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Legislating Surrogacy: A Partial Answer to Feminist Criticism

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LEGISLATING SURROGACY: A PARTIAL ANSWER TO FEMINIST CRITICISM

INTRODUCTION

Although surrogate motherhood has been practiced in some form since Biblical times,[1] it was not until the landmark *Baby M*[2] case that modern surrogacy captured public attention and became the subject of widespread debate. The intense media scrutiny of such cases, increased demand for surrogacy,[3] and ever-improving technology have forced us to rethink our beliefs about such issues as sex, parenting, the scope of personal freedom, and privacy. They have engen-

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1. In the Bible, for instance, when Sarah, Rachel, and Leah were unable to bear children, they gave their handmaids, Hagar, Bilhah, and Zilpah, to have babies for their husbands. GENESIS 16:1-4, 15; 30:1-10. As proponents of surrogacy often fail to point out, however, this arrangement degenerated into some confusion and turmoil. Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 133-34 (1986). "Soon after Hagar became pregnant, she began to despise Sarah, Sarah blamed Abraham, and Abraham insisted that Sarah handle Hagar. Sarah in turn harshly rebuked Hagar, who consequently left town." *Id.* I offer the rest of the story not as proof that surrogacy should be prohibited, but rather as an illustration of the complexities and potential problems involved in surrogacy for which legislation can provide a useful remedy.

2. *In re* Baby M, 537 A.2d 1227 (N.J. 1988). In *Baby M*, Mary Beth Whitehead, a married mother of two, agreed to be inseminated with the sperm of William Stern and to give up the resulting child to him. She was to be paid $10,000. *Id.* at 1235. Three days after the baby was born, Mrs. Whitehead turned the child over to Mr. and Mrs. Stern. *Id.* Whitehead then changed her mind, and claimed the baby as her own. *Id.* at 1236-37. A disturbing sequence of events ensued, including police raids on the Whitehead residence, the Whiteheads' disappearance while "on the run" with the child for approximately three months, suicide threats by Mrs. Whitehead, and accusations that Mr. Stern had sexually abused Whitehead's older daughter. *Id.* at 1237. Ultimately, the court awarded full custody of the child to Mr. Stern, and visitation rights to Mrs. Whitehead. *Id.* at 1278. Mrs. Stern, the intended mother, who was and is actually responsible for the care and upbringing of the child, received no legal rights whatsoever. For a more detailed discussion of the background of the case, see Bonnie Steinbock, *Surrogate Motherhood as Prenatal Adoption*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 123-28 (Larry Gostin ed., 1990).

3. Mark Strasser, *Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies*, 60 TENN. L. REV. 135 (1992).

> It has been estimated that ten to fifteen percent of couples in the Western World wanting to have children cannot have them. It is not difficult to understand why some of these couples might be tempted to hire a surrogate, because their options are somewhat limited. While they might try to adopt, the supply of adoptable children has diminished because of the widespread use of contraceptives, the liberalization of abortion, and the fading social stigma attached to unwed mothers.

Id. at 136-37. Janice Raymond reports that "the correct [number of infertile couples in the United States] is one in twelve." JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 3 (1993).

dered a vigorous debate about surrogacy's ethical and legal implications. "The stakes in the surrogacy debate are high. They are nothing less than the future of the family, the standards for parenting, and the societal image of women."[4]

The surrogacy debate illustrates the fundamental tension between autonomy and paternalism.[5] Advocates for surrogacy argue that it is simply another choice that technology has created and that the state should not dictate how or whether this choice should be exercised.[6] Critics contend that the state should prohibit surrogacy because it exploits and degrades its participants and society as a whole.[7]

This Comment notes that both sides of the issue are correct. Surrogacy has the potential both to exploit and to liberate women.[8] The Comment concludes that, although critics have valid concerns about surrogacy and its implications, carefully drafted legislation can minimize the potentially exploitative aspects of surrogacy and protect the individuals who choose it as a reproductive option. Whether or not one believes surrogacy is morally acceptable, the improvement and regulation of the system would be beneficial to potential parties and society as a whole. Regulation is superior to either the prohibition or even criminalization of surrogacy, actions which would be of questionable constitutionality[9] and in all likelihood drive surrogacy underground.[10] As Marjorie Shultz stated, "[t]he critical, overarching

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4. LORI B. ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, AND BRAVE NEW BABIES xv (1989).

5. Bonnie Steinbock argues that, although "[a]t one time, the characterization of a prohibition as paternalistic was a sufficient reason to reject it, [t]he pendulum has now swung back, and many people are willing to accept at least some paternalistic restrictions on freedom." Steinbock, *supra* note 2, at 128.

6. *See, e.g.*, Larry Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 3, 7 (Larry Gostin ed., 1990) ("Those who would ban or criminalize surrogacy have a heavy burden to explain why they would allow the State to stifle activity that fulfills a human need.").

7. *See, e.g.*, George J. Annas, *Fairy Tales Surrogate Mothers Tell*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 43, 44 (Larry Gostin ed., 1990) (arguing that surrogacy entails the "commercialization of human embryos, the degradation of pregnancy, and the future exacerbation of class distinctions and economic violence"). Lori Andrews, on the other hand, points out that, although this argument is persuasive on its face, it "is reminiscent of the argument that feminists roundly reject in the abortion context: that it demeans us all as a society to kill babies." Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 167, 169 (Larry Gostin ed., 1990).

8. MARTHA FIELD, SURROGATE MOTHERHOOD 78 (1988) (noting affordable surrogacy contracts would resolve the debate of whether surrogacy exploits or liberates women).

9. *See* Gostin, *supra* note 6, at 3-8 (outlining the constitutional basis for surrogacy arrangements under the purported right to privacy).

10. *Cf.* CHRISTINE OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS 116-19 (1987) (drawing comparison of surrogacy with prostitution and noting prostitution

question for legal policy is not whether but how to accommodate the new developments [in reproductive technology.]"[11] The introduction to the ABA's Model Surrogacy Act echoes this pragmatic view, stating that, "[w]hile surrogacy poses potential problems . . . *surrogacy will be used*, and therefore, it is necessary to control these potential problems and provide for the best interests of children born out of the use of such services."[12]

This Comment argues that well-considered legislation can serve as a "strategy of preventative ethics" that will better protect the interests of all parties to a surrogacy arrangement.[13] Typically, surrogacy disputes are framed as polarized power struggles that pit women against women, or women against men, and that courts address only when a surrogacy dispute has reached a "crisis" point. Instead, the debate should emphasize the reduction of conflict and the prevention of exploitation of all parties.[14] This Comment recognizes that some issues raised by surrogacy inherently resist a satisfactory resolution.[15] The Comment, therefore, proposes not to "find the perfect solution . . . but to determine which of several flawed alternatives seems least harmful."[16]

The Comment explains in Part I the medical procedures involved in surrogacy, and then in Part II examines some of the important feminist criticisms of surrogacy as it is now practiced. Part III explores

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has persisted despite criminalization). Harriet Blankfield, Director of Infertility Associates International of Chevy Chase, Maryland, observed: "We screen out 95 of every 100 surrogate applicants. But if you believe there are abuses now, wait till it goes underground. How many couples desperate for a biologically related baby will be so careful medically and psychologically? None. They'll take the first woman who seems committed to them." Andrew H. Malcolm, *Steps to Control Surrogate Births Rekindle Debate*, N.Y. TIMES, June 26, 1988, at A1, A21.

11. Marjorie Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 299 (1990).

12. MODEL SURROGACY ACT, Introduction (Proposed official draft 1988) (ABA Section on Family Law) (emphasis added).

13. Virginia L. Warren, *Feminist Directions in Medical Ethics*, 4 HYPATIA 73, 80-81 (1989).

14. Virginia Warren has described the difference in approaches as a distinction between "housekeeping" and "crisis" issues, and has explained it as follows:

> [I]nformed consent[, for example,] is standardly [sic] interpreted as a crisis issue: "Was an autonomous and informed consent obtained from the patient before this treatment, or did the physician withhold relevant information or pressure the patient?" Compare this to informed consent interpreted as a housekeeping issue: "How should we foster the conditions which make informed consent more likely?"

Id. at 79.

15. *See* Strasser, *supra* note 3, at 135; *see also* Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 IND. L.J. 205, 232 (1992) ("It is unrealistic to believe that all of the harms associated with surrogacy can be eliminated.").

16. Strasser, *supra* note 3, at 135.

approaches that judges and legislators have taken toward surrogacy, first in other states and then in Maryland. Finally, Part IV proposes model legislation and concludes with suggestions for additional reform. The Comment recognizes that the proposed legislation would be significantly reinforced if it were accompanied by broader changes in society and the medical profession. The proposal acknowledges, moreover, that "the capacity of the new technology for good or evil depends on the social context surrounding its use and application."[17]

I. BIOMEDICAL BACKGROUND

Surrogacy, broadly defined, is an arrangement by which a woman is impregnated by assisted conception, carries the resulting fetus, and relinquishes all parental rights to the child at birth.[18] There are two types of surrogacy arrangements: genetic surrogacy and gestational surrogacy.[19]

Genetic surrogacy typically results from the artificial insemination of a surrogate with the intended father's sperm. Specifically, the sperm of the intended father is injected into the vagina of the surrogate, who then carries the resulting child until birth.[20] Genetic surrogacy results in a child genetically related to the surrogate and to the intended father.

Gestational surrogacy involves the removal of the intended mother's egg through an invasive surgical procedure known as laparoscopy.[21] The egg is then placed in a petri dish together with the

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17. Norma Juliet Wikler, *Society's Response to the New Reproductive Technologies: The Feminist Perspectives*, 59 S. CAL. L. REV. 1043, 1055 (1986) (noting ultimate effect of technology must be gauged within an historical perspective).

18. *See* DEBORAH L. RHODE, JUSTICE AND GENDER 221 (1989) (describing modern surrogacy arrangements); Lieber, *supra* note 15, at 206.

19. For a general description of both types of surrogacy arrangements, see COMMITTEE ON ETHICS, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PAMPHLET NO. 88, ETHICAL ISSUES IN SURROGATE MOTHERHOOD, (1990) [hereinafter ACOG PAMPHLET].

20. Field, *supra* note 8, at 34. Artificial insemination is arguably not a technology at all, because it requires no more technology than a needleless syringe. *Id.*

21. Another method of assisted reproduction involves egg donation by a woman who is not the intended mother. Her egg is retrieved, mixed with the sperm of the intended father, and then implanted into the uterus of another woman. The implanted woman is usually the intended mother. This surrogacy option is typically pursued when the gestator has a normal uterus but a problem with her eggs. The gestator might be yet another person. In that case, one woman is the egg donor, another is the gestator, and another is the intended mother. *See* FIELD, *supra* note 8, at 36 (describing the various IVF procedures). A discussion of the legal and ethical implications of these permutations and combinations of surrogacy involving egg donation is beyond the scope of this paper, but ideally, states should address all of these reproductive technologies within a single piece of legislation.

intended father's sperm in a process known as in vitro fertilization (IVF).[22] If the sperm fertilizes the egg, the egg develops into an embryo which is then implanted into the uterus of a genetically unrelated surrogate.[23] For both the intended mother and the surrogate, the gestational surrogacy process is much riskier and more complicated than that of genetic surrogacy.[24] Gestational surrogacy requires not only laparoscopy for the intended mother but also extensive drug therapy for both women in order to synchronize their hormonal cycles.[25]

II. THE FEMINIST CRITICISM OF SURROGACY

It is impossible to identify a unified feminist perspective on surrogacy. Indeed, feminists are deeply divided on the issue.[26] Some see surrogacy as simply one more battle in the long war to increase women's personal freedom to control their own reproduction.[27] Others view surrogacy as a form of slavery or prostitution.[28] Still others see surrogacy as part of a patriarchal conspiracy to control women's bodies and reproduction[29] and seek to prohibit surrogacy in order to pro-

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22. FIELD, *supra* note 8, at 35.

