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## Evolving with the Times: A Push to Legalize Surrogate Parenting Contracts in the State of New York

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# EVOLVING WITH THE TIMES: A PUSH TO LEGALIZE SURROGATE PARENTING CONTRACTS IN THE STATE OF NEW YORK

David F. Eisenberg\*

## I. Introduction

“I was lying in my hospital bed staring down at my second son, and my heart just melted. There I was, holding this precious little life, marveling over how perfect he was, when it hit me. Everyone should feel the love and joy that I was experiencing at that moment. I knew I was blessed with having two beautiful and healthy little boys and I wanted to share that blessing. I told myself right then that when the time was right, I would help an infertile couple have a baby.”<sup>1</sup>

“I had a hysterectomy when I was twenty-three years old due to ovarian cancer.”<sup>2</sup> “Like many woman who are infertile, I had spent many years worrying and wondering if I would ever become a mom. I knew adoption was an alternative all along, but once I learned that surrogacy was another realistic possibility I

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\* The author would like to thank his wife for her unwavering love and support; you are and always will be my best friend. The author would also like to acknowledge the millions of people throughout the county and around the world who suffer from infertility and/or whose personal situations prevent them from conceiving a child naturally – please know that change, while often a slow progression, is the result of patience, persistence and perseverance. The author can be contacted at Deisenberg84@yahoo.com.

1. STACY ZIEGLER, PATHWAYS TO PARENTHOOD: THE ULTIMATE GUIDE TO SURROGACY 1 (2005).

2. ZARA GRISWOLD, SURROGACY WAS THE WAY: TWENTY INTENDED MOTHERS TELL THEIR STORIES 14 (2005).

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became convinced that it was the way I wanted to create my family.”<sup>3</sup>

For many people wishing to start a family, the dream of having a natural child is often unattainable. According to Resolve, an organization advocating on behalf of individuals suffering from various reproductive infertility disorders, infertility affects approximately 7.3 million people in the United States.<sup>4</sup> Despite the physical limitations caused by infertility, many of these people maintain the continuing desire to raise children.<sup>5</sup> As a result, alternative methods of achieving parenthood have been sought out.<sup>6</sup> Due to the recent advancements in science and technology, such methods of acquiring children have become available through the use of Assisted Reproductive Technology (ART).<sup>7</sup> At present, ART procedures are widely available and have successfully led to thousands of births.<sup>8</sup> In spite of their success, this reproductive technology has been the cause of significant controversy in recent years.<sup>9</sup>

Of the many ART techniques currently used, none has been more controversial than the use of surrogates to facilitate the process. Surrogacy can take various forms, but generally refers to “a woman who agrees to become pregnant and give birth to a child on the understanding that she will give up the child [upon its birth] to the parents who have contracted with

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3. *Id.*

4. Alex Kuczynski, *Her Body, My Baby*, N.Y. TIMES, Nov. 28, 2008, <http://www.nytimes.com/2008/11/30/magazine/30Surrogate-t.html?pagewanted=all>.

5. See generally GRISWOLD, *supra* note 2, at 14.

6. See Mary BRIODY MAHOWALD, *BIOETHICS AND WOMEN: ACROSS THE LIFE SPAN* 92 (2006).

7. Jessica Arons, *Future Choices: Assisted Reproductive Technologies and the Law*, CENTER FOR AMERICAN PROGRESS (Dec. 17, 2007), [http://www.americanprogress.org/issues/2007/12/surrogacy\\_laws.html](http://www.americanprogress.org/issues/2007/12/surrogacy_laws.html).

8. *Id.*

9. See Stephanie Saul, *Building a Baby, With Few Ground Rules*, N.Y. TIMES, Dec. 12, 2009, [http://www.nytimes.com/2009/12/13/us/13surrogacy.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2009/12/13/us/13surrogacy.html?_r=1&pagewanted=all).

her.”<sup>10</sup> This type of contractual arrangement is known as a “surrogate parenting contract.”<sup>11</sup> Surrogate parenting contracts, and surrogacy in general, have raised a myriad of ethical, social, moral, and legal concerns.<sup>12</sup> Unfortunately, since “the law is often last to advance and develop,”<sup>13</sup> state legislatures have been left scrambling to determine how best to approach this delicate issue.<sup>14</sup>

“At present, the legal status of surrogate parenting contracts varies from state to state,” as legislatures continue to debate about how to control the practice.<sup>15</sup> Consequently, some jurisdictions currently prohibit surrogate parenting contracts by declaring them void and unenforceable, others jurisdictions permit such contracts but subject them to strict guidelines, while others have yet to come to a decision.<sup>16</sup> Following years of uncertainty and indecisiveness, the New York legislature ultimately declared that surrogate parenting contracts would be “void and unenforceable.”<sup>17</sup>

In opposition to New York’s current prohibition on surrogate parenting contracts, this paper will focus on explaining why, despite its controversial nature, New York should amend its existing law and permit the enforceability of such contracts. Here, common myths surrounding surrogacy will be debunked, arguments made to support the practice of surrogacy will be justified, and an alternative to the current statute will be offered. This alternative statute will propose legislation in a way that can protect New York’s social policy

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10. BLACK’S MEDICAL DICTIONARY 639 (42d ed. 2010).

11. Adam P. Plant, *With a Little Help From My Friends: The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement*, 54 ALA. L. REV. 639, 639 (2003).

12. Paula M. Barbaruolo, *The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions*, 3 ALB. L.J. SCI. & TECH. 39, 41 (1993).

13. Plant, *supra* note 11, at 639.

14. Jane E. Brody, *Much Has Changed in Surrogate Pregnancies*, N.Y. TIMES, July 20, 2009, <http://www.nytimes.com/2009/07/21/health/21brod.html?pagewanted=all>.

15. THOMAS A. MAPPES & DAVID DEGRAZIA, BIOMEDICAL ETHICS 513 (5th ed. 2000).

16. Barbaruolo, *supra* note 12, at 42-43.

17. N.Y. DOM. REL. LAW § 122 (McKinney 2010).

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interests while still permitting the enforceability of surrogate parenting contracts.

