism may serve to reinforce gender roles and stereotypes. Feminist commentators have contended that social ideology that is motivated purely by altruistic rather than economic motivations "bind women to patriarchal roles and expectations." JANICE G. RAYMOND, WOMEN AS WOMBES: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 52 (1993).

<sup>75</sup> See *id.*

<sup>76</sup> This moral view suggests that payment destabilizes traditional notions of childbearing and "compromise[s] the validity of [a surrogate's] consent." Stephen Wilkinson, *The Exploitation Argument Against Commercial Surrogacy*, 17 BIOETHICS 169, 181 (2003). For this reason, some states permit only altruistic surrogacy arrangements in which the surrogate mother is not motivated by economic considerations. *See, e.g.*, N.H. REV. STAT. ANN. § 168-B:16 (2010).

In critiquing the commodification arguments, Marjorie Shultz explains that “[t]he critical issue is not whether something involves monetary exchange as one of its aspects, but whether it is treated as reducible solely to its monetary features.”<sup>77</sup> Indeed, it may be overly “simplistic to think of our social policy choice as binary; —either complete commodification or complete noncommodification.”<sup>78</sup> This view reflects the continuum that has emerged in current discourse, which situates market transactions at one end and altruistic arrangements at the other.<sup>79</sup> However, this view potentially “evinces a hypocritical and damaging oversimplification and dichotomization: Men, work, public life and money are bad—but powerful. Women, home, private life, altruism and sentiment are good—and powerless.”<sup>80</sup> In this way, the altruism-commodification dichotomy overlooks the complexities of surrogacy arrangements and fails to capture the nuance that is necessary to advance dialogue in this area.

### B. Informed Consent

One common criticism of surrogacy arrangements revolves around the notion that prospective surrogates are unable to freely consent to assume the physical and psychological risks associated with pregnancy.<sup>81</sup> The complex psychological relationship established between the surrogate and fetus during gestation arguably vitiates the voluntary nature of the surrogate’s consent.<sup>82</sup> Proponents of this view advance the idea that a surrogate cannot foresee her future emotional response.<sup>83</sup> This assertion provides sufficient justification for invalidating surrogacy contracts.<sup>84</sup> Despite the lack of empirical evidence supporting the bonding

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<sup>77</sup> Shultz, *supra* note 19, at 336.

<sup>78</sup> MARGARET RADIN, CONTESTED COMMODITIES 103 (1996).

<sup>79</sup> Some have argued that this dichotomized view which situates the private, family sphere against a public, market-based sphere denigrates surrogates. See Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1548 (1983) (contending that market-family dichotomies are discriminatory, given that “the market was constructed primarily by men, and the roles available in the market as well as the rewards associated with those roles were created in a sexist and discriminatory environment”).

<sup>80</sup> Shultz, *supra* note 19, at 337.

<sup>81</sup> See Stephen G. York, *A Contractual Analysis of Surrogate Motherhood and a Proposed Solution*, 24 LOY. L.A. L. REV. 395, 419 (1990) (“The law should presume that surrogate mothers are not adequately rational when they enter into the surrogacy contracts.”).

<sup>82</sup> See Warner, *supra* note 31 (explaining that even without the expectation of motherhood, physical and psychological elements contribute to the maternal bond between a birth mother and child).

<sup>83</sup> See *id.*

<sup>84</sup> A more extreme version of this argument provides that hormonal changes during pregnancy render informed consent impossible because the surrogate cannot anticipate her emotions upon relinquishing the child. See Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in SURROGATE MOTHERHOOD 172 (Larry Gostin ed., 1990). See also A.H.W. v. G.H.B., 772 A.2d 948, 953 (N.J. 2000) (suggesting that a surrogate’s emotional and biological reaction to gestating a child compels the need to grant surrogates a period to reconsider surrendering parental rights to the child).

phenomenon between gestational mother and child, this assertion remains one of the central criticisms of surrogacy.<sup>85</sup>

As some commentators have noted, the assumption that a surrogate's consent is ineffective contradicts the basis of informed consent doctrine, which "presupposes that people will predict in advance of the experience whether a particular course will be beneficial to them."<sup>86</sup> When considering informed consent in other contexts involving uncertain outcomes, it is apparent that consent "does not require having this kind of information about one's future emotional states."<sup>87</sup> In fact, some commentators have argued that providing consent prior to conception "makes the surrogate's consent more, rather than less, voluntary and informed."<sup>88</sup> Parties to a surrogacy contract generally wait an average of four months before the first attempt to conceive, suggesting careful consideration preceding pregnancy and allowing the surrogate to evaluate the magnitude of her decision.<sup>89</sup> In addition, empirical evidence refutes the claims that the majority of surrogates experience difficulties or doubts when handing over the child.<sup>90</sup>

In addition, presuming that a woman is unable to grant autonomous consent in this reproductive context has significant implications with regard to her competence and trustworthiness. Advancing policies that question a woman's capacity for making reproductive decisions subverts the core principles underlying feminist theory.<sup>91</sup> Feminist doctrine has long advanced the view that not all women relate to childbearing and child-rearing in a manner that is consistent with traditional conceptions of maternal instincts.<sup>92</sup> To perceive women as incapable of making informed decisions concerning their bodies smacks of paternalism and implies that government intervention is necessary to protect women from their own decisions.<sup>93</sup>

Mechanisms such as screening and counseling are intended to safeguard women from exploitation by ensuring that surrogates comprehend their rights and

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<sup>85</sup> See Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUMAN REPROD. 2196, 2203 (2003); see also April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 122 (2001).

<sup>86</sup> Andrews, *supra* note 84, at 172.

<sup>87</sup> Justin Oakley, *Altruistic Surrogacy and Informed Consent*, 6 BIOETHICS 269, 269 (1992), <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8519.1992.tb00206.x/abstract>.

<sup>88</sup> Brandel, *supra* note 39, at 502.

<sup>89</sup> See MacCallum, *supra* note 26, at 1341.

<sup>90</sup> See Jadva, *supra* note 85, at 2203 (finding that none of the surrogate mothers surveyed expressed doubts about their decision to hand over the child to the intended parents).

<sup>91</sup> See Andrews, *supra* note 84, at 171 (explaining that opposition to surrogacy on the basis of protecting surrogates against their own decisions appears "ill founded and potentially demeaning to women").

<sup>92</sup> See *id.* at 168.

<sup>93</sup> See *id.* at 175.

duties as well as the potential emotional effects of pregnancy.<sup>94</sup> Providing comprehensive information to surrogates prior to conception and affording these women the opportunity to grant informed consent reaffirms their decisional capacity and reproductive autonomy. The alternative—accepting the notion that a woman cannot knowingly consent to carry a child—“forecloses a personal and economic choice on the part of the surrogate mother, and . . . denies intending parents what may be their only means of procreating a child of their own genes.”<sup>95</sup>

### C. Feminist Concerns Surrounding Surrogacy

Feminist commentators have produced a diverse body of literature relating to commercial surrogacy.<sup>96</sup> This commentary reflects conflicting feminist perspectives on the moral permissibility of the practice and its implications for reproductive freedom.<sup>97</sup> Objections to surrogacy center on the commodification and subjugation of women.<sup>98</sup> By contrast, justifications of this practice rely on the values of female autonomy and self-determination.<sup>99</sup> The central premise underlying these arguments is the notion that permitting or prohibiting surrogacy arrangements has far-reaching implications for women’s freedom. On the one hand, decisional autonomy necessitates having the capacity to choose to gestate a child.<sup>100</sup> On the other hand, the potential use of women as “breeding machines” justifies government intrusion into female reproductive autonomy.<sup>101</sup> However, in many ways, “the very existence of surrogacy is a predictable outgrowth of the feminist movement.”<sup>102</sup> Feminist advancements allowed women to pursue opportunities which caused them to postpone childbearing and suffer age-related declines in fertility.<sup>103</sup> The principles of feminist philosophy that enabled these

<sup>94</sup> Many agencies and statutes restrict surrogacy to women who have previously borne children to further ensure that women entering surrogacy arrangements understand the emotional and physical effects of pregnancy. See Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, 21 THEORETICAL ISSUES IN MED. & BIOETHICS 153, 167 (2000).

<sup>95</sup> Munyon, *supra* note 11, at 743-44 (quoting *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993)).

<sup>96</sup> *See id.*

<sup>97</sup> *See id.* at 717-720 (discussing the conflict between contractual freedom and protecting women from exploitation as well as the effect of judicial determinations regarding surrogacy on the status of women).

<sup>98</sup> See ANDREA DWORKIN, *RIGHT WING WOMEN* 182 (1983) (positing that surrogacy perpetuates the perception that women are valued only for their procreative ability).

<sup>99</sup> See CARMEL SHALEV, *BIRTH POWER* 20 (1989) (suggesting that the concept of gestational bonding confines women to a biological destiny and impedes their individuation as autonomous persons).

