DePaul Journal of Health Care Law

Volume 2
Issue 3 *Spring 1999*

Article 5

November 2015

Legal, Moral & International Perspectives on Surrogate Motherhood: The Call for a Uniform Regulatory Scheme in the United States

Lisa L. Behm

LEGAL, MORAL & INTERNATIONAL PERSPECTIVES ON SURROGATE MOTHERHOOD: THE CALL FOR A UNIFORM REGULATORY SCHEME IN THE UNITED STATES

Lisa L. Behm[*]

INTRODUCTION

An estimated two to three million couples in the United States suffer from infertility.[1] Until recently, infertile couples had only two options: adopt a child or remain childless.[2] However, with the advent of new reproductive technologies, infertile couples now have the advantage of selecting from a number of options, including artificial insemination, donor egg transplantation, and surrogacy. Of these new technologies, surrogacy is arguably the most controversial.[3] Nevertheless, within the past fifteen years, the practice of surrogacy has gained respect as an attractive reproductive alternative for infertile couples who wish to conceive a child biologically related to at least one of them.[4]

Surrogacy is defined as an "[a]greement wherein a woman agrees to be artificially inseminated with the semen of another woman's husband; she is to conceive a child, carry the child to term and after the birth, assign her parental rights to the birth father and his wife."[5] This definition, however, refers only to one of two forms of surrogacy arrangements,

---

[*]B.A., University of Wisconsin-Madison, 1994; J.D. (Cum Laude) Marquette University Law School, 1998; LL.M. (Cand.), Georgetown University Law Center, 1999.

[1]*See* HELENA RAGONE, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 13 (1994).

[2]*Id.*

[3]*Id.*

[4]*Id.*

[5]BLACK'S LAW DICTIONARY 1445 (6th ed. 1990).

namely, artificial insemination surrogacy (also known as traditional surrogacy).[6]

The other form of surrogacy arrangement is *in vitro* fertilization surrogacy (also known as gestational surrogacy).[7] In this procedure, an embryo is created in a petri dish with the egg of the intended mother and the sperm of the intended father.[8] The embryo is then transferred to the designated gestational surrogate, who carries it to term.[9] Unlike a child conceived by a traditional surrogacy arrangement, children born of gestational surrogacy arrangement are genetically related to both of their intended parents.[10]

While the prevalence of surrogacy has grown, the debate surrounding it has grown concurrently. Surrogacy has raised a number of legal, moral, and ethical issues and controversies that have yet to be resolved by courts and legislatures. The most commonly raised issues include the contractual aspects of surrogacy, the assignment of parental rights, and the commercial aspect of paying money to the surrogate for her "services."[11] This article examines a number of the issues and controversies surrounding surrogacy. The first part discusses the evolution of surrogacy from Biblical times to the present.[12]

The next section addresses the legal debate over surrogacy that has grown out of this evolution.[13] First, it discusses the constitutional basis for surrogacy and the constitutional issues that have arisen therein.[14] Then it reviews the surrogacy case law, focusing on the landmark cases of *In re Baby M*[15] and *Johnson v. Calvert*,[16] emphasizing the difficulty encountered by the judiciary in adjudicating surrogacy-related disputes in the absence of legislative guidance.[17]

---

[6] *OPTS Informational Newsletter* (Organization of Parents Through Surrogacy, Wheeling, Ill.) Jan.1996 (OPTS is a non-profit organization of parents whose children were born through assisted reproduction).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *See infra* pp. 570-573.

[13] *See infra* pp. 573-587.

[14] *See infra* pp. 573-576.

[15] 537 A.2d 1227 (N.J. 1988).

[16] 851 P.2d 776 (Cal. 1993).

[17] *See infra* pp. 576-587.

Various issues raised by surrogacy from a feminist perspective are then examined.[18] A discussion of feminist views on the issue of surrogacy is useful in conveying the impassioned arguments both for and against surrogacy and other new forms of reproduction.

The next section discusses the legislative response to surrogacy on both the state and federal levels in an attempt to emphasize the lack of legislative uniformity and guidance with respect to the issues surrounding surrogacy.[19] In the absence of comprehensive federal legislation regulating surrogacy in the United States, the Canadian legislative response to surrogacy is examined for insight.[20]

Finally, this article proposes that Congress pass uniform legislation to regulate surrogacy in the United States.[21] Such legislation is necessary in order to respect procreative liberty, protect parties to surrogacy arrangements from the possibility of exploitation, and to effectively guide the courts in adjudicating surrogacy-related disputes. This Part contends that the focus of such legislation should be on the regulation, not the prohibition, of surrogacy. It refutes the arguments for the prohibition of surrogacy, including the argument that surrogacy exploits and commodifies women and children. Surrogacy should be protected as a viable reproductive method by which an infertile couple may conceive a child who will ultimately benefit from their love and nurturing. Additionally, women who wish to become surrogates should have the right to do so under their freedom to contract.

In conclusion, a comprehensive regulatory scheme for legislating surrogacy is needed. This article argues that proposed regulations would effectively address the concerns raised by surrogacy while ensuring the right of infertile couples to procreate pursuant to a surrogacy arrangement.

---

[18]*See infra* pp. 587-591.
[19]*See infra* pp. 591-595.
[20]*See infra* pp. 595-603.
[21]*See infra* pp. 603-609.

THE EVOLUTION OF SURROGACY

The History of Surrogacy

Although most of the controversy surrounding surrogacy has arisen only recently, the concept of surrogacy can be traced back to Biblical times.[22] According to the Old Testament, Abraham's "barren" wife Sarah persuaded Abraham to have intercourse with her maid Hagar so "she may have a child by her."[23] Hagar then conceived and gave birth to Ishmael, whom Sarah and Abraham raised as their own son.[24] Obviously, in those days there were no "surrogacy contracts" nor any notion that the bearer of the child should be paid a fee for carrying the child.[25] Furthermore, it was never disputed that the bearer of the child would relinquish her parental rights upon the birth of the child.[26]

As society and reproductive technology advanced, the concept of surrogacy became more widely recognized. With the creation of procedures such as artificial insemination and *in vitro* fertilization, surrogacy became a viable alternative means of reproduction for infertile couples.[27] Before surrogacy became the center of the current legal debate, many informal surrogacy arrangements existed, in which a woman, usually a friend or relative of the infertile couple, would carry and deliver a child for an infertile couple for purely charitable reasons.[28] In these arrangements, surrogates were rarely screened, and a requirement that the parties sign a contract usually was not present.[29] Furthermore, in response to concerns about violating "baby selling" statutes, which were enacted to regulate black market adoptions, surrogates were almost never paid a fee.[30]

---

[22]*See* Christine L. Kerian, *Surrogacy: A Last Resort Alternative for Infertile Women or a Commodification of Women's Bodies and Children?*, 12 WIS. WOMEN'S L.J. 113, 116-17 (1997).

[23]*Genesis* 16:1-2.

[24]*Id.*

[25]*See* JULIA J. TATE, SURROGACY: WHAT PROGRESS SINCE HAGAR, BILHAH, AND ZILPAH! 1 (1994).

[26]*Id.* The fact that Hagar was Sarah's "maid" may further the notion that surrogacy is a form of slavery. For a discussion of surrogacy as a form of slavery, see Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. PUB. POL'Y 139 (1990).

[27]*See* Kerian, note 22, at 117.

[28]*See* SUSAN L. COOPER & ELLEN S. GLAZER, BEYOND INFERTILITY 261 (1994).

[29]*See id.*

[30]These statutes were enacted to prosecute "baby brokers," who financially induced young, unwed pregnant women to give up their children after birth and then sold the babies to adoptive parents for a profit. *See* John D. Ingram, *Surrogate Gestator: A New and Honorable Profession*, 76 MARQ. L. REV. 675, 681-82 (1993).

The Development of Modern Surrogacy Arrangements

The precedent for modern surrogacy arrangements was set in California in the mid-1970s.[31] At this time, a couple placed an anonymous advertisement in a local paper in order to find a woman to bear a child for them through artificial insemination.[32] When a woman answered the advertisement and agreed to become the surrogate, the couple's attorney drafted a contract in which the couple agreed to pay the surrogate $7,000 for her "services" and $3,000 in medical and legal expenses.[33] The pregnancy that resulted from this agreement produced a baby girl.[34]

When the couple's story appeared in the *Detroit Free Press*, another infertile couple approached Noel Keane, the "father of surrogate motherhood,"[35] in Michigan and requested he help them find a woman who would bear a child for them.[36] Although Keane was hesitant to enter into such an uncharted area of the law, he construed the aforementioned California arrangement as precedent and decided to help this couple and two others.[37]

In order to determine the parameters of the relevant law in Michigan, Keane wrote letters to the State Attorney General, a judge, and a physician.[38] Only the judge replied.[39] The judge opined that, under Michigan law, the impregnation of women through artificial insemination was wholly acceptable and that the payment of medical and legal fees was equally legitimate.[40] Nevertheless, the judge reasoned that the intended parents of the child could not legally pay a surrogate a fee to carry the child or to relinquish the child for adoption.[41] Under these circumstances, Keane encountered great difficulty in finding surrogates for the three couples because, according to state law, these surrogates would not be compensated for undergoing artificial insemination, carrying a baby for

---

[31] *See* NOEL P. KEANE & DENNIS L. BREO, THE SURROGATE MOTHER 33-35 (1981).
[32] *See id.* at 33.
[33] *See id.*
[34] *See id.*
[35] *See* LORI B. ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, & BRAVE NEW BABIES 16 (1989).
[36] *See* KEANE & BREO, *supra* note 31, at 27-30.
[37] *See* KEANE & BREO, *supra* note 31, at 46-48.
[38] *See* KEANE & BREO, *supra* note 31, at 46-48.
[39] *See* KEANE & BREO, *supra* note 31, at 46-48.
[40] *See* KEANE & BREO, *supra* note 31, at 46-48.
[41] *See* KEANE & BREO, *supra* note 31, at 46-48.

nine months, and releasing the child upon birth.[42] In 1978, after appealing to the public's sense of altruism by publicizing the plight of these couples,[43] Keane was finally successful in attracting surrogates for all of the couples, each of whom had babies through surrogacy arrangements.[44] Despite these success stories, Keane's primary objective was to arrange for the legal payment of fees to surrogate mothers.[45] To this end, he attempted to determine a method by which to circumvent the Michigan adoption statutes, which prohibited payment of money to a mother for relinquishing her rights to her child.[46] Thus, in representing an infertile couple in *Doe v. Kelley*,[47] Keane unsuccessfully challenged these laws.[48] In this case, the Michigan Court of Appeals held that, even though a couple might legally use a surrogate to conceive a child, any payment made to the surrogate in exchange for the release of her parental rights to the child was illegal under state law.[49]

Frustrated by Michigan's hard-line rejection of compensation for surrogates, Keane decided to work with a clinic in Kentucky, where the payment to a woman for the relinquishment of her parental rights to a child had not been prohibited.[50] As part of his work, Keane sent Michigan couples to Kentucky, where they established residency, completed adoption proceedings, and paid the surrogate mother $10,000 for her "services."[51] These procedures made Keane's practice of arranging surrogacy agreements highly successful,[52] and helped popularize surrogacy as a viable solution to infertility.[53]

In the 1980s, surrogacy became a prominent practice in California and many other states.[54] In addition to its newfound popularity, the technological aspect of surrogacy expanded with the success of the first

---

[42] *See* ANDREWS, *supra* note 35, at 17.

