

***VOIDING SURROGACY CONTRACTS TO PROTECT
CHILDREN
A BLUEPRINT FOR NEW MEXICO***

**Submitted for the
Law Alumni/ae Association, Don G. McCormick, Helen S. Carter,
and Raymond W. Schowers writing competitions.**

Originally written for Bioethics; Professor Schwartz; Fall 1998

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I. INTRODUCTION

In reality, the origin of a human person is the result of an act of giving. The one conceived must be the fruit of his parents' love. He cannot be desired or conceived as the product of an intervention of medical or biological techniques; that would be equivalent to reducing him to an object of scientific technology. No one may subject the coming of a child into the world to conditions of technical efficiency which are to be evaluated according to the standards of control and dominion.¹

[B]y the action of Modern Industry, all family ties among the proletarians are torn asunder, and their children transformed into simple articles of commerce. . . .²

After much searching, the couple finally found an egg which contained the precise genetic characteristics that they were looking for. They paid their money to the clerk at the register and took their egg in search of some sperm to fertilize it. No ordinary sperm would do, this couple was willing to pay any price for the genetically prime sperm to create their perfect child. After some searching, they found the sperm they were looking for. The eager "parents-to-be" paid their money and took all of the ingredients for their future "bundle of joy" to the lab for fertilization. After a little mixing it was time to implant the newly fertilized egg into a specially chosen "gestator" who would deliver the product in nine months. But nine months is an awful long time to wait for such a busy couple, so after six months it was time to cancel delivery and just call the whole thing off.

Such a "supermarket analysis" of the conception and birth of a human being seems appalling because it treats the creation of a human being with little more dignity than the purchase of a piece of furniture, but in many states sophisticated medical

¹ CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY. (Authorized Vatican Translation, 1987).

technology coupled with a lack of statutory guidance regarding surrogacy arrangements has made just this sort of situation possible.³ This Paper analyzes the problems created by the enforcement of surrogacy contracts and proposes legislation by which the State of New Mexico can proactively protect its children and parents from the social and legal dangers of surrogacy contracts.

First, this Paper will explore three of the most compelling policy reasons for voiding surrogacy contracts: (1) the societal consequences of allowing the redistribution of procreation through contract; (2) “maternal” arguments⁴ for the protection of the hired surrogate; and (3) current policies which are embedded in New Mexico Statutes. Second, this Paper will analyze other state statutes which have voided surrogacy contracts. Finally, based on the earlier analysis of policy and state laws, this Paper recommends a statute which should be adopted in New Mexico. The proposed statute will then be analyzed to see how it would be applied.

II. POLICY REASONS FOR VOIDING SURROGACY CONTRACTS

A. The societal consequences of allowing the redistribution of procreation through contract.

Most issues in contract law hold great weight for the individual litigants but little lasting impact for the society at large and even less of an impact upon future generations. However, the use of contract as a vehicle for reordering or redistributing procreative

² KARL MARX AND FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848).

³ See *Buzzanca v. Buzzanca*, 72 Cal. Rpt.2d 280 (Ct. App. 1998). The Buzzanca situation (“contractual parents” who purchase both egg and sperm then have them implanted in a surrogate) represents the current extreme in the practice of surrogate parentage because it presents a possibility of six different legal parents (the two “contractual parents”, the two biological parents, or the surrogate and her husband).

⁴ See, Margaret F. Brinig, *A Maternalistic Approach to Surrogacy* 81 VA. L. REV. 2377, 2387, n. 2 (1995): Arguing that the feminist counterpart to a paternalistic decision-making process is “Maternalism” and that this viewpoint advocates for the best interests of the children and parents from the mother’s perspective.

resources creates an interplay between the commercial realm and the fundamental facets of what we are as individuals and a society.⁵ Because this issue touches on the almost unimaginable breadth of what it is to be a human being, it is difficult to concisely address this issue. However, I will touch upon two fundamental concerns which the enforcement of surrogacy contracts raises in New Mexico. First, is society's duty to protect human dignity and equality by forbidding the commodification of human beings. Second, is the related concern that surrogacy contracts are illegal because they violate the Thirteenth Amendment⁶ since they market in human beings.