23. ACOG PAMPHLET, *supra* note 19, at 1.

24. *See, e.g.*, Molly Gordy, *Egg Donor Rejected; Problems Plague Unlicensed Center*, NEWSDAY, May 8, 1992, at 6 (describing one donor who developed ovarian cysts as a result of egg donation).

25. *See The New Motherhood*, WASH. POST, Feb. 12, 1991, at Z12. Whether differences in risk, as well as in genetic or gestational methods of surrogacy, should translate into different legal treatments is an important and difficult question that is beyond the scope of this Comment. *See also infra* notes 288-291 and accompanying text.

26. During the *Baby M* trial, for example, the New Jersey chapter of the National Organization for Women (NOW) could not reach consensus on the issue. According to Linda Bowker, head of the local NOW chapter, "[t]he feelings ranged the gamut." Iver Peterson, *Baby M Trial Splits Ranks of Feminists*, N.Y. TIMES, Feb. 24, 1987, at B1.

> We do believe that women ought to control their own bodies, and we don't want to play big brother or big sister and tell them what to do [the president of the chapter said.] But on the other hand, we don't want to see the day when women are turned into breeding machines.

Id.

27. SUSAN SHERWIN, NO LONGER PATIENT: FEMINIST ETHICS AND HEALTH CARE 126 (1992) ("Feminists have a long history of supporting the protection of personal reproductive control."). Sherwin argues that while the ability to avoid unwanted pregnancy is personally and politically vital, involuntary childlessness can be just as compelling. *See also* Andrews, *supra* note 7, at 167-68 ("A cornerstone [of feminist policy on reproduction] has been the idea that women have a right to reproductive choice—to be able to contracept, abort, or get pregnant.").

28. Andrea Dworkin, for example, argues that all reproductive technologies "make the womb extractable from the woman as a whole person in the same way the vagina (or sex) is now." ANDREA DWORKIN, RIGHT WING WOMEN 187-88 (1983).

29. GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS 314 (1985) ("[Men] are beyond . . . giving . . .

tect women. Although feminist criticism is not monolithic, the rationales fall into two related, general categories: the symbolic harm to society and the potential harm to individual surrogates.[30]

A. The Harm to Society

Critics argue that surrogacy is equivalent to baby-selling, contributes to an undesirable "commodification" of reproduction,[31] and thereby "demeans us all as a society."[32] These commentators argue that compensation for the surrogate makes the practice especially objectionable.[33] The *Baby M* court, for instance, noted that the "payment of money" made surrogacy "illegal, perhaps criminal, and potentially degrading to women."[34] By this criticism, only unpaid surrogacy is a "plausible resolution to the surrogacy controversy,"[35] because it would not only greatly restrict the number of women willing

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birth with their electronic fetal monitors, their forceps, their knives. Now they have laboratories.")

30. Andrews, *supra* note 7, at 169-76. Andrews actually analyzes three categories of risk, the third of which is the potential risk to the child. *Id.* at 176-78. The *Baby M* court, for example, noted that the child might suffer from the knowledge that she was born as the result of a commercial transaction. *In re* Baby M, 537 A.2d at 1250. This argument, however, is deeply flawed. First, it relies on "tradition, stereotype, and societal tolerance or intolerance as a driving force for determining what is in a child's best interest"—criteria against which feminists have long fought. Andrews, *supra* note 7, at 176. Second, it is arguable that children resulting from surrogacy might well have an advantage over many children because they are clearly wanted by their parents. Even if being a surrogacy child is not an advantage, it is hard to see how it would be a liability.

> [P]arents in a surrogacy arrangement want children for reasons probably no less humane or understandable than those of parents who reproduce by conventional means. Conventional parents, like surrogate parents, have children for many reasons, some for love, some for money, and some because they have a certain image of the offspring they would like to have. There is no ideal reason for choosing a mate and having a baby.

Gostin, *supra* note 6, at 11.

It would seem that the biggest potential risk to a child of surrogacy is that he or she may not be wanted if born with a "defect" of some kind. Although such a risk is not unique to children of surrogacy, it is plausibly greater for these children because the potential parents have a less clear stake in the child than is the case for traditional birth parents. *See infra* notes 294-301 and accompanying text.

31. *See* FIELD, *supra* note 8, at 25-32 (discussing the commercial ramifications of the surrogacy arrangement).

32. Andrews, *supra* note 7, at 169.

33. FIELD, *supra* note 8, at 23. The term compensation in this context means an extra fee in addition to reimbursement for medical expenses related to the pregnancy. The surrogate is almost always reimbursed for medical expenses, even in "altruistic" surrogacy agreements. *See infra* notes 270-279 and accompanying text.

34. *In re* Baby M, 537 A.2d at 1234.

35. FIELD, *supra* note 8, at 33.

to be surrogates[36] but also reduce the commercial exploitation of surrogacy.[37] Critics also argue that while surrogacy enhances the prospective mother's autonomy by providing her with an additional reproductive choice, it undermines the collective autonomy of women.[38] In this sense, surrogacy fosters a societal perception of women as "breeders" and suggests the evolution of an entire class of "breeder women."[39]

This concern is especially compelling in the context of gestational surrogacy. In theory, gestational surrogacy could be used to allow women capable of bearing children to assign the labor of doing so to someone else,[40] and thereby further increase the potential for economic exploitation.[41] Gestational surrogacy implicates the poten-

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36. Whether or not prohibiting fees beyond compensation for medical expenses and related expenses would effectively end surrogacy is a matter of some dispute. *See infra* note 47 and accompanying text.

37. FIELD, *supra* note 8, at 23.

38. *See* COREA, *supra* note 29, at 272-73.

39. *See, e.g., id.* at 272-82. These critics often cite the fictional Republic of Gilead in Margaret Atwood's *The Handmaid's Tale* as an example of the kind of society that could result if surrogacy and other reproductive technologies continue in use. Lori Andrews points out, however, that the policies a society devises and implements to regulate new technologies are as important as the technologies themselves. Andrews, *supra* note 7, at 167. She points out that in *The Handmaid's Tale,* "it was actually policy changes—the criminalization of abortion and the banning of women from the paid labor force—that created the preconditions for a dehumanizing and harmful version of surrogacy." *Id.*

40. *See, e.g.,* COREA, *supra* note 29, at 272-73. Some critics have argued that to allow surrogacy to continue is to proceed down a slippery slope that may pander to women who find pregnancy inconvenient because of their careers, travel plans, and even for women who simply wish to avoid stretch marks. *Id.*

41. *See* Doe v. Attorney Gen., 87 N.W.2d 484, 487 (Mich. Ct. App. 1992) ("The potential for . . . exploitation [in surrogacy] is much broader than being just gender-based, it is economic-based as well."). Corea's argument asserts that rich or upper middle class women would gladly assign the task of bearing their children to someone else if they could, and that this "someone" would undoubtedly be of a lower socioeconomic background. COREA, *supra* note 29, at 228-31. Statistics on this point are not definitive, but they do not suggest as wide a social or economic disparity between surrogates and intended mothers as one might expect. *See* R. Alta Charo, *Legislative Approaches to Surrogate Motherhood, in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 88, 89 (Larry Gostin ed., 1990). Ms. Charo states:

> Agencies reported that approximately 64 percent of their clients have a household income over $50,000, with an additional 25 percent earning $30,000 to $50,000 per year. Overall, the services reported that at least 37 percent of their clients are college-educated, while another 54 percent have attended graduate school. Agencies report that the women waiting to be hired as surrogate mothers are generally non-Hispanic, Protestant whites . . . . Fewer than 35 percent of those waiting to be hired . . . had ever attended college, and only 4 percent had attended any graduate school. Thirty percent earn from $30,000 to $50,000 per year, but two thirds (66%) earn less than $30,000.

Id.

tial for racial exploitation because gestational surrogacy can allow a white couple to create their own, genetically related white offspring, and pay an African-American or other minority woman, as was the case in *Johnson v. Calvert*,[42] to bear it for them.[43]

B. The Harm to Individual Surrogates

Not surprisingly, critics also argue that surrogacy arrangements are harmful to the individual surrogate.[44] They contend that it is impossible for a woman to grant the necessary informed consent in order to become a surrogate mother for two reasons. First, her consent is never informed because the hormonal changes that accompany pregnancy make it impossible for a surrogate to predict how she will feel when she relinquishes the child at birth.[45] This argument is based on the assumption that it is "unnatural" for a mother to give up her child under any circumstance.[46] Second, critics argue that consent to become a surrogate is never fully voluntary because surrogates only enter into these agreements out of economic necessity.[47] In *Baby M*, for example, the New Jersey Supreme Court implicitly adopted both of these arguments:

> Under the contract, the natural mother [in this case, the genetic surrogate,] is irrevocably committed before she ever knows the strength of her bond with her child. She never makes a totally voluntary, informed decision, for quite clearly

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42. 851 P.2d 776 (Cal. 1993) (holding that the couple who donated the egg and sperm, not the gestating woman who was Hispanic, had the legal right to the child).

43. The reverse may, of course, hold as well. Whether these possibilities justify disparate legal treatment is another question and one that this Comment is unable to resolve. *See infra* notes 288-293 and accompanying text.

44. Andrews, *supra* note 7, at 171-76.

45. *Id.* at 172-73.

46. *Id.*

47. FIELD, *supra* note 8, at 72 (arguing surrogacy contracts are not voluntary because society does not offer women enough economic alternatives). This argument assumes that women would not choose to become surrogates if they had other economic options or if no compensation were permitted, an assumption that is vigorously debated. *See* Annas, *supra* note 7, at 45 ("Even [surrogacy's] strongest supporters freely admit that if they could not pay women a large fee for giving up their children, they would be out of business."). Field's argument appears to contradict her earlier recognition that, "[t]here are . . . circumstances in which it is easy to believe a recital of no compensation: some surrogacy arrangements involve a sister or good friend. But even among strangers, many motives besides monetary compensation can contribute to the decision to become a surrogate mother." FIELD, *supra* note 8, at 19-22. Field cites reasons such as compensation for a previous experience with abortion or adoption, or simply that the woman enjoys pregnancy. *Id.* Her compensation argument also "implies nothing about whether surrogacy should be permitted *when society refuses to provide these other alternatives.*" Strasser, *supra* note 3, at 141.

> any decision prior to the baby's birth is uninformed in the most important sense, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a $10,000 payment is less than totally voluntary.[48]

Some argue that surrogacy's harm to women is not limited to the surrogate. They contend that the "choice" of the intended parents, and particularly of the intended mother, to pursue surrogacy as a reproductive option is not a truly free choice either.[49] Critics argue that the availability of surrogacy technology[50] coupled with the social devaluation of women who are not able to have children[51] make the "choice" to pursue all available means of reproduction an illusory one.[52] "To choose to be childless is still socially disapproved and to be childless in fact is to be stigmatized as selfish and uncaring. In such a situation, the offer of the hope of motherhood is a coercive offer."[53]

Similarly, some argue that to choose the surrogacy process is not an exercise in autonomy due to the paternalistic nature of the medical establishment.[54] Susan Sherwin notes:

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48. *In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988).

49. *See* COREA, *supra* note 29, at 27-30.

50. Paul Lauritzen, *What Price Parenthood?*, HASTINGS CENTER REP., Mar./Apr. 1990, at 38, 38-39 (noting critics' argument that the very existence of these technologies constitutes a coercive offer). Lauritzen observes that social concepts of masculinity also influence the choice of surrogacy.

> In a culture that defines virility so completely in phallocentric terms, infertility can also threaten male identity, for infertility is often confused with impotence . . . . It is hard to know which is worse: to endure a toast on Father's Day made with great fanfare by someone who knows full well your efforts to become a father or to suffer yet another comment about "shooting blanks."

Id.

