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Weldon E. Havins

James J. Dalessio

Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts

Weldon E. Havins* and James J. Dalessio**

> *In the creative process there is the father, an author of the play; the mother, an actor pregnant with the part; and the child, the role to be born.*[1]

I. INTRODUCTION

The advancement of the science of artificial reproductive technology (ART) has created ever-increasing options to the person or couple who wishes to beget a genetically related child.[2] Single, infertile, or childless men who, just a few years ago, never would have imagined the possibility of fatherhood can now opt for parenthood.[3] Today, couples with functioning gonads who nevertheless are incapable of bearing children can elect to beget their own genetic children through the modern technique of gestational surrogacy. Women with non-functioning ovaries or women who have undergone a hysterectomy, through the science of ART, can have their own genetic children. Women wishing to delay having children but anxious about losing their opportunity to reproduce, can have their eggs harvested and frozen for their or another's future use.[4]

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* B.A., San Diego State University; M.A. (management), Claremont Graduate University; M.D., Wake Forest University School of Medicine; J.D., *cum laude*, University of San Diego School of Law; L.L.M. (concentration in Health Law), *cum laude*, University of San Diego School of Law. Weldon E. Havins is a fellow of the American College of Surgeons and the American College of Legal Medicine. He practices law and medicine in Las Vegas, Nevada.

** B.A., University of California, San Diego; J.D., *magna cum laude*, University of San Diego School of Law. James J. Dalessio has served as a law professor at both the University of San Diego School of Law and California Western School of Law. He is currently practicing law in San Diego.

1. KONSTANTIN SERGEEVICH ALEKSEEV STANISLAVSKI, AN ACTOR PREPARES 312 (Elizabeth Reynolds Hapgood trans., 1988) (1936).

2. *See generally* Eisenstadt v. Baird, 405 U.S. 438, 453-55 (1972) (finding a constitutional, fundamental right to "beget" a child).

3. This can be accomplished either by using donated sperm and a traditional surrogacy arrangement, or by using donated sperm and ovum fertilized *in vitro* and implanted in a gestational surrogate.

4. *See* Laura Bonetta, *Postponing Pregnancy By Freezing Oocytes*, 4 NAT. MED. 138, 138 (1998); *see also* Edgardo Young et al., *Triplet Pregnancy After Intracytoplasmic Sperm Injection of Cryopreserved Ooctyes: Case Report*, 70 FERTILITY & STERILITY 360, 360 (1998); Kutluk Oktay et al., *Cryopreservation of Immature*

However, the miracle of ART—perhaps as significant a milestone in the development of modern science as mankind walking on the moon—faces its greatest challenge at the regulatory level. One prime example of this challenge arises in contractual surrogacy arrangements. Surrogacy contracts come in two forms: traditional surrogacy, wherein a man's, usually the husband's, sperm is used to artificially inseminate a surrogate; and the modern ART technique wherein an *in vitro* fertilized egg is implanted into a surrogate who is genetically unrelated to the donor-providers. Unfortunately, there is a wide discrepancy among states over the enforceability and legality of gestational surrogacy agreements: the legislative spectrum spans from enforcement of such contracts on the one hand, to criminal prosecution of individuals involved in the "ART" of gestational surrogacy on the other.[5]

This Article critically examines and analyzes the advantages and disadvantages of surrogacy contracts, with its primary focus being on gestational surrogacy. Because of the historical common law and the contemporary statutory hostility to traditional surrogacy arrangements—assuming arguendo that such legislation even exists from state-to-state—this Article argues in favor of the creation of new uniform regulation governing gestational surrogacy contracts. At the very least, such legislation should recognize the significant medical, legal, ethical, and moral differences between traditional and modern gestational surrogacy.

Part II of this Article briefly discusses the courts' treatment of traditional surrogacy contracts.[6] Part III next reviews court decisions regarding gestational surrogacy contracts.[7] Part IV analyzes in depth the many varied and haphazard legislative approaches to the surrogacy contract problem and the state legislatures' failure to distinguish between the radically different surrogate techniques.[8] Part V addresses the moral and ethical implications of surrogacy.[9] Finally, Part VI of this Article concludes by offering sample legislation governing gestational surrogacy arrangements.[10]

Human Oocytes and Ovarian Tissue: An Emerging Technology, 69 FERTILITY & STERILITY 1, 1-6 (1998).

5. *See infra* Part IV for a full discussion of the regulation of gestational surrogacy arrangements.
6. *Infra* Part II.
7. *Infra* Part III.
8. *Infra* Part IV.
9. *Infra* Part V.
10. *See infra* Part VI (proposing the Uniform Gestational Surrogacy Contract Act).

II. TRADITIONAL SURROGACY CONTRACTS

Traditional surrogacy[11] involves a contract between an infertile couple ("H" and "W," for example) and a fertile woman (the "surrogate"). In the traditional surrogacy contract, the surrogate agrees to be inseminated with H's sperm, and to carry the pregnancy to term. After the birth of the baby, the surrogate promises to relinquish all rights to the baby, transfer the baby to H and W, and facilitate W's adoption of the baby.[12] For this, all of the surrogate's expenses are paid by H and W, who also pay a fee for the surrogate's services. These traditional surrogate contracts have not been well received in the common law courts.

The first traditional surrogate contract case to reach a state supreme court occurred in 1987 in *In re Baby M.*[13] In this case, the New Jersey courts were asked to determine the validity of a contract that utilized a new way to bring a child into a family.[14] In addition to expenses, the surrogacy contract in *Baby M.* provided for a fee of ten thousand dollars for the woman's services.[15] For this consideration, the woman promised to be inseminated with the contracting husband's sperm, to carry the conceived child to birth, to transfer custody of the child to the husband-father, to relinquish all legal rights to the child, and finally, to assist with any formalities of adoption by the wife.[16] However, after the child was born, the gestational mother refused to honor the contract and demanded custody of the child.[17] The husband and wife then sued for specific enforcement of the contract.[18]

The trial court held that New Jersey statutes governing adoption, termination of parental rights, and the prohibition of the payment of money in connection with adoption did not apply to surrogacy contracts.[19] The trial court found the surrogacy contract valid and ordered specific performance of the contract.[20] Granting the

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11. The origin of surrogacy dates back as far as the biblical story of Genesis. Sarah, Abraham's infertile wife, directs Abraham to "go into my maid," Hagar, so that Sarah "may found a family through her." *Genesis* 16:2 (King James). Thereby, Hagar became the first documented surrogate. What did Hagar have to say about this? We do not know.

The second documented surrogate was Rachel's slave Bilhah. Infertile Rachel encouraged her husband Jacob to "lie with [Bilhah], so that she may bear sons to be laid upon my knees, and through her I too may build up a family." *Genesis* 30:3-5 (King James).

From these early surrogacy arrangements, exploitation of surrogates has been suspect. However, is the dominant concern the exploitation of the surrogate as a woman or the exploitation of the surrogate as a slave? This paper will argue that the concern is the exploitation of the woman as a slave because the slave has no choice in assenting to the surrogacy.

