

# (Not) Just Surrogacy

Courtney G. Joslin\*

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

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

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

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\* Martin Luther King Jr. Professor of Law, UC Davis School of Law. I thank Jamie Abrams, Sarah Ainsworth, Doug NeJaime, Kevin Maillard, Kim Mutcherson, Melissa Murray, Rachel Rebouché, Cathy Sakimura, Karla Torres, and Rose Villazor for helpful comments and conversations related to this project. I thank Dean Kevin Johnson and the UC Davis School of Law for generous financial support. I am also grateful to the editors of the *California Law Review*.

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

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## INTRODUCTION

Scholars have long debated whether the practice of surrogacy furthers or inhibits principles of equality and reproductive liberty.<sup>1</sup> For example, in the 1980s and 1990s, some theorists opposed surrogacy based on concerns that it would result in exploitation of women,<sup>2</sup> particularly poor women and women of color who, they predicted, might be targeted to act as surrogates.<sup>3</sup> Others, by contrast, argued that surrogacy bans denied women the freedom to make choices about their bodies and interfered with the liberty interests of intended parents to form families of choice.<sup>4</sup>

Initially, surrogacy opponents were most persuasive. Most jurisdictions either banned the practice or remained silent; but the tide turned in the mid-1990s.<sup>5</sup> Every statutory scheme enacted since then has permitted surrogacy. This ever-increasing body of permissive statutory schemes is not identical; it is far from it. Despite the diversity of approaches, contemporary discussion—both mainstream and in legal scholarship—remains largely fixated on the initial threshold question of whether to ban or to permit surrogacy.<sup>6</sup> By focusing on the ban/permit question, contemporary surrogacy discussions both obscure critical details that lie below the surface and impede robust consideration of whether and to what extent *the ways in which jurisdictions regulate* surrogacy further principles of equality and liberty. This Article fills these gaps.

This gap filling is critically important. Variations in the law of surrogacy hold profound implications for the participants themselves. They may, for

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1. Compare, e.g., JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* (1993) (arguing against a permissive surrogacy approach), and BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD*, (1989) (same), with, e.g., Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L. MED. & HEALTH CARE 72, 72 (1998) (“[T]he rationales that [feminists] and others are using to justify [support for bans on surrogacy] may come back to haunt feminists . . .”), and Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077 (2014) (offering a “progressive, feminist approach” to compensated surrogacy).

2. While most people who act as surrogates are women, some people who act in this capacity are not or do not identify as women. See Courtney G. Joslin, *Surrogacy and the Politics of Pregnancy*, 14 HARV. L. & POL'Y REV. 365, 365 n.2 (2020) [hereinafter Joslin, *Politics of Pregnancy*]. Here I use a gender-specific term because that is the term used by the theorists who took that position. In other parts of this Article, I sometimes use a gender-neutral phrase in recognition of the fact that some people who act as surrogates are not women. At other times, however, I use a gendered term. I do so in recognition of the fact that surrogacy has some gendered implications. For example, as discussed in more detail herein, the ways in which surrogacy is regulated can have profound implications for women's reproductive freedom more broadly.

3. See, e.g., Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17, 30 (1991) (“Minority women increasingly will be sought to serve as ‘mother machines’ for embryos of middle and upper-class clients.” (quoting Jeremy Rifkin & Andrew Kimbrell, *Put a Stop to Surrogate Parenting Now*, USA TODAY, Aug. 20, 1990, at A8)).

4. See, e.g., Andrews, *supra* note 1, at 72.

5. See *infra* Part I.

6. See *infra* Part II.

example, determine whether a person is a parent or a legal stranger.<sup>7</sup> Or they may determine whether a person can make decisions about their own body or whether they can be compelled to undergo unwanted invasive medical procedures.<sup>8</sup>

The obscured details also have consequences for the development of law and policy that flow well beyond the surrogacy participants themselves. Surrogacy law holds the potential to challenge family law rules that long have excluded families that depart from gender- and biology-based norms about the nature of motherhood and fatherhood.<sup>9</sup> Surrogacy laws' details also implicate the scope and meaning of fundamental liberty interests, including the right to form families of choice and reproductive autonomy.<sup>10</sup>

Consider the following scenario that draws from actual fact patterns<sup>11</sup>:

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

That the relevant jurisdiction “permits” surrogacy agreements does not alone dictate which of the three participants are parents. This is true because permissive statutory regimes in the United States do not all authorize the same array of arrangements. Today, for example, many jurisdictions permit surrogacy agreements *regardless* of the marital status, gender, sexual orientation, or genetic connection of the intended parents.<sup>12</sup> In contrast, though, laws in other jurisdictions limit legal protection based on the identity of the intended parents. For example, in Louisiana, surrogacy agreements are enforceable only if the intended parents are married to each other *and* each contributed genetic

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7. See *infra* Part III.B.

8. See *infra* Part III.C.

9. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2305 (2017).

10. See, e.g., Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 484 (2017) (“When viewed through a constitutional analysis that is pro-equal liberty, anti-stigma, and dynamic, marriage-only [assisted reproductive technology] rules present a serious constitutional claim.”) [hereinafter Joslin, *The Gay Rights Canon*]. See generally Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 915 (2019) [hereinafter Joslin, *Autonomy*] (“This Article contends that the conventional approach governing the economic rights of nonmarital families impedes rather than furthers a robust vision of choice in family form.”).

11. In one case—*In re Marriage of Buzzanca*—the married intended father initiated divorce proceedings shortly before the birth of the child conceived pursuant to a surrogacy arrangement. *Buzzanca v. Buzzanca (In re Marriage of Buzzanca)*, 72 Cal. Rptr. 2d 280, 282 (1998). In the divorce proceeding, the intended father argued he was not a parent and had no obligation to support the child. *Id.* The trial court “reached an extraordinary conclusion: [that the resulting child] had *no* lawful parents.” *Id.* This decision was reversed on appeal. *Id.* at 293–94 (declaring the intended parents to be parents).

In another case, the married intended parents refused to accept custody of one of the two children conceived pursuant to a surrogacy arrangement. *Surrogate Birth Produces Twins: Couple Accepts Only the Girl; Mother Is Left with Boy to Care for*, DALL. MORNING NEWS, Apr. 23, 1988, at 8a.

12. See *infra* Part III.B.1, Appendix B.

material.<sup>13</sup> The marriage requirement obviously excludes unmarried couples. The genetic material requirement essentially excludes all same-sex couples, as well as many different-sex couples.

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

Now consider another hypothetical, founded on common practices today<sup>14</sup>:

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

Here too, that the relevant jurisdiction “permits” surrogacy agreements does not alone dictate the outcome. This is true because another axis of variation relates to decision-making authority during the pregnancy. In some permissive jurisdictions, the agreement must allow the person acting as a surrogate<sup>15</sup> to make all medical decisions during pregnancy, including decisions about labor and delivery.<sup>16</sup> In contrast, other permissive surrogacy schemes expressly allow for contract clauses that *require* people acting as surrogates to undergo certain medical treatments even over their contemporaneous objections. Illinois is one such jurisdiction.<sup>17</sup> Illinois law declares that these kinds of contract clauses may be valid and enforceable.<sup>18</sup>

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13. LA. STAT. ANN. §§ 9:2718, :2718.1(6) (2018).

14. It is common for surrogacy agreements to require the person acting as a surrogate to consent to future medical procedures and treatments. *See, e.g.*, Heather E. Ross, *Gestational Surrogacy in Illinois: Contracting the Unknown*, DCBA BRIEF, Dec. 2013, at 16, 17 (“[S]urrogacy agreements typically include language requiring the Gestational Surrogate to submit to medical procedures (i.e., ultrasound, amniocentesis, Cesarean section, etc.) . . . .”); Hillary L. Berk, *Savvy Surrogates and Rock Star Parents: Compensation Provisions, Contracting Practices, and the Value of Womb Work*, 45 LAW & SOC. INQUIRY 398, 412 (2020) (describing clauses in surrogacy contracts addressing “the event that a cesarean section is ordered to deliver the child(ren)”).

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

15. As I explain elsewhere:

I generally use the phrase “person acting as a surrogate,” rather than the more commonly used terms like “surrogate carrier” or “surrogate mother.” “The phrase ‘person acting as surrogate’ better recognizes that panoply of rights for all people acting as surrogates and serves as a useful reminder of their presence in the process throughout.”

Joslin, *Politics of Pregnancy*, *supra* note 2, at 365 n.2 (citation omitted).

16. *See, e.g.*, WASH. REV. CODE § 26.26A.715(1)(g) (Supp. 2019).

17. 750 ILL. COMP. STAT. ANN. 47/25(d)(1) (2019).

18. *Id.* 47/25(d).

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

In the past, the person who gave birth was always considered a legal parent.<sup>19</sup> Hence, children always had mothers at birth.<sup>20</sup> But under permissive surrogacy laws, the person who gave birth may not be the child’s legal parent at birth.<sup>21</sup> Thus, as Douglas NeJaime explains, surrogacy law can “cleave[] the biological process of reproduction from the legal status of motherhood.”<sup>22</sup> By doing so, surrogacy law can challenge deeply rooted family law principles that rest on reproductive biology.<sup>23</sup> Such rules reproduce long-standing sex-based stereotypes about the nature of motherhood and fatherhood.<sup>24</sup> These stereotypes, and the myriad family law rules that reflect them, inflict particularly acute harm on families and individuals that defy them. For example, same-sex parent families—families that do not consist of one mother and one father—may be unprotected by rules rooted in these gender- and biology-based stereotypes.<sup>25</sup> But the harms are not limited to those families alone. Rules that tie motherhood to reproductive biology reinforce the view that all women are mothers.<sup>26</sup> “[T]hey also harm men by viewing fatherhood as derivative.”<sup>27</sup>

Surrogacy law can also further a broader and more inclusive vision of liberty. Surrogacy laws, for example, can allow a wide array of people to form families of choice.<sup>28</sup> They can support principles of reproductive freedom by protecting women’s choices about their reproductive capacities.

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19. *In re C.K.G.*, 173 S.W.3d 714, 729 (Tenn. 2005) (“The common law thus has presumed that the birth mother is the legal mother of the child.”).

20. *See, e.g.*, UNIF. PARENTAGE ACT § 3(1) (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1973) (stating that parentage “may be established by proof of her having given birth to the child”).

21. *See infra* Appendix B.

22. NeJaime, *supra* note 9, at 2305.

23. *Id.* (“Strikingly, the recognition of genetic mothers as legal mothers—and the corresponding nonrecognition of gestational surrogates—made reproductive biology less central to legal parenthood, and thus reduced the salience of a key justification for gender-differentiated parental recognition.”).

24. *Id.* at 2328–29.

25. *See, e.g., Ex rel. A.E.*, No. 09-16-00019-CV, 2017 WL 1535101, at \*10 (Tex. Ct. App. Apr. 27, 2017) (refusing to apply rules to establish the parentage of a husband to a lesbian spouse). Biologically based justifications are frequently invoked to deny recognition of LGBTQ nonbiological parents. *See, e.g., Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017) (holding unconstitutional Arkansas’s refusal to list a lesbian spouse on her child’s birth certificate and rejecting the State’s argument that “a birth certificate is simply a device for recording biological parentage”); *E. J. D.-B. v. U.S. Dep’t of State*, 825 F. App’x 479, 480 (9th Cir. 2020) (mem.) (affirming the trial court’s conclusion that the citizenship statute governing children born abroad to a married U.S. citizen does not require proof of a biological relationship).

26. NeJaime, *supra* note 9, at 2329–30.

27. *Id.* at 2329.

28. *See, e.g., Joslin, The Gay Rights Canon*, *supra* note 10, at 481–87 (developing a broad theory of a liberty to form families of choice).

The extent to which these principles of equality and liberty are furthered, however, depends on the details. Surrogacy laws can, and in some jurisdictions do, embrace families without regard to sex, sexual orientation, marital status, or genetic connection.<sup>29</sup> But, not all existing surrogacy laws do. Some surrogacy laws, like those in Louisiana, only protect married different-sex couples who are both genetically related to the resulting child.<sup>30</sup> Rather than reforming family law in more equitable ways, such rules reinforce a genetically based, heterosexual model of the family. In doing so, they “carry forward legacies of exclusion.”<sup>31</sup>

With respect to reproductive freedom, permissive surrogacy laws enable women to make decisions about their procreative lives and capacities. At the same time, however, some schemes include provisions that are in tension with this principle. Among other things, laws in some jurisdictions permit wide-ranging control and surveillance of people acting as surrogates.<sup>32</sup> Take Oklahoma’s recently enacted law. It allows for the inclusion of contract clauses requiring the person acting as a surrogate to submit to all recommended medical procedures.<sup>33</sup> This could, for example, result in a person—like Davina described above—being required to submit to an unwanted cesarean section or other surgical procedure.<sup>34</sup> Laws like Oklahoma’s reinforce a view that pregnant women’s autonomy is secondary to the interests of other people or even the fetus.<sup>35</sup>

Such rules are troubling when considered within the context of surrogacy. They are even more troubling when one contemplates application of the principle more broadly.<sup>36</sup> These collective concerns are not simply theoretical. Surveillance and control of pregnant people outside the context of surrogacy occurs today in a range of contexts.<sup>37</sup> Indeed, as Michele Goodwin explains: “[L]egislative fetal protection efforts are on the rise, driving the creation, enactment, and enforcement of statutes authorizing . . . intervention in women’s pregnancies.”<sup>38</sup> In addition to longer-running practices of criminalizing pregnant

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29. See *infra* Appendix B.

30. LA. STAT. ANN. § 9:2718.1(6) (2018).

31. NeJaime, *supra* note 9, at 2268.

32. See *infra* Part III.C; see also *infra* Appendix C.

33. OKLA. STAT. tit. 10 § 557.6(D)(1) (Supp. 2020).

34. See, e.g., Joslin, *Politics of Pregnancy*, *supra* note 2, at 377.

35. See Kimberly Mutcherson, *Fetal Rights in the Trump Era*, 95 TEX. L. REV. SEE ALSO 214, 214–15 (2017), <https://texaslawreview.org/wp-content/uploads/2018/01/Mutcherson-Vol95-SeeAlso.pdf> [<https://perma.cc/ZEN3-ZVR2>] (discussing the use of the “fetal-rights” narrative to justify restrictions on women’s reproductive autonomy).

36. See, e.g., Joslin, *Politics of Pregnancy*, *supra* note 2, at 381–85.

37. See, e.g., Khiara M. Bridges, *Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies*, 3 NW. J. L. & SOC. POL’Y 62, 84–86 (2008); Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781, 786–87 (2014); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1252 (2012); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1006–07 (1999); Note, *Rethinking [M]Otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1326–31 (1990).

38. Goodwin, *supra* note 37, at 786.

women's conduct,<sup>39</sup> more recent efforts include “sanctioning women for refusing cesarean sections [and] forcibly confining them to bed rest.”<sup>40</sup> Poor women and women of color disproportionately feel the effects of such policies.<sup>41</sup>

Another mode of variation relates to the status and treatment of the fetus. In many jurisdictions, determinations of parentage do not become effective until there is a child in existence.<sup>42</sup> In other jurisdictions, however, the law allows for such determinations prior to the birth,<sup>43</sup> suggesting that the fetus is an entity to which rights attach. Such rules may impact the legal treatment of the fetus in other contexts. This is particularly true given the myriad contemporary efforts to imbue the fetus with personhood status.<sup>44</sup>

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

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

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39. See, e.g., Paltrow, *supra* note 37, *passim*; Courtney G. Joslin, *Legal Regulation of Pregnancy and Childbirth*, THE CHILD: AN ENCYCLOPEDIA COMPANION 774 (Richard A. Shweder, Thomas R. Bidell, Anne C. Dailey, Suzanne D. Dixon, Peggy J. Miller & John Modell, eds. 2009).

40. Goodwin, *supra* note 37, at 786.

41. See, e.g., Paltrow, *supra* note 37, at 1023–29.

42. See *infra* Part III.B.3.

43. See, e.g., 750 ILL. COMP. STAT. ANN. 47/35(a) (2019); N.H. REV. STAT. ANN. § 168-B:12(I) (2014 & Supp. 2020) (“[A] petition [for a parentage order] may be brought either before, during, or subsequent to the pregnancy. The court shall . . . grant the petition upon a finding [of] substantial compliance . . . Such parentage orders . . . shall conclusively establish or affirm . . . the parent-child relationship.”); N.J. STAT. ANN. § 9:17-67(a), (f) (West Supp. 2020) (providing that the action can be filed in the county in which the resulting child is expected to be born, and that “[i]f the court finds that the parties have complied with the [surrogacy] provisions . . . the court shall enter an order of parentage naming the intended parent as the legal parent of the child”).

44. See Goodwin, *supra* note 37, *passim*.



This intervention is not only important; it is timely. Today, approximately half the jurisdictions—twenty-six states and the District of Columbia—have statutory provisions regulating surrogacy.<sup>45</sup> The contemporary trend strongly favors permissive statutory regimes; twenty-two of the twenty-seven existing schemes are permissive ones.<sup>46</sup> This trend is accelerating and likely to continue. Most of these permissive laws—fourteen of the twenty-two—were enacted in the last ten years.<sup>47</sup> And in 2019 alone, at least six more states considered bills to permit surrogacy.<sup>48</sup> All of this is happening at a time in which broader questions related to equality and liberty hang in the balance. The Supreme Court recently decided that LGBTQ people are protected from employment discrimination under federal law.<sup>49</sup> This term, however, the Court is considering whether and to what extent religious providers may be exempt from bans on sexual orientation and gender identity discrimination.<sup>50</sup> Around the country, government officials are resisting the Supreme Court’s prior directives on LGBTQ equality by invoking reproductive biology.<sup>51</sup> Although the Supreme Court recently held Louisiana’s abortion ban unconstitutional,<sup>52</sup> the future of reproductive autonomy and the continued vitality of *Roe v. Wade* remain under assault.<sup>53</sup> In short, it is critical to pay careful attention not just to whether jurisdictions should allow surrogacy, but also to *how* they regulate surrogacy.

This Article proceeds in four Parts. Part I begins by offering context. It tells the evolution of surrogacy advocacy and law in the United States. Part II explores what we do know about surrogacy law. It demonstrates that current descriptions of surrogacy law are incomplete. Despite the enactment of many and, importantly, varied permissive surrogacy schemes in the United States, descriptions of the law continue to skim the surface. In so doing, these

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45. See *infra* Appendix A.

46. See *infra* Appendix A.

47. See *infra* Appendix A.

48. See, e.g., H.R. 6507, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019); H.R. 1369, 121st Gen. Assemb., First Reg. Sess. (Ind. 2019); S. 77 / H.R. 139, 191st Gen. Ct., 2019–20 Sess. (Mass. 2019); Assemb. 1071 / S. 2071, 2019 Leg., 2019–20 Reg. Sess. (N.Y. 2019); H.R. 243, 2019 Gen. Assemb., 2019 Sess. (Pa. 2019); H.R. 5707, 2019 Gen. Assemb., Jan. Sess. (R.I. 2019).

49. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

50. *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (granting certiorari in case raising the question of whether the government can condition a religious adoption agency’s participation in government foster-care certification services on the agency’s compliance with the government’s nondiscrimination policy); see also *Fulton v. City of Philadelphia, Pennsylvania*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/> [<https://perma.cc/KV2C-NMWZ>].

51. See, e.g., *Henderson v. Box*, 947 F.3d 482, 487 (7th Cir. 2020) (rejecting Indiana’s biology-based justification for refusing to list a female spouse on her child’s birth certificate), *cert. denied*, No. 19-1385, 2020 WL 7327836 (U.S. Dec. 14, 2020).

52. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2113 (2020).

53. See, e.g., Sabrina Tavernise & Elizabeth Dias, *The Supreme Court Stopped Anti-Abortion Momentum. For Now.*, N.Y. TIMES (June 29, 2020) [<https://perma.cc/H86P-8FQ5>] (“The anti-abortion movement has a long pipeline of new cases that, if taken up by the Supreme Court, could present a more direct challenge to *Roe v. Wade* [than did *June Medical Services*].”).

descriptions obscure critical variations in the law. Part III considers why these details have remained hidden, despite their consequential nature both to the individuals involved in surrogacy arrangements and to the development of law and policy more broadly.

Next, drawing from a meticulous analysis of existing law set forth in the Appendices, Part IV offers the first comprehensive typology of surrogacy statutes. In addition to identifying previously hidden details, it theorizes the consequences of these details both within and without surrogacy. Finally, Part V draws insights from this uncovered story to chart a more just path forward for the law of surrogacy and beyond.

## I.

### SURROGACY IN THE UNITED STATES: A BRIEF HISTORY

Media accounts report that compensated surrogacy arrangements were first entered into in the United States in the late 1970s and early 1980s.<sup>54</sup> At the time, there was no U.S. law expressly addressing the permissibility of these arrangements.<sup>55</sup> There was also no developed consensus.<sup>56</sup> Indeed, few people even knew about the issue. In this period, “newspaper stories about surrogacy parenting appeared only intermittently.”<sup>57</sup>

This changed during the *Baby M* litigation.<sup>58</sup> The *Baby M* case was a parentage and custody dispute between the intended parents—William and Elizabeth Stern—and the woman who acted as a genetic surrogate<sup>59</sup>—Mary Beth Whitehead.<sup>60</sup> After the child was born, Whitehead refused to relinquish custody of the child.<sup>61</sup> Litigation ensued. Whitehead argued that she was a parent of the resulting child and should be awarded custody.<sup>62</sup> The Sterns asserted that the court should enforce the contract and terminate Whitehead’s parental rights.<sup>63</sup>

54. See, e.g., Garry Abrams, *A Setback for Surrogate Parenting?*, L.A. TIMES, Feb. 4, 1988, at G1; NOEL P. KEANE & DENNIS L. BREO, *THE SURROGATE MOTHER* 88–94 (1981).

55. See, e.g., Lori B. Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, 17 HASTINGS CTR. REP., Oct.–Nov. 1987, at 31, 31, 40 nn.6–7.

56. See, e.g., *In re Baby M*, 525 A.2d 1128, 1138 (N.J. Super. Ct. Ch. Div. 1987) (dictum) (“The issues and dimensions of surrogacy are still evolving.”), *aff’d in part and rev’d in part*, 537 A.2d 1227 (N.J. 1988); SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* 22 (2007) (“Polls [taken during the *Baby M* litigation] also captured the public’s contradictory and ambivalent response to surrogate motherhood . . .”).

57. MARKENS, *supra* note 5656, at 20.

58. See *In re Baby M*, 537 A.2d at 1234.

59. Genetic surrogacy is where the person acting as a surrogate provides the ova and is therefore genetically related to the resulting child; gestational surrogacy is where the person who acts as a surrogate does not provide the ova. COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 4:1 (2020–2021 ed. 2020).

60. *Id.* at 1235.

61. *Id.* at 1236–37.

62. *Id.* at 1238.

63. *Id.* at 1237. Ultimately, the New Jersey Supreme Court held that the genetic surrogacy agreement was void and unenforceable. *Id.* at 1240 (“We have concluded that this surrogacy contract is

The case garnered considerable public and media attention.<sup>64</sup> In 1987, the year of the Baby M custody trial, “[media] coverage of the issue peaked.”<sup>65</sup> The case, and the widespread media coverage of it, “etch[ed] surrogacy indelibly onto the national consciousness.”<sup>66</sup> More attention, however, did not bring agreement on the path forward.

The most vocal opponents of surrogacy at the time were religious groups and some women’s rights advocates.<sup>67</sup> These “unlikely alliances”<sup>68</sup> raised a number of concerns. Many of the objections raised by women’s rights advocates were grounded in issues of equality and reproductive freedom. One of the most commonly stated concerns was exploitation.<sup>69</sup> Some commentators worried that poor women of color might be turned into a “breeder class” for rich white people.<sup>70</sup> Critics also argued that surrogacy commodified reproduction and, in this way, harmed not only the individual women but also the child and society as a whole.<sup>71</sup>

Advocates on the other side also relied on equality and liberty rhetoric. Permissive legislation, they argued, furthered autonomy and reproductive choice.<sup>72</sup> Permissive regimes allowed women to make decisions about their own

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invalid.”). The court further held that Mary Beth Whitehead—the person who acted as a genetic surrogate—was a parent of the resulting child. *Id.* at 1253.

64. Catherine Gewertz, *Surrogate Motherhood: A Wrenching Test of Ethics*, L.A. TIMES, Nov. 18, 1990, at OCA1 (“Surrogacy burst on the national scene in 1987” during the *Baby M* dispute).

65. MARKENS, *supra* note 56, at 20.

66. *Id.*

67. See, e.g., Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 109 (2009) (“Opponents of surrogacy [were] mostly feminists and religious groups . . .”); MARKENS, *supra* note 56, at 163–64.

68. Catherine Clabby, *Surrogate Moms on Way Out? New Law Prohibits Pregnancy Profits*, TIMES UNION (Albany), July 26, 1992, at 11.

69. MARTHA A. FIELD, SURROGATE MOTHERHOOD 25 (1988) (“One of the most serious charges against surrogate motherhood contracts is that they exploit [the] women [acting as surrogates].”); see also MARKENS, *supra* note 56, at 17 (noting feminists who argued that surrogacy raised “exploitative (and racist) potentials”).

70. E.g., Khiara M. Bridges, Windsor, *Surrogacy, and Race*, 89 WASH. L. REV. 1125, 1134 (2014) (noting that some commentators “imagined a dystopic future in which there exists a ‘breeder class’ composed of indigent black women” (quoting Allen, *supra* note 3, at 30)); see also *supra* note 3.

71. See, e.g., Elizabeth S. Anderson, *Is Women’s Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 75 (1990) (arguing that when reproduction “is treated as a commodity, the women who perform it are degraded”); Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1928–36 (1987) (discussing commodification theory as applied to surrogacy).

72. See, e.g., Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, in SURROGATE MOTHERHOOD 3, 4 (Larry Gostin ed., 1990) (arguing that permitting surrogacy can promote the “exercise of constitutional rights to privacy and autonomy”); MARKENS, *supra* note 56, at 57–58 (stating that Marsha Elliot of the National Organization for Women (NOW) Executive Committee testified: “We affirm our commitment to the right of every woman to control her body which includes among other things the right to have and not to have children as a single parent, as part of a couple and as a surrogate” (quoting *Hearing on Surrogate Parenting Before the S. Comm. on Health & Hum. Servs.*, 1987–88 Sess. (Cal. 1987))). For a more contemporary articulation of this argument, see, for example, Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L.

bodies and their reproductive lives.<sup>73</sup> Surrogacy also facilitated family creation for the intended parents, furthering their constitutionally protected interest in forming families of choice.<sup>74</sup> An even larger group remained in the middle, undecided on the issue.<sup>75</sup>

Initially, the “curious” alliance<sup>76</sup> of surrogacy opponents was the larger and more successful contingent.<sup>77</sup> By late 1988, six states had passed laws “banning the agreements or declaring them void;”<sup>78</sup> these bans constituted the majority of enacted legislation at the time.<sup>79</sup> The tide soon shifted, however. In 1990 and 1991, respectively, New Hampshire and Virginia became the two first states to enact comprehensive statutory schemes permitting surrogacy.<sup>80</sup> While New York passed a statutory ban in 1992, that “statute represents the political high-water mark of the antisurrogacy movement.”<sup>81</sup> Every surrogacy scheme enacted in the United States since then has permitted surrogacy in at least some

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REV. 1235, 1293 (2014) (“[L]aws prohibiting or restricting access to surrogacy infringe upon a fundamental right protected substantively by the Due Process Clause.”).

73. See, e.g., MARKENS, *supra* note 56, at 17 (“[L]iberal feminists and their supporters defend a woman’s right to use her body as she chooses, even if that means being a surrogate.”).

74. See, e.g., GOSTIN, *supra* note 72, at 6 (“The genetic father and his partner use the surrogacy arrangement for the purpose of having a child, implementing their personal decision to procreate and to obtain the right to intimate association with the future offspring.”).

75. See, e.g., MARKENS, *supra* note 56, at 160 (“A lobbyist for Planned Parenthood told [an] aide [to California state Senator Watson] that their membership was split fifty-fifty on the issue. As a result, the organization did not take an official position on [Senator Watson’s surrogacy] bill”); Myrna Oliver, *Baby M: Old Story but the Legal Issues Remain Unresolved*, L.A. TIMES, Apr. 5, 1987, at A3.

76. Scott, *supra* note 67, at 129 (describing this coalition as “a curious one”). Susan Markens described the groups as “strange bedfellows.” MARKENS, *supra* note 56, at 163.

77. See, e.g., Oliver, *supra* note 75 (noting the “small constituency demanding laws [permitting surrogacy]”).

78. Scott, *supra* note 67, at 117.

79. *Id.*; see also Andrews, *supra* note 55, at 34 (discussing legislative developments).

80. See *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1548–49 & nn.159–60 (1990) (citing H.R. 1426-FN, Gen. Ct., 1990 Sess. § 168-B (N.H. 1990) (codified at N.H. REV. STAT. ANN. § 168-B)); UNIF. L. COMM’N, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 128TH YEAR 558 (2019) (stating that Virginia and North Dakota enacted the Uniform Status of Children of Assisted Conception Act (USCACA)). The New Hampshire scheme allowed courts to approve surrogacy agreements and find the intended parents to be the legal parents. Robert L. Stenger, *The Law and Assisted Reproduction in the United Kingdom and United States*, 9 J.L. & HEALTH 135, 158 n.169 (1994). The Virginia scheme made Virginia the first and only state to enact the permissive version of USCACA. Walter J. Wadlington, *Contracts to Bear A Child: The Mixed Legislative Signals*, 29 IDAHO L. REV. 383, 395 (1992) (“Unlike North Dakota, Virginia elected to adopt the basic [USCACA] framework for recognizing surrogacy contracts.”).

81. Scott, *supra* note 67, at 120.

circumstances.<sup>82</sup> Thus, as Professor Richard Storrow put it, “the legislative trend, if there is one, is toward legaliz[ing] surrogacy.”<sup>83</sup>

These permissive statutory schemes, however, are not identical. At the most fundamental level, they differ with regard to which types of surrogacy are permitted. Some permissive schemes expressly permit only gestational surrogacy and are silent as to genetic surrogacy. This is true, for example, in California.<sup>84</sup> Other permissive surrogacy schemes expressly permit gestational surrogacy and expressly prohibit genetic surrogacy. This is true, for example, in New York.<sup>85</sup> In contrast, the laws in other jurisdictions permit and regulate both gestational and genetic surrogacy agreements. The District of Columbia is one such jurisdiction.<sup>86</sup>

Permissive laws also differ with regard to what kinds of payments are allowed. Some jurisdictions, like Virginia, permit only reimbursement of expenses.<sup>87</sup> Other jurisdictions, such as Utah, expressly allow for compensation.<sup>88</sup> Although they remain insufficiently theorized, contemporary scholarly literature and media accounts catalogue these basic descriptions about which types of surrogacy are permitted or banned.<sup>89</sup>

Other types of variations, however, remain largely overlooked. Here I am referring to the ways in which the law regulates or safeguards the interests of the participants. Briefly, existing permissive statutory regimes differ in this regard in significant ways. Take Arkansas. Arkansas’s one-provision scheme simply

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82. Nicolas, *supra* note 72, at 1288 (stating that “[s]ince 1993, only one state has enacted a law prohibiting or criminalizing any aspect of surrogacy” and citing, as that one example, a provision enacted in Virginia—a state that “generally facilitat[es] surrogacy arrangements”—which “imposed criminal penalties on intermediaries who earn a fee for facilitating surrogacy agreements”). Thus, to be clear, some surrogacy laws enacted after this tipping point regulate or prohibit specific types of conduct related to surrogacy arrangements, but any such provisions were enacted in states that also *permit* surrogacy at least under certain conditions.

