

Surrogacy and the Politics of Pregnancy

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This Essay examines the regulation of pregnancy through a less commonly explored lens—surrogacy legislation. Initially, the dominant position of feminist advocates was to understand the practice of surrogacy as antithetical to women’s equality and reproductive autonomy. Due in part to their active and persuasive involvement, the early legislative trends tracked this position; most of the legislation enacted in the 1980s and early 1990s banned surrogacy. By the mid-1990s, however, the legislative tide turned. All of the comprehensive surrogacy statutes enacted since that time permit and regulate surrogacy. This shift was due in part to a growing sense among some feminists and others that permitting surrogacy can promote the goals of liberty and equality.

At times, however, too little attention was paid to the details of these permissive surrogacy schemes. As a result, permissive surrogacy statutes in some states may undermine these aims. This Essay focuses on one such type of statute: surrogacy provisions that authorize potentially sweeping control over the lives, bodily integrity, and decision making of people acting as surrogates. For example, a number of permissive surrogacy schemes expressly authorize contract clauses that require people acting as surrogates to undergo risky and invasive medical procedures over their clearly stated, contemporaneous objection.

But such schemes are not inevitable. This Essay concludes by highlighting recent examples that illustrate how permissive surrogacy legislation can foster, rather than impede, the ability of people to control decisions about their own bodies.

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INTRODUCTION

Much attention has been directed on the effects of abortion regulation and access to contraception on women’s reproductive freedom, and rightly so.¹ This Essay explores the politics of pregnancy through a less commonly explored lens—surrogacy legislation. Surrogacy is the process by which a person (usually a woman)² enters into an agreement with an intended parent

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¹ See generally Helen Norton, *Pregnancy and the First Amendment*, 87 *FORDHAM L. REV.* 2417 (2019); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 *N.Y.U. L. REV.* 175 (2018); Mary Ziegler, *Facing the Facts: The New Era of Abortion Conflict After Whole Woman’s Health*, 52 *WAKE FOREST L. REV.* 1231 (2017).

² Throughout this Article, I generally use the phrase “person acting as a surrogate,” rather than the more commonly used terms like “surrogate carrier” or “surrogate mother.” “The phrase ‘person acting as surrogate’ better recognizes that panopoly of rights for all people acting

or parents in which they agree to become pregnant with the intent that the intended parent or parents will be the parents of the resulting child.³

Surrogacy has been controversial since its practice first began in the U.S. in the late 1970s and early 1980s.⁴ Initially, the dominant position of feminist advocates was to understand the practice of surrogacy (in any form) as antithetical to women's equality and reproductive autonomy.⁵ Many feminists feared that surrogacy would result in the exploitation of women, particularly poor women of color, who might be coerced into serving as surrogates.⁶ Some feminists also worried that the practice of surrogacy would

as surrogates and serves as a useful reminder of their presence in the process throughout." Letter from advocates and scholars to Andrew Cuomo, Governor, New York, et al. (April 1, 2019) (regarding Proposed Amendments to the Child-Parent Security Act (CPSA)) [hereinafter *Cuomo Letter*]. I was a signatory to this letter and I helped prepare it.

While most people who act as surrogates are women, I use a gender-neutral phrase in recognition that some people who act in this capacity are not or do not identify as women. *See id.* The use of a gender-neutral phrase, however, does not mean that surrogacy has no gender-related implications. To the contrary, as I detail in this Essay, the ways in which surrogacy is regulated can have profound implications for women's reproductive freedom more broadly.

³ *See* COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW § 4:1 (2019 ed.). There are two types of surrogacy. Gestational surrogacy refers to a situation where the person acting as a surrogate did not provide the ova. *See id.* Genetic surrogacy—also referred to as traditional surrogacy—refers to a situation where the person acting as a surrogate did provide the ova. *See id.*

⁴ Some reports state that the first child born as the result of a surrogacy agreement was born in 1980. *See* Garry Abrams, *A Setback for Surrogate Parenting?*, L.A. TIMES (Feb. 4, 1988, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1988-02-04-vw-40595-story.html> [<https://perma.cc/XLW3-JB22>] (reporting that "Elizabeth Kane [was] the first surrogate mother in this country" and that "she delivered a surrogate son on Nov. 9, 1980"). Attorney Noel Keane, however, reports that he had clients who gave birth in the late 1970s. *See* NOEL KEANE & DENNIS L. BREO, *THE SURROGATE MOTHER* 75–95 (1981).

⁵ *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2301 (2017) ("Judges and lawmakers, as well as scholars and activists, worried about the exploitation of women, the commodification of women's reproductive capacity, and the deprivation of biological mothers' rights.")

Some of the early feminist writing opposing surrogacy include: PHYLLIS CHESLER, *THE SACRED BOND: THE LEGACY OF THE Baby M Case* (1988); GENA COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* (1985); MARTHA A. FIELD, *SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES* (1988); BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD, IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* (1989); JANICE RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* (1993); Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER J. 17 (1991); Mary Lyndon Shanley, *Surrogate Mothering and Women's Freedom: A Critique of Contracts for Human Reproduction*, 18 SIGNS 618 (1993).

⁶ *See* Allen, *supra* note 5, at 30 ("Minority women increasingly will be sought to serve as 'mother machines' for embryos of middle and upper-class clients. It's a new, virulent form of racial and class discrimination. Within a decade, thousands of poor and minority women will likely be used as a 'breeder class' for those who can afford \$30,000 to \$40,000 to avoid the inconvenience and danger of pregnancy."); Khiara M. Bridges, Windsor, *Surrogacy, and Race*, 89 WASH. L. REV. 1125, 1134 (2014) (explaining that in the 1980s and 1990s, some commentators feared that surrogacy was "not simply a means by which the wealthy can exploit the poor, but rather [it was] a means by which wealthy white people can exploit poor people of color" (emphasis in original)); *see also* Elizabeth Mehren, *Feminists Fight Court Ruling in Baby M. Decision: Steinem, Friedan, Chesler, French Among Supporters*, L.A. TIMES (July 31, 1987, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1987-07-31-vw-147-story.html> [perma.cc/2VC3-U8XP].

denigrate reproduction and women's role in that process.⁷ These concerns led many feminists in the 1980s and 1990s to oppose the practice of surrogacy altogether.⁸

Due in part to their active and persuasive involvement, the early legislative trends tracked their position; most of the legislation enacted during this period banned surrogacy.⁹ A few of these earlier statutory schemes also authorized the imposition of civil¹⁰ and, in some cases, criminal penalties¹¹ on parties involved in surrogacy arrangements.

The legislative tide, however, turned. Since the mid-1990s, all of the states that have enacted comprehensive surrogacy legislation have enacted legislation that permits and regulates at least some forms of surrogacy.¹² This period is what Elizabeth Scott calls the “second wave” of surrogacy legislation.¹³ This shift from bans to permissive regulatory approaches is the result of several different developments and changes. One such force is a growing sense among some feminists and others that permitting surrogacy can promote the goals of liberty and equality. Permissive approaches can open up reproductive choices for intended parents, including single intended parents and LGBTQ-intended parents.¹⁴ Permissive schemes can also allow women to make important choices about their bodies, including the choice to act as a surrogate. At times, however, too little attention was paid to *the details of*

⁷ See, e.g., N.Y. STATE TASK FORCE ON LIFE & THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 121 (1988), https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogate_parenting.pdf [<https://perma.cc/M9Q7-VJES>].

⁸ See Elizabeth Scott, *Surrogacy and the Politics of Commodification*, 72 L. & CONTEMP. PROBS. 109, 115 (2009) (“Feminists and liberals were among the most active advocates, unifying against surrogacy as the *Baby M* litigation played out.”).

⁹ 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, 1285–86 (2014) (noting the states that passed surrogacy bans during and in the aftermath of the *Baby M* litigation).

¹⁰ See, e.g., N.Y. DOM. REL. LAW § 123(2)(b) (McKinney, Westlaw through L.2019, chapter 444.) (“Any other person or entity who . . . assists in the formation of a surrogate parenting contract for . . . compensation . . . shall be subject to a civil penalty not to exceed ten thousand dollars.”).

¹¹ See, e.g., MICH. COMP. LAWS ANN. § 722.859(2) (West, Westlaw through P.A.2019, No. 115, of the 2019 Reg. Sess., 100th Leg.) (“A participating party . . . who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than \$10,000.00 or imprisonment for not more than 1 year, or both.”).

¹² See Nicolas, *supra* note 9, at 1288 (“Since 1993, only one state has enacted a law prohibiting or criminalizing any aspect of surrogacy. In 2010, Virginia enacted a law that, while generally facilitating surrogacy arrangements, imposed criminal penalties on intermediaries who earn a fee for facilitating surrogacy agreements.” (footnote omitted)).

¹³ I borrow this framing from Elizabeth Scott. See Scott, *supra* note 8, at 117.

¹⁴ As I detail elsewhere, not all permissive surrogacy schemes have inclusive rules regarding intended parents. See Courtney G. Joslin, (*Not*) *Just Surrogacy*, 109 CALIF. L. REV. — (forthcoming 2021) [hereinafter Joslin, (*Not*) *Just Surrogacy*].

these permissive surrogacy schemes.¹⁵ As a result, some states now have surrogacy laws in place that should be cause for concern and further reflection.¹⁶

Before going further, a caveat is in order. I support legislation permitting and regulating surrogacy. I served as the drafter of the Uniform Parentage Act (UPA) (2017).¹⁷ Among other things, the UPA (2017) includes optional provisions that permit and regulate both gestational and genetic (also referred to as traditional) surrogacy.¹⁸ Experience shows that the practice of surrogacy continues even when the law does not condone it.¹⁹ When that happens, the parties involved in the process may have few if any clear protections. By permitting *and also* regulating surrogacy, policy makers can establish basic protections for the participants, including people who act as surrogates.²⁰ In addition, inclusive surrogacy legislation is a means by which the state can support and protect a diverse array of families, including single people, unmarried couples, and LGBTQ parent families.²¹ In this way, permissive surrogacy legislation can be a means of furthering the goals of equality and liberty.

Not all permissive surrogacy legislation, however, is the same. This Essay is part of a series of Articles in which I argue it is important to be attentive to the details.²² The goal here it to identify and critique surrogacy laws that authorize potentially sweeping control over the lives, bodily integrity,

¹⁵ For other contemporary scholarship that consider the details of permissive surrogacy legislation through a feminist lens, see Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1101 (2014); Scott, *supra* note 8, at 110. For earlier such scholarship, see Lori B. Andrews, *Surrogacy Motherhood: The Challenge for Feminists*, 16 L., MED. & HEALTH CARE 72, 72 (1988).

¹⁶ See, e.g., Ainsworth, *supra* note 15, at 1082 (2014) (arguing that “the lack of consensus in feminist thought [on surrogacy regulation] . . . has stymied the ability of feminist law reformers, in most instances, to meaningfully engage in the legal and legislative response to surrogacy”).

