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# It's Complicated: Advocating for Uniformity in the Enforcement of Surrogacy Contracts

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*The current landscape of surrogacy laws in the United States is uneven and broken in many places. Some states go so far as to criminalize surrogacy, and other states do not have any surrogacy laws on the books whatsoever. The lack of legal support for surrogacy arrangements, and for gestational surrogacy contracts in particular, infringes upon the reproductive autonomy of intended parents and surrogates alike. This Note argues that gestational surrogacy contracts should be enforced across the United States and looks to Article 8 of the Uniform Parentage Act of 2017 as a stepping-stone toward uniform, nationwide enforcement.*

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### INTRODUCTION

A few months into the COVID-19 worldwide pandemic, a New York couple boarded a nearly empty plane to Paris, France.<sup>1</sup> People in protective bodysuits walked around the French airport.<sup>2</sup> From Paris, the couple flew to Belarus and later found themselves at a military checkpoint on the Belarus-Ukraine border.<sup>3</sup> The border gates were closed, and soldiers and bomb-sniffing dogs stood on guard nearby.<sup>4</sup> As the couple reached the gates, they saw a group of Eastern Europeans being turned away.<sup>5</sup> After an examination of documents, the border agents waved the couple through, and they headed down an empty highway wearing surgical masks and pulling their suitcases behind them, all while carrying thousands of dollars stuffed in their pockets.<sup>6</sup>

Twenty-four hours before the start of the couple's trip, they had received a document from the Ukrainian Ministry of Foreign Affairs allowing them to enter the country through Belarus.<sup>7</sup> These are the lengths that New Yorkers Ben and Abbie Rosenberg went to so that they could meet their daughter for the first time, who was born via surrogate in Ukraine.<sup>8</sup> Odessa, serendipitously named after the *Odyssey* and the town she was born in, was brought into the world nearly a year before New York's statewide ban on gestational surrogacy was lifted.<sup>9</sup> The

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1. Lizzie Widdicombe, *The Stranded Babies of the Coronavirus Disaster*, NEW YORKER (July 20, 2020), <https://www.newyorker.com/news/news-desk/the-stranded-babies-of-the-coronavirus-disaster> [<https://perma.cc/63YC-FCJT>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*; *see also* Press Release, Dep't of Fin. Servs., N.Y. State, Governor Cuomo Announces Gestational Surrogacy Now Legal in New York State (Feb. 16, 2021), [https://www.dfs.ny.gov/reports\\_and\\_publications/press\\_releases/pr202102162](https://www.dfs.ny.gov/reports_and_publications/press_releases/pr202102162) [<https://perma.cc/5FWY-BJNR>] [hereinafter Cuomo Press Release].

Rosenbergs were one of many families who had traveled to great lengths, literally, to retrieve their child who was born via surrogate outside of their home state.<sup>10</sup> The already-existing complications of out-of-state surrogacies were made unimaginably worse when COVID-19 hit and countries started implementing heavy restrictions on travel.<sup>11</sup> One attorney in Oregon who specializes in surrogacy arrangements hoped that these complications would cause governments to rethink surrogacy laws: “We’d love it if they’d put laws in place so you could do surrogacy domestically, and not be forced to travel abroad to have a child.”<sup>12</sup>

Like that attorney, this Note argues that surrogacy contracts should be enforceable across the United States. The lack of enforcement of these contracts not only necessitates burdensome travels during a global health crisis but also leaves open the possibility of abuse on either side of an agreement where a court refuses to enforce fully informed and agreed-upon terms. Arguing for the enforceability of surrogacy contracts is not a novel pursuit. Academic scholars have long called for surrogacy protections by advocating for the federal regulation of surrogacy contracts<sup>13</sup> and the creation of uniform surrogacy regulation.<sup>14</sup> Further, scholars have defended surrogacy agreements from a contract perspective<sup>15</sup> and have pushed for an expansion of protections for surrogacy transactions.<sup>16</sup> This Note lifts up these arguments by advocating that the Uniform Parentage Act of 2017 (UPA) provides a framework for the enforceability of gestational surrogacy agreements and should be adopted. Additionally, despite all the academic arguments made for protecting surrogacy arrangements and enforcing surrogacy contracts, little progress has been made toward uniformity. Only a handful of states have adopted uniform legislation such as the UPA provisions for surrogacy.<sup>17</sup> And states are still all over the map in terms of who is allowed to become a surrogate or intended parent, whether compensation is permitted, and what rights intended parents have before the birth of their children born via surrogacy.<sup>18</sup> This Note puts front and center the need

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10. Widdicombe, *supra* note 1 (noting that at least 200 babies born via surrogate for out-of-country clients were stuck in the United States due to COVID-19 travel restrictions in addition to at least 125 in Ukraine as of July 2020).

11. *Id.*

12. *Id.*

13. See, e.g., Brett Thomaston, Comment, *A House Divided Against Itself Cannot Stand: The Need to Federalize Surrogacy Contracts as a Result of a Fragmented State System*, 49 J. MARSHALL L. REV. 1155 (2016).

14. See, e.g., Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating “Non-Traditional” Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673 (2000).

15. See, e.g., Yehezkel Margalit, *In Defense of Surrogacy Agreements: A Modern Contract Law Perspective*, 20 WM. & MARY J. WOMEN & L. 423 (2014).

16. See Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223 (2013).

17. UNIF. PARENTAGE ACT at 2 (UNIF. L. COMM’N 2017).

18. *The United States Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/> [https://perma.cc/53BY-4LFZ] (last visited Aug. 14, 2022).

for the enforceability of surrogacy contracts by highlighting the perspectives of surrogates and the roles surrogates play in helping couples and individuals achieve their dreams of having children. This Note illustrates that making surrogacy contracts unenforceable by law can lead to exploitation, self-service, misunderstanding between surrogates and intended parents, and a lack of access to affordable ways for couples and individuals to create families.

This Note is limited in scope and breadth but, nonetheless, provides an important exploration of why surrogacy contract enforcement is needed. Countries without consistent surrogacy laws or recommendations see higher rates of baby-selling, exploitation of women with low incomes, and poor health outcomes among women with low incomes.<sup>19</sup> The United States in particular has a long way to go before all states are on the same page about surrogacy.<sup>20</sup> Some states are coming to realize that protections for some sort of surrogacy arrangements are important, even if the arrangements that those states allow discriminate against same-sex couples,<sup>21</sup> while others refuse to change the laws they put in place after the infamous *In re Baby M* ruling over thirty years ago.<sup>22</sup> Even though some states are coming around,<sup>23</sup> and only a handful of states currently deem surrogacy contracts to be void and unenforceable,<sup>24</sup> this note highlights that the first important step toward consistency across the United States is for states to adopt uniform standards, such as those provided in the UPA, that ensure the enforceability of valid surrogacy contracts. As the ever-changing laws surrounding surrogacy demonstrate, surrogacy serves an important purpose and is not going away anytime soon in the United States. But the current hodgepodge of laws—or the lack thereof—can infringe on the reproductive autonomy, economic agency, and overall sanity of intended parents and surrogates alike.

This Note proceeds in four parts. Part I explores a brief history of reproductive technologies, such as cryopreservation and in vitro fertilization (IVF), and illustrates how technology has given people the opportunity to build families. This Part also defines surrogacy and the terms used to describe the process. Then, Part I surveys the current state of the law in the United States via an original chart

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19. Michele Goodwin, *Baby Markets and the New Motherhood: Reproducing Hierarchy in Commercial Intimacy*, HUFFPOST (May 13, 2016), [https://www.huffpost.com/entry/baby-markets-the-new-motherhood\\_b\\_7263050](https://www.huffpost.com/entry/baby-markets-the-new-motherhood_b_7263050) [<https://perma.cc/F9F5-FEAL>].