12. In this example, the sperm provider is the undisputed father of the child.
13. 537 A.2d 1227 (N.J. 1988).
14. *Id.* at 1234.
15. *Id.* at 1235.
16. *Id.*
17. *Id.* at 1236-37.
18. *Id.* at 1237.
19. *Id.* at 1238.
20. *Id.*

husband sole custody of the child,[21] the trial court severed any parental rights of the surrogate and granted adoption rights to the wife.[22]

On appeal, the New Jersey Supreme Court reversed the trial court and invalidated the surrogacy contract, holding that the surrogacy contract conflicted with the same laws the trial court had found inapplicable.[23] The State Supreme Court held that the payment of money to a surrogate mother was illegal, contrary to public policy, and "potentially degrading to women."[24] While the court granted child custody rights to the father, it voided the wife's parental rights and the wife's adoption of the child.[25] The Supreme Court then declared the surrogate to be the child's natural and legal mother.[26] The court added, however, that "where a woman voluntarily and without payment agrees to act as a 'surrogate mother,' provided that she is not subject to a binding agreement to surrender her child," no New Jersey law is offended.[27] The court appeared to be stating that surrogacy per se does not offend New Jersey law; however, the enforcement of a surrogacy contract is offensive to New Jersey law.

A few years after the decision in *Baby M.*, a California appellate court ruled on the validity of "traditional surrogacy" contracts in *In re Marriage of Moschetta.*[28] The California court began by distinguishing traditional surrogacy from an earlier California Supreme Court case addressing gestational surrogacy.[29] The appellate court also distinguished a prior California case involving a sperm supplier who

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21. The trial court found, among others, the following facts: the surrogate party had fled the state with the baby to avoid service of process; the surrogate lived in twenty different motels and homes in the next three months to avoid prosecution; threatened to kill herself and kill the child; and falsely accused the husband of sexually molesting the surrogate's other child. *Id.* at 1237.

22. *Id.* at 1237-38.

23. *Id.* at 1234.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1235. The states of Florida, Nevada, New Hampshire, and Virginia have adopted statutes providing that unpaid surrogacy contracts are explicitly enforceable through specific performance, although New Hampshire requires advance judicial approval of the agreement, and even then permits the surrogate to opt out of the agreement within seventy two hours of the birth of the child. Virginia requires the intended mother to be infertile for the agreement to be valid, and requires advance judicial approval of the agreement (but not of the "opt-out" provision) for the contract to be enforceable. *See infra* Appendix I (setting forth the relevant Florida, Nevada, New Hampshire, and Virginia statutes).

28. *In re* Marriage of Moschetta, 25 Cal. App. 4th 1218, 1221-22 (1994) (holding traditional surrogacy contracts unenforceable and invalid in California).

29. *Id.* Gestational surrogacy contracts were addressed prior to *In re Marriage of Moschetta* by the California Supreme Court in *Johnson v. Calvert*, 5 Cal. 4th 84 (1993). Gestational surrogacy involves the *in vitro* fertilization of sperm with an egg which then grows into an embryo. This embryo is then implanted in another woman's uterus. The woman gestates the child for the "intended" mother and father, and under the terms of the gestational contract, is (usually) paid for her services. The gestational mother is not, therefore, genetically related to the child.

asserted his parental rights.[30] The Court of Appeal relied on a California statute requiring that consent for adoption of the baby be obtained by, and in the presence of, a licensed social worker.[31] Because traditional surrogacy contracts are necessarily made before the child is born, the court found that traditional surrogacy contracts cannot comply with the California provision because no baby exists at the time the contract is formed.[32] Consequently, the court held that traditional surrogacy contracts are invalid in California.[33]

As these cases demonstrate, the common law evidences judicial hostility toward traditional surrogacy contracts, and holds these contracts to be invalid as against public policy, or to be otherwise unenforceable. This consistent judicial approach of holding traditional surrogacy contracts unenforceable cracked in 1998 under the holdings of two traditional surrogacy cases. The Connecticut Supreme Court, apparently persuaded more by considerations of equity than of common law, upheld the validity of traditional surrogacy contracts in two separate cases.

The first such instance occurred in the Connecticut Supreme Court case of *Jane Doe v. John Doe.*[34] Here, John and Jane Doe's advertisement for a surrogate in their local newspaper resulted in a woman's agreement to serve as their surrogate.[35]

John and Jane Doe, not being a couple to waste perfectly good medical insurance premiums, accompanied the surrogate to her pre-natal doctor visits.[36] During these visits, the surrogate assumed Jane's identity and used Jane's name and social security number.[37] Upon admission to the hospital for delivery, the surrogate identified herself as Jane, and the birth certificate indicated Jane's name as the mother.[38] The surrogate, of course, signed Jane's name on all the hospital forms,

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30. *See id.* at 1222 (distinguishing *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386 (1986)). In *Jhordan*, the court ambiguously referred to the sperm supplier as a sperm "donor." Here, as in the traditional surrogacy contract, the baby is genetically related to the sperm supplier and the gestational mother. The issue was whether the sperm "donor" was an intentional "true" donor. Donation implies relinquishment of any right to the item donated. True donation occurs for example when the source of sperm sells a sample to a sperm bank. *Id.* at 1230-31.

31. *See In re* Marriage of Moschetta, 25 Cal. App. 4th at 1231 (citing California Family Code section 8814).

32. *Id.*

33. *Id.* at 1222-23. The traditional surrogate-contract child is the product of the intended father and the unintended mother, and genetically related to both.

34. 710 A.2d 1297 (Conn. 1998). Jane, having borne three previous children in another country and then undergoing a tubal ligation, met John. Together, they decided to have a child. A tubal reconstruction re-anastomosis procedure was unsuccessful, and Jane's pregnancy via the usual means was not possible. *Id.* at 1302-03.

35. Jane Doe v. John Doe, 710 A.2d 1297, 1302-03 (Conn. 1998). The price agreed upon, the woman surrogate was inseminated by John and Jane at the surrogate's house using a syringe filled with John's semen. *Id.* The surrogate, incidently, was also married and living with her husband at the time.

36. *Id.*

37. *Id.*

38. *Id.*

including the birth certificate.[39] True to her bargain, the surrogate delivered the baby to John and Jane upon leaving the hospital, never to bother the couple again.[40]

The apparently successful ruse collapsed when Jane filed for divorce and requested custody of the then fourteen-year-old child.[41] John countered with the uncontested fact that Jane was not the biological mother and that Jane had never legally adopted the child.[42] The trial court held that the child was not an issue of the marriage and thus the court had no subject matter jurisdiction to determine the custody dispute between John and Jane.[43]

Complicating matters, the surrogate was married and living with her husband during the course of the pregnancy and delivery.[44] Connecticut law provides that a child born to a married woman living with her husband is a presumed child of the (surrogate's) marriage.[45] The trial court concluded that this presumption had not been rebutted by the requisite clear and convincing evidence.[46] At that point, it appeared that neither John nor Jane could be declared the child's legal parent because the presumed parents had moved out of the jurisdiction and were unavailable.

After the trial court's ruling that the child was not an issue of John and Jane's marriage, John brought a motion in probate court to be declared the child's father, and to sever any parental rights of the surrogate and her former husband.[47] This motion was granted by the probate court.[48] The trial court, deferring to the probate court's holding declaring John to be the father, subsequently ruled that it did not have jurisdiction to decide custody.[49] Thus, by default, the trial court ensured the father's custody of the child.[50]

On appeal, the Connecticut Supreme Court reversed the trial court, and concluded that the trial court did have subject matter jurisdiction over the custody matter.[51] Further, the court held that the statutory presumption that a child's best interest is to be with the natural parent did not apply.[52] The case was remanded to the trial court for a determination of child custody solely based on the best interests

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39. *Id.*
40. *Id.* at 1303.
41. *Id.* at 1301.
42. *Id.*
43. *Id.* at 1303.
44. *Id.*
45. Schaffer v. Schaffer, 445 A.2d 589, 590 (Conn. 1982) (holding that children who otherwise might have been deemed illegitimate are presumed at common law to be "children of the marriage" if they were born to the wife during the course of the marriage).
46. *Jane Doe*, 710 A.2d at 1303.
47. *Id.* at 1302. The parental rights of the surrogate were now uncontested. *Id.*
48. *Id.*
49. *Id.* at 1303.
50. *Id.* at 1302.
51. *Id.* at 1319.
52. *Id.*

of the child.[53] While specifying that Connecticut's equitable parent doctrine did not apply to the facts of this case,[54] the court suggested that the wife should receive custody of the child.[55] This, of course, is precisely the application of the equitable parent doctrine.