[43] *See* ANDREWS, *supra* note 35, at 28 (discussing how Keane took the couples on local talk shows).

[44] *See* KEANE & BREO, *supra* note 31, at 95, 115.

[45] *See* KEANE & BREO, *supra* note 31, at 116.

[46] *See* KEANE & BREO, *supra* note 31, at 116.

[47] Doe v. Kelley, 307 N.W.2d 438 (Mich. App. 1981).

[48] *Id.*

[49] *Id.*

[50] *See* ANDREWS, *supra* note 35, at 28-29.

[51] *See* KEANE & BREO, *supra* note 31, at 186, 210.

[52] *See* Kerian, *supra* note 22, at 119.

[53] *See* Kerian, *supra* note 22, at 119.

[54] *See* Kerian, *supra* note 22, at 119.

gestational surrogacy arrangement in 1986.[55] By the mid-1980's, however, the growth and success of surrogacy arrangements was thwarted by legal battles and controversies.[56]

THE LEGAL DEBATE OVER SURROGACY

As surrogacy became more prevalent, it engendered a host of legal issues and conflicts. These conflicts have at times erupted into a fierce debate over the legality of surrogacy. A discussion of this debate is necessary in order to understand the arguments underlying surrogacy. Furthermore, since the controversy surrounding surrogacy, as established by the leading surrogacy cases and arguments made by legal scholars and commentators, has shaped society's attitudes toward surrogacy, such a discussion is important in determining how surrogacy should be dealt with in the future.[57]

The Constitutional Issues Surrounding Surrogacy

Although the United States Supreme Court has not addressed the issue of surrogacy, it has recognized an individual's right to be free from government intrusion in matters relating to marriage, procreation, and child-rearing.[58] *In Griswold v. Connecticut,*[59] the Court found the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the penumbral rights in the specific guarantees of the Bill of Rights encompassed a right to privacy.[60] Thus, the Court invalidated a Connecticut statute prohibiting the use of contraceptives by married couples under the reasoning that the marital relationship falls within this "zone of privacy" and should, therefore, be free from government intrusion.[61]

---

[55]*See* Jamie Levitt, *Biology, Technology, and Genealogy: A Proposed Uniform Surrogacy Legislation,* 25 COLUM. J.L. & SOC. PROBS. 451, 455 (1992).

[56]*See* Kerian, *supra* note 22, at 119.

[57]*See* Kerian, *supra* note 22, at 119-20.

[58]*See* Kerian, *supra* note 22, at 119-20.

[59]381 U.S. 479 (1965).

[60]*Id.* at 484-86.

[61]*Id.* at 484-86.

In *Eisenstadt v. Baird,*[62] the Court invalidated a Massachusetts statute prohibiting the distribution of contraceptives to single individuals, and extended the protection of the "zone of privacy" to the decision of every individual, married or single, whether to bear a child.[63] The Court emphasized the fundamental right of the individual to privacy, stating "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[64] In the landmark case of *Roe v. Wade,*[65] the Court reasoned that since the right to procreate is constitutionally protected, the converse of this right is also protected.[66] Thus, privacy and autonomy include the right to obtain an abortion.[67]

The fundamental right of privacy in matters of procreation gained further momentum in *Stanley v. Illinois.*[68] In this case, the Court held that in the absence of a compelling state interest to the contrary, parents have a fundamental right to raise and beget children without government interference.[69] In doing so, the Court deemed the rights to conceive and raise children to be "essential," "basic civil rights" that are "far more precious than property rights."[70]

Differing Views on the Relationship Between Procreative Liberty and Surrogacy

Proponents of surrogacy contend that "if the right to procreate through traditional, coital method is a protected right, then procreation through surrogacy or other medically available options should also be protected."[71] These proponents argue that the "liberty interests protected by the Constitution do not change definition because of the presence or absence

---

[62]405 U.S. 438 (1972).
[63]*Id.* at 453.
[64]*Id.* at 453 (emphasis in original).
[65]410 U.S. 113 (1973).
[66]*Id.* at 152-153.
[67]*Id.* at 153.
[68]405 U.S. 645 (1972).
[69]*Id.* at 648.
[70]*Id.* at 651.
[71]*See* Eric A. Gordon, *The Aftermath of Johnson v. Calvert: Surrogacy Law Reflects a More Liberal View of Reproductive Technology*, 6 ST. THOMAS L. REV. 191, 200 (1993).

of reproductive technology."[72] Moreover, they view surrogacy as a form of conception that is equally legitimate to the traditional form because it is "arguably no more 'artificial' than the contraceptive devices to which the Supreme Court recognized a right of access in Griswold and Eisenstadt."[73] Thus, under the Due Process Clause, the fundamental right to "bear or beget a child" includes "access to any means of procreation."[74]

Proponents further argue that under the Equal Protection Clause of the Fourteenth Amendment, the recognition of artificial insemination through donor sperm as a means of dealing with male infertility necessitates the recognition of surrogacy as a remedy for female infertility.[75] They assert that, "[t]o deny protection to surrogacy while allowing it for AID [Artificial Insemination by Donor] would discriminate against infertile women and would likely be found in violation of the Equal Protection Clause of the Fourteenth Amendment."[76] In addition, protecting the right of fertile couples to bear and beget children, while denying infertile couples the same right, results in discrimination.[77] Under this reasoning, the practice of surrogacy is protected by the Constitution and may only be restricted upon a demonstration of a compelling state interest.[78]

Opponents of surrogacy, on the other hand, argue the right of procreative liberty, as established in the *Griswold-Roe* line of cases, applies exclusively to "marital intimacy" and "social stability."[79] Thus, non-coital means of reproduction are beyond the scope of constitutional

---

[72]*See* Kerian, *supra* note 22, at 121.

[73]*See* Kerian, *supra* note 22, at 121 (citing Ann MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L.Q. 487, 505 (1991)).

[74]*See* Kerian, *supra* note 22, at 122 (citing Massie, *supra* note 73, at 508).

[75]*See* SCOTT B. RAE, THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES? 17 (1994). *But see* Barbara L. Keller, *Surrogate Motherhood Contracts in Louisiana: To Ban or to Regulate?*, 49 LA. L. REV. 143, 179 (1988) (distinguishing between sperm donation, which involves virtually no risks and surrogate motherhood, which involves the physical and psychological risks of carrying a child for nine months).

[76]*See* Kerian, *supra* note 22, at 122.

[77]*See* RAE, *supra* note 75, at 18.

[78]*See* John A. Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 24, 25-26 (Larry Gostin ed., 1990).

[79]*See* Kerian, *supra* note 22, at 121.

protection.[80] They contend that "bringing a third party [the surrogate] into the procreative relationship cannot be justified on a theory of marital intimacy, and the strain such an arrangement puts upon the traditional notions of parenthood and family does little to further social stability."[81] Furthermore, opponents argue that even if the right of the surrogate mother and the biological father to reproduce is constitutionally protected, the payment of fees to the surrogate does not enjoy constitutional protection.[82] According to this reasoning, "[t]he dangers of exploitation and commodification inherent in commercial surrogacy, then, arguably constitute countervailing interests that states may identify as outweighing the right of privacy asserted by prospective surrogate parents."[83] Thus, opponents of surrogacy argue the prohibition of surrogacy arrangements is justified by a compelling state interest in preventing "child bartering."[84]

While the right to procreate falls under the constitutional right to privacy, the question of whether the Constitution protects the right to procreate via surrogacy has remained largely unanswered, despite the convincing arguments made on both sides. Moreover, complex issues persist regarding the custody, care, and parentage of the child after birth.[85] In grappling with these issues, courts have encountered confusion in determining under what principles of law surrogacy cases should be decided.[86]

The Leading Surrogacy Cases

In the absence of statutory laws governing surrogacy, courts have attempted to resolve surrogacy issues by analogizing them to issues arising from artificial insemination or adoption.[87] Accordingly, most of the earlier judicial opinions regarding surrogacy were based on contract and family law principles.[88] At the same time, such opinions relied on the

---

[80] *See* Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 152 (1986) ("The fundamental right of privacy in childbearing matters is intended to guarantee the right of an individual to control his or her own reproductive faculties, not to commission and monitor the pregnancy of a third party.")

[81] *See* Keller, *supra* note 75, at 176.

[82] *See* Keller, *supra* note 75, at 177.

[83] O'Brien, *supra* note 80, at 147.

[84] *See* Kerian, *supra* note 22, at 121.

[85] *See* Kerian, *supra* note 22, at 122.

[86] *See* Kerian, *supra* note 22, at 122.

[87] *See* Kerian, *supra* note 22, at 122-23.

[88] *See* Kerian, *supra* note 22, at 123.

"best interests of the child" standard.[89] The following discussion examines the development of surrogacy law in the United States, placing special emphasis on the two most influential and precedent-setting cases.

IN RE BABY M AND *JOHNSON V. CALVERT*

The Early Cases

In the 1980s, state courts began to address the issue of surrogacy. In the 1983 case of *Doe v. Kelley*,[90] a Michigan trial court struck down a surrogacy-for-money arrangement on the grounds it violated state adoption laws.[91] As previously noted, the court of appeals upheld the statute as constitutional, and determined that while the decision to bear a child is constitutionally protected, the exchange of money in connection with the adoption of the child from the surrogate mother is not.[92] Furthermore, the court viewed the surrogate parenting arrangement as an effort to circumvent the Michigan adoption laws.[93] Thus, the court reasoned that, since the statute in question prohibited adoption for money, it also prohibited payment for consent to adopt a child born out of a surrogacy-for-money arrangement.[94]

In *Surrogate Parenting Associates v. Kentucky ex rel. Armstrong*,[95] the court addressed the legality of surrogate parenting under a Kentucky statute that prohibiting the purchase or sale of a child.[96] In upholding the validity of surrogacy contracts, the court held that surrogacy did not constitute "baby selling" under the statute.[97] The court determined that unlike adoption, surrogacy contracts are arranged before conception, and are, therefore, based on rational, well-reasoned decisions.[98] Furthermore, the court reasoned that both the statute and surrogate parenting arrangements yield similar results to the extent that "both enable a childless couple to have a baby [which is] biologically related to one of

---

[89] *See* Kerian, *supra* note 22, at 123.

[90] 307 N.W.2d 438 (Mich. Ct. App. 1981).

[91] *Id.* at 441. The relevant statutory provision is MICH. COMP. LAWS § 710.54 (1983).

[92] *Id.* at 441.

[93] *Id.*

[94] *Id.* at 440-41.

[95] 704 S.W.2d 209 (Ky. Ct. App. 1986).

[96] *Id.* at 210. *See* KY. REV. STAT. § 199.590(2) (Michie/Bobbs-Merill 1991) (prohibiting the sale, purchase, or procurement of a child for adoption).

[97] *Surrogate Parenting Assoc.*, 704 S.W.2d at 211.

