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Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?

KATHERINE B. LIEBER*

Women are human beings first, with minor differences from men that apply largely to the single act of reproduction. We share the dreams, capabilities, and weaknesses of all human beings, but our occasional pregnancies and other visible differences have been used—even more pervasively, if less brutally, than racial differences have been used—to create an "inferior" group and an elaborate division of labor. The division is continued for a clear if often unconscious reason: the economic and social profit of males as a group.1

INTRODUCTION

Since the emergence of the feminist movement around 1910,2 women have attempted to gain control over their bodies. For centuries, their bodies and reproductive capacities were used to control and oppress them. The feminist movement has attempted to break this mold. Women sought to control their bodies so as not to be prisoners of their biological capacity. An important step towards liberation was the legalization of abortion on demand,3 which gave women a choice of whether or not to bear children without having to ask anyone's permission.4 With the emergence of new reproductive technologies, however, women are faced with new challenges and choices. Some regard these choices as new reproductive freedoms while others view them as other ways for society to continue to control women through their reproductive capacities.5

Among these new reproductive technologies, surrogacy in particular has alarmed many commentators, especially feminists.6 Although they have been fighting for years to enable women to gain control over their bodies, many feminists believe that surrogacy is a form of oppression and that the choice

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3. See Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right to an abortion is grounded in the constitutional right to privacy).
for a woman to become a surrogate is really no choice at all. This Note examines feminist perspectives of surrogacy and analyzes whether these concerns are ameliorated by recent legislative activity regulating the practice. It attempts to answer whether or not a legislature, typically dominated by males, can adequately respond to feminist concerns regarding surrogacy and whether it is possible to establish adequate safeguards to answer the concerns of feminists without effectively eliminating surrogacy arrangements.

Part I discusses the issues surrounding surrogacy, including the technology which made surrogacy possible and the judicial response to this new technology. Part II discusses the feminist critique of surrogacy and the concerns which have arisen in the context of commercial surrogacy. Part III explores the legislative response. In particular, this Part examines New Hampshire’s and Virginia’s surrogacy statutes in depth and details the regulations that these states have set up to deal with the issue of surrogacy. Finally, Part IV attempts to reconcile the feminist concerns about surrogacy with the regulatory schemes of New Hampshire and Virginia and considers whether these schemes go far enough in protecting the rights of all the parties involved. This Note concludes by evaluating the implications of these statutory schemes and suggests additional ways in which the competing interests can be reconciled.

I. SURROGACY ISSUES

A. The Technology of Surrogacy

Surrogacy, one of the most dramatic of the new reproductive technologies, is an arrangement by which a woman agrees to be impregnated by assisted conception, carries the resulting fetus, and relinquishes all parental rights to the child at birth. Surrogacy became possible with the advent of two distinctly different reproductive technologies: artificial insemination and in vitro fertilization. Artificial insemination (AI) "was the first method of noncoital conception (that is, without sexual intercourse) to be developed." It is a simple procedure in which sperm is injected into the vagina of a woman, who carries the resulting child until birth. Donated semen has

7. Id. at 1049.
8. Other reproductive technologies include donor insemination, in vitro fertilization, and sex preselection. Reproductive technologies which may appear in the future include artificial parthenogenesis, egg fusion, and cloning. For an in depth look at these new technologies, see Hubbard, supra note 5, at 317-23.
11. Id.
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mainly been used to impregnate the fertile wife of an infertile husband. In this way, the couple can raise a child who is genetically related to one of the partners.

In vitro fertilization (IVF), known as the test-tube baby method, involves removing the eggs from a woman’s ovaries through a surgical procedure known as a laparoscopy. The eggs are then placed in a laboratory dish together with a man’s sperm. If all goes well, one of the sperm will fertilize an egg and the resulting embryo will be inserted into the woman’s womb through her vagina. In vitro fertilization is primarily used by childless couples who, for some reason, are unable to conceive in the conventional way.

Surrogacy emerged in conjunction with these two methods of reproduction. In some surrogacy arrangements, the surrogate is inseminated with the sperm from the husband of the infertile couple. The resulting child is genetically related to the surrogate mother and to the husband of the infertile couple. Another type of surrogacy arrangement involves removing the infertile wife’s egg by laparoscopy, placing it in a laboratory dish with her husband’s sperm, and inserting the resulting fertilized embryo into the surrogate’s womb. The resulting child, who is genetically related to both the infertile woman and the fertile male, is then carried by the surrogate until birth. Thus, depending on the infertility problem involved, either AI or IVF may be used in a surrogacy situation.

B. The Courts’ Response to Surrogacy in the Nineties

1. The Baby M Case

The New Jersey Supreme Court’s decision in *In re Baby M* sparked much controversy and debate over the legality of a surrogate parenting
contract. The contracting father, William Stem, entered into a surrogacy arrangement with Mary Beth Whitehead whereby Ms. Whitehead was artificially inseminated with the sperm of Mr. Stem. The case involved a custody battle between Whitehead, the gestational mother, and Stem, the biological father. The court concluded that the surrogacy contract between them was unenforceable because it conflicted with existing "(1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions." In addition, the court held that the contract was against public policy and that a mother could not contract away her parental rights under the New Jersey statutes.

Upon finding the contract unenforceable, the court transformed the case into a custody battle. It applied established rules for determining child custody by deciding what arrangement was in the best interest of the child. The court concluded that William Stem, a biochemist, and Betsy Stem should raise the child and that Mary Beth Whitehead, whose parental rights could not be extinguished without a finding of parental unfitness, should be given visitation rights.

2. Subsequent Cases

As recently as 1990, courts have applied this same analysis to surrogate parenting contracts. In In re Adoption of Paul, the parties signed a forty-nine page surrogate parenting agreement whereby the surrogate agreed to be artificially inseminated with the sperm of the contracting male. The contract provided for payment of $10,000 to the surrogate, in addition to all other expenses, upon surrender of custody of the child to the intended parents. The surrogate appeared before a New York family court to obtain a "Judicial Consent" to allow the adoption of her son by the father and his wife.

