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TIME TO RETHINK SURROGACY: AN OVERHAUL OF NEW YORK'S OUTDATED SURROGACY CONTRACT LAWS IS LONG OVERDUE

CHARLES GILI[†]

INTRODUCTION: THE EXISTING ILLEGALITY OF SURROGACY CONTRACTS IN NEW YORK

“Making the decision to have a child – it is momentous. It is to decide to forever have your heart go walking around outside your body.”¹ This statement was made by author and educator Elizabeth Stone and expresses the joy that deciding to have a child can bring.² Unfortunately, that decision is complicated, and some people who have decided to bring children into their families must explore alternate options to effectuate that decision. Some choose surrogacy to accomplish their wish.

Surrogacy is the process by which a surrogate mother becomes pregnant and carries the child to term for another person or persons.³ There are two distinguishable types of surrogacy. Traditional surrogacy involves becoming pregnant through artificial insemination using the intended father or a donor's sperm.⁴ Gestational surrogacy involves the surgical implantation of a fertilized embryo through the in vitro

[†] Notes & Comments Editor, *St. John's Law Review & Journal of Catholic Legal Studies*; J.D. Candidate 2020, St. John's University School of Law; B.A., 2011, Brooklyn College. I am most sincerely grateful to Professor Margaret Valentine Turano for her guidance during the Note process and beyond. I also thank, love, and admire my wife for her tirelessness in the face of every challenge and for encouraging me to follow my dreams.

¹ *Elizabeth Stone Quotes*, GOODREADS, https://www.goodreads.com/author/quotes/251288.Elizabeth_Stone (last visited July 4, 2019).

² *Elizabeth Stone*, Fordham University, https://www.fordham.edu/info/24124/elizabeth_stone (last visited Oct. 10, 2019).

³ See Traci Johnson, *Using a Surrogate Mother, What You Need to Know*, WEBMD, <https://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother#1> (last visited July 2, 2019).

⁴ *Id.*

fertilization (“IVF”) process.⁵ In processes involving IVF, the surrogate usually has no genetic tie to the implanted embryo.⁶ Current New York law pertaining to surrogacy contracts does not distinguish between the two types of surrogacy.⁷ New York Domestic Relations Law (“DRL”) § 121 defines a “surrogacy parenting contract” as

any agreement, oral or written, in which: a woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband; and the woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.⁸

DRL § 122 declares that all such contracts violate the public policy of the State and are “void and unenforceable,”⁹ independent of whether they are for profit.¹⁰

While all surrogacy contracts are void in New York, the State takes an even harsher stance against surrogacy contracts for monetary consideration.¹¹ DRL § 123 lays out the punishment for attempting to enter into such a contract.¹² The parties signing the contract on both sides are subject to civil penalties as high as \$500.¹³ Those attempting to facilitate any such contract that involves a fee can be subjected to a \$10,000 fine for the first offense and may be prosecuted on a felony charge for any further offenses.¹⁴ Furthermore, regardless of whether a surrogacy contract is for compensation, DRL § 124 indicates that any surrogacy contract signed by the birth mother will not diminish her parental rights.¹⁵

⁵ *Id.*

⁶ *Id.*

⁷ *See generally*, N.Y. DOM. REL. LAW §§ 121–24 (McKinney 2019).

⁸ *Id.* § 121.

⁹ *Id.* § 122.

¹⁰ *Id.* (stating without particularity that “[s]urrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable”).

¹¹ *Id.* § 123.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* § 124.

The effect of the current law in New York is multifaceted. Because the law makes surrogacy contracts that are for profit expressly illegal,¹⁶ and also refuses to honor any surrogacy contract,¹⁷ even where a friend or relative is willing to act as surrogate, no contract may be devised to ensure that the child, while in the womb, is legally recognized as the child of the “intended” parent or parents. Not only does this set the stage for a difficult legal battle if the surrogate eventually refuses to give the child to the intended parent or parents, but it also creates a potentially disastrous situation for the unborn child: if the intended parents die and neither has been declared a parent to the unborn child, the child will not be entitled to any death benefits from those parents.¹⁸

Part I of this Note discusses the influential effect of the much publicized *Baby M* case¹⁹ as well as the societal perceptions of the time that led to the enactment of New York’s current “anti-surrogacy” laws, DRL §§ 121–124. Part II explores changes in the legal, scientific, and societal atmospheres that have rendered those laws archaic and unconstitutional. Part III argues that needed change should come in the form of new legislation meant to foster, rather than burden, the formation of family.

I. THE EVOLUTION OF NEW YORK’S “ANTI-SURROGACY” STATUTES

A. *The Effect of the Baby M Case*

The current law in New York exists, in large part, due to the heavy influence of the infamous *Baby M* case. To understand the impact of the *Baby M* case on New York surrogacy law, it is useful to look at New York’s stance immediately prior to the case. New York and other states had taken a neutral stance when considering the legality and constitutionality of surrogacy

¹⁶ *Id.* § 123.

¹⁷ *Id.* § 122.

¹⁸ *See, e.g.*, N.Y. EST. POWERS & TRUSTS § 2-1.3 (McKinney 2019) (stating that dispositions to “children” will include children who are conceived during but born after their parents’ life, including nonmarital children). However, if the child born to the surrogate is not a genetic child of the parent or parents who have died, there is no legal basis to establish parentage after the fact for purposes of estate distribution. *Id.* (containing no relevant language to account for the given set of circumstances).

