



2013

Legislative Oppression: Restricting Gestational Surrogacy to Married Couples Is an Attempt to Legislate Morality

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Anderson, Linda S. (2013) "Legislative Oppression: Restricting Gestational Surrogacy to Married Couples Is an Attempt to Legislate Morality," *University of Baltimore Law Review*: Vol. 42: Iss. 4, Article 2.
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol42/iss4/2>

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LEGISLATIVE OPPRESSION: RESTRICTING GESTATIONAL SURROGACY TO MARRIED COUPLES IS AN ATTEMPT TO LEGISLATE MORALITY

Linda S. Anderson*

ABSTRACT

Since the days of Baby M, surrogacy arrangements have become a well-accepted form of assisted reproduction. As one of the first alternatives available to those who could not create families naturally, surrogacy arrangements have been scrutinized and discussed from a variety of angles. Today, state laws determine whether surrogacy is allowed, establish the standards for the agreements and qualifications of those who use this form of family creation, and set limits on payments involved in such arrangements. Many states that regulate surrogacy through legislation have restricted the availability of surrogacy arrangements to married couples, thereby eliminating any non-traditional heterosexual couples, single individuals, and in most states, all same-sex couples.

At first glance, this distinction does not seem to violate constitutional principles because it does not single out a suspect class, nor does it appear to treat similarly situated people differently. However, by reviewing a statutory scheme in Florida, where married couples have two statutory options for surrogacy arrangements and anyone else is limited to only one more burdensome option, it becomes clear that the only possible reason for the different treatment is the marital status of the intended parent or parents. This article suggests that the distinction is based on an effort to legislate a particular moral stance about marriage and families, explores whether legislation based on morality alone is appropriate, and concludes that, when morality is the only reason for a distinction, such legislation is not appropriate. Consequently, the requirement that intended parents

* Professor of Legal Skills, Stetson University College of Law. This article was supported by a research grant from Stetson College of Law. I wish to thank Associate Dean James Fox for his encouragement and advice. I must also thank the many colleagues, friends, and family members who provided the support and encouragement I needed to bring this article to completion.

be married in order to avail themselves of the benefits of gestational surrogacy arrangements is an inappropriate attempt to legislate morality, and the requirement should be eliminated.

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I. INTRODUCTION

Steve and Marci, a married couple, tried for several years to start a family with no success. They engaged the services of a fertility specialist yet were still unable to conceive a child. Mitch and Laura, a committed couple who had decided to forgo the traditional legal trappings of marriage, were in a similar situation, unable to conceive despite numerous alternative treatments. Glenn and Jim, a committed gay couple, also wanted to start a family, yet wanted to be sure that at least one of them was genetically connected to the child they would raise together. Though each couple had some options available to them, they all did not have the same options. While all could adopt, and the two heterosexual couples could use a variety of assisted reproductive techniques to attempt to conceive a child of their own, in many states only Steve and Marci, the heterosexual married couple, had the option to engage the services of a surrogate carrier to help them have a child.¹

In many states, only married heterosexual couples have the option of becoming the intended parents of a child born in conjunction with a surrogacy contract.² This article will focus on the effect of legislators' concerns about the marital status and sexual orientation of the intended parents, and how that concern affects legislation related to one particular form of assisted reproduction—the use of a gestational surrogate to carry a child. Beginning in Part II, this article will briefly introduce the history and evolution of legislation related to surrogate arrangements, concluding the description of legislation in Part III with an explanation of the current legislative schemes that address surrogacy. Using Florida as its basis, Part IV addresses the way legislation in this area discriminates against non-married couples and individuals. After evaluating the various justifications for the discrimination in Part IV, Part V explores the only remaining potential justification, morality. Part VI explores the judicial response to morals-based legislation and posits that legislation based solely on morality expresses animus toward particular groups who do not conform to that sense of morality. Part VII concludes that the

1. See JUDITH DAAR, *REPRODUCTIVE TECHNOLOGIES AND THE LAW* 40 (2006); Darra L. Hofman, "Mama's Baby, Daddy's Maybe:" *A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 454–60 (2009); John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 336 (2004).

2. Hofman, *supra* note 1, at 454–60.

only way to avoid the unconstitutional use of morality-based justification that discriminates against single individuals and unmarried couples is to allow all potential parents to make use of all options regarding surrogacy arrangements.

Though the prominent cases involving surrogacy arrangements, especially in the media, have involved intended parents who are married, the use of surrogacy agreements is one of the few options available to those who are in same-sex relationships or to those who do not have an opposite-sex partner.³ Almost all states that allow surrogacy agreements restrict them to married couples or make the process significantly more burdensome for unmarried intended parents.⁴ At the time the legislation was first introduced, imposing an additional burden on those who were not in a heterosexual marriage may have originally been designed to hinder those outside of heterosexual marriages from using assisted reproduction techniques in an effort to provide the most suitable environment for the resulting children.⁵ However, in today's world, parents come in all sizes, shapes, marital statuses, and sexual orientations. There is no legitimate reason to continue to differentiate between intended parents based on marital status or sexual orientation.⁶ Continuing to do so is simply an effort to retain a hold on a specific moral view of the world that is no longer as popularly agreed upon as in the past.⁷ Imposing this moral view on everybody demonstrates animosity toward those who do not conform.⁸ This norm is based on an outdated idea of morality—;one that is driven by religious views, and one that is no longer a valid reason for restricting behaviors or rights to access certain services, such as gestational surrogacy.⁹

II. SOCIETY'S DEBATE ABOUT SURROGACY

A. Background

Despite the innate need to procreate, not everyone is able to do so.¹⁰ Infertility and its treatment have been documented as early as the

3. See Robertson, *supra* note 1, at 359.

4. See June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 380 (2006).

5. See Hofman, *supra* note 1, at 460.

6. Anne R. Dana, Note, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 374 (2011).

7. *Id.* at 373–74.

8. See *id.*

9. See *id.* at 374.

10. DAAR, *supra* note 1, at 10.

fifth century B.C., when Hippocrates wrote of various recipes for its cure.¹¹ Reasons for infertility vary. Possible causes of infertility range from medical abnormalities in connection with reproductive organs; side effects of treatments of other medical conditions, such as chemotherapy or radiation treatment for cancer; social conditions; and unknown causes.¹² Today, there are a variety of assisted reproductive techniques to help infertile individuals have children. These include techniques that allow for the introduction of sperm through non-coital means, others that combine egg and sperm outside the body and then introduce the fertilized egg back into the uterus or fallopian tubes, and variations of these procedures that enhance the chances of conception, such as intracytoplasmic sperm injection, where the sperm is injected directly into the egg outside the body.¹³ In addition, for those who are unable to carry a child regardless of how it is conceived, surrogacy provides an option that allows at least one of the gamete donors to be genetically connected to the resulting child.¹⁴ It is also possible to use a surrogate carrier with donated gametes, allowing the intended parents to cause the child to be conceived without contributing to the genetic materials used to do so.¹⁵

Until the 1980s, when the infamous Baby M case¹⁶ brought surrogacy to the nation's attention, most people had not considered the complicated consequences of using a non-traditional approach to family building.¹⁷ Then came the media frenzy surrounding the Baby M case.¹⁸ Discussions about Marybeth Whitehead, the surrogate mother who had used her own egg and the sperm of William Stearn, a married man whose wife was unable to bear children, became

11. *Id.* at 25.

12. See AM. SOC'Y REPROD. MED., INFERTILITY: AN OVERVIEW: A GUIDE FOR PATIENTS, 6, 8-9, 11, 14 (2012), available at http://asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/infertility_overview.pdf; U.S. CONG., OFFICE OF TECH. ASSESSMENT, OTA-BA-358, INFERTILITY: MEDICAL AND SOCIAL CHOICES, 61-84, (1988), available at <http://www.fas.org/ota/reports/8822.pdf>.

13. See DAAR, *supra*, note 1, at 40.

14. *E.g.*, Dana, *supra* note 6, at 360.

15. See Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1161 (1997).

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

17. Sarah Mortazavi, Note, *It Takes a Village to Make a Child: Creating Guidelines for International Surrogacy*, 100 GEO. L.J. 2249, 2262 (2012); see also Christine L. Kerian, Article, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 116-17 (1997).

18. Mortazavi, *supra* note 17, at 2264.

common.¹⁹ All forms of media outlets, newspapers, television news, talk shows, and radio shows covered the news of the surrogate mother who changed her mind about giving up her baby to the biological father and literally “stole” the child and went into hiding until she was finally found several months later, at which point the child was returned to the Stearns.²⁰ Yet even then, the drama was still unfolding as people followed the court case that determined who would be considered Baby M’s parents.²¹ By the time it was over in 1988, several state legislatures had already begun to consider how to regulate situations where surrogates might be used.²² In states where the legislature had not yet acted, courts found that they had to address the issue with no guidance.²³

Prior to 1978, when the use of in vitro fertilization became possible, the only form of surrogacy available (now referred to as traditional surrogacy) required the use of the gestational mother’s ovum.²⁴ This created a genetic connection between the gestational carrier and the resulting child, which allowed courts to comfortably identify the surrogate as the legal mother when disputes arose.²⁵ Once it became possible to fertilize an egg in the lab and place the resulting zygote into a woman’s uterus for gestation through in vitro

19. See *id.* at 2262–64.

20. See, e.g., Robert Hanley, *Baby M Will Become Angry Over Legal Fight, Mother Says*, N.Y. TIMES, Apr. 8, 1987, at B1; Roger Rosenblatt, *Baby M. - Emotions for Sale*, TIME, Apr. 6, 1987, at 88; United Press Int’l, *Daughter Can't Testify for Surrogate Mom in Trial*, ORLANDO SENTINEL, Feb. 7, 1987, available at http://articles.orlandosentinel.com/1987-02-07/news/0100460021_1_whitehead-baby-m-surrogate-mother. The story was even made into a TV movie. *Baby M.* (ABC Circle Films 1988), <http://www.imdb.com/title/tt0094696/>.

21. The final decision regarding custody was issued on February 3, 1988, almost two years after Baby M was born, and approximately eighteen months after she was returned to Mr. Stearns. See *In re Baby M*, 537 A.2d 1227, at 1234–35.

22. See LA. REV. STAT. ANN. § 9:2713 (2005) (originally enacted by Acts 1987 No. 583 § 1, 1987 La. Sess. Law Serv. 583 (West)); MICH. COMP. LAWS ANN. § 722.851 (West 2011) (originally enacted by 1988 Pub. L. No. 199, § 1, 1988 Mich. Legis. Serv. 199 (West)); NEV. REV. STAT. ANN. § 127.287 (LexisNexis 2010) (originally enacted by 1987 Nev. Stat. 2049); N.J. STAT. ANN. § 9:17-44 (West 2002) (originally enacted by 1983 N.J. Sess. Law Serv. (West)).

