

# Research Handbook on Surrogacy and the Law

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## 22. Surrogacy in the United States of America: from prohibition to permission

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### I INTRODUCTION

Surrogacy law in the United States has evolved significantly in the last several decades. Unlike many other countries, surrogacy is the subject of state-by-state regulation in the United States rather than the federal government. In 1986, the New Jersey Supreme Court declared that contracts for the purpose of traditional surrogacy are against public policy and will not be enforced.<sup>1</sup> A few years after the *Baby M* case, the New York State legislature passed a law criminalizing surrogacy.<sup>2</sup> Thirty years later, both New Jersey and New York also reversed course and recently legalized compensated surrogacy.<sup>3</sup> The trend from prohibition to permission of surrogacy has been occurring in many states around the country. There are several explanations for this change. The first relates to the advances of medical technology. The *Baby M* case involved a 'traditional' or 'genetic' surrogacy, whereas with the increased availability of in-vitro fertilization (IVF), gestational surrogacy is more common.

Besides medical technology, other reasons also explain trend to legalize compensated surrogacy. The debates around the recent New York legislation are emblematic of the new national politics around surrogacy in the United States today. First, a new powerful lobby of gay men and other members of the LGBTQI+ community pushed for legalization of surrogacy in New York. Second, while in the 1980s much of the feminist opinion on surrogacy was opposed to it, a new feminist perspective in favor of surrogacy was injected into the debates. However, consistent with their positions over the last 30 years, certain feminists and Catholic groups continued to oppose legalization. Third, another important voice in the conversation is RESOLVE: The National Infertility Association (Resolve), which also supported surrogacy legalization in New York and other states.

There is no consistent approach to surrogacy across the US states. The general trend among states is to explicitly legalize compensated surrogacy contracts through statute. The statutes are not uniform across the country. They differ, for example, in regard to who can be an intended parent and the rights and responsibilities of the surrogate. Even where there is no statute legalizing surrogacy contracts, courts may still enforce them. Courts may also permit intended parents to obtain orders naming them on the birth certificate of the child. Despite the trend, a few states have continued to prohibit surrogacy.

In this chapter, I trace the changing perspectives in the US courts on surrogacy. I provide an overview of the various legal approaches to surrogacy across US states today. I conclude with a case study of the debates surrounding the legalization of surrogacy in New York. Although

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<sup>1</sup> *Matter of Baby M* 109 N.J. 396, 419–421 (1988) (U.S.).

<sup>2</sup> Surrogate Parenting Contracts Void, 1992 Sess. Law News of N.Y. Ch. 308 (S. 1906) s 122 (U.S.).

<sup>3</sup> NY Family Court Act §§ 581–203, 581–401, 581–406 (U.S.); N.J.S.A. 9:17–60, et seq. (U.S.).

the dynamics vary from state-to-state, the general trend is to legalize surrogacy. Anti-feminist and religious organizations are often active in opposing efforts to legalize, but other feminist groups, LGBTQI+ organizations and advocates for infertile people have support efforts to legalize it. The positions of the various interest groups participating in the legislative process in New York reflect the new national perspectives on surrogacy.

## II FROM THE *BABY M* TO *JOHNSON V. CALVERT*

The quest of a woman to revoke her surrogacy contract and gain custody of the child she gave birth to became a national conversation in the 1980s.<sup>4</sup> An agency in New York recruited a surrogate named Mary Beth Whitehead and she entered into a surrogacy contract with Richard Stern. She was biologically related to the child and eventually decided that she could not part with her. Represented by an anti-surrogacy lawyer, Harold Cassidy, Ms. Whitehead sought and received significant media attention.<sup>5</sup> A public debate about surrogacy was underway in the United States as a result.

Ms. Whitehead refused to give up custody of Baby M and so Mr. Stern sued her in New Jersey where the child was born and where Ms. Whitehead resided.<sup>6</sup> The case made its way all the way up to the New Jersey Supreme Court.<sup>7</sup> There were 19 amicus briefs filed in the case. In one amicus brief, prominent feminists cautioned that surrogacy would exploit poor and minority women who will be forced into it. One of the signatories of the brief argued that surrogacy 'promotes baby-selling', permits 'an elite economic class to exploit a poorer group as breeders' and opens 'the floodgates to commercialization' of emerging reproductive technologies.<sup>8</sup> Another signatory, Betty Friedan, argued that 'the 'surrogate' becomes a kind of reproductive technology laboratory', and that surrogacy 'dehumanizes, depersonalizes and commodifies' women.<sup>9</sup> Another brief, by the Rutgers Women's Rights Clinic, argued that the surrogacy contract should be invalidated as against public policy.<sup>10</sup>

In overturning the lower court opinion, the New Jersey Supreme Court declared surrogacy contracts as against public policy and thus invalidated Ms. Whitehead and Richard Stern's contract. The court found that, although there was no statute that addressed the issue directly, several statutes could be seen to conflict with the surrogacy arrangement. Namely, the surrogacy contract conflicts with: (1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination

<sup>4</sup> Retro Report, 'Baby M and the Question of Surrogacy' (*The New York Times*, 23 March 2014) <http://nytimes.com/video/us/100000002781402/baby-m-and-the-question-of-surrogacy.html> accessed 16 August 2022.

<sup>5</sup> Margot Hornblower, 'Whitehead Vows Fight to End' (*Washington Post*, 3 April 1987) <http://washingtonpost.com/archive/politics/1987/04/03/whitehead-vows-fight-to-end/92781bad-9dfb-4f73-9344-9278caaf027d/>.

<sup>6</sup> *Matter of Baby M* (n 1) 416.

<sup>7</sup> *Ibid* 419.

<sup>8</sup> Betty Friedan, 'Feminists Fight Court Ruling in Baby M Decision: Steinem, Friedan, Chesler, French Among Supporters' (*LA Times*, 31 July 1987) <http://latimes.com/archives/la-xpm-1987-07-31-vw-147-story.html> accessed 17 May 2022.

<sup>9</sup> *Ibid*.