¹⁹ *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

contracts.²⁰ Notably, in *In re Baby Girl L.J.*, the court validated a surrogacy contract.²¹ A couple had signed a surrogacy contract with a woman who agreed to bear a child for them via artificial insemination using the husband's sperm, and the couple agreed to pay the woman \$10,000.²² As there were no New York laws dealing with such contracts at the time, the court examined the elements of the case individually,²³ validating the transfer of the child to the couple because no alternative action would have served the child's best interests,²⁴ and then addressing the legality of the payment to the surrogate.²⁵ The court cited the holding and rationale used in a similar case that had been decided in the Kentucky Supreme Court—a ruling that the transfer of a child to the intended family and payment made to the surrogate mother did not violate state adoption laws.²⁶ The New York court agreed, holding that there were “fundamental differences” that distinguished the “buying and selling of children,” which laws against adoption fees aim to prevent, from the payments made in a surrogacy contract.²⁷ It pointed out that the reason behind New York and Kentucky adoption laws that prohibited payments was to ensure that mothers were not being “coerced” into parting with their children after birth.²⁸ Borrowing the rationale from *Surrogate Parenting Associates*, the court explained that the motive of payment in a surrogacy contract is inherently different:

[t]he essential considerations for the surrogate mother when she agrees to the surrogate parenting procedure are *not* avoiding the consequences of an unwanted pregnancy or fear of the financial burden of child rearing. On the contrary, the

²⁰ See generally, *In re Baby Girl L.J.*, 132 Misc. 2d 972, 978 (N.Y. Sur. Ct. 1986) (ruling that a paid surrogacy contract was valid and did not violate existing adoption laws); *Surrogate Parenting Assocs., Inc. v. Kentucky*, 704 S.W.2d 209, 214 (Ky. 1986) (upholding the formation of surrogacy contracts and voicing the court's opinion that disallowing them would be a job for the legislature).

²¹ 132 Misc. 2d at 978.

²² *Id.* at 973.

²³ *Id.* (parceling the case into two distinct questions: (1) whether the transfer of the child to the intended family was legal, and (2) whether the payment of a fee to the surrogate mother violated New York laws).

²⁴ *Id.* at 974.

²⁵ *Id.* at 974–78.

²⁶ *Id.* at 976–78 (discussing the rationale used by the Kentucky Supreme Court in *Surrogate Parenting Assocs., Inc. v. Commonwealth*, 704 S.W.2d 209 (Ky. 1986)).

²⁷ *Id.* at 977.

²⁸ *Id.*

essential consideration is to assist a person or couple who desperately want a child but are unable to conceive one in the customary manner to achieve a biologically related offspring.²⁹

The court's basis for distinguishing paid surrogacy contracts from adoption laws forbidding payment was that surrogacy contracts are signed prior to conception and are thus not likely to represent the perceived evil of a payment intended to entice giving up an already conceived child.³⁰ Additionally, the court noted that at the time these laws were written, the legislature had not anticipated that advancements in science would make such situations possible.³¹ Ruling that both the payment to the surrogate and to the lawyer who created the contract should be allowed, the court stated that addressing any moral or legal concerns is a job to be undertaken by the legislature if at all necessary.³²

The case of *Baby M* involved a paid surrogacy contract in New Jersey.³³ Mary Beth Whitehead was artificially inseminated with sperm from William Stern after signing a contract with William and Elizabeth Stern to carry a child for them.³⁴ However, shortly after the child was born, Mrs. Whitehead decided that she wanted to keep the baby and fled the state with her husband.³⁵ The case attracted national attention.³⁶ Articles flooded local and national papers with accounts of the story and the trial that followed.³⁷ Originally, the New Jersey Superior Court validated the contract.³⁸ However, the New Jersey

²⁹ *Id.* (quoting *Surrogate Parenting Assocs., Inc.*, 704 S.W.2d at 211–12).

³⁰ *Id.*

³¹ *Id.* at 978 (stating that “this court . . . is inclined to follow the majority opinion [of *Surrogate Parenting Assocs., Inc.*] by finding that biomedical science has advanced man into a new era of genetics which was not contemplated by . . . the New York legislature when it . . . prohibit[ed] payments in connection with an adoption”).

³² *Id.*

³³ *In re Baby M*, 537 A.2d 1227, 1234–35 (N.J. 1988).

³⁴ *Id.* at 1235–36.

³⁵ *Id.* at 1237.

³⁶ See generally Robert Hanley, *Father of Baby M Granted Custody; Contract Upheld; Surrogacy is Legal*, N.Y. TIMES, Apr. 1, 1987, at A1; Iver Peterson, *Baby M's Future*, N.Y. TIMES, Apr. 5, 1987, at A1; Robert Hanley, *Surrogate Mother Battle Goes to Trial*, N.Y. TIMES, Jan. 1, 1987, at 3; George Andreassi, *Surrogate Mother Mary Beth Whitehead Admitted Today She Made...*, UPI NEWS (Feb. 9, 1987), <https://www.upi.com/5733843>; Elizabeth Kolbert, *In Struggle For Baby M., Fierce Emotion and Key Legal Issues*, N.Y. TIMES, Aug. 23, 1986, at 25.

³⁷ See sources cited *supra* note 36.

³⁸ *In re Baby M*, 525 A.2d 1128, 1159 (N.J. Super. Ct. Ch. Div. 1987) (holding that once the surrogacy contract is signed, the surrogate could still refuse until the

Supreme Court reversed.³⁹ In an opinion seething with skepticism towards surrogacy, Chief Justice Wilentz explained why such contracts violated public policy.⁴⁰ His language demonstrated a harsh opposition toward such contracts.⁴¹ In the end, the Sterns were granted custody based upon the best interests of the child.⁴² Prior to the case, surrogacy, and especially surrogacy contracts, had received limited national exposure.⁴³ *Baby M* thrust the subject into the spotlight.⁴⁴ Unfortunately, that spotlight was ill-natured, and based at least partially upon the selective media portrayal and a ruling filled with harsh criticism, many states rushed toward policies against such contracts.⁴⁵

Cases following *Baby M* were heavily influenced by the New Jersey court's rationale.⁴⁶ New York was not beyond the reach of this effect. Soon after the *Baby M* decision, a case involving a paid surrogacy contract was heard in Kings County, New York.⁴⁷ *In re Adoption of Paul* involved a contract that, in the words of the court, was "virtually identical" to the contract addressed in *Baby Girl L.J.*⁴⁸ Despite the similarities, despite the prior New York ruling, and despite the fact that the legislature had passed no new laws, the court in *Paul* adopted the stance taken by the

time of conception but not after) *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

³⁹ *Baby M*, 537 A.2d at 1234–35.