83. Richard F. Storrow, *Surrogacy: American Style*, in SURROGACY, LAW AND HUMAN RIGHTS 193, 198 (Paula Gerber & Katie O’Byrne eds., Routledge 2016) (2015).

84. CAL. FAM. CODE § 7962 (West 2013 & Supp. 2020).

85. N.Y. FAM. CT. ACT § 581-401(a), (c) (McKinney, Westlaw through L. 2021, chs. 1–23) (providing that compliant gestational surrogacy agreements “will be enforceable” and providing that such an agreement “may provide for payment of compensation”); N.Y. DOM. REL. LAW. § 122 (McKinney, Westlaw through L. 2021, chs. 1–23) (providing that “[g]enetic surrogate parenting agreements are hereby declared contrary to the public policy of this state, and are void and unenforceable”).

86. D.C. CODE § 16-401(22)–(23) (Supp. 2020). Other jurisdictions that permit genetic surrogacy include Florida, Maine (family members only), Vermont (family members only), Virginia, and Washington. FLA. STAT. § 63.213(6)(h) (2019); ME. STAT. tit. 19-A, § 1931(1)(E) (2020); VT. STAT. ANN. tit. 15C, § 801(a)(4) (2019); VA. CODE ANN. § 20-156 (2016 & Supp. 2020); WASH. REV. CODE § 26.26A.700(3) (Supp. 2019).

87. VA. CODE ANN. § 20-162(A), (B)(3).

88. UTAH CODE ANN. § 78B-15-803(2)(g) (LexisNexis Supp. 2020).

89. See, e.g., Darra L. Hofman, “*Mama’s Baby, Daddy’s Maybe: A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*,” 35 WM. MITCHELL L. REV. 449, 454–60 (2009) (charting whether surrogacy contracts are criminalized, unenforceable, probably unenforceable, uncertain, probably enforceable, or enforceable).

declares that the intended father who contributes sperm is the legal parent of a child born as the result of a surrogacy.<sup>90</sup> It does not expressly address the parentage of the intended male-gamete provider's unmarried partner. The statute also does not set forth any requirements for the agreement to be enforceable. On the other end of the spectrum are jurisdictions like Washington. Washington's surrogacy scheme is longer and more comprehensive.<sup>91</sup> Importantly, this more detailed scheme sets forth a range of requirements intended to safeguard the parties and to fulfill important policy goals.

In the Sections that follow, this Article considers why these critical details remain shrouded. It then seeks to fill this critical gap by offering a comprehensive descriptive account of existing law.

## II.

### EXISTING DESCRIPTIONS AND THEIR LIMITATIONS

This Section briefly canvases existing descriptions of U.S. surrogacy law. In short, despite important variations in the law of surrogacy, the contemporary conversation is largely framed around a basic binary distinction—whether the jurisdiction bans or permits surrogacy. This is true both in popular media descriptions and, to a lesser extent, in the legal literature.

In the simplest formulation, the jurisdiction's approach is designated by color. Popular media often use the color red to designate jurisdictions that ban surrogacy, either civilly, criminally, or both.<sup>92</sup> Maps often use the color green to denote jurisdictions that permit at least some forms of surrogacy. Different sources characterize jurisdictions differently, but that level of detail is typical.<sup>93</sup> Surrogacy maps may also indicate *which types* of surrogacy—gestational and/or genetic, compensated and/or uncompensated—are permitted or banned by the jurisdiction.<sup>94</sup>

News reports reinforce this permit/ban focus. A series of maps included in the *New York Times*, for example, divides jurisdictions into the following categories: (1) "Statutes permit surrogacy, some with restrictions," (2) "Statutes

90. See ARK. CODE ANN. § 9-10-201(b)–(c) (2015).

91. See WASH. REV. CODE §§ 26.26A.700–.785 (Supp. 2019).

92. See, e.g., *The United States Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS LLC, <https://www.creativefamilyconnections.com/us-surrogacy-law-map> [https://perma.cc/J8B3-KDKT] (listing Louisiana, Michigan, and Nebraska as "red light" jurisdictions).

93. Compare *id.* (listing forty-one states and the District of Columbia as "green light" jurisdictions), with *Surrogacy Laws by Country*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Surrogacy\\_laws\\_by\\_country](https://en.wikipedia.org/wiki/Surrogacy_laws_by_country) [https://perma.cc/M884-5BTM] (identifying forty-six states and the District of Columbia where, variously, "[b]oth gainful and altruistic forms [of surrogacy] are legal," "[o]nly altruistic [surrogacy] is legal," or there is "[n]o legal regulation" of surrogacy).

94. See, e.g., *Current Law*, SURROGACY360, <https://surrogacy360.org/considering-surrogacy/current-law/> [https://perma.cc/35AC-R8DW] (identifying six categories and using the commercial/altruistic distinction); *The United States Surrogacy Law Map*, *supra* note 92 (employing prohibition of compensated surrogacy contracts as a "red light" classifier).

prohibit enforcement of surrogacy contracts,” (3) “At least one court opinion upholds some form of surrogacy,” and (4) “There is neither a statute nor published case on surrogacy.”<sup>95</sup> This fixation pervades legal scholarship as well.<sup>96</sup>

To be sure, these accounts communicate useful and important information. This basic question—whether surrogacy (or at least some form of surrogacy) is permitted within the jurisdiction—is a critical piece of data. It is certainly important for potential participants to know whether their conduct will be a crime under the law of the relevant jurisdiction.<sup>97</sup>

Focusing only on the one-dimensional permit/prohibit question, however, can lead to a few problems. First, binary surveys can be incomplete and even misleading. This is true because in a number of jurisdictions, the law bans some forms of surrogacy but permits other forms of surrogacy. For example, North Dakota law provides that surrogacy agreements are void<sup>98</sup> *unless* they involve a child conceived using the sperm and egg from the two intended parents.<sup>99</sup> Since

95. Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), <https://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html> [<https://perma.cc/PV72-9AMN>].

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

97. Consider, for instance, Professor Peter Nicolas’s experience with surrogacy. In his law review article, he described how he and his husband pursued surrogacy outside their home state of Washington because Washington law at the time “not only render[ed] compensated surrogacy contracts unenforceable, but actually ma[de] it a *crime* to enter into them.” Nicolas, *supra* note 72, at 1238–39 (footnote omitted). Washington amended its surrogacy provisions in 2018. Uniform Parentage Act, ch 6, 2018 Wash. Sess. Laws 158 (codified at WASH. REV. CODE §§ 26.26A.005–26.26A.903, 19.380.010).

98. N.D. CENT. CODE § 14-18-05 (2017).

99. *Id.* §§ 14-18-01(2), -08. Indeed, it may be the case that the agreement is void unless the gametes are from the two intended, *married* parents. See, e.g., *id.* § 14-18-05 (“Any agreement in which a woman agrees to . . . relinquish [her] rights and duties as parent of a child conceived through assisted conception is void.”); *id.* § 14-18-01(1) (“‘Assisted conception’ means a pregnancy resulting from insemination of an egg . . . with sperm . . . by means other than sexual intercourse . . . [except] pregnancy resulting from the insemination of an egg of a wife using her husband’s sperm.”).

The provisions are not a model of drafting clarity. While two of the provisions cited immediately above could be interpreted to mean that a surrogacy agreement is *void unless* the embryo used was created with gametes from the *two married, intended parents*, two other provisions, when read together, suggest that the intended parents need not be married. *Id.* § 14-18-08 (“A child born to a gestational carrier is a child of the intended parents for all purposes and is not a child of the gestational

the state bans most, but not all, surrogacy arrangements, it is difficult to accurately categorize the status of the law using a simple permit/ban designation. More fundamentally, this frame suggests that the permit/ban question is the only, or at least the most important, question to be asked. In this way, it obscures a range of other issues that may well have a profound effect on the experiences of parties to any such arrangement and on the development of law and policy more broadly.

A few academic sources go a step further by cataloguing some of the surrogacy laws' substantive or procedural requirements.<sup>100</sup> Professor Peter Nicolas, for example, offered a six-category rubric.<sup>101</sup> The category designations turn on the extent to which the jurisdiction "overregulate[s]" the process.<sup>102</sup> Even these more detailed descriptions still offer only a partial picture, often a one-sided picture *focusing on the intended parents*.<sup>103</sup> For example, Professor Dave Snow ranked Canadian statutes "along a spectrum from permissive to restrictive."<sup>104</sup> As he put it, "parentage policy becomes more permissive if there are *fewer legal barriers for intended parents*."<sup>105</sup>

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

### III.

#### ACCOUNTING FOR THE OMISSIONS

As described in Part II, much of the contemporary conversation about surrogacy overlooks critical differences in the ways jurisdictions regulate

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carrier and the gestational carrier's husband, if any."); *id.* § 14-18-01(2) ("Gestational carrier" means an adult woman who enters into an agreement to have an embryo implanted in her and bear the resulting child for intended parents, where the embryo is conceived by using the egg and sperm of the intended parents."). There is no published case law that attempts to interpret or reconcile these provisions.

100. See, e.g., INT'L HUM. RTS.: POL'Y ADVOC. CLINIC, CORNELL UNIV. L. SCH. & TRANSNAT'L HUM. RTS. SEMINAR, NAT'L L. UNIV., DELHI, SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED? 1 (2017), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2685&context=facpub> [<https://perma.cc/7GVR-7TK7>].

101. Nicolas, *supra* note 72, at 1240.

102. *Id.* at 1241.

103. See, e.g., Hofman, *supra* note 89, at 460 ("[T]hree issues most sharply divide legislatures . . . whether the surrogacy is traditional or gestational, whether the surrogate is compensated beyond expenses, and the marital status and sexual orientation of the intended parents.>").

104. Dave Snow, *Measuring Parentage Policy in the Canadian Provinces: A Comparative Framework*, 59 CANADIAN PUB. ADMIN. 5, 7 (2016).

105. *Id.*



surrogacy. This Section identifies and examines some of the forces that contribute to this trend.

#### A. Historical Perspective

First, though, some historical context is useful. In the early years of surrogacy practice in the United States, surrogacy emerged as a hot political issue. The media devoted significant attention to the *Baby M* litigation in New Jersey.<sup>106</sup> Unsurprisingly, much consideration focused on the basic question of whether surrogacy should be permitted. For example, numerous books were written at the time taking one side or the other in this debate regarding whether to ban or permit surrogacy.<sup>107</sup> Importantly, however, the discussion at the time *also* engaged with the details of permissive regimes, including details as they relate to the intended parent *and* as they relate to the person acting as a surrogate.

With respect to rules regarding intended parents, for example, scholars and advocates discussed and debated whether permissive schemes should limit enforceable agreements only to those involving intended parents who were married. The Uniform Law Commission, for example, answered that question in the affirmative in 1988.<sup>108</sup> Others opposed marriage-based limitations with respect to intended parents. For example, the 1988 surrogacy policy of the American Civil Liberties Union (ACLU) provides: “The state cannot discriminate against a person who seeks participation in a surrogacy arrangement on the basis of age, race, sex, sexual orientation, economic or social status, religion, *marital status*, or physical or mental condition.”<sup>109</sup> The 1988 American Bar Association (ABA) Family Law Section’s Model Surrogacy Act (which was never approved by the ABA)<sup>110</sup> incorporated an inclusive rule regarding intended parents that did not require a marital relationship.<sup>111</sup> The early models also took varied approaches with regard to whether the intended parents must prove that they had a “medical need” to use surrogacy to have children; the

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106. See, e.g., MARKENS, *supra* note 56, at 20–22.

107. Books arguing that surrogacy should be banned include RAYMOND, *supra* note 1; ROTHMAN, *supra* note 1; FIELD, *supra* note 69; PHYLLIS CHESLER, SACRED BOND: THE LEGACY OF *BABY M* (1988); GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS (1985). Books arguing that surrogacy should be permitted include LORI ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, & BRAVE NEW BABIES (1989).

108. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1(3) (UNIF. L. COMM’N 1988) (“‘Intended parents’ means a man and woman, married to each other, who enter into [a surrogacy] agreement under this [Act] . . .” (second alteration in original)).

109. SURROGATE MOTHERHOOD, *supra* note 72, app. IV at 294 [hereinafter 1988 ACLU Policy Statement] (emphasis added); see also *id.* at 295 (“[T]he state may not limit surrogacy arrangements to married couples.”); *id.* at 294 (“[T]he ACLU would oppose any law limiting access to surrogacy arrangements to heterosexuals.”).

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

111. MODEL SURROGACY ACT § 2(c) (AM. BAR ASS’N, Draft 1988) (“Intended Parent: The individual or individuals who enter into a surrogacy agreement with a surrogate with the intent to become the legal parent or parents of the child born to the surrogate.”).

Uniform Status of Children of Assisted Conception Act (USCACA) included a so-called “medical need” requirement, while the Model Surrogacy Act did not.<sup>112</sup>

There was also robust engagement with the rules related to people acting as surrogates. Scholars writing in this period noted, for example, that surrogacy contracts often contained clauses regulating the decision-making and behavior of people acting as surrogates.<sup>113</sup> Writing in 1988, Alta Charo explained that surrogacy contracts at the time “typically prohibit[ed] the mother from smoking, drinking alcohol, and taking illegal drugs [and required her] to abide by physician’s orders.”<sup>114</sup> Scholars may have been particularly attentive to this issue given that the contract in the widely watched *Baby M* case contained such limitations.<sup>115</sup> Surrogacy contracts at the time also often included provisions specifically addressing whether the person acting as a surrogate could terminate the pregnancy through abortion and the circumstances under which they must do so. For example, the contract in the *Baby M* case declared that Mary Beth Whitehead would “not abort the child once conceived except, if in the professional medical opinion of the inseminating physician, such action is necessary for [her] physical health” or if the fetus was “physiologically abnormal.”<sup>116</sup> The contract further required Whitehead to have an abortion “upon demand of” the intended father.<sup>117</sup> Scholars debated whether these kinds of contract provisions could be enforced. Laurence Tribe wrote that the right to terminate a pregnancy is inalienable.<sup>118</sup> Richard Epstein, in contrast, took the position that *any* clause in a surrogacy agreement, including abortion clauses,

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112. Compare UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 6(b)(2) (requiring that “the intended mother is unable to bear a child or is unable to do so without unreasonable risk to an unborn child or to the physical or mental health of the intended mother or child, and the finding is supported by medical evidence”), with MODEL SURROGACY ACT § 5 (omitting medical need requirement).

113. E.g., Karen H. Rothenberg, *Surrogacy and the Health Care Professional: Baby M and Beyond*, in SURROGATE MOTHERHOOD, *supra* note 72, at 201, 210 (“Typical contractual provisions create limitations on the surrogate’s behavior and control during pregnancy.”); Thomas Wm. Mayo, *Medical Decision Making During a Surrogate Pregnancy*, 25 HOUS. L. REV. 599, 604 (1988) (noting that most surrogacy contracts at the time included clauses regulating the behavior and medical decision-making of people acting as surrogates).

114. R. Alta Charo, *Legislative Approaches to Surrogate Motherhood*, in SURROGATE MOTHERHOOD, *supra* note 72, at 88, 93.

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

116. *Id.* at 1268.

117. *Id.* at 1268. Other “sample” contracts available at the time included similar provisions. See, e.g., Katie Marie Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263, 280–82 (1981); KEANE & BREO, *supra* note 54, at 294.

118. Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 338 (1985) (“[T]he rights of women to terminate unwanted pregnancies are . . . inalienable . . . .”); see also Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1937 (1986) (“[C]ourts should hold specific performance of the promise not to abort unconstitutional.”).

should be enforceable.<sup>119</sup> Scholars also debated whether contract clauses that limited other kinds of medical decisions during pregnancy were enforceable.<sup>120</sup> Larry Gostin, who served as chair of the ACLU's Special Committee on Surrogacy Parenting, argued that these kinds of clauses were impermissible: "The rights to choose one's lifestyle and medical treatment are among the most private aspects of human life."<sup>121</sup> "Since the government cannot reach into this intensely private domain," he continued, "it is difficult to envisage a private party having the power to do so based upon a contractual obligation."<sup>122</sup> Lori Andrews also raised normative concerns about provisions that required the person acting as a surrogate to "obey all doctor's orders."<sup>123</sup> Others argued to the contrary.<sup>124</sup>

During this period, concerns about control of pregnant women's bodies were very much on the forefront. In 1992, *Roe*'s future was on the line. Ultimately, the core principles of *Roe* narrowly survived the challenge in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>125</sup> But in the years leading up to and following that decision, the Supreme Court slowly chipped away at women's access to abortion. Not unrelatedly, this period saw a rise in the rhetoric of so-called "fetal rights."<sup>126</sup> In a range of contexts, opponents of reproductive freedom invoked so-called fetal rights to justify control over pregnant women. As the *Harvard Law Review* wrote in 1990: "Regulation of women's conduct during pregnancy represents a new variation in the continuing

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119. Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2336 (1995) ("[I]t cannot be regarded as unjust or unwise that [the intended father's] decision should determine whether the abortion should take place for precisely those reasons that are so important to ordinary married couples.").

120. See, e.g., Mayo, *supra* note 113, at 636–43 (reviewing arguments).

121. Gostin, *supra* note 72, at 14.

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

123. See Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2372 (1995) (quoting Epstein, *supra* note 119, at 2334). These concerns, however, were allayed by Andrews' conclusion that other laws and social forces would militate against the future inclusion, or at least the enforcement of, clauses limiting medicinal decisionmaking of the person acting as a surrogate. See *id.* at 2372–74. It appears that Professor Andrews might have been wrong in this regard. Existing studies suggest that these kinds of provisions remain common in surrogate agreements. See, e.g., Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 LAW & SOC'Y REV. 143, 156–57 (2015) (detailing common contract provisions).

124. See, e.g., Epstein, *supra* note 119, at 2335 ("To argue that these contractual terms are inconsistent with the autonomy of the surrogate mother is to miss the function of all contractual arrangements over labor.").

125. See C. Steven Bradford, *What Happens If Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 88–89, 89 n.6 (1993).

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

debate over fetal rights and women's reproductive freedom."<sup>127</sup> Women's rights advocates expressed alarm about this trend.<sup>128</sup>

These debates influenced the development and content of model and uniform laws on surrogacy produced in this period. The ABA Family Law Section approved the Model Surrogacy Act in 1988.<sup>129</sup> The same year, the Uniform Law Commission (ULC) approved the USCACA.<sup>130</sup> Both Acts, for example, allow for compensation,<sup>131</sup> and both Acts provide that people acting as surrogates must be permitted to make decisions about their bodies during their pregnancy.<sup>132</sup> In sum, in the early years of surrogacy practice, there was a fairly robust conversation not just about the practice of surrogacy per se but also with regard to the details of permissive statutory schemes.

Fast forward to 2020. Many more jurisdictions now have permissive statutory schemes in place—twenty-two to be precise.<sup>133</sup> Despite numerous and varied models out there, public and scholarly engagement with the details of these schemes has dropped off markedly.

Take Illinois. When Illinois approved its surrogacy scheme in 2004 under the Gestational Surrogacy Act,<sup>134</sup> there were “few opponents—and no women's groups—[that] spoke against [the legislation].”<sup>135</sup> There was little to no legislative opposition either. The final votes in the House and the Senate were unanimous.<sup>136</sup> This was true even though Illinois's statutory scheme includes a number of provocative and controversial provisions. For example, as discussed in more detail in Part IV below, Illinois law provides that the agreement may include contract clauses that limit and regulate the bodily autonomy and

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127. Note, *supra* note 37, at 1325.

128. See, e.g., Mutcherson, *supra* note 35, at 214–15.

129. MODEL SURROGACY ACT 123 (AM. BAR ASS'N, Draft 1988); see also H. Joseph Gitlin, *Family Law Section Approves Model Surrogacy Act: A Comment*, 22 FAM. L.Q. 145 (1988) (discussing the debates surrounding the approval of the Act as chair of the Family Law Section's Surrogacy Committee).

130. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT cover (UNIF. L. COMM'N 1988); see also Mimi Yoon, Note, *The Uniform Status of Children of Assisted Conception Act: Does It Protect the Best Interests of the Child in a Surrogate Arrangement*, 16 AM. J.L. & MED. 525, 544 (1990). USCACA was approved by the American Bar Association in 1989. *Supra*.

131. MODEL SURROGACY ACT § 3(b); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 9(a).

132. The Model Surrogacy Act provides that the agreement must “[s]tate that the surrogate shall be the sole source of consent with respect to the clinical management of the pregnancy, including termination of the pregnancy.” MODEL SURROGACY ACT § 5(k). USCACA provides that the surrogacy agreement “may not limit the right of the surrogate to make decisions regarding her health care of that of the embryo or fetus.” UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 9(b).

133. See *infra* Appendix A.

134. Pub. Act No. 93-931, 2004 Ill. Laws 3256 (codified as amended at 750 ILL. COMP. STAT. ANN. 47/1–/75).

135. Scott, *supra* note 67, at 124 n.94.

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

decision-making of people acting as surrogates.<sup>137</sup> Specific enforcement of such a clause could mean that Davina, from the hypothetical described in the Introduction, could be forced to undergo an invasive surgical procedure like a cesarean section over her contemporaneous objection.<sup>138</sup> The law also appears to allow for an enforceable determination of parentage prior to the birth of the child.<sup>139</sup> Assigning rights to a fetus is a contentious issue and a conclusion that alarms many reproductive rights advocates.<sup>140</sup> But, again, despite these controversial provisions, there was no public or legislative opposition to the bill. There was also surprisingly little coverage of the legislation in the news or in legal scholarship.<sup>141</sup>

A similar pattern occurred in California in 2012 when California finally enacted surrogacy legislation after many years of previous unsuccessful attempts.<sup>142</sup> While there had been robust stakeholder engagement during earlier unsuccessful attempts to pass surrogacy legislation,<sup>143</sup> the legislative history of the 2012 law reports no known opposition.<sup>144</sup> Not one member of the legislature voted against the legislation.<sup>145</sup> Even though issues related to surrogacy were in the news in California in 2012, a search of news sources during that time did not turn up a single article on the legislation prior to its arrival on the Governor's desk.<sup>146</sup> Again, this absence of political opposition or engaged analysis is particularly striking given the content of California's surrogacy law. California's scheme, like Illinois's, includes controversial provisions, although the provisions are less obviously so. California's statutes do not expressly allow contractual

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137. See 750 ILL. COMP. STAT. 47/25(d) (2019).

138. See *infra* text accompanying notes 325–328.

139. 750 ILL. COMP. STAT. ANN. 47/35(a) (“[A] parent-child relationship shall be established prior to the birth of a child born through gestational surrogacy if [certain conditions are met].” (emphasis added)).

140. See, e.g., Johnsen, *supra* note 126, at 605.

141. A Westlaw news search for “adv: DA(aft 01/01/2004) and DA(bef 01/01/2005) and Illinois and surrogacy” produced zero news stories on the Illinois legislation.

142. See Act of Sept. 23, 2012, ch. 466, 2012 Cal. Stat. 4390 (codified as amended at CAL. FAM. CODE §§ 7960, 7962). For discussions of some of the prior unsuccessful efforts to enact surrogacy legislation in California, see MARKENS, *supra* note 56, at 45–46.

143. *Id.* at 45.

144. See Assemb. Comm. on Judiciary, Analysis of Assemb. B. 1217, 2011–12 Reg. Sess., at 5 (Cal. 2011) (reporting no known opposition); S. Comm. on Judiciary, Analysis of Assemb. B. 1217, 2011–12 Reg. Sess., at 9 (Cal. 2012) (same).

145. See, e.g., *AB-1217 Surrogacy Agreements: Votes*, CAL. LEGIS. INFO., [https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill\\_id=201120120AB1217](https://leginfo.ca.gov/faces/billVotesClient.xhtml?bill_id=201120120AB1217) [<https://perma.cc/7YHE-B8YM>] (listing votes of the Assembly and Senate floors and Judiciary Committees, with zero total no votes).

146. A Westlaw news search for “adv: DA(aft 01/01/2012) and DA(bef 01/01/2013) and California and surrogacy” did not turn up a single article about the legislation prior to passage by both chambers of the legislature, and only one article discusses the legislation after it was signed into law. See *California Enacts Landmark Legislation Giving Same Sex Parents via Surrogacy Equal Parenting Rights*, PR NEWSWIRE (Oct. 17, 2012), <https://www.prnewswire.com/news-releases/california-enacts-landmark-legislation-giving-same-sex-parents-via-surrogacy-equal-parenting-rights-174590041.html> [<https://perma.cc/65G7-6UBJ>].

clauses that limit the bodily and decision-making autonomy of the person acting as a surrogate. But they do not expressly prohibit them either. Anecdotal evidence suggests that clauses regulating the decision-making and behavior of people acting as surrogates are regular features of agreements, including agreements governed by California law.<sup>147</sup>

Surprisingly, scholars have also paid little attention to surrogacy laws' details. To be sure, there are some examples of scholarship that consider whether and the extent to which surrogacy law utilizes inclusive intended parent rules that embrace, for example, LGBTQ and nonmarital families.<sup>148</sup> But even here, there are few examples. A grand total of *three* law review articles cite the Louisiana provision discussed in the Introduction that excludes from protection all unmarried couples, as well as same-sex married couples.<sup>149</sup>

There is also a striking lack of attention to issues related to people acting as surrogates. Consider engagement with some of the most controversial surrogacy provisions regarding people acting as surrogates—provisions that authorize control over the medical decision-making and daily behavior of people acting as surrogates. These types of provisions purport to allow surrogacy agreements to include clauses requiring the person acting as a surrogate—like Davina described in the Introduction—to undergo invasive medical procedures, even over their contemporaneous objection.

A Westlaw search reveals a total of ten law review articles, other than my own,<sup>150</sup> which discuss the statutory language allowing contract clauses that require the person acting as a surrogate to “undergo all medical exams [or examinations], treatments and fetal monitoring procedures.”<sup>151</sup> Of the ten law review articles, six were written by students,<sup>152</sup> and one is simply a reprint of the

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147. See, e.g., Berk, *supra* note 123, at 156–57.

148. In his exploration of the evolution of parentage law more broadly, Professor NeJaime explores the extent to which surrogacy law embraces LGBTQ-parent families. See generally NeJaime, *Parenthood*, *supra* note 9.

149. Courtney M. Cahill, *After Sex*, 97 NEB. L. REV. 1, 31 (2018); NeJaime, *supra* note 9, at 2324; Tara Richelo, Note, *Continuing to Resolve Surrogacy Uncertainties in a Post-Baby M Modernity*, 71 RUTGERS U. L. REV. 857, 902 (2019). Same-sex couples can now marry, thereby bringing themselves within the requirement that intended parents be married. But, with the exception of same-sex couples in which one person is transgender, such couples cannot comply with the other key identity requirement in Louisiana, which is that they “each exclusively contribute their own gametes to create their embryo.” LA. STAT. ANN. § 9:2718.1(6) (2018).

150. Joslin, *Politics of Pregnancy*, *supra* note 2, at 376–77.

151. I searched the Westlaw Law Reviews & Journals database for “adv: “undergo all medical” /s “treatments and fetal monitoring procedures.””

152. Emma Cummings, Comment, *The [Un]Enforceability of Abortion and Selective Reduction Provisions in Surrogacy Agreements*, 49 CUMB. L. REV. 85, 89 (2018); Alexis Williams, Comment, *State Regulatory Efforts in Protecting a Surrogate’s Bodily Autonomy*, 49 SETON HALL L. REV. 205, 227 (2018); Brock A. Patton, Note, *Buying A Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507 app. at 533 (2010); Michelle Ford, Comment, *Gestational Surrogacy Is Not Adultery: Fighting Against Religious Opposition to Procreate*, 10 BARRY L. REV. 81, 81 (2008); Richey, *supra* note 136, at 176; Levitt, *supra* note 14, at 500.

2008 version of ABA Model Act Governing Assisted Reproductive Technology which includes this language.<sup>153</sup> Two other articles simply cited the relevant language without any substantive analysis of it.<sup>154</sup> There is only one law review article written by a legal scholar or practicing lawyer that grapples with the substance of these controversial provisions.<sup>155</sup>

Likewise, again, excluding my own work, only ten law review articles returned on Westlaw quote statutory provisions allowing surrogacy agreements that require the person acting as a surrogate to “abstain from any activities” that are perceived to be harmful to the pregnancy or the fetus.<sup>156</sup> One of these simply reprinted the 2008 ABA Model Act from which this statutory text is drawn.<sup>157</sup> Of the other nine articles, five cited the language with no discussion or engagement.<sup>158</sup> Only two of the ten law review articles were both written by another scholar or practicing lawyer and did more than simply quote the relevant statutory language.<sup>159</sup> It is particularly interesting that there has been little recent engagement regarding the ways in which the United States regulates and protects people acting as surrogates given that this is a—if not *the*—key issue in conversations about *international* surrogacy.<sup>160</sup>

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Student-written pieces often both identify cutting edge issues and offer important insights on those issues. The point here is not to suggest that such pieces are of little value; again, they often are of great value. Instead, the point is that few, if any, legal scholars researching or writing on related topics or lawyers with practical legal experience have even identified much less written about these issues.

153. American Bar Association, *Model Act Governing Assisted Reproductive Technology* (Feb. 2008) 42 FAM. L.Q. 171 (2008) (reproducing the full text of the Model Act).

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

In addition, a number of the student-written pieces also simply cited the language without any substantive engagement. *See, e.g.*, Patton, *supra* note 152, app. at 533; Ford, *supra* note 152, at 81; Richey, *supra* note 136, at 176.

155. Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1606–07 (2020).

156. I searched the Westlaw Law Reviews & Journals database for “adv: surrog! /p “abstain from any activities.””

157. American Bar Association, *supra* note 153.

158. Emily Urch, *Putting All of North Carolina’s Eggs in One Basket: The Case for Comprehensive Surrogacy Regulation*, 37 N.C. CENT. L. REV. 31, 37 (2014); Lorillard, *supra* note 154, at 265 (quoting ABA Model Act); Patton, *supra* note 152, app. at 533 (including the Illinois statutes); Ford, *supra* note 152, at 107; Ford, *supra* note 154, at 245.

