INFORMED CHOICES AND UNIFORM DECISIONS: ADOPTING THE ABA'S SELF-ENFORCING ADMINISTRATIVE MODEL TO ENSURE SUCCESSFUL SURROGACY ARRANGEMENTS

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Non-traditional families are on the rise in America today, with more and more same-sex couples raising families together. Yet, all same-sex partners seeking to become parents must make use of some assisted reproductive technique ("ART"), as must some heterosexual married couples. Despite the growing number of people who want to create families, including those that resort to ARTs to have genetically-related children, there are significant moral, economic, and legal obstacles in their way. What has long been needed is a codified roadmap for a successful surrogacy agreement that delineates the rights and obligations of the parties involved, as well as the responsibilities to the resulting child. In addition, such a codified roadmap must vest parentage automatically in the intended parents, with no judicial intervention or approval required, so that the children born are guaranteed their legal parents from conception. This article argues that state courts and legislatures need to emerge from the "uncharted waters" of surrogacy and adopt the ABA's self-executing, administrative model for surrogacy agreements. Adoption of this model not only allows prospective intended parents to know that their intent will be legally preserved, but also ensures that children born to them are treated equally. Such an attempt to equalize children's status demonstrates a policy for eliminating the penalty for illegitimacy and ensuring that children born through surrogacy enjoy the same rights as children born to a married couple.

I. INTRODUCTION

Non-traditional families are on the rise in America today, with more and more same-sex couples raising families together.[1] The advent of states' adoption

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[1] In 2007, the Maryland court observed that "there appears to be a trend towards the gradual erosion of the 'traditional' nuclear family in today's society to the extent that the classic family structure, consisting of a mother, father, and children born to them during the marriage, is less and less the norm." Conaway v. Deane, 932 A.2d 571, 632 (Md. 2007). *See generally* Christine M. Lorillard,

of same-sex marriage will only increase these numbers. Same-sex couples' motivations are the same as those of heterosexual couples: to create a family unit, to demonstrate love and commitment to a partner, to fulfill a biological drive, or to fulfill cultural and/or social expectations.[2] Yet, all same sex partners seeking to become parents must make use of some assisted reproductive technique ("ART"), as must some heterosexual married couples.

There are a growing number of people who want to create a family including genetically related children and who must resort to ARTs to have these children. Despite these growing numbers, there are significant moral, economic, and legal obstacles in having children this way.[3] Catherine DeLair has observed that physicians are the gatekeepers, deciding who will receive treatment; yet these physicians may have their own moral, social, ethical, or religious prejudices against reproductive technology or homosexuality.[4] There are certainly economic barriers, as well, since ARTs are expensive, and often not covered by insurance.[5] Surrogacy is especially expensive because it involves a third person and extra technology.[6] Additionally, surrogacy is the only ART that is surrounded by legal barriers to its use. While the physician may be the gatekeeper to other ARTs, the courts are the gatekeepers in surrogacy arrangements.

An early problem of all assisted reproduction was determining the parentage of children born through the use of ARTs.[7] However, state courts have now come to defer to the intended parent(s) in ARTs other than surrogacy. Although California has led the way in using the intent of the parties to determine the legal parentage of a child born of surrogacy,[8] many states have not followed suit. In such states, parental rights do not automatically vest by consent or intent; rather, they require judicial intervention.[9] Such states vary in their intervention, from imposing certain criteria for surrogacy[10] to outlawing it altogether.[11] Thus, the only intended parents who need state/judicial approval for legal parenthood are women who cannot bear or carry a child and gay men.

Placing Second-Parent Adoption Along the "Rational Continuum" of Constitutionally Protected Family Rights, 30 WOMEN'S RTS. L. REP. 1 (2008).

[2] Catherine DeLair, *Ethical, Moral, and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Man and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 148 (2000).

[3] *See infra* Part II.

[4] DeLair, *supra* note 2, at 150.

[5] *Id.* at 159.

[6] *Id.*

[7] *See* Jerald V. Hale, *From Baby M to Jaycee B.: Fathers, Mothers, and Children in the Brave New World*, 24 J. CONTEMP L. 335, 369 (1998).

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

[9] Debra J. Baselton & Maxine Weiss Kunz, *Non-Traditional Families and Alternative Family Building: Securing Parental Rights for Intended Parents*, 20 DCBA BRIEF 30, 30 (2007).

[10] *See infra* note 19.

[11] *See infra* note 17.

While no state laws directly prohibit or restrict ARTs such as artificial insemination, embryo transfer, or intracytoplasmic sperm injection[12] for women, lesbian or straight,[13] many state laws severely restrict access to surrogacy.[14] State courts consider the legality and enforceability of surrogacy agreements themselves, as well as of the compensation to the surrogate.[15] Two states criminalize surrogacy,[16] seven states have statutes prohibiting surrogacy altogether,[17] and one state has two Attorney General opinions indicating that surrogacy agreements are unenforceable until the legislature specifies otherwise.[18] Six states restrict surrogacy to married couples.[19] Many states have no specific legislation regarding surrogacy.[20] In such instances, courts often resort to determining legislative intent regarding surrogacy by applying related statutes, usually adoption or parentage statutes.[21] These statutes are almost uniformly interpreted to prevent the intended parent or parents from establishing parentage.[22]

These laws, in theory, substantially interfere with gay men and infertile women's rights to procreate. Yet, as John Robinson points out, there is not yet sufficient precedent to indicate whether a challenge on such ground would succeed.[23] The Constitution does, however, guarantee all persons the right to procreate.[24] It follows that such a right inures regardless of marital status or sexual orientation.[25] Logic would dictate, as Justice Brennan stated in *Eisenstadt v. Baird*,

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[12] *See ABA Model Act Governing Assisted Reproductive Techniques*, 25 Fam. L.Q. § 101, § 102(1), at 175 (2008) [hereinafter *ABA Model Act*].

[13] John A. Robinson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 349 (2004).

[14] State laws on surrogacy are constantly changing. At the time of this writing, the following information was correct. See Darra L. Hofman, *'Mama's Baby, Daddy's Maybe:' A State-By-State Survey Of Surrogacy Laws And Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449 (2009), for the fullest and most recent discussion of surrogacy on a state by state basis.

[15] DeLair, *supra* note 2, at 162.

[16] Hofman cites Washington D.C. and Washington State as providing the possibility of criminal sanctions. Hofman, *supra* note 14, at n.22; n.53.

[17] D.C. CODE § 16-402 (2001); IND. CODE ANN. § 31-20-1-2 (West 1999); LA. REV. STAT. ANN. § 9:2713 (1991); MICH. COMP. LAWS § 722.859 (West 2002); NEB. REV. STAT. § 25-21,200 (1995); N.Y. DOM. REL. LAW § 123 (McKinney 1999); N.D. CENT. CODE § 14-18-05 (2004).

[18] Kan. Op. Att'y Gen. 96-73 (1996); Kan. Op. Att'y Gen. 82-150 (1982); KY. REV. STAT. ANN. § 199.590 (West 2009).

[19] FLA. STAT. ANN. § 742.15 (West 2009); NEV. REV. STAT. ANN. § 126.045 (West 2008); N.H. REV. STAT. ANN. § 168-B:1 (2009); TEX. FAM. CODE. ANN. § 160.754 (Vernon 2009); UTAH CODE ANN. § 76-7-204 (West 2005); VA. CODE ANN. § 20-156 (West 2004).

[20] "The vast majority of states are silent or near silent on the issues of whether, when, and how surrogacy agreements are enforceable, void, or voidable. . . . In many of the states that are 'silent' on surrogacy, bills have been shot back-and-forth through the legislature but come to naught." Hofman, *supra* note 14, at 454. Hofman has also observed that "[o]f those states that do have laws on the books regarding such agreements, the responses range from relying heavily on the Uniform Parentage Act or party intent to outright bans or even criminalization of surrogacy." *Id.*

[21] *See infra* Part IV.

[22] *Id.*

[23] Robinson, *supra* note 13, at 352.

[24] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[25] Robinson, *supra* note 13, at 325.

that "if the right to privacy means anything, it means the right of the individual, married or single, to decide whether to bear or beget a child."[26] Such procreative liberty, as various scholars have observed, demands the right to use ARTs when necessary to achieve such a goal.[27]

However, because surrogacy alone of all ARTs involves a third person, it does require some regulation, although uniform regulation has not to date been created. What has long been needed is a codified roadmap for a successful surrogacy agreement that delineates the rights and obligations of the parties involved, as well as the responsibilities to the resulting child.[28] Such a codified roadmap should also vest parentage automatically in the intended parents, with no judicial intervention or approval required.

