

Contracts for Children: Constitutional Challenges to Surrogacy Contracts and Selective Reduction Clauses

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Are babies commodities? Are they a proper subject of contract law? Many states say no, holding surrogacy contracts void as against public policy. Others, however, enforce surrogacy contracts. In the rare instances when disputes arise over selective reduction clauses and/or parentage, should the intended parent be able to enforce the contract? If so, what remedies should be available when a surrogate mother breaches the contract? This Note examines the several constitutional challenges that can be raised in opposition to the enforcement of a surrogacy contract, and concludes that the constitutional rights of the surrogate mother outweigh the contractual rights of the intended parent(s) to a surrogacy contract. Thus, surrogacy contracts should be deemed void and, therefore, unenforceable. However, this should not eliminate surrogacy arrangements if surrogate gestational mothers and intended parents: (1) fully and properly investigate each other and have the difficult conversations about what should be done in the event that multiple pregnancies result; (2) discuss what will be done in the event that fetal abnormalities are discovered; and (3) discuss what will be done if the surrogate changes her mind about giving the baby up to the intended parents. Though uncomfortable, these conversations are bound to expose differences in opinions, allowing surrogates and wishful parents to make fully informed decisions in deciding to enter into surrogacy arrangements.

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INTRODUCTION

Surrogacy contracts are largely unregulated in the United States, despite the fact that they implicate a number of important legal issues and rights. Surrogacy contracts are not federally regulated.¹ State statutory and common laws that address or have been applied to surrogacy contracts vary greatly.² Several states choose not to statutorily regulate surrogacy contracts at all,³ while others ban surrogacy altogether.⁴

1. See ALEX FINKELSTEIN ET AL., COLUMBIA LAW SCH. SEXUALITY & GENDER CLINIC, SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 44, 57–63 (2016), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf (“In the U.S., [] [] states technically have purview over family law”); *State-by-State Surrogacy Summary*, CTR. FOR BIOETHICS & CULTURE, http://www.cbc-network.org/wp-content/uploads/2012/08/State-by-State_Surrogacy_Sum_CBC.pdf (last visited Jan. 19, 2019).

2. See, e.g., *infra* text accompanying notes 27–28.

3. See, e.g., FINKELSTEIN ET AL., *supra* note 1, at 57–62.

4. See *id.* at 63.

California, however, regulates gestational surrogacy⁵ agreements by statute, through California Family Code sections 7960 through 7962.⁶ Section 7962 provides requirements that surrogacy contracts must meet to be valid and enforceable.⁷ A contract that meets these requirements rebuts any presumption of parentage other than that of the intended parent or parents specified in the contract.⁸ Thus, under the statute, a party wishing to dispute the surrogacy agreement is limited to challenging the validity of the contract itself.⁹

For example, in 2017, the California Court of Appeal decided *C.M. v. M.C.*, which involved a surrogacy contract dispute arising under section 7962.¹⁰ The trial court held that, because the surrogacy agreement satisfied the requirements of section 7962, it was enforceable.¹¹ The appellate court affirmed the trial court's order declaring the intended father to be the sole legal parent of the children and holding that the surrogate mother had no parental rights.¹² In its analysis of section 7962, the appellate court noted that the California legislature's express intent in enacting the statute was to codify the California Supreme Court's decision in *Johnson v. Calvert* and the California Court of Appeal's decision in *In re Marriage of Buzzanca*.¹³

In *Johnson v. Calvert*, the California Supreme Court held that when two women each presented proof of maternity—either gestation or biological relation—the court would look to the parties' intent as evidenced by the surrogacy contract to determine which party was the legal mother.¹⁴ In *In re Marriage of Buzzanca*, the California Court of Appeal held that, when no party is genetically related to the child (both egg and sperm were donated), the intended parents who initiated the surrogacy agreement were the legal parents of any resulting children.¹⁵

California Family Code section 7962 establishes the minimum requirements for a surrogacy contract (assisted reproduction agreement) and a procedure by which the intended parent or parents can establish a legal parent-

5. Surrogacy may be gestational or traditional. In gestational surrogacy, the surrogate mother is genetically unrelated to the embryo, which is created through in vitro fertilization. The egg and sperm may be provided by a couple, or either may be provided by a donor, but the surrogate's own egg is not used. In traditional surrogacy, the surrogate's own egg is used to create the embryo, either through artificial insemination or in vitro fertilization. Today, gestational surrogacy is the most common form. See *About Surrogacy: The Different Types of Surrogacy: Which Is Right for You?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/types-of-surrogacy> (last visited Jan. 19, 2019).

6. CAL. FAM. CODE §§ 7960–62 (West 2018).

7. *Id.* § 7962.

8. *Id.*

9. *Id.* § 7962(f)(2).

10. 213 Cal. Rptr. 3d 351 (Ct. App. 2017).

11. *Id.* at 354.

12. *Id.*

13. *Id.* at 363 (citing *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998)).

14. 851 P.2d 776, 782 (Cal. 1993).

15. 72 Cal. Rptr. 2d 280, 290–91 (Ct. App. 1998).

child relationship with the fetus before birth.¹⁶ Section 7962 requires no home study or psychological screening of any party prior to forming the contract; it merely requires a showing that the assisted reproduction agreement meets the formal requirements of section 7962.¹⁷ For example, the statute requires a disclosure of insurance coverage for the surrogate mother's medical expenses and separate legal representation for each party to the contract.¹⁸ A surrogate may challenge the intended parent's right to a parent-child relationship with the resulting child *only* if she can challenge the validity of the assisted reproduction agreement by showing that it does not meet the requirements of section 7962.¹⁹

Many scholars have advanced persuasive arguments that the contractual approach is necessary to achieve predictability in surrogacy agreements and that arguments against enforceability patronize women by promoting the idea that women cannot voluntarily enter into such contracts.²⁰ This view is in harmony with that of the California Supreme Court expressed in *Calvert*:

The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock.²¹

This Note examines the constitutional rights of both parties to a surrogacy contract—the surrogate mother and the intended parent or parents.²² For example, both the surrogate mother's and the intended parent's fundamental right to privacy are implicated with respect to reproductive choice (the right to choose when and if one should become a parent). So too are the parties' due process rights respecting the fundamental right to a parental relationship with their child. Additionally, surrogacy contracts often contain provisions that infringe on the surrogate mother's right to privacy with respect to her right to refuse unwanted medical care.

More specifically, the selective reduction clauses typically found in surrogacy contracts vest the right to terminate a pregnancy under certain circumstances, such as a multiple pregnancy or the discovery that a developing fetus has serious birth defects, in the intended parent. In theory, this means that the intended parent can force a surrogate mother who is adamantly opposed to abortion to have her bodily integrity infringed, in violation of her fundamental

16. CAL. FAM. CODE § 7962 (West 2018).

17. *Id.*

18. *Id.*

19. *See id.*

20. *See, e.g.*, Deborah S. Mazer, Note, *Born Breach: The Challenge of Remedies in Surrogacy Contracts*, 28 YALE J.L. & FEMINISM 211, 216–17 (2016).

21. *Johnson v. Calvert*, 851 P.2d 776, 785 (Cal. 1993).

22. For the sake of simplicity, this Note tends to refer to the intended parent in the singular unless the factual situation dictates otherwise.

right to privacy and, perhaps, the free exercise of her religion.²³ By requiring each party to the contract to be represented by independent legal counsel, California's law attempts to ensure that surrogate mothers are informed of selective reduction clauses. However, these provisions do not adequately protect marginalized women from surprise abortion requests. Stricter regulation of surrogacy arrangements, such as requiring psychological and financial evaluations of the parties, however, cannot be the answer because such requirements would have discriminatory effects respecting fundamental reproductive rights.

