

PROTECTING THE ALABAMA SURROGATE: A LEGISLATIVE  
SOLUTION

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## I. INTRODUCTION

In Margaret Atwood's repopularized dystopian novel, *The Handmaid's Tale*, institutionalized surrogacy becomes a form of slavery.<sup>1</sup> Society relegates fertile women to serving as "reproductive machines" for the wealthy and the elite.<sup>2</sup> The Handmaids, representing the few remaining fertile women following the downfall of democratic society, were distributed among the Commanders' households to act as "reproductive prostitutes" for a Commander and his infertile wife.<sup>3</sup> If the Handmaid became pregnant, she would surrender the child to the Commander and abandon all maternal relations with the child.<sup>4</sup>

Fortunately, the reality of surrogacy is a very different picture. Surrogacy as an assisted reproductive alternative has become a very common and, for the most part, accepted function in our society. In 2008 alone, nearly 1,400 babies were born to gestational surrogates,<sup>5</sup> 300 of which were born in Alabama.<sup>6</sup> However, the increasing prevalence of surrogacy contracts throughout the United States has not brought judicial or legislative clarity to the process, leaving surrogates questioning the long-term consequences of their promises—both legally and emotionally.<sup>7</sup> This Note calls upon the Alabama Legislature to adopt a detailed scheme of regulation in order to guide surrogates and intended parents through the contracting process.

Although *The Handmaid's Tale* imagines a fictional future, it serves as a cautionary tale as to the potential dangers of unregulated surrogacy.<sup>8</sup> It resonates strongly with real-world arguments that compensating surrogates to carry and deliver children commodifies and exploits women due to the unequal bargaining position of the typical surrogate.<sup>9</sup> Both economic and racial factors play into this concern. Critics further argue that contracting to

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1. See MARGARET ATWOOD, *THE HANDMAID'S TALE* (1986); Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 160 (1997).

2. Kerian, *supra* note 1, at 161.

3. *Id.*

4. *Id.*

5. Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS 4 (2010), <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevj0a1m.pdf>. A gestational surrogate is "a woman bearing a genetically-unrelated child for another person or couple." *Assisted Reproductive Technology (ART): Key Findings*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 5, 2016), <http://www.cdc.gov/art/key-findings/gestational-carriers.html>.

6. Gugucheva, *supra* note 5, at 3.

7. See *infra* Part III.

8. See Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799, 822 (2012).

9. *Id.*; see *infra* Part V.A.

give up a baby whom a woman necessarily forms a nine-month bond with increases the surrogate's likelihood of suffering negative psychological consequences.<sup>10</sup> A legislative response focused on informed consent, independent legal representation, and medical health evaluations is necessary to address these concerns for the surrogate's wellbeing.

In Part II, this Note will provide an overview of the different methods of surrogacy and the respective legal and emotional issues surrogates face with each option. Next, Part III takes a closer look at who the typical surrogate mother is. Part IV covers the disparate legal treatment that both courts and state legislatures afford the topic. It also lays out three model regulation regimes that will ultimately form the basis of this Note's legislative recommendation. Part V details the two main concerns that surrogacy opponents raise with regard to the safety of the surrogate, namely the unequal bargaining power between the surrogate and the intended parent(s) and the potential psychological effects a woman risks after giving up a child she has carried for nine months. Finally, Part VI examines these concerns and offers a legislative recommendation for Alabama that prioritizes the surrogate.

## II. SURROGACY METHODS AND THE RESPECTIVE ISSUES THEY PRESENT FOR SURROGATES

The two types of surrogacy arrangements are traditional and gestational surrogacy. Each method presents different issues for surrogates, both legally and emotionally. With traditional surrogacy, the surrogate "acts as both the egg donor and as the actual surrogate for the embryo."<sup>11</sup> The surrogate is impregnated through an artificial insemination process called intrauterine insemination (IUI).<sup>12</sup> During this process, the doctor transfers sperm taken from the biological father to the surrogate's uterus, allowing natural fertilization.<sup>13</sup> After the birth, the surrogate "relinquishes her parental rights to the intended natural father and the intended mother who then adopt the child."<sup>14</sup>

Traditional surrogacy agreements are controversial largely because the surrogate is the biological mother of the child.<sup>15</sup> Because of this genetic

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10. Arshagouni, *supra* note 8, at 828; *see infra* Part V.B.

11. *See What Are the Different Types of Surrogacy and What Are They Called?*, MOD. FAM. SURROGACY CTR., [http://www.modernfamilysurrogacy.com/page/different\\_types\\_of\\_surrogacy](http://www.modernfamilysurrogacy.com/page/different_types_of_surrogacy) (last visited Feb. 15, 2018).

12. *Id.*

13. *Id.*

14. Kerian, *supra* note 1, at 114.

15. Caitlin Conklin, Note, *Simply Inconsistent: Surrogacy Laws in the United States and the Pressing Need for Regulation*, 35 WOMEN'S RTS. L. REP. 67, 70 (2013).

link, a traditional surrogate may be more likely to form a bond with the child she carries, making it more difficult to relinquish her parental rights after the birth.<sup>16</sup> This potentially increases the likelihood that the traditional surrogate will develop mental health problems—a risk that is perhaps diminished in gestational carriers who are not the biological mothers of the child.<sup>17</sup> These concerns have led some courts to refuse enforcement of traditional surrogacy agreements against the surrogate.<sup>18</sup>

While the same concerns are present in gestational surrogacy, the potential for psychological consequences in the surrogate may be lessened, making it an attractive option for some prospective mothers.<sup>19</sup> Nevertheless, opponents argue that modern gestational surrogacy contracts have evolved into a “market-driven event that is much more complicated than simply bringing a new life into the world.”<sup>20</sup> In gestational surrogacy, the surrogate does not contribute her own eggs.<sup>21</sup> The eggs and sperm of the donor parents are combined in a laboratory, and the resulting embryos are then implanted into the surrogate.<sup>22</sup> Unlike traditional surrogacy, the child bears no genetic relation to the surrogate and is the biological issue of both donor parents.<sup>23</sup> Again, the surrogate is contractually obligated to give birth then relinquish all of her parental rights to the “commissioning” parents.<sup>24</sup>

Although the child is not biologically related to the surrogate, the legal issues surrounding gestational surrogacy are more complex than those associated with traditional surrogacy. Critics question the ethics and the legality of paying a woman to bear children for a contracting party.<sup>25</sup> Others focus on a more foundational issue: the legal status of the gestational carrier. Historically, the woman who gave birth to the child was

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16. See *R.R. v. M.H.*, 689 N.E.2d 790, 791 (Mass. 1998) (during the sixth month of pregnancy, the biological mother in the traditional surrogacy agreement changed her mind about giving up the child); Amy M. Larkey, Note, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 *DRAKE L. REV.* 605, 610 (2003) (explaining that the biological connection between the traditional surrogate and child can create a bond between them).