159. Rebouché, *supra* note 155, at 1607; Ainsworth, *supra* note 1, at 1083.

Students wrote six of the eleven articles. Williams, *supra* note 152, at 227; Teresa Donaldson, Note, *Whole Foods for the Whole Pregnancy: Regulating Surrogate Mother Behavior During Pregnancy*, 23 WM. & MARY J. WOMEN & L. 367, 394 (2017); Urch, *supra* note 158, at 37; Patton, *supra* note 152, app. at 533; Ford, *supra* note 152, at 107; Levitt, *supra* note 14, at 500.

160. *See, e.g.*, Jamie Cooperman, Comment, *International Mother of Mystery: Protecting Surrogate Mothers’ Participation in International Commercial Surrogacy Contracts*, 48 GOLDEN GATE U. L. REV. 161, 178 (2018) (“[T]he international community should redirect its focus to protecting surrogate mothers from a potentially exploitive process . . . .”); Xinran “Cara” Tang, Note, *Setting Norms: Protections for Surrogates in International Commercial Surrogacy*, 25 MINN. J. INT’L L. 193 (2016); Izabela Jargilo, *Regulating the Trade of Commercial Surrogacy in India*, 15 J. INT’L BUS. & L. 337, 349 (2016); Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International*

### B. What Changed?

Given the growth in permissive statutory schemes, the variations among these laws, and the potential implications of these differences, why has there been so little attention? This Section explores that question by identifying some of the forces contributing to that lack of attention.

#### 1. Binary Framing

One force that impedes robust engagement with the details of surrogacy laws is the tendency in the media, legal literature, and elsewhere to focus the surrogacy discussion on the threshold binary question: to prohibit or to permit. As discussed in Part II, this tendency permeates almost all discussions of surrogacy. Thus, for example, news articles and social media tend to frame the debate as one between those who oppose surrogacy and those who support it.<sup>161</sup>

This framing remains resilient despite the enactment of increasing numbers of and increasing variations among permissive schemes.<sup>162</sup> By continuing to focus on the permit/ban issue, the existing discourse hides and in turn *discourages* consideration of other questions, including *the ways in which* jurisdictions permit and regulate surrogacy, as well as the implications of those variations.

#### 2. Advocates and Advocacy

The relative lack of modern attention to the details of surrogacy schemes also reflects and is the product of changes in advocacy regarding surrogacy. In the early years, a time when few permissive schemes were enacted, feminists and women's rights advocates were some of the most active participants in the discussion.<sup>163</sup> Some feminists and women's rights groups opposed surrogacy altogether.<sup>164</sup> For example, in the early years of surrogacy, a group of feminists declared: "The enforcement of surrogacy contracts *victimizes women* physically, emotionally, and economically. The surrogacy contract represents a *unique form of exploitation of women's bodies* and will lead to the full-scale commercialization of women's reproductive organs and genetic makeup."<sup>165</sup>

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*Surrogacy Agreements*, 24 J.L. & POL'Y 41, 75 (2015) ("[An international] convention must ensure that the surrogate mother is not abandoned, coerced, or required to accept draconian terms."); Ruth Zafran & Daphna Hacker, *Who Will Safeguard Transnational Surrogates' Interests? Lessons from the Israeli Case Study*, 44 LAW & SOC. INQUIRY 1141 (2019).

161. See *supra* notes 92–96 and accompanying text.

162. See *supra* Part II.

163. See, e.g., Scott, *supra* note 67, at 129–30; MARKENS, *supra* note 56, at 164 (discussing the "unusual alliance between feminists and Catholics in New York" and their advocacy for the 1992 bill criminalizing compensated surrogacy). To be sure, opposition to surrogacy was more robust in some jurisdictions and less robust in others. See, e.g., *id.* at 34 (noting the minimal opposition at 1982 hearings regarding surrogacy legislation in California).

164. See *supra* Part I.

165. MARKENS, *supra* note 56, at 61 (quoting Betty Friedan et al., *Feminists on Commercialized Childbearing: Adapted from a Friend of the Court Brief in the Baby M Case*).



Other feminists and women's rights groups supported permissive regimes.<sup>166</sup> While there was no consensus, there was often robust engagement. This included engagement with the particulars of proposed permissive schemes, especially regarding how to best protect the rights and interests of people acting as surrogates.<sup>167</sup>

Over time, though, women's rights groups and feminists tended to be less publicly involved in the conversations about surrogacy.<sup>168</sup> As lawyer and advocate Sara Ainsworth put it, "It's rarer [now] than it was in the '80s and '90s to see feminists flat-out opposing surrogacy."<sup>169</sup> Some organizations with policy positions opposing surrogacy, or at least some forms of surrogacy, have not weighed in on debates about the details of permissive surrogacy legislation.<sup>170</sup> Other organizations have not yet established their position on surrogacy. As Ainsworth explained, "[surrogacy is] complex and there's a lot of discomfort surrounding the issue, so many women's groups have not taken a formal position."<sup>171</sup> Thus, for example, in the 1990s, a number of California-based women's rights groups did not take positions on pending legislation that would have permitted and regulated surrogacy.<sup>172</sup> A "lobbyist for Planned Parenthood" explained that "the organization did not take an official position on"<sup>173</sup> pending surrogacy legislation because "their membership was split fifty-fifty on the issue."<sup>174</sup> In short, while "[many] organizations have backed off from their oppositional stance," "many remain internally conflicted about the best policies for which to advocate."<sup>175</sup>

At the same time that some women's rights organizations and advocates stepped away from the debate, organized support for people who wanted to form families through surrogacy increased. Initially, supporters were relatively few in

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166. For example, in the late 1980s, California NOW opposed legislation that would have banned surrogacy arrangements based on their position that women ought to be able to control their own bodies. *Id.* at 57–58.

167. See, e.g., Andrews, *supra* note 123; Nadine Taub, *Surrogacy: Sorting Through the Alternatives*, 4 BERKELEY WOMEN'S L.J. 285 (1989); *supra* Part IV.A.

168. See, e.g., Scott, *supra* note 67, at 121 ("Attorneys, brokers, and parents' groups have become active advocates for supportive laws, while women's groups and civil-liberties organizations have withdrawn from the political arena.")

169. Lewin, *supra* note 95.

170. For example, neither the national ACLU nor the New York Civil Liberties Union officially weighed in on the surrogacy legislation in New York. See, e.g., *Protecting Modern Families Coalition*, FAMILY EQUALITY, <https://www.familyequality.org/campaigns/protecting-modern-families-coalition/> [<https://perma.cc/2W64-FEY6>].

171. Lewin, *supra* note 95.

172. See, e.g., S. 937, 1991 Leg., 1991–92 Reg. Sess. (Cal. 1991).

173. MARKENS, *supra* note 56, at 160; see also *id.* at 161 ("[M]ost California women's and women's rights groups did not take official positions due to a lack of consensus within their organizations."). This was not true of all women's rights organizations. California NOW opposed S.B. 937 and did so based on concerns about the details of the regulatory scheme. See *id.*

174. MARKENS, *supra* note 56, at 160.

175. Shayna Medley, *Regulating Surrogacy: In Whose Interest?*, ONLABOR (May 12, 2017), <https://www.onlabor.org/regulating-surrogacy-in-whose-interest/> [<https://perma.cc/786P-8XHA>].

number.<sup>176</sup> Over time, however, the number of families created through surrogacy, and the number of attorneys and agencies serving them, increased. This growing group of intended parents and their allies became strong advocates for permissive statutory regimes.<sup>177</sup> Due at least in part to their efforts, public support also grew.<sup>178</sup> LGBTQ organizations joined the push in support of permissive surrogacy regimes, as inclusive approaches to surrogacy “offer[ed] a way for all people—regardless of sex, sexual orientation, or marital status—to form and protect families.”<sup>179</sup>

In sum, supporters of people who wanted to become parents through surrogacy grew in number at the same time that organized opposition and organizations with a particular focus on the rights and interests of people acting as surrogates withdrew. During this period, a number of states enacted permissive surrogacy schemes with little to no public opposition, little engagement by women’s rights and reproductive rights organizations, and, importantly, little engagement with the details of the proposals.<sup>180</sup> As noted in Part III.A, this lack of robust engagement was true even in states, like Illinois and California,<sup>181</sup> where the proposed (and ultimately enacted) schemes included controversial provisions.<sup>182</sup>

### 3. Legislative Process

Another influence in the shift away from the law’s details is the contemporary legislative drafting process.<sup>183</sup> For the most part, legislators “do not write the text of statutes, nor do they focus in particular on the text.”<sup>184</sup> Rather, legislators typically focus on “concepts” or general policies.<sup>185</sup> This

176. See, e.g., MARKENS, *supra* note 56, at 166–67 (“One informant said the 1992 [New York] bill [to ban commercial surrogacy] was successful because only a limited group of people actually cared about surrogate motherhood, and this group did not have much political clout.”).

177. See, e.g., Scott, *supra* note 67, at 121 (“Attorneys, brokers, and parents’ groups have become active advocates for supportive laws . . .”).

178. See, e.g., MARKENS, *supra* note 56, at 113–24 (describing the effectiveness of the framing of surrogacy as a response to the “plight of infertile couples”).

179. Joslin, *Politics of Pregnancy*, *supra* note 2, at 375; *id.* at 375 n.71 (citing Press Release, Family Equality Council, Statement from Family Equality Council Regarding a Press Conference on the Issue of Legalizing Gestational Surrogacy in New York (May 13, 2019)).

180. See *supra* Part III.A.

181. See *supra* notes 135–147 and accompanying text.

182. See *infra* Appendix C.

183. For discussion on the legislative drafting process, see, for example, Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 576 (2002) (noting that “[l]ittle has been written” about the “legislative drafting process”); Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291 (2019) (exploring the drafting of tax laws); Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79 (2015) (exploring the “actual workings of the legislative process”).

184. Oei & Osofsky, *supra* note 183, at 1335.

185. *Id.* at 1335–36 (“In particular, we too found that Members only engage in drafting at a policy level, rather than engaging in the actual drafting of statutory text.”); see also Nourse & Schacter, *supra* note 183, at 585 (“Most staffers indicated that, as a general rule, senators themselves did not write the

focus on big policy questions can fuel a tendency to keep the conversation limited to those overarching policy questions, like whether to permit or prohibit surrogacy. Moreover, participants in the legislative process routinely note the challenges of “time pressure and limited resources.”<sup>186</sup> These challenges make it difficult in practice for legislators to be familiar with the finer-grain details of all of the legislation under consideration. This is especially true if interested stakeholder groups are not drawing legislators’ attention to controversial or concerning aspects of the legislation.

There is less empirical data about legislative drafting *at the state level*, where surrogacy legislation is drafted and enacted.<sup>187</sup> Nonetheless, there is reason to believe that these findings might be *even more prevalent* at the state level. At the federal level, lawmaking is the legislator’s full-time job. Federal legislators also have fairly large staffs to assist them.<sup>188</sup> In contrast to members of Congress, the occupation of a state legislator is often not a full-time job. There are a few states, typically some of the bigger ones, where state legislators “are paid enough to make a living without outside income.”<sup>189</sup> But in many states, this is not the case; in the majority of states, legislators do not receive “enough [compensation] to make a living without another source of income.”<sup>190</sup> Indeed, in some states, the position is only the equivalent of a half-time job, for which they “receive minimal compensation.”<sup>191</sup>

These state legislators, often working only part-time as legislators, typically have fewer staff people compared to members of Congress.<sup>192</sup> On top of all that, state legislators often consider and enact much more legislation. For example, the Illinois legislature recently enacted 2,381 bills.<sup>193</sup> By comparison, Congress typically enacts between 200 and 350 statutes per year.<sup>194</sup> These conditions make it even harder for state legislators to be familiar with legislative details. This is no less true with surrogacy legislation. As a result, even co-sponsors of surrogacy

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text of legislation.”); *id.* at 586 (“[S]enators, as a general rule, do not draft text as an original matter.”); Sitaraman, *supra* note 183, at 90–91 (“The overall picture that emerges . . . is that [members of Congress] are not drafters but rather decisionmakers.”).

186. Oei & Osofsky, *supra* note 183, at 1323.

187. See, e.g., Grace E. Hart, *State Legislative Drafting Manuals and Statutory Interpretation*, 126 YALE L.J. 438, 442 (2016).

188. See, e.g., IDA A. BRUDNICK, CONG. RSCH. SERV., RL30064, CONGRESSIONAL SALARIES AND ALLOWANCES: IN BRIEF 5 (2018) (“[E]ach Member [of Congress] may use the [Members’ Representational Allowance] to employ no more than 18 permanent employees . . . . A Member may employ up to four additional employees if they fall into [certain specified categories].”).

189. Hart, *supra* note 187, at 444–45.

190. *Id.* at 445.

191. *Id.*

192. *Id.*; see also *Size of State Legislative Staff*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 2, 2018), <https://www.ncsl.org/research/about-state-legislatures/staff-change-chart-1979-1988-1996-2003-2009.aspx> [<https://perma.cc/BYJ6-6NAM>] (noting, for example, that in 2015, the Colorado legislature had a total of 316 permanent and session staff).

193. Hart, *supra* note 187, at 445.

194. See *Statistics and Historical Comparison*, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/YEQ5-VSU7>].

legislation may be unfamiliar with all of its details; many may know little more than whether the legislation permits or bans surrogacy. Although, to be sure, this is not always the case.<sup>195</sup>

As drafting by legislators has declined, drafting by outside groups has increased.<sup>196</sup> For some of the reasons noted above, this is particularly true at the state level. As one scholar recently put it, “The influence of private lawmaking . . . at the state level[] is profound.”<sup>197</sup> So-called private lawmaking is not necessarily a bad thing. There are benefits to having outside groups involved in legislative drafting. Outside groups often bring a high level of expertise and knowledge about a particular issue.<sup>198</sup> Outside lobbyists may have strong relationships with the relevant constituency groups, which can help garner support for the initiative.<sup>199</sup>

At the same time, though, there can be downsides to private lawmaking. Before discussing some of the potential downsides or dangers, it is important first to clarify that there are different types of outside legislative drafters. First, “Some private lawmakers are apolitical organizations that are not affiliated with specific interest groups.”<sup>200</sup> The Uniform Law Commission is one such organization.<sup>201</sup> Founded in 1892, the ULC seeks to “increase uniformity and clarity in state law.”<sup>202</sup> Each act is drafted by a group of commissioners who bring varied experience and perspective to the issues.<sup>203</sup> In addition, the process is open to the public. Materials are publicly available and interested stakeholders and organizations are permitted and indeed encouraged to participate in the

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

196. See, e.g., Nourse & Schacter, *supra* note 183, at 583 (“Our respondents uniformly reported that lobbyists are regularly involved in drafting the text of bills in this committee.”); Sitaraman, *supra* note 183, at 103 (“[S]cholars have long understood that outside groups sometimes provide first drafts of legislation.”); Oei & Osofsky, *supra* note 183, at 1354 (“[A] decline in Legislative Counsel dominance has coincided with more private sector interests providing legislative language . . . .”); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 848 (2014) (“[I]n recent years it has become much more common for lobbyists, especially big law firms, to present drafts of a potential bill or amendment to a bill.”).

197. Barak Orbach, *Invisible Lawmaking*, 79 U. CHI. L. REV. DIALOGUE 1, 1–2 (2012), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1000&context=uclev\\_online](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1000&context=uclev_online) [<https://perma.cc/4JGF-9AS4>].

198. See, e.g., Shobe, *supra* note 196, at 848 (“Lobbyists have unique knowledge of how statutes will affect their clients and the resources to closely follow how court cases affect statutes.”); Nourse & Schacter, *supra* note 183, at 611 (“Lobbyists are the closest to the people who will be affected by the bill, explained one staffer.”).

199. See, e.g., Sitaraman, *supra* note 183, at 113 (“When an issue is particularly important or complex, the need for external drafting and stakeholder input will likely be greater . . . .”).

200. Orbach, *supra* note 197, at 2.

201. For more information about the ULC drafting process, see, for example, Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 126 (1993); Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 MINN. L. REV. 861, 866–67 (1995).

202. Orbach, *supra* note 197, at 2.

203. See, e.g., Joslin, UPA (2017) Preface, *supra* note 195, at 443–44.

process.<sup>204</sup> While commissioners are appointed by a state official, they are not accountable to that state in any meaningful way. According to Patchel, the ULC's position is that the lack of accountability of commissioners "insulates the laws the Conference promulgates from political pressure."<sup>205</sup> Some existing surrogacy legislation is based on uniform laws.<sup>206</sup>

Another type of outside drafter is an interested stakeholder. Sometimes these interested stakeholders are "legislative arms of interest groups."<sup>207</sup> Notably, "[u]nlike apolitical private lawmakers (like the ALI [American Law Institute] or NCCUSL [National Conference of Commissioners on Uniform State Law, the former name of the ULC]), [interested private law-makers] are in the business of advancing narrow interests."<sup>208</sup> Interested stakeholders can also consist of groups of practicing attorneys with expertise in the area. For example, surrogacy attorneys who represent intended parents were the primary drafters of the legislation in Illinois<sup>209</sup> and in California.<sup>210</sup>

Again, there can be a great benefit to having practicing attorneys assist with the drafting process. They are intimately familiar with the underlying legal issue. They likely have close ties to the affected stakeholders and can bring those voices and experiences to bear on the process. Nonetheless, as with other private lawmaking, there are vulnerabilities as well. These practicing attorneys may be approaching the issue from a particular perspective. Because the involvement of outside groups is often "relatively invisible,"<sup>211</sup> this perspective may not be obvious to others. As a result, legislation may not get the kind of careful consideration of the details that is warranted. This lack of attention to detail can be exacerbated if, as discussed above, some of the critical stakeholder groups are not actively engaged in the conversations.

#### 4. Neoliberalism

Another force at play is the influence of neoliberal theories. As described above, some of the recently enacted surrogacy legislation purports to allow for serious curtailments of the day-to-day behavior and medical decision-making of

204. See Miller, *supra* note 201, at 868.

205. Patchel, *supra* note 201, at 92.

206. The surrogacy laws in Washington and Vermont are two recent examples.

207. Orbach, *supra* note 197, at 2.

208. *Id.* at 9.

209. See, e.g., Attorney Profiles, DESAI & MILLER, <http://www.familybuildinglaw.com/profiles.html> [<https://perma.cc/63A6-PH2Y>] (noting that Nidhi Desai was "one of the principal authors of the Gestational Surrogacy Act"); Scott, *supra* note 67, at 124 n.94 (describing Nidhi Desai as "an attorney intimately involved in drafting and proposing the bill").

210. See, e.g., Andrew Vorzimer & David Randall, *California Passes the Most Progressive Surrogacy Bill in the World*, PATH2PARENTHOOD (Jan. 25, 2013), <http://www.path2parenthood.org/blog/california-passes-the-most-progressive-surrogacy-bill-in-the-world> [<https://perma.cc/3AKX-L87E>] ("When [Vorzimer and Randall] drafted the initial version of the bill, [their] goal was to ensure that adequate protections were established . . .").

211. Orbach, *supra* note 197, at 15.

people acting as surrogates. These provisions exist even in jurisdictions that are generally viewed as “progressive.”

Particularly in those types of jurisdictions, people defending these provisions may invoke arguments that reflect neoliberal or laissez-faire principles. As Meredith Harbach explains, “Neoliberalism prescribes a model citizen-subject based on a marketized society: [t]he neoliberal subject is a rational actor, *homo economicus*, who engages in cost-benefit analysis to make choices and is then responsible for those choices.”<sup>212</sup> Under this approach, parties are responsible for any agreement into which they choose to enter.<sup>213</sup> The state’s primary role is to stay out and to allow these private agreements to flourish with little to no intervention or oversight.<sup>214</sup> Indeed, under this theory, state intervention in private ordering is viewed with skepticism.<sup>215</sup>

The persuasiveness of this neoliberal ideology is evidenced by its influence on many areas of family law.<sup>216</sup> Take premarital and postmarital agreements. Historically, even if the parties both agreed to the contents of the agreements, premarital agreements were considered void as a violation of public policy. States gradually abandoned this flat prohibition in favor of “limited enforceability” with significant caution and oversight.<sup>217</sup> Over time, however, this more cautious approach gave way to a phase in which some states “treated premarital contracts similarly to conventional contracts.”<sup>218</sup> In these jurisdictions, courts apply a largely hands-off approach, leaving the parties to their own devices. In some states, this hands-off approach is applied even in situations where there were significant imbalances of power at the time of execution.<sup>219</sup>

Consider, too, the rules governing the economic rights of nonmarital couples. Upon dissolution, these couples are obligated to share property accumulated during their relationships only if they agreed to do so.<sup>220</sup>

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212. Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL’Y REV. 459, 471 (2019).

213. *See id.* (“[T]he neoliberal subject is responsible for all consequences of [their] choices, even in the face of significant constraints and unequal resource distributions.”).

214. *See id.* at 471–73.

215. *See* Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 25 (2014) (“[U.S. family] law endorses laissez-faire market outcomes and portrays the state as overbearing and incompetent.”).

216. *See id.* at 25 (“Neoliberalism permeates U.S. family law.”); Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 218 (2017) (critiquing “the current narrow vision of the role of government expressed in recent law, sometimes known as ‘neoliberalism,’ based on the wellbeing of families” (footnote omitted)).

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

218. *Id.*

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

220. *See, e.g.*, Aloni, *supra* note 217, at 353 (“When it comes to informal relationships, most states have adopted default rules that declare that partners do not have financial obligations vis-à-vis one another unless they contract otherwise.”); Courtney G. Joslin, *Family Choices*, 51 ARIZ. ST. L.J. 1285,

Jurisdictions continue to adhere to this rule even though very few couples enter into such agreements, and this approach often produces unfair results.<sup>221</sup> In these areas, the law largely leaves people responsible for the “choices” they make. The law provides little in the way of oversight or intervention.

Applied to surrogacy, this might explain why surrogacy legislation in some jurisdictions viewed as progressive nonetheless have laws that allow for serious curtailments of the bodily integrity of people acting as surrogates. In the context of surrogacy specifically, someone who generally supports a woman’s right to make decisions about her own body might rely on neoliberal principles to defend statutory provisions that allow for contract clauses curtailing the bodily and medical autonomy of people acting as surrogates. While a woman has a right to make decisions about her body, the argument goes, she also has the right to waive that right.<sup>222</sup> Particularly where she was represented by counsel, the law should respect and specifically enforce her choices in that regard.<sup>223</sup> Respecting the terms of the contract, the argument continues, is necessary in order to respect the autonomous decision-making power of the parties.<sup>224</sup>

A neoliberal perspective supports the position that the law should allow parties to enter into these agreements and then largely leave the parties to their own devices. Indeed, the law in some jurisdictions does just that. The deep-blue jurisdiction of California, for example, permits surrogacy and imposes very few parameters on the contours of the arrangements.<sup>225</sup> Not only might this ideology explain the state of the law in jurisdictions like California and Illinois—that at once have statutes that more robustly protect access abortion and, at the same time, have in place surrogacy provisions that allow for the potential surveillance and control of pregnant people’s bodies. The pervasiveness of this ideology also explains why such surrogacy provisions failed to provoke more controversy or engagement during the legislative process.

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Again, for a variety of reasons, much of the contemporary conversation about surrogacy remains focused on the question of whether surrogacy should be permitted or not. While important, these are not the only questions that must

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1286 (2019) [hereinafter Joslin, *Family Choices*] (describing and critiquing current law regarding property division upon the dissolution of a nonmarital relationship).

221. See, e.g., Joslin, *Autonomy*, *supra* note 10, at 931 (“Women disproportionately lose out under this regime.”); Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1020 (2018) (“The existing approaches rarely produce satisfactory outcomes.”).

222. See, e.g., Epstein, *supra* note 119, at 2335 (“To argue that these contractual terms are inconsistent with the autonomy of the surrogate mother is to miss the function of all contractual arrangements over labor.”); Julia Dalzell, Comment, *The Enforcement of Selective Reduction Clauses in Surrogacy Contracts*, 27 WIDENER COMMONWEALTH L. REV. 83, 88 (2018) (“[L]ike many other constitutional protections, [a woman’s right to terminate a pregnancy] is a protection that can be voluntarily, knowingly, and intelligently waived.”).

223. For a particularly fulsome articulation of this argument, see Epstein, *supra* note 119, at 2335.

224. See *id.*

225. For an argument that the state should play a greater oversight role with respect to family-based arrangements, see, for example, Joslin, *Family Choices*, *supra* note 220.

be grappled with. The ways in which jurisdictions permit and regulate surrogacy hold crucial implications not only for the parties themselves but also for law and policy well beyond the boundaries of surrogacy. This next Section seeks to intervene in this cycle by carefully documenting surrogacy laws' details.

#### IV.

##### A NEW TYPOLOGY

This Section is the empirical core of the Article. After meticulously gathering and analyzing the statutes in all fifty states and the District of Columbia, I provide a more comprehensive and textured typology of existing U.S. surrogacy laws. My rubric begins with some basic questions that have been surveyed by others. Part IV.A, based on the material presented in Appendix A, describes which jurisdictions permit or prohibit surrogacy. But, importantly, this is only the first layer of analysis, rather than the last. After plotting this basic information, I go on to assess and catalogue previously overlooked details of the existing permissive statutory regimes. This Section also offers new terminology to better identify and distinguish important elements of existing schemes. Part IV.B, drawing from Appendix B, explores statutory variations related to the interests of the intended parents. Collectively, I call these factors Intended Parent Protections or IP protections. Part IV.C, drawing from Appendix C, assesses and catalogues criteria regarding people acting as surrogates. Collectively, I call these criteria Person Acting as Surrogate Protections or PAS protections.

##### A. Regulated Forms of Surrogacy

This Section catalogues whether the jurisdiction permits or bans surrogacy and, if so, which types are permitted or banned. Because others have gathered this information, this Section moves through it quickly. Of the twenty-seven jurisdictions with statutory provisions addressing surrogacy, twenty-two jurisdictions permit gestational surrogacy.<sup>226</sup> Of these twenty-two permissive jurisdictions, five authorize both gestational and genetic surrogacy, and twenty permit compensation.<sup>227</sup> In contrast, eight states civilly ban some or all forms of surrogacy.<sup>228</sup> Two states allow for the possible imposition of penalties—civil or criminal—on participants.<sup>229</sup>

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226. See *infra* Appendix A.

227. See *infra* Appendix A. Issues related to compensation are addressed in more detail in Part II.B.3.

228. See *infra* Appendix A.

229. See *infra* Appendix A. As these numbers indicate, some jurisdictions, like New York, fall in multiple categories. While New York law now authorizes gestational surrogacy agreements, including compensated ones, it continues to ban and authorize penalties on parties engaged in genetic surrogacy. *Id.*



### B. Intended Parent (IP) Protections

Drawing on the details assessed in Appendix B, this Section takes a deeper dive into the details of existing permissive statutory regimes as they relate to intended parents. Among other things, it examines status-based criteria for eligibility to use surrogacy, evaluations of suitability to be an intended parent, and the method to determine parentage. Status-based criteria include restrictions on the identity of intended parents, medical need requirements, and genetic connection requirements. Collectively, these status-based criteria impact the extent to which the statutory scheme is inclusive (or not) of a range of possible intended parent combinations.

#### 1. Status-Based Criteria

With respect to the first status-based criterion—requirements expressly addressing the identity of the intended parents—a minority of jurisdictions with permissive statutory regimes—three (or maybe four)<sup>230</sup> of twenty-two—limit enforceable agreements to those in which the intended parents are married.<sup>231</sup> These jurisdictions are Louisiana, Texas, and Utah. One of the three—Louisiana—limits enforceable agreements to those in which both married spouses provided gametes.<sup>232</sup> In practice, this requirement limits the process to different-sex married couples.<sup>233</sup>

But the strong trend is in favor of statutes to permit any intended parents to enter into surrogacy agreements regardless of sex, sexual orientation, or marital status.<sup>234</sup> Thirteen of the twenty-two permissive jurisdictions have intended parent rules that expressly include all intended parents. For example, New Jersey’s definition of intended parent is as follows: “The term . . . shall include

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230. As discussed above, there is an argument that North Dakota’s statutes limit enforceable agreements to those in which the intended parents contribute the only gametes and are married to each other. *See supra* note 99.

231. LA. STAT. ANN. § 9:2718.1(6) (2018); TEX. FAM. CODE ANN. § 160.754(b) (West 2014); UTAH CODE ANN. § 78B-15-801(3) (LexisNexis 2018). Two other states—Arkansas and Oklahoma—have more limited restrictions on the identity of intended parents. ARK. CODE ANN. § 9-10-201 (2015) (recognizing both married and unmarried male genetic intended parents but using gendered language); OKLA. STAT. tit. 10, § 557.5(B)(4) (Supp. 2020) (covering and protecting single unmarried intended parents and married couples but not unmarried couples).

232. LA. STAT. ANN. § 9:2718.1(6). There is an argument that this is required in North Dakota as well. *See supra* note 99.

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

234. *See* CAL. FAM. CODE § 7960(c) (West 2013 & Supp. 2020); DEL. CODE ANN. tit. 13, § 8-102(18) (2009 & Supp. 2020); 750 ILL. COMP. STAT. 47/10 (2019); ME. STAT. tit. 19-A, § 1832(12) (2020); NEV. REV. STAT. § 126.590 (2020); N.H. REV. STAT. ANN. § 168-B:1(XIII) (2014 & Supp. 2020); N.J. STAT. ANN. § 9:17-62 (West Supp. 2020); N.Y. FAM. CT. ACT § 581-102(l) (McKinney, Westlaw through L. 2021, chs. 1–23); 15 R.I. GEN. LAWS § 15-8.1-102(15) (Supp. 2020); VT. STAT. ANN. tit. 15C, § 102(14) (2019); VA. CODE ANN. § 20-156 (2016 & Supp. 2020); WASH. REV. CODE § 26.26A.010(13) (Supp. 2019); D.C. CODE § 16-401(16) (Supp. 2020).

persons who are single, married, partners in a civil union or domestic partnership, and couples who are not married or in a civil union or domestic partnership.”<sup>235</sup>

Four additional states—Arkansas, Florida, Iowa, and Oklahoma—have provisions that are expressly, partially inclusive. Arkansas’ law covers both married and unmarried intended parents; the rules, however, are gendered, and they seem to protect men only when they are *genetic* intended parents.<sup>236</sup> Florida permits married and unmarried couples, but its provisions use gendered terminology.<sup>237</sup> Oklahoma allows married couples of any sexual orientation and single individuals of any sex or sexual orientation to be intended parents, but it does not allow unmarried couples (of any sexual orientation) to be intended parents.<sup>238</sup> Iowa’s regulation does not expressly limit who can be an intended parent. The rule, however, protects only genetic parents.<sup>239</sup> As a result, all same-sex intended parents and some different-sex intended parents will be at least partially unprotected. By contrast, Connecticut’s statute is also silent as to who can be an intended parent,<sup>240</sup> but the Connecticut Supreme Court held that the statute “confer[s] parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent’s genetic relationship to the children.”<sup>241</sup> Overall, the strong trend is towards inclusiveness and the elimination of discriminatory criteria.