This Note proposes that any given remedy for breach of a selective reduction clause may be deemed coercive, and specific performance is not and should not be available to contracting parents. After all, a surrogate has a fundamental right, applicable to the states through the Due Process Clause of the Fourteenth Amendment, to a parental relationship with the child she carries.²⁴ The surrogate, whether gestational or traditional, should be able to assert this right to challenge the surrogacy contract for up to seventy-two hours after birth, and all parties should be informed of this possibility before contracting. The seventy-two-hour time period would be consistent with the new Uniform Parentage Act's provision allowing a traditional surrogate to withdraw her consent to the agreement for up to seventy-two hours after birth,²⁵ and it would also account for the fact that the surrogate's physical relationship with the child is not complete until she has gone through labor and delivery.

While the risk of unenforceability may deter some intended parents from contracting with a surrogate, this Note argues that the possibility of unenforceability would incentivize intended parents to exercise due diligence in investigating surrogates, discussing the possibility of selective reduction, and finding counterparts whose beliefs and intentions align with their own. Thus, the possibility of unenforceability actually presents an opportunity for intended parents to find the most appropriate surrogate counterparts, and the best chance to obtain what they want from the contract and to avoid future disputes.

Part I of this Note examines the background of surrogacy contract law in the United States; the selective reduction clauses typically found in such contracts; and the development of surrogacy contract law in California, ending with the enactment of California Family Code section 7962. Part II addresses the challenges of balancing the contracting parties' fundamental rights when disputes arise. To prevent such disputes, should access to fertility services be regulated in the first place? Can an intended parent enforce a selective reduction clause against a surrogate, and if so, what is the appropriate remedy for breach?

23. This notion is premised on the belief that abortion is murder and, thus, violates a religious mandate, for example, the Sixth Commandment, *see Exodus* 20:13 ("Thou shalt not kill."), and that a court order requiring one to violate a religious mandate contravenes the Free Exercise Clause, *see U.S. CONST. amend. I*.

24. *See In re Baby M*, 537 A.2d 1227, 1253 (N.J. 1988) ("They are the rights of personal intimacy, of marriage, of sex, of family, of procreation. Whatever their source, it is clear that they are fundamental rights protected by both the federal and state Constitutions." (citations omitted)).

25. UNIF. PARENTAGE ACT § 814 (UNIF. LAW COMM'N 2017).

Furthermore, does any enforcement of a surrogacy contract impermissibly infringe upon a surrogate mother's constitutional rights? Part III offers a proposed solution of at-risk contracting supported by full disclosure among the parties in surrogacy relationships. Though this system may reduce the popularity of surrogacy arrangements, it would allow commercial surrogacy to continue, while at the same time protecting the surrogate mother's rights.

I. BACKGROUND

A. STATES' DIVERSE STANCES ON CONTRACTING FOR BABIES

There is no federal law governing surrogacy in the United States,²⁶ and state laws respecting surrogacy contracts vary wildly. On one end of the spectrum, New Jersey—home of the famous *Baby M.* case—considers surrogacy contracts to be void and unenforceable as against public policy.²⁷ In contrast, California's courts enforce properly executed surrogacy contracts, refusing to consider extrinsic evidence, such as evidence that enforcing the contract would not be in the best interests of resulting children.²⁸

The California approach seeks to guarantee the integrity of surrogacy contracts by ensuring predictability for contracting parties.²⁹ As the California Court of Appeal explained in *C.M. v. M.C.*, “[p]ermitting a surrogate to change her mind about whether the intended parent would be a suitable parent . . . would undermine the predictability of surrogacy arrangements.”³⁰ After all, predictability underlies the value of the contract for both parties.

However, predictability is undermined by the states' various disjointed stances on the enforceability of surrogacy contracts. A surrogate mother who wants to escape the demands of the intended parent of the child she carries can simply flee to a state that does not enforce surrogacy contracts. For example, in 2012, a gestational surrogate named Crystal Kelley left her Connecticut home for Michigan after the intended parents insisted that she abort the fetus she was carrying due to birth defects.³¹ She ultimately delivered the child in Michigan, and another family adopted the child.³² However, not every surrogate is likely willing or able to move to a different state to escape her home state's surrogacy laws. Kelley's story illustrates that the absence of federal laws governing surrogacy undermines predictability with respect to surrogacy contracts made in states that choose to embrace the enforceability of surrogacy contracts.

26. See FINKELSTEIN ET AL., *supra* note 1, at 55–63 (analyzing the different states' stances on surrogacy).

27. *In re Baby M.*, at 1240.

28. CAL. FAM. CODE § 7962(f)(2) (West 2018).

29. *C.M. v. M.C.*, 213 Cal. Rptr. 3d 351, 363 (Ct. App. 2017).

30. *Id.*

31. Elizabeth Cohen, *Surrogate Offered \$10,000 to Abort Baby*, CNN (Mar. 6, 2013, 2:58 PM), <https://www.cnn.com/2013/03/04/health/surrogacy-kelley-legal-battle/index.html>.

32. *Id.*

B. SELECTIVE REDUCTION CLAUSES

Selective reduction clauses contribute to the debate over whether surrogacy contracts contradict public policy. Many gestational surrogacy contracts contain a selective reduction clause, which gives the intended parent(s) the right to choose to terminate one or more of the fetuses in the event of a multiple pregnancy or fetal abnormality. Selective reduction is the process of terminating one or more fetuses, usually in the first trimester, by using a needle to inject potassium chloride directly into the fetal heart to cause it to stop; the terminated fetus then remains in the uterus where it is absorbed.³³ A sample selective reduction clause in California reads:

The parties understand that a pregnant woman has the right to abort or refuse to abort any fetus or fetuses that she may be carrying. Any promise to the contrary is unenforceable. However, the parties intend in this Section to set forth their beliefs, expectations, and intentions regarding abortion and selective reduction, in order to reduce the possibility of future disagreements.³⁴

One provision provides for selective reduction in the case of fetal abnormalities, if: “(c) Intended Mother requests an abortion based on testing which indicates substantial physiological abnormalities in the fetus or fetuses.”³⁵ The provision concerning selective reduction in the case of a multiple pregnancy provides: “(d) if more than two fetuses are developing, Surrogate agrees to selective reduction to not less than [specify number] fetuses, and (e) if one or more of the fetuses are physiologically abnormal, then Surrogate agrees to selective reduction of every abnormal fetus.”³⁶ While this sample contract provides terms for selective reduction only in the case of three or more fetuses, parties are free to contract for selective reduction any time there is more than one fetus.

C. SURROGACY CONTRACTS IN CALIFORNIA

1. *The Uniform Parentage Act*

The California legislature enacted the Uniform Parentage Act (UPA) in 1975 to eliminate the legal distinction between legitimate and illegitimate children by grounding parental rights in the existence of a parent-child relationship, rather than on the marital status of the parents.³⁷ The UPA recognizes both genetic consanguinity and giving birth as means of establishing motherhood.³⁸ However, in enacting the UPA, the legislature did not contemplate how advances in assisted reproductive technology would change

33. Radhika Rao, *Selective Reduction: “A Soft Cover for Hard Choices” or Another Name for Abortion?*, 43 J.L. MED. & ETHICS 196, 200 (2015).

34. 2 CALIFORNIA TRANSACTION FORMS: FAMILY LAW § 7:47, at 81 (1998).

35. *Id.*

36. *Id.* § 7:47, at 82 (alteration in original).

37. *Johnson v. Calvert*, 851 P.2d 776, 778–79 (Cal. 1993).

38. *Id.* at 782.

the nature of conception. That consideration was taken up by the California Supreme Court in *Johnson v. Calvert* in 1993.