17. See R.J. Edlmann, *Surrogacy: The Psychological Issues*, 22 *J. REPROD. & INFANT PSYCHOL.* 123, 125 (2004) (suggesting that traditional surrogates may have increased mental health risks because of their genetic relationship to the child).

18. See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 901 (Cal. Ct. App. 1994); *R.R. v. M.H.*, 689 N.E.2d 790, 797 (Mass. 1998); *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988); *infra* Part IV.A & B.

19. See Edlmann, *supra* note 17, at 125.

20. Angie G. McEwen, Note, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 *VAND. J. TRANSNAT'L L.* 271, 273 (1999).

21. See *MOD. FAM. SURROGACY CTR.*, *supra* note 11.

22. See McEwen, *supra* note 20, at 275.

23. *Id.* at 275–76.

24. *Id.* at 276.

25. See generally Arshagouni, *supra* note 8; Kerian, *supra* note 1; McEwan, *supra* note 20.

always the same woman as the “genetic progenitor.”<sup>26</sup> Gestational surrogacy forces courts and legislators to reevaluate the traditional definition of motherhood.<sup>27</sup> Under more complex gestational surrogacy agreements, three different women may claim maternal rights: “the gestational mother, the genetic mother, and the intended mother.”<sup>28</sup> Despite its legal complications, gestational surrogacy is generally preferred over traditional surrogacy, because it allows both donor parents to have a genetic link to their child.<sup>29</sup>

Alabama offers no legislative or judicial guidance to families considering surrogacy.<sup>30</sup> The legality of surrogacy contracts is not addressed in its case law and is explicitly excluded from its statutes.<sup>31</sup> Notwithstanding Alabama’s lacking legal framework, surrogacy continues to be a popular assisted reproduction alternative. According to a recent Assisted Reproductive Technology Report from the CDC, Alabama has six fertility clinics across the state.<sup>32</sup> Although no statistics are available on traditional surrogates, Alabama produced an estimated 320 children born to gestational surrogates in 2007.<sup>33</sup> Absent any other impetus for change, the increasing prevalence of surrogacy agreements in Alabama necessitates a legislative response in order to provide the best protection for local surrogates.

### III. WHO IS THE TYPICAL SURROGATE MOTHER?

Empirical evidence shows that the vast majority of surrogate mothers consenting to surrogacy agreements are women who are both financially and psychologically stable.<sup>34</sup> A study of the demographic profile of the average American surrogate paints a picture of an informed, young woman who freely and voluntarily consents to the agreement. While this Section is

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26. See Arshagouni, *supra* note 8, at 833.

27. *Id.*

28. Erin Y. Hisano, Comment, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 528 (2011).

29. *Id.* at 527.

30. See Part IV.B.

31. See ALA. CODE § 26-10A-34(c) (2016); *Brasfield v. Brasfield*, 679 So. 2d 1091 (Ala. Civ. App. 1996).

32. A. Paige Miller, Note, *The Silence Surrounding Surrogacy: A Call for Reform in Alabama*, 65 ALA. L. REV. 1375, 1378 (2014); 2011 Assisted Reproductive Technology: Fertility Clinic Success Rates Report, CTRS. FOR DISEASE CONTROL AND PREVENTION 25–31 (2013), [http://www.cdc.gov/art/ART2011/PDFs/ART\\_2011\\_Clinic\\_Report-Full.pdf](http://www.cdc.gov/art/ART2011/PDFs/ART_2011_Clinic_Report-Full.pdf).

33. See Gugucheva, *supra* note 5, at 3. This is the most recent statistic available on surrogacy births in Alabama. No statistics are available on traditional surrogacy births.

34. Lina Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative*, 21 AM. U.J. GENDER SOC. POL’Y & L. 555, 560–65 (2013) (citing Karen Busby & Delaney Vun, *Revisiting The Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 17 (2010)).

not intended to diminish the concerns discussed in Part V, it should be noted that those concerns represent real, albeit unlikely, abuses that this Article's legislative recommendation seeks to avoid.

Karen Busby, Professor of Law at the University of Manitoba in Canada, and Delaney Vun, found that the research “does not support the stereotype of poor, single, young, ethnic minority women whose family, financial difficulties, or other circumstances pressure her into a surrogacy arrangement.”<sup>35</sup> Most of these women are “Caucasian, Christian, and in their late 20-early 30s.”<sup>36</sup> Helena Ragoné, Ph.D., Professor of Anthropology at the University of Massachusetts, also found that 30% of the women she surveyed were married, full-time homemakers with children of their own.<sup>37</sup>

As for education, a substantial portion of surrogates have received some type of higher education. Social work studies show that most women completed high school, and many had received college degrees—even masters degrees.<sup>38</sup> Researchers agreed that the majority of women inform themselves and enter the process “on their own initiative, with a strong sense of what it is that they are committing to and that they rarely regret having been a surrogate mother.”<sup>39</sup>

Psychologically, surrogates traditionally score very high on extroversion—they are social, assertive, optimistic, and self-sufficient.<sup>40</sup> Melinda Hohman, Ph.D., Assistant Professor of Social Work at San Diego State University, and Christine Hagan, Psy.D., Assistant Professor of Social Work at California State University, found that surrogates are also more likely to be “independent thinkers, and nonconformists, and therefore tend to be less affected by social pressure than other women.”<sup>41</sup> The overall impression that Hohman and Hagan received was that it was “very clear that this is what they wanted to do, often despite negative responses from those around them.”<sup>42</sup>

#### IV. LEGAL TREATMENT ACROSS THE BOARD

In the early years of surrogacy agreements, legal outcomes over these disputes were difficult to predict due to a lack of judicial precedent at the

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35. *Id.* at 560.

