# Why the Intent Test Falls Short: Examining the Ways in Which the Legal System Devalues Gestation to Promote Nuclear Families

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*For hundreds of years, the act of gestating and giving birth to a child was the lynchpin of the mother-child relationship. Now, changes in technological and societal norms have made it possible for motherhood to be established by some combination of gestation, genetics, and intent. As maternity disputes have increased, courts have privileged genetic and intent-based claims to motherhood over gestation-based claims.*

*This Note argues that in privileging genetic and intent-based claims to maternity over gestation-based claims, courts have implicitly devalued the historic importance of gestation in ways that privilege nuclear families at the expense of more marginalized women. Part II provides background on the evolution of the mother-child relationship in U.S. family law. Part III discusses the ways in which the legal system's current approach to maternity disputes was shaped by its historical approach to paternity disputes. Part IV explores the ways in which the current approach specifically disadvantages gestational mothers — in particular, gestational surrogates and birth mothers. Part V proposes a model of reform that would more fully recognize both the contributions of gestational mothers and the rights of children to have relationships with all the women involved in their creation.*

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# I. INTRODUCTION

The fundamental tension at the heart of family law lies in the dual nature of the family in American society. On the one hand, certain norms have evolved over the past 150 years such that the family is increasingly viewed as a deeply private institution with which the law should not interfere.[1] These norms have been affirmed by judicial reluctance to adjudicate familial relationships.[2] At the same time, because the family unit has always operated as a legal construct of the state, individuals may form families that the state does not recognize.[3] Unfortunately, many of the legal benefits of belonging to a family are inaccessible to those whose family arrangements are not legally cognizable under U.S. law.[4]

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1. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1510–1511 (1992) ("One hundred years ago, in *Maynard v. Hill*, [125 U.S. 190 (1888)] the Supreme Court cited both the public and the private importance of marriage as reasons for retaining a high degree of state control over the institution of marriage . . . A century later, in *Zablocki v. Redhail*, [434 U.S. 374 (1977)] the Supreme Court invoked a strikingly similar characterization of marriage to affirm the existence of an individual right to marry and to hold that state requirements that significantly interfered with the exercise of this individual right were constitutionally suspect."). As a result, as marriage moved from the public sphere to the private, the decision-making autonomy/happiness of individuals in the relationship became increasingly emphasized. *Id.* at 1512.

2. See, *e.g.*, United States v. Lopez, 514 U.S. 549 (1987), in which the Supreme Court, opposed to the perceived extremity of the government's position in the case, noted that it might lead to a slippery slope in which the family, too, was regulated. *See also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (acknowledging the existence of a "private realm of family life in which the state cannot enter").

3. For instance, the United States protects and privileges "marital relationships," yet has historically defined the "marital relationship" in very restrictive ways. Throughout history, this has left many families formed through unprotected extramarital partnerships vulnerable. For example, interracial partners could not marry until *Loving v. Virginia*, 388 U.S. 1 (1967), fathers in arrears on child support could be barred from marrying until *Zablocki v. Redhail*, 434 U.S. 374 (1978), prisoners could be prevented from marrying until *Turner v. Safley*, 482 U.S. 78 (1987), and same-sex couples could be refused marriage licenses until *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Because the law also distinguished between marital and non-marital children until very recently — see *infra* Part II — the state's refusal to allow particular marriages to occur increased the likelihood that partners excluded from marriage would also have a more difficult time securing state recognition of their parent-child relationships.

4. Most recently, the fight to recognize same-sex marriage highlighted this gap: same-sex partners established sincere, emotional bonds with each other but, lacking the ability to participate in state-sanctioned marriage, were often considered legal strangers. In *Obergefell v. Hodges*, the case that invalidated bans on same-sex marriage nationwide, the plaintiff sought to be listed as the surviving spouse on his husband's death certificate, contrary to a state law that required Obergefell and his partner to "remain strangers even in death." 135 S. Ct. at 2594. Similarly, in *United States v. Windsor*, 570 U.S. 744 (2013), the plaintiff brought suit after she was unable to claim a federal estate tax exemption for surviving spouses, as the federal government did not recognize her marriage and thus could not recognize her as a "surviving spouse." *See also* UNIV. WISC.-EXTENSION CTR. FOR

Although U.S. law lacks a consensus definition of the term "family,"[5] the U.S. Census Bureau defines a family as "a group of two people or more (one of whom is the householder) related by birth, marriage, or adoption and residing together[.]"[6] To extrapolate from the Census Bureau's definition, individuals who desire legally cognizable familial relationships must demonstrate either that they are genetically related or that they have entered into contractual relationships that the legal system recognizes and enforces.[7] Today, a lack of recognition of a certain family as a legally cognizable family usually involves a state failure to recognize a relationship that the individuals established by contract rather than by blood.[8] It is this nexus between contract law and the family that facilitates the movement of non-traditional family[9] arrangements from their creation in the

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EXCELLENCE IN FAMILY STUDIES, BUILDING POLICIES THAT PUT FAMILIES FIRST: A WISCONSIN PERSPECTIVE 18–23 (Karen Bogenschneider et al. eds., 1st ed. 1993), https://learningstore.uwex.edu/Assets/pdfs/BFI01.pdf [https://perma.cc/5H3Y-KU82]. ("How we define the family is often hotly-debated because the definition has significant consequences in people's lives. . . . Towns or cities often have to define families in developing zoning and housing regulations. Family definitions can have a bearing on access to such resources as health and life insurance, educational, recreational, and mental health services. Furthermore, definitions sometimes convey societal beliefs about what is 'normal' and 'acceptable' and thus, by implication, what is 'deviant' or 'socially sanctioned.'").

5. *See* UNIV. WISC.-EXTENSION CTR. FOR EXCELLENCE IN FAMILY STUDIES, *supra* note 4, at 18–23.

6. U.S. Census Bureau, *Current Population Survey (CPS): Subject Definitions* (2015), https://www.census.gov/programs-surveys/cps/technical-documentation/subject-definitions.html#family [https://perma.cc/M4K8-WG7H] (last revised Aug. 25, 2015).

7. Contractual relationships that the legal system recognizes include marital relationships and adoptive relationships. Reproduction, too, has become increasingly contractualized: prospective parents may contract to buy genetic material and/or pay for the services of a surrogate. Carol Sanger, *Bargaining for Motherhood: Post-Adoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 309–311 (2012).

8. The reason behind this is straightforward: if an individual claims a relationship based on a blood tie, that tie either exists or it does not exist. But if an individual claims a relationship based on contract, there are an infinite number of possible contract permutations. As such, previously unrecognized relationship categories tend to be contract-based. Again, look to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Before *Obergefell*, many states refused to recognize marriage contracts between same-sex individuals. In other words, under the law, a contract could not be recognized as a "marriage contract," unless the applicants were heterosexual. Same-sex couples could enact any private contract that they wanted, but such contracts would not be legally binding. *Obergefell* forced states to eliminate the requirement that applicants be heterosexual for the "marriage contract" to be cognizable.

9. This Note uses "traditional family" and "non-traditional family" slightly atypically. For the purposes of this Note, in a "traditional family," the only relationship established by contract rather than by blood is the marriage relationship. Thus, a married heterosexual couple and their biological children constitute a "traditional family," as does a single parent and his or her naturally-conceived biological children. The phrase

private sphere to their acknowledgement in the public sphere. When the legal system recognizes these private contracts as publicly valid and enforceable, new family arrangements are legitimated.

This Note focuses on a relatively new challenge in family law: its attempt to navigate mother-child relationships established by contract, such as in surrogacy arrangements or adoption. More specifically, this Note reviews the law's current approach to maternity disputes as applied to two groups of women: gestational surrogates[10] and birth mothers seeking to enforce post-adoption contact agreements (PACAs). Part II reviews the evolution of the mother-child relationship in U.S. family law and explores how the courts' response to maternity disputes has been limited by the premise that a child can only have a maximum of two legal parents. Part III then explores the evolution of the legal system's approach to maternity disputes. It discusses how the legal system's approach to *paternity* disputes influenced its approach to maternity disputes, resulting in the development of an "intent test" that closely mimics the standards applied in disputed paternity cases. It concludes that the "intent test" has had a detrimental effect: it privileges "intent" at the expense of gestation, which, historically, has been a separate and superior means of establishing a parent-child relationship. Part IV discusses the specific shortcomings of the intent test as applied to gestational surrogates and birth mothers seeking to enforce PACAs, and demonstrates the intent test's frequent inability to produce court rulings that reflect an equitable balancing of the

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"non-traditional family," in contrast, refers to a family wherein the relationships are primarily established by contract (which the legal system may or may not recognize as valid). Under this definition, both same-sex and heterosexual adults who become parents through adoption or surrogacy — both contractual means of establishing a relationship — have become parents "non-traditionally." This includes heterosexual married couples wherein one member of the couple is a step-parent to the other's children, and same-sex married couples with children who are biological to one parent. More typical use of the two phrases would distinguish between a married heterosexual couple and their biological or adopted children — the traditional family — and all other family units. *See* UNIV. WISC.-EXTENSION CTR. FOR EXCELLENCE IN FAMILY STUDIES, *supra* note 4, at 18–23. Though this Note uses the phrases "parents" and "couples" largely to refer to heterosexual married couples who seek to become parents through gestational surrogacy or adoption, thereby involving a second woman with a cognizable claim to motherhood, there are of course many other familial structures, some of which do not include two parents, and some which do not include a mother at all.