⁴⁰ *Id.* at 1240–42. In his opinion, Justice Wilentz describes the intended parents as the "adoptive couple" who had entered into a "coercion [] contract." *Id.* at 1240. He goes on to discuss that there is potential for "baby-bartering" in surrogacy contracts. *Id.* at 1241. Justice Wilentz then undertakes a lengthy explanation of why surrogacy contracts are against public policy. *Id.* at 1246–50. He describes how money is the cause of these contracts and that the underlying "evil" is that the resulting situation is a mother separated from her child. *Id.* at 1249–50.

⁴¹ *Id.* at 1249–50.

⁴² *Id.* at 1260–61.

⁴³ No major cases or heavily publicized events had yet drawn major media attention to surrogacy contracts.

⁴⁴ See generally *supra* note 36.

⁴⁵ See, e.g., *supra* note 36; *infra* note 53. Many articles were written about the *Baby M* case that would have likely inspired strong emotional effects among readers. *Supra* note 40.

⁴⁶ See *Jane Doe v. Attorney Gen.*, 487 N.W.2d 484, 486–87, 488–89 (Mich. Ct. App. 1992) (relying, in part, on the *Baby M* court's equating surrogacy contracts to "baby-bartering" in holding surrogacy contracts to be "void and unenforceable"); *In re Adoption of Paul*, 146 Misc. 2d 379, 384–85 (N.Y. Fam. Ct. 1990) (holding that despite prior New York case law, the court would apply the rationale from *Baby M* invalidating a surrogacy contract).

⁴⁷ *Adoption of Paul*, 146 Misc. 2d at 379–80.

⁴⁸ *Id.* at 381.

court in *Baby M*, repeatedly comparing paid surrogacy contracts to paid adoption and declaring the contract void as illegal.⁴⁹ In its ruling, the court explicitly stated that it agreed with the New Jersey Supreme Court's opinion that such contracts constituted "baby bartering."⁵⁰ New York's movement towards its current anti-surrogacy status had begun.

B. Legislation and the New York State Task Force on Life and Health

Prior to *Baby M* and cases adopting its rationale, New York lawmakers had attempted to pass legislation aimed at legalizing surrogacy contracts.⁵¹ In the aftermath of *Baby M*, in 1992, laws staunchly opposed to surrogacy were proposed and eventually enacted in the form of DRL §§ 121–124.⁵² These laws were a direct result of the recommendation made by the newly appointed New York State Task Force on Life and Health.⁵³ This Task Force was made up of twenty-six members and consisted of medical doctors, lawyers, professors, priests, rabbis, and others.⁵⁴ In their official recommendation, the Task Force defined surrogate parenting as "a social arrangement that uses

⁴⁹ *Id.* at 381–85.

⁵⁰ *Id.* at 382. The court expressed that despite the fact that a New York court had previously dealt with a very similar situation and had chosen not to declare surrogacy contracts illegal, and despite there being no specific laws in New York dealing with surrogacy contracts, it agreed with the "infamous" *Baby M* case. *Id.* at 381–82. The court adopted the rationale from that case, specifically relying on the borrowed principle that surrogacy contract agreements constitute "the sale of a child, or, at the very least, the sale of a mother's right to her child." *Id.* at 384–85 (quoting *In re Baby M*, 537 A.2d 1227, 1248 (N.J. 1988)).

⁵¹ Mindy Ann Baggish, *Surrogate Parenting: What We Can Learn From Our British Counterparts*, 39 CASE W. RES. L. REV. 217, 260–68 (1988) (explaining at length that proposed New York legislation known as the "Dunne Bill" sought to legalize and regulate surrogacy contracts).

⁵² N.Y. DOM. REL. LAW §§ 121–24 (McKinney 2019).

⁵³ See The New York State Task Force on Life and the Law, *Surrogate Parenting: Analysis and Recommendations for Public Policy*, N.Y. STATE DEP'T OF HEALTH (1988) [hereinafter *Task Force Analysis*], https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogate_parenting.pdf (last visited July 4, 2019). New York Governor Mario Cuomo originally commissioned the Task Force in 1985 with the purpose of "assist[ing] the State in developing public policy on issues related to medicine, law, and ethics." *About the Task Force on Life and the Law*, N.Y. STATE DEP'T OF HEALTH (Nov. 2016), https://www.health.ny.gov/regulations/task_force/about.htm. In the spring of 1987, in light of the *Baby M* case having given the practice of surrogacy "prominence and immediacy," Governor Cuomo specifically asked the Task Force to focus its policy development efforts on the issue of surrogate parenting contracts. *Task Force Analysis, supra*, at i.

⁵⁴ *Task Force Analysis, supra* note 53, at Task Force Members.

reproductive technology (usually artificial insemination) to enable one woman to produce a child for a man and, if he is married, for his wife.”⁵⁵ The Task Force opined it was in society’s best interest to take a stance against surrogate parenting.⁵⁶ The Task Force based its recommendation on a variety of factors including the ruling of the *Baby M* case, private adoption laws, existing best interest of the child standards, and perceived societal attitudes toward “deep-rooted social and moral assumptions about the relationship between parents and their children.”⁵⁷ The legislature accepted the Task Force’s recommendation and passed DRL §§ 121–124.⁵⁸ These sections voided any contracts to the extent they dealt with surrogacy arrangements.⁵⁹ The courts would thereafter not consider a signed surrogacy contract against the birth mother for purposes of establishing parentage of a child.⁶⁰ Additionally, paid surrogacy contracts and the brokering of such contracts became punishable offenses for all parties involved.⁶¹ In particular, the impact of the *Baby M* case cannot be understated. To this day New York courts ruling on surrogacy contract cases acknowledge the impact of *Baby M* on the current legal landscape.⁶²

⁵⁵ *Id.* at iii.

⁵⁶ *Id.* at iv.

⁵⁷ *Id.* The Task Force’s report was heavily influenced by the ongoing *Baby M* case—so much so that in the introduction of the Task Force’s nearly 150-page report, the entire first paragraph was dedicated to rehashing the facts of the decision in *Baby M*. *Id.* at 1.