20. In re Baby M, 537 A.2d at 1235. Betsy Stern, the infertile wife, was not a party to the contract although it gave her sole custody of the child in the event of Mr. Stern's death. Id.
21. Id. at 1240.
22. Id. at 1245, 1251.
23. Id. at 1246-50.
24. Id. at 1258.
25. Id. at 1259.
26. Id. at 1263.
28. Id.
29. Id. at 815-16.
30. Id. at 816.
In deciding the case, the court first addressed whether the contract was legal under state law.\textsuperscript{31} It found that there was no clear legislative guidance on the subject of surrogacy and thus looked to the law governing adoption.\textsuperscript{32} New York's adoption statutes, like New Jersey's, prohibit any compensation in connection with an adoption.\textsuperscript{33} The court thus found that "compensation direct [sic] to the mother for her 'services' in conceiving, carrying and giving birth to the child is not permitted."\textsuperscript{34} Therefore, the surrogate parenting contract was void under existing New York law.\textsuperscript{35} In order for the adoption to take place, the court had to be assured that the surrender of the surrogate's parental rights was truly voluntary. Thus, the surrogate had to submit an affidavit swearing that she "[would] not request, accept or receive the $10,000 promised to her in exchange for the surrender of the child."\textsuperscript{36} In addition, the prospective adoptive parents had to submit an affidavit swearing not to pay the surrogate any compensation for the exchange of the child.\textsuperscript{37} The New York court clearly found "the analysis and conclusion reached by the New Jersey Supreme Court compelling."\textsuperscript{38} Given the above, it seems likely that the court would apply the "best interest of the child" analysis to any contested surrogacy adoption case.\textsuperscript{39}

Two more recent cases have cast further doubt on the legality of surrogate parenting contracts. In \textit{In re Adoption of Matthew B.-M.},\textsuperscript{40} a surrogate mother was artificially inseminated, gave birth, and signed a consent to adoption.\textsuperscript{41} Approximately eight months later, she petitioned to withdraw consent to the adoption.\textsuperscript{42} The surrogate claimed that the illegality of the surrogacy contract was a sufficient basis for the withdrawal of her consent to adoption.\textsuperscript{43} The court refused to rule on the legality of the contract and instead stated that, even assuming the illegality of the contract, the adoption action rested on the surrogate's signed consent and not on the alleged illegal contract.\textsuperscript{44} The court further found that contracts purporting to determine the custody and control over children in a custody dispute "while not void or illegal, are not binding on the court; rather, the best interests of the

\textsuperscript{31} Id.
\textsuperscript{32} Id. at 817.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 818.
\textsuperscript{36} Id. at 819.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 817.
\textsuperscript{39} Id. at 819 (allowing surrender of child only if surrogate assured court that such surrender was motivated by her concern for the best interests of the child).
\textsuperscript{41} Id. at 21.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 24.
\textsuperscript{44} Id. at 25.
child control custody determinations, regardless of the parties’ agreement.\textsuperscript{45} The court seemed to consider this strictly an adoption proceeding without much further discussion of the surrogacy contract and, in the best interest of the child, denied the surrogate’s petition and allowed the adoption to proceed.\textsuperscript{46} The court further urged the legislature to consider the question of surrogacy and provide courts with the necessary guidance with which to determine questions associated with surrogacy.\textsuperscript{47}

In a second case, decided in 1991, the court sought to determine whether a surrogate who was implanted with a fertilized egg was the legal mother of the resulting child or whether the husband and wife, who provided the fertilized egg, were the legal parents.\textsuperscript{48} The California appellate court in \textit{Anna J. v. Mark C.} concluded that the surrogate, who agreed to have the fertilized egg implanted in her womb and who carried the child to term, was not the natural mother of the child.\textsuperscript{49} The court ruled that the wife, who provided the egg, was the natural mother\textsuperscript{50} and that the husband, who provided the sperm, was the natural father.\textsuperscript{51} The surrogate further argued that even if she was not considered the natural mother under California law, she should be given parental rights as a matter of constitutional law, due to the profound contribution she made to the child’s development.\textsuperscript{52} The court rejected this argument and found that to give a gestational surrogate “a liberty interest in her relationship with the child is to diminish the liberty interest of [the biological parents] in their relationship with the child.”\textsuperscript{53} In its conclusion, the court again urged the legislature to take action on the subject of surrogacy “so that both parents and children can face the future with certainty over their legal status.”\textsuperscript{54}

It seems clear from the discussion above that courts want and need legislative guidance concerning surrogacy contracts. Although courts are dealing with this issue because they have to, they are subtly (and sometimes not so subtly) pleading with their respective legislature to help them resolve these tough questions. While many legislatures have enacted some type of legislation to deal with surrogacy, the question remains whether any legislation can adequately deal with the various concerns that feminists raise.

\textsuperscript{45} Id. at 27.
\textsuperscript{46} Id. at 30.
\textsuperscript{47} Id. at 37.
\textsuperscript{49} Id. at 376.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 378.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 380 (emphasis in original).
\textsuperscript{54} Id. at 381 (in portion of opinion not certified for publication).
II. FEMINIST PERSPECTIVES

It is impossible to identify one unified feminist perspective on surrogacy because feminists are as varied in their views as they are in their identities. Some feminists believe that surrogacy is one of the many reproductive choices that women should be free to make. However, most feminist writers see surrogacy as a form of slavery or prostitution in which the surrogate is exploited through the enticements of money, the social expectation of self-sacrifice, or both.

One of the main tenets of feminism is that women should not have their destiny controlled by their biology. Historically, the social roles of women have been defined by the fact that only women can become pregnant. In Western society, women not only bear the children, but are also given the primary responsibility for rearing them. However, control over women's bodies, and particularly over their reproductive capacities, has been largely in the hands of men. This control is cited by feminist scholars as one of the main factors in the domination and oppression of women.

For centuries women were considered little more than the property of their fathers or husbands. Surrogacy conjures up many of the same fears of women's bodies being controlled by men for their own ends. As one sociologist has observed, "in a system characterized by a power imbalance, the greater the asymmetry, the greater the potential for abuse of the less powerful group." Thus, when analyzing surrogacy, the fact that contem-
porary U.S. society is still largely patriarchal is relevant—most of the power is possessed by men and arguably used to further their own needs and desires.

Many feminists contend that once women gain control of their reproductive capacities, women will have made an essential first step in gaining the much-needed control over their bodies and thus their destiny. Feminists have made great gains in their fight for the right to reproductive choice. Women have established significant reproductive rights, including the right to avoid pregnancy through the use of contraceptives; the right to become pregnant through artificial insemination; the right to control their bodies during pregnancy by choosing, for example, not to have Caesarean sections; and the right to terminate their pregnancies through abortion. "According to feminist arguments, these rights should not be overridden by possible symbolic harms or speculative risks to potential children."

Early on in the surrogacy debate, feminist principles "provided the basis for a broadly held position that contracts and legislation should not restrict the surrogate's control over her body during pregnancy (such as by a requirement that the surrogate undergo amniocentesis or abort a fetus with a genetic defect)." This argument is based on the notion of gender equality. It rests on common law principles that protect a person's bodily integrity, and contract law principles which reject the remedy of specific performance for personal service contracts. Currently, however, many feminists are seeking to ban surrogacy entirely. "The rationales being used," says Lori Andrews, a noted legal scholar on reproductive technologies, "fall into three general categories: the symbolic harm to society of allowing paid surrogate, the potential risks to the women of allowing paid surrogate, and the potential risks to the potential child of allowing paid surrogacy."