20. See CREATIVE FAM. CONNECTIONS, *supra* note 18.

21. *Id.*

22. Susan Samples, *Michigan the 'Worst' for Couples Seeking Surrogacy*, WOODTV (June 22, 2021, 1:18 PM), <https://www.woodtv.com/news/target-8/michigan-the-worst-for-couples-seeking-surrogacy/> [<https://perma.cc/H8CL-WHE3>] (“The Michigan law was written for traditional surrogacy . . . (Michigan) is a little behind in terms of how they view (surrogacy).” (alteration in original) (statement of Dr. William Dodds)); see *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (A couple entered into a traditional surrogacy contract with a surrogate, and after giving birth to the couple’s child, the surrogate fled and refused to give the child to the couple. A court eventually determined that the surrogacy contract was unenforceable and reinstated parental rights to the surrogate.)

23. Cuomo Press Release, *supra* note 9.

24. See *infra* Part I.

created to compile information about states that do not enforce surrogacy contracts and those that criminalize compensated surrogacy. Part II then examines the demands for surrogacy and where the supply comes from to meet those demands. In doing so, this Part highlights the stories of surrogates who have chosen to help intended parents realize their dreams, for better or worse. Part III unpacks the gaps that exist to meet the demands of surrogacy in the United States. This Part addresses the issues that arise from the imbalance of supply and demand as well as the arguments against surrogacy. Last, Part IV offers recommendations for moving forward by advocating for the adoption of Article 8 of the UPA to provide a solution for states that currently make surrogacy contracts void and unenforceable.

## I. REPRODUCTIVE TECHNOLOGIES AND THE CURRENT STATE OF U.S. SURROGACY LAWS

Reproductive technology gives people the opportunity to build families when it otherwise would be difficult for them to do so on their own. Surrogacy provides a similar opportunity by allowing intended parents to use reproductive technologies to produce a baby when they cannot use such technologies themselves. First, Part I will briefly expand on the assisted reproductive technologies of cryopreservation and IVF. Next, Part I will define surrogacy and the terms surrounding surrogacy arrangements. Part I will then provide an originally crafted chart that compiles data on surrogacy laws across the United States. Finally, this Part will end with two brief explorations of what prohibitive laws can mean for those seeking surrogacy.

### *A. Key Technologies and Terms*

Fertility preservation involves the preservation of gametes, embryos, and reproductive tissues for use in artificial reproduction.<sup>25</sup> Cryopreservation is the most common fertility preservation technique.<sup>26</sup> It involves freezing cells and tissues at extremely low temperatures.<sup>27</sup> Cryopreservation allows for cells and tissues to be stored for centuries with little to no change in functionality or genetic information, making this storage method popular.<sup>28</sup> For example, in 2020, Molly Gibson, a perfectly healthy baby, was born from a twenty-seven-year-old embryo that was adopted by her parents.<sup>29</sup> Molly's parents struggled with infertility and learned about embryo adoption after first having their hearts set on traditional adoption to start their family.<sup>30</sup> The couple then adopted two embryos, one that

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25. Aniruddha Bagchi, Erik J. Woods & John K. Critser, *Cryopreservation and Vitriification: Recent Advances in Fertility Preservation Technologies*, 5 EXPERT REV. MED. DEVICES 359, 359 (2008).

26. *Id.*

27. *Id.*

28. *Id.*

29. Scottie Andrew, *Baby Born from 27-Year-Old Embryo Believed to Have Broken Record Set by Her Big Sister*, CNN (Dec. 1, 2020, 5:31 PM), <https://www.cnn.com/2020/12/01/us/baby-frozen-embryo-27-years-trnd/index.html> [<https://perma.cc/FXQ3-WYGB>].

30. *Id.*

later resulted in Molly's birth and another that produced her older sister Emma.<sup>31</sup> Emma had set the world record for the longest-frozen embryo known to have resulted in a birth.<sup>32</sup> That record was beaten when Molly was born.<sup>33</sup> Cryopreservation allowed Emma and Molly's parents to realize their dream of becoming parents.<sup>34</sup> Doctors have touted Emma and Molly's births as "proof that embryos shouldn't be discarded because they're 'old'" and have claimed that this is evidence of the ability to preserve embryos for use "under an indefinite time frame."<sup>35</sup>

IVF is a method of Assisted Reproductive Technology (ART) that involves combining eggs and sperm outside the body in a laboratory.<sup>36</sup> The first baby to be conceived using IVF was Louise Brown, who was born in England in 1978.<sup>37</sup> Since 1996, more than one million babies have been born in the United States as a result of ART.<sup>38</sup> After one or more eggs are fertilized, the embryos "may be transferred into the woman's uterus, where they may implant in the uterine lining and develop."<sup>39</sup> Any excess embryos can be cryopreserved and stored to be used in the future.<sup>40</sup> IVF is a multi-cycle process, and the basic steps are "ovarian stimulation, egg retrieval, fertilization, embryo culture, and embryo transfer."<sup>41</sup>

Surrogacy is a social arrangement that can be used to employ the aforementioned reproductive technologies.<sup>42</sup> *Surrogacy* is defined as "the practice of serving as a surrogate mother."<sup>43</sup> A *surrogate mother* is defined as "a woman who becomes pregnant by artificial insemination or by implantation of a fertilized egg created by in vitro fertilization for the purpose of carrying the fetus to term for

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Infertility and In Vitro Fertilization*, WEBMD, <https://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization> [<https://perma.cc/FXQ3-WYGB>] (last visited Aug. 14, 2022) (medically reviewed by Nivin Todd, M.D. on August 1, 2021).

37. *Id.*

38. Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW RSCH. CTR. (July 17, 2018), <https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/> [<https://perma.cc/3JKL-U263>].

39. AM. SOC'Y FOR REPROD. MED., *ASSISTED REPRODUCTIVE TECHNOLOGY: A GUIDE FOR PATIENTS* 4 (2018).

40. *Id.*

41. *Id.*

42. Sharyn L. Roach Anleu, *Reinforcing Gender Norms: Commercial and Altruistic Surrogacy*, 33 *ACTA SOCIOLOGICA* 63, 63 (1990).

43. *Surrogacy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/surrogacy> [<https://perma.cc/MX67-SR63>] (last visited Aug. 14, 2022). This term can be underinclusive of transgender and gender non-conforming surrogates who are reproductively able to have children but do not identify as female and would prefer not to be identified as a "mother."

another person or persons.<sup>44</sup> The American Society for Reproductive Medicine (ASRM) uses the term *gestational carrier* instead of *surrogate mother*.<sup>45</sup> The ASRM defines a *gestational carrier* as “a woman who agrees to have a couple’s fertilized egg (embryo) implanted in her uterus.”<sup>46</sup> This Note will refer to a gestational carrier as a *surrogate*.

There are two common types of surrogacy arrangements.<sup>47</sup> The first is traditional surrogacy. In a traditional surrogacy arrangement, the surrogate is biologically related to the fetus because she has provided her own egg for the embryo and the intended father (or sperm donor) has provided his sperm.<sup>48</sup> The second type of surrogacy arrangement is gestational surrogacy. In a gestational surrogacy arrangement, the surrogate is not genetically related to the child as she does not provide the egg in these arrangements.<sup>49</sup> In both traditional and gestational surrogacy, the surrogate carries the fetus and intends to give birth to the child for its intended parent(s).<sup>50</sup> Surrogacy arrangements are typically either a *commercial surrogacy*, where surrogates are receiving payment,<sup>51</sup> or an *altruistic surrogacy*, where surrogates are not.<sup>52</sup> This Note will refer to “commercial” surrogacy as *compensated surrogacy* and “altruistic” surrogacy as *uncompensated surrogacy*.<sup>53</sup> Additionally, this Note explores contracts for gestational surrogacy, not traditional surrogacy. Since traditional surrogacy arrangements have not been well received throughout the history of surrogacy case law,<sup>54</sup> and since there has been a decline in the use of

44. *Surrogate Mother*, MERRIAM-WEBSTER, [https://www.merriam-webster.com/dictionary/surrogate mother](https://www.merriam-webster.com/dictionary/surrogate%20mother) [https://perma.cc/3WZE-WSCM] (last visited Aug. 14, 2022).