This case serves as an example of the twisted reasoning that a court, bound by a policy of invalidating surrogacy contracts, will resort to in order to give effect to the substantial purposes of a surrogacy arrangement.[56] The court here suggests that the "best interests of the child" test trumps the jurisdiction's common and statutory law. However, the "best interests of the child" test is normally used to determine which parent will be awarded custody. Evidently, the court here would vest complete equity power in the trial courts to determine child custody on a best interest basis, whether or not the child issued from the marriage.[57]

Later, during the same year that *Jane Doe v. John Doe* was decided, the Connecticut Supreme Court became the subject of another controversy regarding one of its decisions. In *Mary Doe v. John Roe*,[58] the Connecticut Supreme Court ruled on whether the Superior Court, the trial court of general jurisdiction, had subject matter jurisdiction to render judgment in accordance with a stipulated agreement reached in probate court.[59] The post-baby birth settlement agreement at issue in the case included a promise by the traditional surrogate mother to consent, for additional consideration, to the termination of her parental rights.[60]

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53. *Id.* at 1324. While the court stated that Connecticut's equitable parent doctrine would not apply to these facts, the court remanded the case suggesting that joint custody would be in the best interests of the child. *Id.* at 1324.

54. *Id.* at 1318 n.46. The court stated that the equitable parent doctrine

> has considerable emotional appeal, because it permits a court, in a particularly compelling case, to conclude that, despite the lack of biological or adoptive ties to the child, the deserving adult nonetheless may be determined to be the child's parent. This appeal may be enhanced in a given case because the best interests of the child [may be] . . . determined irrespective of the otherwise invalid claim of parentage. . . . That doctrine, however, would lack the procedural and substantive safeguards provided to the natural parents and the child by the adoption statutes. In addition, the equitable parent doctrine, which necessarily requires an ad hoc, case-by-case determination of parentage after the facts of the case have been determined, would eliminate the significant degree of certainty regarding who is and who is not a child's parent. . . .

Id.

55. *Id.*

56. *Baby M.* and *In re Marriage of Moschetta* hold that surrogacy contracts are invalid or unenforceable, and imply that genetic relationships control, with the non-gestational wife having no parental rights notwithstanding the intention of the parties at the time of contract. *Baby M.*, 537 A.2d at 264; *In re Marriage of Moschetta*, 25 Cal. App. 4th at 1222. *Jane Doe* suggests that intention coupled with time can prevail over established common law. *See Jane Doe*, 710 A.2d at 1337 (citing both time and intent of the parties as factors to consider).

57. Normally, the best interests test is used to determine which legal parent will receive custody of a child. The court here implied that the legal parent requirement was a nullity.

58. 717 A.2d 706 (Conn. 1998).

59. *Id.* at 707-08.

60. *Id.*

In this case, a traditional surrogacy contract between a husband and a surrogate resulted in the birth of a healthy baby boy.[61] Four months later, the surrogate mother filed a motion for habeas corpus in probate court, seeking custody of the child.[62] She also filed for declaratory judgment, requesting a determination that the surrogacy contract was void as against public policy and voidable as a coercive contract allegedly signed under duress and false pretenses.[63] The husband counterclaimed, asking the court for "specific performance of the surrogacy contract."[64] During the course of the litigation, a settlement was reached in which the surrogate mother agreed to relinquish her parental rights for additional consideration.[65] The probate court accepted the settlement agreement, terminated the surrogate's parental rights, and authorized proceedings to begin for stepparent adoption.[66]

Because the surrogate refused to sign the adoption papers or relinquish custody of the child eight months after the settlement agreement had been accepted by the probate court, the husband and wife filed a motion in superior court asking that court to hold the surrogate in contempt for failing to comply with the terms of the settlement agreement.[67] The surrogate countered with a motion to dismiss the case on the grounds that the superior court lacked subject matter jurisdiction.[68]

The Connecticut Supreme Court, arguably acting in the child's best interest, ultimately ignored the invalid traditional surrogacy contract, and ruled that the superior court had jurisdiction to enforce the settlement agreement, and that the superior court also had the authority to order the contract's specific enforcement.[69] This case suggests that if a surrogate sues to invalidate a traditional surrogacy contract, a prudent husband and wife in Connecticut should delay settlement of the case until the baby's birth. After the birth of the baby, a surrogate's judicially accepted settlement agreement providing for the "voluntary" termination of her parental rights (in consideration for more money, of course) would be enforceable as a resolution of a custody dispute, and the husband and wife would become the legal parents.

Thus, even though a traditional surrogacy contract would be unenforceable, the effect of enforcement may be attained through a settlement agreement which will likely include the original pecuniary consideration, plus some additional consideration. This apparently does not violate adoption laws that prohibit "buying a baby." Connecticut courts will view this type of settlement as a valid settlement

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61. *Id.* at 708.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 709.
67. *Id.*
68. *Id.*
69. *Id.* at 711.

of a disputed claim. The distinguishing feature of this case was to give effect to a post-birth settlement agreement of a presumably unenforceable pre-birth traditional surrogacy agreement.

These sagacious decisions float alone in a sea of judicial hostility to traditional surrogacy contracts.

III. GESTATIONAL SURROGACY CONTRACTS

Gestational surrogacy differs significantly from traditional surrogacy.[70] In gestational surrogacy, an ovum is fertilized with sperm *in vitro*.[71] The zygote is grown into an eight cell (or more) organism—the embryo—at which point it is either placed into the uterus of a woman unrelated to the gamete providers, or frozen for such use in the future. The gestational surrogacy contract is entered into by a couple desiring to bring a child into the world and a uterus provider who is genetically unrelated to the embryo. The gestational surrogate provides the incubator facilitating the development and gestation of another couple's genetic child.[72]

California's landmark case of *Johnson v. Calvert*[73] was the first to address the enforceability of gestational surrogacy contracts. Crispina Calvert underwent a hysterectomy a few weeks prior to her marriage to husband Mark.[74] However, Mark and Crispina both desired to beget their own child.[75] Although Crispina was without a uterus, her functioning ovaries continued to produce healthy eggs.[76] A sympathizing co-worker of Crispina's mentioned Crispina's situation to a friend who suggested that she, the co-worker's friend, could serve as the couple's surrogate.[77] The gestational surrogacy contract provided that for a fee,[78] the

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70. Because gestational surrogacy is clearly distinguished in both law and biology from traditional surrogacy, authors and legislatures would do well to avoid the generic term "surrogacy." With the advances in *in vitro* fertilization and the temporal proximity of human cloning, gestational surrogacy will become increasingly common. Gestational surrogacy and its associated contractual arrangements will cease to be at issue only by the advent of an effective artificial uterus, which can circumvent the need for a human uterus. When that day arrives, needless to say, there will be a plethora of comments on the appropriateness of utilizing such a device.

71. The fertilization occurs in a petri dish outside the body.

72. Corollaries exist in the animal world. In one such example, a genetically unrelated penguin is driven by instinct to incubate an exposed egg.

73. 851 P.2d 776 (1993).

74. *Id.* at 778.

