

# BARGAINING ABOUT BIRTH: SURROGACY CONTRACTS DURING A PANDEMIC

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## ABSTRACT

*Surrogacy contracts depend on the exchange of information. Intended parents want information about the surrogate's pregnancy to make decisions regarding prenatal care, during-pregnancy behavior, and birth. Contract provisions can cater to those desires and support the broader assumption that parents should seek as much prenatal information as possible. Yet surrogates have the right, by statute and as patients, to manage their prenatal care and thus control information about their pregnancies.*

*During the COVID-19 pandemic, travel restrictions, limits on hospital visits, vaccine mandates, and the threat of COVID contraction—with evolving understanding of effects on pregnant people and resulting children—upended the expectations of intended parents and surrogates. If anything, the pandemic encouraged intended parents to surveil the health of gestational surrogates because of the heightened threat of illness. The result was a change in contracting practices that ranged from incentives, such as “stay-at-home” stipends for surrogates, to punitive measures, like the threat of liability under contract clauses governing prenatal behavior. More broadly, the pandemic has underscored the fragility of surrogacy arrangements and the surprising irrelevance of statutory protections when disputes about prenatal care arise. This essay assesses the challenges of negotiating, drafting, and enforcing gestational surrogacy contracts during the pandemic. It argues that new legislation in several states, which attempts to protect the interests of intended parents and surrogates through rights to parentage and bodily autonomy, respectively, is unlikely to affect what happens on the ground.*

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*Indeed, when conflicts arise, parties look to professionals, such as lawyers and fertility brokers, who in turn continue to rely on largely unenforceable contract provisions to diffuse conflict. These practices highlight the power of professionals and agencies—repeat players with their own agendas. Specifically, the question of vaccination highlighted the limits of honoring statutory and contractual commitments to surrogate autonomy and belie the assumption that surrogacy is an act of altruism, rather than economic exchange.*

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## INTRODUCTION

The COVID-19 pandemic created a crisis in contract law.<sup>1</sup> Across a wide range of transactions, contracts were breached, re-negotiated, reformed, or abandoned because of the pandemic.<sup>2</sup> Gestational surrogacy contracts—under which people become pregnant after in vitro fertilization (IVF) and give birth to children to whom they are not genetically related—offer one of the most striking examples of altered contractual expectations and obligations.<sup>3</sup> Restrictions on travel at the commencement of the pandemic, and the introduction of vaccinations, have shifted practices among surrogates, intended parents, and the entities that match and manage them.<sup>4</sup> Parties navigated agreements that evolved as circumstances changed, but, as this essay endeavors to illustrate, they wrestled with problems endemic to the field.<sup>5</sup>

1. See Jonathan Lipson & Rachel Rebouché, *Introduction: COVID, Contract, and Crises*, 85 L. & CONTEMP. PROBS. i, i–viii (2022).

2. See David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 979–83 (2021).

3. “Intended parents” are the people who intend to assume the legal responsibilities of parenting the resulting child or children, and often, but not always, who donate genetic material. This essay refers to “intended parents” while acknowledging that often an individual, rather than a couple, pursues gestational surrogacy.

4. This essay uses the term “agency” throughout to refer to the organizations, for-profit and not-for-profit, that act as the managers for intended parents’ and surrogates’ arrangements. Those entities range from institutes to clinics; the key characteristic for the groups studied here is that the organization serves as a hub for legal advice and health care, bringing together varied professionals who assist parties at the different stages of the surrogacy process.

5. Patricia Fronck & Karen Smith Rotabi, *The Impact of the COVID-19 Pandemic on Intercountry Adoption and International Commercial Surrogacy*, 63 INT’L SOC. WORK 665, 667–68 (2020); Margaret E. Swain & Colin James Rogerson, *Addressing Legal Issues in Cross-Border Gestational Surrogacy: Current Topics and Trends*, 115 FERTILITY & STERILITY 268, 269 (2021); Susan

Consider the travel restrictions in place at the beginning of the COVID-19 pandemic. Intended parents were unable to travel for the birth of infants.<sup>6</sup> Though also true for parties who lived in the United States, the consequences of travel bans were most vivid for international surrogacy arrangements.<sup>7</sup> News stories documented makeshift care arrangements as intended parents struggled to enter the countries where births had occurred.<sup>8</sup> In one such account, intended parents walked across the Belarus-Ukraine border to collect an infant who had been cared for in an orphanage for several weeks because of the parents' travel delays.<sup>9</sup> In another instance, an employee of a Chicago-based surrogacy agency cared for two infants for five months while the intended parents from China waited for travel restrictions to abate and for the visas and passports needed to enter, as well as leave, the United States.<sup>10</sup>

Domestic gestational surrogacy has not received the same media attention as international surrogacy but has experienced its own set of disruptions. Hospital visitation restrictions made being present at birth difficult for intended parents.<sup>11</sup> Beyond birth plans and travel, intended parents and gestational surrogates confronted a novel set of questions related to prenatal decision-making—related to wearing masks or receiving

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L. Crockin, *The Impact of a Pandemic on International Surrogacy: An Interview with ART Attorneys Margaret Swain and Nidhi Desai*, AM. SOC'Y REPROD. MED. (Aug. 18, 2020), <https://web.archive.org/web/20201001064444/https://www.asrm.org/news-and-publications/news-and-research/legally-speaking/the-impact-of-a-pandemic-on-international-surrogacy-an-interview-with-art-attorneys-margaret-swain-and-nidhi-desai/> [<https://perma.cc/2HF2-C82T>]; Carol Morello, *Coronavirus Upends Years of Planning for International Adoptions and Surrogacy Births*, WASH. POST (Apr. 16, 2020, 7:40 PM), <https://www.washingtonpost.com/national-security/coronavirus-upends-years-of-planning-for-international-adoptions-and-surrogacy-births/2020/04/16/5e03c8> [<https://perma.cc/5LXN-UHE3>].

6. Fiona Lyon, *The Surrogacy Journey*, NEW L.J., Sept. 4, 2020, at 12, 14.

7. Gaëlle Deharo & Allane Madanamoothoo, *Is International Surrogacy the Lark's Glimmer?: When Covid-19 Reveals the Legal Insecurity of Surrogacy*, 27 EUR. J. HEALTH L. 345, 350 (2020).

8. See, e.g., Lizzie Widdicombe, *The Stranded Babies of the Coronavirus Disaster*, NEW YORKER (July 20, 2020), <https://www.newyorker.com/news/news-desk/the-stranded-babies-of-the-coronavirus-disaster> [<https://perma.cc/T5JD-S9V2>]; Valeria Perasso, *Coronavirus Splits Couple from Baby Born Through Surrogacy 8,000 Miles Away*, BBC (May 19, 2020), <https://www.bbc.com/news/world-latin-america-52706228> [<https://perma.cc/Z56M-H79K>]; Avichai Scher, *Coronavirus Pandemic Sows Chaos in Surrogacy Process*, NBC NEWS (Mar. 31, 2020, 9:32 AM), <https://www.nbcnews.com/feature/nbc-out/coronavirus-pandemic-sows-chaos-surrogacy-process-n1172286> [<https://perma.cc/R3VD-7P7B>]; Nara Schoenberg, *Chinese Infants Born to Chicago-Area Surrogates Are Stranded in the U.S. Without Their Parents, Due to Covid-19: "I am missing this kid every minute."*, CHI. TRIB. (July 22, 2020, 10:58 AM), <https://www.chicagotribune.com/lifestyles/ct-life-chinese-babies-stranded-in-america-07212020-20200722-mi3kk2jokvewrl5r3zjqjr6yt74-story.html> [<https://perma.cc/Q3PH-2JVP>].

9. Widdicombe, *supra* note 8.

10. Schoenberg, *supra* note 8.

11. Sirin Kale, *Surrogates Left Holding the Baby As Coronavirus Rules Strand Parents*, GUARDIAN (May 14, 2020, 4:00 AM), <https://www.theguardian.com/lifeandstyle/2020/may/14/surrogates-baby-coronavirus-lockdown-parents-surrogacy> [<https://perma.cc/QYH4-987D>].

a vaccine, for instance—but the underlying conflicts were familiar. Although gestational surrogacy agreements now address issues particular to COVID contraction, those contracts implicate longstanding concerns about the extent to which intended parents can dictate prenatal decisions and the nature of the relationship between the parties. For instance, parties to gestational surrogacy contracts have diverged on the question of vaccination: some intended parents seek to mandate surrogate vaccination, while others attempt to prohibit the surrogate from taking a vaccine. Early on, the question of vaccination was complicated by unclear advice about whether pregnant people should receive a vaccine. As that advice encouraged vaccination during pregnancy, attitudes about purported risks did not shift uniformly. The disagreements between parties became more visible as fertility agencies started to reassure clients and explain COVID protocols.

As surrogacy contracts began to incorporate language about vaccination status, other provisions addressed prenatal behaviors to reduce the risk of COVID contraction.<sup>12</sup> Measures include “stay-at-home” stipends (paying surrogates additional compensation to offset missed work if they agree to limit outside engagement), as well as attempts to ban activities deemed risky in light of the pandemic.

Although the subject matter of some provisions of post-2020 surrogate contracts are new, efforts to control prenatal decision-making are not. Since the inception of gestational surrogacy contracts, intended parents and their representatives have sought to manage prenatal behavior in order to assure a healthy pregnancy and birth.<sup>13</sup> The concern that such management would encroach on surrogates’ autonomy is reflected in contemporary state statutes that attempt to protect surrogates’ agency and privacy as patients while acknowledging that a core aspect of the contract entitles intended parents to some amount of pregnancy information and control. State laws, as the first part notes, are an important check against exploitation; however, those laws seldom address the work of intermediaries (namely, lawyers and agencies) who write contracts and structure the relationships of the parties.<sup>14</sup>

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12. For example, one fertility agency includes in their website’s language the following sentence, with little additional explanation: “Candidates for surrogacy in our program must meet a series of criteria, and these include having a Covid and pregnancy history that is free from prior complications.” *Is Surrogacy Still Possible Amid Covid-19?*, SURROGACY CTR. PHILA., <https://www.philadelphiasurrogates.com/surrogacy-and-pregnancy-still-possible-amid-covid/> [https://perma.cc/C7H8-F6LW] (last visited Feb. 17, 2023).

13. See CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA 198–99 (2017) (noting clauses governing abortion in the earliest surrogacy contracts).

14. Carol Sanger noted the role of intermediaries in one of the earliest surrogacy cases, *Baby M*, which concerned a surrogate genetically related to the resulting child. Carol Sanger, *Developing Markets*

The COVID-19 pandemic spotlights the work of surrogacy agencies and the professionals employed by them—interventions that historically have been hard to map. A review of the websites of the national leading surrogacy agencies, seventy in total, depicts agencies' priorities in reassuring potential clients that surrogacy arrangements are secure and any resulting pregnancy will result in a healthy child or children. This essay, however, asks what happens to the balance of bargaining power between parties when surrogates have fewer options and intended parents contemplate additional risks. The pandemic may have deepened gaps in privilege between intended parents and surrogates. Surrogates, like all pregnant people, still had to seek prenatal care and rely on hospitals during birth. Surrogates were likely more dependent on surrogacy income because their jobs were disproportionately disrupted by the pandemic. While surrogates' vulnerability may have increased during the pandemic, the contracts to which they were subject became more onerous in terms of surveilling their pregnancies.

The current method of addressing vulnerability and risk through contractual terms, brokered with the assistance of professional intermediaries, may not adequately address potential bargaining inequality. In seeking to balance the interests of both surrogates and intended parents, state statutes focus on the rights claims of the parties and do little to change the context in which people negotiate those rights. More significantly, they do not regulate the powerful industry that matches surrogates and intended parents, which is the key driver of contract content and practice.

