COMMENT

ESTABLISHING AND REBUTTING MATERNITY: WHY WOMEN ARE AT A LOSS DESPITE THE ADVENT OF GENETIC TESTING

* Amanda E. De Vito*

I. INTRODUCTION

Surrogacy is an age old practice, dating to Biblical times.¹ Some scholars believe that surrogate motherhood pre-existed the famous story of Sarah and Abraham—Sarah, being barren, offered her handmaiden, Hager, to Abraham to act as a surrogate.² This surrogacy arrangement resulted in the conception and birth of Sarah and Abraham's first child, Ishmael.³ Their story was merely the first to be recorded and known worldwide as a result of the Bible.⁴ History has demonstrated the illustrious uses for surrogacy—most significantly, as a means of carrying on a family name or legacy. Yet, thousands of years later, society is still perplexed by the legitimacy and ethics accompanying surrogacy arrangements. Through assisted reproductive technology (“ART”), the possibility of bearing children composed of one’s own genetic material has served as a catalyst for driving more infertile couples towards surrogacy.

Access to new reproductive technologies can sometimes lead to exploitation. The commoditization of reproductive materials and

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² Id.
³ Id.
⁴ Id.
services has created what is known as the “baby market,” and some might say that the highly efficient development of the infertility industry “fits well within America’s capitalistic norms.”\(^5\) Coupled with America’s capitalistic society is the world of the “celebrity,” or, Hollywood. In recent years commercial surrogacy has become openly known and used within the entertainment industry, therefore making the practice more publicized in the wake of our country’s obsession and need for emulation of celebrity lifestyle.\(^6\) Some examples include Kelsey Grammar, former star of *Frazier*, actress Sharon Stone, *Good Morning America* host Joan Lunden, and most recently, *Sex and the City* star Sarah Jessica Parker.\(^7\) The significance of pop culture’s acceptance and use of surrogacy is that it does not always reflect surrogacy arrangements as they exist for the non-celebrity family. While the above named celebrities did not encounter any serious litigation questioning their parental rights to the resulting child, surrogacy arrangements often times fail to manifest in the way they were originally intended, subsequently leaving the families involved distraught and unhappy.

New York law has not been updated to reflect the most current medical abilities in assisted reproductive technology—specifically, surrogacy. Traditional surrogacy is very much a practice of the past and essentially all of the legislative intent surrounding surrogacy law was created to implement safeguards protecting the surrogate who has a legitimate genetic claim to the child. The more common usage of surrogacy, in 2011, is as a gestational carrier. The law does not differentiate between the two (gestational and traditional), however,

[a] narrowing construction of [the statute] that would limit its application to surrogate birth mothers who have contributed their own genetics to the conception of the child would obviate the application of the statutory presumption to cases of true gestational surrogacy . . . and avoid any conflict with the fundamental rights of genetic/biological


This Note claims that there is a fundamental flaw in New York legislation when applied to “compassionate” or gestational surrogacy. New York Domestic Relations Law section 122 declares all surrogate parenting contracts void and unenforceable for public policy reasons. As a result, the woman who gives birth is the presumed legal mother of the child, even if she is not biologically/genetically related to it. Biological/intended fathers who are parties to the surrogacy arrangements can assert parental rights by simply providing proof of the genetic connection. Intended mothers and surrogates have no such rights in declaring or rebutting their parental status. Article Five of the New York Family Court Act only provides a mechanism for paternal declaration. This infirmity creates a problem for the issuance of the child’s birth certificate in compassionate surrogacy situations. All parties to the arrangement (compassionate surrogate, compassionate surrogate’s husband, genetic/intended mother, genetic/intended father) agree that the genetic/intended parents should be listed on the child’s original birth certificate. However, the New York State Department of Health and Mental Hygiene (“DOHMH”) will only agree to put the father’s name on the certificate and will not list the intended mother as “mother” on the birth certificate. Instead, the DOHMH will issue the birth certificate with the surrogate listed as the child’s “mother.” The Family Court Act provides a quick and easy mechanism for a genetic father to be declared the legal father of the child but fails to offer the same solution for women. The statutory framework established for dealing with cases of gestational surrogacy results in a violation of Due Process and Equal Protection for both the

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9 Compassionate surrogates are not solicited on the promise of money, but are instead uncompensated. A compassionate carrier is usually a friend or relative that agrees to carry the embryo, created from the intended parent’s genetic material for no fee and under no contractual obligation. Once the baby is born, the carrier voluntarily relinquishes parental rights as “mother.” See Julia J. Tate, Surrogacy Agreement Talking Points: An Attorney’s thoughts on Negotiating your Surrogacy Agreement, THE AM. FERTILITY ASS’N, http://www.theafa.org/library/article/surrogacy_agreement_talking_points_an_attorneys_thoughts_on_negotiating_you/ (last visited Apr. 14, 2011).
10 N.Y. DOM. REL. LAW § 122 (McKinney 1999).
11 See N.Y. FAM. CT. ACT § 516-a (McKinney 2010).
12 Id.
13 Id.
14 Id.
15 See discussion infra Part III.A.1.
intended mother and the surrogate.

Compassionate Surrogates are not solicited on the promise of money, but are instead compassionate carriers, or, uncompensated carriers.\(^\text{16}\) A compassionate carrier is usually a friend or relative that agrees to carry the embryo, created from the intended parent’s genetic material, for no fee and under no contractual obligation. Once the baby is born, the carrier voluntarily relinquishes her rights as “mother” and the intended parents should be deemed the child’s legal parents.\(^\text{17}\) This situation has encountered numerous variations in how state courts rule and, in a state such as New York where surrogate parenting contracts are held to be void and unenforceable, the judicial precedent is even more inconsistent.\(^\text{18}\) However, what is consistent is the discriminatory nature of New York law towards claims of maternity. Intended mothers whose genetic material created the child are not provided an effective mechanism allowing them to be declared the child’s legal mother. Establishment of paternity is quite simple—the biological father merely has to take a paternity test.\(^\text{19}\) However, for a woman, her only viable and efficient option is to adopt the child—an imperfect solution at best. If both men and women are similarly situated in situations using assisted reproductive technologies, then why does New York have a statute allowing men to be declared the legal father and not women? New York law is outdated and intended mothers who find themselves caught in the trenches of litigation do, in fact, have valid claims to Due Process and Equal Protection violations. This Note focuses on the purest and most non-commercial form of gestational surrogacy in which no money is exchanged, no contract is followed, and there are no third party claims to any of the child’s genetic makeup.

This Note proceeds in five parts. Part one describes the background information needed to understand the intricacies of surrogacy arrangements and the current legal status of surrogacy throughout the country. Part two focuses directly on New York, and the statutory framework effecting gestational surrogacy arrangements. Part three establishes the legal framework of

\(^{16}\) Tate, supra note 9, at 2.

\(^{17}\) Depending on the state the arrangement occurs in, the laws will reflect which path the intended parents must go down to become the child’s legal parents. In states that hold surrogacy contracts null and void, this is often achieved through a declaratory judgment of paternity by a judge or through adoption by the intended mother.

\(^{18}\) N.Y. DOM. REL. LAW § 122 (McKinney 2009).

\(^{19}\) N.Y. JUD. CT. ACTS § 516-a (McKinney 2010).
surrogacy and works through a constitutional analysis of procreation and privacy interests. Part four focuses on assisted reproductive technology and whether or not one has a fundamental right to access such services. Lastly, part five argues that the flaws plaguing New York’s legislation surrounding gestational surrogacy parenting arrangements should be resolved through implementation of newer, up to date, non-discriminatory laws for declaring parental status in gestational surrogacy arrangements. To the extent that the New York statute conclusively presumes the gestational surrogate to be the legal mother of the child, Domestic Relations Law section 122 violates both the intended mother’s and gestational surrogate’s fundamental rights to both exercise and avoid procreation guaranteed by both the United States and New York State Constitutions.