Various model or uniform surrogacy acts have been proposed in the past twenty years;[29] none have been adopted by a state legislature. However, in 2008 the Family Law Section produced the ABA Model Act on Assisted Reproductive Techniques (the "Act" or "Model Act"). The stated purpose of the Act is to delineate for participants in ARTs "clear legal rights, obligations, and protections . . . by establishing legal standards" addressing some of society's most pressing concerns about ARTs.[30] The Act includes two surrogacy provisions, both provisions break new ground by allowing compensation to the surrogate. This provision eliminates one of the major obstacles to successful surrogacy arrangements.[31]

The first alternative is a Judicial Preauthorization model. It requires:

> all participants to enter into a written surrogacy agreement and submit the agreement for a judge's express approval prior to the performance of any medical procedures to initiate the pregnancy. This model also requires a second court order after the birth of the child to confirm the parties' continuing agreement and amend the birth records.[32]

As such, it perpetuates the problem of a judge as gatekeeper of successful surrogacy arrangements.

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[26] Eisenstadt v. Baird, 405 U.S. 438, 543 (1972).

[27] Robinson, *supra* note 13, at 325. *See also* DeLair, *supra* note 2, at 178.

[28] 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 (1997). Kerian similarly called for legislative guidelines twelve years ago.

[29] *Id.* at 143 (noting the Uniform Conception Act and the Model Surrogacy Act. The Uniform Conception Act had two alternatives: a judicial authorization model, and a model banning surrogacy altogether.).

[30] *See* ABA Model Act, Prefatory Note, at 171. The Model Act specifies that it is not the intent of the Act to "conflict with or supersede provisions of the Uniform Parentage Act." *Id.* at art. 6 at 188.

[31] *Id* at §§ 701-11, at 188-97.

[32] Charles P. Kindregan Jr. & Steven Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 220 (2008).

The second is an Administrative model providing for a "self-enforcing" gestational agreement that does not require judicial approval.[33] This model perhaps recognizes that most surrogacy arrangements "proceed routinely to the conclusion desired by all parties at the outset—a woman who can bear children assisting a childless couple to fulfill their desire for a biologically-related child."[34] The Administrative model was intended to provide a more "streamlined, user-friendly" model to establish parentage in surrogacy arrangements, which is faster and less expensive for the intended parents, and also provides greater consistency and judicial economy.[35] As its drafters, Charles Kindregan Jr. and Steven Snyder observe "it may even be the start of a trend toward a contractual—administrative model for surrogacy arrangements."[36]

Under this alternative, both the surrogate and the intended parents must meet certain eligibility requirements in order for the agreement to be valid.[37] The most stringent provide that at least one of the intended parents have a genetic connection to the child and that the intended parents show a medical need for surrogacy, with a physician's affidavit attached to the agreement.[38] While this might be read to preclude a gay couple as intended parents, Kindregan and Snyder have observed that "the most obvious example of such a medical need is some form of infertility, such as the inability to produce a pregnancy"[39] implying that other examples exist. This term of the Model Act's second surrogacy provision must be clearly delineated as applying to others other than infertile women. The Act itself makes this implicitly clear in its Prefatory Note, which provides that the Model Act is to provide a "flexible framework . . . to guide the expansion of ways by which families are formed."[40] The Prefatory Note also recognizes that ARTs will be used to enable "individuals to have children when for personal reasons they cannot or choose not to do so by means of sexual intercourse."[41]

Such a reading of the Model Act's second surrogacy alternative underscores the recognition by states that now permit same sex marriage,[42] and even that of many that do not, that sexual orientation has no impact on the well-being of children raised in a same-sex household.[43] Research shows that children raised by

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[33] *Id.* at 223.

[34] Surrogate Parenting Assocs. v. Commonwealth, 704 S.W.2d 209, 214 (Ky. 1986).

[35] Kindregan & Snyder, *supra* note 32, at 224.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at n.114.

[40] ABA Model Act, Prefatory Note, at 172.

[41] *Id.*

[42] As of this writing, Massachusetts, Connecticut, Iowa, Maine, Vermont, and New Hampshire permit gay marriages. California briefly allowed gay marriage before Proposition 8 banned it again in November 2008. However, the marriages that took place between June and November 2008 remain valid in California.

[43] Lorillard, *supra* note 1, at 16.

homosexual parents are just as healthy and well-adjusted as children raised by heterosexual parents; sexual orientation has no measurable impact.[44] A New Jersey court additionally noted that:

> [S]tudies on the subject of homosexual parents . . . have shown that, "overall . . . development of gender identity, of gender role behavior, and sexual preference among offspring of gay and lesbian parents was found in every study to fall within normal bounds . . . no evidence has been found for significant disturbances of any kind in the development of sexual identity among these individuals."[45]

Since the present debate over same sex marriage is often about the welfare of children,[46] and since marriage itself is not a "proxy for parental fitness,"[47] any person or couple who intends to conceive a child through surrogacy and conforms to the provisions of the administrative alternative, should be guaranteed legal protection for the family created through that surrogacy agreement.

This article argues that state courts and legislatures need to emerge from what Darra Hofman has called the "uncharted waters"[48] of surrogacy and adopt a self-executing, administrative approach to surrogacy to best preserve the intent of the parties to the surrogacy arrangement, and to ensure the best interests of the children born to those parties. Adoption of this alternative, with the caveat that it be interpreted to include gay men who cannot otherwise have a genetically-related child, not only allows prospective intended parents to know that their intent will be legally preserved, but also ensures that children born to them are treated equally, since at common law, a child's legal status was defined by the relationship of the father and mother.[49] Such attempts to equalize children's status demonstrates, as

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[44] JAMES B. BOSKEY & JOAN H. HOLLINGER, ADOPTION, LAW AND PRACTICE, § 3.06(6) (2005). Boskey also notes the strong support of all professional organizations with expertise in child development and family dynamics for placement of children in homosexual households. *Id.*

[45] *In re* Adoption of Child by J.M.G., 632 A.2d 550, 553-54 (N.J. Super. Ct. Ch. Div. 1993) (citing Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1031-32 (1992); Daniel Goldman, *Studies Find No Disadvantage in Growing Up in a Gay Home*, N.Y. TIMES, Dec. 2, 1992, at C14).

[46] Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 307 (2006).

[47] *Id.* at 309.

[48] Hofman, *supra* note 14, at 467.

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> At common law, parentage derived from two events, a child's birth to its "mother," and the mother's marriage to a man. Children born out-of-wedlock had only one legal parent, their birth mother. Recognizing the many advantages that flowed to children from having two parents, legislatures enacted filiation or paternity proceedings to confer legal parentage on non-marital biological/genetic fathers . . . a status which carries support and other obligations . . . . Similarly, adoption statutes established legal parentage for married couples who were biological/genetic strangers to a child . . . . Adoption also permitted an unrelated person, married to a child's mother or father subsequent to the child's birth, to attain "parental" rights, rather than functioning only as a step-parent. Over time, by legislative action and/or judicial construction, adoption became available to unmarried

Joan Catherine Bohl points out, a policy for eliminating the penalty for illegitimacy,[50] and ensuring that children born through surrogacy enjoy the same rights as children born to married couples.

Part II of this Article considers the history and types of surrogacy, explores the legal, moral, and economic controversies over surrogacy and discusses some seminal cases. Part III delineates the administrative surrogacy provision of the 2008 ABA Model Act Governing Assisted Reproductive Techniques. Part IV explores the hypothetical application of the administrative alternative of the Model Act to the surrogacy cases discussed in Part II, as part of an argument that state adoption of the Act will remedy many of the problems that have plagued surrogacy cases. This Article concludes that surrogacy should ultimately take its place alongside other assisted reproductive techniques that are equally accessible to all, without the need for judicial intervention.

II. A DESCRIPTIVE HISTORY OF SURROGACY AND THE CONTROVERSIES SURROUNDING IT

As a form of ARTs, surrogacy is a relatively new procedure, and was not widely available or prevalent until the 1980s. However, despite the many moral, ethical, and religious objections levied against surrogacy,[51] many trace surrogacy back to the Old Testament, pointing to the problem of the infertility of Abraham and his wife Sarah.[52] In the Biblical story, Sarah persuaded her husband, Abraham, to have intercourse with her handmaiden, Hagar.[53] Sarah stated that her intent was that "I may obtain children by her."[54] Hagar gave birth to the child Ishmael, who was raised by Sarah and Abraham.[55] While some have characterized this as a story of a concubine or second wife, rather than as one of a surrogate mother,[56] the fact is that before the advent of the surrogacy contract, the practice of surrogacy was an altruistic one, with the surrogate usually a friend or family member.[57]

> same-sex couples . . . . The legislative purpose behind all these expansions of parentage has consistently been the best interests of the child, both economic and . . . psychological.