This essay proceeds as follows. The first part provides a background on the contemporary statutes that govern gestational surrogates. The next part explains why those statutes may have made little difference to the practice of drafting and enforcing surrogacy contracts. The final part describes how COVID, specifically as related to vaccination, has influenced contract terms, both challenging the efficacy of protections in state statutes and illustrating recurring dilemmas in gestational surrogacy.

## I. SURROGACY CONTRACTS: LAW ON THE BOOKS

Over the last ten years, newly enacted state statutes show a clear trend toward allowing gestational surrogacy. Recent legislation passed by New York, which was one of the few remaining states that banned surrogacy, provides an example of how modern laws regulate surrogacy contracts. Although New York's Child Parent Security Act (CPSA) emphasizes

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*in Baby-Making: In the Matter of Baby M*, 30 HARV. J. L. & GENDER 67, 82 (2007) (noting "how three intermediation functions—searching and matching, price setting, and quality control—played out in the transaction" for the parties in *Baby M*); see generally DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006).

surrogates' rights to bodily autonomy, introducing the first Surrogates' Bill of Rights,<sup>15</sup> the Act mirrors other state laws that presume a contract is enforceable so long as it is in "substantial compliance" with the statute's procedural requirements.<sup>16</sup> This part offers a snapshot of state legislation, which seeks to check potential abuses of power, but may miss how contract practice occurs on the ground.

### A. *The Legal Landscape*

Forty-seven states currently permit gestational surrogacy contracts either through statute or case law.<sup>17</sup> Almost every state allows compensated surrogacy, except for Louisiana and Nebraska, which permit uncompensated surrogacy only.<sup>18</sup> In each state, however, contracts may provide for the surrogate's lost wages or educational opportunities, insurance, attorney fees, medical expenses, pregnancy-related expenses, living expenses, housing subsidies, and food costs.<sup>19</sup> Wyoming's 2021 law limits compensation to "prenatal care, delivery of the child and any other costs including the cost of lost opportunity that are directly connected to the pregnancy."<sup>20</sup> Only three states prohibit surrogacy contracts. Michigan punishes compensated surrogacy as a crime and will not enforce uncompensated agreements.<sup>21</sup> Arizona and Indiana ban surrogacy contracts, but do not punish people involved in surrogacy arrangements, compensated or not.<sup>22</sup>

Of the forty-seven states, twenty-six states permit surrogacy by statute.<sup>23</sup> State statutes impose a variety of eligibility requirements on surrogates and

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15. N.Y. FAM. CT. ACT § 581 (McKinney 2021).

16. *Id.* § 581-203(d).

17. See Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 app.e (2017); see also Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 486–503 (2015).

18. LA. STAT. ANN. § 9:2720(c) (2016); NEB. REV. STAT. § 25-21,200 (2007).

19. I. Glenn Cohen & Katherine L. Kraschel, *Gestational Surrogacy Agreements: Enforcement and Breach*, in HANDBOOK OF GESTATIONAL SURROGACY 85, 87 (E. Scott Sills ed., 2016). Contemporary courts have not scrutinized the nature and amount of payment received by surrogates for living or non-medical expenses. In one study, surrogates described compensation for lost wages as their most important financial concern. Zsuzsa Berend, *The Emotion Work of a "Labor of Love": An Ethnographic Account of Surrogacy Arrangements in the United States*, in HANDBOOK OF GESTATIONAL SURROGACY, *supra*, at 62.

20. WYO. STAT. ANN. § 35-1-401(a)(xiv)(G) (2021).

21. MICH. COMP. LAWS §§ 722.855–859 (1988).

22. ARIZ. REV. STAT. § 25-218 (LexisNexis 2011); IND. CODE § 31-20-1-1 (2006).

23. Seventeen states do not have legislation prohibiting, permitting, or regulating surrogacy; most of those states have case law permitting surrogacy. See *Surrogacy Laws*, SURROGACY EXPERIENCE, <https://www.thesurrogacyexperience.com/u-s-surrogacy-law-by-state.html> [https://perma.cc/5J2L-2JAM] (last visited Feb. 17, 2023).

intended parents.<sup>24</sup> For example, surrogates must meet age thresholds or have given birth previously; in some states, intended parents must be married, infertile, or state residents.<sup>25</sup> Most state statutes require independent legal counsel for all parties, whether paid for by the intended parents or not, and medical and psychological evaluation of surrogates (as well as for intended parents under some statutes).<sup>26</sup> These requirements seek to ensure that parties are mature, stable, and informed. And even if those requirements are not met, the contract may still be enforceable based on a court's assessment of the parties' intent.<sup>27</sup>

Relevant to this essay, state surrogacy statutes target prenatal care and decision-making in several ways. For example, statutes permit contracts to specify how a surrogate's prenatal care and prenatal screening is delivered and authorize restrictions on surrogate behavior judged dangerous to the fetus.<sup>28</sup> Several state laws recognize contracts with terms requiring "[t]he gestational carrier's agreement to undergo all medical exams, treatments, and fetal monitoring procedures that the physician recommends for the success of the pregnancy."<sup>29</sup> As for during-pregnancy behavior, state

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24. See, e.g., UNIF. PARENTAGE ACT § 802 (UNIF. LAW COMM'N 2017) (requiring that surrogates be at least "21 years of age," "have given birth to at least one child," undergo mental and medical examinations, and have independent counsel paid for by the intended parents); Courtney G. Joslin, (*Not*) *Just Surrogacy*, 109 CALIF. L. REV. 401, 432–55 (2021) (setting out a typology of rights and duties for intended parents and surrogates).

25. The 2017 Uniform Parentage Act (UPA) draws from various state approaches. UNIF. PARENTAGE ACT § 802 cmt. ("Most of these recently adopted surrogacy provisions include similar requirements regarding age, medical and mental health evaluations, and independent counsel. . . . Another requirement . . . is that the surrogate have 'given birth to at least one live child.'") (citing D.C. CODE § 16-405 (2019); ME. STAT. tit. 19-A, § 1931 (2018)). Marriage equality established under *Obergefell v. Hodges* challenged the explicit (and de facto) exclusion of same-sex couples or LGBTQ individuals from contracting as intended parents. *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015); see also NeJaime, *supra* note 17, at 2377 (citing LA. STAT. ANN. § 9:2718 (2016), which requires use of gametes by both intended parents).

26. See, e.g., 2018 N.J. Laws 157 (codified in scattered sections of N.J. REV. STAT. § 9:17) (permitting the intended parents to pay for the surrogate's representation); see also COLO. REV. STAT. § 19-4.5-104(1)(d)–(e) (2021) (requiring "independent legal representation" for all parties and a "mental health consultation" for the surrogate); D.C. CODE § 16-405(a)(4)–(5), (b)(1)(B) (2017); *id.* § -406(a)(3) (requiring "affirmation [that] all parties . . . ha[d] independent legal counsel" and that parties undertake joint counseling as well as separate "mental health evaluation" for the surrogate).

27. See, e.g., 750 ILL. COMP. STAT. 47/25(e) (2005); NEV. REV. STAT. § 126.780(2) (2013); MODEL ACT GOVERNING ASSISTED REPROD. § 712 (AM. BAR ASS'N 2019) ("In the event of noncompliance with this Article, the appropriate Court of competent jurisdiction shall determine the respective rights and obligations of the parties to any Surrogacy Arrangement based solely on evidence of the parties' original intent.").

28. Joslin, *supra* note 24, at 408 (2021) ("[C]ontrol and surveillance of pregnant bodies run the political gamut . . .").

29. DEL. CODE ANN. tit. 13, § 8-807(d)(1) (2019); see also 750 ILL. COMP. STAT. 47/25(c)(3) (2005); NEV. REV. STAT. § 126.750(5)(b) (2013); OKLA. STAT. tit. 10, § 10-557.6(D)(1) (2019) (permitting contracts that ask a surrogate "to undergo all medical examinations, treatments and fetal monitoring procedures recommended for the success of the pregnancy by the physician providing care

statutes contemplate contract provisions that compel the surrogate “to abstain from any activities that the intended parent or parents or the physician reasonably believes to be harmful to the pregnancy and future health of the child.”<sup>30</sup> This includes, but is not limited to, “smoking, drinking alcohol, using nonprescribed drugs, using prescription drugs not authorized by a physician aware of the gestational carrier’s pregnancy, exposure to radiation, or any other activities proscribed by a health care provider.”<sup>31</sup>

At the same time, state laws guarantee that surrogates will make all decisions concerning their pregnancies. Maine’s law, for example, provides that “[a] gestational carrier agreement may not limit the right of the gestational carrier to make decisions to safeguard her health.”<sup>32</sup> Likewise, Washington, D.C. requires “that at all times during the pregnancy and until delivery, regardless of whether the court has issued an order of parentage, the surrogate shall maintain control and decision-making authority over the surrogate’s body.”<sup>33</sup> State laws thus send mixed messages: surrogates should exercise the same rights as all other pregnant people but should cede some control of their prenatal choices to intended parents.

Tensions between the involvement of intended parents and the autonomy of surrogates are reflected in the guidance of professional organizations, which is cited in state statutes as standards to follow. The American Society for Reproductive Medicine (ASRM) Recommendations for Practice Utilizing Gestational Carriers balance a surrogate’s right to refuse or to accept medical treatment/advice against the intended parents’ “right to information” and provisions governing “behavior during pregnancy and

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to the gestational carrier during the pregnancy”). *See generally* Joslin, *supra* note 24, at 446 (discussing laws that “permit contract clauses that *limit* or *override* the contemporaneous medical decision-making authority of the person acting as a surrogate with respect to their own body”).

30. DEL. CODE ANN. tit. 13, § 8-807(d)(2) (2019); 750 ILL. COMP. STAT. 47/25(d) (2005); NEV. REV. STAT. § 126.750(5)(b) (2013); OKLA. STAT. tit. 10, § 10-557.6(D)(2) (2019).

31. DEL. CODE ANN. tit. 13, § 8-807(d)(2) (2019); *see* Joslin, *supra* note 24, at 448 (noting that abstention clauses prohibit a number of behaviors such as “smoking, drinking, exercising, or even taking night classes”); *see also* June Carbone & Jody Lyneé Madeira, *The Role of Agency: Compensated Surrogacy and the Institutionalization of Assisted Reproduction Practices*, 90 WASH. L. REV. ONLINE 7, 29 (2015) [hereinafter Carbone & Madeira, *The Role of Agency*].

32. ME. STAT. tit. 19-A, § 1932(5) (2019); *see also* FLA. STAT. § 742.15(3)(a) (West 2019) (providing “that the gestational surrogate shall be the sole source of consent with respect to clinical intervention and management of the pregnancy”). Although many statutes include an explicit right for the surrogate to choose her own physician, others condition the surrogate’s physician choice on consultation with the intended parents. The Illinois and Delaware statutes guarantee “[t]he right of the gestational [surrogate/carrier] to utilize the services of a [physician/health care provider] of her choosing, after consultation with the intended parents, to provide her care during the pregnancy.” 750 ILL. COMP. STAT. 47/25(c)(3) (2005); DEL. CODE ANN. tit. 13, § 8-807(c)(3) (2019).