[98] *Id.*

them when they could not do so otherwise."[99] Despite upholding the legality of surrogate parenting arrangements, however, the court placed limitations upon such arrangements by allowing the birth mother a period of five days after the birth of the baby to change her mind.[100]

In contrast, the court in *In re Adoption of Baby Girl L.J.*[101] addressed the issue of surrogacy-for-money by employing a standard of looking at the best interests of the child.[102] In this case, the court held the best interests of a child born out of a surrogacy arrangement would be served by awarding adoption to the child's natural father.[103] The *Baby Girl* court further addressed the issue of whether the surrogate parenting arrangement violated New York adoption laws, prohibiting the sale of children.[104] The court determined these statutes were enacted to prevent the auction of children without consideration of their well-being.[105] It then concluded such statutes did not necessarily prohibit surrogate parenting arrangements.[106]

In re Baby M

Although courts had addressed the issue of surrogacy before, the case that brought national attention to surrogacy was the 1988 case of *In re Baby M.*[107] This case involved a surrogacy contract between Mary Beth Whitehead and William Stern in which Mrs. Whitehead agreed to be artificially inseminated with Mr. Stern's sperm and to carry and deliver the child that resulting from the procedure.[108] The contract further provided that Mrs. Whitehead was to be paid a fee of $10,000 upon delivering the child to Mr. Stern and his wife.[109] However, after the birth of the child, Mrs. Whitehead refused to hand the baby girl over to the Sterns.[110] When the Sterns, accompanied by police, went to reclaim the

---

[99] *Id.* at 212.
[100] *Id.* at 213.
[101] 505 N.Y.S.2d 813 (Sup. Ct. 1986).
[102] *Id.* at 815.
[103] *Id.* at 815.
[104] *Id.* at 817.
[105] *Id.* at 815.
[106] 505 N.Y.S2d at 818.
[107] *In re* Baby M, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part and rev'd in part*, 537 A.2d 1227 (N.J. 1988).
[108] 537 A.2d at 1235.
[109] *Id.*
[110] *Id.* at 1236-37.

child after obtaining a court order for temporary custody, Mrs. Whitehead passed the child through the window to her husband, and the Whiteheads subsequently left the state with the child.[111] Florida police eventually recovered the baby from the Whiteheads and returned her to the Sterns.[112]

After the Sterns recovered the baby, they brought suit for the enforcement of the surrogacy contract and permanent custody of the child.[113] The trial court held the contract was enforceable, Mrs. Whitehead's parental rights should be terminated, and permanent custody of the child should be awarded to Mr. Stern.[114]

In the trial court opinion, Judge Sorkow reasoned the constitutional right to privacy and the Equal Protection Clause legitimized commercial surrogacy.[115] He stated "[f]amily and procreative privacy rights legitimate both private use of commercial surrogates and public validation and enforcement of surrogacy agreements;" he also noted "[t]he right to procreate by whatever means available furthered the value and interests underlying the creation of family."[116] Judge Sorkow concluded under the Equal Protection Clause, a woman should have the right to sell her reproductive capacities just as a man has a right to sell his sperm.[117]

The court likewise determined surrogate parenting arrangements did not violate the Thirteenth Amendment's prohibition against human slavery.[118] The court reasoned because the child resulting from a surrogacy arrangement is biologically connected to the intended father, the father "cannot purchase what is already his."[119] Furthermore, state adoption statutes relating to the termination of parental rights, the consent period after birth, and the prohibition on fees paid in connection with the adoption of the child would not apply in this situation because the legislature did not intend for them to apply to surrogacy.[120]

---

[111] *Id.* at 1237.

[112] *Id.*

[113] 537 A.2d 1227, 1237 (N.J. 1988).

[114] *Id.*

[115] 525 A.2d 1128, 1164 (N.J. Super. Ct. Ch. Div. 1987).

[116] *Id.*

[117] *Id.*

[118] *Id.* at 1157. *See* M. Celeste Schejbal-Vossmeyer, Comment, *What Money Cannot Buy: Commercial Surrogacy and the Doctrine of Illegal Contracts*, 32 ST. LOUIS U. L. J. 1171, 1183 (1988).

[119] *See* Schejbal-Vossmeyer, *supra* note 118, at 1183.

[120] *See* Schejbal-Vossmeyer, *supra* note 118, at 1184 (In contrast to the New Jersey Supreme Court, which applied family law principles, the trial court applied contract law in this case).

On appeal, the Supreme Court of New Jersey invalidated the surrogacy contract between Mrs. Whitehead and the Sterns on the grounds it violated state adoption statutes and contravened public policy.[121] The court applied family law principles and concluded that the best interests of the child would be served by awarding custody to Mr. Stern.[122] In recognizing Mrs. Whitehead's parental rights, however, the court voided the adoption of the child by Mrs. Stern and remanded the case for an appropriate determination of Mrs. Whitehead's visitation rights.[123]

With respect to other issues, the court determined the $10,000 fee paid to Mrs. Whitehead by the Sterns was not for the personal services of Mrs. Stern, but rather for the adoption of the child.[124] Since New Jersey law prohibited the payment of money or other consideration in connection with the adoption of a child, the court found that the surrogacy contract was an effort to frustrate the goals of the adoption statutes because the parties knew that the money paid was for adoption.[125]

The court also found that pursuant to state law, courts may not terminate parental rights unless a party can demonstrate voluntary surrender, abandonment, or that the natural mother is unfit.[126] Because none of these factors were present, the court held "a contractual agreement to abandon one's parental rights, or not to contest a termination action, will not be enforced in our courts."[127]

The court also addressed the public policy issue. Focusing on the best interests of the child standard, the court held a contract in which parents decided who would get custody of the child before the child's birth was against the child's best interest.[128] The court also implied such contracts constitute a form of baby-selling, which results in the

---

[121]537 A.2d 1227, 1240 (N.J. 1988) The court determined that surrogacy contracts conflicted with statutory provisions prohibiting the payment of money in connection with adoptions, requiring proof of paternal fitness and abandonment before termination of parental rights, and making the surrender of custody and consent to adoption revocable in private adoptions. *Id.*

[122]*Id.* at 1259.

[123]*Id.* at 1263.

[124]*Id.* at 1240.

[125]*Id.* The New Jersey statute prohibits the payment of money or consideration of any kind (including discharge of financial obligations) in connection with adoption proceedings. *Id.* (citing N.J. STAT. ANN. § 9:3-54 (West 1988)). An individual found guilty of violating this statute is guilty of a high misdemeanor. *Id.* at 1240-41.

[126]537 A.2d at 1242.

[127]*Id.* at 1243.

[128]*Id.* at 1246.

exploitation of all parties involved.[129] Under the court's rationale, surrogacy contracts do not pass muster under the best interests of the child standard because they fail to inquire into the "fitness of the [purchasing couple] as custodial parents" and they fail to consider the effect on the child of separation from its natural mother.[130]

The court also considered the ramifications of the limited counseling Mrs. Whitehead received pursuant to the surrogacy contract. The court concluded surrogacy both fails to provide the natural mother with necessary counseling and psychological evaluation and deprives the intended parents of vital information about the surrogate's medical and psychological history.[131] Furthermore, even though Mrs. Whitehead had undergone a psychological evaluation to determine whether she might change her mind, the results of this evaluation were never discussed with the Sterns.[132] If the results of the evaluation had been disclosed both parties would have known of the possibility that Mrs. Whitehead might refuse to relinquish the child.[133]

The court further construed public policy to require children remain with and be raised by both natural parents.[134] The court held surrogacy contracts violated this policy because they provided for the permanent separation of a child from its natural mother.[135] Finally, the court rejected the trial court's holding that the constitutional right to procreative liberty and the Equal Protection Clause supported the legality of surrogacy contracts.[136] Although the court recognized that the right to procreate was constitutionally protected, the court held this right did not extend to surrogacy because "the custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation . . . ."[137] The court reasoned that the right of procreation, derived from the constitutional right to privacy, is "qualified by the effect on innocent third persons of the exercise of those rights."[138] Thus, biological parents cannot use their right

---

[129]*Id.* at 1242.
[130]*Id.* at 1248.
[131]537 A.2d at 1241.
[132]*Id.* at 1247.
[133]*Id.* at 1247-48.
[134]*Id.* at 1246-47.
[135]*Id.*
[136]537 A.2d at 1253-54.
[137]*Id.* at 1253.
[138]*Id.* at 1254.

to procreate to justify an arrangement that would contravene the best interests of the child.[139]

Addressing the trial court's equal protection argument, the court held the use of donor sperm for artificial insemination could not be analogized to a surrogate mother in determining equal protection.[140] The court reasoned that, given the substantial differences in the time commitment and the physical and psychological strain between carrying a child to term and merely donating sperm, the two situations were so diverse they could not form a basis for an equal protection problem.[141]

In summary, the *Baby M* case serves to illustrate the harm that may result from surrogate parenting arrangements. The court, however, suggested that "legislative consideration of surrogacy would provide an opportunity to consider the overall impact of new technology in reproduction."[142] As a result, a number of state legislatures enacted statutes prohibiting surrogacy.[143] At the same time, courts following the *Baby M* rationale confronted the issue with extreme caution.[144] Then, in 1993, came the landmark decision of *Johnson v. Calvert*,[145] in which the California Supreme Court became the first state high court to legitimize the use of gestational surrogacy arrangements.[146]

Johnson v. Calvert

In *Johnson v. Calvert*,[147] the California Supreme Court held gestational surrogacy contracts did not violate the United States Constitution, state law, or public policy.[148] Like most surrogacy cases, *Johnson* involved a

---

[139]*Id.*

[140]*Id.*

[141]537 A.2d at 1254-55.

[142]*See* Katy R. Klinke, *The Baby M. Controversy: A Class Distinction*, 18 OKLA. CITY U. L. REV. 113, 139 (1993) (citing *Baby M*, 537 A.2d at 1264).

[143]*See* Kerian, *supra* note 22, at 128.

[144]*See, e.g., In re* Adoption of Paul, 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990) (holding that surrogacy contracts violated state statutory prohibitions against compensation in exchange for the adoption of a child); Doe v. Attorney Gen., 487 N.W.2d 484 (Mich. Ct. App. 1990) (same). *But see In re* Adoption of Baby A & Baby B, 877 P.2d 107 (Or. Ct. App. 1994) (holding that even though the surrogacy arrangement provided for payment, the fee was not provided for locating a child for adoption, and therefore did not contravene state adoption statutes).

[145]851 P.2d 776 (Cal. 1993).

[146]*Id.* at 778.

[147]*Id.* at 776.