23. See *Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 213–14 (Ky. 1986); *Yates v. Keane*, 457 N.W.2d 693 (Mich. Ct. App. 1990); *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813, 818 (N.Y. Sur. Ct. 1986); *In re Adoption of Reams*, 557 N.E.2d 159, 162 (Ohio Ct. App. 10th Dist. 1989).

24. Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 98 (Supp. 2010).

25. *Id.*

fertilization, gestational surrogacy became the more popular option.²⁶ Gestational surrogacy allows the surrogate to avoid any genetic connection to the resulting child, which makes it easier for an intended couple to be considered the legal parents.²⁷

States are free to allow or ban surrogacy arrangements, leading to a good deal of disparity in the way such arrangements are treated.²⁸ When surrogacy first became a reasonable option, issues arose regarding the distinction between providing a gestational service and selling babies.²⁹ Issues of whether payment for services was appropriate,³⁰ enforceability of contracts,³¹ and resolution of disputes involving custody and parentage caused some states to ban the practice of using surrogate agreements altogether.³² Other states limited the compensation involved or included restrictions on the terms of agreements.³³ The remaining states avoided the topic completely, leaving the legality of the agreements in those jurisdictions unclear.³⁴

Generally, compensation of surrogates is discouraged.³⁵ By restricting payment to identifiable costs of the process and resulting pregnancy, concerns about baby selling and exploitation of women are avoided.³⁶ The issues of enforceability of contracts and parentage determinations, though still not settled completely, have been well debated and generally addressed either through legislation or court decisions.³⁷ Though different from state to state, the individual jurisdictional approach to basic surrogacy issues has become rather apparent and settled by the jurisdictions that have addressed the issues.³⁸

26. *See id.* at 98–99.

27. *See id.*

28. *See id.* at 101.

29. *Cf.* Andrea B. Carroll, *Reregulating the Baby Market: A Call for a Ban on Payment of Birth-Mother Living Expenses*, 59 U. KAN. L. REV. 285, 290–94 (2011).

30. *Cf. id.* at 293–94.

31. Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2307–08 (1995). *See generally* Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21 (1989).

32. *See Spivack, supra* note 24, at 101.

33. *See* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 851 (2000).

34. Spivack, *supra* note 24, at 102.

35. *See id.* at 101.

36. *See* Carroll, *supra* note 29, at 310, 313.

37. *See* Spivack, *supra* note 24, at 101–11.

38. *See id.* at 101–02.

Now that the use of surrogacy agreements has become an accepted option for dealing with infertility problems, new, secondary issues have begun to arise as more parties attempt to fit this service into their own personal situations. The use of gestational surrogates has opened doors for parties to add contract provisions for certain situations that allow a more personalized determination of the legal and social status of all involved.³⁹ Though a gestational surrogate is not generally recognized as a legal parent, some contracts establish the nature of the connection between the gestational surrogate, the resulting child, and the intended parents.⁴⁰ These agreements often involve sharing information about the child with the gestational mother and may involve establishing some sort of visitation, making the gestational surrogate a quasi-parent or at least a quasi-relative who has some involvement with the resulting child.⁴¹

Some gestational surrogates provide this service several times, and in addition to the altruistic reasons for doing so, in states where some compensation is allowed, the gestational surrogate is potentially

39. See *Sample Gestational Surrogacy Agreement*, ALL ABOUT SURROGACY.COM, http://www.allaboutsurgogacy.com/sample_contracts/TScontract2.htm (last visited June 31, 2013).

40. See *id.*

41. An example of such contract provisions can be found in a sample contract provided by AllAboutSurrogacy.com. *Id.* The relevant language is:

11. Postpartum contact between the *Genetic Father*, resulting offspring and *Surrogate* shall be upon the mutual agreement of the parties with the best interest of the Child controlling it.

11.1. Without it consisting any alienation of *Genetic Father*'s rights as to the sole and exclusive custody, parental responsibility, decision-making, care and control of the Child nor setting up base for any claim from *Surrogate* to this effect, it is *Genetic Father* intention to allow *Surrogate* to visit the Child freely, after having previously set an appointment for such visit. All the visits shall be in the presence of the *Genetic Father* unless permitted otherwise by the *Genetic Father*.

11.2. Under no consideration will the *Surrogate* take the Child from the custody of the *Genetic Father* or leave with the Child to take him to a place different than the one where she was permitted to visit him. Such visits shall not be construed as shared custody visitation rights nor set base for any claim to such. At any time, with consideration to the Child's well being and best interest, *Genetic Father* may change or end the regimen of such visits.

11.3. *Surrogate*, agrees that in the best interest of the child she will not form or attempt to form a parent-child relationship with any child born pursuant to the terms of this Agreement.

Id.

engaging in a business endeavor.⁴² Like any other service-related business, it seems reasonable for there to be incentives and consequences involved in the provision of this service. However, these issues have not yet been addressed through legislation or appellate court decisions.

Another secondary issue arises when parties to the surrogacy agreement are located or have obtained services in different jurisdictions. Typical conflict-of-laws analysis is usually sufficient to address concerns with various states, but many people use surrogates from other countries as well.⁴³ For instance, India has a number of surrogacy agencies that provide gestational surrogates for American or European intended parents.⁴⁴ Recently, issues related to the citizenship of the resulting child have caused unanticipated complications for people using these services.⁴⁵

An additional issue is access to surrogacy agreements by parties who are not heterosexual married couples. Most legislation has limited surrogacy agreements to married couples, identifying them as husband and wife.⁴⁶ Some, however, have been silent about who can use a traditional surrogate, and at least one state, Florida, has separate statutes relating to traditional surrogacy and gestational surrogacy, with marital status as one of the criteria for which type of arrangement is available.⁴⁷ Anyone can make use of a traditional surrogate.⁴⁸ Only married heterosexual couples get the full benefit of the statute related to gestational surrogates.⁴⁹ As this article will demonstrate, there are very important benefits available through the gestational surrogacy statute that are not available to those who choose, or are restricted to, traditional surrogacy.⁵⁰

42. See Epstein, *supra* note 31, at 2318–19.

43. Clarissa Ward, *More Americans Now Traveling to India for Surrogate Pregnancy*, ABC NEWS (Apr. 27, 2010), <http://abcnews.go.com/WN/adoption-india-americans-plan-surrogacy-abroad/story?id=10487880>.

44. Isha Bhatia, *Indian Surrogacy Industry Sets Take-Home-Baby Trend*, DEUTSCHE WELLE (June 2, 2013), <http://www.dw.de/indian-surrogacy-industry-sets-take-home-baby-trend/a-16579078>.

45. See, e.g., Marcelo de Alcantara, *Surrogacy in Japan: Legal Implications for Parentage and Citizenship*, 48 FAM. CT. REV. 417 (2010).

46. Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 334 (2006).

47. Compare FLA. STAT. ANN. § 742.15 (West 2010) (requiring marriage for gestational surrogacy), with FLA. STAT. ANN. § 63.213 (West Supp. 2013) (identifying parties without requiring any of them to be married).

48. See § 63.213 (West Supp. 2013).

49. § 742.15(1) (West 2010).

50. See *infra* Part IV.

B. Applying Existing Law to Surrogacy Disputes

Faced with this new technological aspect of reproduction, several courts attempted to address issues related to surrogacy arrangements by applying existing legislative schemes. When the Kentucky Attorney General attempted to revoke the charter of a corporation that provided surrogacy services, the Kentucky Supreme Court was forced to evaluate whether baby-selling statutes applied to businesses providing surrogacy options.⁵¹ In *Surrogate Parenting Associates, Inc. v. Commissioner ex rel. Armstrong*,⁵² the court eventually decided that the statutes related to baby selling could not apply because the agreements regarding the children occurred before conception.⁵³ The court assumed that the traditional process for terminating the mother's rights that was used in adoption proceedings would apply, so the mother would have the opportunity to change her mind after the birth of the child.⁵⁴ This essentially set out the guidelines for surrogacy agreements, but the court invited the legislature to take action.⁵⁵ The Kentucky legislature eventually changed the rule announced in *Surrogate Parenting* when it outlawed surrogacy agreements that involved compensation.⁵⁶

The New York Surrogate Court also invited legislative action since it wanted to avoid judicially legislating on this issue.⁵⁷ Faced with deciding the fate of a child born to a surrogate who had been paid \$10,000, and whether the contractual arrangement would be given legal effect, the court declined to apply the existing adoption law statutes, which prohibited payment in this situation.⁵⁸ Instead, it reluctantly upheld the agreement, including the payment provisions, indicating that since the legislature had not contemplated surrogacy when it had enacted a ban on payment for adoption of a child, the court could not legislate from the bench.⁵⁹

51. *Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209, 210–11 (Ky. 1986).

52. *Id.*

53. *Id.* at 211.

54. *Id.* at 212–13.

55. *Id.* at 213–14.

56. KY. REV. STAT. ANN. § 199.590 (West 2006).

57. See *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813, 818 (N.Y. Sur. Ct. 1986) (“However, the court requests the legislature to review this serious problem in order to determine whether statutory provisions should be made to allow or disallow the payments requested herein and the practice of surrogate parenting.”).

58. *Id.* at 814, 817–18.

59. *Id.* at 817–18.

C. Legislative Attempts to Regulate or Restrict Surrogacy

As states first began to enact legislation, there were four different types of statutes considered. Some outlawed compensation to surrogates but remained silent regarding voluntary agreements or the rights of those involved.⁶⁰ Others outlawed contracts that involved compensation to the surrogate and attempted to address other issues for agreements that did not involve compensation.⁶¹ A third category outlawed surrogacy altogether, regardless of compensation, but still went on to address such things as parentage, recognizing that whether enforceable or not, there may be agreements that would result in children whose status must be addressed.⁶² Finally, there were statutory attempts to exempt surrogacy from existing legislation on adoption, but with no additional attempts to regulate the practice.⁶³

60. See, e.g., LA. REV. STAT. ANN. § 9:2713 (2005). Section A of this statute states: "A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy." *Id.*

61. Compare WASH. REV. CODE ANN. § 26.26.230 (West 2005) (banning surrogacy agreements for compensation by stating: "No person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract, written or unwritten, for compensation"), with *id.* § 26.26.260 (recognizing that surrogacy agreements without compensation would be valid and would require parentage determinations: "If a child is born to a surrogate mother pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child . . .").

62. E.g., ARIZ. REV. STAT. ANN. § 25-218 (2007) (holding unconstitutional in the case *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994)). This statute, enacted in 1989, stated:

A. No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.

B. A surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to custody of that child.

C. If the mother of a child born as a result of a surrogate contract is married, her husband is presumed to be the legal father of the child. This presumption is rebuttable.

D. For the purposes of this section, 'surrogate parentage contract' means a contract, agreement or arrangement in which a woman agrees to the implantation of an embryo not related to that woman or agrees to conceive a child through natural or artificial insemination and to voluntarily relinquish her parental rights to the child.

Id.