In that landmark surrogacy case, the California Supreme Court held that under the UPA, the intended mother under the surrogacy contract, not the surrogate, was the child's natural mother.³⁹ *Calvert* involved a gestational surrogate who challenged the parental rights of the intended parents, a married couple who had provided both the sperm and egg, after her relationship with the couple deteriorated and she decided that she wanted to keep the child.⁴⁰ In determining that the wife, who had provided the egg and was the intended mother under the contract, was the child's natural mother, the *Calvert* court held that

although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.⁴¹

Calvert thus recognized both a genetic and gestational relationship as means of establishing legal maternity, but used intent as evidenced in the contract as a “tie-breaker” when one woman had a genetic relationship, and another woman had a gestational relationship, to the child.⁴²

2. California Surrogacy Contract Requirements

Enacted in 2012, California Family Code section 7962 sets out the requirements of a valid surrogacy contract in California.⁴³ Under the statute, “where a gestational surrogate or carrier and the intended parent(s) enter into a contract that meets certain specifications, and where that contract is presented before a court, the intended parents will be listed on the issued birth certificate and all parental rights of the surrogate will be severed.”⁴⁴ The statute requires the following information to be included in an enforceable surrogacy contract:

- (1) The date the contract was executed;
- (2) The names of the persons from which the gametes [ova and sperm] originated, unless anonymously donated;
- (3) The name(s) of the intended parent(s); and
- (4) A disclosure of how the medical expenses of the surrogate and the pregnancy will be handled, including a review of applicable health insurance coverage and what liabilities, if any, that may fall on the

39. *Id.*

40. *Id.* at 777–78.

41. *Id.* at 782.

42. *Id.* at 789 (Kennard, J., dissenting).

43. CAL. FAM. CODE § 7962 (West 2018).

44. *Cook v. Harding*, 190 F. Supp. 3d 921, 927 (C.D. Cal. 2016) (footnote omitted), *aff'd*, 879 F.3d 1035 (9th Cir. 2018); *see also* FAM. § 7962.

surrogate.⁴⁵

The statute further provides that the contract must be fully executed before any embryo transfer begins; that both the intended parent(s) and the surrogate must be represented by separate, independent counsel before executing the agreement; and that the agreement must be signed and notarized.⁴⁶ Section 7962 also describes the procedure by which the intended parent may bring an action to establish a parent-child relationship prior to the child's birth.⁴⁷ Upon a showing of a validly executed surrogacy contract under section 7962, the statute provides that the court shall issue a judgment or order establishing a parent-child relationship "without further hearing or evidence, unless the court or a party to the assisted reproduction agreement for gestational carriers has a good faith, reasonable belief that the assisted reproduction agreement for gestational carriers or attorney declarations were not executed in accordance with this section."⁴⁸ Thus, the statute forecloses any challenges to parentage unless based on the validity of the surrogacy contract. If the contract meets the requirements of section 7962, the court is instructed to issue an order enforcing the contract, without further hearing or evidence.

II. BALANCING THE PARTIES' FUNDAMENTAL RIGHTS

The case of *C.M. v. M.C.* was a dispute over parental rights and the selective reduction clause in a surrogacy contract executed pursuant to section 7962.⁴⁹ The facts of the case, which ended with the court granting parental rights to the intended father,⁵⁰ raise questions of whether section 7962 adequately protects each party's fundamental rights.

A. THE DISPUTE OVER PARENTAL RIGHTS AND SELECTIVE REDUCTION IN *C.M. v. M.C.*

On January 26, 2017, the California Court of Appeal decided the case of *C.M. v. M.C.*, affirming the trial court's order awarding sole custody of unborn triplets to the intended father under a surrogacy contract executed in compliance with California Family Code section 7962.⁵¹ The unusual case attracted media attention at the trial court level,⁵² and again after both the California Supreme

45. FAM. § 7962.

46. *Id.* § 7962(b), (c).

47. *See id.* § 7962(e).

48. *Id.* § 7962(f)(2).

49. 213 Cal. Rptr. 3d 351, 354 (Ct. App. 2017).

50. *Id.* at 370.

51. *Id.*

52. *See* Michelle Goldberg, *Is a Surrogate a Mother?*, SLATE (Feb. 15, 2016, 5:00 PM), http://www.slate.com/articles/double_x/doublex/2016/02/custody_case_over_triplets_in_california_raises_questions_about_surrogacy.html; Brendan Pierson, *California Surrogate Loses Bid to Be Named Mother of Triplets*, REUTERS (June 8, 2016, 1:40 PM), <http://www.reuters.com/article/us-california-surrogacy/california-surrogate-loses-bid-to-be-named-mother-of-triplets-idUSKCN0YU2G3>.

Court and the United States Supreme Court denied certiorari.⁵³ The unique circumstances of the case present concrete examples of the challenges inherent in regulating surrogacy contracts.

M.C., or Melissa Cook, offered her services as a surrogate through Surrogacy International, a California-based surrogacy broker.⁵⁴ Surrogacy International matched her with C.M., the intended father and, in May 2015, the two entered into a gestational surrogacy agreement pursuant to section 7962.⁵⁵ As required by the statute, Cook was a gestational surrogate not genetically related to the embryos. C.M. provided the sperm, and an anonymous donor provided the egg.⁵⁶ An embryo transfer took place in August 2015, and it was later confirmed that Cook was pregnant with triplets.⁵⁷

Problems first arose between Cook and C.M. a few weeks later, when C.M. emailed Cook about the possibility of aborting one of the fetuses.⁵⁸ After expressing concerns about his financial situation and the health of the fetuses, C.M. requested that Cook reduce the pregnancy by one fetus, pursuant to the selective reduction clause in their surrogacy contract.⁵⁹ Cook, citing her anti-abortion beliefs and arguing that the fetuses were all healthy, refused to agree to the reduction.⁶⁰ C.M. then informed Cook that he was considering seeking adoptive parents for one or more of the children.⁶¹ In response, Cook offered to raise one of the children herself, but C.M. refused and continued to request that Cook abort one of the fetuses.⁶²

In January 2016, Cook filed a complaint in the Los Angeles Superior Court alleging violations of her and the children's equal protection and procedural and substantive due process rights, and seeking to enjoin C.M. from filing a section 7962 petition.⁶³ The court dismissed her complaint because it was filed in the wrong court and without proper service.⁶⁴ C.M. then filed a section 7962 petition in the California Children's Court to terminate Cook's parental rights and to be declared the sole legal parent of the children.⁶⁵ In response, Cook filed a counterclaim, challenging the validity of the contract and the constitutionality of section 7962.⁶⁶ The following day, Cook filed a similar complaint in federal

53. See Margot Cleveland, *Supreme Court Refuses Surrogacy Case of Mother Pressured to Abort Triplet*, FEDERALIST (Oct. 3, 2017), <http://thefederalist.com/2017/10/03/supreme-court-refuses-hear-surrogacy-case-mother-pressured-to-abort-extra-triplet>.

54. *Cook v. Harding*, 190 F. Supp. 3d 921, 928 (C.D. Cal. 2016), *aff'd*, 879 F.3d 1035 (9th Cir. 2018).

55. *Id.* See generally CAL. FAM. CODE § 7962 (West 2018).

56. *Cook*, 190 F. Supp. 3d at 928.

57. *Id.*

58. *Id.*

59. *Id.* at 928–29.

60. *Id.* at 929.

61. *Id.*

62. *Id.*

63. *Id.* at 929–30.

64. *Cook v. Harding*, 879 F.3d 1035, 1038 (9th Cir. 2018).