⁵⁸ N.Y. DOM. REL. LAW §§ 121–24 (McKinney 2019). In fact, the Task Force’s “Proposed Surrogate Parenting Act” was adopted and enacted nearly word-for-word by the New York legislature as DRL §§ 121–124. *Compare Task Force Analysis*, at A-1–A-2 with N.Y. DOM. REL. LAW §§ 121–24 (McKinney 2019).

⁵⁹ N.Y. DOM. REL. LAW § 122 (McKinney 2019) (declaring surrogacy contracts “void and unenforceable”).

⁶⁰ *Id.* § 124.

⁶¹ *Id.* § 123.

⁶² *See, e.g., In re Adoption of J.*, 59 Misc. 3d 937, 938 (N.Y. Fam. Ct. 2018). The court in this case ruled that it could not validate a surrogacy contract based upon DRL 121–124. *Id.* In doing so, the court specifically noted that “[f]ollowing the decision in *Matter of Baby M.*, surrogacy was outlawed in New York.” *Id.* (citation omitted). The court went on to state that “the law remains the same as it did in 1988 when surrogacy contracts were found to be against public policy.” *Id.*

C. *Medical Technology and Societal Attitudes Toward Family at the Enactment of DRL §§ 121–124*

Surrogacy technology was in an early stage of development at the time DRL §§ 121–124 passed into law.⁶³ The most common technique was artificial insemination, as occurred in *Baby M*.⁶⁴ IVF was still an emerging technology.⁶⁵ This provides additional support to indicate what the legislature considered when outlawing surrogacy contracts. Surrogacy situations that started in the same way as in *Baby M* were considered the norm, and thanks to that case, did not enjoy public support.⁶⁶

There is much speculation as to why people began to pursue surrogacy more frequently. Some sources indicate that infants available for adoption were becoming more difficult to obtain around the time of this legislation.⁶⁷ Others may have considered surrogacy because of infertility issues or health problems that could prohibit a safe pregnancy. In fact, the Task Force specifically considered much of this in its analysis.⁶⁸ However, while this legislation was being considered, legislators were generally only thinking about a very early stage of reproductive technology and were likely only considering the implications of these issues as they related to traditional families. Legislators

⁶³ See Jeff Wang & Mark Sauer, *In Vitro Fertilization (IVF): A Review of Three Decades of Clinical Innovation and Technological Advancement*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Dec. 2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1936357/> (explaining the scientific advances involving assisted reproduction that were occurring in the mid- to late-1980s).

⁶⁴ *Id.* (referring to the fact that IVF was still in the early stages of development); see also W. Ombelet & J. Robays, *Artificial Insemination History: Hurdles and Milestones*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4498171/> (discussing how artificial insemination possibly dates back centuries and was being used effectively at the time IVF began to be used).

⁶⁵ Wang & Sauer, *supra* note 63.

⁶⁶ See generally *Task Force Analysis*, *supra* note 53. It seems very likely that while the Task Force may have realized technology in the medical field was evolving, it considered the practice that was prevalent at the time, namely artificial insemination. It is likely that it did not examine the full beneficial scope of what reproductive technology, including IVF, was becoming capable of.

⁶⁷ See National Committee for Adoption, *Issues in Child Adoption*, CQPRESS: CQRESEARCHER, (Nov. 16, 1984), <https://library.cqpress.com/cqresearcher/document.php?id=cqresrre1984111600> (“Adoption experts estimate that two million American couples want to adopt children, preferably healthy infants or toddlers. But only about 50,000 healthy babies are available for adoption each year.”); Deann Borshay Liem, *First Person Plural: Adoption History*, POV (2000), <http://www.pbs.org/pov/firstpersonplural/history/2/> (describing that in the early 1990s, many American citizens were seeking to adopt children in Central America).

⁶⁸ *Task Force Analysis*, *supra* note 53, at 7.

did not consider the effects of these issues on same-sex couples and individuals. To realize this, one needs to understand that while New York has traditionally been viewed as reasonably liberal where same-sex rights are concerned, New York did not sanction an adoption by a same-sex couple until 1997, officially permit adoption by same-sex couples and individuals until 2010,⁶⁹ or legalize same-sex marriage until 2011.⁷⁰ Same-sex marriages performed in other states were not recognized until 2008.⁷¹ Suffice it to say, New York lawmakers were not prioritizing any attempt to address the effect of dwindling adoption numbers and anti-surrogacy contract policies on the same-sex community.⁷² Nevertheless, the laws that were adopted based upon the recommendation of the Task Force remain in effect today and are fully enforced by New York courts.⁷³

II. THE CURRENT LAW IS OUT OF PLACE IN A CHANGING WORLD

A. *What Has Changed Since the Adoption of New York's Current Surrogacy Contract Laws?*

1. Surrogacy-Related Technology and Practice

Our world is a different place than it was when anti-surrogacy laws were passed in New York. While IVF is still an advancing technology, it is being used both more often and more successfully.⁷⁴ It has been implemented to assist couples and

⁶⁹ Jay Carmella, *New York Governor Signs Law Allowing Unmarried Couples to Adopt*, JURIST (Sept. 21, 2010, 11:18 AM), <https://www.jurist.org/news/2010/09/new-york-governor-signs-law-allowing-unmarried-partners-to-adoption/> (discussing how the bill amended the language of existing New York law so as to make it legal for same-sex individuals and couples to adopt).

⁷⁰ See Marriage Equality Act, A. 8354, Assemb., Reg. Sess. (N.Y. 2011) (legalizing same-sex marriage in New York).

⁷¹ See *Martinez v. County of Monroe*, 50 A.D.3d 189, 192 (4th Dep't 2008) (ruling that New York would honor same-sex marriages that were performed in other jurisdictions).

⁷² Considering the facts pointed out above, specifically, that New York did not allow same-sex adoption or marriage until years after the Task Force completed its analysis and made its recommendation, it follows that the Task Force would not have considered the impact of a law against surrogacy contracts on same-sex couples or individuals.

⁷³ See, e.g., *In re Adoption of J.*, 59 Misc. 3d 937, 938–39 (N.Y. Fam. Ct. 2018) (ruling that the court could not validate an “illegal surrogacy contract”).