36. *Id.* at 560–61.

37. *Id.* at 561 (citing HELENA RAGONÉ, *SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART* 54 (1994)).

38. *Id.*

39. *Id.* at 562.

40. Peng, *supra* note 34, at 562.

41. *Id.* (citing Melinda Hohman & Christine B. Hagan, *Satisfaction with Surrogate Mothering: A Relationship Model*, 4 J. HUM. BEHAV. SOC. ENV'T. 61, 80–81 (2001)).

42. *Id.*

time.<sup>43</sup> While all states had laws governing traditional contract disputes, few states had laws controlling surrogacy agreements, which left courts with little guidance.<sup>44</sup> Much of this uncertainty still exists today as a result of disparate state treatment arising from a lack of federal legislation, leaving surrogates and prospective mothers to guess at the validity of their agreement.<sup>45</sup>

### A. *Early Judicial Responses*

Two similar cases with opposite rulings sparked the legal discussion surrounding the enforceability of surrogacy agreements—*In re Baby M* (1988) and *Johnson v. Calvert* (1993).<sup>46</sup> There is a key factual difference between these two cases that perhaps explains their different outcomes: *Baby M* involved a traditional surrogacy agreement,<sup>47</sup> whereas *Johnson* involved a gestational surrogacy agreement.<sup>48</sup> The inconsistent state law that developed following these cases has led potential parties to surrogacy agreements to forum shop, looking for states with the most “surrogate-friendly” laws to bring their child into the world.<sup>49</sup> Following the *Johnson* case and its progeny, the “surrogacy market has settled in Florida and California.”<sup>50</sup>

#### 1. *New Jersey: In re Baby M*

Mr. and Mrs. Stern wanted children, but Mrs. Stern’s health problems prevented her from being able to have her own.<sup>51</sup> Eager to be parents, the Sterns responded to an advertisement by the Infertility Center of New York

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43. Conklin, *supra* note 15, at 72.

44. *Id.*

45. *Id.* at 69. In fact, the Supreme Court recently refused the opportunity to weigh in on the surrogacy debate and establish a federal approach to the validity of surrogacy agreements. *See* C.M. v. M.C., 213 Cal. Rptr. 3d 351 (Cal. Ct. App.), *cert. denied*, 138 S. Ct. 239 (2017). After executing a gestational surrogacy contract, the surrogate discovered that she was pregnant with triplets. The intended parent, a fifty-year-old deaf-mute living in his elderly parents’ basement, demanded that she abort one or more of the babies despite the surrogate’s willingness to care for the undesired children. Applying California’s Gestational Surrogacy Enabling Statute, the family court enforced the contract and awarded custody of the triplets to the intended parent over the objections of the mother. The mother challenged the statute, arguing that its application denied her and her children due process and equal protection rights.

46. Conklin, *supra* note 15, at 72.

47. *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988).

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

49. Conklin, *supra* note 15, at 72.

50. *Id.*

51. *Baby M*, 537 A.2d at 1235.

(ICNY) and met with a surrogate, Mary Beth Whitehead, and her husband to discuss a traditional surrogacy contract.<sup>52</sup>

The contract provided that in exchange for a \$10,000 surrogacy fee, Mrs. Whitehead would be impregnated through artificial insemination (AI) using Mr. Stern's sperm, "carry the child to term, bear it, deliver it to the Sterns, and thereafter do whatever was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child."<sup>53</sup> Mrs. Whitehead received no legal advice in connection with this agreement.<sup>54</sup> While psychological and physical exams were conducted on Mrs. Whitehead, the Sterns never asked to see the results.<sup>55</sup> The court notes that both parties seemed "less sensitive to the implications of the transaction"; they were simply excited about the opportunity ahead of them.<sup>56</sup>

After a routine pregnancy, Mrs. Whitehead gave birth to Baby M on March 27, 1986.<sup>57</sup> Immediately after the birth, Mrs. Whitehead began having second thoughts about giving up her child. She "broke into tears" when the Sterns told her what they planned on naming the baby and explained how Baby M looked like her other daughter.<sup>58</sup> Nevertheless, Mrs. Whitehead adhered to the agreement and on March 30th gave Baby M to the Sterns, who were overjoyed to welcome their baby home.<sup>59</sup> Later that same day, Mrs. Whitehead "became deeply disturbed, disconsolate, [and] stricken with unbearable sadness."<sup>60</sup> She returned to the Sterns' home the following day and begged to have Baby M for one more week, after which she would give the child back to the Sterns as promised.<sup>61</sup> Fearing that Mrs. Whitehead would commit suicide, the Sterns obliged, believing she would stay true to her word.<sup>62</sup>

However, Mrs. Whitehead fled New Jersey and did not return Baby M. It was not until four months later, after Baby M was forcibly removed from the Whiteheads' home in Florida, that the child was returned to the Sterns.<sup>63</sup>

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52. *Id.* at 1236.

53. *Id.* at 1235–36.

54. *Id.* at 1247.

55. *Id.*

56. *Id.* at 1236.

57. *Baby M*, 537 A.2d at 1235.

58. *Id.* Recall the discussion in Part II of the potential emotional consequences of traditional surrogacy agreements on the surrogate—a traditional surrogate could be more likely to struggle parting with a child she has a genetic bond with.

59. *Id.*

60. *Id.*

61. *Id.* at 1237.

62. *Id.*

63. *Baby M*, 537 A.2d at 1237.

The Sterns sued, seeking enforcement of the surrogacy contract and custody of Baby M.<sup>64</sup> The Supreme Court of New Jersey found the surrogacy contract unenforceable because it violated state adoption statutes.<sup>65</sup> The court considered the \$10,000 surrogacy fee to be compensation for the adoption, rather than for Mrs. Whitehead's services in carrying the child.<sup>66</sup> Because New Jersey "prohibit[ed] paying or accepting money in connection with any placement of a child for adoption," the court viewed the fee as an attempt to circumvent the law.<sup>67</sup> The court prioritized the "child's best interests" and further held that surrogacy agreements contravened public policy for natural parents to contract "in advance of birth which one is to have custody of the child."<sup>68</sup> Such agreements border on "baby-selling," which the court rejected, stating that "[t]here are, in a civilized society, some things that money cannot buy."<sup>69</sup>

The New Jersey Supreme Court also voiced some of the concerns that opponents of surrogacy agreements raise today: "The long-term effects of surrogacy contracts are not known, but feared . . . the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child. . . ."<sup>70</sup> While the "parade of horrors" the New Jersey court feared<sup>71</sup> is not a reason for Alabama to prohibit surrogacy agreements altogether, it is a reason to adopt a legislative scheme designed to protect surrogates, as well as other parties to the agreement.