63. E.g., NEV. REV. STAT. ANN. § 127.287 (LexisNexis 2010). This statute bans payment for adoption, but paragraph 5 states: "The provisions of this section do not apply if a woman enters into a lawful contract to act as a surrogate, be inseminated and give birth to the child of a man who is not her husband." *Id.* At the time this statute was

Louisiana was the first state to enact legislation governing surrogacy.⁶⁴ The Louisiana statute made surrogacy contracts that involved compensation void and unenforceable.⁶⁵ Soon after, Washington made agreements involving compensation void and unenforceable⁶⁶ yet recognized that volunteer agreements could be used that would require determinations of the rights and obligations of the parties involved.⁶⁷ The Washington legislature additionally mandated that existing laws regarding a child's best interests applied to make these determinations.⁶⁸

At least initially, Nevada legislation suggested that surrogacy might be viable but exempted it from statutes on adoption.⁶⁹ Arizona and Michigan each attempted to outlaw surrogacy in any form yet also included statutory provisions that established parentage rights and custody for children born of such agreements.⁷⁰ Apparently, the legislatures in these states recognized that they could prevent the agreements from being enforceable by the court but might still have to deal with the resulting children of agreements that did not involve disputes between the contracting parties.⁷¹ Finally, of the early legislative efforts, Indiana enacted very specific provisions, making certain portions of agreements unenforceable but allowing agreements that followed guidelines enumerated in the statutes.⁷²

enacted, there were no provisions for valid surrogacy agreements in Nevada. The current statute that regulates such agreements was enacted in 1993. *See id.* § 126.045.

64. Dana R. Bennett, *Surrogate Parenting*, Nev. Legislative Council Bureau, Research Div., Background Paper 88-2, available at <http://www.leg.state.nv.us/Division/Research/Publications/Bkground/BP88-02.pdf>; *see also* LA. REV. STAT. ANN. § 9:2713 (2005)) (enacted Sept. 1, 1987).
65. LA. REV. STAT. ANN. § 9:2713A ("A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.").
66. WASH. REV. CODE ANN. §§ 26.26.230, 240.
67. *See id.* (establishing parentage and custody of a child born through surrogacy arrangements).
68. *See id.* (establishing parentage and custody of a child born through surrogacy arrangements).
69. NEV. REV. STAT. ANN. § 127.287.
70. ARIZ. REV. STAT. ANN. § 25-218 (2007); MICH. COMP. LAWS ANN. §§ 722.855, 859, 861 (West 2011).
71. *See supra* notes 63–73 and accompanying text.
72. IND. CODE ANN. § 31-8-2-1 (LexisNexis 2007), *repealed by* Pub. L. No. 1-1997, § 157. The former statute read:
- CHAPTER 2. SURROGATE AGREEMENTS;
ENFORCEABILITY
§ 31-8-2-1. Agreements which may not be enforced.

D. Model Legislation Efforts

By 1990, there were two model acts that addressed issues related to surrogacy: The Model Surrogacy Act proposed by the American Bar Association and the Uniform Status of Children of Assisted Conception Act, drafted by the National Conference of Commissioners on Uniform State Laws.⁷³ Each of these has evolved and been incorporated into more comprehensive versions.⁷⁴ Originally, the Model Surrogacy Act eliminated the presumptive maternity of the surrogate, ceding that decision to the surrogacy contract itself.⁷⁵ It also authorized a fee for the surrogate and addressed issues about informed consent.⁷⁶

The focus of the Uniform Status of Children of Assisted Reproduction Act was the status of the resulting child in relation to the parents.⁷⁷ Broader than the Model Surrogacy Act, the Uniform Children of Assisted Reproduction Act addressed relationships created by any type of assisted reproduction.⁷⁸ Many of the requirements included in the Uniform Status of Children of Assisted Reproduction Act mirrored those already in place for adoptions, such as home studies and a guardian ad litem, to represent the best interests of the resulting child or children.⁷⁹

The provisions of these two model acts, along with several other model acts that attempted to clarify rights and obligations of parents

The general assembly declares that it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to do any of the following:

- (1) Provide a gamete to conceive a child.
- (2) Become pregnant.
- (3) Consent to undergo or undergo an abortion.
- (4) Undergo medical or psychological treatment or examination.
- (5) Use a substance or engage in activity only in accordance with the demands of another person.
- (6) Waive parental rights or duties to a child.
- (7) Terminate care, custody, or control of a child.
- (8) Consent to a stepparent adoption under IC 31-3-1.

Pub. L. No. 175-1988, § 1.

73. Linda S. Cioffredi, *New Hampshire in Surrogacy: Making Way for the Future*, 31 N.H. B.J. 189, 192-93 (1990).

74. See, e.g., UNIF. PARENTAGE ACT (2002).

75. Cioffredi, *supra* note 73, at 192.

76. *Id.*

77. *Id.* at 193; Ann MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L.Q. 487, 492-93 (1991).

78. See Cioffredi, *supra* note 73, at 192-93; Massie, *supra* note 77, at 489-90.

79. See Cioffredi, *supra* note 73, at 193.

and children, were consolidated into the Uniform Parentage Act (UPA).⁸⁰ The amended version of the UPA treats children equally regardless of their parents' marital status.⁸¹ Article 8 addresses gestational agreements.⁸² The drafters recognized that there was no consistency among the states about how to handle decisions related to gestational surrogacy, so the section was created in a manner that allowed states to eliminate this section without compromising the provisions of the rest of the UPA.⁸³ Article 8 requires court approval of surrogacy agreements⁸⁴ and insures that children will be supported even if the arrangements do not proceed as contemplated.⁸⁵ In a significant departure from earlier acts, the 2002 amended version eliminates the need for one of the intended parents to have a genetic connection to the resulting child.⁸⁶

III. SURROGACY LEGISLATION TODAY

Today, those states that have surrogacy legislation run the gamut from criminalizing surrogacy agreements⁸⁷ to the types of comprehensive regulation now part of the Uniform Parentage Act.⁸⁸ Legislatures and courts still grapple with three concerns: whether there are differences related to traditional surrogacy or gestational surrogacy,⁸⁹ whether the surrogate gets compensated for more than

80. UNIF. PARENTAGE ACT (2002).

81. *Id.* at prefatory note.

82. *Id.* art. 8.

83. *Id.* art. 8, intro. cmt.

84. *See id.* §§ 801–03.

85. *See id.* § 807.

86. *Id.* art. 8, intro. cmt.

87. *See, e.g.,* N.Y. DOM. REL. L. § 123 (McKinney 2012).

Any person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section, after having been once subject to a civil penalty for violating this section, shall be guilty of a felony.

Id. § 123(2)(b).

88. *See* N.H. REV. STAT. ANN. § 168:B (LexisNexis 2010).

89. Traditional surrogacy involved the use of the surrogate mother's egg and the sperm of the intended father or a donor. Gestational surrogacy requires that there be no genetic connection to the surrogate mother. Hofman, *supra* note 1, at 451.

Surrogacy's permutations can include situations where:

- A surrogate serves solely as the gestational mother to a child who is the genetic offspring of both intended parents (often called "gestational surrogacy");

....

the expenses incurred as a result of the pregnancy, and whether the intended parents must be married and heterosexual.⁹⁰

Most states restrict surrogacy agreements to married couples.⁹¹ In doing so, these states' legislatures have not explicitly explained why they have made this choice. It is likely that this is a political move—a way to appease those who believe that only married couples should have children and to get support for this alternative means of doing so, which may be a stretch for some with strong beliefs about reproduction and marriage.⁹² In fact, the Catholic Church does not approve of the use of surrogacy even if the intended parents are married.⁹³ Looking at the restriction to married couples as a compromise may be an accurate explanation. For example, when the Florida legislature enacted the initial legislation that addressed surrogacy, the Preplanned Adoption statute,⁹⁴ two of the sponsors of the bill reported on the process in an effort to assist others who might be contemplating such a legislative effort.⁹⁵ The sponsors, both physicians as well as legislators, described the process of garnering support from various interested groups, such as the Florida Medical Association, the Florida Society of Obstetricians and Gynecologists, and the Florida Society of Reproductive Endocrinologists.⁹⁶ Other interested organizations that were not involved in the direct provision of medical services related to surrogacy included the American Civil Liberties Union and the Florida Catholic Conference.⁹⁷ In the initial

• A surrogate serves as both the genetic and the gestational mother to a child who is the genetic offspring of the intended father (often called “traditional surrogacy”);

Id.

90. *Id.* at 460.

91. Jamie L. Zuckerman, Comment, *Extreme Makeover—Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements*, 32 NOVA L. REV. 661, 680 (2008).

92. Hofman, *supra* note 1, at 460.

93. CATECHISM OF THE CATHOLIC CHURCH, 631, Part Three, Section Two, Chapter Two, Article 6, III, 2376 (1997) (“Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral. These techniques (heterologous artificial insemination and fertilization) infringe the child's right to be born of a father and mother known to him and bound to each other by marriage. They betray the spouses' ‘right to become a father and a mother only through each other.’”).

94. FLA. STAT. ANN. § 63.213 (West Supp. 2013).

95. See Angeli R. Maun et al., *The Passage of Florida's Statute on Assisted Reproductive Technology*, 84 OBSTETRICS & GYNECOLOGY 889, 891 (1994).

96. See *id.* at 891.

97. See *id.*

efforts to avoid strong opposition from the Catholic delegation, the drafters and sponsors included many provisions that mirrored the adoption process, including the requirement that the intended parents be married.⁹⁸ Some of those requirements were later jettisoned from the bill, but even when they were included, they appeased the Catholic delegation only to the point of avoiding a strong oppositional campaign.⁹⁹ In the end, that group still refused to support the legislation.¹⁰⁰

Regardless of the reasons for distinguishing between married and unmarried couples, those distinctions are common to most legislation regarding surrogate agreements.¹⁰¹ Creating distinctions such as these where none should exist is unconstitutional discrimination. The Florida statutory scheme provides a vivid example of this type of discrimination.

IV. DISCRIMINATION AGAINST NON-MARRIED COUPLES AND INDIVIDUALS

Most states that have legislation regarding surrogacy restrict all forms of surrogacy to married couples.¹⁰² One group clearly prohibited from this option is same-sex couples.¹⁰³ But unmarried heterosexual couples are also prohibited from accessing these arrangements.¹⁰⁴ Since the legislation does not single out only same-sex couples, it is difficult to suggest that the legislation discriminates against couples based on their gender.¹⁰⁵ If this were the case, the Equal Protection analysis would likely allow for some enhanced level of scrutiny to determine whether the discrimination was constitutional.¹⁰⁶ But when left with rational basis review, one who wishes to challenge these statutes must demonstrate that, in addition to same-sex couples, regardless of their marital status, the unmarried couples and individuals are similarly situated to the married couples,

98. *See id.* at 891–92.

99. *See id.* at 892–93.

100. *See id.* at 893.

101. Zuckerman, *supra* note 91, at 680.

102. *Id.*

103. *See supra* Part III.

104. *See supra* Part III.