¹⁷ UNIF. PARENTAGE ACT (Unif. Law Comm’n 2017), <https://www.uniformlaws.org/viewdocument/final-act-with-comments-61?CommunityKey=C4f37d2d-4d20-4be0-8256-22dd73af068f&ctab=librarydocuments> [<https://perma.cc/4BSR-557W>]. For more information about the UPA (2017), see Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J. FORUM. 589 (2018) [hereinafter Joslin, *Nurturing Parenthood*]; Courtney G. Joslin, *Preface to the UPA* (2017), 52 FAM. L.Q. 437 (2018) [hereinafter Joslin, *Preface*].

¹⁸ UNIF. PARENTAGE ACT art. 8 (Unif. Law Comm’n 2017).

¹⁹ See Hague Conference on Private International Law, *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements*, at 10, Prel. Doc. No. 10 (Mar. 2012), <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf> [<https://perma.cc/Y6DS-JK2G>] (noting that in some jurisdictions with surrogacy bans, there is a “thriving ‘underground’” surrogacy business, and that intending parents [who] reside in these jurisdictions are travelling to more permissible States to enter into surrogacy arrangements there” (footnotes omitted)).

²⁰ See, e.g., Joslin, (*Not*) *Just Surrogacy*, *supra* note 14.

²¹ See Ainsworth, *supra* note 15, at 1111 (discussing principle of non-discrimination). The intended parent definition in the UPA (2017), for example, includes all intended parents, regardless of sex, sexual orientation, or marital status. See UNIF. PARENTAGE ACT § 102(13) (Unif. Law Comm’n 2017) (“‘Intended parent’ means an individual, married or unmarried, who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction.”).

²² See also Joslin, (*Not*) *Just Surrogacy*, *supra* note 14.

and decision making of people acting as surrogates. The law in some states, for example, permits contract clauses that require the person acting as a surrogate to undergo medical treatment, even over her contemporaneous objection.²³ These medical treatments could include anything from fetal monitoring, to invasive and risky surgeries including but not limited to cesareans.²⁴

Drawing insights from the reproductive justice movement, I argue that these provisions are troubling. As Priscilla Ocen puts it, a reproductive justice approach conceptualizes reproductive harms “as part of a larger and historically continuous project of ‘selectively controlling the destiny of entire communities through the bodies of women and individuals.’”²⁵ Accordingly, this methodology “look[s] not just to the moment of choice but also to the broader social, legal, and institutional structures in which people make reproductive choices.”²⁶ Consistent with this approach, this Essay locates and re-considers these surrogacy laws within a larger context of attempts to control the bodies and lives of pregnant people.

This Essay proceeds in three parts. Part I offers a brief history of the evolution of surrogacy legislation in the United States. Initially, most legislation was in the form of statutory bans. In the mid 1990s, however, the trend shifted towards permissive, regulatory regimes. These schemes, however, are not identical. Here I draw attention to provisions in some states that authorize sweeping control over the lives and bodies of people acting as surrogates.

Part II places these provisions within a context of a broad range of efforts to control the decisions and behavior of pregnant people. This context helps one better appreciate how these types of surrogacy laws are shaped by and in turn reinforce narratives about pregnancy and pregnant bodies. Part III returns to surrogacy legislation. This Part concludes by highlighting recent examples that illustrate how permissive surrogacy legislation can better foster (rather than impede) the ability of people to make “decisions about [their] own bodies, sexuality, and reproduction for [them]selves.”²⁷

²³ See *infra* Part II.

²⁴ See *id.*

²⁵ Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2241 (2018) (citation omitted); see also Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL'Y REV. 273, 279 (2020) (noting that the reproductive justice approach “look[s] beyond individual acts and choices to the social structures in which those acts and choices take place”).

²⁶ Bagenstos, *supra* note 25, at 279 (citing Loretta Ross, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4, 4 (2007)).

²⁷ Ocen, *supra* note 25, at 2238.

I. THE EVOLUTION OF U.S. SURROGACY LEGISLATION

Surrogacy practice in the United States began in the late 1970s and early 1980s.²⁸ Initially, no states had legislation specifically addressing the practice.²⁹ During the early years, there was also no “unified position” of feminist advocates and organizations regarding surrogacy.³⁰ Like others, feminists were grappling with their position on the practice.

This began to shift during the famous *Baby M* litigation.³¹ The *Baby M* case involved a dispute between Mary Beth Whitehead, a woman who had acted as a genetic surrogate, and the intended parents, Elizabeth and Bill Stern.³² The case was the first disputed surrogacy case in the U.S. to result in an appellate court decision.³³ The legal proceedings were carefully followed in newspapers around the country.³⁴ As the LA Times wrote at the time: “for many feminists, the Baby M case crystalized anger and focused attention on commercial ramifications of reproductive technology as well as what author and Ms. Magazine editor Letty Cottin Pogrebin . . . called the concomitant ‘potential for exploitation of poor women.’”³⁵ By the time the *Baby M* case

²⁸ See Abrams, *supra* note 4 (reporting that “Elizabeth Kane [was] the first surrogate mother in this country” and that “she delivered a surrogate son on Nov. 9, 1980”); Nadine Brozan, *Surrogate Mothers: Problems and Goals*, N.Y. TIMES (Feb. 27, 1984), <https://www.nytimes.com/1984/02/27/style/surrogate-mothers-problems-and-goals.html> [<https://perma.cc/VMT4-6WJP>] (reporting in 1984 that attorney Noel P. Keane had been “involved in arranging surrogate births for eight years”).

²⁹ See Scott, *supra* note 8, at 117. In 1985, Arkansas became the first state to enact surrogacy legislation. See Myrna Oliver, *Baby M: Old Story but the Legal Issues Remain Unresolved*, L.A. TIMES (April 5, 1987, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1987-04-05-mn-377-story.html> [<https://perma.cc/2E5W-A9BQ>] (noting that in 1985, Arkansas enacted a bare-bones “‘one line’ law” that addressed the parentage of a child born through a surrogacy agreement).

³⁰ Mehren, *supra* note 6.

³¹ See Catherine Gewertz, *Surrogate Motherhood: A Wrenching Test of Ethics*, L.A. TIMES, Nov. 18, 1990, at A1 (“Surrogacy burst onto the national scene in 1987, when Mary Beth Whitehead, a New Jersey woman whose own egg was inseminated with the sperm of William Stern, reneged on her contract and fought unsuccessfully to keep Baby M, the daughter she bore for Stern and his wife.”); see also Scott, *supra* note 8, at 115 (noting that “[e]arly in the trial, feminists acknowledged that surrogacy was a hard issue; news reports described them as ‘torn between support [of] a woman’s right to use her body as she chooses’ and concerns about the exploitation of women”) (footnote omitted).

³² See *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988).

³³ By 1988, a few trial courts had ruled on such disputes. In addition, two appellate courts had ruled in surrogacy cases that did not involve disputes between the parties to the agreement. In 1985, the Michigan Supreme Court ruled in a case in which all of the parties sought a judgment that the intended parent was the legal parent of the resulting child. See *Syrkowski v. Appleyard*, 362 N.W.2d 211, 211 (Mich. 1985). In 1986, the Kentucky Supreme Court held that a state statute prohibiting baby selling did not apply to surrogacy agreements. See *Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 214 (Ky. 1986).

³⁴ SUSAN MARKENS, *SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION* 20 (2007) (noting that newspaper coverage of surrogacy “peaked” “during the Baby M custody trial”).

³⁵ Mehren, *supra* note 6.

culminated in 1988,³⁶ the dominant public position of feminists was to oppose the practice of surrogacy altogether.³⁷

Some surrogacy opponents grounded their opposition in concerns regarding the implications for women's bodies and women's reproductive rights. For example, some feminists opposed the practice of surrogacy because, they argued, "surrogacy degraded the female reproductive function."³⁸ As expressed in a NY Task Force Report issued in 1988, "the characterization of gestation as a 'service' . . . depersonalizes women and their role in human reproduction."³⁹ Others raised concerns about the possibility of exploitation of women, particularly poor women and women of color who, they feared, would be coerced into making this reproduction-related decision.⁴⁰ According to a group of feminist advocates, permitting surrogacy would enable "an elite economic class to exploit a poorer group [of women] as breeders."⁴¹ Some surrogacy opponents feared that women who agreed to act as surrogates might later change their minds. Surrogacy bans, therefore, would protect women from these "potential psychological . . . risks" associated with this possibility.⁴²

³⁶ See *Baby M*, 537 A.2d at 1234 (invalidating a genetic surrogacy agreement on the ground that "it conflicts with the law and public policy of this State").

³⁷ See Andrews, *supra* note 15, at 73 ("Now a growing feminist contingent is . . . seeking to ban surrogacy altogether."); see also Scott, *supra* note 8, at 115 ("Feminists and liberals were among the most active advocates, unifying against surrogacy as the Baby M litigation played out."); Shayna Medley, *Regulating Surrogacy: In Whose Interest?*, ON LAB. (May 12, 2017), <https://onlabor.org/regulating-surrogacy-in-whose-interest/> [https://perma.cc/4ZH4-R92C] ("Many feminist organizations opposed surrogacy in the 1980s and 1990s."); James Risen, *Michigan Outlaws Surrogate Maternity Contracts; Ban Aimed at 'Baby M' Clinic*, L.A. TIMES, June 28, 1988, at C4 ("Other social activists, including many leading feminists, now strongly oppose such contracts as exploitative of women and dehumanizing for the children.").

For seminal writings taking this position, see sources cited *supra* note 5. Not all feminists agreed with this position. For early feminist writing opposing surrogacy bans, see, for example, Andrews, *supra* note 15.

³⁸ Scott, *supra* note 8, at 109–10.

³⁹ N.Y. STATE TASK FORCE ON LIFE & THE LAW, *supra* note 7, at 121.

⁴⁰ See, e.g., Allen, *supra* note 5, at 30 (quoting Jeremy Rifkin & Andrew Kimbrell, *Put a Stop to Surrogate Parenting Now*, USA TODAY, Aug. 20, 1990, at A8) ("Minority women increasingly will be sought to serve as 'mother machines' for embryos of middle and upper-class clients. It's a new, virulent form of racial and class discrimination. Within a decade, thousands of poor and minority women will likely be used as a 'breeder class' for those who can afford \$30,000 to \$40,000 to avoid the inconvenience and danger of pregnancy."); see also Bridges, *supra* note 6, at 1134 (noting that some commentators in the 1980s and 1990s "imagined a dystopic future in which there exists a 'breeder class' composed of indigent black women, their reproductive capacities readily available for purchase by infertile, wealthy white couples who seek to use black women's bodies to overcome their own physical limitations and to have children that were their genetic progeny").

⁴¹ Mehren, *supra* note 6 (quoting an amicus brief filed on behalf of feminists in the Baby M case).