45. *Gestational Carrier or Surrogacy*, AM. SOC’Y FOR REPROD. MED., <https://www.reproductivefacts.org/topics/topics-index/gestational-carrier/> [https://perma.cc/F9UV-TLGH] (last visited Aug. 14, 2022).

46. *Id.*

47. Kiran Sreenivas & Lisa Campo-Engelstein, *Domestic and International Surrogacy Laws: Implications for Cancer Survivors*, in ONCOFERTILITY: ETHICAL, LEGAL, SOCIAL, AND MEDICAL PERSPECTIVES 135, 138 (Teresa K. Woodruff, Laurie Zoloth, Lisa Campo-Engelstein & Sarah Rodriguez eds., 2010).

48. *Id.*

49. *Id.*

50. *Id.*

51. Lennlee Keep, *Surrogacy Facts and Myths: How Much Do You Know?*, PBS: INDEPENDENT LENS (Oct. 22, 2019), <https://www.pbs.org/independentlens/blog/surrogacy-facts-and-myths-how-much-do-you-know/> [https://perma.cc/DQ75-3FBX].

52. *Id.* (explaining that altruistic surrogacy arrangements can still include payment for medical bills and other costs, but do not typically include compensation beyond basic needs).

53. *See generally* Roach Anleu, *supra* note 42, at 63–64 (explaining that there is little distinction between so-called “commercial” and “altruistic” surrogacy). *See also* Katie O’Byrne & Paula Gerber, *Surrogacy and Human Rights: Contemporary, Complex, Contested and Controversial*, in SURROGACY, LAW AND HUMAN RIGHTS 1, 5–6 (Paula Gerber & Katie O’Byrne eds., 2015) (highlighting that it might be more appropriate to use “compensated” instead of “commercial”).

54. *In re Baby M*, 537 A.2d 1227, 1246 (N.J. 1988) (holding that a traditional surrogacy contract was against state public policy). The result of *Baby M* was a huge setback to surrogacy and prompted states to act preemptively and prohibit or else greatly limit surrogacy agreements. Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS., Summer 2009, at 109, 110.



traditional contracts because of IVF and reproductive technologies,<sup>55</sup> this Note will focus solely on gestational surrogacy, which accounts for ninety-five percent of surrogacy contracts.<sup>56</sup>

*B. A Survey of Surrogacy Laws in the United States*

As table 1 shows, a handful of states consider surrogacy contracts to be void and unenforceable: Indiana, Arizona, Michigan, and Nebraska.<sup>57</sup> Additionally, compensated surrogacy is illegal in two states: Louisiana and Michigan.<sup>58</sup> One might question the importance of supporting a change in only a handful of states across the country, but this landscape looked vastly different a few years ago.<sup>59</sup> Laws surrounding surrogacy vary widely across the states, which makes it even more important to highlight the work that still needs to be done.

States	Gestational Surrogacy Contracts	Compensated Surrogacy
Alabama	Likely Enforceable	Legal
Alaska	Likely Enforceable	Legal
Arizona	Void and Unenforceable	Cannot be Enforced
Arkansas	Enforceable	Legal
California	Enforceable	Legal
Colorado	Likely Enforceable	Legal
Connecticut	Enforceable	Legal
Delaware	Enforceable	Legal
Florida	Enforceable	Legal
Georgia	Likely Enforceable	Legal
Hawaii	Likely Enforceable	Legal
Idaho	Likely Enforceable	Legal
Illinois	Enforceable	Legal

55. Thomaston, *supra* note 13, at 1158.

56. Scott, *supra* note 54, at 139.

57. See CREATIVE FAM. CONNECTIONS, *supra* note 18; *What You Need to Know About Surrogacy in Nebraska*, AM. SURROGACY, <https://www.americansurrogacy.com/surrogacy/nebraska-surrogacy-laws> [<https://perma.cc/4AG8-CPR5>] (last visited Aug. 14, 2022).

58. CREATIVE FAM. CONNECTIONS, *supra* note 18.

59. See Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 FAM. L. Q. 29, 33 (2015) (discussing the lack of laws addressing gestational surrogacy).

Indiana	Void and Unenforceable	Cannot be Enforced
Iowa	Likely Enforceable	Legal
Kansas	Likely Enforceable	Legal
Kentucky	Likely Enforceable	Legal
Louisiana	Enforceable	Illegal
Maine	Enforceable	Legal
Maryland	Likely Enforceable	Legal
Massachusetts	Likely Enforceable	Legal
Michigan	Void and Unenforceable	Illegal
Minnesota	Likely Enforceable	Legal
Mississippi	Likely Enforceable	Legal
Missouri	Likely Enforceable	Legal
Montana	Likely Enforceable	Legal
Nebraska	Void and Unenforceable	Legal
Nevada	Enforceable	Legal
New Hampshire	Enforceable	Legal
New Jersey	Enforceable	Legal
New Mexico	Likely Enforceable	Legal
New York	Enforceable	Legal
North Carolina	Likely Enforceable	Legal
North Dakota	Enforceable	Legal
Ohio	Enforceable	Legal
Oklahoma	Likely Enforceable	Legal
Oregon	Likely Enforceable	Legal
Pennsylvania	Likely Enforceable	Legal
Rhode Island	Likely Enforceable	Legal
South Carolina	Enforceable	Legal

South Dakota	Likely Enforceable	Legal
Tennessee	Likely Enforceable	Legal
Texas	Enforceable	Legal
Utah	Enforceable	Legal
Vermont	Likely Enforceable	Legal
Virginia	Enforceable	Legal
Washington	Enforceable	Legal
West Virginia	Likely Enforceable	Legal
Wisconsin	Enforceable	Legal
Wyoming	Likely Enforceable	Legal

Table 1. Current State of U.S. Surrogacy Laws<sup>60</sup>

Consider the struggles that the following couples and individuals faced when encountering prohibitive laws in Michigan and New York.<sup>61</sup> In Michigan, paid surrogacy arrangements are criminalized.<sup>62</sup> Michigan is one of the only remaining states, along with Louisiana, to criminalize compensated surrogacy.<sup>63</sup> However, this move toward decriminalization is recent, as New York, Washington, New Jersey, and the District of Columbia repealed their statutes criminalizing compensated surrogacy not long ago.<sup>64</sup> Violating Michigan's law against

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60. See CREATIVE FAMILY CONNECTIONS, *supra* note 18; *What You Need to Know About Surrogacy Laws in the U.S.*, AM. SURROGACY, <https://www.americansurrogacy.com/surrogacy/surrogacy-laws-in-the-united-states> [<https://perma.cc/6M7N-JKBQ>] (last visited Aug. 14, 2022). These sources provide that, in most states, there are restrictions on the types of clauses and conditions a surrogacy contract can include, as well as limitations on who can enter into them. The term *Likely Enforceable* is used to describe states where there may be no statutes, regulations, or case law legally defining the enforceability of these contracts, but there is also nothing prohibiting them. The contracts in these states are generally upheld when they are drafted appropriately since they are legal contracts and surrogacy is not prohibited in these states. The term *Cannot be Enforced* is used when compensation for surrogacy is not specifically against the law, but since surrogacy contracts are not enforceable in these states, compensation cannot be enforced.

61. New York has recently lifted its almost thirty-year ban on gestational surrogacy. See Cuomo Press Release, *supra* note 9.

62. Ellen Trachman, *Michigan's 'Safe Haven' Surrogacy Laws Are a Problem for the Entire Country*, ABOVE THE LAW (Aug. 12, 2020, 1:49 PM), <https://abovethelaw.com/2020/08/michigans-safe-haven-surrogacy-laws-are-a-problem-for-the-entire-country/?rf=1> [<https://perma.cc/2UK4-JZKY>]; Maria Cramer, *Couple Forced to Adopt Their Own Children After a Surrogate Pregnancy*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/us/michigan-surrogacy-law.html> [<https://perma.cc/2RR9-QRS5?view-mode=server-side>].

