Born Breach: The Challenge of Remedies in Surrogacy Contracts

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ABSTRACT: This Note examines the legal approaches to surrogacy and argues that the realities of gestational surrogacy in the United States necessitate a predictable and clear legal approach. In Part I, this Note surveys the state of surrogacy and highlights the pressing need for legal certainty. Part II considers and rejects common arguments against the enforceability of surrogacy contracts. Using recent examples from California, Part III demonstrates American courts’ increasing comfort with adjudicating reproductive disputes in a freedom of contract framework, and encourages this judicial approach for future surrogacy disputes. The Note further argues that it is imperative that lawyers advising parties to surrogacy contracts consider liquidated damages for “tragic breaches” of contract. By honoring well-negotiated liquidated damages provisions, courts can respect the wishes, autonomy, and intentions of the contracting parties.

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INTRODUCTION

There is an immense literature on the moral status of both the practice of surrogacy and surrogacy contracts. Surrogacy contracts are "agreements pursuant to which a woman would, for a fee, agree to bear a child for a man, woman or couple incapable of having a child of their own."\(^1\) Much of what is written falls within two distinct eras. The first, ranging from approximately the late 1980s to the mid 1990s tracks with the introduction of medicalized assisted reproductive technologies, such as artificial insemination, which made traditional surrogacy more available and palatable to the average infertile couple. With this surge came disputes related to surrogacy—primarily disputes over parentage. Most famously, the New Jersey courts considered the matter of Baby M.\(^2\) Mary Beth Whitehead, a surrogate, refused to hand over to the Sterns the child she had carried for them.\(^3\) While ostensibly a contract dispute, the case largely focused on parentage and evaluations of appropriate parentage (or best interests of the child). Accordingly, much of the literature from this era focuses on questions of parentage: who is the mother, legally and morally? Can a woman "sell" the baby she carried to term?

The second, ranging from approximately the mid-2000s onward tracks with the proliferation of the second wave of assisted reproduction, specifically in vitro fertilization ("IVF"), as well as greater social and legal acceptance of gay relationships and gay marriage. Here, the nature of the discussions changes. If a woman is merely a gestational carrier, that is, if the surrogate is inseminated via IVF, and the implanted embryo is genetically unrelated, does she have the same

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\(^2\) In re Baby M., 537 A.2d 1227 (N.J. 1988).

\(^3\) Id.
claims to parentage as a traditional surrogate? How are courts to interpret laws that give parentage to the “natural mother” in the event of a custody dispute? Indeed, both are “natural” insofar as one is genetically related and the other carried and delivered the child. In the wake of expanded reproductive rights and greater social and constitutional acceptance of gay relationships, are people entitled to assisted reproductive technologies to help them “beget a child?”

Overlaying all of this is a more general discussion of whether surrogacy contracts are valid and enforceable.

While these are all important questions, they primarily focus on family structure and parentage. In doing so, they obfuscate the underlying fundamental questions about the validity of surrogacy contracts, and whether surrogacy contracts can coherently fit into a freedom of contract framework. The prevailing discourse frames the surrogacy debate as a polarized issue: either surrogacy contracts are valid and enforceable, or they are not. The literature that does address the validity of surrogacy contracts still focuses on issues of parentage insofar as the examples of broken surrogacy agreements focus on promises that are broken after the surrogate brings the child to term. As a result, this literature misses important kinds of broken promises that challenge existing views.

Three examples highlight the fundamental flaw in focusing on ex post breaches:

- **Scenario 1: Surrogate Refusal to Terminate**
  A husband and wife (“the couple”) cannot conceive naturally but have viable eggs and sperm. They decide to engage a gestational surrogate. The surrogate successfully undergoes IVF with the couple’s genetic embryo. As the pregnancy progresses, the couple decides they want to terminate the pregnancy. The surrogate refuses to terminate. Prior to implanting the embryo, the surrogate and the couple agreed that the surrogate would terminate the pregnancy at the request of the couple, and her refusal to do so constitutes a breach (assuming the contract is valid and enforceable) or a broken promise.

- **Scenario 2: Surrogate Unilaterally Terminates**
  Scenario 2 involves the same basic facts as Scenario 1, but in this case, the surrogate decides to terminate the pregnancy without the couple’s consent and without notifying them in advance.

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4. 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.” (emphasis added)).

5. They might decide to terminate the pregnancy for a variety of reasons, including fetal abnormalities, a change in life circumstances, divorce, etc.
Scenario 3: Surrogate Breaches “Behavioral Terms”

Scenario 3 again involves the same basic facts as Scenario 1, but in this case, the surrogate fails to follow any “behavioral terms” in the contract. These “behavioral terms” are provisions that circumscribe the surrogate’s behavior during the pregnancy, and can range from provisions prohibiting certain activities (e.g. drinking, substance use/abuse, etc.) to provisions requiring certain activities (e.g. attending regular doctor’s appointments, taking certain prenatal vitamins, etc.). The surrogate fails to follow these provisions, carries the fetus to term, and the resulting child is born with mild to severe disabilities.

These three scenarios present cases of what I call “tragic breaches.” They present difficult questions of ethics and of law. Similar to Guido Calabresi and Philip Bobbitt’s “tragic choices,” these tragic breaches require the courts to make determinations of law and equity that necessarily will result in tragedy for one or both parties because of the nature of the breach.

The first tragic breach scenario is the only scenario touched on in the literature but is little discussed and inadequately addressed. Indeed, this scenario necessarily involves questions of parentage and financial responsibility for the child, and existing frameworks of family law can plausibly resolve it. The second scenario, however, is more challenging. What would an appropriate remedy be in this scenario? Obviously the equitable remedy of specific performance is unavailable (and, in the event that the surrogate notified the couple of her intentions prior to terminating the pregnancy, likely unconstitutional). Often surrogates are not in a financial position to return the costs of assisted reproduction because of the exorbitantly high costs of these procedures. This leaves the courts in the uncomfortable and undesirable position of placing monetary value on potential human life. Indeed, that is why many courts and legislatures have declared surrogacy contracts unenforceable, or in some cases, criminal. But this is a cowardly and prophylactic reaction to an unavoidable challenge.

In this Note, I briefly survey the history of and legal approaches to surrogacy, and argue that the realities of gestational surrogacy in the United States necessitate a predictable and clear legal approach. I examine and reject two common objections to surrogacy contracts: that these contracts are unconscionable, and that they violate public policy. Instead, I argue that unconscionability is ill-suited to the surrogacy contract because of both the changing power differentials and the diverse demographics of women who

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7. See infra Part VI.
8. See infra Part I.
9. See N.Y. DOM. REL. LAW § 122 (McKinney 2010).
serve as surrogates. Specifically, I show that surrogacy contracts ought to be enforced, and the court should apply a freedom of contract framework to disputes about surrogacy contracts as it is freedom enhancing—not freedom limiting—in this context. Finally, I argue that surrogacy contracts should contain, and courts ought to honor, liquidated damages provisions in the event of tragic breaches.

This Note focuses solely on gestational surrogacy, and it characterizes gestational surrogacy as a service. Indeed, the payment structure of surrogacy contracts supports this characterization. Many surrogacy contracts specify compensation is to be paid in installments over the course of the pregnancy. The difference between traditional and gestational surrogacy is discussed in more depth below. Accordingly, the Note does not (and need not) address arguments around market inalienability of human body parts, including gametes. Notably, construing sexual or reproductive services or abilities is not new legal reasoning; indeed, loss of consortium claims place value in sexual services or capabilities. Despite the paper's exclusive focus on gestational surrogacy contracts, very few courts have specifically addressed the issue, so it is useful to look to judicial reasoning in other areas of assisted reproduction. For example, examining the judicial reasoning in disputes involving traditional surrogacy, as well as cases involving egg donation, provides illuminating indications of how courts may frame issues and balance competing interests in this area. Though gestational surrogacy presents unique concerns, some considerations are common to both: multiple parties with directly conflicting interests, potential "mismatch" between the genetic parent and the intended parent, and more broadly, the issue of contracting around human reproduction.