From the founding days of our nation we have recognized a duty to protect the dignity and equality of human life.⁷ Over time we have sought to expand these protections when we have recognized that current protections were lacking.⁸ Included within the state protection of the dignity of human life are prohibitions which proscribe contractual alienation of goods and services which offend the basic dignities which our society embraces. For example, prohibitions on the alienation of; human flesh for consumption, human organs for profit, and the commercial alienation of sex are widely accepted as necessary for the protection of human dignity.⁹

1. The Commodification of Children as an Offense to Human Dignity.

⁵ See William J. Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: the Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 7 (1990).

⁶ U.S. CONST. amend. XIII.

⁷ THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁸ See e.g. U.S. CONST. amend. XIII (invalidating slavery); *Brown v. Board of Education*, 347 U.S. 483 (1954) (abolishing segregation in public schools); and U.S. CONST. amend. XIX (extending the right to vote to women).

⁹ See Wagner, *supra* note 5, at 184.

Allowing resources to be exchanged through contract requires that they be commodified.¹⁰ The contractual reallocation of procreation through surrogacy results in the commodification of both children and women. Treating women and children as objects which can be bought, sold, and rented is an affront to the principals of human dignity and equality which we strive for as a community.

The design of the vast majority of surrogacy contracts demonstrate the commodification of children through surrogacy. In most surrogacy contracts the surrogate is paid nothing if she miscarries the child prior to the fifth month of pregnancy, \$1000 if she carries the child beyond the fifth month but the pregnancy results in a still-birth, and \$10,000 if she gives birth to a live child at full term.¹¹ These arrangements clearly indicate that it is the child, not the egg or gestation that is being paid for.¹² While such conditions could be outlawed, their current existence demonstrates the underlying commodification which would not end with a change of contractual terms.

The manner of child selection further indicates the commodification of children born (or aborted) through surrogacy contracts. For example, when the prospective parents need to obtain sperm, ova, or both from a donor they can go to a sperm or ovum bank and review the personal characteristics of the donor such as the height, weight, educational achievements (as a indication of IQ), eye color, race, physical attractiveness, as well as a myriad of other characteristics.¹³ This practice is often defended on the grounds that the purchasers should be able to find a child which has characteristics

¹⁰ *Id.* at 168-170.

¹¹ See M. Celeste Schejbal-Vossmeier, Comment, *What Money Cannot Buy: Commercial Surrogacy and the Doctrine of Illegal Contracts*, 32 ST. LOUIS U. L. J. 1171, 1202 (1988); see also, Ragone, *infra* note 59, at 141-53.

similar to their own.¹⁴ However, the reality is that purchasers choose children with ‘good’ characteristics rather than short, fat, ugly, children with low IQs even if these characteristics which match their own.¹⁵ This search for the ‘good’ in a child results in the commodification of the child himself and misses the point that all children are ‘good’ and deserving of dignity.¹⁶

A final demonstration of the commodification of the children through surrogacy and the use of surrogacy contracts is the fact that the parent’s rights to have a child through this method is directly based on the parents willingness and ability to pay for the child.¹⁷ As one commentator stated: “[A]doptive parents can tell their child, ‘your mother loved you so much she gave you up, even though it made her sad because that was best for you.’” but the contract father can only say; “Your mother gave you up in order to earn \$10,000.”¹⁸ While the contractual parents may not tell their children this, the studies have shown that economics is the primary motivation for women who decide to bear a child as a surrogate, so the underlying commodification remains the same.¹⁹

Women are commodified through the surrogate process as well. In a ‘traditional’ surrogacy context where the surrogate mother’s own egg is impregnated by the donor father, the surrogate is commodified in two very important ways. First, much like the child, she is sought after as one who can provide the ‘good’ child in terms of race, IQ,

¹² See Schejbal-Vossmeyer, *supra* note 11, at 1202.

