2018

The Enforcement of Selective Reduction Clauses in Surrogacy Contracts

Julia Dalzell
University of San Diego School of Law

THE ENFORCEMENT OF SELECTIVE REDUCTION CLAUSES IN SURROGACY CONTRACTS

Julia Dalzell*

Introduction

As reproductive technology advances, many infertile couples are turning to gestational surrogacy,[1] resulting in thousands of babies born through contracting.[2] Although most contracts are completed without issue, the conflicts that do arise are quickly reported and debated.

Controversial cases of surrogacy quickly make headlines. In 2013, Crystal Kelley, a gestational surrogate for an infertile couple,

---

* J.D. Candidate University of San Diego School of Law, 2018. B.A., Economics, The Pennsylvania State University. Lead Articles Editor, San Diego Law Review. I would like to thank Professor Dov. Fox for all his help and guidance in writing and publishing this article. I also extend my thanks to the editors of the Widener Commonwealth Law Review for their support.

[1] California law distinguishes between so-called "traditional surrogates" and "gestational carriers." A gestational carrier is one "who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproduction agreement," whereas a traditional surrogate is "a woman who agrees to gestate an embryo, in which the woman is the gamete donor and the embryo was created using the sperm of the intended father or a donor arranged by the intended parent or parents." CAL. FAM. CODE § 7960(f)(1)-(2) (Deering 2016).

[2] In 2014, there was an estimated 2,000 babies born through gestational surrogacy in the United States. *See* Tamar Lewin, *Coming to US for Baby, and Womb to Carry It*, N.Y. TIMES (July 6, 2014), http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html?_r=0. *See also* Karen Caplan, *More than 1.5% of American babies owe their births to IVF, report says*, L.A. TIMES (Mar. 3, 2015, 12:07 PM), http://www.latimes.com/science/sciencenow/la-sci-sn-ivf-live-births-success-rate-20150303-story.html. The Center for Disease Control estimates that 19,218 births have resulted from all types of surrogacy arrangements as of 2010 in California alone, with a nationwide estimate of 137,482. Magdalina Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS (2010), http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf, at 10.

refused to terminate a fetus with severe abnormalities, including a cleft palate, a brain cyst, serious heart defects, misplaced organs, and not one, but two improperly functioning spleen—all requiring multiple surgeries.[3] The surrogacy contract contained a clause giving the intended parents the right to terminate the fetus at any time if it had severe and debilitative abnormalities.[4] Kelley, the surrogate, signed the agreement in its entirety, yet later refused to have an abortion.[5] The child was born with severe health issues and later adopted by another family.[6]

In 2016, a case arose in Los Angeles, California, after a surrogate, Melissa Cook, refused to selectively reduce a high-risk triplet pregnancy.[7] Because of Cook's advanced age, multiple embryos were transferred, which resulted in triplets.[8] Fearing he would not be able to afford triplets, or even twins, the intended father asked Cook to reduce the pregnancy by one fetus and abide by their agreement's selective reduction clause.[9] Cook, although having signed, and presumably having read the contract, refused to reduce, "citing her anti-abortion beliefs."[10] Twice more the intended father requested the surrogate reduce the pregnancy,

---

[3] Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 FAM. L.Q. 29, 29 (2015); Elizabeth Cohen, *Surrogate Offered $10,000 to Abort Baby*, CNN (Mar. 6, 2013), http://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/.

[4] Forman, *supra* note 3, at 49.

[5] Caitlin Keating, *Surrogate Mom Gives Birth to Baby Girl with Serious Birth Defects Despite Parents' Order to Abort: 'She is Everything I Believed She Would Be,'* PEOPLE (Mar. 3, 2016, 4:10 PM), http://people.com/babies/surrogate-crystal-kelley-baby-with-birth-defects-parents-order-to-abort/. When asked to have an abortion she refused. The couple then offered Kelley $10,000 to go forward with the abortion. Kelley counter offered at $15,000. Cohen, *supra* note 3.

[6] Kelley, on the other hand was able to make a quick buck publishing the story of her surrogacy triumphs. She fled to the state of Michigan, where the parental rights over a surrogate child belonged to the genetic mother, not the intended parents. She then found a new couple to adopt the child. Cohen, *supra* note 3.

[7] Cook v. Harding, 190 F. Supp. 3d 921, 928-29 (C.D. Cal. 2016).

[8] *Id.* at 928.

[9] *Id.* at 928-29.

[10] *Id.*

worried the health of all three fetuses could suffer.[11] All three babies were born prematurely and remained in the neonatal intensive care unit for two months.[12] As surrogacy and in vitro fertilization (IVF) become more common, and cases like Kelley's and Cook's continue to occur, courts will most likely face an ethical conundrum in handling selective reduction clauses.

Conflict in surrogacy agreements has previously stemmed from the waiver of parental rights, a sort of "whose baby is it anyway" discussion.[13] Some jurisdictions debate the enforceability of surrogacy contracts of any kind—viewing the "commodification of babies" and "rental of wombs" as repugnant.[14] In states where

---

[11] *Cook*, 190 F. Supp. 3d at 928-29.

[12] "The [b]abies were born prematurely (at 28 weeks gestation) . . . ." *Id.* at 929. The case was ultimately dismissed and the intended father was awarded sole custody. *Id.* at 930. The Court reiterated the importance of agreeable surrogacy agreements by stating, "[s]hould Cook ultimately prevail, the Court is at a loss to imagine an intended parent in this state who would contract with a gestational surrogate, knowing that the woman could, at her whim, 'decide' that the intended parent or parents are not up to snuff and challenge their parenting abilities in court." *Id.* at n.9.

[13] *See In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988) (holding a traditional surrogacy contract conflicted with state public policy, but the best interests of the child justified awarding custody to the genetic father). *But see* Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993) ("A woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own.").

[14] Some states expressly allow surrogacy agreements. *See* N.D. CENT. CODE, § 14-18-08 (2016); TEX. FAM. CODE ANN. § 160.754 (West 2016); CAL. FAM. CODE § 7962 (West 2016); ARK. CODE. ANN. § 9-10-201 (2016); COLO. REV. STAT. § 15-11-121 (2016). Some states expressly do not allow surrogacy agreements, with a few even criminalizing the contracts. *See* ARIZ. REV. STAT. ANN. § 25-218 (2016); N.M. STAT. ANN. § 40-11A-801 (West 2016); MICH. COMP. LAWS § 722.855 (2016); IND. CODE § 31-21-1-1 (2016); NEB. REV. STAT. § 25-21, 200 (2016). A few states allow surrogacy agreements with certain contingencies. *See* VA. CODE ANN. § 20-158 (2016) (allowing surrogacy agreements if they have been approved by the court. *See also* N.Y. DOM. REL. LAW § 123 (McKinney 2016) (allowing purely altruistic surrogacy contracts and outlawing contracts involving compensation). *See* Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 428 (2012) ("Of those states that allow surrogacy, many require that the intended parents be married. That leaves many single women and men, along with lesbian and gay couples, unable to utilize

surrogacy contracts are enforceable, courts still quarrel with certain terms in the contracts—specifically, provisions and clauses that restrict the surrogates' behavior and decision-making authority regarding the termination of pregnancy.[15]

Because of the huge financial burdens and emotional costs, couples usually resort to surrogacy after exhausting many other reproductive options.[16] After investing time, money, and emotions, terminating a pregnancy is a choice no intended parent wants to consider. Intended parents are not only faced with their own choices, but also the choices of the surrogate carrying their child. To combat any disagreements, contracts often contain provisions that specifically address the risks of pregnancy termination and selective reduction to determine decisions in advance.[17]

These provisions provide the intended parents with the right to make all selective reduction or termination decisions, often with situation-specific instructions.[18] Usually, intended parents

---

surrogacy in numerous states such as Florida, Nevada, New Hampshire, Oklahoma, Utah, and Virginia.").

[15] *See Calvert*, 851 P.2d at 784 (declining to "determine the validity of a surrogacy contract purporting to deprive the gestator of her freedom to terminate the pregnancy.").

[16] Surrogacy can cost up to $150,000, which includes fees such as doctors' fees, psychological screenings, counseling, attorney fees, medication, travel expenses, compensation for the surrogate, agency fees and costs associated with pregnancy and recovery. Catherine Pearson, *A Basic Guide to the Complicated World of Surrogacy*, HUFFINGTON POST (June 5, 2015, 1:44 PM), http://www.huffingtonpost.com/2015/06/05/what-is-surrogacy_n_7513702.html. *See also Anticipated Costs*, AGENCY FOR SURROGACY SOLUTIONS, https://www.surrogacysolutionsinc.com/intended-parents/anticipated-costs/ (last visited Oct. 29, 2017); *Cost of Hiring a Surrogate*, GROWING GENERATIONS, https://www.growinggenerations.com/surrogacy-program/intended-parents/surrogacy-cost/ (last visited Oct. 20, 2016).

[17] Deborah L. Forman, Esq., *Abortion and Selective Reduction Clauses in Surrogacy Contracts: What Every Intended Parent and Surrogate Needs to Know*, PATH2PARENTHOOD (Nov. 24, 2014), http://www.path2parenthood.org/blog/abortion-and-selective-reduction-clauses-in-surrogacy-contracts-what-every-intended-parent-and-surrogate-needs-to-know.