This paper only addresses surrogacy contracts formed and occurring within the United States, though it does use Canada as an illustrative example in Part VI. Power differentials are substantially different in the context of cross-border surrogacy. The economic and racial disparities between the surrogate and the intended parents are greater and often these surrogacy arrangements operate under the shadow of the law or in a legal vacuum entirely. These circumstances allow brokerage agencies to systematize the exploitation and facilitate "reproductive tourism" between Western couples seeking a surrogate and a surrogate in another country (typically India, Nepal, and Thailand).

11. For a discussion of the market inalienability of body parts, see Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849 (1987). Radin's basic argument is that all rights, attributes, and things intrinsically unique to the human person ought not be commodified, and market-inalienability is the proper way to ensure body parts are not commodified. See also Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990) (Arabian, J., concurring).
13. These arrangements are known by a variety of terms, including "rent-a-womb" arrangements and reproductive tourism. One recent example is Nepal, where foreign couples that had engaged
exploitation concerns in these contexts are fundamentally different and
currently cannot be adequately addressed in a freedom of contract framework.
As Angie Godwin McEwen notes, "The absence of an international policy
regulating transnational surrogacy arrangements, combined with varying
policies in individual countries, creates the possibility of inequity and
overreaching in surrogacy."\textsuperscript{14}

Part I provides background information about the history of surrogacy
techniques and early judicial approaches to surrogacy disputes in the United
States. This history is crucial to contextualizing and understanding the
entrenched beliefs about surrogacy and objections to surrogacy contracts,
despite the radically different medical technology used in surrogacy procedures
today. Part II rebuts the common argument that surrogacy contracts are
unconscionable. While the power differentials at the negotiation stage tend
toward the intended parents, these power differentials reverse in a predictable
way: the surrogate is in a superior position for the period between conception
and birth. This reversal of power differentials throughout the surrogacy process
creates a contractual context that is not unconscionable, but instead is freedom
enhancing for both parties to the contract. Part III surveys recent judicial
decisions that address and adjudicate disputes in other areas of assisted
reproduction from a freedom of contract framework. Two examples in
California courts illustrate a shift in some courts’ willingness to adjudicate such
disputes and suggest that some courts may be more amenable to the approach
proposed by this paper than previously believed. Indeed, Part IV argues that
courts should respect freedom of contract in the surrogacy context and ought to
extend this theoretical framework to disputes arising out of surrogacy contracts.
This section focuses on the legal uncertainties that currently exist and argues
that legal certainty is needed and that freedom of contract is the best and most
practical way to achieve this certainty. Part V addresses the limitations to my
argument, including the constitutional concern about whether and to what
extent certain fundamental rights are involved in surrogacy disputes. These are
deep questions that warrant attention, but are outside the general scope of this
paper, which is limited to surrogacy in the contractual context. While it is true
that to a certain extent it is a fiction to separate the contract from the
Constitution, it is unlikely that these constitutional questions will receive much
traction outside of the Academy—it is unlikely that the Supreme Court will
have an opportunity to provide guidance on these issues for a variety of
reasons, including, but not limited to, the rarity with which surrogacy disputes

\footnote{surrogates were stuck in Nepal after the surrogate gave birth to the child. The government ultimately
decided to issue exit documents to these couples and the babies that were the result of surrogacy services
arranged prior to the recent ban. \textit{See 54 Couples Leave Country with Surrogate Babies}, \textit{KATHMANDU

\footnote{14. McEwen, \textit{supra} note 10, at 286.}
are litigated. The constitutional questions are interesting and important, but it is crucial to adopt a realistic approach to surrogacy given the widespread use of surrogates, the legal uncertainty of these contracts, and the deeply personal implications of tragic breaches.

I. THE REALITY OF SURROGACY IN THE UNITED STATES

The current state of surrogacy technology and contractual arrangements is markedly different from the surrogacy discussed at the outset, but the current state of surrogacy has been informed by this history. Most significantly, medical advances have made gestational surrogacy involving three parents the norm, and this greatly affects the power and family dynamics of surrogacy. Understanding the history of surrogacy techniques and the enforcement of surrogacy contracts is critical to understanding the common objections to enforcing these contracts, insofar as the history contextualizes and explains the development and entrenchment of these deeply held beliefs.

A. History and Evolution of Surrogacy Techniques

Surrogacy is the oldest assisted reproduction technique; barren women have been using surrogates since Biblical times. Genesis first tells the story of Sarah, Abraham, and Hagar:

Now Sarai Abram's wife bare him no children: and she had [a] handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, Behold now, the Lord hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai.  

Similarly, when Rachel and Leah were unable to bear children, they also requested that their husbands "obtain children" by their maids. These maids had no agency in these traditional surrogacy arrangements. Surrogacy in biblical times was limited to traditional surrogacy. In traditional surrogacy arrangements, the surrogate provides her own egg and is inseminated by "donor" sperm. The insemination can take many forms; in biblical times, surrogacy likely required sexual intercourse, but it has since become more medicalized. Because the surrogate in a traditional surrogacy arrangement provides her own egg, the surrogate mother and not the intentional

16. See Genesis 30:1-4, 9-10 (King James).
mother has the genetic link to the resulting child. Forms of traditional surrogacy have survived into the modern era.

Early modern surrogacy arrangements had similar power dynamics to biblical surrogacy. As Carla Spivack notes, "Arguably, all African American slave women before the Civil War were surrogate mothers for their owners, gestating and giving birth to children who would not belong to them but become the property of their masters." After the Civil War, traditional surrogacy declined until advances in reproductive technologies in the 1970s allowed for easier surrogate arrangements. Medicalized artificial insemination made traditional surrogacy simpler, and in 1978 in vitro fertilization ("IVF") paved the way for gestational surrogacy. IVF first resulted in a child in the United States in 1981.

Gestational surrogacy, in contrast to traditional surrogacy, eliminates the genetic connection between the gestational carrier (surrogate) and the resulting child. Just as courts began to gain confidence in their resolution of parentage disputes, the biological connection between surrogate and child was severed. As a result of this separation of components, some jurisdictions have more favorable policies towards gestational surrogacy contracts leading many fertility clinics to prefer gestational surrogacy as the standard form. Furthermore, this differentiated supply (i.e., women willing to sell their eggs and women willing to serve as a gestational carrier) allowed the markets for both to grow. Some women are interested in only providing either the egg or acting as the gestational carrier, but not both. As of 2013, these new medical advances "have made the science of making babies into a $3 billion-a-year industry."

B. The Current State of Surrogacy Contracts in the United States

Given the size of the baby-making business, it is perhaps surprising that there is no uniform regulation. There was a largely unsuccessful attempt at uniform regulation of surrogacy contracts across the United States that began in earnest in 1998. The National Conference of Commissioners on Uniform State Laws ("NCCUSL") promulgated the Uniform Status of Children of Assisted Conception Act ("USCACA"). USCACA provided two alternative provisions

20. Id.
23. Id.
regarding the validity of surrogacy contracts because the commissioners were unable to reach consensus. Met with little acceptance, the NCCUSL replaced it in 2000 with the Uniform Parentage Act ("UPA"). The UPA took the position that surrogacy contracts are valid and enforceable if first approved by a court, and allowed for compensation to the surrogate.

The American Bar Association ("ABA") Section of Family Law’s Committee on Reproductive and Genetic Technology has also promulgated a model act addressing surrogacy contracts. The Model Act Governing Assisted Reproductive Technology offers two approaches to surrogacy contracts, but both assume valid contracts. Notably, as of 2010, no state has adopted the Model Act Governing Assisted Reproductive Technology.

As a result, there is a patchwork of different approaches to surrogacy contracts across the United States.24 Some states prohibit surrogacy contracts outright, regardless of compensation, and impose civil and/or criminal penalties on the parties to the contract.25 Other states take a "hands off" approach: the state declines to ban surrogacy contracts by statute, but allows the courts to nullify these contracts as contrary to public policy.26 Applying another statutory structure still, some states allow surrogacy, but prohibit consideration for surrogacy—though reimbursement of expenses is usually permissible.27 Six states—Kentucky, Louisiana, Nebraska, New York, North Carolina, and Washington—refuse to enforce surrogacy contracts involving compensation.28 Illinois is unique insofar as it permits a fee for service.29 Given that there is no unifying statutory or judicial approach to surrogacy contracts, there is certainly no uniformity in approaches to adjudicate disputes arising from these contracts.