<sup>10</sup> Nadine Taub, 'Amicus Brief: In the Matter of Baby M' (1987) 10(1) *Women's Rights Law Report* <http://pubmed.ncbi.nlm.nih.gov/16086457/>.

of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions.<sup>11</sup>

The court further objected to the fact that Ms. Whitehead irrevocably committed to give up the child before she knew the strength of her bond with the child. According to the court, a surrogate:

never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary.<sup>12</sup>

As a result of the decision, traditional surrogacy contracts could no longer be enforced in New Jersey. To adjudicate custody of 'Baby M', the New Jersey Supreme Court sent the case back down to the lower court. Instead of contract law principles, the court used family law principles to decide that it was in the best interests of the child to grant primary custody to the Sterns.<sup>13</sup>

While the New Jersey Supreme Court had taken a prohibitory approach, just five years later, in 1993, the California Supreme Court approached the issue differently. It was the first opinion in the United States where a court found that a compensated surrogacy contract was enforceable. Anna Johnson entered into a surrogacy agreement with Mark and Crispina Calvert whereby she agreed to be implanted with an embryo that was genetically related to Mark and Crispina Calvert. She agreed that she would not have any parental rights in the child. But after the delivery, Anna sought custody of the child. The court found that, although Anna could also be considered a mother under the California statute, the court would honor the intent of the parties in entering into the agreement.<sup>14</sup>

In *Johnson v. Calvert*, the court rejected as paternalist similar rationales advanced by the court in *Baby M*. The court stated that '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'.<sup>15</sup> This opinion opened the way for a burgeoning gestational surrogacy industry in California. However, only a year later, a California Court of Appeal held that traditional surrogacy arrangements were unenforceable thereby foreclosing what some consider a safer route for the surrogates.<sup>16</sup>

Although 19 amicus briefs were filed in the *Baby M* case, only one was submitted in *Johnson v. Calvert*. The American Civil Liberties Union (ACLU)'s amicus brief in *Johnson v. Calvert* argued that Anna's right of privacy requires recognition and protection of her status as 'birth mother'.<sup>17</sup> Acknowledging that procreative decisions are protected under California's constitution, the court, however, rejected the view that Anna's claim falls within even the broad parameters of the state right of privacy.<sup>18</sup> According to the court, 'the choice to gestate

<sup>11</sup> *Matter of Baby M* (n 1) 423.

<sup>12</sup> *Ibid* 437.

<sup>13</sup> *Ibid* 466.

<sup>14</sup> *Johnson v. Calvert* 5 Cal. 4th 84 (1993) (U.S.).

<sup>15</sup> *Ibid* 98-9.

<sup>16</sup> *In re Marriage of Moschetta* 25 Cal. App. 4th 1218, 1221 (1994).

<sup>17</sup> *Calvert* (n 14) 100.

<sup>18</sup> *Ibid*.

and deliver a baby for its genetic parents pursuant to a surrogacy agreement' is not the equivalent of the decision whether to bear a child of one's own.<sup>19</sup> Thus, '[a] woman who enters into a gestational surrogacy arrangement is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child as her own'.<sup>20</sup>

In a matter of five years, two of the highest state courts in the country (i.e., New Jersey and California) had arrived at diametrically different approaches to surrogacy. An important distinction between the two cases was that while in *Baby M*, the surrogate had a genetic relationship with the child, the surrogate in *Johnson v. Calvert* did not. When the surrogate does not have a genetic relationship with the child, it weakens her claim under family law that has historically relied on biology as one important basis for adjudicating custody. While the *Baby M* court invalidated the contract on public policy grounds, the *Johnson v. Calvert* court found no basis for that.<sup>21</sup> Instead, they relied on contract law interpretive doctrines that focus on the intention of the parties at the time they entered into the contract.<sup>22</sup> The different approaches of the two state supreme courts may also be related to the evolving understanding of surrogacy. Unlike in the *Baby M* case where feminists and other groups vociferously objected to surrogacy, the growing public opinion in the United States is in favor of legalization of compensated gestational surrogacy. In the next section, I discuss the different legal approaches taken by states in the United States towards surrogacy more recently.

### III PATCHWORK OF APPROACHES TO SURROGACY IN THE UNITED STATES

People enter into surrogacy arrangements in most states in the United States today except for a few states where statutory prohibitions still exist. Even in prohibitive states, however, intended parents can still have children through surrogacy by entering into contracts with surrogates resident in permissive states. Permissive states offer varying approaches to surrogacy. Some states have explicitly permitted it by statute. Those statutes might recognize surrogacy contracts as binding and might also permit courts to grant 'pre-birth orders.' Pre-birth orders allow the names of intended parents rather than the surrogate to be placed on birth certificates. Even where states have not adopted statutes, courts in those states also routinely enforce surrogacy contracts and/or grant pre-birth orders.

In some states, the law on the books tells a different story than the practice in each state. For example, Arizona passed a statute that prohibits courts from enforcing gestational and traditional surrogacy contracts.<sup>23</sup> Yet, intended parents and surrogates still enter into contracts even though they know they will not be enforced in court. They call these unenforceable contracts 'memorandum of understandings'. Even though courts will not enforce agreements made

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<sup>19</sup> Ibid 99.

<sup>20</sup> Ibid 100.

<sup>21</sup> Ibid 96.

<sup>22</sup> Ibid.

<sup>23</sup> Arizona Revised Statutes s 25-802 (U.S.).

about surrogacy arrangements, they have given intended parents some assurances by granting orders identifying intended parents as the legal parents even prior to the birth of the child.<sup>24</sup>

Surrogacy law and practice is constantly evolving across the United States. A surrogacy agency, Creative Family Connections, maintains a fairly up-to-date map of state laws maintained by lawyers in each state.<sup>25</sup> They divide states into the following three broad categories based on the level of protections they offer for intended parents.

### **Category 1: Green Light States (42 States and the District of Columbia)**

Ten states and the District of Columbia offer intended parents high levels of protection. In those states, surrogacy is permitted for all parents (including same-sex couples) and pre-birth orders are granted which allow for both intended parents to be named on the birth certificate.<sup>26</sup> In 31 other green light states, while surrogacy contracts are enforceable, it might be more difficult to obtain pre-birth orders and restrictions might apply for same-sex couples.<sup>27</sup>

### **Category 2: Yellow Light States (5 States)**

In three states, there is no clear statute or case law prohibiting surrogacy, and as a result it is practiced.<sup>28</sup> In two states, surrogacy contracts are void and unenforceable, but surrogacy is still practiced even though the parties know that their contracts are unenforceable contracts.<sup>29</sup> In Virginia, gestational surrogacy is permitted by statute, but compensation is generally not permitted for the surrogate other than housing and other reasonable expenses and intended parents must be married or a single person.