105. FLA. STAT. ANN. §§ 742.13–15 (West 2010); § 63.213 (West Supp. 2013).

106. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (identifying heightened scrutiny as the appropriate standard of review for claims of discrimination based on sex).

and the distinction between married or unmarried persons has no legitimate purpose.¹⁰⁷

A. *An Example of Blatant Discrimination*

By enacting two alternative ways to use a surrogate carrier, Florida has provided a clear basis for arguing that unmarried couples and individuals, regardless of sexual orientation, are similarly situated to married couples when it comes to the use of surrogate parentage arrangements.¹⁰⁸ One of the most blatant examples of the distinctly different ways intended parents are treated differently based on marital status is the statutory scheme in Florida.¹⁰⁹ While most scholars describe the Florida surrogacy statute as one that is limited to married couples,¹¹⁰ Florida actually has two different statutes that can apply to a surrogacy agreement depending on whether the parties involved qualify under the statute.¹¹¹

1. Preplanned Adoption Act

Under Florida Statutes Annotated section 63.213, the Preplanned Adoption Statute, anyone, regardless of their marital status, is eligible to enter into a surrogacy agreement as long as the agreement comports with the procedure set out in the statute.¹¹² This provision can be used in either a traditional surrogacy arrangement or a gestational surrogacy arrangement, as there is no requirement delineating where the gametes originate in relation to the parties.¹¹³ The Preplanned Adoption Statute provides a forty-eight hour window after the birth of the child for the woman who gave birth to change

107. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (stating that the Equal Protection Clause requires that those who are similarly situated be treated equally).

108. FLA. STAT. ANN. §§ 742.13–15 (West 2010); § 63.213 (West Supp. 2013).

109. §§ 742.13–15; § 63.213.

110. See, e.g., Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 643 (2002). “Florida, Nevada, New Hampshire and Virginia’s statutes all contain provisions requiring at least one of the intending parents to be a genetic parent of the child. In addition, these statutes require that the intending parents be married to each other.” *Id.* The article goes on to briefly discuss the traditional surrogacy statute, but does not explain that the traditional model can be used by unmarried intended parents. *Id.* at 643–47; see also Joseph F. Morrissey, Lochner, Lawrence, and Liberty, 27 GA. ST. U. L. REV. 609, 629 (2011) (“[S]ome of the states which expressly permit surrogacy, including Florida . . . have closed off this avenue to unmarried people.”).

111. §§ 742.13–15 (West 2010); 63.213 (West Supp. 2013).

112. § 63.213.

113. *Id.*

her mind and keep the child.¹¹⁴ As of July 1, 2012, this provision only applies when the gestational carrier is genetically related to the child.¹¹⁵

In addition, the statute requires court approval of the “adoption” of the child, using the standards outlined in the Florida adoption statutes.¹¹⁶ Until recently, this connection to the Florida adoption statutes meant those in a same-sex relationship were implicitly prohibited from meeting the qualifications since Florida did not allow practicing homosexuals to adopt.¹¹⁷ However, recently the ban on homosexual adoption has been changed, and sexual orientation is no longer a consideration in the adoption decision.¹¹⁸ This change eliminates the last restriction based on marital status or sexual orientation.¹¹⁹

Finally, this statute allows for any party to change his or her mind throughout the entire term of the contract.¹²⁰ The result of the application of this statute for many years was that the surrogate could keep the child and be considered the legal mother, even if she had no genetic link to the child.¹²¹ So when a couple, married or not, used this process and chose to use a gestational surrogate but provided an embryo created using both of their gametes, they risked the chance that the surrogate carrier would change her mind about relinquishing the child and would keep it, regardless of her lack of genetic connection and the couple’s genetic contribution.¹²²

114. *Id.* § 63.213(2)(a).

115. *Id.*

116. *See id.* § 63.213(2)(c), (d).

117. Until the recent case of *Fla. Dept. of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010), which found Florida Statute Annotated § 63.042(3) unconstitutional, homosexuals were banned from adopting.

118. *See id.* at 91–92.

119. *See* § 63.042(3) (West Supp. 2013), *invalidated by Fla. Dept. of Children & Families*, 45 So. 3d 79.

120. § 63.213(2)(i) (“[T]he agreement may be terminated at any time by any of the parties.”).

121. The Preplanned Adoption statute contains no requirement that the gestational mother provide the egg, so even though there is a separate statute that addresses only gestational surrogacy, parties could choose to use a contract that conforms to the Preplanned Adoption statute instead, thereby creating a situation where the intended parent or parents provided the gametes or embryo and the gestational mother chose to rescind the agreement and keep the resulting child.

122. *See* § 63.213(2)(a), (e) (West 2012), *amended by FLA. STAT. ANN.* § 63.213(2)(a), (e) (West Supp. 2013).

Under the new provisions of the Preplanned Adoption Statute, effective July 1, 2012, those who choose to use their own egg¹²³ will be treated differently than those who rely on the gestational carrier to provide the egg. This will eliminate the odd potential of the gestational carrier retaining her rights to a child who has no genetic connection to her but has a genetic connection to at least one if not both of the intended parents. Simultaneously, however, the revised legislation discriminates against anyone who is unable to provide an egg and chooses to use the carrier's egg. A couple, married or not, who chooses to use the gestational carrier's egg (traditional surrogacy) runs the risk that the carrier will opt to retain her rights to the child.¹²⁴ The same distinction between "traditional surrogacy" and "gestational surrogacy" applies to all who use the provisions outlined by this statute. Consequently, in isolation, the statute appears to treat all equally. While this change seems appropriate since it treats all parties alike, the existence of an alternative that avoids this result, available only to married couples, highlights the way married and unmarried couples are treated differently.¹²⁵

Looking more broadly at all of the options for surrogate arrangements available in Florida demonstrates a clear discriminatory distinction. Only married heterosexual couples have the option of following the process described in the Gestational Surrogacy provisions of the Florida statutes.¹²⁶ Unmarried couples and individuals are limited to the Preplanned Adoption provisions, including the requirement to comply with adoption standards, and the option of either party to terminate the agreement prior to the birth of the child.¹²⁷ Married couples may choose to proceed under either the Preplanned Adoption statute or the Gestational Surrogacy Act.¹²⁸

2. Gestational Surrogacy Act

At first glance, the existence of the Preplanned Adoption statute does not appear to treat people differently based on their marital status, and now that Florida adoption laws are no longer excluding homosexuals, it does not prohibit surrogacy based on sexual

123. When a surrogate contributes none of the genetic material the process is referred to as gestational surrogacy. If the surrogate carrier also contributes the egg, the process is referred to as traditional surrogacy. See Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 474 (2006).

124. See § 63.213(1)(a), (2)(a), (e) (West Supp. 2013).

125. See discussion of Florida Surrogacy Act *infra* Part IV.A.2.

126. § 742.15(1) (West 2010).

127. § 63.213(2)(i) (West 2012).

128. § 63.213 (West 2012); § 742.15(1) (West 2010).

orientation.¹²⁹ In isolation, it does not discriminate as currently written.¹³⁰ However, the 2012 Legislature amended this statute.¹³¹ The amendments eliminate the ability of a surrogate carrier to opt to keep the resulting child if she is a true gestational surrogate.¹³² Though this improves the statute by eliminating such a drastic option, and makes clear that all intended parents can use a gestational surrogacy arrangement, it does not address the other differences that demonstrate bias toward those who are married.¹³³ The potential for differing treatment arises by virtue of the fact that the legislature has also enacted another statute that deals exclusively with gestational surrogacy.¹³⁴ Under Florida Statutes Annotated § 742.13 et seq., a surrogacy arrangement where at least one of the intended parents has contributed genetic material and the surrogate has no genetic connection to the resulting child (a scenario that can potentially arise under the Preplanned Adoption statutes as well) is subject to an expedited and non-adversarial process to affirm parental rights.¹³⁵ As long as the surrogate has no genetic connection to the resulting child, and at least one of the intended parents does have a genetic connection, the gestational carrier cannot have any parental rights.¹³⁶ She must immediately relinquish her rights to the child upon its birth,¹³⁷ and the intended parents are able to obtain an expedited order from the court affirming their rights as parents and naming them on the birth certificate.¹³⁸ There is no need for a long process and no application of the adoption standards to the determination.¹³⁹ Instead of a waiting period when the birth mother can change her mind, as in the Florida adoption statutes¹⁴⁰ or the Preplanned Adoption Statute,¹⁴¹

129. See *supra* text accompanying notes 120–23.

130. See *supra* text accompanying note 115.

131. See discussion *supra* Part IV.A.1.

132. See § 63.213(1)(a), (2)(a), (e) (West Supp. 2013).

133. See § 63.213(6)(h) (West Supp. 2013).

134. See § 742.13–18.

135. See § 742.16.

136. See § 742.15 (3)(c), (e).

137. § 742.15(3)(c).

138. § 742.16(1), (8).

139. See § 63.213(2) (West Supp. 2013) (outlining Florida’s statutory adoption requirements).

140. See § 63.082 (4)(a), (b) (“(a) [C]onsent to an adoption shall not be executed before the birth of the minor. (b) A consent to the adoption of a minor who is to be placed for adoption may be executed by the birth mother 48 hours after the minor’s birth or the day the birth mother is notified in writing, . . . that she is fit to be released from the licensed hospital or birth center, whichever is earlier.”).

the gestational mother has no option to claim the child.¹⁴² Rather than an approval process that might involve the type of searching inquiry that courts use when evaluating adoptive parents,¹⁴³ the Gestational Surrogacy Statute simply requires the court to determine whether the terms of the contract have been met and that one of the intended parents has a genetic connection to the child.¹⁴⁴

While Florida provides an option for unmarried couples where some other states do not, the significantly higher risks associated with the only option available to non-married couples highlights the blatant discrimination against non-married individuals and couples in a way that the other states do not.¹⁴⁵ Yet the same type of discrimination is created by states that limit surrogacy arrangements to married couples.¹⁴⁶ Though non-married couples have the option

141. See § 63.213(1)(b) (West 2012) (prohibiting arrangements from “[c]onstitut[ing] consent of a mother to place her child for adoption until 48 hours following birth”); § 63.213(2)(e) (requiring an agreement contain the acknowledgment of the intended parents that “they may not receive custody or the parental rights under the agreement if the volunteer mother terminates the agreement or if the volunteer mother rescinds her consent to place her child for adoption within 48 hours after birth”).

142. See § 742.15(3)(c) (West 2010) (providing that except when neither of the intended parents is genetically connected to the child, “the gestational surrogate agrees to relinquish any parental rights upon the child’s birth and to proceed with the judicial proceedings prescribed under section 742.16”).

