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Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour

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COMMENTS

INTERPRETING A RENT-A-WOMB CONTRACT: HOW CALIFORNIA COURTS SHOULD PROCEED WHEN GESTATIONAL SURROGACY ARRANGEMENTS GO SOUR

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"Give me children, or else I die. Am I in God's stead, who hath withheld from thee the fruit of the womb? Behold my maid Bilhah. She shall bear upon my knees, that I may also have children by her."¹

I. INTRODUCTION

Life often imitates art. In 1932, Aldous Huxley foretold of human babies conceived outside of human wombs.² Huxley's novel, *Brave New World*, has proved prophetic: science-fiction became science when Louise Brown, conceived in a lab and implanted in her mother's womb, was born alive and well in 1978.³

This breakthrough has led to more recent advances in reproductive technology.⁴ Today, harvesting eggs from one woman, creating embryos in a lab, and implanting the embryos in a different woman is a fairly common procedure.⁵ Because reproductive science now allows a woman to carry to term a baby that is genetically unrelated to her, a woman can *lend* or *rent* her womb to others for this purpose. Just as farmers can contract to grow crops on their land with seeds provided by another party, a woman can agree to *grow* a baby for a couple who supplies the necessary embryonic *seeds*. These new procedures create a slew of moral considerations and legal controversy.⁶

1. MARGARET ATWOOD, *THE HANDMAID'S TALE* 88 (1986); see also *Genesis* 30:1-3 (King James). In this novel, "a [h]andmaid's role is to bear children for elite, childless families." *The Handmaid's Tale Book Notes*, BOOKRAGS.COM, <http://www.bookrags.com/notes/hmt/SUM.html> (last visited Oct. 5, 2005).

2. ALDOUS HUXLEY, *BRAVE NEW WORLD* (First Perennial Classics ed., 1998); see also Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 509 (2005) (noting that Huxley's prediction has been realized).

3. Moses, *supra* note 2.

4. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 790 (Cal. 1993) (Kennard, J., dissenting) ("Recent advances in medical technology have dramatically expanded the means of human reproduction. Among the new technologies are in vitro fertilization, embryo and gamete freezing and storage, gamete intra-fallopian transfer, and embryo transplantation. Gestational surrogacy is the result of two of these techniques: in vitro fertilization and embryo transplantation." (citation omitted)).

5. "In the last two decades, gestational surrogacy, which involves the use of in vitro fertilization (IVF), has become increasingly popular." Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407, 409 (2002).

6. See *K.M. v. E.G.*, 117 P.3d 673, 685 (Cal. 2005) (Werdegar, J., dissenting).

While scientific advances in reproductive technology now afford individuals previously unimagined opportunities to become parents, the same advances have also

This Comment focuses on a specific type of arrangement,⁷ gestational surrogacy, in which a woman, the gestational surrogate, agrees to be implanted with embryos created from the eggs and sperm provided by another party, the intended parent or parents.⁸ The gestational surrogate carries the resulting fetus to term and relinquishes the baby (or babies) once birth occurs.⁹ This arrangement allows a fertility-challenged couple to have a third party gestate a child for them.¹⁰

Parties can have a gestational surrogacy contract drafted and signed, but, currently, they cannot be sure how a court will interpret their contract terms because no contractual framework has been assigned to this type of agreement.¹¹ The California legislature and courts have failed to clarify how the specific terms and the language of gestational surrogacy contracts should be interpreted if one party alleges breach.¹² Connecting gestational surrogacy contracts to an existing framework would serve as a guide for adjudicating future conflicts. This Comment explores that issue and suggests that courts wait

created novel, sometimes heartbreaking issues concerning the identification of the resulting children's legal parents. Declarations of parentage in this context implicate complex and delicate biological, personal, legal and social policy considerations.

Id.

7. This Comment and its analysis do not apply to egg-donor consent form contracts; a recent California Supreme Court case distinguished egg-donor agreements from gestational surrogacy contracts, and these two contract types are now treated differently in law. *See id.* at 678 (discussing *Johnson*, 851 P.2d 776). “[G]estational surrogacy” is defined as “the process by which a woman attempts to carry and give birth to a child created through in vitro fertilization using the gamete or gametes of at least one of the intended parents and to which the gestational surrogate has made no genetic contribution.” Nancy Ford, *The New Illinois Gestational Surrogacy Act*, 93 ILL. B.J. 240, 240 (2005).

8. “‘Intended parent’ is defined as the ‘person or persons who enters into a gestational surrogacy contract with a gestational surrogate pursuant to which he or she will be the legal parent of the resulting child.’” Ford, *supra* note 7, at 240 (quoting 750 ILL. COMP. STAT. ANN. 47/10 (West Supp. 2005)).

9. *Id.* at 243.

10. Gestational surrogacy can “allow some otherwise infertile couples to bear and raise a genetically related child.” Moses, *supra* note 2, at 514.

11. Although no such provisions exist, frameworks—such as the framework of rules used to interpret goods contracts, service contracts, employment contracts, and other agreements—exist in contract law to dictate how agreements are interpreted. E. ALLAN FARNSWORTH, *CONTRACTS* § 1.10, at 36-37 (4th ed. 2004).

12. See *infra* Part V for a discussion on California case law. Courts have focused on general enforceability but have not specified a framework of contract law to use in resolving conflicts over specific breached terms. *See infra* Part V.. In future cases, parties may agree on the enforceability of these types of contracts but have a conflict about compensation, dietary restrictions, or another contract term. To resolve these disputes, a court would have to use a specific framework of contract law such as a statutory code, traditional common law rules, or a combination of both.

for the legislature to create a contractual framework, rather than interpret gestational contracts using a preexisting framework.

Part II of this Comment describes some illustrative scenarios, while Part III provides a background for the medical procedure of gestational surrogacy. Part III offers an overview of the different types of reproductive techniques available to fertility-challenged individuals. The scientific history behind these techniques is presented along with a description of the gestational surrogacy procedure itself.

Part IV discusses the philosophical debate issues that have sprung up as a result of this new scientific advancement: motherhood being redefined, commercialization of the womb, criminalization of the procedure, and debates about baby-selling analogies.

Next, Part V reviews California case law in this area. California consistently enforces surrogacy contracts. Additionally, the lack of specific statutory legislation is explored. This section also includes a brief summary of gestational surrogacy contract policy in other jurisdictions.

Part VI explores the relationship between gestational surrogacy and contract law, describing how some type of contract—whether oral, written, or implied—is inevitably created when people arrange gestational surrogacy relationships. Part VII examines gestational surrogacy contracts in relation to common conceptual frameworks in contract law, such as service, at-will employment, adoption, goods, and relational contracts. This section discusses the similarities and key differences between these contract types and gestational surrogacy agreements.¹³

Part VIII recommends courts resist adopting an existing contractual framework to encourage the California legislature to create a statutory scheme for gestational surrogacy agreements. This Comment concludes by emphasizing the importance of establishing a recognized framework for gestational surrogacy contracts. In parting, the Comment explores how this medical advancement may someday be used in ways that could inspire even greater social controversy.

13. Other contract types, such as insurance agreements, also have frameworks of specific rules, yet these are too different from surrogacy agreements for a useful comparison. Fields such as insurance and labor law are assigned their own jurisprudence that departs from contractual common law and is dictated by statute. FARNSWORTH, *supra* note 11, § 1.10, at 36. This Comment compares only contractual frameworks that have at least some commonality to gestational agreements.

II. ILLUSTRATIVE SCENARIOS

Imagine a woman who agrees to be implanted with embryos and to carry the resulting fetus to term in exchange for \$20,000. The woman signs a contract that includes an express term giving the other party (a fertility-challenged couple) the right to order an abortion if multiple embryos develop into fetuses. As a result, the couple retains control over the number of fetuses that will be carried to term.

Then, almost predictably, two embryos take hold and twins begin to grow inside the surrogate's womb. The infertile couple wishes to exercise its right to order selective abortion of one fetus and schedules the procedure for the thirteenth week of pregnancy. However, the surrogate refuses the selective abortion, arguing there was an oral agreement between the parties—not memorialized in the contract itself—that any selective abortion must take place before twelve weeks of pregnancy.

Was this oral agreement a valid amendment to the original written contract, which was silent on a time limit for the abortion option? Will the infertile couple be forced to raise two children, when they in fact desired and contracted for only one? If the couple now refuses to compensate the surrogate, who breached the contract? Was it the surrogate for refusing the abortion or the couple for refusing to pay her?