So-called medical need requirements, the second type of status-based criterion, also impact who is recognized and protected as a parent of the resulting child. Older statutes are more likely to require proof that the intended parents have a “medical need” for surrogacy.<sup>242</sup> By contrast, most of the more recently enacted schemes jettison this requirement.<sup>243</sup> The elimination of the medical

235. N.J. STAT. ANN. § 9:17-62.

236. See ARK. CODE ANN. § 9-10-201(c)(1) (“[I]n the case of a [child born to a] surrogate mother, . . . the child shall be that of: (A) The biological father and the woman intended to be the mother if the biological father is married; (B) The biological father only if unmarried; or (C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor’s sperm was utilized for artificial insemination.”); *id.* § 9-10-201(b) (establishing the parentage rules applicable in situations in which the person acting as a surrogate is married rather than unmarried).

237. FLA. STAT. § 742.13(2) (2019) (“‘Commissioning couple’ means the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents.”). There are strong statutory and constitutional arguments that this language must be read in a gender-neutral manner. See, e.g., *McLaughlin v. Jones*, 401 P.3d 492, 498 (Ariz. 2017) (holding that a gendered marital presumption must be applied equally to a woman in a same-sex relationship).

238. OKLA. STAT. tit. 10, § 557.5(B)(4) (Supp. 2020).

239. See IOWA ADMIN. CODE r. 641-99.15(7)–(10) (2021).

240. See CONN. GEN. STAT. § 7-48a (2019).

241. *Raftopol v. Ramey*, 12 A.3d 783, 799 (Conn. 2011).

242. See, e.g., FLA. STAT. § 742.15(2) (2019); 750 ILL. COMP. STAT. § 47/20(b)(2) (2019); TEX. FAM. CODE ANN. § 160.756(b)(2) (West 2014); VA. CODE ANN. § 20-160(B)(8) (2016 & Supp. 2020). Utah used to have such a requirement, but it was repealed in 2020. See UTAH CODE ANN. § 78B-15-803(2)(b) (LexisNexis 2018), invalidated by *In re Gestational Agreement*, 449 P.3d 69, 74 (Utah 2019), and repealed by 2020 Utah Laws 912.

243. The following jurisdictions do not include a medical need requirement: Arkansas, California, Connecticut, Delaware, Iowa, Maine, Nevada, New Hampshire, New Jersey, New York,

need requirement is also a means of opening surrogacy to a wider range of potential intended parents.

Among other things, medical need requirements create barriers for male same-sex couples. The issues surrounding medical needs requirements were borne out in Utah. Utah’s statutory scheme formerly included a medical need requirement; the parties had to establish that “the intended mother [wa]s unable to bear a child or [wa]s unable to do so without unreasonable risk to her physical or mental health or to the unborn child.”<sup>244</sup> In 2017, a Utah trial court judge refused to validate a surrogacy agreement involving gay male intended parents on the ground that the couple was unable to meet the law’s medical need requirement.<sup>245</sup> On appeal, the Utah Supreme Court declared the requirement to be unconstitutional.<sup>246</sup> As the court explained, “a plain reading of [the medical need provision] works to deny certain same-sex married couples a marital benefit freely afforded to opposite-sex married couples.”<sup>247</sup> Accordingly, the court declared, “the statute violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment, under the analysis set forth in *Obergefell*.”<sup>248</sup> Even when medical need requirements do not screen out entire classes of people based on their identity, some advocates oppose them on the ground that they unnecessarily intrude on and interfere with choices about reproduction and family creation.<sup>249</sup>

Jurisdictional law also varies with regard to whether one or both intended parents must be genetically related to the resulting child, the third factor in the status-based criteria. A minority of jurisdictions—Florida, Illinois, Iowa, Louisiana, and North Dakota—include such requirements.<sup>250</sup> Two of these states, Louisiana and North Dakota, require both intended parents to be

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North Dakota, Rhode Island, Utah, Vermont, Washington, and the District of Columbia. *See infra* Appendix B. Two recently enacted schemes do, however, include requirements related to medical need. LA. STAT. ANN. § 9:2720.3(B)(4) (2018) (requiring proof of medical infertility); OKLA. STAT. tit. 10, § 557.10(B)(4) (Supp. 2020) (same).

244. *See* UTAH CODE ANN. § 78B-15-803(2)(b) (LexisNexis 2018) (repealed 2020).

245. *See, e.g.*, Jennifer Dobner, Utah Couple Heads to State Supreme Court over Law that Prevents Married Gay Men from Having Biological Children Through Surrogacy, SALT LAKE TRIB. (Sept. 12, 2017), <https://www.sltrib.com/news/2017/09/12/married-gay-couple-challenges-utahs-surrogacy-law-after-court-denies-petition/> [<https://perma.cc/7CFQ-EGLD>].

246. *In re Gestational Agreement*, 449 P.3d at 74.

247. *Id.*

248. *Id.*

249. *See, e.g.*, 1988 ACLU Policy Statement, *supra* note 109, at 295 (“[T]he state may not restrict the right to participate in the surrogacy arrangement based upon a diagnosis of infertility of the contracting father’s partner. Decision about human reproduction should be a matter of voluntary choice free of government compulsion.”).

250. FLA. STAT. § 742.13(2) (2019); 750 ILL. COMP. STAT. 47/20(b)(1) (2019); IOWA ADMIN. CODE r. 641-99.15(4)–(10) (2021); LA. STAT. ANN. § 9:2718.1(6) (2018); N.D. CENT. CODE § 14-18-01(1)–(2) (2017). On first glance, Virginia’s provisions appear to have a genetic connection requirement, but the section goes on also to permit arrangements under which the intended parent has “legal or contractual custody of the embryo at issue.” VA. CODE ANN. § 20-160(B)(9) (2016 & Supp. 2020).

genetically related to the resulting child.<sup>251</sup> Another, Iowa, does not absolutely require both intended parents to be genetic parents.<sup>252</sup> That said, only genetic parents are recognized as legal parents under the rule.<sup>253</sup> In contrast, the majority of permissive jurisdictions—seventeen of the twenty-two—do not include such a requirement.<sup>254</sup>

Intuitions about the importance (or not) of genetic connections also animate statutes that limit enforceable agreements to gestational surrogacy. As shown in Appendix A, the majority of permissive jurisdictions only allow gestational surrogacy arrangements. Only five of the twenty-two jurisdictions—specifically, Arkansas, Florida, Virginia, Washington, and the District of Columbia—expressly permit genetic surrogacy.<sup>255</sup> And even among this group, all of the jurisdictions except Arkansas treat gestational and genetic surrogacy differently in some respects.<sup>256</sup>

Stakeholders have long been concerned with the potential effects of exclusionary intended parent rules. For example, the ACLU's 1988 policy position on surrogacy states: "The state cannot discriminate against a person who seeks participation in a surrogacy arrangement on the basis of age, race, sex, sexual orientation, economic or social status, religion, marital status, or physical or mental condition."<sup>257</sup> More recently, feminist attorney Sara Ainsworth similarly argued: "[S]urrogacy legislation should ensure that these arrangements are open to adult people regardless of marital status, sexual orientation, or their reasons for seeking a surrogacy arrangement."<sup>258</sup>

The people most obviously impacted by intended parent eligibility rules are the intended parents. Eligibility rules also have consequences for the child. When intended parents are not recognized and protected, the resulting children are left vulnerable. Typically, intended parents who are not covered by the statutory scheme are not prohibited from entering into a surrogacy agreement. Instead, the effect of the exclusionary criteria is to render the parties and the resulting child unprotected.<sup>259</sup> Among other things, the result may be that courts will not

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251. LA. STAT. ANN. § 9:2718.1(6); N.D. CENT. CODE § 14-18-01(2).

252. See IOWA ADMIN. CODE r. 641-99.15.

253. See *id.*

254. See *infra* Appendix B.

255. Three additional jurisdictions—Maine, Rhode Island, and Vermont—allow genetic surrogacy, but only if the agreement is between family members. ME. STAT. tit. 19-A, § 1931(1)(E) (2020); 15 R.I. GEN. LAWS § 15-8.1-102(13) (Supp. 2020); VT. STAT. ANN. tit. 15C, § 102(12) (2019).

256. See *infra* Appendix A & note 431.

257. 1988 ACLU Policy Statement, *supra* note 109, at 294.

258. Ainsworth, *supra* note 1, at 1117; see also CTR. FOR REPROD. RTS., COMPENSATED GESTATIONAL SURROGACY IN THE UNITED STATES 1 (2019), [https://reproductiverights.org/sites/default/files/2019-09/64829505\\_US-HumanRights-20190910-Surrogacy-Final-NoBleeds.pdf](https://reproductiverights.org/sites/default/files/2019-09/64829505_US-HumanRights-20190910-Surrogacy-Final-NoBleeds.pdf) [<https://perma.cc/UBP9-EWSM>] (setting forth a "set of considerations critical to ensuring that laws and policies on compensated gestational surrogacy in the United States respect, protect, and fulfill the rights of all stakeholders to a surrogacy arrangement").

259. For example, prior to the enactment of its current statutory scheme, a New Jersey court held that gestational surrogacy agreements were void in New Jersey. As a result, the court held that the

recognize the intended parents as the legal parents of the resulting child.<sup>260</sup> Children can be harmed when they lack legal relationships to the people they view and rely on as parents.<sup>261</sup>

Intended parent criteria in surrogacy laws have implications for parentage law more broadly. Noninclusive intended parent rules reinforce stereotypes about which family forms are perceived as “best” for children.<sup>262</sup> These kinds of stereotypes and exclusionary rules based on them historically have harmed nonmarital children,<sup>263</sup> as well as the children of same-sex couples.<sup>264</sup> In contrast, inclusive intended parent rules bolster principles that all families—including same-sex parent and nonmarital families—are respected and protected under the law. Inclusive intended parent rules also break down beliefs that families must all consist of one mother and one father. Such beliefs are rooted in and perpetuate gender-based notions about the nature of motherhood and fatherhood and denigrate single-parent families.

Similarly, rules that require a genetic connection to the intended parents or that prohibit a genetic connection to the person acting as a surrogate reinforce deeply held intuitions that biological or genetic connections are an essential aspect of parenthood. As Douglas NeJaime explained, “Biological connection can present itself as a natural and innocuous parenting norm, but appeals to biological parenthood can both incorporate and mask judgments about same-sex family formation.”<sup>265</sup> Indeed, one can find numerous recent examples in which lack of biological connection was invoked to justify discrimination against same-sex couples.<sup>266</sup> In contrast, by jettisoning rules that require or prohibit genetic

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nonbiological married gay male intended father was not a parent of the resulting twins. *A.G.R. v. D.R.H.*, No. FD-09-001838-07, 2009 N.J. Super. Unpub. LEXIS 3250 (N.J. Super. Ct. Ch. Div. Dec. 23, 2009).

260. This is true, for example, in Louisiana, where intended parents of permissive surrogacy arrangements must be: (1) a married couple; (2) each of whom is a genetic parent of the resulting child. LA. STAT. ANN. § 9:2718.1(6) (2018). Surrogacy arrangements that do not comply with those and other rules are void and unenforceable. *Id.* § 9:2720(C).

261. See, e.g., Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010) [hereinafter Joslin, *Protecting Children*] (exploring harms).

262. For an exploration of how these kinds of arguments were used to oppose marriage equality, see Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 85–94 (2011).

263. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165, 175–76 (1972) (striking down as unconstitutional laws that treated nonmarital children less favorably by denying them workers’ compensation following their father’s workplace-related death). For a fascinating exploration of the “illegitimacy” cases of the 1960s and 1970s, see Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015).

264. See, e.g., Joslin, *Protecting Children*, supra note 261.

265. NeJaime, supra note 9, at 2324.

266. See, e.g., *Henderson v. Box*, 947 F.3d 482 (7th Cir. 2020) (rejecting Indiana’s invocation of biology as justification for refusing to list a female spouse on her child’s birth certificate), cert. denied, No. 19-1385, 2020 WL 7327836 (U.S. Dec. 14, 2020); *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017) (rejecting Arkansas’s invocation of biology as a justification for refusing to list a female spouse on her child’s birth certificate); *McLaughlin v. Jones*, 401 P.3d 492, 498 (Ariz. 2017) (rejecting biological

connections, jurisdictions can instead further trends in parentage law that ascribe greater significance to other factors, including intent and function. This move is necessary to vindicate principles of equality and autonomy in parentage law and beyond.<sup>267</sup>

## 2. Evaluations

Three states—Texas, Utah, and Virginia—have home study requirements to determine the “fitness” of the intended parents, although that requirement can be waived in Texas and Utah.<sup>268</sup> A fourth state—Louisiana—requires criminal background checks, child abuse and neglect checks, and restraining order checks.<sup>269</sup>

Some advocates and scholars oppose home study or similar gatekeeping requirements on the ground that they are inappropriate in the context of surrogacy. Home studies are required for adoptions.<sup>270</sup> Surrogacy, it is argued, differs from adoption in important respects. In a surrogacy arrangement, the parties deliberately engage in a medical procedure for the purpose of bringing a child into the world, a child the intended parents intend to parent from birth.<sup>271</sup> By contrast, in adoption, the prospective adoptive parent enters the picture after conception. Home study requirements can allow bias to seep into the process.<sup>272</sup> Indeed, in the adoption context, evidence shows that LGBTQ and other “disfavored” people, including disabled people, often face bias from agency officials.<sup>273</sup> Home study requirements, it is also claimed, infuse inappropriate

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mother’s argument that the marital presumption cannot be applied to female spouses because female spouses cannot be biological parents).

267. NeJaime, *supra* note 9, at 2333 (“In practical terms, equality requires law to value social as well as biological contributions in recognizing parents.”).

268. TEX. FAM. CODE ANN. § 160.756(b)(3) (West 2014) (requiring conducting a home study of the intended parents to determine that they “meet the standards of fitness applicable to adoptive parents,” unless judicially waived); UTAH CODE ANN. § 78B-15-803(2)(b) (LexisNexis Supp. 2020) (same); VA. CODE ANN. § 20-160(B)(2)–(3) (2016 & Supp. 2020) (same, without waiver).

269. LA. STAT. ANN. § 9:2720.4(A)(1)–(3) (2018).

270. See, e.g., CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH AND HUM. SERVS., HOME STUDY REQUIREMENTS FOR PROSPECTIVE PARENTS IN Domestic Adoption I (2020), [https://www.childwelfare.gov/pubPDFs/homestudyreqs\\_adoption.pdf](https://www.childwelfare.gov/pubPDFs/homestudyreqs_adoption.pdf) [<https://perma.cc/XT4E-A37W>] (“Laws and policies for approving prospective adoptive homes vary considerably from State to State. In all cases, the process involves conducting an assessment or home study of the prospective adoptive parent or parents.”).

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

272. Cf. Ainsworth, *supra* note 1, at 1111 (raising concerns about provisions that can “undermine or further serve to subordinate groups of people”).

273. Cf. *id.* (noting the discriminatory impact of various policies in both adoption and surrogacy contexts). For example, a 2011 study of prospective gay and lesbian adoptive parents found that nearly half of the people who responded to the survey reported that they experienced discrimination in the process. DAVID M. BRODZINSKY & EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN III: RESEARCH-BASED BEST PRACTICES IN ADOPTION BY GAYS AND LESBIANS 24–25 (2011), [https://www.researchgate.net/profile/David-Brodzinsky/publication/271909962\\_Expanding\\_Resources\\_for\\_Children\\_III\\_Research-](https://www.researchgate.net/profile/David-Brodzinsky/publication/271909962_Expanding_Resources_for_Children_III_Research-)

state control over what should be private decisions about procreation and family creation.<sup>274</sup> Based on these and other concerns, the vast majority of permissive jurisdictions do not include a home study or similar requirement.<sup>275</sup>

### 3. Procedural Rules

Surrogacy laws vary on the timing of and procedures for determinations of parenthood, and both of these components have significant implications for the rights and responsibilities of the intended parents. Half of the permissive jurisdictions—thirteen of the twenty-two—clearly provide for automatic determinations that the intended parents are parents of children conceived pursuant to a compliant gestational surrogacy agreement.<sup>276</sup> Three additional

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based\_best\_practices\_in\_adoption\_for\_gays\_and\_lesbians/links/54d67cd90cf25013d0341e5c/Expanding-Resources-for-Children-III-Research-based-best-practices-in-adoption-for-gays-and-lesbians.pdf [https://perma.cc/SJ4G-WNU6]; see also FRANK J. BEWKES, SHABAB AHMED MIRZA, CAITLIN ROONEY, LAURA E. DURSO, JOE KROLL & ELLY WONG, WELCOMING ALL FAMILIES: DISCRIMINATION AGAINST LGBTQ FOSTER AND ADOPTIVE PARENTS HURTS CHILDREN, *CTR. FOR AM. PROGRESS* (2018), <https://www.americanprogress.org/issues/lgbt/reports/2018/11/20/461199/welcoming-all-families/> [https://perma.cc/LU9R-YW2P] (reviewing the current legal landscape of protections for LGBTQ foster and adoptive parents and chronicling discrimination they may experience); Rachel H. Farr & Abbie E. Goldberg, *Sexual Orientation, Gender Identity, and Adoption Law*, 56 *FAM. CT. REV.* 374, 378 (2018) (“Even in the context of laws allowing for adoption by LGBTQ persons, the process of adoption can involve stigma and discrimination in the context of both interpersonal and institutional interactions.”).

For a discussion of some of the cases in which LGBTQ prospective adoptive parents alleged discrimination based on their sexual orientation or gender identity, see JOSLIN ET AL., *supra* note 59, §§ 2:12–14. For reporting on one recent such case, see, for example, Christine Hauser, *Utah Judge Orders Lesbian Couple to Give Up Foster Child*, *N.Y. TIMES* (Nov. 12, 2015), <https://www.nytimes.com/2015/11/13/us/utah-lesbian-couple-foster-child-heterosexual-family.html> [https://perma.cc/P595-57C6].

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

274. See, e.g., 1988 ACLU Policy Statement, *supra* note 109, at 295 (arguing that an intended parent should be able to decide for themselves, without government control or compulsion, whether to use surrogacy to build their family).

275. See *infra* Appendix B.

276. ARK. CODE ANN. § 9-10-201(c)(1) (2015); CAL. FAM. CODE § 7962(f)(2) (West 2013 & Supp. 2020); CONN. GEN. STAT. § 7-48a(b) (2019); *Raftopol v. Ramey*, 12 A.3d 783, 799 (Conn. 2011) (“[W]e conclude that the legislature intended § 7-48a to confer parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent’s genetic relationship to the children.”); IOWA ADMIN. CODE r. 641-99.15 (2021); ME. STAT. tit. 19-A, § 1933(1) (2020); NEV. REV. STAT. § 126.720(1)(a) (2020); N.J. STAT. ANN. § 9:17-63 (West Supp. 2020); N.Y. FAM. CT. ACT § 581-406 (McKinney, Westlaw through L. 2021, chs. 1–23); N.D. CENT. CODE § 14-18-08 (2017); § 15 R.I. GEN. LAWS § 15-8.1-803(a)(1) (Supp. 2020); VT. STAT. ANN. tit. 15C, § 803(a)(1) (2019); WASH. REV. CODE § 26.26A.750(1) (Supp. 2019); D.C. CODE § 16-407 (2020).

states have laws that are not explicit on this point but may also provide for this result.<sup>277</sup>

This approach, it is argued, provides the parties with certainty and finality.<sup>278</sup> The benefit of automatic determinations of parentage, without the need for a court adjudication, is more obvious with respect to the intended parents. There is a strong argument that automatic determinations of parentage also benefits the child. Establishing parentage as a matter of law ensures that the child will have legal parents. Schemes that require the parties to return to court after birth leave the child's parentage unclear for at least some period of time. That can be harmful to all parties, including the child.

Some advocates argue that rules providing for parentage as a matter of law also benefit the person acting as a surrogate. Such rules provide assurance to the person acting as a surrogate that—so long as they comply with the statutory requirements—the intended parents will be required to assume custody and responsibility for the child after the child's birth. Sara Ainsworth described the benefits of such a rule in this way:

The child is never left parentless; the intended parents are both assured of and required to assume their parental obligations; and the woman acting as surrogate knows in advance exactly what will happen when she agrees to act as a surrogate, and is never left with parental responsibility for a child she did not intend to raise.<sup>279</sup>

Laws providing for automatic determinations of parentage also minimize the costs, time, and procedural hurdles associated with having one or more required court appearances. These appearances can be particularly burdensome when the proceedings must occur in states other than the home state of one or more of the parties.<sup>280</sup>

Relatedly, there is a trend in favor of statutes that permit courts to issue parentage orders prior to the birth of the child.<sup>281</sup> Obtaining a pre-birth order regarding parentage can be helpful to the parties. Having such an order can provide the parties with a greater degree of certainty and security over their respective statuses regarding the future child.<sup>282</sup> From a practical perspective,

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277. See DEL. CODE ANN. tit. 13, § 8-807 (2009 & Supp. 2020); 750 ILL. COMP. STAT. § 47/35 (2019); N.H. REV. STAT. ANN. § 168-B:12(I) (2014 & Supp. 2020).

278. See, e.g., Ainsworth, *supra* note 1, at 1120–21; CTR. FOR REPROD. RTS., *supra* note 258 (“Pre-birth parentage orders (PBPOs) in compensated gestational surrogacy arrangements help establish legal clarity by establishing who the future child’s legal parents will be if and once the child is born.”).

279. Ainsworth, *supra* note 1, at 1120–21.

280. See, e.g., Nicolas, *supra* note 72, at 1245 (discussing challenges of working with a person acting as a surrogate in a different state).

281. See, e.g., CAL. FAM. CODE § 7962(f)(2); 750 ILL. COMP. STAT. 47/35(a); ME. STAT. tit. 19-A, § 1934(1); NEV. REV. STAT. § 126.720(4); N.H. REV. STAT. ANN. § 168-B:12(I); N.J. STAT. ANN. § 9:17-67(a), (f); N.Y. FAM. CT. ACT § 581-203(b), (d); 15 R.I. GEN. LAWS § 15-8.1-804; VT. STAT. ANN. tit. 15C, § 804(a)(1); WASH. REV. CODE § 26.26A.750(1)(a); D.C. CODE §§ 16-408(a), (e).

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



the order can facilitate a number of important steps both before and shortly after the birth of the child.<sup>283</sup> For example, it can streamline issues related to securing health insurance for the resulting child.<sup>284</sup> Having the order can also facilitate the completion of the child's original birth certificate.<sup>285</sup>

The date upon which the orders of parentage become effective differs among jurisdictions. In some jurisdictions, these provisions clarify that while such orders can be *issued* prior to birth, they do not become *effective* until the birth of the child.<sup>286</sup> The relevant Washington provision provides, for example, that a pre-birth order can “order[] that parental rights and duties vest immediately on the birth of the child exclusively in each intended parent.”<sup>287</sup> In other jurisdictions, however, any such orders are effective immediately even if issued prior to the birth of the child. For example, Illinois's provision states that “a parent-child relationship shall be established prior to the birth of a child born through gestational surrogacy” if the parties comply with all of the statutory requirements.<sup>288</sup>

Some women's rights and reproductive rights advocates are troubled by statutory provisions that purport to establish legal parentage prior to the birth of the child.<sup>289</sup> The concern is that legislation declaring the parentage of a fetus could be understood to suggest that the fetus is a person to which rights attach.<sup>290</sup> Fetal rights-based arguments have been utilized as a means to chip away at women's right and access to abortion services, as well as other types of reproductive health care.<sup>291</sup> For this reason, at the urging of feminists and

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283. *Id.* at 635.

284. *Id.*

285. *Id.* at 634–35.

286. *See, e.g.*, ME. STAT. tit. 19-A, § 1934(1)(B); NEV. REV. STAT. ANN. § 126.720(1)(a), (4); N.Y. FAM. CT. ACT § 581-203(d); 15 R.I. GEN. LAWS § 15-8.1-804(b)(2); VT. STAT. ANN. tit. 15C, § 804(a)(1); WASH. REV. CODE § 26.26A.750(1)(a); D.C. CODE § 16-408(e)(1)(A).

The law in California is more ambiguous. The law permits the issuance of an order prior to birth “establishing a parent and child relationship.” CAL. FAM. CODE § 7962(f)(2). Another provision, however, provides that while a parentage action “may be brought, [and] an order or judgment may be entered before the birth of the child . . . enforcement of that order or judgment shall be stayed until the birth of the child.” *Id.* § 7633 (West 2013).

287. WASH. REV. CODE § 26.26A.750(1)(a).

288. 750 ILL. COMP. STAT. 47/35(a) (2019); *see also* N.H. REV. STAT. ANN. § 168-B:12(I) (2014 & Supp. 2020) (“[A] petition [for a parentage order] may be brought either before, during, or subsequent to the pregnancy. The court shall . . . grant the petition upon a finding [of] substantial compliance . . . Such parentage orders . . . shall conclusively establish or affirm . . . the parent-child relationship.”); N.J. STAT. ANN. § 9:17-67(a), (f) (West Supp. 2020) (providing that the action can be filed in the county in which the resulting child is expected to be born, and that “[i]f the court finds that the parties have complied with the [surrogacy] provisions . . . the court shall enter an order of parentage naming the intended parent as the legal parent of the child”).

289. *See, e.g.*, CTR. FOR REPROD. RTS., *supra* note 258 (“Pre-birth parentage orders (PBPOs) . . . help establish legal clarity by establishing who the future child's legal parents will be if and once the child is born . . . PBPOs neither grant fertilized eggs, embryos, or fetuses the status of persons under the law nor grant any party parental rights over them.”).

290. *See, e.g., id.*

291. *See, e.g., Goodwin, supra* note 37, at 783.

women's rights advocates, a preamble was added to the final (unsuccessful) 2019 version of the New York legislation that would have permitted and regulated gestational surrogacy.<sup>292</sup> The preamble declared: "No fertilized egg, embryo or fetus shall have any independent rights under the laws of this state, nor shall any fertilized egg, embryo or fetus be viewed as a child under the laws of this state."<sup>293</sup> As noted above, for similar reasons, the law in a number of jurisdictions clarifies that parentage orders issued during pregnancy do not become effective until birth.<sup>294</sup>

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

### C. *Person Acting as a Surrogate (PAS) Protections*

This Section explores the extent to which existing permissive statutory schemes protect persons acting as surrogates. These details are set forth in Appendix C. The issues explored in this subsection include the right to and provision of independent counsel during various stages of the contracting process; the right of the person acting as a surrogate to maintain autonomy over decisions regarding their body, health care, and behavior during pregnancy; the right to terminate the surrogacy agreement; and the right to accept and set compensation.

#### 1. *Independent Counsel*

While there is much about surrogacy that is debated, the general agreement is that surrogacy arrangements do hold the potential for inappropriate coercion.<sup>295</sup> One safeguard that is increasingly included in surrogacy legislation is the requirement of independent legal representation for all parties. The independent counsel requirement is intended to guard against untoward coercion and to address the unequal bargaining power that is typical in these

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292. See, e.g., Letter from Lourdes Rivera, Senior Vice President, U.S Programs, Ctr. for Reprod. Rts., to Andrew M. Cuomo, Governor of N.Y., et al. 2 (June 12, 2019) (on file with author) (acknowledging the "positive development" of the addition of the preamble language).

293. Assemb. 1071B / S. 2071A, 2019 Leg., 2019–20 Reg. Sess. § 581-101 (N.Y. 2019). This preamble was not included in the version of the legislation that was enacted in 2020, Act of Apr. 3, 2020, ch. 56, pt. L (to be codified in scattered subjects of the Consol. Laws of N.Y.). The new law, however, does provide that even those parentage orders entered before birth declare the child's parentage *upon birth*. N.Y. FAM. CT. ACT § 581-203(d)(1) (McKinney, Westlaw through L. 2021, chs. 1–23) (providing that upon proof of the required showings, the court shall issue a judgment declaring "that upon the birth of the child born during the term of the surrogacy agreement, the intended parent or parents are the only legal parent or parents of the child").

294. See *supra* notes 286–287 and accompanying text.

295. See *supra* notes 69–71 and accompanying text.

arrangements.<sup>296</sup> Some of the older schemes do not speak to this issue.<sup>297</sup> Today, most permissive statutory regimes include some kind of requirement related to independent legal counsel for all parties.<sup>298</sup> There is some variation, however, in this regard. Some jurisdictions require independent legal representation, but only for some aspects of the arrangement. For example, California law simply requires that the parties be represented by independent counsel *prior to the execution* of the agreement.<sup>299</sup> In contrast, a number of other statutes require independent legal representation “throughout the surrogacy arrangement”<sup>300</sup> or in “all matters concerning” the agreement.<sup>301</sup>

The benefits of a legal advocate to guard against abuse are limited if the person acting as a surrogate cannot afford legal counsel.<sup>302</sup> Accordingly, three of the more recently enacted statutory schemes require the intended parents to pay for counsel for the person acting as a surrogate.<sup>303</sup> This requirement does raise the potential that counsel may have some allegiances to the intended parents. The attorneys are, however, governed by ethical rules. These rules require counsel to zealously advocate on behalf of the client—the person acting as a surrogate.<sup>304</sup>

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296. See Ainsworth, *supra* note 1, at 1114 (“Gains can be achieved by providing for redistribution in the form of the intended parents paying for independent legal counsel for the woman acting as surrogate . . .”).

297. See, e.g., ARK. CODE ANN. § 9-10-201 (2015) (no mention of counsel); § CONN. GEN. STAT. § 7-48a (2019) (same); TEX. FAM. CODE ANN. §§ 160.751–.763 (West 2014 & Supp. 2018) (same); UTAH CODE ANN. §§ 78B-15-801 to -809 (LexisNexis 2018 & Supp. 2020) (same); FLA. STAT. § 742.15 (2019) (same); *id.* § 63.213(4) (providing that if there is counsel, counsel cannot jointly represent the intended parent and the person acting as a genetic surrogate).

298. CAL. FAM. CODE § 7962(b) (West 2013 & Supp. 2020); DEL. CODE ANN. tit. 13, § 8-807(b)(3) (2009 & Supp. 2020); 750 ILL. COMP. STAT. 47/25(b)(3) (2019); ME. STAT. tit. 19-A, § 1931(1)(D) (2020); NEV. REV. STAT. § 126.750(2) (2020); N.H. REV. STAT. ANN. § 168-B:11(III) (2014); N.J. STAT. ANN. § 9:17-65(a)(3) (West Supp. 2020); N.Y. FAM. CT. ACT § 581-403(e); OKLA. STAT. tit. 10, § 557.6(A)(3)–(4) (Supp. 2020); 15 R.I. GEN. LAWS § 15-8.1-802(b)(7) (Supp. 2020); VT. STAT. ANN. tit. 15C, § 802(b)(7) (2019); WASH. REV. CODE § 26.26A.710(7) (Supp. 2019); D.C. CODE § 16-406(b) (2020).

299. CAL. FAM. CODE § 7962(b); accord D.C. CODE § 16-406(b) (“[The parties] shall be represented by independent legal counsel in the preparation, counseling, and negotiation of the surrogacy agreement.”).

300. E.g., WASH. REV. CODE § 26.26A.710(7); accord N.Y. FAM. CT. ACT § 581-403(e) (requiring independent representation “throughout the contractual process and the duration of the contract”).