10. *See infra* note 36 for a discussion of the politics surrounding the use of the phrase "gestational surrogate."

contracting parties' interests.[11] Finally, Part V argues that, in an effort to limit legal parenthood to two people,[12] courts unnecessarily deprive certain women — in many cases, women who would generally be considered marginalized in U.S. society — of even limited rights to the children they could otherwise validly claim.[13] Instead, as the meaning of motherhood becomes increasingly fragmented, and as motherhood is increasingly contractualized, courts should seek a way to recognize the competing, valid interests of women who have gestational, genetic, and social claims of motherhood to the same child, rather than ignoring those claims.

## II. THE EVOLVING NON-TRADITIONAL MOTHER-CHILD RELATIONSHIP

### A. THE TRADITIONAL MOTHER-CHILD RELATIONSHIP

Legal parenthood has always been premised around the certainty of biological motherhood — specifically, the certainty that women give birth to children to whom they are genetically related — and the corresponding uncertainty of biological fatherhood.[14] Until very recently, women achieved legal recognition of their maternity through the physical act of gestating and birthing a child, which linked the mother to that child and was seen as an acceptance of motherhood as a social role.[15] If a woman who gave birth did not want to be that child's

11. *See infra* Part IV. Note that courts analyzing the enforceability of PACAs do not use the phrase "intent test" in explaining their rationale. Nevertheless, courts still do use the "intent test" rationale, if not the term. *See, e.g.*, State *ex rel.* C.S., 2010-0687 (La. App. 1 Cir. 09/10/10); 49 So. 3d 38, 43.

12. Those people being the intended or adoptive parents (applying to gestational surrogacy and adoption, respectively).

13. Though courts often use an ostensibly neutral "intent test" to resolve maternity disputes, empirical research has shown that even when judges do not explicitly rely on the intent test, they are most likely to privilege intent when doing so benefits a married heterosexual couple. This suggests that gestational surrogates and birth mothers, then, are correspondingly less likely to have their intent privileged. *See* Mary Byrn & Lisa Giddings, *An Empirical Analysis of the Use of the Intent Test to Determine Parentage in Assisted Reproduction*, 50 HOUS. L. REV. 1295, 1320 (2013) ("[R]elationship status is significantly related to judicial decisions that had the same outcome as the intent test. Cases involving married heterosexual couples . . . are most likely to result in a parentage determination that is the same as had the judge relied on the intent test.").

14. *See infra* note 17.

15. JANET DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE 121 (1997).

mother, she had to take active steps to terminate her parental rights, ending her presumptive relationship with her child.[16]

Men, on the other hand, achieved legal recognition of their paternity on the basis of the legitimacy of their marital relationship with the mother[17] — meaning that, at least outside marriage, there was no expectation that a biological father assume social fatherhood.[18] As a result, the parent-child relationship in U.S. family law — and the British common law from which it derived[19] — was *fundamentally centered* around the mother-child relationship, and the mother-child relationship was defined by the act of carrying and birthing a child.[20]

The law privileged the mother-child relationship on the assumption that birthing a child and having a genetic relationship with that child went hand in hand. The rapid proliferation of surrogacy and adoption arrangements in recent years,[21] however, has disturbed that assumption. It no longer necessarily follows that a woman who gives birth is necessarily genetically related to the child she birthed, nor is it true that the

16. Today, women who do not want to assume social motherhood might "opt-out" by choosing adoption over motherhood, for instance. *See* Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 620 (2003).

17. Katharine K. Baker, *The DNA Default and its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2038 (2016). *See also* Ann E. Kinsey, Comment, *A Modern King Solomon's Dilemma: Why State Legislatures Should Give Courts the Discretion to Find that a Child Has More than Two Legal Parents*, 51 SAN DIEGO L. REV. 295, 306 (2014).

18. DOLGIN, *supra* note 15, at 108.

19. Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L. J. 2260, 2274 (2017).

20. *Id.* at 2280 ("The mother-child relationship was established by proof of giving birth. Maternity was understood as a conclusive fact — not a disputed status that could be rebutted.").

21. Kim Bergman, *One Million Babies born from IVF*, GROWING GENERATIONS: NEWS & BLOG (Aug. 29, 2017), https://www.growinggenerations.com/news/one-million-babies-born-from-ivf/ [https://perma.cc/G7Z8-XEXR]. Between 1987 and 2015, the American Society for Reproductive Medicine reported one million births via assisted reproductive technologies in the United States (the article's title references one million births via in vitro fertilization (IVF), but the text of the article itself clarifies that the correct category is assisted reproductive technologies, encompassing IVF, egg donation, sperm donation, embryo donation, and surrogacy). The use of assisted reproductive technologies to achieve parenthood has resulted in the reexamination of the role of biology in parenthood. *See also The Evolution of the American Family: A Look at How Families Have Changed and Grown Through the Years*, CAL. CRYOBANK, https://cryobank.com/the-evolution-of-the-american-family.html [https://perma.cc/2FNY-NZDE] (last visited Feb. 28, 2018) ("From 1994 to 2008, the adoption rate increased by 172%."). In 2008, more than twice as many children were adopted as in 1944.

act of giving birth necessarily constitutes assumption of social motherhood.

As a result, multiple women may in theory have cognizable claims to motherhood over the same infant: for instance, one woman may have given birth, another woman may be genetically related, and a third may intend to assume social motherhood.[22] Yet much of U.S. family law continues to revolve around the premise that, while any number of adults may play valuable roles in a child's life, a child can only have a maximum of two legal parents[23] — two people whose decision-making authority over the child is recognized by the state, who possess all of the rights and responsibilities that attend that authority.[24] This presumption[25] has largely endured even as changing societal and technical realities[26] have made it possible for more than two people to assert cognizable parental claims towards a given child — such as in surrogacy or adoption.[27] Thus, knowing that their children can only have two legal parents, parties to surrogacy or adoption usually draft contracts[28] that identify the parents by prioritizing

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22. This example is not meant to suggest that a maximum of three women may have cognizable claims to the same infant. At present, technological developments have made it possible for up to two different women to have a genetic relationship with the same child. This technology is in its infancy; its full impact on U.S. family law is unknown. *See Mitochondrial Replacement Therapy,* UNITED MITOCHONDRIAL DISEASE FOUND., https://www.umdf.org/mitochondrial-replacement-therapy/ [https://perma.cc/7XL6-QJKF] (last visited Jan. 20, 2019). Likewise, changing legal precedent has made it possible for up to two women to assume social motherhood over the same child. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). Thus, in theory, five women might have cognizable claims to motherhood over the same infant at present, and the possibility remains that that number will increase to reflect changing technological and societal realities. *See infra* note 23.

23. Kinsey, *supra* note 17, at 297–98. Though there have been instances where children have been held to have three parents, this is anomalous, and outside the limited scope of this Note (which focuses on the legal challenges facing women who seek continued contact with their children, but not full parental status). For more, see Jeff Chiu, *Modern Family: More Courts Allowing Three Parents of One Child*, NBC NEWS (June 19, 2017), https://www.nbcnews.com/feature/nbc-out/modern-family-more-courts-allowing-three-parents-one-child-n774031 [https://perma.cc/N745-6TC5].

24. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 884–885 (1984).

25. Some legal scholars disagree with the two-parent presumption — see, for example, Kinsey, *supra* note 17 — but this Note does not challenge it.

26. Specifically, artificial reproductive technologies such as artificial insemination, IVF, donor conception, and surrogacy.

27. Kinsey, *supra* note 17, at 299–300 ("Even though courts have responded by expanding the definition of parent to include more than two people, 'they have maintained the rigid idea that a child can have only two legal parents.'") (internal citation omitted).

28. *See, e.g.*, *If You Are Going to Brave Surrogacy On Your Own,* FERTILITY SOURCE CO., https://www.fertilitysourcecompanies.com/if-you-are-going-to-brave-it-on-your-own-

either the genetic, gestational, or social aspects of parenthood.[29] Of course, contracts cannot prevent all disputes, and so the legal system must step in when the contracts break down.

## B. UNDERSTANDING GESTATIONAL SURROGACY AND ADOPTION

Before discussing the legal system's approach to maternity disputes, it may be helpful to set out some of the key terms and concepts used throughout the remainder of this Note. Confusingly, the surrogacy and adoption contexts sometimes use different terms to describe the same mother-child relationship, as each industry has its own language. In discussing a subject as potentially controversial and emotionally fraught as the mother-child relationship, the vocabulary adopted is critically important.[30] Not only is an individual woman's claim to motherhood prioritized or downplayed depending on the term used to describe her, so too is the importance of the particular aspect of motherhood to which she lays claim.

### 1. *The Vocabulary of Surrogacy*

The term "surrogate" refers to the woman who gestates (carries and gives birth to) a child as part of a surrogacy agreement.[31] There are two types of surrogacy, traditional and gestational, which differ from each other in the method used to create the pregnancy. In traditional surrogacy, the surrogate is

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surrogacy-2/ [https://perma.cc/Z9LR-7TJH] (last visited Mar. 2, 2018) ("Don't ever enter into a surrogacy arrangement without a legal contract. . . . If you are a single mother by choice — make sure you obtain sperm from a trusted source like a sperm bank. . . . It's going to cause many headaches in the future and again regardless of who you obtain sperm from two words: LEGAL CONTRACT. . . . Spell [everything] out in your legal contract — from A to Z. That's why it's so incredibly important to hire a lawyer.").