[148]*Id.* at 778.

married couple, Mark and Crispina Calvert, who desired to have a child.[149] Although Crispina Calvert was able to produce ova, she was unable to bear a child since she had a hysterectomy several years earlier.[150] After hearing about the Calvert's plight, Anna Johnson, a nurse and single mother, approached the Calverts and offered to serve as a surrogate.[151] Under the surrogacy contract, Ms. Johnson agreed to carry to term the embryo resulting from the union of Mr. Calvert's sperm and Mrs. Calvert's egg.[152] She would also relinquish all parental rights to the Calverts upon the birth of the child.[153] In return, the Calverts agreed to pay Ms. Johnson $10,000 for her services, as well as all medical and related childbearing expenses.[154] All parties signed a formal contract indicating their agreement to the aforementioned conditions.[155]

Prior to the birth of the child, the relationship between Ms. Johnson and the Calverts deteriorated.[156] Accordingly, the Calverts sought a judicial declaration that they were the legal parents of the child.[157] Ms. Johnson filed a similar action, and the two cases were eventually consolidated by the court.[158] When Ms. Johnson gave birth to the child, blood tests indicated that the child was biologically related to the Calverts, and not to her.[159] Thus, the trial court held the Calverts were the child's "genetic, biological, and natural parents" and the surrogacy contract was legally enforceable.[160] The Court of Appeals affirmed the trial court's decision, and the California Supreme Court followed suit, holding the Calverts were to be the child's parents at birth based on their genetic relation to the child and the original intent of the contract.[161]

In deciding this case, the California Supreme Court was faced with two primary issues: (1) whether the child's 'natural mother' under state law was the genetic mother or the birth mother; and (2) whether

---

[149] *Id.*
[150] 851 P.2d at 778.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] 851 P.2d 776, 778 (Cal. 1993).
[156] *Id.*
[157] *Id.*
[158] Anna J. v. Mark C., 286 Cal. Rptr. 369 (Cal. Ct. App. 4th 1991).
[159] *Johnson*, 851 P.2d at 778.
[160] *Id.*
[161] *Id.*

gestational surrogacy arrangements contravener the constitutional guarantees and public policies of the state statutes.[162]

Addressing the first issue, the court considered the Uniform Parentage Act (Act), which defined the parent/child relationship as including both "natural" and "adoptive" parents.[163] The court determined that, because the Act was passed before the first reported commercial motherhood arrangement, the legislature did not intend for the Act to resolve surrogacy disputes.[164] However, the court concluded that the Act "facially applies to any parentage determination, including the rare case in which a child's maternity is at issue."[165]

Accordingly, the court looked to the Act to determine the mother of the child.[166] Relying upon Civil Code Section 7003, a parent/child relationship between a child and a natural mother might be established by proof of her having given birth to the child.[167] Although the Act prescribed only one method of ascertaining the mother/child relationship, the court determined later provisions of the Act, applicable to finding a father/child relationship, might also apply in determining the existence of the mother/child relationship.[168] Under California Civil Code Section 7004 and California Evidence Code Section 721, paternity might be determined through a blood test.[169] Thus, under the various code provisions, disputes as to maternity might also be resolved through blood testing.[170] Because both Crispina Calvert and Anna Johnson had presented evidence, genetic evidence and bearing the child respectively, the court was compelled to examine the original intentions of the parties in entering into the surrogacy contract.[171]

---

[162]*Id.* at 777-78.

[163]Johnson v. Calvert, 851 P.2d 776, 778-85 (Cal. 1993). *See also* Uniform Parentage Act, CAL. CIV. CODE §§ 7000-21 (West 1993) (repealed and replaced by §§ 7600-7650 in the California Family Code, effective January 1, 1994).

[164]*Johnson*, 851 P.2d at 779. The Uniform parentage Act was introduced in 1975 to eliminate the distinction between legitimate and illegitimate children. *Id.* at 778-79.

[165]*Id.* at 779.

[166]*Id.*at 780 (referring to CAL. CIV. CODE §§ 7000-21).

[167]*Id.* (referring to CAL. CIV. CODE § 7003(1)).

[168]*Id.* (referring to CAL. CIV. CODE § 7015).

[169]Johnson v. Calvert, 851 P.2d 776, 780-81 (Cal. 1993). *See* CAL. CIV. CODE § 7004 (West 1993) and CAL. EVID. CODE § 892 (West 1993) (repealed and replaced by CAL. FAM. CODE §7611, 7611.5 and 7612 (West 1994) and CAL. FAM. CODE §7551, effective January 1, 1994).

[170]*Johnson*, 851 P.2d at 781.

[171]*Id.*

Mark and Crispina Calvert had agreed to supply the genetic material to Anna Johnson so she could bear a child genetically related to them.[172] They had not intended to donate a zygote to Ms. Johnson so she could have a child of her own.[173] The court observed that but for the Calvert's original intention to have a child, Ms. Johnson would not have received the zygote in the first place.[174] Accordingly, the court held the intentions of the parties were clearly defined by the surrogacy contract.

Although the Act recognized both genetic consanguinity and giving birth as a means of establishing the mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child, that is, she who intended to bring about the birth of a child that she intended to raise as her own, is the natural mother under California law.[175]

Further, in addressing the public policy issue, the court rejected Ms. Johnson's argument that surrogacy agreements contravene public policy because, under the adoption statutes, payment for consent to the adoption of a child is illegal.[176] The court reasoned that gestational surrogacy was so different from adoption that the state adoption statutes did not apply.[177] The court found the payments made pursuant to the surrogacy contract were intended to compensate Ms. Johnson for carrying the child to term, not for relinquishing her parental rights to the child.[178] Thus, the court held the contract did not violate public policy on those grounds.[179]

The Calverts also argued surrogacy contracts were legally enforceable based on Senate Bill 937, a bill passed by the California legislature in 1992.[180] That legislation included a statement that surrogacy

---

[172]*Id.* at 778, 782.

[173]*Id.* at 787.

[174]*See, e.g.*, John L. Hill, *What Does It Mean to be a "Parent?" The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 414-15 (1991).

[175]Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

[176]*Id.* at 783-83. Section 273(a) of the California Penal Code states: It is a misdemeanor for any person or agency to pay, to offer to pay, or to receive money or anything of value for the placement for adoption or for the consent to an adoption of a child. This subdivision shall not apply to any fee paid for adoption services provided by the State Department of Social Services, a licensed adoption agency, adoption services providers, as defined in Section 8502 of the Family Code, or an attorney providing legal services. CAL. PENAL CODE § 273(a) (West 1998).

[177]*Johnson*, 851 P.2d at 784.

[178]*Id.*

[179]*Id.*

[180]*Id.* at 783.

contracts do not contravene sound public or social policy.[181] However, because Governor Pete Wilson vetoed the bill, it did not pass.[182]

Ms. Johnson, in turn, pointed out a number of other public policy violations, including involuntary servitude and the exploitation and degradation of women.[183] First, the court dismissed the involuntary servitude claim on the grounds that Ms. Johnson had brought forth no evidence of coercion or duress in the contract.[184] Next, the court rejected Ms. Johnson's claim that surrogacy contracts exploit women, especially those from a lower economic class.[185] Specifically, the court noted "there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment."[186] In support of its position, the court cited the Office of Technical Assessment Report on the demographics of surrogates, which found that while a majority of surrogates came from the income bracket of $15,000-$30,000 per year, only 13 percent of the overall number of surrogates had incomes below $15,000 per year.[187]

The court further determined that since Ms. Johnson was not the child's natural mother under California law, any constitutional interests in the child claimed by Ms. Johnson, including her rights to privacy, procreative liberty, and substantive due process, were superceded by those of Crispina Calvert, the biological mother.[188] Accordingly, the court dismissed Ms. Johnson's claims of constitutional and public policy violations.[189] Thus, it held the gestational surrogacy contract between Ms. Johnson and the Calverts was legally enforceable and it did not run afoul

---

[181] *Id.*

[182] *Johnson*, 851 P.2d at 783.

[183] *Id.* at 784-85.

[184] *Id.* at 784. It is interesting to note here that Ms. Johnson was the one who approached the Calverts with the offer to become a surrogate mother for them. *Id.* at 778.

[185] *Id.* at 785.

[186] *Id.*

[187] *See* U.S. CONGRESS OFFICE OF TECH. ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 273-74 (1988).

[188] *See* Eric A. Gordon, *Note and Comment, The Aftermath of Johnson v. Calvert: Surrogacy Law Reflects a More Liberal View of Reproductive Technology*, 6 ST. THOMAS L. REV. 191, 200 (1993).

[189] *Id.*

of the United States Constitution, state law, or social and public policy interests.[190]

As the aforementioned case law clearly demonstrates, courts have encountered great difficulty in resolving surrogacy-related custody disputes. Although the issues surrounding such disputes have not been completely resolved, this legal debate has engendered debate in a number of other societal circles, debate that may shape the legal resolution of such issues in the future.

THE FEMINIST DEBATE OVER SURROGACY

Although the issues surrounding surrogacy have been debated in a number of religious, economic, ethical, and moral contexts,[191] perhaps the most impassioned debates concerning the morality and legality of surrogacy have occurred among feminists. Since the second wave of the feminist movement in 1910, feminists have argued that women have a constitutional right to control their own bodies, and therefore, have the right to procreate, to use contraception, or to abort.[192] With the advent of new reproductive technologies, however, a number of different choices have arisen. While some feminists view these new choices as reproductive freedoms, others view them as vehicles for the exploitation of women. Thus, feminists are widely divided on the issues surrounding surrogacy.

The role of women in society historically has been defined by the biological fact that only women can bear children.[193] Since men have exercised control over women's bodies and reproductive capacities, some feminists fear that men will use surrogacy in order to further their control over women's bodies for their own needs.[194] They also fear that the use of the new reproductive technologies will infringe upon women's

---

[190]*See* Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).

[191]For a discussion of (other) moral, ethical, and economic perspectives on surrogacy, see Kerian, note 22, at 150-58.

[192]*See* Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 167, 168 (Larry Gostin ed., 1990)

[193]*See* Norma J. Wikler, *Society's Response to the New Reproductive Technologies The Feminist Perspectives*, 59 S. CAL. L. REV. 1043, 1043 (1986).

[194]*See* GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS, 283-88 (1985).

autonomy and that women's reproductive capacities will be employed to further the interests of a male-dominated society.[195]

Liberal feminists advocate a woman's reproductive choice and freedom to contract.[196] They opine that women should be free to choose among the various reproductive alternatives, including surrogacy, as long as this choice does not harm anyone in the process.[197] According to liberal feminist theory, the protection of a woman's constitutional rights to privacy and procreation is the foremost priority.[198] Therefore, liberal feminists view surrogacy as a positive practice because it ensures the preservation of these rights in such a way that all parties ultimately will benefit.[199] The surrogate "achieves fulfillment by giving the gift of life to the infertile couple and the couple also receives the benefit of a 'child of their own.'"[200] Furthermore, because both the surrogate and the intended parents encounter great adversity to bring a child into the world, liberal feminists reason that children born of surrogacy arrangements are the actual beneficiaries of such arrangements.[201]

Radical feminists, on the other hand, argue that surrogacy exploits both women and children.[202] In arguing that surrogacy commodifies the reproductive capacity of women, they analogize surrogacy to prostitution: prostitutes sell their sexual services for a fee, while surrogates sell their reproductive services for a fee.[203] Under the radical feminist theory, women do not exercise free choice in selling these services in the context of either prostitution or surrogacy.[204] Rather, "a woman 'chooses' to do this . . . only in the sense that when a woman's sole alternatives are being poor or exploited, she may opt for exploitation as the lesser of two evils."[205]

---

[195]Wikler, *supra* note 193, at 1044.

[196]Rosemarie Tong, *Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus,* in REPRODUCTION, ETHICS AND THE LAW: FEMINIST PERSPECTIVES 55, 69 (Joan C. Callahan ed., 1995).

[197]*Id.*

[198]*Id.* at 69-71.

[199]*Id.* at 68.

[200]*Id.*

[201]Tong, *supra* note 196, at 68-69.

[202]Tong, *supra* note 196, at 68.

[203]Tong, *supra* note 196, at 64.

[204]Tong, *supra* note 196, at 64.

[205]Tong, *supra* note 196, at 65.

