Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime

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I. INTRODUCTION

Most couples have enough to worry about upon the birth of their children—with changing diapers, making bottles, and constant cleaning. When two Minnesota men in a committed same-sex relationship finally realized their dreams of having a child in July 2007, however, they must have experienced even greater fears and stress. Because Minnesota Governor Tim Pawlenty vetoed legislation establishing requirements for surrogacy agreements that advocates claimed would have created greater certainty of outcomes in such cases,[1] the fate of what should have been one of the most joyous times of these men's lives vacillated upon the opinion of a Minnesota trial court judge who had neither statutes to interpret nor binding precedent on which to base his decision.[2]

The couple had arranged to have a child through a surrogate mother, who had agreed to voluntarily terminate her parental rights. Upon the birth of their child, however, the surrogate mother changed her mind and tried to abduct the child from the couple's home during a visitation.[3] Fortunately, the police were able to stop her that day, but even though the intended parents offered the surrogate mother ongoing visitation, she refused to compromise.[4] Instead, she brought suit against the child's biological father

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[1] Kevin Duchschere & Norman Draper, *Pawlenty Vetoes Bills on Sick-Leave Use, Surrogacy Contracts*, STARTRIBUNE.COM, May 17, 2008, http://www.startribune.com/ politics/state/19013079.html.

[2] A.L.S. v. E.A.G., No. A10-443, 2010 Minn. App. Unpub. LEXIS 1091, at *15 n.5 (8th Cir. Oct. 26, 2010) ("We are aware of no precedent applying Minnesota law to a surrogacy agreement. One unpublished opinion of this court, which is not precedential . . . concluded that a gestational surrogacy agreement was enforceable under a foreign statute because of a choice-of-law clause in that agreement.").

[3] *Id.* at *3.

[4] *Id.*

(one of the intended parents) "to establish paternity, alleging that [the child] was the product of sexual intercourse between [the biological father] and [herself]."[5] The surrogate sought not only sole custody, but also child support from the intended parents.[6] Consequently, the intended parents countersued for enforcement of the surrogacy contract.[7]

After months of litigation and a ten-day trial, the child's intended parents ultimately received sole legal and physical custody.[8] In determining custody, the trial court judge relied upon the recommendations of the custody evaluator and guardian ad litem, both of whom believed this result was in the child's best interests.[9] Similarly, the intended parents presented a psychologist as an expert witness who found the surrogate mother to have "problems with authority, anger, inability to accept responsibility and externalization of blame, paranoia and mistrust of others, and difficulty maintaining long-term relationships."[10]

The trial court determined that the surrogate mother "was not a legal parent of [the child] and declared the nonexistence of a mother and child relationship."[11] Based on its interpretation of the Parentage Act, the court adjudicated *sua sponte* that the biological father's partner was also a legal parent of the child.[12] However, it was not until October 2010—more than three years after the child was born—that the Minnesota Court of Appeals decided that the trial court had erred in its conclusion that the surrogate mother was not the legal mother of the child and that the biological father's partner was a legal parent to the child.[13] The Court of Appeals upheld the decision to give sole physical and legal custody to the biological father,[14] however, because the trial court had not erred in determining that it was in the child's best interest for the biological father to have full custody.[15]

American family court judges must often feel like King Solomon when faced with these dilemmas between surrogates and intended parents. In the

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[5] *Id.*

[6] *Id.*

[7] *Id.* at *3–4.

[8] A.L.S. v. E.A.G., No. A10-443, 2010 Minn. App. Unpub. LEXIS 1091, at *4–5 (8th Cir. Oct. 26, 2010).

[9] *Id.* at *4.

[10] *Id.*

[11] *Id.* at *5.

[12] *Id.* at *4–13.

[13] *Id.*

[14] The court recognized that the biological father's partner was an important person in the child's life but was not the legal parent and did not have any right to custody. *Id.*

[15] A.L.S. v. E.A.G., No. A10-443, 2010 Minn. App. Unpub. LEXIS 1091, at *21–22 (8th Cir. Oct. 26, 2010).

familiar Biblical parable of the Judgment of King Solomon, two women who gave birth within three days of each other appeared before the King to decide who would get to keep the surviving child.[16] One mother had accidentally killed her own child when she rolled over on it while asleep, and she then replaced her dead child with the other woman's child.[17] With no way to determine which woman was the true mother, King Solomon told the women he would use a sword to cut the child in half so each could have a portion of the baby.[18] The second woman agreed with the outcome, but the true biological mother said she would rather see her infant go to the lying woman than see him killed.[19] Based on their reactions, Solomon ultimately returned the child to its rightful mother.[20] We can laugh at this parable as barbaric now, but like the Minnesota trial court judge in *A.L.S. v. E.A.G.*, King Solomon did not have any statutes or binding precedent to rely upon in making his decision.

This Note will show that the United States can protect the rights of the intended parents, the surrogate, and the child while avoiding uncertainty and unnecessary litigation by enacting uniform legislation akin to the United Kingdom's regime. Part II will examine the history of surrogacy law in the United States, demonstrate the inconsistency of these laws, and suggest that reform is needed. Part III will discuss the United Kingdom's legislative response to the problem of surrogacy arrangements, which has provided more uniformity despite obstacles similar to those faced in the United States. Part IV will illustrate that American constitutional law dictates that the United States should adopt a uniform surrogacy law. Part V will argue that even those who disagree that families created through surrogacy are constitutionally protected should support uniform federal legislation. Finally, Part VI will address why even the most logical and convincing counterarguments do not provide a rational basis for perpetuating our patchwork surrogacy regime.

II. INCONSISTENCIES IN AMERICAN SURROGACY LAW

A. What is Surrogacy?

Although concepts of surrogacy can be traced back to the Old Testament, where Abraham and Sarah used Hagar to bear a child for them

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[16] 1 *Kings* 3:16–18.

[17] *Id.* at 3:19–21.

[18] *Id.* at 3:23–25.

[19] *Id.* at 3:26.

[20] *Id.* at 3:27–28.

to raise,[21] in vitro fertilization did not become available until 1978.[22] Surrogacy thereafter became more "widely available [and] prevalent" in the 1980s.[23] There are two different types of surrogacy, partial and full.[24] Both partial and full surrogacy can employ in vitro fertilization, but in partial surrogacy, artificial insemination is "the easiest, safest and cheapest."[25]

In partial surrogacy, the intended father fertilizes the surrogate mother's own egg through artificial insemination.[26] Consequently, the surrogate mother in partial surrogacy cases has a biological connection to the child equal to that of the intended father's,[27] making it more difficult for some judges to determine who the legal parents are or should be. Partial surrogacy gained popularity in the 1970s when a Michigan couple, relying on the experience of a California couple who found a surrogate mother using a newspaper advertisement, hired an attorney to find the same arrangement for them.[28] The attorney, Noel Keane, consulted with a Michigan judge who said surrogacy arrangements were legal in Michigan, but it was illegal for the surrogate to receive any compensation whatsoever.[29] Keane then decided to begin sending couples to Kentucky, where intended parents were permitted to compensate the surrogates, in order to bring these agreements to fruition.[30] Though many women do choose to become surrogate mothers for mostly altruistic reasons, most parties agree that compensation is a fair and necessary part of the arrangement because of the toll that carrying a child to term takes on the body and the fact that partial surrogacy may be the only way for the intended parents to have a child.[31] Consequently, Keane popularized the

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[21] 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, 243 (2010).

[22] Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. SUPP. 97, 98 (2010).

[23] Lorillard, *supra* note 21, at 243.

[24] Spivack, *supra* note 22, at 98.

[25] Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 148 n.11 (2000). *See also* Spivack, *supra* note 22, at 98.

[26] Spivack, *supra* note 22, at 98.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] DeLair, *supra* note 25, at 160–61 ("[S]urrogates deserve payment because the process requires 'many months of negotiations, screenings and inseminations; 24 hour-a-day child care over the course of nine months; countless hours at medical appointments; time lost from work; and health risks,

surrogacy movement for infertile couples and is now referred to as the "father of surrogate motherhood."[32]

In full, or gestational, surrogacy, both the sperm and the egg of the intended parents are implanted in the surrogate mother, severing her biological connection with the child.[33] Full surrogacy uses in vitro fertilization, a process in which egg cells are fertilized by sperm outside the womb.[34] Because of the lack of a biological connection between the child and the surrogate mother, some judges do not face the same difficulty ruling for the intended parents in full surrogacy cases.[35] Many couples still prefer the partial method, however, because a foreign egg removed from the intended mother, fertilized, and placed in the surrogate's uterus is less likely to implant than an egg that never leaves the surrogate.[36] Additionally, full surrogacy poses a greater medical risk to the surrogate mother,[37] so the parties may prefer to utilize the partial surrogacy method instead. Finally, couples in which the intended mother is infertile do not have the option to use their own egg, so they must use full surrogacy.

B. Why Is Surrogacy the Only Legitimate Option for Many Couples?

Several factors make surrogacy the only legitimate option for infertile and same-sex couples. Ten percent of Americans have fertility problems, and "[e]ach year, about one million people seek some sort of fertility treatment."[38] In addition, "[o]nce a woman turns thirty, her chances of getting pregnant decrease about 3–5 percent each year. By the age of thirty, 7 percent of couples are infertile, and by the time they reach the age of forty, 33 percent of couples are infertile."[39] This decrease in fertility can be attributed to "the increasing tendency to delay parenting, the escalating prevalence of obesity, and the high level of sexually transmitted infections

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emotional upheaval, and possible permanent bodily changes.'") (citing APRIL MARTIN, THE LESBIAN AND GAY PARENTING HANDBOOK 108 (1993)).

[32] Spivack, *supra* note 22, at 98.

[33] *Id.* at 98–99. Same-sex couples, of course, need a donor's reproductive cells.

[34] *Id.* at 98. Melissa Jeffries, *How In Vitro Fertilization Works*, DISCOVERY HEALTH, http://health.howstuffworks.com/pregnancy-and-parenting/pregnancy/fertility/in-vitro-fertilization.htm (last visited Apr. 14, 2011).

[35] Spivack, *supra* note 22, at 99.

[36] *See, e.g.*, Heather Weller, *Traditional Versus Gestational Surrogacy*, SUITE101.COM, Mar. 30, 2001, www.suite101.com/article.cfm/surrogacy_new/64753 ("[T]here is a higher miscarriage rate among pregnancies achieved [through gestational means] than through traditional means.").

[37] DeLair, *supra* note 25, at 149–50.

[38] NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 1 (2009).

[39] *Id.*

. . . ."[40] Another factor is the declining birth rate as a result of widely available contraception and abortion resulting in fewer babies being put up for adoption.[41] Still other couples consider surrogacy their only option if the intended mother has a medical condition that would make her pregnancy dangerous to both her and the baby.[42] With all of these problems, it is no wonder why so many couples seek help from fertility clinics, which boast success rates of more than 30 percent.[43]

A common argument against surrogacy is that it is selfish to use reproductive technology rather than to adopt a child.[44] Adoption, however, comes with a set of problems all its own. Only about one-quarter of the children waiting for adoption are white.[45] Consequently, a disparity results because more Caucasians seek adoptions than other races.[46] Still, race is not a dispositive factor; many first-time parents are simply not equipped to treat the mental health or special needs of children in the foster care system.[47] Additionally, bias against certain couples based on age, religion,[48] or sexual orientation,[49] costs,[50] and time constraints[51] make

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[40] K. Bruce-Hickman et al., *The Attitudes and Knowledge of Medical Students Towards Surrogacy*, 29 J. OBSTETRICS & GYNAECOLOGY 229, 229 (2009).

[41] *See* Iris Leibowitz-Dori, *Womb for Rent: The Future of International Trade in Surrogacy*, 6 MINN. J. GLOBAL TRADE 329, 333 n.22 (1997) (stating that there has been "a decline in the number of healthy American babies due to the increased availability of abortion and contraceptive use," which has in turn led to an increase in international adoptions). It is reasonable to conclude that this declining birth rate has also led Americans to turn to surrogacy.

[42] Bruce-Hickman, *supra* note 40, at 229. While adoption would also be an available option, for couples that want a biological link to the child, surrogacy is the "preferred option." *Id.*

[43] *See* CAHN, *supra* note 38, at 1.

[44] Elisabeth Eaves, *Not the Handmaid's Tale*, FORBES.COM, Dec. 19, 2008, http://www.forbes.com/2008/12/18/kuczynski-surrogacy-motherhood-oped-cx_ee_1219eaves.html ("Would-be parents who are buying themselves a scientific boost are often told that they are selfish and should instead adopt a needy child.").

[45] *See* Julie Palermo, Comment, *Whose Child Is This? A Critical Look at International Adoptions that Fail*, 20 IMMIGR. & NATIONALITY L. REV. 713, 716 (1999).

[46] Andrea B. Carroll, *Reregulating the Baby Market: A Call for a Ban on Payment of Birth-Mother Living Expenses*, 59 U. KAN. L. REV. 285, 311 n.131 (2011) (noting that among Caucasian parents, there is a desire to adopt children who share the same race).

[47] *See* U.S. Dep't. of Health and Human Servs., *Mental Health*, CHILD WELFARE INFORMATION GATEWAY, http://www.childwelfare.gov/systemwide/mentalhealth/ (last visited Mar. 24, 2011) ("Children and adolescents involved in the child welfare system can be at greater risk for mental health issues than children in the general population because of histories of child abuse and neglect, separation from biological parents, or placement instability. Children with untreated mental health problems can be at greater risk for substance abuse, educational failure, juvenile delinquency, imprisonment, or homelessness. Mental health is frequently a concern in reunification efforts, and it is one of the main reasons adoptive parents seek postadoption services.").

[48] *See, e.g.*, Stacy Christman Blomeke, *A Surrogacy Agreement that Could Have and Should Have Been Enforced:* R.R. v. M.H., *689 N.E.2d 790 (Mass. 1998)*, 24 U. DAYTON L. REV. 513, 515 n.9 (1999) (discussing a case in which an infertile couple who shared different religious beliefs and were in their forties decided it would be too difficult to adopt a child); DeLair, *supra* note 25, at 157–58 ("Because gays and lesbians are not able to legally marry [in most states], many people harbor false

adoption unfeasible for many couples. For example, William and Elizabeth Stern, the intended parents in the *Baby M.* case, were discouraged because of the delays involved in the process and because they were concerned that the difference in their ages and religious backgrounds might prejudice their application.[52] Additionally, depending on the jurisdiction, the mother usually has an interval after the birth of the child to decide whether she wants to revoke her consent to the adoption.[53] Similarly, in some states such as Minnesota, a biological father who does not know he conceived a child can participate in adoption proceedings and object to the adoption of this child, as long as he places his name on a putative fathers' registry within thirty days of the child's birth.[54] Moreover, only parents who do not want or are not able take care of their children put them up for adoption, so the process has relatively little certainty of outcomes. While it is a tragedy for intended parents to lose their children even with a surrogacy agreement, an even greater problem is that only a limited number of couples can afford in vitro fertilization in the first place because the process is so expensive and is often not covered by insurance.[55] Couples concerned about finances can still turn to partial surrogacy with an at-home insemination kit to cut down on medical

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perceptions that homosexuals are involved in short-term and unstable relationships. Since parental instability is regarded as dangerous to the psychological development of the children, some conclude that gays and lesbians make bad parents because they are more likely to be involved in unstable relationships. However, this conclusion is without merit since heterosexual relationships, just like homosexual relationships, can be equally stable or unstable. Several studies have indicated that gays and lesbians are often involved in long term relationships, and can therefore, provide stability in a home environment.") (internal citations omitted).

