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Carrying Capacity: Should Georgia Enact Surrogacy Regulation?

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CARRYING CAPACITY: SHOULD GEORGIA ENACT SURROGACY REGULATION?

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While modern gestational surrogacy technology has existed for almost forty years, surrogacy is viewed as a matter of state law because the United States has yet to regulate it at the federal level. Many have advocated for either federal legislation or their own individual states to enact legislation addressing surrogacy, but Georgia is one of many states that still lacks any laws regulating—or even mentioning—surrogacy agreements. To make the process more uncertain for couples contemplating surrogacy, Georgia also lacks any case law that could provide parties to surrogacy agreements with guidance on how to proceed or how any dispute may be resolved. To provide Georgia citizens with legal stability and certainty, the Georgia legislature should pass legislation addressing traditional surrogacy agreements and acknowledging the technology and use of surrogacy.

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I. INTRODUCTION

In January of 2017, Kim Kardashian and Kanye West welcomed their child, Chicago, into the world.[1] Without the help of a surrogate mother, however, Kim Kardashian may not have been able to safely bring Chicago into her family. Like many other women who must endure infertility problems, Ms. Kardashian suffered from placenta accreta during her previous two pregnancies, which can endanger both the mother's and child's life.[2] Praising the benefits it brought to her family, Ms. Kardashian described surrogacy as "the best experience," one she "would recommend . . . for anybody."[3] As celebrities continue to utilize surrogacy, the American public's awareness of the previously unconventional option will only increase.[4] Fortunately, the Kardashian-West family was able to confidently and legally work with a surrogate mother in California, "one of the most surrogacy-friendly states."[5] Unfortunately, though, the surrogate process is uncertain for hopeful parents in other American states, including Georgia.[6]

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[1] *See Chicago West's Birth Certificate Revealed as 'Hands-on Mom' Kim Kardashian Is Getting Up in the Night with Newborn Daughter*, DAILY MAIL (Jan. 23, 2018, 7:49 PM), https://www.dailymail.co.uk/tvshowbiz/article-5304937/Kim-Kardashian-shares-Chicago-Wests-birth-certificate.html.

[2] *See* Jen Juneau, *Kim Kardashian West Opens Up About Her Decision to Hire a Gestational Surrogate for Baby No. 3*, PEOPLE (Jan. 18, 2018, 10:50 AM), https://people.com/parents/kim-kardashian-west-daughter-surrogate-decision-instant-bond/ (quoting Kim Kardashian saying, "when I wanted to have a third baby, doctors said that it wasn't safe for my—or the baby's—health to carry on my own"); Stephanie Petit, *Kim Kardashian West Explains Why She Chose to Transfer a Female Embryo to Her Surrogate*, PEOPLE (Mar. 13, 2018, 1:10 PM), https://people.com/parents/kim- kardashian-west-female-embryo-surrogacy-daughter-chicago/ ("Giving birth again isn't an option for Kardashian West, who suffered from placenta accreta during both of her pregnancies with son Saint, 2, and daughter North, 4½.").

[3] Petit, *supra* note 2.

[4] *See,* e.g., KAREN SMITH ROTABI & NICOLE F. BROMFIELD, FROM INTERCOUNTRY ADOPTION TO GLOBAL SURROGACY 121 (2017) (discussing why Elton John and his partner chose surrogacy); Olivia B. Waxman, *The Complicated History of Surrogacy From 'Baby M' to Kim Kardashian and Kanye West*, TIME (Jan. 16, 2018), http://time.com/5070296/surrogacy-baby-kim-kardashian-kanye-west/ ("But, with the West family welcoming one of the new most famous faces of surrogacy, awareness of the option is only bound to increase.").

[5] *See* ROTABI & BROMFIELD, *supra* note 4, at 121; Allie Jones, *Here's Why Kim Kardashian's Surrogate Is Making Only $45,000*, CUT (Sept. 13, 2017), https://www.thecut.com/2017/09/kim-kardashian-pregnancy-surrogate-third-child.html ("[T]he California-based surrogate is pregnant with a baby girl . . . .").

[6] *See* Tamar Lewin, *Surrogates and Couples Face a Maze of Laws, State by State*, N.Y. TIMES (Sept. 17, 2014), https://www.nytimes.com/2014/09/18/us/surrogates-and-couples-face-

While modern gestational surrogacy technology has existed for almost forty years, surrogacy is viewed as a matter of state law because the United States has yet to regulate it at the federal level.[7] Many have advocated for either federal legislation or for their own individual states to enact legislation addressing surrogacy, but Georgia is one of many states that still lacks any laws regulating—or even mentioning—surrogacy agreements.[8] To make the process more uncertain for couples contemplating surrogacy, Georgia also lacks any case law that could provide parties to surrogacy agreements with guidance on how to proceed or how any dispute may be resolved.[9] This Note discusses the benefits and problems associated with regulating surrogacy in Georgia and the type of surrogacy law, if any, that has the best chance of being passed there. Part II examines the history and technology of surrogacy along with existing international and U.S. state laws regulating surrogacy. Part III considers legislative options for Georgia and the most likely outcome of a successful effort to pass a surrogacy law in Georgia.

II. BACKGROUND

Internationally and nationally, laws differ on how to address surrogacy. Not only are there two types of surrogacy that complicate the debate, but there are also a whole host of moral, political, and social issues over whether surrogacy should be banned or allowed, and if so, how it should be regulated.[10] To determine the direction the Georgia legislature should take in addressing surrogacy, it is

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a-maze-of-laws-state-by-state.html (noting the "[m]aze of [l]aws" surrogates and parents must navigate through because "[t]here is nothing resembling a national consensus on how to handle [surrogacy] and no federal law, leaving the states free to do as they wish"); *see, e.g.*, Sara K. Alexander, *Who Is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature*, 38 GA. L. REV. 395, 396 (2003) ("Georgia's legislature has yet to enact a law that deals with surrogacy issues.").

[7] *See* Cyra A. Choudhury, *The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor*, 48 VAND. J. TRANSNAT'L L. 1, 40 (2015) ("The business of surrogacy is regulated at the state level in the United States. The result is that there is no uniformity, and various states exhibit a range of policy and legal preferences towards the business and the practice.").

[8] *See* Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 491 (2015) (noting that "[t]here is no legal authority in Georgia governing the enforceability of surrogacy agreements"); *see also* Alexander, *supra* note 6, at 398 (advocating for the Georgia legislature to adopt a law on surrogacy over ten years ago).

[9] *See* Morrissey, *supra* note 8, at 491 ("[T]here are no instructive published Georgia opinions.").

[10] *See* discussion *infra* Section II.B.

necessary to examine the technology behind surrogacy, why surrogacy is contested, and how other countries and states regulate surrogacy.

A. THE TECHNOLOGY AND THE PREFERENCES: TRADITIONAL AND GESTATIONAL SURROGACY

Surrogacy regulation today generally makes two distinctions: (1) between traditional and gestational surrogacy and (2) between compensatory and altruistic surrogates.[11] A compensatory surrogacy arrangement exists when the intended parents pay the surrogate mother a fee for her services in carrying and delivering the baby.[12] Alternatively, altruistic surrogacy occurs when the surrogate acts as a donor whose principal motivation in carrying the child is to help intended parents who otherwise would be unable to conceive.[13] In both situations, however, the intended parents will often reimburse the surrogate mother for medical expenses and living expenses incurred as a result of the pregnancy.[14]

Today, a surrogate mother is impregnated by artificial insemination (usually using sperm from the intended father) or by implantation of an embryo (often using genetic material from both intended parents).[15] With the invention of artificial insemination,

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[11] *See* Katherine Voskoboynik, *Clipping the Stork's Wings: Commercial Surrogacy Regulation and Its Impact on Fertility Tourism*, 26 IND. INT'L & COMP. L. REV. 336, 342 (2016) ("Two categories of arrangements exist in regard to surrogate compensation: commercial and altruistic."). *But see* Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, BERKELEY J. INT'L L. 412, 426 (2012) ("Although some states see a clear line between commercial and altruistic surrogacy, others do not differentiate between the two and consider both types to be legal and contractually enforceable.").

[12] *See* Voskoboynik, *supra* note 11, at 342 ("In a commercial surrogacy arrangement, the surrogate 'stands to gain financially' from giving birth to the child.").