These facts are not hypothetical. The surrogate's name is Helen Beasley and the intended parents are Charles Wheeler and Martha Berman.¹⁴ The couple's attorney argues "that they only contracted for one baby. They want one, or none."¹⁵ This argument is the basis for the couple's refusal to accept either baby or to pay Beasley her fee because she refused to abort one fetus.¹⁶

Here, the issue concerns oral modification of the written agreement and a disagreement over the quantity of children produced. Is this a service contract where Beasley contracted to carry a child and to undergo abortion as part of the service? Or, is it a goods contract

14. Greg Moran, *One-or-None Edict Complicates Surrogate Pregnancy*, SAN DIEGO UNION-TRIB., Aug. 11, 2001, at A1; European Centre for Law & Justice, *British Surrogate Mom Sues in Abortion Dispute*, http://www.eclj.org/news/euro_news_010813_british.asp (last visited Feb. 13, 2006); *In the Courts: British Woman Sues U.S. Couple for Breach of Contract Over Surrogacy Agreement*, KAISERNETWORK.ORG, Aug. 13, 2001, http://kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=6351; *Surrogate Mother Pushes for Adoption*, BBC NEWS, Aug. 12, 2001, <http://news.bbc.co.uk/1/hi/health/1485494.stm>.

15. Moran, *supra* note 14; Kaisernetwork.org, *supra* note 14.

16. Kaisernetwork.org, *supra* note 14.

where the main purpose of the contract is to deliver a set quantity of the item in question? Until a court decides which framework of contract law to use, it cannot interpret the contract.¹⁷

Take another set of facts: a man wishes to be a father. He contacts two women through a surrogacy agency, selects one woman to provide eggs to be fertilized with his sperm, and chooses a second woman to carry the artificially inseminated embryos to term. Both women enter into agreements to do so in exchange for monetary compensation.

The procedure is a success, resulting in the birth of healthy triplets. The story should end with the contracted-for outcome, the two women get paid their fees and the man raises the triplets. But what happens if all three people want sole custody of the triplets? A court would need to interpret the contract terms to resolve the conflict between the parties.

Again, life has a tendency to surpass the drama of even the most far-fetched television plot. These facts occurred, and the three parties went to trial for a legal tug-of-war over the three babies.¹⁸ Because situations like these will occur more often as gestational surrogacy becomes more common, courts should decide not only the issues of validity and enforceability, but also how to adjudicate the terms and language in these agreements.¹⁹

17. See FARNSWORTH, *supra* note 11, § 7.7. Courts interpret contracts by ascertaining the meaning of the language used by the parties. *Id.*

18. Rice v. Flynn, No. 22416, 2005 WL 2140576, at *1 (Ohio Ct. App. Sept. 7, 2005). A brief case summary follows:

Appellee James O. Flynn ("Flynn"), Appellee/Cross-Appellant Jennifer Rice ("Rice"), and Appellant/Cross-Appellee Danielle Bimber ("Bimber") entered into a surrogacy contract whereby Bimber would serve as a surrogate mother for Flynn and Rice's children. Flynn, a resident of Ohio, was not involved in a romantic relationship with Rice, a resident of Texas, or Bimber, a resident of Pennsylvania; both women were contacted through a surrogacy agency and compensated by Flynn. Sperm was collected from Flynn and used to fertilize eggs collected from Rice, which created embryos that were inseminated in Bimber at University Hospital in Cleveland, Ohio. As a result of the *in vitro* fertilization, Bimber became pregnant and gave birth to triplets. The parentage, possession, and custody of the triplets have been contested since their births.

Id. at 1.

19. See *infra* Part V for a discussion of the validity and enforceability of gestational surrogacy contracts in California.

III. GESTATIONAL SURROGACY PROCEDURE OVERVIEW

A. *The History of Reproductive Technology*

Aldous Huxley anticipated the future of reproductive science in 1932,²⁰ but the first “test-tube baby” was not born until 1978, followed by the second and third test tube babies in 1980 and 1981, respectively.²¹ This was in vitro fertilization in its simplest form.²² Since then, medical doctors have varied the technique over time, as some methods proved more successful than others:

One variation, for example, is “blastocyst transfer,” whereby embryos are allowed to develop for a longer period of time (approximately five days) prior to transfer in an effort to increase the chances of successful implantation.

Two other important developments were cryopreservation of embryos and the use of donated ova. Embryo cryopreservation was developed in Australia (with the first live birth in 1985) and quickly moved to the United States. Although the use of donated ova was foreseeable from the first days of IVF, the first reported case did not come until 1983. A more recent variation of ova donation, cytoplasm transfer, has been successfully performed in New Jersey. In that technique, the cytoplasm from a donor’s ovum is injected into the ovum of an infertile woman together with the father’s sperm. It allows an older woman or a woman whose mitochondria are defective to be the near-genetic mother of her child, the genetic material in the mitochondria being the exception.²³

In addition to finding ways to increase the success rate of the procedures, scientists have also sparked added controversy by using this area of science to develop embryo cloning methods.²⁴ Embryo cloning and gestational surrogacy may one day be used in concert.

20. “The notion of ‘test-tube babies’ was anticipated in Aldous Huxley’s *Brave New World*, first published in 1932.” Moses, *supra* note 2, at 509.

21. *Id.* at 509-10.

22. *See id.* at 510.

23. *Id.* at 510-11.

24. Cloning bypasses the need to fertilize the eggs, and this technique has inspired controversy over the ethics involved in creating organisms that have the exact genetic thumbprint as the source of the original cells. *Id.* at 512.

B. *The Different Procedures Available to Infertile Couples or Persons*

Gestational surrogacy is a subset of a group of reproductive medical procedures that also includes traditional surrogacy, egg donation,²⁵ and embryo donation.²⁶ A traditional surrogate agrees to use her own eggs to create the resultant child.²⁷ The surrogate's own eggs never leave her body;²⁸ she is artificially inseminated and then gestates the resultant fetus.²⁹ Thus, a traditional surrogate is genetically linked to the child she carries.³⁰ The sperm can be provided by the other party to the agreement or by anonymous donor.³¹

Egg donation involves the relinquishment of rights over a woman's eggs.³² The eggs are taken from a woman's body to be fertilized in a lab (*in vitro*).³³ The eggs are then implanted in the intended mother's womb.³⁴ Embryo donation occurs when prospective parents have had embryos created and cryopreserved,³⁵ yet no longer

25. An egg refers to "a cell produced by a woman or female animal from which a baby might develop if it combines with sperm from a male." CAMBRIDGE ADVANCED LEARNER'S DICTIONARY, <http://dictionary.cambridge.org> (search "egg"; then select "egg (REPRODUCTION)") (last visited Feb. 13, 2006).

26. An embryo is "[a]n organism in its early stages of development, especially before it has reached a distinctively recognizable form. An organism at any time before full development, birth, or hatching. [Or, t]he fertilized egg of a vertebrate animal following cleavage." DICTIONARY.COM, <http://dictionary.com> (search "embryo") (last visited Feb. 13, 2006).

27. "Traditional surrogacy: a surrogate, using her own eggs, is artificial inseminated with the semen of the prospective father. She then carries and gives birth to the child." Thomas M. Pinkerton, *Surrogacy and Egg Donation Under California Law*, SURROGACYLAW.NET, <http://www.surrogacylaw.net/currentlaws.htm> (last visited Sept. 1, 2005).

28. *Id.*

29. *See id.*

30. *See id.* (explaining that a traditional surrogate is both the surrogate and the egg donor).

31. *Id.*

32. *Id.*; *see also* K.M. v. E.G., 117 P.3d 673, 685-86 (Cal. 2005) (Werdegar, J., dissenting) ("In a true 'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law.")

33. "In vitro" refers to "fertilization outside the womb." Pinkerton, *supra* note 27. "In vitro fertilization or IVF is the fertilization of a human egg outside the human body in a laboratory. Children that have been conceived this way are often called 'test tube babies,' because their actual conception took place in a petri dish." Johnson v. Calvert, 851 P.2d 776, 790 (Cal. 1993) (Kennard, J., dissenting).

34. Pinkerton, *supra* note 27.

35. *Id.*; Moses, *supra* note 2, at 514 ("Embryos may be cryopreserved and stored for an arbitrary period of time. A cryopreserved embryo can be tested, manipulated, or destroyed. It can also be thawed and either transferred to the uterus of a woman, allowed to perish, or used in research.")

have a need for the embryos and wish to donate them to another person or couple.³⁶

Gestational surrogacy³⁷ differs from the above procedures with a critical distinction: the gestational surrogate has no genetic tie to the baby she carries.³⁸ Typically, in this procedure an egg is first removed from the intended mother.³⁹ That egg is “inseminated with the intended father’s sperm and then implanted in the surrogate mother’s womb.”⁴⁰ The surrogate’s role is limited to gestation of implanted embryos; the surrogate plays no role in donating the genetic material that is used to create the embryos.⁴¹ This procedure can accomplish any one of several goals:

(1) a woman may donate an egg that, when fertilized, will be implanted in the uterus of a woman who intends to raise the child; (2) the woman who provides the egg may herself intend to raise the child carried to term by a gestational surrogate; or (3) a couple desiring a child may arrange for a surrogate to gestate an embryo produced from an egg and sperm, both donated (perhaps by close relatives of the couple).⁴²

This Comment focuses on gestational surrogacy in situations (2) and (3), analyzing the agreements entered into by the gestational surrogate and the intended parents.