[18] For example, the parties may agree that the intended parents will not reduce a pregnancy to select for gender. The parties might also decide in advance how many embryos and which to reduce when there is a multiple pregnancy. *See e.g.*, Joseph F. Morrissey, *Surrogacy: The Process, The Law, and The Contracts*

contemplate one of two scenarios: (1) in which a fetus is suffering from severe and debilitating birth defects, or (2) in which their surrogate is carrying high-order multiple pregnancies and selective reduction is recommended to improve the health and outcome for the remaining fetuses.[19] Although both parties agree to these provisions when contracting, they are largely written off by courts as unenforceable on moral and constitutional grounds, giving the surrogate the final say on the choice of termination.[20]

This Comment takes a unique look at surrogacy contracts and recovery for non-performance by implicating both constitutional issues and contractual issues into one coherent rationale. By arguing that selective reduction and termination clauses should be

---

51 WILLAMETTE L. REV. 459, 533-34 (2015) providing an example of a selective reduction clause:

> Example 3-13: Selective Reduction: The parties hereto agree that if the Surrogate becomes pregnant with [two] [three] or more embryos, that the Intended Parents will have the right to request a selective reduction up until the [12th][20th] week of pregnancy, as measured from the date of insemination. If such a request is made, then the Responsible Physician will identify the embryos with the lowest chance of survival and will terminate that or those embryos, allowing the most viable to remain and develop. Understanding that such a provision is not specifically enforceable, the Surrogate agrees to respect and follow the wishes of the Intended Parents in this regard. In any event, the parties agree that if any Responsible Physician advises that continuing to be pregnant with multiples puts the Surrogate's life or health at risk, then the Surrogate shall have the right to decide to terminate any or all of the embryos at any time.

[19] "An estimated 36 percent of recent twin births and 77 percent of births of triplets or more in the United States resulted primarily from medically-assisted pregnancies . . . multiple pregnancies can be fraught with complications that compromise a successful outcome and the health of mothers and babies . . . many of those babies are born prematurely and spend weeks or months in a neonatal intensive care unit. Some even die hours or days after birth." Jane E. Brody, *Some I.V.F. Experts Discourage Multiple Births*, N.Y. TIMES (Oct. 10, 2016), https://www.nytimes.com/2016/10/11/well/family/experts-advise-minimizing-multiple-births-through-ivf.html. The babies that do survive often emerge with lasting physical and developmental problems. The carriers are also more likely to develop pregnancy-related complications. *See id.*

[20] *Calvert*, 851 P.2d at 783.

enforceable, this Comment also maintains that specific performance is an appropriate remedy.

Part II will argue that surrogates should be held to their earlier commitment at the time of contracting. The constitutional protection of a woman's right to abortion is immensely important; however, like many other constitutional protections, it is a protection that can be voluntarily, knowingly, and intelligently waived. Furthermore, because a surrogate voluntarily relinquishes her authority to the intended parents without state compulsion or delegation, the judicial enforcement of the private contract should not be regarded as an exercise of state power.

Part III will delve into contract remedies for breach and the standard of care to which surrogates and clinics should be held. Past scholars seem hesitant to advocate strongly for specific performance—most likely due to repercussions or backlash they might receive from supporting the "ordering" of an unwanted abortion. The few courts that addressed the issue of what to do when selective reduction clauses are breached determined that specific performance was largely off the table, refusing to even consider it.[21] This Comment develops a comprehensive way to address issues surrounding selective reduction clauses and argues why specific performance is a justifiable remedy. Intended parents should also be able to receive damages for breach of contract, including damages for emotional distress. Additionally, clinics and professionals should be held to a heightened standard of care to protect all parties in the agreement and help ensure that the contract can be properly fulfilled.

Part IV will propose solutions and preventative measures to keep surrogacy contracts from going south. Both the intended parents and the surrogate should be screened in advance of entering an agreement. The compatibility of intended parents and surrogates should be weighed, and both parties should be financially stable to avoid coercion and breach of contract. All parties should have separate legal counsel to ensure they are well informed about all aspects of the contract. Furthermore, there should be national standards to regulate payments and minimize reproductive tourism that could have negative impacts on socioeconomics abroad. All

---

[21] *See Calvert*, 851 P.2d at 783.

parties will be better off enforcing selective reduction clauses and regulating surrogacy contractual agreements more efficiently.

Part II.

BACKGROUND

Before the advent of reproductive technology, infertile women and gay or single men were limited to either adopting or accepting infertility. [22] Now, they have a range of options, including surrogacy. Surrogacy is traditionally defined as a procedure whereby a couple or single person contracts with a woman—the surrogate—to conceive and carry a child for them.[23] The party who contracts for the child is referred to as the intended parent.[24] The surrogate relinquishes all parental rights of the child to the intended parents. [25] There are two types of surrogacies: traditional and gestational.[26] Gestational surrogacy, which involves the process of in vitro fertilization, is the main focus of this Comment. In gestational surrogacy, an embryo from the egg and sperm of the intended parents is created in a petri dish and artificially inseminated into the surrogate.[27] The offspring is biologically related to both intended parents, not the surrogate. Often more than one embryo is transferred to increase reproductive success in the surrogate.[28] This sometimes leads to multiple pregnancies, which can be high risk to

---

[22] The first "test-tube baby" was born in 1978. Kate Brian, *The amazing story of IVF: 35 years and five million babies later*, THE GUARDIAN (July 12, 2013, 12:34 PM), https://www.theguardian.com/society/2013/jul/12/story-ivf-five-million-babies; *See also* Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L. J. 113 (1997).

[23] Kerian, *supra* note 22, at 114.

[24] The intended parent can be a single man, woman or a couple, either heterosexual and homosexual. Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 360 (2011).

[25] *Id.* at 361.

[26] *Id.* at 360.

[27] *Id.* In traditional surrogacy, the child is only genetically related to the intended father.

[28] *See* Kerian, *supra* note 22, at 114.

the surrogate and the fetuses, leading to the question of whether or not to terminate one or more of the fetuses.[29]

The growth of surrogacy has generated much debate. Opponents of surrogacy argue it demeans both women and children, reducing them to mere commodities and exploiting financially strapped women.[30] Those with concerns of commodification view surrogacy as a commercial enterprise for women's labor, where the child birthed is analogized to a commodity for sale in the marketplace.[31] Their argument focuses on the exploitation of the women who are surrogates by the women who are hiring the surrogates—generalizing surrogates as poor and minority women carrying children for wealthy white women.[32] Proponents of surrogacy, on the other hand, argue surrogacy does not exploit women or reduce children to commodities; rather, it is a mutually beneficial agreement in which the surrogate receives compensation for the assistance in creating a desperately wanted child.[33]

Judicial debate has mainly focused on disputes arising over whether the surrogate or the intended parents have legal parentage.[34] The range of rules and different state tests have led to unpredictable results, making it difficult to contract with any real assurance.[35] For the purposes of this Comment, it is assumed that all private contracts for surrogacy are valid, focusing only on the intricacies of selective reduction clauses contained within those agreements.

WAIVER OF CONSTITUTIONAL RIGHTS

Women have a constitutionally protected right to seek an abortion.[36] Most of the Court's abortion jurisprudence connects the

---

[29] Forman, *supra* note 17.

[30] Kerian, *supra* note 22, at 116.

[31] Anne R. Dana, The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers, 18 DUKE J. GENDER L. & POL'Y 353, 361 (2011).

[32] *Id.*

[33] Kerian, *supra* note 22, at 116.

[34] *See In re Baby M*, 537 A.2d at 1227; *Calvert*, 851 P.2d at 783.

[35] See Mohapatra, *supra* note 14, at 424-28.

[36] Roe v. Wade, 410 U.S. 113, 153 (1975). *Roe v. Wade* gave a woman the right to an abortion during the entirety of her pregnancy but allowed prescribed state intervention for regulating abortion in the second and third trimesters. *Id.* at 153-54.

constitutional protections afforded to abortion with the need to protect bodily integrity.[37] Privacy is protected in contraceptive and abortion cases where there is not only a protection against state intrusion into the "marital bedroom," but also protection of a more intimate right of personal decisions.[38] In *Carey v. Population Services International*, a case involving the distribution of contraceptives, the Supreme Court of the United States noted the "decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices," and this protection is "understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or prevent conception are among the most private and sensitive."[39]

Some opponents believe the right to abortion is unrestricted; so fundamental that it cannot be waived, even if the woman is willing to do so.[40] Although formed with good intentions, this argument ignores the recognized fact that one can knowingly and voluntarily waive his or her fundamental rights.[41] Waivers of constitutional

---

[37] Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1156–57 (2008) ("[The] right to be free from interference with bodily integrity does not mandate recognition of a similar right to prevent the use of the products of our body. To use a non-productive technology example while it might infringe on an individual's bodily integrity to force a tube down his throat with an emetic to 'stomach pump' up pills as incriminating evidence, . . . the same concerns are not present when one examines saliva on pills already regurgitated . . . [t]he key word in 'bodily integrity' is integrity, and once that integrity is broken because biological material is no longer attached to the body, the rationale for avoiding invasion of bodily integrity seems to lose its purchase.").

[38] *Id.* at 1151.

[39] *Id.* at 1151-52 (citing Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)). *See also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 896 (1992) (noting that "state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman.").

[40] *See* Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements under California Law*, 1 UCLA WOMEN'S L.J. 89, 120 (1991); Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077, 1090 (2014).

[41] Rights that can be waived include: the right to waive due process notice of trial, *see* In re K.M.L., 443 S.W.3d 101, 119 (Tex. 2014); the right to counsel,

rights must be voluntary, "knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences."[42]

A party who accepts benefits under a contract may also waive legislative impairment of their rights under the contract.[43] The Constitution protects the individual's right to be free from "abuse of governmental power" and a state's delegation of power.[44] In determining whether a contractual right has been unconstitutionally impaired, a court must ascertain certain facts including: "(1) whether a contractual obligation is present[;] (2) whether the state's actions impaired that contract[;] and (3) whether the impairment was reasonable and necessary to serve an important public purpose."[45] The impairment must be of drastic measures; minimal alteration of contractual obligations may end the inquiry into state intervention.[46] There is a significant difference between state compulsion and state enforcement of a contract into which a party has willingly and autonomously entered.[47] In the case of surrogacy contracts, the carrier willingly relinquishes her authority over the decision to

---

see Brady v. U.S., 397 U.S. 742, 748 (1970); the right to free speech, a jury trial, right to be free from unreasonable searches and seizures, right against self-incrimination and others, *see* 16 C.J.S. *Constitutional Law* § 192 (2016). Consent to adoption is a means of waiving parental rights, *see* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.4 (2d ed. 1988); Consent to bodily touching waives rights against battery in tort law, *see* DAN B. DOBBS, THE LAW OF TORTS 95 (West 2000).