65. *Id.*

66. *Id.*

district court; the district court abstained and dismissed the case, and Cook appealed.⁶⁷ The Ninth Circuit affirmed the dismissal on grounds of issue preclusion in light of the decision of the California Court of Appeal.⁶⁸

The Children's Court granted C.M.'s petition for parental rights and terminated Cook's parental rights, holding that section 7962 "did not allow the court to consider the best interests of the children or for Cook to offer her opinions concerning C.M.'s parenting abilities."⁶⁹ The children were born prematurely on February 22, 2016, and were released to C.M.'s care on April 14, 2016.⁷⁰

The conflict between Cook and C.M. over parental rights to the triplets attracted media attention from various sources. While some articles focused on the viability of Cook's legal arguments under California law,⁷¹ others lamented the fact that, under the current law, California courts enforced the surrogacy contract without considering what was in the best interests of the children.⁷² Some sources called for stricter regulation of who is permitted to enter into a surrogacy contract, emphasizing that, at the time of the case, the intended father, C.M., was single, deaf, in his fifties, employed as a postal worker, and caring for his elderly parents,⁷³ with whom he was living.⁷⁴ An article published after C.M. was awarded custody of the triplets detailed allegations made by C.M.'s sister, which described the children's living conditions as "deplorable."⁷⁵ Cook made similar arguments before the California Court of Appeal, alleging that C.M. was "not capable of raising three children by his own admission, and may not be capable of raising even one or two children."⁷⁶ Cook claimed that she learned only after she was pregnant that Surrogacy International had never conducted a home study to determine C.M.'s fitness as a parent.⁷⁷

67. *Id.*; *Cook*, 190 F. Supp. 3d at 938.

68. *Cook*, 879 F.3d at 1043.

69. *Cook*, 190 F. Supp. 3d at 930.

70. *Id.* at 929.

71. See Ellen Trachman, *I Want to Put a Baby in You: Triplets Trouble*, ABOVE L. (Mar. 2, 2016, 1:02 PM), <https://abovethelaw.com/2016/03/i-want-to-put-a-baby-in-you-triplets-trouble/?rf=1>.

72. See Cleveland, *supra* note 53.

73. As will be discussed in Subpart II.A.1, these criticisms of C.M. highlight the problem of discrimination which is inherent in efforts to regulate access to assisted reproductive technologies. These allegations provide examples of discrimination based on marital status, disability, age, and financial status.

74. Kathleen Sloan, *Surrogacy Reaches the Supreme Court*, PUB. DISCOURSE (Sept. 25, 2017), http://www.thepublicdiscourse.com/2017/09/20130/?utm_source=The+Witherspoon+Institute&utm_campaign=c4037af71b-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_15ce6af37b-c4037af71b-84106953.

75. Johnny Dodd, *Triplets Born to Surrogate Mom Melissa Cook Are Living in 'Deplorable' Conditions with Birth Father*, COURT DOCUMENTS SAY, PEOPLE MAG. (Sept. 21, 2017, 3:35 PM), <https://people.com/human-interest/surrogate-mom-melissa-cook-triplets-living-deplorable-conditions-birth-father-court-documents/>.

76. *C.M. v. M.C.*, 213 Cal. Rptr. 3d 351, 356 (Ct. App. 2017).

77. *Id.*

1. *Constitutional Challenges to Access Regulation*

It is easy to look at the *C.M.* case and see that something went wrong. Though both parties voluntarily entered into the surrogacy contract with guidance from legal counsel, the relationship between the parties deteriorated and became contentious, leading to a court battle and a high-risk pregnancy resulting in the premature birth of triplets. The difficult question is what, if anything, could have been done to prevent the dispute in the first place.

Adoption procedures require prospective parents to undergo extensive screening to determine their ability to care for the child.⁷⁸ Regulating access to assisted reproductive technologies is more challenging, however, because those regulations may infringe upon the constitutional right to procreate.⁷⁹ After all, when a woman conceives in the traditional manner, the government does not inspect her home, finances, or psychological health to determine whether she is fit to raise her biological child, so subjecting women who conceive in untraditional ways to such screening procedures would constitute disparate treatment.⁸⁰ In fact, the United States Supreme Court has prohibited government attempts to regulate who may or may not reproduce based on socioeconomic factors such as marital status.⁸¹ Parity requires the same principles to be extended to those who wish to produce via artificial reproductive technologies.

Nonetheless, the problems associated with the failure to screen intended parents in the surrogacy context are apparent. In a gestational surrogacy contract, the agreement involves both the genetic relationship of the intended parent(s), as well as the gestational relationship of the surrogate mother, to the fetus. As illustrated by the cases discussed in this Note, bitter disputes can arise during the process, with life-altering implications for all parties, including the resulting child(ren). Thus, it seems counterintuitive to avoid screening intended parents in surrogacy contracts, yet it is unclear what type of screening would be appropriate and constitutional.

Indeed, the California Supreme Court has rejected the application of adoption statutes to gestational surrogacy agreements.⁸² Likewise, the California Court of Appeal in *C.M.* rejected the application of a family law best interests analysis to determine custody of children resulting from a surrogacy contract.⁸³

78. See, e.g., CAL. FAM. CODE §§ 8800–23 (West 2018).

79. See generally *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (holding that prisoners have the right to refuse to be sterilized); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983) (discussing the fundamental right to avoid conception and childbirth).

80. As the district court stated in *Cook v. Harding*, “[W]hat a far different experience life would be if the State undertook to issue children to people in the same fashion that it now issues driver’s licenses. What questions, one wonders, would appear on the written test?” 190 F. Supp. 3d 921, 932 n.9 (C.D. Cal. 2016) (internal quotation marks omitted) (quoting *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1286 n.29 (D. Utah 2002)), *aff’d*, 879 F.3d 1035 (9th Cir. 2018).

81. See *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

82. *Johnson v. Calvert*, 851 P.2d 776, 784 (Cal. 1993).

83. *C.M. v. M.C.*, 213 Cal. Rptr. 3d 351, 367–68 (Ct. App. 2017).

As the following Parts clarify, legal scholars have come to different conclusions about the application of adoption or family law concepts to surrogacy agreements.

2. *The Family Law Approach: Best Interests of the Child*

For example, Glenn Cohen, one of the world's leading experts on the intersection of bioethics and the law, argues that the best interests reasoning—a family law concept, which purports to determine the best outcome for the child—is inherently unreliable when applied in the context of artificial reproductive technology because the best interests framework is meant to be applied to already existing children, not to determine whether allowing conception to occur would be in the best interests of any resulting children.⁸⁴ After all, conception, as opposed to non-existence, is almost always in the best interests of the child.⁸⁵ As Cohen puts it “we cannot be said to harm children by creating them as long as we do not give them a life not worth living.”⁸⁶ Furthermore, Cohen defines a life not worth living as one “so full of pain and suffering and so devoid of anything good that the individual would prefer never to have come into existence.”⁸⁷ Thus, Cohen argues, we cannot conclude that it would be in the child's best interest to never be born just because the child might be better off physically, emotionally, or financially if born under different circumstances.⁸⁸

Cohen's argument, applied in the context of surrogacy, suggests that a best interests analysis is illogical.⁸⁹ If not for the intended parent's expectation that the contract would be enforced, the intended parent may not have employed a surrogate at all, and thus would not have initiated conception of the resulting child in the first place.⁹⁰ If conception, as opposed to non-existence, is always in the child's best interests, then those interests lie with the intended parent who initiated the process. While a full analysis of the family law best interests approach is beyond the scope of this Note, it bears mentioning that other commentators have objected to the non-existence argument, because taken to its logical extreme, “it would support the argument that there is no degree of pain and suffering that cannot be inflicted on a child, provided that the alternative is

84. I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 437 (2011).

85. *Id.*

86. *Id.* (discussing Derek Parfit's “Non-Identity Problem”).