A. Harm to Society

The symbolic harm to society posed by surrogacy is that surrogacy may be characterized as baby selling, a practice that demeans all of society. Some argue that surrogacy treats children as commodities that can be bought or sold for a price. Others contend that surrogacy should be prohibited for the same reasons that the sale of organs for transplantation

64. See, e.g., Andrews, supra note 55, at 167-69.
69. Id. at 168-69.
70. Id. at 169.
is prohibited.\textsuperscript{72} Shari O’Brien states that “the law deters people from relinquishing nonregenerative parts of themselves for mere money. . . . [W]hen an organ or an infant is being marketed the seller experiences pain and substantial risks, the buyer may pay a hefty or even an extortionate fee, and the commodity sold is unique and irreplaceable.”\textsuperscript{73}

O’Brien opposes the argument that the surrogate is merely being paid for her services. She states that “[t]he services component cannot be isolated from the goods component, especially when the idiosyncratic goods are being supplied from the very body of the seller, and must be proffered if the deal is to be consummated.”\textsuperscript{74} In the commercial surrogacy context, the surrogate usually creates a child not because she wants to be magnanimous, but because she wants to earn the fee.\textsuperscript{75} O’Brien contends that “[m]aking this form of trade routine would alter social perceptions of children; babies, like automobiles, stock, and pedigreed dogs, will be viewed quantitatively, as merchandise that can be acquired, at market or discount rates.”\textsuperscript{76}

Many feminists have also likened surrogacy to prostitution,\textsuperscript{77} in which reproductive capacity becomes a commodity. Andrea Dworkin, a prominent radical feminist and accomplished author, states that all reproductive technologies “make the womb extractable from the woman as a whole person in the same way the vagina (or sex) is now.”\textsuperscript{78} This practice is harmful to society in that “[a]n individual’s integrity is affected negatively by being discussed in market rhetoric as a fungible commodity, because such terminology ignores the unique quality and differences between individuals.”\textsuperscript{79}

In turning the womb into a commodity, many feminists fear that society will once again value women primarily for their reproductive capacities. This fear is exacerbated by the strong possibility that, because of economic coercion, surrogacy will occur for the benefit of the rich at the expense of poorer women.\textsuperscript{80} Many feminists additionally fear that surrogates will be turned into a class of breeders and that a “reproductive brothel!”\textsuperscript{81} will emerge.\textsuperscript{82}

\textsuperscript{72} O’Brien, \textit{supra} note 56, at 143.
\textsuperscript{73} Id. at 142-43.
\textsuperscript{74} Id. at 143.
\textsuperscript{75} One study of 125 women who applied to be surrogate mothers revealed that the vast majority required a fee for their participation although other motivations were present. Philip J. Parker, \textit{Motivation of Surrogate Mothers: Initial Findings}, 140 \textit{AM. J. PSYCHIATRY} 117, 117 (1983).
\textsuperscript{76} O’Brien, \textit{supra} note 56, at 144 (footnote omitted).
\textsuperscript{78} Dworkin, \textit{supra} note 77, at 187.
\textsuperscript{80} Joan Mahoney, \textit{An Essay on Surrogacy and Feminist Thought, in SURROGATE MOTHERHOOD, supra} note 55, at 183-84.
\textsuperscript{81} Corea, \textit{supra} note 56, at 38.
\textsuperscript{82} References to the dangers of surrogacy and artificial insemination have been featured
In this "breeding brothel" approach to reproduction, white women who are judged superior would be selected as egg donors and turned into machines for producing embryos; women of color would be used as breeders, with artificial synchronization of menstrual cycles perfecting the assembly line. This would continue until the development of the artificial womb, after which the breeder would no longer be of value.\textsuperscript{81}

Some feminists, however, argue that what is being sold is not the resulting child but the "pre-conception termination of the mother's parental rights"\textsuperscript{84} and the use of the surrogate's time, energy, and womb. They analogize this practice with the pre-conception sale of a father's parental rights through the donation of sperm and artificial insemination.\textsuperscript{85} If a man has a right to sell his sperm, a woman should have a right to sell her ovum and reproductive capabilities as well.

**B. Harm to Women**

Another major rationale against the legalization of surrogacy is the potential for actual psychological and physical harm to women. Proponents of surrogacy argue that it is a woman's choice to use her body any way she sees fit.\textsuperscript{86} Many feminists believe, however, that commercial surrogacy will lead to the exploitation of women, not only through economic pressures but through societal ones as well.\textsuperscript{87} Andrea Dworkin argues that in surrogacy, just like in prostitution, women often are not free to choose. "In both prostitution and surrogate motherhood, . . . the state has constructed the social, economic and political situation in which the sale of some sexual or reproductive capacity is necessary to the survival of the woman."\textsuperscript{88} Women are not unaffected by the society in which they live. "One of the actual conditions that perpetuates the exploitation of woman is her economic status."\textsuperscript{89} Women earn far less than men and are often relegated to what society considers women's employment.\textsuperscript{90} Women who do obtain what

\textsuperscript{82} References to the dangers of surrogacy and artificial insemination have been featured in prominent futuristic literature. See, e.g., MARGARET ATWOOD, THE HANDMAID'S TALE (1986) (presenting a society in which the criminalization of abortion and the banning of women from the workforce led to institutionalized surrogacy as a form of slavery).
\textsuperscript{84} Andrews, supra note 55, at 170.
\textsuperscript{85} See id.
\textsuperscript{86} See supra note 55 and accompanying text.
\textsuperscript{87} See supra note 56 and accompanying text.
\textsuperscript{88} GENA COREA, THE MOTHER MACHINE 228 (1985).
\textsuperscript{89} Id.
\textsuperscript{90} For a more detailed discussion on women in the workplace, see DEBORAH C. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 161-201 (1989).
society considers typical male jobs are often discriminated against in salary, promotions, and benefits, and many may suffer the added stress of sexual harassment. Some of these women may be pressured into surrogacy as a way to alleviate economic pressures at home.

Just as a woman’s economic status may affect her decision, many feminists contend that a woman’s emotional structure and societal status affect her decision as well. Gena Corea, a recent co-chair of the National Coalition Against Surrogacy, concludes that women have been taught to put others’ needs above their own. She states that “society places a greater premium on a woman’s childbearing role than it does on her employment prospects. Given that childbearing is the prime function for which women are valued, it is not surprising that some women only feel special when they are pregnant and assert that they love reproducing.” Some feminists argue that it is men who perpetuate the idea that women love to be pregnant. “Men are controlling not only what choices are open to women, but what choices women learn to want to make. Women may have a will to be pregnant[,]... but we have the potential to want other things as well.” This potential, Corea adds, is one that is kept largely unfulfilled. These pressures influence a woman’s decision by pushing her into believing that childbearing is her main function and that surrogacy is simply a natural progression of that function.

The messages received by women and societal pressures may also be contradictory. As one feminist commented, “[i]t is drilled into us in every conceivable way that we women have this maternal instinct, maternal love. We are told that if we have an abortion, we’ll suffer a great psychological trauma and sense of loss.” Now, with the advent of surrogacy, “[t]hey’re conditioning women to say: ‘It’s not my baby. It’s your baby because you paid for it.’ How fast they change! They switch propaganda on us as it suits their needs.”