<sup>100</sup> *See Andrews, supra* note 84, at 168.

<sup>101</sup> *Id.* at 167.

<sup>102</sup> *Id.* at 168.

<sup>103</sup> See Shultz, *supra* note 19, at 307 (“The increasing economic, social and legal independence of at least some women give them greater freedom to exploit their natural procreative advantages.”); see also Danielle Crittenden, *Feminism Has Limited Women’s Choices*, in *FEMINISM: OPPOSING VIEWPOINTS* 81 (Jennifer A. Hurley ed.) (2001) (contending that feminism, while expanding women’s opportunities in the workplace, also resulted in neglect or postponement of women’s personal lives).

advancements to occur are many of the same principles that provide the basis for the argument that women must be empowered to retain control over their own bodies.<sup>104</sup>

Women's capacity to bear children has historically defined their social role.<sup>105</sup> Biological childrearing roles have long been employed to justify sex-based distinctions and divisions within society.<sup>106</sup> For this reason, reproductive autonomy has served as an important component of women's advancement.<sup>107</sup> Developments in medical technology have added new dimensions to the reproductive landscape, offering the potential to expand female choice or, conversely, to contribute to the exploitation of women.<sup>108</sup> The feminist perspectives discussed below illuminate the ethical and societal concerns surrounding surrogacy and offer mechanisms to explore the power inequities that define this form of reproductive technology.

#### *D. Feminist Doctrine<sup>109</sup>*

Feminist discourse expounds two alternate routes for achieving equality for women.<sup>110</sup> The first approach, gender neutrality or anti-differentiation doctrine, resists acknowledgement of gender-related differences.<sup>111</sup> Feminists who support this approach object to measures that provide "special treatment" for women and perceive differentiation as a form of discrimination.<sup>112</sup> Under this view, "the use

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<sup>104</sup> However, feminist commentary provides contrasting views of the concepts of freedom and control, especially with regard to reproductive freedoms. See Andrews, *supra* note 84, at 168-69.

<sup>105</sup> See Norma Juliet Wilker, *Society's Response to the New Reproductive Technologies: The Feminist Perspectives*, 59 S. CAL. L. REV. 1043, 1043 (1986).

<sup>106</sup> See *id.*

<sup>107</sup> See Anne Roiphe, *Feminists Should Support Abortion Rights*, in FEMINISM: OPPOSING VIEWPOINTS 140 (Jennifer A. Hurley ed.2001) ("[T]he right to control one's body is central to women's dignity and independence . . .").

<sup>108</sup> Many feminists argue that legal enforcement of surrogacy contracts could help redress power inequities within society, given that the law has historically disempowered women by restricting their ability to freely contract within a market economy. See Mary Becker, *Four Feminist Theoretical Approaches and the Double Bind of Surrogacy*, 69 CHI.-KENT L. REV. 303, 307 (1993).

<sup>109</sup> It is important to note that an internal conflict exists within feminist discourse over the true meaning and nature of feminism. Although this theoretical divide is beyond the scope of this Article, it is important to acknowledge that the discussion here only begins to touch on the diverse ideological perspectives that have shaped this dynamic field. However, there is one point of consensus among many feminist commentators: so long as institutionalized patterns of female oppression and systems of domination remain, feminism is not obsolete. See *id.* at 304 ("It is the systemic creation of hierarchy—out of real or perceived differences—that forms the core of discrimination.").

<sup>110</sup> See CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 33-34 (1987) (defining these alternate paths to equality but contending that both approaches operate within a culture of male supremacy).

<sup>111</sup> See, e.g., Wendy Williams, *Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN'S RTS. L. REP. 151, 170 (1992) (proposing an "equal treatment" approach, which rejects single-sex protective laws).

<sup>112</sup> Critiquing what she terms the "sameness standard," Catharine MacKinnon explains that gender neutrality has inadvertently benefited men in the legal context, transforming divorce proceedings by overlooking the societal factors that place women in greater need of alimony while advantaging men.

of the law to change group-based social inequalities [is] problematic, even contradictory.”<sup>113</sup> The conception that women are different subverts the core principle that women deserve social equality with men.<sup>114</sup> The contrasting view, or anti-subordination approach, acknowledges the power differential between the sexes and the manner in which society reinforces male dominance.<sup>115</sup> In light of male-dominated social structures, achieving gender equality requires the redistribution of power to elevate women’s status within society.<sup>116</sup> Feminists who subscribe to this view perceive gender as a relevant distinction and resist the notion that differentiation is inherently counterproductive.<sup>117</sup>

These fundamental tensions in feminist theory underlie the current conflict within gender-based surrogacy discourse.<sup>118</sup> The issues surrounding surrogacy implicate the ideological divide between proponents of formal equality for women and those who advocate an anti-subordination approach.<sup>119</sup> These diverging views highlight the inherent ethical issues and potential benefits of surrogacy. For this reason, feminist doctrine is a valuable mechanism for examining the moral and legal implications of surrogacy with regard to gender, class, and racial inequities.

#### *E. Exploitation*

Many feminists criticize surrogacy as a practice that subjugates women and defines them by their reproductive capabilities.<sup>120</sup> Through this lens, surrogacy appears to exploit and dehumanize vulnerable women who consent to “rent” their bodies as vessels to serve the interests of wealthy couples.<sup>121</sup> Some commentators have analogized surrogacy to prostitution, contending that payment in both contexts induces women to consent to bodily intrusion.<sup>122</sup> Therefore, if commercial

MACKINNON, *supra* note 110, at 35.

<sup>113</sup> *Id.* at 42.

<sup>114</sup> See Williams, *supra* note 111, at 173.

<sup>115</sup> See Martha A. Fineman, *Feminist Legal Theory*, 13 AM. U. J. GENDER SOC. POL’Y & L.13, 17 (2005) (explaining that mere formal equal treatment cannot “sufficiently address existing structural and ideological inequalities” within society).

<sup>116</sup> See Joan Mahoney, *An Essay on Surrogacy and Feminist Thought*, in SURROGATE MOTHERHOOD 188-99 (Larry Gostin ed., 1990); see also CATHARINE MACKINNON, FEMINISM UNMODIFIED 32-45 (1987).

<sup>117</sup> See MACKINNON, *supra* note 110, at 40 (asserting that the law must confront sex-differential abuses of women and challenge the existing distribution of power).

<sup>118</sup> The contemporary women’s movement has further expanded the scope of feminist dialogue. The latest wave of feminism focuses on the notion that male dominance is deeply embedded within our cultural norms and existing social structures, which give rise to inequalities and shape social consciousness. See generally Barbara J. Risman, *Gender as a Social Structure: Theory Wrestling with Activism*, 18 GENDER & SOC. 429 (2004) (conceptualizing gender as a social structure in order to analyze the ways in which gender is embedded into our society).

<sup>119</sup> See MACKINNON, *supra* note 111, at 149 (“[S]exuality itself is a social construct . . . . Sexuality free of male dominance will require *change*, not reconceptualization, transcendence, or excavation.”).

<sup>120</sup> See Munyon, *supra* note 11, at 722.

<sup>121</sup> GUGUCHEVA, *supra* note 23, at 3.

<sup>122</sup> See DWORKIN, *supra* note 98, at 182.

surrogacy contracts are valid and enforceable, economic and social pressures may compel underprivileged women to enter these arrangements under coercive circumstances.<sup>123</sup> Under this view, surrogacy serves as another attempt by the paternalistic, male-dominated medical establishment to exploit women's reproductive capabilities to serve its own interests.<sup>124</sup> Therefore, critics maintain that surrendering control of a woman's body in this way does not constitute true choice on the part of a surrogate.<sup>125</sup> Rather, these subversive elements of surrogacy oppress women and perpetuate gender inequality.<sup>126</sup> The concerns regarding exploitation in commercial surrogacy can be classified into two categories discussed below: economic exploitation and racial exploitation.

### 1. Economic Exploitation

Contemporary debate has centered on the potential for commercial surrogacy to produce a class of underprivileged women serving as child bearers for wealthier couples.<sup>127</sup> Data on the experiences and motivations of commissioning couples indicate that the majority of these couples occupy professional or managerial positions,<sup>128</sup> while anecdotal evidence suggests that women who serve as surrogates generally occupy a lower socioeconomic status.<sup>129</sup> This dynamic has given rise to the concern that such arrangements allow upper class women to reassign the task of childbearing and systematically disadvantage low-income women who sell their reproductive capacities out of necessity.<sup>130</sup> A lack of

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<sup>123</sup> See York, *supra* note 81, at 400 (identifying economic considerations as one of several factors motivating women to enter surrogacy arrangements).

<sup>124</sup> See Brandel, *supra* note 39, at 497 ("[S]urrogacy is the latest chapter in the long history of experimentation, exploitation, and control over women's bodies by a patriarchal medical establishment.").