87. *Id.*

88. *Id.* at 437–38.

89. *Id.* at 470–71.

90. *Id.* at 470.

never to have been conceived.”⁹¹ Others criticize the best interests analysis for its potential to be applied discriminatorily by courts.⁹²

In contrast, Pamela Laufer-Ukeles argues that a surrogate mother’s relationship to the child she carries cannot be alienated by contract and that, if she wishes to pursue custody of the child, a court should determine custody based on the family law concept of best interests of the child.⁹³ She asserts that the surrogate mother’s gestation of the child creates a constitutionally protected interest in a parent-child relationship, which can be raised as a challenge to a surrogacy contract.⁹⁴ In her view, when a gestational surrogate wishes to pursue custody, there are three resulting parents, and the court should determine custody under a best interests analysis, with the primary caretaker presumption applying in favor of the surrogate mother.⁹⁵ She concludes that adoption laws should govern surrogacy arrangements, and therefore, the only compensation to the surrogate mother should be the cost of medical expenses and other costs allowed by adoption law.⁹⁶ Given the low financial incentive to surrogates and the high risk of litigation and loss of custody to intended parents, Laufer-Ukeles admits that her proposed framework would significantly limit the use of surrogates.⁹⁷ In fact, she suggests that both intended parents and surrogates would be more likely to seek out arrangements with people whom they know and trust, such as close family members.⁹⁸

While the best interests approach may be imperfect, this Note proposes that the surrogate mother’s constitutional right to a relationship with the child she carries mandates application of the best interests analysis when the surrogate chooses to pursue custody of the child. The best interests analysis allows for each potential parent to assert claims to custody, rather than automatically granting parental rights to the intended parent(s) under the contract, which this Note argues is an unconstitutional infringement on the surrogate mother’s due process rights.⁹⁹ Commercial surrogacy contracts, with compensation for the surrogate (beyond medical expenses), can survive this framework if, as in the majority of surrogacy contracts executed in the United States, all parties perform their obligations and never have to bring the issue before a court. Of course, there will probably never be a perfect success rate for surrogacy arrangements,

91. NAT’L BIOETHICS ADVISORY COMM’N, CLONING HUMAN BEINGS 65 (1997).

92. See, e.g., Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of “Best Interest of the Child” and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 15–20 (2008).

93. Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407, 447 n.208 (2002).

94. *Id.* at 441–42 (“The act of gestating a baby for nine months and the deep physiological relationship entails in and of itself a mothering relationship that is sufficient, though not necessary, to imbue a protected relationship of motherhood.”).

95. *Id.* at 447 n.208.

96. *Id.* at 447.

97. *Id.* at 448.

98. *Id.*

99. See *infra* Subpart II.C.

considering the web of deeply personal issues involved, and the potential for human beings to change their minds. Nonetheless, some fertility clinics screen potential patients in an effort to consider the future child's best interests before initiating fertility treatments.¹⁰⁰

3. *Screening Potential Parents and Surrogates*

In terms of evaluating who may access reproductive services, fertility clinics report some screening of potential patients, revealing biases that could threaten equal access to fertility treatments or surrogacy arrangements if such screening practices were uniformly required by law.¹⁰¹ A study published in 2005 showed that fertility clinic staff report turning away potential clients on the basis of age, marital status, and mental illness (which may be based on the staff member's assumptions or the client's self-reporting, rather than a mental health professional's diagnosis).¹⁰² Additionally, "48% of clinics reported being 'very or extremely likely' to turn away a gay male couple who wants to use surrogacy, and 17% reported being likely to turn away a lesbian couple."¹⁰³ These findings suggest inherent dangers in implementing a screening process for access to reproductive services. While the lack of a uniform screening process may lead to inconsistencies among fertility clinics, uniform federal screening processes would be vulnerable to the same biases and potentially subject to equal protection and other constitutional challenges. Adding to the problem is the fact that these biases may often be subconscious and difficult to detect; a fertility clinic staff member may genuinely believe that she is looking out for the best interests of a potential future life, while in reality discriminating against the patient in his or her access to reproductive technology.

B. CHALLENGES IN ENFORCING SELECTIVE REDUCTION CLAUSES

Substantive liberty and privacy interests underlie reproductive freedom. The United States Constitution guarantees a woman's fundamental right to make choices such as whether to become pregnant or use contraception,¹⁰⁴ whether to terminate a pregnancy,¹⁰⁵ and whether to accept or refuse medical treatment.¹⁰⁶ However, the Supreme Court has never considered whether an intended parent's right to choose not to become a parent to a given potential child trumps a surrogate mother's right to choose not to have an abortion against the wishes of

100. See *infra* text accompanying notes 101–102.

101. Kayte K. Spector-Bagdady, *Artificial Parentage: Screening Parents for Assisted Reproductive Technologies*, 14 MICH. ST. U. J. MED. & L. 457, 462–63 (2010).

102. *Id.* at 462 (citing Andrea D. Gurmankin et al., *Screening Practices and Beliefs of Assisted Reproductive Technology Programs*, 83 FERTILITY & STERILITY 61 (2005)).

103. *Id.* at 462.

104. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 496–97 (1965).

105. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016); *Roe v. Wade*, 410 U.S. 113, 153 (1973), *overruled in part by*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

106. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

the intended parents. Thus, while it seems unlikely the Court would order specific performance of a selective reduction clause, there is no decision directly on point.

To date, no court has ordered specific performance of a selective reduction clause, and many legal scholars believe this remedy is unavailable in any case because specific performance would impermissibly intrude upon the gestational surrogate's fundamental rights established by *Roe v. Wade*, and possibly upon the Thirteenth Amendment's prohibition against involuntary servitude.¹⁰⁷ At least one case where the intended parents sought specific performance of the selective reduction clause has come before a California court, but the court refused to order termination of one of the fetuses.¹⁰⁸ The case involved Helen Beasley, a gestational surrogate who contracted with a married couple and refused to selectively reduce the pregnancy when it was discovered that she was carrying twins.¹⁰⁹ The complaint was dismissed, the record sealed, and the twin girls were eventually adopted.¹¹⁰

In light of this uncertainty, the terms of surrogacy contracts generally assume that specific performance of the selective reduction clause cannot be ordered. Instead, these clauses generally call for monetary damages in the event that a surrogate refuses to comply with a selective reduction clause.¹¹¹ Monetary damages, in an amount determined by a court or jury, may be a solution if specific performance is not available, but this remedy presents issues of its own. A court may find a monetary damages provision to be coercive and thus unenforceable since damages are likely to be substantial if intended to compensate the intended parent for caring for additional children or for a developmentally challenged child.¹¹² If the surrogate mother does not want to terminate the pregnancy, but does so because she knows she cannot afford to pay damages to the intended parents, she may have been coerced out of making a constitutionally protected decision about her own rights.¹¹³

A liquidated damages provision, negotiated by the contracting parties to pre-determine the amount of damages should the surrogate breach the clause, may provide a feasible solution in some situations, but is subject to the same risk of being overly coercive. Ideally, parties to the contract would discuss their views on selective reduction in the case of a multiple or otherwise high-risk

107. See generally Mazer, *supra* note 20, at 235; Alayna Ohs, *The Power of Pregnancy: Examining Constitutional Rights in a Gestational Surrogacy Contract*, 29 HASTINGS CONST. L.Q. 339, 361 (2002); see also *Roe*, 410 U.S. at 153; U.S. CONST. amend XIII.

108. Deborah Zalesne, *The Intersection of Contract Law, Reproductive Technology, and the Market: Families in the Age of ART*, 51 U. RICH. L. REV. 419, 471–72 (2017).