With surrogacy, the psychological risks women face and the potential for regret are thought by some to be enormously high. Visions of babies being ripped from their mothers’ arms are extremely disturbing to say the least. It is assumed that many surrogates will feel the same regret that biological mothers feel in traditional adoption cases. But, “[w]hile 75 percent of the biological mothers who give a child up for adoption later change their

91. Corea, supra note 88, at 228.
92. Id. at 230.
93. Id. at 232.
94. Id. at 233.
95. Id.
96. Id.
97. Id. at 238.
98. Id.
minds, only around 1 percent of the surrogates have similar changes of heart.\footnote{Id. (footnote omitted).}

Feminists generally agree that women should be able to enter into potentially risky behavior as long as they have given their voluntary and informed consent.\footnote{Id. at 171-72.} But "a strong element of the feminist argument against surrogacy is that women cannot give an informed consent until they have the experience of giving birth."\footnote{Id. at 172.} Some believe that hormonal changes during pregnancy make it impossible for the surrogate to predict how she will feel about relinquishing her parental rights at the time of birth.\footnote{Id. at 172 n.34.} Other feminists argue that this is a very dangerous argument to make. For example, psychologist Joan Einwohner points out that:

women are fully capable of entering into agreements in this area and of fulfilling the obligations of a contract. Women's hormonal changes have been utilized too frequently over the centuries to enable male dominated society to make decisions for them. The Victorian era allowed women no legal rights to enter into contracts. The Victorian era relegated them to the status of dependent children. Victorian ideas are being given renewed life in the conviction of some people that women are so overwhelmed by their feelings at the time of birth that they must be protected from themselves.\footnote{Id. at 173 (quoting In the Matter of a Hearing on Surrogate Parenting Before the N.Y. Standing Committee on Child Care (Apr. 10, 1987) (statement of Joan Einwohner at 10-11).}

If feminists are not careful, this type of rationale could come back to haunt women in other areas. "It would seem to be a step backward for women to argue that they are incapable of making decisions. That, after all, was the rationale for so many legal principles oppressing women for so long, such as the rationale behind the laws not allowing women to hold property."\footnote{Id.}

\textbf{C. Harm to Children}

The third major argument in opposition to surrogacy is the potential harm to children. Just as baby selling is harmful to society's notion of children, it may also be harmful to the children themselves. "Baby selling
SELLING THE WOMB is prohibited in our society, in part because children need a secure family life and should not have to worry that they will be sold and wrenched from their existing family. 106 But, the child born of a surrogate is never in a state of insecurity because "[f]rom the moment of birth, he or she is under the care of the biological father and his wife, who cannot sell the child."107

An additional argument states that the effects on the surrogate's existing children could be harmful. 108 "All children may be burdened by special fears and insecurities in a society where their parents may obtain money for family necessities by giving away newborn siblings."109 This may cause the surrogate's children to believe that they too may be sold. The fears of these children, however, may be unfounded. Andrews believes that if the surrogate were to explain to her own children that she is helping another couple and that the child she is carrying is not part of their own family, they would "realize that they themselves are not in danger of being relinquished."110

III. THE LEGISLATIVE RESPONSE

Many, including the courts, have called upon the legislatures to respond to the issue of surrogacy.111 Legislatures in Arizona, 112 Indiana, 113 and North Dakota114 have answered this call by making any type of surrogacy contract void and unenforceable. Other states, including Kentucky,115 Louisiana,116 Nebraska,117 Utah,118 and Washington,119 have made any surrogacy contract entered into for compensation void and unenforceable as against public policy. Michigan goes a step further by criminalizing surrogacy.120

The Virginia and New Hampshire legislatures have enacted statutes which permit surrogacy contracts and establish extensive schemes governing their

106. Id. at 176.
107. Id.
108. Id. at 177.
109. Allen, supra note 19, at 1763.
111. See supra notes 47, 54 and accompanying text.
120. Under the Michigan statute, any participating party who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of up to $10,000 and one year imprisonment. Mich. Comp. Laws Ann. § 722.859(2) (West 1991). Further, any party who induces, arranges, or otherwise assists in the making of such a contract for compensation is guilty of a felony with a fine of up to $50,000 and five years' imprisonment. Id. § 722.859(3).
terms and enforcement.121 They have made surrogacy contracts legal but not enforceable, thereby allowing the courts to oversee surrogacy arrangements and provide remedies in case of a breach by one of the parties. These two statutes are discussed below.

A. The Virginia Model

The Virginia surrogacy statute, which becomes effective July 1, 1993, allows surrogacy contracts, subject to certain limitations.122 The statute recognizes two general types of surrogacy contracts: those contracts that are approved in advance by the court and those that have not gained prior approval. Surrogacy arrangements which seek prior approval by the court must meet certain requirements. Those arrangements which have not been approved by the court must be capable of being reformed to meet certain minimum standards required by the statute.

1. Court-Approved Surrogacy Contracts

a. The Petition

The first step in gaining approval of a surrogacy contract is for the surrogate, her husband,123 and the intended parents to sign the contract and petition the court for approval.124 The court is required to appoint a guardian ad litem to represent the interests of the child, and counsel to represent the interests of the surrogate.125 A hearing is held in camera and the court continues to have jurisdiction until all provisions of the contract have been fulfilled to the satisfaction of the court.126

b. Requirements

Certain requirements must be met before the court will approve the contract. First, one of the parties must reside in Virginia for the court to have jurisdiction.127 A home study of the intended parents, the surrogate,

123. The surrogate must be married to obtain court approval of the pre-execution surrogacy contract. Id. § 20-160(B)(6); see infra note 153. But cf. the requirements for reformed contracts, discussed infra at text accompanying note 153.
124. Id. § 20-160(A).
125. Id.
126. Id.
127. Id.
and her husband must be conducted, and all interested parties must meet the standards of fitness applicable to adoptive parents.\textsuperscript{128} The court must find that the contract was voluntarily entered into and that its terms were understood by all parties.\textsuperscript{129} Prior to signing the contract, all parties must undergo physical and psychological examinations and receive counseling regarding the effects of the surrogacy contract.\textsuperscript{130}

c. The Intended Parents

The intended parents are responsible for all reasonable medical and ancillary costs associated with the pregnancy,\textsuperscript{131} which include costs of the assisted conception and birth, maternity care, medication, maternity clothes, any other reasonable costs associated with the pregnancy, and any court costs and counsel fees.\textsuperscript{132} The intended mother must be either infertile or unable to bear children without unreasonable risk of mental or physical harm to herself or the unborn child, and at least one of the intended parents is expected to be genetically related to the unborn child.\textsuperscript{133}

d. The Surrogate

Any woman wishing to be a surrogate under a court-approved contract must be married, have had at least one successful pregnancy, and be in good mental and physical health.\textsuperscript{134} Her husband must be a party to the contract and the surrogate must not be compensated over and above any expenses associated with the pregnancy.\textsuperscript{135} Throughout the pregnancy, the surrogate is solely responsible for the clinical management of the pregnancy.\textsuperscript{136}

e. Termination

After court approval of the surrogacy contract but before the surrogate becomes pregnant, the court—for cause—or any of the interested parties may terminate the contract by giving notice to all parties and the court.\textsuperscript{137} If the surrogate is also a genetic parent, she may terminate the contract