II. BACKGROUND

Surrogacy has both medical and legal components. In order to adequately discuss the legal implications resulting from such an arrangement, one must first understand the physical logistics of surrogacy and what it truly means to be a parent. Additionally, to analyze the reproductive situation this Note focuses on, traditional and gestational surrogacy must be distinguished.

A. What It Means to Be a Parent

The issue of parental rights has produced some of the most perplexing questions when it comes to surrogacy. Medical technology allows us “to separate the genetic, gestational, and social components of motherhood successfully.” However; society has yet to set a precedent for the legal, moral, and social implications that result from such new technologies. Now that biology is no longer the predetermining factor of motherhood, society is faced with confronting the distinction between biological and social motherhood. A social mother is one who is not biologically related to the child, and this relationship is most commonly found through adoption or foster parenting. The meaning of biological motherhood must also now be made clear because new technologies

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21 Id.
22 Id.
are able to separate the genetic and gestational elements of surrogacy. Legal precedent for gestational surrogacy was established in the California Supreme Court Decision of Johnson v. Calvert. The court decided in this case that the intended parents were in fact the legal parents of the child and followed the contractual agreement entered into by all the parties.

Structuring surrogacy legislation or regulation can become difficult when establishing parental rights are so deeply intertwined with biology. While not all surrogacy arrangements are identical, usually, “there are at least two unrelated people making parental claims, and in gestational surrogacy, there are three people who have made biological contributions to the child. However, there could be as many as five people making custody claims upon any given child born of a surrogacy arrangement.” These very complicated relations are where much of the litigation regarding surrogacy comes from, therefore, underscoring the importance of defining who the actual parents of a given child are.

Black’s Law Dictionary defines “mother” as “[a] woman who has given birth to or legally adopted a child.” In lieu of in vitro fertilization, the definition of motherhood has been re-examined because “mother” no longer simply means the woman who physically gave birth to the child. History has long since been comfortable with the question of paternity being uncertain; however, maternity never really had such a problem given the fact that the mother had no choice but to be present during the birth of the child. “Jewish law, for example, reflects this certainty of maternity in its insistence that a child born to a Jewish mother retains the Jewish heritage, irrespective of paternity.” However, in surrogacy the issue of paternity is rarely ever contested—the greater concern rests in defining maternity.

While it is important to legally establish parental rights, there are inherent limits to exercising such definitions as “mother,” “father,” and “parents.” When attempting to define these terms, conclusions must be drawn for certain scenarios. For example, “is an egg donor who does not carry the child to term the ‘mother’ of the

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23 Id.
25 Id.
26 RAE, supra note 20, at 77.
27 BLACK’S LAW DICTIONARY 1031 (7th ed. 1999).
28 RAE, supra note 20, at 79.
29 Id. at 80.
30 Id. (citation omitted).
child?"31 One way of approaching this obstacle is by stipulating a clear definition of parenthood.32 Thus, the term “parent” means those who are biologically related to the child or raised the child.33 However, stipulating a definition is not all-encompassing.34 Essentially, it is near impossible to find a formal or correct definition of “parent” because it ignores vital factors such as the social, moral, and legal contingencies which have influenced the societal institutions of parenthood.35 Therefore, an appropriate definition must account for the conditional factors which have shaped this social meaning.36 “In essence, the search for a unifying conception of parenthood cannot be simply an exercise in semantics; instead, it must be a genuinely normative quest that accounts for a great deal of empirical evidence and moral assessment.”37

B. Ethical Complexities That Accompany Defining Motherhood

There are clear limits that come with defining the different units of the family, however, the ethical problems people see with surrogate motherhood and defining “motherhood” come with societies competing ethical views. One argument rests on the notion of “autonomy and choice”—women have a right to sell reproductive services.38 Other arguments concentrate on the sacred value of the female body and protection from financial exploitation.39 In the advent of modern technology, the lack of continuity when defining motherhood results from the concept of “natural” motherhood.40 There have been four leading ideas

32 Id.
33 Id.
34 Id. at 361 n.24. Professor [C]opi distinguishes five types of definitions: stipulative, lexical, precising, theoretical, and persuasive. Each has a different function and can result in disparate meanings for the same term. The primary logical distinction between a stipulative definition and a lexical definition is that a truth value can be assigned to the latter, but not to the former. In other words, it either is or is not true that a certain term is used in common parlance in a particular way. Conversely, the stipulative meaning need not conform to common usage at all. See I. COPI, INTRODUCTION TO LOGIC 140–47 (7th ed. 1986); see also Hill, supra note 31, at n.24.
35 Id. at 362.
36 Id.
37 Id.
39 Id.
governing this issue when no clear definition of “natural” motherhood exists. Some supporters take a very contractual stance on this issue, stating that the intended mother is the legal mother pending consent from the egg donor (if there is an egg donor). Others believe that the genetic mother should be deemed the child’s legal mother because the genetic contribution of her egg is most important to the relationship. Conversely, others argue that gestation is the most significant element of birth and the gestational carrier should be labeled as “mother.” Lastly, others advocate a “best interest of the child” standard as being the leading factor in determining which woman should be the child’s “mother.” There has also been the unique idea of dual motherhood where both women are considered “mother” of the child. Whichever ideology is imposed when defining “motherhood,” it will undoubtedly involve value judgments affecting the use of reproductive technologies. There is a direct causal connection between these judgments, definitions, and the precedent establishing the legal framework for surrogacy.

C. Distinguishing Gestational from Traditional Surrogacy

A common assumption among society is that a surrogate mother is genetically related to the child she carries to term. “A surrogate commonly is defined as one who substitutes in bringing a pregnancy to term for another person who is unable to become pregnant.” There are two different types of surrogacy: traditional and gestational. A traditional surrogate holds a genetic relationship to the child she carries. In this context, the egg donor, who is also the carrier of the child... is artificially inseminated with the sperm of the intended father, carries the child to term, and then relinquishes parental rights after birth, with the father acknowledging paternity and taking custody of the child; his spouse

41 Laufer-Ukeles, supra note 38, at 92 n.8.
42 Id.
43 Id.
44 Id.
45 Id.
47 Id.
48 Id.
typically adopts the child.\textsuperscript{49} However, in a gestational surrogacy arrangement, the gestational surrogate bears no genetic relationship to the child. [T]he donated egg begins outside of the gestational carrier, who is impregnated with a fertilized embryo, often as a result of \textit{in vitro} fertilization of the egg of the intended mother with the sperm of the intended father. The gestational surrogacy context can [also] involve anonymous sperm and egg donors, with the result that the child has no genetic relation to the gestational carrier or the intended parents.\textsuperscript{50} Gestational surrogacy can result in many different individuals all having a claim to the gestated child—be it a genetic relationship or intended parental relationship. Essentially, the determining factor, both medically and legally, between a gestational and traditional surrogate is that the gestational surrogate has no genetic relationship to the child she is carrying.\textsuperscript{51} Medically, the gestational surrogate serves as merely a carrier or incubator for the child. Legally, it will be desired that parental rights are viewed in light of the intent of the parties. So, in the situation of a gestational surrogacy agreement, there is no genetic relationship between the mother and child. Additionally, the intended parents are known in advance.

1. Compensated versus Uncompensated Carriers

It is also very important to distinguish between compensated and uncompensated surrogates, or compassionate carriers. The type of surrogate mother this paper focuses on is the compassionate carrier—one who carries the fetus to term for no cost. Uncompensated surrogates differ from compensated surrogates because there is no binding agreement or exchange of money, which illustrates the ethical and moral concerns with surrogacy in somewhat of a different manner.