¹³ See George J. Annas, *Human Cloning: A Choice or an Echo?*, 23 U. DAYTON L. REV. 247, 259 (1998).

¹⁴ See John A. Robertson, *Embryos, Families, And Procreative Liberty: The Legal Structure Of The new Reproduction*, 59 S. CAL. L. REV. 939, n. 79 (1986).

¹⁵ See Margaret J. Randin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1925-1928 (1987).

¹⁶ *Id.*

¹⁷ See Wagner, *supra* note 5, at 151.

¹⁸ See Schejbal-Vossmeyer, *supra* note 11, at 1205.

health, athletic ability, height, weight, etc. with ‘better’ surrogates in greater demand.²⁰

In addition, in this type of surrogacy agreement although the surrogate and the sperm donor each contribute one-half of the genes to the child and the surrogate carries the child for nine months, upon birth the sperm donor becomes the natural father while the surrogate remains just that, a surrogate.²¹

In the context of the commodification of both the women and children involved in surrogacy agreements there is really no similarity to adoption because unlike adoption the mother in a surrogacy agreement brings a child into the world only in response to the contracting parent’s payment and demand.²² This contracting for human beings is unacceptable because “[t]here are in a civilized society, some things that money cannot buy.”²³ Long ago, this nation fought The Civil War in order to establish that human beings are one of the things that money cannot buy.

2. Surrogacy Contracts Violate the Dignity and Equality Guaranteed by the Thirteenth Amendment.

The Thirteenth Amendment to the Constitution of the United States of America proclaims that “[n]either slavery nor involuntary servitude, . . . shall exist within the United States, or any place subject to their jurisdiction.”²⁴ Shamefully, New Mexico had a part in the development of the jurisprudence of the Thirteenth Amendment. A widespread practice in New Mexico called “peonage”(which began under Mexican rule

¹⁹ See Yvonne M. Warlen, Comment, *The Renting of the Womb: An Analysis of Gestational Surrogacy Contracts Under Missouri Contract Law*, 62 U. MO. KAN. CITY L. REV 583, 589 (1994).

²⁰ See Randin, *supra* note 13, at 1932.

²¹ See Schejbal-Vossmeier, *supra* note 11, at 1172.

²² See Randin, *supra* note 13, at 1928-1929.

²³ See *In Re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988).

²⁴ U.S. CONST. amend. XIII..

and continued after New Mexico became a territory and the Thirteenth Amendment was ratified) led to 42 U.S.C. §1994 and 18 U.S.C. §1581.²⁵

Peonage was a practice not unlike the modern surrogacy agreements.²⁶ Under peonage contracts, like modern surrogate contracts, a free person²⁷ entered into a contract for personal services for which he or she was paid in advance.²⁸ Once this contract had been entered into, the service contract became specifically enforceable against the peon.²⁹ Under this system of labor, the rich landowners in New Mexico bound a large class of peons.³⁰ If a peon attempted to renege on his or her contract, the master “pursued, reclaimed, and reduced him to obedience and labor again; and the *alcaldes*³¹ . . . aided the master in bringing back his fugitive.”³²

Accordingly, New Mexico lent the weight of its government (under both Mexican and American rule) to the enforcement of personal labor contracts in the past.³³ However, this practice was outlawed by the peonage acts³⁴ in 1867. Some consider this practice to be even more dangerous than slavery.³⁵ While slavery is an institution which we (at least now) recognize as being blatantly in violation of human rights for a host of reasons, peonage is an institution which is much more invidious because the peons are encouraged

²⁵ The Peonage Cases, 136 F. 707 (E.D. Ark., 1905).