[13] *See* Angie Godwin McEwen, *So You're Having Another Woman's Baby: Economics and Exploitation in Gestational Surrogacy*, 32 VAND. J. TRANSNAT'L L. 271, 276 (1999) (explaining that while a commercial surrogate "receives payment for donating her egg or gestating the fetus, an altruistic surrogate donates her egg or gestates the fetus as a gift").

[14] *See* Voskoboynik, *supra* note 11, at 342 ("[T]he intended parents may still reimburse the surrogate for pregnancy-related medical expenses and living expenses in an altruistic surrogacy arrangement.").

[15] *See Surrogate Mother*, DICTIONARY.COM, https://www.dictionary.com/browse/surrogate-mother (last visited Aug. 26, 2019) (defining a surrogate as a "woman who bears a child on behalf of a couple unable to have a child, either by artificial insemination from the man or implantation of an embryo from the woman").

technology detached conception from sex,[16] and subsequently, with the breakthrough of in vitro fertilization (IVF), the use of surrogacy expanded rapidly.[17] In addition to removing sexual intercourse from the equation, modern technology allows for the possibility that the surrogate mother may carry a child who is genetically related to both intended parents but genetically unrelated to her.[18]

1. Traditional Surrogacy v. Gestational Surrogacy.

Traditional surrogacy involves a surrogate mother using her egg and intended parents providing the sperm, either from the intended father or a sperm donor.[19] Usually, the surrogate's egg is fertilized through artificial insemination, but IVF may also be used.[20] Therefore, when a surrogate mother agrees to a traditional surrogacy arrangement, she is not only agreeing to carry the child for nine months, but she is also agreeing to give up a child to whom she is genetically related.[21]

With gestational surrogacy, IVF is always used,[22] but the embryo is created using an egg from the intended mother or from a donor.[23] The embryo is then implanted in the surrogate's womb.[24] Therefore, in contrast to traditional surrogacy, the surrogate mother is not genetically related to the child to whom she gives birth. [25]

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[16] *See* DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 75 (2006) ("[C]onception was removed from sex . . . .").

[17] *See id*. at 78 (noting that "it was IVF that drove the prospects for a prosperous reproductive trade").

[18] *See id*. at 79 (discussing how "the great beauty of IVF was that it raised the possibility of splitting the genetic mother (the woman who provided the eggs) from the surrogate mother, of letting the surrogate carry a child who genetically was not hers").

[19] *See* Morrissey, *supra* note 8, at 470 (defining traditional surrogacy).

[20] *See id*. ("With a traditional surrogacy, the intended parents usually choose to proceed by having the egg fertilized through . . . [artificial insemination], although a couple may also choose IVF.").

[21] *See id*. (discussing how with traditional surrogacy "the surrogate's egg is used, [and therefore] the surrogate is actually biologically related to the baby that will be born").

[22] *See* RENATE KLEIN, SURROGACY: A HUMAN RIGHTS VIOLATION 5 (2017) (discussing how "'gestational' surrogacy . . . always needs in vitro fertilization (IVF)").

[23] *See* Voskoboynik, *supra* note 11, at 341 (discussing how in gestational surrogacy "[i]f an intended parent is unable to supply his or her genetic material, he or she will utilize donor egg or sperm").

[24] *See* Tina Lin, *Born Lost: Stateless Children in International Surrogacy Arrangements*, 21 CARDOZO J. INT'L & COMP. L. 545, 550 (describing gestational surrogacy as when "an embryo is created with in vitro fertilization (IVF) and implanted in the surrogate's womb").

[25] *See id.* ("Intended parents may prefer gestational surrogacy to traditional surrogacy due to the lack of genetic ties between the child and the surrogate woman . . . .").

2. Why Gestational Surrogacy Is Preferred.

Gestational surrogacy is now the most common preference for parents choosing to utilize surrogacy.[26] This partiality arose because, while uncommon, there exist a few high-profile cases in which surrogate mothers have attempted to keep surrogate children after giving birth, resulting in a legal contest over parental rights.[27] The potential for a successful claim by the surrogate is higher in traditional surrogacy because the child is genetically related to the surrogate mother, who could assert a claim of parental rights to the child "[i]f for some reason [she] decide[s] not to honor her commitment to give the baby to the intended parents after birth."[28] In cases like these, courts have greater difficulty justifying termination of a surrogate mother's parental rights based on a contract because the baby is genetically related to both an intended parent and the surrogate.[29] Gestational surrogacy, however, allows courts to more freely and easily grant full parental rights to the intended parents in the agreement due to the lack of a genetic link between the surrogate mother and the baby.[30]

Most intended parents prefer not to risk a legal battle over parentage, however unlikely one may be. Choosing gestational

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[26] *See* Morrissey, *supra* note 8, at 471 ("Traditional surrogacy . . . is now discouraged by experts.").

[27] *See As Demand for Surrogacy Soars, More Countries Are Trying to Ban it*, ECONOMIST (May 13, 2017), https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are-trying-to-ban-it [hereinafter *As Demand for Surrogacy Soars*] (discussing the famous case of "Baby M," where the surrogate mother sued for custody but noting that "recent studies show that it is extremely rare for the surrogate mother to change her mind and seek to keep the baby"); *see also* Morrissey, *supra* note 8, at 471 (noting that "if a relevant court did not uphold the surrogacy agreement and a traditional custody battle ensued, the surrogate would have a much weaker claim to parental rights since she is not the biological mother").

[28] Morrissey, *supra* note 8, at 471; *see also* SPAR, *supra* note 16, at 78 ("What made traditional surrogacy complicated . . . was that the surrogate mother was also the genetic mother of the child she bore.").

[29] *See* Tamar Lewin, *Coming to the U.S. for Baby, and Womb to Carry It*, N.Y. TIMES (July 5, 2014), https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html (discussing how with traditional surrogacy arrangements families fight over a baby who belongs to both of them).

[30] *See* Voskoboynik, *supra* note 11, at 342 ("Courts' inclination to establish legal parentage due to the genetic link and the accessibility of reproductive technology popularized gestational surrogacy.").

surrogacy can mitigate this risk.[31] When parents choose this route, "the lack of a biological connection between the surrogate and the child strengthens the intended parents' claim to custody."[32] In addition to creating greater legal security, gestational surrogacy creates emotional and psychological distance between the surrogate mother and the child she carries because she knows it is not her genetically-related child.[33] Therefore, many view gestational surrogacy as being more emotionally and legally secure, and if utilized, the outcome of a legal battle over custody is more likely to honor the intention the parties possessed when they entered into the agreement.

B. WHY IS SURROGACY SO CONTESTED?

When couples contemplate entering surrogacy arrangements, they are not just contemplating another every-day contract but instead a contract that involves a host of legal and highly charged emotional issues. Almost every argument concerning surrogacy references the infamous American case of Baby M from 1985.[34] The case involved every intended parent's nightmare: the surrogate mother sought to keep the baby. What made the story more newsworthy, however, was that the surrogate mother and her husband fled New Jersey to Florida with Baby M, inciting a legal battle for custody.[35] Four months after the surrogate mother fled the state, the intended parents finally reclaimed Baby M when authorities forcibly removed the child from the surrogate mother's custody.[36] *In re Baby M* was one of the first cases in the United States to address the validity and legality of surrogacy contracts. In the end, the New Jersey court invalidated the surrogacy agreement.[37] On appeal, however, the court gave custody of Baby M

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[31] *See id.* at 341 ("Gestational surrogacy is considered 'legally safer' than traditional surrogacy, because the child has no biological relation to the gestational surrogate. Gestational surrogacy poses fewer hurdles to the establishment of legal parentage . . . .").

[32] Morrissey, *supra* note 8, at 471.

[33] *See id.* (explaining that because "the surrogate is the gestational carrier and is not the biological mother . . . the surrogate is less likely to bond as strongly with the baby or babies she carries").

[34] *See In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988) (invalidating a traditional surrogacy agreement as contrary to public policy).

[35] *Id.* at 1237.

[36] *Id.*

[37] *See id.* at 1234 ("We invalidate the surrogacy contract because it conflicts with the law and public policy of this State.").

to the intended parents after a best-interests-of-the-child analysis.[38] In the time since Baby M's story hit headlines in the United States, the concept and morality of surrogacy has been hotly debated, with states taking divergent stances on whether to enforce surrogacy agreements and if so, how.[39]

1. Critics.

Arguments against legalizing compensatory surrogacy agreements characterize surrogacy as baby selling, "eggsploitation,"[40] or creating "breeder-women."[41] Framing surrogacy as commodifying both women and children, many have argued against the morality of surrogacy. Opponents concentrate "on the transactional nature of the surrogacy agreement and the fact that the contract's particular purpose is the production of a child that will ultimately be handed over to commissioning parents."[42] Socioeconomic disparity between parties to a surrogacy agreement is another frequently argued critique, as intended parents usually come from a higher socioeconomic tier than surrogate mothers.[43] Critics argue this disparity can lead to

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[38] *See id*. at 1259 ("Based on all of this we have concluded . . . that Melissa's best interests call for custody in the Sterns.").