In re Adoption of Sebastian, 879 N.Y.S.2d 677, 679-80 (N.Y. Sur. Ct. 2009); *see also* Jessica Hawkins, *My Two Dads: Challenging Gender Stereotypes in Applying California's Recent Supreme Court Cases to Gay Couples*, 41 FAM. L.Q. 623, 625 (2007).

[50] Joan Catherine Bohl, *Gay Marriage in Rhode Island: A Big Issue for a Small State*, 12 ROGER WILLIAMS U. L. REV. 291, 301 (2007).

[51] *See infra* Part III.

[52] Ted Peters, *Surrogate Motherhood: An Ethical Puzzle*, *in* FOR THE LOVE OF CHILDREN: GENETIC TECHNOLOGY AND THE FUTURE OF THE FAMILY 59-60 (Don R. Browning & Ian S. Evison ed., 1996); *see also* Kerian, *supra* note 28, at 117.

[53] *Genesis* 16:2 (emphasis added).

[54] *Id.* Both the King James version and the New American Standard version have Sarah issuing her intent in the first person.

[55] *Genesis* 16:15.

[56] *See e.g.*, Katy Ruth Klinke, *The Baby M Controversy: A Class Distinction*, 18 OKLA. CITY U. L. REV. 113, 115 (1993) (giving several examples).

[57] *See* Kerian, *supra* note 28, at 117.

Surrogacy arose as a viable form of ARTs with the advent of new technology that allowed the creation of an embryo with the surrogate's egg and the father's sperm, but without the need for sexual intercourse, as between Abraham and Hagar. In this procedure, called "traditional surrogacy," the surrogate is artificially inseminated, and then carries the child to term, relinquishing her parental rights to the child's natural father.[58] The natural father's wife may then adopt the child in a proceeding referred to as step-parent adoption, an exception to the general statutory provision that *both* natural parents must relinquish their rights in order for a child to be eligible for adoption.[59]

A second form of surrogacy is "gestational surrogacy," in which the surrogate is implanted with an embryo that is the product of in vitro fertilization.[60] The embryo consists of the "combined gametes of two others, who may be third party donors, the husband and wife seeking the surrogate's services, or a combination of the two."[61]

All of these methods of creating a child challenge the traditional notion of the nuclear family, and as such, have provoked challenges over payment to the surrogate and assignment of parental rights.[62] Litigation over surrogacy issues appeared soon after the growth of surrogacy in the 1980s, and courts faced the challenge of deciding these issues in the absence of statutory law on surrogacy per se.[63] Such was the case in what would become the watershed in surrogacy litigation, *In re Baby M.*[64]

In that case, a married couple, the Sterns, entered into a surrogacy contract with Mary Beth Whitehead because Mrs. Stern was infertile.[65] The contract provided that Whitehead would be impregnated through artificial insemination, using Mr. Stern's sperm, carry the child to term, bear it, deliver it to the Sterns, and terminate her parental right to the child to allow Mrs. Stern to adopt the child.[66] The contract provided for payment of $10,000 to Mrs. Whitehead, with the provision that the payment was not for termination of parental rights or in exchange

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[58] *See generally* Kevin Tuininga, *The Ethics of Surrogacy Contracts and Nebraska's Surrogacy Law*, 41 CREIGHTON L. REV. 185 (2008).

[59] *See generally* Lorillard, *supra* note 1, at 4.

[60] *See* Tuininga, *supra* note 58, at 188.

[61] *Id; see also* Kerian, *supra* note 28, at 114 (describing gestational surrogacy as that involving the embryo of the genetic material of the intended mother and father, and donor surrogacy as that where the egg and/or sperm used to create the embryo is donated by a third party).

[62] *See* Kindregan & Snyder, note 33, at 203 ("The growing use of Assisted Reproductive Technology (ART) raised difficult issues surrounding parentage, the interests of children, use of the technology by same-sex couples and in other nontraditional families, and the resolution of conflicting interests when the law provided no guidance.").

[63] *See ABA Model Act Governing Assisted Reproductive Techniques*, 42 FAM. L.Q. vii, Editor's Note (2008)(stating that over the last twenty years, ARTs have not been consistently regulated by the states).

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

[65] *Id.* at 1235.

[66] *Id.* Whitehead's husband was also a party to the contract. *Id.*

for surrendering the child for adoption, but for services.[67] Mrs. Whitehead volunteered to be a surrogate because of the sympathy she felt for those who could not have a child and because she wanted money to help her family.[68]

After becoming pregnant, Mrs. Whitehead immediately bonded with the child she was carrying, and when the child was born, she realized she could not give up the child.[69] Although she initially kept her part of the contract and relinquished the child to the Sterns three days after birth, she went to them the next day and told them she could not live without the child and that they must return the child to her.[70] Because the Sterns were concerned by the magnitude of her despair and thought that she might commit suicide, they agreed to return the child to her, believing that she would eventually keep her word and surrender the child.[71]

The notorious struggle over the child began when the Sterns realized that Mrs. Whitehead was not going to return the child.[72] The Sterns filed suit to enforce the surrogacy agreement, and sought and obtained an ex parte order granting them temporary custody because they feared Mrs. Whitehead would flee with the child.[73] When the process server entered the Whitehead's home, Mrs. Whitehead handed the baby to her husband, who fled with the baby through a window.[74] The Whiteheads fled to Florida with the baby, where they stayed with Mrs. Whitehead's parents.[75] Eventually, the police forcibly took the child from Mrs. Whitehead under a court order.[76]

The Sterns proceeded with their original suit and were awarded temporary custody.[77] The trial court eventually held that the contract was valid, ordered Mrs. Whitehead's rights terminated, gave sole custody to Mr. Stern, and ordered that Mrs. Stern be allowed to adopt the child, as per the terms of the contract.[78]

The Supreme Court of New Jersey, after considering Mrs. Whitehead's instability, gave custody to the Sterns because it was in the best interests of the child, but restored Mrs. Whitehead's parental rights and voided the adoption by Mrs. Stern.[79] The court evaluated the surrogacy agreement under New Jersey's baby-selling statute and characterized the agreement as "baby-bartering," which it found was "illegal and perhaps criminal."[80] While not finding surrogacy contracts

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[67] *Id.* at 1241.
[68] *Id.* at 1236.
[69] *In re Baby M*, 537 A.2d 1227, 1236 (N.J. 1988).
[70] *Id.* at 1236-37.
[71] *Id.* at 1237.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *In re Baby M*, 537 A.2d 1227, 1237 (N.J. 1988).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 1259.
[80] *Id.* at 1240.

automatically void in the state, the court took particular issue with the payment of money to the surrogate,[81] and invalidated the surrogacy contract because it conflicted with the law and public policy of New Jersey.[82]

The resolution of issues such as these, as is pointed out in the Prefatory Note to the Model Act, "has caused confusion and contradictions in the application of a body of existing statutory and common law,"[83] producing "a wide variety of often-contradictory responses to assisted reproduction issues."[84] What follows is a synopsis of the various arguments that have been made against surrogacy generally, and paid surrogacy specifically, and their application in cases where the surrogacy agreement was uncontested by the parties. After more than 25 years of surrogacy litigation, however, these arguments have been countered by scholars and courts alike, and these counterarguments, also synopsized here, pave the way for an administrative approach to surrogacy, without the need for judicial approval.

A. Legal Arguments

Opponents of surrogacy often begin their legal arguments against it by announcing that surrogacy contracts violate the Thirteenth Amendment's prohibition of slavery, in that they allow for the "trade" of a child for financial consideration.[85] The Supreme Court of California in *Johnson v. Calvert* reasoned, however, that the surrogacy contract in that case provided that the pregnant surrogate retained her "absolute right" to abort the child, thereby preserving her "freedom" under the Thirteenth Amendment.[86]

Many other problems with surrogacy contracts arise in connection with an individual state's existing statutes, most often in the context of adoption. For example, courts in jurisdictions with anti-baby-selling statutes have split over whether surrogacy contracts are lawful. Secondly, statutes providing for the use of artificial insemination by married couples also promote arguments about whether the statute should be extended to surrogacy.

Courts looking to outlaw surrogacy, or declare surrogacy contracts void, most often do so by likening surrogacy to statutorily prohibited baby-selling. In *In re Baby M.*, for example, the New Jersey Supreme Court argued that the purpose of the state's anti-baby-selling statutes compelled an interpretation that included prohibition of paid surrogacy.[87] Thus, the court held that a surrogate mother could not be compelled to give up her parental rights pursuant to a surrogacy contract

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[81] *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988).

[82] *Id.* at 1234.

[83] ABA Model Act, Prefatory Note, at 171.

[84] Kindregan & Snyder, *supra* note 32, at 206.

[85] *See e.g.*, *In re Baby M*, 525 A.2d at 1253 n.12; *see also* Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) (in which the surrogate asserted this as one of her arguments).