Radical feminists also argue that surrogacy favors privileged women at the expense of disadvantaged women because it is usually upper-income women who hire lower-income women to bear their children.[206] As a result of this trend, radical feminists foresee the creation of a dystopia such as that described in *The Handmaid's Tale* by Margaret Atwood.[207] The *Handmaid's Tale* portrays a society, Gilead, in which abortion is criminalized and women are banned from the workforce.[208] In this society, surrogacy became a form of slavery.[209] Women were divided into the following categories: the "Wives" acted as the social secretaries; the "Marthas" were the domestic servants; the "Jezebels' were the sexual prostitutes; and the "Handmaids" were the reproductive prostitutes.[210] The final category of women, the Handmaids, were the only fertile women in Gilead.[211] They were utilized as "reproductive machines" for the wealthy Commander and his infertile wife.[212] Accordingly, when the Handmaids became pregnant, the resulting child would be handed over to the Commander and his wife and regarded as their child.[213] One radical feminist commentator, Janice Raymond, has argued that the gap created by surrogacy arrangements between privileged and disadvantaged women parallels the fictitious situation portrayed in the *Handmaid's Tale:*

> If women were truly lining up to become surrogate mothers out of altruism and concern for the infertile, we would have middle- and upper-class women bearing the babies of lower-class couples, where the added gift of aiding those who cannot afford to pay would be an even greater expression of altruism.[214]

Radical feminists further assert that surrogacy commodifies not only women, but also children. They argue that surrogacy arrangements, which consist of relinquishing a child for a sum of money, treats children born

---

[206]Tong, *supra* note 196, at 66.
[207]Tong, *supra* note 196, at 66.
[208]MARGARET ATWOOD, THE HANDMAID'S TALE 164 (1986).
[209]Tong, *supra* note 196, at 66.
[210]*Id.*
[211]*Id.*
[212]*Id.*
[213]ATWOOD, *supra* note 208, at 164.
[214]JANICE G. RAYMOND, WOMEN AS WOMBS 44-45 (1993). According to Raymond, altruism is not the real motivation behind surrogacy and any "altruism" that does exist reduces women's bodies into raw materials used to serve the interests of others. *Id.* at 44.

out of such arrangements as products that can be bought and sold on the market.[215] Since these children become products in a market that demands product quality, "parents [sic] love for their children would no longer be unconditional; rather it would depend on whether or not their children were 'good' products."[216]

To further their argument that surrogacy arrangements are psychologically damaging to children, radical feminists also assert that carrying a child as a service for others in exchange for compensation radically challenges the way in which society has viewed and valued pregnancy. By attaching commercial values to the social and moral meanings associated with human reproduction, surrogate parenting fragments the inherent social and moral bonds of kinship. Therefore, the children resulting from a surrogacy arrangement will be psychologically disturbed to learn their mother gave them away pursuant to an agreement.[217]

Given their divergent views on the morality and legality of surrogacy, it should come as no surprise that feminist commentators do not agree on the appropriate response to the aforementioned issues. Some commentators suggest that government regulation of female reproductive decision making is necessary in order to protect the interests of women as a group.[218] Robin Rowland, a contemporary feminist writer, has stated that:

> to retain control over human experimentation, women may have to consider state intervention of some kind in the areas of research funding, research application and reproductive rights - with all its inherent dangers .... We may have to call for an end to research which would have helped infertile women to conceive, in consideration of the danger to women as a social group of loss of control over "natural" childbearing ....[219]

On the other hand, other feminist writers, fearing the loss of women's reproductive choices, strongly oppose government intervention. One such

---

[215]*See* Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1930-32 (1987).
[216]Tong, *supra* note 196, at 67.
[217]Kerian, *supra* note 22, at 165.
[218]Wikler, *supra* note 193, at 1050-51.
[219]ROBIN ROWLAND, MOTHERHOOD, PATRIARCHAL POWER, ALIENATION AND THE ISSUE OF "CHOICE" IN SEX PROTECTION 14, 17 (1984).

writer, Norma Wikler, argues that "[i]f one accepts that the government would not be violating the fundamental right to privacy by intervening . . . it is difficult to argue that it would be a violation of that right for the government to intervene in another reproductive practice, namely, abortion."[220]

As the previous discussion illustrates, feminist views on the issues surrounding surrogacy diverge considerably. While liberal feminists argue that surrogacy allows infertile women to realize the gift of life, radical feminists assert that surrogacy can lead to exploitation and commodification of women and children. Although these differing viewpoints illustrate the inherent dangers of surrogacy arrangements, they also illustrate the potential benefits of such arrangements. Thus, feminists and other commentators, similar to the courts, have encountered difficulty in achieving a consensus as to how surrogacy-related issues should be resolved. Accordingly, the confusion over surrogacy in legal and feminist circles, as well as other debates has necessitated legislative guidance on these issues.

STATE AND FEDERAL STATUTORY RESPONSES TO SURROGACY

State and federal legislators have faced similar difficulties when addressing the issue of surrogacy. Often, the most difficult decision legislators must make is whether and to what extent they should even attempt to regulate the issue.

State Legislative Responses to Surrogacy

State legislatures have only recently begun to address the complex issues raised by surrogacy. The results of state regulation of surrogacy vary significantly from state to state: while some state statutes impose a blanket prohibition on surrogacy agreements, others recognize them as legally enforceable. One common factor, however, is that most state statutes do not make the distinction between traditional surrogacy arrangements and gestational surrogacy arrangements.[221]

---

[220]Wikler, *supra* note 193, at 1051.

[221]*See* Todd M. Krim, *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 ANNALS HEALTH L. 193, 210 (1996).

Over the past ten years, almost half of the states have enacted legislation addressing surrogacy.[222] In Arizona, New York, North Dakota, and Utah, the legislatures have taken a blanket approach, deeming all surrogacy contracts to be void and unenforceable.[223] Kentucky, Louisiana, Nebraska, and Washington, on the other hand, have taken a less restrictive approach, passing legislation that voids only those surrogacy contracts that provide for compensation of the surrogate.[224]

Michigan has adopted the most hard-line approach by criminalizing surrogacy.[225] According to the relevant state statute, those who facilitate surrogacy arrangements are guilty of a felony, punishable by a fine of up to $50,000 and/or up to five years' imprisonment.[226] In addition, participants in such contracts are guilty of a misdemeanor, punishable by a fine of up to $10,000 and/or up to one year in prison.[227]

In contrast, Florida, New Hampshire, and Virginia have adopted the minority approach to surrogacy contracts by making them legal and enforceable.[228] All three of these state statutes prohibit the compensation of the surrogate, with an exception of expenses incurred as a result of pregnancy and childbirth.[229] They also allow the surrogate an opportunity to rescind the contract.[230] Aside from these similarities, however, the approaches of Florida, New Hampshire, and Virginia are each unique.[231]

---

[222]ALA. CODE §§ 26-10A-33 to 26-10A-34 (1992); ARIZ. REV. STAT. ANN. § 25-218 (1991 & Supp. 1997); ARK. CODE ANN. §§ 9-10-201 to 9-10-202 (Michie 1998); FLA. STAT. ANN. §§ 742.14-742.17 (West 1997); KY. REV. STAT. ANN. §§ 199.950(20, 199.590(4), 199.990 (Michie/Bobbs-Merrill 1995); LA. REV. STAT. ANN. § 9:2713 (West 1991); MICH. COMP. LAWS ANN. §§ 722.851 to 722.863 (West 1993); NEB. REV. STAT. § 25-21, 200 (1996); NEV. REV. STAT. ANN. § 126.045 (Supp. 1997); N.H. REV. STAT. ANN. §§ 168-B:1 to 168-B:32 (1994 & Supp. 1995); N.J. REV. STAT. ANN. §§ 9:3-41, 9:17-44 (West 1993 & Supp. 1998); N.Y. DOM. REL. LAW §§ 121-124 (Consol. 1993 & Supp. 1998); N.D. CENT. CODE §§ 14-18-01 to 14-18-07 (1997); OR. REV. STAT. ANN. §§ 109.239, 109.243, 109.247 (1997); UTAH CODE ANN. § 76-7-204 (1995); VA. CODE ANN. §§ 20-156 to 20-165 (Michie 1995 Supp. 1998); WASH. REV. CODE ANN. §§ 26.26.210 to 26026.260 (West 1997); W. VA. CODE § 48-4-16 (1998).

[223]*See* Krim, *supra* note 221, at 210.

[224]*See* Krim, *supra* note 221, at 210.

[225]MICH. COMP. LAWS ANN. § 722.857 to 722.863.

[226]*Id.* at § 722.857.

[227]*Id.* at § 722.859.

[228]*See* Krim, *supra* note 221, at 210.

[229]*See* Krim, *supra* note 221, at 210.

[230]*See* Krim, *supra* note 221, at 210.

[231]*See* Krim, *supra* note 221, at 210-11.

The Florida statute includes several provisions specifically designed to regulate surrogacy contracts. According to the statute, the following factors must be present in any surrogacy arrangement:

(1) the intended parents, (who must be legally married) and the surrogate are eighteen years of age or older; and
(2) a physician determines that
(a) the intended mother cannot physically gestate a pregnancy to term;
(b) the gestation will cause a risk to her health; or
(c) the gestation will cause a risk to the health of the fetus.[232]

The statute further provides that the intended parents may compensate the surrogate only for the reasonable living, legal, and medical expenses in the prenatal, intrapartal, and postpartal periods.[233] Finally, the statute allows the surrogate to rescind the agreement to relinquish parental rights within seven days of the child's birth.[234]

Surrogacy legislation in New Hampshire is even more comprehensive than that in Florida because it requires judicial preauthorization of all surrogacy contracts.[235] Under the New Hampshire statute, the following conditions must be present for a surrogacy contract to obtain court approval:

(1) the parties must have given their informed consent;
(2) psychological counseling and evaluations must have been completed;
(3) the contract must not include any prohibited or unconscionable terms; and
(4) the contract must be in the best interests of the intended child.[236]

In addition, all court-approved surrogacy arrangements must provide a right of recission to the surrogate until seventy-two hours after the birth

---

[232]FLA. STAT. ANN. § 742.15 (WEST 1996).
[233]*Id.*
[234]*Id.*
[235]N.H. REV. STAT. ANN. §§ 168-B:16 to 168-B:23 (1994 & Supp. 1997).
[236]*Id.*

of the child.[237] In the event that the surrogate decides to keep the child, the parental rights of the intended parents are terminated, as is their obligation to provide financial support to the child.[238] If the surrogate does not decide to keep the child, her parental rights will automatically terminate and these same rights will vest in the intended parents.[239] Finally, the New Hampshire statute prevents any entity from soliciting any party for purposes of entering into a surrogacy arrangement for compensation.[240]

The Virginia statute differs from the New Hampshire statute in that it recognizes two general types of surrogacy arrangements, those that are judicially pre-authorized and those that are not.[241] Under the statute, surrogacy contracts may be preauthorized if the gestational mother is married and has had at least one successful pregnancy and if all parties, including the surrogate's husband, have signed the contract.[242]

Before court approval of the contract, a home study of the intended parents, the surrogate, and the surrogate's husband must be conducted to ensure that all parties meet the standards of fitness applicable to adoptive parents.[243] In addition, the Virginia statute requires all parties to undergo physical testing and psychological counseling.[244] Finally, the intended mother must be either infertile or unable to bear children without substantial health risks to either herself or the unborn child, and at least one of the intended parents must be biologically related to the unborn child.[245]

With respect to surrogacy contracts executed without court approval, the Virginia statute will enforce such contracts only if their provisions may be reformulated to conform with statutory requirements.[246] The primary difference between court-approved contracts and court-reformed

---

[237] *Id.* at § 168-B:25.

[238] *Id.*

[239] *Id.*

[240] N.H. REV. STAT. ANN. §§ 168-B:16.

[241] Krim, *supra* note 221, at 212.

[242] VA. CODE ANN. § 20-160(B)(6) (Michie 1995). The intended child and the gestational surrogate are entitled to legal counsel at this stage. *Id.*

[243] *Id.* § 20-160(B)(8).