36. Pinkerton, *supra* note 27.

Most commonly, embryos are donated by a couple who had a successful pregnancy by using in vitro fertilization and implantation of the fertilized eggs, and who are seeking prospective parents for the remaining cryopreserved (frozen) embryos who [sic] were not implanted. Sometimes, this process is referred to as embryo adoption, although that term is a misnomer because there is no court adoption proceeding.

Id.

37. In gestational surrogacy,

a surrogate carries the pregnancy but her own genetic material is not used. Instead, eggs provided by an ovum donor or by the intended mother are fertilized in vitro with the sperm of the prospective father or sperm donor. The resulting embryos are then transferred to the gestational surrogate who then carries and gives birth to the child.

Id.

38. Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 193 (2005). In gestational surrogacy, “the woman has no genetic link to the resulting embryo and later born child—prompting some commentators to refer to the situation as ‘womb donation.’” *Id.*

39. Laufer-Ukeles, *supra* note 5, at 409.

40. *Id.*

41. Berg, *supra* note 38, at 193.

42. *Johnson v. Calvert*, 851 P.2d 776, 790 (Cal. 1993) (Kennard, J., dissenting).

C. *The Gestational Surrogacy Medical Procedure*

The science behind gestational surrogacy can sound deceptively simple when the steps are briefly summarized. In vitro fertilization, "in its simplest form, involves hormonal monitoring and stimulation of the woman producing ova, harvesting the ova, mixing them with sperm in a petri dish containing a culture medium, waiting for approximately three days for embryo development, and then transferring one or more embryos, back to the woman."⁴³ The woman then gestates the resulting fetus to term and gives birth.⁴⁴

In practice, however, there are adverse side effects, potential complications, and high failure rates. Uncomfortable hormonal stimulation of the ova donor is necessary to facilitate the retrieval of eggs by inducing "superovulation."⁴⁵ Further, the harvesting of the ova is accomplished through "aspiration, a nonsurgical technique, or through an invasive surgical procedure known as laparoscopy."⁴⁶ Both of these procedures are physically and emotionally draining;⁴⁷ the entire process is expensive, time-consuming, and has a low success rate.⁴⁸ Yet, the fact that prospective parents elect to pursue this option illustrates the lengths to which infertile couples will go to become parents.⁴⁹

IV. PHILOSOPHICAL AND MORAL ISSUES

As evinced by the treatment that gestational surrogacy contracts receive in court opinions and scholarly writing, gestational surrogacy inspires philosophical, social, and moral debate. The first issue raised is a philosophical one: how do we define motherhood? The procedure has allowed the role of motherhood to be partitioned into separate roles: genetic contribution, gestation of the fetus, and the social responsibilities of raising the child.⁵⁰ A child can have a different woman providing each of these three functions,⁵¹ leading to the ra-

43. Moses, *supra* note 2, at 510.

44. Johnson, 851 P.2d at 791 (Kennard J., dissenting).

45. Superovulation is the production of multiple eggs. *Id.* at 790.

46. *Id.*

47. *Id.*

48. *See id.*

49. *Id.*

50. *Id.* at 791.

51. *See id.*

tional conclusion that a child can have multiple mothers, as defined by statute.

Divorce has already “made multiple parent arrangements common in our society,”⁵² but California courts have been unwilling to concede equal parental rights to the multiple women involved in gestational surrogacy.⁵³ Intended parents who contract for the birth of a child have greater rights than the genetic or gestational mothers.⁵⁴ So, in effect, the concept of *motherhood* is not only defined by the procreation process, but also by contracts and societal obligations.

Aside from the philosophical quest to define motherhood, courts and scholars debate the morality of gestational surrogacy agreements. Paying a woman to carry a baby for another person and expecting her to relinquish all rights to the unconceived child conflicts with state law in many jurisdictions.⁵⁵ For example, some states have legislation prohibiting the use of money in connection with adoption transactions⁵⁶ and laws that make a birth mother’s relinquishment of parental rights revocable in certain cases.⁵⁷ Most of these states categorize gestational surrogacy agreements where the surrogate is compensated as exploitive of women,⁵⁸ against public policy,⁵⁹ or even criminal.⁶⁰

52. *Id.* at 782 (majority opinion). “[T]wo women each have presented acceptable proof of maternity” and “evidence of a mother and child relationship” with the same child, under sections 7003 and 7004 of the California Civil Code. *Johnson*, 851 P.2d at 781-82.

53. *Johnson*, 851 P.2d at 781-82. The court held: “We decline to accept the contention of amicus curiae the American Civil Liberties Union (ACLU) that we should find the child has two mothers. Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here.” *Id.* at 781 n.8.

54. *See id.* at 782 (refusing to recognize parental rights in the gestational mother who had no role in raising the child after birth and not allowing her to share the role of motherhood).

55. *See* L. Lynn Hogue, *Avoiding Parentlessness by Assisted Reproductive Technology (ART): A Proposal for Enforcing Contracts and Avoiding the Public Policy Doctrine in Interstate Cases*, 4 WHITTIER J. CHILD & FAM. ADVOC. 269, 279-80 (2005).

56. *Id.* at 280. In states that prohibit paying a fee to a surrogate, surrogates can attempt to circumvent the law by disguising the fee as “living expenses.” EverythingSurrogacy.Com, *Surrogate Mothers: How to Figure Out How Much Compensation to Ask for from Intended Parents?*, <http://www.everythingsurrogacy.com/cgi-bin/main.cgi?calculate> (last visited Sep. 1, 2005) [hereinafter *Everything Surrogacy*].

57. Hogue, *supra* note 55, at 280.

58. Some jurisdictions have addressed the emotional vulnerability and psychological coercion that a woman can experience when agreeing to release a child born of her body to another party. *See, e.g.*, *Methodist Mission Home v. N.A.B.*, 451 S.W.2d 539, 543-44 (Tex. Ct. App. 1970). In addition, “commentators have expressed concern that surrogacy contracts tend to exploit or dehumanize women, especially women of lower economic status.” *Johnson*, 851 P.2d at 784. “Surrogacy critics . . . maintain that the payment of money for the gestation and relinquishment of a child threatens the economic exploitation of poor women who

Another moral objection to these contracts is the commoditization of children because “the practice of surrogacy may encourage society to view children as commodities, subject to trade at their parents’ will.”⁶¹

However, California courts have rejected these arguments based on a lack of evidence supporting these theories.⁶² Additionally, they have held that gestational surrogacy does not violate constitutional prohibitions against involuntary servitude.⁶³ California courts, a mi-

may be induced to engage in commercial surrogacy arrangements out of financial need.” *Id.* at 792 (Kennard, J., dissenting).

59. In Massachusetts, a court held that an implied-in-fact gestational surrogacy agreement existed despite the absence of a written or express oral contract. *T.F. v. B.L.*, 813 N.E.2d 1244, 1249-50 (Mass. 2004). However, the court held the implied-in-fact contract unenforceable on public policy grounds. *Id.*

60. *See, e.g.*, Hogue, *supra* note 55, at 279-89. Some states have imposed criminal penalties, including both jail time and fines, on attorneys and other professionals who facilitate surrogacy arrangements. Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R. 5th 567, § 2(a) (2000); *see, e.g.*, *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988). Other states have outlawed surrogacy contracts outright, all on the basis that they are against public policy. *Id.*; *see also* Hogue, *supra* note 55, at 279-80.

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

62. *Id.* at 785.

Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, 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. We are likewise unpersuaded by the claim that surrogacy will foster the attitude that children are mere commodities; no evidence is offered to support it. . . .

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

Id. at 785.

63. “It has been suggested that gestational surrogacy may run afoul of prohibitions on involuntary servitude. . . . We see no potential for that evil in the contract at issue here, and extrinsic evidence of coercion or duress is utterly lacking.” *Id.* at 784. However, this holding was fact-specific. In the future, involuntary servitude may become a consideration in contract enforcement, particularly if future courts or the legislature deem gestational surrogacy contracts to be “personal service” contracts. *See* Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CAL. L. REV. 975, 1036 (2005) (discussing that courts will not order a party to complete a personal service contract because “a decree ordering an employee to specifically perform an employment contract would seem too much like involuntary servitude or peonage”). *See also infra* Part VII.A for a comparison between gestational surrogacy and personal service contracts.

nority in this view, find surrogacy agreements conscionable and enforceable.⁶⁴

The differing state of the law in this area demonstrates the nation's struggle with the moral and philosophical considerations involved. Although California courts have taken a stance with regard to these issues, future cases could instantly change the legal landscape for parties to surrogacy contracts.⁶⁵

V. ENFORCEABILITY OF GESTATIONAL SURROGACY CONTRACTS IN CALIFORNIA

Although some states have addressed surrogacy in the courts⁶⁶ or at the legislative level,⁶⁷ in California there is only one statutory provision that merely mentions surrogacy agreements.⁶⁸ Additionally, although some national-level legislation has been proposed, no federal legislation has been passed to regulate this practice.⁶⁹

64. See *Johnson*, 851 P.2d at 785.

65. In a recent California Supreme Court case, the law in the related area of egg-donor contracts made an unexpected about-face when the court went against previously established rules for enforcing this type of agreement. *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005). The parties to the agreement entered into the contract at a time when gestational surrogacy agreements were enforced and birth mothers ordered to relinquish their parental rights in accordance with these agreements. *Id.* at 678. However, this case changed the law by holding that when an egg donor gives her ova to her lesbian partner and the couple originally intended to co-parent the child, the agreement is not enforceable against the donor. *Id.* at 682.