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

[87] *In re Baby M*, 537 A.2d at 1248.

because such a contract "is the sale of a child, or, at the very least, the sale of a mother's right to her child."[88] The *Baby M* court also found that a surrogacy contract that pays full compensation only upon the delivery of a child indicated that the contract was not merely for the surrogate's services for carrying the child because the contract specified that the intended parents "would pay nothing in the event the child died before the fourth month of pregnancy and only $1,000 if the child were stillborn."[89]

Courts have also prohibited surrogacy despite state statutes permitting other forms of assisted reproduction by distinguishing surrogacy as providing an actual life, rather than the potential for life. In *In re Adoption of Paul*, for example, a New York court held that a statute permitting artificial insemination by married couples could not logically be extended to include surrogacy.[90] The court reasoned that surrogacy was not analogous to sperm donation as a "means to achieve parenthood."[91] The court found that there was a "significant difference" in that:

> a sperm is merely a gamete, potentially capable, if successfully joined with an egg, of creating an embryo which must then survive gestation to birth, while the 'surrogate' mother is supplying a life-in-being, having provided, not only the egg, but protection and nourishment during gestation and having delivered a human child capable of independent survival. It is this difference that renders surrogate mothering for financial gain illegal baby-selling . . . .[92]

Finally, since most surrogacy agreements provide for the sole custody of the child by the father immediately upon birth—only later, perhaps to be adopted by a spouse or partner—surrogacy contracts have been found to violate state statues that provide that "children should remain with and be brought up by both of their natural parents."[93] The New Jersey court in *Baby M* found that such was the purpose of the state's adoption act.[94] The court reasoned that, "in the surrogacy context, the whole purpose and effect of the contract is to give the father the exclusive right to the child by destroying the mother's rights."[95]

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[88] *Id.* The court reasoned that "almost every evil that prompted the prohibition on the payment of money in connection with adoptions exists here." *Id.*

[89] *Id.* at 1241; *see also In re Adoption of Paul*, 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990). The New York court similarly held that a surrogacy contract would only be upheld if the surrogate agreed not to accept compensation because "compensation direct to the mother for her 'services' in conceiving, carrying and giving birth to the child" was not permitted under the state's anti-baby-selling statute. *Id.* at 817.

[90] *In re Adoption of Paul*, 505 N.Y.S. at 818.

[91] *Id.*

[92] *Id.*

[93] *In re Baby M*, 537 A.2d 1227, 1247 (N.J. 1988).

[94] *Id.* The court explained that "the first stated purpose of the previous adoption act . . . [is] to protect the child from unnecessary separation from his natural parents . . . . While not so stated in the present adoption law, this purpose remains part of the public policy of this State." *Id.*

[95] *Id.*

However, no court has invalidated a relinquishment of parental rights or consent to adoption merely because the surrendering parent happened to be a surrogate mother.[96] Courts upholding parental relinquishment or consent in the face of a state statute prohibiting baby-selling have done so for two reasons. First, some courts find that the payment in a surrogacy contract is simply compensation for the surrogate's *services* of carrying a child.[97] They reason that surrogacy contracts do not implicate the purpose of anti-baby-selling statutes, which is to keep baby brokers from overwhelming an expectant mother with financial incentives to give up the child.[98] Since surrogacy contracts are formed *prior* to conception, the surrogate mother is not motivated by avoiding consequences of an unwanted pregnancy or fear of the financial burden of child rearing, but by her desire to help an individual or couple who cannot conceive and desperately want a child.[99] Additionally, payment is usually made over the nine months of the pregnancy, indicating that it is compensation for the surrogate's services in carrying the child, not in a lump sum only if and when a healthy baby is produced.[100]

Alternatively, some courts uphold surrogacy contracts as long as they do not include a monetary compensation clause. These courts reason that surrogacy cannot constitute baby-selling in the absence of compensation and the policy concerns underlying statutes prohibiting baby-selling are not implicated when a surrogate's decision to surrender parental rights is not motivated by financial gain.[101] For example, although a New York court invalidated an uncontested surrender of parental rights by a surrogate in *In re Adoption of Paul*, it found that the surrender would have been allowed if the parties had foregone compensation as a term of the contract.[102]

Second, some courts have upheld surrogacy contracts because they find them consistent with state statutes permitting other types of ARTs, such as in vitro fertilization, in that they all involve "tampering with nature in the interest of

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[96] Most other cases, including *In re Baby M*, involve contested adoptions and custody disputes in which the surrogate mother wished to retain parental rights. *See e.g., Id.* at 1248 (holding a surrogacy agreement was invalid where the surrogate was to receive $10,000 upon delivery of the child but changed her mind and refused to consent to adoption); *see also* R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998) (refusing to enforce a surrogacy agreement against a birth mother who sought to retain custody but noting that surrogacy agreements that do not provide for compensation beyond pregnancy-related expenses do not present the same policy concerns). In the uncontested surrogacy cases discussed *infra*, the court did not find surrogacy contracts void per se, but only if the surrogate was paid.

[97] *See* Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993); *In re* Adoption of Baby A, 877 P.2d 107, 108 (Or. Ct. App. 1994).

[98] *See* Surrogate Parenting Assocs. v. Commonwealth, 704 S.W.2d 209, 212 (Ky. 1986).

[99] *See eg., id.* at 211-12; *see also Johnson*, 851 P.2d at 784.

[100] *See e.g., Johnson*, 851 P.2d at 784.

[101] *See* Surrogate Parenting Assocs., 704 S.W.2d at 211.

[102] *See In re* Adoption of Paul, 550 N.Y.S.2d 815, 818-19 (N.Y. Fam. Ct. 1990); *see also In re Adoption of Baby* L.J., 505 N.Y.S.2d 813, 818 (N.Y. Sur. Ct. 1986).

assisting a childless couple to conceive."[103] These courts reason that in vitro fertilization and surrogacy arrangements "are similar in that both enable a childless couple to have a baby biologically related to one of them when they could not have done so otherwise."[104]

B. Moral and Ethical Arguments

Many scholars have determined that the moral and ethical arguments over surrogacy center around three main themes: the exploitation and degradation of women; the commodification of children; and the negative psychological impact on the surrogate, the intended parent(s), and the child.[105]

Since surrogacy is the only ART that involves an actual third *person*, and that person is always a woman, it is not surprising that the controversy surrounding the legality and enforceability of surrogacy agreements is reflected in and often propelled by various policy concerns of the women's movement. A main tenet of the feminist movement is that a woman has the right to control her own body, as reflected in the movement's advocacy for women's rights to procreate, to use contraceptives, and to have an abortion.[106] However, modern technology has expanded these choices, which has resulted in feminists arguing either that such technology simply provides women with further choices in the use of her body, or that these advances simply provide men additional ways to gain control of women's bodies for their own needs.[107]

The arguments against surrogacy on moral and ethical grounds, like those on legal grounds, go both to surrogacy generally, and to paid surrogacy specifically. Some courts and feminists argue that surrogacy contracts in general degrade women.[108] The New Jersey court in *Baby M* reasoned that even though "many women may not perceive surrogacy negatively but rather see it as an opportunity does not diminish its potential for devastation to other women."[109] Opponents also argue that surrogacy contracts are by nature coercive because irrevocable consent must be given before the mother has a chance to bond with the child she will carry, making any consent neither truly voluntary nor informed. The court in *In re Baby M* found that "quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a [] payment, is less than totally voluntary."[110]

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[103] Surrogate Parenting Assocs., 704 S.W.2d at 212.

[104] *Id.*

[105] *See e.g.*, DeLair, *supra* note 2, at 152; *see also* Kerian, *supra* note 28, at 160.

[106] Kerian, *supra* note 28, at 158 (citations omitted).

[107] *Id.*

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

[109] *Id.*

[110] *Id.* at 1248.

Others argue that paid surrogacy contracts, specifically, are coercive and pressure women into giving up their parental rights involuntarily when the contract is entered into due to great financial need.[111] Therefore, most surrogates will be poor women and/or women of color.[112] Some state courts have therefore found that in order to avoid the development of a "breeder class,"[113] surrogacy contracts must eliminate any financial reward to a surrogate mother to ensure that "no economic pressure will cause a woman, who may well be a member of an economically vulnerable class, to act as a surrogate."[114] A surrogacy agreement can be considered unconscionable if the surrogate was under duress, not fully informed, and not represented by counsel.[115]

Proponents of surrogacy, however, point out that surrogacy contracts must be deemed voluntary precisely because they are made *prior* to conception,[116] and thus require the surrogate's voluntary and active participation in order to become pregnant.[117] Additionally, most surrogacy arrangements "proceed routinely to the conclusion desired by all parties at the outset–a woman who can bear children assisting a childless couple to fulfill their desire for a biologically-related child."[118] Therefore, the California court, in *Johnson v. Calvert*, pointed out that declaring surrogacy contracts unenforceable might "deny intending parents what may be their only means of procreating a child of their own genetic stock."[119]

The California court in *Johnson v. Calvert* also reasoned that any argument that a woman cannot "knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law."[120] The court reasoned that "[t]o resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother."[121] The *Johnson* court further reasoned that:

> although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, 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.[122]

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111 *See* Kerian, *supra* note 28, at 163.