## 2. *California: Johnson v. Calvert*

Five years after the *Baby M* decision, the California Supreme Court upheld a gestational surrogacy contract, finding that such agreements did not violate California law or public policy.<sup>72</sup> The Calverts, a married couple incapable of having children themselves, contracted with Anna Johnson to form a surrogacy agreement.<sup>73</sup> The contract provided that Johnson would be impregnated using Mrs. Calvert's egg and Mr. Calvert's sperm, and the child would be accepted into the Calvert's home as "their child."<sup>74</sup> Johnson

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64. *Id.*

65. *Id.* at 1240.

66. *Id.* at 1242.

67. *Id.*

68. *Id.* at 1246; Arshagouni, *supra* note 8, at 803.

69. *Baby M*, 537 A.2d at 1249.

70. *Id.* at 1250.

71. *See* Arshagouni, *supra* note 8, at 805.

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

73. *Id.*

74. *Id.*

agreed to “relinquish all parental rights” to the Calverts.<sup>75</sup> In return, the Calverts would pay Johnson a surrogacy fee of \$10,000.<sup>76</sup>

Shortly after they realized Johnson was pregnant, relations between the parties became tense.<sup>77</sup> When it became clear that Johnson intended to break the contract, both parties filed actions to be declared the parent(s) of the child.<sup>78</sup> The child was born on September 19, 1990.<sup>79</sup> Blood samples taken from Johnson and the child on the day of the birth “excluded Anna as the genetic mother.”<sup>80</sup> The Supreme Court of California used this evidence to determine that the Calverts were the “genetic, biological and natural” parents.<sup>81</sup>

But the court didn’t stop its analysis there; it further looked to the intent of the parties at the time of contracting to determine the issue of motherhood. In circumstances where one woman gives birth that is not the genetic mother of the child, “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.”<sup>82</sup>

Unlike New Jersey, California grounded its public policy determination outside the confines of state adoption statutes. The court viewed the purpose of the contract, and therefore the payments, to be compensation for Johnson’s services in carrying and delivering the child.<sup>83</sup> Thus the purpose of the contract did not violate public policy, because the Calverts were not paying for the child itself, but rather the services Johnson rendered in the act of giving birth.<sup>84</sup>

Similar to the court in *Baby M*, the California Supreme Court recognized the potential adverse effects surrogacy contracts could have on the surrogate—namely, the exploitation of women of a lower socioeconomic class.<sup>85</sup> However, the court took the position of modern day proponents of surrogacy agreements, believing that to deny women the right to contract in this respect would be to deny them the power of “economic choice.”<sup>86</sup> There simply was not enough evidence of the “parade

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75. *Id.* (internal quotations omitted).

76. *Id.*

77. *Id.*

78. *Johnson*, 851 P.2d at 778.

79. *Id.*

80. *Id.*

81. *Id.* (quoting *Anna J. v. Mark C.*, 286 Cal. Rptr. 369, 373 (1991) (internal quotations omitted)).

82. *Id.*

83. *Id.*

84. *Johnson*, 851 P.2d at 784.

85. *Id.*; see *infra* Part V.A for a discussion of the potential exploitation of women of lower socioeconomic classes.

86. *Johnson*, 851 P.2d at 785.

of horrors” the *Baby M* court feared to persuade California to find surrogacy agreements invalid.<sup>87</sup>

### B. Mixed State Action

The United States can be divided into four surrogacy law regimes: “prohibition, inaction, status regulation, and contractual ordering.”<sup>88</sup> Prohibition states place a complete ban on surrogacy agreements, or even impose criminal penalties on those who enter into surrogacy contracts or facilitate them.<sup>89</sup> Jurisdictions that fall into this category include: Arizona,<sup>90</sup> the District of Columbia,<sup>91</sup> Indiana,<sup>92</sup> Michigan,<sup>93</sup> Nebraska,<sup>94</sup> New York,<sup>95</sup> and North Dakota.<sup>96</sup>

Under the inaction model, states decline to support surrogacy agreements through a “passive resistance” approach.<sup>97</sup> The legislatures of these states have not officially banned surrogacy agreements by statute, but their courts decline to enforce them.<sup>98</sup> The most notable example in this category is New Jersey in the *Baby M* case.<sup>99</sup> Other states following the

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87. Arshagouni, *supra* note 8, at 805.

88. Austin Caster, Note, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 486 (2011); Miller, *supra* note 32, at 1386 (internal quotations omitted).

89. Caster, *supra* note 88, at 486.

90. ARIZ. REV. STAT. ANN. § 25-218 (2017). Although the Arizona appellate court found the statute unconstitutional, no new legislation has been adopted. *See Soos v. Superior Court of Ariz.*, 897 P.2d 1356 (Ariz. Ct. App. 1994).

91. D.C. CODE ANN. §§ 16-401, -402 (West 2017). The District of Columbia imposes a civil penalty of up to \$10,000 and a criminal penalty of one year imprisonment on those who facilitate a surrogacy contract. *Id.* § 16-402(b) (repealed Apr. 7, 2017).

92. IND. CODE ANN. § 31-20-1-1 (West 2017).

93. MICH. COMP. LAWS ANN. §§ 772.851–61 (West 2017). Michigan imposes the most severe penalties on those who enter into or facilitate a surrogacy contract, including fines up to \$50,000 and five years of imprisonment. *See id.* § 722.859.

94. NEB. REV. STAT. ANN. § 25-21, 200 (Lexis Nexis 2017).

95. N.Y. DOM. REL. LAW § 123(2)(a)–(b) (McKinney 2017) (imposing a civil penalty of \$500 on anyone entering into a surrogacy contract and \$10,000 on anyone who facilitates the contract in exchange for compensation).