[42] A woman can waive a constitutional right by signing a contract so long as in signing that contract she waives her rights knowingly, intelligently and voluntarily. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Brady v. U.S., 397 U.S. 742, 748 (1969).

[43] Bd. of Educ. of Unified Sch. Dist. No. 443 v. Kansas State Bd. of Educ., 966 P.2d 68, 77 (Kan. 1998).

[44] *See Casey*, 505 U.S. at 898; *See also* Planned Parenthood Cent. Mo. v. Danforth, 428 U.S. 52, 92 (1976).

[45] Bailey v. State, 500 S.E.2d 54, 60 (N.C. 1998) (citing U.S. CONST. art.1, §10, cl.1).

[46] U.S. CONST. art.1, § 10, cl. 1.

[47] *See* J.B. v M.B., 751 A.2d 613, 619 (N.J. 2000) (declining to resolve embryo disposition dispute on constitutional grounds because "it is not clear that judicial enforcement of the alleged private contract would constitute state action under the Fourteenth Amendment.").

reduce or terminate a pregnancy—the state does not compel her to do so or delegate authority to the intended parents.[48]

Waiver occurs when a person possesses an exercisable right but purposely decides to relinquish it.[49] Waiver of constitutional rights usually involves inducement from the government, a conditioned benefit by the government, or relief from state penalty.[50] A right can also be waived without any inducement by the government.[51] For example, a criminal defendant may plead guilty and waive his right to a jury trial because the evidence weighs heavily against him.[52] "A right might also be "waived because . . . [by] neglecting to protect it, the right is forfeited.""[53] In this circumstance, the waiver usually holds trivial consequences and is neither noticed nor reflected on.[54] But in other circumstances, a waiver of rights can have serious repercussions and is therefore contemplated carefully and sometimes with professional advice.[55]

There are different approaches to categorizing what constitutional rights can and cannot be waived.[56] A "value-oriented" approach to waiver opines that a constitutional right should not be waived if that waiver would "undermine a substantial public value the right protects."[57] Under this approach, "[w]hen the value of a constitutional right lies in protecting the interests of the public at large, the right transcends the interest of any single person."[58] Taking a value-oriented approach to waiver focuses on externalities and costs borne by the public at large from the individual's decisions.[59] If considerable public values are not

---

[48] Forman, *supra* note 3, at 38.

[49] *See* Jason Mazzone, *The Waiver Paradox*, 97 NW. U.L. REV. 801, 804 (2003).

[50] *Id.* For example, a criminal defendant may agree to plea guilty in exchange for some protection or benefit from the government.

[51] *Id.*

[52] *Id.*

[53] *Id.* at n.9 (citing United States v. Gagnon, 470 U.S. 522, 528 (1985); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[54] Mazzone, *supra* note 49, at 804.

[55] *Id.*

[56] *See id.* at 856.

[57] *See id.* at 865.

[58] *See id.*

[59] *Id.*

affected, persons should have the option to waive their rights.[60] Rights that only affect individuals are forfeitable because the public has little or no interest in that instant.[61]

The Supreme Court of the United States has yet to draw a distinction between the waiver of criminal rights as opposed to other inherent rights, protected by the Constitution.[62] However, academics have categorized "all criminal rights as 'individualistic' rights subject to waiver and of all other constitutional rights as 'public' rights that [can] be bargained away."[63] The claim that criminal rights are the sole rights that can be waived "because they are individual rights" is unpersuasive.[64] Certainly, there are criminal rights that function primarily to protect individuals, but there are other criminal rights that serve important public functions.[65] Therefore, criminal rights cannot be considered as fundamentally different from noncriminal rights.[66]

Are there any persuasive reasons why the right to abort should be afforded more protection from waiver than any other fundamental right? Will waiving reproductive rights substantially affect the public at large? By singling out and holding abortion rights non-waivable due to a fear of vulnerability or exploitation, one is, essentially, holding women's decision-making capabilities subservient.[67]

---

[60] A Fifth Amendment protection against self-incrimination does not only protect an individual but also an important public value—ensuring reliability and an absence of coercion in criminal procedure. *See* Mazzone, *supra* note 49, at 865. A First Amendment right to freedom of speech also holds largely a public value. *See id.* Contrary, the Confrontation Clause of the Sixth Amendment protects the individual defendant in mounting a defense at trial—waiver does not implicate any substantial public interest. *See id.*

[61] *Id.*

[62] *Id.* at 850.

[63] *Id.*

[64] Mazzone, *supra* note 49, at 855.

[65] *Id.*

[66] *Id.*

[67] *See* Healy, *supra* note 40, at 121 ("If genetic parentage is considered supreme, then gestational mothers are reduced to mere 'human incubators.' That view demeans and dehumanizes all women.").

The Supreme Court previously held that First Amendment rights may be contractually waived.[68] First Amendment waiver can be analogized to a waiver of reproductive rights because both involve deeply personal issues unique to the individual, not a collective class.[69] Although rights that belong to the collective public and not solely to the individual cannot be waived,[70] courts have reiterated that procreative decisions are strictly confined to the individual.[71] If a waiver of constitutional rights would undermine a compelling public value, then individuals should not be able to waive those rights.[72] Decisions about an individual's own body are arguably rights that are "individualistic," affecting only the individual.[73] Because the individual has primacy in procreative decisions, her advanced agreement should be upheld to honor her earlier decision.

The Supreme Court has invalidated a waiver of rights when the government is compelling an individual to forego those rights as a condition for receiving governmental benefits.[74] Waiver in surrogacy contracts is a different category—the government is not compelling the individual to waive her rights, on the condition that another benefit will be awarded.[75] Compulsory state action is therefore lacking in the enforcement of private surrogacy contracts.

---

[68] *See* Cohen, *supra* note 37, at 1189 (citing Cohen v. Cowles Media Co. 501 U.S. 663 (1991)).

[69] Cohen, *supra* note 37, at 1190.

[70] *Id.* at 1191.

[71] *See Danforth*, 428 U.S. at 71.

[72] Mazzone, *supra* note 49, at 804.

[73] To understand which rights can be waived we can begin "with a clean slate and ask [] which constitutional rights are individualistic, on one hand, and which constitutional rights protect public values, on the other. . . ." *See* Mazzone, *supra* note 49, at 850.

[74] *See id.* at 807; *See, e.g.*, Sherbert v. Verner, 374 U.S. 389, 404 (1963) (stating that conditioning unemployment benefits on willingness to work on religious holidays forces the choice between religion and forfeiting benefits); *See also* Speizer v. Randall, 357 U.S. 513, 519 (1958) (holding that to deny State exemptions to those who engage in certain forms of speech is to penalize them for that speech).

[75] Mazzone, *supra* note 49, at 807 (Invalidated compulsion efforts by the government "include: public employment conditioned on political affiliation, associational ties, or speech; unemployment benefits conditioned on an applicant's ability to work on her Sabbath; property tax exemptions conditioned

The Supreme Court's decision in *Shelley v. Kraemer*[76] was a benchmark decision regarding state action in the enforcement of private contracts.[77] The Court struck down a racially restrictive property covenant, arguing that enforcement would constitute state action in violation of the Fourteenth Amendment's Equal Protection Clause.[78] However, in recent years, commentators have argued *Shelley* should be limited to its facts and not applied as a test for finding state action.[79] Lower courts have reached similar conclusions.[80] The Eleventh Circuit declined to extend *Shelley* in *Davis v. Prudential Securities, Inc.*,[81] concluding that "mere confirmation of private arbitration award by a district court is insufficient state action . . . ."[82]

Given that courts have refused to find state action in the enforcement of arbitration clauses in private contracts, it is doubtful that a court would find state action in the enforcement of selective reduction clauses in surrogacy contracts. Commentators have argued the state does not act when enforcing obligations that parties have formally undertaken between themselves, but it does act when it imposes those obligations absent a contract.[83] Therefore, the

---

on taking a loyalty oath; welfare benefits conditioned on a one-year residency in a state; building permits conditioned on the owner granting a public easement to a portion of the property; subsidies to the press conditioned on certain content; legal-services funding conditioned on refraining from challenging welfare laws; professional licenses, such as to practice law, conditioned on an individual's political affiliations or an agreement to finance certain kinds of speech; and funding of a public school student newspaper conditioned on foregoing an editorial viewpoint.") .

[76] Shelley v. Kraemer, 334 U.S. 1 (1948).

[77] *See* Cohen, *supra* note 37, at 1174.

[78] *Shelley*, 334 U.S. at 20.

[79] *See* Cohen, *supra* note 37, at 1175.

[80] *See, e.g.*, Fed. Deposit Ins. Co. v. Air Fla. Sys., Inc., 822 F.2d 833, 842 (9th Cir. 1987).

[81] Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995).

[82] *Id.* at 1192. The court held *Shelley* did not extend beyond the context of race discrimination. The confirmation of a private arbitration award by a district court was not sufficient state action to trigger the Due Process Clause.

[83] *See* Cohen, *supra* note 37, at 1178-79 (citing Alan E. Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 CORNELL L. REV. 261, 350 (1998); Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 64 (1995)).

enforcement of selective reduction waivers in a private surrogacy contract would not constitute state action and should be upheld as a proper waiver of a constitutional right.

BINDING FUTURE SELVES

Courts generally accept that obligations arise from a party's agreement at the time of contracting, and the future self is bound to that agreement.[84] The intention of the parties is determined at the time the contract was created.[85] Intervening acts can excuse performance due to impracticability, but only when unanticipated.[86] Terms addressing selective reduction and termination cannot logically be categorized as unanticipated when they were predetermined and mutually agreed upon. They arguably fall under the exact definition of "foreseeable circumstances" in contract law.[87] Yet, in certain intimate and morally provoking agreements, courts have adopted the novel view that the enforcement of a person's earlier commitment would improperly constrain their current will.[88] This defense to contract enforcement is termed the "different selves rationale."[89] Courts endorsing the idea of "different selves" assume that an intervening change has created a meaningful and legally significant difference between the self at

---

[84] RESTATEMENT (SECOND) OF CONTRACTS § 17–21 (AM. LAW INST. 1981).

[85] *Id.* at § 200, cmt. b.