### **Category 3: Red Light States (3 States)**

In the three most restrictive states in the United States, compensated surrogacy is explicitly prohibited and in one state surrogacy is criminalized. It is only in these restrictive states that people are not likely to engage surrogates from within their states.<sup>30</sup>

<sup>24</sup> Creative Family Connections, 'Gestational Surrogacy in Arizona' (2020) <http://creativefamilyconnections.com/us-surrogacy-law-map/arizona/> accessed 17 May 2022. Creative Family Connections, 'The United States Surrogacy Law Map' (2020) <http://creativefamilyconnections.com/us-surrogacy-law-map/> accessed 17 May 2022. In Indiana, surrogacy contracts are also void by statute, but parties still enter into 'unenforceable' contracts. Creative Family Connections, 'The United States Surrogacy Law Map' (2020) <http://creativefamilyconnections.com/us-surrogacy-law-map/indiana/> accessed 2 August 2022.

<sup>25</sup> Creative Family Connections, 'The United States Surrogacy Law Map' (2020). <http://creativefamilyconnections.com/us-surrogacy-law-map/> accessed 17 May 2022.

<sup>26</sup> These states are California, Colorado, Connecticut, Delaware, Maine, New Hampshire, New Jersey, Nevada, Vermont, and Washington.

<sup>27</sup> These states are Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Maryland, Minnesota, Mississippi, Missouri, Montana, New York, North Carolina, North Dakota, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Wisconsin, and West Virginia.

<sup>28</sup> These states are Idaho, Tennessee and Wyoming.

<sup>29</sup> These states are Arizona and Indiana.

<sup>30</sup> Louisiana, Michigan, and Nebraska.

States have come a long way since the *Baby M* case. The trend has been to move from prohibition to permission. Today surrogacy is allowed in the great majority of states, but states offer different levels of protection to the surrogate. Indeed, Professor Joslin observed the lack of uniformity in the statutory schemes of many states, including in regard to protections for surrogates.<sup>31</sup> Some states explicitly allow contract provisions that restrict a surrogate's autonomy in terms of her eating or other lifestyle during the pregnancy.<sup>32</sup> Some states require surrogates to have independent counsel by statute and other states regulate compensation.<sup>33</sup> In the next section, I discuss a state that recently passed a law legalizing surrogacy that included a 'surrogates' bill of rights'. The different interest groups involved in lobbying for and against the bill are emblematic of the national politics on surrogacy in the United States today.

#### IV THE NEW YORK CASE STUDY: HOW SURROGACY WENT FROM BEING CRIMINALIZED TO LEGALIZED?

In this section, I explain how New York law changed from criminalizing surrogacy to legalizing it. New York adopted one of the country's most draconian anti-surrogacy laws in 1992 in response to *Baby M* case, which was playing out in a neighboring state, New Jersey. A Task Force for Life and Law was formed by then-governor Mario Cuomo to study the issue. The Task Force strongly objected to surrogacy on grounds that it uses unproven technology, disrupts our traditional understanding of family, and has the potential to be abusive of poor and minority woman who would become surrogates (among other things).<sup>34</sup> The empirical data has not borne out the consequentialist concerns about the potential harms of surrogacy.

I highlight the various interest groups that participated in the legislative process in New York whereby surrogacy was legalized after nearly 30 years of prohibition. A new and powerful group of people in New York as well as nationally have entered the conversation about surrogacy – the LGBTQI+ community. They lobbied for legalization in New York.<sup>35</sup> In addition, while the feminist voices against surrogacy from the time of the *Baby M* case have remained present, there were also other feminist views in favor of surrogacy.<sup>36</sup> New York was the most recent state to legalize surrogacy and national actors convened upon New York to propose their own viewpoints. The debates that unfolded around New York's surrogacy laws are reflective of the national debates underway in the United States on surrogacy today.

<sup>31</sup> Courtney G. Joslin, '(Not) Just Surrogacy' (2021) 109(1) *California Law Review* 401.

<sup>32</sup> Ibid 448.

<sup>33</sup> Ibid 456.

<sup>34</sup> The New York State Task Force on Life and the Law (The New York Task Force), *Surrogate Parenting: Analysis and Recommendations for Public Policy* (1988), 23.

<sup>35</sup> Glenn Blain, 'Exclusive: Gay Rights Advocates Fight to Lift Ban on Paying Surrogate Moms' *New York Daily News* (New York, 15 January 2014) <http://nydailynews.com/news/politics/push-nys-ban-paying-surrogate-moms-article-1.1581165> accessed 27 July 2022.

<sup>36</sup> See Jennifer A. Parks, 'Gestation Surrogacy and the Feminist Perspective' in Escott Sills (ed.), *Handbook of Gestation Surrogacy: International Clinical Practice and Policy Issues* (Cambridge University Press 2016); see also Sarah Jefford, 'Feminism and Surrogacy' (2022) <http://sarahjefford.com/feminism-and-surrogacy/> accessed 27 July 2022.

## A The New York Surrogacy Ban

The New York State Legislature prohibited compensated surrogacy in 1992 on the heels of *Baby M* case. While the New Jersey legislature never adopted a statutory ban, New York banned compensated surrogacy based on the strong recommendations of a 1988 report by the New York Task Force for Life and Law. The Task Force concluded that public policy should discourage surrogate parenting. In justifying this conclusion, they argued that surrogacy 'places children at risk and is not in their best interests or those of society at large', 'has the potential to undermine the dignity of women, children, and human reproduction by commercializing childbearing', and 'represents a significant departure from existing values and standards about parental rights and responsibilities embodied in New York State law'.<sup>37</sup> On the basis of these conclusions and the idea that a legislature 'should act to safeguard the basic values and rights that have long been embodied in our laws on the relationship between parents and their children', the Task Force proposed legislation that formed the motivation for, and substantially provided the language which comprises, the current New York law on surrogacy.<sup>38</sup>