66. See, e.g., *Johnson*, 851 P.2d at 790; *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988) (holding that adoption laws supersede gestational surrogacy contracts).

67. See Danny R. Veilleux, Annotation, *Validity and Construction of Surrogate Parenting Agreements*, 77 A.L.R. 4th 70, § 2(a) (1990).

Several states have enacted statutes that expressly prohibit the enforcement of surrogate parenting agreements, and others have introduced bills to regulate or prohibit them. In the majority of jurisdictions, however, the legal issues generated by surrogacy agreements must be resolved by reference to public policy considerations or statutes generally relating to adoptions, child custody, or the termination of parental rights, since express legislation is lacking. All 50 states have statutes that regulate adoptions and prohibit a mother from irrevocably consenting to the adoption of her child prior to birth, or prior to the passage of a prescribed waiting period after birth. Furthermore, about half of the states have "baby-selling" statutes that prohibit the exchange of money in connection with an adoption.

Id. Illinois passed the Gestational Surrogacy Act, effective January 1, 2005, to provide direction for parties to gestational surrogacy agreements. See 750 ILL. COMP. STAT. ANN. 47/1 (West Supp. 2005); Ford, *supra* note 7, at 240.

68. CAL. FAM. CODE § 7648.9 (West Supp. 2006) ("This article does not establish a basis for setting aside or vacating a judgment establishing paternity with regard to a child conceived by artificial insemination pursuant to Section 7613 or a child conceived pursuant to a surrogacy agreement.").

69. "The debate over whom the law should recognize as the legal mother of a child born of a gestational surrogacy arrangement prompted the National Conference of Commissioners

With no guidance from the legislature in this area, California courts have referred to the Uniform Parentage Act.⁷⁰ However, courts have ultimately created new case law.

Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme, looking to the imperfectly designed Uniform Parentage Act and a growing body of case law for guidance in the light of applicable family law principles. Or the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques. As jurists, we recognize the traditional role of the common (i.e., judge-formulated) law in applying old legal principles to new technology.⁷¹

California case law includes an "intent test" to determine the parentage of children born to surrogates.⁷² Under the intent test first used in *Johnson v. Calvert*,⁷³ the woman who was intended to be the child's mother when the surrogacy agreement was created should be the one granted custody of the child.⁷⁴ Because gestational contracts by their very nature establish the intent of the parties involved, the intent test makes gestational surrogacy contracts enforceable in California.⁷⁵ But enforceability and interpretation are distinct issues. While a court may enforce the purpose of the contract—to grant parental rights to the parties who hire the surrogate to gestate the fetus—courts need

on Uniform State Laws to propose the Uniform Status of Children of Assisted Conception Act." *Johnson*, 851 P.2d at 793 (Kennard, J., dissenting). The California legislature chose not to enact this proposed legislation. *Id.* at 794. In addition, legislation that would criminalize surrogacy transactions has been proposed but failed to pass into law.

Since 1989, there have been two unsuccessful attempts at passing federal legislation that would prohibit or restrict the use of surrogacy arrangements. The first bill, known as the "Surrogacy Arrangements Act of 1989," . . . sought to impose criminal sanctions upon any person who "on a commercial basis knowingly makes, or engages in, or brokers a surrogacy arrangement." . . .

The second bill, referred to as the "Anti-Surrogate Mother Act of 1989," . . . purported to criminalize all activities relating to surrogacy arrangements, including the provision of medical assistance and the advertisement of services related to such arrangements.

Lisa L. Behm, *Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States*, 2 DEPAUL J. HEALTH CARE L. 557, 585-86 (1999).

70. CAL. FAM. CODE § 7600 (West 2004).

71. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).

72. *Johnson*, 851 P.2d at 782.

73. *Id.* at 782; see also *id.* at 795 (Kennard J., dissenting) (describing and criticizing the majority's intent test).

74. *Id.* at 782 (majority opinion).

75. See Pinkerton, *supra* note 27.

additional guidance to interpret the terms within these contracts. This requires an analysis of common contractual frameworks to determine which framework is most appropriate for resolving conflicts over gestational surrogacy contract terms.

VI. WHY DOES GESTATIONAL SURROGACY INVOLVE CONTRACTS?

An agreement to gestate a child can be between family members or at arms-length between strangers.⁷⁶ It can be a purely altruistic gift or have an economic basis (many gestational surrogates are compensated monetarily for this arrangement).⁷⁷ A promise by one party to carry a child for another creates an emotion-laden expectation in the other party, and contract law becomes an issue when strangers, money, promises, and expectations combine.

A. Contracts Generally

Contracts exist to enforce promises and protect the parties' expectations in a transaction.⁷⁸ Contract law is designed to deal with the unfortunate fact that people sometimes break their promises and that unplanned factors can complicate the best-laid plans.⁷⁹

The complexity of contract law is attributable to both the inability of people to foresee all possible contingencies⁸⁰ and the fuzzy quality of language itself.⁸¹ Communication between people is open to interpretation.⁸² Beauty is in the eye of the beholder, and it seems that

76. See Behm, *supra* note 69, at 560 (describing the evolution of surrogacy agreements and the parties involved).

77. *Id.* at 560-61.

78. See MICHAEL H. DESSENT, *FIRST YEAR CONTRACT LAW* 1 (2d ed. 2003); JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 8 (3d ed. 1990).

79. See IAN R. MACNEIL & PAUL J. GUEDEL, *CONTRACTS, EXCHANGE TRANSACTIONS AND RELATIONS* 29 (3d ed. 2001).

80. FARNSWORTH, *supra* note 11, § 3.27, at 202 (discussing causes of indefiniteness in contracts).

81. *Id.* § 7.8, at 441. "It is a rare contract that needs no interpretation. It has been wisely observed that there is no 'lawyer's Paradise [where] all words have a fixed, precisely ascertained meaning . . .'" *Id.* (alteration in original) (quoting J. THAYER, *A PRELIMINARY TREATISE ON THE LAW OF EVIDENCE* 428-29 (1898)).

82. "Inadequate or inaccurate communication is familiar to us all. . . . Perfect communication between people is impossible. . . ." MACNEIL & GUEDEL, *supra* note 79, at 30. "[T]he contract is an abstract legal relationship between the parties." MURRAY, *supra* note 78, § 8.

word meanings are equally subjective. A written word or sentence can be misunderstood or interpreted in a myriad of ways.⁸³

This lack of crystal-clear understanding between people has made contract law multifaceted in response, with the law assigning different contract rules to specific types of contracts.⁸⁴ Case law has shown that the type of transaction being conducted determines which contract law framework to use; once a framework is assigned, a court can determine if a breach occurred and decide the appropriate remedy.⁸⁵

Courts adjudicate contract disputes by “protect[ing] process values, interpret[ing] language, and supply[ing] terms when the parties’ contract fails to provide for the dispute that divides them.”⁸⁶ Accordingly, contracts are categorized into different agreement types, based on the most commonly found transactions between parties,⁸⁷ such as contracts for goods, services, employment, adoption, and others. Most contracts can be defined by a category, and legal rules have evolved to dictate how courts deal with each of these categories.⁸⁸

In some cases, statutory law has been enacted to provide courts with guidelines for interpreting contracts.⁸⁹ For example, if there are missing key terms in an agreement, courts will treat this fact differ-

83. “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” FARNSWORTH, *supra* note 11, § 7.8, at 441 (quoting Justice Oliver Wendell Holmes’s opinion in *Towne v. Eisner*, 245 U.S. 418, 425 (1918)).

84. FARNSWORTH, *supra* note 11, § 1.10, at 36-37.

85. For example, in a leading case dealing with selecting the appropriate law framework to apply to a contract, the court held that “in failing to consider the UCC [the statutory law used for goods transactions], the magistrate did not apply the correct legal principles to the facts as found.” *Pittsley v. Houser*, 875 P.2d 232, 235 (Idaho Ct. App. 1994). The court further held that on remand, issues such as whether there was breach as defined by code provisions could be considered by the magistrate. *Id.* “The magistrate may then consider the various remedies that are available under the UCC and any other provisions of the code that the court deems applicable.” *Id.*; see also DESSENT, *supra* note 78, at 166-67 (discussing the applicability of the UCC only to goods contracts).

86. Alan Schwartz, *Relational Contracts in the Courts*, in FOUNDATIONS OF CONTRACT LAW 187, 187 (Richard Craswell & Alan Schwartz eds., 1994).

87. See FARNSWORTH, *supra* note 11, § 1.10, at 36 (“the general rules of contract law have been successfully accommodated to the peculiarities of particular transactions . . .”).