⁴² Andrews, *supra* note 15, at 73; see also Nadine Taub, *Surrogacy: Sorting through the Alternatives*, 4 BERKELEY WOMEN'S L.J. 285, 288 (1989) ("Many opponents of surrogacy say that the woman simply cannot anticipate who she will feel after she experiences the pregnancy and thus cannot make an informed decision prior to birth.").

To be sure, the position of feminists was not monolithic. Some feminists voiced early opposition to surrogacy bans.⁴³ For example, Lori B. Andrews warned in 1988 that the rationales used to oppose the practice of surrogacy “may come back to haunt feminists in other areas of procreative policy and family law.”⁴⁴ A “cornerstone” of feminist policy, she argued, is the principle that “women have a right to reproductive choice.”⁴⁵ This includes the right to decide to act as a surrogate (so long, she continued, as the woman maintained the right to make decisions about her body and the pregnancy).⁴⁶

The most vocal public position of feminists at the time, however, was in opposition to surrogacy. These feminist opponents of surrogacy were joined in their efforts by religious conservatives.⁴⁷ For religious conservatives, “[s]urrogacy was simply one dimension of a larger threat to core Catholic beliefs about family formation posed by new reproductive technologies.”⁴⁸ Initially, this unlikely coalition turned out to be quite influential.⁴⁹ Most surrogacy legislation enacted in the 1980s and 1990s were laws banning surrogacy.⁵⁰ Writing in 1990, Andrews reported that “10 states ha[d] made some kinds of surrogate contracts unenforceable in court, including two that ha[d] also outlawed surrogacy for pay.”⁵¹ By contrast, a smaller number of states had taken steps to permit the practice.⁵²

Eventually, however, the legislative trend shifted.⁵³ Since the mid-1990s, every state that has enacted surrogacy legislation in the U.S. has enacted legislation that permits and regulates surrogacy.⁵⁴ (A few additional

⁴³ See, e.g., Andrews, *supra* note 15, at 72; Taub, *supra* note 42, at 288; Gewertz, *supra* note 31 (noting that in 1990, “Linda Joplin, state coordinator of the California chapter of the National Organization for Women, disagree[d with feminists opposing surrogacy], contending that such an attitude implies that women can’t make their own decisions responsibly”).

⁴⁴ Andrews, *supra* note 15, at 72.

⁴⁵ *Id.* at 72–73.

⁴⁶ *Id.*

⁴⁷ See Scott, *supra* note 8, at 129 (“But the coalition was a curious one: feminists and civil-liberties groups seldom ally with traditional religious organizations—particularly on issues relating to the regulation of reproductive choices.”).

⁴⁸ *Id.* at 130.

⁴⁹ See also Risen, *supra* note 37 (“Rifkin and other opponents [of surrogacy] have gained momentum since the controversy surrounding the Baby M case sparked a nationwide debate over the issue, and they now hope to push for . . . legislation [like Michigan’s criminal ban] throughout the nation.”).

⁵⁰ See, e.g., Scott, *supra* note 8, at 117 (“[B]y late 1988, six states had passed laws banning the agreements or declaring them void—often with little opposition.” (footnote omitted)).

⁵¹ Gewertz, *supra* note 31; see also Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1225 (2013) (“Anti-surrogacy advocacy by feminists, social conservatives, and others has led to the banning of the practice in a number of states in the United States and countries worldwide.”).

⁵² See Gewertz, *supra* note 31.

⁵³ See Scott, *supra* note 8, at 120 (“The 1992 passage of the New York statute represents the political high-water mark of the antisurrogacy movement.”).

⁵⁴ See Nicolas, *supra* note 9, at 1288.

states, including Arkansas,⁵⁵ Florida,⁵⁶ and Virginia,⁵⁷ have permissive surrogacy schemes that predate this turning point.) This shift occurred for a range of reasons.⁵⁸ First, time and experience proved that surrogacy bans did not end its practice in the U.S. Instead, surrogacy practice grew and expanded,⁵⁹ even in states without permissive legislation.⁶⁰ Parties often found ways around the bans. Intended parents could, for example, work with a person acting as a surrogate in another state.⁶¹ When practiced in a state without clear law, the parties to a surrogacy arrangement typically had few if any basic safeguards and protections, and they often lacked certainty about their legal statuses.⁶²

Second, time and experience also revealed that some of the key concerns held by surrogacy opponents had not borne out, or at least not to the degree some feared. For example, most people acting as surrogates in the U.S. and the U.K. report that the experience was a positive one, or least not

⁵⁵ See ARK. CODE ANN. § 9-10-201 (West, Westlaw through the end of the 2019 Reg. Sess. of the 92nd Arkansas General Assemb.).

⁵⁶ See FLA. STAT. ANN. § 742.11 (West, Westlaw through the 2019 First Reg. Sess. of the 26th Leg.).

⁵⁷ See VA. CODE ANN. § 20-159 (West, Westlaw through End of the 2019 Reg. Sess.).

⁵⁸ For a more detailed examination of this shift, see Scott, *supra* note 8, at 136–45.

⁵⁹ Since 2004, the American Society for Reproductive Medicine (ASRM) has collected information about surrogacy from member clinics that have chosen to share their data with them. See, e.g., N.Y. STATE TASK FORCE OF LIFE & THE LAW, REVISITING SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY ON GESTATIONAL SURROGACY 22 (2017), https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogacy_report.pdf [<https://perma.cc/265Y-9NLS>] (citing E-mail from Eleanor Nicoll, Pub. Affairs Manager, Am. Soc’y of Reprod. Med. (June 14, 2017)). ASRM reports that according to their (albeit) incomplete reports, 738 children were born in 2004 as the result of surrogacy arrangements. See *id.* By 2015, that number had increased to 2,807. See *id.*; see also MAGADALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 3 (2010), <http://thetarrytownmeetings.org/sites/default/files/Surrogacy%20in%20America%20Report.pdf> [<https://perma.cc/XLL8-YS3R>] (finding that the number of gestational surrogacies increased 89% from 2004 to 2008).

⁶⁰ See, e.g., Scott, *supra* note 8, at 120 (“Contrary to predictions, surrogacy has flourished over the past decade.”); see also *id.* at 123 (noting that intended parents “have increasingly shown themselves ready to turn to surrogates, even when the agreements are of uncertain legality”).

⁶¹ See *A Preliminary Report on the Issues Arising From International Surrogacy Arrangements*, *supra* note 19, at 10 (noting that in some jurisdictions with surrogacy bans, there is a “thriving ‘underground’” surrogacy business, and that intending parents who reside in these jurisdictions are “travelling to more permissible States to enter into surrogacy arrangements there” (footnotes omitted)); see also Nicolas, *supra* note 9, at 1237–45 (describing his process of deciding how to pursue surrogacy while residing in a state that banned it).

⁶² See SITAL KALANTRY, CORNELL UNIV. LAW SCH., ET AL., SHOULD COMPENSATED SURROGACY BE PERMITTED OR PROHIBITED?: POLICY REPORT EVALUATING THE NEW YORK CHILD-PARENT SECURITY ACT OF 2017 THAT WOULD PERMIT ENFORCEABLE AND COMPENSATED SURROGACY 1 (2017) <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2685&context=facpub> [<https://perma.cc/D575-R8K4>] (“When New Yorkers go out-of-state this can lead to uncertainty over the law that applies to the arrangement and subsequently the parentage of children. It also leaves New Yorkers to work with professionals who are not accountable to them in New York, and having to conduct any litigation outside of their home state. The result is more complicated and less secure surrogacy arrangements.”).

a highly negative one.⁶³ Few people acting as surrogates in the U.S. and countries with similar legal regimes describe the arrangement as a coercive one.⁶⁴ In addition, while people acting as surrogates in the U.S. generally have fewer financial assets than intended parents, they tend not to be poor.⁶⁵

Another factor is advocacy. Initially, there were few organized supporters of surrogacy practice. That changed. Over time, more families have been formed through surrogacy. These families and an established web of surrogacy practitioners who represent them now actively push for permissive surrogacy regimes.⁶⁶ LGBTQ organizations have also joined in these efforts. On the flip side, some of the strong feminist opposition to surrogacy dissipated.⁶⁷ As lawyer and advocate Sara Ainsworth put it: “It’s rarer [now] than it was in the ‘80s and ‘90s to see feminists flat-out opposing surrogacy.”⁶⁸

⁶³ See Susan Imrie & Vasanti Jadva, *The Long-Term Experiences of Surrogates: Relationships and Contact with Surrogacy Families in Genetic and Gestational Surrogacy Arrangements*, 29 REPROD. BIOMEDICINE ONLINE 424, 425 (2014) (noting that a number of studies have found that “most surrogates report[] positive experiences and few regret[] their decision to become a surrogate”); Vasanti Jadva et al., *Surrogate Mothers 10 Years On: A Longitudinal Study of Psychological Well-Being and Relationships with the Parents and Child*, 30 HUM. REPROD. 373, 377 (2015) (finding “that overall, surrogates report positive well-being as demonstrated by their high self-esteem, their lack of signs of depression and their good or above average relationship quality with their husbands/partners”); see also Ainsworth, *supra* note 15, at 1101 (“In both United States and British studies, women acting as surrogates indicate that they appreciated the emotional bond with the intended parents—or were unhappy if that was lacking—and that they were comfortable, even happy, giving the baby to the intended parents after the birth.” (footnote omitted)).

⁶⁴ See Imrie & Jadva, *supra* note 63, at 430 (“The primary theme that emerged from the analysis of relationships [between people acting as surrogates and intended parents] categorised as positive was that surrogates viewed the relationship as a genuine, close friendship, which felt ‘natural’ and ‘easy.’”); see also *id.* (“Of those surrogates and parents who had remained in contact, surrogates reported a positive relationship with 89% (55) of mothers and 85% (55) of fathers. Surrogates reported a neutral or ambivalent relationship with 8% (8) of mothers and 9% (6) of fathers, and stated they had no relationship with 3% (2) of mothers and 6% (4) of fathers. No surrogates who had remained in contact with the couples reported a negative relationship.”); Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U. J. GENDER, SOC. POL’Y & L. 555, 559–60 (2013) (“Empirical studies on surrogate mothers have repeatedly demonstrated that the vast majority of surrogacy arrangements are successfully executed and consented to by women who are financially and psychologically stable.”).

⁶⁵ See Ainsworth, *supra* note 15, at 1113 (“The fear that most women acting as surrogates will be low-income women coerced by economic circumstances into acting as surrogates for the wealthy has not materialized in the United States.” (footnote omitted)).

⁶⁶ See Scott, *supra* note 8, at 121 (“Attorneys, brokers, and parents’ groups have become active advocates for supportive laws.”).

⁶⁷ See *id.* (“Attorneys, brokers, and parents’ groups have become active advocates for supportive laws, while women’s groups and civil-liberties organizations have withdrawn from the political arena.”).

⁶⁸ Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), <https://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-a-maze-of-laws-state-by-state.html> [https://perma.cc/Z8P2-NZTS].