143. Florida statute provides:

The preliminary home study must include, at a minimum:

- (a) An interview with the intended adoptive parents;
- (b) Records checks of the department's central abuse registry and criminal records correspondence checks under s. 39.0138 through the Department of Law Enforcement on the intended adoptive parents;
- (c) An assessment of the physical environment of the home;
- (d) A determination of the financial security of the intended adoptive parents;
- (e) Documentation of counseling and education of the intended adoptive parents on adoptive parenting;
- (f) Documentation that information on adoption and the adoption process has been provided to the intended adoptive parents;
- (g) Documentation that information on support services available in the community has been provided to the intended adoptive parents; and
- (h) A copy of each signed acknowledgment of receipt of disclosure required by s. 63.085.

§ 63.092(3) (West 2012); see also § 63.125 (West 2012) (explaining requirements of final home study).

144. § 742.16(6) (West 2010).

145. See discussion *infra* Part IV.D.1.

146. See Storrow, *supra* note 110, at 643.

of creating families through adoption or a female partner's use of donated sperm, additional legal steps for both parties to become legal parents are required, which also means that additional scrutiny by the courts is required.¹⁴⁷ But it also means that these states allow non-married individuals and couples to build their families in non-traditional manners.¹⁴⁸ So the discrimination arises because of the limitations on the types of non-traditional, family-building options available.¹⁴⁹

B. Justification for Discrimination

As noted in Part II, in the early 1990s, when surrogacy was just beginning to be legislatively regulated, the Uniform Status of Children of Assisted Conception Act¹⁵⁰ provided a model for state legislatures to use as they considered legislation related to surrogacy. The express purpose of the Uniform Act was to define the legal status of children.¹⁵¹ The act provided two options for states to address surrogacy.¹⁵² One was a complete ban; the other established specific and rigorous requirements designed to “protect the ‘rights, security and well-being’ of affected children” and to “provide a child with two legal parents.”¹⁵³ The requirements suggested by the Uniform Act included the requirement that the intended parents be a male and female, and married to each other.¹⁵⁴ The requirement that intended parents be married had the potential to bring up questions about whether states could limit this reproductive option to only married couples, and by extension, whether there was a fundamental right to procreation outside of marriage.¹⁵⁵ Most of the argument for the constitutionality of the distinction was based on the state's interest in preserving the marital family, traditional family life, and “historical notions of morality.”¹⁵⁶

As the legislation was implemented in various states, scholars discussed potential challenges to the constitutionality of the legislative distinction based on the Due Process and Equal Protection

147. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982).

148. See *supra* notes 112–21 and accompanying text.

149. See *supra* notes 123–36 and accompanying text.

150. See discussion *supra* Part II.C–D.

151. Massie, *supra* note 77, at 489; see also discussion *supra* Part II.D.

152. Massie, *supra* note 77, at 490.

153. *Id.* at 490, 495.

154. *Id.* at 490.

155. See *id.* at 508.

156. *Id.* at 509.

provisions of the Constitution.¹⁵⁷ When evaluating the potential legislation under the Due Process Clause, the statute need only meet the rational basis test, since there are no status distinctions that trigger a higher standard of review.¹⁵⁸ Proponents of restricting the access to surrogacy arrangements to married couples argue that the state's interest in providing a child with a family that "include[s] two parents, a man and a woman, who are married to each other"¹⁵⁹ serves the best interests of the child and meets the rational basis test.¹⁶⁰ In fact, at the time the Uniform Act was being drafted, proponents argued that this reason would also meet the heightened scrutiny test, since serving the best interests of children rises to the level of a compelling state interest.¹⁶¹ The argument continues by recognizing that requiring a heterosexual married couple at the time of the birth does not guarantee that the same family dynamic will remain as the child grows up.¹⁶² Nor does it guarantee that the married couple requirement necessarily leads to a safe and supportive family environment; but the requirement that the child at least begin life in a situation like this was considered, by at least some, to be justification for the restriction to heterosexual married couples.¹⁶³

This same reason, that a heterosexual married couple as a parental unit serves the best interest of the resulting child, is used to support the argument that the Equal Protection Clause is not violated by this statutory scheme.¹⁶⁴ This argument requires determining whether married couples and unmarried couples who want to use surrogacy are similarly situated.¹⁶⁵ The obvious difference is that one couple is legally recognized as a unit and the other is not, but this is not a legitimate reason to distinguish between married or unmarried couples who want to build families.¹⁶⁶ Under the current statutory system in Florida, it is difficult to suggest that married and unmarried couples, or even single individuals, are situated differently in terms of abilities to create families.¹⁶⁷ All can adopt.¹⁶⁸ All can use various

157. *See, e.g., id.* at 499.

158. *Id.* at 510; *see also* *Romer v. Evans*, 517 U.S. 620, 621 (1996).

159. *Massie, supra* note 77, at 510–11.

160. *Id.*

161. *See id.* at 511.

162. *Id.* at 511–12.

163. *See id.*

164. *See id.* at 517.

165. *Id.* at 515.

166. *See id.* at 517.

167. *See* FLA. STAT. ANN. § 63.213 (West 2012); § 742.15 (West 2010).

168. *See* § 63.213 (West 2012).

assisted reproductive technologies like sperm-donation and IVF.¹⁶⁹ All can enter into surrogate carrier arrangements.¹⁷⁰ Consequently, in terms of building families, couples, married or not, and individuals are similarly situated.¹⁷¹

C. *Equal Protection Analysis*

Evaluating whether legislation violates the Equal Protection Clause requires initially determining the level of scrutiny to apply.¹⁷² Laws affecting fundamental rights or targeting suspect classes, such as groups identified by race, gender, or alienage, are entitled to heightened scrutiny.¹⁷³ All other distinctions are evaluated using rational basis review.¹⁷⁴

Though the right to procreate is a fundamental right,¹⁷⁵ it is unclear whether that right extends to the use of alternative reproductive technologies and the involvement of third parties.¹⁷⁶ Until the use of alternative forms of procreation is specifically included within the fundamental right to procreate, it is more appropriate to consider that such use does not trigger the heightened scrutiny based on its potential as a fundamental right.¹⁷⁷ In this instance, it does not matter. Even under a rational basis review the statutory scheme is unconstitutional.

Rational basis review asks whether a “legislative classification . . . bears a rational relation to some legitimate end.”¹⁷⁸ Though the rational basis review is extremely deferential, there must be some relationship between the “classification adopted and the object to be attained.”¹⁷⁹ Generally, legislation does not violate the Equal Protection Clause if it “advance[s] a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or of the rationale for it seems tenuous.”¹⁸⁰

169. See § 742.14 (West 2010).

170. See § 742.15.

171. See Massie, *supra* note 77, at 517.

172. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 470 (1985).

173. *Id.* at 440.

174. See *Heller v. Doe*, 509 U.S. 312, 319–20 (1993).

175. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

176. See Massie, *supra* note 77, at 516.

177. See *id.* at 526.

178. *Romer v. Evans*, 517 U.S. 620, 631 (1996).

179. *Id.* at 632.

180. *Id.*

Most legislation survives rational basis scrutiny.¹⁸¹ Even legislation that creates incidental disadvantages is constitutional if it also has legitimate public policy reasons supporting it.¹⁸² But enactments that carve out a specific class of citizens and provide that class with a disfavored legal status “raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”¹⁸³ For instance, in *Romer v. Evans*¹⁸⁴ Amendment 2, the effort to remove legal protections regarding discriminatory practices from a single class of citizens—homosexuals—lacked any rational relationship to a state interest and was therefore invalid.¹⁸⁵ In another example, Proposition 8 in California was also found to have violated the Equal Protection Clause by removing the ability of gays and lesbians to obtain marriages and to refer to the committed partnership that had all of the rights and obligations of traditional marriage as a “marriage.”¹⁸⁶ Unlike Amendment 2 in *Romer*, which was broad and affected many different situations, Proposition 8 affected one specific right, “the right to use the designation of ‘marriage’ to describe a couple’s officially recognized relationship.”¹⁸⁷ Despite the precise nature of the disability imposed on the group by Proposition 8, it still worked a “meaningful harm” that “must be justified by some legitimate state interest.”¹⁸⁸ In fact, the *Perry* court found the precise nature of the harm made the legislation even more troublesome.¹⁸⁹ Both Amendment 2 and Proposition 8 required the reviewing courts to consider whether a legitimate state interest existed, and if not, to “infer that [the enactments were] enacted with only the constitutionally illegitimate basis of ‘animus toward the class it affects.’”¹⁹⁰

181. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357 (1999) (“These cases are sufficiently rare to stand out as unusual, but they do exist. [From 1971 to 1996], the Court . . . decided ten such cases, while during the same time period, it ha[d] rejected rational basis arguments on one hundred occasions.”).

182. *Romer*, 517 U.S. at 635.

183. *Id.* at 634.

184. *Id.*

185. *Id.* at 635.

186. *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012), *vacated and remanded by Hollingsworth v. Perry*, 133 S.Ct 2652 (2013).

187. *Id.* at 1081.

188. *Id.*

189. *Id.*

190. *Id.* at 1082 (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

D. Justifications Break Down as Societal Values Shift

The desire to protect the best interest of the resulting children, by providing them with parents who are male and female and married to each other, may have been legitimate as new ways of family building first started to appear in the early 1990s.¹⁹¹ Without the experience of observing alternative family structures over a significant period of time, there was not enough evidence to support the assertion that these alternative forms of family structures were not harmful to children, and could also be in the best interest of the resulting child.¹⁹² Though this distinction may have made sense at one point in our history, as family-building alternatives such as adoption, sperm donation to singles, and gay and lesbian parents raising children of their own or their partners became more common, and traditional surrogacy arrangements became available to unmarried individuals, the argument that children's interests were harmed by the lack of two heterosexual married parents became more difficult to support.¹⁹³

Since there is no protected class or fundamental right involved, the legislature can regulate the different forms of family building differently as long as the regulation is reasonable in light of the legislative purpose.¹⁹⁴ On its face, the statute that restricts the use of surrogacy arrangements to married couples only was a reasonable way to protect the best interests of the resulting children—at least as those interests were viewed at the time of the institution of these statutes—but that is no longer the case.¹⁹⁵

191. See generally Gregory Acs & Sandi Nelson, CHANGES IN FAMILY STRUCTURE AND CHILD WELL-BEING: EVIDENCE FROM THE 2002 NATIONAL SURVEY OF AMERICA'S FAMILIES 1, 4 (2003), available at http://www.urban.org/UploadedPDF/311025_family_structure.pdf (presenting an analysis of changing family structures including findings that cohabitation, a growing familial structure in the 1990s, is not as beneficial to children as is a marital home).

192. See *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 822 (11th Cir. 2004) (explaining that the legislature could rationally conclude that a significant difference exists between heterosexual and homosexual households); *In re Opinion of the Justices*, 530 A.2d 21, 25 (N.H. 1987) (“Although opponents of the bill have cited a number of studies that find no correlation between a homosexual orientation of parents and the sexual orientation of their children, the source of sexual orientation is still inadequately understood and is thought to be a combination of genetic and environmental influences.”).