88. *Id.*

89. The Uniform Commercial Code was developed by Karl Llewellyn and Soia Mentschikoff, two law professors, to “provide a modern means by which parties could allocate risk and obtain enforcement for promises which were breached” in relation to contracts for goods. DESSENT, *supra* note 78, at 165-66; see also FARNSWORTH, *supra* note 11, § 1.10, at 37 (stating that general rules of contract law, such as the UCC, act as default rules which courts may apply). The code has been adopted as statutory law in forty-nine states. DESSENT, *supra* note 78, at 166.

ently in a goods contract than in a service contract.⁹⁰ When contracting for goods, otherwise necessary components such as consideration and express acceptance are not required.⁹¹ In addition, common law rules, such as the mailbox rule⁹² and the mirror image rule,⁹³ are thrown out when dealing with goods.⁹⁴ At-will employment contracts have their own framework for interpretation,⁹⁵ likely because of the nature of the relationship between employer and employee.

Sometimes parties themselves can decide what set of rules will govern their agreement, but many parties “subject[] themselves to a body of usages shown to be regularly observed in transactions of that particular sort, which then serve as a body of specialized rules for the transaction at hand.”⁹⁶ Gestational surrogacy contracts, however, are novel and a set of rules is not yet available. No *body of usages* is regularly observable, but the development of a *body of specialized rules* is inevitable.

B. Gestational Surrogacy Contracts

A gestational surrogacy contract resembles a service contract, but it can also be considered an at-will employment contract. Or, with reluctance because of the moral implications, one also can view gesta-

90. See DESSENT, *supra* note 78, at 166, 171 (explaining that the UCC applies only to goods, it is a departure from common law rules, and it allows “gap-fillers” to be used for omitted terms in contracts).

91. *Id.*

92. The mailbox rule is a contract law rule that dictates “in any case where a mailed acceptance is reasonable . . . [t]he contract is regarded as made at the time and place that the letter of acceptance is put into the possession of the postal service.” 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 3.24, at 437 (rev. ed. 1993); MACNEIL & GUDEL, *supra* note 79, at 1246. The Uniform Commercial Code abandons this rule; under section 2-204 a contract is created in any manner sufficient to show agreement, including the conduct of the parties. See FARNSWORTH, *supra* note 11, § 3.21, at 169. Therefore, goods contracts are evaluated under a different framework of rules.

93. Weisz Graphics Div. v. Peck Indus., Inc., 403 S.E.2d 146, 149 (S.C. Ct. App. 1991).

At common law, no contract is formed if the acceptance varies the terms of the offer. Instead, an acceptance which adds different or additional terms is treated as a counteroffer. . . . This so-called “mirror-image” rule, is well suited to simple, one time transactions. . . . However, it fails to accommodate the realities of much modern commercial practice. . . . For this reason, the Uniform Commercial Code modifies the “mirror image” rule.

Id. (citation omitted); see also FARNSWORTH, *supra* note 11, § 3.21, at 161, 163; MURRAY, *supra* note 78, § 11, at 23.

94. These rules do not apply to contracts for the sale of goods. See MURRAY, *supra* note 78, § 11 (defining the rule as “matching acceptance”).

95. See FARNSWORTH, *supra* note 11, § 2.10, at 68.

96. *Id.* § 1.10, at 37.

tional surrogacy contracts as akin to contracts for goods or unborn livestock. This issue—which contractual framework to use when evaluating gestational surrogacy contracts—has not yet been discussed by courts dealing with this fairly modern medical procedure. At present, courts have analyzed the social and ethical problems related to enforcing these agreements,⁹⁷ but have yet to consider the framework to use in cases where the contract itself has missing terms or formation problems. Finding the contracts either void and unconscionable or valid and enforceable has been an issue in case opinions.⁹⁸ However, courts have yet to evaluate a gestational surrogacy contract against an existing framework, such as the common law, or under a statutory code analysis.

California is one of the few states to recognize gestational surrogacy contracts as valid and enforceable if the parties intend to be bound at the time of agreement. Although the enforceability of the contract depends on the intent test in *Johnson v. Calvert*,⁹⁹ issues about a disagreement over terms unrelated to custody of the child would have to be evaluated under some type of contract analysis. As of yet, only enforceability itself (as related to parental rights) has been decided by California courts. Future cases or legislation will decide how

97. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 783-85 (Cal. 1993); see also *id.* at 791-93 (Kennard, J., dissenting).

98. See, e.g., *id.* at 782 (majority opinion); *K.M. v. E.G.*, 117 P.3d 673, 686 (Cal. 2005) (Werdergar, J., dissenting); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).

California family law generally protects surrogacy and egg donation contracts.

Infertile couples from around the world have found California to be a highly favorable legal forum for assisted parenthood. In general, California:

- Has well established case law which protects all parties to surrogacy and egg donation pregnancies;
- Honors the intentions expressed in a written contract between prospective parents, surrogates and egg donors; and
- Consistently upholds assisted parents' rights and obligations to their parenthood, whether they use their own genetic material with a surrogate, donated eggs, or donated sperm for help in creating their families.

Pinkerton, *supra* note 27. However, due to a narrow holding made in August of 2005, egg donor agreements between co-habiting women may not be enforceable. See *K.M.*, 117 P.3d at 682. But, egg donor contracts are distinguishable from gestational surrogacy contracts: in the former, it is the birth mother who intends to both gestate and raise the child, while in the latter, the birth mother intends only to gestate the child for others to raise. *Id.* at 678-79. In addition, the holding in *K.M.* applies only to a limited type of party, as the court was clear in expressing, “[w]e decide only the case before us, which involves a lesbian couple who registered as *domestic partners*. We express no view regarding the rights of others” *Id.* at 678 n.3 (emphasis added).

99. *Johnson*, 851 P.2d at 782. A court will determine the intent of the parties at the time the parties entered into the agreement to determine parentage of the child. Pinkerton, *supra* note 27 (explaining the intent test as set forth in *Johnson*).

terms are to be interpreted once intent is established and the contract is found enforceable.

Undoubtedly, guardianship and parentage of the child is only one part (albeit the most important part) of these agreements. But terms are usually included to account for a number of other contingencies and compromises: compensation for carrying the child, compensation for expenses, agreement to undergo medical procedures and tests, and even terms that dictate the surrogate's drinking and smoking habits.¹⁰⁰ Some agreements even include terms that give parties the discretion to elect abortion of a fetus.¹⁰¹

Although precedent now allows California parties entering into these agreements to feel confident that their contracts will be upheld as valid once party intent can be established, questions remain about which rules will be used to resolve problems in case of breach, missing terms, disagreements over compensation and expenses, or contract formation issues. These issues cannot be resolved under an intent test, so some workable framework is needed. Having a set framework will allow greater judicial expediency and certainty when adjudicating conflicts that will possibly arise in these delicate arrangements.¹⁰² As a result, parties can know in advance how the agreement terms will likely be interpreted if a disagreement arises.

VII. APPLYING EXISTING CONTRACT FRAMEWORKS AND DOCTRINES TO THE GESTATIONAL SURROGACY CONTRACT

All contract law frameworks have one thing in common: courts use them for guidance when deciding how conflicts should be resolved. One possible conflict that could arise in a gestational surrogacy agreement is a disagreement over which party is responsible for

100. See Mark A. Johnson, *Observations of Laws of Surrogacy in the U.S. (Part 5)*, SURROGACY.COM, Feb. 26, 2005, <http://www.surrogacy.com/legal/article/checklist/chk1st7.html>.

101. See Moran, *supra* note 14.

102. See *K.M.*, 117 P.3d. at 685 (Werdegar, J., dissenting).

[C]ourts have sought above all to avoid foreseeable disputes over parentage with rules that provide predictability by permitting the various persons who must cooperate to bring children into the world through assisted reproduction to determine in advance who will and will not be parents, based on their expressed and voluntarily chosen intentions.

Id.

a particular cost.¹⁰³ Another area of uncertainty relates to unexpected medical procedures.¹⁰⁴ In order to explore ways that courts can resolve these and other conflicts, the following contractual frameworks are discussed in relation to gestational surrogacy contracts.

A. Service Contracts

Service contracts refer to contracts between parties who are in an employer-independent contractor relationship, such as contracts for freelance work by individuals and services provided by businesses.¹⁰⁵ A contract for a service is formed when a party agrees to perform an act for another party in exchange for some form of consideration.¹⁰⁶ Examples of service contracts include hiring a cleaning service to tidy up a home in exchange for payment, providing childcare for another person's child in exchange for an item of value, and paying to have an item delivered to a location. A personal service is one performed by a specific individual and it is usually not assignable to another.¹⁰⁷

Consider the ordinary childcare provider running a daycare center: he or she contracts to take care of other people's children in exchange for compensation. The provider assumes a duty to the children who spend time there. The contract can specify instructions that must be followed in caring for the children, such as administering medicine and following diet restrictions due to allergies. The provider is responsible in some way for the development of the child, since growth takes place while the child is in his or her care. The compensation paid to the provider is not tied to the release of the child back to the

103. "The most common need for . . . legal assistance is when a surrogate and intended parent do not agree on whose responsibility a particular cost is [sic]." Everything Surrogacy, *supra* note 56.