33. D.C. CODE § 16-406(a)(4)(C) (2019).

methods for resolving conflicts (e.g., eating habits, prescription drugs, alcohol).”<sup>34</sup>

In general, and across states, surrogacy contracts include language about prenatal behavior and decision-making throughout pregnancy regardless of those provisions’ enforceability or statutory protections.<sup>35</sup> When disagreements or disputes arise, some statutes include definitions of and consequences for non-compliance.<sup>36</sup> State statutes, however, do not indicate how parties should address or solve disagreements about prenatal care. And parties to surrogacy contracts seldom sue for breach; their claims rarely see a courtroom.<sup>37</sup> The next section puts statutory trends in perspective by highlighting the recently enacted New York surrogacy law and Bill of Rights for surrogates.

### *B. Contemporary Protections for Surrogates*

Until recently, New York banned all surrogacy agreements within the state. But, in February 2021, the CPSA, which permits the practice of gestational surrogacy, took effect and provides a contemporary example of surrogacy regulation.<sup>38</sup>

The CPSA outlines eligibility for those interested in acting as a surrogate, including being at least twenty-one years of age, receiving a medical evaluation, having independent legal representation as well as a health insurance policy.<sup>39</sup> Intended parents must meet certain citizenship and New York residency requirements, as well as retain independent legal

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34. Am. Soc’y Reprod. Med. & Soc’y Assisted Reprod. Tech., *Recommendations for Practice Utilizing Gestational Carriers: An ASRM Practice Committee Guideline*, 97 FERTILITY & STERILITY 1301, 1306 (2012). Compare the Uniform Parentage Act of 2017, which requires surrogacy contracts to detail how intended parents will cover surrogacy-related care for the surrogate and the resulting child or children. The UPA emphasizes surrogates’ rights to autonomy, providing that “[t]he agreement must permit the surrogate to make all health and welfare decisions regarding herself and her pregnancy.” UNIF. PARENTAGE ACT § 804(a)(6)–(7) (UNIF. LAW COMM’N 2017).

35. Courtney G. Joslin, *Surrogacy and the Politics of Pregnancy*, 14 HARV. L. & POL’Y REV. 365, 376–77 (2020).

36. Nevada’s law defines non-compliance as “when [a surrogate or intended parents] breach any provision of the gestational agreement or fail to meet any of the requirements of [the statute].” NEV. REV. STAT. § 126.780(1) (2013).

37. A notable exception are disputes about terminating a pregnancy, which have garnered national attention in the press, and disputes over parentage and custody—topics not covered here. See Rachel Rebouché, *Contracting Pregnancy*, 105 IOWA L. REV. 1591, 1591–95 (2020) (exploring how contracts incorporate clauses on terminating a pregnancy and noting courts’ focus on parentage claims rather than contract claims).

38. Joseph R. Williams, *New Surrogacy Law Brings Opportunities but Practitioners Beware*, N.Y. STATE BAR ASS’N (Mar. 9, 2021), <https://nysba.org/new-surrogacy-law-brings-opportunities-but-practitioners-beware/> [<https://perma.cc/C2NL-XV5P>].

39. N.Y. FAM. CT. ACT § 581-402(a) (McKinney 2021).

counsel in order to enter a surrogacy agreement.<sup>40</sup> Like other states' laws, a health care provider conducts a medical examination that documents "known health conditions that may pose risks to the potential surrogate or embryo during pregnancy."<sup>41</sup> A licensed health care practitioner must inform a surrogate of risks associated with surrogacy, which include "psychological and psychosocial risks, and impacts on their personal lives."<sup>42</sup>

The validity of a surrogacy agreement hinges on its "substantial compliance" with the statutory requirements of the Act.<sup>43</sup> Thus, under the CPSA, drafting the agreement is a crucial step, underscoring the importance of legal professionals who will be knowledgeable of statutory requirements.<sup>44</sup> Intended parents may contract to provide the surrogate compensation for medical risks, physical discomfort, inconvenience, and any other responsibilities attendant to the surrogacy process.<sup>45</sup> While the CPSA does not specify a dollar amount, the compensation provision requires that the amount be "reasonable and negotiated in good faith between the parties."<sup>46</sup> In addition, payments do not extend past eight weeks post-birth of any resulting children.<sup>47</sup> Although parties are free to decide matters of compensation, the CPSA forbids payment conditioned on "actual genotypic or phenotypic characteristics . . . of any resulting children."<sup>48</sup>

The CPSA includes a lengthy Surrogates' Bill of Rights.<sup>49</sup> The Bill of Rights is non-waivable and cannot be limited in any way, including by agreement of the parties, and applies to any person acting as a surrogate in New York.<sup>50</sup> Any contract that purports to waive or limit these rights will

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40. *Id.* § 581-402(b); *see id.* § 581-402(b)(3) for additional provisions related to the spousal relationship requirements and limitations for intended parents.

41. *Id.* § 581-402(a)(4).

42. *Id.* § 581-402(a)(5). Many of these guidelines have been adopted from the American Society for Reproductive Medicine and American Congress of Obstetrics and Gynecologists. *See Williams, supra* note 38.

43. N.Y. FAM. CT. ACT § 581-203(e).

44. If the surrogacy agreement is deemed insufficient, the court, considering the best interests of the child, determines the parentage based on the intent of the parties. *Id.* § 581-407.

45. *Id.* § 581-502(a).

46. *Id.* § 581-502(b). Nationally, average compensation varies from approximately \$30,000 to \$60,000 depending on factors such as whether the surrogate has previously acted as a surrogate. *See Williams, supra* note 38.

47. *Id.* § 581-502. The compensation funds, and any other reasonably foreseeable additional expenses, must be placed in an escrow account with an independent escrow agent before the surrogate begins medical treatments related to the surrogacy process, except for the necessary medical evaluations to determine eligibility. *Id.* § 581-403.

48. *Id.* § 581-502(d).

49. Although other states may not have a "Bill of Rights," many states have provisions that provide for similar rights for surrogates. *See Williams, supra* note 38.

50. N.Y. FAM. CT. ACT § 581-601.

be deemed void and unenforceable as a matter of public policy.<sup>51</sup> Related to prenatal care and decision-making are the surrogate's rights:

- To make all health and welfare decisions during the pregnancy,<sup>52</sup>
- To choose independent legal counsel, paid for by the intended parent(s),<sup>53</sup>
- To a health insurance policy for all associated medical expenses, paid for by the intended parent(s), that covers all medical treatments, hospitalization, and behavioral health care,<sup>54</sup> and
- To psychological counseling to address surrogacy-related issues, paid for by the intended parent(s).<sup>55</sup>

The example of the CPSA illustrates how modern surrogacy regulation rests on foundational assumptions that surrogates retain rights of bodily autonomy during and shortly after pregnancy, just as any other expecting person. Guarantees such as those in the CPSA Bill of Rights are intended to mitigate concerns about exploitation—surrogates maintain control over their bodies and health care decisions. But these protections conflict with intended parents' rights to prenatal information and some amount of control—rights guaranteed in the same contracts that seek to protect surrogates' autonomy. Intended parents, through their lawyers, draft provisions that recognize surrogates' rights while still maintaining access to prenatal information and some amount of prenatal decision-making.

COVID-related provisions make the balancing of parties' interests all the more fraught. The next part demonstrates how legal professionals and fertility agencies manage recurring tensions, both to comply with state mandates but also to ensure that parties' relationship stay intact.

## II. SURROGACY CONTRACTING: PRACTICES ON THE GROUND

Statutory protections may have done little to resolve conflicts over prenatal care; laws seek to safeguard surrogates' decision-making rights while giving intended parents latitude to enforce contracts that attempt to control that decision-making.<sup>56</sup>

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51. *Id.*

52. *Id.* § 581-602. This includes decisions on whether to undergo a cesarean section, a multiple embryo transfer, termination of the pregnancy, limiting the number of embryos to carry, and the selection of a health care practitioner. *Id.*

53. *Id.* § 581-603.

54. *Id.* § 581-604.

55. *Id.* § 581-605.

56. Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 *LAW & SOC'Y REV.* 143, 156–57 (2015).

Lawyers who draft and implement contracts do so to cultivate trust between intended parents and the surrogate. This trust is the basis for balancing power between the parties. Lawyers manage intended parents' desires to control the surrogate's pregnancy while recognizing surrogates' right to make their own health decisions. Neither party will litigate a claim during pregnancy unless the parties' relationship has already ended or is in crisis. As a matter of incentives and professional practice, lawyers try to avoid such an impasse by applying a contract's terms even when those terms exert stronger normative than legal force.

Limitations on parties' ability to enforce agreements help shape their contracts.<sup>57</sup> As explained below, relational contracts describe the trust and reputation on which parties rely to ensure their arrangements succeed, rather than relying on courts. Forms of relational contracting occur in a variety of commercial transactions, with the potential benefits of reducing disputes over issues that are not 'deal-breakers' and preserving parties' autonomy to arrange their own affairs. Perhaps distinct from other commercial contexts, surrogacy is often characterized as altruistic. Until relatively recent statutory changes, for instance, financial compensation for surrogacy was not allowed in many jurisdictions.<sup>58</sup> Intermediaries' efforts to build and maintain trust may re-inscribe the expectation that gestational surrogacy is an act of altruism rather than a service offered by a billion-dollar business.<sup>59</sup>

### A. *The Role of Lawyers*

The importance of coming to an agreement on prenatal decision-making is reflected in statutory provisions calling for joint consultation "regarding issues that could arise during the surrogacy."<sup>60</sup> At the pre-pregnancy stage,

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57. Jonathan C. Lipson, *Promising Justice: Contract (as) Social Responsibility*, 2019 Wis. L. REV. 1109, 1146.

58. As referenced in the notes below, the commodification for reproductive services has received extended scholarly attention. This essay does not engage in the debate of how payment for reproductive services should be treated differently than other compensatory transactions.

59. "[B]y the year 2026, the global fertility industry is predicted to make upwards of \$40 billion in sales alone . . . gestational surrogacy today comprises as much as ninety-five percent of American surrogacy arrangements and even serves as a first option for many." Ayesha Rasheed, *Confronting Problematic Legal Fictions in Gestational Surrogacy*, 24 J. HEALTH CARE L. & POL'Y 179, 180–83 (2021). See DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW 39 (2019) (in the United States, estimating 470 fertility centers and over 1,700 reproductive endocrinologists in an "industry of mostly regional competition"); Carbone & Madeira, *The Role of Agency*, *supra* note 31, at 21 ("Yet, there is reason to doubt that altruistic transactions are necessarily happier or less conflicted . . .").

60. D.C. CODE § 16-405(a)(5) (2019) ("An individual seeking to serve as a surrogate shall enter into a written surrogacy agreement and, at the time that the surrogacy agreement is executed, shall . . . [h]ave completed, with the intended parent or parents, a joint consultation with a mental health professional regarding issues that could arise during the surrogacy."). Some fertility agencies also provide joint counseling as part of their services.

the intended parents ostensibly drive the process of arranging for mental health counseling. Mental health professionals describe their services as providing psychosocial education for clients about the emotional and mental strain that the process of surrogacy can impose.<sup>61</sup> Specifically, these are forums to discuss potential points of disagreement. For example, counseling can attempt to reassure intended parents that surrogates will agree to prenatal screening and share prenatal information.<sup>62</sup> But while intended parents initiate the process, which begins in the offices of counselors—often coordinated by a fertility clinic or matching agency—the delivery of pregnancy care places the surrogate at the center of decision-making.<sup>63</sup>

Even so, surrogacy agreements (as well as select statutory provisions) attempt to shift some decision-making back to intended parents by having parties pledge to share information and decisional authority.<sup>64</sup> An American College of Obstetricians and Gynecologists (ACOG) Committee Opinion explains that the physician’s responsibility is to “communicate clearly to the patient the primacy of her right to autonomous decision making related to her health and her pregnancy, which includes the right to choose what information she does and does not wish to receive or share.”<sup>65</sup> Yet, the ACOG opinion envisions the physician’s role as a quasi-conflict manager, “who counsel[s] women . . . [and] encourage[s] them to discuss with the intended parent(s) as many foreseeable decision-making scenarios in pregnancy as possible,” which “should be formally documented in the gestational surrogacy contract.”<sup>66</sup> The ACOG opinion suggests that

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61. One psychologist working in the fertility industry commented that patients receiving fertility services need an “opportunity to think through the sort of social and emotional aspects of a choice.” JODY LYNEÉ MADEIRA, TAKING BABY STEPS: HOW PATIENTS AND FERTILITY CLINICS COLLABORATE IN CONCEPTION 205 (2018).