C. Early Judicial Approaches to Surrogacy Disputes

When courts were first faced with surrogacy contract disputes, their outcomes were difficult to predict because the disputes were issues of first impression at a magnitude not usually seen: surrogacy contracts do not fit neatly into standard contract law regimes, nor do they fit cleanly into family

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29. See infra note 93 and accompanying text.

*In re Baby M* first brought attention to the legal difficulties with traditional surrogacy agreements. In 1985, William Stern, Mary Beth Whitehead, and Richard Whitehead entered into a contract, which provided that Whitehead would be inseminated with William Stern’s sperm, bring the child to term, and relinquish parental rights to the Stems, after which Elizabeth Stern (William Stern’s wife) would officially adopt the child. The artificial insemination was successful, and Whitehead gave birth to the baby girl in late March of 1986. Three days later, she gave the baby to the Stems. Whitehead then had second thoughts, and begged the Stems to take the child back. Four months later, the Stems regained custody of the baby girl by having the baby forcibly removed from the Whitehead’s control. The Stems subsequently brought a complaint seeking enforcement of the surrogacy contract. The trial court held the surrogacy contract was valid and enforceable. On appeal, the New Jersey Supreme Court held that the contract was invalid because it conflicted with the state laws and was against public policy insofar as it amounted to “baby-selling” in contravention to the adoption laws of New Jersey.

A second case that brought questions of gestational surrogacy contracts to the fore was the case of *Johnson v. Calvert*. The surrogate, Anna Johnson, contracted with Mark and Crispina Calvert to be implanted with an embryo comprised of the Calvert’s sperm and egg, bring the fetus to term, and relinquish the child to the Calverts in exchange for $10,000 and a $200,000 life insurance policy. After conception, the “relations deteriorated between the two sides.” The surrogate, Anna Johnson, threatened to keep the child unless the Calverts tendered the final payment early. In return, the Calverts sought a declaration that they were the parents of the child. The trial court ruled in the Calvert’s favor. On appeal, the Supreme Court of California looked to the intent of the parties in signing the contract, finding that “when the two means [gestation and genetics] do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.” Here, the Court found that the commissioning couple—the Calverts—was the legal parents of the child. Despite the fact that the court did not find surrogacy contracts to violate public policy, it also did not endorse them as California policy.

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31. *Id.*
33. *Id.*
34. *Id.* at 778.
35. *Id.* at 782.
Predictably, the wildly divergent outcomes of these cases have led people who wish to engage a surrogate to forum shop among surrogate-friendly states. Florida and California in particular have become hubs for the surrogacy market. Despite the shady legal status of surrogacy contracts in most jurisdictions, the desire to have biological children is a strong one and the surrogacy market is alive and well. Individuals or agencies that broker surrogacy arrangements are common and have existed since the beginning of the modern surrogacy era (roughly understood as beginning in the 1970s with advances in reproductive technologies).

Recent estimates put the cost of surrogacy, excluding medical costs for IVF and pregnancy, at $60,000 to $80,000. "A first time surrogate typically receives compensation of $25,000 for a single fetus, and $28,000+ for carrying more than one child." The outstanding $35,000 to $55,000 represents the cost of legal fees, surrogate background checks, and health insurance.

Noel Keane, a Michigan attorney, brokered the first surrogacy agreement in the United States. He arranged the births of over six hundred children (including the contract that led to the Baby M dispute). After Keane, surrogacy brokerage firms popped up across the country in jurisdictions that are surrogacy friendly as well as those that are not. For example, the New York area is a hub for fertility brokerage services despite the fact that New York has strict surrogacy laws. In New York, all surrogacy contracts (including altruistic surrogacy arrangements) are void and unenforceable. Parties to the contract are subject to a civil penalty up to $500, and parties who helped to arrange the contract may face a penalty of $10,000 and must disgorge any fees received in the brokering process. A second violation constitutes a felony.

Most reported cases addressing surrogacy sidestep the fundamental issue of enforceability of the contract, and instead address secondary questions including: whether the surrogacy arrangement violates "baby-selling" statutes; whether these statutes are constitutional; which party to the contract is entitled to custody of the future child; whether the gestational carrier (birth mother) or the genetic mother is the legal mother of the child; the effect of the contract on the right of the child to inherit. In general, most courts have not directly declared whether surrogacy contracts are valid contracts, preferring to punt this question to the legislatures and to the Academy.

36. Conklin, supra note 22, at 72 (citations omitted).
37. Id.
38. See, e.g., id. at 87.
39. Id.
40. Id.
41. Id. at 70.
42. Id. at 71.
43. See N.Y. DOM. REL. LAW § 122 (McKinney 2010).
44. Id § 123(2)(a)-(b).
45. Id.
46. 7 WILLISTON, supra note 1, § 16:22.
II. SURROGACY CONTRACTS ARE NOT UNCONSCIONABLE OR CONTRARY TO PUBLIC POLICY

A. Unconscionability Concerns Are Unfounded

A frequent refrain in the literature is that surrogacy contracts should not be enforced because they are per se unconscionable insofar as they amount to "baby-selling" or "reproductive slavery." These moralistic unconscionability arguments are weak at best as they misunderstand the doctrine of unconscionability. Unconscionability is a broad and poorly defined concept. Indeed, the UCC does not define "unconscionable" but instead "gives the courts broad latitude in determining, either on their own initiative or based on an assertion by a party, that a particular contract or clause was unconscionable as a matter of law at the time the agreement was made."

One of the oldest iterations of unconscionable agreements holds that an unconscionable agreement is one "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." This definition has led to two paths of unconscionability jurisprudence, with one focusing on inherent fairness of the outcome, and another focusing on inherent fairness of the process.

Courts have endorsed the outcome fairness view of unconscionability as recently as 2012, characterizing unconscionability as "directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-

47. See, e.g., George Annas, Surrogate Parenthood: Surrogacy = Baby Selling, 73 ABA JOURNAL 38 (1987). The broad idea that an individual cannot voluntarily contract oneself to slavery finds root in the work of John Stuart Mill and Jean-Jacques Rousseau. In On Slavery, Mill explains how slavery defeats the very justification underlying freedom of contract: [B]y selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. . . It is not freedom, to be allowed to alienate his freedom. JOHN STUART MILL, ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS, 99-100 (Mark Philp & Frederick Rosen eds., Oxford University Press 2015) (1859). Rousseau discusses the absurdity of contracts for slavery in Book I of Social Contract: "To say that a man gives himself gratuitously, is to say what is absurd and inconceivable; . . . Finally, it is an empty and contradictory convention that sets up, on the one side, absolute authority, and, on the other, unlimited obedience." JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT & DISCOURSES (G.D.H. Cole, trans. J.M. Dent & Sons, Ltd. 1920) (1792), http://www.gutenberg.org/files/46333/46333-h/46333-h.htm#CHAPTER_IV. These arguments about slavery broadly have been adopted by critics of surrogacy who argue that it is similarly inconceivable and contradictory for a woman to contract away her reproductive liberty by making binding decisions about her future reproductive choices at an earlier point in time. Proponents of this view argue that this constrains the very liberty that freedom of contract aims to protect; in agreeing to carry a child for another person, the woman constrains her future liberty to exercise her reproductive choices, such as having an abortion or keeping the child.