Under the 1992 law in New York, uncompensated and compensated surrogacy agreements were both void and unenforceable. Furthermore, those entering into, or assisting others in entering into, compensated surrogacy agreements were subject to fines and criminal sanctions. A penalty of \$500 attached to the conduct of intended parents and surrogates (along with their spouses) participating in a surrogacy arrangement in which payment exceeded reasonable medical expenses and those expenses permissible in an adoption. Any other person or entity who induced, arranged or otherwise assisted in the formation of a surrogacy agreement in violation of statutory restrictions faced fines up to \$10,000 and forfeiture of any fees received, and would have been guilty of a felony if they had been previously subject to a civil fine for violating the section.<sup>39</sup> The parties to an uncompensated surrogacy arrangement were not subject to fines or criminal sanctions, the surrogate was considered under New York law to be the presumptive legal mother of the child. Consequently, if a child was born through a surrogacy arrangement in New York, the child's legal relationship to his or her intended parents would have been insecure.<sup>40</sup>

In addition, because surrogacy agreements were void and unenforceable, a surrogate was not able to sue to recover any payments due to her. A New York appellate court had even refused to enforce a contract to perform IVF services against a physician who agreed to transfer an embryo in connection with a paid surrogacy. Stating that the IVF services were 'part and parcel of [the surrogacy] contract', the court declined to enforce the contract because 'a party to an illegal contract cannot seek a court of law to help her carry out her illegal object, and the court will leave the parties to such a contract where they find them'.<sup>41</sup>

Despite the fact that compensated surrogacy agreements were unenforceable, they still occurred in New York. The parties typically executed a 'memorandum of understanding',

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<sup>37</sup> The New York Task Force, *Surrogate Parenting* (n 34) 138.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* 25.

<sup>40</sup> New York Domestic Relations Law 2021 s 122 (U.S.).

<sup>41</sup> *Itskov v. New York Fertility Institution* 813 N.Y.S.2d 844, 844-6 (2006) (U.S.).



which, though unenforceable, helps the parties understand each other's positions on important issues.<sup>42</sup>

During the prohibitionist period, many New York residents sought out surrogates from other states. When New Yorkers contracted with surrogates in other states, their contracts usually contained choice-of-law clauses specifying that the law of the foreign state governs the contract and the child is born in that state.<sup>43</sup> Since the child's place of birth is one place where a potential custody battle can arise, surrogacy contracts may have required surrogates to give birth in states that enforce surrogacy contracts.<sup>44</sup> Before or after the surrogate successfully delivers a child in a surrogacy-friendly state, the intended parents typically obtain an order of parentage pursuant to the law of that state. Next, I discuss the concerns that led the legislature to adopt the ban and then discuss how technology and society have changed since that time.

## **B      Decreasing Relevance of the Concerns that Led to New York to Ban           Compensated Surrogacy**

A report published by the New York Task Force on Life and Law (the Task Force) in 1988 heavily influenced New York to ban surrogacy. After describing arguments both for and against surrogacy, the report recommended a ban on surrogacy.<sup>45</sup> The Task Force raised five main concerns: (1) individual access and societal responsibility in the face of new technological possibilities; (2) the interests of children; (3) surrogacy's impact on family life and relationships; (4) individual liberty in human reproduction and attitudes about reproduction and women; and (5) application of the informed-consent doctrine.<sup>46</sup>

Many of the Task Force report's concerns have been alleviated by technological and/or societal changes. The Task Force's first concern involved individual access and societal responsibility in the face of new technological possibilities. The Task Force noted that opponents of surrogacy argue that surrogacy involves new technology and that, until it is demonstrated that the practice is not harmful, it should not be allowed.<sup>47</sup> The technology used for surrogacy, IVF, is no longer new technology, but has been legally available in New York for decades.<sup>48</sup> Egg donation and sperm donation are also legal. Thus, while this technology might have been new in the early 1990s when the New York ban was passed, it no longer is unproven.

The Task Force's second set of concerns involved the children born from surrogacy agreements. First, the Task Force referred to concerns that surrogacy constitutes baby selling.<sup>49</sup> When the Task Force Report was published, the few surrogacy arrangements that existed were 'traditional surrogacy' arrangements, but today most involve gestational surrogacy.<sup>50</sup> This

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<sup>42</sup> Interview with Cornell International Human Rights Clinic and New York surrogacy attorney (21 March 2017).

<sup>43</sup> *Ibid*; see also *Hodas v. Morin* 814 N.E.2d 320 (2004) (U.S.).

<sup>44</sup> Uniform Child Custody Jurisdiction and Enforcement Act s 201(a)(1) (U.S.).

<sup>45</sup> The New York Task Force, *Surrogate Parenting* (n 34) 138.

<sup>46</sup> *Ibid* 71.

<sup>47</sup> *Ibid* 74.

<sup>48</sup> Task Force on Life and the Law, New York State Department of Health, 'Executive Summary of Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy' (2011) [http://health.ny.gov/regulations/task\\_force/reports\\_publications/execsum.htm](http://health.ny.gov/regulations/task_force/reports_publications/execsum.htm) accessed 16 August 2022.

<sup>49</sup> The New York Task Force, *Surrogate Parenting* (n 34) 77.

<sup>50</sup> *Ibid* 23.

means that the surrogate is not carrying a child created from her egg. In addition, legal innovations by courts grant parenthood rights to the intended parents prior to the birth of the child. Thus, concerns that the surrogate is selling her child are alleviated by the fact that the surrogate is not a genetic parent and the intended parents and not the surrogate have legal responsibility for the child at birth. Further, any compensation is specifically characterized as payment for time, effort, pain and/or risk to health in excess of reasonable medical and ancillary costs.<sup>51</sup> In modern relationships, the surrogate is viewed as selling a service, and not a child.