[86] A court may relieve someone of a duty if performance has unexpectedly become impracticable as a result of a supervening event. *See id.* at § 261, cmt. a ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.").

[87] *Id.* at § 351 ("Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made. Loss may be foreseeable as a probable result of a breach because it follows from the breach: (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.").

[88] Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 73 (2014).

[89] *See id.*

"time zero" and the self at "time now" that warrants honoring the later self's change in decision.[90]

Often, the different selves rationale is upheld in cases involving cryopreserved embryos.[91] In *J.B. v. M.B.*,[92] a married couple cryopreserved embryos for future possible use.[93] When they later separated, a dispute arose over whether to donate the remaining embryos or not.[94] Although the couple had previously agreed to terms for what should happen to the embryos in the event of the couple's separation, the Supreme Court of New Jersey concluded the language was too conditional and ambiguous to be a binding agreement.[95] Because the court struggled with the public policy implications of "forcing a person to become a biological parent against his or her will," they held cryopreservation agreements valid but "subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored pre-embryos."[96] The court based its reasoning on the idea that there could be "life-long emotional and psychological repercussions" in forcing someone into such an emotionally tolling situation.[97]

Similarly, in *In re Marriage of Witten*, the Supreme Court of Iowa held that embryo disposition agreements would only be enforceable as long as the progenitors did not change their minds.[98]

---

[90] Time zero is the time the contract is made. Time now is the current event that is in dispute. *See id.* at 71.

[91] "Cryopreserved," means freezing embryos to transfer later. *See* A.Z. v. B.Z., 725 N.E.2d 1051, 1057 (Mass. 2000) (refusing to enforce an agreement between the spouses that gave control of cryopreserved embryos to the wife in the event of the couple's separation because to do so would compel the father to become a parent against his will).

[92] J.B. v. M.B., 783 A.2d 707 (N.J. 2001).

[93] *Id.* at 710.

[94] *Id.*

[95] *Id.* at 714.

[96] *Id.* at 718-19.

[97] *Id.* at 717.

[98] In re Marriage of Witten, 672 N.W.2d 768, 781-83 (Iowa 2003). A couple sought to have their marriage dissolved. *Id.* at 772. The couple disputed which party had control of frozen embryos they had fertilized together. *Id.* at 772-73. The court held it would be "against public policy of this state to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos." *Id.* at 781.

This seems to beg the question of how the court defines "enforceable." If a contract is said to be enforceable only up until the time when you want to actually *enforce* that contract, is the contract then really "enforceable?" "Advance agreements allow parties to settle their rights and obligations before an issue over rights and obligations arise."[99] Yet, if advance agreements were enforceable only in the event that the parties continue to agree, they would essentially be worthless.

The Court of Appeals of New York in *Kass v. Kass* agreed with the sentiment of binding future selves—honoring the parties' initial expressions of choice.[100] In this case, a couple agreed to written terms describing what would happen to frozen embryos should the couple divorce.[101] Following the eventual divorce, the court held that the couple clearly expressed their intent and they should be bound by it, stating, "[k]nowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process."[102] Similarly, in *Szafranski v. Dunston*, a sperm donor attempted to revoke his consent for his significant other to use their preserved embryos.[103] The Appellate Court of Illinois ruled that great weight should be given to the principal apparent purpose and intention of the parties at the time of contracting.[104]

In cryopreserved embryo cases that honor advance agreements, courts maintain that when terms are so foreseeable that they are literally spelled out in their own clauses, it is against the basic tenets of contract law to hold those terms unenforceable.[105] Arguably, this form of reproductive technology subjects parties to emotional and intimate decisions very similar to those in surrogacy agreements.

Having later regrets is clearly not a feeling unique to a carrier in surrogacy agreements.[106] Yet many opponents still reason

---

[99] Szafranski v. Dunston, 34 N.E.2d 1132,1155 (Ill. App. Ct. 1st Dist. 2015).

[100] Kass v. Kass, 696 N.E.2d 174, 177-78 (N.Y. 1998).

[101] *Id.* at 176.

[102] *Id.* at 180.

[103] Szafranski v. Dunston, 993 N.E.2d 503, 505 (Ill. App. Ct. 2013).

[104] *Id.* at 515.

[105] *See Kass*, 696 N.E.2d at 180-81; *Dunston*, 993 N.E.2d at 514.

[106] Having later regrets is not unique to the realm of assisted reproduction either. Individuals enter into non-revocable contracts often, such as military

carriers cannot be bound at the time of contracting because they will not know at the time of contracting how they will feel when a situation arises, even though a carrier has expressly agreed to preset terms. Uneasiness about the outcome of an agreement can extend to almost all contracts, and allowing for a change of heart once all the cards are on the table could invalidate contractual agreements altogether.[107] There is also a possible state interest in "facilitating the undertaking of mutually beneficial activities through contract and allowing individuals to protect their reproductive autonomy."[108] Reproductive contracts, like all contracts, "enabl[e] persons to combine resources and energies to achieve welfare-enhancing goals that could not be achieved without enforcement of the mutual promises."[109]

Courts using the different selves rationale are seeking to protect the parties from choices that may have been swayed by emotion and intimacy, but arguably, they are doing quite the opposite—they are restraining decision-making autonomy by refusing to enforce agreements made in good faith.[110] The court in *Johnson v. Calvert* reiterated that there is no evidence that surrogates waive their rights, due to coercion or oppression, in an agreement that is inconsistent with public policy.[111] The Supreme Court of California categorized the payments to the surrogate as compensation for the labor of gestating and delivering a fetus, not as compensation for giving up

---

combat, organ donation, cable plans, etc. Nevertheless, they are required to fulfill their obligations or held for some form of remedy. "No major surgical procedure ever is done with the patient's [full] informed consent—for one can never know in advance" how one might feel post-op. *See* Hon. Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. POL., 21, 30 (1989).

[107] Because surrogacy contracts are "so much less attractive [for] the [intended parents] when . . . not enforceable, the [intended parents] will not be willing to pay nearly as much as they would if [the contract] were enforceable." Posner, *supra* note 106 at 23. Ultimately, "the surrogate is hurt." *Id.*

[108] *See* Cohen, *supra* note 37, at 1170.

[109] *Id.* at 1169 (citing John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L. J. 989, 1002 (2001)).

[110] Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 FORDHAM L. REV. 93 165 (2001).

[111] *Calvert*, 851 P.2d at 783.

her rights.[112] Unconvinced by the claims that children born out of surrogacy were treated as commodities, the court found no proof of exploitation beyond normal economic necessity. [113] The generalization that all surrogates will later change their minds cannot be justified simply because a few surrogate mothers may have underestimated their distress in isolated instances.[114] In fact, very few surrogate arrangements have actually resulted in litigation.[115]

Similar to the "different selves" rationale, some advocate for a pure "intent-based" test to "determine the intent of all of the parties at the moment they entered into the surrogacy agreement." [116] Proponents of the intent-based test propose that intended parents' intentions should be held superior to those of the surrogate because but for the actions of the couple, the surrogacy agreement would not exist.[117] But because defining intent requires determining mental state, a party's intent is usually hard to establish absent a contractual agreement. [118] In the case of surrogacy contracts where the contractual agreement is assumingly free from force, duress, fraud or misrepresentation, the intentions of both parties should be relatively clear to gauge from the contract itself.[119]

Although the situation can be an emotional one, surrogates are not engaging in these agreements blindsided as to what is to come. They are, presumably well aware of the emotional, burdensome, and taxing demands of pregnancy and childbirth.[120] To begin with, the

---

[112] *Calvert*, 851 P.2d at 784.

[113] *Id.* at 785 ("[T]here has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.").

[114] Posner, *supra* note 100, at 25.

[115] *Id.*

[116] Dana, *supra* note 31, at 357.

[117] *Id.* at 382-83.

[118] *Id.* at 384.

[119] *Id.*

[120] Andrew W. Vorzimer, a Los Angeles surrogacy lawyer, has found there is actually a greater risk the intended parents will change their minds than the surrogate. Over the decades, he estimated 81 cases of intended parents who changed their minds while only 35 where surrogates did. Lewin, *supra* note 2, at A1.

women who would need protection because they are so distraught by the idea of surrogacy, are not the women who would willingly enter these contracts. The most frequent argument against enforcing selective reduction clauses is that the consent is not truly voluntary and the surrogate would not have agreed had she not been desperate.[121] However, there is no persuasive evidence that women who agree to become surrogates underestimate the distress they will feel or that they are "drawn from the ranks of the desperately poor."[122] Many surrogates volunteer because they find pregnancy a positive experience and are compassionate for the infertile couple.[123] Some experts have found that surrogates "see themselves as able to give an extraordinary gift to a couple in need."[124] The women who willingly enter these agreements have weighed the benefits and costs and determined that surrendering some portion of their autonomy is a fair exchange for what they perceive to be far more valuable—helping another in their reproductive endeavors.[125]

Interests lie on both sides of these transactions. The intended parents are not the only ones with significant personal interests.[126]

---

[121] Posner, *supra* note 100, at 24.

[122] *Id.* at 25. A woman is possibly not more coerced by money then she might be by other social coercions. *See* Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER, L., & JUST., 22, 64 (2015) ("An offer of $50,000 for a woman to sell her eggs might be coercive, but a man who is urged by his parents to give sperm to his brother's wife so that the married couple might have a child with a genetic link to the husband might also feel coerced by the tug of familial responsibility or loyalty.").

[123] Daniel Goleman, *Motivations of Surrogate Mothers*, N.Y. TIMES (Jan. 20, 1987) at C1.

[124] *Id.* (quoting Isadore Schmukler, a clinical psychologist who gives psychological tests to women who apply to the Surrogate Mother Program, an agency in Manhattan).

[125] *See* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2335 (1995) ("Full control over their own bodies and labor is what autonomous individuals have before they contract. The process of contracting always requires a surrender of some portion of autonomy, but only in exchange for things that are thought to be more valuable.").

[126] Female autonomy is also not the most convincing argument because the surrogate is not the only person with an interest at stake—a child is also involved. *See* Posner, *supra* note 100, at 23 ("It is very likely that the baby is made better off by the contract of surrogate motherhood, and certainly not worse off. For without the contract the baby probably would not be born at all. With the contract he (or she) becomes a member of a [biological] family.").