[39] *See As Demand for Surrogacy Soars*, *supra* note 27 ("Ten years later 'Baby M,' intended for a couple in New Jersey, made headlines when the surrogate changed her mind and sued—unsuccessfully—for custody of the child . . . ."); *see also* ROTABI & BROMFIELD, *supra* note 4, at 124 (discussing how with surrogacy "a range of moral and social concerns have emerged in recent years as the human rights of the surrogate mothers have now captured a great deal of attention by the media, human rights defenders and scholars"); Voskoboynik, *supra* note 11, at 344 ("Some states, such as California and Illinois, are very favorable toward commercial surrogacy. . . . [In contrast,] Michigan not only ban[s] the practice, but also effectuate[s] civil and criminal sanctions upon those who participate in surrogacy arrangements.").

[40] *See* KLEIN, *supra* note 22, at 20 (discussing how one documentary says "eggsploitation" means "[t]o plunder, pillage, rob, despoil, fleece, and strip ruthlessly a young woman of her eggs . . . to be used selfishly for another's gain, with a total lack of regard for the well being of the donor").

[41] SPAR, *supra* note 16, at 77 (noting how Gena Corea at a press conference described the surrogacy industry as "the opening up of the 'reproductive supermarket'").

[42] Choudhury, *supra* note 7, at 12–13. *See also* Aristides N. Hatzis, *"Just the Oven": A Law & Economics Approach to Gestational Surrogacy Contracts* (discussing the economic exploitation argument against surrogacy and how in extreme cases some women engage in surrogacy, "an activity that they deem as immoral, exploitive and inhuman, because it is their only option"), *in* PERSPECTIVES FOR THE UNIFICATION OR HARMONISATION OF FAMILY LAW IN EUROPE 412, 422 (Katharina Boele-Woelki ed., 2003).

[43] *See* McEwen, *supra* note 13, at 299 (discussing the "exploitation of surrogates based on both gender and race, which . . . [contribute] to the surrogate having a lower socioeconomic status than the commissioning couple"). *But see* Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1234 (2013) ("While surrogates are

exploitation of the surrogate mother, as she may lack adequate legal representation and may therefore be unaware of her legal rights.[44]

Critics also argue that surrogacy's "ultimate purpose is the production of a child through the commodified services of a surrogate's reproductive ability."[45] Based on this argument, surrogacy degrades women and their bodies by commercializing their reproductive ability.[46] Under this reasoning, the surrogacy fee is mostly for the sale of the child and *not* the service provided by the surrogate because the intended parents pay the majority of the fee only after receiving the baby.[47]

When it comes to international and cross-border surrogacy, critics focus on the treatment of surrogates in developing countries and the lack of protections from exploitation that they receive from their own governments.[48] Furthermore, critics point to the problem of international surrogacy producing stateless children as another rationale for banning—or at least limiting—surrogacy.[49]

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generally in a lower economic class than intended parents, they are not usually in desperate positions. It is possible that poor, more vulnerable women are screened out by surrogacy agencies and commissioning couples . . . ."). Laufer-Ukeles goes on to discuss how "[c]ontrary to many predictions, there are educated women who do have other choices for earning money and supporting themselves and their families who seem to prefer surrogacy to other job choices and even enjoy the process." *Id.* at 1235.

[44] *See* Elizabeth Nicholson, *Protecting the Alabama Surrogate: A Legislative Solution*, 69 ALA. L. REV. 701, 720 (2018) (discussing risks of commercialization and exploitation of surrogates and arguing that "[r]equiring each party to be represented by independent legal counsel contributes to the guarantee of the surrogate's informed consent").

[45] Choudhury, *supra* note 7, at 13; *see also* Anton van Niekerk & Liezl van Zyl, *The Ethics of Surrogacy: Women's Reproductive Labour*, 21 J. MED. ETHICS 345, 345 (1995) (discussing how many critics liken surrogacy to prostitution).

[46] *See* Choudhury, *supra* note 7, at 12 ("[S]ome feminists . . . fear the devaluation of women's bodies and reproductive capacities through the work of market forces.").

[47] *See id.* at 13 (citing Brock A. Patton, Note, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 514 (2010)) ("[T]he bulk of the fee for the surrogacy is paid after the child is born and transferred.").

[48] *See* Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J. L. & POL'Y 41, 51 (2015) ("International surrogacy raises many ethical problems, specifically when intending parents rely on the procreative ability of women in developing countries.").

[49] *See* Lin, *supra* note 24, at 546 ("The lack of international consensus on the legality of surrogacy has resulted in the birth of children who are not recognized as citizens by any nation."); *see also* Choudhury, *supra* note 7, at 11 (citing Martha M. Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 55–59 (2003)) (discussing the different frameworks used to understand the practice of surrogacy as ranging from "the highly negative 'baby-selling'/commodification framework to the polar opposite of a framework that asserts surrogacy as altruism and giving the gift of life").

2. Advocates.

In contrast, proponents celebrate the rise of modern surrogacy technology as a critical advancement that provides couples who otherwise would not be able to bear a child with the gift of a child.[50] These advocates laud the hope surrogacy restores in couples with fertility problems who have often faced repeated disappointments while attempting to conceive on their own.[51] Putting emotional arguments aside, proponents point to the surrogate's freedom of contract and argue that the parties alone should decide whether to enter into such an agreement and if so, on what terms.[52] According to these advocates, the "freedom for women include[s] the freedom to contract for labor, be it working in a factory or bearing a child."[53] In California, one court agreed with this notion and "characterize[d] the idea that no surrogate mother can truly consent to a surrogacy contract as patronizing, if not outright discriminatory against women."[54]

Defenders counter criticisms that surrogacy commodifies women and babies and perpetuates disparities between the rich and poor in two ways. While it is true that disparity in socioeconomic status almost always exists between surrogate mothers and intended parents, this is often equally true in adoption circumstances.[55] In surrogacy, however, not only do the intended parents often actually compensate the surrogate for her services, but they also fully reimburse the surrogate for living and medical expenses incurred as a result of the pregnancy.[56] Furthermore, even

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[50] *See* SPAR, *supra* note 16, at 77 (discussing how one way "supporters of surrogacy frame[] their arguments [is] in terms of . . . parental desperation (those who turned to surrogacy had no other means of producing a much-wanted child)").

[51] *See* Laufer-Ukeles, *supra* note 43, at 1224 ("Advocates intuitively embrace the practical solutions surrogacy provides for couples and individuals who seek to procreate but are inhibited by infertility . . . .").

[52] *See* SPAR, *supra* note 16, at 77 ("[I]f individuals were allowed to procreate and to contract, then surely they should be able to procreate under contract.").

[53] *Id.*

[54] *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 899 (Cal. Ct. App. 1994) (citing Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993)).

[55] *See* Laufer-Ukeles, *supra* note 43, at 12 ("While surrogates are generally in a lower economic class than intended parents, they are not usually in desperate positions.").

[56] Voskoboynik, *supra* note 11, at 342. While many states allow adoptive parents to reimburse the mother who gives her child up for adoption, this is only possible if the child is placed for adoption immediately following the birth of the child. *See, e.g.*, O.C.G.A. § 19-8-24(c).

though opponents of surrogacy fixate on how the paycheck can incentivize women to enter into surrogacy agreements, birth mothers to adoption agreements also frequently give up their children for economic reasons.[57] These strongly held opinions on both sides of the debate demonstrate not only why the United States has failed to come to a legislative consensus on the issue but also why the entire world is divided.

C. THE COMPLEXITY OF SURROGACY LAWS: INTERNATIONALLY AND IN THE U.S.A.

Around the world, countries' positions towards surrogacy differ markedly, and there is currently no international treaty addressing surrogacy regulation.[58] Countries are generally divided into four categories regarding the approach they take to surrogacy laws: (1) completely ban surrogacy agreements;[59] (2) allow surrogacy but restrict it;[60] (3) allow surrogacy with little regulation;[61] or (4) avoid acknowledgement of the legality or illegality of surrogacy.[62]

The complexity, diversity, and restrictions existing in and between the laws governing surrogacy have stimulated so-called

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[57] *See* Choudhury, *supra* note 7, at 15 (discussing how a birthmother who gives her child up for adoption is not paid and "therefore, has no monetary incentive to 'sell' her child, even though undoubtedly she is severing her parental ties because of economic constraints to begin with").