Second, the Task Force noted that the identity and emotional well-being of a child delivered by a surrogate could be harmed because surrogacy arrangements fracture parenting into genetic, gestational, and rearing components.<sup>52</sup> The Task Force also noted that other children could be harmed through surrogacy arrangements, including the surrogate's pre-existing children, who may develop fears of abandonment and sadness from having lost a sibling.<sup>53</sup> While numerous fears about children's well-being existed decades ago and some still make those arguments, empirical research has not substantiated these concerns. In fact, research suggests that surrogacy does not have a negative effect (and may have a positive effect) on children born of surrogacy arrangements and the existing children of surrogates.<sup>54</sup>

Third, the Task Force pointed out that intended parents might abandon disabled children.<sup>55</sup> Although this is not a widespread problem, there have been cases where disabled children have been abandoned by their intended parents. In one case, when a fetus was diagnosed with Down's syndrome, the intended parents told the surrogate to abort the fetus. When the surrogate refused, the intended parents relinquished any claim to the child. The surrogate nonetheless gave birth to the child, and she and her partner took custody of and assumed responsibility for the child.<sup>56</sup> While any parent, regardless of how the child was conceived, could choose to relinquish their child due to the child's disability, surrogacy laws should proactively address this risk. Surrogacy lawyers suggest that it is good practice to discuss issues such as disability and abortion (in those states where abortion is not banned) with intended parents and surrogates prior to the surrogacy, to ensure that both parties are in agreement about what should occur if the fetus is diagnosed with disabilities.<sup>57</sup>

<sup>51</sup> New York Family Court (N.Y. Fam. Ct.) Act 2021 s 581-103(G) (U.S.).

<sup>52</sup> New York Task Force, *Surrogate Parenting* (n 34) 77.

<sup>53</sup> *Ibid.*

<sup>54</sup> Vasanti Jadva and others, 'Surrogacy Families 10 Years On: Relationship with the Surrogate, Decisions Over Disclosure and Children's Understanding of Their Surrogacy Origins' (2012) 27 *Oxford Academic* 3008; see also S. Golombok and others, 'Non-genetic and Non-Gestational Parenthood: Consequence for Parent-Child Relationships and the Psychological Well-being of Mothers, Fathers and Children at Age 3' (2006) 21 *Oxford Academic* 1918; see also Fiona MacCallum and others, 'Surrogacy Families: Parental Functioning, Parent-Child Relationships and Children's Psychological Development at Age 2' (2006) 47 *Journal of Child Psychology and Psychiatry* 213; see also Katherine H. Shelton and others, 'Examining Differences in Psychological Adjustment Problems Among Children Conceived by Assisted Reproductive Technologies' (2009) 33 *International Journal of Behavior Development* 385; see also Vasanti Jadva and Susan Imrie, 'Children of Surrogate Mothers: Psychological Well-Being, Family Relationships and Experiences Of Surrogacy' (2014) 29 *Human Reproduction* 90.

<sup>55</sup> New York Task Force, *Surrogate Parenting* (n 34) 77.

<sup>56</sup> Keston Ott-Dahl, 'Why Surrogacy Laws Must Be Established – the Story of the Ott-Dahls' (*Huffington Post*, 29 March 2017) [http://huffingtonpost.com/keston-ottdahl/why-surrogacy-laws-must-b\\_b\\_9413418.html](http://huffingtonpost.com/keston-ottdahl/why-surrogacy-laws-must-b_b_9413418.html) accessed 16 August 2022.

<sup>57</sup> Interview with Cornell International Human Rights Clinic and New York surrogacy attorney (2 February 2017).

The Task Force articulated a set of concerns relating to how surrogacy disrupts traditional notions of family.<sup>58</sup> The arguments assumed that surrogacy involved a heterosexual married couple where the child was the biological child of the man of the couple and of the female surrogate. For example, the Task Force noted that surrogate parenting violates the traditional relationship of parents and children by promoting the abdication of the parental responsibility to nurture one's children (presumably by the surrogate). The Task Force further noted that the fact that the child is genetically linked to only one parent could weaken the bond between the unrelated parent and the child.<sup>59</sup>

The traditional model of a family as one male and one female married couple has greatly evolved since the report was published nearly 30 years ago. A growing number of couples are same-sex partners. Obviously for same-sex couples, only one parent (at most) will be genetically connected to the child. The US Supreme Court's decision in 2015 to guarantee same-sex couples equal marriage rights is evidence of the changing social norms and beliefs.<sup>60</sup> While it is true that surrogacy has the potential to change traditional notions of family by creating new possibilities for parental relationships, what are considered acceptable family structures by our society has already changed. Thus, the concerns articulated by the Task Force in this regard are less relevant today.

The Task Force noted concerns that surrogates who enter into surrogacy agreements may not or cannot give informed consent to an agreement that requires them to give up legal custody of a child to whom they have given birth. According to the Task Force, a person is thought to give informed consent when a person has given consent and (1) the person possesses sufficient information to make a decision; (2) the person has the ability to understand and appreciate their decision; and (3) the decision is voluntary and free from coercion.<sup>61</sup> Focusing on the first two prongs of the informed-consent definition, the Task Force pointed out that opponents of surrogacy believe that women cannot make an informed choice to enter into a surrogacy contract prior to a child's birth. They argue that women cannot anticipate their feelings until after the conception and birth. Those arguments were largely informed by the experience of Mary Beth Whitehead, the surrogate in the *Baby M* case, who made a very public plea to keep the child she gave birth to despite her prior agreement to relinquish custody.<sup>62</sup>

Since the *Baby M* decision, many surrogacy relationships have taken place in the United States. There is much more empirical data to evaluate the concerns that were raised by the Task Force. The empirical data on surrogacy arrangements suggests that women are able to anticipate in advance whether or not they would be comfortable relinquishing physical and legal custody of a child they gestated. As of 2008, approximately 25,000 women in the United States had given birth through surrogacy in its contemporary form as a legal, commercial process.<sup>63</sup> It is estimated that over 99 percent of these women willingly relinquished the child as they had agreed to do, and less than one-tenth of 1 percent of agreements resulted in court

<sup>58</sup> New York Task Force, *Surrogate Parenting* (n 34) 84–5.

<sup>59</sup> *Ibid* 81.

<sup>60</sup> See *Obergefell v. Hodges* 135 S. Ct. 2584 (2015) (U.S.).

<sup>61</sup> New York Task Force, *Surrogate Parenting* (n 34) 88.

<sup>62</sup> *Ibid* 89.