51. COREA, *supra* note 29, at 15.

> A woman who failed to produce a child could be reproached, ridiculed, and, during the Middle Ages, even burned as a witch. Husbands in polygamous marriages might replace her with a new wife and relegate her to the level of a servant. In many Islamic lands, they could cast her out. She could be divorced, leaving her isolated, socially stigmatized, often poverty-stricken. Patriarchal societies made it easy for men to dispose of barren women. For example, under Jewish law, a husband has the right to sue for divorce if his wife is barren. But a woman may not sue for divorce on grounds that her husband is sterile. "In centuries past," wrote infertility counselor Barbara Eck Menning, "the woman who was childless was as useless and despised as a piece of land that would yield no crops. The same word was given to both—barren."

Id.

52. Lauritzen notes that infertility specialists "simply assume that patients will pursue all available treatments. . . ." Lauritzen, *supra* note 50, at 41.

53. *Id.* at 40. Lauritzen describes the surrogacy problem as a "tyranny of technology." *Id.* at 39.

54. *See* COREA, *supra* note 29, at 303.

> Most arguments in support of IVF are based on appeals to the rights of the individual to choose such technology. Feminists urge us to look carefully at these autonomy based arguments, however, because as IVF is usually practiced, it does not altogether satisfy the motivation of fostering personal freedom. Like many other forms of reproductive technology, IVF is controlled by medical specialists and not by the women who seek it.[55]

These critics argue that the paternalism inherent in any doctor-patient relationship is likely to be more pronounced and abusive when the patient is a woman.[56] In this context, surrogacy is the latest chapter in the long history of experimentation, exploitation, and control over women's bodies by a patriarchal medical establishment.[57] This history includes DES, the Pill, estrogen replacement therapy, tranquilizers, and unnecessary hysterectomies, cesarean sections, and radical mastectomies.[58] Critics of surrogacy contend that the patriarchal establishment recharacterized infertility as a "disease" in order to serve its own interests and to disguise its experimentation on women's bodies as a "cure."[59]

III. JUDICIAL APPROACHES TO SURROGACY CONTRACTS

In states that lack legislation clearly directed toward the regulation of surrogacy, courts have taken a variety of approaches to surrogacy contracts. Generally, the courts have relied on statutes that cover adoption and custody determinations or upon the common law of contracts to resolve surrogacy disputes.[60] Surrogacy legislation is needed because none of these approaches is appropriate. Each approach fails to address the unique complexities of surrogacy. The inappropriateness of existing models is underlined by a judicial history that has reached inconsistent and conflicting results.[61] Regulatory legislation is needed to provide a measure of uniformity and predictability for the parties to surrogacy agreements. The legislature,

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55. SHERWIN, *supra* note 27, at 126. *See* COREA, *supra* note 29, at 303 (suggesting the choice to participate in an IVF program is conditioned by a society that condemns childless women).

56. *See* COREA, *supra* note 29, at 3.

57. *Id.* at 304-14.

58. SHERWIN, *supra* note 27, at 151-53. Sherwin chronicles "a long, historical pattern of medical attempts to extend authority over an increasing number of spheres of women's lives." *Id.* at 150.

59. COREA, *supra* note 29, at 303-14.

60. *See, e.g.*, Surrogate Parenting Assocs. v. Commonwealth, 704 S.W.2d 209 (Ky. 1986) (applying adoption rule that prohibits enforcement of pre-birth consent to surrogacy).

61. *See infra* notes 209-228 and accompanying text.

moreover, is the proper forum to resolve the complex issues of public policy involved in surrogacy.[62]

A. Judicial Analysis of Adoption Statutes

Many courts have applied adoption statutes to surrogacy arrangements.[63] The New Jersey Supreme Court held in *Baby M*,[64] which involved genetic surrogacy, that the contract violated a state law that prohibits payment in connection with an adoption, also known as "baby-selling."[65] The court stated that because "the money is being paid to obtain an adoption and not . . . for the personal services of [the surrogate]: . . . [i]t strains credulity to claim that these arrangements . . . really amount to something other than a private placement adoption for money."[66] The court further held a contractual provision that the surrogate's consent was irrevocable violated the New Jersey statute[67] that states that a person's consent to adoption is irrevocable only after the birth of the child, only if in writing, and only in conjunction with an approved adoption agency.[68] The court therefore refused to permit Mrs. Stern, the intended mother, to adopt the baby.[69] Custody was granted to the biological father, Mr. Stern,[70] and the surrogate, Mrs. Whitehead, was granted visitation rights.[71]

A similar approach to genetic surrogacy was taken in *In re Adoption of Paul*.[72] A New York court found that the forty-nine page surrogate parenting agreement signed by the parties violated the state's adoption statutes[73] prohibiting compensation in connection with an

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62. Our doctrine of separation of powers directs this approach. *See infra* note 96 and accompanying text.

63. *See generally Surrogate Parenting Assocs.*, 704 S.W.2d at 209 (applying adoption standard to surrogacy); *but see* Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) ("Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes."). The *Johnson* court held that consent was voluntary because the surrogate consented before conception and that the payment was for gestational services rather than to surrender "parental" rights to the child. *Id.*

64. 537 A.2d 1227 (N.J. 1988). *See supra* note 2 for a description of the case.

65. *Id.* at 1240.

66. *Id.* at 1241-42. *But see Surrogate Parenting Assocs.*, 704 S.W.2d at 211-12 (holding surrogacy does not constitute baby-selling because consent is given prior to conception).

67. N.J. STAT. ANN. 9:3-54 (West 1993).

68. *Baby M*, 537 A.2d at 1244-45.

69. *Id.* at 1251-53.

70. *Id.* at 1258-59.

71. *Id.* at 1263.

72. 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990) (holding the surrogacy agreement violated a statutory prohibition against compensation for adoption).

73. *Id.* at 817.

adoption.[74] The court voided the transaction.[75] The court, nevertheless, agreed to grant the adoption if the surrogate submitted an affidavit swearing that she "[would] not request, accept or receive the $10,000 promised to her in exchange for surrender of her child."[76] The prospective parents also had to submit affidavits swearing not to pay the surrogate.[77]

On the other hand, in *Surrogate Parenting Associates v. Commonwealth,*[78] the Supreme Court of Kentucky expressly held that surrogacy does not constitute baby-selling within the meaning of an adoption statute quite similar to New York's because the child was not conceived when the contract was made.[79] The Kentucky court accepted the view that consent given prior to conception is sufficiently different, or less susceptible to coercion, than consent given afterwards, and therefore, surrogacy does not constitute "baby-selling."[80] In *Surrogate Parenting Associates,* the state's attorney general had sought to revoke the charter of the defendant corporation on the grounds that its activities violated Kentucky's adoption statute.[81] The court rejected that claim, holding that surrogacy contracts are voidable, but not illegal or presumptively void.[82] The conflicting holdings in Kentucky and New York illustrate how even when courts rely on the same statutory paradigm, they often reach different and even directly opposite results.[83]

B. Judicial Analysis of Custody Statutes

Other courts have characterized disputes pursuant to surrogacy contracts as standard custody battles and, consequently, apply a "best interests of the child" standard.[84] In *In re Adoption of Matthew B.,*[85] a genetic surrogacy case, the surrogate was artificially inseminated, gave birth, and then signed a consent agreement.[86] Eight months later,

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74. N.Y. SOC. SERV. LAW § 374(b) (prohibiting "any compensation of a thing of value, directly or indirectly, in connection with the placing out an adoption of a child . . .").

75. 550 N.Y.S.2d at 817-18.

76. *Id.* at 818-19.

77. *Id.* at 819.

78. 704 S.W.2d 209 (Ky. 1986).

79. *Id.* at 211.

80. *Id.* at 211-20.

81. *Id.* at 210. *See* KY. REV. STAT. ANN. § 199.590(2) (prohibiting the sale, purchase or procurement of any child for the purposes of adoption).

82. *Id.* at 213-14.

83. *See infra* notes 209-228 and accompanying text.

84. *See, e.g.,* Adoption of T., 44 Cal. App. 3d Supp. 699, 704 (1965) (stating the purpose of the "best interests" standard is to maximize a child's opportunity to develop into a stable and well-adjusted adult).

85. 284 Cal. Rptr. 18 (Cal. App. 1st Dist. 1991), *cert. denied,* 112 S. Ct. 1685 (1992).

86. *Id.* at 21.

after the contract had been fully performed, the surrogate sought to withdraw her consent to the agreement and argued that the illegality of the contract was sufficient basis for her withdrawal.[87] The court refused to rule on the legality of the contract and instead considered the case strictly as an adoption proceeding.[88] The court then applied a "best interests of the child"[89] standard, denied the surrogate's petition, and allowed the adoption by the intended mother to proceed.[90]

C. *Judicial Analysis of Contract Law*

Finally, some courts apply a contract law paradigm in order to enforce the parties' bargain.[91] In *Johnson v. Calvert*,[92] which involved a gestational surrogacy arrangement, the Supreme Court of California held that the surrogate had no rights with respect to the child she bore because the intended mother, who donated the egg, was the nat-

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87. *Id.* at 24.

88. *Id.* at 22. "[W]e do not attempt to resolve the debate over the desirability or validity of surrogate contracts . . . . We rely instead on those considerations mandated by statute, the best interests of the child." *Id.*

89. *Id.* The "best interests" standard is "an elusive guideline that belies rigid definition." *Adoption of T.*, 44 Cal. App. 3d Supp. 699, 704 (1975). The determination typically includes a consideration of several factors: the child's age; the extent of the child's bonding with the adoptive parents; and their ability to provide adequate care and guidance to the child. *Id. See also* George P. Smith, II, *The Case of Baby M: Love's Labor Lost, in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 233, 235 (Larry Gostin ed., 1990) (arguing that the best interests standard "defies a uniform standard of application" and listing factors to be considered).

90. *In re* Adoption of Matthew B., 284 Cal. Rptr. at 30-32. The court's finding that the child had lived with the adoptive mother continuously since she was four days old was the decisive factor in allowing the adoption to proceed. Compare *In re* Baby Girl L.J., 505 N.Y.S.2d 813 (1986), in which a New York court found the parties' surrogate parenting agreement voidable, but not necessarily void depending on whether the state's adoption laws were violated. *Id.* at 817. Despite "strong reservations about these arrangements both on moral and ethical grounds," the court approved the fee paid to the surrogate and permitted the adoption as being in the best interests of the child. *Id.* at 815-17. The court found nothing in existing law to prohibit surrogate parenting contracts, but called upon the legislature to give direction on the matter. *Id.* at 818.

91. *But see* Strasser, *supra* note 3, at 135.

> Perhaps one of the few areas of consensus [in the surrogacy debate] is that surrogacy contracts should be viewed in light of one of two legal paradigms—contract law or family law. Use of the former would lead to surrogacy contracts being upheld while use of the latter would lead to the contracts being held void or voidable. Unfortunately, this consensus has retarded rather than advanced the debate. It is neither clear that contract law would make such agreements enforceable nor clear that family law would make such contracts void or voidable.

Id.

92. 851 P.2d 776 (Cal. 1993).

ural mother, and the intended father, who donated the sperm, was the natural father.[93] The court held,

> But for [the intended parents'] acted-on intention, the child would not exist . . . . Although the gestative function [the surrogate] performed was necessary to bring about the child's birth, it is safe to say that [she] would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child's mother. No reason appears why [the surrogate's] later change of heart should vitiate the determination that Crispina is the child's natural mother.[94]

The court reasoned that the intentions of the parties, as expressed in their contract, should dictate which parties have legal parent status.[95]

D. Why None of the Former Approaches is Appropriate

It should be noted that the courts in several of the above mentioned cases openly pleaded for legislative action to address the issue of surrogacy.[96] Although courts have dealt with this issue out of necessity, it is clear that they are not satisfied to adapt present legal frameworks to the unique considerations surrogacy raises. It is persuasively argued that to stretch current statutory schema over surrogacy arrangements

> ignore[s] and trivialize[s] distinctions between conventional pre-technology procreation and the transactions and relationships in the surrogacy arrangement. To say that the factual issues are 'the same' as if [the parties to a surrogacy contract] had simply had a child out of wedlock ignores the centrally important fact that modern reproductive techniques allow the separation of personal and sexual intimacy from procreation. It ignores that these reproductive tech-

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93. *Id.* at 782.