104. *See id.*

105. Service contracts are discussed separately from employment contracts. An employment contract refers to the contract between an employer and an employee, as distinguished from a contract between an employer and an independent contractor. "The rights of independent contractors may differ from the rights of employees . . ." MICHAEL H. DESSENT, ENTERPRISE LAW 740 (3d ed. 2006). The distinction is critical enough that the Internal Revenue Service and other government agencies clearly distinguish between workers classified as independent contractors and employees. *Id.* Lawsuits may arise over this distinction. *Id.*

106. 3 ANN TAYLOR SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES § 56.2 (2005).

107. MURRAY, *supra* note 78, § 138, at 801. In gestational surrogacy, the issue of assignability would arise if the gestational surrogate desires to subcontract her role to another woman after signing the contract but before the medical process begins.

parents; if the provider were to refuse to relinquish the child back to the parents, this would be a criminal and civil wrong.¹⁰⁸

A gestational surrogacy agreement is somewhat analogous to this arrangement. The gestational surrogate assumes a duty of care over the small individual she carries. Like a childcare provider who agrees to address specific needs for a child, the gestational surrogate usually contracts to take care of the growing baby's needs by staying healthy and avoiding drugs, smoking, and alcohol.¹⁰⁹ Growth takes place while she has physical custody of the baby. The compensation paid to her is analogous to the compensation paid to the childcare provider; it is tied only to the service and is not an incentive to turn over physical custody at the end of the contract term. Therefore, an intended parent could claim kidnapping if the gestational surrogate refused to relinquish the child after birth. Further, as in a personal services contract, "where what is bargained for is a specific person's performance,"¹¹⁰ the gestational surrogacy arrangement is for a specific woman to provide the gestation service. She cannot delegate her duty to another woman because of the personal nature of her service.

Although the service contract model is a good fit because of the logical relationship between childcare and gestation, key distinctions exist between service contracts and gestational surrogacy contracts. For instance, generally daycare centers are regulated by state law that dictates the level of care to be taken.¹¹¹ In contrast, because gestational surrogacy has not yet been written into legislation, there is no official standard established for the level of care to be exercised when gestating a fetus for another person. Also, while a parent can instantly remove a child from the daycare center, an intended parent cannot safely remove the fetus from the care of the gestational surrogate prematurely. Additionally, the issue of assignability is a factor. A daycare provider can hire subcontractors to work in her daycare center, while a gestational surrogate cannot assign her duties once the fetus is growing within her womb.

108. For example, the provider could be liable for a criminal charge such as kidnapping. See CAL. PENAL CODE § 207 (West 1999 & Supp. 2006).

109. See Johnson, *supra* note 100.

110. Stuart M. Riback & Siller Wilk, *Intellectual Property Licenses: The Impact of Bankruptcy*, in PRACTISING LAW INSTITUTE: PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 762, 785 (2005).

111. See, e.g., Daycare.com, California State Requirements, <http://www.daycare.com/california/center.html> (last updated Aug. 7, 2002).

Most importantly, compensation differs between the two contract types. In many gestational surrogacy agreements, payment is dependant on relinquishment of the baby upon birth.¹¹² In cases where the arrangement deteriorated only because the birth mother refused to release custody of the child, the intended parents refused to pay the fee to the birth mother.¹¹³ Therefore, in one view, the surrogate is not only providing the service of physical care for the baby, but she is also earning her fee by handing the child over after its birth. In comparison, in a service contract, the fee is directly tied to the service itself, and not necessarily to the status of a product or good.¹¹⁴

B. At-Will Employment Contracts

An at-will employment contract can be interpreted under state contract law or, in some cases, state and federal labor laws.¹¹⁵ Under the common law, "employment is presumed to be voluntary and indefinite for both employees and employers. As an at-will employee under the doctrine, you may quit your job whenever and for whatever reason you want, usually without consequence. In turn, at-will employers may terminate you whenever and for whatever reason they want"¹¹⁶

112. See Everything Surrogacy, *supra* note 56.

It should be noted that in about 40% of all surrogacies there are illegal and ill advised payments made to the surrogate after the birth. Many intended parents prefer to pay their surrogate part or all of her "fee" after the birth because it protects them financially in the event of a major problem. It would be tragic not only emotionally but financially if they were to invest so much in a surrogacy which in the end did not result in the child they have been wanting so very badly. This or [sic] course becomes a major mess should the intended parents not pay the surrogate as she would have very little possible legal recourse because payment after the birth is considered baby selling in most U.S. states.

Id.

113. See, e.g., Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).

114. If the essential purpose of a contract is the sale of goods with a service being only incidental, the law governing the sale of goods applies. Pittsley v. Houser, 875 P.2d 232, 235 (Idaho Ct. App. 1994) (determining that whether a service or the sale of goods is the essential purpose of a contract is necessary before applying the applicable law to the facts). Different remedies are applied to a contract based on services. See *id.*

115. DESSENT, *supra* note 105, at 729; see also Caterpillar Inc. v. Williams, 482 U.S. 386, 390 (1987) (analyzing an at-will employment contract under state contract law and federal labor law). Therefore, if a gestational surrogacy contract is deemed to fit the at-will employment agreement framework, the parties need to consider any applicable employment and labor statutes.

116. J. Steven Niznik, *Employment at Will*, ABOUT.COM (2002), <http://jobsearchtech.about.com/od/laborlaws/1/aa092402.htm>.

A gestational surrogate may be considered a type of employee because she is hired to provide her body's organic processes to the intended parents for an indefinite time span, much like an employee providing physical labor for his or her employer's benefit. Successful implantation can take many months to achieve, requires voluntary cooperation, and can be called off early by abandoning the process. Moreover, the pregnancy itself may last an indefinite number of weeks due to the possibility of early miscarriage. These factors can be argued to characterize the *employment* of a gestational surrogate as *voluntary* and *indefinite*, as required for an at-will employment agreement.

The key factor that makes an at-will employment agreement and a gestational surrogacy contract distinct is that one cannot expect the surrogacy relationship to be terminable at will by either party. The gestational surrogate should not be able to cancel her service while the fetus is growing within her, for doing so would have a detrimental effect on the life she carries. Similarly, the intended parents should not have the right to abandon the plan and leave the gestational surrogate pregnant with their child, depriving the gestational surrogate of her compensation and forcing her to keep the child or give the child up for adoption. Because of these key differences, the at-will employment framework is inappropriate for gestational surrogacy agreements.

C. Adoption Contracts

California courts addressed the issue of whether to apply adoption contract principles to gestational surrogacy contracts. The courts held that the lack of a genetic tie between the gestational surrogate and fetus she carries makes adoption an inaccurate way to describe her relinquishment of rights.¹¹⁷

117. The court in *Johnson* rejected the . . . argument that policies underlying the adoption laws of the state were violated by a surrogacy contract because it in effect constituted a prebirth waiver of [] parental rights. The court stated that gestational surrogacy differs in crucial respects from adoption and, therefore, it is not subject to the state's adoption statutes.

Campbell, *supra* note 60, § 6a.

D. Sale of Goods Contracts

The Uniform Commercial Code changes classical contract law for transactions dealing with goods.¹¹⁸ Goods contracts can be formed and enforced even when the common law principles of offer and acceptance are missing.¹¹⁹ Terms can be expressly included in a writing, such as the goods contract, or can be found by the court.¹²⁰ A contract for the sale of a good can be formed even when a crucial term such as price has not been specified.¹²¹ In common law service contracts, the “failure to include terms such as price, time of delivery, place of delivery, or other details of the bargain” would constitute “fatal indefiniteness.”¹²² However, a sales contract can be missing these terms and still be valid and enforceable because the Uniform Commercial Code “permits virtually any term (with the exception of the quantity term) to be implied.”¹²³ Also, unlike service contracts under the common law, “the precise time of contract formation need not be provable” because a person “may accept an offer in any reasonable manner or medium.”¹²⁴

Although morally distasteful to compare gestational surrogacy to an exchange of property, similarities exist.¹²⁵ The Uniform Commercial Code defines “goods” to also include “the unborn young of animals and growing crops.”¹²⁶ A rancher or animal breeder can contract for ownership of unborn livestock or pets that are being gestated by another’s animal. A farmer can also sell his unconceived crops to another person, who will have rights to the crops once they are grown. In comparison, a gestational surrogate agrees that the child she will

118. MURRAY, *supra* note 78, § 11, at 22-23.

119. “A contract for a sale of goods may be made in any manner sufficient to show agreement” U.C.C. § 2-204(a) (1998); *see also* FARNSWORTH, *supra* note 11, § 3.21, at 169.

120. FARNSWORTH, *supra* note 11, § 3.21.

121. *Id.* § 3.29, at 211.

122. *See* MURRAY, *supra* note 78, § 11 (noting that the UCC liberalized this view).

