The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers

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"Assisted reproductive technologies bring to the fore important questions about . . . whom society deems entitled to reproduce and parent."[1]

This Article will examine the state of the law for determining parentage in gestational surrogacy arrangements, specifically with respect to homosexual male couples. It will argue that despite the assumption that the development of gestational surrogacy shifted state legislatures and courts towards an intent test, a recent court decision involving a gay couple demonstrates that this is not necessarily the case. Continued judicial bias reflecting enduring social stigmatization against two fathers and the desire to reinforce heterosexual procreation, along with unfair legal tests that discriminate against homosexual male couples because of biological gender differences and the necessity for a non-anonymous third party, results in gay male couples facing a greater challenge in being awarded legal parentage when a surrogacy dispute arises. The Article will argue that the solution is a pure intent test.

INTRODUCTION

Rapidly evolving technology addressing infertility problems has dramatically altered who is able to have children and how these children are conceived. As a result, the use of assisted reproduction has risen dramatically.[2] The law in the United States, however, has not kept up.[3] Courts continue to

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1. JESSICA ARONS, CTR. FOR AM. PROGRESS, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 1 (2007), *available at* http://www.americanprogress.org/issues/2007/12/pdf/arons_art.pdf.

2. *See, e.g.*, Wendy Chavkin, *Working Women, the Biological Clock, and Assisted Reproductive Technologies*, *in* BEYOND STATES AND MARKETS: THE CHALLENGES OF SOCIAL REPRODUCTION 159, 159 (Isabella Bakker & Rachel Silvey eds., 2008) ("Louise Brown, the world's first test tube baby, is now 30 years old. In the two and a half decades since she was born, births such as hers have increased at a dizzying pace. In 2002, some 33,000 American women delivered babies as a result of assisted reproductive technologies (ARTs) – more than twice the number who had done so in 1996. Additionally, more than double that number used ARTs unsuccessfully.").

3. *See* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 599 (2002) ("[P]arentage disputes arising from assisted reproduction create confusion over what body of law should control their outcome . . . .

struggle with how to best resolve conflicts that arise out of the use of these new technologies. The modern form of surrogacy—hiring a third party to carry and give birth to a child as an answer to infertility[4]—results in questions about who are the legal parent(s) of the child(ren) born out of this arrangement.[5] Are the parents those with a genetic link to the child, the woman who gave birth to the child, or those who contracted and paid for the technology that produced the child?

Medical and technological advances making conception without coitus possible gave rise to a growing number of people utilizing surrogacy arrangements as a method to procreate.[6] With no direct federal or state guidance, these arrangements were initially governed solely by private contractual agreements. As a result, when a dispute arose between the intended parents and the surrogate, it was up to judges to determine which parties were the legal parents.[7] Judges in multiple states issued opinions that included a plea

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Unfortunately, these judicial and legislative efforts have done little to develop coherent and clear criteria for the determination of parentage in this area and appear even to be working somewhat at cross purposes."); Linda S. Anderson, *Adding Players to the Game: Parentage Determinations when Assisted Reproductive Technology is Used to Create Families*, 62 ARK. L. REV. 29, 54-55 (2009) ("Courts that must determine parentage in situations involving the use of reproductive technology are facing a constantly changing set of circumstances in which these questions arise. Science marches on, regardless of whether the law knows what to do about the resulting situations. . . . Societal norms change, even if the laws that define that society have not yet fully acknowledged the shift."); Christen Blackburn, *Family Law: Who is a Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. MEM. L. REV. 349, 353 (2009).

4. The social arrangement of surrogacy has existed since biblical times as a way to circumvent a woman's barren status. Historically, surrogates were slaves or concubines, forced to have sexual intercourse with the intended father. After birth, the child would be given to the intended mother. This is in stark contrast to today's methods, which while still a social arrangement, follow ethical rules and employ advanced technology so that no intercourse occurs. *See, e.g.*, Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 224 (2009).

5. Hereinafter, this Article will refer to parents as plural and child as singular for simplicity's sake; however, not all surrogacy arrangements include two intended parents, and use of ARTs often results in multiple births.

6. *See supra* note 4.

7. The National Conference of Commissioners on Uniform State Laws has addressed issues regarding parentage through the passage of multiple Acts, namely the Uniform Parentage Act (UPA) of 1973. However, this version of the UPA did not address parentage in light of ARTs beyond artificial insemination. UNIF. PARENTAGE ACT § 5(a), 9B U.L.A. 301 (1973) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."). In 1988, the Conference adopted the Uniform Status of Children of Assisted Conception Act (USCACA). UNIF. PARENTAGE ACT, prefatory cmt. (2002). However, this resembled a model act more than a uniform act because it provided two opposing options regarding gestational surrogacy. As of 2002, only two states had enacted the USCACA, selecting different options. *Id.* As a result, the Uniform Parentage Act of 2000, as amended in 2002, is the official recommendation of the Conference on the subject of parentage and makes obsolete all previous acts. *Id.* The 2002 UPA addresses ARTs in Article 7 and gestational agreements in Article 8, providing guidance to states, but many state courts and legislatures established rules prior to the passage of the UPA. *See* UNIFORM PARENTAGE ACT, arts. 7, 8 (2002); UNIF. LAW COMM'N, LEGISLATIVE FACT SHEET - PARENTAGE ACT, *available at* http://uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act (stating that Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming have enacted the Uniform Parentage Act:); Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples:*

for guidance from their respective state legislatures,[8] yet only a handful of states actually passed laws regarding parentage in the case of surrogacy arrangements,[9] and today many states continue to rely on judicial determinations.[10] The rules governing surrogacy arrangements vary widely.[11] The range of states' rules and courts' tests have led to unpredictable results, making it difficult for intended parents—meaning those parties who intend to have a child, take steps to bring a child into the world, and contract with a surrogate who agrees not to assert parental rights[12]—to rely on being deemed the legal parents in a court of law.[13]

Two key cases with dramatically different holdings have helped define how states' resolve this conflict: *In re Baby M*, decided by the New Jersey Supreme Court in 1988,[14] and *Johnson v. Calvert*, decided by the California Supreme Court in 1993.[15] These cases have long been viewed as distinguishable due to the use of advanced technology—enabling gestational surrogacy—in the

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Developments in the Law, 39 FAM. L.Q. 683, 686-87 (2005) ("Approximately nineteen states have adopted some variation of the 1973 version of the UPA," and "two states—North Dakota and Virginia—adopted the Uniform Status of Children of Assisted Conception Act (USCACA)"—which the UPA adopts practically verbatim.). Finally, how the UPA applies to unmarried gay couples remains in dispute. Nicole L. Parness, *Forcing A Square into A Circle: Why Are Courts Straining to Apply the Uniform Parentage Act to Gay Couples and Their Children?*, 27 WHITTIER L. REV. 893, 911 (2006) ("[P]arentage issues that gay parents face are left unclear because the UPA does not guide them in any way."); Deirdre M. Bowen, *The Parent Trap: Differential Familial Power in Same-Sex Families*, 15 WM. & MARY J. WOMEN & L. 1, 13 (2008) (stating that the 2002 UPA, which did address various ARTs, has been adopted by only seven states).

8. *See, e.g.*, J.F. v. D.B., 848 N.E.2d 873, 881 (Ohio Ct. App. 2006) (Slaby, J. concurring) ("Unless the state legislators begin to address the multiple issues involved, it will be the children that will be caught in a continual tug of war . . . ."); *In re* C.K.G., 173 S.W.3d 714, 736 (Tenn. 2005) ("We, as interpreters of the law, not makers of the law, are powerless, in my view, to reach a different resolution."); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998) ("Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction."); Belsito v. Clark, 644 N.E. 2d 760, 767 n.3 (1994) ("[I]t would be beneficial to the law of surrogacy for the legislature to act and end this uncertainty."); *In re* Adoption of Matthew B., 284 Cal. Rptr. 18, 37 (Ct. App. 1991) ("[W]e urge the Legislature to [act] expeditiously.").

9. *See infra* Appendix I.

10. ARONS, *supra* note 1, at 25 (A non-exhaustive list of states that do not have statutes regulating surrogacy is: Alaska, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming.).

11. *See* Krawiec, *supra* note 4, at 225 ("United States federal law is silent on the issue of commercial surrogacy, leaving a hodge-podge of widely varying state laws governing the issue."); R. Alta Charo, *Legislative Approaches to Surrogate Motherhood*, *in* SURROGATE MOTHERHOOD 88, 107 (Larry Gostin ed., 1990) ("Statutes, when enacted, are likely to vary considerably, ranging from complete bans to only minimal oversig-ht of contractual arrangements.").

12. Storrow, *supra* note 3, at 642-43.

13. *See id.* at 601 ("Concerning maternity, courts have yet to cope successfully with the fragmentation of maternity by surrogacy and have issued decisions inspiring more speculation than certainty. . . . leaving gaps in the law that render unclear the outcome of potential future disputes.); Anderson, *supra* note 3, at 52 ("The variety of types of analyses employed by the courts, however, leads to unpredictable results and makes it difficult for anyone advising parents to accurately describe potential concerns.").

14. 537 A.2d 1227 (N.J. 1988).

15. 19 Cal. Rptr. 2d 494 (Cal. 1993).

latter case, making it possible for the surrogate to have no genetic link to the child. Gestation without a genetic link challenged established ideas about biological processes and enabled people to conceive of alternative notions of motherhood.[16] For this reason, after the California decision commentators believed that the issue of parentage determinations in gestational surrogacy situations was obsolete.[17] Yet a recent court decision makes it clear that this is not the case.

In *A.G.R. v. D.R.H.*,[18] a legally married gay couple contracted with a surrogate.[19] Five months after giving birth to twin girls she changed her mind and asserted a legal right to be the girls' mother. Despite being a gestational surrogacy arrangement, the New Jersey Superior Court continued to rely on the rules established under *Baby M*.[20] Such a decision suggests that when judges and politicians make determinations about who are the legal parents, their decisions may be influenced by cultural conditioning with respect to homosexuality and parenting. This is supported by the contention that courts approach ART cases involving homosexual couples differently from ART cases involving heterosexual couples.[21]

Court decisions setting precedent and legislative rules for determining legal parentage are applicable to all people who utilize a surrogacy arrangement; however, these results are particularly salient for homosexual male couples[22] who are structurally unable to have children without assistance from a third party. While lesbian couples also experience problems establishing legal parentage, the laws for establishing legal parenthood unfairly burden gay

16. *See* Storrow, *supra* note 3, at 605 (arguing that the law surrounding maternity in surrogacy cases reflects a judicial "willingness to revise the model of the traditional marital family to make it more malleable and complex").

17. Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS., no. 3, Summer 2009, 109, 122-23 (declaring that the difference between gestational and traditional surrogacy has created an important legal distinction, the result of which is that courts and legislatures have enacted laws directing that the intended parents, not the gestational surrogate, be named the legal parents); John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 360 (2004) (stating that "participants and practitioners in states without established law" with respect to the drawing a distinction between traditional and gestational surrogacy "have assumed that gestational surrogacy would be given effect"); Carol Sanger, *Developing Markets in Baby-Making:* In the Matter of Baby M, 30 HARV. J.L. & GENDER 67, 72 (2007) (arguing that Baby M was a result of four distinct factors that would not exist ten years later).

18. No. FD-09-1838-07, slip op. at 2 (N.J. Super. Cr. Ch. Div. Dec 23, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf (Couple was "legally married under California law . . . and registered their domestic partnership in New Jersey pursuant to the New Jersey Domestic Partnership Act, N.J.S.A. 26:8A-1 *et seq*.").

19. *Id*.

20. *Id*.

21. Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 392 (2007).

22. I use the terms "homosexual male couple," "same-sex male couple," and "gay fathers" interchangeably in this Article. While I recognize that none of these terms may be deemed perfect or adequately represent the social, cultural, and political identities chosen by various individuals and that they may leave out certain sexual identities, I have chosen them because they are the most universally recognized and provide for a semblance of consistency.

male couples because the law sets up standards that they are unable to meet.[23] Due to biological reproductive differences, homosexual male couples are unable to utilize loopholes available to lesbians utilizing various ARTs. Additionally, the necessity of a surrogate for a gay male couple to have a child together means that a non-anonymous third party always exists to assert her right to parent the child. Because there is no alternative mother to assert a competing right and thereby create a tie as is available to heterosexual couples utilizing gestational surrogacy, gay male couples appear unable to both be declared legal parents under established rules.

With a rise in the number of children being born to same-sex couples,[24] determining who are the legal parents is becoming increasingly problematic and ripe for growing caseloads.[25] Yet the law does not appear to know how to approach this litigation due to the alternative family structures and the novel case law that is required. As a result of the new technology, established notions of procreation have been upended and existing legal frameworks cannot fully address the issues that arise in surrogacy arrangements.[26] Thus, courts—such as the Superior Court of New Jersey—are improperly relying on decisions whose holdings are archaic and no longer applicable given modern technology. If appealed *A.G.R.* may be decided differently, but the Superior Court's continued reliance on the reasoning in *Baby M* points to the potential for other state courts to follow in its footsteps.

Using *A.G.R* as a case study, this Article will argue that in situations of gestational surrogacy, courts should apply a pure intent-based test to determine the intent of all of the parties at the moment they entered into the surrogacy agreement.[27] Such a test recognizes that 'but for' the genetic parents' intent to

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23. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 267 (2006) (asserting that "an approach that excludes all gay male couples from the easy and beneficial default rule and makes them instead navigate more onerous and intrusive hurdles, even if some traditional and lesbian couples occasionally face such hurdles as well" is gender-based).