62. The advice of the National Fertility Association provides an example; its online advice website, “The Role of the Fertility Counselor,” stresses that counseling sessions are the place to reach an agreement about potential difficult situations and decisions that might arise during pregnancy. Tara Simpson, *The Role of the Fertility Counselors*, RESOLVE: NAT’L FERTILITY ASS’N, <https://resolve.org/learn/what-are-my-options/surrogacy/fertility-counselors/> [<https://perma.cc/4T8T-ZUPA>] (last visited Feb. 17, 2023).

63. See Am. Coll. of Obstetricians & Gynecologists Committee on Ethics, Opinion No. 660: Family Building Through Gestational Surrogacy 5 (2016), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2016/03/family-building-through-gestational-surrogacy.pdf> [<https://perma.cc/GZS3-XWFY>] [hereinafter ACOG 2016 Opinion] (“There must be a clear understanding of how appropriate medical details related to the health of the fetus will be communicated to the intended parent(s) during the pregnancy, keeping in mind that such communications must take place only with the express consent of the pregnant patient.”).

64. In August 2019—before the pandemic—Illinois enacted a law that prohibits denial of intended parents’ entry into a delivery room when “the gestational surrogate is being induced or in labor,” unless the gestational surrogate’s life or health could be jeopardized, the gestational surrogacy contract prohibits entry, or “other good cause,” such as an intended parent’s presence “causing a disturbance or other security concerns.” 210 ILL. COMP. STAT. 85/6.27 (2019).

65. ACOG 2016 Opinion, *supra* note 63, at 4.

66. *Id.* at 4–5.

physicians should understand their patients' contractual duties before pregnancy and during pregnancy. But expecting physicians to interpret and apply surrogacy agreements seems beyond their professional expertise and obligations. Lawyers, on the other hand, come equipped to mediate disputes over prenatal and postnatal decisions.

Lawyers seek to keep clients out of court and in the agreements they negotiated, regardless of whether contractual terms are legally enforceable. But much is unknown about what occurs in lawyers' offices. Fertility agencies provide referrals to attorneys, and lawyers increasingly work directly or exclusively with agencies that assemble teams of professionals to assist clients.<sup>67</sup> From establishing escrow accounts for surrogates' payments to executing legal instruments that establish parental legal rights and duties, legal professionals participate before, during, and after the pregnancy. Lawyers draft the contract, often using model language or from boilerplates.<sup>68</sup> And intended parents almost always pay for the surrogate's attorney.<sup>69</sup>

The attorney's role in drafting the contract may help explain why contracts continue to include language that simultaneously guarantees surrogate autonomy while promising intended parents some role in pregnancy decisions. Courts are unlikely to enforce these provisions, so they rarely result in damages. But lawyers draft contractual provisions even when they know that those terms are difficult if not impossible to enforce.<sup>70</sup>

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67. See, e.g., *Legal Expertise and Guidance*, CONCEIVEABILITIES, <https://www.conceiveabilities.com/parents/legal-services-offered> [https://perma.cc/Z6XN-938J] (last visited Feb. 17, 2023) (highlighting a fertility agency offering services across states and describing the work of the in-house lawyer). Like health care entities generally, brokers and clinics have realized the financial advantages of consolidation. June Carbone & Jody Lynée Madeira, *Buyers in the Baby Market: Toward a Transparent Consumerism*, 91 WASH. L. REV. 71, 80 (2016). Specifically, fertility agencies have incentives to join networks for in-house financing, marketing, management of pharmaceuticals, and health-information technology. *Id.* at 81–82.

68. Rebouché, *supra* note 37, at 1611 (“Boilerplate contracts are available online and in handbooks for intended parents and their attorneys.”). Courtney Joslin notes that attorneys specializing in fertility services have been architects of state legislation, too: “[S]urrogacy attorneys who represent intended parents were the primary drafters of the legislation in Illinois and in California.” Joslin, *supra* note 24, at 429.

69. For example, the Washington State Uniform Parentage Act states: “The intended parent or parents must pay for independent legal representation for the woman acting as a surrogate.” WASH. REV. CODE § 26.26A.710(8) (2019). Likewise, the 2017 UPA sets out that “[t]he intended parent or parents must pay for independent legal representation for the surrogate.” UNIF. PARENTAGE ACT § 803(8) (UNIF. LAW COMM’N 2017); see also Daniel Schwartz, Comment, *Gestational Surrogacy Contracts: Making a Case for Adoption of the Uniform Parentage Act*, 33 WIS. J.L. GENDER & SOC’Y 131, 131 (2018).

70. Cathy Hwang draws from the “robust modern contracts literature, in which scholars have shown, compellingly, that there is often a link between how a contract is drafted, ex ante, and how it will be litigated, ex post.” Cathy Hwang, *Faux Contracts*, 105 VA. L. REV. 1025, 1033 n.28 (2019) [hereinafter Hwang, *Faux Contracts*] (emphasis added) (citing Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848 (2010)). Moreover, “other scholars have also shown that attention paid to the front-end contract drafting process can also reduce back-end enforcement costs.” *Id.* at 1039.

In this vein, gestational surrogacy agreements track patterns noticed by scholars writing about relational contracts.<sup>71</sup>

### *B. Relational Contracts*

Even in the absence of a real threat of liability or enforcement, the process of drafting a contract creates relationships that foster a sense of obligation. A sense of obligation and the strength of the parties' relationship may be fundamental to arrangements staying intact, even if courts may not award damages (and will not require specific performance) when surrogates do not observe safety precautions or take health protections.<sup>72</sup> The process of contract formation unearths potentially divergent expectations and sets in motion the means by which conflicts over those expectations will be resolved.

Relational contracting focuses on "the commitment that [parties] have made to one another, and the conventions that the trading community establishes for such commitments."<sup>73</sup> Cathy Hwang applied theories of relational contracting to "faux contracts," or contracts that are "heavily negotiated but [with] rarely triggered formal contracts and enforcement mechanisms."<sup>74</sup> She describes the benefit of a faux contract as allowing parties "to decouple ex ante contracting from ex post enforcement."<sup>75</sup> Though a court might not enforce a contract's terms, Hwang provides examples of lengthy, tailored, and sophisticated contracts that create a framework for how parties will conduct their relationship during the life of the agreement.<sup>76</sup>

As with Hwang's examples, parties to gestational surrogacy contracts rely on trust and reciprocity to implement obligations that a court may never

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71. See *id.* at 1044.

72. See MODEL ACT GOVERNING ASSISTED REPROD. § 714(3) (AM. BAR ASS'N 2019) (prohibiting specific performance as a remedy for breach if the agreement limits the rights of the surrogate to make decisions regarding her own health).

73. Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569. See generally Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 56–59 (1963); Robert E. Scott, *The Promise and the Peril of Relational Contract Theory*, in REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY 105, 108 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013).

74. Cathy Hwang, *Faux Contracts*, *supra* note 70, at 1044. See also Cathy Hwang, *Deal Momentum*, 65 UCLA L. REV. 376, 389 (2018) [hereinafter Hwang, *Deal Momentum*] ("existing explanations for why parties use preliminary agreements rely on formal enforcement as an important part of the story" but that explanation does not capture why contracts persist despite a credible threat of enforcement).

75. Hwang, *Faux Contracts*, *supra* note 70, at 1025.

76. Hwang, for instance, focuses on drafting non-binding term sheets in mergers and acquisitions to illustrate how "parties [can] harness the organizational and clarification benefits of creating a contract, while excluding most consequences of breach." *Id.* at 1027.

enforce.<sup>77</sup> For example, contracts can obligate a surrogate to give weekly reports or to allow intended parents to attend all medical appointments. But intended parents will not sue for breach if they miss a doctor's appointment, just as courts likely would not enforce a provision requiring a surrogate to give weekly reports. The contract, however, confers legitimacy on the parties' expectations, and the parties will think of and treat that contract as legally binding.<sup>78</sup>

The glue that holds the surrogacy arrangement together is "a sense of moral obligation" based on the relationship developed during contract negotiations—a relationship that lawyers facilitate.<sup>79</sup> Perceptions about *how* parties reached their agreement affect the quality of their relationship and the likelihood of their performance of the contract's terms. If parties are satisfied with the process of contract formation, they may be more willing to comply with the agreement.<sup>80</sup>

According to studies that describe the attitudes of surrogates and intended parents, the parties' sense of trust and mutually shared sense of obligation carries significant weight.<sup>81</sup> Gestational surrogates in Zsuzsa Berend's research consistently described their roles in relational terms.<sup>82</sup> Berend notes: "Surrogates take contract negotiations seriously even in states where such contracts are not legally recognized. . . . [C]ontract negotiations work out all the details of the agreement and also signal – at least to surrogates – the emotional compatibility of the parties and foreshadow the relationship."<sup>83</sup> Another study "found that surrogates can place a great deal of importance on this relationship which can determine how they perceive

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77. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (explaining that relational contracting emphasizes the social, community, and business norms that are meaningful to an ongoing relationship); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (discussing the role of bonds forged by reputation in contractual commitments); Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1270 (2015) (explaining "that people sometimes feel bound to exchanges when the law would release them" due to "[n]orms of promise keeping and reciprocity, interpersonal courtesy, and community reputation").

78. See Berk, *supra* note 56, at 159; see also Hwang, *Deal Momentum*, *supra* note 74, at 382 (referring to the importance of non-binding agreement as "signposts").

79. Hwang, *Deal Momentum*, *supra* note 74, at 409.

80. See Wilkinson-Ryan & Hoffman, *supra* note 77, at 1286–87.

81. Kim L. Armour, *The Lived Experiences of Intended Parents During Surrogate Pregnancy and Transition to Parenthood in Relation to the United States Healthcare System* 103 (Apr. 25, 2012) (Ph.D. dissertation, University of Texas at Tyler) (on file with the University of Texas at Tyler, Nursing and Theses Dissertations) ("Clearly relationships were critical for intended parents as they built a foundation for this journey of surrogate pregnancy. Many participants discussed stories of both positive and negative encounters, yet all participants agreed to the importance of building a relationship with their surrogate and other parties that were involved in the process.").