29. Because of the presumption that a child born during a marriage is the husband's child (*see supra* note 17 *and infra* note 52), the advent of sperm donation did not dramatically reshape the doctrine regarding paternal rights (though, of course, a couple who conceived using donated sperm ought to have a signed contract indicating the husband's assumption of paternity, should a donor attempt to rebut the presumption). In contrast, the advent of surrogacy was more complex, as it introduced the potential complication that a child born to a married surrogate would legally be the child of the surrogate's husband. *See In re* Baby M, 537 A.2d 1227, 1235 (N.J. 1988) ("[The surrogate's] husband, Richard, was also a party to the contract . . . Richard] promised to do all acts necessary to rebut the presumption of paternity under the Parentage Act.").

30. ALEX FINKELSTEIN ET AL., SURROGACY LAW AND POLICY IN THE U.S.: A NATIONAL CONVERSATION INFORMED BY GLOBAL LAWMAKING 5 (2016).

31. *Id.*

artificially inseminated (which requires the surrogate to donate her own egg).[32] As such, the traditional surrogate both gestates and is genetically related to the child in question. In gestational surrogacy, in vitro fertilization (IVF) is used to create an embryo that is then implanted in the surrogate. The embryo may be created out of the genetic material of the couple that has hired the surrogate, or it may be created using a donated egg and/or donor sperm[33] (the laws vary as to whether the hiring couple must be genetically related to the child).[34] Since the advent of IVF made gestational surrogacy possible, it is estimated that 95% of surrogacy agreements in the United States are gestational surrogacy agreements (in part because of concerns that traditional surrogacy arrangements are pretextual attempts to circumvent existing adoption laws).[35] As such, this Note uses "gestational surrogate" and "surrogate" interchangeably.[36]

In both traditional and gestational surrogacy, surrogates are hired by the "intended parents," who, as the term suggests, intend to raise the child after its birth. While most intended parents are also the genetic parents of the child in question, the term "intended parents" is used even when one or both intended parents have no genetic relationship to the child.[37] If egg or sperm donors are used in gestational surrogacy agreements, they

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32. *Id.* at 5, 7.

33. *About Surrogacy: Traditional Vs. Gestational Surrogacy–What's Best For My Family?*, SURROGATE.COM, https://surrogate.com/about-surrogacy/types-of-surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my-family/ [https://perma.cc/D94F-A6L9] (last visited Jan. 20, 2019).

34. *Gestational Surrogacy Law Across the United States*, CREATIVEFAMILYCONNECTIONS.COM, https://www.creativefamilyconnections.com/us-surrogacy-law-map/ [https://perma.cc/6RH6-94GX] (last visited Feb. 20, 2019). For example, contrast Maine and Florida. Maine law allows intended parents to be declared a child's legal parents in a pre-birth order even if neither intended parent is genetically related to the child. Florida, in contrast, does not generally allow pre-birth orders and will not allow intended parents to be declared the legal parents in a post-birth order if neither intended parent is genetically related to the child.

35. Richard F. Storrow, *Surrogacy American Style*, *in* SURROGACY, LAW, AND HUMAN RIGHTS 191, 200 (Paula Gerber & Katie O'Byrne eds., 2015) (citing Diane S. Hinson & Maureen McBrien, *Surrogacy Across America*, 34 FAM. ADVOCATE 32, 34 (2011)). *See In re* Baby M, 537 A.2d 1227, 1235 (N.J. 1988).

36. Other accepted terms for a gestational surrogate include "surrogate mother," "gestational mother," "gestational carrier," and "birth mother." Determining the most appropriate terms is often emotionally charged, laden as each term is with normative implications about the surrogate's role and what it means to be a mother. This Note has chosen to use "gestational surrogate" and "surrogate" because these appear to be the terms used most often in academic writing. *See* FINKELSTEIN ET AL., *supra* note 30, at 5.

37. *Id.* at 5.

are referred to solely as egg or sperm donors — they are not called "genetic parents."[38]

Note that describing couples who hire surrogates as "intended parents" presupposes the outcome of a maternity dispute between an "intended mother" and a mere surrogate. In the earliest days of surrogacy, couples who hired surrogates were not referred to as intended parents.[39] That terminology appears to have developed in *Johnson v. Calvert*,[40] discussed extensively in Part IV, which also codified the intent test.

### 2. *The Vocabulary of Adoption*

In the adoption context, the "birth mother" is the woman who is both genetically related to and gives birth to the child, and the "adoptive parents" are the couple who intend to raise the child after its birth.[41] If a birth mother and the adoptive parents agree to allow the birth mother continued contact with the adoptive child after adoption, that agreement is usually codified in a post-adoption contact agreement (PACA).[42]

### 3. *The Legal Distinctions Between Gestational Surrogates and Birth Mothers*

The law primarily distinguishes between a gestational surrogate and a birth mother, and affords a birth mother greater rights, on the basis that a gestational surrogate lacks a genetic relationship with the child she gestates, whereas a birth mother is both the gestational and genetic mother, as discussed above.[43] But scientific research on fetal development suggests it is overly simplistic to conclude that because the embryo is not created

38. *See, e.g.*, *About Surrogacy, supra* note 33.

39. *See, e.g.*, In re *Baby M*, 537 A.2d at 1235.

40. Johnson v. Calvert, 5 Cal. 4th 84 (1993).

41. *Accurate Adoption Language*, NAT'L COUNCIL FOR ADOPTION (2007), https://www.adoptioncouncil.org/images/stories/Accurate_Adoption_Language.pdf [https://perma.cc/P5SM-CG2R] (last visited Jan. 21, 2019).

42. Sanger, *supra* note 7, at 315. As the name suggests, "post-adoption contact agreements" are separate contracts incorporated into the adoption contract that provide for continued contact between the birth and adoptive families.

43. For example, in most states, a birth mother cannot irrevocably relinquish parental status until after her child is born, whereas a gestational surrogate may irrevocably relinquish any right to parental status at the time the gestational surrogacy contract is signed. *See* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J. L. & FEMINISM 210, 234 (2012).

using the gestational surrogate's egg, her genes do not meaningfully contribute to the growing child's genetic expression. Rather, the results of a recent study indicate that while a child's genetics are encoded in its DNA, a child's genetic expression may be shaped by microRNA molecules, which "turn" genes on or off.[44] In other words:

> What this means is that it's the gestational carrier's DNA (because RNA is a portion of a person's DNA) that effectively directs the embryo's genetic development, because RNA affects genetic coding, decoding, regulation and expression. It's the gestational carrier's DNA, then, that influences the way the baby develops, because it's her genetic material that helps determines [sic] which of the baby's genes get turned on and off. The gestational carrier passes these micro RNAs to the embryo via chemical molecules in the endometrial fluid, and it's thought that they can influence the activity levels of the baby's genes throughout life.[45]

Thus, in distinguishing between surrogates and birth mothers — and affording surrogates fewer rights[46] — on the basis of genetics, the law may not fully reflect biological reality or the complexity of human development. As such, the law's current differentiation of surrogates and birth mothers is arguably arbitrary and against the weight of current scientific research. This Note thus takes the position that surrogates and birth mothers seeking to enforce post-contact agreements should be granted the same legal rights,

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44. Susan Fuller, *Does a Gestational Carrier Have Any Genetic Influence on the Child She Carries?*, SURROGACY BY DESIGN (July 7, 2017), http://www.surrogacybydesign.com/blog/does-a-gestational-carrier-have-any-genetic-influence-on-the-child-she-carries [https://perma.cc/6JYU-ZL8X].

45. *Id.* *See also* Felipe Vilella et al., *Hsa-miR-30d, Secreted by the Human Endometrium, Is Taken Up by the Pre-Implantation Embryo and Might Modify Its Transcriptome*, 142 DEVELOPMENT 3210, 3221 (2015), http://dev.biologists.org/content/142/18/3210.long#sec-1 [https://perma.cc/2W9H-4NNC]. According to Dr. Vilella, over the past thirty years, scientists have attempted to confirm a theory known as the Barker hypothesis, which hypothesizes that intrauterine conditions affecting embryonic/fetal development may continue to reverberate throughout the individual's life. Accumulated evidence, the result of numerous studies throughout the years, suggests the accuracy of the Barker hypothesis, though the exact mechanics involved in this phenomenon are still being discovered. Dr. Vilella's study posits that maternal microRNAs (miRNAs) are one such mechanic, a conclusion that appears to be consistent with other studies on the role of other mechanics. *Id.*

46. *See supra* note 43.

as their relationships with the children in question are substantially similar.

## III. THE ORIGINS OF THE INTENT TEST

As discussed in Part II, prior to the availability of genetic testing to prove or disprove paternity,[47] the law could not determine "legitimate" paternity based on a biological connection.[48] Instead, children born within a marriage were presumed to have been fathered by their mother's husband, while children born out of wedlock were considered *filius nullius*, or a child of nobody[49] (though the state still expected their mothers to provide for them).[50] Although nonmarital children today face less overt discrimination in U.S. family law than they did in the past,[51] discrimination between unwed and married fathers

47. Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1, 23 (2004).

48. The one exception, of course, was instances where there was a "lack of access" between a husband and wife (meaning that the husband was not physically present at the time of the child's conception). *Id.* at 23. *See also In re* Findlay, 170 N.E. 471, 472–473 (N.Y. 1930). But, to make matters more even more complicated, neither husband nor wife could testify to non-access! Goodwright v. Moss, 98 Eng. Rep. 1257 (K.B. 1777) ("[Requiring evidence of non-access other than the testimony of the married couple] is a rule, founded in decency, morality, and policy, that [the couple] shall not be permitted to say after marriage, that they have had no connection and therefore that the offspring is spurious; more especially the mother, who is the offending party."). Ostensibly, this rule was intended to privilege the welfare of the child at the husband's expense. However, as noted by Professor Mary Louise Fellows, application of the rule often reinforced existing gender and racial inequalities, ultimately privileging the couples' (and, in particular, the husband's) privacy over the welfare of the children involved. *See* Mary Louise Fellows, *Symposium Remark: A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195 (1998).