[244] *Id.*

[245] *Id.*

[246] *See* Alice Hofheimer, *Gestational Surrogacy: Unsettling Parentage Law and Surrogacy Policy,* 19 N.Y.U. REV. L. & SOC. CHANGE 571, 577-78 n.29 (1992).

contracts is the surrogate's right to rescind the contract.[247] Pursuant to court-approved contracts, the intended parents are automatically considered to be the parents of the child unless the surrogate decides to terminate the contract within 180 days of becoming pregnant.[248] With regard to surrogacy contracts that have not been court-approved, the intended parents are not considered to be the parents of the child until the surrogate, after a twenty-five day waiting period, relinquishes her parental rights by signing a consent form allowing the intended parents to be named on the child's birth certificate.[249]

Like the New Hampshire statute, the Virginia statute also forbids any entity from inducing or recruiting any party into entering a surrogacy contract for compensation.[250] This provision applies to judicially preauthorized and court-reformed surrogacy contracts alike.[251]

Although some states have successfully attempted to resolve the perplexing issues surrounding surrogacy, significant problems still remain due to the lack of uniformity in state surrogacy legislation. This lack of uniformity has created confusion because what may be considered "baby bartering" in one state may be considered sound public policy in another.[252] Thus, problems of enforcement may arise when infertile couples from states that prohibit surrogacy arrangements cross state lines in order to enter into surrogacy arrangements in states where such agreements are legally enforceable.

Attempts to Regulate Surrogacy at the Federal Level

In the absence of comprehensive federal legislation relating to surrogacy arrangements, diverse, and often conflicting, actions have been taken by both state courts and legislatures in their attempt to resolve disputes arising out of such agreements. Since 1989, there have been two unsuccessful attempts at passing federal legislation that would prohibit or restrict the use of surrogacy arrangements. The first bill, known as the "Surrogacy Arrangements Act of 1989," which was introduced by

---

[247]*Id.*
[248]Krim, *supra* note 221, at 212.
[249]Krim, *supra* note 221, at 212.
[250]VA. CODE ANN. § 20-165 (Michie 1995).
[251]*Id.*
[252]*See* Krim, *supra* note 221, at 213.

Representative Thomas A. Luken (D-Ohio),[253] sought to impose criminal sanctions upon any person who "on a commercial basis knowingly makes, or engages in, or brokers a surrogacy arrangement."[254] Furthermore, the Surrogacy Arrangements Act would have amended the Federal Trade Commission Act to allow criminal sanctions for anyone who advertised services related to surrogacy arrangements.[255] This bill eventually died in the House Committee on Energy and Commerce.[256]

The second bill, referred to as the "Anti-Surrogate Mother Act of 1989," was introduced by Representative Robert K. Dornan (R-Cal.).[257] This legislation purported to criminalize all activities relating to surrogacy arrangements, including the provision of medical assistance and the advertisement of services related to such arrangements.[258] Moreover, this proposed bill sought to make all commercial and noncommercial surrogacy arrangements null and void.[259] This bill met the same fate as its predecessor when it died in the House Committee on the Judiciary.[260]

The federal legislative vacuum with respect to surrogacy has produced a patchwork of conflicting state regulations, creating serious problems. In the absence of a uniform standard at the federal level, certain states may become havens for couples who wish to have children through surrogacy arrangements. In contrast, a uniform regulatory scheme would allow all individuals an equal opportunity to produce children through surrogacy arrangements.[261] Such a scheme would also address many of the concerns about surrogacy, such as the exploitation and commodification of women, because concrete standards would ensure the legitimacy of the practice.[262]

---

[253]H.R. 275, 101st Cong. (1989).
[254]*Id.*
[255]*Id.*
[256]*See* Krim, *supra* note 221, at 214.
[257]H.R. 576, 101st Cong. (1989).
[258]*Id.*
[259]*Id.*
[260]*See* Krim, *supra* note 221, at 214.
[261]*See* Krim, *supra* note 221, at 214.
[262]*See* Krim, *supra* note 221, at 214.

THE CANADIAN EXPERIENCE WITH SURROGACY

The United States is not alone in grappling with the complex issues surrounding surrogacy. Canadian courts and legislators have encountered a similar struggle in their attempt to regulate and interpret surrogacy arrangements. Although the Canadian experience has no direct legal effect on surrogacy in the United States, an examination of that experience may provide valuable insights into how Congress should approach surrogacy issues.

The Ontario Law Reform Commission Approach

The Canadian experience with surrogacy began in 1982, when the Attorney General for Ontario asked the Ontario Law Reform Commission (Ontario Commission) to inquire into and consider the legal issues relating to the practice of human artificial insemination, including surrogate mothering and transplantation of fertilized ova to a third party and to report on the range of alternatives for resolution of any legal issues that may be identified.[263] In working toward this objective, the Ontario Commission considered the experiences of other countries, including the United States, with the issue of surrogacy.[264]

The Ontario Commission's resulting report addressed a broad range of artificial reproductive technologies, including surrogate motherhood.[265] Its proposal for the regulation of surrogacy arrangements is similar to that adopted by the legislatures in Virginia[266] and New Hampshire.[267] In particular, the proposal requires parties to a surrogacy arrangement to follow certain prescribed practices, such as court approval of the surrogacy contract and formal screening of both the surrogate and the intended couple.[268] Furthermore, under this proposal, the parental rights of the surrogate mother would be automatically terminated, thus ensuring

---

[263] ONTARIO LAW REFORM COMMISSION, REPORT ON HUMAN ARTIFICIAL REPRODUCTION AND RELATED MATTERS 1 (1985) [hereinafter ONTARIO LAW REPORT].

[264] *See id.* at 3-4.

[265] *See id.* at 7, 91-102, 218-73.

[266] *See supra* notes 195-200 and accompanying text (discussing Virginia's regulation of surrogacy).

[267] *See supra* notes 201-210 and accompanying text (discussing New Hampshire's regulation of surrogacy).

[268] ONTARIO LAW REPORT, *supra* note 263, at 235.

the intended couple that they will be the legally recognized parents of the child.[269]

A Call for Regulation, Not Prohibition

The Ontario Commission formulated its proposal in favor of regulated surrogacy based on its belief that "[regulation, not prohibition] would protect the interests of all concerned, particularly the [interests of the] child who is to be conceived and transferred" pursuant to the surrogacy agreement.[270] In reaching this conclusion, the Ontario Commission carefully analyzed the arguments of the opponents of surrogacy, noting that the opponents had cast "the burden of justifying the practice upon its proponents, without advancing compelling arguments in favour of prohibition."[271] Attempting to shift this burden, the Commission argued that "in principle, prohibitory action is warranted only where there is an extremely powerful justification; the onus should be on those who would advocate such action, not on those whose conduct is to be the subject of legislative or other interference."[272]

The Ontario Commission observed that most of the criticism of surrogacy has focused on the fact that it is often done for profit.[273] Thus, it suggested that if the payment arrangements to both licensed commercial agencies and surrogate mothers were controlled so that services might be rendered for a modest profit, the rationale for these criticisms would be significantly weakened.[274] The Commission noted that these criticisms were further weakened by an empirical study suggesting that financial gain may not be the sole motivating factor for a surrogate.[275]

Furthermore, the Commission reasoned that, given the relative accessibility of artificial insemination, full-scale prohibition of surrogacy

---

[269] *Id.* at 260.
[270] *Id.* at 232-33.
[271] *Id.* at 232.
[272] *Id.*
[273] *Id.*
[274] ONTARIO LAW REPORT, *supra* note 263, at 231.
[275] *See* Phillip J. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117, 118 (1983). This study demonstrated that, even though money is a motivating factor for surrogates, altruistic considerations are also significant. Surrogates in the study "often expressed a strong wish to give the gift of a baby to a parent who needed a child." *Id.* at 118. For "89% of the women who said a fee was a necessary condition, it was never a totally sufficient reason for being a surrogate mother." *Id.*

arrangements would result in clandestine private arrangements.[276] This would lead to a number of potential dangers, such as "exploitation of the weak by the powerful, pregnancies contracted by the irresponsible, and the introduction of infants into inappropriate, even dangerous, circumstances . . . ."[277] The Commission also argued that children born of these illegal surrogacy arrangements might be in a worse position than under existing law.[278] If, for example, a dispute arose between the surrogate and the intended parents as to the child's custody, the child's place in society would be uncertain because there would be no available recourse to the courts.[279]

The Commission found unpersuasive the moral argument that surrogate motherhood should be proscribed because one person should not be exploited by another for purposes of childbirth.[280] With respect to the morality of surrogacy, the Commission stated:

> On a very trivial level, we see the principle [that one person should not serve as a means to an end of another] ignored wherever services are purchased and sold. A more relevant illustration of its inapplicability occurs in the case of an organ donation for a therapeutic purpose by a live donor. While the recipient is using the donor to realize an "end," we do not find this conduct offensive to fundamental values . . . . [W]e would suggest that the principle that one person should not serve as a means to an end for another is not an absolute one to which deference must be paid, but that each situation should be evaluated independently to assess its ethical propriety.[281]

The Ontario Commission also found unpersuasive the argument that surrogacy arrangements should be prohibited due to the physical risks associated with pregnancy and childbirth.[282] Although the Ontario Commission recognized such risks, it reasoned that they would not be problematic if they were carefully explained to a surrogate and minimized

---

[276]*See* Arthur Serratelli, *Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum?*, 26 GEO. WASH. J. INT'L L. & ECON. 633, 661-62 (1993).

[277]*Id.* at 662.

[278]ONTARIO LAW REPORT, *supra* note 263, at 232.

[279]*Id.*

[280]*Id.* at 231.

[281]*Id.*

[282]*Id.*

with adequate medical care.[283] Furthermore, since most surrogates have given birth before, they are certain to be aware of the risks surrounding pregnancy and childbirth.[284] The Ontario Commission pointed out that regulation modeled after the previously discussed Virginia statute, which requires a surrogate to have given birth prior to entering into an enforceable court-approved surrogacy arrangement, would ensure that surrogate mothers were well-informed of the physical risks associated with pregnancy and childbirth.[285]

In conclusion, the Ontario Commission emphasized that the legalization of surrogacy arrangements would not lead to the dissolution of the family nor harm to children.[286] Rather, by assisting an otherwise childless couple, surrogate motherhood may be the sole means of affirming the centrality of family life.[287] Thus, even though the prohibition of surrogacy may properly animate individual moral values and decisions, it was not warranted by the public interest.[288]

The Proposed Ontario Commission Regulations

The proposed Ontario Commission regulatory scheme consists of three major components:

(1) mandatory minimum standards established unambiguously by statute to which all surrogacy arrangements must conform;
(2) judicial intervention prior to the implementation of all surrogacy arrangements particularly before artificial conception technology is employed to achieve a pregnancy; and
(3) recognition of the intended couple as the parents of the child for all legal purposes, with the surrogate retaining no legal relationship to the child.[289]

Under this proposal, the regulatory process begins when the prospective surrogate and the infertile couple reach a written agreement

---

[283] *Id.*
[284] *See* Serratelli, *supra* note 276, at 663.
[285] VA. CODE ANN. § 20-160(B)(6) (Michie 1992).
[286] ONTARIO LAW REPORT, *supra* note 263, at 232.
[287] *Id.*
[288] *Id.*
[289] *Id.* at 233, 259, 260.

that, at a minimum, addresses certain matters specified by statute.[290] For instance, every surrogacy contract must require the surrogate to relinquish the child immediately after birth.[291] In the event that the surrogate refuses to do so, the courts would be empowered to order the release of the child.[292] The Ontario Commission reasoned that such a requirement is strongly supported by the equitable doctrine of specific performance as it applies to contracts.[293]

The Ontario Commission also addressed the issues of compensation to surrogates and the possible birth of a handicapped child.[294] Regarding surrogate compensation, the Commission recommended that no compensation be allowed without prior judicial approval.[295] The Commission reasoned that such a provision would reveal any possible exploitation of the surrogate so that it might be prevented or remedied prior to compensation.[296] Addressing the possibility that a child resulting from a surrogacy arrangement would be born handicapped, the Commission recommended that legislation provide that the intended parents be deemed the legal parents of the child, regardless of the child's condition at birth.[297]

> Finally, the Commission proposed that the parties to a surrogacy arrangement be required to agree upon a resolution of the following issues:
>
> (1) health and life insurance protection for the prospective surrogate mother;

---

[290] *Id.* at 235.