[58] *See* Caroline Vincent & Alene D. Aftandilian, *Liberation or Exploitation: Commercial Surrogacy and the Indian Surrogate*, 36 SUFFOLK TRANSNAT'L L. REV. 671, 672 (2013) ("[N]o international treaty exists to regulate the practice of surrogacy around the globe, which results in many complex questions of private international law between states.").

[59] Both France and Germany completely ban surrogacy arrangements. *See* SPAR, *supra* note 16, at 83 ("Germany and France, for example, banned any form of surrogacy contract, arguing (in the French case) that 'the human body, its elements and its products may not be the subject of a contractual agreement.'" (citing Bernard M. Dickens, *Protecting the Human Body Against the Person: French Laws on the Uses of Bodily Materials*, 1 INT'L J. OF BIOETHICS 7, 16 (1996))).

[60] Britain only allows altruistic, noncommercial surrogacy. *See id.* (quoting MARY WARNOCK, QUESTION OF LIFE 45 (1991)) (pointing to the 1984 Warnock Report, which argued that "it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child").

[61] Ukraine's surrogacy laws are an example. *See* Claire Bigg & Courtney Brooks, *Ukraine Surrogacy Boom Not Risk-Free*, RADIO FREE EUROPE (June 4, 2011), https://www.rferl.org/a/womb_for_hire_ukraine_surrogacy_boom_is_not_risk_free/24215336.html ("Low tariffs and relatively lenient legislation are making Ukraine an increasingly popular destination for Western couples seeking to have children through surrogacy.").

[62] Belgium's laws do not address surrogacy. *See* Lin, *supra* note 24, at 552 (discussing the four categories that "[a] nation's laws on surrogacy may fall into").

"fertility tourism" in recent years.[63] Fertility tourism occurs when people travel "abroad to take advantage of assisted reproductive technologies," which may be unavailable generally or unavailable specifically to them in their home country because they possess certain prohibiting characteristics, such as being unmarried or homosexual.[64] Although some criticize fertility tourism, especially regarding use of surrogates in developing countries,[65] international surrogacy is not only extremely prevalent but is also a lucrative business.[66]

Despite the potential business opportunities, only a few countries outside the United States allow surrogacy.[67] Of those countries, a few have experienced a booming surrogacy market (for better or worse).[68] However, the United States remains an attractive and popular surrogacy destination and is described as "[t]he most active commercial surrogacy country" in the world.[69] One of the added benefits for international parents choosing to use a U.S.-based surrogate is that any child born in the United States automatically receives citizenship, thus solving the oft-cited problem of how cross-border surrogacy can result in stateless children.[70]

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[63] *See id.* at 553 ("Differing laws, coupled with the ease of modern day communications and travel, have encouraged commissioning parents to enter into surrogacy arrangements in foreign nations."); *see also* Mina Chang, *Womb For Rent: India's Commercial Surrogacy*, HARV. INT'L REV. (July 6, 2009, 11:30 PM), http://hir.harvard.edu/frontiers-of-conflict/womb-for-rent.

[64] Jennifer Rimm, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429, 1429 (2009) (citing Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295, 300 (2005)); *see also* Voskoboynik, *supra* note 11, at 347–48 (discussing how India enacted a law in 2013 that prohibited "single, same-sex, and unmarried individuals" from entering into surrogacy agreements).

[65] *See* Rimm, *supra* note 64, at 1433 ("India's minimal regulation of surrogacy agreements raises a broad host of concerns from both a legal and ethical standpoint."); *see also* Margalit, *supra* note 48, at 51 ("International surrogacy raises many ethical problems, specifically when intending parents rely on the procreative ability of women in developing countries.").

[66] *See* Lin, *supra* note 24, at 553 ("International surrogacy has become a booming business . . . .").

[67] *See* Voskoboynik, *supra* note 11, at 339 (discussing the high costs of entering into a surrogacy agreement in the United States as compared to foreign countries).

[68] *See* Vincent & Aftandilian, *supra* note 58, at 671 ("Commercial surrogacy in India is currently estimated to generate more than USD2 billion in revenue annually . . . [but t]his booming market comes at a dangerous time because India has no laws in place to protect the rights of the surrogate.").

[69] ROTABI & BROMFIELD, *supra* note 4, at 124.

[70] *See id.* ("[A]ll children born in the United States receive US citizenship upon birth."); *see also* Laura Rose Golden, Note, *Regulating International Surrogacy Arrangements Within the United States: Is There a Conceivable Solution?*, 47 GA. J. INT'L & COMP. L. 169, 187–88

Even though international couples continue to travel to the United States for surrogacy, "[i]n the United States . . . the federal government has been . . . mute: there are no federal laws regarding either gestational or traditional surrogacy."[71] Therefore, as the issue of surrogacy has been left to the states to regulate, the result is an assortment of conflicting laws throughout the country.[72] For example, in Michigan not only are surrogacy contracts "void and unenforceable as contrary to public policy" but a party to a surrogacy contract is "guilty of a felony punishable by a fine of not more than $50,000.00 or imprisonment for not more than 5 years, or both."[73] Conversely, in California, "[a]n assisted reproduction agreement for gestational carriers executed in accordance with [certain requirements] is presumptively valid."[74] Unfortunately, intended parents in Georgia, as in many other states, are left without any guidance on the status of their surrogacy agreements and can only hope that nothing goes astray.[75]

III. REGULATION IN GEORGIA

With the increased use of surrogacy and alternative reproductive technology in the past decade, it is unlikely that the use of surrogacy will become less prevalent any time soon. Currently in Georgia, a contested surrogacy agreement would likely be governed by contract law, family law, and more general laws—enacted without consideration of the unique challenges posed by surrogacy.[76] This Note argues the Georgia legislature needs to

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(2018) (addressing the United States' role as a surrogacy hub in the international scene and noting that "the United States is one of the few countries that has legalized surrogacy").

71 SPAR, *supra* note 16, at 84.

72 *See* Dominique Ladomato, *Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation*, 23 HASTINGS WOMEN'S L.J. 245, 250 (2012) ("While the laws in [the] states vary by nuance, they can generally be grouped into five subcategories of legal regulation . . . .").

73 MICH. COMP. LAWS ANN. §§ 722.855, 722.857 (West 2019).

74 CAL. FAM. CODE § 7962 (West 2019).

75 *See* Morrissey, *supra* note 8, at 491 ("There is no legal authority in Georgia governing the enforceability of surrogacy agreements. The Georgia statutes are silent on the subject and there are no instructive published Georgia opinions.").

76 *See* Eliza Hall, *From European Theory to American Practice: The United States as a Laboratory for Surrogacy Law* ("Surrogacy is primarily a question of family and contract law . . . ."), *in* REGULATION OF SURROGACY 69 (Beate Ditzen & Dr. Marc-Philippe Weller eds., 2018).

finally address surrogacy contracts to provide guidance and security to all the parties involved.

As a state without clear caselaw or statutes governing surrogacy, Georgia leaves intended parents in the dark about whether surrogacy contracts will be upheld should either party contest the agreement's validity before a court.[77] The intended parents are not the only party in need of more certainty. In surrogacy agreements, there can be up to five parties involved—"two intended parents, two donors, and a surrogate."[78] Each participant to the agreement stands to lose or gain something, but without any law addressing the subject, the security of each party's interests remains uncertain. By failing to address surrogacy arrangements, Georgia is missing "an opportunity to protect [its] citizens . . . while also promoting the creation of cohesive family units."[79] Furthermore, with other states and countries banning or strictly regulating surrogacy agreements, Georgia could become a popular surrogacy destination if Georgia did pass surrogacy legislation.[80] Unless the federal government bans surrogacy nationally, or unless the Georgia legislature takes steps to curb surrogacy agreements, surrogacy will likely remain a growing alternative reproductive method.

Surrogacy is the answer for many who have no other way to have a genetically-related child. Within the LGBT community and among single men and women, surrogacy is an increasingly popular way to start a family.[81] Taking advantage of surrogacy provides these individuals with the ability to plan their families at the time most convenient to them.