63. Cramer, *supra* note 62.

64. Trachman, *supra* note 62.

compensated surrogacy is a misdemeanor and can entail facing “up to \$10,000 in fines and up to a year in jail.”<sup>65</sup> The penalties are worse for those who assist in or arrange the formation of a compensatory surrogacy contract, such as an attorney or surrogacy matching agency.<sup>66</sup> These parties “could be convicted of a felony punishable by a fine of up to \$50,000, and up to five years in prison.”<sup>67</sup> In 2018, a Michigan state senator introduced a bill that would have legalized compensated and uncompensated surrogacy in Michigan, but the proposed bill did not make it far and was never passed.<sup>68</sup>

Not only is compensatory surrogacy criminalized in Michigan, but non-compensatory surrogacy contracts are also unenforceable.<sup>69</sup> Thus, even though uncompensated surrogacy is not criminalized in the state, there are still hurdles for intended parents to overcome before they can be recognized as legal parents.<sup>70</sup> Michigan “does not recognize the parental rights of the intended parents.”<sup>71</sup> Anyone who has a child through surrogacy must receive a judge’s approval to be recognized as a legal parent or else go through an adoption process.<sup>72</sup> One Michigan attorney reports that “judges in Michigan have granted parental rights to the people who intend to be parents in at least 72 cases since 2005.”<sup>73</sup> Another attorney echoes this point and says that a few Michigan judges are deciding to spare intended parents the stress and cost of going through adoption proceedings.<sup>74</sup>

But, for a Michigan woman like Courtney Welz, Michigan’s anti-surrogacy laws resulted in her and her husband having to adopt their biological twins who were born through surrogacy.<sup>75</sup> Courtney had a medical condition that prevented her from being able to carry a child. After thirteen years of infertility treatments, Courtney was appalled that the law did not recognize her twins as her legal children.<sup>76</sup> The couple had to go through an adoption agency that made routine visits to their home for six months to ensure that it was suitable for children.<sup>77</sup> From Courtney’s perspective, the adoption agency “ha[d] to treat us as if we were unfit until they deemed us fit to parent.”<sup>78</sup> The Welzes ultimately paid \$18,000 to adopt

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65. *Id.*

66. Trachman, *supra* note 62.

67. Trachman, *supra* note 62.

68. *See* Samples, *supra* note 22.

69. Cramer, *supra* note 62.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *See* Samples, *supra* note 22.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

their twins.<sup>79</sup> Now, Courtney is on a journey to change Michigan's anti-surrogacy laws and plans to use her story to do so.<sup>80</sup>

In 2021, New York's nearly thirty-year ban on gestational surrogacy was lifted when the Child-Parent Security Act went into effect.<sup>81</sup> But before that, New York couples and individuals pursuing surrogacy sometimes traveled thousands of miles to have their children.<sup>82</sup> No matter how far they traveled, all of them were forced to go out of state for surrogacy, typically paying a minimum of \$80,000 for the process, in addition to travel expenses.<sup>83</sup> The ban meant that some had to miss medical appointments and important parts of the pregnancy.<sup>84</sup> Dennis Williams, a gay man from New York who decided to work with an out-of-state surrogate to have a child, claimed that everything was about calculations. He had to calculate whether he could take a day off work to hear his baby's heartbeat, be there when a technician first revealed the sex of the baby from a sonogram, afford another flight, and continue losing valuable face time at his job.<sup>85</sup>

The fight for surrogacy legalization in New York was led by the LGBTQ community.<sup>86</sup> The movement was born from a push for "fertility equality," which hopes for a future where the ability to create a family is "no longer determined by one's wealth, sexuality, gender or biology."<sup>87</sup> These advocates highlight that some gay men never thought that they would be able to have a family, and even now that New York's surrogacy law has passed, there are still immense financial hurdles for intended parents to overcome.<sup>88</sup>

Reproductive health advocates have also expressed that the New York State Department of Health's (NYSDOH) newly issued guidance relating to surrogacy<sup>89</sup> may not provide enough protections for surrogates. These experts have five main health-related concerns about the NYSDOH guidelines that pertain to surrogates: (1) the guidelines do not adequately communicate the health risks of a surrogate pregnancy to surrogates; (2) the recommended age range of surrogates should be narrowed from between twenty-one to forty-five years old to between

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79. *Id.*

80. *Id.*

81. Cuomo Press Release, *supra* note 9.

82. Dan Avery, *New Hope Rises for Would-Be LGBTQ Parents in New York*, NBC NEWS (Apr. 22, 2019, 7:45 AM), <https://www.nbcnews.com/feature/nbc-out/new-hope-rises-would-be-lgbtq-parents-new-york-n996411> [<https://perma.cc/MYN7-Y98Z>].

83. *Id.*

84. *Id.*

85. *Id.*

86. David Kaufman, *The Fight for Fertility Equality*, N.Y. TIMES (July 24, 2020) <https://www.nytimes.com/2020/07/22/style/lgbtq-fertility-surrogacy-coverage.html> [<https://perma.cc/4F46-D6F7?view-mode=server-side>].

87. *Id.*

88. *Id.*

89. Press Release, Dep't of Health, N.Y. State, *The Child-Parent Security Act: Gestational Surrogacy* (2021), <https://health.ny.gov/community/pregnancy/surrogacy/> [<https://perma.cc/LV92-36XV>].

twenty-one to thirty-five years old; (3) comorbidities such as autoimmune disease, hypertension, and diabetes are not disqualifying and they should be; (4) there is no requirement that the surrogate be informed of known and unknown health risks of gestational surrogacy to her current and future health; and (5) surrogates need to be informed that their compensation is subject to taxation.<sup>90</sup>

These advocates also highlight issues within the New York Gestational Surrogates' Bill of Rights. They argue that surrogates should not be able to request a non-medical cesarean section and multiple embryo transfer since, per the American College of Obstetricians and Gynecologists' recommendations, these practices may present non-negligible risks.<sup>91</sup> They also claim that surrogates should be able to make decisions about their behavior, not just their health and welfare.<sup>92</sup> Additionally, the Bill of Rights should provide that a surrogate may terminate the surrogacy agreement by choosing to terminate the pregnancy.<sup>93</sup>

Part I has laid a foundation by introducing reproductive technologies and basic surrogacy terms. It has also elucidated the current state of surrogacy laws across the United States. This Part has highlighted that, although it seems like only a handful of states deem surrogacy contracts to be void and unenforceable, this landscape looked much different just a few years ago. Change and progress are being made, but the stories of parents seeking surrogacy in Michigan and New York emphasize why there is still a long way to go to reach full success.

## II. SURROGACY SUPPLY AND DEMAND

With the continuous increase in infertility rates<sup>94</sup> and the use of assisted reproductive technology increasing by five to ten percent a year,<sup>95</sup> the rates of surrogacy have recently been on the rise.<sup>96</sup> The number of gestational carrier cycles in 1999 was 727 and increased to 3,432 in 2013.<sup>97</sup> Some of the reasons why the

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90. Christina Caron, *Surrogacy Is Complicated. Just Ask New York.*, N. Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/parenting/pregnancy/surrogacy-laws-new-york.html> [<https://perma.cc/326C-JAYS>].

91. *Id.*

92. ALEX FINKELSTEIN, SARAH MAC DOUGALL, ANGELA KINTOMINAS & ANYA OLSEN, *SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING* 51 (2016).

93. Courtney G. Joslin, *Surrogacy and Politics of Pregnancy*, 14 HARV. L. & POL'Y REV. 365, 380 (2020).

94. SingleCare Team, *Infertility Statistics 2022: How Many Couples are Affected by Infertility?*, SINGLECARE: CHECKUP (Feb. 15, 2022), <https://www.singlecare.com/blog/news/infertility-statistics/> [<https://perma.cc/7MZF-MUHH>].