[49] Lynn D. Wardle, *Preference for Marital Couple Adoption--Constitutional and Policy Reflections*, 5 J. L. & FAM. STUD. 345 (2003) (discussing a bias against unmarried as opposed to married couples who intend to adopt).

[50] Carroll, *supra* note 46, at 286 n.8 ("The total cost of a domestic adoption can be more than $40,000, depending on the circumstances and the state of adoption.") (internal citations omitted).

[51] Leibowitz-Dori, *supra* note 41, at 333 n.22 (stating that international adoptions have a short waiting period of between approximately six months to one year).

[52] *In re* Baby M., 537 A.2d 1227, 1236 (N.J. 1988).

[53] *See, e.g.*, UNIF. ADOPTION ACT § 2-404(a) (1994) ("A parent whose consent to the adoption of a minor is required by Section 2-401 may execute a consent or a relinquishment only after the minor is born. A parent who executes a consent or relinquishment may revoke the consent or relinquishment within 192 hours after the birth of the minor.").

[54] Minn. Dep't of Health, *Minnesota Father's Adoption Registry Questions and Facts*, http://www.health.state.mn.us/divs/chs/registry/faq.htm (last visited Mar. 24, 2011) ("The Fathers' Adoption Registry is a record of putative fathers who voluntarily register any time before their child's birth or within 30 days of the birth. It applies to children born on January 1, 1998 or later, but not before then. If adoption proceedings begin for the child, and if the father has placed his name on the registry, the court can find the father so he can participate in the adoption proceedings.").

[55] *See* SUSAN L. CROCKIN & HOWARD W. JONES JR., LEGAL CONCEPTIONS: THE EVOLVING LAW AND POLICY OF ASSISTED REPRODUCTIVE TECHNOLOGIES 74, 76, 79 (2010); DeLair, *supra* note 25, at 160.

expenses,[56] but no less expensive, at-home process for adoption exists.

Another example evincing adoption as an unfeasible alternative for many couples is seen in the recent increase in international surrogacy agreements.[57] Countries such as India, the United Kingdom, the Netherlands, Poland, Belgium, Germany, China, and Taiwan permit couples to enter into surrogacy contracts,[58] which some scholars argue share corrupt practices similar to international adoptions.[59] Even international scholars have argued that strict prohibitions lead only to reproductive tourism, defined as "travelling by candidate service recipients from one institution, jurisdiction, or country where treatment is not available to another institution, jurisdiction, or country where they can obtain the kind of medically assisted reproduction they desire."[60] One

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[56] Insemination kits including oral medicine syringes and cervical caps are now widely available on the Internet and even at local drug stores, so surrogacy is now even possible without a physician involved. *See, e.g.*, *Insemination Supplies*, http://www.shop.inseminationsupplies.com/ (last visited Mar. 26, 2011). *See also* DeLair, *supra* note 25, at 149 n.16 (noting that "[a]rtificial insemination can be accomplished by simply using a syringe or 'the legendary turkey baster'") (internal citation omitted).

[57] *See generally* SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES (Rachel Cook, et al. eds., 2003); Leibowitz-Dori, *supra* note 41, at 329 n.4; Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15 (2008–2009).

[58] *See, e.g.*, F. Shenfield et al., *Cross Border Reproductive Care in Six European Countries*, 25 HUM. REPROD. 1361, 1363 (2010) ("Reasons [for crossing borders to obtain ART] varied from one 'outgoing' country to another. Legal reasons were predominant for patients coming from Italy (70.6%), Germany (80.2%), France (64.5%) and Norway (71.6%). Difficulties accessing treatment were more often noted by UK patients (34.0%) than by patients from other countries, and expected quality was an important factor for most patients."); Rachel Cook et al., *Introduction*, *in* SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 1, 2 (Rachel Cook et al. eds., 2003) ("[S]urrogacy is permitted and regulated by means of legislation in Australia (Victoria), Brazil, Hong Kong, Hungary, Israel, The Netherlands, South Africa and the United Kingdom. Australia (5 states), Korea, and some states in the USA have introduced voluntary guidelines. Surrogacy is also practised in a number of countries where no legislation or regulations, either permitting or banning it, exist: Belgium, Finland, Greece, India. Currently, IVF surrogacy is not permitted in Australia (South or West), Austria, China, the Czech republic, Denmark, Egypt, France, Germany, Italy, Jordan, Mexico, Norway, Poland, Portugal, Singapore, Spain, Sweden, Switzerland, Taiwan, Turkey, and some US states."); FAITH MERINO, ADOPTION AND SURROGATE PREGNANCY 58, 61 (2010) ("As in the United States, China has no statewide law regarding surrogacy, other than a ban on gestational surrogacy. Nevertheless, both forms are still in practice . . . . Despite cultural beliefs in the intimacy of the family unit, commercial surrogacy was legalized in India in 2002 and has since become a thriving international enterprise, with Indian surrogacy agencies overwhelmed with requests from Western couples for surrogate mothers."); Leibowitz-Dori, *supra* note 41, at 329 n.4.

[59] *See, e.g.*, Leibowitz-Dori, *supra* note 41, at 335–36 ("Like adoption, surrogacy needs to be regulated on an international level. Poor women and children are especially vulnerable to exploitation. In the past, women were bullied to give up their babies and sell them for a price as low as a piece of jewelry. As the adoption market became more promising, poor children were abducted from their families and sold internationally, leaving their parents without any hope of ever seeing them again. Unless the surrogacy market is regulated internationally, it will face similar market abuses.") (internal citations omitted).

[60] G Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, 28 J. INST. MED. ETHICS 337, 337 (2002). *See also id.* at 338 ("Generally speaking, the main causes of reproductive tourism can

Australian journalist similarly warned that "restrictive and intrusive new laws on surrogacy may perversely fuel the worst kind of exploitative surrogacy arrangements overseas."[61] If the laws in the United States regarding surrogacy were clear, uniform, and less restrictive, then perhaps fewer American couples would turn to these exploitative international surrogacy agreements.

C. How Do American States Treat Surrogacy Contracts?

Throughout the years, the United States has solved custody disputes by enacting and interpreting laws that most often look to the best interests of the child.[62] The determination becomes more difficult, however, when a woman agrees before conception to bear a child for an infertile or same-sex couple and then changes her mind once the baby is born. Surrogacy cases raise additional concerns because it is not just custody, but *parentage* that is at issue.

Unlike other regimes such as adoption, visitation, and custody that are becoming more settled in the United States, surrogacy remains the one area of family law that many states either disagree about or remain silent upon altogether.[63] Some courts agree the natural mother should have the opportunity to keep the child if she wishes,[64] but others argue that this path leads to a miscarriage of justice for those unfortunate couples that cannot conceive a child on their own.[65] These infertile and same-sex couples

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be summarised as follows: a type of treatment is forbidden by law for moral reasons; a treatment is not available because of lack of expertise or equipment (like preimplantation genetic diagnosis (PGD)); a treatment is not available because it is not considered safe enough (for the moment); certain categories of patients are not eligible for assisted reproduction; the waiting lists are too long in the home country; and the costs to be paid by the patients are too high in their home country."). *See also* Marcia C. Inhorn & Pankaj Shrivastav, *Globalization and Reproductive Tourism in the United Arab Emirates*, 22 ASIA-PAC. J. PUB. HEALTH 68S, 68S (2010); Lisa C. Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, 27 L. & INEQUALITY 277, 278 (2009); Eric Blyth & Abigail Farrand, *Reproductive Tourism—A Price Worth Paying for Reproductive Autonomy?*, 25 CRITICAL SOC. POL'Y 91, 96, 108 (2005); Guido Pennings, *Legal Harmonization and Reproductive Tourism in Europe*, 19 HUM. REPROD. 2689, 2690 (2004); Shenfield, *supra* note 58, at 1361.

[61] Adele Horin, *Surrogacy Laws Need Middle Path*, SYDNEY MORNING HERALD, Nov. 6, 2010, http://www.smh.com.au/opinion/society-and-culture/surrogacy-laws-need-middle-path-20101105-17hdo.html.

[62] One California judge argued the best interests of the child standard should be used only to determine custody, not parentage. *See* Johnson v. Calvert, 851 P.2d 776, 799 (Cal. 1993) (Kennard, J., dissenting). Some scholars have challenged the constitutionality of the best interest standard. *See, e.g.*, David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 857 (2006).

[63] *See generally* Spivack, *supra* note 22; The Human Rights Campaign, *Surrogacy Laws*, HRC.ORG http://www.hrc.org/issues/parenting/surrogacy/surrogacy_laws.asp (last visited Mar. 26, 2011) (demonstrating that the surrogacy laws vary from state to state by noting the practice of each state in the area of surrogacy).

[64] *See, e.g.*, *In re* Baby M., 537 A.2d 1227, 1247 (N.J. 1988).

[65] *See, e.g.*, *Johnson*, 851 P.2d at 791.

desire to have children for many of the same reasons as fertile straight couples do.[66] Such couples have not just been anticipating this child for nine months, but their entire lives.

Minnesota is not the only state having trouble determining custody battles involving surrogacy contracts. Without uniform legislation or binding precedent regarding surrogacy arrangements, states exceedingly diverge in both processes and outcomes. Professor Radhika Rao categorizes the United States into four broad surrogacy law regimes: "(1) prohibition; (2) inaction; (3) status regulation; and (4) contractual ordering."[67]

Those states that fall into the first category, prohibition, "attempt[] to put an end to surrogacy, either by means of an outright statutory ban on the practice or by imposing civil and criminal penalties on persons who enter into or facilitate surrogacy contracts."[68] Arizona, District of Columbia, Indiana, Michigan, Nebraska, and North Dakota, have statutes that prohibit surrogacy contracts.[69] Although the Arizona Appellate Court recently ruled its statute unconstitutional, the law has not yet been repealed.[70]

Under the second approach, inaction, "the state seeks to withdraw its support by refusing to enforce surrogacy contracts and by declining to prescribe specific rules governing the allocation of parental rights and

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[66] *See, e.g.*, DeLair, *supra* note 25, at 148 ("Gays' and lesbians' motivations for wanting to bear and raise a biological child are similar to those of heterosexual couples. Many intend to have children in order to form a family unit. Some see having a child with a partner as a 'common project' and a way of demonstrating love and commitment. Some may desire to fulfill a biological drive and to even experience pregnancy. Finally, the desire to have a child may be rooted in cultural and sociological expectations.") (internal citations omitted).

[67] Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, *in* SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 23, 23 (Rachel Cook et al. eds., 2003). Although the following analysis attempts to follow Professor Rao's original categories, changes in the law since 2003 could place some states in more than one category so I have based the following classifications on my own interpretation of the current statutes and case law. The manner in which states have dealt and continue to deal with surrogacy contracts remains in flux; as such, my categorization is for illustrative purposes only.

[68] *Id.*

[69] ARIZ. REV. STAT. ANN. § 25-218 (2008); D.C. CODE §§ 16-401, 402 (2001); IND. CODE § 31-20-1-1 (2007); MICH. COMP. LAWS §§ 722.851-861 (2005 & Supp. 2010); NEB. REV. STAT. §§ 25-21,200 (1995); N.D. CENT. CODE ANN. §§ 14-18-05, 08 (2009). *See also* Rao, *supra* note 67, at 24 n.3 (citing statutes in Arizona, D.C., and Indiana which prohibit surrogacy arrangements).

[70] ARIZ. REV. STAT. ANN. § 25-218(D) (2009) (stating that a surrogate is "the legal mother of a child born as the result of a surrogate parentage contract and is entitled to custody of that child"). *But see* Soos v. Super. Ct. *ex rel.* County of Maricopa, 897 P.2d 1356 (Ariz. Ct. App. 1994) (finding that the statute violated the Equal Protection Clause of the Fourteenth Amendment by granting the intended father an opportunity to establish legal parentage but denying that same chance to the intended mother). *See also* Spivack, *supra* note 22, at 101 (mentioning Arizona as a state that falls into the prohibition category); The Human Rights Campaign, *Arizona Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/828.htm (last visited Mar. 26, 2011).

responsibilities in this context."[71] These states have not officially proscribed surrogacy contracts by statute, but in a form of "passive resistance," their courts may refuse to enforce them.[72] Seven jurisdictions have not specifically banned surrogacy contracts but decline to enforce agreements that involve compensation other than legal, medical, and counseling costs.[73] Those states include Kentucky, Louisiana, New Jersey, New York, North Carolina, Oregon, and Washington.[74]

In the third approach, called status regulation, "individuals may enter into state-approved surrogacy contracts that contain mandatory terms and create preordained status relationships."[75] The states that fall into this category "set limits upon the age and marital status of the parties to a surrogacy arrangement, require the intending mother to be incapable of gestating a pregnancy without physical risk to herself or the fetus, and mandate that the parties be physically fit and psychologically suitable to

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[71] Rao, *supra* note 67, at 23.

[72] *Id.* at 26.

[73] Spivack, *supra* note 22, at 101; Rao, *supra* note 67, at 27.