\textsuperscript{128} Id. § 20-160(B)(2), (3).
\textsuperscript{129} Id. § 20-160(B)(4).
\textsuperscript{130} Id. § 20-160(B)(7), (11).
\textsuperscript{131} Id. § 20-160(C).
\textsuperscript{132} Id. § 20-156.
\textsuperscript{133} Id. § 20-160(B)(8)-(9).
\textsuperscript{134} Id. § 20-160(B)(6).
\textsuperscript{135} Id. § 20-160(B)(4).
\textsuperscript{136} Id. § 20-163(A).
\textsuperscript{137} Id. § 20-161.
within 180 days after she becomes pregnant.\textsuperscript{138} Upon exercising her rights, the surrogate incurs no liability to the intended parents.\textsuperscript{139}

2. Court-Reformed Surrogacy Contracts

Virginia also recognizes surrogacy contracts executed without prior court approval prior to conception. Such contracts are enforceable only to the extent that their provisions are reformed to conform to the requirements set forth in the statute.\textsuperscript{140}

\textit{a. Requirements}

The surrogate, her husband, if she has one, and the intended parents must be parties to the contract.\textsuperscript{141} The contract must be in writing, acknowledged before an officer of the court, and signed by all the parties.\textsuperscript{142} The contract must also guarantee that the intended parents are responsible for all reasonable medical and ancillary costs of the pregnancy,\textsuperscript{143} and all of the parties must sign a statement that they voluntarily entered into the contract and understand the terms of the contract and their rights and responsibilities under Virginia law.\textsuperscript{144}

\textit{b. Termination}

If at least one of the intended parents is genetically related to the resulting child, the surrogate, in order to relinquish her parental rights, must sign a surrogate consent form naming the intended parents as the parents of the child no less than twenty-five days after the birth of the child.\textsuperscript{145} If the contract does not already hold, it shall be construed to include a provision which states that the intended parents will be the parents of the resulting child when and if the surrogate relinquishes her rights.\textsuperscript{146} If the contract does not include an allocation of financial responsibility upon the termination of the contract, then it shall be construed as follows: if all parties agree to terminate, then the intended parents are responsible for all costs for a period of six weeks following termination.\textsuperscript{147} If the surrogate termin-

\textsuperscript{138} Id. § 20-161(B).
\textsuperscript{139} Id.
\textsuperscript{140} Id. § 20-162(A).
\textsuperscript{141} Id. § 20-162(A)(1).
\textsuperscript{142} Id. § 20-162(A)(2).
\textsuperscript{143} Id. § 20-162(B)(3).
\textsuperscript{144} Id. § 20-162(B)(2).
\textsuperscript{145} Id. § 20-162(A)(3).
\textsuperscript{146} Id. § 20-162(B)(1).
\textsuperscript{147} Id. § 20-162(C)(1).
nates, the intended parents are liable for one-half of the costs incurred prior to termination.\textsuperscript{148} If the surrogate fails to relinquish her parental rights after the birth of the child, then the intended parents are responsible for one-half of all costs incurred prior to birth.\textsuperscript{149} As with a contract that has prior approval, the surrogate is solely responsible for clinical management throughout the pregnancy.\textsuperscript{150}

3. Comparison

A major difference between contracts receiving prior court approval and those which do not concerns the right of the surrogate to terminate the contract. Apparently, with a contract in which there was prior approval, intended parents are automatically considered the parents of the resulting child unless the surrogate elects to terminate the contract within 180 days of becoming pregnant.\textsuperscript{151} With contracts that did not receive prior approval, the intended parents are not automatically considered the parents of the resulting child. The surrogate, after a twenty-five day waiting period, must relinquish her parental rights by signing a consent form before the intended parents can be named as the child’s parents on the birth certificate.\textsuperscript{152}

Another difference is the requirement that the surrogate be married. With contracts receiving prior approval, it appears that the surrogate must be married for the court to approve the contract.\textsuperscript{153} With contracts not approved prior to conception, the courts cannot require that the surrogate be married.\textsuperscript{154}

4. Surrogate Brokers

The statute prohibits any entity from recruiting or otherwise inducing any surrogate or intended parent into a surrogacy contract for compensation.\textsuperscript{155} Violation of this prohibition results in a Class 1 misdemeanor.\textsuperscript{156} Not only does the statute make the surrogate broker liable for criminal sanctions, it also makes the surrogate broker civilly liable to the surrogate and the intended parents for up to three times the amount paid to the broker for

\begin{itemize}
  \item \textsuperscript{148} Id. § 20-160(C)(2).
  \item \textsuperscript{149} Id. § 20-162(C)(3).
  \item \textsuperscript{150} Id. § 20-163(A).
  \item \textsuperscript{151} Id. § 20-161(B).
  \item \textsuperscript{152} Id. § 20-162(A)(3).
  \item \textsuperscript{153} Id. § 20-160(B)(6). "The Court shall enter an order approving the surrogacy contract ... upon a finding that: ... 6. The surrogate is married and has had at least one pregnancy ... ." Id. (emphasis added).
  \item \textsuperscript{154} See id. § 20-162.
  \item \textsuperscript{155} Id.
  \item \textsuperscript{156} Id. § 20-165(A).
\end{itemize}
arranging the purported contract. These sanctions, however, do not apply to the services of any attorney giving legal advice in regard to a surrogacy contract.

B. The New Hampshire Model

New Hampshire, like Virginia, has also adopted an extensive statutory scheme regulating surrogacy. But, unlike Virginia, New Hampshire only recognizes surrogacy contracts which have been judicially preauthorized.