94. *Id.* at 786. Shultz, *supra* note 11, at 323 ("[I]ntentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.").

95. *Johnson*, 851 P.2d at 786.

96. *See, e.g., Johnson*, 851 P.2d at 784 ("We are all too aware that the proper forum for resolution of this issue is the Legislature, where empirical data, largely lacking from this record, can be studied and rules of general applicability developed."); *In re* M.S.M. and G.M. Adoption No. 11171, slip. op. at 19 (Cir. Ct. Montgomery County, Md., 1993) ("[I]t is clear to the Court that the prerogative to prohibit or permit these arrangements belongs not to it, but to the General Assembly."); Surrogate Parenting Assocs. v. Kentucky, 704 S.W.2d 209, 213 (Ky. 1986) ("If there are social and ethical problems in the solutions social science offers, these are problems of public policy that belong in the legislative domain, not in the judicial . . . .").

> niques have different meanings and occur in different factual contexts than those contemplated by baby-selling statutes. It ignores that the father here differs in important ways from stereotypical unwed fathers.[97]

"Baby-selling statutes," for example, were intended to prevent economic pressures from causing parents to sell already-born or expected children that they would otherwise keep.[98] This potential for duress is arguably not present in a surrogacy arrangement, since the surrogate has specifically decided to become pregnant with the intention of parting with the child. Contrary to the *Baby M* holding, consent that is given before pregnancy makes the surrogate's consent more, rather than less, voluntary and informed.[99]

Custody law is based on traditional assumptions that are not valid in the context of surrogacy. For example, much custody law rests upon the assumption that unwed fathers are "uninterested" in their children.[100] This is clearly not appropriate in the context of surrogacy, where both intended parents have gone to great lengths to become parents and are clearly "interested" in the child.

The contract law paradigm is also problematic. For example, many commentators suggest that contracts are simply inappropriate in the family context, and that surrogacy contracts are necessarily contracts for the sale of a child.[101] Although surrogacy contracts can be designed so that they are truly contracts for the service of the surrogate, surrogacy services are simply not the same as "fixing a car or typing a manuscript."[102] Surrogacy (and indeed, pregnancy) involves significant danger to life and health, is extremely time-intensive (twenty-four hours a day for nine months plus recovery time), and requires "a much greater investment of the self than do other services

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97. Shultz, *supra* note 11, at 376.

98. "The concern is that a species of duress infects the decision to part with the child." *Id.* at 376 n.253.

99. *See, e.g., Surrogate Parenting Assocs.*, 704 S.W.2d at 211-12.

100. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 399 (1979) (Stewart, J., dissenting) ("Our law has given the unwed mother custody of her illegitimate children precisely because it is she who bears the child and because the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested.").

101. *But see* Strasser, *supra* note 3, at 139 ("[T]he claim that contracts are foreign to the family context are false. For example, marriage is a type of contract."). *See also* A.M. Capron & M.J. Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood, in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 59, 63-64 (Larry Gostin ed., 1990) (suggesting contractual nature of surrogacy arrangements will commercialize child bearing).

102. Strasser, *supra* note 3, at 140.

(both physiologically and emotionally)."[103] Even if the contract model were entirely acceptable, it would not make surrogacy contracts necessarily enforceable. More than a hundred years of legal precedent holds that the remedy of specific performance is not available for personal service contracts.[104]

The existing statutory schema, therefore, are not entirely appropriate to the unique relationships and intentions of the parties to a surrogacy agreement.[105] This is not to say, however, that surrogacy legislation should not draw on existing legal principles. Although there are significant and relevant differences between surrogacy and contract law, adoption law, and custody law,[106] this Comment proposes a solution that draws upon the most useful attributes of these approaches in order to protect the interests of all parties.[107]

Adapting some principles of adoption law to surrogacy, such as a "grace period" during which the surrogate may change her mind and revoke her consent to the agreement, would be a valuable strategy because it is both protective and respectful of the surrogate.[108] The requirement of an extensive evaluation of the intended parents, as required by adoption law, is also appropriate because it would protect the interests of the child. A consideration of the "best interests of the child," the critical standard in custody disputes, could be effected by appointing a guardian *ad litem* for the child. The implementation of safeguards such as full disclosure of risks and surrogacy success rates to ensure informed consent—precautions that are crucial to the validity of a contract—are also desirable in order to avoid disputes and serve the interests of all the parties.

Even if an existing scheme were completely applicable to surrogacy, legislation would still be needed to provide uniformity and predictability to surrogacy agreements. The current lack of clear standards creates a situation in which "logic will not select for a judge which approach to follow; instead the judge will be heavily influenced

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103. *Id.*

104. Lumley v. Wagner, 43 Eng. Rep. 687 (Ch. 1852); *see also* Strasser, *supra* note 3.

105. Randall P. Bezanson, *A Comment on* the Matter of Baby M *and the Limits of Judicial Authority, in* SURROGATE MOTHERHOOD, POLITICS AND PRIVACY 243 (Larry Gostin ed., 1990).

106. *But see id.* ("Existing statutory provisions and common law doctrines are relevant to the surrogacy question only as they are grounded on assumptions about parentage, family, and the reproductive process. But these assumptions are *simply irrelevant* to the dilemmas posed by surrogacy arrangements . . . .") (emphasis added).

107. *See* Strasser, *supra* note 3, at 138-40 (stating that existing statutory models, although helpful and at least partially applicable, are not decisive). Strasser argues that application of the contract model does not necessarily lead to the conclusion that surrogacy contracts are enforceable. *Id.*

108. *See* ACOG PAMPHLET, *supra* note 19, at 3.

by her or his own views concerning whether the state ought to prohibit these contracts or whether instead the contracts serve a socially legitimate purpose."[109]

IV. WHAT STATE LEGISLATURES HAVE DONE

A. *States Prohibiting Surrogacy*

Eighteen states have addressed the legality of surrogate parenting contracts.[110] Through legislation, many of these states have eliminated surrogacy as a reproductive option.[111] Arizona,[112] Indiana,[113] Washington,[114] Louisiana,[115] Nebraska,[116] New York,[117] and Utah[118] have made any type of surrogacy contract void and unenforceable. Other states, including Kentucky[119] and North Dakota,[120] have decided that commercial surrogacy contracts are void and unenforceable as against public policy.[121] Michigan has gone so far as to criminalize surrogacy.[122]

B. *Nevada and Arkansas*

Nevada and Arkansas both permit surrogacy and regulate it, but only in limited ways. Nevada's statute, which is the more restrictive, requires contracts to specify the respective rights of each party, including the parentage of the child, custody in the event of a change in circumstances, and the respective responsibilities and liabilities of the

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109. FIELD, *supra* note 8, at 19.

110. NATIONAL CONFERENCE OF STATE LEGISLATURES, STATES WITH SURROGACY LAWS (1993) [hereinafter NCSL].

111. Larry Gostin has argued that it is unconstitutional for the state to prohibit or criminalize surrogacy arrangements. Gostin, *supra* note 6, at 4. Surrogacy is also "dead" in Oklahoma and Oregon, which have attorney general opinions that state it is illegal, and in New Jersey, after the *Baby M* opinion. *See* NCSL, *supra* note 110.

112. ARIZ. REV. STAT. ANN. § 25-218 (1991).

113. IND. CODE ANN. § 31-8-2-1 (Burns Supp. 1994).

114. WASH. REV. CODE ANN. § 26.26.240 (West Supp. 1994).

115. LA. REV. STAT. ANN. § 9.2713 (West 1991).

116. NEB. REV. STAT. § 25:21,200 (1989).

117. N.Y. DOM. REL. LAW §§ 121-124 (McKinney Supp. 1994).

118. UTAH CODE ANN. § 76-7-204(1)(c) (Supp. 1994).

119. KY. REV. STAT. ANN. § 199.590 (3) (Baldwin Supp. 1993).

120. N.D. CENT. CODE § 14-18-05 (1991).

121. Larry Gostin argues that, "banning payment for gestational services would deprive the woman of the right to be paid for valued labor." Gostin, *supra* note 6, at 9. *See also* Lieber, *supra* note 15, at 232 ("To prohibit a surrogate from selling her reproductive capacities but allowing [sic] her to give them away devalues and exploits women.").

122. The Michigan statute mandates that a "participating party . . . who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than $10,000 or imprisonment for not more than one year." MICH. COMP. LAWS ANN. § 722.859(2) (West 1993).

contracting parties.[123] Nevada outlaws the payment of anything other than "medical and necessary living expenses related to the birth of the child as specified in the contract."[124] The statute aims to require that the parties plan for contingencies and essentially make their own law with regard to the surrogacy arrangement, but offers little or no guidance on the substance of the planning, except to ban compensation.

Arkansas regulates surrogacy a bit more extensively and addresses some aspects of it under its adoption laws.[125] For example, payment of fees conditioned upon relinquishment of parental rights is illegal, but otherwise compensation is permitted.[126] Another Arkansas statute establishes certain presumptions of parenthood when artificial insemination is used.[127] A child born to a woman by means of artificial insemination is presumed to be the child of that woman and her husband, except in the case of a surrogate mother, in which case the child shall be that of:

> (1) the biological father and the woman intended to be the mother if the biological father is married; or
> (2) the biological father only if unmarried; or
> (3) the woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.[128]

Arkansas's statute adopts the presumption that the intended parents are the legal parents of a child born of a surrogate mother, but offers no regulation of the process nor of the content of the contract.

C. Florida

Florida requires the parties to have a contract before conception pursuant to a gestational surrogacy arrangement.[129] "Commissioning couples" need be only eighteen years old, but must be legally married, and the intended mother must be either physically unable to gestate a pregnancy to term or have her health or the health of the fetus at risk if she becomes pregnant.[130] The surrogate must also be eighteen,[131] and is not required to have had a previous birth.

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123. NEV. REV. STAT. ANN. § 126.045 (Michie 1993).
124. *Id.* § 126.045(3).
125. ARK. CODE ANN. § 9-9-206 (Michie 1991).
126. *Id.*
127. *Id.* § 9-10-201.
128. *Id.* § 9-10-201(b) and (c).
129. FLA. STAT. ANN. § 742.15(1) (West 1993).
130. *Id.* § 742.15(1) and (2)(a).
131. *Id.* § 742.15(1). All other states that address the issue require the surrogate to be at least twenty-one.

Gestational surrogacy contracts in Florida must contain provisions to the effect that a gestational surrogate is "the sole source of consent with respect to clinical intervention and management of the pregnancy."[132] The surrogate must also agree to "submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health."[133] Florida permits slightly more compensation than Nevada, allowing the surrogate to be compensated for her "reasonable living, legal, medical, psychological, and psychiatric expenses . . . that are directly related to prenatal, intrapartal, and postpartal periods."[134] "The gestational surrogate must agree to relinquish any parental rights upon the child's birth and to proceed with the [prescribed] judicial proceedings."[135] Conversely, the intended parents are required to accept custody of, and assume full parental rights and responsibilities for, the child immediately upon the child's birth "regardless of any impairment of the child."[136] Florida's law establishes that when at least one of the intended parents is the genetic parent of the child, the intended parents are presumed to be the parents.[137]

D. New Hampshire and Virginia

New Hampshire and Virginia both have laws which make surrogacy contracts legal but unenforceable, that is, they are revocable at the option of either party.[138] These states have established the most extensive schemes to govern the terms and enforcement of surrogacy contracts as well as their oversight by the courts.[139]

1. New Hampshire.—In New Hampshire, only those surrogacy contracts which are "pre-approved" by the courts will be recognized by law.[140] The parties to a surrogacy contract must petition the court for

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132. *Id.* § 742.15(3)(a).