193. In fact, some previous gay marriage opponents have since changed their opinion based upon children's interests. See Mark Oppenheimer, *In Shift, Activist Enlists Same-Sex Couples in a Pro-Marriage Coalition*, N.Y. TIMES, Jan. 30, 2013, at A19.

194. *Romer*, 517 U.S. at 631.

195. See discussion *infra* Part IV.D.1.

1. Marriage and the Best Interests of the Children

Much of the argument about the best interests of the children is based on public policy that emphasized traditional, heterosexual marriages as the optimum situation for raising children.¹⁹⁶ In the early 1990s, some states still prohibited cohabitation,¹⁹⁷ and no state provided those who cohabited with the same legal protections that were available to married couples.¹⁹⁸ This lack of legal recognition suggested that children of unmarried couples were more at risk of losing the support of one parent because the cohabiting couple was more likely to separate and the legal rights between the couple were too tenuous to provide the child with the same type of support that a child of divorced parents received.¹⁹⁹ The rationale for the distinction appears to be the imposition of a moral duty—an individual moral obligation to be married in order to create a family, because the act of creating a family has an effect on others, namely the resulting members of the family.²⁰⁰ Alternatively, this distinction between married and unmarried parents could be supported by the idea that legislation should reflect society's general moral values, and society (at least in part) valued marriage as the mechanism for building families.²⁰¹ At the time, the distinction may have been appropriate. If the legislative purpose for restricting surrogacy to married couples was to serve the best interests of the resulting children because the state provided more support to married couples, the two groups were

196. See discussion *supra* Part IV.B.

197. For example, in 1990, Florida Statute section 798.02 addressed “[l]ewd[] and lascivious behavior,” stating: “If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior, they shall be guilty of a misdemeanor of the second degree” FLA. STAT. ANN. § 798.02 (West 2010). In the same year, Idaho had similar language in section 18-6604: “Lewd cohabitation.—If any man and woman, not being married to each other, shall live and cohabit together as man and wife, or shall lewdly and notoriously associate together, such man or woman is guilty of a misdemeanor.” IDAHO CODE ANN. § 18-6604 (1986) (repealed 1994). Georgia criminalized the same behavior, but defined it as fornication: “Fornication. An unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person and, upon conviction thereof, shall be punished as for a misdemeanor.” GA. CODE ANN. § 16-6-18 (2011), *invalidated by In re J.M.*, 575 S.E.2d 441, 444 (Ga. 2003).

198. See *Massie*, *supra* note 77, at 527. It was not until the advent of civil unions that states began to extend protections and benefits of marriage to couples who were unmarried.

199. See *id.*

200. *Id.* at 509.

201. See *Oppenheimer*, *supra* note 193.

not similarly situated for the purpose of Equal Protection analysis.²⁰² Though this may have been a reasonable conclusion in the early 1990s, when much of this legislation was being enacted, it no longer holds true today.

Today the only distinction between married and unmarried couples involves a different process and differing levels of risk, so the argument that restricting this family-building option to only married couples to serve the best interests of the resulting child fails completely.²⁰³ When a married couple can engage a gestational surrogate who will never have any rights to the resulting child and will have to immediately turn the child over to the intended parents with no opportunity to make a choice to keep the child,²⁰⁴ yet an unmarried couple can only engage the services of a surrogate if they are willing to take the chance that the surrogate will change her mind and keep the child,²⁰⁵ or that the court will determine, through a much more rigorous review of the couple's qualifications to be parents, that they are unsuitable,²⁰⁶ the two similarly situated couples are treated differently. This different treatment appears to be based only on ideas about morality related to individual choices about sexual interactions, a characteristic that is not reasonably related to a legitimate state interest. Both couples are trying to build a family by using a surrogate. Both are allowed to do so under the statutory scheme. Yet the unmarried couple must assume more risk that the surrogate will be allowed to keep the child and the couple will be subjected to a much more rigorous and invasive review of their home situation before being allowed to proceed.²⁰⁷ The argument that preventing unmarried couples from having children through surrogacy because of the best interests of the children cannot exist if the unmarried couple actually can engage the services of a surrogate, just with additional process and risk.²⁰⁸

2. Genetic Connections

One additional reason for the distinction might be the desire to maintain some type of genetic connection between the parent or parents and the resulting child, or to at least give that connection

202. See discussion *supra* Part IV.C.

203. See discussion *supra* Part IV.A.

204. See FLA. STAT. ANN. § 742.15(2)(c) (West 2010).

205. See § 63.213(1)(b) (West 2012).

206. See § 63.213(1)(a), (b).

207. See § 63.213(2)(c).

208. See § 63.213; §§ 742.13(2), 742.15.

some consideration, especially if one of the genetic contributors would not be involved in the upbringing of the child.²⁰⁹ The original pre-planned adoption legislation²¹⁰ was drafted when the only option being considered was traditional surrogacy, so the best interest of the child involved looking at two genetic parents who were never going to be in the same household.²¹¹ Today, gestational surrogacy arrangements are the preferred model, meaning the gestational mother has no genetic connection to the resulting child, and the intended parents may or may not have a genetic connection.²¹² Therefore, the best-interest analysis must consider more than just who the biological parents are, and instead look at who is most appropriate to be named the legal parents.

When legislators, courts, and other policy makers consider how to handle parentage determinations and availability of surrogacy arrangements, they appear to put a good deal of emphasis on genetic consanguinity.²¹³ For instance, despite the fact that it is medically possible to provide an embryo using a donor egg and donor sperm, or to use the donated embryo of a couple who did not intend to be donors until after the embryos were created, most surrogacy regulation requires at least one of the intended parents be genetically related to the resulting child.²¹⁴ Though potentially arising from a concern that no one would want to claim the child once it was born, leaving it in the custody of the state, this emphasis on genetic consanguinity is not present in other parentage determinations.²¹⁵

Family building that occurs through adoption completely ignores any requirement for genetic connections.²¹⁶ In fact, for a long time it

209. See Hofman, *supra* note 1, at 451–53, 460.

210. § 63.213.

211. See *id.*

212. See Spivack, *supra* note 24, at 98–99.

213. Compare Hofman, *supra* note 1, at 451–53, 460 (theorizing that genetic relation underlies many courts' approaches), with Spivack, *supra* note 25, at 97, 99, 101–06 (discussing other approaches, including contractual and intent-based theories, to resolving legal disputes about parentage).

214. See, e.g., N.H. REV. STAT. ANN. § 168-B:1 (XII) (2010).

215. See Linda S. Anderson, *Adding Players to the Game: Parentage Determinations when Assisted Reproductive Technology is Used to Create Families*, 62 ARK. L. REV. 29, 34–38 (2009); Linda S. Anderson, *Just Because You Don't Want Kids Doesn't Mean I Can't Have Them: How Clarifying Definitions of "Parent" and "Procreate" Can Prevent the Indefinite Storage of Cryopreserved Embryos*, 49 U. LOUISVILLE L. REV. 231, 240–41 (2010).

216. See 2 AM. JUR. 2D *Adoption* § 1 (2004) (suggesting that although states' methods of defining adoption vary, there is agreement about its general characteristics).

was impossible to adopt your own child,²¹⁷ because adoption contemplates creating a family where no genetic connections existed.²¹⁸ Even traditional family building with a heterosexual married couple puts little emphasis on genetic connections.²¹⁹ A child born to a married couple is presumed to be the child of the husband and wife, even if there is not a genetic connection to one parent or the other.²²⁰

Despite this lack of emphasis on genetics in other options, the distinction present in the two contrasting Florida surrogacy schemes is at least somewhat based on where the genetic connections exist and where they are absent.²²¹ The gestational surrogacy statute requires genetic connections with at least one parent,²²² while the preplanned adoption statute does not include this requirement.²²³ Married couples can more easily build a family with no genetic connection to one or the other of them than unmarried couples.²²⁴ Unmarried couples and single individuals are left with a regulatory scheme that allows for the gestational mother to have no connection to the resulting child, but runs the risk that the gestational mother will opt to keep the child,²²⁵ whereas married couples have options that ignore any genetic ties to the surrogate and prohibit the possibility that the gestational mother will keep the child.²²⁶

In order to meet constitutional muster, there must be a rational basis for the distinction between married and unmarried potential

217. As same-sex couples began to find creative ways to build families, some individuals would have a child, relinquish their right to the child, and then try to adopt the same child as a couple. This was generally not allowed, so states began allowing second-parent adoptions, even though there was still a parent who had not relinquished rights to the child. *See generally In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002); Patricia J. Falk, *Second-Parent Adoption*, 48 CLEV. ST. L. REV. 93 (2000); Ann K. Wooster, Annotation, *Adoption of Child by Same-Sex Partners*, 61 A.L.R. 6th 1 (2011).

218. BLACK'S LAW DICTIONARY (9th ed. 2009), adoption.

219. *See Michael H. v. Gerald D.*, 491 U.S. 110, 117, 119–20 (1989) (explaining the history and rationale behind California's statutory presumption that a child born to a married woman living with her husband is a child of that marriage).

220. *See id.* at 128–29; Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1, 7–8 (2006).

221. *See* FLA. STAT. ANN. § 63.213 (West 2012); §§ 742.13(2), 742.15 (West 2010).

222. § 742.13(2) (West 2010).

223. § 63.213 (West Supp. 2013).

224. *See* Zuckerman, *supra* note 91, at 676–77.

225. *See* § 63.213(2)(e) (West Supp. 2013).

226. § 742.15(3)(c).

parents.²²⁷ The best interests of the children is not a valid reason because unmarried couples can use the more invasive statute to create a family.²²⁸ Genetic consanguinity is not a valid reason because the two statutes provide alternatives that allow situations with no genetic connection to the resulting children.²²⁹ The only rationale left is to enforce societal views about morality—especially moral judgments about the appropriateness of marriage for families, as opposed to alternative family situations.²³⁰ This reason alone is not enough to make the regulation constitutional.²³¹

V. MORALITY AS THE ONLY REMAINING RATIONALE

If the state's rationale for distinguishing between married couples and unmarried couples cannot be based on the best interests of the resulting children, or the need for genetic consanguinity, then the only other reason that might account for the difference in treatment is to maintain "traditional family life"²³² or to protect "historical notions of morality."²³³ Though at one time courts appeared to accept morals-based justifications for decisions, these decisions were never based exclusively on such justifications. Legislating based on morality alone is inappropriate because there is no way to identify whose morals are correct.

A. Legislation and Morality

The connection between societal views of morality and the law has long been assumed.²³⁴ Yet these two concepts, while similar because

227. *Massie*, *supra* note 77, at 510.

228. § 63.213 (West Supp. 2013).

229. *Compare* § 742.15(3)(e) (West 2010) (providing that the surrogate assumes parental rights and responsibilities for the child if it is determined that neither member of the commissioning couple is the genetic parent of the child), *with* § 63.213(6)(d)–(e) (West Supp. 2013) (implying that a genetic relation between the child and either of the intended parents is not required).