[74] Spivack, *supra* note 22, at 101, n.10 (stating that Kentucky, Louisiana, Nebraska, New York, North Carolina and Washington all refuse to enforce compensation for surrogacy contracts). For more information on Kentucky's surrogacy law see Rao, *supra* note 67, at 24 n.4 (citing KY. REV. STAT. ANN. § 199.590(4) (Baldwin 2006)); *Kentucky Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/977.htm (last visited Apr. 27, 2011) (citing Surrogate Parenting Assocs. v. Commonwealth *ex rel.* Armstrong, 704 S.W.2d 209 (Ky. 1986)). Louisiana. *See* Rao, *supra* note 67, at 24 n.4 (citing LA. REV. STAT. ANN. § 9:2713 (2009)); *Louisiana Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/998.htm (last visited Apr. 27, 2011). New Jersey. *See In re* Baby M, 537 A.2d 1227, 1264 (N.J. 1988) (finding a surrogacy contract for compensation void but noting: "Nowhere . . . do we find any legal prohibition against surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights"). New York. *See* Rao, *supra* note 67, at 24 n.4 (citing N.Y. DOM. REL. LAW § 123 (McKinney Supp. 1997–98)); *New York Surrogacy Law,* HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/1505.htm (last visited Apr. 27, 2011) (citing NY. DOM. REL. LAW § 122 (2009); Doe v. New York City Bd. of Health, 782 N.Y.S.2d 180 (N.Y. App. Div. 2004); *In re* Adoption of Paul, 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990).). New Mexico. *See New Mexico Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/1528.htm (last visited Apr. 27, 2011) (citing N.M. STAT. ANN. § 32A-5-34 (2010)). North Carolina. *See North Carolina Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/1154.htm (lasted visited Apr. 27, 2011) (citing N.C. GEN. STAT. §§ 48-10-102, 103 (2009)). Oregon. *See Oregon Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/1471.htm (last visited Apr. 27, 2011) (citing *In re* Adoption of Baby A and Baby B, 877 P.2d 107, 108 (Or. Ct. App. 1994); 46 Op. Ore. Att'y Gen. 221 (April 19, 1989) (stating that there is no explicit surrogacy statute in Oregon, and that Oregon will not enforce exchange of money for right of adoption)). Washington. *See* Rao, *supra* note 67, at 24 n.4 (citing WASH. REV. CODE ANN. § 26.26.230 (West 1997)); *Washington Surrogacy Law,* HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/1168.htm (last visited Apr. 27, 2011) (citing WASH. REV. CODE § 26.26.210 (2009) (defining "compensation" as payment of money or objects of monetary value—except payment of pregnancy or medical expenses, or attorneys' fees); WASH. REV. CODE § 26.26.230 (2009) (prohibiting compensation in surrogacy contracts in Washington); 1989 Op. Wash. Att'y Gen. 4 (Feb. 17, 1989) (stating that surrogacy agreements in exchange for money are unlawful in Washington and that surrogacy agreements are not specifically prohibited)).

[75] Rao, *supra* note 67, at 23.

parent a child."[76] States that fall under this category include Florida, Illinois, Nevada, New Hampshire, Utah, and Virginia.[77] Texas, Arkansas, and Tennessee have partial surrogacy regimes that leave unclear whether surrogacy contracts will be enforced, compensated or not.[78]

Under the final category, contractual ordering, "the parties are entirely free to negotiate their rights and responsibilities under the surrogacy

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[76] *Id.* at 28–29.

[77] *See id.* at 28 & n.39 (stating that Florida, New Hampshire, and Virginia "regulate surrogacy, authorizing court-approved contracts that contain mandatory terms and create pre-ordained relationships"). For more information on Florida's surrogacy law see *Florida Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/869.htm (last visited Apr. 27, 2011) (citing FLA. STAT. ANN. § 742.15(2) (2009) (providing for physical requirements for commissioning mothers and gestational surrogates in Florida); Lowe v. Broward Cnty., 766 So.2d 1199, 1205 (Fla. Dist. Ct. App. 2000) ("[D]omestic partners under the [Act] . do not . . . enjoy the numerous additional rights reserved exclusively to partners in marriage . . . [such as] the right to enter into a gestational surrogacy agreement."). Illinois. *See Illinois Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/962.htm (last visited Apr. 27, 2011) (citing 750 ILL. COMP. STAT. ANN. 47/20 (West 2005) (establishing eligibility requirements for gestational surrogacy and intended parenting in Illinois)). Nevada. *See Nevada Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/1291.htm (last visited Apr. 27, 2011) (citing NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2010) (limiting surrogacy contracts in Nevada to intended parents with marriages that are valid under state law)). New Hampshire. *See New Hampshire Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/1334.htm (last visited Apr. 27, 2011) (citing N.H. REV. STAT. ANN. § 168-B:13 (West 2011) (establishing eligibility requirements, such as being twenty-one years or older, for in vitro fertilization and pre-embryo transfer in New Hampshire)). Utah. *See Utah Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/1803.htm (last visited Apr. 27, 2011) (citing UTAH CODE ANN. §§78B-15-801 to -803 (LexisNexis 2008) (establishing requirements in Utah for age, marital status, intended mother's inability to bear a child without risk, and suitability of the intended parents)). Virginia. *See* VA. CODE ANN. § 20-160(B(7)-(8)) (LexisNexis 2008) (establishing requirements for surrogacy contracts including suitability of intending parent and the intended mother's inability to bear the child without risk); *Virginia Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/1205.htm (last visited Apr. 27, 2011)).

[78] For more information on Arkansas's surrogacy law see The Human Rights Campaign, *Arkansas Surrogacy Laws*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/822.htm (last visited Mar. 26, 2011) (noting that Arkansas leaves unclear how surrogacy law would apply to lesbian, gay, bisexual, and transgender individuals and couples) (citing *In re* Adoption of K.F.H., 844 S.W.2d 343, 345 (Ark. 1993) ("Under Arkansas law, parental consent [to allow a surrogate child to be adopted by the wife of the biological father] is not required of the non-custodial parent if that parent fails significantly and without justifiable cause to communicate with the child for a period of at least one year."). Tennessee. *See* The Human Rights Campaign, *Tennessee Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/1789.htm (last visited Apr. 27, 2011) (citing TENN. CODE ANN. § 36-1-102(48) (2010) (establishing the definition of a surrogate birth, but nevertheless leaving open the question of whether the surrogacy process will be approved or not); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (While this case did not directly address surrogacy, the Human Rights Campaign posits that the court's willingness to reach this holding in a case upholding prior agreements about embryos intended for surrogacy suggests that Tennessee courts approve of surrogacy arrangements.)). Texas. *See* The Human Rights Campaign, *Texas Surrogacy Law*, HRC.ORG, http://www.hrc.org/issues/ parenting/surrogacy/1777.htm (last visited Apr. 27, 2011) (citing TEX. FAM. CODE ANN. §§ 160.754, 160.762 (West 2008)). *See also* Spivack, *supra* note 22, at 102 n.13 (noting that Texas and Arkansas leave unanswered whether contracts involving compensation will be enforced); *id.* at 102 n.14 (noting that Tennessee leaves unanswered whether surrogacy contracts will be enforced).

contract."[79] The twenty-eight states that fall into this category fail to address surrogacy contracts through legislation at all, leaving unclear whether a court will later rule such contracts unconstitutional or against public policy based on other persuasive family law statutes.[80]

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[79] Rao, *supra* note 67, at 30.

[80] *See* The Human Rights Campaign, *Surrogacy Laws, State Laws*, HRC.ORG, http://www.hrc.org/issues/parenting/surrogacy/surrogacy_laws.asp (describing Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, New Hampshire, Utah, and Virginia as states where surrogacy law remains uncertain). For more information on Alabama's surrogacy law see ALA. CODE §§ 26-10A-33, 34 (LexisNexis 2009) (adoption statute specifically stating that "[s]urrogate motherhood is not intended to be covered by this section"); Brasfield v. Brasfield, 679 So.2d 1091 (Ala. Civ. App. 1996) (acknowledging parental rights of non-biological participants in a surrogacy arrangement). Alaska (no case law or statutes on point). California. *See* CAL. FAM. CODE § 7648.9 (West 2004) ("This article does not establish a basis for setting aside or vacating a judgment establishing paternity with regard to a child conceived . . . pursuant to a surrogacy agreement."); Elisa B. v. Superior Court, 117 P.3d 660, 665 (Cal. 2005) ("No provision of the UPA expressly addresses the parental rights of a woman who . . . has not given birth to a child, but has a genetic relationship because she supplied the ovum used to impregnate the birth mother."); K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (holding that a statute treating a sperm donor as though he was not the natural father of a child did not apply to a case in which a lesbian had donated eggs to impregnate her partner); Johnson v. Calvert, 851 P.2d 776, 777–78, 787 (Cal. 1993) (holding that, despite the legislature's failure to address this issue, a surrogacy contract was not unconstitutional when it gave natural parentage rights to two biological parents who had implanted a zygote in the gestational mother); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998) (holding that a California statute, which makes a husband the lawful father of a child unrelated to him if he causes it to be created by artificial insemination, also applies to intended parents); *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 897–98 (Cal. Ct. App. 1994) (holding a surrogacy contract unenforceable when it was incompatible with parentage and adoption statutes). Colorado. *See* COLO. REV. STAT. § 19-4-106 (2010) (discussing legal terms of relationships resulting from assisted reproduction but excluding surrogates from its coverage). Connecticut. *See* Cassidy v. Williams, FAO84006951S LEXIS 1727, at *9 (Conn. Super. Ct. July 9, 2008) (enforcing a surrogacy contract in the absence of a statute); Doe v. Doe, 710 A.2d 1297, 1324 (Conn. 1998) (holding that the trial court had jurisdiction to adjudicate the custody issue between the parties asserting a claim to custody and that due to the undisputed facts of the case, the statutory presumption in favor of the husband had been rebutted as a matter of law); Doe v. Roe, 717 A.2d 706, 708 (Conn. 1998) (holding that court still had jurisdiction over a matter covered in a surrogacy agreement). Delaware. *See In re* Hart, 806 A.2d 1179, 1185 (Del. Fam. Ct., 2001) (not addressing surrogacy but finding that it was conceivable that the Delaware General Assembly, would have meant to include "second parent" adoptions in enacting the state's adoption laws, given the statutory mandate to read the statute in best interest of children); Hawkins v. Frye, 1988 Del. Fam. Ct. LEXIS 31, at *6–7 (Del. Fam. Ct. 1988) (not addressing surrogacy but finding that the Legislature did not "provide for termination of parental rights by contractual agreement of the parents" and that "public policy is a factor which must be addressed when dealing with the termination of parental rights by contract"). Georgia (no case law or statutes on point). Hawaii (no case law or statutes on point). Idaho. *See* DeBernardi v. Steve B.D., 723 P.2d 829, 834 (Idaho 1986) (not addressing surrogacy but holding that "in the absence of fraud, duress, or undue influence" consent to adoption becomes final and irrevocable and taking into account the child's welfare and the protection of the interests of the natural and the adoptive parents). Iowa. *See* IOWA CODE ANN. § 710.11 (West 2003) (prohibiting purchasing or selling an individual but explicitly excluding surrogate mother arrangements). Kansas. *See* 29 Op. Kan. Att'y Gen. No. 96-73 (Sept. 11, 1996) (finding that a surrogate fee does not fall under the professional service exemption from prohibition against consideration in connection with adoption or placement for adoption); *but see* 54 Op. Kan. Att'y Gen. No. 82-150 (July 2, 1982) (finding that major legal impediment to compensation for surrogate is "the long-standing legal principle and public policy that children are not chattel and therefore may not be the subject of a contract or gift."). Maine (no case law or statutes on point). Maryland. *See* MD. CODE ANN., CRIM. LAW § 3-603 (LexisNexis 2002) (prohibiting sale of a minor, and describing penalty); 85 Op. Md. Att'y Gen. 348 (December 19, 2000)

So why do American states still vary so widely with respect to the enforceability of surrogacy contracts? Breaching a contract in any other

(opining that surrogacy contracts involving a fee are illegal and unenforceable in Maryland); *see also* Abby Brandel, *Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 MD. L. REV. 488, 511 (1995) ("The current state of the law on surrogacy in Maryland is best described as unclear. The state legislature has made numerous attempts to prohibit surrogacy that have either not passed or have been vetoed by the Governor. Two Maryland courts have taken sharply conflicting positions on surrogacy."). Massachusetts. *See* Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001) (finding that an artificial insemination statute did not apply to parentage determination in gestational surrogacy of children who were conceived by a married couple, but technically born out of wedlock by a gestational carrier not married when she gave birth to them); R.R. v. M.H., 689 N.E.2d 790, 797 (Mass. 1998) (holding a surrogacy agreement unenforceable despite acknowledgement that Massachusetts lacked a statute on point). Minnesota. *See* A.L.S. v. E.A.G., No. A10-443, 2010 Minn. App. LEXIS 1091) (Minn. Ct. App. Oct. 26, 2010) (holding that a surrogate was a parent under the Parentage Act, and that the homosexual partner of the biological father was not a parent under the Parentage Act); Mississippi (no case law or statutes). Missouri. *See* MO. ANN. STAT. § 568.175 (West 1999) (not explicitly discussing surrogacy but criminalizing the delivery of a child for adoption in exchange for money). Montana (no case law or statutes on point). Ohio. *See* OHIO REV. CODE ANN. § 3111.89 (LexisNexis 2009) (stating that the state provisions regarding artificial insemination do not deal with surrogate motherhood); J.F. v. D.B., 879 N.E.2d 740, 741–42 (Ohio 2007) ("Ohio does not have an articulated public policy against gestational surrogacy contracts [and] no public policy is violated when a gestational-surrogacy contract is entered into, even when one of the provisions requires the gestational surrogate not to assert parental rights"); Decker v. Decker, No. 5-01-23, 2001 Ohio App. LEXIS 4389 (Ohio Ct. App. Sept. 28, 2001) (holding that the biological parent—here, the surrogate for her brother and his male partner—has paramount parental rights over the non-parents); Turchyn v. Cornelius, No. 98 CA 86, 1999 Ohio App. LEXIS 4129, at *6 (Ohio Ct. App. Aug. 26, 1999) (holding that, in the context of a surrogacy arrangement in which the surrogate is the biological mother, the surrogate's husband cannot uphold the presumption that he is the legal father of the child, and genetic testing can be ordered); Belsito v. Clark, 644 N.E.2d 760, 762 (Ohio C.P. Summit Cty.1994) (holding that genetic parents are the natural parents of child delivered by surrogate);Seymour v. Stotski, 611 N.E.2d 454, 458 (Ohio Ct. App. 1992) (holding that the oral surrogacy agreement, in which the surrogate was the biological mother of the child, could not be used to give the non-biological mother custody of the child because she did not have any legal relationship to the child and so did not have standing for suit). Oklahoma. *See* OKLA. STAT. ANN. tit. 21, § 866 (West Supp. 2011) (not addressing surrogacy but describing the acts that constitute trafficking in children); 1983 Op. Okla. Att'y Gen. No. 83-162 (Sept. 29, 1983) (opining that surrogate gestation contracts that provide compensation beyond statutory limitations are illegal in Oklahoma). Pennsylvania. *See* J.F. v. D.B., 897 A.2d 1261, 1280 (Pa. Super. Ct. 2006) (declining to rule on the validity of surrogacy contracts in general because "[t]hat is a task for our legislators"). Rhode Island. *See* R.I. GEN. LAWS §§ 23-16.4-2(c)(2)(i) (2008) (not specifically addressing surrogacy but protecting in vitro fertilization against prosecution under the statute prohibiting cloning of human beings). South Carolina. *See* Mid-South Ins. Co. v. Doe, 274 F. Supp. 2d 757, 766 (D.S.C. 2003) (holding, *inter alia*, that a child born to a surrogate mother is not the natural child of the surrogate's husband and the child is the "dependent" of the biological parents for the purpose of insurance coverage)); South Dakota (no case law or statutes). Vermont. *See* VT. STAT. ANN. tit. 15A, § 1-102 (West 2011) (not specifically dealing with surrogacy but stating that any person may adopt or be adopted, and the partner of a parent may adopt the child of that parent without terminating the parent's parental rights if the adoption is in the best interest of the child). West Virginia. *See* W. VA. CODE ANN. § 48-22-803(e)(3) (LexisNexis 2009) (stating that payment or receipt of fees and expenses included in any surrogacy agreement is not prohibited as the purchase or sale of a child). Wisconsin. *See* WIS. STAT. ANN. § 69.14(h) (West 2003) (stating that the birth certificate of a child born to a surrogate shall be filled in with the surrogate mother's information, with the father's information to be omitted, until the court orders issuance of a new birth certificate with alternate parental information); L.M.S. v. S.L.S., 312 N.W.2d 853, 855 (Wis. Ct. App. 1981) (holding that a husband who, because of his sterile condition, consents to his wife's impregnation, with the understanding that a child will be created whom they will treat as their own, has the legal duties and responsibilities of fatherhood, including support). Wyoming (no case law or statutes).