48. 8 WILLISTON, supra note 1, § 18:8.

fashioned bad bargain."\textsuperscript{50} For example, in a series of 2013 cases, West Virginia courts further endorsed this view, holding that a contract is unconscionable when it is one-sided or grossly imbalanced, and stating that a court may be justified in refusing to enforce such a contract as written.\textsuperscript{51}

In contract law, the also-prevalent procedural understanding of unconscionability doctrine is that the doctrine "allows courts to deny enforcement of a contract because of procedural abuses arising out of the contract's formation."\textsuperscript{52} An oft-quoted articulation of this view is that the doctrine of unconscionability is grounded in the equitable principle "that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other."\textsuperscript{53} On this view, unconscionability should be defined solely by reference to external factors that may prevent parties from making free choices.\textsuperscript{54}

Today most courts typically consider both aspects when determining whether a contract or clause is unconscionable. The "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."\textsuperscript{55} While unconscionability technically only applies to the Uniform Commercial Code ("UCC"), "courts have also recognized a broadly applicable common law public policy against agreements involving an unconscionable disparity in bargaining positions."\textsuperscript{56}

The commodification argument—a common objection to surrogacy contracts—does not fit into the doctrine of unconscionability, despite appealing to it for support. The commodification argument, broadly, contends that by contracting around reproductive services, society impermissibly treats women and children as commodities.\textsuperscript{57} Proponents of this argument appeal to something akin to human dignity or an inviolable and sacred aspect of reproduction,\textsuperscript{58} whereas the doctrine of unconscionability focuses on power differentials, bargaining power, and fairness. Though individuals may perceive commercial surrogacy as violating human dignity, this alone is an insufficient reason to prohibit the practice. Indeed, many individuals are uncomfortable

\textsuperscript{50} Schnuerle v. Insight Communications, Co., 376 S.W.3d 561, 575 (Ky. 2012).
\textsuperscript{52} Markwed excavating, Inc. v. city of Mandan, 791 N.W.2d 22, 30 (N.D. 2010) (quoting Strand v. U.S. Bank Nat'l Ass'n, 693 N.W.2d 918, 921 (N.D. 2005)).
\textsuperscript{53} United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting).
\textsuperscript{55} 8 WILLISTON, supra note 1, § 18:9 (citing Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965)).
\textsuperscript{56} Id. at § 18:5.
\textsuperscript{57} See, e.g., Elizabeth S. Anderson, Is Women's Labor a Commodity?, 19 Phil. & Pub. Aff. 71 (1990); Radin, supra note 11.
with abortion and assisted dying for similar reasons,\textsuperscript{59} yet our pluralistic society recognizes that these are decisions for individuals to make.\textsuperscript{60} Further, the realities of surrogacy today are such that these arrangements are occurring in an environment of legal uncertainty, which puts all parties to the contract at legal risk.

In related areas of law arguments from unconscionability have been rejected. For example, premarital agreements are also contracts about family structure, yet these do not face the same critiques despite power differentials existing between spouses.\textsuperscript{61} As Deborah Forman notes, “[t]he Uniform Premarital Agreement Act, adopted by many states, provides that a premarital agreement is not unconscionable unless it was involuntary or would leave an ex-spouse on public assistance if it were enforced.”\textsuperscript{62} It is clear, then, that another common argument against surrogacy—the coercion argument—also does not fit tightly into unconscionability doctrine.

Unconscionability is not a sufficient justification for blanket unenforceability of surrogacy contracts. Surrogacy contracts are not inherently unconscionable; both parties negotiate the terms of the contract and, given the biological realities of pregnancy, are aware of the likely outcomes. Indeed, the potential breaches discussed in the introduction are examples of “surprising” or “extraordinary” outcomes, but these are not outcomes of the terms of the contract—as breaches, they are by definition outside the contract.

Further, proponents of blanket unconscionability for surrogacy contracts fail to recognize that the power differentials inherent in surrogacy contract change over time, and so enforceability protects both parties to the contract.\textsuperscript{63} At the outset of negotiation, the parents may be in the power position. The intended parents can “shop” between potential surrogates and set a price they


\textsuperscript{60} Abortion and assisted dying are individual decisions and not contracts, so the human dignity concerns manifest as a slightly different legal argument. There, the argument is that because these decisions violate human dignity, the state should prohibit individuals from exercising their freedom of choice and criminalize or limit access to these services. In the case of surrogacy contracts, the argument is that the contracts violate human dignity and thus courts should find these contracts unconscionable. In both cases, however, the argument in the abstract is that there is an affirmative action that violates human dignity, and the state, in the way most available to it, should prohibit individuals from making these decisions for themselves. However, our pluralistic society either has already concluded that these are personal choices that ought to be left up to individuals (in the case of abortion) or is moving toward that view (in the case of assisted suicide). Because there are reasonable disagreements about morality, that one group of people finds an act to violate human dignity is an insufficient reason for denying a second group of people from acting.

\textsuperscript{61} Some forms of marital contracts do, however, face being voided as against public policy (for example, a contract that would change some essential incident of the marital relationship in a way detrimental to the public interest of the institution of marriage). See \textit{Restatement (Second) of Contracts} § 190 (Am. Law Inst. 1981) (“Promise Detrimental to the Marital Relationship”).


deem appropriate, offering more or less depending on a multitude of factors including their desperation for a child and the “desirability” of the surrogate, among others. This power structure is commonly the focus of discussions of unfair bargaining and thus per se unconscionability. This argument focuses on exploitation; given that money can be a strong motivator to act when one might otherwise not, many vulnerable and poor women of childbearing age will be induced to act as a surrogate as a result of this motivation. The underlying concern is that the power structures inherent in the intended parent-surrogate negotiation process allow the intended parents to exploit the surrogate by offering enough money to compel the surrogate to sign a contract that is clearly not in her best interest.4

The general structure of this exploitation argument is common across bioethics literature, and is most prominent in the context of organ donation. This exploitation argument might hold sway in the surrogacy context if power differentials are only considered ex ante. However, the surrogacy context is fundamentally different, and so it is misguided to focus solely on the contractual negotiations.

Generally, courts look to only to the power differentials that exist at the contract negotiation stage in assessing the contract because of a concern that looking at other points of the contract may allow one party to extort the other party at a later point in time after negotiations are complete. That is, courts are concerned that looking to post-contractual power differentials will destabilize contracts, undermine freedom of contract, and allow a party to claim more than what both parties agreed to during the negotiation stage. Accordingly, courts look to the power differentials that exist when the contract was formed to determine whether the contract in question was exploitative.5 In the surrogacy context, though, the change in power differentials is significant and always present such that the power differentials that exist at the time of formation are not determinative of whether the contract is exploitative.

Surrogacy contracts are unique in that the aforementioned “flip” in power differentials is always present in surrogacy contracts, and accordingly is foreseeable for every contract. Foreseeability of this switch in the power position mitigates against the general concern of courts that one party may be extorting the other party after negotiations are complete. Both parties entering into the contract know that their power position will flip, and therefore account

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64. The argument in the context of organ donation is that vulnerable and/or poor people will act against their own best interests and sell their organs for a short-term monetary gain. See, e.g., Kate Greasley, A Legal Market in Organs: The Problem Of Exploitation, 40 J. MED. ETHICS 51 (2012).
for this future change when negotiating the terms of the contract. Looking only to the power differentials as they exist at the contract formation stage when reviewing a contract for unconscionability misses this unique feature of surrogacy contracts.

Surrogacy itself is at least a nine-month process after the initial negotiation, and the changing power structures must be considered as well. Once the intended parents and surrogate are deep into the negotiation process, the surrogate can hold an extreme position of power. First, if the intended parent is turning to surrogacy as a last resort, the surrogate can demand more consideration for her services. Not only does the surrogate have legal rights, but once she starts to perform, she is carrying the future child. This creates a situation in which the power positions have flipped: the surrogate now holds most of the power. At an extreme, the intended parents may be victims of extortion, or, more likely, will feel a personal compulsion to acquiesce to the surrogate’s every whim for fear of surrogate breach.