<sup>125</sup> See CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 246, 248 (1991).

<sup>126</sup> Cf. Becker, *supra* note 108, at 304.

<sup>127</sup> Commentators addressing the nature of autonomy in the surrogacy context have argued that surrogacy enhances the autonomy of wealthy, prospective mothers and fathers but does little to advance the collective autonomy of women. Instead, surrogacy enables upper class women to employ lower-class surrogates' reproductive capacities to serve the needs of the privileged. *See id.* at 308 ("Working-class white women is the group most likely to benefit from surrogacy.").

<sup>128</sup> See MacCallum, *supra* note 26, at 1335.

<sup>129</sup> Interestingly, surrogacy's popularity as a source of income for military wives has risen dramatically in recent years. Surrogacy agencies in Texas and California have reported that military spouses comprise fifty percent of their gestational carriers. *See* Ali, *supra* note 20. Many of these women are motivated by the prospect of supplementing the family income while their husbands are serving overseas. There is minimal data to support this trend, merely "[i]ndirect, anecdotal evidence suggest[ing] that women in military families are disproportionately hired as surrogates." GUGUCHEVA, *supra* note 23, at 5. Reports indicate that surrogacy agencies perceive these women as attractive targets for advertising, given that they are generally low-income, stay-at-home mothers. However, the lack of economic alternatives "creates massive potential for exploitation." *Id.* at 25.

<sup>130</sup> See R. Alta Charo, *Legislative Approaches to Surrogate Motherhood*, in SURROGATE MOTHERHOOD 89 (Larry Gostin ed., 1990). Allowing fertile, able-bodied women to procure surrogates could exacerbate these fears and enhance the likelihood of exploitation. The potential for surrogacy to become a socially acceptable reproductive method among a certain class of couples or serve as a status symbol has led some jurisdictions to statutorily prohibit surrogacy arrangements for reasons other than

economic alternatives renders these women particularly susceptible to coercion and arguably negates the voluntary nature of these arrangements.<sup>131</sup> Consequently, many argue that the expansion of surrogacy has profound implications for class distinctions and the societal distribution of wealth.<sup>132</sup>

However, it is not so clear that permitting surrogacy would perpetuate socioeconomic divides and give rise to a pool of underpaid and desperate surrogates.<sup>133</sup> Some contend that denying compensation for surrogacy services fails to remove the possibility of coercion and, in actuality, harms women by restricting economic opportunity.<sup>134</sup> Protectionist restrictions on a woman's ability to secure viable employment undercut feminist attempts to affirm women's legitimacy in the workforce.<sup>135</sup> In this way, prohibiting payment for surrogacy services deprives women of reproductive autonomy as well as the "right to be paid for valued labor."<sup>136</sup> In addition, confining the practice of surrogacy to its altruistic form invokes the problematic notion that women should be motivated by sentiment while men deserve payment for their efforts and services.<sup>137</sup> Permitting women to contract for services and undertake significant risks without reasonable payment would be considered exploitative in other contexts.<sup>138</sup> Yet, paradoxically, the surrogacy arrangements deemed coercive are those in which women *do* receive compensation.<sup>139</sup> In addition, prohibiting surrogacy could reduce the amount of compensation paid to surrogates, further disadvantaging these women.<sup>140</sup> This

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medical necessity. *See* VA. CODE ANN. § 20-160 (2010).

<sup>131</sup> *See* MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 27, 72 (1990) (explaining that surrogacy contracts do not represent a meaningful choice on the part of the surrogate, but rather are driven by circumstance and gender constructs which systematically disadvantage women).

<sup>132</sup> The court in *Baby M.* invalidated the surrogacy contract in part due to public policy concerns, including the apparent coercion of the surrogate and the potential for class distinctions resulting from such arrangements. *See In re Baby M.*, 537 A.2d 1227, 1249 (N.J. 1988) (expressing the concern that "surrogacy will be used for the benefit of the rich at the expense of the poor"). Data verifying anecdotal evidence regarding the socioeconomic and educational status of surrogates would lend support to the claims of racial and financial exploitation. *See* GUGUCHEVA, *supra* note 23, at 5. However, insufficient data on the racial and socioeconomic characteristics of surrogates preclude a comprehensive, empirically-based analysis of these issues. *See id.* at 8.

<sup>133</sup> *See* Wilkinson, *supra* note 76, at 181.

<sup>134</sup> As some have explained, "[c]oercion within the context of the family may be even more onerous than coercion by contract or money." Brandel, *supra* note 39, at 522 (explaining that surrogacy arrangements between family members can substantially disrupt family relationships while failing to minimize the risk of exploitation).

<sup>135</sup> *See* Andrews, *supra* note 84, at 174 (identifying a sexist undertone to arguments that women are exploited by commercial surrogacy agreements but not activities performed for altruism).

<sup>136</sup> Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, in SURROGATE MOTHERHOOD 9 (Larry Gostin ed., 1990).

<sup>137</sup> *See id.*

<sup>138</sup> *See* David R. Bromhan, *Surrogacy: Ethical, Legal, and Social Aspects*, 12 J. ASSISTED REPROD. & GENETICS 509, 510 (1995).

<sup>139</sup> *See* FIELD, *supra* note 131, at 26.

<sup>140</sup> *See* Richard Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH & POL'Y 21, 23 (1989).

suggests that society should not prohibit these arrangements but rather ensure that surrogates receive sufficient compensation in order to minimize potential exploitation.<sup>141</sup>

## 2. Racial Exploitation

Other feminists have employed slavery as a paradigm for surrogacy, maintaining that both practices are characterized by a lack of self-ownership.<sup>142</sup> This slavery parallel implicates the potential racial exploitation that is often perceived as an inescapable outcome of commercial surrogacy.<sup>143</sup> Historically, women of color were subject to forcible sterilization and oppressive reproductive restrictions.<sup>144</sup> Black slave women were often classified as “breeders” who had no legal claims to their children.<sup>145</sup> Accordingly, some argue that “[g]estational surrogacy is another instance where Black women are valued for their affective labor in the service of White people.”<sup>146</sup> The debate surrounding surrogacy illuminates the “symbolic, gendered, and racial nature of policy battles and discourses that form and inform the politics of reproduction.”<sup>147</sup>

Some commentators have suggested that the risk of commodification is more apparent when women of color serve as surrogates for white couples. When the surrogate’s race differs from that of the child she is carrying, it is easier to perceive her as a mere “womb for rent.” Dorothy Roberts, a prominent legal scholar, has written extensively on the interplay of gender, race, and class in legal issues concerning reproduction.<sup>148</sup> Roberts posits that racial disparities in access to reproductive advancements such as surrogacy reinforce the societal value placed on the “white genetic tie.”<sup>149</sup> Gestational surrogacy in particular enables white couples to procure the services of minority women to serve as surrogates and bear

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<sup>141</sup> See *infra* Part IV.D.3.

<sup>142</sup> See Allen, *supra* note 62, at 140-41 (contending that slavery is instructive for determining surrogacy’s moral status within the U.S.). Allen offers a depiction of southern slave experiences which rendered black mothers “surrogates” in the sense that they gave birth to children whose ownership was already invested in the slave master. *Id.* at 144.

<sup>143</sup> See Cherry, *supra* note 85, at 126 (contending that gestational surrogacy serves as a contemporary example of racially race-neutral legal rules which have historically been used to ensure white supremacy and black subordination).

<sup>144</sup> See JUEL SILLIMAN, MARLENE FRIED, LORETTA ROSS & ELENA GUTIERREZ, UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZING FOR REPRODUCTIVE JUSTICE 5, 11 (2004).

<sup>145</sup> See Allen, *supra* note 62, at 144.

<sup>146</sup> Cherry, *supra* note 85, at 118. See also Dorothy Roberts, *Race and Parentage*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 526 (Richard Delgado & Jean Stefancic eds., 1997) (explaining that “[t]he vision of black women’s wombs in the service of white men conjures up images of slavery,” a practice that epitomized the commodification and devaluation of human life).

<sup>147</sup> SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 7 (2007).

<sup>148</sup> See Roberts, *supra* note 146, at 523 (explaining that the reproductive landscape represents an intersection of a number of factors including financial barriers and cultural preferences).