## II. Where Does New York Stand on Surrogacy?

With the emergence of surrogacy as a viable method of producing a child, New York has struggled with determining how to handle the legal and social consequences of such arrangements. Before the enactment of New York's present statute, these determinations were left to the courts; a task which proved to be littered with indecision. The judiciary's uncertainty is evidenced by a variety of conflicting and indecisive decisions. The first decision in which the court was asked to confront this issue was in the case of *In re Adoption of Baby Girl L.J.*<sup>18</sup> Here, the court declared that surrogate parenting contracts are not void, but rather voidable.<sup>19</sup> The court held that the determination on contractual agreement enforceability would be based on an evaluation of which alternative was in the best interests of the child.<sup>20</sup> Thus, following this decision, a surrogate parenting contract which provided monetary compensation to the birth mother could potentially be upheld under the law. Four years later, however, the court re-visited the issue of surrogate contracts when confronted with *In re Adoption of Paul*.<sup>21</sup> In this case, the court modified the holding set forth in *In re Adoption of Baby Girl L.J.* by declaring that the termination of the surrogate mother's rights to the child, in favor of the intended parents, would only be enforceable if the surrogate mother would swear under oath that she had not and would not accept the monetary compensation promised to her pursuant to the surrogate parenting contract.<sup>22</sup> Therefore, following this case, surrogate parenting contracts were enforceable, but only if the birth mother was not compensated for her services.

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18. *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813 (Sur. Ct. 1986).

19. *Id.* at 817.

20. *Id.*

21. *In re Adoption of Paul*, 550 N.Y.S.2d 815, 815-16 (Fam. Ct. 1990).

22. *Id.* at 818-19.

Throughout this period of judicial indecisiveness, the infamous *In re Baby M* case was grabbing national headlines as it swiftly made its way through the New Jersey court system. In what has been referred to as the “custody trial of the twentieth century,”<sup>23</sup> on February 3, 1988, the New Jersey Supreme Court declared that surrogate parenting contracts were void, illegal and possibly criminal.<sup>24</sup> In the wake of the *Baby M* case, and after years of conflicting results in the New York court system,<sup>25</sup> on July 17, 1992, the 215th Legislature of the State of New York passed an Act which amended the states laws regulating surrogate parenting contracts.<sup>26</sup>

According to the newly enacted law, “surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.”<sup>27</sup> The statute went on to define a surrogate parenting contract as

[A]ny agreement, oral or written, in which:

- (a) A woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband; and
- (b) The woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.”<sup>28</sup>

In addition to declaring surrogate contracts void and unenforceable, the Legislature also set forth two consequences to punish the parties involved in the surrogacy arrangement.

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23. Carol Sanger, *Developing Markets in Baby-Making*: In the Matter of Baby M, 30 HARV. J.L. & GENDER 67, 69 (2007).

24. *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988).

25. Scheinkman, Practice Commentaries, McKinney’s Cons Laws of NY, Book 14, Domestic Relations Law § 122 (McKinney 2010).

26. Act of July 17, 1992, 1992 N.Y. Sess. Laws 308 (McKinney) (codified at N.Y. DOM. REL. LAW §§ 121-124 (2012)); 45 N.Y. JUR. 2D *Domestic Relations* § 330 (2007) (the act did not officially become effective and enforceable until July 17, 1993).

27. N.Y. DOM. REL. LAW § 122 (McKinney 2010).

28. *Id.* § 121.

First, the statute provides that a civil penalty will be assessed against not only the parties to the agreement, but also any other person or entity who “induces, arranges or otherwise assists in the formation of a surrogate parenting contract . . . .”<sup>29</sup> Although the civil penalty to be assessed against a party to the agreement is capped at five hundred dollars, the potential penalty which can be imposed against someone who contributed to the formation of the contract can be as high as ten thousand dollars.<sup>30</sup> More significant than the monetary penalty, the Act provides that in any action or proceeding between the birth mother and the intended parents, “the court shall not consider the birth mother’s participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations.”<sup>31</sup> Consequently, this language effectively gives the surrogate birthing mother the opportunity to maintain custody of the newly born child, despite the fact that she signed a surrogate parenting contract in which she agreed to relinquish her rights to the child.

Since taking effect, the judiciary has, despite its contentious and divisive nature, carried out the will of the legislature. In *Itskov v. New York Fertility Institute, Inc.*, the New York courts applied the newly enacted statute to a case in which the genetic mother of the newborn child initiated an action against the physician who performed medical services in connection with an in-vitro fertilization procedure on the surrogate she hired. Here, the court held that “a party to an illegal contract cannot seek a court of law to help her carry out her illegal object and the court will leave the parties to such a contract where they find them.”<sup>32</sup> In *Doe v. New York Board of Health*, the Court came to a similar conclusion.<sup>33</sup> The court held that the biological parents of triplets carried by a gestational surrogate were not entitled to a pre-birth order declaring them the parents of the children since such a result

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29. *Id.* § 123.

30. Scheinkman, Practice Commentary, McKinney’s Cons Laws of NY, Book 14, Domestic Relations Law § 123 (McKinney 2010).

31. N.Y. DOM. REL. LAW § 124 (McKinney 2010).

32. *Itskov v. N.Y. Fertility Inst., Inc.*, 813 N.Y.S.2d 844, 845 (N.Y. App. Term 2006) (citations omitted).

33. *Doe v. N.Y.C. Bd. of Health*, 782 N.Y.S.2d 180 (Sup. Ct. 2004).

would have terminated the birth mothers rights, which would be contrary to the prohibition against surrogate parenting contracts.<sup>34</sup>

In light of New York's current prohibition on surrogate parenting contracts, the need for reconsideration and amendment is a necessary step. Since the *Baby M* decision in 1988 and the successive enactment of New York's statute in 1992, much has changed in both science and the overall perception of the "traditional family unit." To justify these assertions, however, there needs to be an understanding as to what ART is, and how surrogacy is utilized to produce the birth of a child.