Many surrogates enter into these arrangements because they enjoy helping others in their reproductive pursuits.[127] Because of the significant health risks and burdens associated with pregnancy and childbirth, it is unrealistic to assume that surrogates—strangers to the intended parents—sign up for this process purely altruistically, and therefore, should not be compensated.[128] Financial inducement is surely a factor, but surrogacy is not a career—altruistic motivations outweigh mere financial gain.[129]

To argue that a surrogate, who willingly and knowingly entered into a contract, can no longer be held to her good faith agreement because of the intervening distress of pregnancy, reinforces notions about a woman's decisional maturity based on her supposed hormonally-induced unpredictability—depicting a strong sense of paternalism.[130] This argument presumes that women are naïve,

---

[127] A surrogate interviewed described, "[t]he money is nice, but we could manage without it, and it's not why I'm doing this." Lewin, *supra* note 2, at A1.

[128] Mutcherson, *supra* note 122, at 62 ("A woman might have a genuine interest in experiencing pregnancy separate from and excluding an interest in being a parent. Some women who act as surrogate mothers articulate this interest and explain that they have easy pregnancies or love the experience of being pregnant. Further, they have children of their own and desire to help others experience the joys and tribulations of parenting. For these women, the procreative interest involved in acting as a surrogate is all about the experience of pregnancy and not at all about a desire to parent the child, who will be born and given to others to be raised.").

[129] "Some psychologists who interview prospective surrogate mothers said that a woman who was interested in only the money was a poor candidate, and would be turned down." Goleman, *supra* note 117.

[130] Healy, *supra* note 40, at 108. *See* Kevin Yamamoto & Shelby A.D. Moore, *A Trust Analysis of a Gestational Carrier's Right to Abortion*, 70 FORDHAM L. REV. 93, 162–163 (2001) (stating harshly, "[r]ather than acknowledging that women have the prerogative to participate in gestational carrier arrangements, and further to suspend or waive a fundamental right such as the right to abort, some radical feminist writers are willing to risk that women may be viewed as weak-willed, as sheep being led to slaughter. The outcome of their arguments would be to thrust women back into the darkness of a time when women were declared unable to make important decisions, relegating them to a child-like status"). *See also Calvert*, 851 P.2d at 784 ("The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law.").

unable to evaluate information from their health care providers, and psychologically unfit to make rationale choices.[131] The women who choose to become surrogates do not need protection against their own judgments. To say otherwise challenges the very idea that women are autonomous individuals deserving of legal respect. The issue of psychological regret can be solved with a "legal regime where surrogacy contracts are enforced come hell or high water."[132] If selective reduction clauses are unenforceable:

> [W]omen who were once committed have the luxury of second thoughts, [and] women who are not quite sure what they will do at childbirth will be more willing to participate in surrogacy transactions. Two advantages of the firm contract are therefore lost. First, it no longer functions as a safeguard against psychological regret. Second, it strips away from the biological father and his wife an essential sorting device for selecting the right surrogate mother.[133]

With a clear legal rule that selective reduction clauses are enforceable, any woman with doubts about her psychological stability will steer away from contracting altogether, avoiding the problem of later regret.[134] Furthermore, the sanctity of all contracts can be reinforced by holding surrogates to their commitments at the time of contracting rather than their later change of mind.

---

[131] Posner, *supra* note 100, at 27 ("Beyond this, the idea that women who "sell" (really, rent) their reproductive capacity, like women who sell sexual favors, are "exploited" patronizes women. Few would argue that a gigolo, or a sperm donor, or a man who marries for money or a male prostitute is "exploited." These men might not be admirable, but they are not victims. The idea that women are particularly prone to be exploited in the market place hearkens back to the time when married women were deemed legally incompetent to make enforceable contracts.").

[132] Epstein, *supra* note 125, at 2339.

[133] *Id.*

[134] *Id.*

Part III. Remedies and Ramifications

CONTRACT REMEDIES

When a surrogate breaches a contract by refusing selective reduction, intended parents are left with no remedy—often in a state of emotional distress—having spent ample time, energy, and money relying on the surrogate to fulfill her promises. Even though surrogacy contracts are personal services, specific performance should be an enforceable remedy. Breach of contract can be remedied by putting the party back in the position she would have been had the contract been performed.[135] Courts usually will not order specific performance for contracts that involve personal services due to fears of involuntary servitude, but there is an exception when those personal services involve unique and peculiar value.[136] Specific performance is unnecessary in cases in which the contract "calls for the sale of a fungible commodity that can be covered in the market."[137] Reproduction would qualify as an exceptional case or circumstance holding unique value—the life of a child.[138] Damages are likely not enough to "cover" the distress and burden of upbringing an unintended child or a child with severe disabilities.[139] Therefore, specific performance is a more appropriate remedy.

---

[135] RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. LAW INST. 1981).

[136] RESTATEMENT (FIRST) OF CONTRACTS § 379 (AM. LAW INST. 1932); Epstein, *supra* note 125, at 2337 ("In cases involving the sale of land, which is generally regarded as "unique," and certain specialized goods, the remedy of specific performance is routinely awarded. One reason is the difficulty of finding a sum of money that will leave the buyer indifferent between the goods promised and their money substitute.").

[137] Epstein, *supra* note 125, at 2337.

[138] Services and goods are still unique even if a price is paid. *See* Mutcherson, *supra* note 122, at 63. The act of "renting" a womb does not diminish the seller, the buyer, or the incredibly unique value of the human life. *See id.* at 63–64 ("Goods can be precious, even when they are bartered for in a market. Respect for an item does not evaporate simply by placing a price on it. As such, it is unclear that money, standing along, should be an impediment to respecting a constitutional right to procreate in exchange for payment.").

[139] Epstein, *supra* note 125, at 2337 ("Once therefore it is realized that surrogacy contracts are not transactions for the sale of commodities, it should be

Enforcing specific performance in contracts involving selective reduction or termination clauses might mirror compelling abortion, which "unreasonably interferes with the individual's privacy and personal liberty."[140] In the case of surrogacy contracts, however, where the individual has already agreed to forego her rights to abortion at the time of contracting, the court would not be compelling an abortion procedure, but rather compelling the surrogate's voluntarily pre-made choice. The surrogate has agreed to the invasive examinations and circumstances that accompany pregnancy and birth.[141] The physical burden of an abortion might then "pale in comparison to nine months of pregnancy, prenatal visits, blood draws, pelvic examinations and the delivery itself."[142]

Parental rights of a child born out of surrogacy agreements are, in most jurisdictions, predetermined and legally binding. [143] Suppose, for example, the intended parents decide they no longer want the child *after* birth. The surrogate cannot be forced to keep the child, even if she is awarded damages and child-rearing expenses. The surrogate is not left with the child because the contract is legally binding in regards to parental rights.[144] On the other hand, when a surrogate is hesitant to reduce a fetus after contracting in advance to do otherwise, the intended parents should also not be forced to bear the expense of an unwanted child. Selective reduction clauses should therefore be enforceable, just as parental rights in surrogacy contracts are enforceable.

Nonetheless, if specific performance is not rewarded, monetary damages can be an adequate substitute remedy for breach of contract. Awarding reliance and expectation damages can help put the intended parents back in a position they would have been prior to contracting. [145] Intended parents may also have a right to

---

painfully clear that damages at law are not an adequate remedy, and that specific performance is needed.").

[140] 71 AM. JUR. 2D *Specific Performance* §181 (2016).

[141] Forman, *supra* note 3, at 41.

[142] *Id.*

[143] The intended parent(s) hold all parental rights to the child. Epstein, *supra* note 125, at 2337.

[144] *Id.*

[145] RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) ("The injured party has a right to damages based on his expectation interest as measured by: (a)

restitution because they conferred benefit to the surrogate in the form of compensation.[146] But even if reliance, expectation, or restitution damages are refused, emotional distress damages—damages for intruding on the intended parents' family-planning choices, and the psychological distress that accompanies an inability to care for a child or surrendering a child to adoption—should be awarded.[147] The Supreme Court in *Roe v. Wade* reasoned that:

> [A]dditional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child-care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable psychologically and otherwise, to care for it.[148]

This language suggests that courts have long recognized emotional distress as a repercussion of reproduction gone amiss. These repercussions can be properly addressed by rewarding monetary damages for emotional distress to the intended parents.

The intended parents should receive compensation for the emotional distress accompanied with the deprivation of their

---

the loss in the value to him of the other party's performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that he has avoided by not having to perform."); *Id.* at § 349 (AM. LAW INST. 1981) ("As an alternative to the measure of damages stated in §347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.").

[146] RESTATEMENT (SECOND) OF CONTRACTS § 373 (AM. LAW INST. 1981).

[147] Although children do bring joy, imposing the unplanned and unexpected responsibility of caring for a child for eighteen-plus years is indeed injurious. Roe v. Wade, 410 U.S. 113, 153 (1973) ("There is also the distress . . . associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it."). Intended parents are under no duty to "mitigate" their emotional distress damages from raising an unplanned child by first attempting to give the child up for adoption.

[148] *Roe*, 410 U.S. at 153.

decisions regarding parental rights. This deprivation likely outweighs the physical burden of the surrogate's abortion and the surrogate's right to pregnancy.[149] Tort law often recognizes the deprivation of choice as worthy of compensation in wrongful birth cases.[150] Damages for the intended parents' deprivation of constitutional rights to decisions over their own procreation and parenthood should be rewarded and not disregarded or diminished by the surrogate's claims.[151] Gestational surrogacy is possibly their only opportunity to bear a child that truly is *theirs*—a true genetic and biological child of the couple.[152] Current law, which does not recognize the disruption of family planning as a compensable, should be amended to classify the deprivation of these rights as either an independent cause of action or an element of damages beyond emotional distress.[153]

Modern procreation by means of assisted reproductive technology (ART) involves multiple parties and varying techniques.[154] Therefore, the right to procreate, or reproductive rights as also termed, is not one singular right, but a bundle of rights, which may carry differing levels of care and protection.[155] By defining procreation in stages and intentions, we can unbundle reproductive rights into three distinct and separate rights:[156] "[T]he right to pregnancy (gestating a fetus), [the right to] parenthood (raising a child), and particulars (selecting offspring traits)."[157]

A right to pregnancy is the exercise of control over decisions about whether or not to carry a child.[158] This is a significant right because pregnancy carries with it physical, emotional, economic,

---

[149] Forman, *supra* note 3, at 44.