\textsuperscript{49} In re Roberto D.B., 923 A.2d 115, 117 (Md. 2007).
\textsuperscript{50} Id. (citations omitted).
\textsuperscript{51} Stark, supra note 46, at 288; see, e.g., Roberto, 923 A.2d at 117.
D. Legal Status of Surrogacy

As the assisted reproductive technology revolution began to explode during the 1980s, surrogacy arrangements were brought to the forefront and given much attention—especially as a result of the widely publicized Baby M case.\(^{52}\) However, presently, there are still only a small minority of states that have actually addressed surrogate parenting arrangements through legislation. As of 2010, twenty-three states and the District of Columbia have at least one statute that pertains to surrogacy arrangements.\(^{53}\) There are varying degrees of surrogacy regulation—some provisions involve clauses addressing medical and psychological screenings, some allow surrogacy but impose certain conditional requirements, while other states ban surrogacy all together.\(^{54}\) The following eleven states allow surrogacy, but with fluctuating degrees of restriction: Arkansas, Florida, Illinois, Iowa, Nevada, New Hampshire, Texas, Virginia, Washington, West Virginia, and Wisconsin.\(^{55}\) The states that declare surrogacy agreements null and void under state law, banning them altogether are: Arizona, Indiana, Michigan, Nebraska, New York, North Dakota, Utah, and, although not a state, the District of Columbia.\(^{56}\) The remaining four states—California, Massachusetts, Tennessee, and Kentucky—have legislation of case law precedent that address parentage issues, such as whether or not a parent-child relationship exists between the intended parents and the child.\(^{57}\)

Despite the fact that more than half of the states have yet to address the issue of surrogacy, the varying conditional

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\(^{52}\) See discussion infra Part I.E.

\(^{53}\) DAA, supra note 6, at 465.

\(^{54}\) Id.


requirements among states that do allow surrogacy can be analyzed with respect to many factors: history, precedent, past practice, geographical location, state demographics, and population, etc. For example, Florida legislation permits but strictly regulates surrogacy.\textsuperscript{58} “A contract for gestational surrogacy shall not be binding and enforceable unless the gestational surrogate is 18 years of age or older and the commissioning couple are legally married and are both 18 years of age or older.”\textsuperscript{59} New York not only declares surrogacy contracts void and unenforceable, but also imposes civil and criminal penalties on “[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.”\textsuperscript{60} In states where gestational surrogacy arrangements are validated, the leading factors underscoring legislation are medical necessity and the genetic contributions from the intended parents.\textsuperscript{61} Landmark decisions occurring over the last three decades have determinatively effected and influenced the way states respond to surrogacy through either the lack of, or presence of legislation—and they have heavily relied on the factors of intent, genetics, and biology.

\textbf{E. Landmark Decisions for Surrogate Parenting Arrangements}

The seminal case for surrogate parenting agreements was decided by the New Jersey Supreme Court in 1988—\textit{In the Matter of Baby M}.\textsuperscript{62} In 1985, William and Elizabeth Stern (a married couple) sought to enter into a surrogacy arrangement with Mary Beth Whitehead which resulted in a contractual agreement between Mr. Stern and Mrs. Whitehead.\textsuperscript{63} The contract that each party to the arrangement signed provided that Elizabeth Stern was infertile but wanted a child; that Mary Beth Whitehead would become artificially inseminated with William Stern’s sperm, carry the baby to term, deliver the baby to the Sterns, and then do whatever she could to terminate her maternal rights so Elizabeth Stern could adopt the baby.\textsuperscript{64} Elizabeth Stern was not a party to the contract—William Stern, Mary Beth Whitehead and her husband, Mr.

\begin{itemize}
  \item \textsuperscript{58} \textit{FLA. STAT. ANN.} § 742.15 (West 2010).
  \item \textsuperscript{59} \textit{Id.}
  \item \textsuperscript{60} \textit{N.Y. DOM. REL. LAW} § 122, 123(2)(b) (McKinney 1992).
  \item \textsuperscript{62} \textit{In re Baby M}, 537 A.2d 1227 (1988).
  \item \textsuperscript{63} \textit{Id.}\ at 1235.
  \item \textsuperscript{64} \textit{Id.}
\end{itemize}
Whitehead were all parties to the contract.\hspace{0.5em}65 After giving birth and delivering the child to the Sterns, Mrs. Whitehead became anguished over her decision and told the Sterns that “she could not live without her baby.”\hspace{0.5em}66 Understanding the mental trouble facing the surrogate, but also wanting to adhere to the contract that was agreed upon, the Sterns and the Whiteheads litigated the issue of parental rights—who the child’s legal parents truly were as according to the surrogacy contract.\hspace{0.5em}67 The important elements to note in this scenario are that first, this is a traditional surrogacy arrangement where the surrogate has a genetic relationship to the child; and second, that the contract, or pre-birth parentage orders, clearly accounted for the intent of all parties involved. In its holding, the court deemed Mary Beth Whitehead, the traditional surrogate, the child’s mother, but awarded custody to the intended mother and genetic father, the Sterns, based on the best interest of the child.\hspace{0.5em}68 The court said, “[t]he unfortunate events that have unfolded illustrate that [surrogacy’s] unregulated use can bring suffering to all involved. Potential victims include the surrogate mother and her family, the natural father and his wife, and most importantly, the child.”\hspace{0.5em}69 Ironically, twenty-one years after this case was decided, New Jersey has yet to implement one piece of legislation that speaks to surrogate parenting agreements.

The next influential decision, Johnson v. Calvert,\hspace{0.5em}70 unlike the Baby M case, involved a gestational surrogate mother. Here, Mark and Crispina, a married couple, contracted with Anna Johnson to carry an embryo created from Mark’s sperm and Crispina’s ovum with the intention that Mark and Crispina would parent the child made from their genetic material, to which Anna would give birth.\hspace{0.5em}71 Directly following the birth of the child, the parties performed a blood test which ruled Anna out as the child’s genetic mother.\hspace{0.5em}72 At trial in October 1990, the court ruled “that Mark and Crispina were the child’s ‘genetic, biological and natural’ father and mother, [and]

\hspace{0.5em}65 \textit{Id.}
\hspace{0.5em}66 \textit{Id.} at 1236–37.
\hspace{0.5em}67 The facts of this case are much longer and more nuanced. However, I am providing the reader only with a short overview of the most important factors.—those that will contribute to the ultimate decision by the New Jersey Supreme Court.
\hspace{0.5em}68 \textit{Id.} at 1263.
\hspace{0.5em}69 \textit{Id.} at 1264.
\hspace{0.5em}70 Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
\hspace{0.5em}71 \textit{Id.} at 778.
\hspace{0.5em}72 \textit{Id.}
that Anna had no ‘parental’ rights to the child.’” The trial court also deemed the surrogacy contract legally enforceable, and terminated Anna’s visitation. Litigation carried this case all the way to the California Supreme Court, who ultimately sided with the Calverts. The court held that the terms agreed upon within the contract, regarding the intentions of the parties and parentage, rightfully determined maternity. The court said that, 

[A]lthough the [California Civil Code] recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.

Intent of the parties was the determinative factor in this case, and similar to New Jersey, California has yet to enact one piece of legislation that speaks to surrogacy—it instead relies on public policy.

1. The Intersection of the Equal Protection Doctrine and Surrogacy

An Arizona case, Soos v. Superior Court in & for County of Maricopa addressed the equal protection rights of intended mothers in gestational surrogacy arrangements. In Soos, the intended parents entered into a gestational surrogacy arrangement through a “Host Uterus Program” at the Arizona Institute of Reproductive Medicine. The surrogate became pregnant with triplets and during the pregnancy the intended mother filed a petition for the dissolution of her marriage and requested shared custody of her unborn triplets. The intended father countered her petition by claiming “he was the biological father of the unborn triplets,” and pursuant to Arizona Revised Statutes Annotated section 25–218 (1991), “the Surrogate was the legal mother of the

73 Id.
74 Id.
75 Id. at 787.
76 Id. at 782.
77 Id. (footnote omitted).
79 Id. at 1357–58.
80 Id. at 1358.
A. No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.
The Arizona Court of Appeals ultimately found the legislation to be unconstitutional.