75. *Id.*

76. *Id.*

77. *Id.*

78. Some authors declare that surrogacy contracts are an exploitation of the poor. *See infra* Part V. In the instant case, the fee of $10,000 is calculated to be $1.45 per hour for 24 hours per day for 40 weeks. The implication is that this "low" payment constitutes exploitation of the surrogate.

This argument is spurious. Since when is a voluntary, non-coercive, mutually negotiated contract to be adjudged by an outside party to be exploitative? Neither party is required to contract. Is pregnancy a full time occupation? Absent complications, most pregnant women work at their usual jobs during their pregnancy. Is it

surrogate, Ms. Johnson, would have Mark and Crispina's *in vitro* produced embryo implanted into her uterus, would carry the fetus to term, and would relinquish all parental rights after the birth of the child.[79]

Just before delivery, a dispute arose over the financial terms of the contract.[80] Ms. Johnson threatened to refuse to give up the baby after the baby was born.[81] The Calverts sued to be declared the child's legal and natural parents.[82] Ms. Johnson filed her own suit to have the contract declared an unenforceable surrogacy contract.[83] The trial court ruled in favor of the Calverts, and ordered any parental rights of Ms. Johnson terminated.[84] The Court of Appeal unanimously affirmed the trial court.[85]

The California Supreme Court, in a matter of first impression, affirmed the holdings of the two lower courts.[86] Holding California's Uniform Parentage Act[87] inapplicable because under the Act a woman could claim legal motherhood either by giving birth to the child or by proving genetic relation to the child,[88] the court declared that its decision was governed by the affirmative intent of the parents without which "the child would not exist."[89] In a statement of brilliantly simple logic, the court concluded that "[t]he parties' aim was to bring Mark and Crispina's child into the world, not for Mark and Crispina to donate a zygote to [the surrogate]."[90] More generally, in a gestational surrogacy contract, the intent of the

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not a person's autonomous right to use his or her body as he or she desires (assuming such use does not harm others)? Is a college athletic scholarship an exploitation of a person who does not happen to be wealthy? Where is the evidence that only poor women agree to become surrogates? It appears that this contention of exploitation of poor women is at best a non-meritorious speculation.

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

80. *Id.* at 779.

81. *Id.*

82. *Id.*

83. *Id.* The cases were later consolidated. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 778.

87. CAL. FAM. CODE §§ 7600-7650 (West Supp. 1999). The California Uniform Parentage Act was enacted as a result of the United States Senate proposing a bill entitled the "Uniform Parentage Act" as part of legislation introduced in 1975. *Johnson*, 851 P.2d at 779. The proposed legislation in the U.S. Senate came about as a result of United States Supreme Court decisions that had eliminated the legal distinction between legitimate and illegitimate children. These cases are *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glona v. American Guarantee Co.*, 391 U.S. 73 (1968). The main portions of this Senate Bill became part of the California Family Code, which was entitled the "Uniform Parentage Act."

88. *Johnson*, 851 P.2d at 781.

89. *Id.* at 781. This reasoning seems weak because the intent of the husband and wife in a traditional surrogacy contract also is to bring a child into being. Because intent exists in both situations, it seems better to rely on the genetic origins of the child as the controlling factor. Genetic origin is objective, discoverable, and constant. Reliance on genetic origin is consistent with the result in traditional surrogacy contracts and also with the outcome here.

The dissenting opinion in *Johnson v. Calvert* stated that the best interests of the child should control rather than considerations of intent. *Id.* at 799-800 (Kennard, J., dissenting).

90. *Id.* at 782.

two genetic (gamete) suppliers is to bring a child into the world, not to donate their zygote to the surrogate.[91] This solitary finding clearly distinguishes traditional surrogacy from gestational surrogacy.

The court recognized that "a woman who voluntarily agrees to gestate and deliver for a married couple a child who is their genetic offspring is situated differently from the wife who provides the ovum for fertilization, intending to mother the resulting child."[92] Additionally, the court stated that all of the parties realized that a pregnant woman has a constitutionally protected right to abort any fetus which she is carrying, consistent with current law.[93] Any promise abrogating that right would be unenforceable.[94] Additionally, the court opined that gestational surrogacy contracts do not exploit women of lower economic status any more than other forms of employment that are poorly paying and undesirable.[95] Therefore, gestational surrogacy contracts are not unconscionable or coercive as a matter of law.[96]

The dissenting justice in *Johnson* concluded that the satisfaction of the strong desire to have one's own genetically related child was not worth the social price of the surrogacy arrangement.[97] He would have remanded the case to the trial court, where the surrogacy contract dispute could be settled by using "the best interests of the child" test.[98] He cautioned that the magnitude and severity of public policy considerations demand immediate legislative attention and action.[99]

Those criticizing gestational surrogacy as economically exploitative should note that the *Johnson* court assumed that women of lower economic classes would more likely serve as contractual surrogates than those of higher economic classes. However, the California Supreme Court found no factual basis to support the exploitation contention.[100] The court added that no proof existed to show that surrogacy contracts exploit poor women more than general economic necessity in general exploits them by inducing them to accept lower paying or otherwise undesirable employment.[101]

In the 1994 *Belsito v. Clark*[102] decision, an Ohio court found that its State statutes did not resolve surrogacy issues.[103] The Court found the State's birth

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91. *Id.*
92. *Id.* at 785.
93. *Id.* at 784-85.
94. *Id.* at 785.
95. *Id.*
96. *Id.* at 784.
97. *Id.* at 800-01 (Kennard, J., dissenting).
98. *Id.* (Kennard, J., dissenting).
99. *Id.* (Kennard, J., dissenting).
100. *Id.* at 785.
101. *Id.*
102. 644 N.E.2d 760 (Ohio 1994).
103. *Id.* at 763.

registration statutes inapplicable in a gestational surrogacy arrangement.[104] In *Belsito*, the wife had undergone a hysterectomy just before marriage.[105] Knowing of the couple's yearning to have a child, the wife's sister agreed to gestate the couple's *in vitro* conceived embryo without compensation.[106] As the pregnancy neared term, the couple learned of an Ohio law providing that if the birth mother is not married to the father, the child is officially deemed illegitimate.[107] To avoid stigmatizing their child as illegitimate, the genetic mother (wife) and genetic father (husband) filed a motion requesting a declaratory judgment finding them to be the legal and natural parents of the soon-to-arrive baby.[108]

The court found Ohio's birth registration statutes inapplicable in a gestational surrogacy setting.[109] Consistent with *Johnson*, the *Belsito* court noted that the gestational mother was genetically unrelated to the embryo, and that the genetic providers' (husband and wife's) intent governed whether the child would be brought into being.[110] Because the husband and wife provided the child's genes, and because the husband and wife intended to bring the child into being, the court held the husband and wife to be the child's natural and legal parents.[111] The birth certificate was subsequently ordered to indicate this status.[112]

Thus, the Supreme Court of California and the court of Ohio reached the same compelling holding regarding gestational surrogacy contracts: the providers of the genetic gametes are the natural and legal parents of the child, and the intent of those providers to bring the child into the world controls.[113]

Perhaps the ultimate gestational surrogacy contract case, involving five parties, occurred in California's *Buzzanca v. Buzzanca*.[114] In *Buzzanca*, a sterile husband and an infertile wife, desiring a child but wanting to have some choice over the child's genetic constituency, obtained a donated egg and selected donated sperm for

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104. *Id.* at 768.

105. *Id.* at 761. This is the same fact the court faced in *Johnson*. *Johnson*, 851 P.2d at 778.