Together, these forces led to a shift in favor of permissive legislation.⁶⁹ Many of these new statutory schemes incorporate inclusive rules regarding intended parents.⁷⁰ Inclusive, permissible surrogacy regimes offer a way for all people—regardless of sex, sexual orientation, or marital status—to form and protect families.⁷¹ In this way, inclusive surrogacy schemes further the goals of equality and procreative liberty.⁷²

Permitting surrogacy, some argue, also protects women’s autonomy by allowing them to decide to act as a surrogate.⁷³ Some permissive schemes also expressly protect the person’s decision making and bodily autonomy during their pregnancy. This is true in Washington state, for example. As discussed in more detail below,⁷⁴ Washington’s newly enacted surrogacy laws declare that “[t]he agreement must permit the woman acting as a surrogate to make all health and welfare decisions regarding herself and her pregnancy and, notwithstanding any other provisions in this chapter, provisions in the agreement to the contrary are void and unenforceable.”⁷⁵

⁶⁹ See Nicolas, *supra* note 9, at 1288 (“Following this spurt of legislative activity in the years immediately following *Baby M*, states stopped enacting laws criminalizing surrogacy and instead began enacting laws designed to facilitate surrogacy arrangements.”).

⁷⁰ See N.J. STAT. ANN. § 9:17-62 (West, Westlaw through L.2019, c. 266 and J.R. No. 22) (“The term [‘intended parent’] shall include persons who are single, married, partners in a civil union or domestic partnership, and couples who are not married or in a civil union or domestic partnership. Any reference to an intended parent shall include both spouses or partners in a civil union or domestic partnership. This term shall include the intended mother, the intended father, the intended mother and intended father, the intended mother and intended mother, or the intended father and intended father.”); see also CAL. FAM. CODE § 7960(c) (West, Westlaw through Ch. 860 of the 2019 Reg. Sess.); DEL. CODE ANN. tit. 13, § 8-102 (West, Westlaw through ch. 218 of the 150th General Assemb. (2019-2020)); D.C. CODE ANN. § 16-401(16) (West, Westlaw through September 11, 2019); 750 ILL. COMP. STAT. ANN. 47/10 (West, Westlaw through P.A. 101-591); ME. REV. STAT. tit. 19-A, § 1832(12) (West, Westlaw through the 2019 First Reg. Sess. and Chapter 531 of the First Spec. Sess. of the 129th Leg.); NEV. REV. STAT. ANN. § 126.590 (West, Westlaw through the end of the 80th Reg. Sess. (2019)); N.H. REV. STAT. ANN. § 168-B:1(XIII) (West, Westlaw through Chapter 345 of the 2019 Reg. Sess.); VT. STAT. ANN. tit. 15C, § 102(14) (West, Westlaw through Acts of the Reg. Sess. of the 2019-2020 Vermont General Assemb. (2019)); VA. CODE ANN. § 20-156 (West, Westlaw through End of the 2019 Reg. Sess.); WASH. REV. CODE ANN. § 26.26A.010(13) (West, Westlaw through the 2019 Reg. Sess. of the Washington Leg.).

⁷¹ See, e.g., Press Release, Family Equality Council, Statement from Family Equality Council Regarding a Press Conference on the Issue of Legalizing Gestational Surrogacy in New York (May 13, 2019), <https://www.familyequality.org/press-releases/statement-from-family-equality-council-regarding-a-press-conference-on-the-issue-of-legalizing-gestational-surrogacy-in-new-york/> [<https://perma.cc/7F8K-XJJ2>] (“Family Equality Council believes every LGBTQ person should have the right and opportunity to form and sustain a loving family, regardless of who they are or where they live.”). See also Joslin, (*Not*) *Just Surrogacy*, *supra* note 14, at Appendix B.

⁷² See, e.g., NeJaime, *supra* note 5, at 2260 (noting that the article “explores what it means to fully vindicate gender and sexual-orientation equality in the law of parental recognition”).

⁷³ See Andrews, *supra* note 15, at 72–73.

⁷⁴ See *infra* Part III.

⁷⁵ WASH. REV. CODE ANN. § 26.26A.715(1)(g) (West, Westlaw through the 2019 Reg. Sess. of the Washington Leg.).

This is not true of all statutory surrogacy schemes, however. In contrast to the Washington law, some existing surrogacy laws include provisions that are in tension with the goal of promoting the “ability of people to make ‘decisions about [their] own bodies, sexuality, and reproduction.’”⁷⁶ Here, I am speaking of laws in a number of states that allow for potentially sweeping control over the lives, bodies, and decisions of people acting as surrogates. Of the seventeen jurisdictions that enacted permissive surrogacy regimes since 2000,⁷⁷ six expressly permit the direct regulation of the bodies of pregnant people, even over their contemporaneous objection.⁷⁸ Indeed, the laws in some of these states *require* that regulation.⁷⁹

Illinois is an example of a state that includes these types of troubling statutory provisions. Illinois law states that a surrogacy agreement can require the person acting as a surrogate to “undergo all medical exams, treatments, and fetal monitoring procedures that the physician recommended for the success of the pregnancy.”⁸⁰ Similar language appears in the laws of other states, including Delaware,⁸¹ Nevada,⁸² and Oklahoma.⁸³ The Oklahoma scheme expressly declares that such contractual clauses are enforceable.⁸⁴

⁷⁶ Ocen, *supra* note 25, at 2238 (quoting ASIAN CMTYS. FOR REPROD. JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 1 (2005), <https://forwardtogether.org/wp-content/uploads/2017/12/ACRJ-A-New-Vision.pdf> [<https://perma.cc/F4ZA-8YG5>]).

⁷⁷ Joslin, (*Not*) *Just Surrogacy*, *supra* note 14, at Appendices A & C.

⁷⁸ See DEL. CODE ANN. tit. 13, § 8-807(d)(1) (West, Westlaw through ch. 218 of the 150th General Assemb. (2019-2020)); FLA. STAT. ANN. § 742.15(3)(b) (West, Westlaw through the 2019 First Reg. Sess. of the 26th Leg.); 750 ILL. COMP. STAT. ANN. 47/25(d)(1) (West, Westlaw through P.A. 101-591); LA. STAT. ANN. § 9:2720.2(A)(2) (West, Westlaw through the 2019 Reg. Sess.); NEV. REV. STAT. ANN. § 126.750(5)(a) (West, Westlaw through the end of the 80th Reg. Sess. (2019)); OKLA. STAT. ANN. tit. 10, § 557.6(D)(1) (West, Westlaw through the First Reg. Sess. of the 57th Leg. (2019)).

⁷⁹ See *infra* notes 89–91 and accompanying text.

⁸⁰ See 750 ILL. COMP. STAT. ANN. 47/25(d)(1) (“(d) A gestational surrogacy contract shall be presumed enforceable for purposes of State law even though it contains . . . the following provision[]: (1) the gestational surrogate’s agreement to undergo all medical exams, treatments, and fetal monitoring procedures that the physician recommended for the success of the pregnancy.”).

⁸¹ See DEL. CODE ANN. tit. 13, § 8-807(d)(1) (“(d) A gestational carrier agreement shall be enforceable even though it contains . . . the following provision[]: (1) The gestational carrier’s agreement to undergo all medical exams, treatments, and fetal monitoring procedures that the physician recommends for the success of the pregnancy.”).

⁸² See NEV. REV. STAT. ANN. § 126.750(5)(a) (“5. A gestational agreement is enforceable even if it contains . . . the following provision[]: (a) The gestational carrier’s agreement to undergo all medical examinations, treatments and fetal monitoring procedures recommended for the success of the pregnancy by the physician providing care to the gestational carrier during the pregnancy.”).

⁸³ See OKLA. STAT. ANN. tit. 10, § 557.6(D)(1) (“D. The inclusion in a gestational agreement of . . . the following provision[] shall not constitute cause for a court to deny the validation of the gestational agreement, and such provisions in a validated gestational agreement shall be enforceable: 1. The gestational carrier’s agreement to undergo all medical examinations, treatments and fetal monitoring procedures recommended for the success of the pregnancy by the physician providing care to the gestational carrier during the pregnancy.”).

⁸⁴ See *id.* (“D. The inclusion in a gestational agreement of any one or more of the following provisions shall not constitute cause for a court to deny the validation of the gestational

If specifically enforced, this kind of authorized contract clause could result in a person being forced to undergo an invasive, risky medical procedure like a cesarean section over their clearly stated, contemporaneous objection. Not only would that result interfere with the person's bodily integrity in the moment, it could also have more long-term consequences. "Women who have cesareans are more likely to experience death, emergency hysterectomy, blood clots and stroke, surgical injury such as bladder and uterine lacerations, hemorrhage, infection, and intense and prolonged postpartum pain."⁸⁵ Cesareans are also associated with future infertility or complications in future pregnancies.⁸⁶

A contract clause authorized under these laws could also require the person to undergo an unwanted selective reduction when it is "recommended to improve the outcome for the remaining fetus(es)."⁸⁷ Theoretically, this too could be required over the objection of the person acting as a surrogate as surrogacy contracts often "provide that the intended parents have the right to make all termination decisions."⁸⁸ Indeed, among other things, the contract in the Baby M case included the following clause:

13. MARY BETH WHITEHEAD, Surrogate, agrees that she will not abort the child once conceived except, if in the professional medical opinion of the inseminating physician, such action is necessary for the physical health of MARY BETH WHITEHEAD or the child has been determined by said physician to be physiologically abnormal. MARY BETH WHITEHEAD further agrees, upon the request of said physician to undergo amniocentesis (see Exhibit "D") or similar tests to detect genetic and congenital defects. In the event said test reveals that the fetus is genetically or congenitally abnormal, MARY BETH WHITEHEAD, Surrogate, agrees to abort the fetus upon demand of WILLIAM STERN, Natural Father⁸⁹

Two states—Florida⁹⁰ and Louisiana⁹¹—go even further. The statutes in these two states *require* the person acting as a surrogate "to agree[] to

agreement, and such provisions in a validated gestational agreement *shall be enforceable*: 1. The gestational carrier's agreement to undergo all medical examinations, treatments and fetal monitoring procedures recommended for the success of the pregnancy by the physician providing care to the gestational carrier during the pregnancy." (emphasis added).

⁸⁵ Elizabeth Kukura, *Birth Conflicts: Leveraging State Power to Coerce Health Care Decision-Making*, 47 U. BALT. L. REV. 247, 266 (2018) (footnote omitted).

⁸⁶ *See id.*

⁸⁷ Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 FAM. L.Q. 29, 34 (2015) ("[C]ontracts often contain abortion and selective reduction provisions").

⁸⁸ *Id.*

⁸⁹ The agreement is included as an appendix to the *Baby M* decision. *See In re Baby M*, 537 A.2d 1227, app. A at 1268 (N.J. 1988).