Given that these potential inequities affect and are foreseeable to both parties to the contract, the traditional concern of exploitation is less convincing than it might be in non-surrogacy contexts. Exploitation of surrogates is, of course, a valid concern—and in some cases the surrogate may indeed be exploited—but this concern is insufficient to justify blanket unenforceability of surrogacy contracts. Instead, surrogates and intended parents should be allowed to negotiate the terms of their unique contract. This deliberative process allows each party to consider the potential risk and benefit of the bargain. A per se prohibition on enforcing surrogacy contracts is paternalistic and fails to respond to exploitation concerns because any exploitation is necessarily fact- and situation-specific. On this understanding, surrogacy contracts are freedom enhancing, and not freedom limiting. Specifically, surrogacy contracts are freedom enhancing insofar as they enable the parties to negotiate the terms by which they exercise their reproductive choices, freedoms, and goals. Honoring surrogacy contracts enhances the reproductive freedom of woman who wish to serve as surrogates, and allows these women to negotiate the terms by which they choose to use their reproductive capabilities to serve as a surrogate.

66. See, e.g., Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (in which the surrogate demanded the final payment before schedule and threatened not to relinquish her rights to the Calverts if they failed to comply).

67. The feminist literature on surrogacy implicitly recognizes this changing power differential, which is, in part, why there is no uniform feminist view of surrogacy. See, e.g., SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 160-62 (2007) (discussing the disagreement among California women’s rights group responses to proposed surrogacy legislation in the 1980s).

68. I.e. surrogacy contracts limit freedom insofar as they require parties to contract their choices around fundamental rights.
Furthermore, per se unconscionability fails to recognize differences among the women who serve as surrogates. Blanket unenforceability is paternalistic insofar as it is based on assumptions about potential surrogates, specifically that they are poor, vulnerable, and unable to make informed decisions in their best interest.

In reality, the motivations and demographics of surrogates are more diverse. “Contrary to popular beliefs about money as a prime motive, surrogate mothers overwhelmingly report that they choose to bear children for others primarily out of altruistic concerns.”69 Other motivations to act as a surrogate include an enjoyment of pregnancy, a sense of achievement, and of course, financial gains.70 Additionally “most surrogate mothers are in their twenties or thirties, White, Christian, married, and have children of their own . . . incomes are most often modest (as opposed to low) and they are from working class backgrounds.”71 Collecting data in the surrogacy context is challenging for both practical and ethical reasons and so the sample sizes of these studies tend to be small. As a result, it is difficult to determine with certainty what proportion of surrogates fit the aforementioned demographic. Despite this limitation, it is clear that all surrogates cannot be reduced to the generalization of poor, vulnerable, uneducated, ethnic minorities.

B. Surrogacy Contracts Do Not Violate “Public Policy”

A tangential but recurrent argument made by both surrogacy scholars and the courts is that surrogacy contracts are against public policy and thus void. The basic argument is that public policy may categorically prohibit certain types of agreements, despite the fact that all parties have agreed to the terms of the agreement. It is in the interest of public policy to uphold and respect human dignity, so contracts for goods and services that degrade human dignity are legally void.72 Prostitution, or contracts for sexual services, is a famous example of such a transaction facing this criticism.73 Proponents of this view in

70. Id.
71. Id. at 31.
73. Melissa Farley, a research and clinical psychologist, is a leading advocate of the view that prostitution is by definition a form of exploitation and abuse of women, regardless of the context, structure of the prostitution arrangement, or existence of violence. In an affidavit from the leading Canadian case on the constitutionality on three criminal prohibitions on prostitution, Farley states that whether legal or illegal, “[p]rostitution is better understood as domestic violence than as a job.” Farley Aff. ¶ 16, Apr. 2008, Bedford v. Att’y Gen. of Canada, 2010 ONSC 5712 (Can.) (07-CV-329807PD1). Farley, Catharine MacKinnon, and Wendy Shalit argue for this view in an episode of IntelligenceSquared titled “It’s Wrong to Pay for Sex.” MacKinnon analogizes prostitution to slavery, noting that:
the surrogacy context specifically argue that surrogacy contracts are against public policy because under adoption law, “payment for consent to adoption of a child [is] illegal” and so surrogacy should be illegal as well.\textsuperscript{74}

This reasoning was adopted early on by the Supreme Court of New Jersey in the \textit{Matter of Baby M}. The court held that surrogacy contracts are void because they “[violate] the policy of this State” because the harms and evils that justify the prohibition of payments for adoptions also exist within the context of surrogacy arrangements.\textsuperscript{75} The court found that the surrogacy contract amounted to a “sale of a child, or, at the very least, the sale of a mother’s right to her child, the only mitigating factor being that one of the purchasers is the father.”\textsuperscript{76}

This analogy between surrogacy and adoption falls apart when surrogacy contracts are seen as service contracts because the surrogate is compensated for the services of carrying the child and not for relinquishing parental rights. Indeed, the court in \textit{Johnson v. Calvert} adopted a similar logic, finding that surrogacy and adoption are fundamentally different, despite the fact that both surrogacy and adoption have the potential to allow infertile couples have a family.\textsuperscript{77}

\section*{III. Courts Have Begun to Address Assisted Reproduction in a Freedom of Contract Framework}

Since the infamous \textit{Baby M} and \textit{Johnson v. Calvert} cases, courts and regulators have been hesitant to touch assisted reproduction,\textsuperscript{78} effectively resulting in a legal vacuum around the issue, with some exceptions. Two recent

\begin{itemize}
  \item In prostitution, women have sex with men they would otherwise never have sex with. The money thus acts as a form of force, not as a measure of consent. It acts like physical force does in rape. \ldots And then she is stigmatized and deprived for dignity by society, and criminalized by the legal system. \ldots And what he is buying is not only that chunk of her humanity called self-respect.


  \item \textit{In re Baby M.}, 537 A.2d 1227, 1247 (1988).

  \item \textit{Id.} at 1248.

  \item Gordon, \textit{supra} note 74, at 198.

  \item See, e.g., Malcolm L. Goggin et al., \textit{The Comparative Policy Design Perspective}, in \textit{COMPARATIVE BIOMEDICAL POLICY: GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGIES} I (Ivar Bleiklie et al. eds, 2004).
\end{itemize}
cases, both out of California (one in state court and one in a federal district court), suggest a shift in some courts’ willingness to adjudicate disputes around assisted reproduction. Notably, both courts are most comfortable addressing these issues in the framework of freedom of contract.

The Northern District of California’s decision in Kamakahi v. American Society for Reproductive Medicine is one example of the changing view of the courts. In 2000, the Defendant, American Society for Reproductive Medicine (“ASRM”) created rules “setting forth the maximum compensation its members should pay for egg donor services . . . and Defendant the Society for Assisted Reproductive Technology (“SART”) adopted Maximum Price Rules.”

Like the surrogacy market, the egg donor market is largely self-regulated. There are no federal laws or regulations governing economic compensation for egg donation; only two states—Louisiana and Indiana—have laws governing egg donor compensation. Accordingly, a majority of American fertility clinics follow the ASRM guidelines. The rationale behind the guidelines is to avoid creating a structure that incentivizes vulnerable (read: young and poor) women to donate their eggs without considering the risks associated with the procedure.

In reality, however, the ASRM guidelines strengthen the power of fertility clinics and surrogacy matching services. The guidelines, which establish payment ceilings for egg donors, allow these clinics and services to keep a larger proportion of the money brought in by the women seeking the fertility treatment. Payment to egg donors is meant to compensate the extreme physical and psychological toll of the process: hormone injections to stimulate egg production, frequent medical tests and doctor visits to monitor the eggs, and minor surgery to retrieve or “harvest” the eggs.