<sup>63</sup> Elly Teman, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' (2008) 67 *Social Science and Medicine* 1104, 1104. For a comprehensive review of the empirical literature on the impact of surrogacy on surrogates, children, and others, please see, Annie Yau, Rachel L. Friedlander, Allison Petrini and others, 'Medical

battles.<sup>64</sup> In addition, empirical research suggests that the majority of surrogates have a high level of satisfaction with the process and report no psychological problems as a result of relinquishment.<sup>65</sup> In fact, surrogate mothers in the United States have reported satisfaction and a sense of ‘helping’ a childless individual or couple.<sup>66</sup>

Recognizing the decreasing relevance of the concerns that led to New York’s ban on surrogacy, efforts to legalize surrogacy began in 2012. Compensated gestational surrogacy became legal in New York in 2021. The debates around surrogacy in New York discussed below are emblematic of the new national conversation on surrogacy today.

### C Lobbying for Legalization

A version of the Child-Parent Security Act (CPSA) was first introduced in 2012 by Assembly Member Amy Paulin (D-Scarsdale) and was introduced in the Senate by Senator Brad Hoylman (D-Manhattan, 27th District). It is a comprehensive bill addressing the parentage of all children born through third-party reproduction. The CPSA permits New York residents to enter into enforceable, compensated gestational surrogacy agreements, as long as the agreements comply with several criteria, and provides mechanisms for establishing the legal parentage of children conceived with assisted reproductive technology.

Certain feminist organizations and Catholic groups vociferously lobbied against legalization. On the other hand, a national infertility association as well as LGBTQI+ groups pushed for legalization. The debates in New York on surrogacy are a microcosm for the national conversation in the United States. While opponents to surrogacy remain, the supporters of allowing people to be compensated for being surrogates appear to be winning. Below I provide an overview of the positions of various organizations in regard to the legalization of compensated surrogacy in New York.

#### 1. Catholic organization

The Catholic church has historically been opposed to surrogacy. In their statement against the CPSA, they focused on exploitation of the surrogacy. Kathleen M. Gallagher, director of pro-life activities for the New York State Catholic Conference stated that ‘legislation is designed mainly to benefit wealthy men who can afford tens of thousands of dollars to pay baby brokers, at the expense of low-income women’.<sup>67</sup> As evidence that surrogates are typically taken advantage of, they cited other countries, including European Union countries. They also argued that countries such as India, Nepal, Thailand and Cambodia have banned

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and Mental Health Implications of Gestational Surrogacy’ (2021) *Am. J. Obstet. Gynecol.* (8 April 2021) [http://ajog.org/article/S0002-9378\(21\)00438-5/fulltext](http://ajog.org/article/S0002-9378(21)00438-5/fulltext) accessed 20 July 2022.

<sup>64</sup> Teman (n 63) 21.

<sup>65</sup> Ibid; see also Vasanti Jadva and others, ‘Surrogacy: The Experiences of Surrogate Mothers’ (2003) 18 *Human Reproduction* 2196.

<sup>66</sup> Karen Smith Rotabi and Nicole F. Bromfield, ‘From Inter-country Adoption to Commercial Global Surrogacy’ (1st edn, Routledge 2016) <http://ncbi.nlm.nih.gov/pmc/articles/PMC7721025/> accessed 20 July 2022.

<sup>67</sup> Catholic News Agency, ‘New York Bishops Condemn “Dangerous” Surrogacy Bill’ (8 January 2020) <http://catholicnewsagency.com/news/43236/new-york-bishops-condemn-dangerous-surrogacy-bill> accessed 18 May 2022.

surrogacy trade because of the abuse of poor women and the 'exploitation of the female body and her reproductive organs'.<sup>68</sup>

## 2. Anti-surrogacy feminist perspective

An organization that was opposed to surrogacy in the 1980s reiterated that same position in the legislative debates in New York in 2020. The National Organization for Women (NOW) noted that they are not opposed to uncompensated surrogacy (which they refer to as 'altruistic surrogacy') and they acknowledge that it is 'often utilized to help LGBTQIA+ couples and women struggling with fertility to build their families'.<sup>69</sup> However, NOW still cautioned against the legalization of compensated surrogacy.<sup>70</sup>

Repeating the commodification arguments they made three decades ago, they argued that '[c]ommercial surrogacy does not depend on the willing choice of friends or family to help loved ones, instead it relies on the commodification of women's bodies. History has shown us that the buying, selling and renting of their bodies does great harm to women.'<sup>71</sup> Reminiscent of the arguments made by Catholic organizations, NOW focuses on monetary exploitation of surrogates.<sup>72</sup> They stated: '[o]nce for-profit agencies and large sums of money are involved, women may be drawn into surrogacy due to financial desperation, a choice made when there are no other choices'.<sup>73</sup>

Some of the feminists and feminist organizations who submitted an amicus brief in the *Baby M* case arguing against the practice of surrogacy also wrote a letter to the Governor of New York, at the time Andrew Cuomo, objecting to the CPSA. They argued that:

We are convinced that if passed, this bill will legalize and legitimize the reproductive trafficking of women in New York State, open the door to the mass exploitation of women in consumer-driven contract pregnancies in our State, and ultimately render New York State a global destination for reproductive tourism. In the process, legalized commercial surrogacy in New York State will inflict incalculable harm on New York's most vulnerable women.

Even if the fetus the woman carries is not developed from her egg, her body and mind, her caretaking and nurturing over nine long months, not including the period of time for embryo transplantation and post-delivery recovery, make this gestation possible. The 'Child-Parent Security Act' presumes both that this contribution can be monetized and that the surrogate mother's attachment and rights are subordinate to those of the individual or couple subsidizing the reproductive exploitation of her body.<sup>74</sup>

The arguments set forth in this letter, however, fail to recognize any role for the surrogate as a person with free will who can make decisions for herself. Without any empirical evidence, it presumes that the surrogate will always be in a position of being exploited and abused.

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<sup>68</sup> Ibid.

<sup>69</sup> NewsRoom, 'NOW Issues Statement on Commercialized Surrogacy' (Washington, 14 June 2019) <https://now.org/media-center/press-release/commercialized-surrogacy-exploits-women/>.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> CBC-Network, 'Asking New York State Assemblywoman Amy Paulin to Withdraw Support for Commercial Surrogacy Bill' (21 August 2018) <https://cbc-network.org/2018/08/asking-new-york-state-assemblywoman-amy-paulin-to-withdraw-support-for-commercial-surrogacy-bill/> accessed 18 May 2022.