95. *Id.*; see also Chloe Melas, Editorial, *Why Americans Lack Adequate Access to Fertility Treatments*, CNN (Apr. 22, 2021, 3:46 PM), <https://www.cnn.com/2021/04/18/health/infertility-awareness-week-chloe-melas-wellness/index.html> [<https://perma.cc/Q4M5-6QQ8>] (discussing the lack of accessible fertility treatment in the United States).

96. Samples, *supra* note 22.

97. *ART and Gestational Carriers*, CTRS. FOR DISEASE CONTROL & PREVENTION, (Aug. 5, 2016), <https://www.cdc.gov/art/key-findings/gestational-carriers.html> [<https://perma.cc/FT8K-AQGS>].

number of gestational carrier cycles has grown include that gestational surrogacy has become more widely accepted in the United States, there is a greater understanding of what is involved in the surrogacy process, and medical technology has improved and thus has made surrogacy more accessible for those who can afford it.<sup>98</sup> Further, some doctors have claimed that “social surrogacy” is a growing practice in which women choose to use surrogacy for nonmedical reasons.<sup>99</sup> Importantly, surrogacy also provides one of the only ways for same-sex couples, particularly gay men, to have a biologically-related child.<sup>100</sup> Part II will examine where the supply comes from to meet these increasing demands for surrogacy by first laying out the different eligibility requirements that surrogates need to fulfill before being hired. Then, this Part will highlight stories from surrogates who have chosen to help intended parents create families.

Applicants are subject to extensive eligibility requirements before they can qualify to be a surrogate. One of the oldest surrogacy agencies in the world selects only twenty out of four hundred applicants per month who apply to be surrogates.<sup>101</sup> This agency, the Center for Surrogate Parenting (CSP), listed the following factors as reasons for rejecting applicants: (1) they live in a state where compensated surrogacy is not legal; (2) they have health issues; (3) they are heavily motivated by money; (4) they live too far away from a level two neonatal intensive care unit; and (5) they have not yet had a child.<sup>102</sup>

Other sources claim that “ethical surrogacy agencies and lawyers” reject potential surrogates who fall into one of two categories: (1) their income is below the poverty level, or (2) they have not had children.<sup>103</sup> These agencies and lawyers reject women in the first category because of the assumptions that the potential surrogates may be at a greater risk for health issues and coercion and probably lack medical insurance.<sup>104</sup> Women in the second category are rejected because of the assumption that women who have had children have “proven [that] they are fertile” and have a better “grasp of what it [would] mean to surrender a baby to its legal

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98. *Gestational Surrogacy Stats in the United States*, SURROGATE SOLUTIONS (Nov. 24, 2017), <https://www.surrogatesolutions.net/2017/11/24/gestational-surrogacy-stats-united-states/> [<https://perma.cc/2JSA-PXLS>].

99. Jenny Kleeman, *Having a Child Doesn't Fit into These Women's Schedule: Is This the Future of Surrogacy?*, GUARDIAN (May 25 2019, 5:00 AM), <https://www.theguardian.com/lifeandstyle/2019/may/25/having-a-child-doesnt-fit-womens-schedule-the-future-of-surrogacy> [<https://perma.cc/3E4H-2CTY>].

100. Kaufman, *supra* note 86.

101. Leslie Morgan Steiner, *Who Becomes a Surrogate?*, ATL. (Nov. 25, 2013), <https://www.theatlantic.com/health/archive/2013/11/who-becomes-a-surrogate/281596/> [<https://perma.cc/QSN6-PTWX>].

102. *Id.*

103. *Id.*

104. *Id.*

parents.”<sup>105</sup> Moreover, most women are subject to a mental evaluation, physical evaluation, and credit check before becoming a surrogate.<sup>106</sup>

States that have enacted the Uniform Parentage Act of 2017 follow the eligibility requirements listed in Section 802 of Article 8 of the Act. Under the UPA, the following requirements are needed to establish eligibility for a potential surrogate to enter a gestational surrogacy contract:

- (a) To execute an agreement to act as a gestational or genetic surrogate, a woman must:
  - (1) have attained 21 years of age;
  - (2) previously have given birth to at least one child;
  - (3) complete a medical evaluation related to the surrogacy arrangement by a licensed medical doctor;
  - (4) complete a mental-health consultation by a licensed mental-health professional; and
  - (5) have independent legal representation of her choice throughout the surrogacy arrangement regarding the terms of the surrogacy agreement and the potential legal consequences of the agreement.<sup>107</sup>

The American Bar Association Model Act Governing Assisted Reproduction (ABA Model Act) lists similar eligibility qualifications and only differs from the UPA in a few respects,<sup>108</sup> although no states have adopted it.<sup>109</sup> First, the ABA Model Act specifies that the potential surrogate must complete a medical evaluation relating to the anticipated pregnancy.<sup>110</sup> Second, the ABA Model Act mandates that a mental health evaluation be conducted that relates to the anticipated surrogacy arrangement.<sup>111</sup> Lastly, the ABA Model Act requires that a surrogate must have or obtain health insurance for medical treatments and hospitalization that extends not only throughout the pregnancy but also eight weeks after the birth of the child.<sup>112</sup>

Now that this Part has laid out some eligibility requirements that can be used to select potential surrogates, the conversation will turn to specific anecdotes of women who have filled those roles. Sherrie Smith, the leader of CSP, names the biggest misconception about U.S. surrogates as the idea that these women are only in it for financial gain.<sup>113</sup> She claims that “[h]aving a baby for someone else is as far

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105. *Id.*

106. Danielle McNally, *5 Women Get Candid About Why They Chose to Carry Someone Else's Child*, MARIE CLAIRE (Sept. 30, 2018), <https://www.marieclaire.com/health-fitness/a23438156/why-i-became-a-surrogate/> [<https://perma.cc/N5NG-UT3F>].

107. UNIF. PARENTAGE ACT § 802(a) (UNIF. L. COMM'N 2017).

108. MODEL ACT GOVERNING ASSISTED REPROD. § 702 (2008) (AM. BAR ASS'N, amended 2019).

109. *See id.*

110. *Id.* § 702(c).

111. *Id.* § 702(d).

112. *Id.* § 702(f).

113. Steiner, *supra* note 101.



from easy money as you can get.”<sup>114</sup> One surrogate explains that “people automatically feel that if money is involved then there is no altruism involved, and that’s not necessarily true . . . . We are all compensated for the work we do, and we still want to do good work even though we are compensated.”<sup>115</sup> The example below illustrates the market demand for more surrogates, one woman’s work as a surrogate, and why she chose to undertake this work.

Becoming a surrogate first caught the attention of Christine Rush when she was in high school.<sup>116</sup> A friend of hers had just given birth to a baby as a gestational surrogate for a Japanese couple.<sup>117</sup> The surrogacy experience of her friend made a positive impression on Christine, and after she was married and had two children of her own, she thought surrogacy would be a great opportunity to pursue.<sup>118</sup> Christine’s motivations included financial gain and being able to “put herself through school, keep working, and take care of her children.”<sup>119</sup> Christine contacted a surrogacy agency and was matched with a couple that she would ultimately deliver a healthy baby for.<sup>120</sup> This couple was so grateful that they gave their son a middle name to honor his surrogate: Christopher.<sup>121</sup> Christine explains that the pregnancy was “such an easy thing” for her, and because she loved her experience so much, she worked with the same surrogacy agency to get matched with another couple.<sup>122</sup>

Christine developed a strong relationship with the second couple she was matched with, who had suffered through multiple miscarriages and years of trying to have a baby.<sup>123</sup> Christine had a healthy baby for this couple and described the whole thing as a beautiful experience in which she felt extremely supported by and connected to the intended parents.<sup>124</sup> Three years later, Christine became an advocate for surrogacy. The couple she bonded with created “a non-profit that gives money to couples who have trouble trying to conceive, so they can afford IVF or surrogacy.”<sup>125</sup> After Christine’s experience with surrogacy, she claims that nothing can be more amazing than helping to create a child.<sup>126</sup>

This Note would be remiss to not mention that not all surrogacies go smoothly. The story of Baby S. highlights what can go wrong in surrogacy

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114. *Id.*

115. Marisa Peñaloza, *Carrying ‘Dreams’: Why Women Become Surrogates*, NPR (Apr. 17, 2012, 6:53 PM), <https://www.npr.org/2012/04/17/150589059/carrying-dreams-why-women-become-surrogates> [<https://perma.cc/CJK3-QT4T>].