In 2011, lead plaintiffs—women who donated eggs—filed a class action complaint alleging antitrust violations, specifically alleging a horizontal price-fixing agreement among purchasers of human egg donor services. The

80. Complaint at 2, Kamakahi, 305 F.R.D. 164 (No. 11-cv-01781).
81. LA REV. STAT. § 9:122 (West 2011) (“The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited.”)
82. IND. CODE ANN. § 35-46-5-3(a)-(c) (West 2015) (“A person who knowingly or intentionally purchases or sells a human ovum . . . commits unlawful transfer of a human organism, a Level 5 felony. . . . This section does not apply to . . . [(the transfer to or receipt by either a woman donor of an ovum or a qualified third party of an amount for:] (A) earnings lost due to absence from employment; (B) travel expenses; (C) hospital expenses; (D) medical expenses; and (E) recovery time in an amount not to exceed four thousand dollars.”).
85. See Paying for Egg Donations, supra note 83.
plaintiffs allege that the $5,000 and $10,000 limits constitute an unlawful horizontal price-fixing agreement, resulting in artificially low compensation for egg donors. The complaint withstood a motion to dismiss. The judge granted the plaintiffs' motion for class certification but limited the class to women who donated eggs since April 2007 at any clinic that was, at the time of donation, a member of SART or followed the price rules set by the society and the ASRM. The decision to certify the class demonstrates that some courts are willing to touch the broader issue of contracting around assisted reproduction, and perhaps more importantly, are comfortable considering questions of assisted reproduction in a freedom of contract framework.

A second case came out of the Superior Court of the State of California in and for the county of San Francisco. The dispute in this case is more akin to the examples of contractual disputes described in the introduction: a couple, Findley and Lee, froze five embryos and later disagreed on the fate of these embryos. After a divorce and a bout with cancer, Lee—the ex-wife—sought the right to use these embryos for a viable pregnancy (as they were her only chance of having biological children), despite a contractual provision that in the event of divorce, the embryos would be thawed and discarded.

In this case, the Superior Court held "that the Consent & Agreement Lee and Findley signed prior to their divorce controls and the intent of the parties at the time, as evidenced by that document, must be given conclusive effect."

The court emphasized that freedom of contract was the proper framework to adjudicate this dispute, despite the wrenching nature of such disputes:

The policy best suited to ensuring that these disputes are resolving in a clear-eyed manner—unswayed by the turmoil, emotion, and accusations that attend to contested proceedings in family court—is to give effect to the intentions of the parties at the time of the decision at issue. If there is one thing which, more than another, public policy requires it is that men and women of full age and competent understanding shall have the utmost liberty of contract, and that their contracts, when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice.
IV. COURTS SHOULD RESPECT FREEDOM OF CONTRACT IN THE SURROGACY CONTEXT

There is an unacceptable level of uncertainty as to the enforceability of surrogacy contracts in certain breach scenarios, even in states with comparatively high levels of legal certainty around surrogacy contracts. At the extreme, in a state with no regulation and limited or no precedent, this absence of law is no assurance that the contract will be upheld in any meaningful way in the event of a dispute. Further, the patchwork nature across states combined with the resulting forum shopping creates additional legal concerns of a more procedural nature.91

To a certain extent, the approach to breaches resulting in parentage and custody disputes is fairly settled. After Johnson v. Calvert, California looks to the intention of the parties at the outset when there is a dispute over custody and parentage. Other states have followed this lead, and the ABA Model Act adopts a similar approach.92

Despite this, legal uncertainty exists even in states with more robust surrogacy regimes. For example, the Illinois Gestational Surrogacy Act ("GSA")93 sets forth certain requirements necessary for a valid surrogacy contract: a written contract, two adult witnesses, and separate legal representation for the intended parents and the surrogate. The GSA provides ample guidance in custody disputes, but is still insufficient in the tragic breach situations discussed in the introduction.

The GSA requirements for a valid surrogacy contract represent the bare minimum; they do not ensure that the resulting contract addresses the tragic breaches outlined in the introduction. A written contract negotiated with separate legal representation for the intended parents and the surrogate, and witnessed by two adult witnesses does not ensure that the contract contemplates the appropriate result when the surrogate refuses to terminate the pregnancy at the intended parents request, when the surrogate unilaterally terminates without the consent of the intended parents, or when the surrogate breaches behavioral terms and the resulting child is born with serious physical or behavioral problems. Though contracts that comply with the GSA may contemplate the potential for these tragic breaches, the requirements of the GSA do not ensure that the resulting contracts cover these tragic breaches.

91. For an anecdotal discussion of the procedural concerns accompanying surrogacy agreements that straddle state lines, see Peter Nicolas, Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy, 89 WASH. L. REV. 1235 (2014).
93. 750 ILL. COMP. STAT. ANN. 47/25 (West 2016).
These legal uncertainties and patchwork laws are not just theoretical curiosities; the vastly divergent legal treatment of surrogacy can result in harrowing cross-border ordeals. Though this dispute was never litigated, the breakdown of a surrogacy agreement between Crystal Kelley, a surrogate, and the intended parents illustrates the absurd consequences of this legal uncertainty. In 2011, Crystal Kelley of Vernon, Connecticut met the couple for whom she would serve as a gestational surrogate.94 The intended parents had two remaining embryos comprised of the husband’s sperm and the egg of an anonymous donor, and hoped to have another child through a surrogate before the embryos “expired.”95 After meeting with the intended parents and their children, Kelley contacted her surrogacy agent to start the surrogacy process.96 Kelley reports that the original contract included a provision that allowed the intended parents to ask for an abortion at any time for any reason.97 Kelley was uncomfortable with this, and the parties compromised on a clause that allowed the intended parents to request an abortion only if a 3D ultrasound detected fetal abnormalities.98

At the start, the surrogacy arrangement went smoothly: On October 8, 2011 the doctors implanted the embryos, Kelley became pregnant quickly, and the relationship between Kelley and the intended mother was friendly and supportive.99 At a follow-up ultrasound, the parties learned that the fetus had a possible heart defect; further ultrasounds showed additional birth defects such as a cleft lip and likely stomach problems.100 The intended parents discussed their wishes, and contacted Kelley letting her know that they did not want to continue with the pregnancy. Kelley was uncomfortable with terminating the pregnancy without further medical testing; her own daughter had had heart problems, and recovered well from surgery, and she wanted to ensure the fetus had a similar chance.101 The parents offered Kelley an additional $10,000 to abort the fetus (in addition to the compensation already bargained for), and Kelley refused.102 At this point, the congenial relationship broke down: after this, all communication between Kelley and the intended parents was conducted through a lawyer.103


95. Id.

96. Id.

97. Id.

98. Id.


100. McCane, supra note 99.

101. Id.

102. Id.

103. Keating, supra note 94.
Kelley decided to continue the pregnancy, but under Connecticut state law she would have no parental rights and the child would most likely enter the foster system.\textsuperscript{104} The patchwork nature of state surrogacy laws led Kelley to move to Michigan, because she believed the Michigan law to be more favorable to her interest of putting the child up for adoption.\textsuperscript{105} The intended father relinquished his paternal rights, but asked that he and his wife keep in touch with the adoptive family about the child.\textsuperscript{106} Though the case of Crystal Kelley and Baby S was never adjudicated in court, it presents an example of both a tragic breach, and the ways in which the current uncertainties can exacerbate the fallout. Greater legal certainty is important, and one major way to increase certainty is for courts to honor well-written and well-negotiated surrogacy contracts. The specifics of a well-written and well-negotiated surrogacy contract, and how they avoid tragic breaches, are discussed below.

\textbf{A. The Freedom of Contract Framework is Freedom Enhancing in Surrogacy Contexts}

Freedom of contract is based on the principle of autonomy fundamental to our society. Courts must act with caution when limiting autonomy, for “conscionable freedom of contract has historically been recognized under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.”\textsuperscript{107} Contracts in general are freedom enhancing insofar as they allow parties to contract around the default rules of a given jurisdiction to achieve mutually desirable outcomes. The freedom to change one’s mind comes at the expense of another’s freedom to rely on promised outcome or option. Without contract, the parties would be subject to the default rules of a jurisdiction or a court determination that might not provide an outcome the parties both desire. Both of these results (default rules and court determinations) “circumscribe, rather than enhance, the parties’ freedom. . . . Without this assurance, some individuals might choose not to participate and, hence, enjoy less procreative freedom than they would have otherwise. Others

\textsuperscript{104} Id.; see also Raftopol v. Ramey, 299 Conn. 681, 698 (2011) (holding that Connecticut law “allows an intended parent who is a party to a valid gestational surrogacy agreement to become a parent without first adopting the children”).


\textsuperscript{106} Keating, supra note 94.