Under this feminist view, sometimes referred to as ‘radical feminism’, sex work is also always equated with trafficking without examining the situation of the individuals involved.

In furtherance of their view, the signatories of the letter, like the Catholic organizations, pointed to trends in other countries. They cited the European Parliament’s statement that surrogacy undermines human dignity ‘since [a surrogate’s] body and its reproductive functions are used as a commodity’.<sup>75</sup> The letter also pointed out that countries as France, Germany, and Switzerland, prohibit all reproductive surrogacy arrangements. In addition to Global North countries, the letter also referred to the Global South.<sup>76</sup> They noted that India, Thailand, Nepal, and Cambodia, have chosen to prohibit commercial surrogacy given the problems they saw with reproductive tourism.<sup>77</sup>

### 3. Pro-surrogacy feminist perspective

Although the feminist position was more uniformly against surrogacy in the 1980s when the *Baby M* case was playing out through the national media, a new feminist perspective supported the legalization of surrogacy. The Women’s Bar Association of New York (WBASNY) issued a statement supporting legalization in New York. The organization expressed concern about the potential harmful impacts of surrogacy, namely the ‘inherent health risks to the gestational carrier and resulting child, and the risks of exploitation and human trafficking of vulnerable populations, including immigrants’.<sup>78</sup> Despite these potential negative consequences, WBASNY concluded that the CPSA mitigates the concerns and the risks to women and children associated with such agreements and should be supported.<sup>79</sup>

I also testified before a committee of the New York State legislature. I argued that surrogacy implicates concerns for women’s autonomy. When a woman chooses to support a couple or individual by serving as a gestational surrogate, I believe she must have the autonomy to do so – provided she is protected by the law to ensure that any power imbalance between her, on the one hand, and the intended parents, surrogacy agencies and doctors, on the other hand, is mitigated.

In response to the arguments that surrogacy will be exploitative, I pointed out that critiques conflate an ideological objection to surrogacy with a prediction that surrogates in New York will be abused. Those who shroud their objections to surrogacy by pointing to the abusive conditions in other countries object to surrogacy on religious grounds or because they think women’s gestational care should never be bought and sold.

I pointed out the limitations of comparative approaches to surrogacy. Anti-surrogacy feminists and Catholic organizations both pointed the finger to some of the abusive conditions in India and other countries for surrogates to suggest that the same would result in New York if it were to legalize surrogacy. I argued that the exploitation of surrogates in India was in part because of the failure of the private contract model to protect surrogates in India in the same way it does in the United States. In India, (among other things) courts are not accessible to surrogates (there are no contingent fee arrangements allowed) and litigation takes a significant

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> WBASNY, ‘Position Statement – 2019, Child Parent Security Act, *Support*’ (2019) <http://wbasny.org/legislation/2019-a-1071-c-paulin-s-2071-b-hoylman/> accessed 16 August 2022.

<sup>79</sup> Ibid.

amount of time. On the other hand, in the United States, industry actors operate under the 'shadow of the common law' and have created surrogate-protective norms in part because of a concern that without them contracts could be invalidated in court.<sup>80</sup>

Resolve, a national infertility organization, was also a powerful lobby in favor of the CPSA. In response to the letter signed by Gloria Steinem (among others) to Governor Cuomo, in which they claimed that surrogates will be exploited, Resolve stated that:

We are confident that if Ms. Steinem spent time with women in this country who choose to serve as surrogates – the less than 5% of applicants who meet the rigorous requirements for doing so – she'd arrive at a very different conclusion. She would understand that these women do not enter into surrogacy capriciously or desperately. She would appreciate that they have been informed of, and researched, the science, and the legal guidelines. She would see that they are all mothers raising their own children and are primarily motivated by giving the gift of life to people who ache with the desire to raise children of their own.<sup>81</sup>

Resolve also argued that allowing surrogacy provides a pathway for interfile and LGBTQI+ families to have children.<sup>82</sup>

#### **4. LGBTQI+ groups**

A very vocal constituency in favor of legalization of surrogacy were New York-based and national LGBTQI+ groups. For some gay families, surrogacy is the only way for them to have a child biologically related to at least one parent. Recognizing the connection to equality, Governor Cuomo called legalization the 'natural extension' of marriage equality.<sup>83</sup> To help push for the CPSA's passage, celebrity Andy Cohen was brought to tell his story of how surrogacy helped build his family. When the final votes were being counted for the bill, he tweeted:

THE CLOCK IS TICKING!! The LGBTQ community won't forget if the DRACONIAN surrogacy ban in New York is not overturned. Let the NY Assembly know! RT!<sup>84</sup>

Other organizations such as Equality Now NY and Family Equality sent out similar tweets.

#### **D Surrogacy is Legalized in New York State**

Although introduced in 2012, the CPSA remained stalled in the judiciary committee of the legislature for many years. During the 2019 session of the state legislature, the CPSA made it farther than ever before; it passed the New York State Senate. However, it was not introduced for vote in the New York State Assembly because of the objections of anti-surrogacy feminists and Catholic groups. Governor Cuomo short-circuited the normal legislative process in New York by including the CPSA in the state budget for the fiscal year 2021. Although it may

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<sup>80</sup> Sital Kalantry, 'Paid Surrogacy in New York Won't Lead to Exploitation: What's India Got To Do With It?' (*New York Daily News*, 7 June 2019) <http://nydailynews.com/opinion/ny-oped-paid-surrogacy-wont-lead-to-exploitation-20190607-4jw6du456jd4jpszg062tiarcxq-story.html> accessed 16 August 2022.

<sup>81</sup> Letter from Resolve to Governor Cuomo (13 June 2019).

<sup>82</sup> Letter from National Infertility Organization (Resolve) to Governor Cuomo (13 June 2019).

<sup>83</sup> Bethany Bump, 'Lines Drawn in Surrogacy Debate' (*NewsRoom*, 16 June 2019).

<sup>84</sup> Tweet by Andy Cohen (18 June 2019).

seem that the inclusion of the CPSA in a budget would be beyond the outer limits of executive power, this is not the case in New York. Its Constitution and case law permit the governor to include substantive non-fiscal items in the budget.<sup>85</sup> During this legislative session, both houses of the New York State legislature adopted the budget and the CPSA as the Covid-19 crisis loomed over the country.