24. *See* ABBIE E. GOLDBERG, LESBIAN AND GAY PARENTS AND THEIR CHILDREN 3 (2010) (stating that there have been "actual increases in the number of lesbian and gay parents, particularly those who become parents in the context of same-sex committed relationships"); Uma Narayan, *Family Ties: Rethinking Parental Claims in the Light of Surrogacy and Custody*, *in* HAVING AND RAISING CHILDREN: UNCONVENTIONAL FAMILIES, HARD CHOICES, AND THE SOCIAL GOOD 65, 83 (Uma Narayan & Julia J. Bartkowiak eds.,1999); Joyce Kauffman, *Protecting Parentage with Legal Connections*, 32 FAM. ADVOC., Winter 2010, at 24.

25. Robertson, *supra* note 17, at 325.

26. *See* Storrow, *supra* note 3, at 603 (stating that without adequate legislative rules, courts have been left to reach parentage determinations based on existing precedents and on parallels drawn to artificial insemination legislation, which result in awkward decisions that do not account for the new methods of family formation).

27. While additional issues will arise in future cases – such as what will happen when neither the intended parent nor the surrogate mother has a genetic link – this Article cabins this issue and addresses only what happens in a gestational surrogacy arrangement, meaning that the surrogate has no genetic link and an intended parent does have a genetic link. With that said, the central framework of this Article puts forth a broader proposal that I suggest should be considered for all surrogate arrangements in which the birth mother does not have a genetic connection to the child, given the increasingly complicated scenarios and multiple-party involvement that is sure to continue.

create the child, no parent-child relationship would exist, and therefore those who intended to parent the child are the legal and rightful parents.[28] While the enforceability of the surrogacy contract is not compulsory under an intent test framework, a contract is one means to establish intentional procreative behavior and legal parentage.[29] This Article will go on to argue that the other tests courts rely on to determine legal parenthood, including a presumption of parentage, evidence of a genetic relation, or a gestational approach, are problematic for a variety of reasons. A pure intent test is the only available method for courts to determine parentage without gender, marital, or sexual orientation biases affecting the outcome.

Central to this assertion is a concern regarding when disagreements over legal parentage arise. The vast majority of surrogacy arrangements are successful, meaning the surrogate hands over the child to the intended parents post-birth without regrets or the desire to parent the child.[30] The involvement of courts typically only occurs when a dispute arises and competing claims of parenthood are asserted.[31] Therefore, central to an analysis establishing a default rule governing gestational surrogacy arrangements is the determination of which party the law should protect. The argument in favor of an intent test relies on a two-fold belief about the role of the law. First, the law should look at the overall outcome of all surrogacy arrangements and create a rule that reaffirms the majority result outside of the court's involvement. Given that gestational surrogacy arrangements are broadly successful, the contention that an intent test is an appropriate method for governing these arrangements is compelling. Second, the law should protect those parties who put in the effort, money, and desire to be parents because 'but for' this effort the child would not exist. In sum, an intent test provides a default rule that supports the vast majority of parties involved in surrogacy arrangements, creates certainty for all intended parents prior to undergoing the rigor of a surrogacy arrangement, and creates a rule that treats all parties—no matter what gender, marital status, or sexual orientation—equally.

Section I will provide a historical analysis, including an overview of the development of assisted reproductive technology (ART), the progression of legal developments in both case law and state statutes, and why a recent decision highlights the existing problems facing gay couples who intend to become parents. Section II will examine existing homophobia and continued bias against gay fathers, how this impacts judicial determinations of legal parentage for these couples, and why the recent decision in *A.G.R.* was incorrectly decided.

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28. Anderson, *supra* note 3, at 45.

29. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 325 (1990). Given that other papers have addressed this subject adequately, this Article will not address whether contractual enforcement is the best method for establishing intent.

30. Scott, *supra* note 17, at 127 (Even as early as the *Baby M* decision there was existing evidence that the vast majority of surrogacy arrangements were uncontested.).

31. States with statutes requiring a court's approval prior to a surrogacy arrangement include Florida (only for traditional surrogacy), New Hampshire, Texas, Utah, and Virginia. *See infra* Appendix I.

Section III will analyze the potential tests for determining parenthood, arguing that a pure intent test is proper.

I. HISTORICAL DEVELOPMENTS AND THE CURRENT STATE OF SURROGACY LAWS

A. Infertility, Assisted Reproductive Technologies, and Surrogacy

There are two categories of infertility: functional infertility and structural infertility. Functional infertility occurs when a man or woman is unable to reproduce for medical reasons,[32] including having a low sperm count, having no viable eggs, or being unable to carry a baby to term.[33] Functional infertility affects approximately ten percent of the population, affects men and women equally, and affects individuals of all socioeconomic backgrounds.[34] Most of the data that exists on infertility focuses on functional infertility.[35] Structural infertility, on the other hand, is not a result of a medical condition. Rather, it applies to the situation of individuals who are single or those who have a partner of the same sex, and therefore require another party's biological assistance to reproduce.[36] Data on how many people fall into this category is largely unavailable.[37]

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32. *See* Margarete Sandelowski & Sheryl de Lacey, *The Uses of a "Disease": Infertility as Rhetorical Vehicle*, *in* INFERTILITY AROUND THE GLOBE: NEW THINKING ON CHILDLESSNESS, GENDER, AND REPRODUCTIVE TECHNOLOGIES 33, 35 (Marcia C. Inhorn & Frank van Balen eds., 2002) ("Infertility remains ambiguous medically as it is variously conceptualized as itself a disease, a symptom of disease, a cause of disease, a consequence of disease, and as not a disease at all. The etiology of infertility remains uncertain as biological, behavioral, psychological, and sociocultural factors continue to be variously implicated and as the actual causes of infertility in any one case are often difficult to discern, even when specific medical disorders are identified.").

33. Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 24-25 (2008).

34. ARONS, *supra* note 1, at 2.

35. *See* Daar, *supra* note 33, at 25.

36. ARONS, *supra* note 1, at 2; *see also* Sandelowski & de Lacey, *supra* note 32, at 35 ([S]ingle persons and gay and lesbian couples [are seen] to be 'dysfertile,' that is, as unsuitable for parenthood no matter what their fertility status.").

37. *See* Daar, *supra* note 33, at 25; Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 178 (1996) ("The statistics show that more and more single women seek AID. It is, however, difficult to accurately estimate the number of single women who use AID because there are no federal regulations which govern AID or require record-keeping of women who seek physician assistance for insemination."); David D. Meyer, *Parenthood in Transition: A United States Perspective*, *in* TENSIONS BETWEEN LEGAL, BIOLOGICAL AND SOCIAL CONCEPTIONS OF PARENTAGE 369, 375 (Ingeborg Schwenzer ed., 2007) ("[M]any more unmarried women are electing . . . parenthood."); Sabrina Tavernise, *Parenting by Gays More Common in the South, Census Shows*, N.Y. TIMES, Jan. 18 2011, http://www.nytimes.com/2011/01/19/us/19gays.html ("In 2009, the Census Bureau estimated that there were 581,000 same-sex couples living in the United States . . . . [T]he bureau does not count gay singles."); Sharon Jayson, *Gay Couples: A Close Look at this Modern Family, Parenting*, USA TODAY, Nov. 5 2009, http://www.usatoday.com/news/health/2009-11-05-gayparents05_ST_N.htm ("One in five male couples and one in three lesbian couples were raising children as of the 2000 Census. That's way up from 1990, when one in 20 male couples and one in five lesbian couples had kids."); Robertson, *supra* note 17, at 324 ("As more gays and lesbians enter into partnership arrangements, a growing number will seek to have children. To do so they will turn to assisted reproductive techniques . . . .").

ARTs developed in response to infertility and the desire to have a genetically related child. An ART is defined as any fertility procedure in which both the eggs and the sperm are manipulated *outside* of the body. The most well known type of ART is In Vitro Fertilization (IVF),[38] in which eggs are removed from a woman's ovaries and combined with a man's sperm in a petri dish. The resulting embryos are then implanted in a woman's uterus.[39] While neither the use of fertility drugs to stimulate egg production in ovaries nor Intrauterine Insemination (IUI), also known as Artificial Insemination (AI), technically fall under the ART umbrella because they occur inside a woman's body and do not involve manipulation of both sperm and eggs, they are generally associated with ARTs due to their use in fertility treatments.[40] Similarly, surrogacy itself is not a medical technology; it is a social arrangement between people.[41] However, this arrangement is discussed within the context of ARTs because surrogacy utilizes either AI or IVF.

Surrogacy is a method of childbearing that can be used to circumvent functional infertility for women and structural infertility for gay or single men.[42] A woman, called a surrogate, agrees to gestate and give birth to a child that she does not plan on raising as her own. The party who contracts for the child, whether a single person or a couple, is referred to as the intended parent(s). Today there are two forms of surrogacy: traditional surrogacy and gestational surrogacy.

In traditional surrogacy, a woman who does not intend to be the legal parent agrees to be artificially inseminated with the sperm of a man who is not her husband.[43] Often the sperm that is used is that of the intended father, as it creates a genetic link to one of the intended parents, although this is not always

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38. Technological advances have created variations of IVF, including GIFT, ZIFT, and TUDOR. I use IVF as an umbrella term to refer to all procedures involving hyperovulation and egg removal. *See, e.g.*, ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 201 (1993); JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 12 (1993).

39. BARTHOLET, *supra* note 38, at 192. IVF can involve up to three different women playing the attendant roles: the egg donor, the intended mother, and the birth mother. However, one woman can also fill all three roles. Depending on the infertility problem, a woman can use her own egg and IVF technology, and then have the embryo implanted in her own uterus. A woman could also use another woman's donated eggs and IVF technology, and then have the embryo implanted in her own uterus. The intended mother can use her own egg but have the embryo implanted in another woman, who upon birth will relinquish the child. Finally, the intended mother can purchase a donated egg and hire a surrogate to carry the child to term. These various combinations demonstrate the complexity of determining legal parenthood.

40. ARONS, *supra* note 1, at 5.

41. Surrogacy is considered a social arrangement because prior to technological developments such as IVF, a fertile woman could use a rudimentary form of fertilization—such as insemination with a turkey baster—to become pregnant, and upon the birth of the child give it to the infertile woman. Today surrogacy arrangements utilize technological advances such as IVF, which is why the modern form is discussed alongside ARTs. *See* Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 340-41 (1995).

42. ARONS, *supra* note 1, at 6.

43. *E.g.*, Jennifer L. Watson, *Growing a Baby for Sale or Merely Renting a Womb: Should Surrogate Mothers be Compensated for Their Services?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 529, 529 (2007). Some states, including Virginia, require that the surrogate be married. *See* ARONS, *supra* note 1, at 26-27, 40.

the case—the sperm can be from a third-party donor. Through the use of AI, the sperm and the surrogate's egg join to create the fetus.[44] As a result, the surrogate has a genetic link to the child and one of the intended parents may also have a genetic link to the child. In uncontested cases, once the child is born the surrogate terminates her parental rights and the intended parents become the legal parents, raising the child as their own.[45] In contested cases, a problem arises if the surrogate decides she wants to retain her parental rights and raise the child herself. Because the surrogate is both the birth mother and the genetic mother, many people viewed traditional surrogacy arrangements as forcing a woman to give up her child—likening it to baby-selling, which prompted serious legal and ethical debates about how to determine parentage.[46]

Concerns focused on the commodification and exploitation of women in traditional surrogacy arrangements. The commodification argument viewed commercial surrogacy as the conversion of women's labor—namely giving birth to a child—into a commodity to be sold in the marketplace. Through this process the surrogate goes from being a person worthy of respect and consideration to being a disposable object.[47] The exploitation argument focused on *which* women were surrogates versus *which* women were intended mothers—highlighting class and race concerns—declaring that surrogates would be poor and minority women laboring for wealthy white women. This concern manifested itself through apprehension over surrogacy contracts and the potential for unequal bargaining power.[48]

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44. *Id.* at 5.

45. States differ on the rules for handling the birth of a child to a surrogate. Some states allow a pre-birth order that places the name of the non-genetically related party on the birth certificate, designating that person as a parent. Other states require adoption by the second parent. States differ on the rules for handling the birth of a child to a surrogate. Some states allow a pre-birth order via statute or case law, which allows the hospital to place the intended parents' names on the child's birth certificate, rather than naming the surrogate. Other states expressly prohibit pre-birth orders. *See* Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 637-38, 642 (2005); Erin V. Podolny, *Are You My Mother?: Removing A Gestational Surrogate's Name from the Birth Certificate in the Name of Equal Protection*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 351, 374 (2008). Other states require a same-sex couple to complete a second-parent adoption, which allows the partner of the legally recognized parent to become a second parent via consent, without terminating the partner's parental rights. Second-parent adoption is available in at least ten states. *See* Deirdre M. Bowen, *supra* note 7, at 7; Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 204 (2009).

46. DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 78 (2006).

47. Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 80 (1990).