[150] *See e.g.*, *Roe*, 410 U.S. at 153.

[151] *See* J.R. v. Utah, 261 F. Supp. 2d 1268 (D. Utah 2002).

[152] *Id.* at 1274 ("Their singular opportunity to procreate through gestational surrogacy necessarily implicates their fundamental right to bear children, thereby invoking the protections of the United States Constitution.").

[153] Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 154 (2017).

[154] Mutcherson, *supra* note 122, at 54.

[155] *Id.* at 57.

[156] *Id.* at 54.

[157] Fox, *supra* note 153, at 176.

[158] *Id.*

and social consequences.[159] Pregnancy, and its absence, might also "deeply reflect the way a woman thinks about herself and her relationship to others and society at large."[160] The deprivation of pregnancy rights therefore has a deeper implication than simply "to be, or not to be," carrying a child.[161]

A right to parenthood is the decision whether or not to be a parent—to care for and raise a child until it reaches an age of independence.[162] The denial of the right to choose whether or not to become a parent is arguably "an injury that extends beyond any other associated physical, financial, or emotional consequences."[163] Pregnancy certainly has social, physical, and financial consequences, but the violation of parenthood rights consumes unintended parents with these consequences and added responsibilities for a period much longer than nine months.[164]

The last of the reproductive rights is coined particulars—the right to choose whether the child is likely to be born with certain traits.[165] Knowing a child is predisposed to a genetic disease, or that a birth defect will result from pregnancy, informs intended parents of the risks and additional costs involved in raising the child.[166]

In the context of surrogacy, the intended parents hold the right to parenthood and particulars.[167] The surrogate holds the right to pregnancy. The right to parenthood and particulars is arguably greater than the surrogate's right to pregnancy. The surrogate's right should not be diminished, but also should not outweigh the significant harm the intended parents suffer from being stripped the

---

[159] Fox, *supra* note 153, at 177.

[160] *Id.* at 178.

[161] *Id.* at 178; WILLIAM SHAKESPEARE, HAMLET, act 3, sc.1.

[162] Fox, *supra* note 153, at 177.

[163] *Id.* at 180.

[164] *Id.* at 179.

[165] *Id.* at 180.

[166] *Id.*

[167] Kimberly M. Mutcherson, rather, terms intended parent(s) right to procreate as a Tier I right, which "encompasses coital reproduction and the use of ART to create a child whom they plan to raise and include as part of their family." Mutcherson, *supra* note 122, at 57. The second tier of procreative rights (Tier II), are the rights the surrogate holds. Tier II rights encompass those "who wish to procreate for profit or to procreate as a means of providing an opportunity for other to have a child who others will parent." *Id.*

ability to determine whether or not to be a parent to a healthy, or possibly unhealthy, child.[168]

Surrogates should be held to their contractual agreements because the intended parents relied, to their detriment, on the surrogate's commitments. Therefore, should a court be past the point of ordering specific performance, intended parents should be able to receive an array of other damages. These damages include reliance damages, damages to compensate for the violation of the right to parenthood and particulars, and extra costs possibly associated with rearing a severely disabled child or numerous children. Although the surrogate would bear the physical burdens of the abortion, the intended parents are left responsible for caring for—and the physical, financial, and emotional burdens associated with—parenting an unwanted child or a child with severe birth defects.[169]

In some cases involving negligent reproduction, courts have awarded the extra costs associated with raising a disabled child.[170] These courts carefully adhere to public policy, reiterating that a handicapped child is no less valuable than a healthy child.[171] They attribute damages for the extra burdens of upbringing, not for compensation for the diminished joy the child will bring.[172] Compensation for an unwanted but healthy child is usually not recognized because children are seen as "a blessing."[173]

---

[168] Mutcherson, *supra* note 122, at 54 ("[A] procreative right designed to end in a parenting role for those who initiated the act warrants a high level of deference because procreation has value as means of creating families. However, when a person participates in procreation for profit or solely for personal satisfaction with no intent to parent, the level of legal deference to that decision need not be as substantial—though neither should it be negligible.").

[169] Forman, *supra* note 4, at 43.

[170] Courts are reluctant to engage in an "invidious and morally offensive" calculation of a child's life by valuing its relative degree of disability, but sometimes award damages to the parents for the extra costs associated with raising a disabled child. *See* J.K. Mason, THE TROUBLED PREGNANCY: LEGAL WRONGS AND RIGHTS IN REPRODUCTION 91 (Cambridge University Press, 2007).

[171] *Id.*

[172] *Id.*

[173] A monumental reproductive negligence case in the U.K. denied awarding costs for child maintenance. *See* McFarlane v. Tayside Health Bd. (1999) 2 AC 59 (Scot.); *See also* Pressil v. Gibson, 477 S.W.3d 402 (Tex. App. 2015) (holding no damages should be awarded because the "intangible benefits of parenthood far

Because selective reduction clauses are unenforceable under current law, there is a great opportunity for exploitation. Rewarding damages would avoid any potential physical or emotional burdens the surrogate might feel while also protecting intended parents from the possibility of exploitation. Knowing selective reduction clauses are ultimately unenforceable, the surrogate can threaten noncompliance to receive additional compensation in exchange for her empty promise. Often the focus is on the exploitation of the surrogate, but it is not unimaginable for a surrogate, knowing a selective reduction clause is unenforceable, to exploit the intended parents by demanding additional compensation far in excess of the contracted amount in return for her promise to have an abortion. Without any sort of guarantee, intended parents are likely to turn to other means of assisted reproduction, possibly transnational surrogacy.[174] Therefore, by eliminating the luxury to "wait and see," and imposing damages for noncompliance, surrogates would be less likely to have a change of heart, knowing they are financially responsible.

Contracting with a surrogate gives the intended parents a sense of insurance.[175] Women are insulated from the fear of childlessness and have specifically contracted for all foreseeable consequences.

---

outweigh the monetary burdens involved"); Dan W. Brock, *Shaping Future Children: Parental Rights and Societal Interests*, 13 J. POL. PHIL. 377, 380 (2005) ("choices about whether to procreate at all has more moral importance than how many children to have").

[174] *See* Cook v. Harding, 190 F. Supp. 3d 921, n. 9 (C.D. Cal. 2016) ("[T]he Court is at a loss to imagine an intended parent in this state who would contract with a gestational surrogate, knowing that the woman could, at her whim, 'decide' that the intended parent or parents are not up to snuff and challenge their parenting abilities in court."). With limits on contractual enforcement, there is a heightened possibility of parties evading a contract's terms through migration to another state or even country. *See* Forman, *supra* note 4, at 47. Surrogacy in India has become a booming business, consumed with ethical issues. *See also* Cyra Akila Choudhury, *The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor*, 48 VAND. J. TRANSNAT'L L. 1, 7 (2015) ("Indian surrogates can earn a great deal of money relative to their yearly family income from one surrogacy. Yet, the cost to those commissioning couples or individuals coming from the United States is comparatively modest. And the clinics in India arranging and supervising the services are also profiting.").

[175] Ellen Waldman, The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes, 53 AM. U. L. Rev. 1021, 1056 (2004).

Had these women known that provisions of their contract would not be enforced, they might have sought to insure themselves by other means, possibly choosing another form or "backup" method of procreation. After investing time, emotion and money into a failed surrogacy contract, intended parents might be left disheartened and cease attempts of procreation altogether.

Specific performance or damages associated with breach of contract should be awarded to make certain the surrogate considers the seriousness of her contractual obligations prior to the agreement.

STANDARD OF CARE

Opinions on what definitional relationship and duties a surrogate holds differ, but there is common agreement amongst scholars that surrogates should be bound by a heightened standard of due care.[176] A surrogate might be analogized to anyone who has no initial obligation to help another in dire need yet decides to intervene.[177] Under the tort law principle of Good Samaritanism, once an actor decides to intervene, they cannot revoke their rescue if it would put another in a worse position.[178]

A surrogate surely has subjected the intended parents to significant consequences when she refuses to selectively reduce or terminate a pregnancy. The intended parents have relied on the surrogate's partial performance and have foregone looking for replacement surrogates or other means of reproduction. Therefore, a surrogate could have no *contractual* obligation to terminate a pregnancy, yet could still be bound by the decisions of intended parents, because doing otherwise would put the intended parents in a worse position than they were prior to the surrogate's assistance.

---

[176] *See* Yamamoto & Moore, *supra* note 110, at 176.

[177] RESTATEMENT (SECOND) TORTS § 323 (AM. LAW INST. 1965); *See id.*

[178] RESTATEMENT (SECOND) TORTS § 323, cmt. c ("Where, however, the actor's assistance has put the other in a worse position than he was in before, either because the actual danger of harm to the other has been increased by the partial performance, or because the other, in reliance upon the undertaking, has been induced to forego other opportunities of obtaining assistance, the actor is not free to discontinue his services where a reasonable man would not do so. He will then be required to exercise reasonable care to terminate his services in such a manner that there is no unreasonable risk of harm to the other, or to continue them until they can be so terminated.").