²⁶ See Cyril C. Means, Jr., *Surrogacy v. The Thirteenth Amendment*, 4 N.Y.L. SCH. HUM. RTS. ANN. 445, 458 (1987).

²⁷ See *Mariana Jaramillo v. Jose De La Cruz Romero*, 1 N.M. 190, 199 (1857) (stating that “[a]ll free men and women . . . may celebrate this species of contract.”)

²⁸ *Id.* at 194.

²⁹ *Id.* at 205.

³⁰ *Id.* at 194.

³¹ *Alcaldes* were the modern equivalent of a community magistrate judge. See Jaramillo, *supra* note 27, at 199.

³² Jaramillo, *supra* note 27, at 194.

³³ *Id.*

³⁴ See 42 U.S. C. §1994 (1867).

³⁵ The Peonage Cases, *supra* note 25, at 708

(by poverty or greed) to enter into contracts which grant control of their lives to men of great wealth and power.³⁶ The modern debate over the enforceability of surrogate contracts highlights the invidious nature of peonage arrangements.

The use of the bodies of poor women in order to provide a maternal service for richer women is not unknown in the history of our country. Black women commonly served as ‘wet nurses’ to white children during slavery so that the white women could “preserve the shape of their breasts.”³⁷ The surrogate contract through which women grant the use of their bodies to another for a fee mimics the classic peonage arrangement “by which one person lets or grants to another person the service of [her] person . . . for a certain time.”³⁸

Such contracts are void as violative of the peonage act regardless of whether the “laborer entered into that contract voluntarily and with full knowledge of the conditions of [her] employment”.³⁹ Accordingly, New Mexico should make a clear break from its shameful past, when women and children were sold into peonage, by legislatively refusing to enforce this modern day peonage.

**B. “Maternal” arguments that the surrogate
must be afforded protection by the law.**

³⁶ *Id.* Cf. LEGISLATIVE COMMISSION ON SCIENCE AND TECHNOLOGY: CONTRACT MOTHERHOOD, ETHICAL AND LEGISLATIVE CONSIDERATIONS 47 (1991) (The Legislative Commission noted that “[o]ur society prohibits the payment of money for any organ removed from an individual so as to prevent a market in organs from forming. The intent of such a policy is to preclude a situation where those with few financial resources could be put under duress. This is our public policy despite the fact that the availability of an organ may mean the difference between life and death for those in need.”)

³⁷ See Lorraine Stone, *Neoslavery - “Surrogate” Motherhood Contracts v. The Thirteenth Amendment*, 6 LAW & INEQUITY J. 63, 72 (1988).

³⁸ Jaremillio, *supra* note 27, at 196. (Describing the nature of the personal service contract which is employed in a peonage situation.)

³⁹ The Peonage Cases, *supra* note 25, at 709.

Most discussion on this issue has focused on the rights and obligations of the “parents” who contract for the child to be born. This approach seems to further commodify the surrogate mother as one who is providing a service which has been paid for by the contracting couple.⁴⁰ However, some have taken a “maternalistic” approach to this discussion which addresses the topic of surrogacy with a dominant concern for the rights and obligations of the women who become surrogates.⁴¹

Three major concerns have been raised from the perspective of the surrogates. First, the surrogate mother cannot truly give informed consent at the time she enters into the contract.⁴² Second, the surrogate and her family bear extraordinary psychological consequences resulting from the pregnancy and childbirth which cannot be compensated for through the contract.⁴³ Finally, the surrogate mother bears a substantial biological tie to the child even when she is not biologically related to it.⁴⁴

1. Lack of Informed Consent.

New Mexico law requires that the parties entering into medical contracts must give informed consent to the procedure.⁴⁵ Informed consent means that the patient is educated as to all of the pertinent facts concerning the medical procedure prior to giving consent.⁴⁶ In response to this desire that informed consent be given in surrogacy procedures, several states have passed legislation which allows for surrogacy contracts but requires judicial intervention prior to the inception of the surrogacy arrangement in

⁴⁰ See Randin, *supra*, note 13, at 1930.