⁷⁴ See generally Wang and Sauer, *supra* note 63 (describing the plethora of advances within surrogacy-related reproductive technologies up to 2006); *IVF Treatment 'Safer and More Successful Than Ever'*, INT'L FED'N OF GYNECOLOGY &

individuals who have difficulty conceiving for a number of reasons.⁷⁵ Many couples that cannot conceive due to the infertility of one partner may choose to use a surrogate so as to have a child with the genes of one of the parents.⁷⁶ Other couples may choose surrogacy when the woman is fertile but cannot carry a child due to medical concerns.⁷⁷

Beyond issues involving fertility, a major development in the world of IVF has been the advent of pre-implantation genetic diagnosis (“PGD”).⁷⁸ This process involves the testing of a fertilized embryo through the IVF process.⁷⁹ PGD allows doctors and scientists to ensure that many genetic and sexually transmitted diseases are not present in the fertilized embryo.⁸⁰ Often, the women who utilize this technology suffer from such diseases and cannot safely carry a child to term.⁸¹ Some of these women and their families seek out surrogates to carry their genetic children.⁸²

2. Legal Acceptance Concerning Familial Formation

In addition to changes in medical technology, the legal landscape has also changed. More than just the legality of same-sex marriage itself has followed in the wake of *Obergefell v. Hodges*. A major focus of the Court in *Obergefell* was the concept of family.⁸³ Modern families are now acknowledged, both legally

OBSTETRICS (Mar. 27, 2018), <https://www.figo.org/news/ivf-treatment-'safer-and-more-successful-ever'-0015880> (noting that IVF is safer and more effective than ever); Maggie Fox, *A Million Babies Have Been Born in the U.S. With Fertility Help*, NBC NEWS (Apr. 28, 2017), <https://www.nbcnews.com/health/health-news/million-babies-have-been-born-u-s-fertility-help-n752506> (discussing the incredible leaps in success rates involving pregnancy through IVF technology).

⁷⁵ Traci Johnson, *Using a Surrogate Mother: What You Need to Know*, WEBMD (Sept. 7, 2017), <https://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother#2>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Wang & Sauer, *supra* note 63 (explaining what PGD is and what it is being used for).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Kathryn T. Drazba, et. al., *A Qualitative Inquiry of the Financial Concerns of Couple Opting to Use Preimplantation Genetic Diagnosis to Prevent the Transmission of Known Genetic Disorders*, NATIONAL SOCIETY OF GENETIC COUNSELORS, INC. (Aug. 2013), <https://onlinelibrary.wiley.com/doi/pdf/10.1007/s10897-013-9638-7>.

⁸² Johnson, *supra* note 75.

⁸³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599–609 (2015) (discussing the importance of the concept of family several times throughout the opinion).

and societally, in a variety of shapes and sizes. Since *Obergefell*, federal courts have struck down multiple laws that infringed upon the familial rights of same-sex individuals and couples, including a Mississippi law that banned same-sex adoption.⁸⁴ In *Campaign for Southern Equality v. Mississippi Department of Human Services*, Judge Jordan of the United States District Court for the Southern District of Mississippi explained the reasons for granting an injunction that barred enforcement of a law preventing same-sex couples from adopting children.⁸⁵ He explained that the Court in *Obergefell* had found that laws against gay marriage violated the Equal Protection Clause and that the majority in that case “foreclosed litigation over laws interfering with the right to marry and ‘[the] rights and responsibilities intertwined with marriage.’”⁸⁶ For similar reasons, in *Pavan v. Smith*, the Supreme Court of the United States held that an Arkansas law that did not allow for both same-sex partners to be listed on the birth certificate of their adopted child was unconstitutional.⁸⁷ These decisions have effectively legalized same-sex adoption across the country.⁸⁸

B. Adverse Effects and Issues of Constitutionality

As mentioned in the description of medical advances in IVF and PGD, anyone with an issue conceiving or carrying a child stands to benefit from these advances.⁸⁹ However, the current law in New York refuses to acknowledge any contract involving an informed surrogate.⁹⁰ Even if the surrogate is willing to proceed without charging a fee, the intended parent or parents cannot legally protect themselves from a devastating rebuke of

⁸⁴ *Campaign for Southern Equal. v. Miss. Dep’t of Human Svcs.*, 175 F. Supp. 3d 691, 711 (S.D. Miss. 2016).

⁸⁵ *Id.* at 709–10.

⁸⁶ *Id.* at 710.

⁸⁷ 137 S. Ct. 2075, 2077–79 (2017) (ruling that the Arkansas statute was not about genetics and instead gave special recognition to heterosexual couples, and that this effect was a violation of the principle set forth in *Obergefell* that same-sex couples be privy to the “constellation of benefits” that comes with marriage).

⁸⁸ *See, e.g., E.L. v. V.L.*, 136 S. Ct. 1017, 1019–22 (2016) (applying the full faith and credit clause to an adoption by a woman who had been in a relationship with another woman who conceived through assisted reproductive technology and with whom she had jointly raised such children). The effect of the decisions of federal courts in cases like *Campaign for Southern Equality* is that states have been put on notice that such laws will not hold up under *Obergefell* when challenged.

⁸⁹ *See supra* Part II.A.1.

⁹⁰ *See* N.Y. DOM. REL. LAW § 122 (McKinney 2019).

their agreement by the surrogate.⁹¹ Apart from the emotional trauma this would cause, the intended parents would have already taken on significant medical expenses for IVF and even greater expenses if the process involved PGD.⁹² It would be difficult to take on such expenses while retaining even the slightest doubt over whether it would be possible to foresee a change of heart on the part of the surrogate. Since New York courts will not recognize a contract made prior to the child's birth, any intended parent other than a genetic father, who may establish parentage prior to the delivery of the child,⁹³ will be unable to establish legal parentage until after the delivery of the child through a generic adoption order.⁹⁴ Beyond the emotional turmoil that intended parents face when they are not legally acknowledged as the parents of the child whose birth they anxiously await, issues such as inheritance and insurance may come into play.⁹⁵ Take, for instance, a situation in which the intended mother passes away before the surrogate gives birth to the child. If the mother's will bequeaths her estate in its entirety to her children, the yet to be legally recognized child could lose out on any such inheritance.⁹⁶

1. The Specific Effects of DRL §§ 121–124 on Women

Since men may establish parentage prior to birth but women may not—even though the woman may be the genetic parent in certain situations—it is apparent that the New York law is

⁹¹ *Id.* Since surrogate contracts have been declared unenforceable in New York, it follows logically that any agreement to volunteer as a surrogate comes with the possibility that the surrogate renege on her promise to turn a child over.