The court first noted that the Arizona statute was modeled after a similar statute in Michigan, in which the primary government interest was to “stop ‘baby brokers’ and to stop the trafficking of human beings.” Looking to the situation before them, the court asked whether this statute could withstand constitutional scrutiny under due process, equal protection, and privacy—“whether the statute withstands constitutional scrutiny when it affords a biological father an opportunity to prove paternity and gain custody, but does not afford a biological mother the same opportunity.” First the court addresses the Equal Protection issue. “The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution denies ‘to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.’” In deciding which level of scrutiny to test the Arizona statute against, the court notes that even though there is gender-based distinction at issue, the most appropriate analysis would be strict scrutiny due to the fact that basic civil rights and fundamental liberties are at stake. Subsequently, the “[g]overnment can, however, [only] justify the abridgment of [such] a fundamental right by demonstrating that a countervailing compelling state interest is thereby promoted and

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B. A surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child.
C. If the mother of a child born as a result of a surrogate contract is married, her husband is presumed to be the legal father of the child. This presumption is rebuttable.
D. For the purposes of this section, “surrogate parentage contract” means a contract, agreement or arrangement in which a woman agrees to the implantation of an embryo not related to that woman or agrees to conceive a child through natural or artificial insemination and to voluntarily relinquish her parental rights to the child.

Id. This statute is no longer good law in the state of Arizona.

82 Soos, 897 P.2d at 1358.
83 Id.
84 Id. at 1359.
85 Id.
86 Id. at 1359 (quoting Reed v. Reed, 404 U.S. 71, 75–76 (1971)).
87 Id. at 1360. The court also stated that “[a] parent’s right to the custody and control of one’s child is a fundamental interest guaranteed by the United States and Arizona Constitutions.” Stanley v. Illinois, 405 U.S. 645, 651 (1972); In re Appeal in Cochise Cnty. Juvenile Action No. 5666-J, 650 P.2d 459, 463 (1982). This statement made it clear that Arizona’s history and traditions also recognized parental custody and control as a fundamental right recognizable by the state. The Court also reminds us that they are only arguing the merits of the case before them and “not dealing with the constitutional questions that arise when the surrogate mother wishes to keep the child she bore.” Soos, 897 P.2d at 1359 (emphasis omitted).
that the means are closely tailored to the end sought to be achieved.’\textsuperscript{88}

The Arizona statute, quite simply, allows for a man to rebut the presumption of paternity by proving “fatherhood” but does not also allow such a rebuttable presumption to exist for motherhood.\textsuperscript{89} The court stated,

[a] woman who may be genetically related to a child has no opportunity to prove her maternity and is thereby denied the opportunity to develop the parent-child relationship. She is afforded no procedural process by which to prove her maternity under the statute. The Mother has parental interests not less deserving of protection than those of the Father. ‘By providing dissimilar treatment for men and women who are thus similarly situated,’ the statute violates the Equal Protection Clause.\textsuperscript{90}

The court further disregarded the prior decision in \textit{Lehr v. Robertson},\textsuperscript{91} and stressed that the rule of biology cannot be applied in the context of surrogacy arrangements.\textsuperscript{92} The biological mother can prove maternity \textit{only} through her genetic link to the child.\textsuperscript{93} The biological or intended mother must rely on her biology to protect her fundamental rights because she is not afforded the opportunity to develop a parent-child relationship with her genetic child due to the fact that the Arizona statute does not recognize her as the “legal mother.”\textsuperscript{94} The court held that,

[b]y affording the Father a procedure for proving paternity, but not affording the Mother any means by which to prove maternity, the State has denied her equal protection of the laws. ‘A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’ The surrogate statute violates this principle. We hold that the


\textsuperscript{89} Soos, 897 P.2d at 1359; see ARIZ. REV. STAT. ANN. § 25–218(c) (1991) (“If the mother of a child born as a result of a surrogate contract is married, her husband is presumed to be the legal father of the child. This presumption is rebuttable.”). \textit{Id}.

\textsuperscript{90} Soos, 897 P.2d at 1360 (quoting Reed, 404 U.S. at 77).

\textsuperscript{91} Lehr v. Robertson, 463 U.S. 248, 261–62 (1983). Here, the court held that the mere existence of a biological link was not enough to give rise to the constitutional protections of parents’ fundamental rights. \textit{Id}. at 261.

\textsuperscript{92} Soos, 897 P.2d at 1360.

\textsuperscript{93} \textit{Id}. (emphasis added).

\textsuperscript{94} \textit{Id}. at 1360–61. \textit{See also} ARIZ. REV. STAT. ANN. § 25-218 (1991).
State has not shown any compelling interest to justify the dissimilar treatment of men and women *similarly situated* (the biological mother and father). The statute is unconstitutional on equal protection grounds.\(^9\)

The Arizona Court of Appeals laid the foundational analysis for those wishing to challenge New York surrogacy legislation.

### III. SURROGACY IN NEW YORK AND THE IMPLICATIONS EFFECTING COMPASSIONATE SURROGATES

Until recently, there could be no question that the woman who gave birth to a baby was in fact that baby’s Mother in all capacities. However, through advanced technology, a third person—a genetic stranger to the child—can give birth to a child not her own. In this situation, where all three parties agree that the intended and genetic mother should be declared the child’s legal mother on the child’s birth certificate, New York provides no legislative remedy to mothers, unlike genetic fathers who can simply take a genetic test or sign an affidavit of paternity, because genetic mothers must petition the court for a declaration of motherhood through adoption.\(^{96}\) The root of the problem and lack of recognition for genetic and intended mothers originates from surrogacy being declared null and void.\(^{97}\)

#### A. Identifying the Barriers

1. New York State Family Court Act

Article five of the Family Court Act provides a quick and easy mechanism for a genetic father to be declared the legal father of his

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\(^9\) *Soos*, 897 P.2d at 1361 (quoting *Reed*, 404 U.S. at 76 (emphasis added) (citation omitted)). Judge Gerber in his concurring opinion articulated his additional reasons for disagreeing with the Arizona statute. *Id.* First he stated that the statute fails to take into account a best interest of the child standard—which has consistently been a pattern in domestic relations law. *Id.* Not determining the child’s legal mother as an evidentiary matter resting on the child’s best interests forces parenthood upon someone who does not want it (the gestational carrier), therefore, not being in the child’s best interest. Second, he pointed out that the first part of the statute which prohibits all surrogacy is not narrowly tailored, but in fact overbroad. *Id.* at 1361–62. “[Judge Gerber] cannot see any constitutional barrier to a properly-drafted statute which would permit surrogacy for limited altruistic motives other than profit, i.e., where a family member or friend agrees to serve as an unpaid gestational surrogate for the genetic mother.” *Id.*

\(^{96}\) N.Y. FAM. CT. ACT § 516-a (McKinney 2010).

\(^{97}\) N.Y. DOM. REL. LAW § 122 (McKinney 1999).
child. Where the carrier is married, her husband is the presumptive legal father. Therefore, you need to first establish that the husband is not the genetic father (which means he simply signs an affidavit or testifies in Court). Once that happens, the genetic father can simply and easily be declared the legal father merely on proof of the genetic connection. The DOHMH takes the position that the only way for the genetic mother (who is the wife of the now declared legal father and who is indisputably the genetic mother) to be legally recognized as the child’s mother is through an adoption proceeding, even where the gestational carrier, after the birth of the child, expresses her clear desire to relinquish any parental rights/obligations to the child. In Article 5, if paternity is at doubt, males can take a DNA test, of which the genetic result would be used to declare legal parent status. Even though a female can take a DNA test and be viewed as the genetic mother, the test results will not be used to declare legal parent status. Therefore, you have males and females similarly situated in the process of assisted production, yet the law fails to treat and provide them with the same mechanisms for establishing parental rights.

2. New York State Domestic Relations Law

After much debate, New York declared that surrogacy contracts are contrary to public policy. New York Domestic Relations Law says, “[s]urrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.” The purpose of this statute is to prohibit baby-selling and create a law that voids all surrogacy contracts so litigation on contested matters can be much more cut and dry as a result of the parties not having a legally permissible contract to rely on as part of their argument. Where no contract is formed, or money exchanged,
this does not constitute a violation of New York surrogacy law. However, due to the over-broad nature of Domestic Relations Law section 122, all surrogacy arrangement are considered void. Analysis of this law fails to uphold judicial review under strict scrutiny.