133. *Id.* § 742.15(3)(b). This provision creates the potential for conflict between the surrogate's autonomy in medical decision-making, and her duty to receive prenatal care. In conjunction with independent medical representation, however, the provision is a good compromise which will serve to protect the interests of the intended parents and the child without undue infringement on the rights of the surrogate.

134. *Id.* § 742.15(4).

135. *Id.* § 742.15(3)(c).

136. *Id.* § 742.15(3)(d).

137. *Id.* § 742.16(7). Compare to Arkansas's law, which establishes an intent-based presumption of parenthood even when neither of the intended parents has a genetic connection to the child. *See supra* notes 126-129 and accompanying text.

138. *See infra* notes 152-153 & 158-162.

139. Lieber, *supra* note 15, at 217-18.

140. N.H. REV. STAT. ANN. § 168-B:23 (1994).

authorization of their contract prior to conception.[141] In order to obtain such authorization, the court requires that all parties have undergone medical and psychological evaluations and that they have given informed consent with full awareness of all the potential physical, psychological, financial, and legal obligations under the contract.[142] The psychological evaluations must consider the person's suitability for parenthood and include a home study of both the surrogate and the intended parents.[143] The intended parents need not be married.[144] The intended parents are responsible for all of the surrogate's pregnancy-related expenses, including lost wages, health and life insurance, reasonable attorney's fees and court costs, and counseling costs.[145] Indeed, the surrogate may be compensated only for these expenses.[146] The intended parents may also be liable for child support if they breach the agreement.[147] For a contract to be recognized in New Hampshire, the intended mother must be physiologically unable to bear a child.[148]

Like most regulating states, New Hampshire requires that the surrogate be at least twenty-one years old, and have had at least one successful pregnancy.[149] Contracts must specify that the surrogate is solely responsible for all health care decisions regarding the child and herself prior to birth and for a "grace period" thereafter, including the decision to abort.[150] If the surrogate becomes disabled, health care decisions should then be made by the intended parents unless the contract provides otherwise.[151]

New Hampshire provides that the surrogate may terminate the contract and exercise her right to keep the child any time prior to seventy-two hours after the birth of the child.[152] If there are "extenuating circumstances," that period can be extended to one week.[153] It

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141. *Id.* § 168-B:21. Compare to Florida's statute, which only requires the parties have a contract before conception. *See supra* note 130 and accompanying text.

142. *Id.* § 168-B:18 and B:19.

143. *Id.*

144. *Id.*

145. *Id.* § 168-B:25.

146. *Id.*

147. *Id.* § 168-B:8.

148. *Id.* § 168-B:17.

149. *Id.*

150. *Id.* § 168-B:27.

151. *Id.* § 168-B:6.

152. *Id.* § 168-B:25.

153. *Id.*

is a misdemeanor offense in New Hampshire to solicit or promote surrogacy for compensation.[154]

2. *Virginia.*—The Virginia legislature has established a scheme by which surrogacy contracts are legally recognized whether or not they are pre-authorized, although it treats the two types differently.[155] If a contract is pre-authorized, the intended parents are deemed the legal parents of the resulting child.[156] If not pre-authorized, the gestational mother and her husband are presumed to be the child's legal parents.[157]

In order to obtain pre-authorization, the surrogate, her husband, and the intended parents must sign the surrogacy contract and then petition the court for approval.[158] The contract approval process, if elected, is similar to New Hampshire's mandatory one. Both of the intended parents, as well as the surrogate and her husband, must meet the standard of fitness required of adoptive parents, which is based on a home study.[159] All parties must also undergo physical and psychological examinations and receive counseling about the possible effects of the surrogacy arrangement.[160] If the court finds that the consent of all the parties was informed and voluntary, it will approve the contract.[161] The court must then appoint a guardian *ad litem* to represent the interests of the child and, if necessary, counsel to represent the interests of the surrogate.[162] If, however, the contract is not pre-approved by a court, Virginia's statute treats genetic and gestational surrogacy differently.[163] If the parties have a genetic surrogacy arrangement, then the woman giving birth to the child is presumed to be the mother.[164] If the intended mother is the genetic parent, then she is presumed to be the mother.[165] If either of the intended parents

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154. *Id.* § 168-B:16(IV).

155. VA. CODE ANN. § 20-158 (Michie Supp. 1994).

156. *Id.* § 20-158(D).

157. *Id.* § 20-158(A).

158. At least one of the parties must reside in Virginia for the court to have jurisdiction. *Id.* § 20-157.

159. *Id.* § 20-160(A).

160. *Id.* § 20-160(B).

161. *Id.* § 20-160(A).

162. *Id.*

163. As previously discussed, the resolution of whether different legal rights should be accorded to gestational versus genetic surrogates is not clear. Virginia's solution to this question, however, seems problematic and unfair to the gestational surrogate. *See infra* notes 286-292 and accompanying text.

164. VA. CODE ANN. § 20-158(E)(1).

165. *Id.*

is a genetic parent, then the intended father is the child's father.[166] If neither of the intended parents is a genetic contributor to the child, then the surrogate and her husband are the parents.[167] The intended parents may then obtain parental rights only through an adoption proceeding.[168]

Virginia permits compensation to the surrogate only for "reasonable medical and ancillary costs," whether or not the contract is pre-approved.[169] This allowance includes compensation for "the costs of the performance of the assisted conception," health care costs during and immediately following the pregnancy, "reasonable costs for medications and maternity clothes, and any additional and reasonable costs for housing and other living expenses attributable to the pregnancy."[170]

E. The ABA Model Surrogacy Act

The ABA's Section on Family Law has proposed a model surrogacy act, which sets out extensive regulation of surrogacy contracts.[171] Like New Hampshire and Virginia, it requires counseling, physical and mental evaluations of the surrogate and the intended parents, as well as testing and evaluation of all parties to a surrogacy contract.[172]

The Model Act also specifies the terms of surrogacy contracts. For example, a surrogacy agreement must be in writing, state that the intended parents are responsible for all medical expenses and life insurance for the surrogate with minimum benefits of $100,000, and state the compensation, if any, to the providers of genetic materials and to the surrogate.[173] The Model Act does, however, place some restrictions on compensation. Section 3(b) of the Model Act provides that the minimum and maximum fees permitted to be paid to a surrogate will be determined by an administrative surrogacy fee agency, consisting of three persons.[174] The Model Act requires the agency to re-evaluate the range of compensation every two years, and provides

166. *Id.* § 20-158(E)(2).

167. *Id.* § 20-158(E)(3).

168. *Id.*

169. *Id.* § 20-156.

170. *Id.*

171. MODEL SURROGACY ACT (Proposed official draft 1988). An exhaustive discussion of the Model Act's provisions is beyond the scope of this Comment.

172. MODEL SURROGACY ACT § 4.

173. *Id.* § 5.

174. *Id.* § 3(b). The members of the panel are to be appointed every two years. One member is appointed by the Governor and the other two by the legislature. *Id.*

that the maximum fee cannot exceed one hundred fifty percent of the minimum fee.[175]

As in most of the statutes already discussed, the Model Act requires surrogacy contracts to state that the intended parent or parents "shall take custody of and parental responsibility for [the child] . . . regardless of any mental condition or defect."[176] The Model Act also delineates the rights and responsibilities of the parties in the event of a breach.[177] The Act grants the intended parents a cause of action against the surrogate if she terminates the pregnancy voluntarily, and not because of medical necessity.[178] If termination is medically necessary, the surrogate is entitled to be paid a share of the total compensation in proportion to the actual period of gestation, medical expenses [if the agreement so provides], and reasonable attorney's fees and costs to the surrogate for the enforcement of her rights.[179] Especially notable is the Act's provision for a specific performance remedy. Either of the parties has the right to "have the court order and enforce the delivery of the child to the intended parent or parents."[180]

F. The Uniform Status of Children of Assisted Conception Act

The Uniform Status of Children of Assisted Conception Act (USCACA) establishes the traditional presumption that a woman who gives birth to a child is that child's mother, and her husband is the child's father unless he did not consent to the assisted conception.[181] The Act creates two alternatives from which legislatures may choose.[182] Alternative A provides that the above presumption of parentage is overridden if the parties have entered into an agreement which has been approved by a court prior to conception.[183] Alternative B provides that if the parties do not have a pre-approved contract, the presumption stands.[184]

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175. *Id.*

176. *Id.* § 5(g). The Act also requires the contract to specify that the surrogate is the sole source of consent with respect to the clinical management of the pregnancy, including termination of the pregnancy. *Id.* § 5(k).

177. *Id.* § 6.

178. *Id.* § 6(a).

179. *Id.* § 6(b).

180. *Id.* § 6(c).

181. UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §§ 2, 8, 98 U.L.A. (Supp. 1994).

182. Alternative A comprises §§ 5-9 of the Act. Alternative B would simply make surrogacy contracts void. *Id.* § 8(a).

183. *Id.*

184. *Id.*

The USCACA approval process is similar to that of the New Hampshire and Virginia statutes. It requires the court to appoint a guardian *ad litem* to represent the interests of the child, to hold a formal hearing, and to ensure the satisfaction of ten criteria intended to protect the interests of the parties.[185]

Alternative A does not prohibit compensation to a surrogate or a placement agency. It requires the intended parents to be a married couple.[186] Alternative A also permits the surrogate to "change her mind" within 180 days after the last insemination.[187]

G. Surrogacy in Maryland

The current state of the law on surrogacy in Maryland is best described as unclear. The state legislature has made numerous attempts to prohibit surrogacy that have either not passed or have been vetoed by the Governor.[188] Two Maryland courts have taken sharply conflicting positions on surrogacy.[189] "Family law experts worry . . . that if a collision—which may come in this year's General Assembly session—fails to definitively pronounce a policy or produce a regulatory framework for surrogate parenting, Maryland risks becoming the battleground for the next 'Baby M' legal battle."[190]

1. Legislative and Executive Activity.—In the wake of the *Baby M* decision in 1988, Maryland legislators considered several potential surrogacy laws. Many of the proposals would have prohibited surrogacy altogether.[191] During the 1988 session, the General Assembly

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185. *Id.* § 6. These criteria include a finding as to whether the intended mother is unable to bear a child, the completion of home-studies of the intended parents and the surrogate, a determination that the surrogate has had at least one pregnancy and delivery and is medically fit for the pregnancy, and that all the parties have received counseling and medical evaluations including genetic screening. *Id.*

186. *Id.* § 1.

187. *Id.* § 7(b).

188. *See infra* notes 191-204 and accompanying text.

189. *See infra* notes 208-225 and accompanying text.

190. Michael Riccardi, *Family Law Experts Ponder Effects of Surrogacy Decision*, THE DAILY REC. (Md.), Nov. 13, 1993, at 1.