area of law results in a much more drastic penalty.[81] Infertile and even same-sex couples can adopt children in almost every state,[82] so the reason must not be that the American people have concerns about whether these couples would be unfit parents. If surrogate mothers volunteer through licensed agencies just like in an adoption, there should not be a legitimate fear these women are coerced or put under duress to have children for other couples.[83] Finally, if the rights of the unborn child were the issue, then infertile and same-sex couples, again, would similarly not be allowed to adopt.[84] These questions prove the urgent need for surrogacy law reform in the United States, and the experience of the United Kingdom demonstrates that such reform is possible.

III. THE UNITED KINGDOM ILLUSTRATES THAT UNIFORM SURROGACY LEGISLATION IS THE BEST SOLUTION

A. What Is the Current State of the Surrogacy Laws in the UK?

The United Kingdom serves as an example that uniform, national surrogacy legislation is not only possible, but also is the most practical solution. The UK surrogacy law regime contains two separate acts regarding surrogacy, one preventing commercial arrangements and the other providing rights to intended parents.[85] Though there are other ways

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[81] Depending on the contract and the breach, such penalties may include, among other things, monetary damages and specific performance. RESTATEMENT (SECOND) OF CONTRACTS §§ 346–69.

[82] *See Adoption and Parenting*, LAMBDALEGAL.COM, http://www.lambdalegal.org/issues/adoption-parenting/ (last visited Jan. 27, 2011) ("According to recent data, there are roughly 250,000 children in the United States being raised by same-sex couples. But the rights of LGBT parents vary widely among states. About half of all states permit second-parent adoptions by the unmarried partner of an existing legal parent, while in a handful of states courts have ruled these adoptions not permissible under state laws."). For a state-by-state breakdown of laws regarding same-sex couples' family law rights, see *In Your State*, LAMBDALEGAL.COM, http://www.lambdalegal.org/states-regions/ (last visited Jan. 27, 2011).

[83] For example, military wives who become surrogates do not enter into such arrangements under duress or coercion. For a further discussion of this issue, see Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK.COM, March 29, 2008, http://www.newsweek.com/2008/03/29/the-curious-lives-of-surrogates.html; Habiba Nosheen & Hilke Schellmann, *The Most Wanted Surrogates in the World*, GLAMOUR.COM, http://www.glamour.com/magazine/2010/10/the-most-wanted-surrogates-in-the-world? (lasted visited Jan. 27, 2011) (surrogate agencies often market to military wives when seeking surrogates because they tend to be "independent and self-sufficient," and many such women attest to being motivated by a "desire to help another couple finally have a family" as well as the financial concerns that face military families).

[84] Diana Brahams, *The Hasty British Ban on Commercial Surrogacy*, 17 HASTINGS CENTER REP. 16, 18 (1987), *available at* http://www.jstor.org/stable/3562435. See *infra* Parts III & IV for a further exploration of these concerns.

[85] *See* Surrogacy Arrangements Act, 1985, c. 49, § 2, *available at* www.surrogacy.org.uk/pdf/Sur-act.pdf *(last visited Apr. 16, 2011) (*prohibiting all acts performed on a commercial basis with respect to negotiating or making a surrogacy agreement, offering to negotiate or make a surrogacy agreement, or compiling information to use in the negotiation or making of a surrogacy agreement);

to regulate the process rather than a blanket prohibition on all types of compensation outside of medical, legal, and counseling expenses, such as utilizing licensed agencies, the UK demonstrates that the interests of all involved parties can be taken into consideration. Under the UK system, the rights of (1) the surrogate, (2) the intended parents, and (3) the unborn child are all protected by uniform, national legislation.[86]

1. The Surrogacy Arrangements Act Outlaws Commercial Surrogacy Arrangements in the United Kingdom

When the first British surrogate baby was born, the United Kingdom had not yet enacted any law that prohibited or regulated surrogacy arrangements.[87] The British government had established a committee to investigate and report its findings regarding human assisted reproduction issues such as surrogacy, in vitro fertilization, and use of human embryos, but it was still considering the committee's findings when Baby Cotton was born on January 4, 1985.[88] The birth created so much controversy, however, that within six months the British Government passed the Surrogacy Arrangements Act (hereinafter "Act"), making it criminal for

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Human Fertilisation and Embryology Act, 2008, c. 22, *available at* http://www.legislation.gov.uk/ukpga/2008/22/pdfs/ukpga_20080022_en.pdf (last visited Apr. 16, 2011). *See also* A. Nakash & J. Herdiman, *Surrogacy*, 27 J. OBSTETRICS & GYNECOLOGY 246, 246–47 (2007). *See also infra* Part III.A.1–2.

[86] As one observer explains:

> [Surrogacy] agreements are legal in Britain but are not legally binding in court, even with a formal written contract. Family judges must make decisions based on the best interests of the child, and not the wishes of the parents or surrogates. Commercial surrogacy, including advertising, is a crime but voluntary arrangements between a woman and would-be parents are not illegal, nor are not-for-profit surrogacy agencies. Surrogates can be paid 'reasonable expenses'. . . . A surrogate mother is required to register a baby herself as her child no matter whether she wishes to pass it to someone else. The couple who aim to bring up the child can become the legal parents through a parenting order. A court will appoint a 'parental order reporter'—a social worker—to ensure a series of requirements are met. These say the parents must be over 18, married, civil partners or in an 'enduring relationship'. One must be the biological parent of the child. The conception must have taken place artificially, but methods can include home insemination.

Vanessa Allen et al., *'I Couldn't Give My Baby Away . . . They Only Wanted a Toy': Surrogate Mother Fought Legal Battle After Learning That Would-be Parents Were Violent*, DAILYMAIL.CO.UK, Feb. 15, 2011, http://www.dailymail.co.uk/news/article-1356176/Surrogate-mother-wins-case-baby-giving-birth.html.

[87] Brahams, *supra* note 84, at 16 (noting that Britain's first commercial surrogate baby was born on January 4, 1985 and that the first legislation—the Surrogacy Arrangements Act 1985—was passed six months later).

[88] *Id.* at 16–17.

third parties to commercially benefit from surrogacy arrangements.[89]

The Warnock Committee, which had been established in 1982, recommended all surrogacy arrangements be banned and enforced with criminal law penalties.[90] The committee advised the imposition of criminal penalties upon the "creation or operation of profit-making and nonprofit-making surrogate agencies, as well as the actions of 'professionals and others who knowingly assist in the establishment of a surrogate pregnancy.'"[91] The committee did not suggest banning private, or altruistic, surrogacy arrangements, however, which never became illegal in the United Kingdom.[92]

The Surrogacy Arrangements Act passed into law on July 16, 1985.[93] The Act, which defines a surrogate mother as "a woman who carries a child in pursuance of an arrangement . . . made with a view to any child carried in pursuance of [the arrangement] being handed over to . . . another person or persons," made it criminal for a third party to receive a financial benefit through surrogacy, resulting in a fine of up to £2,000, (which currently equals more than $3,200).[94] In order to determine the surrogate mother's intent to give the child to the putative parents, the Act examines all the circumstances, including any promise or agreement regarding payment.[95] The Act also makes it illegal for third parties, such as members of the surrogate mother's family, to receive or even contemplate payment, even if they later decide to forego it.[96] The Act does not make the payment or receipt of compensation by the surrogate mother illegal; however, these actions could trigger penalties under the Adoption Act of 1958.[97] Complicating things even further, payment to the surrogate to cover

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[89] Surrogacy Arrangements Act, 1985, c. 49, *available at* www.surrogacy.org.uk/pdf/Sur-act.pdf *(last visited Apr. 16, 2011). See also* Brahams, *supra* note 84, at 16.

[90] Brahams, *supra* note 84, at 17.

[91] *Id.* (internal citations omitted).

[92] *Id.*

[93] Surrogacy Arrangements Act, 1985, c. 49, *available at* http://www.legislation.gov.uk/ukpga/1985/49/contents/enacted (last visited Apr. 16, 2011).

[94] Surrogacy Arrangements Act, 1985, c. 49, §§ 1(2), 4(1), *available at* http://www.legislation.gov.uk/ukpga/1985/49/contents (last visited Apr. 16, 2011); Brahams, *supra* note 84, at 16. *Currencies Quote*, REUTERS, http://www.reuters.com/finance/currencies (last visited Feb. 5, 2011).

[95] *See, e.g.*, Surrogacy Arrangements Act, 1985, c. 49, §§2(3), (4), (6), (9), *available at* http://www.legislation.gov.uk/ukpga/1985/49/section/2 (last visited Apr. 16, 2011). *See also* Brahams, *supra* note 84, at 17.

[96] *See* Surrogacy Arrangements Act, 1985, c. 49, §§ 2(1), (5), (7), *available at* http://www.legislation.gov.uk/ukpga/1985/49/section/2 (last visited Apr. 16, 2011). *See also* Brahams, *supra* note 84, at 17 ("Mere contemplation of payment in connection with surrogacy is enough to bring the Act into play, and the Act describes a situation where payment is made not to the person who actually negotiates the agreement but to another, for example, a member of the family.").

[97] Brahams, *supra* note 84, at 17.

"reasonable expenses" is allowed under the Act, but because the term is not defined, it is seemingly left up to the parties to determine what is in fact reasonable, which could lead to abuse.[98]

2. The Human Fertilisation and Embryology Act Allows Intended Parents to Be Named on Their Children's Birth Certificates.

Though the Surrogacy Arrangements Act prevents commercial surrogacy, another act provides intended parents, including same-sex couples, with legal rights and responsibilities. The Human Fertilisation and Embryology Act of 1990 (HFE) deals with surrogacy only tangentially because it

> is concerned primarily with the generation, handling, storage and disposal of what the Act calls 'genetic material'. . . . The distinctive focus of surrogacy is not on genetic parenthood but on gestational parenthood and its relationship to genetic and post-natal (sometimes called 'social') parenthood. . . . The main reason for its inclusion within the HFE Act is because gamete or embryo 'donation' to the surrogate may occur in a licensed clinic . . . .[99]

However, because so many difficult legal issues surfaced with the "surrogate and usually also her husband . . . [being] treated as the child's legal parents at birth, leaving the commissioning parents with no legal connection with their child whatsoever, even where both [were] the biological parents," the Department of Health began considering new draft regulations in 2009.[100] These new provisions, which began staged implementation in 2009, avoid confusion and excess litigation after the birth of a child from a surrogate mother by allowing same-sex couples the opportunity to obtain a parental order, which triggers the re-issue of the birth certificate.[101] By allowing the intended parents to be listed on their

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[98] MERINO, *supra* note 58, at 69–70 ("Though commercial surrogacy and advertisements for surrogates are illegal in England, altruistic surrogacy is legal, assuming no other reimbursement is paid to the surrogate other than what is necessary to cover reasonable expenses. There exists, however, no legal definition of 'reasonable expenses.' Thus, surrogacy in England mirrors surrogacy in the United States, in that a lack of regulation leaves room for problematic loopholes.").

[99] Martin H. Johnson, *Surrogacy and the Human Fertilization and Embryology Act*, *in* SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES 93, 93 (Rachel Cook et al. eds., 2003).

[100] Natalie Gamble & Louisa Ghevaert, *Moving Surrogacy Law Forward? The Department of Health's Consultation on Parental Orders*, BIONEWS.ORG.UK (Oct. 27, 2009), http://www.bionews.org.uk/page_50639.asp.

[101] *See Human Fertilisation and Embryology Act 2008*, LEGISLATION.GOV.UK, http://www.legislation.gov.uk/ukpga/2008/22/section/54 (last visited Apr. 16, 2011); Louisa Ghevaert, *Birth*

children's birth certificates, they can avoid unnecessary litigation regarding parentage, custody or even intestacy rights should a tragedy occur before the adoption process or a custody dispute is complete.

Under the 2008 Human Fertilisation and Embryology Act, a judge can issue a parental order upon a showing that the intended parents "are in a stable relationship; that no fees, other than expenses, are paid to the surrogate mother; and that it is in the child's best interest . . . ."[102] Before the legislation took effect, only heterosexual married couples could use the parental order process with their surrogate mother, forcing same-sex and unmarried couples to go through the extensive and complex adoption process involving social workers and other professional groups.[103] As a result, the surrogate mother for same-sex and unmarried couples retained rights as the legal guardian on the birth certificate until the adoption process was completed.[104] If the surrogate mother was married, her husband's name also showed up on the birth certificate.[105]

Because the UK Government implemented the new HFE regulations in stages, earlier provisions effective in September 2009 allowed a lesbian mother to name her female partner as the child's other parent on the birth certificate following a viable delivery.[106] Under the final stage of implementation that went into effect April 6, 2010, two men can be named as parents using the parental order method.[107] Although opponents argue that "birth certificates should reflect how a baby is 'generated,' . . . [b]irth registration procedures are governed by law, not biology," and it has never been a requirement that birth certificates list both biological parents.[108] For

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Certificates: A New Era?, BIONEWS.ORG.UK (Apr. 30, 2010), http://www.bionews.org.uk/page_59481.asp.