82. Berend, *supra* note 19, at 64–66.

83. *Id.* at 64.

their surrogacy experience.”<sup>84</sup> Surrogates and intended parents alike explain their participation in surrogacy by reference to their interpersonal relationships, and they resist any insinuation that they were motivated by financial gain or buying procreative services.<sup>85</sup> Studies of surrogate attitudes “have largely found that the majority of surrogates are primarily motivated by a wish to help a childless couple, with few mentioning financial motives.”<sup>86</sup>

Lawyers draft contracts that serve the ends of relationship building, and lawyers rely on the trust established between parties to encourage (and, perhaps, pressure) surrogates to share prenatal information and decision making with intended parents throughout the pregnancy.<sup>87</sup> After the contract is signed, attorneys intervene when a sense of obligation is not enough to resolve conflicts over terms that are otherwise unenforceable or will be difficult to enforce. Lawyers also intercede when a party believes the implementation of an agreement has unfair consequences.<sup>88</sup>

Hillary Berk describes the primary role of fertility lawyers “as ‘facilitators’ . . . [who] absorb, suppress, and avert crucial uncertainties that might otherwise elevate transaction costs, risk, and discord.”<sup>89</sup> Parties report disagreements to lawyers, who diffuse conflicts by reference to the contract and through refereeing the dispute.<sup>90</sup> According to Berk’s survey of surrogacy lawyers across the country, attorneys spend much of their practice balancing the power that surrogates and intended parents have over each

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84. Vasanti Jadva, Susan Imrie & Susan Golombok, *Surrogate Mothers 10 Years On: A Longitudinal Study of Psychological Well-Being and Relationships with the Parents and Child*, 30 HUM. REPROD. 373, 374 (2015) [hereinafter Jadva et al., *Surrogate Mothers 10 Years On*]. Surrogates report high levels of cooperation between parties, particularly with intended mothers: “None of the women reported having a relationship characterized by ‘major conflict or hostility’ with either the commissioning mother or the commissioning father.” Vasanti Jadva, Clare Murray, Emma Lycett, Fiona MacCallum, & Susan Golombok, *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196, 2199 (2003) [hereinafter Jadva et al., *Experiences of Surrogate Mothers*]. Studies of surrogate mental health after an arrangement has concluded indicate “that the majority of surrogates do not experience psychological problems.” Jadva et al., *Surrogate Mothers 10 Years On*, *supra*, at 374.

85. Berend, *supra* note 19, at 64–66.

86. Jadva et al., *Surrogate Mothers 10 Years On*, *supra* note 84, at 374. In one study, ninety-one percent of participants reported “wanting to help a childless couple” among the reasons to become a surrogate; only three percent indicated that payment played *any* role in their decision. Jadva et al., *Experiences of Surrogate Mothers*, *supra* note 84, at 2199.

87. Berk, *supra* note 56, at 148 (describing contracts as a series of “symbolic representations, and . . . cultural displays”); see also David A. Hoffman & Zev J. Eigen, *Contract Consideration and Behavior*, 85 GEO. WASH. L. REV. 351, 365 (2017) (noting the importance of contract formation).

88. Wilkinson-Ryan & Hoffman, *supra* note 77, at 1271. For some parties, the trust established in contract formation might lead to “tak[ing] fewer precautions, [or] seeking less information” that would otherwise be relevant to future decisions. *Id.*

89. Berk, *supra* note 56, at 148.

90. Berk describes how surrogacy lawyers rely on “the web of formal restrictions in contracts, along with informal practices like ‘triage.’” *Id.* at 156.

other—enabling intended parents’ desire for control while seeking to protect a surrogate’s privacy and independence.<sup>91</sup>

The attorneys interviewed by Berk recounted that intended parents routinely tried to control surrogates’ behavior. Indeed, contract language may embolden intended parents to intensify bodily surveillance of surrogates in ways repugnant to their decisional autonomy. But when parents became too controlling or demanding, surrogates withheld information or blocked parents from participating in pregnancy decisions. Both actions could be in non-compliance with a contract: intended parents usually agree to respect the surrogate’s autonomy, and the surrogate usually agrees to provide parents with prenatal information. When that does not occur, lawyers deploy tactics that fall across a spectrum from persuasion to coercion. At one end, contracts contemplate remedies for breach, and lawyers can threaten consequences for non-compliance even if they know a remedy like money damages may not materialize. At the other end, lawyers reported counseling clients to adopt different approaches and attitudes not just to comply with the contract, but also to preserve the parties’ relationship.<sup>92</sup> Viewed in this way, lawyers’ self-described “triage” role, according to Berk, helps ensure that the arrangement works, and the contract helps manage the emotions and expectations of the parties.<sup>93</sup>

This management comes with a financial reward for lawyers and the fertility agencies to which lawyers may be connected. Fertility professionals’ incentives, however, go beyond the financial and implicate the relational stakes described here.<sup>94</sup>

### C. Contract Compliance

As the last section explained, parties to contracts appear to adhere to the terms even if the clauses in those contracts are unenforceable. When a surrogate or an intended parent breaches the agreement, contracts often obligate parties to repay any fees and expenses, as well as reasonable attorneys’ fees.<sup>95</sup> But there are scarce examples of litigation concerning the

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91. *Id.* “[T]riage,” according to Berk’s study, is deployed by lawyers “to prevent emotional attachment, resentment, or alienation in the surrogate mother and handle feelings like vulnerability, anxiety, and jealousy in the intended parents.” *Id.*

92. *Id.* at 156–58, 161.

93. Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2316, 2335 (1995) (describing the roles of lawyers and physicians as “intermediaries” and “third-party buffer[s]” in surrogacy arrangements). The importance of intermediaries is a source of commentary, with analogies for the surrogacy context, in commercial contracts.

94. Armour, *supra* note 81, at 104.

95. For example, Colorado law entitles the nonbreaching party to “remedies available to law or in equity” if the agreement is breached. COLO. REV. STAT. § 19-4.5-112(3) (2021). Whether most

breach of contract terms governing prenatal care. Courts will not require specific performance of a clause governing personal behavior or medical care.<sup>96</sup> In addition, parties risk destroying their relationship and ending an arrangement if they were to sue for breach during a pregnancy.

Though tensions between surrogates' rights as patients and intended parents' interests in a resulting child can cause a relationship to break down, available evidence suggests that most agreements do not.<sup>97</sup> But it is difficult to know what happens when conflicting interests in controlling prenatal behavior and information produce disputes because those disagreements are managed within the confidential arrangement between the parties. The fact that disputes are not resolved through litigation does not necessarily indicate the frequency with which conflicts arise.<sup>98</sup>

One explanation for why surrogacy arrangements hold together, even when conflicts arise, is the power intended parents exercise over the process and the surrogate, in part because of their roles as payors. Although laws mandate legal representation for surrogates that is independent from intended parents' representation,<sup>99</sup> legal professionals, especially when tied to a fertility agency, ensure that intended parents' interests in pregnancy management are an essential part of the contact and clinical care.<sup>100</sup> Seeing only the intended parents' bargaining advantages, however, might miss the complexity of the relationships at issue. The parties' bargaining power typically fluctuates as they engage with legal and fertility professionals, who have their own interests and incentives for shifting control among the parties as a pregnancy progresses. Many surrogates in the United States are middle-class, married, white, in their late twenties or early thirties, and have

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surrogates can reimburse intended parents has been a subject of debate. *See, e.g.*, Deborah L. Forman, *Abortion Clauses in Surrogacy Contracts: Insights from a Case Study*, 49 *FAM. L.Q.* 29, 45 (2015).

96 UNIF. PARENTAGE ACT § 812(c)–(d) (UNIF. LAW COMM'N 2017); MODEL ACT GOVERNING ASSISTED REPROD. § 714 (AM. BAR ASS'N 2019) (prohibiting specific performance as a remedy for breach if the agreement limits the rights of the surrogate to make decisions regarding her own health); COLO. REV. STAT. § 19-4.5-112(4) (2021).

97. *See* Forman, *supra* note 95, at 49–52 (discussing the role of lawyers, mental health professionals, and fertility agencies in communicating expectations and information to surrogates and intended parents).

98 *See, e.g.*, Emma Cummings, Comment, *The [Un]Enforceability of Abortion and Selective Reduction Provisions in Surrogacy Agreements*, 49 *CUMB. L. REV.* 85, 87, 103–04 (2018) (noting a recent dispute between intended parents and a surrogate that settled out of court).

99 Jill Hasday called for independent representation for surrogates well before contemporary legislation mandated it. Hasday argued that rather than require surrogates to forgo compensation, laws should protect surrogates from exploitation through guarantees of independent counsel, paid for by the intended parents, and through mandatory disclosure about the risks associated with surrogacy. Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 *HARV. L. REV.* 491, 526 (2005).

100. Fertility agencies advertise their collaborations with healthcare providers in preparing communication tools for parties before and during pregnancy. Jody Lyneé Madeira & Barbara Andraka-Christou, *Paper Trails, Trailing Behind: Improving Informed Consent to IVF Through Multimedia Applications*, 3 *J.L. & BIOSCIENCES* 2, 2–28 (2016).

at least one child.<sup>101</sup> Some laws include provisions that surrogates be “financially secure” and cannot be recipients of public assistance;<sup>102</sup> these requirements mimic existing industry norms and standards.<sup>103</sup>

Fertility agencies, as well as clinics taking on agency-like roles, exert a lot of power over the process even though those entities largely are unaddressed by recent state laws.<sup>104</sup> Establishing some level of equality between parties can be in the best interest of fertility agencies. Fertility specialists’ reputations and brand are tied to matching intended parents with surrogates and having arrangements succeed.<sup>105</sup> Indeed, surrogacy differs in one key respect from the industries studied by scholars of relational contracts.<sup>106</sup> That research shows that relational contracting is powerful

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101. Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 30–31 (2005) (gestational surrogates are typically “in their twenties or thirties, [w]hite, Christian, married, and have children of their own.”); see Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection*, 104 CORNELL L. REV. ONLINE 114, 125 (2019) (“American surrogates are less likely to be illiterate, economically vulnerable, or otherwise disadvantaged when negotiating terms of their reproductive work.”); Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U. J. GENDER SOC. POL’Y & L. 555, 560 (2013) (“The profile of surrogate mothers emerging from the empirical research in the United States and Britain does not support the stereotype of poor, single, young, ethnic minority women whose family, financial difficulties, or other circumstances pressure her into a surrogacy arrangement. Nor does it support the view that surrogate mothers are naively taking on a task unaware of the emotional and physical risks it might entail.”) (quoting Karen Busby & Delaney Vun, *Revisiting The Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 51–52 (2010)). Other scholarship highlights differences in ages, education or income levels, and life experiences between intended parents and surrogates. See Berk, *supra* note 56, at 151 (“[C]ritics of surrogacy emphasize the . . . control of pregnant bodies that varies by class, race, place, and lack of power.”); Hasday, *supra* note 99, at 519–20 (citing “evidence . . . that surrogate mothers typically occupy a relatively low socioeconomic status”).

102. See, for example, a Minnesota bill that, among other prerequisites, requires that a surrogate must be “financially secure” and cannot be the recipient of public assistance. S.F. 1152, 91st Leg., 1st Reg. Sess. (Minn. 2019) (defining “financially secure” as “meaning the gestational surrogate’s household, excluding a homestead mortgage and automobile loan payments, has less than \$10,000 of debt at the time of the creation of the gestational surrogacy contract”).

103. Many agencies impose requirements of financial security, such as barring surrogates who receive government assistance. See *Surrogate Requirements at ACRC Global Surrogacy*, ACRC GLOB., <https://www.acrc-global.com/surrogate-requirements> [<https://perma.cc/WB25-HHKN>] (surrogate “must be financial and living stable: You need to give up food stamp or any other government assistance in surrogacy.”) (last visited Feb. 25, 2023).

104. The CPSA is also instructive here; the legislation is accompanied by an agency registration system. A bill introduced in the New York State General Assembly elaborates further the requirements and criteria for the operation of surrogacy programs. Assemb. B. 6832-B, 2021 Gen. Assemb., Reg. Sess. (N.Y. 2021) <https://www.nysenate.gov/legislation/bills/2021/A6832> [<https://perma.cc/D45D-TBJL>].

105. Typically, when there are problems with intermediaries’ actions, commentators refer to the costs of professional disciplinary actions and, in the context of relational contracting, reputational damage. Hwang, *Faux Contracts*, *supra* note 70, at 1070–71.