3. New York State Public Health Law

It is important to the intended parents for their child’s birth certificate to reflect who his or her legal parents are. Since New York law defaults to naming the surrogate mother as “mother” on the child’s birth certificate, one must look to the Public Health Law which governs when a new certificate of birth can be made. New York Public Health Law does not necessarily have to act as a barrier in surrogacy cases—the language leaves room for discretion and interpretation. Section (b) indicates that a new certificate of birth shall be made whenever “notification is received by, or proper proof is submitted to, the commissioner from or by the clerk of a court of competent jurisdiction or the parents, or their attorneys, or the person himself, of a judgment, order or decree relating to the parentage . . . .”

The language of this statute focuses on the word “parent” and makes no mention of genetics or biology. The law does not seem to have a problem with re-issuance as long as “proof” is offered. The DOHMH takes the position that by issuing only one birth certificate or allowing for a “maternity proceeding” against a genetic mother. Id. at 3 (emphasis added). Additionally, the memorandum recognized that absent a dispute, noncommercial surrogacy arrangements, in New York, can accomplish their objective of creating and transferring a child— with adoption aiding in the establishment of maternity for the genetic mother. Id. The Assembly says that, under existing laws on adoption and surrender of parental rights, surrogate agreements are permitted when the surrogate voluntarily relinquishes the child for adoption and no fees are paid to her. The proposed legislation would not prohibit surrogate arrangements under these circumstances or the payment of reasonable expenses to or on behalf of a surrogate in connection with an adoption. [Social Security Law] § 374.6 permits adoptive parents to pay reasonable medical and other incidental expenses to the birth mother and an attorney in connection with an adoption. Such payments are reviewed by the court pursuant to [Domestic Relations Law] § 115.8. The proposed legislation clarifies that these provisions would apply to surrogate parenting arrangements.

Id. at 6.

Id.

Id.

N.Y. DOM. REL. LAW § 122.

N.Y. PUB. HEALTH LAW § 4138 (McKinney 2008).

Id.

Id.

Id.
that neglects to take into account the surrogate mother, who biologically gave birth to the child, the hospital is not keeping an accurate record of the events that truly happened in the hospital. The DOHMH believes the best approach would simply be for the mother to adopt the child and after finalization of the adoption three months subsequent, seal the original birth certificate and get an amended certificate issued with both intended parents’ names listed. This proposal by the DOHMH is not only imperfect, but it is burdensome to the surrogate who clearly wants no responsibility for the child and wants to rebut her own maternity.

B. Judicial Precedent in New York State Relating to Gestational Surrogacy

There have been very few cases decided in New York State on the matter of gestational surrogacy. Those that have held favorable decisions for intended parents have found cases such as Soos and J.R. very persuasive. 110

1. McDonald v. McDonald

In McDonald, the intended parents used an egg donor and the mother served as the gestational carrier. 111 The litigation in this case again rose out of an action for divorce where the father sought declaration that the children “be declared illegitimate or, in the alternative, should such children be found to be genetically and legally plaintiff’s, that custody be granted to plaintiff.” 112 The court relied on Johnson v. Calvert to establish custody in a true egg donation case: “in a true ‘egg donation’ situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.” 113 Subsequently, the court held that in this case the wife, who was the gestational mother, is the natural mother of the children and was granted temporary custody of the children with visitation to the husband (father). 114

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112 Id.
113 Id. at 12 (quoting Johnson v. Calvert, 851 P.2d, 776 782 n.10 (Cal. 1993)) (citation omitted).
114 Id.
The father in this case also sought two additional requests—change of surnames on the birth certificates and access to all medical records relating to the birth of the children.\footnote{Id.} With regard to changing the children’s surname, the court granted this request stating, “[d]eprivation of a father’s surname is a serious and far-reaching action, more so in our American society with respect to a male child . . . but still an important basic right with respect to a daughter.”\footnote{Id. at 13.} However, the court firmly rejected the father’s motion for access to all medical records.\footnote{Id.} The motives behind this request were transparent to the court—gaining information about the egg donor.\footnote{Id.} The court stated that this motion was properly denied because the egg donor is not a party to this case and any information regarding the egg donor is not relevant to the issue of custody.\footnote{Id.}

Again, the court looked to the issue of intent in determining motherhood in this situation.

2. Doe v. New York City Board of Health

In Doe, the plaintiffs’ action originated from the denial of recognition of the child’s legal parents on the original birth certificate.\footnote{Doe v. N.Y. City Bd. of Health, 782 N.Y.S.2d 180, 182 (N.Y. Sup. Ct. 2004). The genetic or intended mother and the gestational carrier are sisters. The gestational carrier is also married. The surrogate and her husband joined in the plaintiff's action for declaratory relief. Id. at 182.} The DOHMH give two distinct arguments for why relief should be denied. First, they stated that Article 8 of the Domestic Relations Law declares all surrogate parenting contracts void and unenforceable.\footnote{Id. at 182.} Second, they stated their concern for maintaining accurate records to prevent fraud or mistake for matters such as identity, citizenship, inheritance, and insurance coverage, and to accomplish this physicians and hospital staff need to report the true facts surrounding the live birth which include the identity of the woman giving birth to the child.\footnote{Id. at 182–83.} The DOHMH also stated that they would not be opposed to amending the birth certificate post-birth, provided adequate DNA evidence establishes the petitioners are in fact the genetic parents.\footnote{Id. at 183.}
The court noted the plaintiffs' criticism of the Family Court Act as correct, stating,

[the Family Court Act was written in 1962, before today's medical advancements which allow for two women to claim maternal rights to a baby, and is silent as to maternity. It follows, then, that the Supreme Court, as a court of 'general original jurisdiction in law and equity' (N.Y. Constitution article VI, § 7), has the power to issue an 'order of maternity.' Section 7(b) of Article VI of the New York Constitution provides that '[i]f the legislature shall create new classes of action and proceedings, the [S]upreme [C]ourt shall have jurisdiction over such classes or proceedings.' Similarly, the Supreme Court has jurisdiction over a novel dispute where no statutory provision takes it away. Section 124 of the Domestic Relations Law specifically leaves open the type of legal proceeding that may be instituted following the birth of a child born pursuant to a surrogate parenting contract, and does not limit the parties to a formal adoption proceeding.\textsuperscript{124}

The court also rejected the DOHMH’S argument of recordkeeping as a justifiable reason for not issuing a birth certificate with the intended mother’s name.\textsuperscript{125} The court stated the “DOHMH’S administrative needs and concern for the accuracy of vital records can be accomplished within the procedural framework surrounding the issuance of birth certificates.”\textsuperscript{126}

The court ultimately sided with plaintiffs in this case and issued a first set of birth certificates listing the surrogate as the mother—which were sealed—then a second set of birth certificates were issued listing the intended mother as the mother.\textsuperscript{127} The second set did not indicate that they were “amended,” “corrected,” or “supplemental” certificates.\textsuperscript{128}

IV. ESTABLISHING THE LEGAL FRAMEWORK OF SURROGACY

Surrogate parenting arrangements fall within the private realm and involve areas of state law such as contract law, family law, and criminal law.\textsuperscript{129} Surrogacy practices are not regulated by the

\textsuperscript{124} Id at 183–84 (citation omitted).
\textsuperscript{125} Id. at 185.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} DAAR, supra note 6, at 465.
federal government, but are instead a consequence of state law because so many of the issues that arise are within the sphere of state law. As a result of state regulation, there is a "checkerboard" effect across the country concerning surrogacy arrangements. The United States Supreme Court, however, through case law, has given the State's the tools they need to avoid the discriminatory effects their laws may encompass.