[102] Robin McKie, *New Surrogacy Law Eases the Way for Gay Men to Become Legal Parents*, GUARDIAN.CO.UK, Mar. 28, 2010, *available at* http://www.guardian.co.uk/world/2010/mar/28/surrogacy-gay-men-legal-parents.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *The HFE Act (and other legislation)*, HUMAN FERTILIZATION & EMBRYOLOGY AUTHORITY, http://www.hfea.gov.uk/134.html (last updated Apr. 11, 2009) [hereinafter *The HFE Act (and other legislation)*] ("It is planned that the HFE Act 2008 will come into force in three stages: Phase one: On April 6 [sic] 2009 part 2 of the Act, the revised definitions of parenthood took effect. Phase two: In October 2009 the amendments to the 1990 legislation take effect. Examples of these amendments include research on human admixed embryos, and removal of the 'need for a father' Phase three: In April 2010 people in same sex relationships and unmarried couples will be able to apply for orders allowing them to be treated as parents of children born using a surrogate."). *See also New Parenthood Laws*, HUMAN FERTILIZATION AND EMBRYOLOGY AUTHORITY, http://www.hfea.gov.uk/730.html (last updated Apr. 12, 2009) (noting that beginning Sept. 1, 2009, two lesbian parents could be named on their child's birth certificate).

[107] Ghevaert, *supra* note 101. *See also The HFE Act (and other legislation)*, *supra* note 106.

[108] Ghevaert, *supra* note 101.

example, an unmarried woman has the option to choose whether she wants to place the father's name on the birth certificate.[109]

3. *How Did the UK Deal with Criticisms of its Uniform Surrogacy Legislation?*

As in the U.S., international opponents of surrogacy complained that the UK legislation ignored the importance of a biological link between the mother and child and allowed for the potential exploitation of women through surrogacy.[110] Others pointed out, however, that critics of surrogacy contracts focus only on the minority of cases that result in litigation.[111] Diana Brahams, an opponent of the Surrogacy Arrangements Act, suggests that, from the child's point of view, there is no difference between altruistic and commercial surrogacy; if commercial surrogacy is illegal based on a concern for the exploitation of women and children, then arguably altruistic surrogacy should be as well.[112] Interestingly, she compared the British experience to that of the United States, which at the time allowed both commercial and voluntary surrogacy.[113] Brahams argues that proponents of the Act would not have an issue with the use of in vitro fertilization between a husband and wife and posits that although it may be morally abhorrent to only consider children in terms of money, the focus should be on the happiness the procedure brings to the infertile couple and the child's placement in a happy environment.[114] Additionally, she argues since the UK does not ban parents who abuse their children from continuing to procreate, the government should not criminally penalize those couples that cannot do what fertile couples take for granted.[115] And as mentioned earlier, scholars such as Guido Pennings argue that bans or restrictions on reproductive assistance only lead to reproductive tourism.[116] Pennings reasons that the State is not justified in imposing a moral view on its citizens who do not agree with or assent to it.[117] He argues that "[t]he best balance would be to adopt a 'soft' law

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[109] *Id.*

[110] *See, e.g.*, Olga van den Akker, *The Importance of a Genetic Link in Mothers Commissioning a Surrogate Baby in the UK*, 15 HUM. REPROD. 1849, 1849–50, 1853 (2000). *See also* B.R. Sharma, *Forensic Considerations of Surrogacy—An Overview*, 13 J. CLINICAL FORENSIC MED. 80, 81 (2006).

[111] *See, e.g.*, Elly Teman, *Surrogacy Behind the Headlines*, BIONEWS.ORG.UK (Mar. 1, 2010), http://www.bionews.org.uk/page_55320.asp.

[112] *See, e.g.*, Brahams, *supra* note 84, at 17 (suggesting that commercial surrogacy may in fact be better for the child).

[113] *Id.* at 17–18.

[114] *Id.* at 18.

[115] *Id.*

[116] Pennings, *supra* note 60, at 338.

[117] *Id.*

which is mainly focused on safety issues and good clinical practice and does not impose strict prohibitions or obligations on anyone."[118]

Dr. Elly Teman notes that most people believe that *Baby M.*, a case involving intense litigation between the surrogate and intended parents, is the rule rather than the exception.[119] This is exacerbated by the fact that the only cases that receive popular attention are those that are highly contested and antagonistic. Teman explains that intended parents expect that the surrogate will take good care of the child while in utero, and the surrogate trusts the intended parents will "be up front with them about who they are."[120] Only when that trust is broken does litigation occur.[121]

For example, one judge recently ruled in favor of a surrogate mother who wanted to keep the child after finding out the intended parents were "violent."[122] The article described this as an "incredibly rare case,"[123] but most scholars on both sides of the issue would probably agree that the judge was justified deciding it was in the child's best interests to stay with the surrogate mother. The surrogate wanted to help the intended parents—who could not conceive because of the wife's cancer treatments—have a child, but none of the parties received a background check or mental health evaluation because they did not use an agency.[124] It is possible that had the parties engaged in formal contact before the insemination, it might have prevented the arrangement altogether. Instead, while pregnant, the surrogate found out

> [the intended mother] had previously tried to use a prostitute as her surrogate . . .and . . . would abort any child with Down's syndrome, describing children with the condition as "animals." [The surrogate] said [the intended mother] had "snapped" during a foul-mouthed row with an older teenage child, and that she had seen the woman bang the teenager's head against an oven.[125]

Teman suggests that one way to avoid such disputes between surrogates and intended parents is for the parties to treat the arrangement more like a relationship than a business transaction. Teman contemplates

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[118] *Id.*

[119] Teman, *supra* note 111.

[120] *Id.*

[121] *Id.*

[122] Allen et al., *supra* note 86.

[123] *Id.*

[124] *Id.*

[125] *Id.*

that surrogates want to be appreciated and respected, rather than treated like a contractual exchange, and that disputes may arise when the intended parents treat surrogates merely as paid workers.[126] Teman advises that to avoid disputes, the intended parents "need to understand their surrogate's expectations in advance, to be upfront with her about who they are, and give her the credit and respect she deserves."[127]

As stated earlier, the UK's experience with the Human Fertilisation and Embryology Act indicates that the use of parental orders is a way to avoid litigation regarding parentage after a child is born.[128] This may not lead to the result critics of surrogacy contracts desire; however, with uniform regulations that require psychological evaluations and counseling, as well as prevent first-time mothers from becoming surrogates, concerns regarding objectification and commodification should fade away.

B. The U.S. Should Allow Surrogates to Receive Compensation.

Though the UK system illustrates that it is possible to solve most of the problems of the U.S. surrogacy law regime, it has not completely resolved the issue of compensating the surrogate.[129] As noted earlier, because surrogates put so much time and effort into the process, and because their bodies resultantly change drastically and possibly permanently, it seems unfair to deny all forms of compensation.[130] Even though most surrogates volunteer for the process for altruistic reasons,[131] they deserve some sort of compensation.

The argument that surrogates deserve compensation is especially compelling with regard to the situation of military wives. Surrogacy provides a win-win situation for military wives, who want to help others start a family and also have difficulty securing fulltime work while managing their own households and children when their husbands are

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[126] Teman, *supra* note 111.

[127] *Id.*

[128] *See* Ghevaert, *supra* note 101 and accompanying text. *See also* Gamble & Ghevaert, *supra* note 100.

[129] *See supra* Part III.A.1.

[130] *See* DeLair, *supra* note 25, at 160–61 ("[S]urrogates deserve payment because the process requires 'man months of negotiations, screenings and inseminations; 24-hour a day child care over the course of nine months; countless hours at medical appointments; time lost from work; and health risks, emotional upheaval, and possible permanent bodily changes.'").

[131] *See, e.g., id.* at 161 n.122 ("A demographic study involving 89 surrogate women showed that the typical surrogate mother is married with two children, twenty-eight years old, had thirteen years of formal education and was employed full-time . . They had positive pregnancies and enjoyed being pregnant . . . . None of the women stated that money was the deciding factor in considering whether to become involved in the arrangement.") (internal citations omitted).

deployed.[132] Because surrogacy is an attractive option for many military wives, it makes sense that there has been "a significant increase in the number of wives of soldiers and naval personnel applying to be surrogates since the invasion of Iraq in 2003," according to a 2008 *Newsweek* article.[133] Similarly, IVF clinics and surrogate agencies in Texas and California report that military spouses comprise half of their surrogate mothers.[134] There are a number of reasons why military wives may decide to be surrogates:

> Military wives who do decide to become surrogates can earn more with one pregnancy than their husbands' annual base pay (which ranges for new enlistees from $16,080 to $28,900). "Military wives can't sink their teeth into a career because they have to move around so much," says Melissa Brisman of New Jersey, a lawyer who specializes in reproductive and family issues, and heads the largest surrogacy firm on the East Coast. "But they still want to contribute, do something positive. And being a carrier only takes a year—that gives them enough time between postings."[135]

Gina Scanlon—a former surrogate who works as an artist and illustrator and was not identified in the *Newsweek* article as a military spouse—balked at the idea that women serve as surrogates only for the money, stating:

> "Poor or desperate women wouldn't qualify [with surrogacy agencies]" . . . . [T]here are many easier jobs than carrying a baby 24 hours a day, seven days a week. (And most jobs don't run the risk of making you throw up for weeks at a time, or keep you from drinking if you feel like it.) "If you broke it down by the hour . . . it would barely be minimum wage. I mean, have [these detractors] ever met a gestational carrier?"[136]

Other surrogates interviewed in the *Newsweek* article also suggested that they saw compensation as merely an added bonus. For instance, Dawne

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[132] *See generally* Nosheen & Schillmann, *supra* note 83.

[133] Ali, *supra* note 83.

[134] *Id.*

[135] *Id.*

[136] *Id.*

Dill, a surrogate interviewed in the article who worked as an English teacher before marrying a Navy chief, said that she and her husband planned to use their compensation to build an occupational therapy gym for their autistic son.[137] Furthermore, other women interviewed for the article had a number of different motivations for their decisions to be surrogates, and compensation did not seem to be their primary objective:

> Their motivations are varied: one upper-middle-class carrier in California said that as a child she watched a family member suffer with infertility and wished she could help. A working-class surrogate from Idaho said it was the only way her family could afford things they never could before, like a $6,000 trip to Disney World. But all were agreed that the grueling IVF treatments, morning sickness, bed rest, C-sections and stretch marks were worth it once they saw their intended parent hold the child, or children (multiples are common with IVF), for the first time. "Being a surrogate is like giving an organ transplant to someone," says Jennifer Cantor [one of the surrogate mothers interviewed for this article], "only before you die, and you actually get to see their joy."[138]

Consequently, if the U.S. does adopt a uniform surrogacy law regime similar to that of the United Kingdom, it should leave out restrictions on compensation because with proper interviewing, screening, and testing, poor or desperate women would not be approved as surrogates.

IV. UNDER A CONSTITUTIONAL LAW ANALYSIS, ALL AMERICANS HAVE AN EQUAL RIGHT TO REPRODUCE AND RAISE A FAMILY AS THEY SEE FIT

Though the British surrogacy law regime has its problems, the U.S. should emulate its uniformity and fair treatment. Under the latest HFEA provisions, same-sex partners in a committed relationship and heterosexual married couples are given an equal opportunity to become parents.[139] The U.S. Constitution and attendant case law suggest that the U.S. should also treat same-sex couples and heterosexual married couples equally when it comes to parentage.

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[137] *Id.*

[138] *Id.*

[139] McKie, *supra* note 102. *See also* Laura Roberts & Nick Allen, *Elton John Uses a Surrogate to Become a Father for the First Time*, TELEGRAPH.CO.UK, Dec. 29, 2010, http://www.telegraph.co.uk/news/newstopics/celebritynews/8228152/Elton-John-uses-a-surrogate-to-become-a-father-for-the-first-time.html (discussing the fact that Elton John and his partner used a surrogate to become parents).

A. The Fundamental Right to Procreate and Raise Children Is Constitutionally Protected.

As Dr. Martin Luther King, Jr. opined in his "Letter From Birmingham Jail," on St. Augustine's quote that "an unjust law is no law at all," just because an idea is popular with the majority does not necessarily make it constitutional.[140] Thus, case law throughout the years has developed judicial standards of review to determine whether laws, even if the majority approves, are fair to everyone. If they are not, they may be overturned as unconstitutional.[141] The idea of applying different levels of judicial scrutiny depending on how oppressed the class is, and how fundamental the right is, originated in famous footnote four in *United States v. Carolene Products*.[142] The historic footnote suggested that "more exacting judicial scrutiny" should be applied when a case involves a "discrete or insular minority" or when legislation facially violates a constitutional provision that guarantees a fundamental right.[143] Recently, the argument that same-sex couples should be considered a suspect class has begun to gain traction. First, Justice Ginsburg declared in *Christian Legal Society v. Martinez* that there is no difference between same-sex status and same-sex conduct.[144] Second, President Obama's administration declared it would no longer defend the Defense of Marriage Act because it reflects "precisely the kind of stereotype-based thinking and animus the [Constitution's] Equal Protection Clause is designed to guard against."[145] However, there is no need to consider the suspect class argument in this

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[140] Martin Luther King, *Letter from Birmingham Jail*, MLKONLINE.NET (Apr. 16, 1963), http://www.mlkonline.net/jail.html.

[141] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573–74 (2003); City of Boerne v. Flores, 521 U.S. 507, 532 (1997); United States v. Virginia, 518 U.S. 515, 532–33 (1996); Romer v. Evans, 517 U.S. 620, 634 (1996); J.E.B. v. Alabama *ex. rel.* T.B., 511 U.S. 127, 130–31 (1994); Emp't Div. v. Smith, 494 U.S. 872, 878–77 (1990); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); Craig v. Boren, 429 U.S. 190, 204 (1976); Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972); Sherbert v. Verner, 374 U.S. 398, 404 (1963); Korematsu v. United States, 323 U.S. 214, 216 (1944); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).

[142] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[143] *Id.*

[144] Christian Legal Soc. v. Martinez, 130 S. Ct. 2971, 2990 (2010) ("CLS contends that it does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.' . . . Our decisions have declined to distinguish between status and conduct in this context.") (internal citations omitted).

[145] Evan Perez, *Reversal on Gay Marriage: In Legal Shift, Obama Administration Contends Same-Sex Ban Unconstitutional*, WSJ.COM, Feb. 24, 2011, http://online.wsj.com/article/SB10001424052748703775704576162441655208626.html.