1. Judicial Preauthorization

a. The Petition

All of the parties must petition the court prior to conception. The petition must include the surrogacy contract, all written consents, and all completed evaluations and reports required by the statute. The hearing will be closed to the public and the court will not authorize the contract unless all of the requirements have been satisfied.

b. Requirements

The contract must be signed by all parties and include the consent of the surrogate and her husband, if any, to either surrender the child or accept the obligation to parent. It must also include the consent of the intended parents to accept the obligation to parent, provided that the surrogate does not elect to keep the child. Each of the parties must give the health care provider his or her informed consent, which occurs when a competent person is made aware of all the medical and psychological risks, the legal and financial obligations, and any available alternatives. All parties must have received medical and nonmedical evaluations and counseling. The nonmedical evaluations determine each party's suitability to parent, including the ability of the person to give the child love and

157. Id. § 20-165(B).
158. Id. § 20-165(C).
160. Id. § 168-B:16(I)(b).
161. Id. § 168-B:16(I)(b).
162. Id. § 168-B:21(I)-(II).
163. Id. § 168-B:24.
164. Id. § 168-B:25.
165. Id. § 168-B:25(I)-(II).
166. Id. § 168-B:25(III).
167. Id. § 168-B:16(I)(c).
168. Id. § 168-B:1(VI).
169. Id. § 168-B:16(I)(a).
affection and the ability of the person to assume the inherent risks involved in the contract.\textsuperscript{170} A home study must also be conducted to determine each party's ability to provide the resulting child with basic necessities.\textsuperscript{171}

c. Intended Parents

The intended parents are responsible for all pregnancy-related expenses, actual lost wages related to the pregnancy, health and life insurance, reasonable attorney's fees and court costs, and any counseling fees and costs.\textsuperscript{172} However, the intended parents may also be responsible for child support if they breach the contract by failing to accept the resulting child.\textsuperscript{173} In order to qualify as an intended mother, it must be medically determined that the prospective mother is physiologically unable to bear a child.\textsuperscript{174} Either the intended parents or the surrogate must have lived in the state of New Hampshire for at least six months.\textsuperscript{175}

d. The Surrogate

A woman wishing to be a surrogate in New Hampshire must be twenty-one years of age or older, have had at least one successful pregnancy, and be in good health.\textsuperscript{176} Additionally, the surrogate can only be compensated for pregnancy-related expenses.\textsuperscript{177} All health care decisions regarding the child and the surrogate prior to birth and seventy-two hours thereafter shall be made by the surrogate.\textsuperscript{178} This includes the decision of whether or not to abort the child.\textsuperscript{179} However, in the event of the surrogate's disability, all decisions shall be made by the intended parents unless the surrogate contract provides otherwise.\textsuperscript{180}

e. Termination

The surrogate may terminate the contract and exercise her right to keep the child any time prior to seventy-two hours after the birth of the child. If the surrogate does exercise that right, she and her husband become the

\textsuperscript{170} Id. § 168-B:18(II).
\textsuperscript{171} Id. § 168-B:18(III).
\textsuperscript{172} Id. § 168-B:25(V).
\textsuperscript{173} Id. § 168-B:28(II)(c).
\textsuperscript{174} Id. § 168-B:17(II).
\textsuperscript{175} Id. § 168-B:20.
\textsuperscript{176} Id. § 168-B:17(I), (V).
\textsuperscript{177} Id. § 168-B:25(V).
\textsuperscript{178} Id. § 168-B:6(I).
\textsuperscript{179} Id. § 168-B:27(II)-(III).
\textsuperscript{180} Id. § 168-B:6(II).
child's parents.\textsuperscript{181} If the surrogate does not exercise that right, the intended parents automatically become the resulting child's parents and are subsequently named as such on the child's birth certificate.\textsuperscript{182} If there are extenuating circumstances, the period in which the surrogate may exercise the option to keep the child is extended to one week.\textsuperscript{183}

\section*{f. Surrogate Brokers}

New Hampshire does not allow any entity to promote or solicit any party to enter into a surrogacy arrangement for compensation.\textsuperscript{184} Any person who violates this provision will be guilty of a misdemeanor with each separate violation constituting a separate offense.\textsuperscript{185}

\section*{C. Differences between the New Hampshire and Virginia Models}

1. Judicial Preauthorization

A key difference between the New Hampshire and Virginia statutes is that New Hampshire only allows a surrogate contract if it has been judicially preauthorized.\textsuperscript{186} Presumably, if it has not been preauthorized, New Hampshire considers any surrogacy contract illegal. By contrast, Virginia recognizes both court-approved surrogacy contracts and those not previously approved.\textsuperscript{187} By recognizing both types of contracts and making certain that they conform to a certain standard, the Virginia statute affords persons entering into surrogacy arrangements more protection than the New Hampshire statute does. Thus, unsophisticated persons who enter into surrogacy contracts without prior court approval will be protected.

2. Time Limits for Termination

Another important difference between the two statutes is the time limit for allowing the surrogate to keep the resulting child. In New Hampshire, the surrogate has at least seventy-two hours after the birth of the child to elect to keep the child.\textsuperscript{188} Virginia, with a court-approved contract, only

\begin{footnotesize}
\begin{enumerate}
\item Id. § 168-B:25(IV).
\item Id. § 168-B:26.
\item Id.
\item Id. § 168-B:16(IV).
\item Id. § 168-B:26.
\item Id. § 168-B:30(II).
\item Id. § 168-B:16.
\item Va. Code Ann. § 20-159.
\end{enumerate}
\end{footnotesize}
allows the surrogate to elect to keep the child up to 180 days after the last performance of any assisted conception. With a surrogacy contract not approved by the courts, the surrogate must wait at least twenty-five days following the birth of the resulting child before she may relinquish her parental rights under the Virginia statute.

3. Surrogate Brokers

Both statutes make any person who induces any party to enter into a surrogacy contract guilty of a misdemeanor. Virginia goes a step further by making anyone found guilty of surrogate brokering civilly liable to the surrogate and intended parents for up to three times the amount charged by the broker. These provisions essentially eliminate the middlemen in surrogacy contracts and send a strong message prohibiting the commercialization of surrogacy.

IV. CAN A SURROGACY STATUTE ANSWER FEMINIST CONCERNS?

Feminist scholarship reflects many of the same tensions and conflicting concerns that surround the issue of surrogacy. On the one hand, women producing babies for a fee makes many feminists particularly uncomfortable. On the other hand, allowing the government to restrict women's choices may result in diminishing all other strides women have made in the area of reproductive rights. This prospect also makes many feminists very uneasy.

So where does this leave us? Women, as independent economic beings, should be allowed to decide whether or not they wish to become surrogates. However, there should also be some form of government intervention that would hopefully reduce the perceived harms associated with surrogacy. This can and should be done, but legislatures and courts need the guidance and wisdom which only women can provide in the area of reproductive technologies. Of course, no single statute would be able to answer all of the various concerns that feminists have about surrogacy, but, arguably, certain statutory provisions may lessen the concerns of many feminists.

If surrogacy were made illegal, there is a well-founded fear that the practice would go underground and there would be no recourse for the parties involved. Like prostitution, without regulation, many of the opponents' worst fears of surrogacy could come true. If our society has reached the point where this type of arrangement will happen with or

189. VA. CODE ANN. § 20-161(B).
190. Id. § 20-162(A)(3).
191. N.H. REV. STAT. ANN. §§ 168-B:16(IV), 168-B:30(II); VA. CODE ANN. § 20-165.
192. VA. CODE ANN. § 20-165(B).
193. See OVERALL, supra note 77, at 129.
without the state's involvement, it would be better for the state to make the practice legal and to set up a regulatory scheme to protect those involved.