⁴¹ See Brinig, *supra*, note 4, at n22.

⁴² *Id.* at 2381.

⁴³ See Carol L. Nicolette and Libby C. Reamer, Comment, *Regulatory Options for Surrogate Arrangements in Maryland*, 18 U. BALT. L. REV. 110, 141 (1988).

⁴⁴ See R. Brian Oxman, *infra* note 76, at 393.

⁴⁵ *Demers v. Gerety*, 92 N.M. 749, 758, 595 P.2d 387, 396 (N.M. Ct. App. 1978).

order to ensure that the surrogate is fully informed regarding the course which she is to undertake.⁴⁷

However, regardless of judicial intervention, surrogate mothers are incapable of giving truly informed consent for two reasons. First, the motivations of the surrogate mother combined with her inequitable bargaining position in relation to the contracting couple undermines her ability to understand the pertinent facts necessary for making an informed decision.⁴⁸ Second, the surrogate cannot accurately predict the intervening factors which may occur over the next nine months that could undermine her original consent.⁴⁹

The few studies which have been done in this area have uncovered three primary factors which seem to motivate women to become surrogate mothers.⁵⁰ The first is that the women indicate that they enjoy being pregnant because it enhances their feelings of attractiveness and femininity.⁵¹ This factor in and of itself is problematic because it implies that at the time she enters into the contract, the potential surrogate is considering the pregnancy itself rather than giving up the child.

A second common reason for entering into surrogacy agreements seems to be a desire on the part of the surrogate to work through issues surrounding her previous loss of a child through either abortion or adoption.⁵² Again, this reason for entering into such a weighty agreement seems to be suspect because a person who tries to work through issues

⁴⁶ *Id.*

⁴⁷ See VA. CODE ANN. §20-160 (Michie Supp. 1993); N.H. REV. STAT. ANN. §§168-B:16, 168-B:23 (Supp. 1992).

⁴⁸ See York, *infra* note 63, at 404, 405.

⁴⁹ *Id.* at 408-410.

⁵⁰ *Id.* at 399.

⁵¹ *Id.*

created by giving up a child previously by agreeing to give one up again may be setting herself up for failure.

The third key factor that seems to motivate surrogate mothers in their decision to enter into surrogacy agreements is economics.⁵³ Indeed, some studies indicate that this is usually the primary motivation for bearing a child for another through surrogacy.⁵⁴ The economic motive has led many family law scholars and feminists to condemn surrogacy agreements because of the danger that surrogates will be drawn from historically exploited classes of people and a concern that such a system commodifies both the surrogates and their children.⁵⁵

The combination of these motivational factors seem to put the surrogate into a very vulnerable position from the start.⁵⁶ The inequitable position of the surrogate is further intensified by the fact that most surrogates come into contact with the contracting couple through the intercession of a middleman who is seeking to ensure a proper match and a successfully completed contract.⁵⁷ His desire to insure that the contract is successfully completed clearly puts the middlemen on the side of the contracting couple by ensuring that he works toward the relinquishment of the child rather than the best interests of the surrogate.

The inequity of bargaining power between the proposed surrogate and the contracting parents is further illustrated in the extremely intrusive nature of the surrogate contract itself. First and foremost, the surrogate agrees to “rent” her body to another for a

⁵² *Id.* at 399-400.

⁵³ *Id.*

⁵⁴ See Warlen, *supra* note 19, at 589.