## E Key Provisions of the CPSA

The Child-Parent Security Act is likely one of the most comprehensive surrogacy laws in the nation. It does more than just legalize gestational surrogacy contracts; it sets out what should be included in them. Most importantly, it contains a ‘surrogates’ bill of rights’ intended to offer protection to surrogates.

### 1. Recognition of compensated gestational surrogacy agreements only

The CPSA states that if intended parents, a gestational carrier, and the gestational carrier’s spouse (if applicable) enter into a gestational surrogacy agreement, this agreement will be enforceable provided that it meets certain requirements.<sup>86</sup> Note that only gestational surrogacy agreements but not traditional surrogacy agreements are enforceable under the CPSA.<sup>87</sup> A gestational surrogacy agreement may provide reasonable compensation negotiated in good faith. Importantly, compensation cannot be conditioned on the quality of genome-related traits of gametes or embryos, actual genotypic or phenotypic characteristics of the donor or the child, or the health or condition of the child.<sup>88</sup>

### 2. Mandatory contract provisions

The surrogacy contract must include an agreement by the gestational carrier (and the carrier’s spouse, if any) for the surrogate to undergo embryo transfer and to attempt to carry and give birth to the child(ren), and to surrender custody of resulting child(ren) to the intended parent(s) immediately after the birth.<sup>89</sup> The intended parent(s) must agree to accept custody of the resulting child(ren) immediately upon birth regardless of number, gender, and/or mental or physical condition, and must agree to assume sole responsibility for the resulting child(ren).<sup>90</sup>

### 3. Judgment of parentage

The CPSA legally establishes a child’s relationship to his or her parents where the child is conceived through collaborative reproduction.<sup>91</sup> Under the CPSA, when an intended parent

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<sup>85</sup> See *Silver v. Pataki* 96 NY 2d. 532 (2001) (U.S.); see also *Pataki v. NY State Assembly* 4 NY 2d. 75, 85 (2004) (U.S.) ([L]eav[ing] all of the Legislature’s constitutional prerogatives intact, but preserv[ing] the role of the Governor as the “constructor” of the ... budget.’); see also Edmund J. McMahon, ‘Unbalanced by Design: New York State’s Strong Executive Budget System’ (*Empire Center*, 21 January 2020) <http://empirecenter.org/publications/unbalanced-by-design-new-york-states-strong-executive-budget-system> accessed 16 August 2022.

<sup>86</sup> N.Y. Fam. Ct. Act 2021 s 581-403 (U.S.).

<sup>87</sup> N.Y. Fam. Ct. Act 2021 s 581-402 (U.S.).

<sup>88</sup> N.Y. Fam. Ct. Act 2021 s 581-502 (U.S.).

<sup>89</sup> N.Y. Fam. Ct. Act 2021 s 581-102 (U.S.).

<sup>90</sup> *Ibid.*

<sup>91</sup> N.Y. Fam. Ct. Act 2021 s 581-101 (U.S.).



(or donor acting on behalf of the intended parent) provides eggs for assisted reproduction, the intended parent will be considered the legal parent of the resulting child for all purposes.<sup>92</sup> When an intended parent (or a donor acting on behalf of the intended parent) provides the sperm for the assisted reproduction, the intended parent will be considered the legal parent for all purposes. Importantly, the bill states that the court *shall* issue a judgment of parentage (a court order that confirms legal parentage) to the intended parents in a valid surrogacy agreement.<sup>93</sup> This can be obtained prior to the birth of the child, although it will only become effective upon birth.<sup>94</sup>

#### 4. The rights of the surrogate

A surrogacy agreement cannot limit the right of a surrogate to make decisions safeguarding her own health or that of a fetus or embryo she is carrying. The agreement also cannot limit the right of the surrogate to terminate a pregnancy or reduce the number of fetuses she is carrying, or the right of the surrogate to use a health care provider of her own choosing. In addition, the surrogate (or her husband) or any intended parent may terminate the surrogacy agreement by giving notice of termination prior to the surrogate becoming pregnant and will be released from all obligations under the agreement.<sup>95</sup>

#### 5. Requirements to be a surrogate

Surrogates must be at least 21 years old, must not have contributed the egg from which the embryo was formed, must have completed a medical evaluation relating to the planned pregnancy, and must have undergone a legal consultation with independent legal counsel of her choosing (and also her spouse if applicable).<sup>96</sup> The surrogate must also have (or be required to obtain prior to embryo transfer) a health insurance policy covering major medical treatments and hospitalizations, and this must extend through the pregnancy and for eight weeks after the birth of the child.<sup>97</sup> This health insurance policy may be procured and paid for by the intended parents, pursuant to the surrogacy contract.<sup>98</sup>

## V CONCLUSION

In this chapter, I have traced the evolution of surrogacy law in courts and legislatures across the United States. A national conversation opened on surrogacy as a result of the *Baby M* case in the late 1980s. During that time, the view that prevailed was that surrogacy is harmful to the surrogate, to the child, and to society generally. The Supreme Court in New Jersey prohibited the enforcement of surrogacy contracts in 1988. But the views of many state courts have changed since that time; five years after *Baby M*, the California Supreme Court in the *Johnson v. Calvert* allowed enforcement of gestational surrogacy contracts. The effort to repeal New

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<sup>92</sup> Ibid.

<sup>93</sup> N.Y. Fam. Ct. Act 2021 s 581-203 (U.S.).

<sup>94</sup> Ibid.

<sup>95</sup> N.Y. Fam. Ct. Act 2021 s 581-406 (U.S.).

<sup>96</sup> N.Y. Fam Ct. Act 2021.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

York's statutory prohibition on surrogacy reflects the new national perspectives on surrogacy in the United States. Changing medical technology as well as societal views have paved the way for many states to legalize surrogacy either directly through statute or in the absence of statute; courts have often enforced surrogacy contracts and adopted other rules to ensure intended parents are protected. LGBTQI+ organizations have lent a strong voice to legalization of surrogacy as witnessed in the legislative debates surrounding New York's surrogacy law. New feminist voices in favor of surrogacy have also emerged, while other feminists continue to object to it along with religious organizations. Even within trade organizations such as the American Bar Association, there is general agreement that surrogacy should be permitted, but lawyers disagree on how exactly it should be regulated once legalized.