### III. Assisted Reproduction: Building a Baby, with a Little Help

Human reproduction, as it naturally occurs, is the product of sexual intercourse between a man and woman. However, as a result of medical breakthroughs throughout the twentieth century, new scientific techniques in reproductive technology "currently enable us to accomplish things otherwise thought impossible."<sup>35</sup> Reproductive technology is a general term used to describe a multitude of technical procedures that replace the normal process of reproduction.<sup>36</sup> The first procedure developed through this new technology was Artificial Insemination by Donor (AID).<sup>37</sup> AID was designed as a solution to male infertility, and emerged as a popular procedure in the 1930's.<sup>38</sup> Through this technique, the sperm of a donor male can be used to impregnate a woman by injecting the sperm directly into her uterus.<sup>39</sup> This procedure is widely used in both the United States and throughout the world, but has overtime been supplemented with more sophisticated and advanced reproductive procedures.<sup>40</sup>

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34. *Id.*

35. Barbaruolo, *supra* note 12, at 41.

36. MAPPE & DEGRAZIA, *supra* note 15, at 510.

37. Ardis L. Campbell, Annotation, *Determination of Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R.5th 567 (2000).

38. *Id.*

39. MAPPE & DEGRAZIA, *supra* note 15, at 510.

40. Campbell, *supra* note 37, § 2(a).



Since 1978, Assisted Reproductive Technology (ART) has been used to overcome more complicated forms of infertility.<sup>41</sup> ART includes all fertility treatments in which both male sperm and female eggs are handled.<sup>42</sup> Some of the many ART procedures developed over the past thirty-years include: Zygote Intra-Fallopian Transfer (ZIFT), Gamete Intra-Fallopian Transfer (GIFT), Intra-Cytoplasmic Sperm Injection (ICSI), and most importantly, In Vitro Fertilization (IVF).<sup>43</sup> IVF, which “literally means ‘fertilization in glass,’”<sup>44</sup> is a highly technical procedure in which male sperm and female eggs are united outside of the womb, fertilized, and then “implanted through a catheter directly into the uterus.”<sup>45</sup> Since 1981 when the first child was successfully born as a result of an ART procedure, the use of these procedures has increased dramatically.<sup>46</sup> This increase has not, however, been without controversy.

Given that IVF procedures fertilize eggs outside the womb, science has enabled society to overcome many forms of infertility, regardless of whether difficulties stem from the man or the woman.<sup>47</sup> Consequently, if the cause of the infertility lies within the woman, the fertilized egg can be implanted into a third-party. This third-party, in effect, acts as a substitute for the infertile woman. When this third-party agrees, before the child is born, to give sole custody of the child to someone else, this process is known as surrogacy.<sup>48</sup> Despite its simplistic

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41. Victoria Clay Wright et al., *Assisted Reproductive Technology Surveillance – United States, 2005*, 57 Morbidity and Mortality Wkly. Rep. 1, 2 (2008), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5705a1.htm>.

42. *Assisted Reproductive Technology*, CDC (Aug. 1, 2012), <http://www.cdc.gov/ART>.

43. *Infertility Fact Sheet*, WOMENSHEALTH.GOV, (July 1, 2009), <http://www.womenshealth.gov/publications/our-publications/fact-sheet/infertility.pdf>.

44. MAPPES & DEGRAZIA, *supra* note 15, at 510.

45. Kuczynski, *supra* note 4.

46. *Assisted Reproductive Technology*, *supra* note 42.

47. *See generally* MAPPES & DEGRAZIA, *supra* note 15, at 510-13.

48. Diane S. Hinson & Linda C. ReVeal, *Surrogacy: What to Expect*, HUMAN RIGHTS CAMPAIGN,

design, surrogacy embodies a range of choices and issues.

The first step in the surrogacy process is to choose the woman who will carry the fertilized egg. In making this decision, the intended parents must opt to engage in either “voluntary” or “commercial” surrogacy. Voluntary surrogacy entails using a surrogate previously known to the intended parents.<sup>49</sup> This person is usually a friend or relative.<sup>50</sup> The benefits of choosing a surrogate known to the intended parents is that it dramatically reduces the costs of the process,<sup>51</sup> and significantly decreases the likelihood of conflict after the birth.<sup>52</sup> However, the downside of voluntary surrogacy is that many intended parents would prefer to avoid potential family conflicts if something should go wrong with the pregnancy or birth.<sup>53</sup>

In contrast to voluntary surrogacy, intended parents can also choose to pursue commercial surrogacy. In commercial surrogacy, the intended parents seek the assistance of a “brokering agency,” whose primary responsibility is to match the intended parents with a suitable surrogate.<sup>54</sup> If a match is made, legal contracts are drafted between the parties.<sup>55</sup> When a brokering agency is used, the intended parents have no prior familiarity with the surrogate.<sup>56</sup> For many intended parents, this estranged relationship is preferable, as they have no desire to include the surrogate in their family once the child is born. As a drawback, however, commercial surrogacy carries significant additional financial expenses.<sup>57</sup>

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<http://www.hrc.org/resources/entry/surrogacy-what-to-expect> (last visited Aug. 23, 2012).

49. RICHARD HEDGES, *BIOETHICS, HEALTH CARE, AND THE LAW: A DICTIONARY* 200 (1999).

50. *Id.*

51. See ZIEGLER, *supra* note 1, at 26-38, 47-52; Saul, *supra* note 9 (noting that the largest expenses associated with surrogacy are the fees paid for the donor eggs and surrogate’s time and services).