Another principal category of surrogacy clients is women, married or unmarried, who struggle with infertility or who are

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[77] *State-by-State Surrogacy Summary*, CTR. FOR BIOETHICS & CULTURE (2018), http://www.cbc-network.org/wp-content/uploads/2012/08/State-by-State_Surrogacy_Sum_CBC.pdf.

[78] Lisa Milot & T.J. Striepe, Reproductive Technology and Estate Planning 2 (unpublished manuscript) (on file with author).

[79] Ladomato, *supra* note 72, at 253.

[80] *See* Voskoboynik, *supra* note 11, at 339 ("[C]ountries may prohibit reproductive services on a moral grounds and implement discriminatory legislation."); *see also* Golden, *supra* note 70, at 172 ("[T]he issue of international surrogacy is of great importance to the United States, given . . . [its interest in] both sides of the arrangement—foreign citizens come to the United States for surrogacy and U.S. citizens go abroad . . . . Moreover, recent legal changes regarding both immigration and familial rights call for the United States to act in protecting those entering into international surrogacy arrangements.").

[81] *See* Laufer-Ukeles, *supra* note 43, at 1224 ("Surrogacy also allows homosexual couples to have genetically related children and can assist a single man to start a genetic family.").

unable to carry a child themselves.[82] The current trend of women having children later in life contributes to the increased use of surrogacy because women's fertility decreases with age;[83] by the time some women are ready to have a child, it may be too dangerous or too late biologically.[84] With the increasing number of individuals who could turn to surrogacy have a child, the Georgia legislature should finally address the status of surrogacy. However, any law addressing surrogacy would have to comply with both the U.S. Constitution and the Georgia Constitution.[85]

A. CONSTITUTIONALITY

Completely banning or restricting surrogacy at the federal level raises a host of constitutional concerns implicating Americans' fundamental rights.[86] The Due Process Clause of the Fourteenth Amendment prevents states from "depriv[ing] any person of life, liberty, or property, without due process of law."[87] Under this clause, the U.S. Supreme Court has upheld American citizens' rights to

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[82] See *id.* ("Advocates intuitively embrace the practical solutions surrogacy provides for couples and individuals who seek to procreate but are inhibited by infertility . . . .").

[83] *See* Julia Ries, *Meghan Part of Trend of Older First-Time Mothers*, HEALTHLINE (Oct. 22, 2018) https://www.healthline.com/health-news/meghan-markles-pregnancy-part-of-growing-trend-of-older-mothers#Advanced-maternal-age-pregnancies-do-come-with-certain-risks (discussing the movement in the United States where "more women are waiting longer to have children"); *see also* Jamie Ducharme, *American Women Are Having Fewer Kids—and Having Them Later in Life, Report Says*, TIME (Oct. 17, 2018) http://time.com/5425376/fertility-rates-report/ ("American women are having fewer children than in years past, and having them later in life.").

[84] *See* Ries, *supra* note 83 ("[A]s women age and put off having kids, their egg quality deteriorates and, consequently, their fertility declines."); *see also* June Carbone & Naomi Cahn, *Families, Fundamentalism, & the First Amendment: Embryo Fundamentalism*, 18 WM. & MARY BILL OF RTS. J. 1015, 1018 (2010) ("College educated women have experienced the greatest delay in family formation, hence the greatest age-related fertility issues.")

[85] *See As Demand for Surrogacy Soars*, *supra* note 27 ("The problem for those who would regulate surrogacy out of existence is that demand is strong, and rising fast."). While this Note proposes a framework for Georgia to regulate surrogacy, it's also important for the United States to clarify its regulations within the international patchwork of surrogacy agreements. *See* Golden, *supra* note 70, at 172.

[86] *See* Skinner v. Oklahoma *ex rel.* Williamson, Attorney General, 316 U.S. 535, 541 (1942) (discussing how "[m]arriage and procreation are fundamental to the very existence and survival of the race" and are "basic civil rights of man").

[87] U.S. CONST. amend. XIV, § 1.

privacy,[88] to a family,[89] and to procreation.[90] Surrogacy arrangements implicate all of these rights.

Since *Meyer v. Nebraska*, the U.S. Supreme Court has acknowledged "the right of the individual to contract" and the rights "to marry, establish a home and bring up children."[91] If a party contested a surrogacy law, a U.S. court could construe the regulation or prohibition of surrogacy as violating the liberty of an individual to have and raise a child.[92] For those who are physically unable to bear children, banning surrogacy would deprive some Americans of "the right to have offspring."[93] For a large number of women, men, and couples, surrogacy is the only way to have a child that is their genetic offspring.[94] Thus, if a state government bans surrogacy agreements, that government would infringe on its own citizens' recognized fundamental rights to procreate and have genetically related offspring.

Laws that restrict rather than ban surrogacy could also be considered unconstitutional if challenged.[95] The U.S. Supreme Court has repeatedly discussed the importance of individuals' freedom to bear children, stressing that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear . . . a child."[96] By emphasizing the choice of the individual, and not the collective choice of couples or of a husband and wife, the Supreme Court could find restrictions on the access to surrogacy,

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[88] *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion . . . ." (emphasis omitted)).

[89] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[90] *See Skinner*, 316 U.S. at 536 (describing "the right to have offspring" as an "important area of human rights").

[91] *Meyer*, 262 U.S. at 399.

[92] *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate.").

[93] *Skinner*, 316 U.S. at 536.

[94] *See* Laufer-Ukeles, *supra* note 43, at 1224 (explaining how surrogacy can help individuals and couples who are infertile or unable to start a family naturally).

[95] *But see* Doe v. Kelley, 307 N.W.2d 438 (Mich. Ct. App. 1981) (holding that a state restriction prohibiting exchange of money or other consideration for an adoption was constitutional and did not violate the fundamental right to bear a child).

[96] *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the fundamental right to privacy includes decisions about contraception and that the state cannot infringe on this fundamental right arbitrarily).

such as restrictions based on an individual's marital status, to be unconstitutional. Numerous states currently restrict surrogacy as being available only to those who are legally married or to marriages between a man and woman.[97] Other states restrict surrogacy to situations in which it is medically unsafe for the commissioning mother to bear a child.[98] These restrictions mean that these states prohibit unmarried individuals or homosexual couples respectively from entry into surrogacy arrangements.[99]

Laws banning surrogacy could be viewed as violations of the surrogate mother's constitutional rights. While U.S. Supreme Court jurisprudence generally alludes to Americans' right to bear their own children, they nonetheless also emphasize the fundamentality of allowing individuals the freedom to choose whether to *bear* a child.[100] The U.S. Supreme Court could ultimately construe this to include a woman's right to *carry* a child, even one that is unrelated genetically to her and that she does not intend to raise herself.

The U.S. Constitution, however, is not the only constitution that matters. Laws banning or restricting surrogacy also have the potential to violate rights laid out in state constitutions. This distinction is particularly important because, as discussed, surrogacy legislation is primarily a matter of state law in the U.S. Georgia's Bill of Rights guarantees every Georgia citizen life, liberty, and property, stating that "[p]rotection to person and property is the paramount duty of government and shall be

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[97] *See* FLA. STAT. ANN. § 742.15(1) (West 2019) ("A contract for gestational surrogacy shall not be binding and enforceable unless . . . the commissioning couple are legally married . . . ."); TEX. FAM. CODE ANN. § 160.754(b) (West 2019) (requiring marriage); LA. STAT. ANN. § 9:2718-2720 (West 2018) (requiring heterosexual marriage); TENN. CODE ANN. § 36-1-102(51) (West 2019) (defining a surrogate birth as "[t]he union of the wife's egg and the husband's sperm").

[98] *See* VA. CODE ANN. § 20-160(B)(8) (2019) (requiring the intended mother to be "infertile, . . . unable to bear a child, or . . . unable to do so without unreasonable risk to the unborn child or to the . . . health of the intended mother or the child").

[99] For example, Florida law restricts access to married couples and requires it to be medically unsafe for the commissioning mother to bear a child before that mother can legally enter into a surrogacy agreement. *See* FLA. STAT. ANN. § 742.15(2) (West 2019) ("The commissioning couple shall enter into a contract with a gestational surrogate only when, within reasonable medical certainty . . . [t]he commissioning mother cannot physically gestate a pregnancy to term . . . [t]he gestation will cause a risk to the physical health of the commissioning mother; or . . . [t]he gestation will cause a risk to the health of the fetus.").