106. See generally Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

because the parties negotiating an agreement are repeat players in insular fields. Thus, reputation matters a great deal. In gestational surrogacy, the parties to a contract are not repeat players; most surrogates and intended parents only undergo the process one, maybe two times, and rarely enter a contract with each other again.<sup>107</sup> Rather, lawyers' and agencies' reputations and relationships are at stake.<sup>108</sup>

The COVID-19 pandemic has tested the ability of agencies and lawyers to balance the interests of parties behind the scenes; the urgency of assuring intended parents and informing potential surrogates resulted in agencies posting their policies on public websites. Preparations and adjustments because of the pandemic demanded that agencies share information with parties as circumstances changed from March 2020 onward. That information often entailed guidance directly affecting surrogates' prenatal behavior. Moreover, the question of vaccination has spotlighted disputes—and divergent political and health beliefs—among intended parents and surrogates.<sup>109</sup>

### III. PANDEMIC CONTRACTS

At first, travel restrictions and occupancy limits in delivery rooms changed the nature of parties' agreements; more recently, vaccinations and booster shots have.<sup>110</sup> A survey of seventy major U.S.-based surrogacy agencies revealed varying approaches to informing current and prospective

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107. Ian Macneil argued that traditional contract theory failed to appreciate complex relationships that change over time, and instead (inaccurately) framed contracts as discrete transactions. Ian R. Macneil, Commentary, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 594–95 (1974). Arguably, although there is usually one contract between the parties, surrogacy agreements have some of the characteristics that Macneil describes because they last over the course of a pregnancy with provisions that apply to the parties' future relationship.

108. Carbone & Madeira, *The Role of Agency*, *supra* note 31, at 25 (“Repeat players in surrogacy arrangements can anticipate what can and will go wrong and design procedures accordingly. . . . [C]ommercial agencies . . . subject to appropriate regulation and oversight, are more likely to protect the parties involved in a surrogacy arrangement than laws that restrict surrogacy to altruistic exchanges.”).

109. “The recent approval of the coronavirus vaccine(s) presents a perfect example of this, as there are currently conflicting views as to whether it is advisable to obtain such a vaccine during or immediately before pregnancy. . . . [G]uidance on these topics will not be found in the text of the statute or even in DOH regulations.” Williams, *supra* note 38.

110. Deharo and Madanamoothoo briefly explored the possibility of intended parents suing for the right to be present in the hospital room in the face of hospital limitations on who can be in the delivery room. Deharo & Madanamoothoo, *supra* note 7, at 350. Lyon, *supra* note 6, at 12. For those agencies that work with intended parents living outside of the United States, websites included information about how possible travel restrictions might limit their ability to be at their child's birth and an overview of how to navigate those challenges. *See, e.g.*, ANGELS CREATION REPROD. CTR., <https://www.acre-global.com/blog/what-is-covid-19-s-impact-on-surrogacy> [<https://perma.cc/6HQQ-RM88>] (last visited Feb. 17, 2023); CTR. FOR SURROGATE PARENTING, <https://www.creatingfamilies.com/> [<https://perma.cc/T47G-6UGY>] (last visited Feb. 17, 2023).

surrogates and intended parents about evolving COVID policies.<sup>111</sup> Some agencies posted a COVID statement on their website, often in the form of a website banner or home page announcement, alerting visitors to their health precautions and COVID-related practices.<sup>112</sup> Some agencies provide a portal feature with COVID-related information, accessible to clients only by login and not available for public viewing.

Posted policies largely reflect the guidance of federal agencies and professional organizations. But they also represent the efforts of fertility professionals to manage conflicts over health precautions with tools that range from incentives to mandates. Typically, those incentives and mandates are hard to see; they are the subject of confidential contracts and conversations. But the pandemic brought to light how fertility professionals sought to reassure clients and attract potential surrogates.

#### *A. Pandemic Precautions and Vaccinations*

Vaccination guidelines from the Centers for Disease Control and Prevention (CDC) for pregnant and lactating people, coupled with vaccine mandates in workplaces and healthcare settings, significantly influenced

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111. For this essay, the online materials of seventy national surrogacy agencies were reviewed and the references to the COVID-19 pandemic catalogued. *See, e.g., Gestational Surrogacy*, ADOPTION & SURROGACY CHOICES OF OKLA., [https://perma.cc/49JQ-MTN2](https://adoptionchoicesofoklahoma.org/surrogacy/)] (last visited Feb. 17, 2023); ALL FAMS. SURROGACY, LLC, <https://www.allfamiessurrogacy.com/> [https://perma.cc/QV3D-TAGS] (last visited Feb. 17, 2023); CREATIVE CONCEPTION, INC., <https://www.creativeconceptioninc.com/> [https://perma.cc/DR6D-JVJA] (last visited Feb. 17, 2023); FAM. CREATIONS, LLC, <https://www.familycreations.net/> [https://perma.cc/Y2VL-Q4Q4] (last visited Feb. 17, 2023); FERTILITY SOURCE COS., <https://www.fertilitysourcecompanies.com/> [https://perma.cc/3E8Q-SZXG] (last visited Feb. 17, 2023); GROWING GENERATIONS. LLC, <https://www.growinggenerations.com/> [https://perma.cc/BB4U-W4TY] (last visited Feb. 17, 2023); GSHC SURROGACY AGENCY, <https://gshcsurrogacy.com/> [https://perma.cc/F63Z-NSR5] (last visited Feb. 17, 2023); HATCH FERTILITY, <https://www.hatch.us/> [https://perma.cc/A74Z-6WVF] (last visited Feb. 17, 2023); HOPE SURROGACY, <https://hopesurrogacy.com/> [https://perma.cc/RZW9-JH6S] (last visited Feb. 17, 2023); IARC SURROGACY, <https://www.iarcsurrogacy.com/> [https://perma.cc/4HVD-VDNY] (last visited Feb. 17, 2023); OMEGA FAM. GLOB., <https://www.ofgsurrogacy.com/> [https://perma.cc/C4YW-LKFS] (last visited Feb. 17, 2023); SURROGATE SOLS., <https://www.surrogatesolutions.net/> [https://perma.cc/6WAW-SGLF] (last visited Feb. 17, 2023).

112. *See, e.g., A Letter from BFI About Covid-19*, BLDG. FAMS., INC., <https://web.archive.org/web/20201128023436/https://www.buildingfamiliesinc.com/en/2020/03/safety-support-covid-19-response/> [https://perma.cc/Z6EB-65LW] (last visited Feb. 17, 2023); EGG DONOR & SURROGACY INST., <https://eggdonorandsurrogacy.com/> [https://perma.cc/CZU4-FHB2] (last visited Feb. 17, 2023) (information linked in banner); *Covid-19 Update from ASRM*, W. COAST SURROGACY INC., <https://www.westcoastsurrogacy.com/blog/covid-19-update-from-asrm> [https://perma.cc/HDP6-8ZQ8] (last visited Feb. 17, 2023); *Ensuring Patient Safety During the COVID-19 Pandemic*, AM. FERTILITY SERVS., <https://web.archive.org/web/20210509082147/https://americanfertility.com/safety/> [https://perma.cc/3MTX-96G8] (last visited Feb. 28, 2023) (information linked on front page); NW. SURROGACY CTR., <https://nwsurrogacycenter.com/> [https://perma.cc/4S3J-2ULR] (last visited Feb. 17, 2023) (information linked in banner); ELITE FERTILITY SOLS., <https://www.elitefertility.com/> [https://perma.cc/8HZV-JBC9] (last visited Feb. 17, 2023) (information contained in pop-up window).

gestational surrogacy arrangements. In September 2021, the CDC issued its most insistent guidance to pregnant and lactating people, strongly recommending they get vaccinated against COVID either before or during their pregnancy.<sup>113</sup> In response to recent studies, the CDC determined that any risks from vaccination outweighed the risks of contracting the virus while unvaccinated and pregnant.<sup>114</sup> The CDC warned that pregnant people are at greater risk of severe illness and death, and COVID infection can increase the incidence of preterm birth or stillbirth.<sup>115</sup>

Likewise, in August 2021, a leading professional organization offering guidance to healthcare providers, the American Society for Reproductive Medicine (ASRM), updated its Patient Management and Clinical Recommendations During the Coronavirus Pandemic.<sup>116</sup> ASRM announced the following policy position regarding vaccination: “[C]linics should strongly consider requiring vaccination for gestational carriers and advise intended parents to include requirement of vaccination of gestational carriers in their contracts.”<sup>117</sup> The December 2021 ASRM Update recommends that pregnant people receive booster shots.<sup>118</sup>

Agencies used their webpages and blogs to explain guidelines surrounding COVID vaccination and to dispel misinformation.<sup>119</sup> To be sure, some agencies’ materials made no mention of vaccination. But the trend for larger entities was to address the vaccination of surrogates directly

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113. Health Advisory, Centers for Disease Control and Prevention, COVID-19 Vaccination for Pregnant People to Prevent Serious Illness, Deaths, and Adverse Pregnancy Outcomes from COVID-19 (Sept. 29, 2021), <https://emergency.cdc.gov/han/2021/han00453.asp> [<https://perma.cc/3UW7-F2P5>].

114. *Id.*

115. *Id.* And, contrary to early concerns, vaccines have not been shown to have a negative effect on fertility. *Id.*

116. *Update No. 17 – COVID-19 Vaccination and Vaccination Hesitancy*, AM. SOC’Y REPROD. MED. (Aug. 20, 2021), <https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/covid-19/covidtaskforceupdate17.pdf> [<https://perma.cc/N9KU-PWA6>].

117. *Id.*

118. *UPDATE No. 19 – Awareness of Complexity in Uncertain Times*, AM. SOC. REPROD. MED. (Dec. 17, 2021), <https://www.asrm.org/news-and-publications/covid-19/covid-19-press-releases-and-announcements/update-no.-19--awareness-of-complexity-in-uncertain-times-covid-19/> [<https://perma.cc/TE3W-D9D9>] (“Pregnancy is a well-recognized risk factor for severe maternal and neonatal COVID-19 infection outcomes. Providers are encouraged to continue to recommend COVID-19 vaccination, and boosters, and to discuss directly any concerns that patients and partners may have regarding vaccination.”).

119. *See* COVID-19, HEARTLAND SURROGACY, <https://www.heartlandssurrogacy.com/covid-19-and-surrogacy/> [<https://perma.cc/MKK9-643M>] (“Covid-19 Vaccination: At this time, leading health organizations are recommending the COVID vaccine for persons that are pregnant or planning to become pregnant. Many fertility clinics are now requiring vaccination as well.”) (last visited Feb. 28, 2023).

and publicly, either by recommending or requiring vaccination as part of surrogate eligibility and as part of the matching process.<sup>120</sup>

For instance, in January 2021, Three Sisters Surrogacy and Family Solutions International (two prongs of a single surrogacy operation) issued the following statement:

Family Solutions International respects the patient’s autonomy when it comes to their decision whether or not to get the Covid-19 vaccine. Family Solutions International will encourage and facilitate the discussion of whether or not to get the Covid-19 vaccine with our gestational carriers and their intended parents upon matching and while in cycle. We will ensure that the discussion is clear and the outcome is included in the legal agreements for the match.<sup>121</sup>

This statement reflects a matching process that incorporates vaccination status, tracking the practice of other fertility agencies.<sup>122</sup> One agency had prospective surrogates fill out a questionnaire and answer whether they had been vaccinated.<sup>123</sup> For another, a questionnaire asked whether an applicant was vaccinated and if the answer was “no,” the next question explained that many IVF clinics require vaccination and asked whether the applicant would be willing to get vaccinated; the agency’s Q&A webpage asserted that families generally request to be matched with a vaccinated surrogate and fertility clinics require surrogates be vaccinated.<sup>124</sup> To be a surrogate at

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120. Heartland Surrogacy in Iowa included a note on vaccination on its COVID-19 Updates page: “At this time, leading health organizations are recommending the COVID vaccine for persons that are pregnant or planning to become pregnant.” *Covid-19 Updates*, HEARTLAND SURROGACY <https://www.heartland-surrogacy.com/covid-19-and-surrogacy/> [<https://perma.cc/8Z9H-ZKXE>] (last visited Feb. 17, 2023).