116. Jennifer Benjamin, “*Why I Became a Surrogate*,” THE BUMP (Mar. 2, 2017), <https://www.thebump.com/a/surrogate-stories> [<https://perma.cc/FEY6-R6CT>].

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

arrangements, especially when safeguards are not put in place to protect surrogates and intended parents alike. On a fateful day of Crystal Kelley's pregnancy, she was offered \$10,000 to abort the baby she was carrying.<sup>127</sup> Kelley was a gestational surrogate who, after a pleasant meeting with a couple who yearned to have another child, signed a contract with the intended parents to carry one for them.<sup>128</sup> Kelley had decided to become a surrogate after her own struggles with fertility and due to her desire to supplement her income as she raised her two daughters.<sup>129</sup>

At first, Kelley got along extremely well with the intended parents of the child she was carrying. The intended mother was very caring, called Kelley every day when Kelley had morning sickness to see how she was doing, and even bought Christmas presents for Kelley's daughters.<sup>130</sup> When Kelley could not make her rent payment, the intended mother ensured that she received her surrogacy fee a few days early.<sup>131</sup> This caring relationship ended when an anatomy scan showed that the baby had a cleft lip and palate, a cyst in her brain, and a heart abnormality.<sup>132</sup> Doctors estimated that the baby only had around a twenty-five percent chance of living a "normal life."<sup>133</sup>

In light of this news, the intended parents communicated to Kelley that they wanted her to have an abortion.<sup>134</sup> The intended mother tried to schedule a termination procedure for Kelley and was told that she would not be able to do so.<sup>135</sup> Next, the surrogacy agency that Kelley worked with told Kelley that the intended parents would give her \$10,000 to have an abortion.<sup>136</sup> Kelley did not have an attorney of her own, was out of work, and was a single mom who had children to provide for—so she considered taking the money and countered with a \$15,000 request.<sup>137</sup> The intended parents denied this request, and Kelley decided not to terminate the pregnancy.<sup>138</sup> When an attorney for the intended parents reminded Kelley that she signed a contract agreeing to abort the fetus in the case of a "fetus abnormality," Kelley knew it was time to look for her own representation.<sup>139</sup> Kelley ultimately moved to Michigan, where surrogacy contracts are void and

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127. Elizabeth Cohen & Senior Medical Correspondent, *Surrogate Offered \$10,000 to Abort Baby*, CNN (Mar. 6, 2013, 2:58 PM), <https://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/index.html> [<https://perma.cc/Y7WA-GM8Z>].

128. *Id.*

129. *Id.*; see also Kevin Dolak, *Surrogate Mother Flees Halfway Across US to Save Baby from Intended Parents*, ABC NEWS (Mar. 6, 2013, 10:59 AM), <https://abcnews.go.com/US/surrogate-mother-flees-halfway-us-save-baby-intended/story?id=18668498> [<https://perma.cc/YM4H-M23M>].

130. Cohen & Senior Medical Correspondent, *supra* note 127.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

unenforceable, so that she would be recognized as the baby's legal mother.<sup>140</sup> This gave Kelley time to find a couple who had experience raising children with medical issues and who ultimately decided to adopt the child.<sup>141</sup> The child is now infamously referred to as Baby S.<sup>142</sup>

The story of Baby S. demonstrates potential pitfalls that surrogates and intended parents can fall into when there are no uniform laws to regulate and enforce surrogacy contracts. On the one hand, uniform laws could have provided Kelley with adequate protection and information on the rights that she had in this type of situation so that she could make a decision that she felt comfortable with. On the other hand, uniform laws could have put the intended parents on notice of the options they had (and did not have) in a situation where their baby was diagnosed with severe medical conditions. If uniform laws made it clear that a surrogate's right to terminate or not terminate a pregnancy were absolute, the contract may not have included this language and both sides may have been able to make more informed decisions at the contracting stage.

Part II has briefly described the demand for surrogacy in the United States and has shown why the demand likely will not let up anytime soon. This Part also detailed the eligibility requirements used to determine who gets to become a surrogate and how challenging it is to become one. Then, the discussion shined a light on the women who meet those requirements, highlighting their motivations, successes, and, importantly, their complexities.

### III. EXPLORING ALTERNATIVES AND THE PROBLEMS THAT ARISE FROM THEM

In order to address the gaps that exist because of the immense demand for surrogacy, intended parents sometimes seek out alternatives that will allow them to have a child. These alternatives include going abroad to other countries where surrogacy is allowed and potentially cheaper.<sup>143</sup> Additionally, parents may seek an out-of-state clinic to connect them with a surrogate who lives in a state where surrogacy contracts are enforced.<sup>144</sup> Some intended parents choose to go forward with surrogacy arrangements even if their states do not enforce surrogacy contracts.<sup>145</sup> Part III will explore some of these alternatives and the complications that can arise from them as well as other ways that surrogacy arrangements can result in harm when they are not properly regulated.

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140. *Id.*

141. *Id.*

142. *Id.*

143. *See* Widdicombe, *supra* note 1.

144. Lia De Feo, *Embracing the Joys of Pregnancy After Loss: My Surrogacy Journey*, REFINERY29 (Feb. 11, 2020, 5:00 AM), <https://www.refinery29.com/en-us/2020/02/9376456/gestational-surrogacy-story> [<https://perma.cc/Z2YA-HF7T>].

145. CREATIVE FAM. CONNECTIONS, *supra* note 18.

*A. Self-Service*

The high costs of enlisting the services of a surrogacy agency can lead some prospective parents to cut out the middleman and search for a surrogate themselves. Some lawyers say that this mentality is on the rise, but experts warn against a do-it-yourself approach.<sup>146</sup> The reasons why are because these types of agreements often end up breaking down and leading to litigation.<sup>147</sup> Additionally, finding a surrogate online can mean that “there is no way to be sure of the[ir] qualifications, suitability, or reliability.”<sup>148</sup>

Surrogates are also eager to help families avoid these extra costs. Jennifer, a surrogate who had a great experience with surrogacy the first time, decided to become a surrogate again for a second couple.<sup>149</sup> This time, she claimed that she decided not to go through an agency but handled the paperwork and logistics herself.<sup>150</sup> Jennifer stated that she wanted to go this route because she felt bad about the amount of money that couples seeking surrogacy were already spending on things like egg donors, IVF, and embryo transfers, and she wanted to help them cut out some extra costs.<sup>151</sup>

Alissandra, a surrogate from Florida, explains that after she had a miscarriage during her first attempt to carry for a couple, she knew the couple would face a financial burden if they wanted to repeat the process.<sup>152</sup> When she attempted to carry for the intended parents a second time, she asked the couple to reduce her monthly compensation.<sup>153</sup> Alissandra wanted to ease the heavy burden that the intended parents would have to shoulder to get a new set of eggs, create a new embryo, and do an embryo transfer.<sup>154</sup>

Further, self-service can result in entering into a surrogacy agreement in a state that has no laws directly addressing surrogacy. This can leave arrangements in a precarious situation where, if things go awry, the fate of the child and the rights of the intended parents and surrogate are left up to a judge.<sup>155</sup> This is why lawyers advise intended parents and surrogates to retain independent legal counsel to help them get a sense of what the law looks like in a given state and to ensure that they understand the terms of the surrogacy agreement and are entering into it

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146. See Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, ABA J. (Mar. 1, 2011, 11:40 AM), [https://www.abajournal.com/magazine/article/as\\_surrogacy\\_becomes\\_more\\_popular\\_legal\\_problems\\_proliferate](https://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate) [<https://perma.cc/EAX2-FHVG>].