[100] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977) ("[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests . . . .").

impartial and complete."[101] While the rights granted under both the United States and the Georgia constitutions are similar, "the 'right to be let alone' guaranteed by the Georgia Constitution is far more extensive than the right of privacy protected by the U.S. Constitution, which protects only those matters 'deeply rooted in this Nation's history and tradition' or which are 'implicit in the concept of ordered liberty.'"[102] Georgia courts repeatedly emphasize Georgia citizens' liberty right, which includes "the right to live as one will, so long as that will does not interfere with the rights of another or of the public."[103] Therefore, because "the individual is entitled to a liberty of choice as to his [or her] manner of life,"[104] a court could decide that Georgia citizens should be able to freely decide to enter into agreements concerning the private affair of surrogacy, without "unnecessary public scrutiny."[105] Because it could be argued surrogacy agreements do not directly affect the rights of other Georgians outside the parties to the contract, the Georgia legislature may find it difficult, even as compared to the federal government, to completely prohibit or unreasonably restrict surrogacy contracts without violating Georgia precedent and the Georgia Constitution.[106]

B. CREATING A SURROGACY LAW IN GEORGIA

If Georgia ever did decide to enact legislation tackling surrogacy, there would be practical hurdles for the legislature to overcome. Not only would the law need to fit (and not conflict) with other Georgia laws, but any proposed bill would also have to garner enough political support to take effect.

In 2009, Georgia passed the Embryo Adoption Act (the Act), which was the first statute of its kind in the United States and one

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[101] GA. CONST. art. 1, § 1, paras. I–II.

[102] Powell v. State, 510 S.E.2d 18, 22 (Ga. 1998) (quoting Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986)).

[103] *Id.* (quoting Pavesich v. New England Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905)).

[104] *Id.*

[105] *In re* J.M., 575 S.E.2d 441, 442 (Ga. 2003) (quoting *Powell*, 510 S.E.2d at 22).

[106] Those who support the belief that life begins at conception, however, could alternatively argue that the creation and disposal of unused embryos from surrogacy arrangements does affect the rights of the embryos, which are given legal personhood under Georgia's new Living Infants Fairness and Equality Act of 2019. *See* Living Infants Fairness and Equality Act of 2019, H.R. 481, Ga. Cong. § 2 (2019) ("Modern medical science, not available decades ago, demonstrates that unborn children are a class of living, distinct persons . . . .").

of the few laws in Georgia that could possibly implicate surrogacy agreements.[107] Under this law, a "legal embryo custodian may relinquish all rights and responsibilities for an embryo to a recipient intended parent prior to embryo transfer."[108] The law defines a "legal embryo custodian" as the person "who hold[s] the legal rights and responsibilities for a human embryo." [109] For the transfer to be valid, the custodian and the intended parent must enter into a written agreement.[110] Once the child is born, the law presumes the child is the legal child of the intended parents.[111]

The Act is tangentially associated with surrogacy because gestational surrogacy always involves the creation of an embryo outside the womb.[112] Thus, surrogacy might implicate the Act if a surrogate mother is implanted using a donated embryo.[113] Surrogacy, however, is not mentioned nor even alluded to in the statute, nor anywhere else in the Georgia Code.[114]

The importance of the Act with regard to a potential surrogacy law in Georgia is that the law characterizes the transfer of an embryo from one person to another as an "adoption."[115] One may think that if the legislature classifies the transfer of the rights and responsibilities for an embryo as an adoption, the legislature may also want or need to classify the surrogate process as an adoption. Surrogacy often involves the donation of either sperm or eggs, and with gestational surrogacy, the embryo is created outside the womb and then transferred to the surrogate.[116] A surrogate accepting the insertion of the embryo in her womb could be characterized as the

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[107] O.C.G.A. § 19-8-41 (2019); *see also* Lisa Milot, Breakfast CLE Presentation to the Estate Planning & Probate Section of the Atlanta Bar (Jan. 14, 2015) (on file with author) ("In 2009, Georgia became the first state to pass an "Embryo Adoption Act.").

[108] O.C.G.A. § 19-8-41(a) (2019).

[109] *Id.* § 19-8-40(4).

[110] *Id.* § 19-8-41.

[111] *See id.* § 19-8-41(d) (stating that the child is "presumed to be the legal child of the recipient intended parent").

[112] *See* Morrissey, *supra* note 8, at 470 (explaining that in gestational surrogacy, the intended mother or a third party egg donor provides the eggs, which are fertilized and then transferred to the surrogate).

[113] The Georgia law could also be implicated if a couple donated leftover embryos from their own attempt at surrogacy.

[114] *See* O.C.G.A. § 19-8-41 (2019) (failing to mention surrogacy in the statute).

[115] *See id.* § 19-8-41 (classifying an embryo within the "Adoption" section of the Georgia Code).

[116] The Embryo Adoption Act, however, explicitly exempts embryos created using donor gametes from its notification requirements. *See id.* § 19-8-41(b) (noting these donors "shall not be entitled to any notice of the embryo relinquishment").

surrogate taking on the responsibility of the embryo, and therefore, also characterized as an adoption. Nevertheless, because the intended parents will retain the rights to the embryo along with responsibility for the future child resulting from the embryo, it may only be necessary to include surrogacy arrangements in the adoption context if the intended parents decide to use a donated embryo, not donated gametes.

One aspect of the Act that would fit well with the surrogacy process is the presumption of legal parentage afforded to intended parents from the moment the child is born.[117] In order to safeguard the original intent of the parties to the surrogacy contract, any proposed Georgia law regulating surrogacy should include a provision creating a presumption of legal parentage in the intended parents superior to the surrogate mother.[118] In the event of a legal contest over parental rights, the presumption would place the burden on the surrogate mother to show why the court should disregard the original intent of the parties and find her to be the legal mother over the intended parents.

If the Georgia legislature wanted to include surrogacy arrangements within the adoption context, it may be difficult to sanction compensatory surrogacy. Under Georgia adoption law, it is unlawful for an individual to offer financial inducements to another for his or her child.[119] The law, however, does allow the adopting parent to provide certain financial assistance to the biological parent, including medical expenses, counseling or legal services, and living expenses.[120] This allowance appears to fit with surrogacy because intended parents in a surrogacy agreement usually compensate the surrogate mother for her medical and living expenses as a matter of course.[121] Because surrogacy agreements often classify the payment as compensating the surrogate for her services, it may be outside of the financial assistance exceptions outlined in Georgia's adoption statute. However, it could be argued that compensatory gestational surrogacy does not violate Georgia's

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[117] *Id.* § 19-8-41(d).

[118] UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2017) ("An individual is presumed to be a parent of a child if . . . the individual agreed to be and is named as a parent of the child on the birth certificate of the child.").

[119] O.C.G.A. § 19-8-24(b) (2019).

[120] *Id.* § 19-8-24(c).

[121] *See* Voskoboynik, *supra* note 11, at 342 (discussing two categories of payment arrangements for surrogacy).

adoption law because the resulting child is not genetically related to the surrogate mother, and therefore, it is not characterized as an adoption under the Georgia law.[122]

Surrogacy should not be placed within the traditional adoption context in Georgia. When parties enter into a surrogacy contract, there is no baby currently in existence, nor is there a guarantee that a child will be conceived.[123] Therefore, although Georgia's adoption law prohibits a person from "hold[ing] out inducements to any biological parent to part with his or her child,"[124] it cannot be said that the intended parents induce the surrogate to do so because there is no child in existence when the surrogacy contract is made. Surrogacy opponents, however, would likely argue that even if the surrogate is willingly and freely entering the contract before any child is conceived, the continued payments of expenses and compensation could induce the surrogate to uphold her end of the bargain when she otherwise would not have.[125] Regardless of whether continued payment constitutes an inducement, in gestational surrogacy, the child does not biologically belong to the surrogate, and therefore, she is not induced to part with *her* child.

1. How the 2017 Uniform Parentage Act Could Work in Georgia.

If the Georgia legislature decided to legalize and regulate surrogacy, it could base any proposed law on the language of the Uniform Parentage Act (UPA), which was released by the Uniform Law Commission in 2017.[126] Before 2017, the most recent UPA was released in 2002, but of the eleven states that adopted versions of it, only two based surrogacy laws on Article 8.[127] Article 8 of UPA

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[122] *See* O.C.G.A. § 19-8-24(c) (2018) (identifying unlawful inducements in adoptions); *see also* Lin, *supra* note 24, at 550–51 (explaining the lack of genetic ties between the surrogate and the child in gestational surrogacy).