48. *See, e.g.*, Mary Gibson, *Contract Motherhood: Social Practice in Social Context*, *in* LIVING WITH CONTRADICTIONS: CONTROVERSIES IN FEMINIST SOCIAL ETHICS, 402, 402-16 (Alison M. Jaggar ed.,1994); Christine T. Sistare, *Reproductive Freedom and Women's Freedom: Surrogacy and Autonomy*, *in* LIVING WITH CONTRADICTIONS: CONTROVERSIES IN FEMINIST SOCIAL ETHICS, *supra,* at 395, 398; Janice G. Raymond, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 90-93 (1993); 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); Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L. J. 295 (2005); Hilary Rose, *Victorian Values in the Test-tube: The Politics of Reproductive Science and Technology*, *in* REPRODUCTIVE TECHNOLOGIES (Michelle Stanworth ed., 1987); Janet Gallagher, *Eggs,*

The development of IVF,[49] which involves the creation of an embryo in a test tube that can then be implanted in a woman's uterus, helped to bring about broader social acceptance of surrogacy arrangements.[50] This technology, which became widely available to the public in the late 1980s,[51] made gestational surrogacy possible—with profound effects on the ethical debate. Couples could now use their own egg and sperm, or utilize a third party's egg or sperm, to create an embryo to be implanted in the body of another woman who agreed to gestate and bear the child for the intended parents.[52] Gestational surrogacy allowed women with functional infertility and gay men with structural infertility to reproduce.

Gestational surrogacy was credited with transforming the legal and cultural debate surrounding surrogacy.[53] What sets gestational surrogacy apart from traditional surrogacy is that the woman who bears the child is not genetically related to the child.[54] This shift eased legal and ethical concerns about separating a mother from her offspring and increased the number of women willing to provide pregnancy-without-eggs.[55] Women were more comfortable with the idea of gestational surrogacy arrangements, describing the

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Embryos and Foetuses: Anxiety and the Law, *in* REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE, *supra*, at 139, 146.

49. BARTHOLET, *supra* note 38, at 192 (In 1978 the first baby conceived via IVF was born in Great Britain.).

50. Scott, *supra* note 17, at 111.

51. SPAR, *supra* note 46, at 82.

52. Once a woman decides to become a surrogate, her body has to be "prepared" so that it will accept a pregnancy with an embryo that is not genetically related to her. Several weeks prior to the transfer of the embryo, the surrogate must start taking birth control pills and shots of hormones in order to suppress her ovulatory cycle. Then, she is injected with estrogen in order to build the uterine lining. After the embryo is transferred, she must receive daily injections of progesterone until her body "understands" that it is pregnant and can sustain the pregnancy on its own. Short-term side effects include hot flashes, mood swings, headaches, bloating, vaginal spotting, uterine cramping, light-headedness, vaginal irritation, and pain at the injection site. Long-term effects are still largely unknown. Amrita Pande, *Not an "Angel", not a "Whore": Surrogates as "Dirty" Workers in India*, 16 INDIAN J. GENDER STUD. 141, 147 (2009).

53. *See* SPAR, *supra* note 46, at 78 ("As the debates over surrogacy continued to rage, however, scientific developments were already rendering them largely moot. By the mid-1980s, new technologies for conception had supplanted the traditional model of surrogacy, creating a substitute with far greater commercial potential. . . . gestational surrogacy."); Scott, *supra* note 17, at 111-12 ("I seek to explain how and why the social and political meanings of surrogacy have changed over the past decade. . . . [A]dvances in IVF have expanded the use of gestational surrogacy, which, because the surrogate is not genetically related to the baby, was less readily framed as commodification and thus was more palatable than traditional surrogacy."). But note that this shift is largely within the context of the United States and that the early feminist arguments of commodification and exploitation have resurfaced within the international surrogacy market. *See generally* Arlie Hochschild, *Childbirth at the Global Crossroads*, AM. PROSPECT, Oct. 5, 2009, at 25; Antony Barnett & Helena Smith, *Cruel Cost of the Human Egg Trade*, OBSERVER, Apr. 30, 2006, http://www.guardian.co.uk/uk/2006/apr/30/health.healthandwellbeing; Amana Fontanella-Khan, *India, the Rent-a-Womb Capital of the World*, SLATE (Aug. 23, 2010, 7:03 AM), http://www.slate.com/id/2263136; Anuj Chopra, *Childless Couples Look to India for Surrogate Mothers*, CHRISTIAN SCI. MONITOR, Apr. 3, 2006, http://www.csmonitor.com/2006/0403/p01s04-wosc.html.

54. King, *supra* note 41, at 341.

55. SPAR, *supra* note 46, at 82.

relationship with the fetus as less that of a mother and more like a babysitter.[56] Further, the lack of a genetic relationship challenged the commodification and baby-selling argument by cultivating surrogates' identities as "carriers" rather than "mothers."[57]

Nonetheless, the new technology gave rise to increasingly complicated debates about who the rightful parents of the resulting child are. A child born out of a gestational surrogacy arrangement can have up to five prospective parents: (1) the intended mother; (2) the intended father; (3) the gestational mother; (4) the genetic parent via egg donation; and (5) the genetic parent via sperm donation. In a gestational surrogacy arrangement the intended parents may also be the genetic parents, providing both egg and sperm, or, if they have additional functional infertility problems, one or both of the genetic parents can be third-party donors. For gay men, gestational surrogacy *requires* a third-party egg donor, meaning at most only one of the intended parents can be genetically related to the resulting child. The sperm can be from one of the two fathers, or if both men face functional infertility the sperm can also be from a third party donor. The number of parties that may be involved clearly makes determination of the legal parentage of the child difficult. If the intended parents are homosexual, this only compounds the difficulty of determining parentage because having two fathers conflicts with traditional notions of family formation.

These complications and the attending legal risks have not greatly deterred Americans from pursuing gestational surrogacy options. Today, ninety-five percent of surrogacy arrangements in the United States are gestational.[58] Every year around 750 children are born in the United States through gestational surrogacy, and at least twice that many surrogacies are attempted.[59] These factors have created a growing ART industry that reports annual revenues of nearly seven billion dollars.[60] The economic cost of surrogacy varies, but generally includes fees to a surrogacy agency for connecting the parties, legal fees for the execution of a contract between the surrogate and intended parents, the expense of various ART procedures from a certified medical provider, and compensation to the surrogate. All together the process can easily cost $100,000.[61] The legal uncertainty of surrogacy agreements contributes to the

56. Scott, *supra* note 17, at 139.

57. *Id.* at 140.

58. Sanger, *supra* note 17, at 79.

59. Stephanie Saul, *Building a Baby, With Few Ground Rules*, N.Y. TIMES, Dec. 13 2009, http://www.nytimes.com/2009/12/13/us/13surrogacy.html; *see also*, Krawiec, *supra* note 4, at 205 (stating that in 2001, 41,000 children were born in the United States using ARTs, 600 of whom were carried by surrogates).

60. Daar, *supra* note 33, at 25.

61. *See* SPAR, *supra* note 46, at xii (stating that multiple rounds of IVF treatment and several batches of eggs can easily cost between $50,000 and $100,000); Abigail Haworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE, July 29, 2007, http://www.marieclaire.com/print-this/world-reports/news/international/surrogate-mothers-india (stating that the cost of surrogacy in the United States can be $70,000).

need for intermediaries, enabling these intermediaries to demand large compensation when a successful agreement is completed.[62]

For gestational surrogacy to be a successful industry, women who are willing participants must be readily available. Women cite three main reasons for wanting to be surrogates: they like being pregnant, they want the money, and they view having a baby for a childless couple as providing an altruistic gift.[63] Many women also point to the fact that being a surrogate enables them to stay home with their own children while pregnant with someone else's baby.[64] A successful industry, however, also requires surrogates to relinquish the child upon its birth, and for the intended parents to assume responsibility for the child. If any party changes his or her mind, a host of legal issues arise.

B. The Law and Determining Legal Parentage

Until recently, judicial decisions as well as the type of state statutes passed over the past three decades appeared to acknowledge the social and cultural shift created by the development of gestational surrogacy. This assumption is contested by a New Jersey Superior Court decision involving a homosexual male couple. The outcome of the case highlights the judicial bias against gay fathers and the unfair burden that gay men face in establishing parentage in a gestational surrogacy dispute.

i. Traditional Surrogacy

Baby M was the first significant case to address this innovative use of reproductive technology.[65] In 1985 William Stern entered into a traditional surrogacy contract with Mary Beth Whitehead and her husband. They agreed that through AI with Mr. Stern's sperm Ms. Whitehead would become pregnant, and that upon the birth of the child she would relinquish her parental rights, allowing Mr. Stern and his wife to raise the child as their own. In exchange for Mrs. Whitehead's service, Mr. Stern would pay Ms. Whitehead $10,000. Upon the birth of the child, however, Ms. Whitehead decided that she could not part with the baby girl. Mr. Stern filed for custody and enforcement of the contract.[66] The subsequent court hearings highlighted the legal conundrum that these new

62. Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1767 (2010).

63. Sanger, *supra* note 17, at 76. Some states do not regulate payment to surrogates. This Article will not address the issue of payment, but for a more detailed discussion, see generally Krawiec, *supra* note 4.

64. Sanger, *supra* note 17, at 76.

65. *See* Scott, *supra* note 17, at 109, 112-13 ("It was through the lens of *Baby M* that this innovative use of reproductive technology was first scrutinized as an issue of social, political, and legal interest" but at the time of the *Baby M* decision, "a few courts had addressed whether surrogacy contracts were enforceable."); *see also* Surrogate Parenting Assocs. v. Kentucky, 704 S.W.2d 209 (Ky. 1986) (holding that a Kentucky state statute prohibiting the sale of a child for the purpose of adoption does not apply to surrogacy contracts entered into prior to conception); Syrkowski v. Appleyard, 362 N.W.2d 211 (Mich. 1985) (holding that the Michigan Paternity Act, allowing the putative father of a child born out of wedlock to seek a determination of paternity, applies when a surrogate mother is married and the biological and intended father is married to a different woman).

66. *In re* Baby M, 537 A.2d 1227, 1235-37 (N.J. 1988).

reproductive technologies produced and incited public outcry as different organizations and private actors weighed in on who should be deemed the parents of Baby M.

Central to the decision was the court's determination that the surrogacy arrangement was analogous to adoption. This allowed the court to hold that the surrogacy contract was in direct conflict with state adoption laws because: (1) the exchange of money is prohibited; (2) proof of parental unfitness or abandonment is required before termination of parental rights is ordered and an adoption is granted; and (3) the surrender of custody and consent to adoption is revocable in private placement adoptions.[67] The court saw the payment to the surrogate as violating the prohibition of monetary exchange, believing that any money exchanged for the child was the equivalent of baby-selling, which "is illegal and perhaps criminal."[68] The contract also violated adoption law because it allowed the arrangement to sidestep the requirement for a court to determine parental unfitness or find that abandonment requirements were met, and ignored the fact that under adoption law all agreements are revocable. The court further determined that the contract was invalid because it violated New Jersey public policy,[69] which looked to protect children from unnecessary separation from natural parents, ensuring that mother's and father's rights are accorded equal value.[70]

The utilization of adoption law had a significant effect on the outcome of the case. By accepting the analogy of surrogacy with adoption, the court was able to bypass any in-depth analysis about who the legal mother was. Operating on the premise that Mrs. Whitehead was the legal mother, the court turned to an analysis of whether there were grounds for terminating her parental rights, concluding that there was none.[71] This decision had a direct impact on the viability of both parties' assertions that their constitutional rights were violated. While the court recognized that Federal Constitutional rights were involved—Mr. Stern did have a right to procreate and Ms. Whitehead had a right to companionship of her child—Mr. Stern's right was not violated upon non-enforcement of the contract because he had indeed fathered a child, and Ms. Whitehead's right to companionship of her child was not being violated since the court was not terminating her parental rights.[72] With a non-enforceable contract and no violation of constitutional rights, the court applied the "best interests of the child" test and granted full custody to Mr. Stern.[73] In doing so, the court was able to produce what it saw as the right outcome with respect to the best family for the child to be raised in—without disrupting established notions of motherhood or traditional ideas of family formation.

The facts and events surrounding the *Baby M* case helped define how both lawmakers and the public perceived surrogacy and the consequent legal

67. *Id.*
68. *Id.* at 1234.
69. *Id.* at 1246.
70. *Id.* at 1247.
71. *Id.* at 1251-53.
72. *Id.* at 1253-55.
73. *Id.*

issues.[74] Contributing to the public's unease with surrogacy arrangements was the fact that reproductive technologies were rapidly changing and that there was a general lack of knowledge about how they worked.[75] The court's decision reinforced the emerging view of traditional surrogacy as an objectionable commercial arrangement that involved the sale of children and the exploitation of poor women.[76] The outcome not only shaped the law in New Jersey, it also influenced judicial approaches and legislative debates in other states. Prior to the hearing of *Baby M* in 1987, not one state had passed a statute regulating surrogacy contracts, and those legislatures that had begun discussing the issue leaned towards regulation, rather than prohibition, of contracts.[77] Yet even before the New Jersey Supreme Court had issued their opinion, seventy bills regarding surrogacy were introduced in twenty-seven state legislatures. By 1988 six states had enacted statutes banning contracts or declaring them void. Other states passed laws during this period discouraging surrogacy arrangements by prohibiting monetary payment to surrogates or intermediaries or explicitly giving surrogates the right to rescind the contract after the birth of the child.[78] Nonetheless, these fears largely subsided with the developments enabling gestational surrogacy.

ii. Gestational Surrogacy

During the era of *Baby M*, courts largely ignored the difference between traditional and gestational surrogacy because the technology making IVF successful was still being developed. By 1993, however, gestational surrogacy had become much more familiar and was increasingly used by infertile couples.[79] The negative stance taken by the public during *Baby M* subsided considerably,[80] with narratives of baby-selling, exploitation, and commodification replaced by praise for surrogates giving an altruistic gift to infertile couples.[81] Just five years after the *Baby M* decision, the California Supreme Court ruled very differently in the case of *Johnson v. Calvert*[82] and paved the way for states to adapt their family law so as to account for the new technology making gestational surrogacy possible.[83]

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74. Scott, *supra* note 17, at 116. For example, opponents coined the expression "baby-selling" to describe surrogacy, a term that the New Jersey Supreme Court and lawmakers in other states picked up.