230. Zuckerman, *supra* note 91, at 681.

231. *See* *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) ("Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.").

232. *Massie*, *supra* note 77, at 509.

233. *Id.*

234. KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 161 (1987) (describing natural law as "the longstanding position in moral and legal theory that human law is in some sense derived from moral norms that are universally valid and discoverable by reasoning about human nature or true human goods"); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1487 (1987) (arguing that courts interpret statutes in light of existing social norms rather than societal norms

they each seek to guide behavior, are not identical.²³⁵ In fact, law is a subset, or at least partially a subset, of morality.²³⁶ Though law reflects society's views of morality, not all decisions related to appropriate moral behavior or enforcement of morality are appropriate to be incorporated into the law.²³⁷ Most scholars distinguish between enforcement of public morals and enforcement of private morals, suggesting that public morals involve actions that have a negative effect on others, whereas private morals are those that involve actions that are individual in nature, often related to sexual behavior.²³⁸

In his series of lectures at Stanford University, noted legal philosopher H.L.A. Hart distinguished between morality that protects against harm to others and sexual morality, stating that "society could not exist without a morality which mirrored and supplemented the law's proscriptions of conduct injurious to others. But there is . . . no evidence to support, and much to refute, the theory that those who

existing at the time of enactment); Stanley Mosk, *The Common Law and the Judicial Decision-Making Process*, 11 HARV. J. L. & PUB. POL'Y 35, 36 (1988) (describing the evolution of the common law and its ability to reflect societal changes). This assumption is evident by the assertion of connections between morality and law without the need for citation, even by Supreme Court Justice Scalia. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 310 (2000) (Scalia, J., concurring); *Romer v. Evans*, 517 U.S. 620, 644–48 (1996) (Scalia, J., dissenting); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 580 (1991) (Scalia, J., concurring).

235. Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579, 1585–86 (2007).

236. *Id.* at 1581 ("[L]egal incorporation of morality presents the odd case of the subset incorporating the larger set, and thus suggests the peculiar image of a mouse attempting to swallow a python.").

237. See *id.*; Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1300–04 (2004) (discussing the influence of morality on the law after *Lawrence's* disavowal of morality as a legitimate basis for legislation); Gregory Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 30 (2006) (distinguishing public morality from private morality and suggesting that "public good," rather than morality in general, is the appropriate role of legislation).

238. See, e.g., G. Marcus Cole, *What Is the Government's Role in Promoting Morals? . . . Seriously?*, 31 HARV. J. L. & PUB. POL'Y 77, 79 (2008) (using the terms morality of aspiration and morality of duty, where morality of duty involves the "basic duty to respect the person and property of others"); Timothy W. Reinig, Comment, *Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy*, 38 BUFF. L. REV. 859, 880 (1990).

deviate from conventional sexual morality are in other ways hostile to society.²³⁹

Morality, encompassing both private and public, describes what one ought to do, and is grounded in religious teachings.²⁴⁰ Even within the concept of morality, it is possible to have conflicting views about what constitutes proper behavior.²⁴¹ In fact, there is continuing debate and disagreement about what morality requires about all sorts of things, which provides the ultimate rationale for law and the legal system—to settle disputes about what morality requires in specific instances.²⁴²

However, the proper role of the government in promoting or enforcing morals is subject to much debate.²⁴³ There appears to be strong agreement that standards of morality concerning harm to others or others' property are legitimate reasons for the government to get involved in enforcement through legislation.²⁴⁴ Laws relating to murder, assault, robbery, and trespass fall into this category.²⁴⁵

The harder question is whether areas of morality that might be described as virtues are proper subjects for legislation.²⁴⁶ Until the time of King Henry VIII, who took control of the Church of England in the 16th century,²⁴⁷ morality related to virtues was the domain of the ecclesiastical courts.²⁴⁸ Today, in a system that imposes regulations on individuals with vastly different belief systems, continuing to use legislation to impose certain moral imperatives may impinge on others' freedom to hold alternative beliefs about morality.²⁴⁹

While regulating public morality may still be appropriate because doing so protects people from harm created by the choices of others and respects basic human dignity, regulating private morality—what we each choose to do in private, whether virtuous or not—becomes

239. H.L.A. HART, *LAW, LIBERTY AND MORALITY* 50–51 (1963).

240. Cole, *supra* note 238, at 78.

241. Alexander & Schauer, *supra* note 236, at 1583.

242. *Id.* at 1583–84.

243. Cole, *supra* note 238, at 77.

244. *Id.* at 79.

245. *Id.* at 77, 79.

246. *Id.* at 79.

247. King Henry VII ruled England from 1509 to 1547. During the 1530s and 1540s he expanded royal authority at the expense of ecclesiastical authority. See A.F. POLLARD, *Biography of King Henry VIII of England*, in 13 *ENCYCLOPEDIA BRITANNICA*, 289 (Cambridge Univ. Press 1910), available at <http://www.luminarium.org/renlit/tudorbio.htm>.

248. Cole, *supra* note 238, at 81.

249. See, e.g., *supra* text accompanying notes 232–33.

significantly more complicated in a world where we are expected to respect everyone's right to practice their own religion and where tolerance of those who are different from us is expected in all realms of life.²⁵⁰

B. Public Morality vs. Private Morality

Some restrictions on private morality are appropriate because the behaviors being restricted can lead to potentially harmful effects on others.²⁵¹ Legislation that is designed to protect public morals includes such things as restrictions on gambling,²⁵² the attempt to prohibit the use of alcohol,²⁵³ and the outlawing of prostitution.²⁵⁴ Each of these attempts to regulate individual behavior has a basis in both private and public morals.²⁵⁵ The restrictions on individual behavior are likely to discourage behavior that is commonly

250. See generally GREENAWALT, *supra* note 234, at 26 (asserting that “reasons relating exclusively to one’s own welfare do not establish what, morally, one ought to do; people are free morally not to pursue their own welfare”).

251. See HART, *supra* note 239, at 50–51.

252. See, e.g., CAL. PENAL CODE § 330 (West 2012). In fact, Title 9 of the California Penal Code is titled specifically, “Of Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals,” and addresses things such as sexual offenses crimes against children, spousal abuse, obscenity, and gambling. See also KY. REV. STAT. ANN. § 528.010 (West 2006). The commentary to the Kentucky statutes restricting gambling state:

The principal concept of the entire gambling chapter is to punish those who make a business or profession of gambling rather than the player who makes the business possible. Subsection (1), advancing gambling, and subsection (8), profiting from gambling, define the basic proscribed gambling activities. “Advancing gambling activity” refers to the activities of the operator of a gambling enterprise as well as the person who sets up a game, furnishes equipment, provides facilities for gambling or entices others to patronize gambling activities. A “player” as defined in subsection (7), does not advance gambling activity. “Profiting from gambling activity” is intended to reach the entrepreneurs who receive money or other profit, other than as a player, pursuant to an understanding or agreement to that effect.

KY. REV. STAT. ANN. § 528.010 Kentucky Crime Commission/LRC Commentary 1974 (West 2006).

253. See, e.g., U.S. CONST., amend. XVIII (in effect from Jan. 16, 1919, until ratification of the 21st Amendment in 1933).

254. See, e.g., CONN. GEN. STAT. ANN. § 53a-82 (West 2012); D.C. CODE § 22-2701 (Supp. 2012); FLA. STAT. ANN. § 796.07 (West Supp. 2013); NEV. REV. STAT. ANN. § 207.030 (LexisNexis 2012); OKLA. STAT. ANN. tit. 21, § 1029 (West 2012); TENN. CODE ANN. § 39-13-512 (Supp. 2012).

255. See, e.g., *Ballock v. State*, 73 Md. 1, 7–8, 20 A. 184, 186 (1890).

considered lacking in virtue, but more importantly, the restrictions protect others who may be harmed by this lack of virtuous behavior.²⁵⁶ Legislation to restrict gambling has been justified by the need to protect families from the financial trouble that often accompanies excessive gambling.²⁵⁷ Prohibition was designed to discourage and eliminate the potentially harmful behavior that can occur when one is intoxicated.²⁵⁸ Banning prostitution protects those who would participate from various sexually transmitted diseases, as well as protects women from being exploited.²⁵⁹

1. Morality as a Legitimate Basis for Legislation

In addition, our legal system has considered morality a potentially legitimate reason for legislation in a number of areas of society where it is challenging to determine whether the moral imperative is personal or public.²⁶⁰ In each of these instances, where courts reviewed regulation based at least in part on morality, the legislation was allowed when it was based on a combination of both public morality and private morality.²⁶¹ Susan Goldberg has classified instances where the court has considered issues with overtones, whether implicit or explicit, of morality-based legislation, into four categories: “pure, composite, embedded, and inert.”²⁶² Pure morality rationales involve no other possible reason for the legislation, which

256. Cf. Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1, 34 (1999) (discussing restriction of harm to others as basis for morality-based legislation in state police power context).

257. See generally *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 177 (1999) (acknowledging that in the past, commercial speech surrounding lotteries was not protected by the First Amendment because the “demoralizing influence upon the people” was a legitimate reason to restrict advertising about lotteries). This same case identifies the governments concerns about gambling as “contribut[ing] to corruption and organized crime; underwrit[ing] bribery, narcotics trafficking, and other illegal conduct; impos[ing] a regressive tax on the poor; and ‘offer[ing] a false but sometimes irresistible hope of financial advancement.’” *Id.* at 185 (quoting Brief of Respondent at 15–16, *Greater New Orleans Broad. Ass'n*, 527 U.S. 173, 1999 WL 161073, at *15–16).

258. See generally Lisa Lucas, Comment, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment with the Commerce Clause*, 52 UCLA L. REV. 899, 915 (2005) (discussing movement to curb prevalence of alcohol).

259. See generally Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 545 (2000) (discussing public health concerns for criminalization of commercial sex).

260. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986), *overruled by Lawrence v. Texas*, 533 U.S. 558 (2003).

261. See Goldberg, *supra* note 237, at 1235–36.

262. *Id.* at 1244.

is rare.²⁶³ Pure morality rationales were successful (for a time) in *Bowers v. Hardwick*,²⁶⁴ and were attempted but unsuccessful in *Lawrence v. Texas*.²⁶⁵ In these two cases, the only reasons provided for legislatively restricting behavior that had no effect beyond the individuals involved was concern about the virtuousness of that behavior.²⁶⁶ In other cases, morals rationales have been combined with interests related to obvious means of reducing harm or increasing benefits.²⁶⁷ Goldberg names this combination of morality with other reasons composite morals-based justifications.²⁶⁸ Other cases imply a basis in morality, yet never actually discuss the moral

263. *See id.* at 1244–45.

264. *Bowers*, 478 U.S. at 196 (overruled by *Lawrence v. Texas*, 593 U.S. 558 (2003)).

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Id.

265. *Lawrence*, 593 U.S. at 582–83.

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law.”

Id. (internal citations omitted).

266. Goldberg, *supra* note 237, at 1244.

267. *Id.* at 1245.