121. *COVID-19 Statement*, THREE SISTERS SURROGACY & FAM. SOLS. INT’L (Jan. 7, 2021), <https://www.3sistersurrogacy.com/covid-19-statement/> [<https://perma.cc/Z8UK-7G9F>].

122. Heartland Surrogacy announced in a blog post, “At Heartland Surrogacy, we ask about vaccination during the application and matching stage and match intended parents and surrogates accordingly.” *Are COVID-19 Vaccines Available for People Who Are Pregnant?*, HEARTLAND SURROGACY, <https://www.heartland-surrogacy.com/covid-vaccine-and-pregnancy/> [<https://perma.cc/U6LF-N9KJ>] (last visited Feb. 18, 2023). Other centers or agencies had similar language. See, e.g., *COVID-19 Information*, MAIN LINE FERTILITY, <https://www.mainlinefertility.com/covid-19-information/> [<https://perma.cc/2MRP-RWLB>] (last visited Feb. 18, 2023); *COVID-19 Information for Penn Fertility Patients*, PENN MED. (Aug. 4, 2021), <https://www.pennmedicine.org/for-patients-and-visitors/find-a-program-or-service/penn-fertility-care/message-to-penn-fertility-patients> [<https://perma.cc/KY35-95DE>]; *COVID-19 Health Alert*, CCRM FERTILITY, <https://www.ccrmivf.com/covid19/> [<https://perma.cc/63UC-LGHW>] (last visited Feb. 19, 2023); *WFI Statement COVID-19*, WIS. FERTILITY INST. (Mar. 1, 2022), <https://wisconsininfertility.com/wfi-clinic-continuity-covid-19-guidelines/> [<https://perma.cc/9X4P-T3SQ>].

123. *Inquire to Become a Surrogate*, HOPE SURROGACY, <https://hopesurrogacy.com/become-a-surrogate/> [<https://perma.cc/E47N-5HWV>] (last visited Feb. 19, 2023).

124. *Hello! Thank You for Considering Being an Amazing Surrogate.*, NW. SURROGACY CTR., LLC, <https://nwsurrogacycenter.com/surrogate-eligibility/> [<https://perma.cc/R3W3-PG5U>] (last visited Feb. 19, 2023).

Roots Surrogacy in California, any prospective surrogate must be either be vaccinated or willing to be vaccinated.<sup>125</sup> Since October 4, 2021, ORM Fertility in Portland, Oregon, has required that “[a] copy of the [COVID] vaccination record . . . be entered into the gestational carrier’s ORM chart before they begin their treatment cycle.”<sup>126</sup> Creative Family Connections likewise required that all surrogate candidates be vaccinated and provide proof of vaccination.<sup>127</sup>

Different views on vaccination, tracking public debate on COVID vaccines, have been a source of contention between surrogates and intended parents.<sup>128</sup> Agencies indicated that there also was a significant population of intended parents who do not want surrogates to be vaccinated:

About half of the parents working with Massachusetts-based Circle Surrogacy now want a surrogate who’s not planning to get vaccinated during her pregnancy. . . . [T]he agency . . . even had a surrogate and set of intended parents dissolve their partnership because they couldn’t agree on whether the surrogate should get vaccinated. . . . An agency based in California, Surrogate First, has had about a quarter of intended parents say they want an unvaccinated surrogate . . . . And sometimes, they’re willing to go to extreme lengths to make that happen.<sup>129</sup>

The director of the agency Surrogate First noted that “[w]e had intended parents who did not want her [the surrogate] to have the vaccination, were worried about COVID, and they actually paid for her lost wages to not work the last three months’ of her pregnancy.”<sup>130</sup> Lila Seif, an attorney at New Family Fertility Law, concentrated on the consequences for contract enforcement:

If a Gestational Carrier agreed in the contract to receive the vaccine and later refused, this again could not be forced upon her. However, to the extent that her breach of that term caused damage, she

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125. *Surrogate Requirements and Compensation*, ROOTS SURROGACY, <https://rootssurrogacy.com/surrogate> [<https://perma.cc/9ZUJ-PTZ4>] (last visited Feb. 19, 2023).

126. *COVID-19 Update*, ORM FERTILITY, <https://ormfertility.com/covid-19/> [<https://perma.cc/SA8B-MC6E>] (last visited Feb. 19, 2023).

127. *Surrogacy and COVID-19 FAQ*, CREATIVE FAM. CONNECTIONS, <https://web.archive.org/web/20221209012131/https://www.creativefamilyconnections.com/surrogacy-and-covid-19-faq/> [<https://perma.cc/HZ97-S3SM>] (last visited Feb. 28, 2023).

128. Cari Shane, *Where Have All the Surrogates Gone?* FORTUNE (June 4, 2021, 7:00 AM), <https://fortune.com/2021/06/04/pregnancy-how-to-find-a-surrogate-covid-post-pandemic-2021/> [<https://perma.cc/U8JF-6CRH>].

129. Carter Sherman, *Parents Are Demanding Surrogates Who Won’t Get the COVID Vaccine*, VICE NEWS (Mar. 9, 2021, 9:11 AM), <https://www.vice.com/en/article/qjppq3/parents-are-demanding-surrogates-who-wont-get-the-covid-vaccine> [<https://perma.cc/9BZ7-CFJG>].

130. *Id.*

theoretically would be responsible. For this reason, it's recommended that if vaccination is important to a particular Intended Parent, they should be matched with a Gestational Carrier who is in fact already vaccinated.<sup>131</sup>

Contract did the work of conflict diffusion, channeling parties' preferences about "Covid lifestyle issues, including vaccination status, social distancing considerations, and other relevant factors" into drafting the agreement.<sup>132</sup>

Indeed, suggesting the importance of vaccination to the stability of the parties' relationship, an attorney specializing in surrogacy contracts wrote:

For surrogates deciding to vaccinate, it is recommended that their spouse and all of their eligible household members be vaccinated as well. Obviously, intended parents have no control over the vaccination status of anyone in a gestational carrier's household, including the gestational carrier herself. However, the increased likelihood of infection from unvaccinated household members could cause some surrogacy contracts to be put on hold.<sup>133</sup>

The emphasis is on coming to an agreement, if possible, to avoid future misunderstandings that might threaten the stability of the parties' arrangement. Emphasizing surrogates' rights and protection, another attorney advised:

Because of the inherent difference in bargaining power and her basic right to bodily autonomy, a person acting as a surrogate should not be asked to agree in advance to make certain decisions or to allow the intended parents to make or approve decisions that impact her body. This includes decisions around COVID vaccination or treatment and day-to-day behaviors to minimize COVID risks . . . .<sup>134</sup>

So, at the point of matching, agencies express different opinions about how forceful their advice about vaccination can be.

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131. Donor Concierge, *Should Surrogates Get the COVID Vaccine?*, DONOR CONCIERGE (Aug. 26, 2021), <https://www.donorconcierge.com/blog/should-surrogates-get-the-covid-vaccine> [<https://perma.cc/W4KQ-QDWM>].

132. *Id.*

133. Stephanie M. Brinkley, *Why You Should Be Discussing the Covid-19 Vaccine with Your Surrogate*, BRINKLEY L. FIRM (Nov. 3, 2021), <https://www.brinkleylawfirmllc.com/why-you-should-be-discussing-the-covid-19-vaccine-with-your-surrogate/> [<https://perma.cc/HXF6-TN5B>].

134. Cathy Sakimura & Emily Galpern, *Ethics of Surrogacy During COVID-19 Pandemic*, MEN HAVING BABIES, <https://menhavingbabies.org/surrogacy-resources/articles/user-view/post.php?permalink=ethics-of-surrogacy-during-covid-19-pandemic> [<https://perma.cc/8KHS-MKCC>] (last visited Feb. 19, 2023).

Creative Family Connections offers a detailed example of how gestational surrogacy processes have responded to COVID.<sup>135</sup> The agency is a dual law firm and fertility broker and operates like many large-scale surrogacy entities; it matches parties, represents the intended parents, ensures a surrogate has representation, and partners with a reproductive endocrinologist. In 2020, Creative Family Connections posted a presentation detailing measures it took to make the process as smooth and as successful as possible. The discussion was led by the agency's director, and included a gestational surrogate who was then pregnant, an intended parent who was a former client, a fertility physician with whom the agency partners, and a case manager who "facilitates the journey for both the intended parents and the surrogate."<sup>136</sup>

The agency emphasized that it closely follows the recommendations of ASRM and other professional organizations as well as implements its own "very strict health and sanitizing measures."<sup>137</sup> In describing this protocol, the agency director began by describing the rigorous screening process for potential surrogates. The agency conducts three to five home visits to "make sure that [the surrogate's home is] a clean, safe, secure living environment."<sup>138</sup> These visits precede the psychological screening that takes place before a contract is signed. Home visits and psychological screenings were conducted via Zoom; medical screening continued in-person, which required the surrogate to travel to the agency's physician partner.<sup>139</sup>

On matching, the agency director opined that "there's a lot of trust in the surrogacy journey . . . there is a certain amount of gut instinct in choosing."<sup>140</sup> The agency matches surrogates to a clinic that is close to the intended parents "so [they] don't need to travel as far when [they] want to visit [their] gestational carrier and be there . . . for those very important steps," such as ultrasounds, and to increase communication between the parties.<sup>141</sup> The agreement maps out how often surrogates will travel and what precautions they will take. It sets out that intended parents will attend clinical appointments and be present at the birth, which the case manager "communicates to nurses and medical staff."

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135. Creative Family Connections, *Surrogacy in the Time of COVID-19*, YOUTUBE (July 3, 2020), <https://www.youtube.com/watch?v=4nGp-E5KBis> [<https://perma.cc/RWC8-3KLB>].