⁹² *Preimplantation Genetic Diagnosis, It's No Walk in the Park*, ALZFORUM (July 3, 2014), <https://www.alzforum.org/news/research-news/preimplantation-genetic-diagnosis-its-no-walk-park> (stating that the cost of IVF and PGD together, even when covered in part by insurance, can cost about \$25,000).

⁹³ N.Y. FAM. CT. ACT § 564(a)–(b) (McKinney 2019) (describing the process by which a man may, upon an acceptable showing of paternity to the court, be declared the legal father prior to the child's birth).

⁹⁴ *See generally* N.Y. DOM. REL. LAW § 122 (McKinney 2019). Since any contract that recognizes the intended parent, other than a man who can be declared a father prior to birth, is void in New York, intended parents must wait until the child is born and then file normal adoption paperwork afterward.

⁹⁵ *See* N.Y. EST. POWERS & TRUSTS LAW § 2-1.3 (McKinney 2019).

⁹⁶ *Id.*; *see also* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3(b) (McKinney 2019) (providing benefits to a child that was in utero up to twenty-four months after the death of its genetic parent so long as stated processes were followed). N.Y. EPTL § 4-1.3 provides assurances for conceptions after the death of a genetic parent who documented his or her wishes but does not provide any such assurance for unborn children in the given scenario. *See generally id.*

unfairly prejudicial against women. Although this may not have been the legislature's intent,⁹⁷ the direct fallout is that every single woman whose child is carried by a surrogate in New York is barred from establishing legal parentage prior to birth.⁹⁸ Additionally, if a surrogate refuses to turn over the child and the mother attempts to obtain the child through legal recourse, New York courts will refuse to acknowledge a surrogacy contract in determining which woman is the mother of the child.⁹⁹ Therefore, the worst-case scenario for a mother is complete loss of rights to the child, whereas the worst-case scenario for a man who had parentage established during pregnancy or afterward via genetic testing would be a court battle over custody.¹⁰⁰

Furthermore, single women and women in same-sex relationships are even more likely to feel the adverse effect of the current surrogacy laws. When carrying a child is not an option, they may choose to expand their families using the surrogacy process. When they do, these women will face the same obstacles faced by other women, including the inability to be recognized as a parent prior to the birth and adoption of the child.¹⁰¹ However, unlike a single man or a couple that includes a man, single women and same-sex female couples will never be legally recognized prior to birth under the current law, even if one of those women is a donor of the embryo.¹⁰² Therefore, these women are faced with riskier factors of inheritance, insurance, and custody in the absence of a change in New York's stance against surrogacy contracts.

⁹⁷ See generally *Task Force Analysis*, *supra* note 53.

⁹⁸ N.Y. DOM. REL. LAW § 122 (McKinney 2019).

⁹⁹ *Id.* § 124.

¹⁰⁰ A man who is the intended father may legally establish his fatherhood prior to the birth of the child. Once the child is born, the birth mother could refuse to hand the child over to him. His recourse would be to sue for custody. An intended mother could not be so recognized, so a traditional custody hearing might not be available to her. Any legal undertaking that she pursued in order to obtain rights to the child would undoubtedly be much more complicated. Conceivably, under existing New York laws, a court could deny the woman all parental rights.

¹⁰¹ See generally N.Y. DOM. REL. LAW §§ 121–24 (McKinney 2019).

¹⁰² Since, in New York, the only surrogate-utilizing intended parent who may be recognized prior to birth would be a genetic father, neither partner in same-sex female couples that use a surrogate, by default, will be able to establish parentage prior to the birth.

2. The Specific Effects of DRL §§ 121–124 on Men

Men without a partner and all men in same-sex relationships, face perhaps the most consistent risk of running into obstacles placed in their paths to family by the current New York law. If these men choose to pursue parentage outside of adoption, the only remaining choice is to do so through surrogacy, and they will be forced to rely on a surrogate to carry the child for them. New York’s anti-surrogacy contract laws make doing this within the safety of a contract illegal.¹⁰³ Their only options become to either risk surrogacy absent a contract or formal agreement, or to pursue a surrogacy agreement outside of the state, in a more “surrogacy-friendly” jurisdiction.¹⁰⁴

3. New York’s Current Surrogacy Law is Unconstitutional

In *Obergefell*, the Court declared same-sex marriage legal across the United States.¹⁰⁵ As discussed above, cases that followed *Obergefell* solidified the concept that *Obergefell* is not limited to marriage, but extends to the benefits that marriage endows.¹⁰⁶ *Obergefell* and its progeny are not the only cases that demonstrate a current legal trend towards promoting all versions of the concept of family. In *Planned Parenthood v. Casey*, the Court stated in its now famous opinion, that “at the heart of liberty” is the right of a person “to define one’s own concept of existence.”¹⁰⁷ Even cases that came decades before *Obergefell* and *Planned Parenthood* place great emphasis on the right to autonomy in personal and familial decisions.¹⁰⁸ Following the pattern of modern legal rationale demonstrated in all of the these

¹⁰³ See generally N.Y. DOM. REL. LAW §§ 121–124 (McKinney 2019).