Note[146] because the right to procreate is a constitutionally protected fundamental right.[147]

Eisenstadt v. Baird further expanded the right to control procreation, guaranteeing to both married and unmarried couples the right to privacy and the ability to decide whether to use contraception.[148] Many scholars have argued extensively over the years that this right should apply to all persons, regardless of sexual orientation or fertility.[149] As the court in *Johnson v. Calvert* noted, declaring surrogacy contracts unenforceable would deprive infertile and same-sex couples of the only opportunity they would have to fulfill this fundamental right.[150] *Johnson* merely provides persuasive authority for the equal protection argument though, because the Supreme Court of the United States has not yet considered the issue.

Constitutional arguments in favor of upholding surrogacy arrangements include the right to privacy under the Fifth Amendment, the penumbra of the Bill of Rights, and the Fourteenth Amendment.[151] Surrogacy contracts create a tension, however, between the fundamental right to procreate and other related rights of parenthood. This tension has played out in a variety of ways in state courts across the country. For instance, the Supreme Court of New Jersey recognized a constitutional right to procreate in *Baby M.*, even though the court also held that surrogacy contracts in New Jersey were against public policy.[152] That right, however, did not outweigh the surrogate mother's rights, because the surrogate mother also had a biological relationship with the child.[153] Additionally, a California Court of Appeals agreed that the rights and responsibilities of parenthood could not be severed.[154] A putative father

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[146] While this Note does not discuss the suspect class analysis, those who still argue procreation through surrogacy is not a fundamental right should recognize that the application of this alternative analysis could lead to the same result.

[147] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). *See also* Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305, 311–12 (2010).

[148] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

[149] *See, e.g.*, Spivack, *supra* note 22, at 109; John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 325 (2004); Lawrence Gostin, *Surrogacy from the Perspectives of Economic and Civil Liberties*, 17 J. CONTEMP. HEALTH L. & POL'Y 429, 434 (2001); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 854 (2000).

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

[151] Spivack, *supra* note 22, at 109. *See also* Gostin, *supra* note 149, at 434 (discussing the right to privacy in surrogacy arrangements).

[152] *In re* Baby M., 537 A.2d 1227, 1234, 1253 (N.J. 1988).

[153] Spivack, *supra* note 22, at 100.

[154] *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

who was genetically unrelated to a child but signed a surrogacy arrangement was held liable for child support upon the couple's divorce because the procedure that created the child was set in motion by the intended parents.[155] In so holding, the court also relied on the doctrine of estoppel, noting its distaste for such inconsistent actions as bringing the child into existence and later denying any responsibility.[156] Based on the *in loco parentis* theory, another court ruled that a surrogate mother who removed three infants from a hospital against the intended parents' wishes was a third party, and thus had no standing to seek custody or visitation.[157]

B. Children Have Constitutional Rights to Be Treated Equally and Know Their Parents at Birth.

According to the Supreme Court's opinion in *Roe v. Wade*, the constitutional rights that accompany "personhood," including those rights guaranteed under the Fourteenth Amendment, apply upon birth.[158] Therefore, children born through surrogacy are guaranteed equal protection under the Fourteenth Amendment.[159] Consequently, children born through surrogacy should be guaranteed the same rights as children born to married couples through coital conception, including the right to an intact family.[160] Additionally, children born through surrogacy may be put at a higher risk than other children since there is neither legislation nor regulations that test gestational surrogates for sexually transmitted diseases; on the other hand, there are FDA regulations requiring testing for egg and sperm donations.[161] While it is true that children are not entitled to the full panoply of constitutional rights as adults, the Supreme Court has held that children are entitled to protection under the Fourteenth Amendment.[162] Arguably, it violates the Equal Protection Clause of the Fourteenth Amendment to treat children born through surrogacy differently than other children. In addition, various legal scholars have argued that children have the right to

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[155] *Id.* at 282, 294.

[156] *Id.* at 287–88.

[157] J.F. v. D.B., 897 A.2d 1261, 1273–77 (Pa. Super. Ct. 2006).

[158] Roe v. Wade, 410 U.S. 113, 157 (1973).

[159] *See* U.S. CONST. amend. XIV, § 1.

[160] *See* Lorillard, *supra* note 21, at 242–43 (citing Joan Catherine Bohl, *Gay Marriage in Rhode Island: A Big Issue for a Small State*, 12 ROGER WILLIAMS U. L. REV. 291, 301 (2007)).

[161] *See, e.g.*, CROCKIN & JONES, *supra* note 55, at 188–90 (discussing Federal Drug Administration testing of sperm and egg donations and the lack of such regulation for gestational surrogates).

[162] Byrn & Ives, *supra* note 147, at 309–11.

legal parents beginning at birth.[163] Therefore, since it should violate the Equal Protection Clause of the Fourteenth Amendment to deny rights, such as certainty of legal parentage, to children born through surrogacy, the legislature should enact uniform statutes for their protection.

V. EVEN THOSE WHO ARGUE SURROGACY IS NOT A CONSTITUTIONAL RIGHT SHOULD AGREE UNIFORM LEGISLATION IS IN OUR COUNTRY'S BEST INTERESTS.

Even those scholars who argue that surrogacy should not be considered part of the right to family privacy should agree that a uniform surrogacy legal regime is long overdue. Because attempts at harmonization have failed to gain uniform adoption, the only way to make sense of our current patchwork system seems to be through federal legislation. While family law issues are usually reserved to the states, the federal government has previously intervened to protect important family rights; for example, the federal government has established legislation that creates mandates in property distribution and child support so as not to leave broken families destitute.[164] Additionally, the decision regarding abortion came before the U.S. Supreme Court in *Roe v. Wade*.[165] Although surrogacy issues may eventually reach the Supreme Court, federal legislation should occur first because the judicial branch's role should be to interpret the law, not enact it.

The U.S. patchwork surrogacy regime is impractical and is not in accordance with the law given that the United States Supreme Court has long upheld parties' freedom of contract. Surrogates volunteer their services knowing from the beginning the child will go to the intended parents. In addition, giving the child to the intended parents serves the best interests of the child because children should have the right to have legal parents determined at birth.[166] Therefore, any remaining barriers to cohesive surrogacy legislation should be removed or this uncertainty will continue to increase unnecessary litigation.

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[163] *Id.* at 321–24; Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 285–86 (2000–2001).

[164] *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

[165] 410 U.S. 113 (1973).

[166] *See* Lorillard, *supra* note 21, at 242–43.

A. Though Family Law Decisions Are Usually Left for the States to Decide, the Federal Government Needs to Intervene Because Constitutional Rights and Jurisdictional Comity Are Involved.

The United States does not currently have a uniform national law regarding surrogacy because domestic relations law is generally reserved for the states to decide, except for cases that involve federal constitutional issues.[167] Consequently, surrogacy law should not be left to the states because it raises federal constitutional issues such as equal protection and parents' rights to procreate and make decisions regarding their children. By allowing some states to refuse to enforce surrogacy contracts and others to criminalize them, the federal government currently allows these states to unconstitutionally deprive some American citizens of their rights. Desperate couples must resort to circumventing the federal government's regulation of interstate commerce by using agencies across state lines where laws are more supportive of their dreams.[168]

Unfortunately, surrogacy laws still vary widely from state to state, and attempts at harmonization during the past twenty years have been unsuccessful.[169] Two such attempts are the Uniform Conception Act and the Model Surrogacy Act, neither of which has been uniformly adopted by state legislatures.[170] Other efforts, such as the Uniform Parentage Act (UPA)—a set of uniform rules for establishing parentage that may be adopted by legislatures on a state-by-state basis originally approved by the National Conference of Commissioners on Uniform State Laws (hereinafter "NCCUSL") in 1973—have also been unsuccessful.[171]

The UPA's initial version remained silent on most surrogacy issues, except for providing that a sperm donor would be shielded from paternal obligations and would not be granted parental rights rather than the biological mother's infertile husband.[172] The UPA's amendments to Articles 7 and 8 now cover gestational agreements, but these amendments have not been uniformly adopted.[173]

> The amended UPA provisions regarding ART have not been widely enacted at present, and it may be some

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[167] Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 466 (2006).

[168] *See* Katherine Drabiak et al., *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 J. L. MED. & ETHICS 300, 303 (2007).

[169] *See* Lorillard, *supra* note 21, at 238–40.

[170] *Id.* at 240 n.29.

[171] *Id.* at n.30.

[172] Shapo, *supra* note 167, at 466–67.

[173] *Id.*

> considerable time before the National Law Commission (ULC) finally proposes a redrafted UPC. For these reasons, the drafters of the Model Act felt that it was important to provide model legislation for consideration of these topics, even if that proposal largely conforms to the UPA, and cautions that if a new UPC is enacted, that it should control.[174]

The proposed 1988 Uniform Status of Children of Assisted Conception Act (USCACA) covered methods to determine parentage for children born through both in vitro fertilization and artificial insemination using donor sperm (hereinafter "AID") as well as surrogacy arrangements, but only North Dakota and Virginia adopted the Act.[175] The USCACA "was a 'child-oriented act' designed to benefit the increasing number of children born of ART by defining their status, 'their rights, security and well being,' especially by providing the child with two parents."[176] However, even though the NCCUSL abandoned the USCACA in favor of the 2002 APA, those laws in North Dakota and Virginia will remain in force until the legislature repeals them.[177] Additionally, in 2008 the Family Law Section created the ABA Model Act on Assisted Reproductive Techniques, but this Act has also not received uniform ratification.[178] Finally,

> [w]hatever the motives of those who use ART, the need for greater legal regulation providing a framework for resolving disputes is apparent. The absence of legal standards makes it extremely difficult for lawyers to advise clients about ART and for judges to resolve disputes that arise out of the use of the technology. The Model Act is intended to provide "a flexible framework that will serve as a mechanism to resolve contemporary controversies, to adapt to the need for resolution of controversies that are envisioned but that may not yet have occurred, and to guide the expansion of ways by which families are formed."[179]

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[174] Charles P. Kindregan, Jr., & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 219 (2008).

[175] Shapo, *supra* note 167, at 467.

[176] *Id.*

[177] *Id.*

[178] *See* Lorillard, *supra* note 21, at 240.

[179] Kindregan & Snyder, *supra* note 174, at 209.

B. *The Federal Government Should Intervene Because State Laws Prohibiting and Criminalizing Surrogacy Arrangements Violate Freedom of Contract.*

Though modern scholars still debate its lasting significance,[180] conscionable freedom of contract has historically been recognized under the Due Process Clause of the Fourteenth Amendment of the United States Constitution and was vigorously upheld in *Lochner v. New York.*[181] *Lochner* overturned New York's Bakeshop Act, which mandated sanitary conditions in bakeries and prevented bakers from working more than ten hours per day or sixty hours per week.[182] Though the Act merely purported to provide safe working conditions, the Supreme Court held in a 5–4 decision that the Fourteenth Amendment protects the right to make contracts, and that unnecessary or arbitrary interference with such contracts is unconstitutional.[183] Later decisions limited *Lochner*'s absolute right to freedom of contract where the terms were unconscionable or the contracts became tools to the detriment of fellow man, but *Lochner* still has not been explicitly overturned.[184] For example, parties do not have so much freedom of contract that they could make contracts that would violate minimum wage laws, but "[t]he general rule is that [the making of contracts] shall be free of governmental interference."[185]

Some scholars argue surrogacy contracts should be treated the same as

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[180] A complete discussion of the implications of *Lochner v. New York* is beyond the scope of this article, but see generally MICHAEL J. PHILLIPS, THE *LOCHNER* COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S (2001); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (1993); David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563 (2008); Paul Kens, Lochner v. New York*: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404 (2005); Steven M. Ingram, *Taking Liberties with* Lochner*: The Supreme Court, Workmen's Compensation, and the Struggle to Define Liberty in the Progressive Era*, 82 OR. L. REV. 779 (2003); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003); David E. Bernstein, Lochner's Legacy's *Legacy*, 82 TEX. L. REV. 1 (2003); David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85 (1993); James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87 (1993); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767 (1985); Bernard H. Siegan, *Rehabilitating* Lochner, 22 SAN DIEGO L. REV. 453 (1985).

[181] 198 U.S. 45, 64 (1905).

[182] *Id.* at 52.

[183] *Id.* at 64.

[184] *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 388, 400 (1937) (overturning a previous decision in Adkins v. Children's Hosp., 261 U.S. 525 (1923), that held minimum wage laws violated the due process clause); Nebbia v. New York, 291 U.S. 502, 539 (1934) (holding that the New York legislature did not violate due process by convicting a dairy farmer who violated a statute preventing the sale of milk below a price that would upset market stability).

[185] *Nebbia*, 291 U.S. at 523.

any other contract, with intent of the parties controlling.[186] The Supreme Court of California evidenced its willingness to rule based on the intent of the parties in *Johnson v. Calvert*.[187] In *Johnson*, the court examined the parties' intentions, which they considered to be of primary importance, and held that that the child would not have been born if not for the intended parents and that it served the child's interest to award parentage to the couple who chose to have a child from the beginning.[188] A Minnesota Court of Appeals similarly upheld the validity of a surrogacy agreement, noting that the contract reflected the intent of the parties, the parties had not been coerced, and the contract did not violate public policy.[189] Additionally, a Nevada statute requires the couple named as the intended parents in a surrogacy agreement must be treated as the natural parents of the child under all circumstances.[190] Finally, a child born to a surrogate mother in Arkansas is presumed to be the natural child of the biological father and intended mother as long as the biological father is married.[191]

Challengers argue that intent of the parties should be subordinate to gestation and genetics because if intent was the controlling factor, then parents of coitally conceived children could more easily avoid their parental responsibilities.[192] They argue, for example, that if intent ruled, a biological father who did not want a child could avoid child support in situations where birth control was ineffective.[193] Fertile couples are not similarly situated to infertile and same-sex couples in this regard, however, so such an argument is inappropriate. Courts could readily use intent as governing in the latter situations while upholding child support obligations in the former. The only objective those states that refuse to recognize both intent and consent achieve is forcing parties to seek judicial intervention, further flooding the already overburdened courts.[194]

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[186] *See, e.g.*, Garrison, *supra* note 149, at 859–67; Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 376–79 (1990).

[187] Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

[188] *Id.*

[189] *In re* Baby Boy A., No. A07-452, 2007 Minn. App. Unpub. LEXIS 1189, at *8–9, *11, *25 (Minn. Ct. App. Dec. 11, 2007).

[190] NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2001).

[191] ARK. CODE ANN. § 9-10-201 (2009).

[192] *See* Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 623–24 (2003).

[193] *Id.* (internal citations omitted).

[194] *See* Lorillard, *supra* note 21, at 238 ("In such states, parental rights do not automatically vest by consent or intent; rather, they require judicial intervention.").