147. *Id.*

148. *Id.* However, surrogacy agencies are not perfect either. For example, one California-based surrogacy agency, SurroGenesis, closed its doors without warning in 2009. This left dozens of pregnant surrogates and intended parents helpless while millions of dollars of their funds were unaccounted for. The collapse led to a class action lawsuit and investigations by the FBI and U.S. Postal Service. *Id.*

149. Benjamin, *supra* note 116.

150. *Id.*

151. *Id.*

152. McNally, *supra* note 106.

153. *Id.*

154. *Id.*

155. Hansen, *supra* note 146.

voluntarily.<sup>156</sup> Kimberli Barney, a moderator for “a volunteer-run support group for the surrogacy community,” called Surrogate Mothers Online, disagrees.<sup>157</sup> Barney argues that working with a reputable agency is not always necessary. She claims that surrogacy agencies do not do anything “for an individual that the individual can’t do for [them]self.”<sup>158</sup> For example, surrogates sometimes make posts on the *Surrogate Mothers Online* discussion board offering their surrogacy services.<sup>159</sup> However, these do-it-yourself suggestions do not always go as intended. When one couple responded to a surrogate’s post on the discussion board, they were able to hire a surrogate who went on to give birth to a healthy baby for the couple.<sup>160</sup> Everything went smoothly until a month after the surrogate gave birth.<sup>161</sup> The happy ending turned on its head when the surrogate changed her mind about voluntarily terminating her parental rights and showed up on the couple’s doorstep, asking them to give the baby back to her.<sup>162</sup> So, while sometimes a self-service approach can work out for all parties involved and decrease the financial burden on intended parents, this is not always the case, and enforceable contracts ensure that a safeguard exists for situations that do not have such happy endings.

### B. Exploitation

Another alternative that intended parents tend to explore when seeking surrogacy is hiring abroad. *Outsourcing Embryos* is a documentary produced by Vice on HBO that focuses on compensated surrogacy in India.<sup>163</sup> The documentary highlights the issues that surrogates can face within India’s non-regulated commercial surrogacy system, which prioritizes cheap costs for foreign couples and profits for surrogacy agencies.<sup>164</sup> In the documentary, surrogates are recruited from slums and moved into a surrogacy house for almost a year.<sup>165</sup> The video includes footage of the surrogacy house where dozens of women stay with their children while they are carrying babies for intended parents.<sup>166</sup> The doctor leading one of the most famous surrogacy agencies in all of India claims that the surrogates are happy to stay in the house because they live in excellent conditions.<sup>167</sup> She claims that the surrogates look forward to staying in the provided housing because it is like a dorm

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Outsourcing Embryos*, VICE VIDEO (HBO television broadcast Mar. 27, 2015), [https://video.vice.com/en\\_us/video/outsourcing-embryos/582b4b8985eca7d97e20f87d](https://video.vice.com/en_us/video/outsourcing-embryos/582b4b8985eca7d97e20f87d) [<https://perma.cc/62EY-8TN2>].

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

where they get to be around a lot of other women.<sup>168</sup> When it is time for a woman to give birth, a cesarean section is scheduled and the intended parents drive off with the brand new baby just moments after the baby is born.<sup>169</sup> Within minutes, another surrogate is brought in and another cesarean section is performed so that the doctor can get as many babies delivered as possible in a short period of time.<sup>170</sup>

The women in the documentary who serve as surrogates say that they do not like being surrogates but see no other choice for escaping poverty.<sup>171</sup> One woman claims that the typical jobs she can do, including housework and other menial labor, are not enough to sustain her and her two children.<sup>172</sup> An expert in the field of Indian women's rights claims that since surrogacy is unregulated, women from poor backgrounds are taken advantage of and are not informed of the health risks that can arise from surrogacy.<sup>173</sup> This expert argues against the commercialization of surrogacy in India because it exploits disadvantaged women.<sup>174</sup>

Because of the demand for surrogacy, recruiters go into the slums to recruit women to be surrogates.<sup>175</sup> Even though one doctor claims that she does not encourage this type of recruiting and that potential surrogates find her agency through word of mouth, a recruiter who finds women in slums mentions that she works directly for this doctor.<sup>176</sup> The recruiter's success rate is staggering: half of the women she speaks with sign up to work for the agency.<sup>177</sup> This recruiter tells these women that they will earn significantly more money as surrogates and that they will live in a much better home during their pregnancy.<sup>178</sup> The amount that the recruiter tells the surrogates they will earn is thousands of dollars more than what the aforementioned doctor said that they would earn.<sup>179</sup> Some women do not even receive the lessened amount and are then left unable to recover the amount they were promised.<sup>180</sup>

Compensated surrogacy is now banned in India.<sup>181</sup> The new law on surrogacy was passed in 2018 and greatly diminished the ability of foreigners to apply for surrogacy in the country.<sup>182</sup> One of the reasons why India passed this law was the very thing that *Outsourcing Embryos* and experts like Professor Michele Goodwin

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168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. JSRG Saran & Jagadish Rao Padubidri, *New Laws Ban Commercial Surrogacy in India*, 88 MEDICO-LEGAL J. 148, 149 (2020).

182. *Id.*

have highlighted—exploitation.<sup>183</sup> There was concern that women who provided surrogacy services were being taken advantage of and treated unjustly.<sup>184</sup> Particularly, they often lived in poor conditions and were not paid the money that intended parents had given to the agency for the surrogate's compensation.<sup>185</sup> This sentiment has been echoed in other countries that were previously hubs for compensated surrogacy such as Nepal, Cambodia, and Thailand.<sup>186</sup> These countries have either moved to ban surrogacy or restrict it to domestic parents and surrogates who are uncompensated for their surrogacy services.<sup>187</sup>

### C. Sale of Children

Some scholars criticize compensated surrogacy as it is practiced in certain countries “amount[ing] to the sale of children.”<sup>188</sup> One formerly prominent surrogacy broker from California was sentenced to prison for orchestrating an international baby-selling ring.<sup>189</sup> Theresa Erickson was a member of the American Fertility Association but at the same time had a business of recruiting surrogates to send to the Ukraine to be implanted with embryos created from donated eggs and sperm.<sup>190</sup> The surrogates would return, and Erickson would put the resulting babies up for adoption.<sup>191</sup> Erickson would advertise the babies as the result of surrogacies in which the intended parents changed their minds about wanting a baby.<sup>192</sup> Erickson's profits from each adoption were between \$100,000 and \$150,000.<sup>193</sup> After Erickson's sentencing, she admitted to news outlets that her crime was only the “tip of the iceberg” of the California fertility industry.<sup>194</sup> One infamous critic of surrogacy, Jennifer Lahl, also equates surrogacy to selling organs:

We see surrogacy as a human rights violation to women and children and believe that no amount of regulation can protect women who serve as surrogates and children who are born of surrogacy. We don't pay organ donors and the commercial

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183. *See id.*; *see also* Goodwin, *supra* note 19.

184. *See* Saran & Padubidri, *supra* note 181.

185. *Id.*

186. Kaelyn Forde, *Why Surrogacy Is Illegal in So Many Places*, INSTYLE (Jan. 11, 2019, 2:00 PM), <https://www.instyle.com/lifestyle/surrogacy-laws-different-states> [<https://web.archive.org/web/20210728115712/https://www.instyle.com/lifestyle/surrogacy-laws-different-states>].

187. *Id.*

188. *Id.*

189. Michelle Goldberg, *Is a Surrogate a Mother?*, SLATE (Feb. 15, 2016, 5:00 PM), [http://www.slate.com/articles/double\\_x/doublex/2016/02/custody\\_case\\_over\\_triplets\\_in\\_california\\_raises\\_questions\\_about\\_surrogacy.html](http://www.slate.com/articles/double_x/doublex/2016/02/custody_case_over_triplets_in_california_raises_questions_about_surrogacy.html) [<https://perma.cc/7ZWQ-KK8Q>].