⁹⁰ *See* FLA. STAT. ANN. § 742.15(3)(b) (West, Westlaw through the 2019 First Reg. Sess. of the 26th Leg.) ("A gestational surrogacy contract must include the following provisions: . . .

submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health.”⁹²

Four states—Delaware, Illinois, Nevada, and Oklahoma—also include statutory provisions that allow the agreement to require the person acting as a surrogate to “abstain from any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child.”⁹³ The authorized contractual clauses could and often do cover conduct that is already prohibited under other laws, like ille-

(b) The gestational surrogate agrees to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health.”)

⁹¹ See LA. STAT. ANN. § 9:2720.2(A)(2) (West, Westlaw through the 2019 Reg. Sess.) (“In an enforceable gestational carrier contract, the gestational carrier shall do all of the following: . . . (2) Agree to reasonable medical evaluation and treatment during the term of the pregnancy, to adhere to reasonable medical instructions about prenatal health, and to execute medical records releases under R.S. 40:1165.1 in favor of the intended parents.”).

⁹² FLA. STAT. ANN. § 742.15(3)(b). To be clear, however, in both states there are additional provisions stating that the person acting as a surrogate “shall be the sole source of consent with respect to clinical intervention and management of the pregnancy.” *Id.* § 742.15(3)(a); see also LA. REV. STAT. § 9:2720.2(B)(1) (providing that the agreement must “acknowledge that the gestational carrier has sole authority with respect to medical decision-making during the term of the pregnancy consistent with the rights of a pregnant woman carrying her own biological child”). It is unclear how these two provisions interact with one another if the person acting as a surrogate opposes the suggested treatment plan.

⁹³ DEL. CODE ANN. tit. 13, § 8-807(d)(2) (West, Westlaw through ch. 218 of the 150th General Assembly (2019-2020)) (“(d) A gestational carrier agreement shall be enforceable even though it contains . . . the following provision[]: . . . (2) The gestational carrier’s agreement to abstain from any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child, including, without limitation, smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the gestational carrier’s pregnancy, exposure to radiation, or any other activities proscribed by a health care provider.”); see also 750 ILL. COMP. STAT. ANN. 47/25(d)(2) (West, Westlaw through P.A. 101-591) (“(d) A gestational surrogacy contract shall be presumed enforceable for purposes of State law even though it contains . . . the following provision[]: . . . (2) [T]he gestational surrogate’s agreement to abstain from any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child, including, without limitation, smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the gestational surrogate’s pregnancy, exposure to radiation, or any other activities proscribed by a health care provider.”); NEV. REV. STAT. ANN. § 126.750(5)(a)(2) (West, Westlaw through the end of the 80th Reg. Sess. (2019)) (“5. A gestational agreement is enforceable even if it contains . . . the following provision[]: . . . (b) The gestational carrier’s agreement to abstain from any activities that the intended parent or parents or the physician providing care to the gestational carrier during the pregnancy reasonably believes to be harmful to the pregnancy and the future health of any resulting child, including, without limitation, smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the pregnancy, exposure to radiation or any other activity proscribed by a health care provider.”); OKLA. STAT. ANN. tit. 10, § 557.6(D)(2) (West, Westlaw through the First Reg. Sess. of the 57th Leg. (2019)) (“D. The inclusion in a gestational agreement of . . . the following provision[] shall not constitute cause for a court to deny the validation of the gestational agreement, and such provisions in a validated gestational agreement shall be enforceable: . . . 2. The gestational carrier’s agreement to abstain from any activities that the intended parents or the physician providing care to the gestational carrier during the pregnancy reasonably believe to be harmful to the pregnancy or the future health of any resulting child, including, without limitation, smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the pregnancy, exposure to radiation or any other activity proscribed by a health care provider.”).

gal drug use. These statutory provisions, however, permit requirements that go far beyond prohibiting illegal conduct. Indeed, it is common for surrogacy contracts to address issues as far ranging as whether and how much the person acting as a surrogate can or must exercise, what kind of food they should eat, whether they can use a microwave, how much sleep they should get, and whether they continue to work.⁹⁴ Some intended parents seek not only to impose these rules but also to monitor compliance. Based on her study of surrogacy contracts, Hillary Berk writes that one “California lawyer explained that ‘it is not unusual’ for [intended parent] clients to request ‘nanny cams’ for ‘more access’ to police the rules.”⁹⁵ Other intended parents “request that their surrogates move in for 24-7 monitoring.”⁹⁶

In most cases, the intended parents and the person acting as a surrogate are in alignment with regard to behavior during the pregnancy. Most pregnant people—including people acting as surrogates—do their best to create the conditions for a healthy and successful pregnancy. This is no small task. The list of dos and don’ts of a healthy pregnancy is long and complicated. For example, pregnant women are advised to eat fish, but not too much fish, and only certain kinds of fish.⁹⁷ They are advised to gain weight, but not too much weight.⁹⁸ With regard to some issues, there may be no consensus. Advice about whether and how much to exercise during pregnancy is a good example. Again, most pregnant people do their best to provide for a healthy pregnancy. However, in other contexts pregnant people generally⁹⁹ have the

⁹⁴ See Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 L. & SOC’Y REV. 143, 157 (2015) (“Contract rules may include the degree of an intended parents’ [sic] surveillance over the surrogate, restrictions on the surrogate’s daily activities, or requiring the surrogate to consume solely organic foods and supplements while prohibiting caffeine, sugar, or fast food throughout the pregnancy. Some rules require that the surrogate engage in a particular activity—like acupuncture or going to the gym—or prohibit her from doing so—such as bans on microwaves, hairspray, manicures, or changing cat litter.”). See also Rachel Rebouché, *Contracting Pregnancy*, — IOWA L. REV. — (forthcoming 2020) (examining the ways in which model surrogacy contracts seek to control the behavior and decision making of people acting as surrogates) (manuscript on file with author).

⁹⁵ *Id.* at 159.

⁹⁶ *Id.*

⁹⁷ See Zahra Jahedmotlage et al., *Fetal Risks of Environmental Chemicals: The Motherisk Approach to the Organic Mercury Fish Consumption Scare*, 63 HASTINGS L.J. 1605, 1605–08 (2011); see also Kate E. Bloch, *Creating a Clearinghouse to Evaluate Environmental Risks to Fetal Development*, 63 HASTINGS L.J. 1571, 1591–92 (2011) (noting that “Dr. Gideon Koren’s empirical research described in his article in this Symposium issue documents the confusion of real women in the face of conflicting and often overwhelming information about methylmercury and fish consumption during pregnancy”).

⁹⁸ See Katherine Kam, *The Top 7 Pregnancy Myths*, WEBMD (Aug. 12, 2016), <https://www.webmd.com/baby/guide/top-7-pregnancy-myths#1> [<https://perma.cc/2LD2-QQLQ>].

⁹⁹ I use the modifier “generally” because there are situations where women’s behavior during pregnancy is regulated, directly or indirectly. See *infra* notes 104–25 and accompanying text. See also generally Khiara M. Bridges, *Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies*, 3 NW. J.L. & SOC. POL’Y 62 (2008); Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781 (2014); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012). As this scholarship identifies, women of color and poor women are more likely to have their behavior during pregnancy controlled or regulated.

right to make these decisions for themselves.¹⁰⁰ Laws that potentially authorize 24-hour surveillance of pregnant people should be cause for concern.

To be sure, despite the express declaration of enforceability in some of these statutory provisions, there are serious and unresolved questions about whether such a provision would indeed be enforceable and, if so, whether it would be specifically enforceable.¹⁰¹ Some scholars, for example, argue that contract clauses related specifically to abortion decisions are not enforceable.¹⁰² That is the case, it is said, because the right to terminate a pregnancy is an “inalienable” right.¹⁰³ (Others disagree.¹⁰⁴) With respect to other medical decisions, some claim that any such clauses cannot, at the very least, be specifically enforced under general rules of contract enforcement. Courts typically will not order specific enforcement with regard to “personal services,”¹⁰⁵ some argue. To date, however, there are no published decisions addressing whether these or other similar kinds of surrogacy contract clauses are enforceable and, if so, how.¹⁰⁶

¹⁰⁰ Indeed, the Constitution protects women’s rights to make decisions about their own bodies during pregnancy. *See, e.g.*, Janet Gallagher, *Prenatal Invasions & Interventions: What’s Wrong with Fetal Rights*, 10 HARV. WOMEN’S L.J. 9, 13 (1987) (arguing that “the pregnant woman’s fundamental rights to bodily integrity, self-determination, and privacy protect her against government intrusion into her medical decisions.”). This principle remains true even though the Court has held that the government’s interest in the potential life of the fetus may justify interference with some specific decisions at certain points in the pregnancy. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰¹ For greater consideration of these issues, see Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from A Case Study*, 49 FAM. L.Q. 29, 47 (2015).

¹⁰² *See* MARTHA A. FIELD, *SURROGATE MOTHERHOOD* 65 (expanded ed. 1990) (“[A] state’s enforcement of a provision in a surrogacy contract limiting the mother’s right to make decisions concerning abortion would violate the U.S. Constitution.”).

¹⁰³ *See, e.g.*, Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 338 (1986) (arguing that the right to terminate a pregnancy is “inalienable in character”); Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1948 (1986) (arguing that the right to terminate a pregnancy is inalienable).

¹⁰⁴ *See, e.g.*, Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2336 (1995) (“[A]llowing the surrogate to carry the child to term against the wishes of its father is inconsistent with the basic contractual design.”).

¹⁰⁵ *See* Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2372–73 (1995) (“If a court, under traditional contract principles, is not going to grant specific performance to force an opera singer to sing, it seems highly unlikely that a court would enforce the abortion, cesarean section, or medical provisions of the surrogacy contract.”); *see also* Deborah S. Mazer, *Born Breach: The Challenge of Remedies in Surrogacy Contracts*, 28 YALE J.L. & FEMINISM 211, 235 (2016) (“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.”).

¹⁰⁶ In its groundbreaking decision in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), the California Supreme Court expressly declined to decide whether a contractual clause about abortion would be enforceable. *See id.* at 784 (“We note that although at one point the contract purports to give Mark and Crispina the sole right to determine whether to abort the pregnancy, at another point it acknowledges: ‘All parties understand that a pregnant woman has the absolute right to abort or not abort any fetus she is carrying. Any promise to the contrary is unenforceable.’ We therefore need not determine the validity of a surrogacy contract purporting to deprive the gestator of her freedom to terminate the pregnancy.”).

I do not intend to wade into that debate. My point here is a different one. *Regardless* of whether these kinds of contract clauses are permissible or impermissible under other existing legal doctrines, they are troubling from a normative perspective. Laws like the ones described above rest on the principle that women's decisions about their own bodies and their own health can be subordinated to the wishes and interests of others.¹⁰⁷ The state should not condone their use and inclusion through its surrogacy laws.