[123] Morrissey, *supra* note 8, at 476 ("[T]hey should also consider that surrogacy has its drawbacks too. There is the risk of attempting to use IVF, an egg donor, and a surrogate, and simply never getting pregnant.").

[124] O.C.G.A. § 19-8-24(c)(2) (2018).

[125] *See* McEwen, *supra* note 13, at 293 ("Opponents of commercial gestational surrogacy argue 'that the fee paid to [a] surrogate[] constitutes an undue inducement,' forcing the woman 'to do something [that she] ordinarily would not do.'" (alterations in original) (quoting SCOTT B. RAE, THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES? 56 (1994))).

[126] *See* UNIF. PARENTAGE ACT art. 8 cmt. at 72 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017) ("UPA (2017) updates the surrogacy provisions of UPA (2002) to reflect developments that have occurred over the last 15 years.").

[127] *See id.* (noting how only two states, Texas and Utah, "enacted the surrogacy provisions

2017 permits both traditional and gestational surrogacy agreements under distinct requirements. While numerous states allow only gestational surrogacy, if the Georgia legislature wants to allow access to the greatest number of people and align more closely with the majority of states that regulate surrogacy, the legislature should follow the UPA and permit both traditional and gestational surrogacy.[128]

Enacting a version of the UPA would work in Georgia for multiple reasons. When creating any legislation, it is important for the legislature to be knowledgeable on the subject. If Georgia were to consider adopting surrogacy legislation, it may be difficult for legislators to commit the time to thoroughly researching and understanding the current technology of surrogacy and what constituents want. Instead, to solve this problem, the Georgia legislature could base its surrogacy law on the UPA.

Using UPA 2017, the Georgia legislature could be confident in relying on the information and data used to produce UPA 2017 and would not have to independently spend the time and resources researching present technology and practices used in surrogacy in the U.S. UPA 2017 is up-to-date and consistent with current developments and practices in surrogacy around the country and includes practices developed and supported by the American Society for Reproductive Medicine.[129] Adopting language from the UPA would therefore allow Georgia citizens to be more confident in, and

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based on Article 8 of UPA (2002)").

[128] *See id*. ("Article 8 of UPA (2017) regulates and permits both genetic (often referred to as 'traditional') and gestational surrogacy agreements. But UPA (2017) differs in the way that it regulates these two types of surrogacy agreements."). The UPA 2017 also notes that "[o]f the states that permit surrogacy, most permit *only* gestational surrogacy agreements." *Id.*; *see also* SPAR, *supra* note 16, at 85 (discussing how gestational surrogacy "reduced the risks and ambiguity that had surrounded traditional surrogacy").

[129] *See* UNIF. PARENTAGE ACT § 802 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017) (listing the eligibility requirements to enter a gestational or genetic surrogacy agreement); *see also* Courtney Joslin & Jamie Pedersen, *Updated National Uniform Parentage ACT (UPA 2017) Approved*, ASRM NEWS (Nov. 12, 2017), https://www.asrm.org/news-and-publications/news-and-research/legally-speaking/updated-national-uniform-parentage-act-upa-2017-approved/ (noting that the 2017 version of the UPA "updates the surrogacy provisions to reflect developments in that area, making them more consistent with current surrogacy practice, and recently adopted statutes in several states"); Debra E. Guston, *New Jersey Passes Gestational Carrier Law and Amendments to Update Artificial Insemination Law*, ASRM NEWS (June 18, 2018), https://www.asrm.org/news-and-publications/news-and-research/legally-speaking/new- jersey-passes-gestational-carrier-law-and-amendments-to-update-artificial-insemination-law/ (discussing the practices included in the new New Jersey law).

more comfortable with, any surrogacy law passed. Furthermore, relying on UPA 2017 would allow Georgia to join other states that have recently enacted legislation regulating surrogacy without having to debate each provision of a law created from scratch, thus making the enactment of the law more likely.

Whenever surrogacy regulations are passed, restrictions often follow. One advantage of adopting the language of UPA 2017 is that its language is blind to socially-created restrictions. Under UPA 2017, the only restrictions are related to the physical, mental, and legal wellbeing of the parties, as opposed to socially-created restrictions.[130] For example, Ukraine upholds surrogacy contracts only between heterosexual-intended couples,[131] Israel requires the intended parents and the surrogate mother to share the same religion,[132] and Florida, Tennessee, Louisiana, and Texas all require marriage between intended parents.[133] If Georgia were to adopt UPA 2017 word-for-word, the legislature could avoid or at least curtail the debate on which restrictions should be placed on Georgia citizens' ability to enter into surrogacy agreements. Furthermore, minimizing the restrictions on Georgians' ability to enter surrogacy contracts would align with Georgia's tradition of upholding its citizens' right of freedom of contract and right to privacy.[134]

Georgia has the potential to foster a booming market for surrogacy agreements. Widespread, legalized access to surrogacy

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[130] *See* UNIF. PARENTAGE ACT § 802 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017) (requiring both the surrogate and the intended parent(s) to be twenty-one years of age, complete a medical evaluation and mental-health consultation, and have independent legal representation).

[131] *See* Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT'L L. REV. 527, 618 (2013) ("[U]nder Ukrainian law[,] only married, heterosexual couples are permitted to enter surrogacy arrangements.").

[132] *See* D. KELLY WEISBERG, THE BIRTH OF SURROGACY IN ISRAEL 194 (2005) (discussing how under Israeli law "the religion of the surrogate must be the same as that of the intended mother").

[133] *See* FLA. STAT. ANN. § 742.15(1) (2019); LA. STAT. ANN. § 2718.1(6) (2018); TENN. CODE ANN. § 36-1-102(50)(A) (2019); TEX. FAM. CODE ANN. § 160.754(b) (2019).

[134] *See* Powell v. State, 510 S.E.2d 18, 21 (Ga. 1998) ("The right of privacy has a long and distinguished history in Georgia."); *see also* My Fair Lady of Ga., Inc. v. Harris, 364 S.E.2d 580, 581 (Ga. Ct. App. 1987) ("It is the paramount public policy of this state that courts will not lightly interfere with the freedom of parties to contract." (quoting Lovelace v. Figure Salon, Inc., 345 S.E.2d 139, 140 (Ga. Ct. App. 1986))); *Lovelace*, 345 S.E.2d at 140 ("[I]t is general contract law in Georgia that parties are free to contract about any subject matter, on any terms, unless prohibited by statute or public policy, and injury to the public interest clearly appears." (quoting Hall v. Garden Servs., Inc., 332 S.E.2d 3, 5 (Ga. Ct. App. 1985))).

would support equality among Georgians as surrogacy use continues to expand. Furthermore, reducing barriers to surrogacy would encourage more hopeful parents to travel to Georgia to enter into surrogacy agreements. With Georgia's international, high-traffic airport and relatively close geographical proximity to Europe (where many countries highly restrict or completely prohibit surrogacy),[135] legalizing and protecting surrogacy agreements could result in a sizeable number of individuals seeking surrogacy agreements in Georgia who otherwise could not obtain them in their home state or country.[136] Creating a surrogacy law would put Georgia in direct competition with a state like California, which already has a booming surrogacy market but requires a further flight from many places in the Western world.[137]

2. Georgia's Best Bet.

Although enacting a version of the UPA 2017 in Georgia would alleviate many concerns of the parties to surrogacy agreements, it is unlikely that such a law would be passed in Georgia today. The language of the Embryo Adoption Act provides an example of why passage is unlikely. The Embryo Adoption Act characterizes the transfer of an embryo from one person to another as an "adoption," which is "consistent with a view of life as beginning at conception."[138] This is problematic for the legalization of surrogacy in Georgia because "state-of-the-art IVF today routinely produces extra embryos that may never be used[, and therefore] [p]atients generally freeze the embryos that are not implanted so that they will be available to produce additional children or for additional attempts if the first effort does not succeed."[139] Under the belief that

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[135] *See* Helier Chung, *Surrogate Babies: Where Can You Have Them and Is it Legal?*, BBC NEWS (Aug. 6, 2014), https://www.bbc.com/news/world-28679020 (pointing out that France, Germany, Italy, Spain, Portugal, and Bulgaria prohibit all forms of surrogacy).

[136] *See* SPAR, *supra* note 16, at 86 ("As the international market developed, niches predictably appeared, frequently spanning racial, regulatory, or economic gaps.").