52. See generally Hinson & ReVeal, *supra* note 48.

53. See MAPPES & DEGRAZIA, *supra* note 15, at 512-13.

54. HEDGES, *supra* note 49, at 200.

55. *Id.*

56. *Id.*

57. ZIEGLER, *supra* note 1, at 26-39.

In addition to choosing the surrogate who will carry the fertilized ovum, the intended parents must also decide on the type of surrogacy they wish to pursue. In practice, there are two types of surrogacy: “traditional” surrogacy and “gestational” surrogacy.<sup>58</sup> In a traditional surrogacy arrangement—a process utilized before the advent of ART—the surrogate mother is artificially inseminated<sup>59</sup> with the sperm of either the contracting husband or an anonymous donor.<sup>60</sup> Here, the sperm is inserted into the surrogate’s uterus and combined with the surrogate’s own egg.<sup>61</sup> Consequently, the child born out of such an arrangement is half biologically related to the surrogate, and half biologically related to either the contracting husband or the sperm donor.<sup>62</sup> Due to the biological relationship to the surrogate, this procedure has been widely condemned.<sup>63</sup>

The second type of surrogacy that can be accomplished through ART is gestational surrogacy. In a gestational surrogacy arrangement, the sperm and egg used to create the fertilized ovum are obtained from the husband, wife, or suitable donor.<sup>64</sup> The fertilized ovum is then implanted into the surrogate, who carries the child to term.<sup>65</sup> Therefore, under such an arrangement, it is unquestionable that the surrogate mother has no biological relationship to the child she births.<sup>66</sup> For that reason, gestational mothers are more often referred to as “carriers” rather than surrogate mothers.<sup>67</sup>

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58. Hinson & ReVeal, *supra* note 48.

59. *See* Campbell, *supra* note 37 (this procedure is synonymous with AID).

60. Hinson & ReVeal, *supra* note 48.

61. *Frequently Asked Questions for U.S. Surrogacy Process*, ADVOCATES FOR SURROGACY, [http://www.advocatesforsurrogacy.com/parents\\_faqs.php](http://www.advocatesforsurrogacy.com/parents_faqs.php) (last visited Sept. 20, 2012).

62. *See id.*

63. Hinson & ReVeal, *supra* note 48.

64. *Id.*

65. 2 AM. JUR. 2D *Adoption* § 55 (2012).

66. *Id.*

67. *Frequently Asked Questions for U.S. Surrogacy Process*, *supra* note 61.

## IV. Surrogacy: For Some a Last Resort, for Others a Career

In furtherance of understanding the justification for amending New York's current prohibition on surrogate parenting contracts, there needs to be an understanding as to why people pursue surrogacy as a viable alternative. Of the countless reasons why people seek children through surrogacy, their motives can ultimately be distinguished on medical and non-medical grounds.

For many of the thousands of people who pursue surrogacy, the fundamental reason for doing so resides in underlying health conditions. In the United States alone, millions of men and women are prevented from passing along their genetics as a result of a medical condition.<sup>68</sup> For many prospective mothers, a malformed or absent uterus causes conception to be a medical impossibility.<sup>69</sup> This impediment is often times caused by cancerous tumors which have attacked the reproductive organs.<sup>70</sup> For other women, even if their reproductive organs are functional, other illnesses can create serious risks to their health should they become pregnant.<sup>71</sup> Similarly for men, testicular cancer and various other afflictions may cause infertility.

Additionally, there are also a number of non-medical reasons why people pursue surrogacy. One of the most common non-medical reasons for pursuing surrogacy is that the intended parents are single or gay.<sup>72</sup> For members of these groups, natural procreation is an obvious impossibility. Despite this fact, many of them maintain the desire to have children biologically related to them.<sup>73</sup> This desire is quite common, as studies have found that there is a stronger bond between the parent and child when a biological connection exists between them.<sup>74</sup> In addition to the large group of singles and gays, there is another substantial group of people merely unwilling to wait

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68. Kuczynski, *supra* note 4.

69. *Id.*

70. See GRISWOLD, *supra* note 2, at 18-19.

71. MAHOWALD, *supra* note 6, at 92.

72. *Id.* at 101.

73. Brody, *supra* note 14.

74. See ZIEGLER, *supra* note 1, at 42.

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the years it takes to adopt a child.<sup>75</sup> Adopting a newborn child in the United States is a very difficult process, especially if the intended parents already have a child, are older, or reside in a non-traditional marriage.<sup>76</sup> “As it stands now, statistics say for every healthy Caucasian newborn put up for adoption, there are [seventy-five] couples wanting to adopt it.”<sup>77</sup>

A true understanding of the life changing significance of surrogacy is not complete, however, without also understanding why women are willing to undergo nine months of pregnancy to assist someone in need. Of the limitless motivations for becoming a surrogate, the three most commonly cited reasons include: (1) the enjoyment and emotional thrill of being pregnant, (2) the desire to do something unique and remarkable with their lives, and (3) the empathy they feel for someone close to them.<sup>78</sup>

Of the three motivations, the two most commonly cited are the enjoyment of being pregnant and the desire to do something remarkable with their lives.<sup>79</sup> For many women, being pregnant provides an opportunity to feel special and to be the center of attention.<sup>80</sup> For instance, one newly developing tradition is for the intended parents to organize a baby-shower for the surrogate mother or present her with gifts.<sup>81</sup> In one instance, the intended parents sent the surrogate to the Superbowl as a thank-you gift.<sup>82</sup> More than the attention, however, surrogates want to do something substantial for

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75. See Brody, *supra*, note 14.

76. ZIEGLER, *supra* note 1, at 42.

77. *Id.*

78. Hilary Hanafin, *Surrogate Parenting: Reassessing Human Bonding*, CENTER FOR SURROGATE PARENTING, INC., [http://www.creatingfamilies.com/IP/IP\\_Info.aspx?Type=106](http://www.creatingfamilies.com/IP/IP_Info.aspx?Type=106) (last visited Sept. 25, 2012).

79. *Id.*

80. *Id.*

81. Monica Kass Rogers, *The Birth of a New Tradition: Showers for the Surrogate*, CHI. TRIB., July 13, 2005, [http://articles.chicagotribune.com/2005-07-13/features/0507120328\\_1\\_surrogate-legal-parents-birth](http://articles.chicagotribune.com/2005-07-13/features/0507120328_1_surrogate-legal-parents-birth).