A. Minimizing the Symbolic Harm to Society

Both the Virginia and New Hampshire statutes take steps to minimize the symbolic harm to society that many feminists have associated with surrogacy. For example, both statutes provide that the surrogate cannot be paid a fee over and above the reasonable expenses of the pregnancy.\(^{194}\) Since surrogates and intended parents cannot bargain over price, babies will not end up being sold at a "going market rate." This provision would thus decrease the societal view of children as commodities.

Another provision which may lessen the harm to society concerns the intended mother. In order for the intended parents to enter into a surrogacy contract, both statutes require a medical determination that the intended mother cannot physiologically bear a child.\(^ {195}\) It is important that surrogacy be considered as one of many options for infertile couples rather than as a way for women to avoid the rigors of pregnancy by shifting the burden onto another. If surrogacy were an available option for the population at large, there would be a risk that it would become a commercialized business, which would in turn create enormous pressures for illicit payments. However, limiting surrogacy to those persons who for medical reasons cannot become pregnant limits the field of possible consumers and cuts down on the possibility that surrogacy will become institutionalized baby selling.

Another aspect which minimizes the harm to society is the elimination of the middleman. Both New Hampshire and Virginia criminalize surrogate brokers. In New Hampshire, any person or entity who, for a fee, solicits or induces any party into entering into a surrogacy contract is guilty of a misdemeanor.\(^ {196}\) In addition to making surrogate brokers criminally liable, Virginia makes them civilly liable as well.\(^ {197}\) This further minimizes the possibility for fraud and profiteering which can arise in the context of surrogacy.

The third aspect which minimizes the possible symbolic, as well as actual, harm to society is that both statutes require that a home study be performed before the contract can be preauthorized by the court.\(^ {198}\) The purpose of the study is to evaluate whether the intended parents and the surrogate and her husband, if she has one, would be suitable parents. This is a way of demonstrating the importance of the event in which all of the parties are

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about to participate. The intended parents and the surrogate are simply not free to enter into a judicially preauthorized surrogacy contract without first qualifying as suitable parents. It is nothing like buying a car or a pedigreed dog\(^{199}\) where the qualifications of the buyer are irrelevant.

B. Minimizing the Harm to Women

A woman's right to control her body is fundamental in the struggle for control over her life. This control is evidenced in many ways but the main element of control is choice—the choice not to become pregnant, the choice to become pregnant, and the choice to abort. The choice to become a surrogate or to hire a surrogate is a natural evolution of the right of reproductive choice. Limiting women's choices regarding surrogacy may lead to limiting choices which have already been legally guaranteed to women. Both the New Hampshire and Virginia statutes legalize surrogacy contracts and thus not only protect this extension of a woman's right to choose, but address the fear of many feminists that not protecting this right might denigrate the protection already afforded other reproductive rights.

Another element of choice is the control over one's body. The Virginia statute allows the surrogate to retain sole responsibility for the clinical management of the pregnancy.\(^{200}\) This is an important empowering provision for women. However, the New Hampshire statute not only states that the surrogate shall make all the decisions regarding the health of the child and herself,\(^{201}\) but explicitly states that there shall be no specific performance of a term of the contract that requires or forbids the surrogate to have an abortion.\(^{202}\) It is important that surrogacy statutes specifically include the right for the surrogate to decide whether or not to have an abortion. The right to an abortion has come to represent much more to women than simply the right to decide whether or not to continue a pregnancy. Because it represents a woman's right to choose, it is of fundamental symbolic importance to specifically include language which grants the surrogate the sole right to make that decision.

One of the major feminist concerns about surrogacy is that women may be exploited through economic, psychological, and societal pressures.\(^{203}\) Making decisions under these types of pressures does not allow women to freely choose to become a surrogate. The Virginia and New Hampshire statutes eliminate the economic pressure by not allowing surrogates to be paid a fee that exceeds the reasonable costs of the pregnancy.\(^{204}\) This lessens

\(^{199}\) See supra note 76 and accompanying text.
\(^{202}\) Id. § 168-B:27(II)-(III).
\(^{203}\) See supra notes 88-105 and accompanying text.
the possibility that women will be induced into surrogacy contracts because of economic considerations.

The psychological risks women may suffer because of surrogacy are also minimized by the scheme set forth in the New Hampshire and Virginia statutes. Having the surrogate and the intended parents undergo psychological evaluations and surrogacy counseling before entering the contract can minimize the psychological risks. If the surrogate and the intended parents have fully explored the reasons for entering into the contract and have tried to understand the risks involved, the likelihood of emotional distress during and after the completion of the contract is reduced. Allowing for continuing counseling for both parties will also help surrogates and intended parents work through any difficulties as they arise. Additionally, the psychological harm caused by the regret of having to give up the resulting child could be relieved by providing the surrogate with a period of time after the child is born in which to decide whether or not to keep the child. If the surrogate is not able to reconcile her decision to give up the child, she should have the option not to part with the child. This option is provided for in the New Hampshire statute. It allows a surrogate a period of three days after the birth of the child to elect to keep the child. This option relieves much of the psychological harm caused when a child is unwillingly torn from a surrogate’s arms.

The societal pressures that affect women’s decisions, however, may be negatively affected by a statutory provision that denies payment to the surrogate over and above the reasonable costs of the pregnancy. Much of the pressure stems from the fact that women are taught to put the needs of others above their own. Since, under this type of provision, women cannot be paid for being surrogates, the only seemingly plausible reason that a woman would become a surrogate would be because she wished to be magnanimous. In being magnanimous, women inevitably put others’ needs above their own. If the only way to get women to be surrogates is to find someone who is willing to sacrifice for others, then women may experience even more societal pressure to help infertile couples.

Feminists have argued that women cannot give their voluntary and informed consent to enter into surrogacy contracts until they have had the experience of giving birth. One of the requirements of becoming a surrogate under both the Virginia and New Hampshire statutes is that the surrogate must have given birth at least once before entering into the contract. This requirement seeks to ensure that a woman will make a valid informed decision to become a surrogate.

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207. Id.
208. See supra text accompanying notes 102-03.
more informed decision about whether to become a surrogate. Presumably, a woman who has already experienced giving birth will understand what hormonal and emotional changes she is likely to experience. This information, coupled with mandatory counseling before entering into the contract, helps the potential surrogate make a much more informed choice. In addition, by giving the surrogate the option of keeping the child after it is born, the possibility that the contract is entered into involuntarily is eliminated.

Another problem with exploitation of women comes from the middlemen in surrogacy arrangements. Both the New Hampshire and Virginia statutes criminalize this type of activity.²¹⁰ By prohibiting surrogate brokers from recruiting or inducing surrogates to enter into surrogacy contracts, many of the coercive and exploitative elements are decreased. The Virginia statute also sends a strong and socially desirable message by making surrogate brokers civilly liable.²¹¹ It implicitly emphasizes the importance of independent decision making in surrogacy contracts.

This is not to say that a surrogate or the intended parents should not have access to information regarding their legal options. The question is, who does society want uniting potential surrogates with potential intended parents? If a state agency or nonprofit organization regulated the practice of matching up these potential parties, the likelihood of coercion upon either the surrogate or intended parents would be diminished. Similarly, state regulation would inhibit the commercialization of surrogacy.