A. The Fundamental Right to Procreate

"Marriage and procreation are fundamental to the very existence and survival of the race." This viewpoint was strongly articulated by the United States Supreme Court in *Skinner v. Oklahoma*, and then additionally coupled with the issue of privacy in *Eisenstadt v. Baird*. The Court stated, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." This language seems to clearly touch upon the issues couples face when using third parties and assisted reproductive technologies to start a family. In determining whether or not a liberty is fundamental, the Court has guided us to look to those rights implicit in the concept of ordered liberty; look to the traditions and collective conscience of our people to determine whether a principle is so rooted there as to be ranked fundamental; and to also look to precedent. The Court has firmly held that

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130 Id.
131 Id.
133 Id.
135 Id. at 453; see *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); see also *Skinner*, 316 U.S. at 535; *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
fundamental liberties may be infringed upon by the States, when there is a compelling governmental interest at stake.\footnote{When a case involves an issue relating to constitutional due process or equal protection, the court must conduct an analysis through one of three levels of constitutional scrutiny—rational, intermediate, and strict scrutiny. However, first, the court must decide which test should be applied. The rational basis test, or review, is the lowest level of scrutiny. This level of judicial review was first established in United States v. Carolene Products Co. United States v. Carolene Prod. Co., 304 U.S. 144 (1938). Rational basis does not apply to those cases involving fundamental rights or a suspect or quasi-suspect class. In order to withstand rational basis review, the governmental action must be rationally related to a legitimate government interest. Carolene, 304 U.S. at 153. Intermediate scrutiny is the next or middle level of scrutiny. Here, it must be shown that the law or policy being challenged serves an important government objective and that the discriminatory means employed are substantially related to the achievement of those objectives. Intermediate scrutiny is applied to situations involving suspect classifications or quasi-suspect classifications. The last and most stringent standard of judicial review is strict scrutiny. Strict scrutiny is always applied when a fundamental right is at issue. To pass this standard of review, three distinct prongs must be met. First, the law or policy must be justified by a compelling state interest. Second, the law or policy must be narrowly tailored to achieve the governmental interest. Third, the law or policy must be the least restrictive means for achieving the governmental interest.} The government has intruded upon the right to procreate for some individuals. First, in the case of Buck v. Bell,\footnote{Buck v. Bell, 274 U.S. 200 (1927).} the Court upheld Virginia’s compulsory sterilization laws for those deemed to be “feeble-minded, insane, criminals, drug addicts, those with chronic, infectious diseases, the blind, the deaf, the deformed, and the dependent, including orphans... homeless, tramps, and paupers.”\footnote{DAAR, supra note 6, at 98.} Prisoners have also been denied the right to procreate. In Turner v. Safely, an inmate challenged a prison marriage regulation which prohibited inmates from marrying other inmates or civilians unless the prison superintendent approved the marriage after finding that there were compelling reasons for doing so.\footnote{Turner v. Safely, 482 U.S. 78, 82 (1987).} The Court in Turner used a rational basis standard of review, rather than strict scrutiny, to hold that the regulation was valid so long as it had “legitimate penological objectives.”\footnote{Id. at 99.} However, the reasons given by the prison—pregnancy or birth of illegitimate child—were not legitimate objectives.\footnote{Id. at 95–96.} While Turner spoke on the fundamental liberty of marriage, the issue of procreation through artificial insemination while incarcerated has also been addressed as a result of Turner. The Eighth Circuit found that “restriction on inmate procreation [was] reasonably related to furthering the legitimate penological interest of treating all inmates equally, to the
extent possible.” Additionally, the Ninth Circuit refused to use even the most basic standard of review, stating that “the right to procreate while in prison is fundamentally inconsistent with incarceration.” These Circuit Court decisions regarding procreation relied heavily on Turner’s implications about marriage, stating, “that while the intangible and emotional aspects of marriage survive incarceration, the physical aspects do not.” The courts have consistently held that incarceration is a means by which the government does have a legitimate interest in denying the right to procreate. The decision in Buck v. Bell has never been overturned; however, the “eugenics” movement has long since been condemned.

B. The Fundamental Right of Parents to Rear Their Children

The Supreme Court first recognized the rights of parents with regard to their children in Meyer v. Nebraska. It was here that the Court articulated that parents have a right to “establish a home and bring up children” and “to control the education of their own.” Many years later, in Troxel v. Granville, the Supreme Court again revisited the fundamental right of parents to rear their children. Justice O’Connor, blatantly pointing to the strong precedent behind this theory, stated that, “[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” The Court previously held that parents do generally act in the child’s best interests and that the “statist notion that...
governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." Therefore, in Troxel, the Court articulated that as

long as a parent adequately cares for his or her children . . .

there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children. The government may, however, infringe on the fundamental rights of parents in child rearing under the doctrine of parens patriae. Acting as parens patriae, the government has the responsibility “to care for infants within its jurisdiction and to protect them from neglect, abuse and fraud.” The government may also intervene in cases of child neglect and abuse. Under the Child Abuse and Neglect Prevention Treatment Act, child abuse and neglect is defined as any “physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child . . . by a person . . . responsible for the child’s welfare under circumstances indicating harm or threatened harm to the child’s health or welfare.” This definition “encompasses both acts and omissions on the part of a responsible person.”

V. IS THERE A FUNDAMENTAL RIGHT TO ASSISTED REPRODUCTION?

The Supreme Court has never addressed the question of whether reproductive autonomy through assisted reproductive technologies is a fundamental right protected by the constitution. If the use of assisted reproductive technologies is deemed fundamental, “any government restrictions on exercise of that right will be evaluated by a court using strict scrutiny, and can only be justified as achieving a compelling state purpose.” Scholars have taken starkly different opinions as to whether or not this new technology can be merited as fundamental—each interpretation of the Constitution puts forth compelling arguments.

151 Parham, 442 U.S. at 603.
152 Troxel, 530 U.S. at 68–69 (citing Reno v. Flores, 507 U.S. 292, 304 (1993)).
153 People ex rel. Wallace v. Labrenz, 104 N.E.2d 769, 773 (Ill. 1952) (citing Witter v. Cook County Com’rs, 100 N.E. 148, 150 (Ill. 1912)).
155 Id.
156 DAAR, supra note 6, at 137.
A. Arguments for Recognizing ART as a Fundamental Right

One of the most acknowledged and debated scholars advocating on behalf of assisted reproductive technology as a fundamental right is John A. Robertson.\footnote{But see Radhika Rao, \textit{Equal Liberty: Assisted Reproductive Technology and Reproductive Equality}, 76 GEO. WASH. L. REV. 1457 (2008).} Robertson stresses that in order to have a substantive debate regarding new productive technologies, the concept of procreative liberty must be clarified and established.\footnote{\textit{Id}. at 22.} In essence, procreative liberty is the choice to either have or avoid having children.\footnote{\textit{Id}. at 23 (citation omitted).}

As a matter of constitutional law, procreative liberty is a negative right against state interference with choices to procreate or to avoid procreation. It is not a right against private interference, though other laws might provide that protection. Nor is it a positive right to have the state or particular persons provide means or resources necessary to have or avoid having children. The exercise of procreative liberty may be severely constrained by social and economic circumstances.\footnote{\textit{Id}.}

The importance of procreative liberty transcends into personal identity, dignity, and to the meaning of one’s life.\footnote{\textit{Id}. at 24.} The exercise of procreative liberty also affects women’s bodies in a substantial way and also significantly affects one’s psychological and social identity—especially with regard to moral responsibilities.\footnote{\textit{Id}.}

Deciding whether or not to reproduce determines the meaning and direction of one’s life, thus, being a personal and private decision. The person best equipped at making the decision of whether or not to reproduce is the person who will be reproducing—not the government.\footnote{\textit{Id}.}

An ethic of personal autonomy as well as ethics of community or family should then recognize a presumption in favor of most personal reproductive choices. Such a presumption does not mean that reproductive choices are without consequence to others, or that they should never be limited. Rather, it means that those who would limit
procreative choice have the burden of showing that the reproductive actions at issue would create such substantial harm that they could justifiably be limited.\(^\text{164}\)

The primary objective for protecting reproductive freedom is to avoid the invasive measures that could be implemented as a result of governmental control over reproduction.\(^\text{165}\)