82. Lorraine Ali, *The Curious Lives of Surrogates*, THE NEWSWEEK/DAILY BEAST COMPANY, (Mar. 29, 2008, 10:55 AM), <http://www.thedailybeast.com/newsweek/2008/03/29/the-curious-lives-of-surrogates.html>.

someone else.<sup>83</sup> As one woman described her motivation for becoming a surrogate,

[H]ow many people have the opportunity to do something this significant in a lifetime? After all is said and done, no matter what else I do, I will be able to look back at my life and know that I helped . . . do something that I will feel good about forever.<sup>84</sup>

This satisfaction is premised on the knowledge of having given “another couple what they could never have on their own—a family.”<sup>85</sup>

Empathy for childless couples is another strong motivational factor for women who become surrogates.<sup>86</sup> Many surrogates have been known to offer their services to friends or family members who have struggled with years of infertility.<sup>87</sup> For others, merely understanding the importance of children in their own lives creates a desire to share that joyful feeling with others.<sup>88</sup> As one surrogate explains, “I knew I was blessed with having two beautiful and healthy little boys and I wanted to share that blessing.”<sup>89</sup>

## V. Dispelling Myths and Responding to Criticism

New York’s current prohibition on surrogate parenting contracts is premised on the Legislature’s belief that surrogacy violates public policy.<sup>90</sup> The State Judiciary has interpreted this statutory principle by declaring that issues “which conflict with the morals of the time, and contravene any established interest of society may be said to be against public policy.”<sup>91</sup> Of

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83. *Id.*

84. GRISWOLD, *supra* note 2, at 32.

85. Ali, *supra* note 82.

86. Hanafin, *supra* note 78.

87. ZIEGLER, *supra* note 1, at 53.

88. Hanafin, *supra* note 78.

89. ZIEGLER, *supra* note 1, at 1.

90. N.Y. DOM. REL. LAW § 122 (McKinney 2010).

91. Hanfeld v. A. Broido, Inc., 3 N.Y.S.2d 463, 465 (Mun. Ct. 1938).

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the many immoral and unethical arguments made to support this contention, the two most frequently referred to contend that surrogacy is akin to baby-selling<sup>92</sup> and analogous to prostitution.<sup>93</sup> To support the justification for amending New York's current laws on surrogacy, these myths must be examined and subsequently dispelled.

#### A. *Surrogacy Is Equivalent to Baby-Selling*

Commercial surrogacy is perhaps the most controversial and contentious aspect surrounding the practice of surrogacy.<sup>94</sup> Many opponents of commercial surrogacy consider the practice as being equivalent to baby-selling or black-market adoptions.<sup>95</sup> These accusations, however, completely overlook the underlying motivations of the parties. As a result, these common surrogacy myths can easily be dispelled.

The fee paid to a surrogate through a commercial surrogacy contract should not be seen as baby-selling, but rather as compensation for the gestational services.<sup>96</sup> Once the surrogate's fee is viewed as a payment for services, it becomes just another expense for the intended parent(s).<sup>97</sup> Under this premise, the intended parent(s) is neither buying the child nor paying for an adoption, but is, more accurately, simply "renting the surrogate's womb."<sup>98</sup> This renting process should simply be considered "pre-natal babysitting," a service that a surrogate ought to expect a fee for.<sup>99</sup> The payment is basically

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92. SCOTT B. RAE, *THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES?* 3-6 (1994).

93. Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L., 601, 617 (2009).

94. AM. CONG. OF OBSTETRICIANS AND GYNCOLOGISTS, COMMITTEE OPINION, SURROGATE MOTHERHOOD 3 (2008), available at <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co397.pdf>.

95. Kindregan, Jr., *supra* note 93, at 616; RAE, *supra* note 92, at 40-46.

96. RAE, *supra* note 92, at 30.

97. *Id.*

98. See William Laufer, *Can Surrogacy Co-Exist with New Jersey's Adoption Laws?* 18 SETON HALL L. REV. 890 (1988).

99. Karen Marie Sly, *Baby-Sitting Consideration: Surrogate Mother's*

compensation for the entirety of the gestational process, not just the final act of relinquishing custody of the child.<sup>100</sup>

The payment of a fee, although controversial, is however a necessary foundation to keep the practice of surrogacy alive and functioning.<sup>101</sup> Although financial gain is not the primary motivation for surrogates,<sup>102</sup> as “there are many easier jobs than carrying a baby [twenty four] hours a day, seven days a week;”<sup>103</sup> it has been contemplated that most women are unwilling to give up an entire year of their lives without some form of compensation.<sup>104</sup> Nonetheless, once compensation is viewed for its true nature, it can be seen that surrogacy is plainly not equivalent to baby-selling.

In addition to baby-selling, commercial surrogacy has been condemned as black-market adoption. This argument, however, fails to contemplate several key factors. First, in gestational surrogacy arrangements, there is often a biological link between the child and the intended parents.<sup>105</sup> Therefore, instead of going to mere strangers, the newborn child will be turned over to its “natural” parents.<sup>106</sup> Second, as opposed to black-market adoptions which rarely consider the child’s best interests, the intended parents in a surrogacy arrangement are likely to provide the child with a home as healthy and happy as those who become parents by more traditional means.<sup>107</sup> Surrogacy is always a planned and desired process, thereby creating a substantially greater likelihood that the intended parents will care for the resulting child.<sup>108</sup> As a final point, the typical profile of the birth mother in a surrogacy arrangement,

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*Right to “Rent Her Womb” for a Fee*, 18 GONZ. L. REV. 539, 548 (1982).

100. Avi Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 23-24 (1986).

101. Kindregan, Jr., *supra* note 93, at 616-17.

102. Hanafin, *supra* note 78.

103. Ali, *supra* note 82. In fact, this compensation, although seemingly grand, would barely equal minimum wage if calculated hour by hour.