96. N.D. CENT. CODE ANN. §§ 14-18-05, -08 (West 2017).

97. Caster, *supra* note 88, at 487.

98. *Id.*

99. *See In re Baby M*, 537 A.2d 1227 (N.J. 1988), *superseded by statute*, N.J. STAT. ANN. § 9:3-46 (West 2013), *as recognized in In re Adoption of Children by G.P.B.*, 736 A.2d 1277, 1287–88 (N.J. 1999) (O’Hern, J., concurring); *infra* Part IV.A.

inaction model include Kentucky,<sup>100</sup> Louisiana,<sup>101</sup> North Carolina,<sup>102</sup> Oregon,<sup>103</sup> and Washington.<sup>104</sup>

In the status regulation category of states, parties are permitted to enter into state-approved surrogacy agreements, but certain mandatory terms are required.<sup>105</sup> These states impose requirements on the age of the surrogate, the marital status of parties, the medical need for the intended mother to seek childbearing alternatives, and the physical and mental fitness of both parties.<sup>106</sup> Some of the states in this category also require judicial approval of any agreement, requiring the same level of scrutiny present in potential adoption cases.<sup>107</sup> Florida,<sup>108</sup> Illinois,<sup>109</sup> Nevada,<sup>110</sup> New Hampshire,<sup>111</sup> Utah,<sup>112</sup> and Virginia<sup>113</sup> fall into the status regulation category. It is unclear whether Texas, Arkansas, or Tennessee will enforce surrogacy agreements according to their current statutory schemes.<sup>114</sup>

Alabama is one of the twenty-eight states that fall into the final category of contractual ordering.<sup>115</sup> Under this approach, “the parties are entirely free to negotiate their rights and responsibilities under the surrogacy contract.”<sup>116</sup> However, the sense of freedom to contract may be illusory. These states fail to address the validity of surrogacy agreements in their legislation, leaving parties stranded in the event of a challenge to the contract.<sup>117</sup> Alabama, in particular, explicitly excludes surrogacy from its adoption statutes.<sup>118</sup> Its case law offers no additional help, essentially turning a deaf ear to the question of the enforceability of surrogacy

100. KY. REV. STAT. ANN. § 199.590(4) (LexisNexis 2013).

101. LA. STAT. ANN. § 9:2720 (Supp. 2018).

102. N.C. GEN. STAT. §§ 48-10-102, -103 (2017).

103. See 46 Or. Op. Att’y Gen. 221 (1989), 1989 WL 439814 (clarifying that while there is no statute expressly prohibiting surrogacy agreements, the state will not enforce agreements exchanging money for the right of adoption).

104. WASH. REV. CODE ANN. § 26.26.230 (West 2016).

105. Caster, *supra* note 88, at 487.

106. *Id.* at 487–88.

107. See Arshagouni, *supra* note 8, at 807.

108. FLA. STAT. ANN. § 742.15(2) (West 2016).

109. 750 ILL. COMP. STAT. ANN. 47/20 (West 2009).

110. NEV. REV. STAT. ANN. § 126.045 (LexisNexis 2010 & Supp. 2016) (repealed 2013). The statute was active through the end of the 2013 legislative season but no new legislation has been proposed.

111. N.H. REV. STAT. ANN. § 168-B:9 (LexisNexis 2017).

112. UTAH CODE ANN. §§ 78B-15-801 to -803 (LexisNexis 2012).

113. VA. CODE ANN. § 20-160 (2016).

114. Caster, *supra* note 88, at 488.

115. *Id.* at 488–89, 489 n.80.

116. *Id.* at 488–89 (quoting Radhika Rao, *Surrogacy Law in the United States: The Outcome of Ambivalence*, in *SURROGATE MOTHERHOOD: INTERNATIONAL PERSPECTIVES* 23, 30 (Rachel Cook et al. eds., 2003)).

117. *Id.* at 489.

118. See ALA. CODE § 26-10A-34(c) (2016).

agreements.<sup>119</sup> Because there are no specific laws governing the validity of surrogacy contracts, there are no formal requirements for becoming a surrogate, which opens the door to the concerns discussed in Part V. Surrogates and intended parents would be in a much safer position to contract, both legally and emotionally, if Alabama clarified its legislative position on surrogacy agreements.

### C. *The Model Acts*

While the United States has yet to enact any federal legislation on the validity of surrogacy agreements, both the Uniform Parentage Act and the ABA Model Act Governing Assisted Reproductive Technologies offer regulatory guidance on the issue.

#### 1. *Uniform Parentage Act*

In 1973, the Uniform Law Commissioners published the Uniform Parentage Act (UPA).<sup>120</sup> Revolutionary in its time, it clarified the law surrounding parentage disputes, including paternity actions and child support.<sup>121</sup> The Act was revised in 2002 to address gestational surrogacy.<sup>122</sup>

Article 8 of the UPA<sup>123</sup> allows enforceable gestational surrogacy agreements and lays out an optional regulatory model for the states.<sup>124</sup> While a few states have partially adopted Article 8, several states have chosen to take a different direction (that is, those that have legislation on surrogacy agreements).<sup>125</sup> Article 8 requires court approval of all surrogacy agreements, pending the satisfaction of certain requirements.<sup>126</sup>

First, a child welfare agency must perform a home study on the intended parents, similar to studies conducted on prospective adoptive parents.<sup>127</sup> Secondly, all parties, including the intended parents and the “gestational mother” and her husband if she has one, must have “voluntarily entered into the agreement and understand its terms.”<sup>128</sup> The agreement must also include adequate provisions addressing “reasonable health-care expense[s] associated with the gestational agreement until the

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119. See *Brasfield v. Brasfield*, 679 So. 2d 1091 (Ala. Civ. App. 1996).

120. *Parentage Act Summary*, UNIFORM L. COMMISSION, <http://uniformlaws.org/ActSummary.aspx?title=Parentage%20Act> (last visited Feb. 3, 2018).

121. *Id.*

122. *Id.*

123. UNIF. PARENTAGE ACT §§ 801–09 (UNIF. LAW COMM’N 2002).

124. *Id.*

125. Arshagouni, *supra* note 8, at 813.

126. UNIF. PARENTAGE ACT § 803(a).

127. *Id.* § 803(b)(2).