\(\text{B. The Attachment of the Fundamental Right to Procreate Through ART}\)

Procreative liberty encompasses both the right to avoid procreation and the freedom to procreate. We know that the right to avoid procreation involves constitutional rights to abortion and contraception.\(^\text{166}\) The freedom to procreate is the freedom “to bear or beget a child” if one chooses.\(^\text{167}\) Non-coital reproduction raises a different set of concerns and definitively implicates important aspects of procreative liberty.\(^\text{168}\)

If the moral right to reproduce presumptively protects coital reproduction, then it should protect noncoital reproduction as well. The moral right of the coitally infertile to reproduce is based on the same desire for offspring that the coitally fertile have. They too wish to replicate themselves, transmit genes, gestate, and rear children biologically related to them. Their infertility should no more disqualify them from reproductive experiences than physical disability should disqualify persons from walking with mechanical assistance. The unique risks posed by noncoital reproduction may provide independent justifications for limiting its use, but neither the noncoital nature of the means used nor the infertility of their beneficiaries mean that the presumptively protected moral interest in reproduction is not present.\(^\text{169}\)

There is not a nexus between coital infertility and a couple’s adequacy as child rearers.\(^\text{170}\) The underlying values and reasons for wanting to reproduce exist for those who are coitally infertile, and therefore, their actions (“ART”) to form a family deserve respect as

\(^{164}\) \(\text{Id.}\)

\(^{165}\) \(\text{Id. at 24–25. Robertson highlights the country of China and the forcible abortion and sterilization practices that have resulted from the “one-child-per-family population policy.” Id.}\)

\(^{166}\) \(\text{Roe v. Wade, 410 U.S. 113, 153 (1973); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).}\)

\(^{167}\) \(\text{Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). (citations omitted)}\)

\(^{168}\) \(\text{ROBERTSON, supra note 158, at 32.}\)

\(^{169}\) \(\text{Id.}\)

\(^{170}\) \(\text{Id. at 39.}\)
well.\textsuperscript{171} If the right to reproduction is protected as personal privacy or liberty, this right should be constitutionally protected whether it is achieved coitally or non-coitally.\textsuperscript{172} The state, therefore, has the burden of showing severe harm if the practice of non-coital reproduction was unrestricted.\textsuperscript{173}

There are variations for when non-coital techniques are used. In the instance of IVF, where both intended parents genetic material is used, religious or moral objections should not override the use of ART for the purpose of forming a family.\textsuperscript{174} Surrogate arrangements should also be protected because it allows the infertile couple to have and rear children made from their own genetic material. “Indeed, recognizing the couple’s right to use a surrogate is necessary to avoid discrimination against infertile wives. If an infertile male can parent his wife’s child through the use of donor sperm, an infertile woman should be free to parent her husband’s child through use of a surrogate.”\textsuperscript{175} While procreative rights are not absolute, those that would limit those rights have the burden of showing the substantial harm. New York has not articulated a compelling reason for denying infertile mothers the same treatment as infertile fathers.

VI. NEW YORK LAW: VIOLATION OF EQUAL PROTECTION AND DUE PROCESS

The statutory framework that is present in New York State, pertaining to compassionate surrogacy arrangements, forces genetic mothers to seek court permission to enforce their rights as parents while providing an easier path for genetic fathers which thereby violates the Equal Protection and Due Process rights of intended mothers.

\textsuperscript{171} \textit{Id.} at 32.
\textsuperscript{172} \textit{Id.} at 39. Robertson analogizes this to the opportunity to read for those who are blind and the First Amendment. But consider the analogous effect of blindness on the First Amendment right to read books. Surely a blind person has the same right to acquire information from books that a sighted person has. The inability to read visually would not bar the person from using braille, recordings, or a sighted reader to acquire the information contained in the book. Because receipt of the book’s information is protected by the First Amendment, the means by which the information is received does not itself determine the presence or absence of First Amendment rights.
\textsuperscript{173} \textit{See id.}
\textsuperscript{174} \textit{Id.} at 39.
\textsuperscript{175} \textit{Id.} at 40.
A. Due Process Violation

The Due process clauses of the New York and United States Constitutions guarantee all persons the ability to exercise their procreative rights. Article 5 of the Family Court Act denies genetic mothers the opportunity to access the courts to determine legal maternity. Through this denial, the compassionate surrogate is also precluded from rebutting a presumption that she is the legal parent not only to a child she never intended to parent, but also a child to whom she has no genetic relationship.

The genetic mothers’ due process rights are violated as a result of New York Domestic Relations Law Section 122 being overbroad and inextricably interfering with the right to exercise and avoid procreation. The court’s analysis in J.R. v. Utah spoke directly to the issue of due process. J.R. and M.R. were parents who contracted with a gestational carrier, W.K.J., to carry a child for them because the intended mother was medically unable to carry a child herself. Following the birth of twins by the gestational carrier, the Utah State Office of Vital Records and Statistics refused the parties request to issue birth certificates listing the intended parents as the legal parents. Similar to New York, the Utah State Office of Vital Records and Statistics agreed to put the intended father on the birth certificates as the father but declined to remove the gestational carrier or list the intended mother as mother. At that time, Utah statutory law declared all surrogacy arrangements unenforceable. The intended parents argued that this Utah statute infringed upon their fundamental right to procreate “by denying them the right to make an enforceable agreement to obtain the assistance of a third party in bearing children that [the intended mother] is medically incapable of bearing on her own.”

The right to procreate is a fundamental right which is basic to our civil liberties. The Utah court quoted Carey v. Population

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176 U.S. CONST. amend. XIV, § 1; N.Y. CONST. art. I, § 1.
177 See N.Y. FAM. CT. ACT § 516-a. (McKinney 2010).
178 N.Y. DOM. REL. LAW § 122 (McKinney 1999) (“Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.”).
180 Id. at 1270.
181 Id. at 1271.
182 Id.
183 Id.
184 Id. at 1272.
185 See supra Part III.
Services International, saying, “it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.” After establishing that the right to procreation is a constitutionally protected fundamental right, the Utah court then moved to the issue of whether there was a compelling state interest which could justify the burden imposed on the intended parents. Since a fundamental right is at issue, the level of scrutiny employed is strict scrutiny. Considering Utah’s (and New York’s) alternative for declaring parentage for intended mothers, through adoption, the court rejected this solution as acceptable to survive an analysis under strict scrutiny. The court articulated:

Resort to the adoption process to gain legal recognition of J.R. and M.R’s parental rights, effective though it might be, still fails to account for the parent-child relationship that already exists in fact between J.R. and M.R. and the twin children they conceived . . . .

Parents who bear and raise children in the traditional way need not seek the imprimatur of the State before exercising their rights as parents, or being recognized as such by the law. The State’s interest in the child’s well-being ‘favors preservation, not severance, of natural familial bonds,’ and the same would seem to be true of natural familial bonds that happened to be aided in their formation through use of medical technology.

The Utah court believed that the government failed to articulate a sufficiently compelling state interest to justify the undue burden the statute places on the intended parents. The comprehensive analysis put forth by the Utah court mirrors what should be happening in New York State, yet it is not.

The extent that the New York statute conclusively presumes the gestational surrogate to be the legal mother of the child, Domestic Relations Law Section 122 violates both the intended mother and gestational surrogate’s fundamental rights guaranteed by both the United States and New York State Constitutions to both exercise and avoid procreation. The compelling state interest, articulated by

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187 Id. at 1283–84.
188 Id. at 1291 (citation omitted).
189 Id. at 1293.
Establishing and Rebutting Maternity

the legislative history, is to protect “the interests of children, [by ensuring] that they are not relegated in law to the status of property.”\textsuperscript{190} However, this state interest does not extend to the situation at hand where no contract or money is involved. Strict scrutiny also requires that the statute be narrowly tailored. Domestic Relations Law section 122 is overbroad and fails to narrowly get to the heart of the issue it wishes to prohibit. For these reasons, Domestic Relations Law section 122 fails to withstand an analysis of strict scrutiny.