109. *Id.* at 471.

110. *Id.* at 472 n.240.

111. See, e.g., 2 CALIFORNIA TRANSACTION FORMS: FAMILY LAW, *supra* note 34, § 7:47, at 82 (“[I]ntended Mother shall have the option to terminate this Agreement, and to seek reimbursement from Surrogate for the additional costs of raising any child who is born with abnormalities.”).

112. Heather E. Ross, *Gestational Surrogacy in Illinois: Contracting the Unknown*, DCBA BRIEF, Dec. 2013, at 16, 22.

113. *Id.* at 22.

pregnancy, or in the case of fetal abnormality, and negotiate an appropriate amount of liquidated damages in case the surrogate chooses not to comply with the selective reduction clause.¹¹⁴ The negotiation would give the parties an opportunity to fully discuss their views on these issues, which would also give the parties a chance to decide not to contract with one another if their views on selective reduction are incompatible.¹¹⁵

The negotiation of a liquidated damages clause not only provides a monetary remedy less likely to be coercive (because it was negotiated among the parties), it gives parties the opportunity and motivation to talk to one another and become informed about the possibility of selective reduction and about each other's views on the issue. In addition, a predetermined amount of liquidated damages would promote predictability in the contract. The problem of the amount of damages, however, remains. To compensate the intended parents for costs of childcare, the amount must be substantial, such that some surrogate mothers may be unable to pay. Moreover, there may be individual situations where the amount of liquidated damages is not so openly negotiated, where a court could still deem the provision coercive, and parties could still fail to become informed about each other's views. Liquidated damages provisions are subject to judicial scrutiny, so it is possible that even a negotiated provision could be deemed unenforceable by a court.¹¹⁶

On the other hand, Julia Dalzell argues that selective reduction clauses are enforceable and that specific performance can and should be ordered when a surrogate pregnancy comes within the terms of the clause.¹¹⁷ According to her, the surrogate voluntarily chooses to contract away her right to make her own decision regarding abortion, and to argue that she cannot legally bind herself to this decision is paternalistic.¹¹⁸ The intended parents rely, to their detriment, on the surrogate's promise to comply with the selective reduction clause, and they should not bear the emotional and financial burdens of raising more children than they planned for or caring for a child with birth defects.¹¹⁹ In addition, the decision not to reduce a multiple pregnancy may place the health of all fetuses at risk.¹²⁰

Dalzell argues that, while a woman has a constitutional right to choose whether or not to have an abortion, in becoming a surrogate, she contractually waives that right.¹²¹ Moreover, even though specific performance is typically unavailable as a remedy for breach of contract for personal services,¹²² specific

114. Mazer, *supra* note 20, at 236.

115. *Id.*

116. *Id.*

117. Julia Dalzell, *The Enforcement of Selective Reduction Clauses in Surrogacy Contracts*, 27 WIDENER COMMONWEALTH L. REV. 83, 87 (2018).

118. *Id.* at 103–04.

119. *Id.* at 110.

120. *Id.* at 114–15.

121. *Id.* at 91–92.

122. RESTATEMENT (SECOND) OF CONTRACTS § 367 (AM. LAW INST. 1979).

performance should be available as a remedy in surrogacy contracts because there is an exception for services that involve unique and peculiar value.¹²³ She argues that gestational services and the eventual life of a child are of unique value, and monetary damages are unlikely to adequately compensate intended parents for the emotional and financial burdens of caring for unwanted children.¹²⁴

While these arguments are persuasive in terms of contract enforceability, they do not account for the possibility of human error, which has arisen in the few surrogacy cases that have been litigated. For example, as a measure to protect parties entering into surrogacy contracts, Dalzell advocates for independent legal representation for each party.¹²⁵ While independent legal representation is an important step toward ensuring that parties are fully informed about these provisions, it is not always enough, as illustrated by *C.M.*, where Cook and the intended father each had independent counsel as required by California Family Code section 7962.¹²⁶

Furthermore, Dalzell argues that each party to the contract should be screened psychologically and financially, and potential surrogates should then be matched with potential intended parents.¹²⁷ One purpose of financial screening would be to determine the financial stability of the intended parents: “The intended parents’ finances should prove they are financially able to raise a child, and in the event of a multiple-pregnancy, able to financially raise more than one child.”¹²⁸ The surrogate could also be financially screened to ensure that she is not impoverished and seeking to become a surrogate out of financial desperation.¹²⁹

While screening and matching may, at first glance, be an appealing way to ensure compatibility between intended parents and surrogates with respect to their views on the selective reduction clause, the screening process also leaves room for discrimination. As discussed above, fertility clinics admit to discriminating against some individuals based on such factors as age, marital status, and sexual orientation.¹³⁰ Financial screening would permit discrimination based on class and income level. In fact, screening of this sort comes closer to the evaluation potential adoptive parents must undergo, and therefore it may impermissibly infringe upon the intended parents’ constitutional right to reproduce. Financial, psychological, and home-study evaluations are

123. Dalzell, *supra* note 117, at 105.

124. *Id.*

125. *Id.* at 118.

126. *C.M. v. M.C.*, 213 Cal. Rptr. 3d 351, 354 (Ct. App. 2017).

127. Dalzell, *supra* note 117, at 119–20.

128. *Id.* at 121.

129. *Id.* at 121 n.233.

130. See Spector-Bagdady, *supra* note 101, at 462 (“However, out of the 82% percent [sic] of clinics that reported candidates did not meet with a mental health professional, 11% still said they would turn down a woman with bipolar disorder . . . [And] screening judgments seem to be imposed upon [] gay and lesbian candidates . . .”).

constitutional in the adoption context where an existing child's best interests are at issue, but not as a means of regulating who may choose to reproduce, either traditionally or through use of assisted reproductive technologies.

C. CONSTITUTIONAL CHALLENGES TO DETERMINING PARENTAGE BY CONTRACT

Even if a selective reduction clause cannot be enforced in terms of specific performance, the broader question remains of whether enforcement of the surrogacy contract in any way contravenes the surrogate's constitutional rights. To claim that the enforcement of a surrogacy contract would violate a surrogate's constitutional substantive due process rights, one would have to show that surrogate mothers have a right deeply rooted in the history and tradition that is protected by the Due Process Clause of the Fifth Amendment and applicable to the states through the Fourteenth Amendment.¹³¹ For the purpose of addressing whether gestation and childbirth give rise to a right deeply rooted in history and tradition, it is helpful to look at the line of Supreme Court cases dealing with the rights of biological fathers.

In *Stanley v. Illinois*, the Court held that an unmarried biological father had a due process right to a relationship with his children after their mother's death, and that this right could not be terminated absent a showing of his unfitness as a parent.¹³² Based on a presumption that unwed fathers were unfit parents, Stanley was denied a hearing before being deprived of custody over his biological children, whom he had lived with and helped raise, even though Illinois law provided a hearing before terminating custody for all other parents.¹³³ The State's interest in protecting children from unfit parents was legitimate, but insufficient to deny the father an opportunity to show his fitness as a parent.¹³⁴ The Court deemed the presumption in Illinois that an unmarried father was unfit to raise his biological children an unconstitutional infringement of the father's fundamental right to a relationship with his children, as well as a violation of the Equal Protection Clause, since the presumption treated unmarried fathers differently than married fathers.¹³⁵

Unlike in *Stanley*, in *C.M.* there was no Equal Protection issue as to a married or unmarried parent.¹³⁶ Whereas *Stanley* involved an unconstitutional

131. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) ("Our precedents have required that implied fundamental rights be 'objectively, deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)); see also U.S. CONST. amend. XIV.

132. 405 U.S. 645, 651, 657–58 (1972).

133. *Id.* at 649.