⁵⁵ See Brinig, *supra* note 4, at 2380.

period of nine months.⁵⁸ Prior to entering the contract, the surrogate must normally undergo both psychological and physical examinations to ensure that she is acceptable to the contracting parents for the task at hand.⁵⁹ She must contract not to have any sexual intercourse during a prescribed time.⁶⁰ She must agree not to consume alcohol or smoke during the pregnancy.⁶¹ Finally, the surrogate contracts that she will not abort the child of her own will but she will abort the child if the contractual parents so desire.⁶²

The central theme of most surrogacy contracts surrounds the agreement that once the child has been delivered, the surrogate will relinquish all rights to the child in favor of the contracting “parents”.⁶³ This situation requires that the surrogate contractually bind herself to a course of action which she must perform in nine months. This is inappropriate because the surrogate cannot have gauged precisely what the effects of pregnancy and child-birth will be from her *ex ante* position.⁶⁴

This commitment to a course of action which is to culminate in nine months ignores the fact that much will change in and around the surrogate in the course of the next nine months. Indeed, the intent of the contract revolves around the notion that much will change. Strong emotional bonding between a woman and the child within her womb

⁵⁶ *Id.* at 2386.

⁵⁷ *Id.* at 2393-2394.

⁵⁸ See Warlen, *supra* note 19, at 583-584.

⁵⁹ See HELENA RAGONE, *SURROGATE MOTHERHOOD* 143-144 (1994).

⁶⁰ *Id.* at 144.

⁶¹ *Id.* at 145.

⁶² *Id.* Although the contracts themselves often recognize that these provisions are Constitutionally infirm, they are still included. This action demonstrates the coercive nature of the contract, in that it purposely includes terms which the drafters wish to enforce although they know that these terms are illegal.

⁶³ *Id.* at 141-153; see also Stephen G. York, *A Contractual Analysis of Surrogate Motherhood and a Proposed Solution*, 24 LOY. L.A. L. REV. 395, 397 (1991).

⁶⁴ See Brinig, *supra* note 4, at 2388.

occurs even within women who do not intend to keep their child.⁶⁵ This bonding indicates that even mothers who enter a pregnancy with the intent of relinquishing the child cannot be fully informed of the emotional consequences of their decision at the outset.⁶⁶

2. Psychological Effects on the Surrogate and Her Family.

The surrogate and her family bear a psychological toll from the pregnancy and relinquishment of the child which cannot be compensated within the contract.⁶⁷ The potentially grave nature of these effects cautions against enforcement of the agreement which may result in psychological harm not only to the surrogate but to her children as well.⁶⁸

Many surrogacy agreements require that the surrogate has previously given birth to at least one child.⁶⁹ Indeed research indicates that many surrogates already have children.⁷⁰ However, despite their inevitable involvement in the pregnancy of their mother, the surrogate's children in this situation are third parties who are not a part of the main action.⁷¹ It is appropriate to evaluate this type of situation from a family law perspective, placing the surrogate's children first despite parental attempts to put their own interests first.⁷²

⁶⁵ See Ryncarson, *Relinquishment and Its Maternal Complications: A Preliminary Study*, 139:3 AM. J. PSYCHIATRY 338 (1982).

⁶⁶ See York, *supra* note 63, at 401.

⁶⁷ See Brinig, *supra* note 4, at 2391, 2392.

⁶⁸ *Id.*

⁶⁹ See Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, n. 133 (1988); *see also* VA. CODE ANN. §20-159 (Michie Supp. 1993).

⁷⁰ See Randin, *supra* note 13, at 278.

⁷¹ See Brinig, *supra* note 4, at 2392.

⁷² *Id.*

Often a surrogate, who already has children of her own, decides to bear a child for another couple out of a desire for money or even out of an altruistic desire to give a child to another family.⁷³ Current debate and scholarship in this area has focused on the wants and needs of the adults. However, this debate has not addressed the potential impact on the surrogate's children who may be left asking: Will mommy give me away if she needs money or decides that another couple needs me more than her?⁷⁴ There appears to be no research regarding the psychological consequences of surrogacy on the surrogate's children. Rather than encouraging the continuation of a potentially harmful practice, this lack of knowledge should counsel for extreme caution when analyzing surrogacy arrangements.