49. Baker, *supra* note 47, at 22–23.

50. Courtney Joslin, *The Evolution of the American Family*, 36 HUM. RTS. MAG., Summer 2009, https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_evolution_of_the_american_family.html [https://perma.cc/NSM4-T7GM].

51. Discrimination against nonmarital children was both legal and widely accepted until the early 1970s. Nonmarital children had no right to damages for the wrongful death of a parent until 1968, when *Levy v. Louisiana*, 391 U.S. 68, 70 (1968), was decided. Similarly, nonmarital children had no right to paternal support or paternal intestate succession until 1977, when *Trimble v. Gordon*, 430 U.S. 762 (1977) was decided. Even today, evidentiary requirements that burden nonmarital children relative to marital children still exist (and are only subject to intermediate scrutiny). For example, nonmarital children may still be required to prove paternity to qualify for intestate succession or U.S. citizenship, whereas marital children are presumptively the children of their mother's husband. *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 357, 360–361 (2011). Discrimination against nonmarital children is particularly insidious because nonmarital

remains enshrined.[52] This is particularly relevant because, as maternity disputes have proliferated, courts have looked to the rules of decision in disputes between married and unwed fathers to inform their resolution of disputes between potential mothers.[53]

The state's primary concern regarding children born to unmarried parents is the provision of financial support.[54] Throughout the twentieth century, the state asserted a significant interest in ensuring that unmarried mothers either married their children's fathers or found stable, two-parent homes for their children, so that these women and children would not need to be supported by the state.[55] Because mothers were thought to be invested in their children due to "the significant emotional and physical burdens of pregnancy"[56] — and perhaps because unmarried mothers bore much of the stigma for having had children outside of wedlock[57] — courts were inclined to work with unmarried mothers to ensure that their children were

children are disproportionately lower-income and/or children of color, thus, discrimination based on marital status reinforces racism and classism. *Id.* at 367–369.

52. *Contrast* Uniform Parentage Act of 1973 (amended 2002), § 204(a): "A man is presumed to be the father of a child if: (1) he and the mother of the child are married to each other and the child is born during the marriage . . . *with* Art. IV. § 402: "(a) Except as otherwise provided in subsection (b) or Section 405, a man who desires to be notified of a proceeding for adoption of, or termination of parental rights regarding, a child that he may have fathered must register in the registry of paternity before the birth of the child or within 30 days after the birth. (b) A man is not required to register if: (1)] a father-child relationship between the man and the child has been established under this [Act] or other law . . . *See also*, Art. II § 201(b): "The father-child relationship is established between a man and a child by: (1) an unrebutted presumption of the man's paternity of the child under Section 204; (2) an effective acknowledgment of paternity by the man under [Article] 3, unless the acknowledgment has been rescinded or successfully challenged; (3) an adjudication of the man's paternity; (4) adoption of the child by the man; [or] (5) the man's having consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child; or (6) an adjudication confirming the man as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law]."

53. *See infra* Part III.

54. Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L. J. 2292, 2303 (2016) ("By the middle decades of the twentieth century, American policymakers had constructed a social and legal infrastructure that presumed wives and mothers would provide primary care for children and other dependents, while husbands and fathers furnished financial support and social insurance benefits through gainful employment. 'Unwed mothers' who kept and raised their children without a man's support threatened not only the public fisc, but also a political and legal system that assumed that marital households are the basic economic unit of society and the primary site of social provision.").

55. *Id.*

56. Baker, *supra* note 47, at 18–19.

57. *See infra* note 108 *and* note 110.

placed with stable, married couples. At the same time, courts tended to view the unmarried father as a potential spanner in the works[58] — as a deadbeat who would contribute nothing to the financial upkeep of the child, yet who might attempt to prevent the mother from doing the socially desirable thing and having the child adopted. As such, states enacted laws differentiating between the parental rights of unmarried fathers relative to unmarried mothers.[59]

In the 1970s and 1980s, a number of constitutional challenges reached the Supreme Court, most of which alleged that unmarried fathers had been deprived of equal protection under the law when compared with unmarried mothers. The cases that best illustrate how the legal approach to paternity disputes came to inform the legal approach to maternity disputes are *Caban v. Mohammed*[60] and *Lehr v. Robertson*,[61] both of which examined the rights of unwed fathers to dispute the adoption of their children.

*Caban v. Mohammed* evaluated the right of an unwed father who maintained a fatherly relationship with his children to dispute their adoption by another man. The plaintiff, Caban, fathered two children with Maria Mohammed over the course of five years, during which Caban, Mohammed, and the children all cohabitated.[62] Though Caban and Mohammed "represented themselves as being husband and wife,"[63] they never married one another. Caban was in fact legally married to another woman throughout his relationship with Mohammed.[64] Mohammed and Caban separated while the children were still young, and both Mohammed and Caban married other partners (after Caban divorced his first wife).[65] A custody dispute erupted between Caban and Mohammed, resulting in Mohammed requesting that

58. *See, e.g.*, *In re* T.E.T., 603 S.W.2d 793, 797 (Tex. 1980), in which the court considered the necessity of obtaining an unmarried father's consent to a child's adoption ("While the mother who is unmarried and pregnant is trying to figure out what she will do with the child, the father is totally free from any responsibility . . . To classify him as a parent simply because he is a biological father would give him a powerful club with which he could substantially reduce the options available to the unmarried mother.").

59. *See supra* note 52; *infra* note 67.

60. Caban v. Mohammed, 441 U.S. 380 (1979).

61. Lehr v. Robertson, 463 U.S. 248 (1983).

62. *Caban*, 441 U.S. at 382.

63. *Id.*

64. *Id.*

65. *Id.* at 382–83.

her new husband be allowed to adopt the children.[66] New York law at that time required the consent of "the parents or surviving parent . . . of a child born in wedlock" or "the mother . . . of a child born out of wedlock."[67] Accordingly, Caban's consent was irrelevant.

Caban brought an equal protection claim in an attempt to prevent the adoption of his children and the consequent termination of his parental rights.[68] He argued that, under the statute, "an unwed mother has the authority . . . to block the adoption of her child, simply by withholding consent. The unwed father has no similar control over the fate of his child, even when his parental relationship is substantial,"[69] thereby depriving unwed fathers of equal protection under the law.

In evaluating Caban's claim, the majority of the Court found it highly relevant that even if Caban and Mohammed never married, Caban, Mohammed, and their children lived together for several years, and both Caban and Mohammed actively cared for and supported the children.[70] In a system fundamentally shaped by the marital presumption, the resemblance of Caban and Mohammed's relationship to marriage struck a chord with the Court. As such, one of the chief propositions for which *Caban* is cited is the idea that to be a "true" father in the eyes of the law, not just a biological father, a man must demonstrate his *intent* to be a parent to his child, with marriage serving as an indicator of that intent.[71]

Interestingly, the key difference between the majority and the dissent in *Caban* was not in their understandings of the parental rights of unwed mothers versus unwed fathers. In fact, the majority seemed sympathetic to the assertion that "a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does"[72] — at least, as long as the children in question are very young[73] — and acknowledged a

66. *Id.*
67. N.Y. Dom. Rel. L § 111 (McKinney 1977) (amended 2016).
68. *Caban*, 441 U.S. at 384 ("The Surrogate granted the Mohammeds' petition to adopt the children, thereby cutting off all of [Caban's] parental rights and obligations.").
69. *Id.* at 385–86.
70. *Id.* at 389.
71. *Lehr*, 463 U.S. at 261 (characterizing and distinguishing *Caban*).
72. *Caban*, 441 U.S. at 387 (citing Transcript of Oral Argument at 41).
73. *Id.* at 389 ("Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased.").

legitimate state interest in "providing for the well-being of illegitimate children . . . [which] often may require their adoption into new families who will give them the stability of a normal, two-parent home."[74] Rather, the majority saw Caban and Mohammed's "natural family" as sufficient evidence of Caban's intent to be a social parent to the children. In contrast, Justice Stewart, in dissent, argued that marriage was *the* critical indicator of a man's intent to be a social father:

> The Constitution does not require that an unmarried father's substantive parental rights must always be coextensive with those afforded to the fathers of legitimate children. In this setting, it is plain that the absence of a legal tie with the mother provides a constitutionally valid ground for distinction. . . . Parental rights do not spring full-blown from the biological connections between parent and child. They require relationships more enduring. The mother carries and bears the child, and in this sense, her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage to the mother.[75]

Thus, Justice Stewart seemingly would have required a more formal marital relationship to demonstrate Caban's intent to take on social fatherhood.

*Lehr*, decided a few years later, contrasts sharply with *Caban*. Though Lehr lived with Robertson, the mother of his child, during her pregnancy, they separated almost immediately after their child's birth.[76] As such, Lehr, Robertson, and their daughter lacked the history of cohabitation as a natural family unit that had proven so persuasive in *Caban*. At the time that Robertson sought her daughter's adoption by her new husband, Lehr had seen the child only very infrequently since her birth, though Lehr himself claimed that he had made many attempts to do so and was consistently prevented by Robertson.[77]

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74. *Id.* at 391.
75. *Id.* at 397.
76. Lehr v. Robertson, 463 U.S. 248, 252, 268–269 (1983).
77. *Id.* at 269.