<sup>149</sup> *Id.*

white offspring.<sup>150</sup> Couples can therefore hire economically vulnerable surrogates as a measure to secure low-cost services without concern for the women's genetic traits, notably their race.<sup>151</sup> Additionally, in the event of custody disputes arising from surrogacy arrangements, black surrogates are placed at a significant disadvantage for two reasons: women of color are less likely to be able to afford a court battle and less likely to be awarded custody of a white child.<sup>152</sup>

Roberts also notes that reproductive technologies that provide couples with genetically related offspring are used predominantly by affluent white individuals.<sup>153</sup> The high cost of ART restricts the accessibility of these procedures to this class, despite higher rates of infertility among black women.<sup>154</sup> This reality illustrates how "the reproductive rights agendas are shaped by the dynamics of class and race."<sup>155</sup> Feminist critiques of surrogacy that focus on the devaluation of women's wombs often overlook the racial dynamics that compound the potential exploitation of women of color, whose "reproductive and sexual health problems are not isolated from the socioeconomic inequalities in their lives."<sup>156</sup>

#### *F. Autonomy and the Right to Procreate*

Other feminists defend the practice of surrogacy on the basis of female autonomy, contending that surrogacy serves as an example of women exercising their right to self-determination.<sup>157</sup> This feminist contingent contends that

<sup>150</sup> Severing the genetic tie between the gestational carrier and the fetus, according to Roberts, enables white, middle-class couples to select women of color to gestate their offspring. See *id.* at 526. See also Angie Godwin McEwen, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 271, 295 (1999) (contending that poor non-whites are more likely to be chosen as gestational surrogates because the lack of a genetic link will be more visible). These concerns played out in *Johnson v. Calvert*, in which a minority surrogate carried the offspring of an interracial commissioning couple. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). In this seminal case involving gestational surrogacy, the Calverts, a wealthy, professional couple, entered an agreement to pay Johnson, a working-class African-American woman, for carrying their biological child. The case carried important societal implications regarding race and conventional family relationships in that the court's decision "protected the marital family, and it forestalled the disturbing possibility that a white child could have a black mother." Ikemoto, *supra* note 25, at 79-80.

<sup>151</sup> See Roberts, *supra* note 146, at 526.

<sup>152</sup> See *id.* See also Cherry, *supra* note 85, at 127 ("It's not just that blacks are disproportionately poor and desperate, more likely to be single mothers and more likely to lack the resources to sue. It's that their visible lack of genetic connection with the baby will argue powerfully against them in court. . . It is safe to say that few American judges are going to take seriously the claims of a black woman to a nonblack child. Black women have, after all, always raised white children without acquiring any rights to them.").

<sup>153</sup> See Roberts, *supra* note 146, at 523.

<sup>154</sup> See *id.* (explaining that those who are likely to suffer from infertility are generally older, low income, poorly educated black women).

<sup>155</sup> SILLIMAN ET AL., *supra* note 144, at 11. See also Beverly Horsburgh, *Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy*, 8 BERKELEY WOMEN'S L.J. 29, 35 (1993) (noting that many minority women entering surrogacy contracts are "unable to engage in free and meaningful bargaining").

<sup>156</sup> SILLIMAN ET AL., *supra* note 144, at 6.

<sup>157</sup> See Andrews, *supra* note 84, at 168.

surrogate motherhood constitutes a legitimate choice rather than an intrinsically exploitative practice. Such a view supports the position that prohibiting surrogacy arrangements contravenes the fundamental right to decide “whether or not to bear or beget a child” without government interference.<sup>158</sup> Judicial decisions and legislative restrictions have unduly abrogated reproductive freedom in the surrogacy context on the grounds of public policy.<sup>159</sup> Such protectionist regulations constitute an unwarranted infringement on bodily integrity and lead to the erosion of women’s reproductive rights.<sup>160</sup>

Feminist commentators further contend that a prohibition on surrogacy violates women’s constitutional right to privacy and procreative autonomy as well as the interrelated freedom to contract.<sup>161</sup> Restricting these fundamental freedoms imposes a detriment on women under the guise of protecting surrogates from exploitation. Legal prohibitions of this nature are protectionist and foreclose the possibility of women securing a valid economic opportunity by engaging in surrogacy.<sup>162</sup> Placing restrictions on a woman’s right to establish binding commitments “concedes that the government, rather than individual women, is in a better position to determine the risks a woman is permitted to take.”<sup>163</sup> In this way, non-enforcement of surrogacy contracts may ultimately have a detrimental effect on the status of women.<sup>164</sup>

The rising popularity of ART reflects its increasingly prominent status within our society. The advancement of reproductive technologies signals the compelling need to devise and implement strategies that align the best interests of surrogates with those of society. Fashioning an appropriate response to the criticisms surrounding commercial surrogacy requires examination of the power structures underlying the existing reproductive framework and the gender distinctions that subordinate women.<sup>165</sup> Thus, approaches seeking to ameliorate the conditions that disadvantage women warrant close consideration. Accordingly, the appropriate mechanism to safeguard surrogates is not a restriction on women’s procreative

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<sup>158</sup> *Carey v. Population Servs. Int’l*, 431 U.S. 678, 687 (1977). The judge in *Baby M.* restricted this right. *See In re Baby M.*, 537 A.2d 1227, 1253 (N.J. 1998) (“The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that.”).

<sup>159</sup> *See* Munyon, *supra* note 11, at 733.

<sup>160</sup> *See id.*

<sup>161</sup> *See* Allen, *supra* note 62, at 147 (“Would-be surrogate mothers should be deemed to have constitutional privacy rights so strong as to limit their own capacities for alienating their procreative and traditional parental prerogatives.”).

<sup>162</sup> By contrast, states have long allowed pre-conception transfers of parental rights in the context of sperm donation, facilitated by state statute. *See* Andrews, *supra* note 84, at 170.

<sup>163</sup> Munyon, *supra* note 11, at 727.

<sup>164</sup> *Id.*

<sup>165</sup> *See generally* LAURA R. WOLIVER, THE POLITICAL GEOGRAPHIES OF PREGNANCY (2002) (addressing the manner in which modern reproductive politics affect women’s agency).

autonomy but rather protection from the inherently exploitative elements of surrogacy arrangements.

### III. ADOPTING A SURROGATE-FOCUSED CONTRACT MODEL

Legislative and judicial developments surrounding surrogacy have focused primarily on parental status determinations while failing to address the power imbalance inherent in these agreements.<sup>166</sup> In the absence of legislation delineating the rights and obligations of the contracting parties, the foremost consideration should be protection of the party most vulnerable to exploitation—the surrogate. Granting surrogates the authority to dictate contractual terms would preserve individual autonomy, shield women from exploitation, and lessen disparities in bargaining power. Given that surrogates assume considerable physical and emotional burdens, a surrogate-focused approach would enable these women to contemplate foreseeable conflicts and define the scope of services they are willing to provide. This approach also responds to the concerns that underlie feminist criticisms and the judicial protectionism that has defined surrogacy-related precedent. Acknowledging the legal validity of contracts that are consistent with the surrogate's interests advances the notion that women are competent to act as rational agents with regard to their reproductive capacities.<sup>167</sup>

This Part establishes contract law as the proper analytical model to govern surrogacy arrangements and identifies the parties involved in these arrangements as well as the common elements of a surrogacy contract. This discussion sets forth the prominent considerations of a surrogate-focused contract model and articulates the advantages of such an approach.

#### *A. Contract Law as the Appropriate Paradigm*

Judicial analysis of gestational surrogacy arrangements has generated inconsistent precedent throughout the country.<sup>168</sup> Courts and commentators remain conflicted over whether family law or contract law should govern these arrangements.<sup>169</sup> Jurisdictions that employ a family law regime posit that adoption

<sup>166</sup> In settling surrogacy disputes, determining parental status has typically served as the focus of prolonged and highly publicized custody battles. *Baby M.* was the first such case to provoke controversy throughout the nation. In this case, the court was confronted with the question of who should retain custody of a child when a dispute arises in the context of a traditional surrogacy arrangement. The surrogate mother, who was also the child's biological mother, changed her mind about relinquishing her parental rights. The outcome was a two-year custody battle and the emergence of the court's protective role with regard to surrogacy arrangements. The *Baby M.* court ultimately acknowledged the intended father as the child's legally recognized father and the surrogate as the legally recognized mother because of the genetic relationships. See *In re Baby M.*, 537 A.2d 1227, 1259 (N.J. 1998).

<sup>167</sup> See Mary Lyndon Shanley, "Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction, 18 J. WOMEN IN CULTURE & SOC'Y 618, 620 (1993).

<sup>168</sup> See *supra* Part II.A.

<sup>169</sup> See Capron & Radin, *supra* note 66, at 34 ("The central policy issue is settling on the paradigm

statutes provide the proper protections for the parties involved.<sup>170</sup> Judicial resolution pursuant to family law standards seeks to safeguard the fetus by settling disputes in accordance with the best interest of the child.<sup>171</sup> For this reason, commentators argue, states can protect minors by applying legal parentage presumptions to surrogacy arrangements rather than allowing parental status to rely upon the clarity of terms contained within a surrogacy contract.<sup>172</sup> These presumptions, it is argued, foster certainty and reliability and thereby promote the interests of society as well as those of parents and children.<sup>173</sup>

However, any gains in certainty that are achieved by adopting a family law approach come at the expense of women's autonomy and freedom to contract. Surrogacy agreements bear fundamental similarities to personal services contracts involving physical labor.<sup>174</sup> Society recognizes that individuals are entitled to contract for such services and freely undertake actions that require significant sacrifice in the name of contractual obligation.<sup>175</sup> This right is based on individual autonomy and the "prospect of mutual gain"<sup>176</sup> between contracting parties.<sup>177</sup> Enforcing these agreements in accordance with relevant contract principles avoids perpetuating the perception that women are incapable of rationally committing to agreements for their own services.<sup>178</sup>

Contract doctrines and concepts can serve as "important tools for solution of the legal issues raised by modern reproductive technologies."<sup>179</sup> However, an enforceable contract requires a voluntary commitment by all contracting parties.