301. E.g., DEL. CODE ANN. tit. 13, § 8-807(b)(3); 750 ILL. COMP. STAT. 47/25(b)(3); ME. STAT. tit. 19-A, § 1932(3)(G); NEV. REV. STAT. § 126.750(2); 15 R.I. GEN. LAWS § 15-8.1-802(b)(7); VT. STAT. ANN. tit. 15C, § 802(b)(7); accord N.J. STAT. ANN. § 9:17-65(a)(3) (“The [parties] shall have been represented by separate attorneys in all matters relating to the . . . agreement.”).

302. See, e.g., Ainsworth, *supra* note 1, at 1114.

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

304. June Carbone & Christina O. Miller, *Surrogacy Professionalism*, 31 J. AM. ACAD. MATRIM. LAWS. 1, 36 (2018) (“Under [Model Rule of Professional Conduct] 5.4(c), a lawyer may not permit a party who pays the lawyer’s fees or recommends the lawyer to in any way influence or direct the professional judgment of the lawyer in rendering the services.”).

## 2. Bodily Decision-Making and Control During Pregnancy

Another set of key issues regarding people acting as surrogates relate to their ability to make decisions about their bodies and their behavior during pregnancy. Some advocates argue that “[e]nsuring that a woman retains reproductive decision-making should be a key aspect of any regulatory scheme regarding compensated surrogacy.”<sup>305</sup> This position is reflected in some, but not all, permissive surrogacy regimes.

A threshold decision-making issue relates to the choice of the treating physician for the person acting as a surrogate. The law in four permissive jurisdictions—Maine, New York, Rhode Island, and Vermont—expressly requires the person acting as a surrogate to exclusively make such decisions.<sup>306</sup> New Jersey law states that the person acting as a surrogate must be permitted to be treated by a medical professional of her choice, but that this choice can be made only “after she notifies, in writing, the intended parent of her choice.”<sup>307</sup> In contrast, the law in three other jurisdictions—Delaware, Illinois, and Nevada—declares that the person acting as a surrogate can choose a treating physician only “after consultation with the intended [parent or] parents.”<sup>308</sup>

A number of jurisdictions expressly protect the right of the person acting as a surrogate to make a wider range of health care decisions during pregnancy. Washington law, for example, provides that the surrogacy agreement must permit the person acting as a surrogate “to make *all health and welfare decisions regarding herself and her pregnancy*,” and that agreement provisions to the contrary “are void and unenforceable.”<sup>309</sup> This language ensures that the person acting as a surrogate gets to make all medical decisions during their pregnancy. This would include, even where not otherwise expressly protected, the person’s choice of doctor. In addition to that choice, this kind of protection also ensures the right to make many other decisions that may arise during pregnancy, such as whether to have a particular invasive test or a cesarean section. Other

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305. Ainsworth, *supra* note 1, at 1114. The Center for Reproductive Rights endorsed a similar principle, declaring: “Consistent with human and constitutional rights, a person acting as a gestational surrogate controls all decisions about their body throughout a compensated gestational surrogacy arrangement, including during attempts to become pregnant, pregnancy, delivery, and post-partum.” CTR. FOR REPROD. RTS., *supra* note 258, at 1.

306. ME. STAT. tit. 19-A, § 1932(3)(J)(3) (“The gestational carrier has the right to use the services of a health care provider of her choosing to provide her care during her pregnancy.”); N.Y. FAM. CT. ACT § 581-403(i)(1)(vi) (McKinney, Westlaw through L. 2021, chs. 1–23) (“[T]he surrogacy agreement shall permit the person acting as a surrogate to utilize the services of a health care practitioner of the person’s choosing[.]”); 15 R.I. GEN. LAWS ANN. § 15-8.1-802(b)(12) (Supp. 2020) (“The gestational carrier shall have the right to use the services of a health care provider or providers of the gestational carrier’s choosing to provide care during the pregnancy.”); VT. STAT. ANN. tit. 15C, § 802(b)(12) (2019) (“The gestational carrier shall have the right to use the services of a health care provider or providers of the gestational carrier’s choosing to provide care during the pregnancy.”).

307. N.J. STAT. ANN. § 9:17-65(b)(1)(c) (West Supp. 2020).

308. DEL. CODE ANN. tit. 13, § 8-807(c)(3) (2009 & Supp. 2020); 750 ILL. COMP. STAT. 47/25(c)(3) (2019); NEV. REV. STAT. § 126.750(4)(c) (2020).

309. WASH. REV. CODE § 26.26A.715(1)(g) (Supp. 2019) (emphasis added).

jurisdictions that have similar statutory language include New York,<sup>310</sup> Rhode Island,<sup>311</sup> Vermont,<sup>312</sup> Virginia,<sup>313</sup> and the District of Columbia.<sup>314</sup> Recently enacted provisions in both New York and Rhode Island expressly provide that these protected medical choices include, but are not limited to, decisions about whether to consent to a cesarean section or a multiple-embryo transfer.<sup>315</sup>

Three other jurisdictions—Maine, Texas, and Utah—have statutes with somewhat more limited language regarding general medical decision-making.<sup>316</sup> Texas law, for example, provides that “the agreement may not limit the right of the [person acting as a surrogate] to make decisions to safeguard her health or the health of an embryo.”<sup>317</sup> This language clearly protects the right of the person acting as a surrogate to make at least some medical decisions during their pregnancy. It is possible, however, that a court could interpret the “safeguard” language in a way that allows for enforcement of some provisions related to medical decisions that do not impose any risks to the health of the person acting as a surrogate. Under this interpretation, a court might, for example, approve the inclusion of contract clauses under which the person acting as a surrogate agrees not to engage in a range of behaviors such as smoking, drinking, exercising, or even taking night classes.<sup>318</sup>

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310. N.Y. FAM. CT. ACT § 581-403(i)(1)(v) (McKinney, Westlaw through L. 2021, chs. 1–23) (“[T]he surrogacy agreement must permit the person acting as surrogate to make all health and welfare decisions regarding themselves and their pregnancy including but not limited to, whether to consent to a cesarean section or multiple embryo transfer, and notwithstanding any other provisions in this chapter, provisions in the agreement to the contrary are void and unenforceable.”).

311. 15 R.I. GEN. LAWS § 15-8.1-802(d) (Supp. 2020) (“A gestational carrier agreement shall permit the individual acting as a gestational carrier to make all health and welfare decisions regarding the gestational carrier’s health and pregnancy, including, but not limited to, whether to consent to a caesarean section or multiple embryo transfer . . . . Except as otherwise provided by law, any written or verbal agreement purporting to waive or limit these rights is void as against public policy.”).

312. VT. STAT. ANN. tit. 15C, § 802(e) (2019) (“A gestational agreement shall permit the gestational carrier to make all health and welfare decisions regarding the gestational carrier’s health and pregnancy . . . .”).

313. VA. CODE ANN. § 20-163(A) (2016 & Supp. 2020) (“The surrogate shall be solely responsible for the clinical management of the pregnancy.”).

314. D.C. CODE § 16-406(a)(4)(C) (2020) (“[T]he surrogate shall maintain control and decision-making authority over the surrogate’s body[.]”); *see also id.* § 16-406(c) (“A surrogacy agreement may not limit the right of the surrogate to make decisions to safeguard the surrogate’s health or that of the embryo or fetus.”).

315. N.Y. FAM. CT. ACT § 581-403(i)(1)(v); 15 R.I. GEN. LAWS ANN. § 15-8.1-802(d).

316. ME. STAT. tit. 19-A, § 1932(5) (2020) (“A[n] agreement may not limit the right of the gestational carrier to make decisions to safeguard her health.”); TEX. FAM. CODE ANN. § 160.754(g) (West 2014) (“A[n] agreement may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo.”); UTAH CODE ANN. § 78B-15-808(2) (LexisNexis 2018) (“A[n] agreement may not limit the right of the gestational mother to make decisions to safeguard her health or that of the embryo or fetus.”).

317. TEX. FAM. CODE ANN. § 160.754(g).

318. *See, e.g.,* Ainsworth, *supra* note 1, at 1090 (“One couple working with a United States woman acting as surrogate described being distressed that the pregnant woman was taking night classes, and secretly relieved when her physician recommended bed rest for the remainder of the pregnancy.”).

Another group of jurisdictions has multiple provisions regarding the bodily autonomy and integrity of the person acting as a surrogate that appear to be in tension with one another. For example, Florida law provides that the intended parents must agree “that the gestational surrogate shall be the sole source of consent with respect to clinical intervention and management of the pregnancy.”<sup>319</sup> But a different subsection of Florida law provides that the person acting as a surrogate must agree “to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health.”<sup>320</sup> It is not clear how a court would interpret these arguably conflicting provisions in cases where the person acting as a surrogate made a reasonable decision regarding treatment related to the management of their pregnancy that departed from the instructions provided by a medical professional. Louisiana has two similar provisions that likewise appear to be in tension with one another.<sup>321</sup>

Yet another group of permissive statutory schemes take a very different approach. The laws in these jurisdictions permit contract clauses that *limit* or *override* the contemporaneous medical decision-making authority of the person acting as a surrogate with respect to their own body. These kinds of clauses have been included in surrogacy agreements from the early days.<sup>322</sup> Despite some early predictions to the contrary,<sup>323</sup> these clauses remain basic features of the contracts today.<sup>324</sup> Their continued presence is due at least in part to the law’s express condonation of them in a number of states. For example, Oklahoma law expressly allows for the inclusion of agreement clauses that require the person acting as a surrogate to “undergo all medical examinations, treatments and fetal monitoring procedures recommended for the success of the pregnancy by the

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319. FLA. STAT. § 742.15(3)(a) (2019).

320. *Id.* § 742.15(3)(b).

321. LA. STAT. ANN. § 9:2720.2(B)(1) (2018) (“[T]he gestational carrier has sole authority with respect to medical decision-making during the term of the pregnancy consistent with the rights of a pregnant woman carrying her own biological child.”); *id.* § 9:2720.2(A)(2) (requiring that the person acting as a surrogate agree “to [receive] reasonable medical evaluation and treatment during the term of the pregnancy, to adhere to reasonable medical instructions about prenatal health, and to execute medical records releases”).

322. Brophy, *supra* note 117, at 282–83 (providing a sample agreement that includes such a clause).

323. Andrews, *supra* note 123, at 2373–74.

324. *See, e.g.*, Berk, *supra* note 123, at 156–57. One recent surrogacy agreement contained the following waiver:

Voluntary Termination of Pregnancy (Abortion) Gestational Carrier and Genetic Parents understand that the United States Supreme Court cases of *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992), grant constitutional protection to a woman’s right to elect an abortion. Notwithstanding the foregoing, it is Gestational Carrier’s express intent to contractually waive, and she does hereby expressly contractually waive, that constitutional right, and Gestational Carrier hereby expressly grants Genetic Parents the exclusive right and sole discretion whether to terminate a pregnancy by abortion or continue a pregnancy.

Berk, *supra* note 14, at 419. But even when an agreement contains no waiver, “exercising that right to abortion in the case of surrogacy may constitute a breach of contract for which there are serious financial consequences that a surrogate cannot likely afford.” *Id.* at 419–20.

physician providing care to the gestational carrier during the pregnancy.”<sup>325</sup> Three other states—Delaware, Illinois, and Nevada—have similar provisions expressly permitting such clauses.<sup>326</sup> Oklahoma law goes a step further and expressly declares that these clauses “shall be enforceable.”<sup>327</sup>

The schemes in other permissive jurisdictions—including laws in Arkansas, California, Connecticut, Iowa, New Jersey, and North Dakota—do not expressly address contract clauses regarding the decision-making authority of the person acting as a surrogate.<sup>328</sup> While these statutes do not expressly condone such clauses, they also do not expressly render them void. Evidence suggests that attorneys in at least some of these jurisdictions routinely include such clauses in their agreements.<sup>329</sup>

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

[L]awyers insert extensive lists of rules the surrogate must follow . . . . Contract rules may include the degree of an intended parents’ surveillance over the surrogate, restrictions on the surrogate’s daily activities, or requiring the surrogate to consume solely organic foods and supplements while prohibiting caffeine, sugar, or fast food throughout the pregnancy. Some rules require that the surrogate engage in a particular activity—like acupuncture or going to the gym—or prohibit her from doing so—such as bans on microwaves, hairspray, manicures, or changing cat litter.<sup>330</sup>

Arguably, the broad statutory language protecting the right of the person acting as a surrogate to make *all health and welfare decisions* would preclude such clauses.<sup>331</sup> However, this may not be the case in states with provisions protecting only the right to make decisions to “safeguard” their health,<sup>332</sup> or the

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325. OKLA. STAT. tit. 10, § 557.6(D)(1) (Supp. 2020).

326. DEL. CODE ANN. tit. 13, § 8-807(d)(1) (2009 & Supp. 2020); 750 ILL. COMP. STAT. 47/25(d)(1) (2019); NEV. REV. STAT. § 126.750(5)(a) (2020).

327. OKLA. STAT. tit. 10, § 557.6(D).

328. See *infra* Appendix C.

329. See Berk, *supra* note 123, at 156–57.

330. *Id.* at 157.

331. For a discussion of jurisdictions with this type of statutory provision, see *supra* notes 309–315 and accompanying text.

332. See *supra* notes 316–317 and accompanying text. The District of Columbia has a provision with similar language, although another provision provides that “the surrogate shall maintain control and decision-making authority over the surrogate’s body.” See *supra* note 314.

right to make “medical decisions,”<sup>333</sup> or the right to control the “clinical management” of the pregnancy.<sup>334</sup>

These kinds of contract clauses are expressly *condoned* by the statutes in a number of other jurisdictions. Four states—Delaware, Illinois, Nevada, and Oklahoma—have statutory schemes that permit the enforcement of an agreement to include contractual clauses requiring the person acting as a surrogate to “abstain from any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child.”<sup>335</sup> These clauses could cover activities like illegal drug use. Their scope, however, can sweep much more broadly. They could cover—and very often do cover—issues as far ranging as what kind of food the person acting as a surrogate must eat, whether she can use a microwave, and whether and how much she can exercise.<sup>336</sup>

A number of statutory schemes do not directly address these kinds of behavior clauses. Jurisdictions with these schemes include Arkansas, California, New Hampshire, New Jersey, and North Dakota.<sup>337</sup> Arguably, in these states, the agreement is enforceable so long as it otherwise complies with the statutory requirements and does not violate other principles of law. Thus, statutory silence may, in practice, mean that such clauses can be included.

To be sure, there are serious questions about whether contract clauses of this type are enforceable and if so, how. Some scholars argue in favor of “full contractual” enforcement of surrogacy agreements, including provisions about invasive medical treatment and abortions.<sup>338</sup> Others, in contrast, argue that, at a minimum, clauses that require the person acting as a surrogate to have an abortion or that preclude one from having an abortion are unenforceable because

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333. LA. STAT. ANN. § 9:2720.2(B)(1) (2018) (“[T]he gestational carrier has sole authority with respect to medical decision-making during the term of the pregnancy consistent with the rights of a pregnant woman carrying her own biological child.”).

334. *Supra* note 313.

335. DEL. CODE ANN. tit. 13, § 8-807(d)(2) (2009 & Supp. 2020); accord 750 ILL. COMP. STAT. 47/25(d)(2) (2019); NEV. REV. STAT. ANN. § 126.750(5)(b) (2020); OKLA. STAT. tit. 10, § 557.6(D)(2) (Supp. 2020).

336. *See, e.g.*, Berk, *supra* note 123, at 157.

337. *See infra* Appendix C.

338. *See, e.g.*, Epstein, *supra* note 119, at 2336; *see also* Deborah S. Mazer, *Born Breach: The Challenge of Remedies in Surrogacy Contracts*, 28 YALE J.L. & FEMINISM 211, 211–15 (2016) (arguing lawyers should “consider liquidated damages for ‘tragic breaches’ of [surrogacy agreements]” and that “courts ought to honor liquidated damages provisions”).



a person's right over their body is absolute.<sup>339</sup> Some also argue that clauses about other medical interventions during the pregnancy are likewise unenforceable.<sup>340</sup>

In any event, laws that even purport to allow these kinds of contract provisions raise serious concerns.<sup>341</sup> In the context of individual surrogacy arrangements, such clauses diminish the rights and interests of pregnant people and subject their bodies and their lives to the wishes and interests of others. Moreover, that person may experience the effects long after the arrangement has ended. If, for example, a person acting as a surrogate is forced to undergo an unwanted cesarean section, they might experience reduced fertility or other complications associated with the surgery throughout their lifetime.<sup>342</sup>

State condonation of these kinds of clauses has an impact that can reach far beyond surrogacy arrangements and their participants. Applied more broadly, such an approach inhibits women's ability to achieve full equality. Viewed through this lens, these types of surrogacy rules can contribute to efforts to curtail women's bodily autonomy and reproductive freedom. Such curtailments have the potential to impact all aspects of women's lives. As Reva Siegel explains, Supreme Court decisions acknowledge that reproductive decisions have far-reaching impacts on women's lives:

[Reproductive freedom] crucially affects women's health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions that this society no longer believes fair to enforce, yet is unwilling institutionally to redress.<sup>343</sup>

### 3. Termination of Surrogacy Agreements

When and how the parties to a surrogacy agreement can terminate the agreement is a critical issue. Most permissive statutory schemes either clearly provide or seem to provide that compliant gestational surrogacy agreements

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339. See, e.g., Tribe, *supra* note 118, at 338 (arguing, in the context of the debate over state funding for abortions, that a woman's right to terminate her pregnancy is inalienable); see also Note, *supra* note 118, at 1955 ("The application of personhood to the thirteenth amendment and privacy questions raised by specific performance of a surrogate mother's promises suggests that courts should not permit surrogate mothers to alienate their right to an abortion because the risks of specific performance are so severe in comparison with the risks of an inalienable abortion right.")

340. See, e.g., Andrews, *supra* note 123, at 2372–73 ("If a court, under traditional contract principles, is not going to grant specific performance to force an opera singer to sing, it seems highly unlikely that a court would enforce the abortion, cesarean section, or medical provisions of the surrogacy contract." (footnote omitted)).

341. See Joslin, *Politics of Pregnancy*, *supra* note 2, at 381–87 (connecting the regulation of bodily decision-making authority of people acting as surrogates to state regulation of other pregnant persons and their reproductive decision-making).

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

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

become enforceable and binding at the time a successful embryo transfer has occurred. Washington's law is an example of one that expressly provides for this result:

A party to a gestational surrogacy agreement may terminate the agreement, at any time before an embryo transfer, by giving notice of termination in a record to all other parties. If an embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent embryo transfer.<sup>344</sup>

Maine, New York, Rhode Island, Vermont, and Virginia have similar provisions.<sup>345</sup> Other jurisdictions have provisions that seem to have a similar effect, although the provisions do not expressly address the issue of contract termination. These jurisdictions include Arkansas, California, Delaware, New Hampshire, New Jersey, Nevada, North Dakota, and the District of Columbia.<sup>346</sup>

Other jurisdictions require the parties to file an additional pleading with the court after the child is born.<sup>347</sup> Even in these jurisdictions, however, at least with

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344. WASH. REV. CODE § 26.26A.735(1) (2019 Supp.).

345. ME. STAT. tit. 19-A, § 1936(1) (2020) (“A party to a gestational carrier agreement may withdraw consent to any medical procedure and may terminate the gestational carrier agreement at any time prior to any embryo transfer or implantation by giving written notice of termination to all other parties.”); N.Y. FAM. CT. ACT § 581-405 (McKinney, Westlaw through L. 2021, chs. 1–23) (“After the execution of a surrogacy agreement but before the person acting as surrogate becomes pregnant by means of assisted reproduction, the person acting as surrogate . . . or any intended parent may terminate the surrogacy agreement by giving notice of termination in a record to all other parties.”); 15 R.I. GEN. LAWS § 15-8.1-806(a) (Supp. 2020) (“A party to a gestational carrier agreement may withdraw consent to any medical procedure and may terminate the gestational carrier agreement at any time prior to any embryo transfer or implantation by giving written notice of termination to all other parties.”); VT. STAT. ANN. tit. 15C, § 806(a) (2019) (“A party to a gestational carrier agreement may withdraw consent to any medical procedure and may terminate the gestational carrier agreement at any time prior to any embryo transfer or implantation by giving written notice of termination to all other parties.”); VA. CODE ANN. § 20-161(A) (2016 & Supp. 2020) (“[B]efore the surrogate becomes pregnant through the use of assisted conception, the court for cause, or the surrogate, her spouse, if any, or the intended parent, for cause, may terminate the agreement by giving written notice of termination to all other parties and by filing notice of the termination with the court.”).

346. ARK. CODE ANN. § 9-10-201 (2015) (making no mention of how to terminate the contract); N.H. REV. STAT. ANN. § 168-B:7 (2014) (same); N.D. CENT. CODE § 14-18-08 (2017) (same); CAL. FAM. CODE § 7962(i) (West 2013 & Supp. 2020) (“An assisted reproduction agreement for gestational carriers executed in accordance with this section is presumptively valid and shall not be rescinded or revoked without a court order.”); DEL. CODE ANN. tit. 13, § 8-807(a), (b) (2009 & Supp. 2020) (setting forth the requirements for enforceability and requiring that the contract “shall be executed prior to the initiation of an embryo transfer in furtherance of the gestational carrier arrangement”); N.J. STAT. ANN. § 9:17-63(a) (West Supp. 2020) (providing that the intended parents will be the parents of the resulting child if the parties to the agreement meet eligibility requirements and the agreement meets statutory requirements); NEV. REV. STAT. § 126.720(4) (2020) (providing that the intended parents or surrogate may request a court order to determine the contents of the birth certificate before or after birth, provided that the agreement satisfies the statutory requirements); D.C. CODE § 16-411(1) (2020) (permitting parties to withdraw consent only “[i]n accordance with the terms of the surrogacy agreement”).

347. See, e.g., TEX. FAM. CODE ANN. § 160.760(a) (West 2014 & Supp. 2018) (“On the birth of a child to a gestational mother under a validated gestational agreement, the intended parents shall file a notice of the birth with the court . . . .”); UTAH CODE ANN. § 78B-15-807(1) (LexisNexis 2018) (“Upon birth of a child to a gestational mother, the intended parents shall file notice with the tribunal . . . .”).

regard to gestational surrogacy, the effect of an attempted withdrawal of consent at that point is unclear. The statutes in these jurisdictions typically require the parties to go to court *prior to pregnancy* as well. In that pre-pregnancy proceeding, the court typically will issue an order declaring that the intended parents will be the parents of the resulting child upon birth.<sup>348</sup> Thus, in practice, even in these jurisdictions, compliant gestational agreements may become binding after pregnancy has been achieved.

A minority of jurisdictions also permit genetic surrogacy agreements. In these jurisdictions, as noted above, the rules regarding genetic surrogacy typically *do allow* the person acting as a genetic surrogate to terminate the agreement either at some point fairly late in the pregnancy or, more commonly, within a certain number of days after the child's birth.<sup>349</sup>

Whether provisions permitting post-birth termination of surrogacy agreements by the person acting as a surrogate benefits them is a matter of debate. Some advocates and scholars have argued that the person acting as a surrogate must be permitted to terminate the agreement until some period after the birth of the child.<sup>350</sup> For example, the ACLU's 1988 policy position on surrogacy provides:

A gestational mother's waiver of parental rights prior to the birth of the child is . . . unenforceable. This is true whether or not she is also the genetic mother. Waiver of parental rights is enforceable only if the waiver occurs after the rights have come into existence, i.e., after the birth.<sup>351</sup>

A number of scholars and advocates have asserted a similar position in more recent years.<sup>352</sup>

Others, including some feminists, are opposed to schemes that allow for termination of the agreement after pregnancy has been achieved. People in this camp argue that, like intended parents, people acting as surrogates also generally prefer certainty about their status. For example, after carefully considering the matter and speaking to people who had acted as surrogates, the women's rights advocacy group Legal Voice determined that it supported "surrogacy legislation

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348. See, e.g., TEX. FAM. CODE ANN. § 160.756(c) (West 2014); UTAH CODE ANN. § 78B-15-803(1) (LexisNexis 2018 & Supp. 2020).

349. VA. CODE ANN. § 20-161(B) (within 180 days of "the last performance of any assisted conception"); FLA. STAT. § 63.213(1)(b) (2019) (within forty-eight hours after birth); WASH. REV. CODE § 26.26A.765(1)(b) (2019 Supp.) (same); D.C. CODE § 16-411(4) (same).

350. See, e.g., Taub, *supra* note 167, at 296 (advocating for a "cautious approach . . . under which a woman's consent to relinquish her child would not be valid unless given after a designated period following birth"); Field, *supra* note 69, at 97 (suggesting a possible approach under which "[the person acting as a surrogate] would not be bound until she turned over the child").

351. 1988 ACLU Policy Statement, *supra* note 109, at 295.

352. See, e.g., Julie Shapiro, *For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?*, 89 WASH. L. REV. 1345, 1346 (2014) ("[T]he law should be restructured so that a surrogate is recognized as a legal parent of the child."); Council Comm. on Judiciary, Report on B. 21-0016, 2016 Sess., attach. E (D.C. 2016) (statement of Professor Nancy D. Polikoff) ("[A] woman who bears a child should have a brief period of time after the child is born to assert a claim of parentage.").

that unequivocally recognizes the parental rights of the intended parent immediately upon the birth of the child, with no revocation period for the woman acting as surrogate.”<sup>353</sup> Writing about that process, Sara Ainsworth explained, “This decision was not reached without controversy, and it may be one of the hardest questions for feminist law reformers to resolve, once they decide to engage in regulating surrogacy.”<sup>354</sup> The questions are hard because the answers hold implications not just for the lives of people acting as surrogates but also for reproductive freedom and justice more broadly.

In addition, some advocates have noted that surrogacy rules, which provide that the agreement is binding on all parties resist long-standing stereotypes that women generally and pregnant women specifically are incapable of making rational decisions about themselves and their bodies. As the California Supreme Court, for example, explained: “The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law.”<sup>355</sup>

Rules providing for automatic determinations of parentage also challenge long-standing family law rules rooted in reproductive biology. Historically, the person who gave birth was always recognized as a parent. Permissive surrogacy rules that do not allow for post-birth revocation defy this paradigm.<sup>356</sup> On the other hand, some women’s rights advocates are troubled by policies that treat pregnant women and fetuses as separate and severable from each other.<sup>357</sup> What is clear is that a judgment either way has broader collateral consequences.

#### 4. Compensation

Another important variant found in jurisdictional surrogacy statutes that impacts the rights and experience of people acting as surrogates is compensation. As detailed in Appendix A, twelve of the twenty-two permissive jurisdictions expressly allow for “compensation” or “consideration” with respect to at least some forms of surrogacy.<sup>358</sup> Two additional jurisdictions—Maine and New

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

354. *Id.*

355. Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993).

356. See, e.g., NeJaime, *supra* note 9, at 2305 (“Strikingly, the recognition of genetic mothers as legal mothers—and the corresponding nonrecognition of gestational surrogates—made reproductive biology less central to legal parenthood, and thus reduced the salience of a key justification for gender-differentiated parental recognition.”).

357. See, e.g., ACLU, *What’s Wrong with Fetal Rights*, <https://www.aclu.org/other/whats-wrong-fetal-rights> [<https://perma.cc/433P-LXCF>] (“A pregnant woman and her fetus should never be regarded as separate, independent, and even adversarial, entities.”).

358. DEL. CODE ANN. tit. 13, § 8-807(d)(3) (2009 & Supp. 2020) (permitting “reasonable compensation”); 750 ILL. COMP. STAT. 47/25(d)(3) (2019) (same); NEV. REV. STAT. § 126.750(5)(c) (2020) (same); N.H. REV. STAT. ANN. § 168-B:11(IV)(d) (2014) (same); OKLA. STAT. tit. 10, § 557.6(D)(3) (Supp. 2020) (same); FLA. STAT. § 63.213(2)(f) (2019) (permitting “reasonable compensation” for genetic surrogacy only); N.Y. FAM. CT. ACT § 581-401(c) (McKinney, Westlaw through L. 2021, chs. 1–23) (permitting “compensation”); 15 R.I. GEN. LAWS § 15-8.1-802(c) (Supp.

Jersey—permit “reasonable expenses” but do not expressly address compensation.<sup>359</sup> The provisions in another six jurisdictions—Arkansas, California, Connecticut, Iowa, North Dakota, and Texas—omit any mention of payment or reimbursement. At least in California, this omission is understood to allow for the payment of compensation.<sup>360</sup> Three permissive jurisdictions—Florida, Louisiana and Virginia—ban compensation either expressly or implicitly.<sup>361</sup> All three states, however, do permit the intended parents to reimburse the person acting as a surrogate for at least some incurred expenses.<sup>362</sup>

Compensation is controversial. For some who oppose or have reservations about surrogacy, it is compensation that makes the practice most concerning.<sup>363</sup> There are two main concerns that stakeholders raise about compensation. First, some opponents argue that allowing for compensation increases the possibility of economic exploitation of people acting as surrogates, particularly of low-income women of color acting in this capacity. For example, Barbara Katz Rothman argued, “You have only to look at the poor women of color tending their white affluent charges in the playgrounds of every American city to understand which women will be carrying valued white babies in their bellies as a cheap service.”<sup>364</sup> Second, some posit a more general concern about the harms

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2020) (permitting “consideration”); § UTAH CODE ANN. § 78B-15-803(2)(g) (LexisNexis 2018 & Supp. 2020) (same); VT. STAT. ANN. tit. 15C, § 802(d) (2019) (same); WASH. REV. CODE § 26.26A.715(2)(a) (2019 Supp.) (same); D.C. CODE §§ 16-401(1), -406(d) (2020) (permitting payment of “ancillary expenses,” defined to include, among other things, “compensation for risk”).

359. ME. STAT. tit. 19-A, § 1932(4) (2020); N.J. STAT. ANN. § 9:17-68(b) (West Supp. 2020).

360. See, e.g., ALEX FINKELSTEIN, SARAH MAC DOUGALL, ANGELA KINTOMINAS & ANYA OLSEN, COLUMBIA L. SCH. SEXUALITY AND GENDER L. CLINIC, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 9 (2016), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia\\_sexuality\\_and\\_gender\\_law\\_clinic\\_-\\_surrogacy\\_law\\_and\\_policy\\_report\\_-\\_june\\_2016.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf) [<https://perma.cc/AJX8-CQSA>] (“California also allows compensation for the surrogate . . .”).

361. FLA. STAT. § 742.15(4) (2019) (gestational only); LA. STAT. ANN. § 9:2720.5(B)(3) (2018); VA. CODE ANN. § 20-162(A) (2016 & Supp. 2020). Although Florida seems to prohibit compensation for gestational surrogacy, it does allow compensation for genetic surrogacy. FLA. STAT. § 63.213(2)(f) (providing that the intended parents can pay a genetic surrogate “reasonable compensation for inconvenience, discomfort, and medical risk” but that “[n]o other compensation, whether in cash or in kind, shall be made pursuant to a preplanned adoption arrangement”).