To make matters worse, New York maintained a putative father registry through which Lehr could have registered his intent to claim a non-marital child and "therefore [been] entitled to receive notice of any proceeding to adopt that child,"[78] and Lehr failed to register.[79] An unsympathetic Supreme Court distinguished the case from *Caban* and concluded that based on Lehr's lack of a relationship with his daughter, exacerbated by his failure to signal his intention of social fatherhood via registration, he did not establish himself as his daughter's father.[80] The Court considered "the significance of [Lehr's] biological connection [only insofar] that it [offered him] an opportunity that no other male possesses to develop a relationship with his offspring."[81] It was up to Lehr to take advantage of that opportunity. If he did, "he [could] enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. [But since he failed to do so], the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."[82]

As such, *Caban* and *Lehr* both established that genetics alone do not grant a biological father legal recognition. However, analyzing the Supreme Court's parenthood jurisprudence, Professor Katharine Baker notes that "although the courts have never put it in these terms, [there is a clear suggestion] that the gestational mother gains parental status through her gestational investment, not through her genetic contribution."[83] Or at least,

78. *Id.* at 250–51.

79. *Id.* at 251.

80. *Id.* at 267–68 ("Jessica's parents are not like the parents involved in *Caban*. Whereas [Robertson] had a continuous custodial responsibility for Jessica, [Lehr] never established any custodial, personal, or financial relationship with her. If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights.").

81. *Id.* at 262.

82. *Id.* In fact, the language used in earlier drafts of the *Lehr* decision made this point even more strongly. *See*, *e.g.*, Justice John Paul Stevens, First Draft Opinion, Lehr v. Robinson at 19 ("Before birth, the mother carries the child; it is she who has the constitutional right to decide whether to bear it or not. And from the moment the child is born, the mother always has a relationship of legal responsibility toward the child. Because the natural father of an illegitimate child can often be legally and practically anonymous if he chooses, responsibility does not devolve upon him in the same automatic fashion.").

83. Baker, *supra* note 47, at 47.

that was the case until very recently.[84] After all, it is the gestation that separates the investment made by a biological mother and a biological father at the time of a child's birth, and it is that additional investment which seems to fulfill Justice Stewart's proposed requirement of a "relationship more enduring"[85] justifying a presumption that the unmarried gestational mother has demonstrated an inherent intent to parent such that her consent should be required for her child to be adopted, while the unmarried biological father has not.[86]

*Caban* and *Lehr* also highlight two ways in which an intent to parent can be manifested: first, a man may have an established relationship in which his actual past practice of parenting suggests an intent to continue parenting (as in *Caban*); alternatively, a man may have the opportunity to demonstrate his intent to parent by means of a formal filing (as in *Lehr* — although while filing was a necessary step, it may not have been a sufficient one).

Part IV addresses the problem of disputed maternity, and the inherent tensions of the intent test. It explains that the intent test vests parenthood — both paternity and maternity — according to the wishes expressed in a formalized legal contract.[87] Because parties normally execute these contracts prior to the birth of the children in question, "intent" cannot be signaled by the behavior of the intended parents as social parents, and must instead be signaled legalistically, as in *Lehr*.[88] But "intent," as laid out in cases like *Lehr* and *Caban*, ultimately served to help the courts distinguish between the rights of social and biological fathers, while the gestational rights of the mother were always understood as being both clearly separate *and superior*. Thus, there is a tension in applying an intent test to deprive a gestational mother of her rights, given the historical centrality of gestational motherhood in the parent-child relationship as a whole.[89]

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84. *See supra* Part II.

85. *See supra* note 75.

86. *See supra* note 82.

87. *See supra* note 28 and note 29.

88. *E.g.*, in *Johnson v. Calvert*, the contract was executed several days before the zygote was implanted. Johnson v. Calvert, 5 Cal. 4th 84, 87 (1993).

89. This is not to suggest that deemphasizing gestation, generally, has been "bad": as discussed extensively throughout this Part, it has clearly helped to equalize men and women. On the other hand, in maternity disputes in particular, the deemphasis on gestation arguably reinforces inequality at the expense of marginalized women.

# IV. THE INTENT TEST APPLIED

## A. GESTATIONAL SURROGATES AND THE INTENT TEST

As discussed in Part II, gestational surrogacy refers to the practice of having a woman gestate a child with whom she has no genetic relationship (that the law recognizes).[90] In many cases, the surrogate has a gestational claim, and the intended mother has a genetic claim — both of which may be equally valid under state law.[91] Consequently, it has become necessary for the courts to utilize a tiebreaker. This is where the intent test comes in.[92]

The court in *Johnson v. Calvert* developed the intent test in response to the dilemma described above. California's Uniform Parentage Act allowed women to claim maternity by means of genetics or gestation, but it did not contemplate that two women would have cognizable claims of maternity to the same child.[93] The court concluded that:

> [A]lthough the [California Uniform Parentage Act] recognizes both genetic consanguinity[94] and giving birth as means of establishing a mother-child relationship, when the two means do not coincide in one woman, she who intended to procreate the child — that is, she who intended to bring

90. Hillary L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor*, 49 L. & SOC'Y REV. 143, 145 (2015).

91. *Calvert*, 5 Cal. 4th at 92.

92. Due to the limited scope of this Note, and varying enforceability of gestational surrogacy contracts state by state, this discussion of the application of the intent test in gestational surrogacy disputes is limited to the California court system, so chosen because *Johnson v. Calvert*, which codified the intent test, was a California case.

93. *Calvert*, 5 Cal. 4th at 92. California's Uniform Parentage Act was part of a legislative package intended to eliminate the distinction between marital and non-marital children under California Law (in response to the Supreme Court's jurisprudence of the 1960s and 1970s. *See supra* note 51). *Id.* at 89. ("We are left with the undisputed evidence that [Johnson], not [Calvert], gave birth to the child and that [Calvert], not [Johnson], is genetically related to him. Both women thus have adduced evidence of a mother and child relationship as contemplated by the [California Uniform Parentage] Act. Yet for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.").

94. "Consanguinity" refers to the degree of blood-relationship between family members sharing at least one ancestor. *See Consanguinity Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/c/consanguinity/ [https://perma.cc/M2TN-JPY5] (last visited Jan. 22, 2019). As used in the California Uniform Parentage Act, the term indicates that California will recognize either genetic or gestational claims to maternity.

> about the birth of a child that *she intended to raise as her own* — is the natural mother under California law.[95]

That is to say, the court found for the "intended mother" and not the surrogate on the grounds that the child was conceived *because* the intended mother desired a child, as evidenced by the fact that she hired a surrogate to carry a child for her. In doing so, the court established that because all of the parties entered the contract with the understanding that the purpose of the agreement was for the intended parents to become parents, that intention at the time the contract was formed — which the court identified as the but-for cause of the child's existence — should break the tie between the intended mother and the gestational surrogate.[96] Of course, in a surrogacy agreement, the parties who engage the surrogate will never intend for her to be the child's parent. Thus, if intent is the key differentiator that makes an intended mother's right superior to the surrogate's, one would expect surrogates to lose almost all cases that courts resolve using the intent test.[97]

This state of affairs is particularly insidious because it fails to account for the fact that surrogates may have intentions for their relationship with the intended parents and child going forward that are not presently captured in surrogacy contracts. Currently, surrogates have a limited ability to manifest their intent in different ways, such as by including visitation agreements in their surrogacy contracts.[98] Though the law does not prohibit surrogates from incorporating post-surrogacy contact agreements into their contracts, intended parents (and their lawyers) would likely oppose such provisions as undermining their ability to rely on the contract.

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95. *Calvert*, 5 Cal. 4th at 93 (emphasis added).

96. *Id.* at 93 ("But for [the Calverts'] acted-on intention, the child would not exist.").

97. *Id.* at 115 ("In making the intent of the genetic mother who wants to have a child the dispositive factor, the majority renders a certain result preordained and inflexible in every such case: as between an intending genetic mother and a gestational mother, the genetic mother will, under the majority's analysis, always prevail. The majority recognizes no meaningful contribution by a woman who agrees to carry a fetus to term for the genetic mother beyond that of mere employment to perform a specified biological function.").

98. Berk, *supra* note 90, at 170 ("This relates to the degree to which the surrogate will have an ongoing relationship with the parents — or the baby — after the contract has terminated. The content analysis reveals that contracts overwhelmingly provide intended parents exclusive rights to determine future contact, with the default proscribing any continuing relationship.").

Surrogacy contracts are often very controlling, with intended parents looking to establish control over a situation that is, in many ways, out of their control, by managing (or micro-managing) the surrogate's pregnancy.[99] Because behavior during pregnancy has such an impact on the developing fetus, intended parents often contractualize best practices, requiring surrogates, for example, to "consume solely organic foods and supplements while prohibiting caffeine, sugar, or fast food throughout the pregnancy" or to "engage in a particular activity — like acupuncture or going to the gym."[100] Similarly, contracts might prohibit surrogates from engaging in certain activities, resulting in bans on "microwaves, hairspray, manicures, or changing cat litter."[101] Further, concerns that surrogates will renege are so common that, in many cases, surrogates are actively discouraged from thinking of the children they gestate as in any way theirs — some contracts even prohibit surrogates from holding or even viewing the baby post-birth.[102]

While the intended parents' impulse to establish control is understandable, a surrogate may reasonably fear that she will not be hired if she has a reputation for attempting to negotiate better terms for herself. Surrogacy in the United States is expensive, and intended parents "generally have greater wealth, education, and social status, as well as stronger connections to

99. *Id.* at 156 ("I find that the web of formal restrictions in contracts, along with informal practices like 'triage,' are developed and deployed by lawyers in collaboration with matching agencies to prevent emotional attachment, resentment, or alienation in the surrogate mother and handle feelings like vulnerability, anxiety, and jealousy in the intended parents.").