134. *Id.* at 657–58.

135. *Id.* at 658.

136. See *C.M. v. M.C.*, 213 Cal. Rptr. 3d 351, 369 (Ct. App. 2017) ("Thus, for purposes of an equal protection analysis, it is more appropriate to compare children born to surrogates with children born in a traditional manner to other parents than it is to compare children born to surrogates with children placed through adoption or family courts. . . . Thus, M.C.'s equal protection argument on behalf of the Children does not provide any ground for reversal.").

presumption that an unmarried father was unfit to care for his biological children, in *C.M.* there was no presumption of unfitness based on marital status; rather, current California law presumes parental rights based on the surrogacy contract.¹³⁷ In terms of due process, a presumption of parental rights based in contract should receive less protection than a presumption rooted in a biological connection and a relationship with the children. Thus, if Cook, as the gestational mother, has a fundamental due process right to a relationship with the children, she must have an opportunity to rebut the presumption of parentage under the contract.

In another paternity case, *Lehr v. Robertson*, the Supreme Court held that an unmarried father's biological connection to a child, alone, did not establish a fundamental due process right to a relationship with his biological child.¹³⁸ There, the unmarried biological father filed a paternity action after he discovered that the mother's husband had successfully filed a petition for adoption of the child.¹³⁹ The Court rejected the unmarried father's claim that the adoption proceedings were void because he, as the child's biological father, was entitled to advance notice of the adoption proceeding.¹⁴⁰

The Court in *Lehr* drew a distinction between a biological connection alone, and a father's commitment to establishing a relationship with his child.¹⁴¹ The Court explained that, when an unmarried biological father comes forward to participate in caring for his child, his parental rights merit substantial protection under the Due Process Clauses of the Fifth and Fourteenth Amendments.¹⁴² By contrast, the "mere existence of a biological link" does not merit the same constitutional protection.¹⁴³ The existence of a biological connection entitles the natural father to an opportunity to develop a relationship with the child, but if the father fails to take advantage of that opportunity, he fails to develop a fundamental right that receives protection under the Due Process Clause.¹⁴⁴

Similarly, in *Michael H. v. Gerald D.*, the Supreme Court held that a biological father's right to assert parental rights over a child born to a woman who was married to another man was not deeply rooted in history and tradition, and therefore was not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.¹⁴⁵ In that case, even though blood tests established a 98.07% probability of paternity on the part of Michael H., who had an extramarital affair with the mother, under California Evidence Code section

137. See CAL. FAM. CODE § 7962(f)(2) (West 2018).

138. 463 U.S. 248, 261 (1983).

139. *Id.* at 252–53.

140. *Id.* at 266–67.

141. *Id.* at 261.

142. *Id.*

143. *Id.*

144. *Id.* at 262.

145. 491 U.S. 110, 124 (1989).

621, the child was presumed to be that of the mother's husband.¹⁴⁶ The presumption could only be rebutted, in limited circumstances, by the husband or the wife; never by someone outside the marriage who claimed to be the child's biological father.¹⁴⁷ The Court noted that there is no case that has granted substantive parental rights to a biological father over the rights of a husband and wife into whose marriage the child was born, and who wish to raise the child as their own.¹⁴⁸

By contrast, Cook has a historically and traditionally recognized right to a presumption of maternity based on gestation and birth. Under *Lehr* and *Michael H.*, C.M.'s parental rights, which are based on the surrogacy contract and genetic relation to the children, are not among the constitutional due process rights deeply embedded in history and tradition. *Lehr* and *Michael H.* both deny that a biological connection alone establishes a fundamental right to a relationship with the child.¹⁴⁹ Under those cases, the biological connection provides the father an opportunity to develop a parent-child relationship, which would warrant constitutional protection; however, the biological connection alone warrants no special protection.

Additionally, C.M.'s rights under the surrogacy contract cannot be said to have a basis in history and tradition when surrogacy contracts are a fairly recent development in the law, and many states still refuse to recognize or enforce them.¹⁵⁰ Cook's claim to maternity by gestation and birth, however, has historically been recognized. For example, in *Calvert*, the California Supreme Court analyzed two women's competing claims of maternity that were legally recognized under the UPA, where one was based on genetic relation and the other on proof of gestation and of having given birth to the child.¹⁵¹

Cook's connection to the surrogate children she carried was gestation; gestation is both a biological connection and a maternal relationship developed over nine months, and therefore should be protected as a fundamental due process right.¹⁵² Even though Cook was not genetically related to the children, she gestated them and gave birth to them. The biological father who contributes sperm, thereby creating a biological link that gives him an opportunity to develop a relationship with the child, is not similarly situated to the surrogate mother who invests nine months carrying the fetus inside her body. Her link to the child is both a biological connection and a relationship, which she develops through nine months of physically nurturing the fetus and through giving birth. The surrogate's interest, evidenced through her investment of time, the use of

146. *Id.* at 113–14.

147. *Id.* at 115.

148. *Id.* at 127.

149. *Id.*; *Lehr v. Robinson*, 405 U.S. 645 (1972).

150. See FINKELSTEIN ET AL., *supra* note 1, at 57–63.

151. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

152. See Laufer-Ukeles, *supra* note 93, at 430 (“There really are two layers of biological connection—gestation and genetics.”).

her body, and the labor of childbirth, all establish a fundamental due process right to a relationship with the child she carries.

Furthermore, in *C.M.*, there was no “tie” to break between two fathers or two mothers. *Lehr* and *Michael H.* both involved two fathers, and *Calvert* involved two mothers; in each of those cases, the courts had to determine which party had a fundamental due process right that would take precedence over whatever rights the other party might have possessed. Here, Cook was the only mother and the only party who had a fundamental due process right to a relationship with the children.

The competing interests *C.M.* presents are those of a surrogate mother in tension with those of an intended father. Elevating the surrogate’s rights above the intended father’s restricts the father’s reproductive options in a way that may appear sex-discriminatory. After all, the intended father under a surrogacy contract is not merely a sperm donor. Through the contract, he evidences his intent to develop a relationship with the resulting child, and in fact he initiates the entire process. Without *C.M.*’s intent to parent the resulting children, no embryo transfer would have taken place. In fact, through the contract, *C.M.* sought to have a biological child in the only way available to him as a single man. Elevating the surrogate’s rights above the intended father’s ignores the intended father’s investment in the surrogacy contract and appears to have a sex-discriminatory effect on his interest in parental rights.

Importantly, however, a presumption that a surrogate mother has a due process right to parental rights does not divide strictly along gender lines. Intended parents will be both male and female, and a surrogate likewise has a due process right to challenge a surrogacy contract where the intended parent or parents are a single female, a heterosexual couple, or a homosexual couple. As the Supreme Court articulated in *Geduldig v. Aiello* when discussing a state disability program that excluded disabilities resulting from pregnancies, “[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”¹⁵³ In essence, a provision excluding pregnancy from state insurance coverage was not a gender classification because it did not exclude women, in that not all women will become pregnant.¹⁵⁴ Likewise, a presumption that a surrogate has a due process right to challenge a surrogacy contract is not gender discriminatory because it does not protect women’s rights to the exclusion of men; rather, it protects the rights of women who choose to become surrogate mothers.

Former Judge Richard Posner argues that the mutual benefits of the surrogacy contract depend on the contract’s enforceability.¹⁵⁵ If there is some risk that the contract may not be enforced, he argues, intended parents will not be willing to pay as much for surrogates’ services, which will harm surrogates

153. 417 U.S. 484, 496–97 (1974).

154. *Id.* at 496 n.20.