123. *Id.*

124. *Id.*

125. “For those who argue that embryos and fetuses are persons, the theory of strong property interests will likely be unpalatable.” Berg, *supra* note 38, at 160. “[S]ome people [would] respond in horror exclaiming: ‘Surely an embryo is not merely a piece of property!’” *Id.* at 170-71. However, “[i]t is certainly conceivable to talk about embryos in terms of property” because property theory “function[s] as a mechanism to allocate rights and interests” and “does not refer to absolute dominion over a ‘thing,’ but rather ‘a set of legal relations among persons’ relating to things.” *Id.* at 172, 174, 192.

126. U.C.C. § 2-105 (1998).

carry belongs to another party before it is even conceived.¹²⁷ In many real-life scenarios, her compensation is tied to her relinquishment of the child.¹²⁸ In these ways, gestational surrogacy resembles a goods transaction.

Intuitively, one realizes that people invest more emotions and caring into a gestational surrogacy arrangement than will ever exist in a mere goods contract. Although some breeders of pets may feel close to the animals they work with, this relationship cannot compare to the bond between parents and children. Because of this complex emotional involvement, the goods contract model is an inadequate comparison.

E. Relational Contracts

Not all contracts represent discrete transactions.¹²⁹ In situations where

future contingencies are peculiarly intricate or uncertain, practical difficulties arise that impede the contracting parties' efforts to allocate optimally all risks at the time of contracting. Not surprisingly, parties who find it advantageous to enter into such cooperative exchange relationships seek specially adapted contractual devices. The resulting "relational contracts" encompass most generic agency relationships,¹³⁰

including employment agreements, where "[c]lose whole person relations form an integral part of the relation."¹³¹ Intangible elements such as "friendship, reputation, interdependence, morality, and altruistic desires" are "integral parts" of relational contracts.¹³²

Sometimes a traditional analysis—defining whether an agreement consisted of offer, acceptance, and consideration—does not adequately cover the "complex negotiations typical of substantial transactions."¹³³ These negotiations can involve a "gradual process in which

127. Johnson, *supra* note 100.

128. See *supra* note 112.

129. MACNEIL & GUEDEL, *supra* note 79, at 14-15. "Discrete transactions are contracts of short duration, involving limited personal interactions, and containing precise party measurements of easily measured objects of exchange . . ." *Id.* at 14.

130. Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1090-91 (1981).

131. MACNEIL & GUEDEL, *supra* note 79, at 15.

132. *Id.*

133. FARNSWORTH, *supra* note 11, § 3.5.

agreements are reached piecemeal.”¹³⁴ “Instead of a simple, discrete transaction to be consummated in the near future, there may be a complex of transactions to be spread over a period of time.”¹³⁵ Relational contracts do not fit into an existing framework, yet they also cannot be categorized as a separate framework. While frameworks define rules for contract interpretation, relational contracts by essence defy any imposition of rigid rules.¹³⁶

The relational contract theory “looks to relationships between parties to find the existence and terms of a contract.”¹³⁷ Relational contracts “do not settle all important terms; rather they establish a framework within which the parties compose their differences.”¹³⁸ In a relational contract, the relationship can be “expected to last for many years.”¹³⁹ When the future is not foreseeable, draftsmen of relational contracts do not “try to bind the parties to each other with iron fetters.”¹⁴⁰

Gestational surrogacy contracts are the epitome of relational contracts because very few relationships between parties match the uncertainty and complexity of this medical procedure. The gestational surrogacy procedure can be a long-term commitment with no end date in sight at the time of formation. The relationship requires ongoing co-

134. *Id.*

135. *Id.* § 3.27, at 202.

136. “[T]here has been a positive movement away from strict and rigid rules of law in order to accommodate long-term contracts that have become manifestly unfair: evenness and equity should prevail over form, and justice demands whatever flexibility is necessary to fill in contractual gaps and adapt to unexpected changes.” *McGinnis v. Cayton*, 312 S.E.2d 765, 772 (W. Va. 1984).

137. Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 41 (2004).

[W]henever an ongoing relationship between the parties is likely to be more important than a discrete transaction or communication between the parties, the law should look to the relationship itself rather than to specific terms or the lack thereof. As Charles Goetz and Robert Scott put it, “[a] contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations.”

Id. (alteration in original) (quoting Goetz & Scott, *supra* note 130, at 1090-91).

138. *Merk v. Jewel Food Stores*, 945 F.2d 889, 901 (7th Cir. 1991) (Easterbrook, J., dissenting).

139. *R.S. & V. Co. v. Atlas Van Lines, Inc.*, 917 F.2d 348, 352 (7th Cir. 1990).

140. *Id.* Proponents of the relational contract framework see written and signed contracts “as but one factor to consider in solving problems.” 2 STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 1-2 (2d ed. 2003).

ordination of action between the parties, creating a relational connection that is unique to those parties.¹⁴¹

Gestational surrogacy contracts do not necessarily involve contract-savvy individuals. This is a personal arrangement that can occur between parties of different educational and economic levels and who may have little or no experience with complicated business transactions.¹⁴² In many cases, one party may not have an attorney and is relying on the work of the other party's attorney. In other cases, both sides lack legal representation and rely on a form contract supplied by an agency.¹⁴³

The relational contract framework provides the most flexibility in interpreting the agreements between the parties because outside factors, changing circumstances, and the relationship between parties are taken into account.¹⁴⁴ But this flexibility and the lack of case law regarding interpretation of relational contracts¹⁴⁵ make this framework inappropriate. Recognizing a contract as being "relational" will not dictate how a court should interpret its terms and language. Parties need certainty rather than flexibility to effectively forecast how their agreements will be adjudicated. A better-defined framework with clear rules will allow parties to plan for the future and have some assurance that their intent and wishes will be upheld.

141. Gestational surrogacy is "undoubtedly one of the most personal and complicated of concerted human actions. . . . A grossly underestimated aspect of the [gestational surrogacy] contract is that it requires the involved parties to focus on an exceedingly complex undertaking which involves some of the thorniest issues of our day." Johnson, *supra* note 100.

142. *See id.* (explaining the range of parties that may participate in such contracts and outlining the multitude of issue to consider).

143. Internet bulletin boards contain posts that show some women attempt to contract for gestational surrogacy without the use of an attorney. *See, e.g.,* Jennifer S., Response to Anonymous, Surrogate Mothers Online Q & A (Jan. 31, 2000), <http://www.surromomsonline.com/answers/8.23.htm>. One post received a response that points the website visitor to an online sample gestational surrogacy contract. *Id.* One can imagine that agreements between family members, such as a sister offering to carry a child for a sister that is unable to do so, might not be formalized in writing.

144. Goetz & Scott, *supra* note 130, at 1090-92.

145. At the time of writing this Comment, the Westlaw database contained only twenty-three cases that include the term "relational contract," and none provided a clear framework of rules and doctrines for interpretation of the terms and language of these contracts.

F. Contract Law Concepts Applied to Gestational Surrogacy Contracts

1. Promissory Estoppel

Promissory estoppel¹⁴⁶ allows a party who relied on the other party's promise to recover for injuries incurred when the other party breaks that promise, as justice requires.¹⁴⁷ In gestational surrogacy, this doctrine can be applied to enforce an implied agreement based on reliance. For example, if a woman tells a fertility-challenged couple that she volunteers to carry their child for them, the intended parents have not entered into a contract by accepting the woman's gift unless they promise something in return. Voluntary gifts do not create contracts.¹⁴⁸ However, if the couple pays for the medical procedure and forgoes seeking other alternatives in reliance on the woman's promise, then a court could hold that this reliance estops the woman from failing to carry out her promise.

2. Parol Evidence Rule

The parol evidence rule seems simple at first. It stands for the proposition that a written contract between parties supersedes prior negotiations, making the writing the full manifestation of their bargain.¹⁴⁹ However, "people seldom agree expressly that a writing they sign is the final crystallization of their contract."¹⁵⁰

Consider again surrogate Helen Beasley's argument: she insists she had a valid oral agreement specifying that any election by the intended parents to abort a fetus must be made before twelve weeks of pregnancy.¹⁵¹ This alleged oral agreement was not included in their written contract.¹⁵² A court should apply the parol evidence rule,¹⁵³

146. "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); FARNSWORTH, *supra* note 11, § 2.19, at 93.

147. FARNSWORTH, *supra* note 11, § 2.19, at 93.

148. *See id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. b (1981).

149. MACAULAY ET AL., *supra* note 140, at 272.

150. *Id.*

151. *See Surrogate Mother Pushes for Adoption*, *supra* note 14.

152. *Id.*

153. "Generally, the parol evidence rule seeks to exclude testimony of negotiations occurring prior to, or contemporaneous with, the execution of a written instrument." Paolo

with its exceptions,¹⁵⁴ to determine if this oral agreement is an enforceable add-on to the written agreement. This would encourage parties to confirm any subsequent modification to their original agreements in writing. Applying the parol evidence rule would also protect parties who have signed a final agreement from claims that a prior promise made during negotiations should be incorporated into the agreement by a court.