136. *Id.*

137. *Id.*

138. *Id.*

139. Because a medical exam can necessitate travel, Creative Family Connections states that it will "get the legal process finished" given the contract includes language on COVID's impact on the surrogate's travel, healthcare appointments, birth plans, safety precautions during pregnancy, and vaccination. *Id.*

140. *Id.*

141. *Id.*

Specific to COVID and to surrogates' prenatal care, the agency views the role of contract as making all parties feel comfortable and "managing expectations of the assumption of the risk."<sup>142</sup> The director continued by noting that the surrogate assumes the risk of contracting COVID; the intended parent assumes risks of COVID contraction by the child.<sup>143</sup> Per the former, the agency detailed the "dos and don'ts" outlined in the agreement: for example, the surrogate and her partner agree to wear masks and comply with CDC guidelines or local restrictions, whichever are stricter. Those recommendations include getting vaccinated. When asked about compliance with the COVID contract requirements the director responded that she had "never seen a surrogate push those limits."<sup>144</sup> Compliance with COVID protocol, in her view, is not a problem because surrogates have told her that they "took such good care of [themselves] because [the baby] is someone else's."<sup>145</sup>

When disagreements arose, the director and case manager reiterated the role of the agency as the conflict manager. The director offered that "you [the intended parent] are her cheerleader; you let us be the bad cops. . . . [I]f you think there's something that needs to be told in a sterner fashion . . . we never rat out the parents and say 'oh so-and-so said to us,' it's very easy to . . . make it come from us."<sup>146</sup> This intermediary role described by the director is the heart of the service that a surrogacy agency provides. As noted by June Carbone and Jody Madeira, "The formalization and professionalization of the process means that these professionals are likely to be held responsible for things that go awry, providing incentives for anticipating—and avoiding—potential sources of liability."<sup>147</sup>

### *B. Altruism and Exchange*

This essay has recounted how contracts reflect COVID concerns and how those provisions fit with existing understandings of surrogacy legislation and contract practices, particularly as relevant to prenatal decision-making. But the larger question is what these developments reveal about the nature of gestational surrogacy. The issue of vaccination challenges two foundational assumptions about gestational surrogacy: first, that contract practices that undermine rights to autonomy are the exception

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142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Carbone & Madeira, *The Role of Agency*, *supra* note 31, at 27.

and not the norm, and, second, that the relationship between parties is one based in altruism rather than employment or economic exchange.<sup>148</sup>

Taking the first, vaccination choices in surrogacy arrangements highlight the limits, or at least unexplored complications of, rights-based claims on behalf of surrogates. Statutes seek to guarantee surrogates' rights to autonomy and of bodily control, as the example of the CPSA Bill of Rights makes plain, and the language of agreements typically does the same.<sup>149</sup> But there are often competing demands on surrogate decision-making that are explicit in the contract as well as through the practical intervention by lawyers, case managers, or clinicians to manage surrogate behavior. The so-called "bad cops" of Creative Family Connections described above illustrate the point.

It would be a mistake, however, to assume that the COVID-19 pandemic introduced novel surveillance of surrogate decision-making.<sup>150</sup> To be sure, social distancing, wearing masks, and getting vaccinations are new forms of precautions that surrogates can take while pregnant, and, certainly, the threat of COVID contraction may have raised the stakes. But recall that contracts routinely ask surrogates to take measures to ensure a healthy pregnancy and to avoid activities that might cause fetal damage. Abstention clauses, which are found in almost every surrogacy agreement, oblige surrogates to refrain from "smoking, drinking alcohol, and taking illegal drugs,"<sup>151</sup> for example. Hillary Berk, in her review of hundreds of gestational surrogacy contracts, provides a picture of what provisions agreements include, from "requiring the surrogate to consume solely organic foods and supplements" to "engag[ing] in a particular activity—like acupuncture or going to the gym" while "prohibiting caffeine, sugar, or fast food" and banning "microwaves, hairspray, manicures, or changing cat litter."<sup>152</sup>

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148. The line between exchange and altruism is the subject of rich debate. On one side are scholars who challenge the perception that procreative services, when commodified, lose special value associated with intimate and family relationships; on the other are those who contest bifurcating family or intimate relationships and market or commercial interests. For a summary of both views, see Jody Lyné Madeira, *Conceiving of Products and the Products of Conception: Reflections on Commodification, Consumption, ART, and Abortion*, 43 J.L. MED. & ETHICS 293, 295–97 (2015); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 190–95 (2013).

149. Joslin, *supra* note 24, at 448 (noting the issues abstention clauses cover).

150. Law has always targeted the behavior and circumscribed choices of pregnant people with low incomes and pregnant people of color. See generally Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CALIF. L. REV. 781 (2014) (discussing criminal laws that target the behavior of pregnant people).

151. *Id.* at 418 (quoting R. Alta Charo, *Legislative Approaches to Surrogate Motherhood, in* SURROGATE MOTHERHOOD 88, 93 (Larry Gostin ed., 1990)).

152. Berk, *supra* note 56, at 156–57.

Whereas smoking while pregnant may be commonly recognized as unhealthy for the smoker as well as for the fetus, other activities historically listed in abstention clauses are less tethered to health protections. Take, for instance, the common contract provision requiring surrogates to abstain from sexual intercourse during the third trimester of pregnancy, even though by that time the fetus' genetic relationship to an intended parent rather than a surrogate's sexual partner is not at issue.<sup>153</sup> That provision appears to enact intended parents' preferences and sense of propriety rather than protect a surrogate's or a resulting child's health; it is an example of how contracts can embed stereotypes and expectations about what is appropriate behavior.

COVID-protection provisions express the values of the intended parents. Vaccination disputes also may take additional importance because vaccination refusal may signal differing politics between surrogates and intended parents.<sup>154</sup> The threat of COVID contraction, of course, is a concern both for individuals and for collective health, and, perhaps for these reasons, vaccination is a somewhat different choice than abstaining from smoking. However, COVID and non-COVID related provisions are, at bottom, about fetal protection. They express the interest intended parents have in a resulting child that is healthy and their desire to reduce all possible risks threatening that outcome. And, as the provision about sexual intercourse indicates, some aspects of that risk aversion may be emotional or psychological. When intended parents' desire for control begins to translate to enforcing contract provisions dictating behavior, professional intermediaries—fertility lawyers—intervene. Their goal is to keep the relationship from falling apart, and they rely on the trust established by the parties.

Second, the inherent conflict between surrogate autonomy and intended parents' control, which fertility agencies manage, is likely more palatable because of the popular narrative that surrounds surrogacy: surrogacy is not employment but is an act of altruism, akin to duties close family members assume.<sup>155</sup> Agencies' websites stress that surrogates, to participate, should

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153. Forman, *supra* note 95, at 47.

154. Conflicts over decisions to terminate pregnancies have made differing politics among the parties clear. As noted, ethnographies of contemporary surrogacy suggest many surrogates are white, middle class, and have strong religious affiliations. Ciccarelli & Beckman, *supra* note 101, at 30–31 (2005) (stating that gestational surrogates [in the United States] are typically “in their twenties or thirties, [w]hite, Christian, married, and have children of their own”). Rebouché, *supra* note 37, at 1614–16; Forman, *supra* note 95, at 34 (describing recurrent conflicts over decisions to terminate a pregnancy after discovery of fetal anomaly).

155. It is beyond the scope of this essay to analyze the significant literature on altruism and exchange in assisted reproduction. For a sample of that literature, see Michele Goodwin, *Reproducing Hierarchy in Commercial Intimacy*, 88 IND. L.J. 1289, 1290 (2013); Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1251 (2013); MARTHA A. FIELD,

“have a desire to help others have a family,”<sup>156</sup> “enjoy pregnancy and be motivated by the wish to help others create or add to their family,”<sup>157</sup> or be “kind-hearted and altruistic in your intent to help another family have the child they otherwise couldn’t have without your help!”<sup>158</sup> Indeed, vaccination gets to the heart of what the relationship between the parties is. In a context in which everyone’s choices about bodily control have been constrained during a pandemic, does a surrogate have rights that other pregnant people do not? What do surrogates give up and get in their arrangements? What do intended parents gain by requiring a surrogate to abstain from or submit to vaccination?

These questions test the idea that gestational surrogacy is based primarily on altruism and not on economic exchange. COVID and other behavioral restrictions may seem less aberrant if, like other employment concessions, vaccination is a compensated part of the deal. This is not to suggest that disparities in wealth between parties do not exist; even if those disparities are not stark, they shape bargaining power. But it bears repeating that people with financial resources have been able to outsource reproduction, while surrogates continued to go to physicians’ offices, seek prenatal care, and take risks in hospitals during birth. With fewer options, surrogates may have weaker bargaining positions.<sup>159</sup> Given the importance to intended parents, additional risks and additional asks associated with COVID could yield extra compensation. To carry through the example for the previous section, Creative Family Solutions has offered a “Stay-at-home Surrogate Stipend” of \$500 for surrogates who completed various parts of the process

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SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES 75–109 (expanded ed. 1990); Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L. MED. & HEALTH CARE 72 (1988); Debra Satz, *Markets in Women’s Reproductive Labor*, 21 PHIL. & PUB. AFFS. 107 (1992). See also MARTHA M. ERTMAN, *LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015); VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* (2005).

156. *Requirements for Becoming a Surrogate*, ART PARENTING, <https://www.artparenting.com/surrogate-requirements#:~:text=To%20become%20a%20gestational%20surrogate%2C%20you%20will%20undergo%20initial%20screenings,the%20in%20vitro%20fertilization%20process> [https://perma.cc/Z7SM-REQ9] (last visited Feb. 28, 2023).

157. *Become a Surrogate: Bring the Dreams of a Family to Life*, FAMILY SOURCE CONSULTANTS, <https://www.familysourceconsultants.com/surrogates/> [https://perma.cc/C7HT-T6TB] (last visited Feb. 28, 2023).

158. *Surrogacy Requirements and Qualifications*, IARC SURROGACY, <https://iarcsurrogacy.com/surrogate-requirements/#what> [https://perma.cc/W8TM-XVDB] (last visited Feb. 28, 2023).

159. Some surrogates may depend more heavily on the income provided by surrogacy because their jobs were disproportionately disrupted by the pandemic. As Mechele Dickerson notes, the pandemic revealed that the privileged could rearrange their lives to stay at home while their less privileged counterparts, unable to grapple in the same ways with the economic impact of COVID’s disruptions, continued to serve as essential workers who were disproportionately exposed to and died from COVID. Mechele Dickerson, *Protecting the Pandemic Essential Worker*, 85 L. & CONTEMP. PROBS. 177 (2022).

remotely.<sup>160</sup> As noted in the previous part, some surrogates have received additional compensation, such as lost wages, for complying with COVID precautions.<sup>161</sup>

Shifting frames from surrogacy as a gift to surrogacy as employment (or something like it) may serve surrogates' interests in some contexts and not in others; this essay does not stake a position in what is already a rich conversation about the commodification of reproductive services.<sup>162</sup> For those concerned about potential bargaining inequalities between surrogates and intended parents, measures that increase the leverage surrogates have in negotiating, drafting, and implementing agreements might result in meaningful financial gains for surrogates and their families. In the same vein, those seeking to reduce the potential for exploitation should question what contracts do to obscure the role of powerful, resource-rich actors in the fertility industry. The industry already has reputational and financial incentives to protect all parties' interests; those incentives become even stronger with increased oversight and attention to agencies' practices.

#### CONCLUSION

Law and policy might better address the role of fertility agencies and professionals in setting the norms of contract formation and implementation. One avenue would be for policy to shape the nature of surrogacy contracting through market incentives that affect lawyers' and brokers' actions. Looking to courts to police agencies will not be enough; although parties can sue each other for damages or breach, bringing to light the content of their contracts, hardly anyone turns to litigation unless parental rights and custody are at stake. Were states to intervene, as they have done to permit surrogacy generally, regulation might bring transparency to the work of agencies. Responding to the pandemic brought a measure of transparency to surrogacy contracting and to the entities that manage it. Policymakers might question if the laws they write address those practices and what new regulation of the fertility industry might accomplish and cost.

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160. On Creative Family Connections' website, the agency outlined a \$500 stay-at-home stipend for surrogates after they complete the pre-screening and home interview, as well as a guaranteed payment of \$1000 once they have passed psychological and medical screening. *Surrogate Compensation*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/about-surrogacy/surrogate-compensation/> [<https://perma.cc/WH86-GEUN>] (last visited Feb. 23, 2023).

161. Hillary L. Berk, *Savvy Surrogates and Rock Star Parents: Compensation Provisions, Contracting Practices, and the Value of Womb Work*, 45 *LAW & SOC. INQUIRY* 398, 413 tbl.2 (2021) (noting contracts that provide additional payment for invasive procedures).

162. See *supra* note 155 (providing a sample of scholarship on altruism and exchange in family law and reproduction).