112 *Id.*

113 *Id.*

114 R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998).

115 *Id.* at 797.

116 Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993).

117 I owe this observation to my colleague at Southwestern Law School, Professor Tracy Turner.

118 Surrogate Parenting Assocs. v. Commonwealth, 704 S.W.2d 209, 214 (Ky. 1986).

119 *Johnson*, 851 P.2d at 785.

120 *Id.*

121 *Id.*

122 *Id.*

Secondly, some argue that surrogacy commodifies children.[123] Mirroring the legal arguments about baby-selling discussed above,[124] some feminists decry surrogacy as creating a "product" that can be bought and sold in the marketplace.[125] Opponents also argue that surrogacy devalues pregnancy and the resulting child itself.[126] Proponents, however, argue that the intended parents are merely paying a surrogate for her services, pointing out that, but for the deep desire of the intended parents to have the child, the child would never have been conceived.[127] Taking this point to its logical conclusion, John Robinson has argued that, in the context of raising children in a family composed of same-sex parents, there can be no claim that they are harmed "simply because they have been born into what some have claimed to be less than optimal circumstances."[128] The children in question would not exist unless they were brought into the world through the use of arts.[129]

The third controversy centers on surrogacy's impact on the psychological interests of the surrogate, intended parents, and the child. Catherine DeLair points to studies that have shown that surrogates experience "a period of mourning or grief after relinquishing the child."[130] Certainly the *Baby M* case argues for this general proposition.[131] However, other feminists and courts argue otherwise, asserting that a surrogate is entitled to make the decision, and does so motivated by a desire to help the intended parents have a child who will be deeply loved.[132] The California court in *Johnson* similarly refused "to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genetic stock."[133]

The negative psychological consequences of surrogacy are also asserted, interestingly, as affecting even the intended parent(s). This may occur, ostensibly, if the surrogate refuses to relinquish the child, terminate her parental rights,[134] or attempts to establish custodial or visitation rights.[135] Others have argued that

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123 *See* Kerian, *supra* note 28, at 164-65.

124 *See supra* Part II.A.

125 Kerian, *supra* note 28, at 165 (citing Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1930-32 (1987)); *see also* DeLair, *supra* note 2, at 154.

126 Kerian, *supra* note 28, at 164-65 (citations omitted).

127 *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) ("[T]he child would not have been born but for the efforts of the intended parents. . . . [T]he intended parents are the first cause, or the prime movers, of the procreative relationship.") (quoting 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, 415 (1991)).

128 Robinson, *supra*, note 13, at 341.

129 *Id.*

130 DeLair, *supra* note 2, at 152. Surrogate Anna Johnson similarly asserted that "psychological harm . . . may result from the gestator's relinquishing the child to whom she has given birth." *Johnson*, 851 P.2d at 784.

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

132 *See* Kerian, *supra* note 28, at 165 (citation omitted).

133 *Johnson*, 851 P.2d at 785.

134 *See In re Baby M*, 537 A.2d 1227, as a worst case example.

135 *See* DeLair, *supra* note 2, at 153.

surrogacy threatens "the long-standing interest in society for the preservation of the traditional family,"[136] and find that the introduction of a third party, the surrogate mother, into the nuclear family "substantially deviates from and threatens the traditional family concept."[137]

However, "studies on the outcomes of surrogacy arrangements show that all but a few cases of surrogate arrangements go smoothly, wi[th] all parties satisfied with their involvement."[138] Even if a surrogacy arrangement disintegrates, the preservation of the "traditional family" is no longer a viable argument against surrogacy, as the most recent census shows that "[i]n 2000, of the 104.7 million households counted by the U.S. Census Bureau, only 55.3 million of them were composed of married couple households. Of those 104.7 million households, only 24.1 percent were represented by the nuclear family (married couples with their own children)."[139] Finally, any disappointment the intended parent(s) may feel is no different from that of a prospective adoptive parent if the birth mother changes her mind.

Lastly, opponents of surrogacy argue that it is not in the best interests of children. The *Baby M* court pointed out the possibility for placing a child without taking into account the interests of the child[140] because "[t]here is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of [the intended parent(s)] as custodial parents . . . or the effect on the child of not living with [the] natural mother."[141] Additionally, "[i]f the surrogate remains anonymous, the child may subsequently suffer psychological harm by trying to learn the biological mother's identity."[142]

However, in *Johnson*, the court buttressed its conclusion that the intended mother is the "natural" mother under California law by rejecting the "best interests" approach urged by the dissent. The court reasoned that:

> [s]uch an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody . . . . The implicit assumption . . . is that a recognition of the genetic intending mother as the natural mother may sometimes harm the child. This assumption overlooks California's dependency laws, which are designed to protect *all* children irrespective of the manner of birth or conception.[143]

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[136] Surrogate Parenting Assocs. v. Commonwealth, 704 S.W.2d 209, 216 (Ky. 1986) (Wintersheimer, J., dissenting).

[137] *Id.*

[138] DeLair, *supra* note 2, at n.52 (citation omitted).

[139] Conaway v. Deane, 932 A.2d 571, 632 (Md. 2007).

[140] *In re Baby M*, 537 A.2d 1227, 1242 (N.J. 1988).

[141] *Id.* at 1248.

[142] *See* DeLair, *supra* note 2, at 153 (citation omitted).

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

The court also reasoned that, "by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interests of the child are not with her."[144]

C. Economic Arguments

While all ARTs are expensive, a separate controversy arises over the use of surrogacy because it involves the use of a third person to create a child and thus requires more advanced technology.[145] As such, surrogacy may be available only to the wealthy. Opponents of surrogacy argue that the practice should not be permitted, and any such contracts declared void, due to the fact that surrogacy may only be available to the wealthy, and that poor women and women of color may agree to act as a surrogate due to financial hardship.[146]

Another economic consideration is that insurance may not cover ARTs, especially surrogacy, at all.[147] Additionally, since many insurance companies, in an effort to control costs, have instigated "medical necessity" clauses, same sex couples looking to use surrogacy to conceive a child may be turned down for insurance coverage, as they are not "medically infertile."[148]

Despite these economic challenges, some proponents of surrogacy argue that legal and economic principles underlie surrogacy contracts, like any others.[149] Application of such theories shows that parties to a surrogacy contract enter into that contract making rational choices, most often driven by a risk/benefit analysis. Rather than viewing a surrogate's choice to conceive and/or carry a child as an irrational choice fueled by dire financial problems,[150] proponents of the economic theory underlying surrogacy contracts argue that the surrogate deserves payment for the nine months of carrying a child and the countless medical procedures she will undergo.[151] Under this view, a surrogate makes a rational decision that the money she receives is a greater benefit than the risk she will undertake.[152] Similarly, the intended parent(s) believe that the benefit they will receive is worth more than the money they pay.[153] Although opponents of this law and economics approach to surrogacy contracts argue that the child is a non-consenting third party

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144 *Id.*

145 *See* DeLair, *supra* note 2, at 160.

146 *See* R.R. v. M.H., 689 N.E.2d 790, 796 (Mass. 1998).

147 *See* DeLair, *supra* note 2, at 161 (stating that thirty percent of all insurance companies refuse to cover assisted reproductive technologies).

148 *Id.*

149 *See* Kerian, *supra* note 28, at 150 (citing generally Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21 (1989)).

150 *See R.R.*, 689 N.E.2d at 796.

151 *See* DeLair, *supra* note 2, at 160 (citation omitted).

152 *See* Kerian, *supra* note 28, at 150.