\textsuperscript{107} Austin Caster, 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, 10 CONN. PUB. INT. L.J. 477, 507 (2011); see also id. (“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. Later decisions limited Lochner's absolute right to freedom of contract where the terms were unconscionable or the contract became tools to the detriment of fellow man, but Lochner still has not been explicitly overturned.”).
will proceed but end up subject to an outcome at odds with their expectations or desires."

In an area as deeply personal as reproductive choice, having the freedom to make decisions and rely on other people is of paramount importance. Decisions to act as or hire a surrogate have sweeping implications ranging from health risks to astronomic financial costs. The current legal uncertainty around surrogacy contracts places the parties to these agreements in a freedom-limiting limbo; the parties may be subject to the default rules or court determinations contrary to both parties’ interests and desires. Recognizing freedom of contract for surrogacy agreements serves only to enhance the freedom of all parties to these contracts.

B. Potential Remedies for Tragic Breaches

Assuming a court applies a freedom of contract framework to surrogacy contracts and finds the contracts valid and enforceable, the very difficult task of determining appropriate remedies for tragic breaches remains. Some have suggested that the area of assisted reproduction is an ideal area for specific performance.\(^{109}\) As Deborah Forman notes:

> The very factor that might lead us instinctively to reject the option of specific performance—that the embryos are unique to both parties—in fact provides the basis for it. Specific performance is an equitable remedy that is typically available when monetary damages cannot adequately compensate the non-breaching party, such as when unique property is at issue.\(^{110}\)

Notably, Forman focuses on disputes over embryos, and not tragic breaches of surrogacy contracts.

Though both embryo disputes and surrogacy disputes both implicate reproductive technologies, the nature of the disputed matter is very different. First, disagreements involving embryos do not—at the time of the dispute—involve a human life, whereas surrogacy disputes can involve children.\(^{111}\) Second, gestational surrogacy arrangements involve more parties than typical

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111. See, e.g., In re Baby M., 537 A.2d 1227 (N.J. 1988) (surrogate sought to keep the child resulting from the surrogacy agreement and refused to relinquish rights to the intended parents); In re F.T.R., 833 N.W.2d 634 (Wis. 2013) (biological father filed a motion seeking enforcement of a surrogacy agreement, specifically seeking primary placement of the resulting child with the biological father); In re C.K.G., 173 S.W.3d 714 (Tenn. 2005) (gestational surrogate filed a parentage action against the biological father seeking custody of the resulting triplet and child support; the court determined that the gestational surrogate was the legal mother and gave her joint custody).
disputes over embryo disposition. Usually there are at least three parties (the intended parents and the surrogate) but there can be more (an egg donor and/or sperm donor separate from the intended parents or surrogate).

Specific performance—though likely preferable to the non-breaching party—is unavailable because courts are unlikely to compel people to terminate a pregnancy or continue a pregnancy against their wishes. In the event that the surrogate refuses to terminate the pregnancy at the parents’ wishes, a court would likely seek an appropriate alternative to specific performance.

It is apparent that these tragic breaches render traditional contractual remedies unavailable or unappealing and messy for a court to consider. Honoring liquidated damages in surrogacy contracts is an alternative approach to damages that removes responsibility from the courts to explicitly determine the monetary value of human life or the service of pregnancy, as well as make determinations about whether a fetus is a human being.

C. Liquidated Damages

Liquidated damages clauses allow the parties to determine damages, in advance, “for breach of the contract in situations where it would be difficult to ascertain or prove actual damages.” Liquidated damages are perfectly suited to the surrogacy context; courts are hesitant to unilaterally ascertain or determine damages for tragic breaches, and the deeply personal nature of these contractual relationships can result in wildly different damage to the party in each breach. Currently,

American case law, greatly influenced by UCC and the Restatements, has formulated two conditions which must hold for the stipulated damages to be enforceable: (a) The stipulated amount must be reasonable (i.e. not grossly disproportionate) in light of the harm anticipated by the parties or the actual harm caused by the breach. . . . (b) It is difficult or impossible to measure—and thus prove—the presumable loss (due to subjective valuation, uncertainty, difficulty of producing proof of damages, or any other measurement problems).

It is imperative for lawyers representing clients in surrogacy agreements to include negotiations of liquidated damages provisions for specific breach scenarios. Parties ought to negotiate a clause providing for compensation in the case of a breach or of defective performance. This liquidated damages provision can be a formula, a fee schedule, required mediation or arbitration, or any other method to determine damages.

112. Forman, supra note 110, at 442.

Negotiations of liquidated damages provisions in surrogacy contracts are and ought to be fact and context specific; they should reflect the individual interests and values of the parties to the contracts. However, there are some topics that ought to be considered when approaching the negotiation of liquidated damages provisions. A lawyer advising a party to a surrogacy negotiation should ensure that their client—whether the client is the intended parent or the surrogate—as seriously considered their view on issues such as abortion in the case of selective reduction or genetic defects, among others, for example. Armed with this information, a lawyer can better advise their client on the specific terms of the contract, as well as guide the client's thinking about appropriate liquidated damages in the event of a breach.

For example, if the intended parents are strongly averse to raising a child with genetic defects, and the surrogate is strongly averse to abortion in the case of genetic defects, the two parties can approach the negotiations armed with this important information. It may be that both parties feel the mismatch and potential for a breach are too great to continue with the negotiations, or, if the parties are more risk tolerant, they can negotiate liquidated damages in such a way that adequately compensates for a potential breach. Experienced surrogacy lawyers can guide their clients through these difficult personal and bioethical questions and help the client assess the value of a breach to them. What these provisions would look like specifically depends on the specific factual context of the parties and the strength of their views, among other things, and thus cannot be laid out in great detail. The independent value of this deliberation is further discussed in Part V below.

Courts should enforce fairly negotiated liquidated damages provisions, despite the American discomfort with this type of provision. This discomfort is likely a fear of introducing punitive damages "through the back door." In contrast, in civil law jurisdictions, liquidated damages are readily enforced, as long as they are not obviously extravagant.

Liquidated damages clauses are subject to judicial scrutiny. Generally, American courts use either a two- or three-prong test to determine whether a clause is compensatory or punitive. On the basic two-prong test, particular provisions are valid and enforceable where: "[1] the actual damages resulting from a breach are difficult or impossible to ascertain, and [2] the damages agreed upon has a reasonable relationship to probable losses." In jurisdictions that employ the three-prong test, the court also looks to the intention of the parties when crafting the provisions.

114. Id. at 383.
115. Id.
116. 24 WILLISTON, supra note 1, § 65:3.
117. Id.
The difficulty in distinguishing compensatory damages from punitive damages is acute in the surrogacy context. The absence of clear remedies for tragic breaches is the motivator for liquidated damages in the first place, and this difficulty combined with the exorbitant cost of surrogacy may result in large monetary damages. There is a risk of circular reasoning here: appropriate liquidated damages are determined by reference to “standard” damages. Since there are no established damages for these breaches, liquidated damages will either be presumed punitive, or enforced without scrutiny.

Though a challenge, it is not insurmountable. The “fundamental basis of the distinction between a penalty and a stipulated damages provision is generally accepted, and usually said to involve, at least in the classical view, the intent of the parties in agreeing to the provision.” In a fairly negotiated surrogacy contract with well-defined liquidated damages provisions, the intent of the parties is easily discernable, and the damages serve a clearly compensatory purpose. In the surrogacy context stipulated damages are a more accurate estimation of loss. “The parties know better than anyone else their subjective valuations of goods and performances and their stipulations serve their idiosyncratic values.”

Returning to the facts of the Kelley scenario discussed above, which is strikingly similar to the first example of a tragic breach, it is clear that there was a breakdown between the parties as to the value of what was at stake for both parties. When the intended parents offered the gestational surrogate an additional $10,000 if she were to abort, they were either guessing at the surrogate’s likely valuation of aborting the fetus, or making a statement about the value they placed on the breach, or both. Had the parties discussed the liquidated damages for a breach resulting from this sort of disagreement, the communication breakdown, and potentially the dispute in the first place, could have been avoided. In that scenario, Kelley was uncomfortable with the initial abortion provision, and the compromise provision left in turned out to be insufficient as well. If the parties had negotiated not just the provision itself, but the damages in the event of a breach of this provision, all parties would have gone in informed, and there would have been a process to follow in the event of a disagreement.