100. *Id.* at 156–57.

101. *Id.*

102. *Id.* at 167–68 ("Another intimacy restriction used to manage attachment is the practice of preventing the surrogate from holding or even viewing the newborn following delivery, which extends into future contact with the family. The same rationale that applies to breastfeeding — rules to minimize legal risk by inhibiting emotional bonding — applies here. Feeling rules related to degrees of contact are attempts by lawyers, in the face of uncertainty, to channel their clients toward the ultimate goal of establishing parentage. Educated by a psychologist who specializes in adoption, a Minnesota lawyer believed it crucial to 'break that bond.'"). *See also* Kim Bergman, *The Post Birth Relationship with Your Surrogate*, GROWING GENERATIONS (Sept. 9, 2015), https://www.growinggenerations.com/surrogacy-resources-for-intended-parents/the-post-birth-relationship-with-your-surrogate/ [https://perma.cc/GXM4-2BT2] ("It's entirely up to you how much access you allow the surrogate and her family to have to you and your baby from now on. . . . Some parents will develop deep friendships with their surrogate and stay in contact with her for years to come. Other parents prefer a blunt separation at the time of birth. Both options are acceptable. . . . Surrogates are not adoptive [birth] mothers. They have no biological or maternal emotional link to your child.").

institutions of power" than surrogates.[103] The typical surrogate is "middle class, with two to three biological children, working a part-time job . . . with some college education but usually without a college degree," and with a household income of below $60,000.[104] Thus, the $20,000–$30,000 fee that surrogates tend to earn is a substantial part of their household income, though not their primary means of financial stability.[105] Given the role that financial and educational disparities might play in influencing whose intentions get expressed in a surrogacy contract, courts should be more reflective in upholding a test that inherently privileges the already-privileged intended parents at the expense of the surrogate. It is also important to note that by privileging the intended mother's claim on the basis of her intent, the gestational surrogate must therefore be presumed to lack the intent to become a mother — contradicting hundreds of years of history in which the act of gestation in and of itself was seen as a sufficient manifestation of intent.

In conclusion, though courts apply the intent test consistently, that test itself consistently favors the intended parents over the gestational surrogate. Furthermore, surrogates are actively discouraged from attempting to include some formalized post-birth contact as part of the contracts, which might help balance the relationship between all parties to the contracts and better recognize the legitimacy of the surrogate's gestational contribution.

## B. BIRTH MOTHERS, POST-ADOPTION CONTACT AGREEMENTS, AND THE INTENT TEST

In the adoption context, a birth mother, unlike a surrogate, initially has all of the elements of motherhood, being the gestational and (recognized) genetic mother of the child in question. Because the birth mother is the *only* woman with this gestational and genetic claim, she would traditionally assume social motherhood by default. Importantly, the birth mother is also unlike the surrogate in that her association with the

103. FINKELSTEIN ET AL., *supra* note 30, at 26.

104. Leslie Morgan Steiner, *Who Becomes a Surrogate?*, THE ATLANTIC (Nov. 25, 2013), https://www.theatlantic.com/health/archive/2013/11/who-becomes-a-surrogate/281596/ [https://perma.cc/GS3S-D9U2] (last visited Jan. 22, 2019).

105. *Id.*

adoptive parents is comparatively involuntary — she did not get pregnant with the intention that another couple would raise the resulting child. Therefore, the fact that the birth mother is in a presumably unanticipated and undesirable situation should be accounted for when considering the power differential between birth mothers and adoptive parents.

Adoption can be viewed in terms of the birth mother's rejection of her claims to that social role in favor of an adoptive mother, who, though neither gestationally nor genetically related, takes on social and legal motherhood. Because a birth mother would have been thought to have a more natural authority over and connection to the child than the adoptive mother,[106] courts traditionally required birth mothers to completely sever their relationships with their children before allowing an adoption to take place.[107] Though courts paid some lip service to the idea that this severance was best for all involved parties (birth mother, freed from the stigma of unwed motherhood, and the adoptive parents and adopted child, free to establish a socially desirable family unit),[108] in reality, courts adopted the total-severance policy to secure the adoptive parents' authority and to promote the adopted child's well-being, to the exclusion of any substantial concern for the birth mother.[109]

This policy began to change in the 1970s, when a confluence of trends (including push-back from adopted children and the increasing availability of birth control resulting in fewer adoptable children) strengthened the bargaining power of birth mothers.[110] One of the ways in which birth mothers sought to

106. *See supra* note 83.

107. Sanger, *supra* note 7, at 312 ("In a traditional closed adoption, the unmarried birth mother surrendered her parental rights (and where known, the birth father his) to the state or to a licensed private adoption agency. The agency then selected an appropriate married couple from its applicant pool to become the infant's new parents. Following a satisfactory home study, the family or probate court then issued an order declaring the adoption to be in the baby's best interest, and the childless couple was transformed into legal parents with a baby of their very own.").

108. *Id.* at 312–13.

109. *Id.* at 316.

110. Lucy S. McGough & Annette Peter-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13 (1999). By the late 1960s, social scientists increasingly believed that denying adopted children knowledge of their biological families harmed their development. In 1964, a Canadian sociologist provided empirical evidence that these beliefs were well-founded. At around the same time, several adult adoptees published autobiographies detailing their longing for information about their biological families, resulting in the growth of adoption search assistance groups and inspiring increased legislative responses. *Id.* at 40–43. *See also* Sanger, *supra* note 7, at

assert more control over the adoptive process was by incorporating post-adoption contact agreements (PACAs) into adoption agreements.[111] Initially, however, these agreements did very little to secure birth mothers more rights: "because adoption [was] a legal status completely created by statute, parties could not, by agreement, add to or detract from whatever rights and duties the state had fixed."[112] In other words, birth mothers and adoptive parents were free to enter into contracts providing the birth mother with post-adoption rights, but courts would not enforce these provisions should the parties become dissatisfied.

Over time, as these arrangements grew more and more common, courts began to recognize PACAs as enforceable in theory[113] on the grounds that "when the words of a contract are clear and explicit and lead to no absurd consequences, the intent of the parties is to be determined by the words of the contract,"[114] and subsequently enforced.[115] In reality, however, the likelihood of enforcement of a PACA seems to be affected much more by how sympathetic the court is to the birth mother, and much less by the intent of the parties as apparent in the contract.

This dynamic is most obviously in play in the adoption of older children whose birth mothers have proven to be negligent or abusive. For example, *In re D.E.H.*[116] involved a birth mother who was unwilling or unable to prevent her unmarried partner from abusing her infant daughter. Fearing that she would never see her daughter again if her parental rights were involuntarily terminated, the birth mother entered into a mediation agreement with her daughter's foster parents, where she agreed to voluntarily terminate her rights in exchange for guaranteed post-

315. As adoptees entered the public sphere, so too did birth mothers. Stigma had kept these women from publicly identifying themselves, but as more and more adoptees came forward, more and more women were willing to reveal that they had given birth to nonmarital children. Stigma decreased at about the same time that the advent of the birth control pill and the decriminalization of abortion offered women increased reproductive options. Thus, as fewer women opted for adoption, their power relative to that of adoptive parents grew. *Id.* at 313–15. Note, of course, that this history is limited to domestic adoption; international adoption is outside the scope of this Note.

111. Sanger, *supra* note 7, at 315.

112. *Id.*

113. *Id.* at 319. As of 2011, twenty-six states and the District of Columbia recognized enforceable agreements between birth and adoptive parents.

114. State *ex rel.* C.S., 2010-0687, p. 8–9 (La. App. 1 Cir. 9/10/10); 49 So. 3d 38, 43.

115. Again, we see that while this is not the "intent test" as applied in cases involving surrogates, it is substantially similar.

116. *In re* D.E.H, 301 S.W.3d 825 (Tex. Ct. App. 2009).

termination visits.[117] After realizing that the visitation agreement was unenforceable, the birth mother argued that the entire agreement was invalid.[118]

The Texas Court of Appeals had little sympathy for the birth mother, and found that since the Department of Family and Protective Services had never promised the birth mother that the post-termination visits were enforceable, the birth mother had not relinquished her parental rights under fraudulent premises or as a result of coercion.[119] As the dissent noted, in reaching this decision, the majority gave little weight to the fact that the birth mother was non-English speaking and under extreme pressure at the time of relinquishment.[120] Further, though the Department was aware that the birth mother's intent in voluntarily terminating her rights was to secure guaranteed continued contact, the majority's decision emphasized the fact that the Department had never made any explicit promises over the fact that the birth mother's explicit intent was to secure continued post-adoption contact with her daughter.[121]

While the Court of Appeals' lack of sympathy for the mother in *In re D.E.H* may be understandable, the fact that her intent was completely disregarded should still give us pause. If the Department or the courts truly felt that total non-contact with her birth mother was in D.E.H.'s best interests, they could have refused to allow the mediation and the voluntary relinquishment of parental rights. That the Department was willing to allow the voluntary relinquishment even though they should have been aware that the birth mother failed to fully understand the consequences, and that the Court of Appeals was willing to uphold the relinquishment, should not be condoned just because the mother in question was not what the court considered to be a "good" mother.