191. The first Maryland Bill, Senate Bill 795, was introduced only two days after the *Baby M* decision was handed down. Carol L. Nicolette & Libby C. Reamer, Comment, *Regulatory Options for Surrogate Arrangements in Maryland*, 18 U. BALT. L. REV. 110, 136-37 (1988). That bill would have banned surrogacy absolutely and imposed maximum criminal sanctions of either a $10,000 fine, one year imprisonment, or both. S.B. 795, 1988 Md. Leg. Sess. The bill was adopted by the Senate, but was subsequently defeated in the House Judiciary Committee. Nicolette & Reamer, *supra*, at 136. Later that month, a similar bill that would have invalidated commercial surrogacy agreements and subjected violators to criminal sanctions was proposed in the House of Delegates. H.B. 1479, 1988 Md. Leg. Sess. The bill did not include sisters and sisters-in-law (i.e. intra-family, altruistic surrogacy) in the prohibition, so

considered House Bill 649.[192] House Bill 649 would have established minimum protections for the parties involved in surrogacy agreements and would have required that certain terms be included in an enforceable contract.[193] This attempt to regulate surrogacy was defeated in the House Judiciary Committee.[194]

In 1992, the Maryland General Assembly passed a ban on surrogacy contracts.[195] Senate Bill 251 stated simply that "[a] surrogate parentage contract is void and unenforceable as against state policy."[196] Governor Schaefer, however, vetoed the Bill.[197] In his veto statement, the Governor explained that the Maryland Attorney General's Office advised that a state court would probably hold a surrogate parentage contract unenforceable based on Maryland's criminal prohibition on child-selling.[198] Governor Schaefer also based his veto on the political reality that public opinion in Maryland was deeply divided on surrogacy[199] and on his own view that "the creation of a family is a personal decision I think best left to the individuals involved."[200] Governor Schaefer recognized that "the vast majority of surrogacy arrangements work without the necessity of litigation."[201]

Despite the failed attempt at Senate Bill 251, Senator Norman Stone, Jr. introduced an identical bill in 1993.[202] This bill was even

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long as these parties received only reasonable compensation for medical, prenatal, and birth expenses. *Id.* This bill was defeated by a vote of 16-5 in the House Judiciary Committee. Nicolette & Reamer, *supra*, at 136 & n.182.

192. Nicolette & Reamer, *supra* note 191, at 137.

193. H.B. 649, 1988 Md. Leg. Sess. The bill included proposed amendments to the Family Law, Estates and Trusts, and Health-General articles of the Maryland Annotated Code. Nicolette & Reamer, *supra* note 191, at 137 & n.190. The proposal seemed to address only genetic surrogacy but would have required that the surrogate be 18 years old (although she need not be married) and that she undergo medical examinations and psychological counseling. *Id.* The bill required disclosure of the results of the medical examination but made disclosure of the psychological evaluation optional upon request. *Id.* Payment of compensation into an escrow account for the surrogate would be permitted if made prior to the first attempt at insemination, but would have allowed the intended father to recover any fees paid or expenses incurred if the surrogate voluntarily terminated the pregnancy. *Id.*

194. Nicolette & Reamer, *supra* note 191, at 137 and nn.187-190.

195. S.B. 251, 1992 Md. Leg. Sess.

196. *Id.*

197. Letter from W. Donald Schaefer, Governor of Md., to Thomas V. "Mike" Miller, Jr., President of the Maryland State Senate (May 26, 1992) (outlining his rationale for vetoing Senate Bill 251).

198. *Id.* (citing MD. CODE ANN., FAM. LAW § 5-327 (1991)).

199. *Id.*

200. *Id.* at 2.

201. *Id.* *See infra* note 234 and accompanying text.

202. Barry F. Rosen & Lynn S. Lawson, *Surrogacy Contracts in Transition*, MD. BAR J., July/Aug. 1993, at 32, 35 (citing S.B. 369, 1993 Md. Laws).

less successful, passing the Senate but not the House.[203] It also received an unfavorable report from the House Judiciary Committee.[204]

2. *Judicial Activity.*—As of this writing, Maryland courts have addressed the legality of surrogacy twice.[205] Both cases involved uncontested adoption proceedings pursuant to genetic surrogacy arrangements upon which each court granted a petition for adoption.[206] But, although both courts relied on the same Maryland law which prohibits surrogate compensation in connection with an adoption, they reached directly conflicting results on the legality of surrogacy. This brief judicial history, coupled with prior legislative failure, illustrates the urgent need for comprehensive surrogacy legislation in Maryland.[207]

In *Ex Parte in the Matter of the Petition for the Adoption of a Minor Child,*[208] Howard County Master Bernard Raum wrote that "surrogate contracts which involve the custody of a child and for which payments are made in connection therewith are governed by [the baby-selling statute] and are therefore against public policy."[209] The court concluded that the contact was one of baby-selling and cited a provision in the contract which provided that the surrogate would receive full compensation [of $10,000] if the child was born premature and died after seventy-two hours, but only partial fees if the child failed to survive for seventy-two hours after being born.[210] The court further stated that "any attorney who advise[d] their [sic] clients to contract in this fashion would seem to be at the least accessories before the fact and thus liable not only for prosecution as a principal but also for Bar sanctions."[211] Although the court admitted that the legislature was the proper forum for addressing the propriety of surrogacy agreements, and that "it is apparent that the public policy questions surrounding surrogate agreements is [sic] in a state of turmoil," it held unequivocally that surrogacy contracts are void as against public policy.[212]

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203. *Id.*
204. *Id.*
205. *See infra* notes 208-223 and accompanying text.
206. *See infra* notes 208-223 and accompanying text.
207. *See supra* notes 191-204 and accompanying text.
208. Circuit Court for Howard County, Md., No. 91 AD 1681 (June 19, 1992).
209. *Id.* at 6.
210. *Id.*
211. *Id.*
212. *Id.* at 11.

More recently, in a Montgomery County Circuit case,[213] Judge Peter J. Messitte took the opportunity to address the validity of surrogacy agreements.[214] Pursuant to a 1992 statute,[215] Judge Messitte reviewed the propriety of all adoption-related expenses prior to the entry of a final adoption decree.[216] The judge opined that surrogacy contracts do not violate existing Maryland statutes prohibiting the payment of compensation in connection with a placement for adoption[217] and child-selling[218] because it would be virtually impossible to prove that the parties to a surrogacy contract had the criminal intent required by these statutes.[219]

The court noted Governor Schaefer's letter vetoing Senate Bill 251[220] and stated that "public opinion [in Maryland] was too divided to permit the Court to declare such contracts violative of public policy as a matter of law."[221] The court cited the Governor to support the proposition that surrogacy is "a legitimate activity, at least so long as all parties are satisfied."[222] Judge Messitte called for legislative action, and stated that "it is clear to the Court that the prerogative to prohibit or permit these arrangements belongs not to it, but to the General Assembly."[223] Although the *M.S.M. and G.M. Adoption* decision does not have precedential value,[224] it is "nonetheless likely to carry significant weight whenever the matter is revisited,"[225] in view of Messitte's recognized authority on family law[226] and his recent appointment to the federal bench.[227]

In light of Maryland's experience with surrogacy, it seems likely that the General Assembly will take decisive action in the near fu-

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213. *Ex Parte* M.S.M. and G.M. for Adoption of an Infant Minor, Adoption No. 11171, Circuit Court for Montgomery County, Md. (Aug. 20, 1993) [hereinafter *M.S.M. and G.M. Adoption Case*].

214. Judge Messitte, like Master Raum, expressed his thoughts on the matter, despite the fact that the adoption was uncontested. *Id.* at 1.

215. MD. CODE ANN., FAM. LAW § 5-327 (1992 Supp.).

216. *M.S.M. and G.M. Adoption Case*, slip op. at 1.

217. MD. CODE ANN., FAM. LAW § 5-327 (1992 Supp.) (providing that apart from legal and medical fees, no additional compensation may be given to the natural mother in an adoption proceeding).

218. MD. ANN. CODE art. 27, § 35(c) (1992) (proscribing the sale, trade, barter, or offer to sell, trade, or barter a child for money or property).

219. *M.S.M. and G.M. Adoption Case*, slip op. at 8-9.

220. *See supra* note 197 and accompanying text.

221. *M.S.M. and G.M. Adoption Case*, slip op. at 2.

222. *Id.* at 13.

223. *Id.* at 19.

224. Circuit court opinions, typically, are not subject to official publication.

225. *Surrogate Parenting Agreement Upheld*, 10 MD. FAM. L.M. 1, 9 (Oct. 1993).

226. *Id.*

227. Riccardi, *supra* note 190, at 24.

ture.[228] The enactment of comprehensive legislation that fully regulates surrogacy is a realistic and reasonably protective solution, as well as a logical extension of Maryland's already progressive requirement that insurance companies cover in vitro fertilization.[229] It is estimated that "several hundred births" pursuant to surrogacy agreements have occurred since surrogacy began in Maryland in the early 1980s.[230] Comprehensive legislation would provide much-needed practical guidance in the face of a legal vacuum in which at least two private surrogacy agencies currently operate.[231]

V. RESPONDING TO FEMINIST CRITICISM: PROPOSED LEGISLATION AND OTHER REFORM

Legislation is needed in order to resolve the inconsistencies and uncertainty created by this patchwork of judicial precedent and legislative activity. Although regulatory legislation arguably legitimizes the practice of surrogacy, it is necessary to protect more fully the interests of the parties and to inject greater predictability into the process. The solution proposed by this Comment would permit surrogacy contracts but leave them unenforceable. The proposal seeks to avoid the creation of a false sense of security which might encourage people to enter unwisely into these agreements and at the same time respond to the reality that surrogacy will be practiced.

There is no doubt that some surrogacy arrangements have resulted in painful disputes.[232] Viable, comprehensive legislation would substantially reduce this possibility, although it is inevitable that new technology and the imponderables of human nature will continue to present the occasional conundrum for the courts.[233] Even in the face of these emotionally charged controversies, we should strive to have a

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228. *Id.* ("'It is only a matter of time until one of these cases is going to blow up and a judge will have to make a difficult decision . . . . This is the wrong way to make law. This ought to be a legislative policy decision.'" (quoting Natalie H. Rees of Rees & Boyd, who submitted an *amicus curiae* brief on behalf of the surrogate in the *M.S.M. and G.M. Adoption Case*)).

229. MD. ANN. CODE art. 48A, § 354DD (1991). *See generally* Riccardi, *supra* note 190, at 24, 27 (discussing surrogacy procedures that must be taken into account by future legislation). The mandated insurance coverage should begin to ameliorate the financial problems that limit surrogacy to the upper and upper-middle classes.

230. Riccardi, *supra* note 190, at 27.

231. Nicolette & Reamer, *supra* note 191, at 125 n.97. These two centers are Infertility Associates International, in Chevy Chase, and Surrogate Motherhood, Inc., in Germantown. *Id.* Both centers are for-profit organizations and use privately-developed screening and testing procedures. *Id.*

232. *See supra* note 2.

233. *See* Riccardi, *supra* note 190, at 24.

proactive surrogacy policy which is grounded in reason and realism, not one which is simply reacting to images of babies being plucked from their mothers' arms. The vast majority of surrogacy situations never deteriorate into court battles,[234] and such a reactionary response against surrogacy generally ignores its potential benefits. "[T]he hurt and human sadness evident in the *Baby M* case should not be used as a benchmark to judge all surrogacy arrangements."[235]

A. Legislative Reform

1. Access to Surrogacy.—Surrogacy should not be available to those who are able but unwilling to have children. It should be accessible only to the infertile.[236] This limitation would, in part, address the concerns of those who fear the development of an underclass of breeder women.[237] In an affirmative sense, "[i]t is important that surrogacy be considered as one of many options for infertile couples rather than a way for women to avoid the rigors of pregnancy by shifting the burden onto another."[238]

Surrogacy should be available to all who are unable to have their own children. It should not be limited to heterosexual married couples, for example, as many statutes currently provide.[239] Not only does this requirement discriminate against homosexuals, but it diverges from a reality in which the traditional nuclear family is now the exception rather than the rule. A lesbian couple, for example, for whom artificial insemination has been unsuccessful, should be eligible for a surrogacy program. Allowing homosexuals and single persons access to surrogacy would check the concern that surrogacy may be used as a patriarchal instrument to assert domination over female reproduction.[240]

In order to make surrogacy a more accessible option, some surrogacy services should be covered by insurance. Maryland already mandates some coverage for IVF services.[241] The establishment of a

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234. "[W]hile 75% of biological mothers who give a child up for adoption later change their minds, only around 1% of the surrogates have similar changes of heart." Similarly, "[i]n the majority of cases the parties see the [surrogacy] arrangement as in their own best interests." Gostin, *supra* note 6, at 7.

235. *Id.* at 7.

236. *See* Lieber, *supra* note 15, at 226.

237. *See supra* note 39 and accompanying text.