104. Christine A. Bjorkman, Note, *Sitting in Limbo: The Absence of Connecticut Regulation of Surrogate Parenting Agreements and Its Effect on Parties to the Agreement*, 21 QUINNIPIAC PROB. L.J. 141, 148 (2008).

105. RAE, *supra* note 92, at 38.

106. *Id.* at 38-39.

107. Katz, *supra* note 100, at 24-25.

108. See RAE, *supra* note 92, at 39.



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as compared to a black-market adoption, is substantially dissimilar.<sup>109</sup> In so-called black-market adoptions, the typical birth mother is a financially insecure, unmarried teenager, who is pregnant with her first child.<sup>110</sup> In surrogacy, the birth mother is normally a stable, middle-class, married woman, who is reasonably well educated and has had at least one child.<sup>111</sup>

#### B. *Surrogacy and Prostitution Are Not the Same*

In addition to baby-selling, the second most common myth surrounding surrogacy is that the practice is akin to prostitution, or more accurately, “reproductive prostitution.”<sup>112</sup> In making this argument, opponents focus on the surrogate, not the child, and contend that selling one’s reproductive capacities parallels to women who sell their bodies for sex.<sup>113</sup> This argument fails to take into account, however, the differentiation between paying for someone’s labor and actually acquiring rights over that person in the process.<sup>114</sup> As one academic suggests, there is an important distinction between “my paying you for *me* to use your body in a way that benefits me and . . . my paying you for *you* to use your body in a way that benefits me.”<sup>115</sup> Therefore, in surrogacy, the intended parents are “purchasing the service that the surrogate performs with the use of her body, not any rights over her body itself.”<sup>116</sup> To this end, a surrogate is not using her body in a way that parallels prostitution anymore than a patient utilizes a doctor service to cure him.<sup>117</sup>

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109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 55.

113. *Id.* at 54.

114. *Id.* at 55.

115. *Id.* (quoting Heidi Malm, *Paid Surrogacy: Arguments and Responses*, 3 PUB. AFF. Q. 57, 60 (1989)).

116. *Id.* at 56.

117. *See* Heidi Malm, *Paid Surrogacy: Arguments and Responses*, 3 PUB. AFF. Q. 57, 60 (1989).

C. *The U.S. Constitution Protects Certain Fundamental Rights*

“In the United States, the freedom to decide whether and when to conceive or bear a child is highly valued and protected.”<sup>118</sup> Although not explicitly stated, these freedoms of procreation, parentage, and privacy have all been implicitly set forth as fundamental rights through the Due Process Clause of the United States Constitution. As such, States cannot infringe upon the sanctity of these fundamental rights unless a law is necessary and narrowly tailored to form a compelling state interest.

The basis of these implied fundamental rights was established through a series of Supreme Court decisions. In *Meyer v. Nebraska*<sup>119</sup> and *Pierce v. Society of Sisters*,<sup>120</sup> the Court began to flesh-out these rights by declaring that parents have a fundamental right to direct the upbringing and education of their children,<sup>121</sup> and to have a controlling interest in their custody and care.<sup>122</sup> Following these cases, the Court was presented with *Skinner v. Oklahoma*, which challenged the constitutionality of Oklahoma’s mandatory sterilization law for habitual criminals.<sup>123</sup> Here, the Court held that the right to procreate was so basic to our humanity that it must be deemed fundamental.<sup>124</sup> The next case in this series of decisions establishing procreative liberties was *Griswold v. Connecticut*.<sup>125</sup> This case examined the use of contraception and found that there is a fundamental right to privacy for married couples.<sup>126</sup> Drawing on the *Griswold* decision, the Supreme Court later held that the fundamental right to privacy includes

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118. AM. CONG. OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE OPINION, SURROGATE MOTHERHOOD 3 (2008), *available at* <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co397.pdf>.

119. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

120. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

121. *Meyer*, 262 U.S. at 400.

122. *Pierce*, 268 U.S. at 535.

123. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

124. *Id.* at 541.

125. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

126. *Id.* at 485-86.

the right to make personal decisions related to procreation,<sup>127</sup> which ultimately creates the right to manage and “control the various aspects of pregnancy . . . .”<sup>128</sup> Such abilities should therefore include the right to choose the manner in which a child is born. Consequently, New York’s prohibition on surrogacy is an attack on Constitutional rights implicitly granted to all Americans.

In addition to the Due Process clause, the rights of those who pursue surrogacy can also be examined under an Equal Protection Clause analysis. The Equal Protection Clause of the Fourteenth Amendment asserts that no state shall deny any person within its jurisdiction “the equal protection of the laws.”<sup>129</sup> In order to assess whether a state law violates the Equal Protection Clause, those affected by the law must be members of a protected class. One such protected class is “gender.”<sup>130</sup> Gender, however, is considered only a “semi-suspect” class.<sup>131</sup> As a result, state laws that are substantially related to state interest do not violate the Equal Protection Clause.<sup>132</sup>

Under New York law, AID procedures, including those which involve third-parties, are legally permissible and frequently utilized. Since New York already permits sperm donors to replace infertile men, any law that would prohibit surrogates from replacing infertile women “would likely be found in violation of the equal protection clause [sic] of the Fourteenth Amendment.”<sup>133</sup> Although the one-time contribution from a sperm donor and the nine-month participation by a surrogate are noticeably dissimilar, the underlying premise is substantially the same.<sup>134</sup> Regardless of the length of the contribution or the extent of the sacrifice made, AID and gestational surrogacy are both “valid medical

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127. *Roe v. Wade*, 410 U.S. 113, 152 (1977).

128. RAE, *supra* note 92, at 17.

129. U.S. CONST. amend. XIV, § 1.

130. *Craig v. Boren*, 429 U.S. 190, 197-98 (1976).

131. *Id.*

132. *Id.*

133. RAE, *supra* note 92, at 17.

134. *Id.*

ways to alleviate infertility.”<sup>135</sup> Since there are no alternative ways for infertile couples to reproduce, the fundamental objectives of infertile men and women are exactly the same, thereby creating a scenario in which New York’s current laws which permit AID, but prohibit gestational surrogacy, would be a violation of the Equal Protection Clause.