¹⁰⁴ *Intended Parents: Surrogacy Laws by State*, SURROGATE.COM <https://surrogate.com/intended-parents/surrogacy-laws-and-legal-information/surrogacy-laws-by-state/> (last visited June 14, 2019). Based upon its stance against surrogacy agreements, New York is one of only two states listed as “Non-Surrogacy Friendly.” *Id.*

¹⁰⁵ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

¹⁰⁶ See *Campaign for Southern Equal. v. Miss. Dep’t of Human Svcs.*, 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016) (ruling that a law prohibiting same-sex couples from adopting was incompatible with the *Obergefell* ruling); see also *Pavan v. Smith*, 136 S. Ct. 2075, 2077–79 (2017) (discussing the importance of the “constellation of benefits” that *Obergefell* was meant to convey).

¹⁰⁷ 505 U.S. 833, 851 (1992).

¹⁰⁸ See generally *Meyer v. Neb.*, 262 U.S. 390 (1923) (ruling that there is a fundamental right to make decisions regarding one’s children); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (discussing the overarching “penumbral” right to privacy).

cases, it is entirely out of place that any decision regarding the right to begin a family be outlawed based mainly upon the preconceived notions of what is morally proper.

Given the current legal trend, DRL §§ 121–124, which as explained, restrict the smooth transitions of certain methods of giving birth to and rearing children, is unconstitutional. New York's anti-surrogacy contract laws could be interpreted by a court as in violation of the Equal Protection Clause¹⁰⁹ and the Due Process Clause.¹¹⁰ Based on the adverse effects of New York's laws, several groups may have standing to bring such a challenge against DRL §§ 121–124. In particular, as laws outlawing same-sex adoption have been struck down, these New York laws, which similarly burden individuals and couples attempting to effect a specific familial decision, are on shaky ground.¹¹¹ Two major rationales are considered in the *Obergefell* ruling. The first is that the Constitution does not allow laws forbidding same-sex couples' right to marry because of the liberty interests represented by choosing one's own way of life and protecting the family structure.¹¹² The second rationale is that laws forbidding same-sex marriage are particularly damaging considering that they serve to further harm and subjugate those same-sex couples.¹¹³ The *Obergefell* Court states that to deny same-sex couples the right to marry is to withhold a fundamental

¹⁰⁹ U.S. CONST. amend. XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”).

¹¹⁰ *Id.* (“ . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ”).

¹¹¹ *Compare* Campaign for Southern Equal. v. Miss. Dep’t of Human Svcs., 175 F. Supp. 3d 691, 710 (S.D. Miss. 2016) (striking down Mississippi law that prohibited adoptions by same-sex couples because such decisions were meant to be incorporated by the Court in *Obergefell*) with N.Y. DOM. REL. LAW §§ 121–24 (McKinney 2019). As explained, these laws effectively place what can be construed as an intolerable burden upon couples attempting to pursue a decision to have children by refusing to legally recognize agreements meant to facilitate such decisions.

¹¹² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015) (reasoning that there is a liberty interest protected by the Due Process Clause that, among other things, includes the right to make decisions about one’s own “personal identity and beliefs,” and discussing that marriage choices are among the “the most intimate” of decisions). The Court also points out that the right to marry is important as it provides security and a sense of acceptance for the children of those families. *Id.* at 2590.

¹¹³ *Id.* at 2590–91 (discussing how the Equal Protection Clause also protects the right to same-sex marriage because to substantiate such law in light of the “long history of disapproval of [same-sex] relationships” would work further harm and serve to “subordinate gays and lesbians”).

right.¹¹⁴ Regarding situations not foreseen at the time of the ruling, the Court addressed the possibility of additional need for change when it stated, “[w]hen new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.”¹¹⁵

As New York laws against surrogacy contracts obstruct many people from legally securing their pursuit of genetic parentage, those who wish to fulfill dreams of family according to their own perceived ideals will be forced to leave the state of New York and seek security of contract in one of the forty-eight states in which surrogacy contracts are enforceable.¹¹⁶ These pilgrimages—seeking tolerance of one’s own ideas of family—are eerily reminiscent of pilgrimages made not so long ago by men and women seeking the right to gain legal acceptance of whom they chose to marry.¹¹⁷ Such a situation seems to put these laws in stark contrast to the principles advocated by the *Obergefell* Court. The New York law, as it stands, has the potential to have a disproportionately adverse effect on any person who desires to pursue parentage through surrogacy and certainly represents a conflict with “the Constitution’s central protections”¹¹⁸ as they were understood in *Obergefell*.

III. PROSPECTIVE CHANGE

A. *Pending New York Legislation: The Child-Parent Security Act*

The Child-Parent Security Act (“CPSA”) is currently pending approval in New York, and if passed will repeal DRL §§ 121–124.¹¹⁹ Additionally, the CPSA will set forth legal

¹¹⁴ *Id.* at 2604–05.

¹¹⁵ *Id.* at 2589.

¹¹⁶ *Intended Parents*, *supra* note 104. Many states have laws that are favorable to surrogate contracts. *Id.* Most others do not have the dramatic “anti-surrogacy” laws that New York has. *Id.*

¹¹⁷ See *Traveling to Another State or Country to Marry?*, LAMBDA LEGAL (May 27, 2008), <https://www.lambdalegal.org/publications/traveling-to-another-state-or-country-to-marry>. This article, published in 2008 before the federal legalization of same-sex marriage, offers advice to same-sex couples who might be considering leaving their own states to get married. *Id.* The article specifically addresses some of the hazards involved in marrying, including the possibility of facing fines or imprisonment within one’s home state. *Id.*

¹¹⁸ *Obergefell*, 135 S. Ct. at 2589.