238. Lieber, *supra* note 15, at 14.

239. *See, e.g.*, N.H. REV. STAT. ANN. § 168-B:21 (1994) (mandating proof of marriage on the part of intended parents).

240. *See, e.g.*, COREA, *supra* note 29, at 273-74.

241. MD. ANN. CODE art. 48A, § 354DD (1991).

feasible surrogacy option for women of modest economic means would ameliorate surrogacy's potential to exploit lower classes and minority women.[242] Many states currently have such legislation pending or already on the books.[243]

2. Informed Consent.—Voluntary and informed surrogate consent is possible. A comprehensive statute should facilitate informed consent by using several methods, including counseling; full disclosure of all physical, emotional, and financial risks; evaluation of the likelihood of success of a given surrogacy method, including statistics of its past success; independent legal and medical representation for the parties; and judicial oversight of surrogacy contracts.[244]

a. No Previous Birth Requirement.—Many legislators and commentators argue that the surrogate should be required to have had a previous live birth in order to ensure a sound basis to give truly informed consent.[245] Yet, a previous birth requirement

> is at odds with the legal doctrine of informed consent. Nowhere is it expected that one must have the experience first before one can give informed judgment about whether to agree to the experience. Such a requirement would preclude people from ever giving informed consent to sterilizations, abortions, sex change operations, heart surgery, and so forth.[246]

To require surrogates to have had a previous birth is a difficult argument at best because it suggests a return to the sort of paternalism feminists have been striving to eradicate.

> [I]f people may be justifiably prohibited from acting in ways that they may later regret, society would be justified in prohibiting a variety of currently acceptable practices. For example, both abortion and adoption procedures are vulnerable to attack on these grounds. It is not at all clear that the state can justify outlawing surrogacy, given the other practices it permits. . . . The claim that surrogacy contracts cannot be considered voluntary because society itself refuses to give women other options is reason to force society to give

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242. *See* Lieber, *supra* note 15, at 211-16; *see also* COREA, *supra* note 29, at 274-75.

243. *See* NCSL, *supra* note 110.

244. *See* Lieber, *supra* note 15, at 227-28 (if women fully understand the risks involved in surrogacy, and have explored the reasons for entering into a contract, the risks of psychological harm will be minimized).

245. *See supra* notes 45-46 and accompanying text.

246. Andrews, *supra* note 7, at 172.

> women other options rather than reason to prohibit surrogacy.[247]

Rather than requiring a previous birth, consent should be assured through counseling, independent representation, and full disclosure of all relevant information to the parties.

b. Disclosure.—Legislation should regulate and monitor the way surrogacy clinics report their "success" rates. The irregularity of reporting methods invites deception by clinics and can mislead surrogates and intended parents alike.[248] "Clinics often measure success rates not by the number of live births but by the number of successful implantations that [may have] never result[ed] in births or even by the number of chemical pregnancies (elevation of hormone level that may but often does not result in an ongoing pregnancy)."[249] Some clinics count egg retrievals as measures of success rather than live births.[250] Half of the clinics in a 1985 study by journalists Gena Corea and Susan Ince had never had a single live birth.[251] "Even some of the IVF experts admit[ ] that, 'it's easy to fudge results. People can say they have a 50 percent success rate and there's no way to check that.'"[252]

Most clinics do not disclose the number of women who drop out of the program, the number of infants that die within a month of birth, or the percentage of pregnancies that end in miscarriages.[253] In 1988, one of the country's largest fertility operations, IVF America, was sanctioned by the Federal Trade Commission for claiming a twenty-five percent success rate when in fact their true success rate was closer to fifteen percent.[254] Because of this widespread statistical manipulation, federal legislation is expected to take effect in the fall of 1995 which would require clinics to report their pregnancy success rates according to uniform definitions, and would require either the federal government or state governments to inspect and certify clinics.[255] Regardless of whether the federal regulation is implemented,

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247. Strasser, *supra* note 3, at 142.

248. *See* Elizabeth Royte, *The Stork Market,* LEAR'S, Dec. 1993, at 52.

249. RAYMOND, *supra* note 3, at 10-11.

250. Royte, *supra* note 248, at 54.

251. RAYMOND, *supra* note 3, at 9-10.

252. *Id.* at 10 (quoting Alan De Cherney of Yale University).

253. Royte, *supra* note 248, at 54.

254. *Id.*

255. *Id.* at 88 (discussing 42 U.S.C. § 263a-1 (1994)). The legislation, however, does not guarantee the safety or quality of medical care. *Id.*

legislation at the state level should contain provisions to monitor clinics and prohibit deceptive practices.

c. Counseling and Evaluation.—Legislation should mandate medical evaluations, genetic testing, psychological evaluations, and counseling of the prospective parties as part of its informed consent protections.[256] In the past, psychological counseling and screening of prospective parties has been generally lacking or inadequate. In the *Baby M* case, Mrs. Whitehead was examined and psychologically evaluated, but the evaluation "was not put to any use."[257] Although the evaluation indicated that "Mrs. Whitehead demonstrated certain traits that might make surrender of the child difficult and that there should be further inquiry into this issue in connection with her surrogacy, . . . neither Mrs. Whitehead nor the Sterns were ever told of this fact, a fact that might have ended their surrogacy arrangement."[258] In a like manner, medical evaluations vary dramatically in scope and quality.[259] Legislation should impose clear guidelines that specify the criteria for evaluation and remove some diagnostic discretion from the health care provider.[260]

The evaluations of both the intended parent(s) and the surrogate should include a home study as required in adoptions.[261] Home studies will protect the interests of the intended parents (and the fetus) by the advance detection of potential problems with the surrogate such as alcohol or drug abuse. Such a study is surely preferable to and more effective than coercive contract clauses which presume to regulate the surrogate's behavior.[262] An evaluation of the surrogate's abil-

256. Professor Karen Rothenberg has pointed out that "we do not know what the acceptable psychological profile is for a low risk couple and surrogate." Karen H. Rothenberg, *Gestational Surrogacy and the Health Care Provider: Put Part of the "IVF Genie" Back Into the Bottle*, 18 LAW, MED. & HEALTH CARE 345, 348 (1990). Although there is no definitive answer to this question, providers should at the least screen the surrogate for some fairly high standard of mental well-being, complete comprehension of the contract, and ability to care for the child should she change her mind, not simply for the ability to detach herself psychologically from a fetus.

257. *In re* Baby M, 537 A.2d 1227, 1247 (1988).

258. *Id.* at 1247-48.

259. *See, e.g.*, Mounce v. Hanson, No. 89-045388 (Harris City, Tex. 1990) (surrogate died of heart failure during the eighth month of her pregnancy, her history of heart trouble was never revealed during the screening process); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (surrogate failed to disclose two miscarriages and two stillbirths).

260. *See* Rothenberg, *supra* note 256 (discussing the ethical and legal problems of the gestational surrogacy process).

261. FIELD, *supra* note 8, at 63.

262. Rothenberg, *supra* note 256, at 350; *see* Gostin, *supra* note 6, at 13-16 (noting that various investigatory methods used in home study could pose threats to individual privacy and autonomy).

ity to provide and care for the child is necessary to cover the possibility that she may become the custodial parent of the child in the event she exercises her right to keep the child.

Home studies should examine "the ability and disposition of the person being evaluated to give a child love, affection, and guidance, . . . the ability of the person to adjust to and assume the inherent risks of the contract, [and the] ability and disposition of the person to provide the child with food, clothing, shelter, medical care, and other basic necessities."[263] This does not mean health care providers or counselors should seek out surrogates who are passionless or detached. Rather, home studies should ensure that the parties will make good parents and that they fully understand the risks involved. Adoption style evaluations are often criticized as an unwarranted imposition of "middle-class values."[264] If the above criteria is as objective as reasonably possible, the benefits of extensive evaluations should outweigh the doubtful risks of judging a party by conventional social values.

d. Independent Representation.—Surrogacy legislation should require independent medical and legal representation for all parties. Such independent representation was absent in many of the surrogacy arrangements that later degenerated into litigation.[265] This requirement will diminish the potential for oppression of the surrogate and facilitate truly informed consent by all parties.[266]

e. Surrogacy Contracts Must Be Pre-Approved.—Effective legislation should follow New Hampshire's model and recognize only pre-approved surrogacy contracts.[267] Pre-approval adds another safeguard to ensure that the parties have given informed consent to the surrogacy arrangement.[268] Pre-approval is also desirable because it permits reasonable compensation to the surrogate. Judges must be

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263. N.H. REV. STAT. ANN. § 168-B:18 (1994).

264. FIELD, *supra* note 8, at 63.

265. In *Baby M*, for example, "[t]he only legal advice [the surrogate] received regarding the surrogacy contract was provided in connection with the contract that she previously entered into with another couple. [Her] lawyer was referred to her by the [surrogacy center], with which [the lawyer] had an agreement to act as counsel for surrogacy candidates." *In re* Baby M, 537 A.2d 1227, 1248 (N.J. 1988).

266. *See* Joan Mahoney, *An Essay on Surrogacy and Feminist Thought*, *in* SURROGATE MOTHERHOOD, POLITICS AND PRIVACY 189 (Larry Gostin ed., 1990).

267. N.H. REV. STAT. ANN. § 168-B:23 (1994).

268. Virginia claims that "by recognizing both [pre-approved and non pre-approved] contracts and making certain that they conform to a certain standard, [its] statute affords persons entering into surrogacy arrangements more protection than the New Hampshire statute does." Lieber, *supra* note 15, at 224. However, the Virginia statute actually affords

able to disapprove coercive surrogacy arrangements that resemble baby-selling.[269]

3. Payment to the Surrogate.—The prohibition of commercial surrogacy, or payment to surrogates, would not minimize surrogacy's perceived harm to society. First, to deny women payment for their labor is a regression to the days when women were excluded from the labor force. It is an unfair denial of the valuable service that a surrogate provides as well as the risks she faced when she bears a child. "A human being has the right to contract with another to be paid for the performance of services, even highly personal services."[270] To deny surrogates compensation promotes the retrograde stereotype that women are selfless altruists and exacerbates the fiction that women are indecisive, emotional creatures controlled and defined by their biology.

Many judges, legislators, and commentators assert that if a woman is motivated by love, surrogacy is perfectly acceptable, but if she is motivated by money, it is not.[271] Aside from the difficulty in discerning individual motivations, it is dangerous for women to allow value judgments about their motivations to determine the scope of their rights. "Altruism has been one of the most effective blocks to women's self-awareness and demand for self-determination. . . [t]he social relations organized around norms of altruism and the giving of self have been among the most powerful forces that bind women to patriarchal roles and expectations."[272] By limiting women to altruistic surrogacy, society would play into the very stereotypes that have performed an historical disservice to women.

Altruistic surrogacy, moreover, may be more dangerous. If the situation deteriorates into conflict, it would become even more difficult and emotionally stressful where the surrogate and the intended

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less protection to gestational surrogates who enter into non pre-approved contracts. *See supra* notes 163-167 and accompanying text.

269. Nicolette & Reamer, *supra* note 191, at 141.

270. Gostin, *supra* note 6, at 9. Gostin argues that "[a] woman's decision to sell her intimate services may well constitute an indignity for all women and may well mean that she is allowing herself to be exploited. Nonetheless, that choice is not for the state or the body politic but for the woman alone to make." *Id.* at 10.

271. *See* FIELD, *supra* note 8, at 78; *see also* KY. REV. STAT. ANN. § 199.590(3) (Michie/Bobbs-Merrill 1991) (providing that contracts entered into for compensation are void as against public policy); *In re* Baby M, 537 A.2d 1227, 1264 (N.J. 1980) (declining to find surrogacy contract void when surrogate voluntarily relinquishes the child, without payment, and is permitted the opportunity to change her mind and assert her parental rights).