128. *Id.* §§ 801(a), 803(b)(3).

birth of the child, including responsibility for those expenses if the agreement is terminated.”<sup>129</sup> Finally, the payment to the gestational mother, if any, must be reasonable.<sup>130</sup> If all of these requirements are met and the court validates the agreement, it must declare that any child born of the agreement will be the child of the intended parents.<sup>131</sup>

Article 8 also includes a provision for termination of the agreement by either party to the contract: “[B]efore the prospective gestational mother becomes pregnant by means of assisted reproduction, the prospective gestational mother, her husband, or either of the intended parents may terminate the gestational agreement by giving written notice of termination to all other parties.”<sup>132</sup> This Section also clears the gestational mother and her husband of any liability if they choose to terminate the agreement.<sup>133</sup> It does not, however, provide for termination of the agreement *after* pregnancy has been established. It remains unclear how the Act would address this contingency, although Section 801(f) indirectly addresses the issue by giving the gestational mother the power to decide matters of her health and the health of the fetus.<sup>134</sup>

## 2. *ABA Model Act Governing Assisted Reproductive Technologies*

In 2008, the American Bar Association (ABA) promulgated the Model Act Governing Assisted Reproductive Technology.<sup>135</sup> A significant distinction between the ABA and the UPA’s approach is that the Model Act covers both traditional and gestational surrogacy agreements.<sup>136</sup> The Model Act offers two different approaches to analyzing the validity of all surrogacy agreements: Alternative A and Alternative B.<sup>137</sup>

Alternative A, the “judicial preauthorization model,”<sup>138</sup> strongly resembles the UPA. It imposes almost identical requirements, including the process of judicial preapproval,<sup>139</sup> “home study of the intended parents,”<sup>140</sup>

129. *Id.* § 803(b)(4).

130. *Id.* § 803(b)(5).

131. *Id.* § 803 CMT.

132. *Id.* § 806(a).

133. *Id.* § 806(d).

134. *Id.* § 801(f).

135. MODEL ACT GOVERNING ASSISTED REPROD. TECH. (AM. BAR ASS’N 2008).

136. Arshagouni, *supra* note 8, at 819 (explaining that many state courts and legislators recognize a distinction between traditional and gestational surrogacy agreements that warrants separate legislation).

137. MODEL ACT GOVERNING ASSISTED REPROD. TECH. art. 7 legislative note.

138. *Id.*

139. *Id.* § 701(3) (Alternative A).

140. *Id.* § 703(2)(b).

and zero-liability termination procedures in favor of the surrogate.<sup>141</sup> Another notable aspect that Alternative A has in common with the UPA is the level of judicial discretion granted at the preapproval stage.<sup>142</sup> Even if all of the statutory requirements are met, a judge retains the discretion to nevertheless declare the agreement invalid.<sup>143</sup>

The “administrative model”<sup>144</sup> under Alternative B, on the other hand, allows for self-executed surrogacy agreements without judicial preapproval.<sup>145</sup> Instead, Alternative B imposes eligibility requirements on the surrogate: she must be at least twenty-one years old, have given birth to at least one child, have completed a physical and mental medical evaluation, have independent legal counsel, and have medical insurance to cover at least eight weeks following delivery.<sup>146</sup> The intended parents must also provide at least one set of gametes,<sup>147</sup> have a medical need for surrogacy services,<sup>148</sup> and undergo a mental health evaluation to assess parental fitness.<sup>149</sup> Alternative B also contains specific clauses that must be present in the surrogacy agreement in order for it to pass judicial muster.<sup>150</sup>

#### V. THREATS TO THE SURROGATE: TWO MAIN ARGUMENTS

Opponents to surrogacy raise legal and ethical concerns over the enforceability of contracts compensating women for the use of their bodies in the birthing process. These arguments focus on the issue of compensation, the unequal bargaining power between the surrogate and the intended parent(s), and the potential psychological effects a woman risks after giving up a child with which she has formed a nine-month bond. The persuasiveness of these arguments fluctuates depending on whether the agreement is traditional or gestational. While these concerns over the surrogate’s wellbeing do not justify a total prohibition on surrogacy agreements, they do merit efforts to minimize these risks through a detailed legislative plan.

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141. *Id.* § 706(4).

142. *See* Arshagouni, *supra* note 8, at 817.

143. UNIF. PARENTAGE ACT § 803(a) (UNIF. LAW COMM’N 2002); *accord* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 703(1) (Alternative A) (“If the requirements of paragraph 2 are satisfied, a court may issue an order validating the gestational agreement . . .”).

144. MODEL ACT GOVERNING ASSISTED REPROD. TECH. art. 7 legislative note.

145. *Id.* § 703(1) (Alternative B); *see also* Arshagouni, *supra* note 8, at 818.

146. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 702(1) (Alternative B).

147. *Id.* § 702(2)(a).

148. *Id.* § 702(2)(b).

149. *Id.* § 702(2)(d).

150. *Id.* § 703(3).

A. *Commercialization and Exploitation of Surrogates*

Critics of surrogacy agreements are primarily concerned with the commercialization of the way “society [views] and value[s] pregnancy,”<sup>151</sup> in that women are “selling or renting their reproductive capacity.”<sup>152</sup> The debate over the commercialization of the surrogate, and by extension the child (what the *Baby M* court refers to as “baby-selling”),<sup>153</sup> boils down to the issue of compensation. This argument is strengthened in traditional surrogacy agreements because the line between compensating the surrogate for her *services* in carrying the child and compensating her for the *child* itself becomes murky.<sup>154</sup> The surrogate is “contributing more than the labor of her womb; she is also selling her genetic material and it becomes difficult to see how the exchange escapes the charge of baby-selling.”<sup>155</sup> If there is no genetic link between the surrogate and the child, as in gestational agreements, the argument becomes more difficult to sustain.<sup>156</sup>

Opponents also equate commercial surrogacy with the sale of the female body in the context of both slavery and prostitution.<sup>157</sup> This angle of the commercialization argument holds whether the agreement is traditional or gestational because it has to do with the surrogate’s body rather than the child. If the surrogate has to comply with the intended parents’ demands for nine months in exchange for a fee, this begins to look like “involuntary servitude.”<sup>158</sup> Similarly, “just as prostitutes sell their sexual services for a fee, surrogates sell their reproductive services for a fee.”<sup>159</sup> The common thread between the two analogies is the lack of free will. Again, the argument derives from the belief that the fee paid to the surrogate is for the use of her body, rather than for the surrogate’s services in carrying and delivering the child.<sup>160</sup>

The exploitation argument stems from a similar thought process—that a woman *chooses* to become a surrogate “only in the sense that when a

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151. Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 580 (1999).