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

payment to women is also very troubling. It quite literally is the buying and selling of children.<sup>195</sup>

Lahl has also framed permissive surrogacy laws as permitting the wealthy to undermine the dignity of others to purchase a child.<sup>196</sup>

Part III has described some alternatives that intended parents explore when legal surrogacy is inaccessible. This Part has also detailed the complications that can arise from pursuing these alternatives and some perspectives of opponents of surrogacy. Part IV will address why employing a uniform approach to the enforcement of surrogacy contracts across the United States would help to mitigate the use of these alternatives and the complications that arise from them.

#### IV. RECOMMENDATIONS

This Note has shown that surrogates have a sense of obligation towards the couples that they help, dream of one day helping individuals and couples to start a family, and/or have a desire to supplement their income while experiencing pregnancy. Part IV will provide the recommendation that states across the country enforce surrogacy contracts for the sake of surrogates and intended parents alike. Part IV will describe Article 8 of the UPA and recommend its adoption. Part IV will also consider the dual interests of reproductive justice and market involvement to further explain why the enforcement of surrogacy contracts is necessary. Adoption of Article 8 across the country, and particularly in states where surrogacy contracts are currently deemed void and unenforceable, would provide a consistent framework for the enforceability of surrogacy agreements.

Article 8 of the UPA addresses surrogacy agreements and is optional for states enacting the UPA. It requires that surrogacy agreements “permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy.”<sup>197</sup> It further states that the Act “does not enlarge or diminish the surrogate’s right to terminate her pregnancy.”<sup>198</sup> Additionally, section 804 of Article 8 also states that a surrogacy agreement can include “payment of considerable and reasonable expenses.”<sup>199</sup> In other words, the adoption of Article 8 of the UPA would allow for compensated surrogacies. The 2017 version of the Act has currently only been enacted in California, Maine, Rhode Island, Vermont, and Washington.<sup>200</sup> It has been introduced, but not enacted, in two other states.<sup>201</sup>

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195. Samples, *supra* note 22.

196. Jennifer Lahl, *Memo to New York State Senators: Commercial Surrogacy Undermines the Child-Parent Relationship*, CTR. FOR BIOETHICS & CULTURE NETWORK (Feb. 13, 2019), <https://www.cbc-network.org/2019/02/new-york-commercial-surrogacy/> [https://perma.cc/F4LT-DM78].

197. UNIF. PARENTAGE ACT § 804 (UNIF. L. COMM’N 2017).

198. *Id.*

199. *Id.*

200. *Id.* § 803-12.

201. *Id.*



The legal protections that enforceable surrogacy contracts provide can mitigate the risk of surrogate exploitation. The results from one study researching women who became surrogates in India highlight that even though surrogacy was socially stigmatized as “dirty work,” for surrogates it was used as a means to achieve upward mobility for themselves and their children.<sup>202</sup> This was the ultimate goal for surrogates.<sup>203</sup> The women in the study claimed that surrogacy allowed them to work in better conditions.<sup>204</sup> Additionally, they explained that they had clear views on the surrogacy process and the work that they would be doing.<sup>205</sup> Now, this does not negate the exploitation, perpetuated by doctors and surrogate recruiters, that was taking place in India. But the implementation of legal protections for surrogates through the enforcement of contracts can mean that exploitation of disadvantaged women may be less common. In fact, some scholars have noted that “the structural factors that lead to the suspicion of exploitation are not typically present” in surrogacy transactions in the United States.<sup>206</sup>

Nevertheless, laws can—and should—be implemented to prevent the exploitation of vulnerable women. For example, the women in the study of Indian surrogates described a lack of decisional autonomy over the medical processes as a major issue with their surrogacy experiences.<sup>207</sup> To protect against these issues, and the issue that Crystal Kelley faced when pressured to terminate her pregnancy, Article 8 of the UPA requires surrogacy agreements to “permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy.”<sup>208</sup> Article 8 mandates that a surrogacy agreement includes information about each party’s right to terminate the agreement.<sup>209</sup> Thus, enforcement of contracts created under the UPA could mitigate some of the concerns surrounding medical autonomy.

Additionally, enforcing surrogacy contracts in each state could lower the market costs of surrogacy. This enforcement could potentially spur the creation of more clinics, make more individuals eligible to become surrogates, and make surrogacy less expensive and exclusive. Professor Kimberly D. Krawiec has persuasively argued that bans on different types of “baby selling” enable anticompetitive behavior by participants who have the most economic and political

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202. See Virginie Rozée, Sayeed Unisa & Elise de La Rochebrochard, *The Social Paradoxes of Commercial Surrogacy in Developing Countries: India Before the New Law of 2018*, BMC WOMEN’S HEALTH, Oct. 15, 2020, at 1, <https://bmcwomenshealth.biomedcentral.com/articles/10.1186/s12905-020-01087-2> [<https://perma.cc/CLV3-ECTB>].

203. *Id.* at 4.

204. *Id.* at 7, 10.

205. *Id.* at 9–10.

206. Martín Hevia, *Surrogacy, Privacy, and the American Convention on Human Rights*, 5 J.L. & BIOSCIENCES 375, 385 (2018).

207. Rozée, Unisa & de La Rochebrochard, *supra* note 202, at 9.

208. UNIF. PARENTAGE ACT § 804 (UNIF. L. COMM’N 2017).

209. *Id.*

power.<sup>210</sup> According to Professor Krawiec, a wide array of fertility specialists, agents, brokers, facilitators, and lawyers profit immensely from reproductive markets while simultaneously reducing competition by fighting for legal restrictions that hinder gestational surrogates from entering the market independently.<sup>211</sup> The current legal uncertainty regarding the enforceability of surrogacy contracts and the permissibility of payment terms

channels some parents into less risky sectors of the baby market, causes those who remain in the surrogacy sector to charge a risk premium for the surrogate's risk of nonperformance, and enhances the role of intermediaries . . . whose reputations and profits depend on the repeated delivery of surrogates who will perform under the terms of the contract.<sup>212</sup>

The previous parts of this Note have illustrated that there is a need for surrogacy, a need to protect surrogates and intended children from exploitation, and a need to respect the desires of surrogates to help couples and individuals reproduce. This Note has aimed to bring to light the perspectives of surrogates and pinpoint the needs and wants on both sides of a surrogacy agreement. Although the provisions in Article 8 of the UPA create a good foundation for states to draw on, the most important thing is that the Article centers around the enforceability of surrogacy contracts. While the recommendations are imperfect and can be improved with more input from reproductive health advocates and experts, adopting Article 8 would bring the United States one step closer to uniformity and thus greater protections for surrogates.

#### CONCLUSION

This Note has advocated for the enforcement of gestational surrogacy contracts across the United States. This Note has also produced an original chart, compiled from valuable stakeholder data to convey how surrogacy law stands today. The chart is critical to understanding how piecemeal the laws are across the United States, and it can be used as a tool to advocate for uniformity in contract enforcement. This scholarship is important because surrogacy laws are constantly changing, and it is critical to seize on this momentum to ensure that surrogates and intended parents are protected via valid contracts. This Note has recognized that there are immense limits and hurdles to overcome before this country's surrogacy laws become more consistent but highlights that the important first step is to

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210. Kimberly D. Krawiec, *Price and Pretense in the Baby Market*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 41, 48 (Michele Bratcher Goodwin ed., 2010).

211. *Id.* Please also see this source for a fruitful discussion on how pushing for altruism allows these markets and intermediaries to thrive off the efforts of surrogates without giving them a fair cut of the profits.

212. *Id.* at 50.

advocate for the enforcement of surrogacy contracts, especially in states with restrictive surrogacy laws. The Uniform Parentage Act of 2017 can provide a good starting point for states that currently do not allow for the enforceability of these contracts. Let's make surrogacy less complicated.