153 *See generally* DeLair, *supra* note 2.

to the contract who receives no benefit, proponents counter that the benefit to the child is that of being born at all.[154]

1. California's Contractual Approach to Contested Surrogacy Agreements

The theory that surrogacy contracts, like all contracts, are entered into for the mutual benefit of the parties has engendered the "intended parent" approach to surrogacy, first embraced in California, which approaches surrogacy under a simple contract analysis, looking at the intent of the parties to determine the child's parent(s).[155] In *Johnson v. Calvert*, a married couple sought to have a biologically-related child.[156] Although Crispina Calvert had undergone a hysterectomy, she was still able to produce eggs.[157] The surrogate, Anna Johnson, a coworker who had heard of the couple's plight and volunteered to be the surrogate, was implanted with an embryo created from Mark Calvert's sperm and Crispina Calvert's egg.[158] Anna agreed to relinquish all parental rights, and would be paid $10,000 in a series of installments, the last to be paid six weeks after the baby's birth.[159] The Calverts also agreed to pay for a $200,000 life insurance policy for Ms. Johnson, because she already had a child.[160] Before the birth of the child, relations "deteriorated" between the Calverts and Ms. Johnson, who demanded the balance of the payments due or she would refuse to give up the child.[161] Both parties to the agreement eventually filed suit, seeking declaration of parentage.[162] After the child was born, tests excluded Anna Johnson as his genetic mother.[163] The trial and appellate courts found the Calverts to be the parents.[164]

On review, the California Supreme Court looked to the provisions of the Uniform Parentage Act that had been adopted by the California Family Code.[165] The Act states that maternity "may be established by proof of [] having given birth to the child."[166] However, since the Act also allows for maternity to be determined similarly to paternity, by using a blood test to provide "genetic evidence," and it was undisputed and stipulated to by both parties that Crispina was the genetic mother, the court was forced to find that both Anna and Crispina had shown evidence of motherhood under the Act.[167]

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154 Kerian, *supra* note 28, at 150-51.
155 *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).
156 *Id.* at 778.
157 *Id.* at 789.
158 *Id.*
159 *Id.*
160 *Id.*
161 Johnson v. Calvert, 851 P.2d 776, 789 (Cal. 1993).
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.* at 779.
166 *Id.* at 780 (citing Cal. Civ. Code §7003(1)).
167 Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993).

The court's dilemma arose under California law providing that a child may have only one "natural" mother.[168] The court found no legislative preference for establishing maternity by either birth or genetics.[169] Therefore, needing to determine a "tie-breaker," the court found that the case would have to be decided based on the intentions of the parties as manifested in the surrogacy agreement.[170] The court found the Calverts to be the intended parents under the terms of the contract because they "affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization."[171] Anna Johnson, on the other hand, merely "agreed to facilitate the procreation of Mark and Crispina's child."[172] The intent of the contract, freely entered into by all parties, was to "bring Mark's and Crispina's child into the world, not for Mark and Crispina to donate a zygote to Anna," to raise on her own.[173] Therefore, since without the Calvert's initial intentions and the agreement with Anna the child would not exist, the court concluded that although the Uniform Parentage Act provides for two methods of establishing maternity, "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."[174]

2. The Anomaly of the Uncontested Surrogacy Cases

Preserving the intent of the parties and the mutual benefits of the surrogacy, as envisioned by the California Court, however, cannot be guaranteed unless all parties are assured that the contract can and will be enforced.[175] An uncertain outcome makes the contract less valuable to both parties.[176] The need for the self-enforcing administrative model for surrogacy agreements is most apparent in the cases in which the court invalidated surrogacy contracts in *uncontested* surrogacy cases.

For example, in two pre-*Baby M* cases from Michigan, the courts invalidated uncontested surrogacy agreements. In 1981, the Michigan Appellate Court, in *Doe v. Kelley*, was asked to declare unconstitutional those sections of the Michigan Adoption Code that prohibit the exchange of money or other consideration in connection with adoption and related proceedings. The theory for invalidation of these sections was that they were in violation of the intended parents' right to

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168 *Id.*

169 *Id.*

170 *Id.* at 782.

171 *Id.*

172 *Id.*

173 Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

174 *Id.*

175 Kerian, *supra* note 28, at 150 (citing Richard Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 23 (1989)).

176 *Id.*

privacy, including the right to bear and beget children.[177] In that case, a married couple hired a surrogate to carry a child conceived of the surrogate's egg and the husband's sperm, when the wife had had a tubal ligation and was incapable of bearing children.[178] The husband's secretary was willing to be inseminated with the husband's sperm and carry any resulting child to term and to consent to the adoption of the child by the couple.[179] The surrogacy agreement provided that the surrogate would be paid $5,000 plus medical expenses.[180] The court held that the adoption statute did not interfere with the couple's constitutional rights to privacy and procreation.[181] The court reasoned that the statute in question did not directly prohibit having the child as planned in the surrogacy agreement, but did "preclude [the] plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures."[182] The United States Supreme Court later denied certiorari.[183]

Four years later, the Michigan Supreme Court, in *Syrkowski v. Appleyard*, without addressing the validity of the surrogacy agreement, declined to grant an order of filiation to the biological father of the child born to a surrogate. This order would have allowed the father to assert his paternity since Michigan's Paternity Act provided that a child born to an artificially inseminated married woman is treated, for all purposes, as her husband's child.[184] However, for the express purpose of complying with that law, the surrogate's husband had signed an affidavit of non-consent to the artificial insemination.[185] The biological father and his wife had physical custody of the child, and the surrogate and her husband had consistently cooperated with his efforts to obtain a court order acknowledging his paternity.[186] In fact, the defendant surrogate answered the complaint by admitting all the plaintiff father's allegations and joining his request for relief.[187] The parties then jointly submitted a proposed consent order of filiation.[188] The supreme court found that the trial court had jurisdiction, and remanded, although the trial judge

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177 Doe v. Kelley, 307 N.W.2d 438, 439 (Mich. Ct. App. 1981).

178 *Id.* at 440.

179 *Id.*

180 *Id.*

181 *Id.* at 441.

182 *Id.*

183 Doe v. Kelley, 459 U.S. 1183 (1983).

184 Syrkowski v. Appleyard, 362 N.W.2d 211, 212 (Mich. 1985). Christine Kerian notes that:

> the court should have recognized the waiver of parental rights by Mrs. Appleyard. The proposed order of filiation would have allowed Mr. Syrkowski to obtain full custody of the child and thereby avoided a violation of adoption laws prohibiting consideration for the relinquishment of parental rights. By failing to grant the order, the court placed a substantial obstacle in the way of surrogacy.

Kerian, *supra* note 28, at 123-24.

185 *Syrkowski*, 362 N.W.2d at 212.

186 *Id.*

187 *Id.*

188 *Id.*

had granted the Attorney General's motion for accelerated judgment, reasoning that the relief sought was beyond the scope of the Paternity Act.[189] The trial judge read the Act as having the limited purpose of securing financial support for children born out of wedlock.[190] He refused to read the Act more broadly to provide the relief sought by all parties to the surrogacy agreement because he felt that "to do so would sanction surrogacy agreements . . . contrary to public policy."[191]

Subsequent to *Baby M*, in *In re Adoption of Paul*, a New York court invalidated an uncontested surrender of rights by the surrogate mother.[192] The surrogacy agreement provided for artificial insemination of the surrogate by the intended father, when the intended mother, his wife, had been unable to conceive.[193] The husband and surrogate were the only parties to the contract.[194] The agreement provided for payment of $10,000 to the surrogate upon birth and surrender of custody of the child.[195] The agreement further stated that the payment was for expenses and not a payment for consent to surrender the child for adoption.[196] The agreement also provided that the surrogate would terminate "all parental rights with respect to the child and have no rights of visitation following the birth of the child."[197] The surrogate acknowledged that her "sole purpose" in entering into the agreement was to provide a child to the father.[198] When the child was born, no father was listed on the birth certificate, and the surrogate petitioned the court to execute a "Judicial Consent" to the adoption by the couple.[199] Referencing *Baby M*, the court took issue with the payment provision, and held that the surrogate's surrender could only be accepted if she would forswear acceptance of the $10,000. This would assure the court that the surrender was truly voluntary and "motivated by her concern for the best interests of her child and not the promise of financial gain."[200]

III. THE ABA MODEL ACT'S ADMINISTRATIVE PROVISION

The anomaly of the uncontested surrogacy cases provides an interesting backdrop to the 2008 ABA Model Act on Assisted Reproductive Techniques, and its new administrative model for surrogacy agreements. Its Prefatory Note explains

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189 *Id.* at 213.
190 *Id.*
191 *Syrkowski*, 362 N.W.2d at 213.
192 *In re* Adoption of Paul, 550 N.Y.S.2d 815, 819 (N.Y. Fam. Ct. 1990).
193 *Id.* at 815.
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *In re* Adoption of Paul, 550 N.Y.S.2d 815, 816 (N.Y. Fam. Ct. 1990).
199 *Id.*
200 *Id.*

that the need for such an Act was expressed best by the California Appellate Court in *In re Marriage of Buzzanca [sic]*[201]:

> We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of artificial reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some overall legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.[202]

The Model Act is intended to provide "a flexible framework that will serve as a mechanism to resolve contemporary controversies, to adapt to the need for resolution of controversies that are envisioned but that may not yet have occurred, and to guide the expansion of ways by which families are formed."[203] The ABA Model Act Governing Assisted Reproductive Techniques provides "[a model] intended to be considered in whole or in part by legislative bodies" which "contemplate[s] possible solutions to problems created by ART . . . ."[204]

The Alternative B Administrative Model[205] for surrogacy contracts differs from the Judicial Pre-approval Model in Alternative A and in previous Model Acts[206] in that it is based on a "self-executing contract model."[207] Parentage "automatically and administratively" vests in the intended parents as long as all parties meet the eligibility and procedural requirements.[208] No judicial intervention or approval is required.[209] A synopsis of the requirements of Alternative B follows:

> Section 701.2
> This version of the Act establishes a parent-child relationship between the intended parent(s) and the child, prior to the birth of a child born through a gestational carrier arrangement. Therefore, parental rights vest in the intended parent(s) immediately upon the birth of the child; neither the gestational carrier nor her legal spouse, if any, will be the parent of the child for purposes of state law immediately upon birth.
> Section 702.1
> A gestational carrier must fulfill the following requirements at the time the agreement is executed: (a) she must be at least twenty-one years of age; (b) she must have given birth to at least one child; (c) she must have completed

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201 (Although the Note attributes this quote to In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998), the quote is actually from Prato-Morrison v. Doe.).