II. REGULATION OF PREGNANT BODIES IN AND OUT OF SURROGACY

A. *An Overview*

These provisions are particularly troubling when one considers them within a broader context of attempts to regulate pregnant bodies. These attempts are broad and varied. The most obvious are the relentless attempts to restrict women's right to decide to terminate their pregnancies as well as to limit their access to those services, even when abortions remain legal as a technical matter. These assaults have become more and more brazen in recent years. In 2019, for example, a number of states passed legislation essentially banning all abortions in the state.¹⁰⁸ Some of these particularly draconian laws contain only limited exceptions to protect the health of the woman.¹⁰⁹ Other types of laws limiting access to abortion include mandatory waiting periods. According to the Guttmacher Institute, "27 states require a woman seeking an abortion to wait a specified period of time, usually 24 hours, between when she receives counseling and the procedure is performed. 14 of these states have laws that effectively require the woman make two separate trips to the clinic to obtain the procedure."¹¹⁰ These required

¹⁰⁷ See Ainsworth, *supra* note 15, at 1091 ("Under such a scheme, the civil rights and self-determination of pregnant women would become secondary to the concerns of the intended parents—and subject to state control and intervention through judicial enforcement.").

¹⁰⁸ See Eric Levenson, *Abortion Laws in the US: Here Are the States Pushing to Restrict Access*, CNN (May 30, 2019, 10:39 AM), <https://www.cnn.com/2019/05/16/politics/states-abortion-laws/index.html> [<https://perma.cc/V5WW-BT3N>] ("The near-total ban on abortions signed into law in Alabama this month is the most restrictive abortion legislation in the country, but the state is not alone in trying to put limits on the procedure."); see also *Robinson v. Marshall*, No. 2:19cv365-MHT, 2019 WL 5556198, at *1 (M.D. Ala. Oct. 29, 2019) (explaining that the "2019 Alabama statute, Ala. Act No. 2019-189, . . . imposes criminal liability on abortion providers for nearly all abortions, completed or attempted, regardless of fetal viability"). On October 29, 2019, a federal district court struck down the law as unconstitutional as to pre-viability abortions. See *id.* at *4–5.

¹⁰⁹ See, e.g., IND. CODE ANN. § 16-18-2-327.9 (West, Westlaw through all legislation enacted by the 2019 First Regular Session of the 121st General Assembly) (providing for exceptions only where "a condition exists that has complicated the mother's medical condition and necessitates an abortion to prevent death or a serious risk of substantial and irreversible physical impairment of a major bodily function").

¹¹⁰ *An Overview of Abortion Laws*, GUTTMACHER INST. (Nov. 13, 2019), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [perma.cc/98E2-HDSZ].

waiting periods can render abortion practically out of reach for many women, especially women who live in rural areas, far from abortion providers.¹¹¹

Laws regulating the providers of abortion services represent a newer form of attack. These attempts are often referred to as “targeted regulation of abortion providers” or “TRAP” bills. As the Guttmacher Institute states: “Efforts to use clinic regulation to limit access to abortion, rather than to make its provision safer resurfaced in the 1990s and have gained steam since 2010.”¹¹² As a result, “24 states have laws or policies that regulate abortion providers and go beyond what is necessary to ensure patients’ safety; all apply to clinics that perform surgical abortion.”¹¹³ Here, too, these restrictions put abortions practically out of reach for many women, especially rural women, poor women, and women of color, even when the practice is technically still legal.¹¹⁴

Other recent developments include laws and policies that permit employers to discriminate against people who have exercised or who seek to exercise their right to make reproductive health care decisions.¹¹⁵ In *Burwell v. Hobby Lobby Stores, Inc.*,¹¹⁶ for example, the Supreme Court affirmed the right of some private employers to refuse to provide their employees with contraception or access to abortion services.¹¹⁷ Another set of laws and policies authorize hospitals and other health care providers to refuse to provide a range of reproductive health services to women.¹¹⁸ For example, according to the Guttmacher Institute, “46 states allow some health care providers to refuse to provide abortion services.”¹¹⁹

Advance directive laws allow for another form of troubling control of pregnant bodies. Most states “mandate, through their advance directive statutes that an incompetent pregnant woman be kept alive under certain circumstances, despite her earlier wishes expressed in a living will, or, in many

¹¹¹ See Lisa R. Pruitt, *Toward A Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 469 (2007) (exploring the impact of mandatory waiting periods on rural women).

¹¹² *Refusing to Provide Health Services*, GUTTMACHER INST. (Nov. 1, 2019), <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers> [perma.cc/H6EB-WC9D].

¹¹³ *Id.*

¹¹⁴ For an analysis of the negative effect of these TRAP restrictions on rural women’s right to reproductive choice, see Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER, L. & JUST. 76, 118 (2015).

¹¹⁵ For an excellent discussion of these laws and their effects on the lives of women, see Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2529–33 (2015).

¹¹⁶ 573 U.S. 682 (2014).

¹¹⁷ *Id.* at 736.

¹¹⁸ See *Refusing to Provide Health Services*, GUTTMACHER INST. (Nov. 1, 2019), <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services> [https://perma.cc/H6EB-WC9D] (providing a general overview of these laws); see also NeJaime & Siegel, *supra* note 115, at 2533 (2015) (describing a “body of state and federal law [that] allows persons and institutions in the healthcare industry to assert conscience-based refusals to provide patient services”).

¹¹⁹ *Refusing to Provide Health Services*, *supra* note 118.

states, the wishes of her designated healthcare decisionmaker.”¹²⁰ Moreover, many of these laws require unwanted medical treatment regardless of the pain and suffering it might inflict on the woman.¹²¹ “In essence, the restrictions literally conscript the bodies of incompetent pregnant women to serve as fetal incubators for the state.”¹²² Another example of this type of more extreme form of state control are cases in which courts ordered pregnant women to be subjected to serious, invasive, and risky medical procedures including blood transfusions, cesarean sections, and other medical procedures, over their objections.¹²³

Elizabeth Kukura highlights a related issue that, heretofore, largely escaped attention and scrutiny. Even when court orders are not involved, many pregnant women are “bullied, coerced, or forced to accept unwanted medical intervention” by their health care providers.¹²⁴ These medical interventions include, but are not limited to, cesarean sections. Other types of unwanted pregnancy-related medical interventions can include “labor induction, membrane stripping or breaking, vacuum-assisted or forceps-assisted delivery, or manual removal of the placenta.”¹²⁵ Advocates have begun to refer to these kinds of abuses as “obstetric violence.”¹²⁶ Obstetric violence can cause negative physical and mental health consequences for the woman.¹²⁷

Despite the serious nature of many of these medical interventions, as well as their potential consequences, these examples often are not viewed as serious violations of bodily autonomy. This is due, in part, to the deep-seated belief that “good mothers are those who subordinate their own needs (and bodies) in service of their children and families.”¹²⁸

¹²⁰ Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 COLUM. J. GENDER & L. 85, 87 (1997) (footnotes omitted).

¹²¹ See *id.* (noting that many of these statutes require medical treatment “regardless of such critical factors as [the woman’s] own pain and suffering, the fetus’s age, or its prognosis for either a live birth or a healthy life after birth” (footnote omitted)).

¹²² *Id.*

¹²³ See Courtney G. Joslin, *Legal Regulation of Pregnancy and Childbirth*, in THE CHILD: AN ENCYCLOPEDIA COMPANION 774, 774 (Richard A. Shweder et al. eds., 2009). See also *In re A.C.*, 533 A.2d 611, 617 (D.C. 1987) (denying request for stay of trial court order requiring a pregnant woman to undergo a cesarean section over her objection), *vacated*, 573 A.2d 1235 (D.C. 1988); *Jefferson v. Griffin Spalding Cty. Hosp. Auth.*, 274 S.E.2d 457, 460 (Ga. 1981) (denying request for stay of trial court order requiring a pregnant woman to undergo a cesarean section over her objection); Veronika Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1193 (1987) (citing court decisions that ordered pregnant women to undergo cesarean sections over their objections).

¹²⁴ Elizabeth Kukura, *Obstetric Violence*, 106 GEO. L.J. 721, 778 (2018). See also generally Farah Diaz-Tello, *Invisible Wounds: Obstetric Violence in the United States*, 24 REPROD. HEALTH MATTERS 56 (2016).

¹²⁵ Kukura, *supra* note 124, at 734.

¹²⁶ *Id.* at 725.

¹²⁷ See Kukura, *supra* note 85, at 265 (“Medically unnecessary interventions, especially those involving surgery, increase the risk of complications for women.” (footnote omitted)).

¹²⁸ Kukura, *supra* note 124, at 776; see also Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 689–90 (2006).

This brief description includes only some of the myriad attempts to control pregnant women and their bodies.¹²⁹ Some of the examples involve direct control by the state. The most poignant examples of this are cases where courts issued orders directing pregnant people to be subjected to unwanted medical treatment. In other situations, the infringement of bodily integrity and decision-making authority is not the result of a direct order from the state; instead, the infringement is indirectly facilitated by state or federal law. This is true, for example, in cases where the law authorizes private employers to deny contraception coverage for their employees.¹³⁰

In the surrogacy context, both types of state involvement are possible. The existence of laws like the Illinois law described above facilitates the inclusion of clauses in private contracts that regulate the medical decision making and behavior of a pregnant person. But direct state control is also possible. This could happen, for example, if the person acting as a surrogate later objected to a certain form of medical treatment or acted in ways that violated the terms of the agreement. In such a case, it is at least theoretically possible that a court could order compliance.¹³¹

Although the examples discussed in this Part differ in various ways, there is a common through line. In these examples, the right of pregnant or potentially pregnant people to make decisions about their own bodies and their own lives are subordinated to the wishes and interests of others. These practices often run counter to the general rules that apply in other contexts and to other people.¹³² Indeed, by interfering with a person's ability to make decisions about their own bodies, these practices may violate the Constitution as well as other sources of law.¹³³ These types of practices obviously interfere with women's rights to bodily autonomy and decision-making authority in the moment. The effects of these practices are not limited, however, to the period of the pregnancy. Instead, their ripple effects extend to women's equality more generally. For example, as the Supreme Court recognized, "[c]oncern for a woman's existing or potential offspring historically

¹²⁹ For a fuller account of these efforts, see Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1006–09 (1999); Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325 (1990).

¹³⁰ See, e.g., *Fact Sheet: Final Rules on Religious and Moral Exemptions and Accommodation for Coverage of Certain Preventive Services Under the Affordable Care Act*, U.S. DEP'T HEALTH & HUM. SERVS. (Nov. 7, 2018), <https://www.hhs.gov/about/news/2018/11/07/fact-sheet-final-rules-on-religious-and-moral-exemptions-and-accommodation-for-coverage-of-certain-preventive-services-under-affordable-care-act.html> [<https://perma.cc/KE9G-3PVV>].

¹³¹ Again, as previously noted, it remains unresolved whether these kinds of contract clauses are enforceable and, if so, how. See *supra* notes 101–106 and accompanying text.

¹³² For an analysis of constitutional protections of medical decision making, see B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 304–06 (2007).