272. RAYMOND, *supra* note 3, at 51.

mother, for example, are sisters or related in some other way. One Maryland attorney pointedly discourages such intra-family arrangements.[273] She stated that although "[m]ost medical programs . . . prefer a family member [to act as a surrogate], . . . I think it is a mistake because the child and surrogate remain within the same extended family. [A non-related surrogacy] prevents disruptions in the extended family."[274] In a like manner, "the potential for women's exploitation is not necessarily less when no money is involved and reproductive arrangements take place among family members."[275] Coercion within the context of the family may be even more onerous than coercion by contract or money. "[W]here family integration is strong, however, the nature of family opinion may be so engulfing that, for all practical purposes, it exacts a reproductive donation from a female source."[276]

If it is unacceptable to deny women compensation for surrogacy services, the question becomes, "how much compensation?" On one hand, not to regulate compensation is inappropriate because it will likely lead to increased commercialization of the process. But, to allow unlimited compensation would make surrogacy even more inaccessible to the non-wealthy than it already is and exacerbate concerns about surrogacy's exploitative potential.

Legislation should adopt a compensation scheme similar to the ABA Model Surrogacy Act. The ABA Model calls for a three-person panel to set lower and upper limits on the amount of compensation.[277] The Model Act specifies that "the maximum fee shall not be more than 150% of the minimum fee."[278] It also provides that the range shall be reevaluated every two years.[279]

4. Content of the Contract.—

a. Surrogacy Contracts are Legal But Unenforceable.—Surrogacy contracts should be legal but unenforceable, as they are in Virginia and New Hampshire.[280] In practice, this means that the contract is legal, but that the surrogate is permitted to change her mind after the birth, much as the birth mother can in a standard adoption proceeding. Although a surrogate's consent is more likely to be fully volun-

273. Riccardi, *supra* note 190, at 27.
274. *Id.* (quoting Natalie H. Rees of Rees & Boyd, Baltimore, Md.).
275. RAYMOND, *supra* note 3, at 53.
276. *Id.* at 54.
277. Model Surrogacy Act § 3 (proposed official draft 1988).
278. *Id.*
279. *Id.*
280. *See supra* notes 139-170 and accompanying text.

tary and informed than a birth mother's prenatal consent to an adoption,[281] a waiting period is necessary to protect the surrogate's interests and autonomy. A waiting period may also be compelled by civil liberties concerns.[282]

The length of the "grace period" for revocation of the contract should be of sufficient duration to allow the surrogate time for reflection, but not so long that it compromises the best interests of the infant. The 180 days allocated by Virginia statute is too long, especially because the first 180 days of a child's life is a crucial bonding period for both parent and child.[283] On the other hand, New Hampshire's 72 hour period is too brief.[284] The surrogate could be asleep or otherwise in recovery from labor and incapable of rational decision-making. It would be appropriate in this instance to borrow from adoption law and compromise at a fifteen day waiting period.[285]

b. All Clinical Decisions During Pregnancy are Made by the Surrogate.—Surrogacy legislation should disallow any clause in a surrogacy contract that requires the surrogate to undergo any medical tests or procedures during pregnancy, including abortion in specified circumstances. Indeed, it should require every surrogacy contract to contain a provision which specifies that the surrogate is the sole source of all clinical decisions regarding herself and the fetus. Basic notions of civil liberties compel this result. "The rights to choose one's lifestyle and medical treatment are among the most private aspects of human life. . . . Since [sic] the government cannot reach into this intensely private domain, it is difficult to envisage a private party having the power to do so based upon a contractual obligation."[286] Although this provision tends to expose the interests of the intended parents, restrictive behavior clauses are probably unconstitutional, and in any case almost impossible to enforce.[287]

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281. Shultz, *supra* note 11, at 383.

282. *See* Gostin, *supra* note 6, at 16 (arguing that fundamental rights to parenting should be inalienable).

283. VA. CODE ANN. § 20-161 (Michie Supp. 1994). An unapproved contract requires the surrogate to wait at least 25 days. *Id.* § 20-162(A)(3).

284. N.H. REV. STAT. ANN. § 168-B:25 (1994).

285. *See, e.g.*, MD. CODE ANN., FAM. LAW § 5-324 (1991). Maryland prohibits the entry of a final decree of adoption until at least 15 days after the birth of the child and grants the natural parents the right to revoke consent at any time before the final decree or within 90 days of filing their consent, whichever comes first. *Id.* § 5-311(c)(1).

286. Gostin, *supra* note 6, at 14.

287. *See id.* at 15.

c. Genetic versus Gestational Surrogacy.—It is arguable whether any surrogacy law should distinguish between genetic and gestational surrogacy agreements. The contributions that these surrogates make are different, the risks taken are different, and the societal implications may differ as well.[288] Without further public debate, however, exactly how they should be differentiated remains unclear. The question is whether a genetic surrogate "deserves" more, less, or simply different protection and rights than a gestational surrogate.

The American College of Obstetricians and Gynecologists takes the position that "the genetic link between the commissioning parent(s) and the resulting infant, while important, is less weighty than the link between the surrogate mother and the fetus or infant that is created through gestation and birth."[289] The California court in *Johnson v. Calvert*,[290] on the other hand, held that the gestational surrogate had no rights toward the child, which gave the genetic contributors, the intended parents in that case, full parental rights.[291] Although the *Johnson* court's approach did not sufficiently appreciate the gestational surrogate's contribution, the ACOG approach is not entirely acceptable either. More public debate is needed to shed light on this issue.

d. Presumption that Intended Parents Assume Custody and Parental Responsibility.—New legislation should establish a clear presumption that, regardless of any physical or mental defect of the child, the intended parents shall assume custody and full parental responsibility for the child. Although this provision burdens interests of the intended parents (the state cannot force any parent to care responsibly for a child), the establishment of this presumption is in the best interests of the child.[292] The alternative, as exemplified by a California statute that permits the intended parents to force the surrogate to assume custody and responsibility for the child if she was "responsible" for the defect, is very problematic.[293] Not only does the California statute overprotect the interests of the intended parents at the expense of the surrogate and, perhaps, the child, but it also creates

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288. *See supra* notes 24-25 and accompanying text.

289. ACOG PAMPHLET, *supra* note 19, at 2.

290. 851 P.2d 776 (Cal. 1993).

291. *Id.* at 782.

292. *See* Gostin, *supra* note 6, at 7 ("While the possibility of both parents disclaiming responsibility for an imperfect child is an understandable concern, no data, again, are available to support it. Many handicapped infants are abandoned, and it is not certain that surrogacy arrangements would have any significant impact on the rate of abandonment.").

293. S. 1160, 1993 CAL. STAT. § 9518(9).

great uncertainty and the opportunity for litigation. It is already difficult to determine the actual cause of many defects in a traditional pregnancy. Surely, it will become too easy and unfair to blame the surrogate for such problems.

B. Other Reform

Although legislation can be an effective means of addressing many of the feminist criticisms of surrogacy, it is only part of the answer. New perspectives on social action and medical responsibility need to be formulated.

First and foremost, medicine should make the prevention of infertility a public health priority.[294] That we invest far less money and effort in prevention than we do in the treatment of infertility is an example of the reactive, rather than the proactive, approach to policy that is endemic to American public health.[295] The prevention of diseases which cause infertility should be a priority.[296] Our work places need to become more "child-friendly" through the provision of on-site, quality day-care, so that women are not forced to delay childbearing.[297]

Second, attitudes that define women (and men) through their reproductive experience or lack thereof must be combatted.[298] Popular assumptions that women are less valuable if they cannot have children, or selfish if they choose not to have children, are still

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294. *See, e.g.*, Charo, *supra* note 41, at 107-08 (stating infertility may be reduced by more research, data collection and education on sexually transmitted diseases; coordinating career development and reproduction to allow couples to have children during peak fertility years; and improving adoption procedures); Nadine Taub, *Surrogacy: A Preferred Treatment for Infertility?*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 221 (Larry Gostin ed., 1990) (addressing causes of infertility and suggesting that society needs to change its thinking about fertility).

295. Other countries suffer from similarly short-sighted policies. For example, in 1985 the Australian government spent 25,000 Australian dollars on sexually transmitted disease research and prevention, while financing one million dollars of IVF expenditures. RAYMOND, *supra* note 3, at 7.

296. *Id.*

> The most commonly cited causes of female-factor infertility are blocked fallopian tubes or tubal disease, pelvic inflammatory disease (PID) caused by, among other things, past use of an IUD, past iatrogenic (doctor-induced) diseases such as adhesions or occlusion resulting from gynecological surgery, C-sections, and abortions, sexually transmitted diseases, ovulatory dysfunction, and endometriosis.

Id.

297. Charo, *supra* note 41, at 108 ("Congress could also help by facilitating the integration of employment, career development, and reproduction, so that couples might be better able to have children during their peak fertility years.").

298. "The infertility business booms in a cultural context in which producing a child is seen as a symbol of a marriage's success." Royte, *supra* note 248, at 54.

widespread in our society.[299] "As feminists have attacked the false essentialism that the male sexual urge is uncontrollable and therefore men need prostitutes to satisfy their sexual needs, so too feminists oppose the idea that reproduction is a biological imperative."[300]

Third, the manner in which surrogacy is carried out requires close attention. The medical profession's obsession with the technology of medicine that comes at the expense of focus on the individual patients needs to be changed.[301] Perhaps such a shift will be forced upon the medical profession by increasing public frustration with doctors and the perception of them as uncaring technocrats. Medical schools, for example, could put greater emphasis on the "art" of medicine, and do more to foster a "patient-centered" work ethic for doctors.[302]

That technology is perceived by many doctors as more important than the patient is heightened in the context of female reproduction, which the medical profession has historically over-medicalized to the detriment of many women.[303] This harmful over-medicalization has manifested itself in many ways, including the large number of unnecessary cesarean sections performed each year, the Dalkon Shield, and silicon breast implants.

Because over-medicalization is not a problem unique to surrogacy, the prohibition of surrogacy as an answer begs the question. Instead, we should search for ways to put women in control of the surrogacy process whenever possible. It is ironic that, while doctors and researchers continue to characterize reproductive difficulty as a technological problem—which therefore requires a professional elite to solve it—there is yet no official board certification for a fertility specialist.[304] "Any doctor may hang out such a shingle, and by all reports they are hanging them out at a fast clip. Between 1974 and 1988, membership in the American Fertility Society jumped from 3,600 to 10,300."[305]

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299. RAYMOND, *supra* note 3, at xviii.

300. *Id.*

301. SHERWIN, *supra* note 27, at 153.

302. *Id.*

303. *Id.* at 151. For example, "for many decades surgeons were inclined to subject all women with breast cancer to mutilating radical mastectomies even though there was no scientific evidence to establish that this treatment resulted in increased survival rates." *Id.* Doctors have recommended hysterectomies far more frequently than medical necessity demands. *Id.* at 152.

304. RAYMOND, *supra* note 3, at xvi; *see also* Royte, *supra* note 248.

305. RAYMOND, *supra* note 3, at xvi.

Fourth, the language of surrogacy should be re-examined and revised. As Paul Lauritzen points out, terms such as "harvesting" of eggs tend to depersonalize and objectify both the process and the participants.[306] "Women are not present in the medical language, which speaks only of 'maternal environments' and 'alternative reproductive vehicles.'"[307] A change in terminology, coupled with a change in the way medical processes are carried out, could have an empowering effect on the participants. This may improve the way surrogacy, parties to surrogacy agreements, and medical fertility professionals are perceived by the public.

CONCLUSION

Surrogacy is a technology that forces us to question our notions of family, parenthood, sex, personal freedom, and privacy. It raises complicated and difficult questions. The law should not shrink from the challenge to address surrogacy and its implications. Although surrogacy is an issue which ultimately may not be resolved to everyone's satisfaction, carefully drafted legislation can minimize the potentially exploitative aspects of surrogacy and protect an individual's ability to choose it as a reproductive option.

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306. Lauritzen, *supra* note 50, at 42.
307. RAYMOND, *supra* note 3, at xv.