202 ABA Model Act, Prefatory Note, at 172 (quoting Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 516 n.10 (Ct. App. 2002).

203 Kindregan & Snyder, *supra* note 32, at 209.

204 *Id.* at 206.

205 All references are to ABA Model Act, Alternative B, Article 7, 42 FAM. L.Q. at 188-92.

206 *See* Kindregan & Snyder, *supra* note 32.

207 *Id.* at 220-21.

208 *Id.* at 221.

209 *Id.*

a medical evaluation relating to the anticipated pregnancy; (d) she must have completed a mental health evaluation relating to the anticipated gestational carrier arrangement; (e) she must have undergone legal consultation with independent legal counsel regarding the terms of the gestational agreement and the potential legal consequences of the gestational carrier arrangement; and (f) she must have or obtain, prior to the embryo transfer, a health insurance policy that covers major medical treatments and hospitalization, and which has a term that extends throughout the duration of the expected pregnancy and for eight weeks after the child's birth. The policy may be procured by the intended parents on behalf of the gestational carrier pursuant to the gestational agreement.

Section 702.2

The intended parent(s) must fulfill the following requirements at the time the agreement is executed: (a) the parent(s) must contribute at least one of the gametes resulting in an embryo that the gestational carrier will attempt to carry to term; (b) the parent(s) must have a medical need for the gestational carrier arrangement as evidenced by a qualified physician's affidavit attached to the gestational agreement; (c) the parent(s) must have completed a mental-health evaluation relating to the anticipated gestational carrier arrangement; and (d) the parent(s) must have undergone legal consultation with independent legal counsel regarding the terms of the gestational agreement and the potential legal consequences of the gestational carrier arrangement.

Section 703.2

A gestational agreement must fulfill the following requirements: (a) it must be in writing; (b) it must be executed prior to the commencement of any medical procedures—other than medical or mental health evaluations necessary to determine eligibility of the parties—in furtherance of the gestational carrier arrangement, (i) by a gestational carrier meeting the eligibility requirements of this Act and, if married, the gestational carrier's legal spouse, and (ii) by the intended parent(s) meeting the eligibility requirements of this Act—if an intended parent is married, both spouses must execute the gestational agreement; (c) the gestational carrier and the intended parent(s) must be represented by separate, independent counsel in all matters concerning the gestational carrier arrangement and the agreement; (d) the gestational carrier and the intended parent(s) must have signed a written acknowledgment that he or she received information about the legal, financial, and contractual rights, expectations, penalties, and obligations of the gestational agreement; (e) if the gestational agreement provides for the payment of compensation to the gestational carrier, the compensation must be placed in escrow with an independent escrow agent prior to the gestational carrier's commencement of any medical procedure—other than medical or mental health evaluations necessary to determine the gestational carrier's eligibility; and (f) the agreement must be witnessed by two disinterested competent adults.

Section 703.3

A gestational agreement must provide for: (a) the express written agreement of the gestational carrier to, (i) undergo embryo transfer and attempt to carry and give birth to the child, and (ii) surrender custody of the child to the intended parent(s) immediately upon the birth of the child; (b) if the gestational carrier is married, the express agreement of her husband to, (i) undertake the obligations imposed on the gestational carrier pursuant to the terms of the gestational agreement, and (ii) surrender custody of the child to the intended parent(s) immediately upon the birth of the child; (c) the right of the gestational carrier to utilize the services of a physician of her choosing, after consultation with the intended parents, to provide her care during the pregnancy; and (d) the express written agreement of the intended parent(s) to, (i) accept custody of the child immediately upon his or her birth, and (ii) assume sole responsibility for the support of the child immediately upon his or her birth.

Section 703.4

A gestational agreement is enforceable even if it contains one or more of the following provisions: (a) the gestational carrier agrees to undergo all medical exams, treatments, and fetal monitoring procedures that the physician recommended for the success of the pregnancy; (b) the gestational carrier agrees to abstain from any activities that the intended parent(s) or the physician reasonably believes to be harmful to the pregnancy and future health of the child, including, without limitation, smoking, drinking alcohol, using non-prescribed drugs, using prescription drugs not authorized by a physician aware of the gestational carrier's pregnancy, exposure to radiation, or any other activities proscribed by a health care provider; (c) the intended parent(s) agree to pay the gestational carrier reasonable compensation; and (d) the intended parent(s) agree to pay for or reimburse the gestational carrier for reasonable expenses—including, without limitation, medical, legal, or other professional expenses—related to the gestational carrier arrangement and the gestational agreement.

Section 704

Any person who is considered to be the parent of the child is obligated to support the child. Any breach of the gestational agreement by the intended parent(s) shall not relieve such intended parent(s) of the support obligations imposed by this Act. A gamete donor may be liable for child support only if s/he fails to enter into a legal agreement with the intended parent(s) in which the intended parent(s) agree to assume all rights and responsibilities for any resulting child and the gamete donor relinquishes his or her rights to any gametes, resulting embryos, or children.

Section 707

Noncompliance occurs when the gestational carrier, her spouse or the intended parent(s)' breach of a provision of the gestational agreement or any party to or agreement for a surrogacy arrangement fails to meet any of the requirements of this Act.

Section 708

> In the event of noncompliance, a court of competent jurisdiction shall determine the respective rights and obligations of the parties to any surrogacy arrangement based solely on evidence of the parties' original intent. Additionally, there shall be no specific performance remedy available for a breach by the gestational carrier of a gestational agreement term that requires her to be impregnated.
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> Section 711
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> Lastly, no action to invalidate a gestational carrier arrangement meeting the requirements of this Act or to challenge the right of parentage established pursuant to this Act and the relevant state parentage act provisions may be commenced after twelve months from the date of birth of the child.[210]
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> Section 8: Payment to Donors and Gestational Carriers.
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> Since many states ban compensation to surrogates and will invalidate any surrogacy agreement that contains such a clause,[211] making it more difficult to find women to act as surrogates, as Kindregan and Snyder point out,[212] an important aspect of the Model Act is its provision to make reasonable
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> compensation expressly legal.
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> Section 801
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> A donor may be reimbursed for economic losses resulting from the retrieval or storage of gametes or embryos and incurred after the donor has entered into a valid agreement to be a donor. Premiums paid for insurance against economic losses directly resulting from the retrieval or storage of gametes or embryos for donation may also be reimbursed, even if such premiums have been paid before the donor has entered into a valid agreement, so long as the agreement becomes valid and effective before the gametes or embryos are used in assisted reproduction in accordance with the agreement. Otherwise, economic losses occurring before the donor has entered into a valid agreement may not be reimbursed.
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> Section 802
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> Any consideration, paid to a gamete donor or prospective gestational carrier must be reasonable and/or negotiated in good faith between the parties. Compensation may not be conditioned upon the quality or traits of the gametes or embryos, nor may compensation be conditioned on actual genotypic or phenotypic characteristics of the donor or of the child.[213]

IV. THE NEED FOR A SELF-EXECUTING CONTRACT MODEL

The problem of evaluating and enforcing surrogacy agreements, and resolving disputes about parentage drove the creation of the Model Act's surrogacy

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210 ABA Model Act, Alternative B, Article 7, §§ 701.2, 702.1, 702.2, 703.2, 703.3, 703.4, 704, 707, 708, 711, at 188-92.

211 *See supra* Part II.A.

212 Kindregan & Snyder, *supra* note 32, at 225.

213 ABA Model Act, at §§ 801, 802, at 188-92.

provisions. The drafters have hopes that states will adopt the provisions in order to "allow the participants to make informed choices and the courts to strive for uniformity in their decisions."[214] As will be shown, adopting the Administrative Model will not only forward these goals, but will also protect the best interests of the children born from these agreements.