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

363. See, e.g., John Burger, *Gloria Steinem Comes Out Against Bill that Would Legalize Paid Surrogacy*, ALETEIA (June 14, 2019), <https://aleteia.org/2019/06/14/gloria-steinem-comes-out-against-bill-that-would-legalize-paid-surrogacy/> [<https://perma.cc/3U3J-MEWX>] (“‘The danger here is not the use of altruistic surrogacy to create a loving family, which is legal in New York now, but the state legalizing the commercial and profit-driven reproductive surrogacy industry,’ Steinem wrote in the letter, in collaboration with the Center for Bioethics and Culture Network, which takes conservative positions on other bioethical issues.”).

364. Barbara Katz Rothman, *Daddy Plants a Seed: Personhood Under Patriarchy*, 47 HASTINGS L.J. 1241, 1246 (1996); see also Margaret Jane Radin, *supra* note 71, 1849 (1987).

to society of commodifying reproduction.<sup>365</sup> For example, the 1988 New York Task Force on Life and the Law reported: “Critics . . . believe that the exchange of money for possession or control of children is degrading. It also threatens to erode the way society thinks about and values children and, by extension, all human life.”<sup>366</sup> Some advocates who share this concern support compensated surrogacy but on the condition that compensation not be “in exchange for the waiver of the parental rights of the gestational mother.”<sup>367</sup>

Others, however, argue that *prohibitions* on compensation are more troubling. Such stakeholders contend that while so-called altruistic or uncompensated surrogacy may seem less concerning, it may in fact be more so. First, to the extent coercion is the main concern, some—including Professor Lori Andrews—argue that allowing only uncompensated surrogacy might exacerbate the potential for coercion.<sup>368</sup> If compensation is banned, she argued, “Infertile couples will only be able to have a child through this arrangement by pressuring friends or relatives into being a surrogate.”<sup>369</sup> Such a person may actually be *more* vulnerable to coercion.<sup>370</sup> As Andrews put it, “A woman in an arm’s-length transaction with a stranger, represented by her own lawyer, would likely have more ability to refuse than a friend or relative.”<sup>371</sup> Second, if an arrangement between close friends or family members devolves, the fall out can be particularly challenging.<sup>372</sup>

Some who oppose bans on compensation offer a more fundamental objection: acting as a surrogate is an endeavor that involves substantial health risks, as well as significant bodily intrusions for an extended period of time.<sup>373</sup> Women should be entitled to be compensated for providing this important,

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365. See, e.g., Martha A. Field, *The Case Against Enforcement of Surrogacy Contracts*, 8 POL. & LIFE SCI. 199, 199 (1990) (“The consequences of commercialization [of surrogacy] would be widespread and would be felt in diverse ways.”); MARGARET JANE RADIN, *CONTESTED COMMODITIES* 64 (1996).

366. N.Y. STATE TASK FORCE ON LIFE & THE L., *SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY* 76 (1988), [https://www.health.ny.gov/regulations/task\\_force/reports\\_publications/docs/surrogate\\_parenting.pdf](https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogate_parenting.pdf) [<https://perma.cc/2S3A-6Y8B>].

367. Gostin, *supra* note 72, at 13; see also 1988 ACLU Policy Statement, *supra* note 109, at 294 (providing that the person acting as a surrogate can be compensated so long as the agreement does not “condition[] payments to the gestational mother on her termination of parental rights”).

368. Andrews, *supra* note 123, at 2365–66 (stating that she is “even more concerned about coercion in the unpaid surrogacy situation”).

369. *Id.* at 2366; see also Lewin, *supra* note 95 (“[M]any lawyers and doctors say such [uncompensated surrogacy] arrangements are actually the most likely to fall apart, given the difficulty of maintaining comfortable boundaries and the risk of intrusiveness, or coercion, souring relationships that seemed solid.”).

370. Andrews, *supra* note 123, at 2366.

371. *Id.*

372. See, e.g., Lewin, *supra* note 95 (“If the surrogate or the donor is a relative and something goes amiss, it can affect family relationships forever after.” (quoting fertility expert)).

373. For a discussion of some of these health risks, see Joslin, *Politics of Pregnancy*, *supra* note 2, at 377.

valuable, and risky service.<sup>374</sup> Furthermore, allowing women to act as surrogates but barring them from receiving compensation for those essential services reinforces gender-based stereotypes about how women should provide reproductive services based on their compassionate and caring nature.<sup>375</sup> Lori Andrews, for example, argued, “Allowing unpaid rather than paid surrogacy . . . perpetuates the devaluation of women’s activities in a society that is based on a market system.”<sup>376</sup>

A related argument against prohibitions on compensation concerns their practical effects. A number of jurisdictions that ban “compensated” surrogacy nonetheless allow for some payment, usually reimbursement of “expenses.”<sup>377</sup> Studies outside the United States have found that “the money received by ‘altruistic’ surrogates . . . is roughly equivalent to that received by compensated surrogates in the U.S.”<sup>378</sup> Thus, the available evidence suggests that banning compensation does not avoid the exchange of money. Instead, the true effect of such bans, some stakeholders argue, is to reduce the bargaining power of the person acting as a surrogate. For example, sociologist April Hovav posited that schemes that permit only “altruistic surrogacy” may not be in the best interests of people acting as surrogates.<sup>379</sup> Such schemes “enable[] surrogacy agencies to cultivate a docile workforce that cannot advocate for their own financial gain.”<sup>380</sup>

## V.

### RECONSIDERING JUST SURROGACY LAWS

It is not enough to contemplate *whether* to permit surrogacy. Careful consideration must also be given to *how* to regulate surrogacy. These details hold profound consequences from the perspective of both the individual and the collective. But for too long, these details and their normative implications have remained obscured and undertheorized. This Article seeks to reverse this trend.

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374. See, e.g., Gostin, *supra* note 72, at 10 (“They are entitled to economic gain for the physical changes in their bodies, the changes in lifestyle, the work of carrying a fetus, and the pain and medical risk of labor and parturition.”); Taub, *supra* note 167, at 294 (“There is something suspicious about a society’s sudden and vociferous concern with payment now that women propose to take compensation.”).

375. See, e.g., April Hovav, *Producing Moral Palatability in the Mexican Surrogacy Market*, 33 GENDER & SOC’Y 273, 293 (2019) (“The rhetoric of altruism as a feminine virtue enables surrogacy agencies to cultivate a docile workforce that cannot advocate for their own financial gain.”); Andrews, *supra* note 123, at 2365–66 (“[I]t is disturbing that, in most instances, when society suggests that a certain activity should be done for altruism, rather than money, it is generally a woman’s activity. This perpetuates the devaluation of women’s activities in a society that is based on a market system.”).

376. Andrews, *supra* note 123, at 2366.

377. This is true, for example, in Canada. See, e.g., HEALTH CANADA, GUIDANCE DOCUMENT, REIMBURSEMENT RELATED ASSISTED HUMAN REPRODUCTION REGULATIONS (2019), <https://www.canada.ca/content/dam/hc-sc/documents/programs/consultation-reimbursement-assisted-human-reproduction/r-regulations-guidance-document-eng.pdf> [https://perma.cc/P7J3-4PWT] (explaining reimbursable expenses).

378. Shapiro, *supra* note 352, at 1371.

379. Hovav, *supra* note 375.

380. *Id.*

*A. Identifying the Issues*

By identifying and disaggregating the axes of variation, this Article sets forth a blueprint for legislating in a more attentive and just way. In addition to considering whether to allow surrogacy and, if so, which types, stakeholders must also contemplate both a range of issues related to intended parents and people acting as surrogates and the best way to accommodate and balance these interests. As set forth in Part IV.B above, questions related to intended parents include, among others, which intended parents the law should protect and when and under what circumstances the law should treat them as the legal parents of the resulting child. Part IV.C above details a number of important considerations related to people acting as surrogates. These include whether people acting as surrogates should be guaranteed counsel, whether they retain control over their behavior and decision-making during pregnancy, whether they can withdraw consent to the arrangement after pregnancy has been achieved, and whether they may receive compensation. My more fine-grained descriptive account suggests that, in the past, policy-makers elided many of these questions. By drawing attention to these details and their consequences, this Article seeks to correct these oversights in the future.

In addition to identifying important questions for future policy-makers, my typology uncovers past trends that have heretofore gone unnoticed and unexamined. As documented in Part IV.B, permissive surrogacy regimes have become more inclusive and protective of intended parents over time. Today, surrogacy laws are more likely to protect all intended parents—regardless of sex, sexual orientation, or marital status—and to jettison genetic connection requirements rooted in reproductive biology.<sup>381</sup> Recently enacted laws are less likely to require a home study or other outside approval of the intended parents.<sup>382</sup> They are also more likely to eliminate the need for court appearances and to provide for parentage as a matter of law.<sup>383</sup>

A more complicated evolution emerges, however, when one turns to considerations regarding people acting as surrogates. As illustrated by Part IV.C, more recently enacted permissive schemes are more likely to require independent counsel for all parties.<sup>384</sup> This requirement can help protect the interests of people acting as surrogates and address potential imbalances of power. At the same time, many permissive regimes, including some recently enacted ones, omit protections regarding the bodily autonomy and integrity

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381. See *infra* Appendix B (identifying that sixteen of twenty-two permissive jurisdictions omit medical need requirements, and that seventeen of the twenty-two omit any genetic connection requirement).

382. See *infra* Appendix B (identifying that seventeen of the twenty-two permissive jurisdictions omit a home study or similar requirement).

383. See *infra* Appendix B.

384. See *infra* Appendix C.



interests of people acting as surrogates.<sup>385</sup> Indeed, some schemes expressly allow for the curtailment of autonomy in this regard, and others do so implicitly.<sup>386</sup>

My typology also reveals *where* these trends are emerging. This geographical map is particularly interesting. Jurisdictions that permit control and surveillance of pregnant bodies run the political gamut—ranging from blue states of California and Illinois to the red state of Oklahoma.<sup>387</sup> This insight, as well as a review of the legislative histories in these jurisdictions, confirms that these provisions went almost entirely uncontested and untheorized.<sup>388</sup> This lack of careful consideration and engagement is troubling given the profound normative implications of these legislative choices both for the individual participants and for law and policy beyond surrogacy's boundaries. By identifying and mapping the questions on the table, this Article seeks to prevent that kind of lapse in the future.

### B. *Advancing Theoretical Consideration*

In addition to mapping the critical questions that ought to be asked, this Article facilitates deeper normative consideration of them. This Article does so by theorizing the consequences of different potential paths—both for the individual participants to the surrogacy agreements, and for law and policy more broadly. By embracing same-sex parent families and single-father families, inclusive surrogacy laws promote a vision of the family that challenges long-standing sex-based stereotypes. By protecting women's choices about their bodies and their lives, surrogacy law can also vindicate liberty and autonomy principles.<sup>389</sup> The extent to which surrogacy law can further principles of equality and liberty, however, depends on the law's details.

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

But the consequences do not stop there; the ripples travel much further. Surrogacy law is shaped by and in turn shapes the broader rules that regulate families and reproduction. Surrogacy law can challenge long-standing family law rules rooted in reproductive biology, or it can replicate and reinforce them. Inclusive intended parent rules can vindicate principles of equality by expressly

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385. See *infra* Appendix C.

386. See *infra* Appendix C.

387. See *infra* Appendix C.

388. See *supra* Part III.A.

389. See, e.g., Joslin, *The Gay Rights Canon*, *supra* note 10, at 484; Joslin, *Autonomy*, *supra* note 10.

including and protecting all families formed through surrogacy, without regard to sex, sexual orientation, or marital status.<sup>390</sup> For example, surrogacy statutes with inclusive intended parent rules facilitate the formation of “famil[ies] that exclude[] a mother.”<sup>391</sup> In this way, these schemes can “position fathers as primary parents” and challenge traditional gender-based stereotypes about the nature of parenthood.<sup>392</sup> In addition, by jettisoning genetic connection requirements, inclusive surrogacy rules also support the development of family law rules that value social parental relationships.<sup>393</sup> Rules that recognize and protect social parenthood promote and protect same-sex parent families. In the past, these families were excluded by traditional marriage- and gender-based family law rules.<sup>394</sup> In this way, surrogacy laws can promote rules to further equality within and between families.<sup>395</sup>

Not all jurisdictions have inclusive intended parent surrogacy rules, however. Some statutes, like those in Louisiana, cover and protect only married intended parents, each of whom contributed genetic material.<sup>396</sup> In addition to excluding all unmarried intended parents, the genetic contribution requirement excludes all same-sex couples—married and unmarried—as well as many different-sex couples. These types of requirements reinforce stereotyped views about the nature of parenthood, views that venerate different-sex married families as well as biological parents and simultaneously denigrate other family forms.<sup>397</sup> Rather than reforming family law principles, surrogacy rules like those in Louisiana “carry forward legacies of exclusion.”<sup>398</sup>

Another point of variation relates to the inclusion of genetic surrogacy. Most jurisdictions exclude or disincentivize genetic surrogacy arrangements.<sup>399</sup> This choice too has both individual and societal implications. Genetic surrogacy tends to be less expensive than gestational surrogacy.<sup>400</sup> This is true because genetic surrogacy eliminates the need for in vitro fertilization (IVF). As a result, it may be financially accessible to more potential intended parents. In addition, again, because it does not require IVF or ova harvesting, it involves less medical

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390. See *supra* Part II.B.

391. NeJaime, *supra* note 9, at 2330.

392. *Id.* at 2329–30.

393. See *id.* at 2270 (arguing that the law’s recognition of a range of family configurations will “protect parental relationships on social, and not merely biological, grounds”).

394. See, e.g., *Ex rel. A.E.*, No. 09-16-00019-CV, 2017 WL 1535101, at \*10 (Tex. Ct. App. Apr. 27, 2017) (“The substitution of the word ‘spouse’ for the words ‘husband’ and ‘wife’ [in the parentage statutes] would amount to legislating from the bench, which is something that we decline to do.”).

395. See, e.g., Joslin, *The Gay Rights Canon*, *supra* note 10; Joslin, *Autonomy*, *supra* note 10.

396. See, e.g., LA. STAT. ANN. § 9:2718.1 (2018).

397. See, e.g., Joslin, *The Gay Rights Canon*, *supra* note 10, at 484; Joslin, *Autonomy*, *supra* note 10.

398. NeJaime, *supra* note 9, at 2268.

399. See *infra* Appendix A.

400. See Richard B. Vaughn, *UPA (2017): An Improvement—Except Where Genetic Surrogacy Is Concerned*, 52 FAM. L.Q. 471, 474 (2018) (“Genetic surrogacy, in which the surrogate is also the egg donor, can be significantly cheaper and less time-consuming.”).

risk for the person acting as a surrogate.<sup>401</sup> Shifting from consideration of implications for the individual participants to consideration of the broader policy consequences, rules that exclude or disincentivize genetic surrogacy reinforce traditional beliefs about the importance of genetic connections in determining parenthood.<sup>402</sup> This belief harms the many families, including many LGBTQ-parent families, that consist of one or more non-genetic parents.

Surrogacy law also implicates reproductive rights and justice. Surrogacy law, for example, can affirm and protect the right of pregnant people to control and make decisions about their own bodies. It can do so by expressly declaring that the person acting as a surrogate must be permitted to make all health and welfare decisions about her body and the pregnancy.<sup>403</sup> Or it can reinforce trends in which the interests of the fetus or other parties overshadow the interests of pregnant people. Surrogacy law can do so by allowing widespread surveillance and control of pregnant people and their bodies. The law of surrogacy can reflect and support the position that the fetus is not an entity to which rights attach by clarifying that parentage is not established until a child has been born. Or it can do the opposite. Silence in this context often does not mean neutrality. When the jurisdiction does not expressly protect the right of a person acting as a surrogate to make medical decisions, the effect of that omission may be to allow that decision-making authority to be contracted away.<sup>404</sup>

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

### C. Urgency of Intervention

This Article comes at a critical moment. The strong trend with regard to surrogacy legislation favors permissive statutory regimes. Twenty-two of the twenty-seven jurisdictions with statutory schemes have permissive ones. And much of this shift occurred very recently: fourteen of the twenty-two jurisdictions with permissive schemes enacted them in the last decade.<sup>405</sup> This trend is likely to continue. Indeed, in 2019, surrogacy legislation was introduced in at least six states.<sup>406</sup>

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401. See, e.g., Joslin, *UPA Preface*, *supra* note 195, at 466.

402. See *id.*; see also Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 *YALE L.J.F.* 589, 609–10 (2018), [https://www.yalelawjournal.org/pdf/Joslin\\_4srmpiiia.pdf](https://www.yalelawjournal.org/pdf/Joslin_4srmpiiia.pdf) [<https://perma.cc/J27W-Z6CF>].

403. See *supra* notes 309–315 and accompanying text.

404. See *supra* text accompanying notes 328–329.

405. See *infra* Appendix A.

406. See *supra* note 48.

It is also a moment when principles of equality and reproductive freedom and justice hang in the balance. The right of LGBTQ people to be protected from discrimination continues to be shaped by legislatures and courts.<sup>407</sup> And while the Supreme Court recently struck down one state's abortion restrictions,<sup>408</sup> the continued vitality of *Roe v. Wade* remains uncertain.<sup>409</sup> In addition to these high-profile cases, battles are being waged every day at the state and local levels. According to the Guttmacher Institute, "Nearly half of the 58 new [state] abortion restrictions enacted in 2019 would ban all, most or some abortions."<sup>410</sup>

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

#### D. Moving Forward

So how should jurisdictions regulate surrogacy? As this Article posits, efforts to do so ought to be attentive to the liberty and equality concerns of all participants in the process, as well as to the development of law and policy more broadly.

The surrogacy provisions of the Uniform Parentage Act of 2017 (UPA (2017))<sup>411</sup> offer one useful starting place for this process. The surrogacy provisions of the UPA (2017) address many of the details identified herein. The surrogacy provisions of the UPA (2017) cover and protect all intended parents, regardless of marital status, sex, or sexual orientation.<sup>412</sup> Inclusive intended parent rules further principles of nondiscrimination and simultaneously challenge gender-based stereotypes with respect to parents and parentage. The UPA (2017) authorizes the issuance of orders of parentage, but clearly states that such orders do not become effective until the birth of the child.<sup>413</sup> Allowing parties to obtain orders of parentage provides clarity to the parties and facilitates

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407. See *supra* notes 49–50 and accompanying text.

408. See *supra* note 52 and accompanying text.

409. *Supra* note 53.

410. Elizabeth Nash, Lizamarie Mohammed, Olivia Cappello & Sophia Naide, *State Policy Trends 2019: A Wave of Abortion Bans, but Some States Are Fighting Back*, GUTTMACHER INST. (Dec. 10, 2019), <https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back> [<https://perma.cc/WVZ4-4LVR>].

411. UNIF. PARENTAGE ACT art. 8 (2017) (UNIF. L. COMM'N). I served as the reporter of the UPA (2017). For an overview of the surrogacy provisions in the UPA (2017), see, for example, Joslin, *UPA (2017) Preface*, *supra* note 195, at 463–68.

412. UNIF. PARENTAGE ACT § 102(13) ("Intended parent" means an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction.").

413. *Id.* § 811(a) ("Except as otherwise provided . . . before, on, or after the birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, a party to the agreement may commence a proceeding in the [appropriate court] for an order or judgment: (1) declaring that each intended parent is a parent of the child and ordering that parental rights and duties vest immediately on the birth of the child exclusively in each intended parent . . . .") (alteration in original)).

a number of practical steps that may need to be attended to when preparing for the birth of a child. But the rules do so in a way that does not elevate the status of fetuses or assign rights to fetuses.<sup>414</sup>

The surrogacy provisions of the UPA (2017) also set forth a number of key protections for people acting as surrogates. The provisions require all parties, including the person acting as a surrogate, to be represented by separate, independent counsel throughout the arrangement.<sup>415</sup> In adding this requirement, the drafters sought to better balance the bargaining power of the parties and to ensure that all parties enter into the surrogacy agreement with sufficient knowledge about the process and its implications. The UPA (2017) also allows for the provision of compensation.<sup>416</sup> This policy choice recognizes the labor and risk that are involved in acting as a surrogate and challenges the gender-based notions that women should and are expected to engage in work on behalf of others out of altruism, and without an expectation of payment. The UPA (2017) also requires that the agreement “permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy.”<sup>417</sup>

But, to be clear, this scheme should be a starting point, not necessarily the end point. By uncovering surrogacy laws’ details, this Article seeks to foster more thoughtful and just policy-making in this area—policy-making that develops after careful consideration involving a robust and full array of stakeholders. Such consideration may, and likely will, lead to new insights. Take New York. In 2020, the New York legislature enacted legislation permitting compensated gestational surrogacy.<sup>418</sup> This legislation was the product of active engagement by stakeholders on both sides of the issue.<sup>419</sup> The legislation includes some novel requirements. For example, New York’s new surrogacy provisions require the person acting as a surrogate to have “given informed consent for the surrogacy after” receiving notice of the medical and other types of risks associated with participation in the arrangement.<sup>420</sup> The New York legislation also requires the intended parents to pay for comprehensive health insurance for the person acting as a surrogate.<sup>421</sup> Moreover, this insurance must

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414. See *supra* note 289.

415. UNIF. PARENTAGE ACT § 803(7) (“The surrogate and the intended parent or parents must have independent legal representation throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement, and each counsel must be identified in the surrogacy agreement.”). The UPA (2017) also requires the intended parents to pay for “independent legal representation for the surrogate.” *Id.* § 803(8).

416. *Id.* § 804(b)(1) (“A surrogacy agreement may provide for: (1) payment of consideration and reasonable expenses . . .”).

417. *Id.* § 804(a)(7).

418. Act of Apr. 3, 2020, ch. 56, pt. L, sec. 2, § 581-403(f) (to be codified at N.Y. FAM. CT. ACT § 581-403(f)).

419. See, e.g., Vivian Wang, *Surrogate Pregnancy Battle Pits Progressives Against Feminists*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/nyregion/surrogate-pregnancy-law-ny.html> [<https://perma.cc/3NUZ-BVDP>].

420. N.Y. FAM. CT. ACT § 581-402(a)(5) (McKinney, Westlaw through L. 2021, chs. 1–23).

421. *Id.* § 581-402(a)(7).

have a “term that extends throughout the duration of the expected pregnancy and for twelve months after the birth of the child.”<sup>422</sup> These are provisions that other policymakers may want to consider.

Another place where further conversation and contemplation may lead to evolution is with respect to the regulation of *genetic* surrogacy. The UPA (2017) treats genetic surrogacy differently in some respects. Of particular note, under the UPA (2017), a person acting as a genetic surrogate must have a period after birth in which to terminate the agreement.<sup>423</sup> By contrast, a party—including the person acting as a surrogate—can terminate the agreement only prior to a successful embryo transfer.<sup>424</sup> As a result of this differential treatment, genetic surrogacy is legally riskier for the intended parents. This greater legal risk channels most parties into gestational surrogacy—a form of surrogacy that is *medically* riskier for the person acting as a surrogate. Gestational surrogacy is medically riskier because the person acting as a surrogate must undergo an invasive medical procedure to achieve pregnancy, usually following a course of medication to prepare their body for a successful embryo transfer.<sup>425</sup> An embryo transfer, like all invasive medical procedures, carries some risk. The fact that IVF is required also adds to the expenses related to the arrangement. In addition, from a theoretical perspective, treating genetic and gestational surrogacy differently reinforces the view that biological connection or lack thereof is legally relevant in this context. Parentage rules that elevate the role of biology are in tension with the goal of equality for all families.<sup>426</sup>

In short, determining whether to permit genetic surrogacy and whether to treat it identically in all respects to gestational surrogacy requires consideration of a number of complex issues. These issues, like many other issues related to surrogacy, merit further consideration and engagement. Hence, the goal here is not to set forth a final, permanent blueprint. Instead, the goal is to identify a set of critical considerations regarding the regulation of surrogacy that ought to be, but often is not, part of the conversation as policy-makers strive to achieve more just surrogacy laws.

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422. *Id.* § 581-402(7)

423. UNIF. PARENTAGE ACT § 814(a)(2) (2017) (UNIF. L. COMM’N) (“A genetic surrogate who is a party to the agreement may withdraw consent to the agreement any time before 72 hours after the birth of a child conceived by assisted reproduction under the agreement.”).

424. *Id.* § 808(a) (“A party to a gestational surrogacy agreement may terminate the agreement, at any time before an embryo transfer, by giving notice of termination in a record to all other parties. If an embryo transfer does not result in a pregnancy, a party may terminate the agreement at any time before a subsequent embryo transfer.”).

425. See Joslin, *UPA (2017) Preface*, *supra* note 195, at 467.

426. See, e.g., NeJaime, *supra* note 8, at 2333 (“Same-sex family formation ordinarily features nonbiological parent-child relationships. Accordingly, a parentage regime anchored in biological connection does not ensure equality for same-sex couples’ families, even if it withholds legal recognition from nonbiological parents in both different-sex and same-sex couples.”); see also Joslin, *UPA (2017) Preface*, *supra* note 195, at 465–67.

## CONCLUSION

Scholars have long debated whether the practice of surrogacy itself furthers or inhibits principles of equality and liberty. Jurisdictions are increasingly staking out a position on this issue by choosing to permit surrogacy. But they are doing so in widely varied ways. The details of surrogacy law hold profound consequences both for the participants and for law and policy more broadly. Despite this reality, there remains no comprehensive account of *the ways in which* jurisdictions regulate surrogacy. There is also a striking deficiency of theoretical analyses of whether and to what extent these varied efforts further normative goals of equality and autonomy. This Article seeks to intervene and reverse these omissions. It does so by offering the first comprehensive typology of surrogacy statutes, and then theorizing the consequences of these details both within and without the context of surrogacy. In this way, this Article begins to chart a more just path forward for the law of surrogacy and beyond.

## APPENDIX A

ALL JURISDICTIONS WITH STATUTORY OR ADMINISTRATIVE PROVISIONS REGARDING SURROGACY<sup>427</sup>

Key
✓ = yes
∅ = no

Jurisdiction (Year(s) of enactment)	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
<b>AZ (1989)</b> <sup>428</sup>	∅ ARIZ. REV. STAT. § 25-218 (2017)	∅ ARIZ. REV. STAT. § 25-218	∅ ARIZ. REV. STAT. § 25-218	✓ ARIZ. REV. STAT. § 25-218 (civil ban) <sup>429</sup>

427. This chart does not include statutes that simply declare the jurisdiction has no policy authorizing or prohibiting surrogacy. *See, e.g.*, N.M. STAT. ANN. § 40-11A-801(A) (2019) (providing that the “New Mexico Uniform Parentage Act does not authorize or prohibit” surrogacy); TENN. CODE ANN. § 36-1-102(51) (2017 & Supp. 2020) (providing that nothing in the definition of “surrogate birth” “shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the general assembly”); WYO. STAT. ANN. § 14-2-403(d) (2019) (“This act does not authorize or prohibit [surrogacy agreements] . . .”).

428. Act of Apr. 28, 1989, ch. 114, sec. 1, 1989 Ariz. Sess. Laws 393, 393 (codified at ARIZ. REV. STAT. § 25-218).

429. Arizona civilly bans compensated and uncompensated gestational and genetic agreements. ARIZ. REV. STAT. § 25-218. This statute was held unconstitutional as applied to the intended mother in *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994).



Jurisdiction (Year(s) of enactment)	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
AR (1985) <sup>430</sup>	✓ ARK. CODE ANN. § 9-10-201 (2015) <sup>431</sup>	✓ ARK. CODE ANN. § 9-10-201 <sup>432</sup>	✓ ARK. CODE ANN. § 9-10-201 <sup>433</sup>	∅
CA (2012) <sup>434</sup>	✓ CAL. FAM. CODE §§ 7960(f)(2), 7962 (West 2013 & Supp. 2020)	∅ CAL. FAM. CODE §§ 7960(f)(2), 7962 <sup>435</sup>	✓ CAL. FAM. CODE § 7962 <sup>436</sup>	∅

430. Act of Apr. 15, 1985, No. 904, §§ 1–2, 1985 Ark. Acts 1931, 1932 (codified as amended at ARK. CODE ANN. § 9-10-201).

431. Arkansas’s single section on surrogacy simply addresses the parentage of children born as the result of “artificial insemination.” If that phrase were interpreted narrowly, it would cover only genetic surrogacy. Cf. *Patton v. Vanterpool*, 806 S.E.2d 493, 496–97 (Ga. 2017) (holding that the Georgia statute addressing the parentage of children conceived through “artificial insemination” did not apply to child conceived through in vitro fertilization). There is no Arkansas case law interpreting this provision, however.

432. See *supra* note 431.

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

434. Act of Sept. 23, 2012, ch. 466, 2012 Cal. Stat. 4390 (codified as amended at CAL. FAM. CODE §§ 7960, 7962).

435. California law permits “assisted reproduction agreements for gestational carriers.” CAL. FAM. CODE § 7962. But “gestational carrier” is defined to mean “a woman who is not an intended parent and who agrees to gestate a genetically unrelated embryo pursuant to an assisted reproduction agreement.” *Id.* § 7960(f)(2) (emphasis added).

436. Compensation is neither expressly permitted, nor expressly prohibited. *Id.* § 7962.

Jurisdiction (Year(s) of enactment)	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
<b>CT (2011)</b> <sup>437</sup>	✓ CONN. GEN. STAT. § 7-48a (2019) <sup>438</sup>	Ø CONN. GEN. STAT. § 7-36(16) <sup>439</sup>	✓ CONN. GEN. STAT. § 7-48a <sup>440</sup>	Ø
<b>DE (2013)</b> <sup>441</sup>	✓ DEL. CODE ANN. tit. 13, § 8-102(16) (2009 & Supp. 2020)	Ø DEL. CODE ANN. tit. 13, § 8-102(16) <sup>442</sup>	✓ DEL. CODE ANN. tit. 13, § 8-807(d)(3)	Ø

437. Act of July 8, 2011, Pub. Act No. 11-153, 2011 Conn. Acts 1852 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. §§ 7-36, -48a).

438. Although this statute expressly addresses only the completion of birth certificates, the Connecticut Supreme Court ruled that it also effected a substantive change in the law regarding parentage. *Raftopol v. Ramey*, 12 A.3d 783, 799 (Conn. 2011) (“On the basis of our analysis of both the text of the statute, as well as its legislative history, we conclude that the legislature intended § 7-48a to confer parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent’s genetic relationship to the children.”).

439. The statute defines “gestational agreement” as “a written agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent or intended parents, which woman contributed no genetic material to the child.” CONN. GEN. STAT. § 7-36(16) (emphasis added).

While Connecticut statutes do not expressly prohibit genetic surrogacy agreements, people acting as genetic surrogates may be considered parents under Connecticut law. *See, e.g., Doe v. Roe*, 717 A.2d 706, 712 (Conn. 1998) (recognizing a genetic surrogate as a parent).