Unlike the parties in a Good Samaritanism situation, the surrogate and the intended parents are not strangers.[179] The intended parents, unable to conceive, endure considerable monetary and emotional strain when entrusting the surrogate with their reproductive success.[180] The surrogate is aware of the intended parents' goals and willingly submits to assist. Therefore, the surrogate should be viewed as having entered a special relationship with the intended parents and child where they owe a heightened duty of care.[181] Some go as far as describing this relationship as a trustee relationship, where the contractual agreement has created a "special relationship" between the gestational carrier and fetus, whose care and safety have been entrusted to the carrier.[182] "In essence, the carrier is the trustee, and the fetus, as a beneficiary of the fiduciary relationship between the intended parents and the carrier, depends upon the carrier to act in good faith by fulfilling her duties of loyalty and care."[183]

Surrogacy clinics should also be held to a heightened standard of care because of the innate dangers in the surrogacy process. The legal uncertainty surrounding surrogacy agreements contributes to a strong need for intermediaries—allowing these intermediaries to demand large compensation for their work.[184] To avoid exploitation, regulations and responsibilities should be imposed to monitor the industry and ensure all details are disclosed, available, and carefully executed.[185]

---

[179] Only under certain circumstances does one have a responsibility to help strangers. For example, one must aid another with whom he has a special relationship, where one has created the peril, and where one has contracted to help another. RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1965).

[180] Yamamoto & Moore, *supra* note 110, at 165.

[181] *Id.* at 176.

[182] *Id.*

[183] Yamamoto & Moore, *supra* note 110, at 176. The immersion in the surrogacy agreement might make them an active instrumentality—the participation triggering a duty like the one a physician owes a patient. *See, e.g.,* Jacoves v. United Merch. Corp., 9 Cal. App. 4th 88 (1992).

[184] Dana, *supra* note 24, at 363 - 64 (citing Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1767 (2010)).

[185] *See* Mutcherson, *supra* note 122, at 65–66 ("The state has an interest in assuring that competent medical providers offer appropriate care to patients and that those patients have means to redress harm caused by inadequacies in care . .

In *Stiver v. Parker*, the Court of Appeals for the Sixth Circuit held a surrogacy enterprise owed intended parents a duty of heightened diligence arising from a special relationship because of the surrogacy enterprise's intention to profit from the transaction.[186] The defendants "have an affirmative duty reasonably to protect the surrogate mother, the child, and the contracting father from foreseeable harm . . . professional participants [need to provide] the kind of care commensurate with the exercise of a high degree of diligence in protecting the parties from harm."[187]

The surrogacy and IVF processes are expensive, prompting intended parents to transfer multiple embryos to obtain an instant family in one treatment.[188] Clinics attract patients by boasting high pregnancy rates on advertising platforms.[189] However, their statistics often include multiple births and births of babies with severe disabilities, creating illusions that the procedure is far more effective than is true.[190] Clinics choose to transfer multiple embryos to enhance their pregnancy rates, but because of the considerable dangers of multiple pregnancies, clinics should instead advise patients that a single embryo transfer is a safer solution.[191] Electively transferring one embryo at a time can achieve high pregnancy rates with less risk to babies, mothers, and a reduction in multi-fetal pregnancy.[192]

. The state also has an interest in protecting vulnerable people from exploitation and harm, which is another reason why some oversight of medical care, including reproductive healthcare, is appropriate.").

[186] Stiver v. Parker, 975 F.2d 261, 272 (6th Cir. 1992).

[187] *Id.* But the duty only extends to foreseeable harm. *See* Huddleston v. Infertility Ctr. of Am., 700 A.2d 453, 453 (Pa. Super. Ct. 1997) (holding the subsequent murder of the child by the parent was not foreseeable enough to hold the clinic liable).

[188] Forman, *supra* note 17.

[189] Brody, *supra* note 19.

[190] *Id.*

[191] *Id.*

[192] Mutcherson, *supra* note 122, at 66 ("One of the risks associated with ART is the birth of high order multiples, which can happen with the use of fertility drugs or when a physician transfers several embryos to a woman's uterus during IVF. Carrying high order multiples can injure and even kill the pregnant woman and the fetuses that she carries. These pregnancies often result in premature births, which can have distinctly negative consequences for the children. Even twin pregnancies increase pregnancy risks for women and fetuses. The cost of

ECONOMIC RAMIFICATIONS

Stripping intended parents of the right to selectively reduce or terminate pregnancies has broad economic ramifications on the family and society. Without the option to terminate a pregnancy, parents might be left with children they cannot afford to take care of—their time, energy, and resources stretched thin. If parents already have children, an increase in family size as a result of unwanted pregnancy, may lead to a decrease in quality of life for all children in the household.[193] Parents must determine not only how many children to have, but also the amount allocated to each—such as whether they can afford to provide separate bedrooms, higher education, extracurricular activities, and so forth.[194] Unwanted children display a number of negative outcomes, ranging from poorer health, lower school performance, and more neurotic and psychosomatic problems.[195]

An easy solution for most is that intended parents can place these unwanted children in the market for adoption,[196] or simply forego surrogacy contracts.[197] But adding to the vast number of

---

obstetrical care for high-risk pregnancies, involving multiples or not, can be substantial, and people do not always have the financial resources to cover the costs of the care.").

[193] Cristian Pop-Eleches, *The Impact of an Abortion Ban on Socioeconomic Outcomes of Children: Evidence from Romania*, 114 J. POL. ECON., 744, 746 (2006).

[194] Gary S. Becker, *An Economic Analysis of Fertility*, COLUMBIA UNIV. & NAT'L BUREAU OF ECON. RES., 209, 211 (1960), http://www.nber.org/chapters/c2387.

[195] Pop-Eleches, *supra* note 193, at 747.

[196] There is no recognized duty of mitigation in cases involving negligent reproduction and child-rearing expenses. Victims have no duty to mitigate by going to extremes such as adoption. Likewise, there should not be a duty to mitigate in cases of surrogacy. *See* Fox, *supra* note 157, at 189 ("[R]equiring parents to choose between the child and the cause of action offers choice only among morally wrenching options. Insisting that victims terminate either their pregnancy or parental rights as a condition of recovery utterly neglects the injury to interests in reproductive autonomy. Forcing their hand yet again only exacerbates the loss of that measure of control over such a meaningful part of their live . . . .").

[197] Life created with assisted reproduction is still life nonetheless. The procreative rights in both natural reproduction and assisted reproduction stem from identical desires. Arguably, intended parent(s) who are subject to using ART

children in dire need of a stable home is not a favorable solution; likewise, neither is limiting couples' reproductive choices.[198] Couples who can successfully conceive through sexual intercourse are able to decide whether or not to have genetically-related children without scrutiny that they should adopt; yet those who choose surrogacy are criticized for going to extremes for genetic vanity when there are plenty of children ready to be adopted.[199]

Unplanned and unexpected children can have substantial economic and social consequences on both the parents and the children. As such, intended parents should not be denied the right to choose to terminate a pregnancy their surrogate is carrying, especially when there are substantial risks to the child.

REPRODUCTIVE TOURISM

Couples who are fearful that their surrogacy wishes will not be upheld in their home state might join the movement towards reproductive tourism.[200] California is a popular destination for surrogacy within the United States—regarded as a hub for surrogacy because of "its well-established network of sperm banks, fertility clinics, and social workers" and regulations favoring intended

---

have pursued procreation fervently and with more forethought than intended parent(s) who have the ability to naturally conceive. To protect the rights of intended parents in cases of natural reproduction but not assisted reproduction might undermine constitutional rights of equal protection. *See* Mutcherson, *supra* note 122, at 58.

[198] According to a statistic from 2014, there are over 400,000 kids waiting to be adopted nationwide. U.S. DEP'T OF HEALTH AND HUMAN SERV., ADMIN. FOR CHILDREN AND FAMILIES, THE AFCARS REPORT 1 (2015) http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf.

[199] Olga van den Akker, *Psychosocial Aspects of Surrogate Motherhood*, 13 HUM. REPROD. UPDATE 53, 54 (2007); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 286 (1st ed. 1999) ("It would be hypocritical to condemn people who resort to new reproductive technologies for having the same desires for their children as more conventional parents, whose decision are not so scrutinized.").

[200] Reproductive tourism is defined as the practice of citizens of one country traveling to another for the purposes of seeking reproductive treatment that has been banned, is expensive, or difficult to obtain, in their home country. *See* Elizabeth Ferrari Morris, *Reproductive Tourism and the Role of the European Union*, 8 CHI. J. INT'L. L. 701 (2008).

parents.[201] As California does not completely regulate all aspects of surrogacy agreements, and the price per agreement is still extraordinarily high, many couples look to the international market, which has grown to an estimated six billion dollars annually worldwide.[202]

India and Ukraine have emerged as global leaders in surrogacy. [203] In Ukraine, a surrogacy arrangement costs approximately $30,000 to $45,000, while in India, the typical surrogacy arrangement costs $12,000—each location's costs are a fraction of the cost of surrogacy in the United States. [204] The percentage a foreign surrogate is paid is estimated four or five times their annual household income.[205] Thus, a woman's decision to become a gestational surrogate in these countries stems primarily from the high financial benefits she receives.[206] This income often allows women to educate their children or purchase a home, which is a great aspect of the demand for an international market. However, the high economic rewards of surrogacy can also result in coercion and exploitation.[207]

Many surrogate mothers in these foreign countries are unable to read the contracts, if there even is a contract, let alone bargain over the terms.[208] The clinics take a large cut of the surrogacy fee and put in place minimal protections for the surrogate.[209] To avoid

---

[201] Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L L. 412, 423 (2012).

[202] *Id.* at 413, 423, 426, 428.

[203] Mohapatra, *supra* note 201, at 414. Surrogacy in the U.S. can cost up to $150k. *See supra* note 16.

[204] Mohapatra, *supra* note 201 at 431, 435.

[205] *Id.* at 436.

[206] *Id.* at 439.

[207] *See id.* at 445; *see also* Choudhury, *supra* note 174, at 50, 62.

[208] Mohapatra, *supra* note 201, at 445; Choudhury, *supra* note 174, at 55 ("The clinic contracts are drafted by the clinics and are contracts of adhesion, with very little by way of negotiability of important terms like the method of birth. The result is that surrogates rights as a worker are rarely given any consideration. The ability to protect their own health or right to make decisions about procedures through these contracts is minimal.").

[209] *See* Lewin, *supra* note 2 ("Hundreds of new surrogacy businesses advertise their services on the Internet because anyone can establish an agency, regardless of background or expertise."). Tamar Lewin, *A Surrogacy Agency That*

unfavorable outcomes, a set of international guidelines could be enacted.[210] By imposing national standards in the United States, the demand for reproductive tourism could decrease and possibly improve situations of coercion and exploitation of international surrogates.