106. *Belsito*, 644 N.E.2d at 761.

107. *Id.* at 762.

108. *Id.*

109. *Id.* at 768.

110. *Id.* at 764. The court here, as did the court in *Johnson*, specified that the genetic provider's intent is of such critical significance that without it, the baby would not have been born. This intent is distinguished from the intent of the husband and wife in a traditional surrogacy arrangement, where the wife's position sinks to the level of an intended third party beneficiary of the contract between the sperm-provider husband and the ovum-providing surrogate. In a gestational surrogacy contract, the gamete-providing husband and wife's intent governs whether the embryo will be created.

111. *Id.* at 767.

112. *Id.* at 768.

113. *See generally* Teresa Abell, Note, *Gestational Surrogacy: Intent-Based Parenthood in* Johnson v. Calvert, 45 MERCER L. REV. 1429, 1430 (1994) (explaining that the child's existence is due to the intentions upon which the Calvert's acted). The court used a modified "but-for" analysis. "But-for" the Calverts' acts in bringing about the pregnancy, "the child would not have existed."

114. 61 Cal. App. 4th 1410 (1998).

in vitro fertilization.[115] The resulting embryo was implanted into the uterus of another woman serving as a contractual gestational surrogate.[116] Thus, neither the husband nor the wife was genetically related to the embryo, which was derived from an egg donor and sperm donor. The gamete donors were related neither to the contracting couple nor to the gestational surrogate.

Just before the birth of the child, Mr. Buzzanca filed for divorce.[117] Ms. Buzzanca, claiming that she and her husband were the child's parents, demanded paternal child support payments.[118] Mr. Buzzanca disclaimed any paternal responsibility on the grounds that he was not genetically related to the child and that the gestational surrogacy contract was invalid because it was signed after the pregnancy had commenced.[119] The surrogate made clear that her responsibilities were limited to those of a contractual gestational surrogate.[120] The gamete providers[121] were donors that had relinquished their rights at the time of their gamete donations.

The trial court determined that parenthood could be established by showing the claimant had given birth to the child or by proving genetic relation through the use of blood tests.[122] Because the Buzzancas were not genetically related to the child, the gametes were donated without intent to reserve parental rights, and the gestational mother was only obligated to perform under the terms of the contract, the trial court found that the baby was born legally parentless![123]

On appeal, the Fourth District Court of Appeal noted that under California common law, fatherhood could be established if the husband "consented" to the artificial insemination of his wife.[124] The court held this rule to be applicable to the case before it.[125] Because Mr. Buzzanca had consented to the *in vitro* fertilization which was intended to result in a child, he was found to be the lawful father.[126] Uncontested, Ms. Buzzanca was likewise held to be the child's mother. The child's procreation was the product of a medical procedure initiated by parties intending to be parents. The court reasoned that, as the legal father, Mr. Buzzanca was entitled to all the rights and responsibilities of fatherhood, including the payment of child support.[127]

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115. *Id.* at 1412.
116. *Id.*
117. *Id.* at 1413.
118. *Id.*
119. *Id.* at 1414. Recall that under *Baby M.*, the non-genetically related spouse has no claim of parenthood absent adoption. *See supra* notes 13-27 and accompanying text (discussing *In re Baby M.*).
120. *Buzzanca*, 61 Cal. App. 4th at 1414.
121. *Id.*
122. *Id.* at 1412.
123. *Id.*
124. *Id.* at 1412-13.
125. *Id.*
126. *Id.* at 1413.
127. *Id.* at 1412.

Buzzanca follows the reasoning and holding the of California's Supreme Court in *Johnson*, and concurs with the Ohio Supreme Court in *Belsito*.[128] This judicial practice of enforcing gestational surrogacy contracts while refusing to enforce traditional surrogacy contracts is not found in statutes, but is instead the sole creation of case law.

IV. STATUTORY REGULATION OF SURROGACY

Some states have adopted the Uniform Parentage Act (UPA),[129] which appears to apply to surrogacy contracts. Under the UPA, parentage can be established by proving either a genetic relationship to the child, or by the woman's delivery of the child. Applying the Act to a traditional surrogacy situation, the surrogate and the semen provider (usually the contracting husband) are the child's mother and father. Because the wife is neither genetically related to the child nor is she the birth mother, she has no legal parentage status. By contrast, in typical gestational surrogacy, both the husband and the wife are genetically related to the child, thereby providing the wife with a claim under the UPA.

Presently, four states have statutorily recognized the validity and enforceability of surrogacy contracts: Florida, Nevada, New Hampshire, and Virginia.[130] All of these states prohibit the compensation of a surrogate,[131] although they permit payments for direct and indirect medical expenses. Florida, New Hampshire, and Virginia are the only states that specifically recognize gestational surrogacy as distinct from traditional surrogacy (although New Hampshire explicitly enforces non-compensated traditional surrogacy contracts as well).[132] Except for these three states, no other state statutorily distinguishes gestational surrogacy from traditional surrogacy. Furthermore, New Hampshire and Virginia require advance judicial approval of the agreement in order for the surrogacy contract to be enforceable.[133]

Arkansas law appears to address only surrogates impregnated by artificial insemination.[134] The law presumes that the child born by means of artificial insemination belongs to the intended mother rather than the surrogate mother.[135]

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128. *Supra* notes 111-13 and accompanying text.

129. UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301 (1987).

130. *See* Appendix I.

131. Outrageously, Nevada permits prostitution in licensed brothels (needless to say, for large profits), but will not enforce a surrogacy contract if the surrogate is compensated. *See* NEV. REV. STAT. ANN. § 201.354 (Michie 1999) (providing for legalized prostitution and solicitation occurring in a licensed house of prostitution); *Id.* § 126.045(3) (Michie 1997) (stating that surrogacy contracts in which the surrogate receives compensation for her services are unenforceable).

132. *See* Appendix I.

133. *See* Appendix I.

134. 1989 Ark. Acts § 1.

135. ARK. CODE ANN. § 9-10-201 (Michie 1998).

Surrogacy contracts are declared void by statute in the following states: Arizona, Indiana, Louisiana, Michigan, Nebraska, New York, North Dakota, and Tennessee.[136]

The following six jurisdictions provide for criminal penalties for various acts involving surrogacy contracts: District of Columbia, Kentucky, Michigan, New York, Utah, and Washington state.[137] Kentucky, Nebraska, and Washington define surrogacy contracts as those in which a woman is compensated for gestating a baby conceived by artificial means.[138] One could infer from these statutes that non-compensated arrangements are lawful and presumably enforceable assuming compliance with contract law.

In Kentucky, the legislature disagreed with the court as to the enforceability of surrogacy arrangements. The Kentucky Supreme Court ruled in *Surrogate Parenting Associates v. Commonwealth*[139] that compensated surrogate parenting contracts were enforceable. The Kentucky Legislature responded by passing a bill providing that compensated surrogacy arrangements were unenforceable in their state.[140] This implies that the Kentucky Legislature followed Florida, Nevada, New Hampshire, and Virginia, whose statutes provide that uncompensated surrogacy arrangements are enforceable.[141]

It is thus apparent that gestational surrogacy contracts can be viewed either as valid and enforceable, or as invalid and subject to a felony violation with prison term as a possible penalty (along with associated revocation of professional licenses). Some states, such as Florida and Virginia, specifically address gestational surrogacy contracts. Others, like New Hampshire, only imply a recognition of gestational surrogacy contracts.[142] However, most state legislatures that have addressed the issue do not distinguish between traditional and gestational surrogacy. All of these inconsistencies occurred despite the brilliant 1993 California Supreme Court decision which could not have more clearly delineated the distinction between traditional and gestational surrogacy contracts.