440. Compensation is neither expressly permitted nor expressly prohibited. CONN. GEN. STAT. § 7-48a.

441. Act of July 3, 2013, ch. 88, 79 Del. Laws 1 (codified in scattered sections of DEL. CODE ANN. tit. 13).

442. Delaware permits a “gestational carrier arrangement.” DEL. CODE ANN. tit. 13, § 8-102(16). But such arrangement includes only that in which the person acting as a surrogate “has made no genetic contribution.” DEL. CODE ANN. tit. 13, § 8-102(16).

Jurisdiction (Year(s) of enactment)	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
<b>FL (1988, 1993, 2003)</b> <sup>443</sup>	✓ FLA. STAT. § 742.15	✓ FLA. STAT. § 63.213 <sup>444</sup>	Mixed. FLA. STAT. § 742.15(4) (gestational; implicitly prohibited); <i>id.</i> § 63.212(1)(h) (genetic; permitted) <sup>445</sup>	Ø
<b>IL (2004)</b> <sup>446</sup>	✓ 750 ILL. COMP. STAT. 47/5–/10 (2019)	Ø 750 ILL. COMP. STAT. 47/5 <sup>447</sup>	✓ 750 ILL. COMP. STAT. 47/25(d)(3)	Ø

443. Act of July 1, 1988, ch. 88-143, 1988 Fla. Laws 749 (codified as amended at FLA. STAT. § 63.212); Act of May 15, 1993, ch. 93-237, 1993 Fla. Laws 2405 (codified as amended at FLA. STAT. §§ 742.11, .13–.17); Act of May 30, 2003, ch. 2003-58, 2003 Fla. Laws 455 (codified as amended in scattered sections of FLA. STAT. tit. VI, ch. 63).

444. The rules differ depending on the type of surrogacy. *See, e.g.*, FLA. STAT. § 742.15 (gestational surrogacy rules); FLA. STAT. § 63.213 (genetic surrogacy rules).

445. Compensation is implicitly prohibited for gestational agreements, although reimbursement of some expenses is permitted. FLA. STAT. § 742.15(4) (providing that for gestational arrangements, “the commissioning couple may agree to pay only reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods”). By contrast, some compensation is expressly permitted for genetic agreements. *Id.* § 63.213(2)(f) (providing that the intended parents can pay a genetic surrogate “reasonable compensation for inconvenience, discomfort, and medical risk,” but that “[n]o other compensation, whether in cash or in kind, shall be made pursuant to a preplanned adoption arrangement”).

446. Gestational Surrogacy Act, Pub. Act No. 93-931, 2004 Ill. Laws 3256 (codified as amended at 750 ILL. COMP. STAT. ANN. 47/1–/75).

447. Illinois permits “gestational surrogacy” arrangements. 750 Ill. Comp. Stat. 47/10. But “gestational surrogacy” is defined to include only surrogacy arrangements in which the person acting as a surrogate “has made no genetic contribution.” 750 ILL. COMP. STAT. 47/10.

Jurisdiction (Year(s) of enactment)	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
<b>IN (1997)</b> <sup>448</sup>	Ø IND. CODE § 31-20-1-1 (2020)	Ø IND. CODE § 31-20-1-1	Ø IND. CODE § 31-20-1-1	✓ IND. CODE § 31-20-1-1 (civil ban) <sup>449</sup>
<b>IA (2012)</b> <sup>450</sup>	✓ IOWA ADMIN. CODE r. 641-99.15 (2021)	Ø IOWA ADMIN. CODE r. 641-99.15 <sup>451</sup>	✓ IOWA ADMIN. CODE r. 641-99.15 <sup>452</sup>	Ø
<b>KY (1988)</b> <sup>453</sup>	Ø	Ø	Ø	✓ KY. REV. STAT. ANN. § 199.590(4) (2020) (civil ban on compensated only) <sup>454</sup>
<b>LA (2016)</b> <sup>455</sup>	✓ LA. STAT. ANN. § 9:2718.1 (2018)	Ø LA. STAT. ANN. § 9:2719	Ø LA. STAT. ANN. § 9:2720.5(B)(3) <sup>456</sup>	✓ LA. STAT. ANN. § 9:2719 (civil ban on genetic only)

448. Act of May 13, 1997, Pub. L. No. 1-1997, sec. 12, 1997 Ind. Acts. 1, 254–55.

449. Indiana civilly bans compensated and uncompensated gestational and genetic agreements. IND. CODE § 31-20-1-1. For the definition of “surrogate” under Indiana law, *see id.* § 31-9-2-126.

450. 35 Iowa Admin. Bull. 1080 (Dec. 12, 2012) (codified as amended at IOWA ADMIN. CODE r. 641-95 to -100).

451. Genetic surrogacy is neither civilly nor criminally banned in Iowa. *See, e.g.*, IOWA CODE § 710.11 (2020) (exempting surrogacy from the statute criminalizing the “purchase or sale of [an] individual”). However, Iowa law recognizes intended parents as legal parents without the need for an adoption only when they are also genetic contributors. *See* IOWA ADMIN. CODE r. 641-99.15.

452. Compensation is neither expressly permitted nor expressly prohibited. *See id.* r. 641-99.15.

453. Act of Mar. 11, 1988, ch. 52, 1988 Ky. Acts 193 (codified at KY. REV. STAT. ANN. § 199.590).

454. Kentucky civilly bans compensated agreements only. KY. REV. STAT. § 199.590(4). The civil ban may apply only to genetic surrogates, as it uses the term “artificial insemination.” *Id.*

455. Act of June 9, 2016, No. 494, 2016 La. Acts 1603 (codified in scattered sections of LA. STAT. ANN. tits. 9, 14, 40, 44).

456. Although compensation is prohibited, reimbursement of some expenses is permitted. LA. STAT. ANN. § 9:2720.5(B)(3).

Jurisdiction (Year(s) of enactment)	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
<b>ME (2015)</b> <sup>457</sup>	✓ ME. STAT. tit. 19-A, § 1931(1)(E) (2020)	Ø ME. STAT. tit. 19-A, § 1931(1)(E) <sup>458</sup>	✓ ME. STAT. tit. 19-A, § 1932(4) <sup>459</sup>	Ø
<b>MI (1988)</b> <sup>460</sup>	Ø MICH. COMP. LAWS ANN. § 722.855 (2019)	Ø MICH. COMP. LAWS ANN. § 722.855	Ø MICH. COMP. LAWS ANN. § 722.855	✓ MICH. COMP. LAWS ANN. § 722.855 (civil); <sup>461</sup> <i>id.</i> § 722.859(2) (penalties; participants); <i>id.</i> § 722.859(3) (penalties; third parties)
<b>NB (1988)</b> <sup>462</sup>	Ø	Ø	Ø	✓ NEB. REV. STAT. § 25- 21,200(1)–(2) (2016) (civil ban on compensated only)
<b>NV (2013)</b> <sup>463</sup>	✓ NEV. REV. STAT. §§ 126.750, .580 (2020)	Ø NEV. REV. STAT. § 126.580 <sup>464</sup>	✓ NEV. REV. STAT. § 126.750(5)(c)	Ø

457. Maine Parentage Act, ch. 296, pt. A, 2015 Me. Laws 706 (codified as amended at ME. STAT. tit. 19-A, §§ 1831–1939).

458. Maine allows genetic surrogacy only if the person acting as a surrogate “is entering into an agreement with a family member.” ME. STAT. tit. 19-A, § 1931(1)(E).

459. The statute expressly allows for reimbursement of reasonable expenses. *Id.* § 1932(4). Compensation is neither expressly permitted nor expressly prohibited. *See id.*

460. Surrogate Parenting Act, No. 199, 1988 Mich. Pub. Acts 493 (codified as amended at MICH. COMP. LAWS ANN. § 722.851–863).

461. Michigan civilly bans compensated and uncompensated gestational and genetic agreements. Mich. Comp. Laws § 722.855 (1988). For the definition of “surrogate parentage contract” under Michigan law, see *id.* § 722.853(i).

462. Act of Feb. 10, 1988, Legis. B. 674, 1988 Neb. Laws 572 (codified at NEB. REV. STAT. § 25-21,200).

463. Act of May 28, 2013, ch. 213, 2013 Nev. Stat. 805 (codified as amended at NEV. REV. STAT. §§ 126.041, 126.500–810, 127.287).

464. Nevada permits “gestational [surrogacy] agreements.” NEV. REV. STAT. § 126.750. The term is defined to include only those surrogacy agreements in which the child is “conceived using the gametes of other persons and not [from the person acting as a surrogate].” *Id.* § 126.580.

Jurisdiction (Year(s) of enactment)	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
<b>NH (2014)</b> <sup>465</sup>	✓ N.H. REV. STAT. ANN. § 168-B:10 (2014)	Ø N.H. REV. STAT. ANN. §§ 168-B:10, -B:1(XI) (2014 & Supp. 2020) <sup>466</sup>	✓ N.H. REV. STAT. ANN. §§ 168-B:11(IV)(d), -B:1(III)	Ø
<b>NJ (2018)</b> <sup>467</sup>	✓ N.J. STAT. ANN. § 9:17-62 (West Supp. 2020)	Ø N.J. STAT. ANN. §§ 9:17-61(a), -62 <sup>468</sup>	✓ N.J. STAT. ANN. § 9:17-68(b) <sup>469</sup>	Ø
<b>NY (1992, 2020)</b> <sup>470</sup>	✓ N.Y. FAM. CT. ACT § 581-401 (McKinney, Westlaw through L. 2021, chs. 1–23)	Ø N.Y. DOM. REL. LAW § 122 (McKinney, Westlaw through L. 2021, chs. 1–23)	✓ N.Y. FAM. CT. ACT § 581-403(f)	✓ N.Y. DOM. REL. LAW § 122 (civil ban on genetic only); <i>id.</i> § 123(2)(a) (penalties for genetic only; participants); <sup>471</sup> <i>id.</i> § 123(2)(b) (penalties for genetic only; third parties) <sup>472</sup>

465. Act of July 21, 2014, ch. 248, 2014 N.H. Laws 356 (codified as amended at N.H. REV. STAT. ANN. §§ 168-B:1–:21).

466. New Hampshire permits a “gestational carrier arrangement.” N.H. REV. STAT. ANN. § 168-B:10. The term is defined to include only those surrogacy arrangements in which “the gestational carrier has made no genetic contribution.” *Id.* § 168-B:1(XI).

467. Gestational Carrier Agreement Act, ch. 18, 2018 N.J. Laws 157 (codified as amended in scattered sections of N.J. STAT. ANN. tits. 9, 26).

468. New Jersey permits “gestational carrier agreements.” N.J. STAT. ANN. § 9:17-61(a). The term “gestational carrier” is defined to include only people acting as a surrogate who do not use their “own egg.” *Id.* § 9:17-62.

469. The statute expressly allows for reimbursement of “reasonable expenses.” *Id.* § 9:17-68(b). Compensation is neither expressly permitted, nor expressly prohibited. See *id.*

470. The original New York surrogacy ban was enacted in 1992. Act of July 17, 1992, ch. 308, 1992 N.Y. Laws 2943 (codified as amended at N.Y. DOM. REL. LAW §§ 121–124). In 2020, legislation was enacted to permit gestational surrogacy, and to amend the previously existing prohibitions to apply to genetic surrogacy agreements only. Act of Apr. 3, 2020, ch. 56, pt. L, secs. 1–6 (to be codified at N.Y. Fam. Ct. Act §§ 581-101 to -704, N.Y. DOM. REL. LAW §§ 121–124).

471. The penalty provisions apply to compensated agreements only. N.Y. DOM. REL. LAW § 123(2)(a).

472. The provision allowing for the imposition of civil and criminal penalties applies to compensated agreements only. *Id.* § 123(2)(b).

Jurisdiction (Year(s) of enactment)	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
<b>ND (1989, 2005)</b> <sup>473</sup>	✓ N.D. CENT. CODE §§ 14-18-08, -01(2) (2017)	Ø N.D. CENT. CODE § 14-18-05	✓ N.D. CENT. CODE § 14-18-01 <sup>474</sup>	✓ N.D. CENT. CODE § 14-18-05 (civil ban on most agreements) <sup>475</sup>
<b>OK (2019)</b> <sup>476</sup>	✓ OKLA. STAT. tit. 10, §§ 557.3, .2(8) (Supp. 2020)	Ø OKLA. STAT. tit. 10, §§ 557.3, .2(8) <sup>477</sup>	✓ OKLA. STAT. tit. 10, §§ 557.6(D)(3), .17(B)	Ø
<b>RI (2020)</b> <sup>478</sup>	✓ 15 R.I. GEN. LAWS § 15-8.1-802 (Supp. 2020)	Ø 15 R.I. GEN. LAWS § 15-8.1-102(13) <sup>479</sup>	✓ 15 R.I. GEN. LAWS § 15-8.1-802(c)	Ø
<b>TX (2003)</b> <sup>480</sup>	✓ TEX. FAM. CODE ANN. § 160.754 (West 2014)	Ø TEX. FAM. CODE ANN. § 160.754(c)	✓ TEX. FAM. CODE ANN. § 160.756(b)(6) <sup>481</sup>	Ø

473. Assisted Conception Act, ch. 184, 1989 N.D. Laws 561 (codified as amended at N.D. CENT. CODE §§ 14-18-01, 14-18-05, 12.1-31-05); Uniform Parentage Act, ch. 135, 2005 N.D. Laws 696 (codified as amended in scattered sections of N.D. CENT. CODE tits. 12, 14).

474. Compensation is neither expressly permitted nor expressly prohibited.

475. North Dakota civilly bans all surrogacy agreements except gestational surrogacy agreements in which the intended parents both provide gametes. N.D. CENT. CODE § 14-18-05. As discussed above, there is an argument that North Dakota’s statutes limit enforceable agreements to those in which the intended parents contribute the only gametes and are married to each other. *See supra* note 99.

476. Oklahoma Gestational Agreement Act, ch. 433, 2019 Okla. Sess. Laws 1966 (codified at OKLA. STAT. tit. 10, §§ 557–557.25).

477. Oklahoma permits a “gestational carrier arrangement.” OKLA. STAT. tit. 10, § 557.3. But that term is defined to include only those arrangements in which the person acting as a surrogate has not “made any genetic contribution.” *Id.* § 557.2(8).

478. Uniform Parentage Act, chs. 20-59, 20-60 (July 21, 2020) (to be codified at 15 R.I. GEN. LAWS §§ 15-8.1-101 to -1004, 23-3-10).

479. Rhode Island allows genetic surrogacy only if the person acting as a surrogate is a “family member.” 15 R.I. GEN. LAWS § 15-8.1-102(13).

480. Act of June 20, 2003, ch. 457, 2003 Tex. Gen. Laws 1699 (codified at TEX. FAM. CODE ANN. § 160.602, .751–.763).

481. The statute expressly allows for payment of “reasonable health care expenses associated with the pregnancy.” TEX. FAM. CODE ANN. § 160.756(b)(6). Compensation is neither expressly permitted nor expressly prohibited. *See id.*

Jurisdiction (Year(s) of enactment)	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
<b>UT (2008)</b> <sup>482</sup>	✓ UTAH CODE ANN. § 78B-15-801 (LexisNexis 2018)	Ø UTAH CODE ANN. § 78B-15-801(7)	✓ UTAH. CODE ANN. §§ 78B-15-803(2)(h), -808(1) (LexisNexis 2018 & Supp. 2020)	Ø
<b>VT (2018)</b> <sup>483</sup>	✓ VT. STAT. ANN. tit. 15C, § 102(12) (2019)	Ø VT. STAT. ANN. tit. 15C, § 102(12) <sup>484</sup>	✓ VT. STAT. ANN. tit. 15C, § 802(d)	Ø
<b>VA (1991)</b> <sup>485</sup>	✓ VA. CODE ANN. § 20-156 (2016 & Supp. 2020)	✓ VA. CODE ANN. § 20-156 <sup>486</sup>	Ø VA. CODE ANN. § 20-162	Ø
<b>WA (2018)</b> <sup>487</sup>	✓ WASH. REV. CODE § 26.26A.700(3) (2019 Supp.)	✓ WASH. REV. CODE § 26.26A.700(3) <sup>488</sup>	✓ WASH. REV. CODE § 26.26A.715(2)(a)	Ø

482. Act of Feb. 7, 2008, ch. 3, secs. 1368–1458, 2008 Utah Laws 48, 575–92 (codified as amended at UTAH CODE ANN. §§ 78B-15-101 to -902).

483. Act of May 22, 2018, No. 162, 2018 Vt. Acts & Resolves 472 (codified as amended at VT. STAT. ANN. tit. 15C, §§ 101–809, tit. 33, §§ 4291, 6911).

484. Vermont allows genetic surrogacy only if the person acting as a surrogate is “a family member.” VT. STAT. ANN. tit. 15C, § 102(12).

485. Act of Mar. 25, 1991, ch. 600, 1991 Va. Acts 1104 (codified as amended in scattered sections of VA. CODE ANN. tits. 20, 32, 63).

486. The rules governing termination of the contract differ depending on the type of surrogacy. VA. CODE ANN. § 20-161(A), (B).

487. Uniform Parentage Act, ch. 6, 2018 Wash. Sess. Laws 158 (codified at WASH. REV. CODE §§ 26.26A.005–26.26A.903, 19.380.010).

488. The rules governing parentage and withdrawal of consent differ depending on the type of surrogacy. WASH. REV. CODE § 26.26A.740 (parentage; gestational); *id.* § 26.26A.770 (parentage; genetic); *id.* § 26.26A.735 (withdrawal of consent; gestational); *id.* § 26.26A.765 (withdrawal of consent; genetic).



Jurisdiction (Year(s) of enactment)	Authorizes Gestational	Authorizes Gestational and Genetic	Permits Compensation	Civil Ban and/or Penalties
DC (2017) <sup>489</sup>	✓ D.C. CODE §§ 16-401(22), -404 (2020)	✓ D.C. CODE §§ 16-401(22), -404 <sup>490</sup>	✓ D.C. CODE § 16-406(d) <sup>491</sup>	Ø

489. Collaborative Reproduction Amendment Act of 2016, No. 21-672, 64 D.C. Reg. 2037 (Feb. 24, 2017) (codified at D.C. CODE §§ 16-401, -403 to -412).

490. The rules governing parentage and withdrawal of consent differ depending on the type of surrogacy. D.C. CODE § 16-407 (parentage); *id.* § 16-411 (withdrawal of consent).

491. The statutes expressly allow for reimbursement for “reasonable medical and ancillary expenses.” *Id.* § 16-406(d). The provisions also provide for a broad definition of “ancillary expenses” to include, among other things, “compensation for risk, inconvenience, forbearance, or restriction.” *Id.* § 16-401(1).

APPENDIX B

INTENDED PARENT (IP) PROTECTIONS—PERMISSIVE JURISDICTIONS ONLY

Key
✓ = yes
Ø = no

Jurisdiction (Year(s) of enactment)	Inclusive IP rules	No Genetic Connection Requirement	No Medical Need Requirement	No Home Study Requirement	Parentage as a Matter of Law	Pre-Birth Orders
<b>AR (1985)</b> <sup>492</sup>	Partially. ARK. CODE ANN. § 9- 10-201 (2015) <sup>493</sup>	✓ ARK. CODE ANN. § 9-10-201	✓ ARK. CODE ANN. § 9-10-201	✓ ARK. CODE ANN. § 9-10-201	✓ ARK. CODE ANN. § 9-10- 201	Not addressed.
<b>CA (2012)</b> <sup>494</sup>	✓ CAL. FAM. CODE § 7960(c) (West 2013 & Supp. 2020)	✓ CAL. FAM. CODE § 7962	✓ CAL. FAM. CODE § 7962	✓ CAL. FAM. CODE § 7962	✓ CAL. FAM. CODE § 7962(f)(2)	✓ CAL. FAM. CODE § 7962(f)(2)

492. Act of Apr. 15, 1985, No. 904, §§ 1–2, 1985 Ark. Acts 1931, 1932 (codified as amended at ARK. CODE ANN. § 9-10-201).

493. The statute recognizes married and unmarried male genetic intended parents, but the provisions are written in gendered language. ARK. CODE ANN. § 9-10-201.

494. Act of Sept. 23, 2012, ch. 466, 2012 Cal. Stat. 4390 (codified as amended at CAL. FAM. CODE §§ 7960, 7962).

Jurisdiction (Year(s) of enactment)	Inclusive IP rules	No Genetic Connection Requirement	No Medical Need Requirement	No Home Study Requirement	Parentage as a Matter of Law	Pre-Birth Orders
<b>CT (2011)</b> <sup>495</sup>	✓ CONN. GEN. STAT. § 7-48a(b) (2019) <sup>496</sup>	✓ CONN. GEN. STAT. § 7- 48a(b) <sup>497</sup>	✓ CONN. GEN. STAT. § 7- 48a(b) <sup>498</sup>	✓ CONN. GEN. STAT. § 7- 48a(b) <sup>499</sup>	✓ CONN. GEN. STAT. § 7- 48a(b) <sup>500</sup>	Not addressed.
<b>DE (2013)</b> <sup>501</sup>	✓ DEL. CODE ANN. tit. 13, § 8- 102(18) (2009 & Supp. 2020)	✓ DEL. CODE ANN. tit. 13, § 8- 806(b)	✓ DEL. CODE ANN. tit. 13, § 8- 807	✓ DEL. CODE ANN. tit. 13, § 8- 807	Probably. DEL. CODE ANN. tit. 13, § 8-807	Not addressed.

495. Act of July 8, 2011, Pub. Act No. 11-153, 2011 Conn. Acts 1852 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. §§ 7-36, -48a).

496. The statute is silent on the identity of the intended parents, Conn. Gen. Stat. § 7-48a, and the Connecticut Supreme Court has ruled that intended parents can be legal parents “irrespective of the intended parent’s genetic relationship to the children.” *Raftopol v. Ramey*, 12 A.3d 783, 799 (Conn. 2011).

497. *Supra* note 496.

498. The statute is silent on the issue. CONN. GEN. STAT. § 7-48a.

499. The statute is silent on the issue. *Id.*

500. Although the statute expressly addresses only the completion of birth certificates, *id.*, the Connecticut Supreme Court ruled that this statute also effected a substantive change in the law regarding parentage. *Raftopol*, 12 A.3d at 799 (“On the basis of our analysis of both the text of the statute, as well as its legislative history, we conclude that the legislature intended § 7-48a to confer parental status on an intended parent who is a party to a valid gestational agreement irrespective of that intended parent’s genetic relationship to the children.”).

501. Act of July 3, 2013, ch. 88, 79 Del. Laws 1 (codified in scattered sections of DEL. CODE ANN. tit. 13).

Jurisdiction (Year(s) of enactment)	Inclusive IP rules	No Genetic Connection Requirement	No Medical Need Requirement	No Home Study Requirement	Parentage as a Matter of Law	Pre-Birth Orders
<b>FL (1993)</b> <sup>502</sup>	✓ FLA. STAT. § 742.13(2) (2019) <sup>503</sup>	Ø FLA. STAT. § 742.13(2) (gestational) <sup>504</sup>	Ø FLA. STAT. § 742.15(2)	Ø FLA. STAT. § 62.213(a)(1) (genetic only) <sup>505</sup>	Ø FLA. STAT. § 742.16(1) <sup>506</sup>	Ø FLA. STAT. § 742.16(1) <sup>507</sup>
<b>IL (2004)</b> <sup>508</sup>	✓ 750 ILL. COMP. STAT. 47/10 (2019)	Ø 750 ILL. COMP. STAT. 47/20(b)(1) <sup>509</sup>	✓ 750 ILL. COMP. STAT. 47/20(b)(2)	✓ 750 ILL. COMP. STAT. 47/25	Probably. 750 ILL. COMP. STAT. 47/35 <sup>510</sup>	✓ 750 ILL. COMP. STAT. 47/35
<b>IA (2012)</b> <sup>511</sup>	Ø IOWA ADMIN. CODE r. 641- 99.15 (2021) <sup>512</sup>	Ø IOWA ADMIN. CODE r. 641- 99.15 <sup>513</sup>	✓ IOWA ADMIN. CODE r. 641- 99.15	✓ IOWA ADMIN. CODE r. 641-99.15	✓ IOWA ADMIN. CODE r. 641- 99.15 <sup>514</sup>	Not addressed.

502. Act of May 15, 1993, ch. 93-237, 1993 Fla. Laws 2405 (codified as amended at FLA. STAT. §§ 742.11, .13–.17).

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

504. The gestational surrogacy provisions require gametes from at least one of the intended parents. *Id.*

505. Genetic surrogacy is treated as an adoption and, hence, must be approved by the court, subject to “compliance with other applicable provisions of law.” *Id.* § 63.213(1)(a).

506. The statute requires a hearing within three days after birth, although it is unclear if the failure to have such a hearing would affect the parentage determination. *Id.* § 742.16(1).

507. A hearing is required after birth. *Id.*

508. Gestational Surrogacy Act, Pub. Act No. 93-931, 2004 Ill. Laws 3256 (codified as amended at 750 ILL. COMP. STAT. ANN. 47/1–/75).

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

510. Parentage is assigned to the intended parents if the attorneys submit certifications. *Id.* § 47/35. It is unclear, however, if the failure to submit such certifications would affect the parentage determination. *Id.*

511. 35 Iowa Admin. Bull. 1080 (Dec. 12, 2012) (codified as amended at IOWA ADMIN. CODE r. 641-95 to -100).

512. The statute recognizes and protects only genetic intended parents. IOWA ADMIN. CODE r. 641-99.15.

513. Intended parents are protected only if they contribute a gamete. *Id.*

514. Intended parents are automatically recognized as legal parents only if they are genetic contributors. *Id.* Otherwise, they must complete an adoption. *Id.*

Jurisdiction (Year(s) of enactment)	Inclusive IP rules	No Genetic Connection Requirement	No Medical Need Requirement	No Home Study Requirement	Parentage as a Matter of Law	Pre-Birth Orders
<b>LA (2016)</b> <sup>515</sup>	Ø LA. STAT. ANN. § 9:2718.1(6) (2018) <sup>516</sup>	Ø LA. STAT. ANN. § 9:2718.1(6) <sup>517</sup>	Ø LA. STAT. ANN. § 9:2720.3(B)(4)	Ø LA. STAT. ANN. § 9:2720.4(A) <sup>518</sup>	Ø LA. STAT. ANN. § 9:2720(B) (pre- pregnancy); <i>id.</i> § 9:2720.13(A) (post-birth) <sup>519</sup>	Ø LA. STAT. ANN. § 9:2720.13(A)
<b>ME (2015)</b> <sup>520</sup>	✓ ME. STAT. tit. 19-A, § 1832(12) (2020)	✓ ME. STAT. tit. 19-A, § 1832(12)	✓ ME. STAT. tit. 19-A, § 1932	✓ ME. STAT. tit. 19-A, § 1932	✓ ME. STAT. tit. 19-A, § 1933(1)	✓ ME. STAT. tit. 19-A, § 1934(1)
<b>NV (2013)</b> <sup>521</sup>	✓ NEV. REV. STAT. § 126.590 (2020)	✓ NEV. REV. STAT. § 126.590	✓ NEV. REV. STAT. § 126.750	✓ NEV. REV. STAT. § 126.750	✓ NEV. REV. STAT. § 126.720(1)(a)	✓ NEV. REV. STAT. § 126.720(4)

515. Act of June 9, 2016, No. 494, 2016 La. Acts 1603 (codified in scattered sections of LA. STAT. ANN. tits. 9, 14, 40, 44.

516. The intended parents are protected only if they are married to each other and each contributes gametes. LA. STAT. ANN. § 9:2718.1(6).

517. Both intended parents must contribute gametes. *Id.* §

518. While the statute does not require a “home study” per se, it does require a criminal background, child abuse and neglect check, and protective order check. *Id.* § 9:2720.4(A).

519. Both pre-pregnancy and post-birth court actions are required. *Id.* § 9:2720(B) (pre-pregnancy); *id.* § 9:2720.13(A) (post-birth).

520. Maine Parentage Act, ch. 296, pt. A, 2015 Me. Laws 706 (codified as amended at ME. STAT. tit. 19-A, §§ 1831–1939).

521. Act of May 28, 2013, ch. 213, 2013 Nev. Stat. 805 (codified as amended at NEV. REV. STAT. §§ 126.041, 126.500–810, 127.287).

Jurisdiction (Year(s) of enactment)	Inclusive IP rules	No Genetic Connection Requirement	No Medical Need Requirement	No Home Study Requirement	Parentage as a Matter of Law	Pre-Birth Orders
<b>NH (2014)</b> <sup>522</sup>	✓ N.H. REV. STAT. ANN. § 168-B:1(XIII) (2014 & Supp. 2020)	✓ N.H. REV. STAT. ANN. § 168-B:1(XIII)	✓ N.H. REV. STAT. ANN. § 168-B:11 (2014)	✓ N.H. REV. STAT. ANN. § 168-B:11	Probably. N.H. REV. STAT. ANN. § 168-B:12(I) (2014 & Supp. 2020)	✓ N.H. REV. STAT. ANN. § 168-B:12(1)
<b>NJ (2018)</b> <sup>523</sup>	✓ N.J. STAT. ANN. § 9:17-62 (West Supp. 2020)	✓ N.J. STAT. ANN. § 9:17-62	✓ N.J. STAT. ANN. § 9:17-65	✓ N.J. STAT. ANN. § 9:17-65	✓ N.J. STAT. ANN. § 9:17-63	✓ N.J. STAT. ANN. § 9:17-67(a), (f)
<b>NY (2020)</b> <sup>524</sup>	✓ N.Y. FAM. CT. ACT § 581-402(b)(3) (McKinney, Westlaw through L. 2021, chs. 1–23) <sup>525</sup>	✓ N.Y. FAM. CT. ACT § 581-402(b)	✓ N.Y. FAM. CT. ACT § 582-402(b)	✓ N.Y. FAM. CT. ACT § 581-403	✓ N.Y. FAM. CT. ACT § 581-406	✓ N.Y. FAM. CT. ACT § 581-203(a)

522. Act of July 21, 2014, ch. 248, 2014 N.H. Laws 356 (codified as amended at N.H. REV. STAT. ANN. §§ 168-B:1–:21).

523. Gestational Carrier Agreement Act, ch. 18, 2018 N.J. Laws 157 (codified as amended in scattered sections of N.J. STAT. ANN. tits. 9, 26).

524. Act of Apr. 3, 2020, ch. 56, pt. L, secs. 1–6 (to be codified at N.Y. FAM. CT. ACT §§ 581-101 to -704, N.Y. DOM. REL. LAW §§ 121–124).

525. Intended parents need not be married to each other, but if there are two intended parents, they must either be married to each other or be “intimate partners together.” N.Y. FAM. CT. ACT § 581-402(b)(3). The statute also requires “at least one intended parent [to be] a United States citizen or a lawful permanent resident.” *Id.* § 581-402(b)(1).