In fact, other cases show a willingness to disregard birth mothers' intent, even in cases where the birth mothers are far

117. *Id.* at 826.
118. *Id.* at 827.
119. *Id.* at 832.
120. *Id.* at 835.
121. *Id.* at 835–36. *See also* K.V. v. Indiana, Dep't of Child Servs., No. 64A04-1004-JT-236, 2011 Ind. App. Unpub. LEXIS 552 (Ind. Ct. App. Apr. 25, 2011), in which the Indiana Court of Appeals held that since the mother had never explicitly stated that her voluntary relinquishment of parental rights was contingent on post-adoption contact, the fact that she had indicated her interest in post-adoption contact (and, arguably, her belief that post-adoption contact was a term of the agreement) was not controlling. *Id.* at *7, *10.

more sympathetic. For example, a California court in *Carla M. v. Susan E.*,[122] refused to enforce a PACA ostensibly on the grounds that the agreement had not been properly filed.[123] In relying on this technical procedural error,[124] however, and on a stated concern with the best interest of P., the adopted child,[125] the court avoided consideration of the parties' intent at the time of contracting. Had the court properly analyzed the parties' ex ante intent, they might have focused on language in the PACA, and in the representations between Carla, Susan, and their respective husbands that explicitly demonstrated an intent that Carla maintain a relationship with P.,[126] and that the PACA seemed to have broken down not because of concerns that continued contact with Carla would be contrary to P.'s best interests, but because of Susan's growing irritation with Carla.[127]

In court, Carla argued that Susan and her husband had defrauded her: they had failed to file the PACA and had misrepresented their intent to have an open adoption.[128] Susan, in contrast, claimed that Carla was overly emotionally invested in Susan's parenting and in the adopted child, P. Susan and her husband, D., asked Carla and her husband to be less intrusive;[129] though they complied, "Susan remained uncomfortable with [this more limited] contact because she felt that appellant 'still wanted

122. Carla M. v. Susan E., No. H035781, 2011 Cal. App. Unpub. LEXIS 5283 (Cal. Ct. App. July 15, 2011).

123. *Id.* at *22.

124. It is important to note here, that the court found that "if the [PACA] had been filed, it would have found that [Susan and her husband] were justified in restricting contact between [Carla] and P. based on P.'s best interests." *Id.* at *24. In other words: the fact that the PACA was not filed was convenient for the court, who could rely on the procedural error in their decision — but if the PACA had been filed properly, Carla wouldn't necessarily have enforceable rights. Carla loses if there is an error, but does not necessarily win if she does everything properly.

125. *Id.* at *23–24.

126. *Id.* at *6–7 ("Prior to signing the [PACA], the parties left most of the document blank, but they completed the section entitled 'Contact, Communication, and Visits.' (Caps omitted) . . . The section [provided] that the adoptive parents [would] send photographs twice a year (after the first year) upon request, that both the birth parents and the adoptive parents [could] initiate telephone contact, and that the parties will facilitate a minimum of one annual visit between the birth parents and the child.").

127. *Carla M.*, 2011 Cal. App. Unpub. LEXIS at *7–8 ("Between January through September 2004, the relationship between the parties was 'fine,' though some issues had developed. . . . The larger issue, however, was Susan's feeling that '[her] own needs were taking a back seat because appellant [Carla] was '"very intrusive and pushing."').

128. *Id.* at *1–2.

129. Specifically, Susan and D. asked Carla to refrain from sending parenting-related emails and articles. *Id.* at *8.

to have some part of a mothering role.'"[130] Susan eventually asked Carla to contact her husband exclusively, but "when Carla and [Charlie, her husband] contacted D., it continued to cause distress to Susan."[131] As such, Susan felt the need to limit Carla's contact as a result of her overly intrusive behavior.[132] Susan's husband, D., remarked that Carla "saw [Susan and D.] as close relatives and [Susan and D.] were not comfortable with this relationship."[133] This may well have come as a surprise to Carla: Susan and D.'s online adoption profile, in contrast, stated "We admire your courage and love in considering open adoption. If you choose to do this, you will . . . become part of our lives forever."[134]

In evaluating Carla and Susan's competing claims, the trial court briefly considered whether "it would be particularly healthy for an adopted child to have weekly or monthly contact with the birth mother . . . as the child must have an opportunity to bond with her adoptive parents,"[135] before noting that Carla's level of conduct "just [didn't] feel right"[136] and finding that "there was some reason to be emotionally concerned about what [Carla's] expectations were as a birth mother."[137] But Susan's subsequent annoyance with Carla had little to do with the contract into which the parties had entered, nor was there any real evidence proffered to suggest that P. was negatively impacted by continued contact with Carla. Thus, the court's assignment of weight to Susan's discomfort calls back to the historical prioritization of adopted children and adoptive parents in traditional, closed adoptions, and the marginalization of birth mothers.

In contrast, in *Vela v. Marywood*,[138] the Texas Court of Appeals held that the birth mother, "a member of a strong, stable and supportive family" who neighbors described as "the envy of all the mothers in the neighborhood," could invalidate the

130. *Id.* at *9.
131. *Id.*
132. *See supra* note 127.
133. *Carla M.*, 2011 Cal. App. Unpub. LEXIS at *9.
134. *Id.* at *3.
135. *Id.* at *12–13. It is interesting that the court raised this concern, as the PACA did not allow weekly or monthly visitation with Carla in this case, and there is no evidence to suggest that weekly or monthly visitation ever occurred.
136. *Id.* at *14.
137. *Id.*
138. Vela v. Marywood, 17 S.W.3d 750 (Tex. Ct. App. 2000).

termination of her parental rights.[139] As in the cases discussed above, the birth mother voluntarily terminated her parental rights on the belief that she maintained an enforceable right to post-adoption contact; because her adoption agency failed to clearly correct her misunderstanding, the Court of Appeals determined that her consent was fraudulently obtained.[140] Note that the ostensibly less sympathetic mother in *D.E.H.* made the exact same argument, and was also heard by the Texas Court of Appeals: nevertheless, she was unable to invalidate the termination of her parental rights.

That the conduct — or likeability — of birth mothers seems to be such a critical factor in the enforceability of their PACAs is somewhat alarming. The court's role is supposed to be two-fold: to prioritize the best interests of children and to enforce the contractual agreements into which birth and adoptive parents have entered. That courts tend, at least in some circumstances, to prioritize the adoptive mother's need to feel emotionally secure in her motherhood or the ease of a voluntary versus an involuntary termination proceeding over the birth mother's expectation that contracts she signs will be enforced demonstrates the perversion of the intent test. Despite their ostensibly neutral role in applying the intent test to determine the aims of contracting parties, courts actively shape and define who gets to be a fully-recognized mother in favor of nuclear families and to the detriment of birth mothers.

## V. BEYOND THE INTENT TEST: A MODEL FOR REFORM

This Note has thus far discussed how the intent test was modelled off the doctrine developed to determine paternity. It also argued that the use of the intent test as applied to gestational surrogates and birth mothers was inequitable because the intent test inherently devalued the gestational relationships underpinning much of family law — including the paternal rights doctrine — in use up to that point. This Part now proposes a new model for balancing the competing claims of intended or adoptive mothers and gestational or birth mothers: a model that recognizes the state's interest in an administrable family unit,

139. *Id.* at 753, 764.
140. *Id.* at 763–64.

the legal parents' interest in decision-making authority over their children, and the gestational or birth mothers' interest in continued contact.

## A. *TROXEL V. GRANVILLE*: LIMITATIONS ON REFORM

Any proposal that suggests vesting even limited parental rights in third parties must contend with *Troxel v. Granville*, a relatively recent Supreme Court decision that invalidated a Washington state statute allowing "any person [to] petition the court for visitation rights at any time, including, but not limited to custody proceedings."[141] Visitation rights are not custody rights, and do not vest decision-maker authority in the third-party, leaving intact the two-parent presumption discussed above.[142] While every state allows some people — such as grandparents — the right to make third-party visitation claims,[143] the Washington statute at issue in *Granville* was unusually broad: not only did it allow "any person" to ask for visitation, it authorized courts to "order visitation rights for any person when visitation may serve the best interest of the child"[144] even if the legal parents wished to limit or deny visitation.[145]

In *Granville*, the Court held that "it [could not] be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their

141. Troxel v. Granville, 530 U.S. 57 (2000); WASH. REV. CODE § 26.10.160(3) (2011).

142. Susan F. Appleton, *Parents by the Numbers,* 37 HOFSTRA L. REV. 11, 23, 57 (2008) ("Today, almost every state has well-established rules for a division of the 'parenthood pie' after dissolution of marriage, with courts routinely making separate decisions about the child's legal custody (also called decisionmaking authority) and the child's physical custody (also called residential time). . . An important issue that follows, then, asks whether applying the label 'parents' matters or whether the issues posed by multi-parentage remain the same as those explored in the more familiar cases and literature on so-called 'third parties' who sometimes are accorded some parental prerogatives, such as visitation opportunities or other 'custodial fragments,' as Professor Emily Buss calls them.").

143. *Id.* at 38–39.