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that should govern surrogate motherhood, a model of family relations (adoption) or of contractual relations (sale of a product or service").). Compare June Carbunc, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581, 583 (1988) (arguing that contract law is appropriate for surrogacy agreements) with Judith Areen, *Baby M Reconsidered*, 76 GEO. L.J. 1741, 1758 (1988) ("[I]t is the altruistic ethic of family law that should guide the court, not the ethic of self-gratification of the marketplace and contract law.").

<sup>170</sup> See *Surrogate Parenting Assoc., Inc. v. Commonwealth*, 704 S.W.2d 209 (Ky. 1986) (applying state adoption statute to surrogacy arrangement).

<sup>171</sup> This approach ensures that protection of the minor child serves as the paramount consideration when resolving these disputes. See Capron & Radin, *supra* note 66, at 35.

<sup>172</sup> If the status of the relations is dependent on a contract, the rights and obligations of each party are uncertain in the event of a contractual ambiguity or breach. *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> But see Brandel, *supra* note 39, at 502 (distinguishing surrogacy contracts from ordinary personal services agreements); Cunningham, *supra* note 63, at 742 ("The liability of the surrogate mother to exercise a substantial amount of control over performance of the contract distinguishes surrogate contracts from other personal service agreements.").

<sup>175</sup> *See Gostin, supra* note 136.

<sup>176</sup> Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2313 (1995).

<sup>177</sup> *See CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1 (1981).

<sup>178</sup> The court in *Johnson v. Calvert* adopted such an approach by applying contract law to the surrogacy arrangement at issue and addressing the parties' intentions as manifested in the contract. *See Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (describing the surrogate as a host and characterizing the parties' relationship as essentially a business transaction).

<sup>179</sup> Shultz, *supra* note 19, at 303.

Therefore, the parties must have sufficient information and resources available to mutually assent to the contractual terms. This requirement is concerning in light of the social dynamics and informational asymmetries inherent in surrogacy agreements.<sup>180</sup> For this reason, a coherent model for addressing surrogacy contracts must attend to the concerns surrounding information asymmetries and inequitable bargaining power.<sup>181</sup> Such a framework would allow surrogates to evaluate prospective parents and ensure placement of the child in a stable, secure environment.<sup>182</sup> In this way, applying contract principles to surrogacy arrangements would effectively “maximize the social benefits of surrogacy and minimize its social risks.”<sup>183</sup>

### 1. Parties Involved in Surrogacy Arrangements

In gestational surrogacy arrangements, the contracting parties consist of the surrogate mother, the intended parents, and the genetic mother and father.<sup>184</sup> Third parties such as agencies and attorneys often serve as intermediaries between commissioning couples and surrogates.<sup>185</sup> Agencies assist by coordinating the complex arrangements and screening<sup>186</sup> potential surrogates and couples.<sup>187</sup> Attorneys facilitate contract negotiations and ensure that the contractual terms comply with applicable legal constraints.<sup>188</sup> In addition, multiple physicians are generally involved in a surrogacy arrangement; these include the physician who is responsible for carrying out IVF procedures as well as the physician who cares for the surrogate.<sup>189</sup> To prevent conflicts of interest, the commissioning couple’s physician should not be responsible for treating the surrogate during the course of her pregnancy.<sup>190</sup> This restriction forecloses the possibility that a doctor would

<sup>180</sup> See *supra* Part III.B.

<sup>181</sup> See Swapnendu Banerjee & Sanjay Basu, *Rent A Womb: Surrogate Selection, Investment Incentives and Contracting*, 69 J. OF ECON. BEHAV. & ORG. 260, 271 (2009) (explaining that the solution to problems such as misinformation and exploitation is ensuring the enforceability, specificity and clarity of contracts with regard to the parties’ rights, duties, and penalties).

<sup>182</sup> See Cunningham, *supra* note 63, at 728.

<sup>183</sup> Peter H. Schuck, *The Social Utility of Surrogacy*, 13 HARV. J.L. & PUB. POL’Y 132, 136 (1990).

<sup>184</sup> The biological or genetic mother and father may or may not be distinct from the intended parents. In addition, some state laws establish a presumption that the surrogate’s husband is the child’s legal father. In these jurisdictions, the husband serves as an additional party to the contract for purposes of relinquishing parental rights following birth. See, e.g., MASS. GEN. LAWS. ch. 46, § 4B (2010).

<sup>185</sup> Adoption statutes may apply to require a licensed agency to serve as an intermediary in surrogacy arrangements. See Mady, *supra* note 21, at 329.

<sup>186</sup> Agencies often require women to undergo invasive physical exams and to disclose information regarding medical history and health behavior. See GUGUCHEVA, *supra* note 23, at 19 (noting that some agencies require surrogates’ sexual partners to undergo testing for sexually transmitted infections).

<sup>187</sup> See S.E.E.D.S., SURROGACY, EMBRYO AND EGG DONOR SERVICES, INC., <http://www.scdscenter.com/IP.htm#carrier> (last visited Dec. 20, 2010).

<sup>188</sup> See *infra* Part IV.D.1.

<sup>189</sup> See Ber, *supra* note 94, at 156-60 for a discussion of physician obligations in the surrogacy context.

<sup>190</sup> In certain medical situations, the surrogate’s treating physician may be ethically obligated to

serve competing interests, which could compromise the quality of care a surrogate receives.

The involvement of third party agencies and brokers alters the power dynamics in these arrangements. Whether agency involvement may serve to mitigate or exacerbate coercion is unclear, but such involvement potentially introduces an added element of exploitation.<sup>191</sup> Therefore, regulatory oversight of these agencies would shield the contracting parties from the misconduct of fraudulent brokers without imposing undue restrictions on the surrogate's bargaining power.<sup>192</sup> In the absence of such oversight, the complexities of these arrangements, in conjunction with the conflicting interests of multiple parties, contribute to the potential exploitation of surrogates.

## 2. Common Elements of a Surrogacy Contract

Statutory mandates in some jurisdictions proscribe certain conduct relating to surrogacy arrangements.<sup>193</sup> Nevertheless, contracts for surrogacy services generally contain several common elements. Contracts typically define the commissioning couple's expectations and demands with regard to the surrogate's health behaviors and medical care, requiring the surrogate to undergo various medical procedures and to abstain from specified activities that could harm the developing fetus.<sup>194</sup> The surrogate is contractually obligated to carry the pregnancy to term, often with the caveat that she must terminate the pregnancy if a defect is detected.<sup>195</sup> Surrogates are otherwise forbidden from terminating the pregnancy unless medically necessary to protect their health.<sup>196</sup>

In general, contracts require the surrogate to relinquish parental rights to the child upon delivery.<sup>197</sup> These terms address statutory presumptions of parentage, which define the legal relationships between the parent and child and also serve to prevent any expectation of a surrogate continuing a relationship with a child.<sup>198</sup> In

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override the terms of the surrogacy contract to protect the surrogate's health. *See id.* at 166.

<sup>191</sup> See Capron & Radin, *supra* note 66, at 37 ("... the dangers of commodification are posed more imminently by those who organize and implement a market in babies than by parents . . .").

<sup>192</sup> See Bromhan, *supra* note 138 ("The 'surrogate protective' function of formal agencies would undoubtedly be enhanced in societies introducing some form of licensing and control while permitting surrogacy.").

<sup>193</sup> State laws impose varying restrictions on the permissible terms that surrogacy contracts may contain. Accordingly, contracting parties must be cognizant of the applicable restrictions on these contracts.

<sup>194</sup> For instance, surrogates are contractually obligated to refrain from using drugs, alcohol, or tobacco during the pregnancy. *See York, supra* note 81, at 397. Surrogates are often subject to intensive medical tests and fertility procedures. *See id.* (indicating that gestational surrogates are required to undergo several rounds of hormonal treatments, the long-term health effects of which are not well understood).

<sup>195</sup> *See id.*

<sup>196</sup> *See id.*

<sup>197</sup> *See id.*

<sup>198</sup> Family law doctrine traditionally provides that the woman who gives birth to a child is

many cases, compensation is contingent on delivery and relinquishment of the surrogate's parental rights. However, payment cannot be contingent on delivery of an acceptable "product," nor imply the intended sale of a child.<sup>199</sup> Payment must instead compensate the surrogate solely for her services.