75. *Id.* at 126 ("[S]ome of the negative response to *Baby M* was driven by anxiety about the unfamiliar and uncertain risks associated with surrogacy and with the new reproductive technologies generally.").

76. *Id.* at 117.

77. *Id.*

78. *Id.*

79. Scott, *supra* note 17, at 139; *see also id.* at 110 (stating that political and judicial responses to gestational surrogacy shifted towards more general acceptance as these branches recognized that parties continued to enter these agreements even without the guarantee of judicial enforcement).

80. Scott, *supra* note 17, at 120-21; *see also, e.g.*, Illinois Gestational Surrogacy Act, 750 ILL. COMP. STAT. ANN. 47/1-75 (West 2009); Doe v. Roe, 717 A.2d 706 (Conn. 1998); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

81. *See* Scott, *supra* note 17, at 121.

82. 851 P.2d 776.

83. *See* ARONS, *supra* note 1, at 27.

Utilizing the recently developed IVF technology, Mark and Crispina Calvert created an embryo using their own genetic material. They entered into a contract with Anna Johnson, who agreed to be their gestational surrogate and relinquish her parental rights upon the birth of the child. Increasing tension between the parties led Johnson to declare that she intended to keep the child. The Calverts filed suit, seeking a declaration that they were the legal parents of the unborn child.[84] The Supreme Court of California was forced to determine: who is the legal mother when, pursuant to a surrogacy contract, an embryo formed by the gametes of a husband and wife is implanted in the uterus of another woman who then carries the resulting fetus to term and gives birth to a child not genetically related to her.[85] Johnson argued that she was the legal mother because she gave birth to the child, while the Calverts argued that Crispina Calvert was the legal mother because she was both the genetic as well as the intended mother.[86]

California had adopted the Uniform Parentage Act (UPA)[87] and incorporated it into state law.[88] According to the UPA, maternity can be proven by either a blood test establishing a genetic link or by having given birth.[89] The court found that in adopting the UPA the California legislature had not provided a hierarchical preference for motherhood based on genetics versus gestation.[90] The court held that because both women had presented proof of maternity, and the law gave no method for a tiebreaker, when genetic consanguinity and giving birth do not coincide in one woman the court should employ an intent test.[91] Intent is determined by an examination of who was responsible for the initial fertilization of the embryo and who intended to raise the child.[92] The intent test also became known as the "but for" test, with the court declaring that, "[b]ut for" the Calvert's "acted-on intention, the child would not exist."[93] Because Crispina Calvert was the intended mother, she was also the legal mother.

The court's decision was differentiable from *Baby M* because it analyzed the case under an alternative legal framework. The court held that because gestational surrogacy is distinguishable from traditional surrogacy, adoption law is not the appropriate rubric under which to examine the dispute, and thus the court did not need to adopt the rule established in *Baby M*.[94] By discarding the adoption framework, the court was able to bypass the policy problems and find that surrogacy contracts are not contrary to California law. To support this decision, the court found that the monetary payments to the surrogate were for

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

85. *Id.* at 777-78.

86. *Id.* at 779.

87. 1975 CAL. STAT. §§ 3196-3204 (now codified at CAL. FAM. CODE §§ 7600-7750 (West 2004 & Supp. 2011)).

88. *Johnson*, 851 P.2d at 779.

89. *Id.*

90. *Id.* at 781.

91. *Id.* at 782.

92. *Id.*

93. *Id.*

94. *Id.* at 784.

her services, not to relinquish parental rights to the child, and therefore gestational surrogacy agreements did not amount to baby-selling. Nor did the court believe that surrogacy involved exploitation or commodification. The court stated that, "there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment."[95] It also acknowledged the role of a surrogate's consent, asserting, "The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights . . . ."[96]

Another important aspect of the court's choice not to apply the adoption framework and instead to employ intent was that it avoided declaring the gestational surrogate the mother. This decision had direct bearing on the parties' ability to assert their respective constitutional claims. In addressing the potential constitutional issues, the court found that because Johnson was not the legal mother, she had no constitutional right to companionship of the resulting child. Rather, a surrogate is "not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service" to parents who "intended to procreate a child genetically related to them by the only available means."[97]

The *Johnson* decision had an acute impact on how the law regulating surrogacy and the subsequent enforcement of contracts was understood. Many commentators saw the court's use of the intent test as a positive step because it provided an unambiguous rule for establishing legal parenthood and assured parties to a surrogacy agreement of the intended outcome.[98] Commentators also believed that going forward courts would move towards employing an intent test[99] due to the development of IVF and gestational surrogacy,[100] along with the attendant cultural shift.[101] Overall, after *Johnson* people felt more confident that

95. *Id.* at 785; *see also* SCOTT B. RAE, THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD 57 (1994) (stating that statistics do not indicate that surrogates are financially exploited. Most surrogates are "women of moderate means" and "are clearly not destitute.").

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

97. *Id.* at 787.

98. *See, e.g.*, John C. Sheldon, *Surrogate Mothers, Gestational Carriers, and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 ME. L. REV. 523, 540 (2001) ("Procreative intent is the guiding principle that many academics favor in this field of law."); Shultz, *supra* note 29, at 323 ("Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."); Anderson, *supra* note 3, at 30 ("[T]he intent to create and raise a child should determine parentage when any form of assisted reproductive technology is utilized."); Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2372 (1995) ("I favor determining legal parenthood according to the intent of the parties at the start of the arrangement and finding the contracting couple, and not the surrogate, to be the legal parents.").

99. *See* Scott, *supra* note 17.

100. *Id.* at 121.

101. *Id.* at 120-21.

contracts would be enforceable and therefore felt more secure in using gestational surrogacy.[102]

iii. A Hodge-podge of State Statutes

While the *Baby M* decision attracted public attention and an outcry for state legislatures to pass laws forbidding surrogacy arrangements, few states ultimately did so.[103] Those that did pass statutes generally did not distinguish between traditional and gestational surrogacy.[104] Yet after the *Johnson* decision, state legislative decisions reflected the cultural shift towards intent and enforcing gestational surrogacy contracts.[105] As a result, the current legal environment varies greatly,[106] with states' differing widely in their approach to traditional and gestational surrogacy laws.[107] A few states have banned surrogacy agreements and created criminal penalties for participants.[108] Some have simply refused to enforce surrogacy contracts.[109] Others allow such contracts but will only enforce them if certain procedures have been followed.[110] For those states that do allow contracts, they vary on the terms that are permissible. Regulations may include: only allowing compensation for "necessary" expenses; requiring a set time-period for the surrogate to terminate the agreement; requiring at least one intended parent to have a genetic link to the resulting child; and/or holding that a court must pre-approve the contract. Further, some state statutes require that the intended parents be married, precluding gay couples from legal protection if the surrogate breaks the contract.[111] But most states are simply silent on parentage determinations in situations involving surrogacy arrangements.[112]

In states without a statute addressing surrogacy, parties to a dispute over parentage must rely on a court's determination. Courts that have been asked to settle parentage have looked to a variety of established legal frameworks and applied these to surrogacy. The frameworks include: adoption, custody, and

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102. *See id.* at 122 ("Gestational surrogacy arrangements became standard, in part because they afforded legal certainty about the parental status of all parties to the surrogacy contract . . . .").

103. *See* Scott, *supra* note 17, at 117.

104. *Id*. at 121.

105. *See id*. at 123 (citing the Illinois State Legislature's passage of the Gestational Surrogacy Act (GSA) as similar to other contemporary laws that limit enforcement to gestational surrogacy contracts and require the intended parents to automatically become the child's legal parents at birth.); *see also* 750 ILL. COMP. STAT. 47/15 (West 2009); FLA. STAT. § 742.15 (West 2010) (regulating gestational surrogacy).

106. ARONS, *supra* note 1, at 24.

107. *See* Appendix I.

108. Arizona and the District of Columbia prohibit all surrogacy contracts. Florida, Kentucky, Michigan, Nevada, New Hampshire, New York, Utah, Virginia, and Washington ban payment to a surrogate. *See infra* Appendix I.

109. Michigan and New York void and penalize surrogacy contracts; Indiana and Nebraska declare surrogacy contracts void and unenforceable; Kentucky, Louisiana, and North Dakota void traditional surrogacy contracts. *See id.*

110. Arkansas, Florida, Illinois, Nevada, New Hampshire, North Dakota, Texas, Utah, Virginia, and Washington regulate surrogacy. *See id.*

111. ARONS, *supra* note 1, at 26.

112. *See* ARONS, *supra* note 10.

paternity,[113] as well as tort, property, and contract law.[114] The choice of frameworks determines which of four tests will be used to determine parentage: presumption, gestation, genetics, or intent. Which test is utilized has direct bearing on the potential for gay homosexual couples to successfully assert parentage.

iv. Gay Fathers Challenge Assumptions About the Law

A recent New Jersey Superior Court decision, *A.G.R. v. D.R.H. & S.H.*, illustrates four fundamental points: (1) commentators have been wrong to assume that the difference between traditional and gestational surrogacy is significant in every case; (2) an intent test is not necessarily the direction that all states are moving in; (3) there is a continued judicial bias towards gay fathers; (4) gay male couples are subject to unfair legal rules for determining parentage in gestational surrogacy agreements.

In 1996 Donald Robinson Hollingsworth and his spouse, Sean Hollingsworth,[115] used anonymous donor eggs and Sean's sperm to create several embryos. Angelia G. Robinson, Donald's sister, agreed to be their gestational surrogate and signed a pre-birth agreement indicating she would relinquish her parental rights to the resulting child. Twin girls were born in October of 2006 and lived with their two fathers for five months, but in March of 2007 Ms. Robinson filed a lawsuit seeking custody.[116]

The Superior Court determined that *Baby M* governed the case. After addressing the public policy analysis used in *Baby M* and finding that the concerns remain applicable, the court held that the surrogacy contract was invalid.[117] The court disagreed with the Hollingsworths' contention that their case was distinguishable from *Baby M* because the surrogate had no genetic link to the resulting children. As the court stated, "The lack of plaintiff's genetic link to the twins [was], under the circumstances, a distinction without a difference significant enough to take the instant matter out of *Baby M*."[118] The court went on to ask whether it would "really make any difference if the word 'gestational' was substituted for the word 'surrogacy'"[119] The Judge responded that it did not.[120]

The court resolved that New Jersey should not follow California's approach on several grounds. First, unlike in *Johnson*, the court did not need to "break a

113. *Id.*

114. Storrow, *supra* note 3, at 606.

115. A.G.R. v. D.R.H., No. FD-09-1838-07, slip op. at 2 (N.J. Super. Cr. Ch. Div. Dec 23, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf (Couple was "legally married under California law . . . and registered their domestic partnership in New Jersey pursuant to the New Jersey Domestic Partnership Act, N.J.S.A. 26:8A-1 *et seq.*").

116. *See* Stephanie Saul, *New Jersey Judge Calls Surrogate Legal Mother of Twins*, N.Y. TIMES, Dec. 30 2009, http://www.nytimes.com/2009/12/31/us/31surrogate.html; Nathan Koppel, *Surrogacy Battles Expose Uneven Legal Landscape*, WALL ST. J., Jan. 15, 2010, http://online.wsj.com/article/SB10001424052748704362004575000974247846294.html.

117. *A.G.R.*, slip op. at 3.

118. *Id.* at 5.

119. *Id.*

120. *Id.*

tie" between the intended mother and the birth mother, as here the intended parents were both men and therefore there was only one mother at issue.[121] Second, the court highlighted the differences between the New Jersey Supreme Court's and the California Supreme Court's views on public policy principles Because of the difference the court determined that it would be inappropriate to follow California or any other jurisdictions that limited gestational carrier's rights. The court's analysis relied heavily on the assumption that the birth mother is a legal parent, as demonstrated by the court's statement that surrogacy contracts are "directly contrary to the objectives of our laws" because contracts: guarantee that a child will be separated from its mother, allow adoption regardless of the suitability of the intended parents, ignore the best interests of the child, and take the child from the mother regardless of her maternal fitness.[122] Reliance on these presumptions largely sidesteps the legal question of determining parentage because it takes for granted that the woman who gave birth to the child is the legal mother.

In New Jersey no legislative action has been taken to enact a statute to regulate surrogacy contracts,[123] thus, the judicial branch has significant control in determining the outcome of the case. Further, any court can follow the New Jersey Superior Court's line of reasoning and elect to view gestational surrogacy arrangements as no different from traditional surrogacy arrangements, thereby utilizing an adoption law framework and a gestational test to establish legal parentage. This decision, however, negatively impacts gay male couples.