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136. *See* Appendix II.

137. *See* Appendix III.

138. *See* Appendix IV.

139. 704 S.W.2d 209 (Ky. 1986). Specifically, the court provided that these contracts did not violate the law prohibiting the selling of babies. *Id.* at 214.

140. KY. REV. STAT. ANN. § 199.590(4) (Banks-Baldwin 1997).

141. *See* Appendix I.

142. *See* Appendix I.

V. MORAL AND ETHICAL IMPLICATIONS

Opponents of surrogacy have lobbed criticism at the mere concept of surrogacy. Some opponents contend that surrogacy exploits women.[143] The court in *Baby M.* stated that compensated surrogacy agreements financially exploit vulnerable women in a fashion similar to baby selling.[144] The court declared that a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment renders the contract inherently involuntary.[145] Further, the court implied that the rather large payment used as consideration in a surrogacy contract gives rise to an unacceptable class distinction whereby rich, barren women benefit at the expense of poor, fertile women.[146]

One commentator maintains that little compelling evidence exists to support the claim that surrogate arrangements are inherently exploitative.[147] He contends that there are many other motives for women to become surrogates: many wish to help an infertile couple beget a child; others wish to experience pregnancy and childbirth without having to raise a child.[148] Thus, he concludes, the financial exploitation argument appears weak at best.

Another exploitation argument contends that surrogacy reduces a woman to the status of a commercial good. This is the so-called "commodification" argument.[149] Adherents to this argument fear that women will be hired as surrogates because of their beauty, intelligence, or race.[150] Professor Richard Epstein rejects this argument as an effort by some to impose their own conception of the right and proper thing to do with bodies, sperm, and eggs upon those who may feel differently.[151] Epstein believes that no one's views on commodification should be imposed on those who disagree.[152]

Some argue that surrogacy contracts prostitute or enslave women in exchange for money.[153] They argue that, like prostitutes, surrogates are forced into the role of

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143. *But see generally* John L. Hill, *Exploitation*, 79 CORNELL L. REV. 631 (1994) (arguing that there is no substance to the exploitation theory).

144. *In re* Baby M., 537 A.2d 1227, 1250 (N.J. 1988).

145. *Id.* at 1248.

146. *Id.* at 1249.

147. Hill, *supra* note 143, at 691-95.

148. *Id.*

149. *See generally* MARGARET J. RADIN, CONTESTED COMMODITIES (1996) (providing a thorough presentation of the theory that surrogacy relegates the surrogate and the surrogate's product, the child, to the status of a commercial good).

150. Hill, *supra* note 143, at 639-44.

151. Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2326 (1995). *See generally id.* at 2324-30 (addressing non-traditional objections to surrogacy contracts, such as commodification, subordination, and incommensurability).

152. *Id.* at 2326.

153. *See generally* Katherine B. Lieber, Note, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205 (1992) (arguing against surrogacy contracts).

surrogate out of sheer economic necessity.[154] These commentators conclude that because prostitution is morally wrong and generally illegal, surrogacy should be viewed in the same manner.[155] Epstein counters that courts cannot refuse to enforce surrogacy contracts simply because some disapprove of the motives and actions of others.[156] Further, as the Supreme Court in *Planned Parenthood v. Casey*[157] stated, morality alone cannot be the basis for the law.[158]

Professor Hill explains that for a contract to be exploitative, an offer must create or take advantage of a known psychological vulnerability rendering the victim incapable of making reasonable decisions.[159] Consequently, commercial contracts such as surrogacy contracts are not generally exploitative.[160]

Finally, traditional surrogacy arrangements are criticized as being akin to baby-selling. Because state statutes generally prohibit, in the context of adoption, exchanging money for a baby, surrogacy contracts should be prohibited because the result is the same: i.e., the procurement of a baby for money.[161] Commercial surrogacy places a baby in a home without considering whether the prospective parents would be suitable.[162] However, this argument is undermined when one considers that innumerable babies are born everyday into households where the parents may be considered unsuitable.

Perhaps the more common feminist approach to surrogacy is exemplified by the famous anthropologist Margaret Sanger, who proclaimed that "[n]o woman can call herself free who does not own and control her own body."[163] Sanger and others sharing her view implicitly maintain that any restriction of a woman's right to do with her body as she wishes, under any moral or ethical theory, violates the woman's right to ownership of and control over her own body. Supreme Court decisions in *Roe v. Wade*[164] and *Planned Parenthood v. Casey*[165] appear to at least recognize Sanger's point of view.

With the advance of artificial reproductive technological capabilities and the proximity of clinical experimentation in human cloning, there is a compelling need to develop a uniform approach to surrogacy among the states. If uniformity is not achieved, a doctor in state "*A*" assisting with the surrogacy process would be guilty of a felony, while in adjacent state "*B*," the same doctor, assisting a couple

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154. *See generally id.*

155. *See generally id.*

156. Epstein, *supra* note 151, at 2341.

157. 505 U.S. 833 (1992).

158. *Id.* at 850 (stating that men and women of good conscience can disagree about the basic principles of morality, but they cannot mandate the citizens' moral code).

159. Hill, *supra* note 143, at 661-83.

160. *Id.*

161. *In re Baby M.*, 537 A.2d at 1241-43.

162. *Id.*

163. MARGARET SANGER, WOMAN AND THE NEW RACE 8 (1920).

164. 410 U.S. 113 (1973).

165. 505 U.S. 833 (1993).

contracting to beget their baby, would be doing so under a statutorily regulated, positive public policy. Traditional surrogacy contracting has been pummeled by both the courts and the legislatures. The future lies in gestational surrogacy, which has been received favorably in both courts and legislatures, even if confusedly by the latter. It is time for our legislators to awaken to the reality of the promises afforded by gestational surrogacy.

VI. A Proposed Uniform Gestational Surrogacy Contract Act

It is presently possible for a physician practicing medicine in state "*A*" to be found guilty of committing a felony for assisting a couple contracting to beget a baby through gestational surrogacy; in adjacent state "*B*," however, that same doctor could lawfully participate in such activities and even be paid for his or her services. This is only one of the myriad of examples wherein states' inconsistent or non-existent legislation undermines ART and individuals' abilities to beget a child.

As noted, traditional surrogacy contracting has been battered in both the courts and legislatures. Fortunately, the advent of *in vitro* fertilization has rendered traditional surrogacy obsolete and unnecessary. These authors believe that the future of surrogacy now firmly lies in gestational surrogacy arrangements. These arrangements, on the whole, have been received favorably by courts, and reasonably favored, albeit amid confusion, by legislatures. Indeed, with the advancement of the science of ART has come the corresponding hope that ART offers for individuals and couples who were previously unable to beget a genetically related child. These authors believe that the potential benefits of gestational surrogacy to the general public can only be realized upon the passage of uniform state legislation. Set forth below is a proposed model legislation regulating gestational surrogacy.

PROPOSED UNIFORM GESTATIONAL SURROGACY CONTRACT ACT

Section I.

> "Gestational surrogacy," as used herein, means an embryo not genetically related to the woman in whom implantation of the embryo will occur, and which is implanted into the uterus of that woman for the purpose of developing the embryo into a fetus and resulting in the birth of a live baby.

Section II.

> Gestational surrogacy contracts shall be governed by the contract law of the jurisdiction in which the contract was signed. A gestational surrogate shall be entitled to reasonable compensation for her services, either as

provided in the contract agreement or, if not so provided, as otherwise ordered by the court.

Section III.