155. Hon. Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL’Y 21, 23 (1989).

by reducing their income from the contract.¹⁵⁶ The enforceable surrogacy contract, according to Posner, benefits all parties because it maximizes the value of the agreement for all parties; intended parents receive certainty that the child will be theirs upon birth, and the surrogate receives the income that she has determined outweighs the value of her freedom of choice to keep the child for herself.¹⁵⁷

Moreover, Posner contends, the argument that surrogacy contracts are exploitative of women and not truly voluntary because the surrogate can never fully anticipate how she will feel about surrendering the child, is patronizing to women.¹⁵⁸ Referencing empirical data showing that many women who choose to become surrogates already have children of their own, and that hundreds of babies have been born to surrogates and surrendered to intended parents without incident, he posits that most surrogates are able to appropriately balance the risk of emotional distress against financial benefit.¹⁵⁹ Even if it is true that in most cases the intended parents are wealthier than the surrogate, the same can be said for parties to many types of enforceable employment contracts, and such wealth disparity does not render those contracts unenforceable.¹⁶⁰ Furthermore, Posner argues, there is no evidence that most surrogate mothers are impoverished and enter into the contract out of financial desperation.¹⁶¹ Rather, interviews with surrogates show that they are able to weigh the emotional and physical risks against the financial benefits, as well as other factors such as empathy for the childless couple and a desire to help another couple have a child.¹⁶²

Disputes over surrogacy contracts present unique problems. Competing constitutional rights to parenthood must be balanced, yet at the same time, the value of the contract cannot be overlooked if surrogacy contracts with compensation for the surrogate are to survive in any form. The difficulties of enforcing selective reduction clauses, either through specific performance or monetary damages, highlight issues of bodily integrity, reproductive choice, and financial coercion, all of which make legal remedies extremely difficult to calculate or predict. Thorough screening of potential parties may impermissibly infringe upon the constitutional right to reproduce, and furthermore, empirical evidence shows the danger of discrimination inherent in screening individuals for access to artificial reproductive technologies. A system of at-risk contracting, supported by full disclosure among the parties, is a solution that would support predictability of the contract through informed decision-making.

156. *Id.*

157. *See id.* at 25–26.

158. *Id.* at 28.

159. *Id.* at 25.

160. *Id.* at 26.

161. *Id.* at 25–26.

162. *Id.*

III. PROPOSAL: AT-RISK CONTRACTING AND FULL DISCLOSURE IN SURROGACY RELATIONSHIPS

If a surrogate has a constitutional right to a relationship with the fetuses she carries, which can be asserted during the course of the pregnancy, what is the future of surrogacy contracts? What intended parent or parents would choose to contract with a surrogate, knowing that she has a right to change her mind about surrendering the resulting child? Even though the existence of a constitutional right does not necessarily mean the surrogate would prevail in court, the mere possibility of going through such a harrowing process would likely deter many intended parents from considering surrogacy in the first place.

The value of the surrogacy contract to both sides is certainly an important consideration. There may be an alternative avenue to providing not enforceability, but greater predictability in surrogacy contracts. If the majority of surrogacy arrangements proceed without dispute, then enforceability never becomes an issue as to those contracts. In the few disputes that go to court, such as the *C.M.* case, predictability, rather than enforceability, would arguably have been a better safety net for the parties, since it may have prevented the dispute in the first place.

Instead of declaring that a properly executed surrogacy contract is enforceable, California law should provide that parties to a surrogacy contract enter into the contract at their own risk. California law should recognize that a surrogate mother agrees to surrender the child to the intended parent upon birth; however, if she changes her mind before the birth of the child, she can raise her constitutional due process right to a relationship with the child as a challenge to enforcement of the contract.¹⁶³ The court should then award custody based on a best interests analysis.

At first glance, this system appears to provide less predictability and make surrogacy contracts much less attractive to intended parents. Nonetheless, the evidence that few surrogacy agreements are disputed suggests that courts would still see very few of these disputes.¹⁶⁴ As Posner notes, many women who choose to become surrogates already successfully weigh the risks of the contract against the benefits, and in most cases court-ordered enforcement is not necessary.¹⁶⁵

When serious disputes do arise, clarity from the beginning about each party's rights would encourage full and frank discussion among the parties about their concerns and beliefs. If intended parents know from the outset that they are contracting with a surrogate at their own risk, they will be incentivized to investigate their surrogate. Contracting at risk would encourage intended parents and surrogates to discuss important issues, such as each party's beliefs about selective reduction, and what each party would desire in the case of a multiple

163. See *supra* Subpart II.C.

164. The Centers for Disease Control and Prevention estimate that approximately 18,400 infants were born as a result of gestational surrogacy in the United States between 1999 and 2013. Kiran M. Perkins et al., *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 *FERTILITY & STERILITY* 435, 437 (2016).

165. See Posner, *supra* note 155, at 25.

pregnancy or a fetus found to have birth defects. Open discussion would also provide opportunity for the surrogate to investigate the intended parent or parents and address any concerns she might have about surrendering a child to them.

What is clear from surrogacy cases such as *C.M.* is that, even in situations where both parties have legal representation, important issues such as selective reduction have somehow never been discussed, or at least not to the extent that they should have been. When Cook refused to comply with the selective reduction clause in the contract that her attorney helped her review, she showed that she must not have fully understood, or fully considered, that clause before signing. Likewise, the concerns she expressed regarding *C.M.*'s ability to parent could have been illuminated much earlier by communication and disclosure between the parties before entering into the contract.

It is possible that, had Cook and *C.M.* investigated one another before contracting, one or both parties may have chosen not to enter into the agreement. Instead of undermining the value of surrogacy contracts, that decision would have enhanced them. Able to make clear that he wanted only one child, *C.M.* could have sought out a different surrogate whose beliefs about selective reduction aligned with his own. Armed with an understanding of selective reduction clauses and knowing her own anti-abortion beliefs, Cook could have found an intended parent who agreed not to request a selective reduction. If the intended parent's financial circumstances were important to Cook, she could have inquired into them before contracting with him.

Bias and discrimination are serious issues that must be considered in the context of assisted reproduction, and it is easy to see how parties investigating one another might come to decisions based on personal bias. Cook's allegations that *C.M.* was an unfit parent, based on factors including his age, marital status, financial status, and disability, all ring of bias. Of course, freedom of association guarantees individuals the right to make private choices about with whom to carry on private relationships, and such protection would likely apply here.¹⁶⁶ Moreover, whatever personal, individual discrimination may result is outweighed by the benefits of the full exchange of information. Parties considering a surrogacy contract should be encouraged to make the most informed decisions possible, even if some of that information sometimes allows for biased decisions. It seems likely that for most parties, a thorough process of investigating and choosing with whom they will contract would be far preferable to engaging in a bitter court battle over issues that only come to light after the contract is signed.

166. See *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 546 (1987) ("In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984))).

CONCLUSION

Surrogacy contracts present an array of complicated issues involving fundamental rights and problems of contract enforcement. Selective reduction clauses, which lie at the heart of some recent surrogacy disputes, are unenforceable by specific performance, and monetary damages may be coercive, or in any case are unlikely to adequately compensate an intended parent for the care of unexpected multiple or developmentally challenged children. The surrogate mother has a fundamental right to choose whether to terminate a pregnancy, and a due process right to a relationship with the children, based on gestation and giving birth, that she should be able to assert up to seventy-two hours after giving birth. The intended parents should be aware of the surrogate's fundamental right, and of the fact that they contract with her at their own risk. Rather than undermine the predictability of the contract, such knowledge would provide a powerful incentive for the parties to investigate one another and to discuss the important issues of selective reduction and the surrogate's obligation to surrender the child at birth. While no system can fully guarantee predictability and informed decision-making in the surrogacy context, a system of at-risk contracting is the best way to encourage both.