### *B. Advantages of a Surrogate-Focused Approach*

Given that a surrogate generally occupies an inferior bargaining position in surrogacy arrangements, power dynamics and social factors place her at a considerable disadvantage. A surrogate-focused contract model would shift the balance of power during negotiations and preclude the appearance of involuntary servitude.<sup>200</sup> A contractual framework that centers on the surrogate is preferable to rigid regulatory or judicial oversight that restricts autonomy and capacity to contract. By contrast, a surrogate-centered approach directs focus to preconception negotiations rather than post-conception conflicts.<sup>201</sup> This model thus affirms the surrogate's position as an autonomous agent who is fully informed and engaged in the negotiation process.

Economic principles suggest that freely contracting parties generally produce socially efficient outcomes.<sup>202</sup> Enhancing the surrogate's bargaining power would ensure that the contract reflects the procreative aims of all parties.<sup>203</sup> By conceptualizing surrogacy agreements in a way that promotes the surrogate's interests, the contractual terms will evidence her true intent. In light of the uncertainty that accompanies these arrangements,<sup>204</sup> allowing the surrogate to stipulate the contractual terms will enhance the likelihood that she will uphold her

considered the child's legal mother and her husband is the presumed father. *See supra* note 185. Few courts have articulated distinct standards for determining parental status in the surrogacy context, focusing on genetic relations, gestational relationships, or the parties' intent. The intent standard "declare[s] that the person (or persons) who brought about the conception of the child and intended to be its parents should be considered the legal parents. . ." *See Anderson, supra* note 17, at 624. In contrast, courts applying the genetic standard "declare the genetic parents the legal parents." Finally, those adhering to a gestational standard declare the woman who gives birth to the child its legal mother. *See id.*

<sup>199</sup> *Anderson, supra* note 17, at 624. ("[T]he contract should not include language . . . [that] treats the child as an article of manufacture that can be discarded or rejected if it does not meet the standards of the purchasers.").

<sup>200</sup> *See Munyon, supra* note 11, at 743. ("[S]tates [should] recognize the choices made by women and allow for compensation, while at the same time policing for exploitative practices and preventing a 'black market' sale of wombs.").

<sup>201</sup> In spite of sensationalized media reports, the vast majority of surrogacy arrangements are executed without conflict. *See MacCallum, supra* note 26, at 1340 (reporting overwhelming satisfaction among parents involved in surrogacy arrangements).

<sup>202</sup> According to Posner's economic theory, parties enter into contracts which they perceive to be mutually beneficial. *See Posner, supra* note 140, at 22. Under Posner's theory, if surrogacy contracts are unenforceable it further reduces the surrogate's bargaining power, decreasing the value of surrogacy. By contrast, if surrogacy contracts are enforceable, this increases the certainty associated with the arrangement, allowing surrogates to demand higher fees. *See id.*

<sup>203</sup> *See Shanley, supra* note 167, at 624.

<sup>204</sup> *See Cunningham, supra* note 63, at 742-46.

end of the bargain and minimize the risk that the surrogate will renege on her own terms. Thus, this framework would validate female autonomy and decisional capacity while safeguarding women from exploitative practices, thereby responding to feminist criticisms while upholding the sanctity of contracts.

### C. Potential Opposition to a Surrogate-Focused Approach

Opponents may argue that a surrogate-centered model will simply shift the risk of exploitation and enable the surrogate to exploit the intended parents,<sup>205</sup> who often endure multiple rounds of infertility treatment and the emotionally and financially demanding surrogacy process.<sup>206</sup> One could imagine a scenario in which a surrogate bargains for terms that disadvantage the commissioning couple or that enable her to benefit at the expense of the intended parents. In this way, a surrogate-focused regime could grant women power that they might misuse to their advantage. Altering the dynamics of surrogacy arrangements could thus deter individuals who might otherwise engage in the surrogate market. However, a couple's investment in a surrogacy arrangement provides an incentive to secure a prospective surrogate who is sincere and reasonable, thereby increasing the probability of successful performance.<sup>207</sup> If the commissioning couple is unsatisfied with the contractual terms the surrogate sets forth, they can seek a surrogate with more favorable terms. Since surrogates are functioning within a seller's market, they are able to decide which couple will receive their services.<sup>208</sup> Even though certain stipulations could reduce the value of a surrogate's services, the existing model fails to address the exploitative aspects of these negotiations and deprives a surrogate of any such contractual authority to select terms that serve her interests.<sup>209</sup>

In addition, these criticisms obscure the fact that commissioning couples are often more educated and experienced in the surrogacy process than the surrogate

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<sup>205</sup> In *Johnson v. Calvert*, the commissioning parents alleged that the surrogate had attempted to extort money from them while the surrogate claimed the parents failed to provide her with adequate compensation. In this instance, the animosity that developed between the parties resulted in prolonged litigation and custody disputes. See BARRY R. FUROW ET AL., BIOETHICS: HEALTH CARE LAW AND ETHICS 146 (6th ed. 2008).

<sup>206</sup> See Anderson, *supra* note 17, at 628. One study reported that commissioning parents attempt to have a child for an average of 7.5 years prior to entering surrogacy arrangements. See MacCallum, *supra* note 26, at 1336. The surrogate matching process itself can extend twenty months or more, with expenses reaching \$46,000, an estimate that does not include health insurance coverage for the surrogate nor medical expenses and reproductive medicine costs. See S.E.E.D.S., *supra* note 187.

<sup>207</sup> See Epstein, *supra* note 176, at 2317. Epstein explains that a buyer in the surrogacy context is incentivized to make the necessary investment to select a surrogate who will not become emotionally attached to the fetus and who "do[es] not send the arrangement off the rails." *Id.* Rather, the intended parents have a fundamental interest in selecting a surrogate who will uphold the terms of the contract. In this way, the buyer has an incentive to effectively protect the contract and select the proper surrogate. *See id.*

<sup>208</sup> See Cunningham, *supra* note 63, at 728.

<sup>209</sup> See Gostin, *supra* note 136, at 9-12.

and well-represented by legal counsel.<sup>210</sup> Therefore, affirmative measures are necessary to counteract the surrogate's positional vulnerability. Adopting a surrogate-focused approach aligns with feminist doctrine demanding enhanced protection for women. For feminists who object to sex-based differentiation, this special attention to women is counterproductive to achieving the aims of gender equality. However, the law commonly protects groups that are negatively impacted by their social status.<sup>211</sup> In the case of surrogacy, given the prevailing fear that surrogates enter these agreements with less education, fewer resources, and enhanced vulnerability to coercion, a surrogate-centered approach would reduce the likelihood of commodification and mistreatment. Therefore, advancing a surrogate-focused contract model would address feminist concerns surrounding coercion and exploitation and simultaneously advance the objectives of reproductive and contractual freedom.

#### *D. Primary Considerations*

##### 1. Legal Representation

Many surrogates lack the financial resources necessary to obtain competent legal representation.<sup>212</sup> The characteristic power imbalance between the contracting parties underscores the need to ensure that surrogates have independent legal counsel.<sup>213</sup> Since most intended parents have access to or existing legal representation, surrogates are left to secure their own attorney or use one provided by a surrogacy agency. Relying on agencies to furnish legal counsel introduces potential conflicts of interest and "heighten[s] the probability that the surrogacy contract will contain terms that are disproportionately unfavorable to the surrogate."<sup>214</sup> In Virginia, as part of the pre-authorization process for approving surrogacy contracts, the court appoints a guardian ad litem to serve the child's best interests and legal counsel to represent the surrogate.<sup>215</sup> Such a requirement could

<sup>210</sup> See *supra* notes 127-132 and accompanying text.

<sup>211</sup> The Civil Rights Act of 1964 established the statutory framework that permitted "race-conscious strategies to promote minority opportunity." CHARLES V. DALE, CONG. RESEARCH SERV., RS 22256, FEDERAL AFFIRMATIVE ACTION LAW: A BRIEF HISTORY 2 (2005). Other laws provide protections that ensure equal access and appropriate accommodations for disabled individuals within society. See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2010). Although being a woman is arguably not synonymous with being disabled, such legal frameworks seek to challenge male-dominated social constructs. See MACKINNON, *supra* note 110, at 42.

<sup>212</sup> See GUGUCHEVA, *supra* note 23, at 23.

<sup>213</sup> In *Baby M.*, the surrogate received minimal legal advice in connection with the surrogacy contract. See *In re Baby M.*, 537 A.2d 1227, 1247 (N.J. 1998). The lawyer was referred to her by the fertility agency, "with which he had agreement to act as counsel for surrogate candidates. His services consisted of spending one hour going through the contract with the [the surrogate and her husband] . . . and answering their questions." *Id.*

<sup>214</sup> GUGUCHEVA, *supra* note 23, at 24.