(A) A gestational surrogacy contract shall be presumed valid and enforceable as a matter of law when, prior to the commencement of the *in vitro* fertilization, a court of general jurisdiction:
(1) conducts a hearing at which all parties to the contract must appear;
(2) interviews said parties to the contract and determines that all parties have the requisite capacity to enter into the contract and that there is an absence of coercion, duress, and exploitation; and
(3) makes findings that the parties understand the contract terms, including the constitutional right of the gestating female to abort the fetus, as provided by law.

(B) Upon a finding by the court of general jurisdiction that the parties have complied with the provisions of this Act, the court shall specifically enforce the contract against the surrogate should the latter subsequently refuse to perform her obligation under the agreement. The court may, in its discretion, require any party challenging the enforceability of a surrogacy agreement complying with the requirements of this Act, to pay attorneys' fees and costs to the other party or parties to the valid agreement.

(C) Once approved by the court, the gestational surrogacy contract shall not be modifiable except by the written consent of every party to the contract and only then, upon approval by the court.

Section IV.

The court may appoint an attorney to represent any party to the gestational surrogacy contract if the court, in its discretion, finds that one or more of the parties to said contract cannot afford legal services on their own and the court further determines that any of said parties do not understand the nature or legal effect of the contract and the parties' rights and obligations arising therefrom.

Section V.

The court may order, *sua sponte*, medical examinations, psychiatric consultations, or other expert evaluations if the court deems these appropriate to a sagacious decision regarding the contract.

Contracts developed under this Uniform Act would sustain the benefit of pre-approved gestational surrogacy contracts.[166] The Uniform Act follows the holding of the *Johnson* court, and protects gamete providers from the vicissitudes of a surrogate. Section I specifies that only contracts involving the implantation of non-genetically related gametic sources have the potential of acquiring enforceability. This requirement distinguishes gestational surrogacy from traditional surrogacy, wherein, as the result of artificial insemination, the surrogate is genetically related to the fetus. It also distinguishes situations wherein a genetically related gamete is fertilized *in vitro* and implanted into the surrogate. This requirement of no genetic relationship to the implanted embryo is necessary for the Act to be consistent with *Johnson*.[167]

Admittedly, this requirement restricts a woman from donating her own egg, thereby relinquishing all ownership rights over her ovum, and serving as the surrogate for the zygote product of her *in vitro* fertilized egg. However, permitting this exception would blur the distinction between the genetically related traditional surrogate and the non-genetically related gestational surrogate. This distinction has characterized court decisions in this area and allowed courts to distinguish invalid agreements from enforceable contracts.[168]

The provision contained in Section II applies the jurisdiction's contract law, and ensures a party's protections against adhesion, fraud, etcetera, which have developed over time and are accepted public policy. Providing for a gestational surrogate's reasonable compensation conflicts with the statutes of all four states that provide for the enforceability of gestational surrogacy contracts.[169] However, it seems unreasonable to expect the substantial services of a surrogate to go without compensation. Such compensation should enhance the pool of potential, quality surrogates. Admittedly, compensation gives rise to the specter of commodification and economic exploitation discussed earlier. However, the authors of this Article concur with Epstein's arguments that the critics of compensation are but thinly veiled moralists demanding that others' behavior conform to the critics' dictates of right and wrong.[170] Epstein points out that moral reasoning alone has been held by the United States Supreme Court to be inappropriate and insufficient in itself to sustain legislation.[171]

Section III's hearing requirement may adversely impact increasingly scarce judicial resources. However, the importance of the subject matter of the contract

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166. This Act copies the New Hampshire and Virginia requirements of prior judicial approval of gestational surrogacy contracts.

167. *Johnson*, 851 P.2d at 782 (reasoning that the gametic providers intend to bring their baby into the world, not to provide a gift of a zygote to the surrogate).

168. *See supra* notes 73-113 and accompanying text (discussing California's *Johnson* case and Ohio's *Belcito* case).

169. *See* Appendix I (setting forth the relevant statutes of Florida, Nevada, New Hampshire, and Virginia).

170. *See supra* notes 151-52 and accompanying text (recapitulating Epstein's argument).

171. *See generally* Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992).

and the advantage of an experienced neutral fact-finder's first-hand viewing of the parties' demeanor may contribute to avoiding prolonged and painful future litigation. Such a hearing need not be lengthy. For example, if the judge deems the parties and the contract reasonable, he or she may promptly approve them.

Nonetheless, Section III gives a judge the opportunity to ensure that the parties understand and consent to the responsibilities imposed by the contract. The judge is also allowed to evaluate the contract for overreaching or other unlawful elements before the commencement of the *in vitro* procedure. Also, under Section III, the court shall specifically enforce a contract that was previously found to comply with this Act.

Section IV's provision that allows an attorney to be appointed for the surrogate will enhance both fairness and the concept of equal representation to avoid economic exploitation. Section V provides for a court's *sua sponte* discretion to obtain expert professional consultation to help the judge more thoroughly evaluate a party when the judge suspects a party's inappropriate motivation or unsuitability as a surrogate.

VII. CONCLUSION

Adoption of model legislation governing the science of "gestational surrogacy" is long overdue. The proposed Act in this Article distinguishes the discredited and problematic traditional surrogacy arrangement from the valid, viable, and enforceable gestational surrogacy covenant. The rights of the infertile to beget their genetically related child compels legislative action to ensure both the availability of gestational surrogacy and the enforceability of critical gestational surrogacy contracts.

APPENDIX I

FLA. STAT. ANN. §§ 742.13, 742.15-742.16 (West 1985 & Supp. 1999).

742.15. Gestational surrogacy contract

(1) Prior to engaging in gestational surrogacy, a binding and enforceable gestational surrogacy contract shall be made between the commissioning couple and the gestational surrogate. A contract for gestational surrogacy shall not be binding and enforceable unless the gestational surrogate is 18 years of age or older and the commissioning couple are legally married and are both 18 years of age or older.

Additionally, the commissioning mother must not be able to gestate a pregnancy to term. The commissioning couple may agree to pay only reasonable living, legal, medical, psychological . . . expenses directly related to prenatal, intrapartal, and postpartal periods.

NEV. REV. STAT. ANN. § 126.045 (Michie Supp. 1999).

126.045. Surrogacy Agreements: Contract requirements; treatment of intended parents as natural parents; unlawful acts.

1. Two persons whose marriage is valid under chapter 122 of NRS may enter into a contract with a surrogate for assisted conception. Any such contract must contain provisions which specify the respective rights of each party, including:

(a) Parentage of the child;

(b) Custody of the child in the event of a change of circumstances; and

(c) The respective responsibilities and liabilities of the contracting parties.

2. A person identified as an intended parent in a contract described in subsection 1 must be treated in law as a natural parent under all circumstances.

3. It is unlawful to pay or offer to pay money or anything of value to the surrogate except for the medical and necessary living expenses related to the birth of the child as specified in the contract.

4. As used in this section, unless the context otherwise requires:

(a) *'Assisted conception' means a pregnancy resulting when an egg and sperm from the intended parents are placed in a surrogate through the intervention of medical technology.*

(b) 'Intended parents' means a man and woman, married to each other, who enter into an agreement providing that they will be the parents of a child born to a surrogate through assisted conception.

> (c) "Surrogate" means an adult woman who enters into an agreement to bear a child conceived through assisted conception for the intended parents.

(emphasis added).