D. *Benefits Outweigh the Costs*

Surrogacy, like many other morally debatable matters presently regulated, is not without its share of legitimate concerns and precarious consequences. However, the mere fact that surrogacy can result in legal and societal complications is not sufficient to prohibit the practice in its entirety. In support of this assertion, we need to look no further than the practice of adoption. Adoption in New York, as in every other state, is legally permissible.<sup>136</sup> In fact, New York spends considerable amounts of money funding adoption agencies whose primary responsibility is to find suitable parents for the thousands of children currently residing in foster-care-homes throughout the state.<sup>137</sup> Adoption, however, is not without its fair share of troubles and cases “gone wrong.”<sup>138</sup> Despite the fact that many adoptions in New York have resulted in financial and emotional ruin, the state nonetheless sanctions the practice under the premise that the benefit of finding loving families for children without homes outweighs the costs.<sup>139</sup>

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135. *Id.* at 18.

136. N.Y. DOM. REL. LAW § 110 (McKinney 2010).

137. *See generally New York Adoption Facts*, N. AM. COUNCIL ON ADOPTABLE CHILDREN, [http://www.nacac.org/policy/statefactsheets/NY.pdf?utm\\_source=Master+List&utm\\_campaign=2b418ec646-Jan22Update1\\_22\\_2010&utm\\_medium=email](http://www.nacac.org/policy/statefactsheets/NY.pdf?utm_source=Master+List&utm_campaign=2b418ec646-Jan22Update1_22_2010&utm_medium=email) (last visited Sept. 10, 2012).

138. *See* Mark Frankel, *One Year In Adoption Hell*, N.Y. MAGAZINE, Sept. 23, 1996, at 41; Sarah Kershaw, *A 1979 Adoption Gone Wrong Leads to Kidnapping Charge*, N.Y. TIMES, Mar. 9, 2001, <http://www.nytimes.com/2001/03/09/nyregion/a-1979-adoption-gone-wrong-leads-to-kidnapping-charge.html?pagewanted=all>.

139. *See generally* LAURA BEAUVAIS-GODWIN & RAYMOND GODWIN, *THE COMPLETE ADOPTION BOOK: EVERYTHING YOU NEED TO KNOW TO ADOPT A CHILD* (3d ed. 2005).

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Surrogacy, as previously explained, is a vitally important reproductive practice that gives infertile adults the opportunity to obtain children biologically related to them. For those who are unable to do so naturally, the ability of parents to obtain biologically related children is a lifelong dream and ambition. But surrogacy does not just benefit the intended parents. Many, if not all, of the twenty eight thousand babies born through surrogacy since 1976 have been born into happy and loving families.<sup>140</sup> Though there have been cases of “surrogacy gone wrong” over the years, there should be no dispute that the benefits of surrogacy outweigh the potential costs.

## VI. Recommendations

Given the importance of surrogacy to the millions of people influenced by circumstances which prevent them from being biological parents, and the societal importance New York has placed on prohibiting surrogacy, a compromise between these opposing viewpoints must be achieved. Consequently, the obvious solution to this dilemma is in the establishment of a uniform act that protects the interests of both parties. This notion was first proposed in 1973 by the National Conference of Commissioners on Uniform State Laws.<sup>141</sup> The initially proposed uniform law was later amended in 2000, and then again in 2002.<sup>142</sup> Although several states have enacted various forms of this proposed law, New York has yet to consider adopting such a statute.<sup>143</sup> One reason why New York may be apathetic towards such a statute is because the Act does not safeguard the scrupulous interests of the state in protecting the parties involved in a surrogate-parenting contract. With this being said, if a new uniform law was proposed which carefully protected the interests of New York, while still permitted some form of surrogacy, a cordial agreement could be reached.

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140. See Kuczynski, *supra* note 4.

141. The Council of State Governments, *Uniform Parentage Act Statement*, 69 SUGGESTED. ST. LEGIS. 213, 213 (2009), available at <http://ssl.csg.org/dockets/2010cycle/complete2010volume/2010completevolume.pdf>.

142. *Id.*

143. *Id.* at 216.

The following is a newly proposed uniform law. This proposed law is designed to allow the enforceability of surrogate parenting contracts, while concurrently safeguarding the interests of the State, through the use of substantial limitations and protective processes.

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Article 1: Definitions

1. Birth Mother: A woman who gives birth to a child pursuant to a surrogate parenting contract.<sup>144</sup>
2. Genetic Father: A man who provides sperm for the birth of a child born pursuant to a surrogate parenting contract.<sup>145</sup>
3. Genetic Mother: A woman who provides an ovum for the birth of a child born pursuant to a surrogate parenting contract.<sup>146</sup>
4. Intended Parents: The people who enter into a surrogate parenting contract “by which they intend to become the legal parents of the resulting child.”<sup>147</sup>
5. Surrogate Parenting Contract: Any written agreement in which:
  - a. A woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband;<sup>148</sup> and
  - b. The woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.<sup>149</sup>
6. Traditional Surrogacy: The “Birth Mother” is artificially inseminated with sperm belonging to either the “Genetic Father” or an anonymous donor. The egg used

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144. N.Y. DOM. REL. LAW § 121 (McKinney 2010).

145. *Id.*

146. *Id.*

147. RAE, *supra* note 92, at 170.

148. N.Y. DOM. REL. LAW § 121(4)(a) (McKinney 2010).

149. *Id.* § 121(4)(b).

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for fertilization belongs to the “Birth Mother.”<sup>150</sup>

7. Gestational Surrogacy: The “Birth Mother” is impregnated with a fertilized ovum resulting from the egg of the “Genetic Mother” or a donor, and the sperm of the “Genetic Father” or a donor.<sup>151</sup>
8. Compensation: Any valuable consideration paid by the “Intended Parents” to the “Birth Mother.”<sup>152</sup>

#### Article 2: Authorization of Surrogate Parenting Contracts

“Surrogate Parenting Contracts” entered into between a “Birth Mother” and the “Intended Parents” are hereby declared legally binding and enforceable contracts. Such Contracts may provide for “Compensation” to the “Birth Mother.” This authorization is subject to the limitations and guidelines set forth in “Article 3.”