268. *Id.*

implications.²⁶⁹ These are referred to as using “embedded morals rationale.”²⁷⁰ Finally, cases that use the inert morals rationale rely on other reasons for the actual decision, but explicitly discuss the moral implications.²⁷¹

2. Morality Alone Is Insufficient

Though many cases have mentioned morals as part of the rationale, morality alone, or pure morality, has almost never been sufficient to allow regulation.²⁷² Instead, the Supreme Court has increasingly emphasized “observable societal harms.”²⁷³ Vice alone, without damage to others, has not been the subject of legitimate regulation.²⁷⁴

One of the reasons it is so difficult to use morality to enforce virtue—those personal decisions that do not result in societal harm—is that virtue and the associated benefits that spring from a virtuous life require the freedom to choose without coercion.²⁷⁵ Even the Catholic Church, one of the institutions from which moral responsibilities spring, recognizes that religious freedom requires that each person is treated with dignity, which is protected by the constitution that governs society, regardless of their choices about

269. *Id.* at 1244 (identifying cases that restrict adult entertainment, obscenity, and foul language).

270. *Id.* One example of “embedded morals rationale” that Goldberg cites is *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000). *Pap’s A.M.* relied on the city’s interest in combating the secondary effects of nude dancing to find the regulation content-neutral and therefore subject to the standard applied to restrictions on symbolic speech rather than the higher standard applied to content-based restrictions. *Pap’s A.M.*, 529 U.S. at 295–96. The closest the Court came to mentioning morals as a rationale for the regulation appeared when Justice O’Connor stated that “‘few of us would march our sons and daughters off to war to preserve the citizen’s right to see’ specified anatomical areas exhibited at establishments like [the nude dance club].” 529 U.S. at 294 (quoting Justice Stevens’s opinion in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion)).

271. Goldberg, *supra* note 237, at 1246 (citing *Penn. Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104 (1978), as an example). In this case the Court mentioned that land-use regulations are generally upheld when “‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land” yet the decision rested on other reasons. *Penn. Cent. Transp. Co.*, 438 U.S. at 125 (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

272. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . .”).

273. Goldberg, *supra* note 237, at 1259.

274. See *id.* at 1260 (citing Professor Christopher Tiedeman’s objection to the use of police power solely to “banish vice and sin from the world”).

275. See *Cole*, *supra* note 238, at 84; Kalscheur, *supra* note 237, at 9.

morality.²⁷⁶ And the associated decision-making that is afforded to those who are entitled to exercise their own judgment requires that “no one is forced to act in a manner contrary to their own beliefs, . . . no one is to be restrained from acting in accordance with their own beliefs” and that “the dignity of the human person in no way depends on whether or not the person’s beliefs or actions are in accord with religious or moral truth.”²⁷⁷

Legislation that encourages virtuous behavior that will have a positive effect on others; that is, legislation that codifies a commonly accepted duty to others may also be considered regulation of public morality. For instance, statutes that establish compulsory education impose a duty on parents to insure that their children receive at least a minimal level of education.²⁷⁸ Most would consider this a moral obligation as part of parenthood, yet all fifty states and the District of Columbia address compulsory education through legislation, and many include criminal penalties for failure to comply.²⁷⁹ The duty to

276. See Kalscheur, *supra* note 237, at 8–9.

277. *Id.* at 9.

278. See, e.g., MICH. COMP. LAWS ANN. § 380.1561 (West Supp. 2012).

Except as otherwise provided in this section, for a child who turned age 11 before December 1, 2009 or who entered grade 6 before 2009, the child’s parent, guardian, or other person in this state having control and charge of the child shall send that child to a public school during the entire school year from the age of 6 to the child’s sixteenth birthday. Except as otherwise provided in this section, for a child who turns age 11 on or after December 1, 2009 or a child who was age 11 before that date and enters grade 6 in 2009 or later, the child’s parent, guardian, or other person in this state having control and charge of the child shall send the child to a public school during the entire school year from the age of 6 to the child’s eighteenth birthday.

Id.

279. See 50 State Statutory Surveys, Compulsory Education, 0040 SURVEYS 6 (Westlaw 2007). A Colorado statute also imposes a legal obligation on parents in the following provision:

The general assembly hereby declares that two of the most important factors in ensuring a child’s educational development are parental involvement and parental responsibility. The general assembly further declares that it is the obligation of every parent to ensure that every child under such parent’s care and supervision receives adequate education and training. Therefore, every parent of a child who has attained the age of six years on or before August 1 of each year and is under the age of seventeen years shall ensure that such child attends the public school in which such child is enrolled in compliance with this section.

COLO. REV. STAT. ANN. § 22-33-104(5)(a) (West 2011).

provide children with an education has long been a part of American jurisprudence.²⁸⁰ In 1923, in *Meyers v. Nebraska*, the United States Supreme Court pointed out that

[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Corresponding to the right of control, *it is the natural duty of the parent to give his children education suitable to their station in life*; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.²⁸¹

Other parental obligations are as commonly accepted and considered some sort of natural duty as well. Child support legislation codifies the duty of parents to provide financial support for their children, an obligation that is so widely held that federal statutes exist to enforce this obligation.²⁸² Yet these statutorily enforced duties may also be classified as morally imposed obligations on individual behavior.²⁸³

C. Current Demographics

Morality is generally considered to be based on commonly accepted ideals of appropriate human conduct. Yet the ideas regarding the appropriateness of allowing same-sex couples or single individuals to have children may have evolved to the point where there is no "commonly accepted ideal" regarding this behavior. In fact, according to the United States Department of Health and Human Services, the number of single women having children "increased . . . to historic levels in 2007."²⁸⁴ During that year, "about six in seven births to teenagers were non-marital. Sixty percent of births to

280. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

281. *Id.* (emphasis added).

282. See, e.g., Child Support and Recovery Act of 1992, 18 U.S.C. § 228 (2006) (establishing enforcement mechanism for collecting outstanding child support across state boundaries).

283. See *State Dep't of Revenue v. Hubbard*, 720 P.2d 1177, 1179 (Mont. 1986) ("Child support is a social and moral obligation imposed by law without court action.").

284. Joyce A. Martin et al., *Births: Final Data for 2007*, NAT'L VITAL STAT. REP. 24, Aug. 9, 2010, at 1, 2.

women aged 20-24 years and almost one-third of births to women aged 25-29 years were to unmarried women.”²⁸⁵ From 2002 to 2007,²⁸⁶ increases in the number of non-marital births began to increase steeply, reaching an increase of 26 percent from 2002 to 2007.²⁸⁷

D. No Public Morality Reason Remaining

In light of the changing demographics, it seems reasonable to suggest that social values relating to children and the need for a heterosexual, two-parent household are changing.²⁸⁸ If the reasons for legislatively restricting unmarried and same-sex couples from using the same form of surrogacy agreements that are available to heterosexual married couples no longer involve public morality—the protection of the best interests of the children—then the only reason left to create this difference is private morality—imposing one individual’s ideas about virtuous behavior on another, in areas that only affect the individuals involved.²⁸⁹ As demonstrated in Part V.B.2, using this type of morality-based justification is a not legitimate reason to enact legislation that discriminates against those who wish to build families using surrogacy but are not in a heterosexual marriage.²⁹⁰

VI. PURE MORALS-BASED LEGISLATION EQUALS UNCONSTITUTIONAL ANIMUS

When the only reason for legislation that isolates a particular group of people for different treatment is to impose a moral imperative, the legislation is likely to be expressing a level of animus that is also intolerable under the Equal Protection Clause.²⁹¹ Pure morals-based legislation can demonstrate animosity toward a particular group and

285. *Id.* at 8.

286. 2011 is the most current data available from the National Center for Health Statistics. *See id.* at 1.

287. *Id.* at 14; STEPHANIE J. VENTURA, CHANGING PATTERNS OF NONMARITAL CHILDBEARING IN THE UNITED STATES, NCHS DATA BRIEF 2 (May 2009).

288. *See generally* Douglas B. Downey & Brian Powell, *Do Children in Single-Parent Households Fare Better Living with Same-Sex Parents?*, 55 J. MARRIAGE & FAM. 55 (1993); Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159 (2001).

289. *See supra* Part V.A–B.

290. *See supra* Part V.B.2.

291. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down legislation that had “the peculiar property of imposing a broad and undifferentiated disability on a single named group” as “an exceptional and . . . invalid form of legislation”).

the moral choices that group generally makes.²⁹² The unconstitutional animus toward homosexuals in *Romer*²⁹³ and *Perry*²⁹⁴ reflected voters' disagreement with a particular lifestyle. Much of this disagreement is based on the idea that homosexuality is immoral.²⁹⁵ Creating laws that work a "meaningful harm" based only on a justification that expresses animosity toward the moral choices of the individuals affected violates the Equal Protection Clause, and therefore cannot be tolerated.²⁹⁶

The current legislatively created options for surrogacy arrangements in Florida, which allow both married and unmarried people to engage the services of a surrogate carrier, but create more risks, restrictions, and administrative burdens on those who are unmarried than those who are married, create a meaningful harm that can only be based on an illegitimate animosity toward the moral choices of those who are singled out for more restrictive treatment.²⁹⁷ Similar to the laws in *Romer* and *Perry*, which were unconstitutional, the Florida statute that restricts gestational surrogacy contracts to married couples only is also unconstitutional.

VII. CONCLUSION

For many years courts assumed that legislatures had every right to enact legislation to protect the public morals.²⁹⁸ Early cases that evaluated morality-based legislation focused on alcohol use, prostitution, and obscenity.²⁹⁹ The courts routinely found legislation reasonable when it furthered some interest and protected the public's view of a moral life.³⁰⁰ However, as society changed, so did the

292. See *id.* at 634 (explaining that the morals-based legislation before the court in that case raises "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected").

293. *Romer*, 517 U.S. 620; see discussion *supra* Part IV.C.

294. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded by Hollingsworth v. Perry*, 133 S.Ct 2652 (2013).

295. See *id.* at 1095 (explaining the only possible reason for Proposition 8 was to express disapproval for personal choices).

296. See *id.*

297. See *supra* Part IV.A.1–2.

298. See *supra* Part V.B.

299. See *supra* Part V.B.

300. See *Lawrence v. Texas*, 539 U.S. 588, 589 (2003) (Scalia, J., dissenting) ("Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation.").

courts' comfort level with accepting the regulation of public morality as a reason for restricting behavior.³⁰¹

Restricting access to surrogacy arrangements to only married, heterosexual couples is only an effort to hang on to the moral values of the past, despite the fact that the values of the present, and potentially the future, are much more tolerant of a variety of types of relationships and families. Societal values have shifted from oppressing those who choose different ways to build families, to being tolerant, and accepting a variety of family situations and valuing them all. It is time for the legislation to reflect this change and provide the same options for the use of surrogacy agreements to all individuals and couples, regardless of their marital status or sexual orientation.

301. *See id.* at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)) (majority opinion).