N.H. REV. STAT. ANN. §§ 168-B:1 to 168-B:22 (1994 & Supp. 1999) stating, in pertinent part:

> 168-B:1 Definitions
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> . . .
>
> XII. "Surrogacy" or "surrogacy arrangement" means any arrangement by which a woman agrees to be impregnated using either the intended father's sperm, the intended mother's egg, or their preembryo with the intent that the intended parents are to become the parents of the resulting child after the child's birth.
>
> 168-B:16 Regulatory Procedures
>
> I. A surrogate arrangement is lawful only if it conforms to the requirements of this subdivision, and if, before the procedure to impregnate the surrogate:
>
> . . .
>
> (b) The surrogate arrangement has been judicially preauthorized pursuant to RSA 168-B:23; and
> (c) [informed consent is obtained].
>
> . . .
>
> IV. No person or entity shall promote or in any other way solicit or induce for a fee, commission or other valuable consideration, or with the intent or expectation of receiving the same, any party or parties to enter into a surrogacy arrangement.
>
> 168-B:22 Judicial Preauthorization.
>
> [This statute requires a hearing within 90 days of the filing of a petition for preauthorization].

VA. CODE ANN. §§ 20-156 to 20-165 (Michie 1995 & Supp. 1999).

20-156. Definitions.

"Gestational mother" means the woman who gives birth to a child, regardless of her genetic relationship to the child.

"Surrogacy contract" means an agreement between intended parents, a surrogate, and her husband, if any, in which the surrogate agrees to be impregnated through the use of assisted conception, to carry any resulting fetus, and to relinquish to the intended parent the custody of and parental rights to any resulting child.

20-159. Surrogacy contracts permissible.

A. [this section requires a written agreement whereby the surrogate relinquishes all her rights to the child].

B. Surrogacy contracts [require prior approval by the court].

20-161. Termination of court-approved surrogacy contract.

. . .

B. Within 180 days after the last performance of any assisted conception, a surrogate who is also a genetic parent may [request and require the court to revoke the agreement].

APPENDIX II

ARIZ. REV. STAT. ANN. § 25-218(A) (West 1991) ("No person may enter into, induce, arrange, procure or otherwise assist in the formation of a surrogate parentage contract.").

IND. CODE ANN. §§ 31-20-1-1 to 31-20-1-2 (Michie 1997).

31-20-1-1. Legislative declarations.

Sec. 1. 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 31-19 (or IC 31-3-1 before its repeal).

31-20-1-2 Surrogate agreements void

. . .

Sec. 2. A surrogate agreement described in section 1 of this chapter that is formed after March 14, 1988, is void.

LA. REV. STAT. ANN. § 9:2713 (West 1991).

9:2713. Contract for surrogate motherhood; nullity

A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.

B. "Contract for surrogate motherhood" means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child.

MICH. COMP. LAWS ANN. § 722.855 (West 1993).
722.855. Contracts; void and unenforceable

Sec. 5. A surrogate parentage contract is void and unenforceable as contrary to public policy.

NEB. REV. STAT. § 25-21,200 (1995).
25-21,200. Contracts; void and unenforceable; definition.

(1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child.

(2) For purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband.

N.Y. DOM. REL. LAW § 122 (McKinney Supp. 1999) ("Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.").

N.D. CENT. CODE § 14-18-05 (1997).
14-18-05. Surrogate agreements.

Any agreement in which a woman agrees to become a surrogate or to relinquish that woman's rights and duties as parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child.

TENN. CODE ANN. § 36-1-102(46)(C) (1996) ("Surrogate birth—Nothing herein shall be construed to expressly authorize the surrogate birth process in Tennessee unless otherwise approved by the courts or the general assembly.").

APPENDIX III

D.C. CODE ANN. § 16-402 (1997).

16-402. Prohibitions and penalties.

(a) Surrogate parenting contracts are prohibited and rendered unenforceable in the District.

(b) Any person or entity who or which is involved in, or 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, shall be subject to a *civil penalty not to exceed $10,000 or imprisonment for not more than 1 year, or both.*

(emphasis added).

KY. REV. STAT. ANN. § 199.990(2) (Michie 1995) ("[A]ny person who willfully violates [KRS 199.590] shall be fined not less than one hundred dollars nor more than two hundred dollars or imprisoned for not more than thirty days, or both.").

MICH. COMP. LAWS ANN. § 722.857 (West 1993 & Supp. 1999).

722.857. Surrogate parentage contract prohibited; surrogate parentage contract as felony; penalty

> Sec. 7. (1) A person shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract under which an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability is the surrogate mother or surrogate carrier.
>
> (2) A person other than an unemancipated minor female or a female diagnosed as being mentally retarded or as having a mental illness or developmental disability who enters into, induces, arranges, procures, or otherwise assists in the formation of a contract described in subsection (1) is guilty of a felony punishable by a fine not more than $50,000.00 or imprisonment for not more than 5 years, or both.

N.Y. DOM. REL. LAW § 123 (McKinney 1999) (imposing a civil penalty upon those entering into a surrogacy agreement and classifying as a felon third-parties who recruit or procure women to become surrogates).

123. Prohibitions and penalties

> 1. No person or other entity shall knowingly request, accept, receive, pay or give any fee . . . in connection with a surrogate parenting contract . . . .

> 2. (a) [Any party to the contract] who violates this section shall be subject to a civil penalty not to exceed five hundred dollars.
> (b) Any other person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee . . . shall be subject to a civil penalty not to exceed ten thousand dollars . . . . [Any person who twice violates this section] shall be guilty of a felony.

UTAH CODE ANN. § 76-7-204 (1995).

> 76-7-204. Prohibition of surrogate parenthood agreements—Status of child—Basis of custody.
> (1) (a) No person, agency, institution, or intermediary may be a party to a contract for profit or gain in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result.
> (b) No person, agency, institution, or intermediary may facilitate a contract prohibited by Subsection (1). This section does not apply to medical care provided after conception.
> (c) Contracts or agreements entered into in violation of this section are null and void, and unenforceable as contrary to public policy.
> (d) *A violation of this subsection is a class B misdemeanor.*
> (2) An agreement which is entered into, without consideration given, in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result, is unenforceable.
> (3) (a) In any case arising under Subsection (1) or (2), the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes.
> (b) In any custody issue that may arise under Subsection (1) or (2), the court is not bound by any of the terms of the contract or agreement but shall make its custody decision based solely on the best interest of the child.
> (4) Nothing in this section prohibits adoptions and adoption services that are in accordance with the laws of this state.
> (5) This section applies to contracts or agreements that are entered into after April 24, 1989.

(emphasis added).

WASH. REV. CODE ANN. § 26.26.250 (West 1997) ("Any person, organization, or agency who intentionally violates any provision [of this section] shall be guilty of a gross misdemeanor.").

APPENDIX IV

KY. REV. STAT. ANN. § 199.590 (Banks-Baldwin 1997).

199.590 Prohibited acts and practices in adoption of children; expenses paid by prospective adoptive parents to be submitted to court

. . .

(4) A person, agency, institution, or intermediary shall not be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. A person, agency, institution, or intermediary shall not receive compensation for the facilitation of contracts or agreements as proscribed by this subsection. Contracts or agreements entered into in violation of this subsection shall be void.

NEB. REV. STAT. § 25-21,200 (1995).

25-21,200. Contract; void and unenforceable; definition.

(1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child.

(2) For purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband.

WASH. REV. CODE ANN. §§ 26.26.230-26.26.240 (West 1997).

26.26.230. Surrogate parenting—Compensation prohibited

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.

26.26.240. Surrogate parenting—Contract for compensation void

A surrogate parentage contract entered into for compensation, whether executed in the state of Washington or in another jurisdiction, shall be void and unenforceable in the state of Washington as contrary to public policy.