#### Article 3: Limitations and Guidelines

1. Before entering into a “Surrogate Parenting Contract,” the “Birth Mother” and each “Intended Parent” must be represented by separate and independent legal counsel.<sup>153</sup>
2. A “Surrogate Parenting Contract” must be reviewed and validated by a Judicial Official before such contract is deemed valid and enforceable.<sup>154</sup>
3. The validity of a “Surrogate Parenting Contract” will be based on the Judicial Officials determination that the:
  - a. “Surrogate Parenting Contract” was voluntarily, knowingly, and intelligently entered into by each party involved.<sup>155</sup>

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150. See 2 AM. JUR. 2D *Adoption* § 55 (2004).

151. See 7 WILLISTON ON CONTRACTS § 16:22 (4th ed. 2010).

152. See RAE, *supra* note 92, at 170.

153. 750 ILL. COMP. STAT. ANN. 47/25(b)(3) (West 2010); ZIEGLER, *supra* note 1, at 59.

154. See UTAH CODE ANN. §§ 78B-15-801(4), 78B-15-803 (West 2010).

155. See TEX. FAM. CODE ANN. § 160.756(b)(4) (West 2008).

- b. "Intended Parents" maintain the financial means necessary to provide for the child.<sup>156</sup>
  - c. "Intended Parents" and the "Birth Mother" are either related, or were matched through the use of a Licensed-Broker or Not-for-Profit Agency.
  - d. "Intended Parents" and the "Birth Mother" have undergone a complete background check, and have a clean criminal record.
  - e. "Intended Parents" and the "Birth Mother" have undergone complete medical and psychological evaluations by a qualified doctor. The qualified doctor must provide written and signed documentation attesting to the physical and mental fitness of the party evaluated.<sup>157</sup>
  - f. "Intended Parents" and the "Birth Mother" have each submitted four letters of recommendation which have been confirmed and authenticated by the court.
  - g. "Intended Parents" are physically unable to conceive a child naturally. The inability to conceive naturally can be the result of infertility,<sup>158</sup> being a single parent, or maintaining a homosexual relationship.
  - h. "Birth Mother" has had at least one successful prior delivery.<sup>159</sup>
  - i. Each party to the Contract is at least twenty one years of age.<sup>160</sup>
4. The only form of "Surrogate Parenting Contracts" which are enforceable are those involving "Gestational Surrogacy." "Traditional Surrogacy" arrangements are

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156. See N.H. REV. STAT. ANN. § 168-B:18(III) (2010).

157. See *Id* § 168-B:16(III); FLA. STAT. ANN. §§ 742.15(2), (3)(b) (West 2010); 750 ILL. COMP. STAT. ANN. 47/20 (West 2010).

158. See FLA. STAT. ANN. § 742.15(2)(a); N.H. REV. STAT. ANN. § 168-B:17(II); TEX. FAM. CODE ANN. § 160.756(b)(2).

159. See 750 ILL. COMP. STAT. ANN. 47/20(a)(2); N.H. REV. STAT. ANN. § 168-B:17(V).

160. See 750 ILL. COMP. STAT. ANN. 47/20(a)(1); N.H. REV. STAT. ANN. § 168-B:17(I).



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contrary to public policy, void, and unenforceable.<sup>161</sup>

5. The number of fertilized embryo's which can be implanted into the uterus of the "Birth Mother" cannot exceed two.
6. If there is more than one "Intended Parent," the "Intended Parents" must enter into a contractual agreement setting forth the equal financial responsibilities of each party in the event that the parties split from one another. The parties to this agreement must be represented by separate and independent legal counsel.<sup>162</sup>

Article 4: Penalties

Any person who violates the provisions of this Uniform Act shall be guilty of a crime punishable by up to one year incarceration, and a fine of up to \$10,000. Determinations on the severity of the punishment shall be made in the sole discretion of the presiding judge. When making the decision, the presiding judge should consider factors such as the intent of the parties and the severity of the violation.

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## VII. Conclusion

Recent medical advancements in ART have created hope and optimism for some, but confusion and turmoil for others. For the millions of people in the United States unable to achieve parenthood through natural methods, surrogacy has provided an answer to years of frustration and countless tearful nights. For state legislatures, however, surrogacy has posed a daunting task as state officials continue to debate the proper approach for managing the moral, ethical, and legal consequences of such arrangements. In New York, the Legislature concluded that the practice of surrogacy was contrary to public policy and prohibited.<sup>163</sup> However this notion

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161. See LA. REV. STAT. ANN. § 9:2713 (2005).

162. See 750 ILL. COMP. STAT. ANN. 47/25(b)(3) (West 2010).

163. N.Y. DOM. REL. LAW § 122 (McKinney 2010).

of public policy was purported to mean that only those issues which conflict with “the morals of time” are held to be a violation of public policy.<sup>164</sup> In 2010, nearly two decades since New York enacted its statute prohibiting surrogate parenting contracts, much has changed in ART. Today, traditional surrogacy has been almost entirely replaced by gestational surrogacy, the result of which leaves no biological connection between the surrogate mother and the intended parents. With the introduction of gestational surrogacy, common myths and fears surrounding the practice of surrogacy can now be set aside and discredited as ineffective excuses.

Despite the benefits, surrogacy poses realistic and legitimate concerns. But, by controlling the practice with the enactment of strict legislation, New York can protect its societal interests while authorizing the enforceability of surrogate contracts stemming from responsible, healthy, and moral individuals who deserve a chance at parenthood.

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164. *Hanfeld v. A. Broido, Inc.*, 3 N.Y.S.2d 463, 465 (Mun. Ct. 1938).