Jurisdiction (Year(s) of enactment)	Inclusive IP rules	No Genetic Connection Requirement	No Medical Need Requirement	No Home Study Requirement	Parentage as a Matter of Law	Pre-Birth Orders
<b>ND (1989, 2005)</b> <sup>526</sup>	Ø N.D. CENT. CODE § 14-18- 01(1), (2) (2017) <sup>527</sup>	Ø N.D. CENT. CODE § 14-18- 01(1), (2) <sup>528</sup>	✓ N.D. CENT. CODE § 14-18- 01(1), (2)	✓ N.D. CENT. CODE § 14-18- 01(1), (2)	✓ N.D. CENT. CODE § 14-18- 08	Not addressed.
<b>OK (2019)</b> <sup>529</sup>	Partially. OKLA. STAT. tit. 10, § 557.5(B)(4) (Supp. 2020) <sup>530</sup>	✓ OKLA. STAT. tit. 10, § 557.5(B)(4)	Partially. OKLA. STAT. tit. 10, § 557.10(B)(4) <sup>531</sup>	✓ OKLA. STAT. tit. 10, § 557.6	Ø OKLA. STAT. tit. 10, § 557.7(A) (pre- pregnancy); <i>id.</i> § 557.12(A) (post-birth) <sup>532</sup>	Ø OKLA. STAT. tit. 10, § 557.12(A)

526. Assisted Conception Act, ch. 184, 1989 N.D. Laws 561 (codified as amended at N.D. CENT. CODE §§ 14-18-01, 14-18-05, 12.1-31-05); Uniform Parentage Act, ch. 135, 2005 N.D. Laws 696 (codified as amended in scattered sections of N.D. CENT. CODE tits. 12, 14).

527. The statute protects only intended parents each of whom contribute gametes. N.D. CENT. CODE § 14-18-01(1), (2). As discussed above, there is an argument that North Dakota's statutes limit enforceable agreements to those in which the intended parents contribute the only gametes and are married to each other. *See supra* note 99.

528. The statute requires both intended parents to contribute gametes. *Id.* § 14-18-01.

529. Oklahoma Gestational Agreement Act, ch. 433, 2019 Okla. Sess. Laws 1966 (codified at OKLA. STAT. tit. 10, §§ 557–557.25).

530. The statute covers and protects single intended parents and married-couple intended parents, but not unmarried-couple intended parents. OKLA. STAT. tit. 10, § 557.5(B)(4).

531. The statute requires either medical infertility or medical risk. *Id.* § 557.10(B)(4).

532. Both pre-pregnancy and post-birth court proceedings are required. *Id.* § 557.7(A) (pre-pregnancy); *id.* § 557.12(A) (post-birth).

Jurisdiction (Year(s) of enactment)	Inclusive IP rules	No Genetic Connection Requirement	No Medical Need Requirement	No Home Study Requirement	Parentage as a Matter of Law	Pre-Birth Orders
<b>RI (2020)</b> <sup>533</sup>	✓ 15 R.I. GEN. LAWS § 15-8.1- 102(15) (Supp. 2020)	✓ 15 R.I. GEN. LAWS § 15-8.1- 102(15)	✓ 15 R.I. GEN. LAWS § 15-8.1- 802	✓ 15 R.I. GEN. LAWS § 15-8.1- 802	✓ 15 R.I. GEN. LAWS § 15-8.1- 803(a)(1)	✓ 15 R.I. GEN. LAWS § 15-8.1-804
<b>TX (2003)</b> <sup>534</sup>	Ø TEX. FAM. CODE ANN. § 160.754(b) (West 2014) <sup>535</sup>	✓ TEX. FAM. CODE ANN. § 160.754	Ø TEX. FAM. CODE ANN. § 160.756(b)(2)	Ø TEX. FAM. CODE ANN. § 160.756(b)(3) <sup>536</sup>	Ø TEX. FAM. CODE ANN. §§ 160.756, .760(a) (West 2014 & Supp. 2018) <sup>537</sup>	Ø TEX. FAM. CODE ANN. § 160.760(a).

533. Uniform Parentage Act, chs. 20-59, 20-60 (July 21, 2020) (to be codified at 15 R.I. GEN. LAWS §§ 15-8.1-101 to -1004, 23-3-10).

534. Act of June 20, 2003, ch. 457, 2003 Tex. Gen. Laws 1699 (codified at TEX. FAM. CODE ANN. § 160.602, .751–.763).

535. The intended parents must be married. TEX. FAM. CODE ANN. § 160.754(b).

536. A home study is required unless waived by the court. *Id.* § 160.756(b)(3).

537. Both pre-pregnancy and post-birth court procedures are required. *Id.* § 160.756 (pre-pregnancy); *id.* § 160.760(a) (post-birth).



Jurisdiction (Year(s) of enactment)	Inclusive IP rules	No Genetic Connection Requirement	No Medical Need Requirement	No Home Study Requirement	Parentage as a Matter of Law	Pre-Birth Orders
<b>UT (2008)</b> <sup>538</sup>	Ø UTAH CODE ANN. § 78B-15- 801(3) (LexisNexis 2018) <sup>539</sup>	✓ UTAH CODE ANN. § 78B-15- 801	Ø UTAH CODE ANN. § 78B-15- 803(2)(b) (LexisNexis 2018 & Supp. 2020)	Ø UTAH CODE ANN. § 78B-15- 803(2)(c) <sup>540</sup>	Ø UTAH CODE ANN. § 78B-15- 802(1) (pre- pregnancy); <i>id.</i> §78B-15-807(1) (LexisNexis 2018) (post- birth) <sup>541</sup>	Ø UTAH CODE ANN. § 78B-15- 807(1)
<b>VT (2018)</b> <sup>542</sup>	✓ VT. STAT. ANN. tit. 15C, § 102(14) (2019)	✓ VT. STAT. ANN. tit. 15C, § 102(14)	✓ VT. STAT. ANN. tit. 15C, § 802	✓ VT. STAT. ANN. tit. 15C, § 802	✓ VT. STAT. ANN. tit. 15C, § 803(a)(1)	✓ VT. STAT. ANN. tit. 15C, § 804(a)(1)

538. Act of Feb. 7, 2008, ch. 3, secs. 1368–1458, 2008 Utah Laws 48, 575–92 (codified as amended at UTAH CODE ANN. §§ 78B-15-101 to -902).

539. The intended parents must be married. UTAH CODE ANN. § 78B-15-801(3).

540. A home study is required unless waived by the court. *Id.* § 78B-15-803(2)(b).

541. Both pre-pregnancy and post-birth court procedures are required by statute. *Id.* § 78B-15-802(1) (pre-pregnancy) (West 2008); *id.* § 78B-15-807(1) (post-birth).

542. Act of May 22, 2018, No. 162, 2018 Vt. Acts & Resolves 472 (codified as amended at VT. STAT. ANN. tit. 15C, §§ 101–809, tit. 33, §§ 4291, 6911).

Jurisdiction (Year(s) of enactment)	Inclusive IP rules	No Genetic Connection Requirement	No Medical Need Requirement	No Home Study Requirement	Parentage as a Matter of Law	Pre-Birth Orders
<b>VA (1991)</b> <sup>543</sup>	✓ VA. CODE ANN. § 20-156 (2016 & Supp. 2020)	✓ VA. CODE ANN. § 20- 160(B)(9) <sup>544</sup>	Ø VA. CODE ANN. § 20- 160(B)(8)	Ø VA. CODE ANN. § 20-160(B)(2)	Ø VA. CODE ANN. § 20- 160(A) (pre- pregnancy); <i>id.</i> § 20-160(D) (post- pregnancy) <sup>545</sup>	Not addressed.
<b>WA (2018)</b> <sup>546</sup>	✓ WASH. REV. CODE § 26.26A.010(13) (2019 Supp.)	✓ WASH. REV. CODE § 26.26A.010(13)	✓ WASH. REV. CODE § 26.26A.710	✓ WASH. REV. CODE § 26.26A.710	✓ WASH. REV. CODE § 26.26A.750(1) (gestational only)	✓ WASH. REV. CODE § 26.26A.750(1)(a) (gestational only)
<b>DC (2017)</b> <sup>547</sup>	✓ D.C. CODE § 16-401(16) (2020)	✓ D.C. CODE § 16-401(16)	✓ D.C. CODE § 16-406	✓ D.C. CODE § 16-406	✓ D.C. CODE § 16-407 (gestational only)	✓ D.C. CODE § 16- 408(a), (e) (gestational only)

543. Act of Mar. 25, 1991, ch. 600, 1991 Va. Acts 1104 (codified as amended in scattered sections of VA. CODE ANN. tits. 20, 32, 63).

544. At least one intended parent must “be the genetic parent of any child resulting from the agreement or [have] legal or contractual custody of the embryo at issue.” VA. CODE ANN. § 20-160(B)(9) (emphasis added).

545. Pre-pregnancy and post-birth court procedures are required. *Id.* § 20-160(A) (pre-pregnancy); *id.* § 20-160(D) (post-birth).

546. Uniform Parentage Act, ch. 6, 2018 Wash. Sess. Laws 158 (codified at WASH. REV. CODE §§ 26.26A.005–26.26A.903, 19.380.010).

547. Collaborative Reproduction Amendment Act of 2016, No. 21-672, 64 D.C. Reg. 2037 (Feb. 24, 2017) (codified at D.C. CODE §§ 16-401, -403 to -412).

APPENDIX C

PERSON ACTING AS SURROGATE (PAS) PROTECTIONS—PERMISSIVE JURISDICTIONS ONLY

<p>Key                  ✓ = yes                  Ø = no</p>
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Jurisdiction (Year(s) of enactment)	Counsel Required	IP(s) must pay for counsel for PAS	Protects PAS’s right to control own behavior	Protects PAS’s decision-making authority	Protects PAS’s choice of doctor	Requires IP(s) to accept custody
<b>AR (1985)</b> <sup>548</sup>	Ø ARK. CODE ANN. § 9-10-201 (2015) (not addressed)	Ø ARK. CODE ANN. § 9-10-201 (not addressed)	Ø ARK. CODE ANN. § 9-10-201 (not addressed)	Ø ARK. CODE ANN. § 9-10-201 (not addressed)	Ø ARK. CODE ANN. § 9-10-201 (not addressed)	Unclear.
<b>CA (2012)</b> <sup>549</sup>	✓ CAL. FAM. CODE § 7692(b) (West 2013 & Supp. 2020)	Ø CAL. FAM. CODE § 7692(b) (not addressed)	Ø CAL. FAM. CODE § 7692 <sup>550</sup>	Ø CAL. FAM. CODE § 7692 <sup>551</sup>	Ø CAL. FAM. CODE § 7692 <sup>552</sup>	Probably. CAL. FAM. CODE § 7962.

548. Act of Apr. 15, 1985, No. 904, §§ 1–2, 1985 Ark. Acts 1931, 1932 (codified as amended at ARK. CODE ANN. § 9-10-201).  
 549. Act of Sept. 23, 2012, ch. 466, 2012 Cal. Stat. 4390 (codified as amended at CAL. FAM. CODE §§ 7960, 7962).  
 550. An otherwise enforceable surrogacy agreement may be enforceable even if it restricts bodily autonomy of the person acting as a surrogate. *See supra* text accompanying notes 328–329.  
 551. *Supra* note 550.  
 552. *Supra* note 550.

Jurisdiction (Year(s) of enactment)	Counsel Required	IP(s) must pay for counsel for PAS	Protects PAS's right to control own behavior	Protects PAS's decision-making authority	Protects PAS's choice of doctor	Requires IP(s) to accept custody
<b>CT (2011)</b> <sup>553</sup>	Ø CONN. GEN. STAT. § 7-48a (2019) (not addressed)	Ø CONN. GEN. STAT. § 7-48a (not addressed)	Ø CONN. GEN. STAT. § 7-48a (not addressed)	Ø CONN. GEN. STAT. § 7-48a (not addressed)	Ø CONN. GEN. STAT. § 7-48a (not addressed)	Unclear.
<b>DE (2013)</b> <sup>554</sup>	✓ DEL. CODE ANN. tit. 13, § 8- 807(b)(3) (2009 & Supp. 2020); <i>id.</i> § 8-806(a)(5) (PAS); <i>id.</i> § 8- 806(b)(2) (IPs)	Ø DEL. CODE ANN. tit. 13, § 8- 806(5) <sup>555</sup>	Ø DEL. CODE ANN. tit. 13, § 8- 807(d)(2)	Ø DEL. CODE ANN. tit. 13, § 8- 807(d)(1)	After consultation with IPs. DEL. CODE ANN. tit. 13, § 8-807(c)(3)	Probably. DEL. CODE ANN. tit. 13, § 8-807

553. Act of July 8, 2011, Pub. Act No. 11-153, 2011 Conn. Acts 1852 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. §§ 7-36, -48a).

554. Act of July 3, 2013, ch. 88, 79 Del. Laws 1 (codified in scattered sections of DEL. CODE ANN. tit. 13).

555. Payment of counsel fees is required only if "requested" by the person acting as a surrogate. DEL. CODE ANN. tit. 13, § 8-806(a)(5).

Jurisdiction (Year(s) of enactment)	Counsel Required	IP(s) must pay for counsel for PAS	Protects PAS's right to control own behavior	Protects PAS's decision-making authority	Protects PAS's choice of doctor	Requires IP(s) to accept custody
<b>FL (1993)</b> <sup>556</sup>	Ø FLA. STAT. § 742.15 (2019) (no mention)	Ø FLA. STAT. § 742.15 (no mention)	Ø FLA. STAT. § 742.15(3)(b) (no mention)	Unclear. <i>Compare</i> FLA. STAT. § 742.15(3)(b), <i>with id.</i> § 742.15(3)(a) <sup>557</sup>	Unclear. <i>Compare</i> FLA. STAT. § 742.15(3)(b), <i>with id.</i> § 742.15(3)(a) <sup>558</sup>	Unclear.
<b>IL (2004)</b> <sup>559</sup>	✓ 750 ILL COMP. STAT. 47/25(b)(3)	Ø 750 ILL COMP. STAT. 47/25(b)(3)	Ø 750 ILL. COMP. STAT. 47/25(d)(2)	Ø 750 ILL. COMP. STAT. 47/25(d)(1)	After consultation with IPs. 750 ILL. COMP. STAT. 47/25(c)(3).	✓ 750 ILL. COMP. STAT. 47/30.
<b>IA (2012)</b> <sup>560</sup>	Ø IOWA ADMIN CODE r. 641- 99.15 (2021)	Ø IOWA ADMIN CODE r. 641- 99.15	Ø IOWA ADMIN CODE r. 641-99.15	Ø IOWA ADMIN CODE r. 641-99.15	Ø IOWA ADMIN CODE r. 641-99.15	Ø IOWA ADMIN CODE r. 641- 99.15

556. Act of May 15, 1993, ch. 93-237, 1993 Fla. Laws 2405 (codified as amended at FLA. STAT. §§ 742.11, .13–.17).

557. These provisions appear to be in tension with one another. The first provides that the person acting as a surrogate must agree “to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health.” FLA. STAT. § 742.15(3)(b). The second, however § provides that “[t]he commissioning couple agrees that the gestational surrogate shall be the sole source of consent with respect to clinical intervention and management of the pregnancy.” *Id.* § 742.15(3)(a).

558. *Supra* note 557.

559. Gestational Surrogacy Act, Pub. Act No. 93-931, 2004 Ill. Laws 3256 (codified as amended at 750 Ill. COMP. STAT. ANN. 47/1–/75).

560. 35 Iowa Admin. Bull. 1080 (Dec. 12, 2012) (codified as amended at IOWA ADMIN. CODE r. 641-95 to -100).

Jurisdiction (Year(s) of enactment)	Counsel Required	IP(s) must pay for counsel for PAS	Protects PAS's right to control own behavior	Protects PAS's decision-making authority	Protects PAS's choice of doctor	Requires IP(s) to accept custody
<b>LA (2016)</b> <sup>561</sup>	Ø LA. STAT. ANN. § 9:2720.2 (2018)	Ø LA. STAT. ANN. § 9:2720.2	Ø LA. STAT. ANN. § 9:2720.2(A)(2)	Unclear. <i>Compare</i> LA. STAT. ANN. § 9:2720.2(A)(2), <i>with id.</i> § 9:2720.2(B)(1) <sup>562</sup>	Unclear. <i>Compare</i> LA. STAT. ANN. § 9:2720.2(A)(2), <i>with id.</i> § 9:2720.2(B)(1) <sup>563</sup>	Unclear.
<b>ME (2015)</b> <sup>564</sup>	✓ ME. STAT. tit. 19-A, § 1931(1)(D) (2020)	✓ ME. STAT. tit. 19-A, § 1931(1)(D)	Unclear.	✓ ME. STAT. tit. 19-A, § 1932(5)	✓ ME. STAT. tit. 19-A, § 1932(3)(J)(3)	✓ ME. STAT. tit. 19-A, § 1933(1)
<b>NV (2013)</b> <sup>565</sup>	✓ NEV. REV. STAT. § 126.750(2) (2020)	Ø NEV. REV. STAT. § 126.750(2)	Ø NEV. REV. STAT. § 126.750(5)(a), (b)	Ø NEV. REV. STAT. § 126.750(5)(a), (b)	After consultation with IPs. NEV. REV. STAT. § 126.750(4)(c)	✓ NEV. REV. STAT. § 126.720(1)(a)

561. Act of June 9, 2016, No. 494, 2016 La. Acts 1603 (codified in scattered sections of LA. STAT. ANN. tits. 9, 14, 40, 44).

562. These provisions appear to be in tension with one another. The first provides that the person acting as a surrogate must agree “to [receive] reasonable medical evaluation and treatment during the term of the pregnancy, to adhere to reasonable medical instructions about prenatal health, and to execute medical records releases.” LA. STAT. ANN. § 9:2720.2(A)(2). The second, however, provides that the intended parents must “[a]cknowledge that the gestational carrier has sole authority with respect to medical decision-making during the term of the pregnancy consistent with the rights of a pregnant woman carrying her own biological child.” *Id.* § 9:2720.2(B)(1).

563. *See supra* note 562.

564. Maine Parentage Act, ch. 296, pt. A, 2015 Me. Laws 706 (codified as amended at ME. STAT. tit. 19-A, §§ 1831–1939).

565. Act of May 28, 2013, ch. 213, 2013 Nev. Stat. 805 (codified as amended at NEV. REV. STAT. §§ 126.041, 126.500–810, 127.287).

Jurisdiction (Year(s) of enactment)	Counsel Required	IP(s) must pay for counsel for PAS	Protects PAS's right to control own behavior	Protects PAS's decision-making authority	Protects PAS's choice of doctor	Requires IP(s) to accept custody
<b>NH (2014)</b> <sup>566</sup>	✓ N.H. REV. STAT. ANN. § 168-B:11(III) (2014)	Ø N.H. REV. STAT. ANN. § 168-B:11(III)	Unclear. <i>Cf.</i> N.H. REV. STAT. ANN. § 168- B:11(IV)(e) <sup>567</sup>	Ø <i>Cf.</i> N.H. REV. STAT. ANN. § 168- B:11(IV)(f) <sup>568</sup>	Ø <i>Cf.</i> N.H. REV. STAT. ANN. § 168- B:11(IV)(e)	✓ N.H. REV. STAT. ANN. §168- B:11(IV)(c)
<b>NJ (2018)</b> <sup>569</sup>	✓ N.J. STAT. ANN. § 9:17- 65(a)(3) (West Supp. 2020); <i>id.</i> § 9:17-64(a)(5) (PAS); <i>id.</i> § 9:17-64(b)(2) (IPs)	Ø N.J. STAT. ANN. § 9:17- 64(a)(5)	Ø N.J. STAT. ANN. § 9:17-65 (not addressed)	Ø N.J. STAT. ANN. § 9:17-65 (not addressed)	After written notice to IPs. N.J. STAT. ANN. § 9:17- 65(b)(1)(c)	✓ N.J. REV. STAT. ANN. § 9:17-63(a)(1)

566. Act of July 21, 2014, ch. 248, 2014 N.H. Laws 356 (codified as amended at N.H. REV. STAT. ANN §§ 168-B:1--:21).

567. Although the statute does not explicitly address this protection, it allows claims for breaches of the contract that “cause[] harm to the . . . child.” N.H. REV. STAT. ANN. § 168-B:11(IV)(e) (2014). Such breaches may relate to the behavior of the person acting as a surrogate during her pregnancy. *See id.*

568. The statute requires that the agreement include “how decisions regarding termination of the pregnancy shall be made.” *Id.* § 168-B:11(IV)(f).

569. Gestational Carrier Agreement Act, ch. 18, 2018 N.J. Laws 157 (codified as amended in scattered sections of N.J. STAT. ANN. tits. 9, 26).

<b>Jurisdiction (Year(s) of enactment)</b>	<b>Counsel Required</b>	<b>IP(s) must pay for counsel for PAS</b>	<b>Protects PAS's right to control own behavior</b>	<b>Protects PAS's decision-making authority</b>	<b>Protects PAS's choice of doctor</b>	<b>Requires IP(s) to accept custody</b>
<b>NY (2020)</b> <sup>570</sup>	✓ N.Y. FAM. CT. ACT § 581- 403(e) (McKinney, Westlaw through L. 2021, chs. 1–23)	✓ N.Y. FAM. CT. ACT § 581- 402(a)(6) <sup>571</sup>	✓ N.Y. FAM. CT. ACT § 581- 403(i)(1)(v)	✓ N.Y. FAM. CT. ACT § 581- 403(i)(1)(v)	✓ N.Y. FAM. CT. ACT § 581- 403(i)(1)(vi)	✓ N.Y. FAM. CT. ACT § 581- 203(a)
<b>ND (2005)</b> <sup>572</sup>	Ø N.D. CENT. CODE § 14-18- 08 (not addressed)	Ø N.D. CENT. CODE § 14-18- 08 (not addressed)	Ø N.D. CENT. CODE § 14-18-08 (not addressed)	Ø N.D. CENT. CODE § 14-18-08 (not addressed)	Ø N.D. CENT. CODE § 14-18-08 (not addressed)	Unclear.

570. Act of Apr. 3, 2020, ch. 56, pt. L, secs. 1–6 (to be codified at N.Y. Fam. Ct. Act §§ 581-101 to -704, N.Y. DOM. REL. LAW §§ 121–124).

571. There is an exception to this requirement: if the “person acting as a surrogate . . . is receiving no compensation,” they may “waive” the right to have the intended parents pay for counsel. N.Y. FAM. Ct. Act § 581-402(a)(6).

572. Uniform Parentage Act, ch. 135, 2005 N.D. Laws 696 (codified as amended in scattered sections of N.D. CENT. CODE tits. 12, 14).



Jurisdiction (Year(s) of enactment)	Counsel Required	IP(s) must pay for counsel for PAS	Protects PAS's right to control own behavior	Protects PAS's decision-making authority	Protects PAS's choice of doctor	Requires IP(s) to accept custody
<b>OK (2019)</b> <sup>573</sup>	✓ OKLA. STAT. tit. 10, § 557.6(B) (Supp. 2020)	Ø OKLA. STAT. tit. 10, § 557.6(B)	Ø OKLA. STAT. tit. 10, § 557.6(D)(2) <sup>574</sup>	Ø OKLA. STAT. tit. 10, § 557.6(D)(1) <sup>575</sup>	Ø Cf. OKLA. STAT. tit. 10, § 557.6(D)(1) <sup>576</sup>	✓ (If agreement validated.) OKLA. STAT. tit. 10, § 557.11(A)
<b>RI (2020)</b> <sup>577</sup>	✓ 15 R.I. GEN. LAWS § 15-8.1- 802(b)(7) (Supp. 2020)	✓ 15 R.I. GEN. LAWS § 15-8.1- 801(a)(4)	✓ 15 R.I. GEN. LAWS § 15-8.1- 802(d)	✓ 15 R.I. GEN. LAWS § 15-8.1- 802(d)	✓ 15 R.I. GEN. LAWS § 15-8.1- 802(b)(12)	✓ 15 R.I. GEN. LAWS § 15-8.1- 802(b)(14)

573. Oklahoma Gestational Agreement Act, ch. 433, 2019 Okla. Sess. Laws 1966 (codified at OKLA. STAT. tit. 10, §§ 557–557.25).

574. The statute permits the inclusion of provisions requiring the person acting as a surrogate to “abstain from any activities that the intended parents or the physician providing care to the gestational carrier during the pregnancy reasonably believe to be harmful to the pregnancy or the future health of [the] child,” providing that such clauses are “enforceable.” OKLA. STAT. tit. 10, § 557.6(D)(2).

575. *Supra* note 574.

576. Although the statute does not explicitly address this protection, the surrogacy scheme allows for the inclusion of other kinds of clauses that restrict the bodily autonomy and medical decision-making of the person acting as a surrogate. *See supra* note 574.

577. Uniform Parentage Act, chs. 20-59, 20-60 (July 21, 2020) (to be codified at 15 R.I. GEN. LAWS §§ 15-8.1-101 to -1004, 23-3-10).

Jurisdiction (Year(s) of enactment)	Counsel Required	IP(s) must pay for counsel for PAS	Protects PAS’s right to control own behavior	Protects PAS’s decision-making authority	Protects PAS’s choice of doctor	Requires IP(s) to accept custody
<b>TX (2003)</b> <sup>578</sup>	Ø TEX. FAM. CODE ANN. § 160.754 (West 2014) (no mention)	Ø TEX. FAM. CODE ANN. § 160.754 (no mention)	Ø TEX. FAM. CODE ANN. § 160.754 (no mention)	✓ TEX. FAM. CODE ANN. § 160.754(g) <sup>579</sup>	Ø TEX. FAM. CODE ANN. § 160.754 (no mention)	✓ (If agreement validated.) TEX. FAM. CODE ANN. § 160.756(c)
<b>UT (2008)</b> <sup>580</sup>	Ø UTAH CODE ANN. § 78B-15- 803 (LexisNexis 2018 & Supp. 2020) (no mention)	Ø UTAH CODE ANN. § 78B-15- 803 (no mention)	Ø <i>Cf.</i> UTAH CODE ANN. § 78B-15- 808(2) (LexisNexis 2018) <sup>581</sup>	✓ UTAH CODE ANN. § 78B-15- 808(2) <sup>582</sup>	Ø <i>Cf.</i> UTAH CODE ANN. § 78B-15- 808(2) <sup>583</sup>	✓ (If agreement validated.) UTAH CODE ANN. § 78B-15- 803(1) (LexisNexis 2018 & Supp. 2020)

578. Act of June 20, 2003, ch. 457, 2003 Tex. Gen. Laws 1699 (codified at TEX. FAM. CODE ANN. § 160.602, .751–.763).

579. This protection is somewhat limited. The agreement “may not limit the right of the gestational mother to make decisions to safeguard her health or the health of an embryo.” TEX. FAM. CODE ANN. § 160.754(g).

580. Act of Feb. 7, 2008, ch. 3, secs. 1368–1458, 2008 Utah Laws 48, 575–92 (codified as amended at UTAH CODE ANN. §§ 78B-15-101 to -902).

581. The statute protects only the right of the person acting as a surrogate “to make decisions to safeguard her health or that of the embryo or fetus.” UTAH CODE ANN. § 78B-15-808(2).

582. *Supra* note 581.

583. *Id.*

Jurisdiction (Year(s) of enactment)	Counsel Required	IP(s) must pay for counsel for PAS	Protects PAS's right to control own behavior	Protects PAS's decision-making authority	Protects PAS's choice of doctor	Requires IP(s) to accept custody
<b>VT (2018)</b> <sup>584</sup>	✓ VT. STAT. ANN. tit. 15C, § 802(b)(7) (2019)	✓ VT. STAT. ANN. tit. 15C, § 801(a)(3)	✓ VT. STAT. ANN. tit. 15C, § 802(e)	✓ VT. STAT. ANN. tit. 15C, § 802(e)	✓ VT. STAT. ANN. tit. 15C, § 802(b)(12)	✓ VT. STAT. ANN. tit. 15C, § 803(a)(1)
<b>VA (1991)</b> <sup>585</sup>	✓ VA. CODE ANN. § 20- 160(A) (2016 & Supp. 2020)	Ø VA. CODE ANN. § 20-160	Unclear. <i>Cf.</i> VA. CODE ANN. § 20- 163(A) <sup>586</sup>	✓ <i>Cf.</i> VA. CODE ANN. § 20- 163(A) <sup>587</sup>	Probably. VA. CODE ANN. § 20- 163(A) <sup>588</sup>	✓ (If agreement validated.) VA. CODE ANN. § 20-158(D)
<b>WA (2018)</b> <sup>589</sup>	✓ WASH. REV. CODE § 26.26A.710(7) (2019 Supp.) <sup>590</sup>	✓ WASH. REV. CODE § 26.26A.710(8)	✓ WASH. REV. CODE § 26.26A.715(1)(a)	✓ WASH. REV. CODE § 26.26A.715(1)(a)	✓ WASH. REV. CODE § 26.26A.715(1)(a)	✓ WASH. REV. CODE § 26.26A.705(1) (gestational); <i>id.</i> § 26.26A.770(1) (genetic)

584. Act of May 22, 2018, No. 162, 2018 Vt. Acts & Resolves 472 (codified as amended at VT. STAT. ANN. tit. 15C, §§ 101–809, tit. 33, §§ 4291, 6911).

585. Act of Mar. 25, 1991, ch. 600, 1991 Va. Acts 1104 (codified as amended in scattered sections of VA. CODE ANN. tits. 20, 32, 63).

586. The statute provides that the person acting as a surrogate “shall be solely responsible for the clinical management of the pregnancy.” VA. CODE ANN. § 20-163(A). This may include decisions about day-to-day behavior.

587. *Supra* note 586.

588. The statute provides that the person acting as a surrogate “shall be solely responsible for the clinical management of the pregnancy.” *Id.* There is a strong argument that this includes the choice of physician.

589. Uniform Parentage Act, ch. 6, 2018 Wash. Sess. Laws 158 (codified at WASH. REV. CODE §§ 26.26A.005–26.26A.903, 19.380.010).

590. The statute requires representation “throughout the surrogacy arrangement.” WASH. REV. CODE § 26.26A.710(7).

<b>Jurisdiction (Year(s) of enactment)</b>	<b>Counsel Required</b>	<b>IP(s) must pay for counsel for PAS</b>	<b>Protects PAS's right to control own behavior</b>	<b>Protects PAS's decision-making authority</b>	<b>Protects PAS's choice of doctor</b>	<b>Requires IP(s) to accept custody</b>
<b>DC (2017)</b> <sup>591</sup>	✓ D.C. CODE § 16-406(b) (2020)	Ø D.C. CODE § 16-406(b)	✓ D.C. CODE § 16- 406(a)(4)(C); <i>id.</i> § 16-406(c)	✓ D.C. CODE § 16- 406(a)(4)(C); <i>id.</i> § 16-406(c)	✓ D.C. CODE § 16- 406(a)(4)(C); <i>id.</i> § 16-406(c)	✓ D.C. CODE § 16-407(a)(1) (gestational); <i>id.</i> § 16-407(b)(1) (genetic)

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591. Collaborative Reproduction Amendment Act of 2016, No. 21-672, 64 D.C. Reg. 2037 (Feb. 24, 2017) (codified at D.C. CODE §§ 16-401, -403 to -412).