<sup>215</sup> See VA. CODE ANN. § 20-160 (2010).

effectively safeguard the surrogate and protect women's rights.<sup>216</sup> At the very least, requiring the commissioning couple to finance a surrogate's independent legal representation would enable her to obtain legal counsel of her choosing, a measure that is central to the validity and fairness of the contract.<sup>217</sup>

## 2. Breach of the Contract

Enforcing the contractual terms of surrogacy agreements presupposes the availability of adequate remedies in the case of breach. Empowering the surrogate to set the contract terms would also enable her to contemplate the scenarios in which a breach may occur. In one such scenario, the surrogate could breach the agreement by terminating the pregnancy in violation of a contractual provision restricting such conduct.<sup>218</sup> The surrogate could also neglect certain medical obligations or engage in activities that are contractually prohibited. If the surrogate carries the child to term, she could breach the contract by refusing to relinquish her parental rights upon birth.

Other scenarios may result in incomplete performance by the intended parents upon discovery of fetal abnormalities.<sup>219</sup> Couples who have invested considerable time and financial resources into a surrogacy arrangement may attempt to withdraw the agreement or absolve themselves of parental responsibility in the event of a genetic defect.<sup>220</sup> In addition, if the contract mandates termination of the pregnancy upon diagnosis of a deformity,<sup>221</sup> some jurisdictions allow intended parents to sue a surrogate and recoup expenses if the surrogate carries out the pregnancy against their wishes.<sup>222</sup>

These scenarios illustrate that a woman entering a surrogacy agreement often faces the prospect of having to retain custody of an unwanted child or abort a fetus against her will. Courts have grappled with the issue of determining a satisfactory

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<sup>216</sup> See Mahoney, *supra* note 116, at 189 (explaining that requiring separate counsel for each party "does not perpetuate the oppression of women but may help to diminish it.").

<sup>217</sup> Legal fees for these contracts can range from \$2,500 to \$2,750 for the intended parents and \$850 for the surrogate. Additional fees associated with the arrangement may vary. See S.E.E.D.S., *supra* note 187.

<sup>218</sup> See *supra* notes 1-8 and accompanying text.

<sup>219</sup> In some cases, commissioning couples get divorced before the surrogate's pregnancy is complete. See, e.g., *In re Marriage of Buzzanca*, 61 Cal. App. 1410 (Cal. 1998); Tom Blackwell, *Case Illustrates Legal, Ethical Minefield of Surrogate Births*, POSTMEDIA NEWS (Oct. 7, 2010), [http://www.vancouversun.com/story\\_print.html?id=3632384&sponsor=](http://www.vancouversun.com/story_print.html?id=3632384&sponsor=) (last visited Dec. 16, 2010).

<sup>220</sup> See Blackwell, *supra* note 219.

<sup>221</sup> In a recent Canadian case, a British Columbia couple hired a surrogate to carry their child and later learned the infant would likely be born with Down Syndrome. *See id.* The couple subsequently demanded that the surrogate terminate the pregnancy, in accordance with the terms of the surrogacy contact. The surrogate, determined to carry the pregnancy to term, proceeded with the pregnancy against the couple's wishes. Under the terms of the agreement, such conduct absolved the intended parents of responsibility for the child, leaving the surrogate to raise the commissioning couple's genetic offspring. *See id.*

<sup>222</sup> *See id.*

remedy for breach of surrogacy contracts.<sup>223</sup> Such difficulties have previously underscored judicial decisions to void these contracts.<sup>224</sup> In the event of a conflict, judges are reluctant to order specific performance and thereby force a party to raise an unwanted child.<sup>225</sup> In addition, “[t]he large disparity in financial resources between the contracting parties makes doubtful collection of money damages.”<sup>226</sup> Therefore, it is critical that a surrogate address these concerns and contingencies prior to conception. This would allow her to stipulate the damages awarded in each scenario. For instance, a surrogate may incorporate a provision requiring payment of child support if she is required to retain the child.<sup>227</sup> In this way, empowering the surrogate to dictate the contractual terms would enable her to preserve her bodily autonomy and execute a contract that aligns with her true intent.

### 3. Compensation

Commercial surrogacy contracts generally provide that the commissioning couple will be responsible for costs the surrogate mother incurs during the course of the pregnancy, such as living expenses, travel expenses, and lost wages.<sup>228</sup> Pregnancy-related costs also include health insurance, attorney’s fees, medical expenses, and counseling services.<sup>229</sup> On average, payments for surrogates range from \$12,000-\$25,000 to compensate for the sacrifices and risks that accompany pregnancy.<sup>230</sup> When considering that these women commit to providing services 24 hours a day for nine months, their salary ranges from fifty cents to three dollars per hour, a rate that falls significantly below minimum wage.<sup>231</sup> This figure illustrates that surrogates are drastically underpaid relative to the physical and

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<sup>223</sup> See Cunningham, *supra note 63*, at 732.

<sup>224</sup> See *In re Baby M*, 537 A.2d 1227, 1256 (N.J. 1998); Cunningham, *supra note 63*, at 722-23 (concluding that surrogacy contracts are unenforceable because such contracts present intractable remedial problems, given that a remedy does not follow a right in the surrogate context).

<sup>225</sup> General principles of contract law proscribe specific performance as a remedy for personal service contracts. However, the ABA’s Model Surrogacy Act allows for a specific performance remedy. See MODEL SURROGACY ACT § 5 (1988).

<sup>226</sup> Cunningham, *supra note 63*, at 747.

<sup>227</sup> See N.H. REV. STAT. ANN. § 168-B:8 (intended parents may be liable for child support if they breach the terms of the agreement).

<sup>228</sup> See York, *supra note 81*, at 398.

<sup>229</sup> Couples acquiring services through commercial agencies may spend upwards of \$40,000-\$120,000 for medical and legal fees, psychological services, health insurance costs, and surrogate fees. These expenses attach to preceding expenditures in relation to sessions of infertility treatment. See GUGUCHEVA, *supra note 23*, at 5.

<sup>230</sup> See GUGUCHEVA, *supra note 23*, at 5; Ali, *supra note 20*.

<sup>231</sup> See *id.* at 5.

psychological risks they undertake<sup>232</sup> and the benefits that accrue to the commissioning couples.<sup>233</sup>

Providing inadequate compensation to surrogates further marginalizes women. Therefore, payment must be adjusted for a surrogate's unique circumstances, including her financial resources and access to healthcare. This safeguards women whose position within society may compromise their reproductive health and well-being.<sup>234</sup> Given that the child's health depends largely on the level of care the surrogate provides, society has an interest in identifying effective compensation schemes to ensure the provision of optimal care.<sup>235</sup> For this reason, women as well as society would benefit from allowing the surrogate to set payment terms and a level of compensation commensurate with individual circumstances and the quality of care provided.<sup>236</sup>

#### 4. Waiting Period

Many commentators have argued that a surrogate must be permitted a waiting period following the child's birth during which time she is able to change her mind and revoke the contract.<sup>237</sup> A "cooling-off" period would allow the surrogate to "renounce performance under the contract without incurring any legal sanction for the breach."<sup>238</sup> This approach is analogous to standard adoption procedures that permit a "grace period" for the birth mother as dictated by state statute.<sup>239</sup> Some feminists argue that deeming parental rights inalienable "degrade[s] women by implying they need to be protected from their 'irrational' or 'whimsical' impulses, and that they cannot understand the import of relinquishing a child."<sup>240</sup> To the

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<sup>232</sup> Few studies have systematically examined the health risks posed by surrogacy. See GUGUCHEVA, *supra* note 23, at 4. However, surrogates face many of the same risks that are associated with assisted reproduction procedures and multiple births, which elevate general pregnancy risks. *See id.*

<sup>233</sup> See Wilkinson, *supra* note 76, at 179. The fee schedule of one agency provides for a \$500 monthly allowance for gas, mileage, and traveling expenses and coverage for additional expenses such as lost wages and childcare. The surrogate receives \$1000 at the time of embryo transfer and a \$2000 monthly allowance throughout the pregnancy. Upon birth, the surrogate receives \$2,500, with these figures augmented if multiple babies are involved. *See* S.E.E.D.S., *supra* note 187.

<sup>234</sup> See SILLIMAN, *supra* note 144, at 50 (explaining the myriad ways in which racism "contributes, directly and indirectly, to disparities in physical health between African American and white populations").

<sup>235</sup> See Banerjee & Basu, *supra* note 181, at 261 (explaining that the level of care the surrogate provides and "the extent of under-compensation are intertwined").

<sup>236</sup> If surrogacy contracts are unenforceable, a surrogate may not receive adequate compensation. This could also increase the demand for low-quality, less costly surrogates. *See* York, *supra* note 81, at 401.