¹³³ See, e.g., *id.* See also Gallagher, *supra* note 100, at 13 (arguing that “the pregnant woman’s fundamental rights to bodily integrity, self-determination, and privacy protect her against government intrusion into her medical decisions.”).

has been the excuse for denying women equal employment opportunities.”¹³⁴ Indeed, as the Court itself has explained, reproductive freedom:

crucially affects women’s health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions that this society no longer believes fair to enforce, yet is unwilling institutionally to redress.¹³⁵

In this way, restrictions on the right of women to make decisions about their bodies and their reproduction work to deny women full and equal citizenship and participation in society.¹³⁶

B. (Re)considering Surrogacy Legislation

Particularly when viewed in the context of these multiple and varied efforts to limit women’s reproductive choices, statutory surrogacy schemes that expressly allow for the inclusion of contractual clauses requiring pregnant women to be subjected to invasive procedures and control over their daily behavior are concerning.

As one (re)considers these kinds of surrogacy laws, it is important to appreciate their potential scope. Some of the laws discussed above not only permit but arguably encourage the inclusion of contract clauses that require the pregnant person to undergo *any and all* recommended medical treatment. The potential period and degree of control is sweeping. The clauses could relate to medical treatment over the course of almost an entire year. These kinds of contract clauses could authorize subjecting the pregnant person to unwanted medical treatment *even when the continued viability of the fetus is not at issue*. Indeed, the contract clauses could cover every medical decision the person makes during the pregnancy, no matter how minor.

¹³⁴ UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) (striking down as impermissible sex discrimination employer’s policy prohibiting all potentially fertile women from a range of positions). Prior to *Johnson Controls*, numerous courts, including the Supreme Court, upheld “protective” sex-based employment policies that limited workplace opportunities for women. See *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding law banning women from bartending, reasoning “[t]he fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly, in such matters as the regulation of the liquor traffic.”); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (upholding law imposing maximum work-hours restrictions for women only, reasoning that “as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest”).

¹³⁵ Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 819 (2007).

¹³⁶ See April L. Cherry, *Roe’s Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723, 724–25 (2004) (arguing that restricting the “proscrib[ing] pregnant women’s health care decision making . . . works to severely limit the citizenship of women as a social group”).

Permissible contract clauses related to activities and behaviors are likewise potentially breathtaking in scope. As noted above, in many states, permissible contract clauses can cover an almost unlimited range of conduct. And, as Hillary Berk reports, they often do; intrusive life-style restrictions are common features of surrogacy contracts today.¹³⁷ Moreover, the identified statutory provisions authorize contract clauses that regulate not only activity restrictions recommended by the physician, but also activity restrictions imposed by *the intended parents*,¹³⁸ people who often have no medical training.

To be sure, there are some differences—indeed some important differences—between the kinds of surrogacy statutes identified in Part I and the other developments identified in Part II.A. One critical difference is that people who act as surrogates *chose* to take on that role, and they may have voluntarily signed a surrogacy agreement that includes medical decision-making or behavior clauses. That potential difference, I argue, does not eliminate the concern from a normative perspective.

As noted at the outset, a reproductive justice approach looks beyond just the individual to the collective. Thus, even if the individual woman feels comfortable with these provisions, it is nonetheless important to consider the effects of these kinds of provisions and laws authorizing them from a collective or systemic perspective. Of note, it is important to assess whether and how they contribute to a larger narrative that facilitates and justifies diminishing the interest of pregnant people in their bodies and their autonomy in favor of the interests of others.

Supporters of these kind of surrogacy provisions may push back. The intended parents, it may be argued, often have spent large amounts of money on the process and often have turned to surrogacy only after experiencing years of infertility. Under these circumstances, one might argue, intended parents ought to have some control over the pregnancy. While this desire is understandable, the law ought not to authorize it.¹³⁹ Some may also argue that invalidating contractual provisions that the parties agreed to infringes their right to contract.

In considering these objections, it is important to appreciate that intended parents are not the only people who may be in similar circumstances. Many other spouses and nonmarital partners have also spent many years and many tens of thousands of dollars struggling with infertility. This, however, does not¹⁴⁰ and should not authorize them to control the behavior or medical decisions of their pregnant partners. As the Supreme Court explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, for example, even

¹³⁷ See Berk, *supra* note 94, at 156–62.

¹³⁸ See *supra* notes 91–94 and accompanying text.

¹³⁹ See Ainsworth, *supra* note 15, at 1090 (“While it is understandable that intended parents want to ensure prenatal health, it is another thing entirely [to] judicially enforce contracts that constrain the liberty of pregnant women to make decisions about their own health and lives.”).

¹⁴⁰ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895–96 (1992).

though “a husband has a ‘deep and proper concern and interest . . . in his wife’s pregnancy and in the growth and development of the fetus she is carrying,’” that interest does not give rise to a right to make or control decisions about his wife’s body or her pregnancy.¹⁴¹

Moreover, as is done in a range of other contexts, including the employment context,¹⁴² it is appropriate for the government to set forth rules to ensure that safety and other basic protections are met. In this context, the state should declare from a public policy perspective that when people agree to act as surrogates, this agreement cannot result in a waiver of their right to control their own bodies.

III. THE FUTURE OF SURROGACY LEGISLATION

A new “third” wave of surrogacy advocacy has emerged, however. This period is marked by a more visible and robust re-engagement of feminist and reproductive rights advocates in the surrogacy conversation.¹⁴³ This engagement is impacting the content of enacted laws and pending legislation.

A visible example of this third wave was the legislative process in Washington State. In 1989, Washington State enacted a law banning compensated surrogacy.¹⁴⁴ Starting in 2011, legislators and policymakers sought to repeal the ban and replace it with a permissive regulatory scheme.¹⁴⁵ In light of this reality, Legal Voice, “a progressive feminist organization using the power of the law to make change in the Northwest,”¹⁴⁶ sought to deter-

¹⁴¹ *Id.* (“We recognize that a husband has a ‘deep and proper concern and interest . . . in his wife’s pregnancy and in the growth and development of the fetus she is carrying.’ . . . Before birth, however, the issue takes on a very different cast. . . . The effect of state regulation on a woman’s protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.”).

¹⁴² See Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469, 493–96 (1993).

¹⁴³ See Ainsworth, *supra* note 15, at 1078 (“[F]eminist theorists and academics have been deeply engaged for almost three decades in considering the complexities of compensated surrogacy. Yet, women’s rights groups and feminist law reformers outside of academia have not typically led the development of jurisprudence or the efforts to regulate this practice in the United States.” (footnote omitted)); see also Scott, *supra* note 8, at 124 n.94 (noting that “few opponents—and no women’s groups—spoke against” the Illinois surrogacy bill); *id.* at 124 (noting that “one is hard-pressed to find [any] opposition to the proposed Illinois law”).

¹⁴⁴ See Act of May 13, 1989, ch. 404, § 3, 1989 Wash. Sess. Laws 2178, 2179 (codified at *WASH. REV. CODE* § 26.26.230).

For a detailed account of the legislative twists and turns of this law, see Terry J. Price, *The Future of Compensated Surrogacy in Washington State: Anytime Soon?*, 89 *WASH. L. REV.* 1311, 1318–1336 (2014).

¹⁴⁵ See Price, *supra* note 144, at 1325 (“These surrogacy prohibitions were left untouched for more than twenty years before the Legislature revisited the issue in 2011.”).

¹⁴⁶ LEGAL VOICE, <https://www.legalvoice.org/> [<https://perma.cc/VNS7-RRZD>].

mine its position on the matter and, in turn, to participate in the process.¹⁴⁷ The organization first participated in “two years of community engagement, study, and introspection.”¹⁴⁸ This ultimately led Legal Voice to “develop[] a progressive, feminist framework for considering surrogacy and its legal and social implications for women.”¹⁴⁹

Among the principles Legal Voice developed is a key requirement for any permissible surrogacy legislation: the agreement must expressly state that the person acting as a surrogate retains full decision-making authority over her body.¹⁵⁰ This is critical because “when pregnant women’s lives can be monitored and controlled, all women’s status as rights bearers and constitutional persons is at risk.”¹⁵¹ As a result of this conclusion, Legal Voice opposed provisions like the Illinois one described above. Instead, Legal Voice took the position that permissive surrogacy legislation “should expressly hold void and unenforceable any contract provisions that purport to control a pregnant woman’s decisions during pregnancy—from her constitutionally protected decisions to the more mundane decisions of daily life, such as whether, when, and how to exercise, what to eat, and which doctor to see.”¹⁵²

Due in no small part to Legal Voice’s engagement in the process, the legislation in Washington State reflects this stance. Washington law now provides that a surrogacy agreement “must permit the woman acting as a surrogate to make all health and welfare decisions regarding herself and her

¹⁴⁷ As Sara Ainsworth, a former attorney for Legal Voice, explained, “In 2010, the organization recognized the imperative of bringing a progressive, feminist voice to the legislative arena [with respect to surrogacy].” Ainsworth, *supra* note 15, at 1079.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See id.* at 1114. Other feminist scholars and activists share this commitment. *See, e.g.,* CTR. FOR REPROD. RIGHTS, BASELINE GUIDING HUMAN RIGHTS-BASED PRINCIPLES ON COMPENSATED GESTATIONAL SURROGATE IN THE UNITED STATES 4 (2019), <https://reproductiverights.org/sites/default/files/2019-07/Baseline-Guiding-Principles-on-CGS-in-the-US.pdf> [<https://perma.cc/H6Q7-95GG>] (“As is consistent with human and constitutional rights, a person acting as gestational surrogate controls all decisions about their body throughout a compensated gestational surrogacy arrangement . . . Although a person acting as gestational surrogate may, and typically does, strongly consider the stated preferences . . . of the intended parent(s), this right cannot be waived.”); Ruth Zafran & Daphna Hacker, *Who Will Safeguard Transnational Surrogates’ Interests? Lessons from the Israeli Case Study*, 44 L. & SOC. INQUIRY 1141, 1167 (2019) (arguing that standards on surrogacy “must include protections of the surrogate’s free choice and of her health and bodily integrity”); *Recommended Principles and Standards for Engaging in International Commercial Surrogacy Arrangements*, SURROGACY360, <https://surrogacy360.org/resources/principles-and-standards/> [<https://perma.cc/83RR-CDQZ>] (“3. The surrogate must be guaranteed freedom of movement, unrestricted access to her family and community, and autonomy about daily behaviors at all points covered by the surrogacy agreement. 4. The surrogate must have the right to make all health and welfare decisions regarding herself and her pregnancy, including the decision about whether to retain or reduce the number of fetuses and whether and when to terminate or continue a pregnancy.”).

¹⁵¹ Ainsworth, *supra* note 15, at 1091.