152. Kerian, *supra* note 1, at 152.

153. *In re Baby M*, 537 A.2d 1227, 1250 n.11 (N.J. 1988), *superseded by statute*, N.J. STAT. ANN. § 9:3-46 (West 2013), *as recognized in In re Adoption of Children by G.P.B.*, 736 A.2d 1277, 1287–88 (N.J. 1999) (O’Hern, J., concurring).

154. *See Larkey*, *supra* note 16, at 614.

155. *Id.*

156. *Id.*

157. *See* McEwen, *supra* note 20, at 291; *see also* Arshagouni, *supra* note 8, at 823; Behm, *supra* note 151, at 578–79 (harkening back to Margaret Atwood’s novel, *The Handmaid’s Tale*, and referring to the Handmaids as “reproductive prostitutes”).

158. Kerian, *supra* note 1, at 159.

159. *Id.*

160. McEwen, *supra* note 20, at 292.

woman's sole alternatives are being poor or being exploited, she may opt for exploitation as the lesser of the two evils."<sup>161</sup> Thus, the surrogate's bargaining power is compromised due to her economic, and sometimes racial, circumstances. This reasoning assumes two things: (1) that the surrogate is underpaid and (2) that surrogates are often from a lower socioeconomic class than the commissioning parents.<sup>162</sup> However, attempting to value a surrogate's services to determine an appropriate rate leads to problems. Doesn't that discussion alone seem to bolster the concern that surrogacy agreements commodify women? Currently, the average going rate for a first-time surrogate is \$20,000 or more.<sup>163</sup>

Still, the bulk of critics center their argument around the belief that wealthy would-be parents are contracting poor surrogates to bear their children.<sup>164</sup> This threat of economic exploitation does not discriminate between traditional and gestational agreements. The *Baby M* case, involving a traditional surrogacy agreement, illustrates this reality. In *Baby M*, the Sterns were a middle-class, well-educated couple, with a reported income of \$90,000; Mr. Stern was a biochemist and Mrs. Stern was a pediatrician.<sup>165</sup> The surrogate, Mary Beth Whitehead, was a stay-at-home mom who quit high school at fifteen.<sup>166</sup> She married and had two children not long afterwards, but soon separated from her husband and began receiving public assistance.<sup>167</sup> Once reunited with her husband, a sanitation worker with a \$28,000 salary, she filed for bankruptcy and fought the foreclosure of her home during the *Baby M* trial.<sup>168</sup> It is not unreasonable to assume Mrs. Whitehead's economic circumstances forced her to consider becoming a surrogate to ensure an extra source of income for her family.

The *Johnson* case implicates the issue of racial imbalance, which also cuts across both traditional and gestational surrogacy agreements. The surrogate, Anna Johnson, was an African-American woman, the commissioning father was white, and the commissioning mother was Filipino.<sup>169</sup> Recall that *Johnson* involved a gestational surrogacy agreement. With gestational agreements, the surrogate does not share a genetic bond with the child. As a result, couples considering gestational

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161. Kerian, *supra* note 1, at 160 (quoting Rosemarie Tong, *Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus*, in REPRODUCTION, ETHICS, AND THE LAW 65 (Joan C. Callahan ed., 1995)).

162. See Arshagouni, *supra* note 8, at 825–26; see also Behm, *supra* note 151, at 579; Kerian, *supra* note 1, at 161; McEwen, *supra* note 20, at 292–96.

163. Arshagouni, *supra* note 8, at 825–26.

164. *Id.* at 826.

165. McEwen, *supra* note 20, at 294.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 295.

surrogacy may be “more likely to hire non-whites as gestational surrogates, both because women of color may be more willing economically to serve as surrogates and because the color of the gestational surrogate will readily reveal that she is not the genetic mother of the child born to her.”<sup>170</sup> On the other hand, couples that choose traditional surrogacy are more likely to be concerned with the racial and genetic characteristics of their surrogate, since she will have a genetic bond with the child.<sup>171</sup> Commissioning parents tend to be both wealthy and white, as are the surrogates they choose.<sup>172</sup> A state without a concerted legislative approach to surrogacy agreements only perpetuates this type of racial and economic exploitation across both traditional and gestational surrogacy agreements.

Again, the common undercurrent between commercialization and exploitation is the surrogate’s lack of free will in the contracting process. In order to avoid these risks, “[v]oluntary and informed consent”<sup>173</sup> of all parties should be a priority to any legislative scheme.

### B. *Psychological Effects on Surrogates*

As discussed earlier, the *Baby M* court was concerned about surrogates suffering negative psychological effects after delivery,<sup>174</sup> and some psychologists hypothesize that this concern is indeed aggravated in traditional surrogacy agreements due to the genetic bond between mother and child.<sup>175</sup> The fear is that if the surrogate is forced to give up a child with whom she has formed an intimate, nine-month-long bond with, she would be “at substantial risk for potentially severe, adverse psychological consequences.”<sup>176</sup> Regardless of the genetic material of the child, the surrogate still carries the child for nine months and necessarily develops a bond with it.<sup>177</sup> Thus, the distinction between traditional and gestational agreements is perhaps not as psychologically significant as some would suggest. In fact, in assessing the psychological consequences of surrogacy agreements, the research cited below does not separate gestational surrogates from traditional surrogates.

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170. *Id.*

171. *Id.*

172. *Id.*

173. Kerian, *supra* note 1, at 159.

174. *In re Baby M*, 537 A.2d 1227, 1247–48 (N.J. 1988), *superseded by statute*, N.J. STAT. ANN. § 9:3-46 (West 2013), *as recognized in In re Adoption of Children by G.P.B.*, 736 A.2d 1277, 1287–88 (N.J. 1999) (O’Hern, J., concurring).

175. *See* Edelmann, *supra* note 17, at 125.