Part IV. Recommendations

INDEPENDENT LEGAL REPRESENTATION

Unfortunately, not all parties entering surrogacy contracts have retained separate legal representation; some proceed without any professional legal advice at all.[211] Each party to the surrogacy contract should retain separate legal counsel to ensure that there is a not a conflict of interest, and that each is fairly represented throughout the contractual term.[212] Legal counsel is essential to advise and educate intended parents and the surrogate on complicated issues not contemplated by the parties themselves.[213] Furthermore, the greater degree of accuracy and legal expression in the contract, the greater the probability it will withstand the test of enforceability.

Provisions dealing with birth defects and multiple high-order pregnancy terminations should be extensively discussed and outlined within a surrogacy contract. With the looming question of enforceability, it is vital for attorneys to properly counsel clients and ensure all provisions reflect the parties' intentions. Clauses should not be inserted as mere boilerplate language.[214] Language should be

---

Delivered Heatahce, N.Y. TIMES (July 6, 2014), at https://www.nytimes.com/2014/07/28/us/surrogacy-agency-planet-hospital-delivered-heartache.html.

[210] Mohapatra, *supra* note 195, at 448.

[211] Forman, *supra* note 34, at 49-50.

[212] See Committee of the American Society for Reproductive Medicine & Committee of the Society for Assisted Reproduction, *Recommendations for Practice Utilizing Gestational Carriers: A Committee Opinion*, 103 AM. SOC'Y REPROD. MED. 1 (2015) ("Intended parents must have ongoing legal counsel by an appropriately qualified legal practitioner who is experienced with third-party reproduction and licensed to practice in the relevant state or states . . . .").

[213] If the parties cannot afford private legal counsel, the state could mandate appointed attorneys for each of the parties.

[214] Forman, *supra* note 34, at 48.

direct and unambiguous so both the intended parents and the surrogate easily understand all implications. Clarity can also address issues of asymmetric information and unequal bargaining power.[215] Problems can be minimized and, if they arise, be properly addressed when parties have adequate legal representation throughout the surrogacy process.

SURROGATE SCREENING AND MATCHING

Because beliefs regarding abortion are deep-seated and carry strong emotional implications, parties entering surrogacy contracts must be sure their beliefs align.[216] Surrogates and intended parents should be pre-screened and psychologically evaluated by medical health professionals to ensure the match is likely to be a good one.[217] Whether or not to disqualify choosing a woman for surrogacy is mainly a moral question, not a scientific one, so there are no strict definitive guidelines for surrogate selection.[218]

The American Society for Reproductive Medicine (ASRM) recommends screening surrogates beyond their beliefs regarding abortion. Professionals should conduct evaluations for mental health and physical health of both the surrogate and the intended parents.[219] ASRM also recommends discussing behavioral traits and daily activity. Individuals who smoke, consume alcohol, or have other harmful habits should not be considered for gestational

---

[215] Unequal bargaining power and possible exploitation might also be avoided if the government were to create some sort of financial assistance opportunities for those seeking access to ART. Private and public insurance companies could grant a wider variety of people with access to ART, diminishing large wage gaps and social status disparities between surrogate and intended parent(s). Mutcherson, *supra* note 122, at 73.

[216] A surrogate does not change her mind in most cases where a respected surrogacy program is used and carefully screens potential surrogates. *See* BRETTE MCWHORTER SEMBER, THE COMPLETE ADOPTION & FERTILITY LEGAL GUIDE 205 (Sphinx Legal, 2004).

[217] Forman, *supra* note 34, at 51.

[218] Goleman, *supra* note 123.

[219] AM. SOC'Y REPROD. MED., *supra* note 212 (explaining "[t]he psychosocial evaluation and counseling considers the impact of the pregnancy on family and community dynamics, while the medical examination looks for evidence of sexually transmitted diseases, drug use, recent tattooing or piercing, jaundice, smallpox, syphilis, eczema and other unexplained illness.").

carriers.[220] Diet, exercise, and career are also usually discussed prior to agreement to help match preferences.[221] Counseling topics include expectations in the relationship, discussion of medical risks and foreseeable outcomes, and how such situations might be managed.[222] These recommendations are widely accepted but not always followed. The ASRM recommendations present a good model to craft and incorporate into standardized regulations.

Because it is largely unknown how a surrogate might manage such a situation, intended parents might look for surrogates who have previously birthed children or are married—surrogates possibly better equipped to offset potential emotional loss. These types of candidates are also more likely to have financial support and are less susceptible to financial coercion. Psychological screening aims to identify women who are able to handle separation and loss well and are not in "desperate need for a baby to enhance any feelings about themselves or fill any voids from past trauma."[223] Proper and thorough screening can therefore attempt to match surrogates and intended parents to avoid possible future conflict.

FEE PAYMENT REGULATION

Although women agree to be surrogates with altruistic ideals in mind, it is unrealistic to assume compensation is not a factor in their decision—pregnancy and childbirth being unpleasant and arduous.[224] Redefining surrogacy as purely an uncompensated altruistic act might merely shift the distribution of payments, or structure payments to hide surrogacy compensation, without really changing the nature of the transactions.[225] Surrogates surely should be paid for their work, but how much is the question. Surrogacy regulation is currently a state issue, but with the increase in surrogacy contracts nationwide, there should be a stronger push for

---

[220] AM. SOC'Y REPROD. MED., *supra* note 212.

[221] *Id.*

[222] *Id.* at e6.

[223] Signs of trauma might be depression, compulsive promiscuity, a long series of unstable relationships, or a childhood trauma, such as abandonment by a parent, abuse, or neglect. Goleman, *supra* note 123.

[224] Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN'S L. J. 245, 259 (2012).

[225] Choudhury, *supra* note 174, at 18–19.

uniform federal regulation.[226] Although family law is traditionally left to the states to regulate as they deem fit, federal regulation would eliminate forum shopping and set clear standards for the judiciary, ultimately minimizing litigation costs.[227] Regulating payments nationwide might also ensure safety standards and limit fears of extortion.[228]

Making demands of the surrogate, such as waiving the constitutional right to abortion, might not seem as cumbersome or questionable if the surrogate believes her compensation far outweighs the inconvenience.[229] On the other hand, surrogates should not be indebted to the intended parents by a promise of unreasonably high compensation.[230] A cap should be placed on the amount intended parents can pay. The fee should not be so high as to induce surrogates to participate solely for financial gain, yet should not be so low as to be unjust.[231] The cap must also not be too high as to incentivize intended parents to seek a cheaper reproductive route.

With payments capped, a woman cannot resort to surrogacy as a sort-of career.[232] The intended parents should also be required to show financial stability.[233] The intended parents' finances should prove they are financially able to raise a child, and in the event of a multiple-pregnancy, able to financially raise more than one child.[234] This could help in situations where intended parents want to selectively reduce to a single pregnancy because one child is all they can afford.[235] In sum, the payment of a reasonable fee to surrogates

---

[226] Rights of the surrogate as a "laborer," (pun unintended) should be protected just as other laborers' rights in the workplace are protected. *See* Mutcherson, *supra* note 122, at 74.

[227] Ladomato, *supra* note 224, at 267.

[228] *Id.*

[229] *Id.* at 263.

[230] *Id.* at 269.

[231] *Id.* at 279.

[232] *Id.* at 272.

[233] The surrogate could also be asked to provide tax records to prove she is not impoverished at the time of contracting and not solely induced by finances to enter the contract. Ladomato, *supra* note 224 at 270-71.

[234] *See id.* at 270-71.

[235] The medical costs associated with high-risk pregnancies and multiple births are exorbitant. *See* Mutcherson, *supra* note 122, at 66-67.

should be uniformly regulated for the protection of all parties involved.

V. Conclusion

Surrogacy, a process fraught with stress and anxiety, becomes even more complicated when provisions of signed contractual agreements are questioned or deemed unenforceable. No court has directly decided that selective reduction or termination clauses are unenforceable, but language of past decisions makes it apparent that courts are hesitant to rule either way. Because the intended parents have prepared and relied to their detriment on the surrogate, and the surrogate willingly entered the contract, the contract should be enforced in its entirety.

Selective reduction clauses, although dealing with the constitutional right to an abortion, should be upheld because constitutional rights can be waived. There is no greater protection awarded to the right to an abortion than any other constitutional right. Constitutional rights can be voluntarily, knowingly, and intelligently waived so long as there are no public ramifications.

Furthermore, there is no state compulsion involved in waiving the right to an abortion. In the case of surrogacy contracts, in which the individual has already agreed to forego their rights to abortion at the time of contracting, the court would not be compelling an abortion procedure, but rather compelling the surrogate's voluntarily pre-made choice.

Surrogates should be held to their agreement at the time of contracting. They should not be given the freedom to later change their minds when it significantly impacts others procreative decisions and family planning. Although the process can be emotional, surrogates are not walking into these agreements blindsided as to what is to come. To argue that surrogates, who willingly enter a contract, can no longer be held to their good faith agreement because of the intervening distress of pregnancy, reinforces a sense of paternalism—minimizing women's decision-making capabilities due to supposed hormonally-induced unpredictability. Surrogacy contracts should be held to the same requirements under the law as all other contractual agreements.

Even though breach of contract in the grand scheme of surrogacy contracting is relatively rare, surrogacy clinics can implement policies to improve the system. Intended parents and surrogates should seek a relationship built on transparency, and have open discussions about issues of abortion, ideally with the assistance of mental health professionals and legal advisors. All parties should also endure a screening process for mental health, physical health, and financial capacity. Finally, by implementing uniform policies to govern selective reduction clauses, matters of compensation and damages can be regulated to minimize future conflict.

For most, reproduction is an important fundamental right. Many strive for years to have children of their own. As assisted reproductive technology advances, those confined by infertility are finding it easier to genetically reproduce. But while reproductive technology is advancing, the law governing it seems to lag behind. Taking the step towards enforcing selective reduction clauses in surrogacy contracts could open the door to the promotion of other reproductive rights in the future.