¹⁵² *Id.* at 1114.

pregnancy and, notwithstanding any other provisions in this chapter, provisions in the agreement to the contrary are void and unenforceable.”¹⁵³

Their advocacy has had ripple effects well beyond the State’s boundaries. The long-time legislative sponsor of the Act in Washington State¹⁵⁴ was later named to be the Chair of a Uniform Law Commission (ULC) committee charged with drafting a Uniform law on parentage.¹⁵⁵ ULC Drafting Committees are comprised of “practicing lawyers, judges, legislators and legislative staff and law professors.”¹⁵⁶ Their charge is to draft a statutory scheme that “brings clarity and stability to critical areas of state statutory law.”¹⁵⁷ This particular uniform law—the Uniform Parentage Act (2017)—addresses children’s parentage, including the parentage of children born as the result of a surrogacy agreement.¹⁵⁸ The updated Act was promulgated in 2017, approved by the American Bar Association in 2018,¹⁵⁹ and is now available for adoption in the states.¹⁶⁰ The surrogacy provisions of the UPA (2017) include language that is very similar to the new Washington law. Like the Washington legislation, the UPA (2017) requires surrogacy agreements to “permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy.”¹⁶¹ Consistent with the aspirations for a uniform law, the UPA (2017) is now shaping laws in states around the country. In 2018, Vermont enacted a variation of the UPA (2017), including the surrogacy provisions.¹⁶² Bills incorporating variations of the UPA’s surrogacy provisions have been introduced in a number of other states, including Colo-

¹⁵³ WASH. REV. CODE ANN. § 26.26A.715(1)(g) (West, Westlaw through all legislation from the 2019 Regular Session of the Washington Legislature).

¹⁵⁴ The primary sponsor of numerous bills seeking to legalize surrogacy in Washington was state Senator Jamie Pedersen (D-Seattle). See, e.g., Price, *supra* note 144, at 1326.

¹⁵⁵ See UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 2017), <https://www.uniformlaws.org/viewdocument/final-act-with-comments-61?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f&tab=librarydocuments> [<https://perma.cc/4BSR-557W>]; see also Joslin, *Preface*, *supra* note 17, at 443.

¹⁵⁶ *Overview*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/XJZ7-WT2B>].

¹⁵⁷ *Id.*

¹⁵⁸ UNIF. PARENTAGE ACT (Unif. L. Comm’n 2017) prefatory note. For more information about the UPA (2017), see Joslin, *Nurturing Parenthood*, *supra* note 17; Joslin, *Preface*, *supra* note 17.

¹⁵⁹ Parentage Act, Uniform Law Commission, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> [<https://perma.cc/UW2V-G7YF>]. See also Joslin, *Preface*, *supra* note 17, at 444.

¹⁶⁰ See Joslin, *Nurturing Parenthood*, *supra* note 17, at 598.

¹⁶¹ UNIF. PARENTAGE ACT § 804(a)(7) (Unif. L. Comm’n 2017).

¹⁶² See VT. STAT. ANN. tit. 15C, §§ 801–809 (West, Westlaw through Reg. Sess. of the 2019–2020 Vermont General Assemb.).

rado,¹⁶³ Connecticut,¹⁶⁴ Massachusetts,¹⁶⁵ Pennsylvania,¹⁶⁶ and Rhode Island.¹⁶⁷

More recently, this foundational building block was expanded upon during the legislative process in New York State. Like Washington State, New York is a state that enacted one of the early statutory schemes banning compensated surrogacy.¹⁶⁸ New York, however, took its opposition a step farther by allowing for the imposition of civil and, in some cases, criminal penalties.¹⁶⁹ Bills to repeal the ban and replace it with a permissive regulatory scheme have been introduced since 2012.¹⁷⁰

The 2019 legislative session ushered in a new era of activity on those efforts. The engagement—including engagement by women’s rights and reproductive rights advocates—was robust. To be clear, there were a number of feminist advocates who took the firm position that compensated surrogacy should remain banned and criminalized.¹⁷¹ There were other advocates who urged enactment of the bill.¹⁷² What was particularly notable about the process in New York is that there was extremely engaged and robust engagement—on all sides—*regarding the details of the legislation*. And as a result of

¹⁶³ See H.B. 1292, 2020 Reg. Sess. (Colo. 2020).

¹⁶⁴ See H.R. 6507, 2019 Gen. Assemb., Reg. Sess. (Conn. 2019).

¹⁶⁵ See H.R. 139, 199 Gen. Court, Reg. Sess. (Mass. 2019); S. 77, 199 Gen. Court, Reg. Sess. (Mass. 2019).

¹⁶⁶ See H.R. 243, 2019 Gen. Assemb., Reg. Sess. (Penn. 2019).

¹⁶⁷ See S. 789, 2019 Gen. Assemb., Jan. Sess. (R.I. 2019); H.R. 5707, 2019 Gen. Assemb., Jan. Sess. (R.I. 2019).

¹⁶⁸ See N.Y. DOM. REL. LAW §§ 121–123 (McKinney, Westlaw through L.2019, chapter 652). The law not only bans the agreement, it also allows for the imposition of civil and, in some cases, criminal penalties. For a discussion of the enactment of this law, see Scott, *supra* note 8, at 118–20.

¹⁶⁹ See *id.* § 123 (providing for the possibility of a \$500 civil penalty for parties to the agreement, and civil or potentially criminal penalties for “[a]ny other person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration”).

¹⁷⁰ See KALANTRY ET AL., *supra* note 62, at 9.

¹⁷¹ See, e.g., Susan L. Bender & Phyllis Chesler, *Handmaids for Hire: Should Commercial Surrogacy Be Legalized in NYS?*, YAHOO FINANCE (Feb. 21, 2019), <https://finance.yahoo.com/news/handmaids-hire-commercial-surrogacy-legalized-020028442.html> [<https://perma.cc/2LCE-VQCP>] (arguing that “commercial surrogacy is baby selling, baby buying, reproductive prostitution, and the commodification of women [and it] is also matricidal”); Letter from Gloria Steinem, Founder, Ms. Magazine, et al. to Andrew Cuomo, Governor, New York, at 1 (June 1, 2019), <http://catwinternational.org/Content/Images/Article/758/attachment.pdf> [<https://perma.cc/HLU5-5U6V>] (“Our opposition to this bill emerges from our conviction that the legalization of commercial surrogacy contracts in New York State will undermine women’s control over their bodies, thwart women’s reproductive rights, render women vulnerable to reproductive trafficking and exploitation, and further subordinate and harm women, especially those who are economically disadvantaged, in our State.”).

¹⁷² For example, Sital Kalantry, a clinical professor of law, director of the International Human Rights Clinic: Policy Advocacy, and co-director of the Migration and Human Rights Program at Cornell Law School, testified in support of the legislation. See *Sital Kalantry Testifies Before New York State Judiciary Committee on Surrogacy Bill*, CORNELL L. SCH. (June 4, 2019), <https://www.lawschool.cornell.edu/spotlights/Sital-Kalantry-Testifies-before-New-York-State-Judiciary-Committee-on-Surrogacy-Bill.cfm> [<https://perma.cc/SEM7-969N>].

this engagement, there was clear and significant movement in the language of the bill over the course of the 2019 and 2020 legislative sessions.

As initially introduced in 2019, the bill included language that could be interpreted to give people acting as surrogates decision-making authority over some but not all medical decisions during pregnancy. Specifically, the original version only expressly ensured that the person acting as a surrogate would be able to make decisions “to safeguard” their health or that of the fetus or embryo.¹⁷³ That language is not as troubling as the statutory provisions discussed in Part II. Nonetheless, as explained in a memo provided to New York lawmakers by a range of women’s rights groups, narrowly interpreted, this language “could mean that there are some decisions during pregnancy about her body and her pregnancy that she will not be able to make.”¹⁷⁴

In response to feedback provided by both surrogacy supporters and surrogacy opponents, the legislation was amended a number of times. The legislation, which failed in 2019 but was signed into law in 2020,¹⁷⁵ contains the most robust protections for people acting as surrogates in the country. For example, the New York legislation includes a “Surrogates’ Bill of Rights.” Among a range of other important protections, The Bill of Rights declares that:

A person acting as surrogate has the right to make all health and welfare decisions regarding themselves and their pregnancy, including but not limited to whether to consent to a cesarean section or multiple embryo transfer, to utilize the services of a health care practitioner of their choosing, whether to terminate or continue the pregnancy, and whether to reduce or retain the number of fetuses or embryos they are carrying.¹⁷⁶

The process and the evolution of the bill was a positive step forward. The legislation, which was signed into law on April 3, 2020¹⁷⁷ and will go into effect in February 2021, offers a great starting point for others working on surrogacy legislation elsewhere. Equally as important was the conversation and learning that happened over the course of the legislative session.

¹⁷³ Assemb. 1071C, 2019–2020 Leg., Reg. Sess. (N.Y. 2019) (as originally introduced by Rep. Paulin, Jan. 14, 2019) (“A gestational agreement may not limit the right of the gestational carrier to make decisions to safeguard the gestational carrier’s health or that of any fetus or embryo the gestational carrier is carrying.”).

¹⁷⁴ *Cuomo Letter*, *supra* note 2, at 4 (discussing proposed amendments to the Child-Parent Security Act (CPSA)).

¹⁷⁵ *See, e.g.*, Ryan Tarinelli, *Cuomo Signs Bill to Legalize Gestational Surrogacy, Creating Standards for Contracts*, N.Y. LAW JOURNAL (Apr. 3, 2020), <https://www.law.com/newyorklawjournal/2020/04/03/cuomo-signs-bill-to-legalize-gestational-surrogacy-creating-standards-for-contracts/>.

¹⁷⁶ Assemb. 1071C, 2019–2020 Leg., Reg. Sess. (N.Y. 2019) (as amended, Jun. 10, 2019). *See also* Senate 7506B/Assemb. 9506B, 2019–2020 Leg., Reg. Sess. (N.Y. 2020) (same).

¹⁷⁷ *See, e.g.*, https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A09506&term=2019&Summary=Y&Actions=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y#jump_to_Floor Votes.

Through that process, policymakers in New York were pressed in new and deeper ways to consider the issue of surrogacy through the lens of the person acting as a surrogate and to be more attentive to the politics of pregnancy.

CONCLUSION

This is an important moment in time with regard to the politics of pregnancy. The attacks on women's right and ability to control their bodies and their reproductive capacities have grown in number and poignancy. The make-up of the current Supreme Court puts the continued viability of *Roe v. Wade* in jeopardy. Much of the focus of reproductive rights groups have, rightfully so, been directed towards these direct attacks on access to abortion and contraception. It is important, however, to also be attentive to other ways in which pregnancy is being regulated. Surrogacy regulation is one such realm. As reproductive justice advocates urge, policy makers should strike to craft laws and policies that foster rather than impede the ability of people to make "decisions about [their] own bodies, sexuality, and production for [them]selves."¹⁷⁸ This Essay is an attempt to press that conversation and push towards the enactment of surrogacy legislation that is consistent with this goal.

¹⁷⁸ Ocen, *supra* note 25, at 2238–39 (quoting ASIAN CMTYS. FOR REPROD. JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE 1 (2005), <https://forwardtogether.org/wp-content/uploads/2017/12/ACRJ-A-New-Vision.pdf> [<https://perma.cc/F4ZA-8YG5>]).