144. REV. § 26.10.160(3).

145. *Troxel v. Granville* involved a dispute between a legal mother and her children's paternal grandparents following the death of the children's father. Though the mother wanted visitation limited to one day per month, "the Superior Court issued an oral ruling and entered a visitation decree ordering visitation one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays." *Troxel*, 530 U.S. at 61.

children,"[146] and concluded that, in light of the constitutional rights at stake, Washington had infringed on the rights of (fit, custodial) parents by allowing judges, rather than parents, to determine whether the maintenance of particular relationships would be in the best interests of their children.[147]

But while the Court invalidated the Washington statute, it did not preclude the possibility of a third-party visitation rights.[148] Rather, it established two key criteria that third-party visitation statutes would have to satisfy: (1) courts must "accord at least some special weight" to a fit legal parent's determination of the best interests of their children[149] and (2) courts should hesitate to give a third party court-ordered visitation rights unless actual denial of visitation has occurred.[150]

Thus, in considering how *Granville* applies to gestational surrogates and birth mothers seeking continued contact with the children they birth, states should identify two main areas of reform: indirect contact and visitation.

## B. PROPOSED "INDIRECT CONTACT" REFORMS

The first model of reform hinges on the conclusion that *Granville* only applies to cases in which third parties seek visitation, such that more limited rights — such as the right to indirect contact — are not affected by the *Granville* decision. Indirect contact might encompass such things as information about and/or pictures of the child in question or communication with the child via phone, e-mail, video communication, or other such virtual media. It would not encompass physical contact

146. *Id.* at 66.

147. *Id.* at 67 ("The Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.").

148. *Id.* at 73 ("We would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter."). Indeed, the Court acknowledged "the nationwide enactment of nonparental visitation statutes . . . further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons — for example, their grandparents." *Id.* at 64.

149. *Id.* at 70.

150. *Id.* at 71–72.

with the child, which would fall into the second area of reform, involving visitation rights.

Arguing that *Granville* does not control, states could enact statutes entitling gestational surrogates and birth mothers to indirect contact. In an attempt to minimally intrude on the rights of the legal parents, these statutes might envision information being provided every six months for the first five years of a child's life, and then once a year from ages five to eighteen. E-mails, phone calls, and video communication could be similarly restricted. To be on the safe side, this statutory entitlement could be waived by gestational surrogates and birth mothers as part of the surrogacy contract or post-adoption contact agreement.[151]

### C. PROPOSED VISITATION REFORMS

The second, more complicated area of reform involves claims by gestational surrogates and birth mothers to visitation. Concededly, *Granville* applies to cases in which third parties seek visitation. Thus, as long as legal parenthood can vest in only two individuals, states seeking to allow gestational surrogates and birth mothers to make visitation claims will have to prioritize the rights of legal parents to make decisions for their children over the rights of gestational surrogates and birth mothers to visitation. But while this imbalance can never be completely eradicated absent an extensive reimagining of family law, there are steps that legislatures and courts can take to better balance the claims of gestational and birth mothers against those of legal parents, allowing gestational and birth mothers to "opt-out" of visitation rather than requiring them to "opt-in," as is the current state.

First, states should enact a default rule whereby courts will assume that the parties to gestational surrogacy agreements and PACAs intend surrogates and birth mothers to enjoy a right of continued visitation. In other words: a contract that says nothing about visitation grants gestational surrogates and birth mothers some degree of contact. Neither surrogates nor birth mothers are obligated to take advantage of their continued access. However,

151. Of course, any opt-out model comes with the risk that the party with the greater power will be able to force the party with less power to opt-out. This is discussed more thoroughly in Part V.D.

the legal parents may not unilaterally cut-off visitation absent a showing of harm to the child. Should the degree of visitation be disputed, courts should follow *Granville* in deferring to the legal parents. Thus, if a contract is silent, surrogates and birth mothers have a right to a non-zero, but potentially very minimal, amount of visitation with the children they birthed absent a showing of harm.

If a contract does set forth a specific visitation arrangement, however, the legal system should treat the intent as set forth in the "visitation arrangement" exactly as they would the intent as set forth in the remainder of the surrogacy or adoption contract. In other words: once the surrogate or birth mother and legal parents have entered into a contact arrangement, the legal parents have waived their right to change their minds. This parallels the way that the law is currently applied to gestational surrogates and birth mothers. For instance, the intent test, at least as applied to gestational surrogates, implicitly treats the surrogate as if she has waived her right to change her mind. While in the adoption context, there is generally a grace period wherein the birth mother may change her mind, there likewise comes a point where she, too, must abide by the contract. By applying the same (or very similar) standards to all parties to the contract, this modified intent test will strike a more equitable balance between the surrogate, birth mother, and legal parents. Note, though, that if there is a showing of changed circumstances or harm to the child, the court should take that into account — if there is a conflict between the adults' rights and the child's best interests, the child's well-being should be prioritized.

Finally, states should make an exception to the enforcement threshold contemplated in *Granville* (i.e., that courts should hesitate to grant third parties visitation rights unless the legal parents have denied visitation entirely),[152] an exception that would be justified because of surrogates' and birth mothers' greater claims to parental status relative to other third parties. As such, surrogates and birth mothers should be able to enforce visitation should the intended or adoptive parents limit visitation contrary to the terms of the contract, even if some access is allowed.[153]

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152. *See supra* note 150.

153. Again, this access might be very minimal — as infrequent as one or two visits per year, for instance. Courts would have to work out the exact parameters of these visits on

## D. ANALYSIS

While this system — opt-out indirect contact and visitation rights — would be preferable to the current state, it should be acknowledged that the state cannot prohibit waiver of indirect contact or visitation rights. As such, because of the power differential between gestational surrogates, birth mothers, and intended or adoptive parents, the intended or adoptive parents could include boilerplate opt-out clauses in surrogacy or adoption agreements. However, there is something to be said for the normalizing effect of an opt-out system. For example, adoption advocates have had great success in normalizing open adoption, though adoptive parents might prefer closed adoption. Their success may be credited to three main factors: first, sociological research suggested that adopted children were harmed by closed adoption; second, adopted children publicly stated that they were harmed by closed adoption; and third, birth mothers publicly identified themselves and stated that they were harmed by closed adoption.[154] Particularly, as adoptees and birth mothers were able to identify each other and form groups, they were able to challenge societal stigma and press for legislative change.[155]

This suggests that just creating the expectation of continued contact, up to and including continued visitation, may change behaviors in ways that better empower surrogates and birth mothers.[156] Rather than waiting for surrogates, birth mothers, and the children of surrogacy and adoption to take the initiative, the proposed reforms make it acceptable for women who may feel isolated, unable to advocate for continued contact or painfully denied it, to voice their needs and come together to make prospective parents listen. Empirical evidence, though limited, already suggests that children of both surrogacy and adoption are best served by continued contact, that most intended and adoptive parents ultimately wish that their children had more contact with their surrogate or birth mothers, and that these

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a case-by-case basis, taking into account the parties' finances, any other relevant (or changed) circumstances, and the child's best interests. As always, if there is a conflict between the adults' rights and the child's best interests, the child should be prioritized.

154. McGough, *supra* note 110.

155. *Id.*

156. *Id.*

forms of family creation are not going anywhere.[157] Thus, the proposed reforms may well help women and children feel empowered in advocating for contact that is in all parties' best interest. While it should be acknowledged that the proposed reforms cannot fully resolve all of the issues raised, they are a first step in striking a more equitable balance between the rights of intended or adoptive parents, gestational surrogates, and birth mothers, while still complying with the precedent set forth in *Granville*.

## V. CONCLUSION

For much of history, the paternal relationship was premised not on the biological connection between father and child, but on the legitimacy of the relationship that the father had with the child's mother. As a result, an understanding of fatherhood developed in which "fatherhood" could be subdivided into biological and social components.

As changing technical and societal realities made it possible for motherhood to be subdivided into gestational, genetic, and social components, courts responded to maternity disputes by developing an "intent test" that had its origins in paternity disputes, in which a similar requirement of demonstrated intent was necessary for an unmarried biological father to assert paternal rights over a social father with a legitimate relationship to the child's mother. However, there is an inherent tension involved in using an intent test to decide a maternity dispute against a gestational mother, given that gestation was the historical lynchpin of the parent-child relationship until very recently.

As applied to two groups of women — gestational surrogates and birth mothers looking to enforce post-adoption contact agreements — the intent test is often used to diminish the gestational contributions of these women in favor of the intended

157. Vasanti Jadva et al., *Surrogacy Families 10 Years On: Relationship with the Surrogate, Decisions Over Disclosure and Children's Understanding of Their Surrogacy Origins*, 27 HUM. REPROD. 3008 (2012). This is the first empirical study to attempt to understand surrogacy from the viewpoint of children born through surrogacy; as it is a British study, results may not fully apply to the American context. Though the study results applied to both family and stranger surrogacy, it is unclear whether they would be fully relevant in a U.S. context, where, unlike the U.K., most surrogacy is commercial. *See also* McGough & Peter-Falahahwazi, *supra* note 110, at 62–63, 68.

or adoptive parents, who are often privileged relative to the surrogates or birth mothers. In doing so, the courts implicitly devalue gestation to prioritize the nuclear family.

Instead, courts should use an opt-out model in which intent could be used as a baseline to entitle gestational surrogates and birth mothers to an intermediate status similar to that of grandparents and other interested non-parents, unless, of course, all parties to the contract/PACA agreed that no contact was desired. Under this model, if indirect contact and/or visitation were desired — the default presumption — gestational surrogates and birth mothers could claim some degree of indirect contact or visitation as an enforceable right, in accordance with the negotiated agreements. However, should there be allegations of either a change in circumstances or harm to the child, courts would defer to the legal parents in renegotiating or limiting contact, in accordance with Supreme Court precedent.

In this way, courts can achieve greater equity in maternity disputes, more fully recognizing the different contributions of parents — of mothers — and on the rights of children to have relationships with all the women involved in their creation.