[137] *See* Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67, 80–81 (2007) ("Infertile couples around the world have found California to be a favorable legal forum . . . . Prospective parents, surrogates, and egg donors can be reasonably certain that their intentions, as exressed by their agreement, will be upheld in California." (quoting Thomas M. Pinkerton, *Surrogacy and Egg Donation Law in California*, http://www.surrogacy.com/legals/article/calaw.html)).

[138] Lisa Milot, Breakfast CLE Presentation to the Estate Planning & Probate Section of the Atlanta Bar (Jan. 14, 2015) (on file with author).

[139] *See* Carbone & Cahn, *supra* note 84, at 1016.

life begins at conception, the unused embryos are lives that are held in limbo or, if discarded, lives that are exterminated.

As a typically "red" state in the "Bible Belt of America,"[140] many Georgia citizens support the idea that life begins at conception.[141] In May 2019, along with several other conservative states, Georgia governor Brian Kemp signed the "Fetal Heartbeat Bill" into law.[142] This law provides "early infants in the womb with full legal recognition as members of the human community, above the minimum requirements of federal law."[143] Aside from the potential effect this law could have on surrogacy agreements, the new "Fetal Heartbeat Bill" highlights the existence of the conservative majority in Georgia and why it is likely many Georgia citizens would oppose a surrogacy law sanctioning leftover embryos being indefinitely frozen or destroyed.[144]

While today many intended parents favor gestational surrogacy agreements over traditional surrogacy agreements, as a compromise, the Georgia legislature should pass a law solely addressing and endorsing traditional surrogacy agreements. This type of law would have the effect of at least protecting and acknowledging some surrogacy contracts. Conservative Georgia citizens would less likely resist a law that only legalizes traditional surrogacy because traditional surrogacy usually involves artificial insemination, which, as opposed to IVF, does not result in discarded

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[140] *See Federal Elections 2016*, FED. ELECTION COMMISSION, https://www.usa.gov/election-results (last updated Sept. 13, 2018); *see also* Mark Abadi & Shayanne Gal, *The US Is Split into More than a Dozen 'Belts' Defined by Industry, Weather, and Even Health*, BUSINESS INSIDER (May 7, 2018), https://www.businessinsider.com/regions-america-bible-belt-rust-belt-2018-4 ("You may also be familiar with the Bible Belt, a stretch in the South where religion plays an outsize role in the region's culture and politics.").

[141] *See* Maya T. Prabhu, *In the Heart of Georgia's Bible Belt, 'Heartbeat' Law Draws Huge Support*, ATLANTA J. CONST. (May 31, 2019), https://www.ajc.com/news/state--regional-govt--politics/the-heart-georgia-bible-belt-heartbeat-law-draws-huge-support/QCjywFndbGG2xnt1Ey6ajM/# (interviewing one rural Georgian who supports the new heartbeat law and discussing how her "Christian faith tells her that life begins at conception").

[142] *See* Patricia Mazzei & Alan Blinder, *Georgia Governor Signs 'Fetal Heartbeat' Abortion Law,* N.Y. TIMES (May 7, 2019), https://www.nytimes.com/2019/05/07/us/heartbeat-bill-georgia.html (discussing Georgia's new "fetal heartbeat law").

[143] Living Infants Fairness and Equality Act of 2019, H.B. 481, 155th Gen. Assemb. Reg. Session (Ga. 2019).

[144] *See* Carbone & Cahn, *supra* note 84, at 1016 ("On one side of the debate is what we term 'embryo fundamentalism,' that is, the instance that embryos are unique human beings from the moment of conception, and should be respected as such."); *see also* SPAR, *supra* note 16, at 91 (discussing how embryo adoption began with clients who were largely Christian).

or frozen embryos.[145] If the legislation only endorses traditional surrogacy arrangements involving artificial insemination, the debate over the morality of unused embryos effectively disappears.[146] Additionally, laws specifically addressing traditional surrogacy agreements would mitigate the potential problems associated with them and therefore ease parties' reluctance and hesitancy to enter into a traditional surrogacy agreement. If the law outlines the rights of each party, it will be easier for a court to enforce the provisions of the contract based on the original intent of the parties and the justification that "the child would not have been born but for the efforts of the intended parents."[147] Another advantage of traditional surrogacy agreements is that they obviate the need to find a separate egg donor when the intended parent or parents cannot provide both the egg and sperm.

However, a law addressing only traditional surrogacy would have other implications because the advantage of surrogacy for many people disappears without access to gestational surrogacy.[148] A law regulating traditional surrogacy would exclude more individuals from protections that could exist under a law covering both traditional and gestational surrogacy agreements. Any economic benefits afforded to Georgia would be lesser because there would still be uncertainty surrounding gestational surrogacy contracts, which constitute the majority of surrogacy arrangements today.[149]

Even though such a law would not address gestational surrogacy, it would not necessarily have the effect of automatically prohibiting gestational surrogacy agreements. Currently, no law in Georgia addresses gestational surrogacy agreements, but numerous

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[145] *See* Morrissey, *supra* note 8, at 470 ("With a traditional surrogacy, the intended parents usually choose to proceed by having the egg fertilized through AI [artificial insemination] . . . .").

[146] *See id.* (discussing how the process of artificial insemination results in unused embryos).

[147] John L. Hill, *What Does it Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991); *see also* Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993) (holding that the child's natural parents were the people to whom the child was genetically related).

[148] *See* SPAR, *supra* note 16, at 85 (discussing how gestational surrogacy "created considerably more choice for the consumers of reproductive services and . . . enhanced both the supply of and demand for surrogacy's basic ingredients").

[149] *See* Morrissey, *supra* note 8, at 471 ("[E]xperts now recommend gestational surrogacy."); *see also* Choudhury, *supra* note 7, at 4 (discussing how for gestational surrogacy and "[t]hose who desire a genetic child . . . private contracts through agencies" can result in "costs that can reach up to $100,000").

individuals enter into these every year in Georgia. Thus, even with legislation legalizing traditional surrogacy, the law could leave open the possibility of continued use of gestational surrogacy contracts, just without the same legal security traditional surrogacy contracts would have. In fact, gestational surrogacy contracts could potentially benefit from a law only addressing traditional surrogacy arrangements. A court could reason that because the legislature did not expressly prohibit gestational surrogacy contracts via statute, it did not view them as against public policy or it would have expressly prohibited them. As a result, courts may be actually be *more* inclined to uphold the validity of gestational surrogacy contracts.

If Georgia wants to ensure widespread availability of surrogacy and take advantage of the potential economic benefits that would come with recognizing surrogacy, any Georgia law addressing surrogacy should allow compensatory surrogacy. It is true that "most [surrogates] list altruism as the primary motivation for becoming a surrogate mother."[150] But, without some kind of compensation or reimbursement, it is likely fewer women would be willing to enter into surrogacy arrangements.[151] Fewer available surrogates would constrain the public's ability to utilize surrogacy as an option for conceiving children.[152] Therefore, regardless of what type of agreement it governs, any surrogacy law in Georgia should certainly allow for compensated or commercial surrogacy.

While a law addressing only traditional surrogacy is unlikely to pass in Georgia today due to political, moral, and social issues, a law addressing traditional surrogacy could be a starting point on which to build as surrogacy becomes more broadly accepted. Furthermore, in the meantime, the law would at least provide protections and guidance for traditional surrogacy arrangements.

IV. CONCLUSION

The Georgia legislature should pass legislation addressing traditional surrogacy agreements and acknowledge the technology

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[150] Laufer-Ukeles, *supra* note 43, at 1242.

[151] *See* Choudhury, *supra* note 7, at 16–17 ("While altruism may be part of the reason for entering into surrogacy, it is undeniable that without the material remuneration most women would not enter into surrogacy in India, and they likely would not enter into it in the United States either.").

[152] *See* SPAR, *supra* note 16, at 74 ("For without either incentive or coercion, the supply of surrogate mothers is unlikely to equal their demand.").

and use of surrogacy. In addition to economic benefits, surrogacy legislation would provide Georgia citizens with legal stability and certainty. It is possible that the Georgia legislature has avoided addressing surrogacy arrangements because of the constitutional and political concerns associated with surrogacy. However, avoiding the subject only leaves Georgia citizens unguided and unprotected, and "it is a state's responsibility to establish a clear rule of law that will provide certainty and fairness for the parties involved."[153] While federal acknowledgment of surrogacy agreements would be ideal, until this occurs, Georgia should not sit back and wait.

[153] Ladomato, *supra* note 72, at 254.