II. STRUCTURAL INFERTILITY AND GAY FATHERS

Today increasing numbers of gay and lesbian couples are raising children. Of almost 600,000 same-sex households, over fifty percent are raising children,[124] and of these, twenty-two percent are male couples.[125] Overall the number of fathers raising children as the primary caregivers, including gay fathers, is growing.[126] U.S. Census data showed that approximately one in twenty male same-sex couples were raising children in 1990; by 2000 this number had risen to one in five.[127] Further, with legal battles over same-sex marriage asserting

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121. *Id.*

122. *See id.*

123. *See* Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J.L. GENDER & SOC'Y 25, 64 (2009) (discussing the presence or absence of surrogacy statutes in the fifty states).

124. Jessica Hawkins, *My Two Dads: Challenging Gender Stereotypes in Applying California's Recent Supreme Court Cases to Gay Couples*, 41 FAM. L.Q. 623, 623 (2007); *see also* TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 9 (2003); M.V. LEE BADGETT & MARC A. ROGERS, INST. FOR GAY & LESBIAN STUDIES, LEFT OUT OF THE COUNT: MISSING SAME-SEX COUPLES IN CENSUS 2000 (2003) (stating that the number of same-sex households is probably higher than the census demonstrated, due to concerns about revealing one's sexual orientation, confusion over the terms used on the forms, and lack of an appropriate option to be selected by same-sex couples).

125. Hawkins, *supra* note 123, at 631.

126. *See* Kauffman, *supra* note 24, at 24; GOLDBERG, *supra* note 24, at 50.

127. GOLDBERG, *supra* note 24, at 50 ("Importantly, these estimates were conservative and may have failed to capture a large number of lesbian- and gay-parent households by virtue of undercounting the number of same-sex couple households.") (citation omitted).

homosexual couples' right to enter into state recognized partnership arrangements, growing numbers of gays and lesbians are entering into these unions. As increasing numbers do so, they will seek to have children.[128] As a result of the increasing number of gay parents, the need to establish clear legal rules that support these relationships is imperative.[129]

Homosexual couples have several options when considering parenthood. While some gay couples are able to adopt, many are prohibited from doing so by state or national laws.[130] In addition, to assume that all gay couples view adoption as an adequate alternative to biological reproduction is unfair because this holds them to a different standard than their straight counterparts. Some gay couples—like many prospective parents—desire biological reproduction that results in a child that is genetically related to one of them.[131] For homosexual male couples, surrogacy is the only way they can have a child *together* that is genetically linked to one partner.[132] Such an arrangement,

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128. *See id.* ("[T]he number of lesbian- and gay-parent households is steadily increasing—a shift that corresponds to the increasing visibility of lesbian and gay parents in society."); Robertson, *supra* note 17, at 324-25.

129. *See* Kauffman, *supra* note 24, at 24 ("[M]ore and more LGBT individuals and same-sex couples are consciously deciding to have children.").

130. *Adoption by a GLBT Parent*, U.S. DEPARTMENT OF STATE, http:// adoption.state.gov/ adoption_process/who_can_adopt/glbt.php (last visited May 29, 2011) ("Like all Americans considering adoption, gay and lesbian individuals (GLBT) and same-sex couples must comply with three sets of laws in order to adopt: U.S. federal law, the laws of the child's country of origin, and the laws of your home U.S. state. U.S. federal law does not prohibit gay and lesbian Americans or same-sex couples from being an [sic] adoptive parent. However, some countries do forbid gay and lesbian individuals, as well as same-sex couples, from adopting. This is also true of some U.S. states."); *Who May Adopt, Be Adopted, or Place a Child for Adoption?: Summary of State Laws*, CHILD WELFARE INFO. GATEWAY (2009), http://www.childwelfare.gov/systemwide/laws_policies/ statutes/parties.cfm ("The statutory laws in most States are largely silent on the issue of adoption by gay and lesbian persons. At this time, only two States, Florida and Mississippi, explicitly prohibit adoption by homosexuals in their statutes. Utah bars adoption by persons who are cohabiting but not legally married; this language could be interpreted to encompass gay and lesbian adoptions. In Connecticut, the sexual orientation of the prospective adoptive parent may be considered, notwithstanding provisions in the State's laws prohibiting discrimination based on sexual orientation."). *See also* Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 450 (2009) ("[U]ntil quite recently in the Western world . . . legal strictures limited [adoption] . . . to married heterosexuals."); Kauffman, *supra* note 24, at 25 ("On the domestic front, it has become much easier in recent years to adopt as an openly gay individual or couple, although certainly in many jurisdictions adoptions are not possible. For example, the Florida adoption statute explicitly prohibits adoptions by lesbians and gay men. Internationally, no countries (of which this writer is aware) allow openly lesbian or gay couples to adopt. Nonetheless, many single lesbians or gay men have successfully adopted from foreign countries."); King, *supra* note 41, at 331 ("Family law, influenced by both heterosexism and homophobia, often precludes gays and lesbians from forming families of consent through other methods, such as adoption or foster parenting."); GOLDBERG, *supra* note 24, at 69 (discussing varying practices among adoption agencies with respect to their acceptance of applications by same-sex couples).

131. Fred A. Bernstein, *This Child Does Have Two Mothers . . . And a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 14 (1996) ("Believing adoption to be the appropriate route for every gay father 'undervalues desires for a biological legacy—desires that have persisted across time, culture, race, and class.'") (internal citation omitted).

132. Hawkins, *supra* note 123, at 623; Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 321-22 (2003).

however, takes on heightened social and legal significance due to the already precarious legal position of these intimate relationships.[133]

A. Homophobia and Gender Bias Against Gay Male Parents

Today, gay rights are gaining increasing momentum in the United States through legal and political challenges in multiple arenas,[134] but heterosexism—the belief that all people are or should be heterosexual—remains pervasive both socially and in our legal system. Heterosexism is an ideological system that denies, denigrates, and stigmatizes all non-heterosexual forms of behavior, identity, or relationships.[135] In the United States, heterosexuality is privileged in the social structures, laws, and norms governing society.[136] Heterosexism is implicit in the family law arena regulating marriage, adoption, custody, and visitation—marginalizing gay and lesbian relationships and impacting the lives of gay couples and their children on a daily basis.[137] While societal acceptance of the gay, lesbian, bisexual, transgender, and queer (GLBTQ) community has increased in recent years, the law still lags behind when it comes to protecting the family relationships these individuals build. This is particularly acute when it comes to the right to procreate and parent children, as the legal system has been slow to recognize families that do not fit the traditional heterogeneous structure.[138]

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133. King, *supra* note 41, at 336.

134. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 994, 1003 (N.D. Cal. 2010) (holding that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008) (holding that Connecticut Constitution protects same-sex marriage); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003) (holding that a ban on same-sex marriage violates the Massachusetts Constitution); S. 115, 2009 Gen. Assem., 70th Sess. (Vt. 2009) (legislatively enacting same-sex marriage); *Proposition 8 Cases*, CAL. COURTS, http://www.courts.ca.gov/6464.htm. *See generally* S. 4023, 111th Cong. (2010); H.R. 2965, 111th Cong. (2010); *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (last updated Mar. 4, 2011) (documenting the recent events surrounding gay marriage such as Washington, D.C. joining Connecticut, Iowa, Massachusetts, New Hampshire and Vermont in issuing marriage licenses to same-sex couples, while California, New York, and Maine continue to battle over the issue); Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 23, 2011, http://www.nytimes.com/2011/02/24/us/24marriage.html (detailing President Obama's decision to declare that the Defense of Marriage Act (DOMA), which bars federal recognition of same-sex marriages, is unconstitutional and that the Justice Department will no longer defend the law in court); Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES, Dec. 18, 2010, http://www.nytimes.com/2010/12/19/us/politics/19cong.html.

135. *See generally* Gregory M. Herek, *Beyond "Homophobia": Thinking About Sexual Prejudice and Stigma in the Twenty-First Century*, SEXUALITY RES. & SOC. POL'Y, Apr. 2004, at 6.

136. Mikel L. Walters, Invisible At Every Turn: An Examination of Lesbian Intimate Partner Violence at 14, 15 (Dec. 1, 2009) (unpublished Ph.D. dissertation, Georgia State University), *available at* http://digitalarchive.gsu.edu/sociology_diss/42.

137. King, *supra* note 41, at 344; Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 741 (1999).

138. *See generally* Kauffman, *supra* note 24.

Implicit in heterosexism is the belief that families should be comprised of two heterosexual parents—a mother and a father.[139] Narratives relying on stereotypes have been used to support this contention. One narrative positions gay people as hyper-sexual beings; the other asserts that having same-sex parents is harmful to children's psychological and social development.[140] These narratives gained traction in the late 1980s within the context of foster parenting and adoption law. Conservative groups helped push these views in the legal realm, and as a result states ended up passing marriage requirements that effectively barred homosexual couples from fostering children or banned outright adoption by gay couples.[141]

These same arguments have been used in the context of surrogacy arrangements where the intended parents are a gay couple. Opposition to state legislation that would enforce gestational surrogacy contracts—establishing the intended parents as the legal parents—comes from social and religious conservatives who oppose same-sex parenting.[142] For example, in 2008 the Minnesota Legislature passed a bill that would have enforced gestational surrogacy contracts, but as a result of the Catholic Church's opposition to the legislation and the Minnesota Family Council's argument that the statute would promote same-sex parent households,[143] the conservative Republican Governor at the time, Tim Pawlenty, vetoed the bill.[144]

Conservatives argue that having same-sex parents is detrimental to children, but this is not supported by existing data.[145] The American Academy of Pediatrics' Committee on Psychosocial Aspects of Child and Family Health issued a report in 2002 that provided a comprehensive review of gay-parenting studies that all concluded there is no meaningful difference between children raised by gay parents and those raised by heterosexual parents. The report

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139. Narayan, *supra* note 24, at 83-84.

140. Lin, *supra* note 36, at 742-43.

141. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 53 (2008) (stating that "Massachusetts changed its policy, issuing regulations that gave preference to married couples and made it almost impossible for lesbians and gay men to become foster parents," that "New Hampshire became the second state with an adoption ban and the first with a legislatively mandated ban on gay foster parenting" and, that "[i]n 1987 President Ronald Reagan's Interagency Task Force on Adoption recommended that 'homosexual adoption should not be supported.'").

142. *Id.* at 69-70, 77 (citing opposition to homosexual couples raising children as coming from the conservative "fatherhood movement" and the "marriage movement." Conservative organizations include the Institute for American Values, the National Fatherhood Initiative, and the Heritage Foundation.).

143. Scott, *supra* note 17, at 124; *see also* Mike Kaszuba, *Group Says Surrogacy Bill Allows for "Baby-Selling,"* MINN. STAR TRIB., Apr. 8, 2008, http://www.startribune.com/politics/17406454.html.

144. Human Rights Campaign, *Minnesota Surrogacy Law*, http://2fwww.hrc.org/your_community/1074.html; Kevin Duchschere & Norman Draper, *Pawlenty Vetoes Bills on Sick-Leave Use, Surrogacy Contracts*, MINN. STAR TRIBUNE, May 17, 2008, http://www.startribune.com/politics/state/19013079.html?location_refer=$sectionName.

145. *E.g.*, Ethics Comm. of the Am. Soc'y for Reprod. Med., *Access to Fertility Treatment By Gays, Lesbians, and Unmarried Persons*, 92 FERTILITY & STERILITY 1190 (2009); GOLDBERG, *supra* note 24, at 12; POLIKOFF, *supra* note 140, at 73-75.

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successfully debunked three of the main contentions. The first, that gay and lesbian parents raise children differently, was found to be false because the studies revealed more similarities than differences in the parenting styles and attitudes of gay and non-gay fathers. The second, that being raised by gay parents causes gender identity confusion in children, was found wholly inaccurate as none of the several hundred children studied showed signs of gender identity confusion, wished to be of the opposite sex, or engaged in cross-gender behavior. Further, no differences were found in the toy, dress, or friendship preferences of children with gay parents compared with those children of heterosexual parents. The third, that children with same-sex parents suffer emotional and social problems, was found to be erroneous because no differences in personality, self-esteem, behavioral difficulties, academic success and quality of family relationships were found between children of homosexual and heterosexual parents.[146]

Notwithstanding these studies, courts are not impervious to homophobic beliefs rooted in the notion that heterosexual relationships are the best environment for rearing children.[147] As one scholar argues, "courts have generally treated ART cases involving same-sex couples differently from ART cases involving different-sex couples. This difference in treatment is attributable to some combination of institutional discomfort with same-sex families and concern over the legal implications of recognizing two mothers or two fathers for the same child."[148]

Alongside the privileging of heterosexual relationships is the adulation of women as mothers. Men generally, but gay men in particular, face a deep-seated cultural belief that men cannot be good nurturers or caretakers of children.[149] While the Supreme Court rejected the argument that the maternal relationship is more important than the paternal relationship with a child,[150] it did acknowledge that such gender stereotypes remain prevalent in society.[151] It has been suggested that this is the reason that surrogacy produces such social and political antagonism; by decoupling the biological process from the social and legal definition, surrogacy challenges the fundamental categories of "woman" and of "mother"[152] as established by the 'natural' method of

146. Brad Sears & Alan Hirsch, *Heterosexuals Not Only People with Good Parenting Skills*, DAILY REV., Apr. 8, 2004, http://www.law.ucla.edu/williamsinstitute/press/heterosexuals.html; Ellen C. Perrin & Comm. on Psychosocial Aspects of Child & Family Health, Am. Acad. of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 342-43.

147. *See* POLIKOFF, *supra* note 140, at 73.