[291] *Id.* at 249, 252.

[292] ONTARIO LAW REPORT, note 263, at 252. The Commission, however, added the following exception: Where there has been a change in circumstances, or where new information has become available, indicating that the approved social parents are unsuitable to receive the child, the surrogate mother or the children's aid society should be permitted to apply, at any time prior to the birth of the child, for a review of the approval of the surrogate motherhood agreement. The judge should be empowered to rescind the agreement. ONTARIO LAW REPORT, *supra* note 263, at 253.

[293] *Id.* at 250, 252.

[294] *Id.* at 250.

[295] *Id.* at 254, 255. The Commission identified four components of payment: (1) payment to the surrogate in the way of profit for her participation; (2) payment of medical and legal expenses; (3) payment for the surrogate's lost income during pregnancy; and (4) compensation for pain and suffering, including postpartem depression. ONTARIO LAW REPORT, *supra* note 263, at 254.

[296] *Id.* at 255.

[297] *Id.*

(2) arrangements for the child should the intended father or mother, or both, die before the birth of the child;
(3) arrangements for the child should the intended parents cease to live together as a couple;
(4) circumstances regarding the particular manner in which immediate surrender of the child to the parents is to be effected;
(5) the right, if any, of the surrogate mother to obtain information respecting, or to have contact with, the child after surrender;
(6) prenatal restrictions upon the surrogate mother's activities before and after conception, including dietary obligations;
(7) conditions under which prenatal screening of the child may be justified or required, for example, by ultrasound, fetoscopy, or amniocentesis.[298]

Similar to the aforementioned New Hampshire statute, the Ontario Commission's proposed regulatory scheme requires the parties to seek judicial approval of the surrogacy agreement prior to the artificial conception procedure.[299] At the approval hearing, the court would evaluate the suitability of the parties to enter into the surrogate motherhood arrangement.[300] In evaluating the intended couple, the court would first determine the extant medical indications of infertility and/or health risks that would render pregnancy a risk to the couple.[301] The court would also be required to consider all relevant factors, including the marital status of the applicants, the stability of their union, and their individual stability.[302] After doing so, the reviewing court must be satisfied that the intended child will be provided with an adequate upbringing, which is a less rigorous standard than that applied to potential adoptive parents.[303]

In assessing the potential surrogate, the court would consider factors such as the physical and mental health of the surrogate, the disposition of the surrogate's partner, and the effect that the surrogacy arrangement

---

[298]ONTARIO LAW REPORT, *supra* note 263, at 259.
[299]*Id.* at 235.
[300]*Id.*
[301]*Id.* at 236-37.
[302]*Id.* at 239.
[303]*Id.*

might have on the surrogate's existing children.[304] Based on a careful consideration of all relevant factors, if the reviewing court determined that the parties to the arrangement were suitable and that the agreement itself conformed to specific legislative criteria, the court would approve the agreement.[305]

Immediately following the birth of the child, consistent with the agreement, the surrogate mother will be required to surrender custody of the child to the approved parents.[306] The legal status of the child in its new family will be confirmed by legislation and reflected in its birth registration.[307] The surrogate mother, on the other hand, will have no legal relationship to the child.[308] Furthermore, the fact that the child was born to a surrogate mother would not be reflected in the child's birth registration.[309]

Finally, the Ontario Commission addressed the possibility that, aside from hospitals and private infertility clinics that normally offer surrogacy services, individuals might attempt to establish agencies on a commercial basis.[310] Accordingly, the Commission proposed that the Ministry of Community and Social Services be required to regulate such agencies, examining the credentials of operators of agencies, the caliber and number of their staff, advertisement and recruitment practices, services offered, and fees charged.[311]

The Current Situation in Canada

The regulatory scheme at the provincial level proposed by the Ontario Commission has never became law in Canada, nor has it significantly influenced regulation at the federal level.[312] In fact, the Canadian legislature contravened the Ontario Commission's proposal when it enacted federal legislation prohibiting the practice of commercial surrogacy.[313] This legislation, commonly known as the New Reproductive

---

[304]ONTARIO LAW REPORT, *supra* note 263, at 239.
[305]*Id.* at 235.
[306]*Id.*
[307]*Id.*
[308]*Id.* at 260.
[309]*Id.*
[310]ONTARIO LAW REPORT, *supra* note 263, at 261.
[311]*Id.* at 262.
[312]*Id.*
[313]*Id.*

and Genetic Technologies Act (The Reproductive Act), bans thirteen unacceptable uses of new reproductive technologies, including commercial surrogacy.[314] It also prohibits the buying and selling of human eggs and sperm, cloning of human embryos, and sex selection for non-medical purposes.[315] The New Reproductive Act constitutes the Canadian federal attempt to regulate Canada's market for new reproductive technologies, which is quite large considering the fact that about half a million Canadians suffer from infertility.[316]

The Reproductive Act is based on the recommendations of the Royal Commission on New Reproductive Technologies (Royal Commission), which was appointed in 1989 by then Prime Minister Brian Mulroney to examine the medical, legal, and ethical issues arising from new reproductive technologies.[317] In September of 1991, the Royal Commission released a report summarizing the opinions of more than 550 Canadians who had spoken at seventeen public hearings concerning new reproductive technologies.[318] This report demonstrated that many Canadians believed that surrogate parenting is unethical.[319] According to the report, Canadians also thought that surrogacy has a potentially negative effect on society and on the child and that surrogacy is likely to foster exploitation of women.[320] Furthermore, minority groups were concerned that commercial surrogacy would economically pressure minority women into carrying a child for a wealthy couple.[321]

Based upon this public opinion and its extensive study of the effects of the new reproductive technologies, the Royal Commission released its Final Report on November 30, 1993.[322] The report, entitled *Proceed With Care: The Final Report of the Royal Commission on New Reproductive*

---

[314] *Id.*

[315] Ronald Blassnig, *Canadian Legislation to Restrict Use of 13 Reproductive Technologies*, BUFF. NEWS, June 17, 1996, at A2.

[316] *Id.*

[317] *See* Serratelli, *supra* note 276, at 668.

[318] *See* ROYAL COMMISSION ON NEW REPORDUCTIVE TECHNOLOGIES, WHAT WE HEARD: ISSUES AND QUESTIONS RAISED DURING THE PUBLIC HEARINGS 7 (1991) [hereinafter ROYAL COMMISSION INTERIM REPORT].

[319] *Id.* at 19.

[320] *Id.*

[321] *Id.*

[322] *See* ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: THE FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES 1 (1993) [hereinafter FINAL REPORT].

Technologies, states "[p]reconception arrangements commodify reproduction and children, they have potential to exploit women's vulnerability because of race, poverty, or powerlessness and leave women open to coercion."[323] Accordingly, the Report calls for the prohibition of commercial surrogacy and advocates the imposition of criminal penalties on those who act as intermediaries in the facilitation of commercial surrogacy agreements.[324] Moreover, the Final Report purports to establish that a child's legal mother is the woman who gives birth to the child.[325] In the summer of 1996, the Canadian legislature adopted the Royal Commission's recommended prohibition of commercial surrogacy arrangements pursuant to the New Reproductive Act.[326] Canadian Health Minister David Dingwall said that the Act will "limit the use of new reproductive technologies to protect the dignity and security of Canadians and will establish a broad ethical context for conduct in this field."[327] The penalty for violations of the Act, which include entering into a commercial surrogacy arrangement, is a maximum $400,000 fine or ten years in prison.[328]

Although it is too soon to determine the effect of the New Reproductive Act on reproductive technology in Canada, an examination of the Canadian experience leading up to the Act provides valuable insights into two very different approaches to the regulation of surrogacy - regulation and prohibition. Such insights may effectively guide the United States in forming its own regulatory scheme.

PROPOSED RESOLUTION FOR THE UNITED STATES

Because the current patchwork of state surrogacy laws has created confusion over the legality of surrogacy arrangements in the United States, the time has come for a comprehensive federal policy to address the issues surrounding surrogacy. Such legislation will protect both individual and societal interests alike. Unlike many existing state laws, federal surrogacy

---

[323] *Id.* at 19.
[324] *Id.* at 14.
[325] *Id.*
[326] *See* Blassnig, *supra* note 315, at A2.
[327] *Id.*
[328] *Id.*

legislation should not be aimed at prohibiting surrogacy, but at regulating it. Along these lines, Congress would do well to pattern such legislation, at least in part, after the state statutes enacted in Virginia[329] and New Hampshire,[330] and the regulation model proposed by the Ontario Law Reform Commission.[331] Such an approach would respect an individual's right to procreate and, at the same time, would also promote the government's interest in protecting the health and safety of its citizens. Furthermore, federal legislation regulating surrogacy would provide courts with uniform, consistent guidelines for adjudicating surrogacy-related disputes.

The Case Against Prohibition

If Congress decides to address this issue, it should not adopt a prohibitive approach to surrogacy. Most of the proponents of this approach, including some state legislatures,[332] have emphasized the potential for physical and psychological harm to the surrogate, the infertile couple, and the child. In doing so, they have failed to recognize that surrogacy provides an ideal reproductive alternative to many couples who suffer from infertility, an alternative that provides these couples with the constitutionally protected freedom of procreation and the joy and love that comes with parenthood. Surrogacy "prohibitionists" also fail to acknowledge the "positive motivations and experiences of surrogate mothers, who often express a strong desire to give the gift of a baby to a parent who needs a child, or who wish to satisfy personal needs of self-worth or a desire for fulfillment."[333]

As previously noted, surrogacy opponents argue that commercial surrogacy is exploitative of women in that it serves as a form of commodification of female reproductive capacities. However, this view has the ironic effect of degrading women. American society recognizes the right of the individual to contract freely and to make a living. The denial of this right to potential surrogates dehumanizes women because it implies that they are not capable of making intelligent, well-informed

---

[329] *See supra* notes 241-251 and accompanying text for a discussion of the Virginia statute.

[330] *See supra* notes 235-240 and accompanying text for a discussion of the New Hampshire statute.

[331] *See supra* notes 263-314 and accompanying text for a discussion of the Ontario Commission proposal.

[332] *See supra* notes 222-223 discussing state statutes that have prohibited surrogacy.