C. *Federal Legislation Could Include Safeguards to Prevent Exploitation of Women and the Poor by Mandating Psychological Evaluations and Requiring Surrogates Already Have Children of Their Own.*

Another solution that may keep surrogacy agreements from being considered against public policy would be to adopt a nationwide regulation requiring surrogate mothers to undergo a psychological examination and counseling before conception. Reputable surrogacy agencies already employ this strategy,[195] which would serve as a safeguard to those who are concerned that the surrogate mother may suffer mental instability if she is forced to give up the child she carries. Counseling would deter potential surrogates who may be mentally unstable as in the Minnesota case discussed earlier,[196] or those doing it only for the money. It would also eliminate the possibility of contractual defenses of duress, coercion, undue influence, capacity, and uninformed consent from preventing enforcement of the agreement.

In the *Baby M.* case, for example, the intended parents were concerned the surrogate mother might commit suicide if they did not give in to her severely distraught begging to keep the baby for an additional week.[197] Mary Beth Whitehead, the surrogate mother, received a psychological evaluation long before conception, but the Infertility Center ignored its findings.[198] The clinic's psychologist found that Whitehead would have "'strong feelings about giving up the baby' and that she should be counseled further before proceeding."[199] However, that counseling, never took place.[200] If the surrogate mother had received counseling before insemination and during the pregnancy, this litigation may have never happened. The intended parents may have discovered this potential problem sooner and avoided litigation by choosing another surrogate.

D. *The Best Interests of the Child Standard Favors Intended Parents Because Without Them, the Child Would Not Have Been Born.*

Some scholars have challenged the constitutionality of the best interests standard;[201] similarly, courts are split regarding the use of the best

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[195] *See, e.g., Surrogate Agency*, BECOMEASURROGATEMOM.COM, http://www.becomeasurrogatemom.com/surrogate_agency (last visited Feb. 5, 2011).

[196] A.L.S. v. E.A.G., No. A10-443, 2010 Minn. App. Unpub. LEXIS 1091, at *4 (8th Cir. Oct. 26, 2010).

[197] *In re* Baby M., 537 A.2d 1227, 1236–37 (N.J. 1988).

[198] *Baby M: Traditional Surrogacy Gone Wrong*, INFORMATION-ON-SURROGACY.COM, http://www.information-on-surrogacy.com/baby-m.html (lasted visited Apr. 16, 2011).

[199] *Id.*

[200] *In re Baby M.*, 537 A.2d at 1247–48.

[201] *See generally* Meyer, *supra* note 62.

interests standard in determining the custody of a child born through surrogacy. For instance, in the *Baby M.* case the intended parents received custody, which was also upheld on appeal because it served the best interests of the child.[202] The majority in *Johnson* similarly reasoned that the best interests of the child should be used to determine custody once parenthood is established; however, the court also held that the best interests of the child should not be used to determine a child's parentage, but rather that it should be used to determine custody once parenthood is already established.[203] On the other hand, another California case from a lower court argued that family law principles should receive deference rather than deterring illegal conduct.[204] It follows logically that parentage should not have to be determined after the birth of the child because the parties have already determined this in advance. But even when considered, the best interest standard leads to the conclusion that the intended parents should receive custody of the child.

Additionally, the best interests of the child standard favors uniform regulation of surrogacy. The FDA imposes restrictions and testing requirements on sperm and egg donors, but none on gestational surrogates.[205] Consequently, due to the lack of federal regulations requiring transmissible disease testing for surrogate mothers,[206] children born through surrogacy may be more susceptible to transmission of disease.

VI. COUNTERARGUMENTS AGAINST SURROGACY CONTRACTS ARE UNAVAILING AND SHOULD NOT PREVENT UNIFORM FEDERAL LEGISLATION.

To understand why surrogacy laws continue to vary so widely from state to state, it is important to examine the reasons why opponents still want to prevent infertile and same-sex couples from achieving their dreams of becoming parents. "Any change in custom or practice in this emotionally charged area has always elicited a response from established

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[202] Spivack, *supra* note 22, at 100 (discussing *In re* Baby M., 537 A.2d 1227, 1229 (N.J. 1988)).

[203] Johnson v. Calvert, 851 P.2d 776, 782 n.10 (Cal. 1993) ("The dissent would decide *parentage* based on the best interests of the child. Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions. The implicit assumption of the dissent is that a recognition of the genetic intending mother as the natural mother may sometimes harm the child. This assumption overlooks California's dependency laws, which are designed to protect *all* children irrespective of the manner of birth or conception.").

[204] *In re* Adoption of Matthew B., 284 Cal. Rptr. 18, 26 (Cal. Ct. App. 1991).

[205] CROCKIN & JONES, *supra* note 55, at 190.

[206] *Id.*

custom and law of horrified negation at first; then negation without horror; then slow and gradual curiosity, study, evaluation, and finally a very slow but steady acceptance."[207] Only through discussion of and education regarding these arguments will separatists relinquish equal constitutional rights to infertile and same-sex couples.

Because many Americans still fear ART, possibly because they are still uneducated on the topic, the U.S. has moved extremely slowly on creating legislation on surrogacy considering the procedure was first used in the 1970s.[208] Some may still believe ART will result in eugenics, a master "transhuman" race, or unabashed "harvesting" of embryos for cloning and stem-cell research rather than seeing it as giving the gift of life and a family to those couples that cannot conceive a child on their own.[209] Others offer somewhat more persuasive arguments, however, that surrogacy could lead to the objectification of the economically vulnerable, particularly women, and commodification of both women and children.[210] Still others cite religious reasons and argue that surrogacy will lead to the breakdown of the traditional family, separating children from their biological parents.[211] One final argument against ART is that same-sex couples, who frequently turn to ART, have an adverse impact on their children even though twenty years of research have negated those theories.[212] Even the more persuasive arguments, however, are unfounded, so they should not hinder the creation of uniform U.S. surrogacy law.

A. Though the Economically Vulnerable May Be More Susceptible to Exploitation, Psychological Evaluations Should Filter out These Concerns.

One of the more pervasive yet unrealistic arguments opponents provide is that surrogacy might lead to the commodification of women and children, making children a product to be sold on the black market, devaluing pregnancy, and even creating a lower "breeder class."[213] These challengers sometimes attempt to associate surrogacy agreements with

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[207] SOPHIA J. KLEEGMAN & SHERWIN A. KAUFMAN, INFERTILITY IN WOMEN: DIAGNOSIS AND TREATMENT 178 (1966). While this quotation is in regard to sperm donation, it is also especially poignant with respect to surrogacy law.

[208] Spivack, *supra* note 22, at 98. *See also generally* Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885 (2009).

[209] CAHN, *supra* note 38, at 170–73.

[210] Lorillard, *supra* note 21, at 249–51.

[211] *Id.* at 251–52; DeLair, *supra* note 25, at 157.

[212] *See* Austin Caster, *Why Same-Sex Marriage Will Not Repeat the Errors of No-Fault Divorce*, 38 W. ST. U. L. REV. 43, 60–67 (2010).

[213] Lorillard, *supra* note 21, at 249–51.

slavery. In fact, surrogate mothers in several cases have argued that surrogacy contracts violate the Thirteenth Amendment's prohibition against indentured servitude.[214] (Sometimes these arguments have been successful, but other times not.[215]) One scholar even suggested black slave women whose children became property of their masters served as surrogate mothers to their slave-owners,[216] but this argument rests on an illogical gap in reasoning because these women did not agree in advance to give up their children, altruistically or otherwise. Any slave woman who had a choice in the matter would not have been a slave in the first place.

This argument attempts to give credence to the position that the "economically vulnerable" are more "susceptible to exploitation,"[217] but, realistically, having children who would be forced to spend their lives tending their masters' fields was surely not something these women volunteered to do nor had the opportunity to discuss and negotiate. Unlike slaves, surrogate mothers are not forced or coerced into these agreements against their free will. As the court pointed out in *Johnson v. Calvert*,

> 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. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock.[218]

The court could not overcome doubts whether the plaintiff surrogate mother, Anna Johnson—who was a "licensed vocational nurse who had done well in school and who had previously borne a child"—did not know what she was getting into.[219] Surrogate mothers do not sell their bodies as a prostitute does; they give the gift of parentage to couples that are unable to obtain it on their own.

The New Jersey court in *Baby M.* considered surrogacy arrangements

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[214] *Id.* at 246.

[215] *See, e.g.*, *In re* Baby M., 537 A.2d 1227, 1240 (N.J. 1988) (successful argument in this case). *But see, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (this argument was not successful in this case).

[216] Spivack, *supra* note 22, at 97.

[217] *Compare* Lorillard, *supra* note 21, at 250, *with* Spivack, *supra* note 22, at 98.

[218] *Johnson*, 851 P.2d at 785.

[219] *Id.*

to be a form of statutorily prohibited baby-selling because payment was due upon the birth of the child.[220] This is not true of most surrogacy arrangements, however, because payment is usually divided into installments throughout the pregnancy, showing that the compensation is for carrying the child and not giving up parental rights.[221] For instance, the Supreme Court of California ruled in *Johnson v. Calvert* that the surrogate mother's compensation was for carrying the child rather than giving up her rights to the child, and any other low-paying job was just as likely to exploit her.[222] Additionally, the court reasoned that the surrogate mother retained her right to choose whether to abort the child, so her Thirteenth Amendment rights remained intact.[223] Even the court in *Baby M.* recognized that the public policy purpose behind baby-selling statutes is to keep children from being unnecessarily separated from their *natural* parents.[224] At best, a surrogate mother is only as related to the child as the biological father in traditional surrogacy, and in gestational surrogacy, she is not biologically related to the child at all. Although bonding with the child during gestation was one of the surrogate mother's principal arguments in *Johnson v. Calvert*, "from a medical point of view there is certainly no current evidence of a biological basis for bonding. It is entirely a psychological connection, although it may be a very strong one."[225]

Additionally, a surrogate mother never intends to be the child's parent from the beginning. A surrogate mother, as opposed to a mother giving her child up for adoption, does not choose to give up her parental rights because she is too young or is otherwise incapable of caring for the child; rather, the surrogate mother agrees before conception takes place that she will not receive any legal rights to the child in the first place.[226] That is why one of the cardinal rules in surrogacy is that gestational carriers should not be first-time mothers.[227] Still, some scholars argue that a woman cannot know what it is like to give up a child even if she has already borne children because of the bonding that occurs during

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[220] *In re* Baby M., 537 A.2d 1227, 1248 (N.J. 1988).

[221] *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993).

[222] *Id.*

[223] *See id.*

[224] *In re Baby M.*, 537 A.2d at 1247.

[225] CROCKIN & JONES, *supra* note 55, at 209.

[226] *See, e.g.*, Surrogate Parenting Assocs., Inc. v. Commonwealth *ex rel* Armstrong, 704 S.W.2d 209, 211 (Ky. 1986).

[227] Teman, *supra* note 111.

gestation,[228] but if the surrogate mother cannot guarantee a commitment to the agreement, she should probably not volunteer with a surrogacy agency in the first place.

It logically follows that women should not be able to answer a want ad for a surrogate mother, but if she goes through a licensed agency and undergoes a psychological evaluation and counseling, then she should realize that surrogacy is a serious matter and will make a more informed decision. Unfortunately, the surrogate in *Baby M.* seemed to be motivated equally, if not more, by money than altruism, the psychological screening even warned of a future conflict. The court noted that:

> The stability of the Whitehead family life was doubtful at the time of trial. Their finances were in serious trouble (foreclosure by Mrs. Whitehead's sister on a second mortgage was in process). Mr. Whitehead's employment, though relatively steady, was always at risk because of his alcoholism, a condition that he seems not to have been able to confront effectively. Mrs. Whitehead had not worked for quite some time, her last two employments having been part-time.[229]

The best way to protect potential surrogate mothers "from themselves" would be to create a nationwide, uniform law that requires surrogates and couples interested in surrogacy to work with licensed surrogacy agencies that would filter out concerns of mental instability and economic exploitation.

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[228] *See, e.g.,* Vicki C. Jackson, Baby M. *and the Question of Parenthood*, 76 GEO. L.J. 1811, 1819 n.19 (1988) ("Giving up a child can be, for some birth mothers, a far more painful and terrible event than they might have reasonably foreseen prior to conception—a severing of an emotional bond whose power and force cannot be recognized fully before the coming into being of the child as a person. For the profound emotional effect of the child's birth has its roots in the pregnancy itself. Hence some birth mothers—regardless of class or educational background—may be unable to account accurately for their likely feelings (or the 'value' thereof) before conception, despite the best and most closely supervised procedural regulation of such contracts."); Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood?: An Ethical Analysis*, 16 J. L. MED. & ETHICS 57, 60 (1988) ("[I]t has been argued that no one is capable of granting truly informed consent to be a surrogate mother. This argument contends that even if a woman has already borne children, she cannot know what it is like to have to give them up after birth.").

[229] *In re* Baby M., 537 A.2d 1227, 1258 (N.J. 1988).

B. *Opponents Mistakenly Argue that Surrogacy Will Contribute to the Breakdown of the Traditional Family.*

Another argument opponents proffer is that conceiving children through surrogacy will lead to the breakdown of the traditional family.[230] Common law doctrines such as the doctrine of motherhood, the marital presumption, the stranger-to-the-adoption rule, and *filius nullius* evidence the social stigma against having a child out of wedlock. The doctrine of motherhood by gestation assumes that the woman who gives birth to the child is its mother.[231] Similarly, the marital presumption historically considered any children born to a married woman to be children of the marriage, with the husband presumed to be the father.[232] Traditionally, adopted children still did not receive the same inheritance rights as biological children in that they could not inherit property "expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation."[233] Additionally, an adopted child "generally could not inherit through relatives who were not a party to the adoption" under the stranger-to-the-adoption rule.[234] And even harsher, under *filius nullius*, a child born out of wedlock could not inherit at all because he was considered "the son of nobody."[235]

These doctrines seem outmoded in modern times, but the bias against children born out of wedlock still exists. Some separatists even argue that because the surrogate mother sometimes has a genetic link to the child and carried it for nine months, she has more of a right to the child than the intended parents.[236] Notwithstanding this bias against children born out of wedlock, an Ohio court upheld a surrogacy arrangement based on genetics

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[230] DeLair, *supra* note 25, at 157 ("Traditional family lacks a precise definition, but it is commonly defined as 'two heterosexual, married adults and their biological or adoptive children.' This traditional concept of family has existed for centuries. Two men or two women having children challenges this ancient notion of family, and some critics speculate that it sets a bad example for children reared in this environment.") (internal citations omitted); Lorillard, *supra* note 21, at 251–52 ("Others have argued that surrogacy threatens 'the long-standing interest in society for the preservation of the traditional family . . . .") (internal citations omitted).