148. Deborah H. Wald, *supra* note 20, at 392.

149. GOLDBERG, *supra* note 24, at 52; Hawkins, *supra* note 123, at 631.

150. Caban v. Mohammed, 441 U.S. 380, 389 (1979) (noting that the tender-years doctrine may still apply, resulting in a maternal relationship being more important when the child is young). The tender-years doctrine presumed that the mother was the best legal guardian of young children. While held unconstitutional based on sex discrimination, it was replaced with similar tests including the primary-caregiver test and the continuity-of-care test, both of which typically favor women who remain the primary caretakers of children in a heterosexual relationship. *See* Martha A. Field, *Surrogate Motherhood*, *in* PARENTHOOD IN MODERN SOCIETY 223, 231 (John Eekelaar & Petar Šarčević eds., 1993).

151. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003).

152. Hofman, *supra* note 129, at 452.

reproduction.[153] It is the question of how to attend to this decoupling that has preoccupied every court forced to analyze a surrogacy arrangement.

The law is a method by which to maintain and reinforce what is often taken as static: the social relationships that qualify as 'natural.'[154] Biological reproduction was the 'natural' way to determine parentage, but the technological advances used in surrogacy arrangements meant that biology—and the existing laws using biology to establish parenthood—could no longer be relied on. Courts, however, continue to try and recreate this idea of natural reproduction.[155] As scholar Valerie Hartouni says:

> [B]oth [the *Baby M* and *Johnson*] surrogacy rulings work . . . to restabilize as a matter of (natural) fact what they also both presuppose and compel into being. Each ruling, in other words, must contain and rehabilitate alternative stories of origins and kinship. And one of the ways both accomplish this is by retelling these stories in a register that renders them variations on an original story, typically, a highly sentimentalized story of heterosexual love, yearning, and procreative desire.[156]

One of the way courts have achieved the reconstruction of natural parentage is to adjust traditional legal doctrine so as to account for alternative family formations "while maintaining the fundamental premises of the older law."[157] The problem is that this approach is not possible when gay couples—particularly gay men—use surrogacy to procreate because they challenge every established conception of natural reproduction.

Surrogacy has been described as the male equivalent of donor insemination, which can be utilized by lesbian couples—but this analogy ignores the fact that unlike AI, hiring a surrogate is a complex, expensive, and legally precarious process.[158] It also ignores the emphasis that is given to the biological process of gestation and the role of mothers. As one scholar correctly

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153. *See* ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 5-7, 27 (2007). Sterling's work makes it clear that what is traditionally known as "natural" or "biological" is socially constructed. She says: "In most public and most scientific discussions, sex and nature are thought to be real, while gender and culture are seen as constructed. But these are false dichotomies." *Id.* at 27. Instead, she suggests that, "what we call 'facts' about the living world are not universal truths [but] 'are rooted in specific histories, practices, languages and peoples.'" *Id.* at 7. The very "truths" that are created by scholars and biologists are informed by the "political, social, and moral struggles about our cultures and economies." *Id.* at 5. What is considered "natural" is then deemed "normal" and anything outside of that is heteronormative and deviant. *See id.* at 76. While historically the body and the biological process of heterosexual reproduction have been deemed "natural" and "normal," the development of ARTs challenged this notion. IVF and surrogacy allowed for the disaggregation of reproduction into genetic, gestational, and social roles. As a result, society was forced to reconsider established ideas about women's bodies and the heterosexual process required to give birth. In short, ARTs challenged normativity by denaturalizing the process of reproduction. As part of this, ARTs were set up in opposition to what was seen as "natural" procreation, the process achieved through sexual intercourse between a man and a woman.

154. VALERIE HARTOUNI, CULTURAL CONCEPTIONS: ON REPRODUCTIVE TECHNOLOGIES AND THE REMAKING OF LIFE 25 (1997).

155. *See id*. at 20.

156. *Id*. at 19-20.

157. Meyer, *supra* note 37, at 376.

158. Bernstein, *supra* note 130, at 14-15.

notes, "No gay man who employs a surrogate can be assured of success . . . . [H]ad the father of 'Baby M.' . . . been gay, he would not have stood a chance of obtaining custody from [the surrogate]."[159] This opinion is in part due to enduring social stigma against gay couples, but it is also a direct result of the existing legal rules for establishing legal parentage. Without another woman to step in to be the child's mother, a surrogate will not be viewed as a "surrogate uterus; she [will be] the mother."[160] If a surrogate breaks the contract and asserts her parental rights, gay male couples face an even higher bar than heterosexual couples in establishing legal parenthood.

B. Judicial Determinations of Legal Parentage for Male Homosexual Couples

Due to the fundamental biological differences between men and women, homosexual male and female couples face somewhat different issues when it comes to the methods for procreating and establishing legal parentage upon the birth of a child. Lesbians who wish to procreate have two options: (1) using artificial insemination and donor sperm, one partner can get pregnant and give birth to a child, or (2) utilize IVF, where one partner's egg is combined with donor sperm and the resulting embryo is implanted in the other partner.[161] In the first scenario, some courts have held that based on the marital presumption—meaning Partner A consented to Partner B's artificial insemination—Partner A is also legally a second parent.[162] With respect to the second option, states have held that one woman is the legal mother due to a genetic link and the other woman is a legal mother due to gestation and birth.[163] In these states lesbians do not have to resort to second parent adoption[164] to establish parentage upon the birth of the child. Both options create loopholes for lesbians that allow both intended parents to be declared the legal mothers. Because men cannot biologically gestate, neither option is available to them. Additionally, no matter which method a lesbian couple chooses, unless both women are unable to carry a child to term and therefore must hire a surrogate, there is no third party to assert parental rights. Because of clearly established

159. *Id*. at 16.

160. *Id*. (quoting Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO L.J. 459, 469 (1990)).

161. Kauffman, *supra* note 24, at 24.

162. *See* Elisa B. v. Super. Ct., 117 P.3d 660, 662 (Cal. 2005) (holding that "a woman who agreed to raise children with her lesbian partner [and] supported her partner's artificial insemination using an anonymous donor . . . is the children's parent"); *see also* Meyer, *supra* note 37, at 378 ("In the small minority of states which currently permit same-sex marriage, domestic partnerships, or civil unions, same-sex partners or spouses can avail themselves of a presumption of parentage based on the traditional marital presumption . . . .").

163. K.M. v. E.G., 117 P.3d 673, 678 (Cal. 2005) (holding that "K.M. is a parent of the twins because she supplied the ova that produced the children" and that the law stating that a sperm donor is not the legal father "does not apply because K.M. supplied her ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home.").

164. Second-parent adoption is when the gay partner of a biological parent is able to adopt the child and thereby considered the second parent to the child. *See* Lin, *supra* note 136, at 740 n.6; POLIKOFF, *supra* note 140, at 53.

state rules holding that sperm donors are not legal parents,[165] and the ability for lesbians to use an anonymous donor, lesbians do not face the same risks as gay male couples.

Due to biological differences between the genders, a homosexual male couple that wishes to procreate *together* must hire a surrogate; it is impossible for a surrogate to be anonymous, therefore a third party is always present to assert a competing claim of parentage.[166] Assuming that one partner supplies the sperm, the law will recognize him as the biological and legal father of the resulting child. The non-biological partner has no parental rights unless he is able to execute a second parent adoption, which only some states allow.[167] Second parent adoptions require waiting until after the child is born and the proceeding lasts approximately six to ten months, with no guarantee that a court will permit the adoption.[168] Further, if the surrogate chooses to assert her legal right as the child's mother, a second parent adoption is impossible and therefore the intended father with no genetic connection has no actual legal rights over the child. The outcome is a child who has a mother and a father who never contemplated parenting together, and a spouse whose desire to be a father is frustrated by the law.

C. In Light of Judicial Bias and Unfair Legal Tests A.G.R. was Decided Incorrectly

The judge in *A.G.R.* was wrong in his determination that the difference between traditional surrogacy and gestational surrogacy is "a distinction without a difference significant enough to take the instant matter out of *Baby M*."[169] As has been established above, gestational surrogacy is fundamentally different from traditional surrogacy because the child has no genetic link to the surrogate. A woman who agrees to be a gestational surrogate makes a calculated choice to not use her own eggs, instead seeking a role analogous to

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165. States have held that anonymous sperm donors are not legal parents. Because of clearly established rules regarding donor sperm, this paper will not address the issue of third party sperm or egg donors.

166. *See* Op. of the Justices to the Senate, 802 N.E.2d 565, 577 n.3 (Mass. 2004) (Sossman, J.) ("Applying [the presumption] to same-sex couples results in some troubling anomalies: applied literally, the presumption would mean very different things based on whether the same-sex couple was comprised of two women as opposed to two men."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003) (Cordy, J., dissenting) ("Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child."); Appleton, *supra* note 23, at 264-65 (stating that the presumption rule "might extend only to lesbian couples and not to gay male couples" because "the complications that the need for a third-party woman poses for gay male couples" do not exist for lesbian couples).

167. Only about half the states permit same-sex second-parent adoption. States include Massachusetts, New York, New Jersey, Pennsylvania, Vermont, and Connecticut. *See* Stephanie Francis Cahill, *Making Sure Mommy and Mommy Get Custody*, 38 A.B.A. J. E-REPORT, Oct. 4, 2002, 6; Meyer, *supra* note 37, at 378.

168. *See* Hawkins, *supra* note 123, at 636.

169. A.G.R. v. D.R.H., No. FD-09-1838-07, slip op. at 5 (N.J. Super. Cr. Ch. Div. Dec 23, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/national/20091231_SURROGATE.pdf.

that of an incubator.[170] The judge in *A.G.R.* relied on ideas and arguments that are outdated as a result of technological and social shifts.

The fact that the judge did not find the difference significant intimates that there is enduring judicial discrimination against homosexuals. While the judge was required to adhere to the precedent established in *Baby M*, this earlier decision did not address the issue of gestational surrogacy, a technology that was just emerging at the time and not at issue in the case. Thus, the judge in *A.G.R.* was free to follow *Johnson's* decision that adoption is not applicable in gestational surrogacy cases because the surrogate has no genetic link to the child and would not have become pregnant via the biological father without an agreement that she would not assert parental rights over any resulting children. The fact that gestational surrogacy arrangements have been described as "so widely accepted as to be almost mundane"[171] suggests that what was really operating in this decision was cultural discomfort over two fathers.

The decision also highlights the significant cultural value that is still accorded to women as the role of mother. In disputed cases such as *A.G.R.*, where the intended parents are a homosexual male couple in a partnership and one partner is the genetic donor, the circumstances arguably fall within the framework of *Johnson*. The genetic donor is a legal father; however, the other, non-biological partner must contend with the surrogate for the status of legal parent. The surrogate claims parental rights on the fact that she gestated the child, and the partner claims parental status based on both intent and presumption via marriage, civil union, or domestic partnership. Like Crispina Calvert, the non-biological partner has two bases for being the parent, compared to the surrogate's sole basis as the gestational carrier. Notwithstanding the fact that the term 'parent' must be substituted for 'mother,' it is clear that here the intended parent should trump the surrogate. The fact that the intended parent did not succeed indicates the law's unwillingness to fully embrace diverse family forms.

III. ANALYSIS OF LEGAL TESTS IN LIGHT OF GAY FATHERS AND WHY THE INTENT TEST IS PROPER

As the above section makes clear, the market for surrogacy continues to exist and proliferate despite the risks of establishing legal parenthood. In addition, the concerns voiced in *Baby M* and echoed in *A.G.R.* have not materialized. What is apparent is that the variation between states' laws and the fear of non-enforceability has given rise to uncertainty for those couples that choose to undertake a surrogacy arrangement. The following Section analyzes the possible legal tests for establishing parenthood, concluding that a pure intent test is the best rule.

170. *See* Sanger, *supra* note 40, at 75.

171. Krawiec, *supra* note 4, at 206.

A. Analysis of Legal Tests for Establishing Parenthood

i. Marital Presumption

Traditionally the law established parentage based on a procreative connection to the child. Determining who was the mother was considered relatively easy and was based on the biological process of gestation and giving birth.[172] Paternity, however, was more complicated and was established on the basis of a marital presumption: a husband was automatically the legal father of any children born to his wife during their marriage.[173] This rule persists today in every state in various forms.[174]

Presumption operates in a gendered way. For example, a married man is the legal father of *any* children his wife gives birth to, but a married woman is not the legal mother of her husband's biological children that are born to another woman.[175] What has emerged through statute or common law is the establishment of a presumption of fatherhood that trumps genetics or intent. Presumption exists even if AI is used and the husband has no genetic link to the child.[176]

A recent push to create gender-neutral laws has created a loophole for lesbian women. Several state courts have applied the presumption rule to lesbian couples, demonstrating that presumption does not have to apply solely to fathers.[177] A woman who agrees to her lesbian partner being artificially inseminated is presumed to be the second parent. What this implies is that neither a genetic link nor giving birth to the child is required for establishing

172. Meyer, *supra* note 37, at 371.

173. *E.g.* Appleton, *supra* note 23, at 232-33.

174. *See* Bowen, *supra* note 7, at 13 (2008) (The four forms are: "(1) a significant but not totally insurmountable irrefutable presumption; (2) a rebuttable presumption, if to do so is in the child's best interests; (3) a rebuttable presumption that is triggered at the time of divorce regardless of the length of the parent-child relationship, or whether it would be in the best interests of the child; and (4) a rebuttable presumption available to anyone who believes he is the parent to the child in question.").