3. *Missing Terms*

The creation of a goods contract can occur even when offer and acceptance are missing.¹⁵⁵ Even the absence of key terms such as price and place of delivery will not negate the formation of a valid goods contract.¹⁵⁶ For missing terms, the flexibility of the goods contract framework allows the greatest chance that incomplete agreements will still be held enforceable and therefore offers parties more protection.¹⁵⁷ The courts should also reasonably imply missing terms in gestational surrogacy contracts because this would similarly offer parties more protection by making incomplete agreements enforceable.¹⁵⁸

4. *Conditions*

A condition is an “event that must occur before performance of a contractual duty becomes due. In general, a party whose duty is conditioned on such an event is not required to perform unless the event has occurred.”¹⁵⁹ In a gestational surrogacy contract, a perfect exam-

Torzilli, Note, *The Aftermath of MCC-Marble: Is This the Death Knell for the Parol Evidence Rule?*, 74 ST. JOHN'S L. REV. 843, 845 (2000).

154. Section 1856 of the California Code of Civil Procedure defines the parol evidence rule in California and lists several exceptions.

155. “[A] contract for a sale of goods may be made in any manner sufficient to show agreement,” according to section 2-204 of the Uniform Commercial Code. FARNSWORTH, *supra* note 11, § 3.21, at 169.

156. See MURRAY, *supra* note 79, § 11, at 23 (explaining that the UCC liberalized the rules on missing terms and represented a radical departure in some cases from classical contract law).

157. *Id.* (noting that Article 2 “permits virtually any term (with the exception of the quantity term) to be implied”).

158. See *supra* note 143. Some parties enter into gestational surrogacy agreements without the advice or assistance of an attorney. *Id.* Interpreting their agreement under the more lax commercial code formation rules would help laypersons defend their bargain in spite of sloppy drafting.

159. FARNSWORTH, *supra* note 11, § 8.1, at 502.

ple of a condition is the commonly included fee payment term that is conditioned on surrogates reaching certain milestones, such as successful implantation or completed gestation and birth.¹⁶⁰ A breach of a condition could lead to litigation over its performance or dispute about the compensation due to the surrogate. Courts should require that conditions be met by parties before return performance is necessary to protect the bargain struck between the parties.

5. *Substantial Performance*

Full performance is not required under common law in order to have legally performed a contract.

Rather than using a strict performance standard, courts have often adopted a test of materiality. If X has performed some but not all of his duties under a contract, Y may walk away free and clear of any obligation other than restitution only if the failure of performance is “material” or “substantial.”¹⁶¹

However, this principle has not been universally accepted because judges “generally have not applied it” to contracts for goods.¹⁶² Goods must follow the “perfect tender rule,” which allows a party to reject delivery of the goods if they “fail *in any respect* to conform to the contract.”¹⁶³

Because of the impracticability of expecting a pregnancy to proceed without complication or a child to be born with physical perfection, the common law principle of substantial performance, rather than perfect tender, is the recommended model. If a gestational surrogate has materially performed all agreed-upon requirements, minus minor omissions (such as skipping her mandatory vitamins for two days), then she has materially and substantially performed despite deviation from the precise terms in the agreement. She should receive full compensation for her services, offset by whatever costs her omission incurred for the other party.

160. See Everything Surrogacy, *supra* note 56.

161. MACAULAY ET AL., *supra* note 140, at 434.

162. FARNSWORTH, *supra* note 11, § 8.12, at 551.

163. MACAULAY ET AL., *supra* note 140, at 436.

6. Remedies

If the intended parents refuse to take the child, they should pay child support or put the child up for adoption at the birth mother's election. However, if the intended parents refuse to pay the surrogate her fee or expenses, a court should decide how their fee arrangement should be interpreted and issue a judgment accordingly.

If the surrogate breaches by refusing to relinquish the child, this should be treated as a kidnapping. If she demands additional money in exchange for relinquishing the child, this is a ransom because she should have gone to court seeking additional compensation rather than resorting to self-help. If the police fail to assist the intended parents in pursuing her as a kidnapper (which would be the case since most officers would assume the child is with its rightful mother), the intended parents should be awarded specific performance at trial. At their election, they could decide not to pursue specific performance but would then be entitled to reimbursement of gestational surrogacy fees, plus the additional and often more substantial costs of the *in vitro* procedure and the medical bills accumulated during the pregnancy.

If the gestational surrogate breaches the contract terms, such as a term that dictates what her diet will be during pregnancy, but she ultimately completes the contract, the doctrine of substantial performance should be used so that she would still receive her fee, offset by any added costs incurred by the other party due to her breach. These costs would be determined by a jury, because a fact-finder would need to decide the value to place on an abstract concept such as how diet affects a growing fetus.¹⁶⁴

VIII. RECOMMENDATION

This Comment has explored existing contractual frameworks and applied them to the gestational surrogacy transaction. Some frameworks are judge-made, such as the common law applied to service contracts, while others are statutory, such as the Uniform Commercial Code for goods contracts. One framework—relational contracts—is the product of scholars and academics, and it appears to be the anti-framework, which eschews traditional rules in lieu of judicial flexibility.

164. For example, medical experts can be used to show how the gestational surrogate's actions affected the pregnancy.

While some frameworks seem appropriate in some regards, there are problems with each form. No framework provides a perfect fit. Each has severe disadvantages or incompatibilities with the gestational surrogacy relationship. In addition, while many common law stand-alone doctrines such as promissory estoppel and the parol evidence rule would be helpful in settling disputes and resolving conflicts, none of these doctrines represents a complete framework.

As a result, this Comment urges courts not to choose an existing framework. To do so would set a precedent that could bind other courts to apply a framework that is only partially compatible with the gestational surrogacy transaction. Even the application of relational contract principles—which prescribe flexibility—would disadvantage parties by providing them with no certainty as to how a dispute would be interpreted. This would create problems for drafters of these agreements and might discourage people from choosing gestational surrogacy.

This Comment recommends that academics, together with advice from the medical community and the attorneys who advise surrogates and intended parents, create a statutory code to present to the California legislature that would dictate how these contracts should be interpreted. Just as a statutory code was adopted to govern the sale of goods,¹⁶⁵ the California legislature can adopt a code to govern gestational surrogacy agreements. Until then, courts should issue opinions that interpret these contracts, yet make clear that a statutory code is necessary and would override any preceding case law on the subject.

IX. CONCLUSION

In conclusion, contract rules and frameworks serve only as guides. In practice, courts often bypass established rules of contract interpretation because language cannot be pinned down with reliable precision. “Indeed, a court can often select from among pairs of opposing or countervailing rules that seem to conflict, although it should come as no surprise to lawyers that there are situations in which two sound policies argue for opposite results.”¹⁶⁶

Gestational surrogacy contracts will become more common as the medical process advances and gains reliability. Attorneys should counsel their clients to make them aware of the uncertainty in this area

165. See *supra* Part VII.D.

166. FARNSWORTH, *supra* note 11, § 7.11, at 457.

of contract law and should include as many foreseeable contingencies as possible in a gestational surrogacy contract.¹⁶⁷ In time, the California legislature will hopefully create a code that will provide more certainty for parties.

And finally, a prediction: While this procedure is currently used to help infertile individuals who are incapable of either conceiving or carrying a child on their own, it could one day be socially acceptable for a woman who is herself physically able to carry a child to elect to hire another woman to gestate it for her instead. Just as childcare was once rarely necessary because most mothers were homemakers, yet is common today, perhaps the state of pregnancy is moving in the same direction. Busy, career-driven women will have the technology readily available that will allow them to have children that are genetically their own without needing maternity leave or undergoing the physical state of pregnancy. Gestational surrogacy might also be used by women who decide to harvest their eggs before undergoing chemotherapy. These women might elect to implant embryos in a gestational surrogate rather than bear the child themselves once the cancer is in remission.

These possible scenarios trigger a caution: "Some fear the development of a 'breeder' class of poor women who will be regularly employed to bear children for the economically advantaged."¹⁶⁸ Taking this technology even further into the future, one can imagine a point at which the gestational surrogate will no longer be necessary. What if science someday allows gestation of a fetus to full growth inside an artificial womb, bypassing the need for a human womb? At that point, the legislature and legal community will hopefully have addressed in depth this brave new world of fertility science.

*Flavia Berys**

167. An excellent summary of key points for an attorney to include in a gestational surrogacy contract is available on the Internet. See generally Johnson, *supra* note 100.

168. Johnson v. Calvert, 851 P.2d 776, 792 (Cal. 1993).

* J.D. Candidate, California Western School of Law, 2007; B.A., University of California, Los Angeles, 1999. A special thanks to Professor and Dean Emeritus Michael H. Des-sent, whose remark in class inspired this work. His mentoring and advice are invaluable to me. Thanks also to my sister Carolina and the Law Review board for their feedback and painstaking editing. Lastly, I dedicate this Comment to my mom and to my best friend, who happen to be the same person.