Certainly the uncontested surrogacy cases provide the initial argument for adopting the administrative surrogacy provisions of the Model Act. In the three cases discussed above,[215] courts with no specific surrogacy legislation to follow, felt compelled to intervene in uncontested surrogacy proceedings, applying other state statutes to try to determine legislative intent regarding surrogacy. In *Doe v. Kelley*, for example, the court reasoned that the state *adoption* statute did not directly prohibit having the child as planned in the surrogacy agreement, but did "preclude the plaintiffs from paying consideration in conjunction with their use of the state's adoption procedures."[216] Similarly, in *Syrkowski v. Appleyard*, the Supreme Court remanded a case involving an uncontested surrogacy arrangement to the trial court. The trial court judge determined that he could not grant an order of filiation to the biological father of the child born to a surrogate because of Michigan's Paternity Act, which provides that a child born to an artificially inseminated married woman is treated for all purposes as her husband's child.[217] Finally, in *In re Adoption of Paul*, the court intervened in an uncontested surrogacy arrangement, admitting that since there was "no clear legislative direction . . . at present," the court would look to the *law governing adoption generally*, as well as law from other jurisdictions, including the Michigan law applied in *Doe v. Kelley*.[218]

The Administrative Model is the ideal antidote to situations such as these because it allows the surrogacy arrangements to proceed according to the desires of all the parties, without judicial intervention. It places rigorous requirements up front, guiding the actual formation of the agreement and restricting who may enter the agreement in order to avoid consequences such as those in *Baby M.* The requirements that a surrogate be over 21, have had another child, and receive medical, mental, and legal counseling go a long way to ensure that she understands what she is agreeing to and will be willing and able to terminate her parental rights and relinquish the child. Similarly, requiring that the intended parent(s) have a genetic connection to the child[219] and show medical need for the surrogacy ensures that any child born of the agreement is desperately wanted, thus providing the best

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214 Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509, 516 n.10 (Ct. App. 2002).

215 *See supra* Part III.C.2.

216 *Id.*

217 Syrkowski v. Appleyard, 362 N.W.2d 211, 212 (Mich. 1985).

218 *In re* Adoption of Paul, 550 N.Y.S.2d 815, 817 (N.Y. Fam. Ct. 1990).

219 Kindregan and Snyder stated that this requirement may be controversial, but was included to make the administrative alternative more palatable to state legislatures. Kindregan & Snyder, *supra* note 32, at 224.

indication that the intended parent(s) will fulfill their part of the agreement, most importantly the duty to support the child.

Rather than judicially evaluating the terms of the agreement after the fact, and indeed after the birth of the child, the Administrative Model establishes parentage prior to *conception*, with parental rights vesting in the intended parents and being divested of the surrogate and her spouse immediately upon birth, and allows reasonable monetary consideration to be paid to the surrogate. Since state adoption statutes are therefore not implicated, there can be no assertion that "paying consideration in conjunction with [the] use of the state's adoption proceedings . . . [is using] the adoption code to change the legal status of the child."[220] Nor can there be an assertion that "no constitutionally protected right to participate in surrogate parenting arrangements . . . contravene[s] application of [] adoption laws"[221] Since no other statutes are implicated, the Administrative Model better preserves the right "to bear or beget a child,"[222] thus avoiding constitutional challenges such as those that arose in *Doe v. Kelley*.[223]

Additionally, because this alternative vests parentage in the intended parents and divests the surrogate and her husband of parental rights contractually, upon birth of the child, courts will not have to apply state paternity legislation and "look beyond the words of the statute," as did the court in *Syrkowski*,[224] to determine legislative intent in a surrogacy situation that such legislation never anticipated. Rather than requiring that the parties rebut the presumption that the husband of an artificially-inseminated woman is the child's father under any state paternity legislation, as in *Syrkowski*, that presumption is rebutted by the terms of the contract itself, which require that not only the surrogate, but also her husband if she is married, are divested of parental rights and agree to surrender custody of the child immediately upon birth.[225]

The Administrative Model will not preclude contested surrogacy agreements, and some surrogates may change their minds and not wish to relinquish the child and terminate parental rights, as in *Baby M.* Other surrogacy arrangements will fall apart simply because the relationship between the intended parents and the surrogate disintegrates, as in *Johnson v. Calvert.* However, the Administrative Model does expressly resolve a battle over *legal parentage* between the surrogate and intended parent(s) by including sections covering noncompliance and the effect

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220 Doe v. Kelley, 307 N.W.2d 438, 441 (Mich. Ct. App. 1981).

221 *In re Adoption of Paul*, 550 N.Y.S.2d at 818.

222 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977).

223 Doe v. Kelley, 307 N.W.2d at 440; *see also In re Adoption of Paul*, 550 N.Y.S. at 818 (following the reasoning in Doe v. Kelley to find that "no constitutionally protected right to participate in surrogate parenting arrangements . . . contravene[s] application of New York's adoption laws.").

224 Syrkowski v. Appleyard, 362 N.W.2d 211, 213 (Mich. 1985).

225 ABA Model Act, Alternative B, Article 7, §§ 702.1, 703.3.3.

of noncompliance.[226] If one of the parties to the agreement—intended parent(s), surrogate, or her husband—breach or fail to meet any provision of the agreement, with the exception of the surrogate's breach of a term that requires her to be impregnated,[227] judicial intervention occurs to determine such things as parentage, custody, and visitation.

The Administrative Model makes clear that the court's determination of parentage will be "based solely on evidence of the parties' original intent."[228] Thus, adoption of this model is an implicit adoption of California's contractual approach to contested surrogacy agreements, which has at its heart the protection of the best interests of the child by providing a consistent and uniform determination of parentage. This approach is based on the recognition that "the interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being.'"[229] It resolves the three possible scenarios of contest over legal *parentage* of a child: where a surrogate refuses to terminate her parental rights and relinquish the child, where the intended parent(s) refuse to accept the child, and the "rare situation" in which neither the surrogate nor the intended parent(s) is willing to accept custody of the child after birth.[230] Custody and visitation are separate considerations that must be determined on a case by case basis, and again are based on the best interests of the child given the particular situation.

V. CONCLUSION

In 1988, the New Jersey court in *Baby M* called on the legislature to begin to "focus on the overall implications of the new reproductive biotechnology," and to determine "how to enjoy the benefits of the technology . . . while minimizing the risk of abuse."[231] It charged the legislature, not with banning or restricting surrogacy, but with creating a surrogacy statute "subject only to constitutional constraints."[232] Yet twenty-one years later, in 2009, a New York surrogacy court lamented the fact that there was still no consistency "about the ways in which a child's 'parents' are defined and legally constituted, and how the parent/child relationship can be protected in a transient, cross-border society."[233] The problems, the court noted, were often the result of "assisted reproductive technologies (ARTs) and an out-dated statutory scheme which fails to anticipate the relations created by those technologies, [a state's] evolving jurisprudence of same

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226 *Id.* at §§ 707, 708.

227 *Id.* at § 708.2.

228 *Id.* at § 708.1.

229 Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993).

230 *Id.*

231 *In re Baby M.*, 537 A.2d 1227, 1264 (N.J. 1988).

232 *Id.*

233 *In re* Adoption of Sebastian, 879 N.Y.S.2d 677, 678 (N.Y. Sur. Ct. 2009).

sex relationships, equal protection, full faith and credit, and the effects of the federal Defense of Marriage Act[234]

Banning or restricting surrogacy will not deter those who need it to have a child. Individuals and couples will continue to enter into surrogacy arrangements, usually without contest.[235] As has been shown, resorting to state Parentage Acts or adoption procedures will not resolve parentage contests in surrogacy cases. What is needed is consistency in creating and enforcing surrogacy agreements, such that the children born are guaranteed their legal parents from conception. But such guarantees must come at a price. The stringent eligibility and procedural guidelines of the Administrative Model ensure the best possible chance of success. The contract created under it is premised upon the concept, as the California court explained, that "[a] woman who enters into a gestational surrogacy contract is not exercising her own right to make procreative choices; she is agreeing to provide a necessary and profoundly important service without (by definition) any expectation that she will raise the resulting child."[236] The exercise of the procreative rights is the intended parents'; the exercise of the right to use her own body as she sees fit is that of the surrogate. Both rights deserve to be protected and released from a judicial gatekeeper.

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[234] *Id.*

[235] DeLair, *supra* note 2, at n.52 (citations omitted); *see also* Surrogate Parenting Assocs. v. Commonwealth, 704 S.W.2d 209, 214 (Ky. 1986).

[236] Johnson v. Calvert, 851 P.2d 776, 787 (Cal. 1993).