D. This Approach Allows Courts to Avoid Wading into Uncomfortable Territory

Courts are generally loathe to enforce specific performance in service contracts. These arguments are even more compelling in the surrogacy context. Surrogacy is much more intimate “service work” than the service work

118. Id.
119. Hatzis, supra note 113, at 390 (citations omitted).
contemplated in the aforementioned cases. This discomfort is one potential reason that the courts have, with some exceptions, avoided engaging in surrogacy disputes.

Enforcing fairly negotiated liquidated damages provisions helps in three ways. First, enforcement facilitates a more accurate calculation of risks by eliminating uncertainty. 120 Second, it helps parties plan future surrogacy contracts. 121 Third, it reduces transaction costs in the event of disputes (particularly litigation costs). 122 This third benefit should not be overlooked: surrogacy is an expensive undertaking for all parties, and any decrease in overall cost is beneficial.

V. EX ANTE DISCUSSION AMONG PARTIES TO THE CONTRACT OF “TRAGIC BREACHES” AVOIDS BREACHES

One important feature of liquidated damages provisions is the related requirement to discuss tragic breaches and corresponding valuation of the loss with all parties to the contract. This discussion leads to a better understanding of the realities of the contract. When parties must seriously consider the possible breaches and available remedies (if any), they will likely be more discerning about whom they contract with. The resulting fully executed contracts are likely to be among trusting parties who have every intention of carrying out their part of the contract, reducing the risk of tragic breaches in the first place.

The success of this counterintuitive approach to appropriate remedies for breaches of surrogacy contracts is most apparent in Canada. Surrogacy is federally regulated in Canada under the Assisted Human Reproduction Act (“AHRA”). 123 The AHRA prohibits compensated surrogacy countrywide, but allows each province to determine whether altruistic surrogacy is permissible. 124 Section 6 of the AHRA reads in relevant part:

[N]o person shall: pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid; accept consideration for arranging the services of the surrogate mother, offer to make such an arrangement for consideration or advertise the arranging of such services. . . . [these prohibitions] do not affect the validity under provincial law of any agreement under which a person agrees to be a surrogate mother.

120. Id. at 391.
121. Id.
122. Id.
124. AHRA s. 6(1)-6(5).
Altruistic surrogacy permits the intended parents to reimburse a surrogate’s expenses. Accordingly, altruistic surrogacy is permissible in the majority of Canadian provinces and territories.125

Despite the federal prohibition on compensated surrogacy, surrogacy contracts are abundant in jurisdictions that permit altruistic surrogacy. These contracts include provisions about custody of the child and the plan for a declaration of parentage; appropriate expenses to be reimbursed and a fee schedule; permissible and prohibited behavior during pregnancy; access to otherwise-confidential health care information; arbitration, mediation, and liquidated damages.126 The proliferation of surrogacy contracts (and dedicated “fertility lawyers”) in Canada is an interesting phenomenon because the legal status of the contracts at the heart of this niche is unclear. In Ontario, for example, it is clear that the surrogacy relationship is legal, but the legal status of the surrogacy contracts is undetermined.127

This legal uncertainty incentivizes lawyers to comprehensively discuss potential breaches because there is no guarantee that a court would adjudicate a dispute on the contract or even favorably to the client. As a result, initial meetings with clients can be over ninety minutes, and often discuss all contingencies of pursuing a surrogacy relationship and appropriate remedies.128

Another unusual feature of surrogacy agreements in Ontario is the insistence by both fertility clinics and lawyers that the surrogate, her partner, and the intended parents to undergo a psychological assessment before entering into a contract.129 Indeed, many fertility clinics have agreements with social workers or other therapists who specialize in fertility broadly.130 Here, the legal certainty about the relationship but not the contract creates an environment focused on preempting tragic breaches—and thus far seems to have been successful.


126. Telephone Interview with Lisa Feldstein, Principal Lawyer, Lisa Feldstein Law Office (Nov. 28, 2015).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*
VI. LIMITATIONS

A. Many Surrogates Will Be Judgment Proof

It is unusual for wealthy women to act as surrogates, and accordingly there are concerns that the surrogate will be judgment proof—even with liquidated damage provisions negotiated ex ante. Ideally, a well-negotiated contract will address this concern in one of two ways. First, the surrogate and intended parents can have an honest conversation when negotiating the liquidated damages provision about what amount would be feasible. Second, the contract might stipulate that in the event of a breach or pending breach the parties to the contract must go to arbitration or mediation. This second option is common in Canadian surrogacy contracts where the validity and enforceability of monetary liquidated damages provisions is unclear.

B. Is Surrogacy a Fundamental Right? The Constitutional Paradox

Any discussion of surrogacy contracts exists concurrently with discussions of constitutional rights implicated by the surrogacy process. Is there a fundamental right to “bear and beget children”? Is there a fundamental right to assisted reproduction generally? A right to hire a surrogate? Pay an egg donor? Is there a right to publicly funded IVF? How does the established (but constantly challenged) fundamental right to an abortion weigh against any fundamental right to “bear and beget children”? Though a multitude of academic articles address these (and tangential) questions, there is no conclusive jurisprudence on this point. While an in-depth analysis of these difficult questions of constitutional law and constitutional interpretation are outside the scope of this paper, it is important to flag briefly these competing arguments.

The potential breach scenarios explained in the introduction implicate an established substantive due process fundamental right to an abortion as well as the potential fundamental right to “bear or beget a child.” These rights run up against one another most clearly in the event of a surrogate’s unilateral breach by terminating the pregnancy. Clearly, the surrogate has an established right to an abortion. As such, specific performance is not an available remedy for this type of breach.

However, in the event that a court finds the language of Eisenstadt v. Baird compelling, thus establishing a fundamental right to procreate, this right to an abortion runs up against another fundamental right protected by the Fourteenth

133. This remedy is undesirable even in the absence of a fundamental right to an abortion.
Amendment to the U.S. Constitution. It is unclear how a court would balance these two fundamental rights against one another, but it is highly unlikely that specific performance would be an available remedy even in this scenario. For the moment, this clash of fundamental rights is purely theoretical: The United States Supreme Court has not ruled on the potential right to procreate hinted at in *Eisenstadt*. Notably, the courts that have addressed disputes around assisted reproduction have avoided the constitutional questions, and indeed, oftentimes the parties do not raise constitutional issues at all.

An additional question remains under the equal protection clause: Given that men are allowed to contract their reproductive capabilities (sperm donation), do restrictions on women contracting their reproductive capabilities (either egg donation or surrogacy) violate the Equal Protection Clause of the United States Constitution? This is an important legal project—but one that is outside the scope of this Note.

CONCLUSION

In Part I, I surveyed the realities of surrogacy in the United States, and showed that there is a pressing need for legal certainty around surrogacy contracts. In Part II, I considered the use of the common arguments against the enforceability of surrogacy contracts and found these arguments were not up to the task. In Part III, I showed that American courts are becoming increasingly comfortable with analyzing surrogacy contracts in a freedom of contract framework. In light of this, I argue that the courts ought to respect freedom of contract in this context. More specifically, I argue that it is imperative that surrogacy or fertility lawyers consider liquidated damages for tragic breaches, and that courts ought to honor these clauses. Given the legal uncertainty around surrogacy contracts, and the very real implications this uncertainty has on already fraught and tragic disagreements, it is imperative that courts adopt a freedom of contract framework to the field of surrogacy. Widespread adoption, alongside a recognition of liquidated damages provisions can help avoid and mitigate tragic breaches, like the Crystal Kelley example discussed above. By conceptualizing surrogacy contracts as service contracts, and ensuring judicial scrutiny of seemingly unreasonable liquidated damages, courts can respect the wishes, autonomy, and intentions of the contracting parties, while avoiding wading into difficult territory.