\textbf{B. Equal Protection Violation}

Through assisted reproductive technologies, the separation of genetics and biology allows for both intended parents to be situated exactly the same within the situation of gestational surrogacy. Both intended mother and intended father donated their reproductive material to create a fertilized embryo which would later be transferred to the gestational carrier. The order of filiation determining paternity is based on genetics. The intended mother here is seeking the exact same treatment—a declaration of maternity based on genetics or being able to rebut maternity based on genetics. Under both state and federal constitutions, equal protection requires that gender-based classifications be subject to heightened, or intermediate scrutiny—the classification must serve “important governmental objectives” and “the discriminatory means employed [must be] ‘substantially related to the achievement of those objectives.’”\textsuperscript{191}

New York and the United States Constitutions guarantee “equal protection of the laws.”\textsuperscript{192} Discrimination on the basis of gender will constitute an equal protection violation. Statutory sex-based classifications are subject to an intermediate standard of judicial review: the law or policy being challenged “must serve important governmental objectives and . . . the discriminatory means employed [are] substantially related to the achievement of those objectives.”\textsuperscript{193} Article 5 of the Family Court Act clearly and unequivocally treats the intended father differently than the

\textsuperscript{190} Memoranda from Mario M. Cuomo, Governor of N.Y., on approving L. 1992 c 308 (July 17, 1992) (reprinted in 1992 N.Y. Sess. Laws 2883 (McKinney)).


\textsuperscript{192} U.S. CONST. amend. XIV, § 1; N.Y. CONST. art. I, § 11.

intended mother. Pursuant to Article 5, the intended father, and other men, can petition the court for an order of filiation. The law states:

[s]uch acknowledgment must be reduced to writing and filed pursuant to section four thousand one hundred thirty-five-b of the public health law with the registrar of the district in which the birth occurred and in which the birth certificate has been filed. No further judicial or administrative proceedings are required to ratify an unchallenged acknowledgment of paternity.194

The same relief is not available to women, nor is there any mention of the establishment of maternity, therefore, denying women equal protection of the law.

A New York State Surrogate’s Court did recognize the discriminatory effect of the Family Court Act in the case of In re Sebastian.195 Judge Glen stated,

Having established impermissible gender-based discrimination, the question becomes what should be done with the overtly discriminatory (paternity) statutes. Where a statute's gender classification fails to meet the heightened scrutiny standard, courts have several choices: they may construe the statute in a way that avoids constitutional infirmity, or they may declare relevant parts of the statute unconstitutional. Where the constitutional defect is due to underinclusion, “a court may either strike the statute, and thus make it applicable to nobody, or extend the coverage of the statute to those formerly excluded.”196

It is indisputable that New York does have a governmental interest in declaring the genetic parentage of its children—which Article 5 of the Family Court Act proves. However, in anticipation of the duality that can exist in cases of compassionate surrogacy, the declaration of parentage for intended mothers as well, is all the more important.197

When a woman agrees to gestate the fetus formed with egg of another woman, there is no dispute between the surrogate and intended mother as to who should be named legal parent. Under a case of first impression before the Maryland Supreme Court, a

196 Id. at 582 (quoting Liberta, 64 N.Y.2d at 170).
Maryland paternity statute, which provided a mechanism for genetically unlinked males to dispute paternity and not for females, was questioned. The court ultimately held that, “[b]ecause Maryland’s [Equal Rights Amendment] forbids the granting of more rights to one sex than to the other, in order to avoid an equal rights challenge, the paternity statutes in Maryland must be construed to apply equally to both males and females.” The Court of Appeals of Maryland’s holding identifies the claim this Note is making.

C. Possible Solutions—Why Adoption Is Imperfect

The only means of remedying the constitutional infirmity in New York State’s legislative scheme is through two options. The first alternative is issuing new, non-discriminatory legislation regarding the establishment of maternity. A second alternative that could be put into effect immediately, while the state drafts legislation, is to read the New York statute in a gender neutral manner—thus applying the paternity sections in Article Five of the Family Court Act to women as well. A solution that is not acceptable in remedying this statutory infirmity is adoption.

In virtually every case confronted by the courts dealing with gestational surrogacy arrangements, the suggested default remedy of adoption, by the intended mother, is discussed. This proposition is simply not acceptable. Adoption is the recognition of the termination of parental rights and means that the legal mother is a genetic stranger. If applied to compassionate surrogacy, adoption is, in a sense, being untrue to the actual nature of the circumstances—which negates the argument put forth by the DOMH. Adoption is not only costly and time-consuming, but it puts a burden of parental responsibility on the gestational carrier for a child she had no desire to parent in the first place.

Adoption statutes establish legal parentage for married couples who are biological/genetic strangers to a child. Adoption also permits an unrelated person, married to a child’s mother or father subsequent to the child’s birth, to attain “parental” rights, rather than functioning only as a stepparent. Ultimately, by legislative action and/or judicial construction, adoption also became available

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198 In re Roberto d.B., 923 A.2d 115, 117 (Md. 2007).
199 Id. at 124.
200 See e.g., N.Y. DOM. REL. LAW § 110 (McKinney 2010).
201 Id.
to unmarried same-sex couples. The legislative purpose behind all these expansions of parentage has consistently been the best interests of the child, both economic and psychological.

In the advent of new assisted reproductive technology, the statutory framework is inadequate to accommodate the determination of legal motherhood and intended mothers are thrown into the category of “adoptive mother” merely because this is the easiest and only explicitly stated solution in New York. Judge Glen touched upon the issue of adoption for intended mothers in her opinion:

Adoptions are complicated and filled with technicalities such that it is critical, if not imperative, to employ a lawyer at considerable cost. Filiation proceedings are considerably easier, and are often pro se, while statutory acknowledgment of paternity does not require, or even contemplate, a lawyer’s assistance. Adoption proceedings are generally lengthy, taking many months, while both paternity procedures are quick and easy. Adoption requires an intrusive (and often expensive) professional “home study” involving intimate details of a couple’s relationship, finances, family and living situation, as well as fingerprinting and a mandatory check for criminal record and any prior reported child abuse or neglect. There are no such requirements for a finding of paternity.

This solution that is consistently offered by the courts and by statutes merely seems second best. Stripping a woman of her parental rights without a showing of cause goes against public policy and the tiered system of Family Law set up by the United States. When a woman gives up her egg is she automatically relinquishing her parental rights even if she is using them to start a family of her own? The legislature needs to provide a better mechanism than adoption to ensure women equal access to reproductive freedom as provided to men.

Adoption is used to make a legal parent-child relationship where none previously existed. “Adoption is not [and should not be] utilized for, nor... is it available to reaffirm, an already existing parent-child relationship.” When it comes to compassionate

204 E.g., Jacob, 86 N.Y.2d at 658–659.
205 In re Sebastian, 25 Misc.3d 567, 580 n.40.
206 Id. at 681 (footnote omitted).
surrogacy, adoption would be reaffirming the existing genetic parental relationship that already exists between the genetic mother and her child. Additionally, the best interest of the child is repeatedly cited and used as a standard by the courts when establishing parental status. In this situation, issuing legal parentage in favor of a woman who neither wants to be nor is the genetic mother of a child would simply not be in the best interest of the child. Moreover, in the interim of the issuance of a court order, the child is placed in an unnecessary state of parental “limbo.” At such a delicate time in the child’s life, parental status needs to be firmly established in anticipation of important decisions that might need to be quickly made on their behalf. For the foregoing reasons, adoption is not a comprehensive option in solving this problem.

VII. CONCLUSION

To combat these apparent statutory discrepancies, the most effective measure for treating intended mothers constitutionally is through revised and updated legislation by New York law makers. New legislation must take into account the ability for technology to separate biology and genetics and provide a concise mechanism for females. The main objective behind surrogacy statutes can remain the same—to curtail the sale and commoditization of children, however, compassionate surrogacy arrangements need to be accounted for. Article 5 of the Family Court Act must also take into account new reproductive technologies. Genetic testing, to establish parental rights, needs to be available for women as well as men.