175. Appleton, *supra* note 23, at 237 (emphasis added).

176. Bowen, *supra* note 7, at 12.

177. *See* Appleton, *supra* note 23, at 241-42 (noting two decisions, one from Vermont and the *Elisa B.* case from California); Anderson, *supra* note 3, at 49-51 (*Elisa B. v. Superior Court* was a child-support case involving a lesbian couple. Prior to conception, the two women manifested intent to raise the children together. When separating, Elisa denied being the parent of the twins who had been born to her former partner in order to avoid being liable for child support. The trial court held that Elisa was a legal parent, but the Court of Appeals overturned the decision based on the Uniform Parentage Act and the decision in *Johnson v. Calvert*, which held that a child can only have one natural mother. On subsequent appeal, the California Supreme Court clarified its holding in *Johnson*, stating that the rule that a child can have only one natural mother was limited to a dispute where there were two potential mothers and a father, creating three potential parents. In the case at hand, the claim was solely between two mothers, so California will allow the statute relating to fatherhood to be used to determine a second mother as well. As a result, because Elisa treated the children as her own, actively participating in their conception and holding them out as her children, she had accepted the rights and obligations of parenthood. Because there was no competing claim both women were legal mothers.).

legal motherhood. Decisions applying the marital presumption to lesbians invite an extension of the rule—applying it to all same-sex relationships.[178]

The problem is how the extension of presumption to gay male partners in a consent scenario works in practice given that men cannot gestate and give birth. Analyzing this issue highlights how the rule operates differently depending on the biological roles required, which ultimately hinge on gender, an outcome that states actively avoid.[179] In situations where a woman's partner—whether it is a man *or* a woman—agrees to her being impregnated by a third party's sperm, the sperm donor is essentially invisible. The state will apply the presumption rule to the husband, holding that he is the father, or the lesbian partner, holding that she is the second mother. Therefore the state should theoretically also recognize a gay male partner who consents to his partner impregnating a surrogate as the child's second father. But because surrogates are actively involved in the nine-month biological process, the law does not see them as invisible and therefore has never applied the presumption rule to homosexual male couples.

Making the presumption rule the default rule is inappropriate because it is inherently unfair in how it treats the sexes, basing the ability of individuals to establish legal parentage on gender and sexual orientation.[180] Additionally, the presumption rule could be argued as violating the Equal Protection Clause because it benefits lesbian couples without doing the same for gay men.[181] For these reasons presumptive parenthood does not adequately address the new legal issues created by surrogacy.

ii. Gestation

Despite the fact that most legal systems base maternity on the principle of *mater semper certa est*, meaning the woman who gives birth to the child is the legal mother,[182] this Article has argued that using gestation as the test for determining the legal mother is wrong because it precludes those who utilize a surrogate. An additional point is that such a test is not gender-neutral. While not discounting the bond that forms between a woman and the child in utero, using a gestational approach relies on reproductive biology and reinforces

178. *See* Bowen, *supra* note 7, at 14-15. *See generally* Hawkins, *supra* note 123.

179. *See* Op. of the Justices to the Senate, 802 N.E.2d 565, 577 n.3 (Mass. 2004) (Sossman, J.) (stating that for lesbians the presumption rule can be extended, therefore policy reasoning calls for the presumption rule to also extend to same-sex male couples. The problem is how to apply it to gay male couples since they have to resort to surrogacy. Justice Sossman recognized that established rules regarding presumption differ for male and female homosexual couples, saying: "Applying these concepts to same-sex couples results in some troubling anomalies: applied literally, the presumption would mean very different things based on whether the same-sex couple was comprised of two women as opposed to two men. For the women, despite the necessary involvement of a third party, the law would recognize the rights of the "mother" who bore the child and presume that the mother's female spouse was the child's 'father' or legal 'parent.' For the men, the necessary involvement of a third party would produce the exact opposite result—the biological mother of the child would retain all her rights, while one (but not both) of the male spouses could claim parental rights as the child's father.").

180. Appleton, *supra* note 23, at 265.

181. *See id.*

182. Ingeborg Schwenzer, *Introduction* to TENSIONS BETWEEN LEGAL, BIOLOGICAL AND SOCIAL CONCEPTIONS OF PARENTAGE, *supra* note 37, at 1, 2.

societal stereotypes of women as the only parent who can effectively nurture a child. Some courts support this contention by suggesting that gestation is not as valuable as the law has made it out to be, rather gestation was simply the best evidence of a genetic link prior to the advent of deoxyribonucleic acid (DNA) tests.[183]

iii. Genetic Relationship

While some courts have turned to using genetics as the determining factor in establishing parenthood, this fails to adequately take into account the changing face of families that include step-parents, adoptive parents, and parents created through ARTs. Such a test also challenges the established rule that an egg or sperm donor in a surrogacy situation, while genetically linked to the child that is produced, is not the legal parent. Reliance on a genetics test would also raise the question of why such a test would be employed solely in the realm of surrogacy rather than all fertility practices.[184] Additionally, a genetics test becomes increasingly complicated now that recent technological advances have created the potential for a child to be genetically linked to two women through ooplasmic transfer,[185] resulting in a baby that that is genetically related to three people.[186] The employment of a genetic test by the courts leaves room for new substantive legal problems to arise down the road. As a result, a test that relies on genetics also fails to provide a suitable rule for determining parentage in gestational surrogacy arrangements.

B. Intent is the Proper Test for Determining Legal Parentage

Using a pure-intent test as the default rule for gestational surrogacy arrangements is not as innovative as some legal scholars claim.[187] While on its face the law maintains that parentage is based on the biological process of procreation, it is clear that the law establishing paternity is socially constructed.[188] What follows are the numerous arguments for why intent is the better method for determining parentage in gestational surrogacy arrangements than any rule that is currently in operation.

Procreation through the use of IVF, donor eggs, and a gestational surrogate requires intent; it involves a significant financial and emotional investment, and is time-consuming.[189] "But for" the intentions and actions of this couple, the

183. *See* Storrow, supra note 3, at 617 (stating that *Belsito v. Clark* is one example of a case that deemphasized the role of gestation in determining parentage).

184. Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U. L. REV. 913, 925 (2007).

185. *World's First Genetically Altered Babies Born*, CNN.COM (May 5, 2001), http://archives.cnn.com/2001/TECH/science/05/05/US.genes/ ("[O]oplasmic transfer . . . involves taking the contents of a donor egg from a fertile female and injecting it into the infertile woman's egg along with the fertilizing sperm from her mate.").

186. *Id.*

187. Andrews, *supra* note 100, at 2370.

188. *Id.* at 2370-71.

189. Shultz, *supra* note 29, at 324.

child would not exist.[190] As a result, the couple's intent to raise the child should override the claims made by a gestational surrogate for parental rights.[191] It is arguable that this method provides children with the "best and most committed" parents, given that those who performed the major tasks in creating the child exercised a deep desire for the child.[192] Further, an intent test is the best method to clarify legal parenthood prior to any significant actions being undertaken by either party—namely the creation of a new life.

Determination of parental status prior to the birth of the child is in the best interest of the child because it clarifies adult-child relationships from the beginning of the child's life. It enables intending parents to exercise parental authority and receive legal recognition of their functional status throughout the entire course of the child's life.[193] It also prevents disputes over custody, which can affect parental bonding and cause emotional and/or psychological trauma for the child depending on the length of time the dispute remains unsettled.[194]

The intent test provides a legal remedy for whom to hold responsible in the unfortunate circumstance that nobody wants the resulting child.[195] Because intent manifests legal parenthood prior to the child's birth, the state can hold the intended parents legally and financially responsible for the child even if they no longer wish to raise the child. This outcome is supported by states' interest in having all children be financially supported.[196] An intent test also protects surrogates who entered into the arrangement in the expectation that another party will care for the child upon its birth. It is unfair to hold the gestational mother legally responsible for a child she did not want, did not intend to parent, and is not genetically related to.

Utilizing an intent test eliminates inequalities in how the law operates. Relying on intent abolishes gender distinctions and inequalities based on sexual-partner preference in determining a child's legal parents, thus an intent test applies in the same way to everyone.[197] Intent is also the only rule that allows all couples, including homosexual male couples, to legally establish parentage.[198] Interestingly, intent is used to determine parental status in all

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190. *See* Appleton, *supra* note 23, at 277-78 ("[I]ntentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determi-ne legal parenthood . . . [because they] constitute a but-for cause of the existence of the very child in question . . . .").

191. Hawkins, *supra* note 123, at 634-35.

192. King, *supra* note 41, at 378.

193. *See id.* at 360-70.

194. *Id.* at 378.

195. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (where neither the surrogate nor the intended parents wanted the resulting child).

196. Meyer, *supra* note 37, at 381 ("The assumed tie between biological reproduction and parental responsibility remains particularly strong in the law of child support.").

197. *See* Appleton, *supra* note 23, at 277-78 ("[R]elying on intent to determine parentage holds promise for freeing family law from gender stereotypes and assumptions about biology as destiny. An intent-based test puts males and females on equal footing, offsetting rather than reinforcing biological sex differences and offering…'an opportunity for gender neutrality.'") (internal citation omitted); Andrews, *supra* note 100, at 2345 ("Contract law can also counteract some of the deficiencies that have been identified with family law, such as the fact that it tends to recognize only one type of family: the male-led heterosexual couple with children.").

198. *See* Hawkins, *supra* note 123, at 635.

other forms of ARTs including sperm donation, egg donation, and embryo donation.[199] To utilize an intent approach for all collaborative reproductive arrangements *except* surrogacy lacks common sense—and instead hints at the lingering presumption that women make better parents than men.[200]

While states have passed legislation acknowledging intent as one factor, they have not recognized parenthood by pure intention alone.[201] Instead states continue to reaffirm the requirement in *Johnson* that there be a tie between two competing mothers.[202] The effect is that homosexual male couples cannot legally guarantee that they will co-parent a child intentionally conceived and born out of a gestational surrogacy arrangement. Therefore a pure intent test, one that looks solely at the intent of all parties when they entered into an agreement, must be used. Given that technology is rapidly changing in ways that give rise to new legal problems, a pure intent is also the only test that will be able to withstand such changes.[203]

It has been argued that intent is difficult to discern because it requires a court to determine a mental state,[204] but contractual agreements are an easy way to establish the intent of all parties involved. Contract law is governed by clear and established rules.[205] Under contract theory, if force, duress, fraud, or misrepresentation is involved, the contract cannot be enforced. As a result, if a woman was coerced into acting as surrogate, or there was unequal bargaining power, the contract would be nullified and the surrogate would retain parental status.[206] State legislatures are also free to institute laws governing surrogacy contracts in order to ensure that intent is established and/or address specific concerns. Further, contracts governing intent allow room for the current complex and readily evolving family structures.[207] Through a contract manifesting intent parties would have the ability to select from state sanctioned options including three parents,[208] two mothers, *etcetera*.

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199. *See* Appleton, *supra* note 23, at 281.

200. *See id.* at 267-68.

201. Storrow, *supra* note 3, at 643-44 (noting that some states, such as Florida, Nevada, New Hampshire, and Virginia, have passed statutes in the surrogacy context that recognize the parenthood of intending parents under certain circumstances, but these statutes all include provisions requiring that at least one of the intending parents to be a genetic parent of the child and that the intending parents be married to each other).

202. *Id.* at 644 ("These statutes fail to provide an opportunity for parenthood by pure intention and instead seem to respond to the fragmentation of parenthood by forcing a tie between gestational and genetic parenthood and breaking the tie by locating intentional parenthood in a genetic contributor, one of the spouses of a married couple. In this way, the statutes validate the outcome of Johnson v. Calvert.").

203. *See* Anderson, *supra* note 3, at 54-55.

204. Appleton, *supra* note 23, at 283.

205. For a more in-depth analysis of arguments supporting contractual enforcement see Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2308 (1995).

206. *See generally* Swift, *supra* note 183.

207. *See* King, *supra* note 41, at 379.

208. Currently Pennsylvania is the only state that recognizes three parents. Elizabeth Marquardt, Op-Ed., *When 3 Really is a Crowd*, N.Y. TIMES, July 16, 2007, http://www.nytimes.com/2007/07/16/opinion/16marquardt.html.

Another important aspect of the intent test is how it circumvents the competing constitutional claims of procreative liberty (alleged by the intended parents) versus the right to companionship of one's child (averred by the surrogate). Problems arise when the right to procreate runs up against the right to parent one's child. Courts look for ways to avoid violation of either right; in the surrogacy context this can be achieved in various ways based on which test is used. The test has a direct impact on which party's assertion of a constitutional right is successful and impacts whether both members of a gay male couple can be legally declared the parents of the resulting child.

In *Baby M*, the father's right to procreate was not violated by the determination that the surrogate was the legal mother. For gay couples, this holding implies that, while one person can procreate, their chosen partner cannot legally co-parent the child as the gestational surrogate will retain that right if she decides to contest the contract. Thus, a court must determine the breadth of the right to procreate when both the intended parents are men and hence physically unable to biologically engender a child together. If a court were to determine that both men have the right to procreate through the use of a surrogate, the court must also consider what happens when the right to procreate conflicts with the right to parent one's child as would be the case if the surrogate asserted parental rights. While one option would be for the Supreme Court to declare one constitutional right trumps the other, this is unlikely to occur in the context of gay couples, and is objectionable given the decision's dangerous ramifications for other areas of the law.