¹¹⁹ A06959A *Memo: New York State Assembly Memorandum in Support of Legislation*, N.Y. ST. ASSEMBLY, https://assembly.state.ny.us/leg/?default_fld=&bn=

parameters for both paid and unpaid surrogacy contracts¹²⁰ and bestow parental rights to the intended parents under the contract, rather than to the surrogate.¹²¹ It will allow all intended parents to establish parentage prior to the birth of the child, eliminating many concerns involving insurance and inheritance.¹²² In recognition of the concern that such contracts could be misused against an uninformed party, the CPSA mandates that all parties involved obtain representation of counsel in order to ensure that they are properly informed at the outset of the agreement.¹²³

B. The CPSA or a Similar Law is Necessary in a Changing World

The reasons to pass the CPSA or a similar law are in no short supply. They come in the form of addressing the many issues above. Modern medical technology has progressed to a point where new and exciting opportunities exist for the many groups of people who seek to pursue the constitutionally protected goal of forming a family.¹²⁴ As these medical technologies have developed, our country has undergone an inspiring societal change. Acceptance for the way people choose to live their lives has become more than just the custom; it has become the law of the land.¹²⁵ The acceptance and regulation of surrogacy contracts by New York would not only be a logical and positive stride, but a necessary leap in keeping pace with this trend of acceptance. Under a properly constructed law, people seeking to become parents via a viable and increasingly common option will not be forced to leave the state in order to obtain the

A6959&term=2017&Memo=Y (last visited July 5, 2019) [hereinafter *A06959A Memo*] (stating in part that the intention of the bill is to repeal DRL §§ 121–24).

¹²⁰ *Id.* (“Part two establishes the requirements and procedure for obtaining a judgment of parentage of a child born through assisted reproduction or pursuant to a gestational carrier arrangement.”).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Wang & Sauer, *supra* note 63 (describing the advances in relevant medical technology).

¹²⁵ *See, e.g.,* Obergefell v. Hodges, 135 S. Ct. 2584, 2589–90 (2015) (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Conn., 381 U.S. 479, 484–86 (1965); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); Lawrence v. Texas, 539 U.S. 558, 575 (2003)) (ruling same-sex marriage legal based in part upon concepts supported in multiple rulings within the history of Supreme Court including “personal choice,” “safeguard[ing] children,” and treating gays and lesbians fairly).

security a legal contract provides. Additionally, intended parents will be legally recognized and less burdened during a time naturally fraught with concern. Many of these intended parents have already struggled up to the point of surrogacy by dealing with infertility and other health or acceptance-related issues. Legalizing surrogacy contracts will at least assure them that they are legally secure in their pursuit.

The documented legislative intent behind the CPSA states that “New York law has failed to keep pace with medical advances in assisted reproduction, causing uncertainty about who the legal parents of a child are upon birth.”¹²⁶ It further states that “[c]onfusion or uncertainty regarding the parental rights of donors and intended parents (both genetic and non-genetic) who participate in the conception of the child through assisted reproduction is detrimental to the child and secure family relations.”¹²⁷ These and other statements documented as the professed intent of the CPSA are evidence that legislators within New York recognize and see the need to resolve many of the issues referred to above.¹²⁸ It also ties together the legal ramifications in a way that sheds light upon the deeper resolution proffered by the CPSA: allowing surrogacy contracts in New York would give legal acceptance to people whose goal is to begin or expand a family through surrogacy and entitle them to the same legal recognition granted to other “traditionally” formed families. The changes proposed by the CPSA seek to embrace modern legal trends and would resolve issues of constitutionality currently inflicted by DRL §§ 121–124.

C. Any Negatives of Recognizing Surrogacy Contracts Do Not Outweigh the Positives

The arguments against allowing surrogacy contracts exist almost entirely in the moral, religious, and ethical realms. While these represent legitimate concerns, such problems do not exist for the entire population. Laws recognizing such agreements will not force anyone to form such contracts or to pursue surrogacy.

¹²⁶ A06959A Memo, *supra* note 119.

¹²⁷ *Id.*

¹²⁸ *Id.* In the justification of the proposed bill, it is documented that this law is intended, in part, to resolve the situation of the current law’s effects upon same-sex couples. *Id.* The justification notes that “[b]ecause of existing New York laws, couples facing infertility and same-sex couples are forced to go out of state in order to have a child with the assistance of a gestational carrier.” *Id.*

Some people may still fear situations such as that which occurred in *Baby M*. Others may feel that the practice of surrogacy has the potential to degrade women or that women entering surrogacy contracts might be exploited. Some may feel that the practice is offensive based upon their religious worldviews. However, just as the right to liberty properly allows these people to choose to practice their beliefs and faiths, liberty should allow those who need to pursue their concepts of family via surrogacy and those who are in a position to facilitate such pursuits to *choose* whether to exercise those options or not.

It is important to point out that, whatever their reason, those who seek to disallow such legal recognition in New York will not, in effect, prevent surrogacy contracts from happening. Instead, prohibiting surrogacy contracts only forces those within New York to seek such contracts in other states.¹²⁹ Even those who oppose the CPSA or any law like it do not advocate imposing an impossibility upon those seeking surrogacy contracts, but instead advocate imposing an obstacle. This obstacle causes people, already tasked with great adversity, to leave New York and its wealth of medical facilities, and in many cases their home, to find unfamiliar doctors and lawyers who can offer them the security of knowing they can call their child their own from the beginning.¹³⁰ The current law is not only unnecessary, but illogical in that it does not effectuate a proscription, but instead a grossly inappropriate hurdle that serves the purpose of chasing people from conducting their legal and medical business within New York.¹³¹

CONCLUSION

In today's world of advanced scientific technology, progressive legal trends, and societally broad morals, anti-surrogacy laws are out of place. Since its inception, our country has placed an ever-higher emphasis on the right to personal freedom, and our highest court has placed great

¹²⁹ *Intended Parents*, *supra* note 104. Refusing to honor surrogacy contracts in New York leaves people who want to pursue such contracts with the alternative of traveling to a "surrogate friendly" state. *Id.*

¹³⁰ *Id.*; see also *A06959A Memo*, *supra* note 119 (noting that existing New York law requires participants of surrogacy agreements "to use out-of-state clinics and medical professionals despite the fact that New York is home to world-class medical facilities and fertility professionals").

¹³¹ *A06959A Memo*, *supra* note 119.

emphasis on the right “to define one’s own concept of existence.”¹³² This same country has gone to great lengths over the past century to protect the rights involving the building of the family structure, as well as the right to make decisions within that family structure. In such a country, we should pay particular attention to laws that burden individuals and couples who choose an ever-increasingly viable option to build their own families so that they might enjoy those rights that we have managed to attain. Instead, it is more appropriate to continue to pass legislation that fosters familial and societal growth.

¹³² See *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).