[231] Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 524–25 (1996).

[232] CAHN, *supra* note 38, at 74–75.

[233] *Id.* at 76 (internal citations omitted).

[234] *Id.* at 78.

[235] *Id.* at 82.

[236] *See, e.g.*, Larkey, *supra* note 192, at 624.

because the surrogate mother had no parental rights to forego.[237] Additionally, the U.S. Supreme Court has ruled that when both parties have a genetic link to the child, intent is one of the factors that should determine who gets custody of the child.[238] It is still often the case that children born to married parents are the children of those parents, but these theories are now highly criticized because they interfere with the right to privacy in family decisions about reproduction and childrearing, especially when they restrict the already limited options for infertile and same-sex couples.[239] Using this logic, even a sperm or egg donor could successfully challenge a birth mother for custody.

Some intended parents have tried to avoid confusion and litigation using pre-birth orders, which either determine parentage before the child is born or amend the birth certificate after the birth, but courts are split on their validity.[240] Some courts rule for intended parents, citing the fact that they provided the genetic imprint for the child, while others argue that refusing to allow sperm donors or surrogate mothers to disclaim parentage before birth violates equal protection.[241] Separatists, however, argue taking only genetics into consideration demeans the importance of gestation, through which the surrogate bonds with the child.[242] If a woman has not yet bonded with the child at the time of contracting, they argue, she cannot possibly give informed consent, citing what giving up the child will do to the surrogate mother's psychological state.[243] This theory, however, completely discounts the mental anguish the intended parents suffer—the couples that cannot have a child on their own—making them resort to surrogacy in the first place. Dr. Howard W. Jones, Jr. explains:

> One item in the calculus of excellent patient care for infertility is attention to the emotional status of the couple confronting infertility. In practical terms, this means dealing with the frustrations over failure to achieve the

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[237] Belsito v. Clark, 644 N.E.2d 760, 762 (Ohio C.P. Summit Cty. 1994).

[238] *See, e.g.*, Lehr v. Robertson, 463 U.S. 248 (1983) (finding that a biological father would have a stronger due process claim for parental rights if he had established a parent-child relationship with his daughter and followed statutory devices to preserve putative father rights).

[239] *See, e.g.*, Spivack, *supra* note 22, at 106.

[240] *See Belsito*, 644 N.E.2d at 761. *Contra In re* Roberto D.B., 923 A.2d 115 (Md. 2007).

[241] *In re* Roberto D.B., 923 A.2d at 121 ("The appellant argues that a woman has no equal opportunity to deny maternity based on genetic connection—in essence, that in a paternity action, if no genetic link between a man and a child is established, the man would not be found to be the parent, and the matter would end, but a woman, or a gestational carrier, as in this case, will be forced by the State to be the 'legal' mother of the children, despite her lack of genetic connection.").

[242] *See, e.g.*, Coleman, *supra* note 231, at 524–25.

[243] *Id.* at 525; *In re* Baby M., 537 A.2d 1227, 1248 (N.J. 1988).

> innate drive for children and a family. . . . There are several components to this drive, including ones with biological, sociological, and cultural roots.[244]

Thus, surrogacy is different than an adoption because the surrogate never intended the child to be hers in the first place and she conceived only at the request of the intended parents. The surrogate mother's pain may be legitimate, but there should at least be a balancing test weighing harm to both parties.

C. Bias Against Same-Sex Couples Does Not Justify Unequal Treatment Under the Law.

Unfortunately, another reason many oppose surrogacy arises from their continued bias against same-sex couples, even though most surrogacy cases involve heterosexual infertile couples.[245] This bias may arise in part from religious arguments against homosexuality.[246] Such bias is especially offensive when used to deny same-sex couples their fundamental rights, considering that the majority of evidence shows sexual orientation, at worst, has no adverse impact on childrearing.[247] A complete discussion regarding LGBT parenting is beyond the scope of this Note, but the American Psychiatric Association and other leading mental health organizations recently joined to submit an amicus curie brief in the California case challenging a ban on same-sex marriage because, "there is no evidence that gay and lesbian parents are any less capable than heterosexual parents."[248]

Fortunately, there are examples that suggest societal views are changing, including: (1) the majority of Americans now include same-sex couples with children and married gay and lesbian couples in their definition of family;[249] (2) Florida declined to pursue an appeal of its

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[244] CROCKIN & JONES, *supra* note 55, at 6.

[245] *See* CAHN, *supra* note 38, at 166.

[246] *See, e.g.*, DeLair, *supra* note 25, at 154–61 (discussing a religious argument against homosexuality).

[247] *In re* Adoption of Child by J.M.G., 632 A.2d 550, 553–54 (N.J. Super. Ct. Ch. Div. 1993); Caster, *supra* note 212, at 64–65; Lorillard, *supra* note 21, at 241–42 (internal citations omitted); Christine Metteer Lorillard, *Placing Second-Parent Adoption Along the "Rational Continuum" of Constitutionally Protected Family Rights*, 30 WOMEN'S RTS. L. REP. 1, 16 (2008).

[248] *APA Joins Amicus Brief in Support of Same-Sex Marriage*, MEDICALNEWSTODAY.COM, Nov. 18, 2010, http://www.medicalnewstoday.com/articles/208272.php.

[249] Sam Roberts, *Study Finds Wider View of 'Family,'* N.Y. TIMES, Sept. 15, 2010, at A14, http://www.nytimes.com/2010/09/15/us/15gays.html?_r=2.

adoption ban on same-sex couples;[250] and (3) a record number of openly gay employees serve in the Obama administration.[251] Unfortunately, evidence showing homophobia and separatism still thrive in the United States includes the persistent bullying of gay teenagers that has led to an epidemic of suicide[252] and the New York Republican gubernatorial candidate who warned in a public speech not to be "brainwashed into thinking homosexuality is an equally valid or successful option."[253] Separatists might argue these issues are unrelated, but they would be remiss to not at least recognize the deleterious effect of passive discrimination.[254]

Because physicians need to assist some couples during the ART process,[255] physicians who have personal views against same-sex couples can even serve as gatekeepers to their reproductive rights.[256] Some commentators still insist that children born to and raised by same-sex couples will turn out gay themselves,[257] despite many years of evidence to the contrary.[258] If that were the case, how could so many straight couples

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[250] Sarah Warbelow, *Florida Department of Children & Families Declines to Pursue Adoption Ban*, HRCBACKSTORY.ORG, Oct. 12, 2010, *available at* http://www.hrcbackstory.org/2010/10/florida-department-of-children-families-declines-to-pursue-adoption-ban/.

[251] Sean Alfano, *President Obama Has Appointed a Record Number of Gays to his Administration, Data Shows*, NYDAILYNEWS,COM, (Oct. 26, 2010), http://www.nydailynews.com/news/politics/2010/10/26/2010-1026_president_obama_has_appointed_a_record_number_of_gays_to_his_administration_data.html.

[252] *Raymond Chase Commits Suicide, Fifth Gay Youth to Take Life in Three Weeks*, HUFFINGTONPOST.COM, (Oct. 1, 2010, 5:12 AM), http://www.huffingtonpost.com/2010/10/01/raymond-chase-suicide_n_746989.html.

[253] *Carl Paladino: Don't Be 'Brainwashed' into Thinking Homosexuality Is 'Equally Valid' (VIDEO)*, HUFFINGTONPOST.COM, Oct. 10, 2010, http://www.huffingtonpost.com/2010/10/10/carl-paladino-brainwashed-homosexuality-lifestyle_n_757460.html?ref=fb&src=sp.

[254] *See generally* Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J. YOUTH ADOLESCENCE 1001 (2009).

[255] CROCKIN & JONES, *supra* note 55, at 301 ("Generally speaking, in the case of lesbian couples, ART is often not used, on the assumption that the only requirement is a sperm donor.").

[256] DeLair, *supra* note 25, at 150–51 ("The most common and the most significant barrier that gays and lesbians face when trying to access reproductive technologies is physician discrimination and refusal to provide treatment. Physicians mediate all access to medical care, and they are, in a sense, 'gatekeepers' deciding who receives treatment. . . . Physicians who discriminate against gays' and lesbians' access to assisted reproductive technologies will do so for a variety of reasons. These reasons can be categorized as (A) moral and/or ethical objections to reproductive technologies, (B) religious objections to reproductive technologies or homosexuality, and (C) personal prejudices against homosexuality.").

[257] *See, e.g.*, Lynn D. Wardle, Note, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 854 (1997).

[258] DeLair, *supra* note 25, at 159–60 ("[S]everal recent studies have refuted these claims [that children raised by homosexual couples will suffer psychological and intellectual detriments], and overall, none of the existing research supports any of the above concerns. For example, several studies found no difference between a child raised in a heterosexual home and a child raised in a homosexual home in terms of a child's gender identity. The studies also demonstrated that children raised in

raise gay and lesbian children? Unfortunately, many times these arguments serve as pretext to mask prejudice.

For example, one Florida court ignored both biology and intent when it ruled that both mothers in a separating lesbian couple could not have equal custody and visitation rights even though one carried the child, the other provided the egg, and the sperm donor disclaimed his rights.[259] This contradicts a California case in which one same-sex parent unsuccessfully attempted to use this reasoning to escape child support upon the couple's dissolution.[260] More children should not be placed on welfare simply to prevent the LGBT community from obtaining equal protection under the law. The Vermont Supreme Court agreed it would be inappropriate to deny one same-sex parent legal custody and visitation rights and children of same-sex couples the security of a legally recognized relationship with both parents based on an outmoded statute requiring parentage determined based on biology alone.[261] Even at the lowest standard of review, rational basis, a law cannot exist solely based on bias of infertile and same-sex couples and their children.

D. Religious Arguments Do Not Justify Preventing the Practice of Medicine From Creating and Sustaining Life.

Some religious organizations such as the Catholic Church condemn surrogacy as against its moral and social teaching, while, comparatively, Protestant and Jewish leaders are more accepting.[262] According to the

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homosexual families developed appropriate and traditional sex-typed behaviors and none of the children raised by lesbians or gay men were any more likely to be homosexual. Similarly, research had shown that there is no difference in the mental health, self-esteem, peer relationships, moral development, or intellectual abilities between children raised in homosexual homes versus those raised in heterosexual homes.").

[259] Wakeman v. Dixon, 921 So.2d 669, 673 (Fla. Dist. Ct. App. 2006) (holding that the biological parent had statutory rights to visitation that the surviving partner did not).

[260] Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005).

[261] Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006).

[262] CAHN, *supra* note 38, at 170; DeLair, *supra* note 25, at 154–56 ("The Catholic religion teaches that procreation should only occur in the sanctity of a marriage between a man and a woman. Thus, any form of artificial reproductive manipulation is considered morally wrong. Catholics condemn artificial insemination as 'immoral purely and simply.' . Moreover, it is immoral for a woman to receive semen from someone other than her husband. To do so represents adultery on the part of the wife and casts doubt on the legitimacy of the child . . Jewish leaders cite to three principles which, with certain restrictions, permit the use of some 'fertility increasing manipulation' (i.e. *In-vitroI* [sic] fertilization): (1) the commandment 'be fruitful and multiply;' (2) the commandment of charity, in this case, using ones [sic] possessions or talents to ease the suffering of another (a childless couple); and (3) the principle of domestic peace and family integrity. Despite these principles, many Jewish authorities argue that artificial insemination from a donor is forbidden . . Some Protestants take a strict view of artificial insemination finding that it [sic] that the totality of marriage is ruined because artificial insemination ruins the 'one-flesh unity of husband and wife.' Other Protestant leaders would argue that artificial insemination is acceptable.") (internal citations omitted).

Catholic Catechism, "[t]echniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral."[263] One teacher even claimed she was fired when she asked for leave to undergo in vitro fertilization because she broke her employment contract requiring her to "uphold the teachings of the Roman Catholic Church" and "act in accordance with Catholic doctrine and Catholic moral and social teachings."[264]

It seems odd, however, that some opponents cite religious reasons against surrogacy, arguing that God did not intend for these couples to have children, when the children might have died from polio or the chicken pox if it were left up to God.[265] Society allows doctors and scientists to treat cancer, the flu, and broken bones, so why not infertility? Separatists should consider all that modern science has improved in their own lives before judging others' desire for the family they may take for granted.

VII. CONCLUSION

As this Note shows, the UK surrogacy law regime may not be perfect, but it promotes fairness to all parties, something the U.S. would be wise to emulate. With the patchwork surrogacy regime currently present in the United States, intended parents can never be certain whether a court may take away their child, even if the surrogate mother has no biological relationship to the child. Based on the principles of freedom of contract and parents' constitutional right to procreate and raise children as they see fit, infertile and same-sex couples currently do not have equal protection under the law. Though family law principles are usually left to the states to decide, the federal government must intervene when constitutional rights are involved, as here. Additionally, even those who do not believe parentage through surrogacy is a constitutionally protected right should favor a uniform regime because attempts at conventions for states to adopt have failed.

Though opponents do raise some valid points regarding

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[263] CAHN, *supra* note 38, at 170 (citing Official Catechism of the Catholic Church, 2376–2377, *available at* http://www.vatican.va/archive/catechism/p3s2c2a6.htm).

[264] *Id.* (internal citations omitted).

[265] Nelson Hernandez, *Get Kids Vaccinated or Else, Parents Told: Maryland School System Threatens Legal Action*, WASH. POST, Nov. 14, 2007, http://science.education.nih.gov/supplements/nih9/bioethics/guide/pdf/Masters_2_complete.pdf ("Before the chickenpox vaccine was licensed in 1995, almost all people in the United States had suffered from chickenpox by adulthood. . . . Since the vaccine was introduced, the number of hospitalizations and deaths from chickenpox has declined more than 90 percent. . Two types of polio vaccines are available. An injectable one containing chemically inactivated virus was introduced in 1955, and an oral one containing live but weakened virus, in 1961. Before then, 13,000 to 20,000 cases of paralytic polio were reported each year in the United States.") (internal quotation marks omitted).

commodification or objectification of women and children, these concerns could be addressed through a uniform law. With psychological evaluations, counseling, and the prohibition of first-time mothers from the process, the U.S. could filter out potential surrogate mothers who are mentally unstable or who are only doing it for the money. The United Kingdom proves that a uniform surrogacy regime can work in practice, though its complete ban on compensation undermines the value of the surrogate mother's contributions.

Consequently, to prevent infertile and same-sex couples from being denied their constitutional rights to create a family, the federal government must enact uniform legislation. With techniques borrowed from the United Kingdom such as parental orders, U.S. family law courts could avoid excessive, unnecessary litigation regarding parentage of children born through surrogacy.