176. Arshagouni, *supra* note 8, at 828.

177. *See* Larkey, *supra* note 16, at 625.

To date, there is no concrete research that suggests surrogates of either type have extreme difficulty parting with the child after delivery.<sup>178</sup> While economic incentives certainly influence surrogates to enter into surrogacy agreements, they are “primarily motivated by altruistic concerns.”<sup>179</sup> Most report that they “have little difficulty separating from children born as a result of the arrangement,”<sup>180</sup> and they are “quite satisfied with their roles and experiences as surrogates even five and ten years after giving birth.”<sup>181</sup> Additional studies performed by the Center for Family Research at Cambridge University show that on the whole, “surrogacy appears to be a positive experience for surrogate mothers.”<sup>182</sup> Still, there were a few difficulties for surrogate mothers. While none reported having feelings of doubt while giving the baby over to the commissioning parents, 32% experienced some sort of emotional trauma during the weeks following delivery.<sup>183</sup> However, after a few months had passed, “that number fell to only 15%, and by one year after delivery 94% of surrogates reported no difficulties.”<sup>184</sup>

This research should allay critics’ concerns over the psychological impact of surrogacy agreements on surrogate mothers. It seems that the majority of women are able to adequately self-assess their “psychological suitability” to serve as surrogates.<sup>185</sup> Nevertheless, any legislative scheme Alabama adopts should prioritize physical and mental health evaluations in both traditional and gestational surrogacy agreements in addition to the informed consent of all parties.

## VI. LEGISLATIVE RECOMMENDATION FOR ALABAMA

In order to protect the interests of the parties involved, particularly the surrogate, the time has come for Alabama legislators to engage in the dialogue on surrogacy agreements and codify its position. It can no longer afford to be silent while couples looking to grow their families and women considering service as surrogates remain unsure of their rights. The majority of surrogates choose to enter into surrogacy agreements voluntarily, and their right to contract should not be ignored.<sup>186</sup> A scheme

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178. Arshagouni, *supra* note 8, at 828.

179. *Id.* (citing Janice C. Ciccarelli & Linda J. Beckman, *Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy*, 61 J. SOC. ISSUES 21, 30 (2005)).

180. *Id.* (quoting Edelman, *supra* note 17, at 133).

181. *Id.* (citing Ciccarelli & Beckman, *supra* note 179, at 31).

182. *Id.* at 829 (quoting Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196, 2203 (2003)); *see supra* Part III.

183. Arshagouni, *supra* note 8, at 829.

184. *Id.*

185. *Id.*

186. Kerian, *supra* note 1, at 166.

of detailed regulation, rather than a total ban on surrogacy agreements, is the safest avenue for prospective surrogates.

Still, the risks of commercialization and exploitation of the surrogate as well as resultant negative psychological effects are real threats to surrogates as well as the legitimacy of the entire practice. As discussed in Part V, these risks touch equally on traditional and gestational surrogacy agreements—with the exception of the “baby-selling” policy fear that requires a genetic bond between the surrogate and child. A legislative scheme that addresses both types of agreements by conflating the differences between the two would still give credence to these risks while adequately responding to surrogacy critics’ fears. Alabama legislators should draft a statute with these risks in mind—one that covers both traditional and gestational agreements and prioritizes informed consent, the involvement of legal counsel, and medical health evaluations.

The best legislative solution to these risks would be a judicial preauthorization model of regulation addressing both traditional and gestational surrogacy agreements. Requiring the state to be involved before, during, and after the assisted reproduction process helps to ensure the informed consent of both parties. If the surrogacy agreement is submitted to the court before it is considered legally valid, surrogates and intended parents are more likely to understand their legal obligations and the consequences of breaching those obligations under the terms of the agreement. This judicial oversight would diminish the potential for exploitation of a surrogate’s vulnerable bargaining position. Also, if parties understand and agree to the future child’s parentage at the outset of the contracting process, this will not only reduce the frequency of legal contests, but it will also reduce the risk that a surrogate will suffer emotional hardship following delivery.<sup>187</sup>

While the UPA and Alternative A of the ABA’s Model Act provide a starting point for an appropriate judicial preauthorization model, they still miss the mark on two fronts: the requirement for independent legal counsel and medical health evaluations, both of which are featured in Alternative B of the Model Act.<sup>188</sup> Requiring each party to be represented by independent legal counsel contributes to the guarantee of the surrogate’s informed consent, while medical health evaluations help surrogates evaluate whether or not they are up to the task to serve as a surrogate. Any groundwork parties can lay before pregnancy is established lessens the risks discussed in Part V.

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187. See UNIF. PARENTAGE ACT § 803(b)(3) CMT. (UNIF. LAW COMM’N 2002).

188. See *supra* Part IV; see also MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 702(1)(c), (e) (Alternative B) (AM. BAR ASS’N 2008).

Lastly, under both the UPA and Alternative A of the Model Act, the judge assessing the validity of the agreement retains the discretion to set an agreement aside even if it meets all of the specified requirements.<sup>189</sup> This additional veto power opens the door to inconsistent treatment between two similarly situated parties.<sup>190</sup> If the judicial preauthorization model is to retain legitimacy, Alabama should rethink this level of judicial discretion.

#### CONCLUSION

With Alabama's current lack of regulation and judicial precedent, surrogates are left with no guarantee that their rights will be protected, allowing the risks of commercialization, exploitation, and emotional hardship to go unchecked. The Alabama Legislature must look to the safety of surrogates by drafting a statute addressing both traditional and gestational agreements that prioritizes informed consent, the involvement of independent legal counsel, and the need for medical health evaluations. While the UPA and Alternative A of the ABA's Model Act are both viable options, each could do more to protect the surrogate. Regardless, a judicial preauthorization model is the ideal answer to the need for reform. Paraphrasing the words of the California appellate court, I now join the chorus of voices pleading for legislative action to address the needs of local women looking to give the gift of life.<sup>191</sup>

*Elizabeth Nicholson\**

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189. UNIF. PARENTAGE ACT § 803(a); *accord* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 703(1) (Alternative A) (“If the requirements of paragraph 2 are satisfied, a court may issue an order validating the gestational agreement . . .”).

190. See Arshagouni, *supra* note 8, at 817.

191. See generally Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 516 n.10 (Cal. Ct. App. 2002).

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