Instead, the decision in *Johnson* demonstrates why utilization of an intent test is imperative for gay male couples. The California Supreme Court was able to circumvent the two competing constitutional rights by declaring that the surrogate was not a legal parent and therefore had no right to companionship of the child. Only by bypassing this debate can both parties in a same-sex male couple be declared the intended parents without violating a third party's constitutional rights. In *Johnson*, however, intent was only applied after the court found a tie between two mothers. This demonstrates the fundamental problem for gay men facing a contested legal battle with a surrogate—there is no way to create a "tie" if the term parent is not substituted for mother. In order for courts to avoid a surrogate's claim to the right to parent one's child, the court must determine that she is not a legal parent. The only way this is possible is through a pure intent test that recognizes two fathers' intention to be the legal parents of a child born through gestational surrogacy.

IV. CONCLUSION

ARTs have given rise to new methods of procreation, challenging normative assumptions about biological reproduction and produced vexing legal questions about how to determine parentage. Unsure of how to address these issues, the law has applied a wide variety of tests, engendering great uncertainty about who will be declared the legal parents. Despite hope that courts and legislatures were moving towards an intent framework for cases of gestational surrogacy, it is clear that this is not the case. Current frameworks discriminate against homosexual male couples, making it nearly impossible for them to ensure they are declared the legal parents if a surrogate asserts her right

to parent. To avoid these undesirable results, courts and state legislatures need to begin employing a pure intent test. Only through this method can the law keep up with society's expanding definition of the family and recognize alternative family forms.

APPPENDIX I

States that have passed laws regarding surrogacy.[209]

BANS	
Arizona	ARIZ. REV. STAT. ANN. § 25-218 (2007).
	Arizona prohibits all surrogacy contracts, whether paid or unpaid, declares the surrogate as the legal mother entitled to custody, and establishes a rebuttable presumption that the surrogate's husband, if the surrogate is married, is the father.
District of Columbia	D.C. CODE §§ 16-401 to 16-402 (2001).
	The District of Columbia prohibits all surrogacy contracts, declaring them unenforceable. Violations are punishable up to a $10,000 fine and/or 1 year in prison.
VOIDS AND PENALIZES	
Michigan	MICH. COMP. LAWS ANN. §§ 722.851-.861 (West 2002).
	Michigan prohibits all surrogacy contracts. A party to a surrogacy contract is criminally liable for a misdemeanor punishable by a fine up to $10,000 and/or 1 year in jail. Someone who induces or arranges such an agreement is guilty of a felony carrying up to a $50,000 fine and/or 5 years in jail. The same punishment applies to anyone involved in an arrangement with a surrogate who is an unemancipated minor, mentally ill, or suffers from a developmental or mental disability. As a further disincentive, if a custody dispute arises, the person who has physical custody (likely the birth mother) may retain it until a court orders otherwise.
New York	N.Y. DOM. REL. LAW §§ 121-24 (McKinney 2010).
	New York declares surrogacy contracts void and unenforceable and as contrary to public policy. Parties to a contract are subject to a civil penalty of up to $500. Those who assist in arranging the contract are liable for a civil penalty of up to $10,000 and forfeiture of the fee received in brokering the contract; a second violation constitutes a felony. A birth mother's participation in the contract, however, may not be held against her in a custody dispute with the genetic parents or grandparents.
VOID & UNENFORCEABLE	
Indiana	IND. CODE § 31-20-1-2 (LexisNexis 2010).

209. ARONS, *supra* note 1, at 35-40.

	Indiana declares surrogacy agreements unenforceable and against public policy. But, if a parentage determination must be made, courts should not base their best interest analysis solely on the fact that a person entered into a surrogacy agreement.
Kentucky	KY. REV. STAT. ANN. § 199.590 (West 2006).
	Kentucky declares traditional surrogacy agreements void but does not address gestational surrogacy. Compensation is prohibited.
Louisiana	LA. REV. STAT. ANN. § 9:2713 (2005).
	Louisiana declares traditional surrogacy agreements null, void, and unenforceable as contrary to public policy. The state does not address gestational surrogacy.
Nebraska	NEB. REV. STAT. § 25-21,200 (LexisNexis 2004).
	Nebraska declares surrogacy contracts void and unenforceable. The law assigns rights and obligations regarding the child to the biological father.
ALLOWS BUT REGULATES	
Alabama	ALA. CODE § 26-17-801 (LexisNexis 2009) (official comment).
	Surrogacy contracts must be judicially approved to be enforceable. Those that are not judicially approved are unenforceable but not void.
Arkansas	ARK. CODE ANN. §§ 9-10-201 to -202 (2009).
	Arkansas permits surrogacy contracts for married, unmarried couples, and single people. If a woman is a surrogate, then the child's parents will be: (1) the biological father and his wife, if he is married; (2) the biological father alone, if he is unmarried; or (3) the intended mother, if anonymous sperm was used.
Florida	FLA. STAT. ANN. §§ 63.212-.213(West 2005 & Supp. 2011) and 742.15-.16 (West 2010).
	Florida regulates traditional and gestational surrogacy separately. Traditional surrogacy is referred to as a "preplanned adoption agreement" with a "voluntary mother" and requires court approval of the adoption. The birth mother has 48 hours after the birth of the child to change her mind, the adoption must be approved by a court, and the intended parents do not have to be biologically related to the child. Under a gestational surrogacy contract, the surrogate must agree to relinquish her rights to the child upon birth, the intended mother must show that she cannot safely maintain a pregnancy or deliver a child, and at least one of the intended parents must be genetically related to the child. Both laws require the following: all surrogates must submit to medical evaluation; the surrogate is the default parent if an intended parent turns out not to be genetically related to the child; the types of payment allowed are limited and recruitment fees for traditional surrogacy agreements are prohibited; the surrogate must be at least 18 years old; and the intended parents must agree to accept any resulting child, regardless of any impairment the child may have.
Illinois	The Illinois Gestational Surrogacy Act, 750 ILL. COMP. STAT. ANN. 47/1-75 (West 2009), 750 ILL. COMP. STAT. 45/6 (West 2009), 410 ILL. COMP. STAT. 535/12 (West 2011).

	Illinois allows single people, unmarried couples, and married couples to enter into gestational surrogacy contracts. The surrogate may not supply her own eggs, and at least one of the intended parents must be genetically related to the child. Under a valid agreement, the intended parents become the legal parents immediately upon birth, and the parent-child relationship can even be established before birth. A person can bring a challenge to the agreement or the rights assigned under it within 12 months of the child's birth. There is no residency requirement for the intended parents, but the contract must be entered into under Illinois law and the child must be born in Illinois. A licensed physician must certify that there is a medical need for the surrogacy. The intended parents must complete a mental health evaluation and consult with an independent attorney regarding the contract. The gestational surrogate must be at least 21 years old, must have previously given birth to a child, and must complete medical and mental health evaluations, and must consult with an independent attorney about the surrogacy contract. Compensation is restricted to reasonable living, medical, legal, and psychological expenses incurred as a result of the pregnancy. The surrogacy contract must be executed prior to the commencement of any medical procedures related to the intended conception. If the statutory requirements are not met, a court shall determine parentage based on evidence of the parties' intent.
Nevada	NEV. REV. STAT. § 126.045 (LexisNexis 2010).
	Nevada allows married couples to enter into a contract with a surrogate for "assisted conception." Based on the definition of that phrase, the statute applies to gestational surrogacy when both the intended parents have supplied the gametes and are thereby both genetically related to the resulting child. Payment is restricted to living and medical expenses related to the birth.
New Hampshire	N.H. REV. STAT. ANN. § 168-B:16-32 (LexisNexis 2010).
	New Hampshire enforces surrogacy contracts if all statutory requirements are met. The intended parents must be married and at least one of them must be biologically related to the child. The surrogate has 72 hours after birth in which to decide whether to keep the child. The arrangement must be judicially preauthorized. Evaluations and counseling of the parties must be conducted prior to impregnation of the surrogate, and home studies of all parties must be conducted. All parties must be 21 or older. The intended mother must be physically unable to bear a child, the eggs must come from the surrogate or the intended mother—no donor eggs are allowed, and the surrogate must have had at least one prior delivery. Genetic counseling is required if the surrogate is 35 or older. Finally, there is a residency requirement of 6 months for the gestational mother or the intended parents. Compensation is limited to medical expenses, lost wages, insurance, legal costs, and home studies. Fees for arranging a surrogacy contract are prohibited. There are also provisions addressing what happens if the contract is breached or terminated.
North Dakota	N.D. CENT. CODE §§ 14-18-01 to -08, 14-19-01, 14-20-01 to -66 (2009).
	North Dakota voids traditional surrogacy contracts. If the surrogate is genetically related to the child, then she is declared the mother and her husband, if she is married, is deemed the father. North Dakota recognizes gestational surrogacy agreements. Intended parents are the legal parents when they are both biologically related to the child.
Oregon	OR. ADMIN. R. 413-120-0200 (2009).

	Surrogacy agreements for compensation are unenforceable. The Oregon statute prohibiting buying or selling a person has an explicit exemption for fees for services in an adoption pursuant to a surrogacy agreement.
Texas	TEX. FAM. CODE ANN. §§ 160.751-.763 (West 2008).
	Texas's law is modeled after Part 8 of the Uniform Parentage Act of 2002. A gestational agreement must be validated in court. The gestational mother may not use her own eggs. She must have had at least one prior pregnancy and delivery. She maintains control over all health-related decisions during the pregnancy. The intended mother must show that she is unable to carry a pregnancy or give birth. The intended parents must be married and must undergo a home study. There is a residency requirement of at least 90 days for either the gestational mother or the intended parents. An agreement that has not been validated is not enforceable, and parentage will be determined under the other parts of Texas's Uniform Parentage Act.
Utah	UTAH CODE ANN. §§ 78B-15-801 to -809 (LexisNexis 2008).
	Utah's law is modeled after Part 8 of the Uniform Parentage Act of 2002. A gestational surrogacy agreement must be validated in court. The gestational surrogate must have had at least one prior pregnancy and delivery. She maintains control over all health-related decisions during the pregnancy. She may not use her own eggs. The intended mother must show that she is unable to carry a pregnancy or give birth. At least one intended parent must provide gametes. If the gestational surrogate is married, her husband's sperm may not be used. The intended parents must be married and must undergo a home study. All parties must be at least 21 years old and must participate in counseling. There is a residency requirement of at least 90 days for either the gestational mother or the intended parents. The gestational surrogate may not be receiving Medicaid or other state assistance at the time she enters the agreement. Payment to the gestational surrogate is allowed but must be reasonable. An agreement that has not been validated is not enforceable, and parentage will be determined under the other parts of Utah's Uniform Parentage Act.
Virginia	VA. CODE ANN. §§ 20-156 to -165 (2008).

	Virginia requires pre-authorization of a surrogacy contract by a court. If the contract is approved, then the intended parents will be the legal parents. If the contract is voided, the surrogate mother and her husband, if any, will be named the legal parents and the intended parents will only be able to acquire parental rights through adoption. If the contract was never approved, then the surrogate can file a consent form relinquishing rights to the child. But if she does not, the parental rights will vary based on whether either of the intended parents has a genetic relationship to the child. Based on the circumstances, they may need to adopt the child in order to obtain parental rights. With that said, if the surrogate is the genetic mother, she may terminate the contract within the first 6 months of pregnancy. Virginia's requirements for court approval include: a home study; a finding that all parties meet the standards of fitness applicable to adoptive parents; that the surrogate must be married and have delivered at least one prior live birth; that the parties must have undergone medical evaluations and counseling; that the intended mother must be infertile or unable to bear a child; and that at least one intended parent must be genetically related to the child. The intended parents must accept the child regardless of its health or appearance. The surrogate retains sole responsibility for the clinical management of the pregnancy. During the approval proceedings, the court must appoint counsel for the surrogate and a *guardian ad litem* to represent the interests of any resulting children. The court's approval of assisted conception under the contract is effective for twelve months. Compensation beyond reasonable medical and ancillary costs is not allowed. Recruitment fees are punishable as a misdemeanor, and the parties may collect damages from the broker. The law also provides for an allocation of costs when an unvalidated contract is terminated under various circumstances.
Washington	WASH. REV. CODE §§ 26.26.210-60. (West 2005 & Supp. 2011)
	Surrogate contracts are generally allowed but contracts for compensation are prohibited. If a dispute arises over a child born to a surrogate mother, the party with physical custody may retain custody until a court orders otherwise. Intended parents can establish their parentage under a valid surrogacy contract. If a child is born under an invalid contract, parentage shall be determined under the other parts of Washington's Uniform Parentage Act. In contrast, contracts that pay compensation beyond reasonable expenses and contracts with unemancipated minors or women with a mental illness or disability are prohibited. Violation of these prohibitions is a gross misdemeanor. Contracts for compensation also are void and unenforceable as contrary to public policy. Compensation is defined as any payment beyond actual medical costs, other expenses related to pregnancy, and legal fees related to drafting of the contract.
STATES WITHOUT STATUTES ADDRESSING SURROGACY AGREEMENTS	
Alaska; California; Colorado, Connecticut; Delaware; Georgia; Hawaii; Idaho; Iowa; Kansas; Maine; Maryland; Massachusetts; Minnesota; Mississippi; Missouri; Montana; New Jersey; New Mexico; North Carolina; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Vermont; West Virginia; Wisconsin; Wyoming.	