[333] *See* Seratelli, *supra* note 276, at 670-71.

decisions in exercising their right to contract. Specifically, it implies that they need the legal protection of a male-dominated society in order to avoid their own exploitation.[334]

Most, if not all, women who choose to be surrogates do so willingly and voluntarily. Women are no more forced into becoming surrogates than they are into any other commercial role in American society. To argue that women, even lower-income women, enter into surrogacy arrangements for lack of other opportunities, is to deny the intelligence, talents, and competence of all women. Such an argument furthers the dehumanizing view that it is intended to criticize: that women *must* use their bodies in order to make a living. In order to ensure that women are respected and celebrated in American society, women should have the power to freely exercise their right to contract and to make a living as they see fit. Specifically, women should have the freedom to voluntarily contract for the use of their reproductive capacities by entering into surrogacy arrangements. Furthermore, since men are allowed to freely exercise their right to contract in selling their own reproductive capacities by donating sperm, this view engenders an equal protection problem.[335] If men are free to sell their reproductive capacities without government intrusion, women should be free to do the same.

Opponents of surrogacy have also argued that surrogacy arrangements effectively commodify children. They argue that this will ultimately result in psychological harm to the child when the child learns that he or she was "bought" from the woman who gave birth to him or her.[336] This argument, however, fails to recognize that, of all the parties to a surrogacy arrangement, the resulting child is the true benefactor. While all of the parties may arguably benefit from a surrogacy arrangement, the surrogate mother must endure the physical and emotional burdens of pregnancy while the intended parents must also endure a number of emotional and financial burdens. Given the fact that both the surrogate mother and the intended parents had such a strong desire to bring this child into the world in the face of these burdens, the child, who learns about how he or she was brought into the world, will likely gain a sense of self-importance that few children born "naturally" will have.

---

[334] *See, e.g.*, Kerian, *supra* note 22, at 139.

[335] *See supra* notes 58-70 and accompanying text.

[336] *See supra* notes 202-220 and accompanying text.

To argue that surrogacy arrangements constitute a form of baby selling is to ignore their true purpose: to bring a child into the world for its intended parents to love and nurture. As one commentator has noted, "[s]urrogacy creates ardently wanted life . . . . The benefit of children being born to parents who cherish them; the benefit of creating life that would not otherwise exist . . . ."[337] Under this rationale, surrogacy arrangements also benefit surrogate mothers because they allow "women who wish to become surrogates to reap both economic and altruistic rewards for bestowing one of life's greatest gifts."[338] Arguably, most women who decide to become surrogates do so not only for financial gain, but also for altruistic reasons. If these women sought purely financial gain, surely they would choose a quicker, less painful means of achieving this end.

The final argument against prohibiting surrogacy is that individuals will continue to enter into surrogacy arrangements whether they are legitimized or not. Because surrogacy provides such an attractive reproductive alternative to infertile couples, surrogacy practices will continue to be unregulated. In the absence of legal safeguards, surrogacy agreements that are in fact exploitative will simply fall through the cracks. Furthermore, there would be no assurance that proper medical, legal, and counseling services would be available to potential surrogates and infertile couples because professionals in these areas would be prevented from rendering help in furtherance of illegal surrogacy arrangements.[339] Finally, if surrogacy arrangements were not legally recognized, the parties would have no legal recourse should a dispute arise concerning the custody or parentage of a child born out of such an arrangement.[340]

Although the aforementioned concerns about surrogacy are legitimate, they do not justify the prohibition of surrogacy arrangements. Rather, these concerns may be adequately addressed through a comprehensive federal regulatory scheme that maximizes the benefits of surrogacy while minimizing the potential risks.

---

[337]Peter H. Schuck, *The Social Utility of Surrogacy*, 13 HARV. J. L. & PUB. POL'Y 132, 135-36 (1990).

[338]*Id.* at 136.

[339]*See* Seratelli, *supra* note 276, at 672.

[340]*See* Seratelli, *supra* note 276, at 672.

A Proposed Regulatory Scheme

Federal surrogacy legislation, like the proposed Ontario Commission regulations, should allow parties, with the assistance of counsel, the opportunity to reach a written agreement that satisfies their needs and objectives under the auspices of clear, well-defined guidelines. As in the Ontario Commission regulations, the parties should be required to consider and agree upon a resolution of health insurance protection for the prospective surrogate; arrangements for the child should a divorce or death occur as between the intended parents; arrangements for the child should the child be born handicapped; arrangements for the release of the child upon birth; prenatal restrictions upon the surrogate mother's activities; and arrangements for the payment of the surrogate mother's medical and legal expenses.[341]

Furthermore, the agreement must expressly require the surrogate mother to surrender the child immediately after the child's birth. Accordingly, the name of the intended parents should appear on the child's birth certificate, recognizing them as the parents of the child for all legal purposes, regardless of the child's physical condition at birth.[342] This requirement, however, should only be enforced in gestational surrogacy arrangements, in which the surrogate carries to term a child that is biologically related to the intended parents. In this context, the distinction between gestational and traditional surrogacy arrangements, in which the surrogate carries to term a child that is biologically related to her, is necessary because a gestational surrogate should be afforded no legal right to a child that is the true biological child of the intended couple.

In traditional surrogacy arrangements, on the other hand, the surrogate should be permitted to decide whether or not she wishes to keep the child for a certain number of days after the birth of the child. As in the New Hampshire statute, if the surrogate decides to keep the child, the parental rights of the intended parents would terminate and they would no longer be required to provide financial support to the child. If, however, the surrogate decides to surrender the child, she automatically relinquishes her parental rights to the child, and these rights would then vest in the

---

[341] *See supra* note 254 and accompanying text.

[342] As provided by the proposed Ontario Commission regulations, the intended parents should be required to accept parental rights over the child even if the child is not born "perfect." *See supra* note 253 and accompanying text.

intended parents.[343] The right of rescission is only fair in a traditional surrogacy arrangement because, unlike the gestational surrogacy situation, the surrogate mother is in fact the biological mother of the resulting child, and her rights as such should be recognized. Moreover, this requirement provides the traditional surrogate the opportunity to make a voluntary decision about whether or not to give up a child that is biologically her own, thus reducing the appearance of coercion. In this sense, the regulations proposed here mirror the Virginia and New Hampshire surrogacy statutes. Unlike these statutes, however, the right of recission exists only in gestational surrogacy arrangements.

Similar to the New Hampshire statute and the proposed Ontario Commission regulations, the parties also should be required to seek judicial preauthorization before the artificial conception procedure may legally begin. As one commentator has noted, "[r]equiring the parties to seek judicial preapproval will impress upon them the seriousness of the surrogacy agreement and will provide a forum in which the contract can be discussed in detail."[344] In order to obtain judicial approval, the court must find that:

(1) the parties gave their informed consent to the agreement;
(2) physical and psychological examinations have been completed;
(3) the agreement does not contain any illegal or unconscionable terms;
(4) no evidence of exploitation or coercion exists in the agreement; and
(5) that the agreement is in the best interests of the intended child.

In examining these criteria, the court must review with special care the results from the physical and psychological examinations of the parties. First, the court must determine that the intended mother is either infertile or unable to bear children without substantial health risks. Second, the court must determine that there are no physical health risks that would harm the surrogate mother or the potential child. Third, the court must determine that all parties have the capacity to perform their obligations

[343] *See supra* note 254 and accompanying text.
[344] *See supra* note 254 and accompanying text.

under the contract without any psychological ramifications. Finally, the results from the physical and psychological testing of both the surrogate and the intended parents should be disclosed to all parties so that, even if the court is satisfied, that all necessary criteria are met, the parties may refuse to enter into the contract if they are not satisfied with the results. Nevertheless, if and only if the court determines that all parties are willing and able to enter into the contract and that all other legislative criteria are satisfied will the court approve the contract.[345]

Ideally, the prospective surrogate should have had a successful pregnancy prior to entering into the surrogacy arrangement. As discussed earlier, this requirement would ensure that the surrogate is aware of the physical and psychological ramifications of pregnancy and her own individual response to them. Although the Virginia statute's requirement that the surrogate be married may ensure that the surrogate is part of a stable environment, such a requirement may have the effect of attaching a negative social stigma to out-of-wedlock pregnancies.[346] Furthermore, such a requirement is not essential to a successful surrogacy arrangement. Therefore, it should not be legally enforced.

In order to reduce the "commercialization" of surrogacy arrangements, the Virginia and New Hampshire statutes prohibit the use of third party brokers and payment of a fee that exceeds the surrogate mother's actual costs in carrying and delivering the child.[347] Likewise, Congress should forbid the use of third-party brokers in order to maintain the intimacy of the parties' decision to produce a child through a surrogacy arrangement. By removing the influence of third parties, intended parents and surrogate mothers can mutually evaluate each other on a first hand basis, rather than engage in an impersonal, mediated transaction.[348]

---

[345]In the *Baby M* case, the court expressed concern over the surrogacy arrangement because it did not provide the natural mother with the necessary counseling and psychological evaluation, and it failed to "inquire into the fitness of the [purchasing couple] as custodial parents." *In re* Baby M, 537 A.2d 1227, 1241, 1248 (N.J. 1988). The regulations proposed in this Comment would effectively remedy these concerns.

[346]*See* Elizabeth Seale Cateforis, *Surrogate Motherhood: An Argument for Regulation and a Blueprint for Legislation in Kansas*, 4 KAN. J. L. & PUB. POL'Y 101, 109 (1995).

[347]*See* VA. CODE ANN. §§ 20-162(A), 20-165; N.H. REV. STAT. ANN. §§ 168-B:16(IV), 168-B:25(V) (1998).

[348]*See* Cateforis, *supra* note 346, at 110.

Unlike the Virginia and New Hampshire statutes, however, federal surrogacy legislation should not prohibit the compensation of surrogates beyond their actual expenses. Allowing payment to a surrogate effectively recognizes the time and effort spent by the surrogate on behalf of the intended parents. Furthermore, it respects the surrogate's freedom to contract for her services. Many surrogates are prompted in part by economic reasons. Thus, as one commentator has noted, "[p]rohibiting a fee will unnecessarily restrict the practice and will perpetuate the cycle of non-payment for 'women's work.'"[349] As suggested by the proposed Ontario Commission regulations, surrogate compensation, including compensation for profit, should be carefully reviewed and approved by the court prior to implementation of the surrogacy arrangement.[350]

The proposed legislation should also require tender of the promised fee even if the surrogate miscarries in a certain month or if the child is stillborn. Regardless of whether she gives birth to a perfect baby, a surrogate mother has tendered her services, and payment for such services under these circumstances would not be unwarranted.

Finally, challenges brought by surrogate mothers after the birth of the child in gestational surrogacy arrangements and after the relinquishment of parental rights in traditional surrogacy arrangements, should not be cognizable unless equitable grounds, such as coercion or duress, exist to provide a basis for judicial relief. Since the court will likely have detected these problems before approving surrogacy arrangements, these instances would be rare. Should these problems arise after the birth of the child, however, the court should evaluate the claim according to the best interests of the child standard, which is the same standard employed in most other custody disputes.[351]

CONCLUSION

The inconsistent precedent arising from surrogacy case law illustrates the judiciary's need for uniform legislative guidance in adjudicating surrogacy-related disputes. Such guidance should come in the form of the regulation, not prohibition of surrogacy arrangements. Although the arguments for prohibition raise valid concerns with respect to the legality

---

[349] *Id.*

[350] *See supra* notes 255-261 and accompanying text.

[351] *See* Cateforis, *supra* note 346, at 110.

and fairness of surrogacy arrangements, such concerns may be adequately addressed by the regulations proposed in this Comment. If implemented, these regulations would protect the procreative rights of infertile couples, protect surrogates and resulting children from exploitation and other potential ill effects of surrogacy arrangements, and also respect the contract rights of women who wish to act as surrogates. Under these circumstances, surrogacy may ultimately be viewed as a positive reproductive alternative that has the potential to benefit all parties involved.