C. Minimizing the Harm to Children

The harm to both the resulting child and the surrogate's own children stems from the notion of surrogacy as a form of baby selling.²¹² The need to protect children is a valid concern. Both Virginia and New Hampshire require a home study of the surrogate's family and the intended parents.²¹³ This study evaluates each party's suitability for parenting. Including all parties in the home study reveals a legislative commitment to ensuring an adequate family life for the surrogate child.²¹⁴ The protection is far greater than conventional parenting where, of course, no evaluation is ever performed before conception.

Although neither statute specifically mandates counseling for the surrogate's children, it could be made available to the existing children, if desired,

²¹⁰. VA. CODE ANN. § 20-165; N.H. REV. STAT. ANN. § 168-B:30(III). The statutes do not prohibit the legal advice of lawyers or the advice of medical personnel.
²¹¹. VA. CODE ANN. § 20-165(B).
²¹². See supra text accompanying notes 105-10.
²¹³. VA. CODE ANN. § 20-160(A); N.H. REV. STAT. ANN. § 168-B:18(III).
to help them explore their feelings concerning the surrogacy arrangement. Provisions that allow for counseling both the surrogate and her children decrease any risk that the surrogate’s children would feel threatened by the risk of abandonment by their parents.

D. Do These Statutory Provisions Go Far Enough?

Whether this type of statute is effective depends on what it is supposed to accomplish. Overall, it answers many concerns of feminists. It also effectively diminishes the number of surrogacy contracts, which is what many feminists desire. If the goal is to make surrogacy a nonissue by effectively limiting the number of women willing to enter into surrogacy contracts, then the regulatory scheme is a success. Prohibiting payment to surrogates creates a disincentive to become a surrogate mother. It is similar to the disincentive that would be created if doctors were prohibited by statute from getting paid for performing abortions.\textsuperscript{215} Just as few doctors would be willing to perform abortions for free, few women would be willing to be surrogates for free.

If, however, the goal is to maximize the number of surrogacy contracts while minimizing the harm to all parties concerned, then these statutory schemes need adjusting. The considerations at issue here turn on payment to the surrogate. If payment to the surrogate were permitted, many of the concerns raised by feminists would resurface. Would children be viewed as commodities? Would economic forces drive women to become surrogates? Yet prohibiting payment creates a risk that infertile couples would merely offer money to the surrogate under the table. Thus, regardless of the law, surrogacy may go underground. In this case, the protections provided by the statutes would be meaningless.

Hence, is it possible to reconcile feminist concerns with a statute that allows surrogates to receive a fee? The concerns of feminists could be meaningfully eliminated only if payment to surrogates were prohibited. Yet, if effective legislation is desired, payment needs to be part of the package. Although payment to surrogates is not the first choice of many feminists, outlawing payment and driving the practice underground is an unacceptable alternative.

Payment should not be considered a complete obstacle to effective surrogacy laws. The New Hampshire and Virginia statutes are good starting points. In order to minimize the harms associated with payment, however, other protections need to be added, and those already provided should be analyzed again.

\textsuperscript{215} Andrews, \textit{supra} note 55, at 175.
The harm to society and children alike in viewing children as commodities could be minimized not only by controlling the amount paid to a surrogate, but by examining that for which the surrogate is paid. Surrogacy is unlike any other contract, and the price of it should not be controlled by market forces. If the legislature sets a mandatory surrogacy fee, the intended parents will not be able to shop around for a better bargain. This would differentiate surrogacy from commodities available on the open market. It would further give legislatures some control over the supply and demand of surrogacy.

The surrogate should be paid for the gestation and birth of the child, but payment should never be conditioned on relinquishing the child to the intended parents. If the surrogate is paid for delivery of the child to the intended parents, it looks like baby selling, which is, and should be, prohibited. If, however, the surrogate is paid for her services in carrying the child for nine months and giving birth to the child, baby selling is not implicated. The intended parents are not buying physical custody of the child because the surrogate can always elect to keep the child. The intended parents are paying for their use of the surrogate’s womb and not the child. If the surrogate elects to keep the child, however, she could not keep the fee. Although the services of carrying the baby to term were performed by the surrogate in this case, they were for the benefit of the surrogate and, thus, were never provided to the intended parents.

The surrogate also could not reap the benefit of having the full cost of the pregnancy paid for by the intended parents. The financial responsibilities upon breach could be allocated as in Virginia’s statutory scheme. Under Virginia law, if an allocation of costs is not provided for in the contract, then it mandates that upon the surrogate’s unilateral termination of the surrogacy contract, the intended parents are responsible for one-half of all costs prior to termination. If the surrogate elects after birth to keep the resulting child, the intended parents would be responsible for one-half of all costs incurred prior to birth.

In entering into the contract, the intended parents need to be informed of these financial risks. If they are informed, then this allocation is fair and the surrogate will not feel compelled to give up the child due to the costs incurred during pregnancy.

The potential economic exploitation of women is a more difficult issue. Allowing payment to surrogates could induce economically disadvantaged women into surrogacy arrangements that they otherwise would not enter. Thus this exploitation prevents a truly voluntary decision to become a

216. VA. CODE ANN. § 20-162(C).
217. Id. § 20-162(C)(2).
218. Id. § 20-162(C)(3). An additional allocation could be written into this scheme providing that if the intended parents breach, they would be responsible for all costs of the pregnancy and for one-half of the cost of the child’s support.
surrogate. However, by prohibiting payment to surrogates, society is once again economically devaluing the work of women, which in and of itself is oppressive. To prohibit a surrogate from selling her reproductive capacities but allowing her to give them away devalues and exploits women.

The choice is not an easy one to make, but giving the surrogate as much control as possible in the surrogacy contract minimizes the risk of exploitation. Mandatory counseling would provide the potential surrogate with the opportunity to consider her decision. Giving the surrogate the right to terminate the contract and keep the child ensures that performance of the contract is a voluntary act. Thus, while the economic incentive inherent in permitting the surrogate to receive a fee cannot be avoided, measures could be enacted that would help ensure that the surrogate makes the right decision for the right reasons.

CONCLUSION

It is unrealistic to believe that all of the harms associated with surrogacy can be eliminated. However, the harms associated with either the legalization or banning of surrogacy will be felt by society as a whole. Women as a group need to explore any and all possibilities which can minimize the harm to women. Women are identified by their ability to reproduce because, up to this point, only women can do so. The only way for women to seize and stay in control of any existing or new reproductive technology is to present viable legislation for the decision-making bodies of government to act upon. If women, as a group, do not allow themselves to compromise they may end up with an unbearable situation completely out of their control rather than a tolerable situation they helped develop.

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219. See supra text accompanying notes 88-92.
220. Some feminists fear that the prospect of an artificial womb being developed is imminent. See Corea, supra note 88, at 250-59.