<sup>237</sup> See Brandel, *supra* note 39, at 522-23 (concluding that surrogacy contracts should not be enforced against surrogates but should permit a surrogate to reaffirm or revoke the contract and reconsider her decision after the birth).

<sup>238</sup> *Id.* at 418.

<sup>239</sup> See, e.g., MASS. GEN. LAWS ch. 210, 2 (2002) (requiring a four day waiting period before consent to adoption becomes effective).

<sup>240</sup> Gostin, *supra* note 136, at 16; Shultz, *supra* note 19, at 384 ("In holding that surrogates but not

contrary, allowing the surrogate to retain the authority to assert parental rights responds to informed consent concerns and comports with feminist aims regarding power and decisional autonomy.<sup>241</sup> At the very least, a surrogate should possess the authority to determine whether to incorporate a provision in the contract granting her this option.

### 5. Clinical Decisions

Surrogacy contracts routinely specify whether the intended parents are granted any clinical decision-making authority with regard to the surrogate and the fetus.<sup>242</sup> IVF is an invasive procedure that carries high risks of complications and multiple births.<sup>243</sup> For this reason, surrogacy contracts routinely contemplate the issue of selective reduction and abortion in the case of genetic defects. Surrogates often have minimal control over the number of embryos implanted, while financial factors give the intended parents an incentive to implant a greater number to increase the probability of a pregnancy.<sup>244</sup> The surrogate subsequently bears the risks of multiple embryo implantations.<sup>245</sup> When coupled with disparities in education and bargaining power, the surrogate may lack the authority to request implantation of fewer embryos in order to reduce the risk to her health.<sup>246</sup>

Contracting away basic rights regarding treatment decisions implicates important civil liberties.<sup>247</sup> Public policy concerns support a presumption in favor of allowing a surrogate to retain her medical decision-making authority.<sup>248</sup> Furthermore, requiring a surrogate to undergo invasive treatments or to procure an abortion subverts fundamental rights that many consider inalienable.<sup>249</sup> Feminists have objected to provisions in surrogacy contracts restraining a surrogate's right to terminate a pregnancy.<sup>250</sup> Others argue it is paternalistic to restrict a woman's

other parties to the arrangement must have an opportunity to change their minds after giving birth, the court reinforces stereotypes of women as unstable, as unable to make decisions and stick to them, and as necessarily vulnerable to their hormones and emotions.”).

<sup>241</sup> See Brandel, *supra* note 39, at 498. The court in *Baby M.* struck down the contractual provision in the surrogacy contract which specified that the surrogate's consent was irrevocable. *In re Baby M.*, 537 A.2d, 1227, 1244-45 (N.J. 1998).

<sup>242</sup> See Gostin, *supra* note 136, at 14.

<sup>243</sup> See GUGUCHEVA, *supra* note 23, at 18.

<sup>244</sup> See *id.*

<sup>245</sup> This is notable in light of the increasing risk associated with a greater number of embryos implanted. *See id.*

<sup>246</sup> *See id.* at 18, 24 (noting the highly unstable nature of medical insurance coverage in this context, which can have “massive implications for surrogates without the adequate resources to attain competent legal representation.”).

<sup>247</sup> See Gostin, *supra* note 136, at 14.

<sup>248</sup> The ABA's Model Surrogacy Act provides that a contract must specify that the surrogate mother is the sole party responsible for providing consent with regard to clinical decisions and termination of the pregnancy. *See MODEL SURROGACY ACT § 5* (1988).

<sup>249</sup> See Gostin, *supra* note 136, at 15.

<sup>250</sup> See, e.g., Richard, *supra* note 14, at 214. Even the court in *Baby M.* took issue with the section of the surrogacy agreement restricting the surrogate's right to abort. *See In re Baby M.*, 537 A.2d 1227,

right to voluntarily assume contractual obligations, even if the obligations constrain certain rights.<sup>251</sup> Yet feminist principles reject the notion that intended parents should have the authority to restrict a surrogate's control over her body during pregnancy and substantially deprive her of bodily autonomy.<sup>252</sup> These principles advance the notion of gender equality by aligning with common law doctrine that preserves the bodily integrity of both men and women.<sup>253</sup>

#### 6. Diagnosis of Genetic Abnormality

Contracts often absolve the commissioning couple of parental responsibility if the fetus is diagnosed with a genetic defect and the surrogate refuses an abortion.<sup>254</sup> Given the difficulty of determining the cause of many congenital abnormalities, the commissioning couple may blame the surrogate and potentially sue if she proceeds with the pregnancy against their wishes.<sup>255</sup> In the event the intended parents disclaim responsibility for a child with genetic abnormalities, forms of relief available to the surrogate may be limited.<sup>256</sup> Therefore, it is crucial to discuss this scenario and preemptively define the parties' rights and responsibilities, given the inability to fashion retrospective legal relief after birth.<sup>257</sup> Surrogacy contracts must explicitly state which party shall assume custody of the child in spite of any mental or physical conditions or impairments. A surrogate could incorporate a provision mandating that the intended parents assume custody, regardless of the child's mental or physical condition. This measure could prevent situations in which the intended parents demand termination of a pregnancy when genetically preferable traits are absent.

### CONCLUSION

When Helen Beasley entered into the surrogacy agreement with Charles Wheeler and Martha Berman, she never imagined she would confront the choice of

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1268 (N.J. 1998).

<sup>251</sup> See Mahoney, *supra* note 116, at 186; Radin, *supra* note 70, at 1898.

<sup>252</sup> See Andrews, *supra* note 84, at 168-69 ("In the surrogacy context, feminist principles have provided the basis for a broadly held position that contracts and legislation should not restrict the surrogate's control over her body during pregnancy (such as by a requirement that the surrogate undergo amniocentesis or abort a fetus with a genetic defect).").

<sup>253</sup> In addition, preserving this right aligns with constitutional principles that grant pregnant women, rather than male progenitors, the right to make decisions concerning abortion. *See id.* at 169.

<sup>254</sup> See Richard, *supra* note 14, at 214.

<sup>255</sup> See Brandel, *supra* note 39, at 525.

<sup>256</sup> See Mady, *supra* note 21, at 335-36 (examining the difficulties of establishing a claim arising from breach of a surrogacy contract and fashioning legal or equitable relief associated with congenital abnormalities).

<sup>257</sup> *See id.* at 339 (noting that agencies and surrogates should ensure the appropriate level of screening to filter couples who are unwilling to accept a child with genetic abnormalities). Statutes in some jurisdictions mandate extensive psychological evaluations to determine the parties' suitability to parent and/or assume the inherent risks of such a contract. *See, e.g.,* NEW HAMP. REV. STAT. § 168-B:18 (2010).

aborting a fetus or raising another couple's children alone without financial or emotional support. Wheeler and Berman maintained that Beasley was never "forced" to enter into the contract or undergo the pregnancy.<sup>258</sup> However, the conflict that ensued raises the question of whether Beasley received the proper counseling and guidance prior to entering the agreement. If she had been given broader authority to negotiate the terms of the surrogacy contract, Beasley may have considered the foreseeable consequences of the agreement and attempted to bargain for more favorable terms. This case therefore exemplifies the vulnerability of many surrogates in Beasley's position and highlights the concerns surrounding inequitable bargaining power in the context of surrogacy arrangements.

The far-reaching policy implications of commercial surrogacy have generated considerable commentary regarding the societal impact of reproductive advancements. The enduring moral reservations surrounding the practice have prompted legal restrictions that are paternalistic and overly protective. The rationales supporting these restrictions are "the very rationales that feminists have fought against in the context of abortion, contraception, non-traditional families, and employment."<sup>259</sup> The inadequacy of the current legal protections signals the need to re-envision surrogacy contracts from the surrogate's perspective.<sup>260</sup> A surrogate-focused contract model would lessen the appearance of exploitation, enhance surrogate autonomy, and balance the bargaining power between contracting parties.<sup>261</sup> In this way, such a model would address feminist criticisms of surrogacy and challenge paternalistic restrictions on women's reproductive freedom. In addition, viewing surrogacy through the lens of common law contract principles would enable society to articulate and conceptualize consequences of choosing surrogacy.<sup>262</sup> Empowering surrogates to dictate the terms of surrogacy contracts would thereby acknowledge and attend to the gender-based power differentials that situate women in a subordinate position within society. This approach has the potential to validate surrogates' autonomy and decisional capacity while safeguarding women from exploitative practices.

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<sup>258</sup> Robinson, *supra* note 8.

<sup>259</sup> Andrews, *supra* note 84, at 169.

<sup>260</sup> See WOLIVER, *supra* note 165, at 20 ("Including women's voices within the shifting terrains of the new human reproduction is central to evaluating the ethics, politics, and justice of these developments.")

<sup>261</sup> See Anderson, *supra* note 17, at 627.

<sup>262</sup> See York, *supra* note 81, at 416.