3. Physiological Connection Between the Surrogate and the Child.

Most of the literature surrounding surrogacy has considered the surrogate mother to be little more than a “breeder”⁷⁵ who provides a womb for the growth and development of a child who is genetically and biologically only related to the woman who donated the ovum. However, despite this attitude by legal scholars and courts, the Ethics Committee of the American College of Obstetricians and Gynecologists stands by the principle that gestation determines motherhood regardless of genetics.⁷⁶

In his highly technical article detailing the profound impacts which the gestational mother's endocrine system has on the developing child, R. Brian Oxman argued that :
“there is no organ system of the fetus that is not anatomically, psychologically, and

⁷³ See York, *supra* note 63, at 399, 400.

⁷⁴ *Id.* at 2384.

⁷⁵ See Warlen, *supra* note 19, at 583, 584.

genetically affected by a gestational mother's endocrine system, and therefore, the resulting child is uniquely a product of the gestational mother regardless of who contributed genetic material to the child."⁷⁷ Ignoring the contribution of the surrogate mother results is not only scientifically unsound⁷⁸, it reinforces the subjugation of the surrogate mother to the more powerful interests of those who have hired her to carry a child for them. While there is also an obvious biological connection between the child and the donor of the ovum, there is no sound basis for upholding a surrogacy contract on the grounds that the surrogate is not the genetic contributor of the ovum.

C. Surrogacy Contracts Are Void Because They Violate Current New Mexico Statutes.

The enforcement of surrogacy contracts would violate several New Mexico statutes in either letter or policy. Among these are: (1) statutes which prohibit the transfer of parental rights for a fee; (2) statutes which establish the parentage of children; and (3) statutory provisions which outline the necessary procedures for the termination of parental rights.

Although these statutes can apply to void surrogacy contracts, they are not designed to do so. However, they demonstrate that this state embraces ideals of human rights which are contrary to such contracts. Despite these ideals, without legislative action in this area, surrogacy contracts will continue to violate the human rights which this state espouses. To emphasize the need for legislative action in this area I will

⁷⁶ See R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates*, 33 JURIM. J. 387, 396 (1993).

⁷⁷ *Id.* at 389.

⁷⁸ *Id.* at 393.

analyze each of these statutes in order to demonstrate the underlying policies and the inadequacies in surrogacy situations.

1. Statutes which prohibit the transfer of parental rights for a fee.

Under the New Mexico Children's Code⁷⁹ the legislature specifically outlined the types of permissible payments in the context of adoption.⁸⁰ First, the statute only allows the payment of certain expenses to third party vendors.⁸¹ Second, although the statute does allow payment for such items as medical expenses⁸² and living expenses,⁸³ it specifically states that "[n]othing in this section shall be construed to permit payment to a woman for conceiving and carrying a child."⁸⁴ The code provides that a party responsible for making statutorily unauthorized payments is guilty of a full misdemeanor.⁸⁵

Surrogacy agreements by their very nature contemplate a contract in which a woman is paid for conceiving and carrying a child. On its face, a surrogacy contract is apparently not only void as violative of the New Mexico Children's Code, but may also expose the contracting parties to criminal liability.⁸⁶ Although this analysis lends support to the notion that surrogacy contracts are void under New Mexico law, it may be difficult to prosecute those who enter into surrogacy agreements for violation of the Children's Code for two reasons.

⁷⁹ N.M. STAT. ANN. §32A

⁸⁰ N.M. STAT. ANN. §32A-5-34B.

⁸¹ *Id.*

⁸² N.M. STAT. ANN. §32A-5-34B(2).

⁸³ N.M. STAT. ANN. §32A-5-34B(4).

⁸⁴ N.M. STAT. ANN. §32A-5-34F.

⁸⁵ N.M. STAT. ANN. §32A-5-34C; N.M. STAT. ANN. §32A-5-42A.

⁸⁶ *Id.*

First, there is currently no caselaw interpreting the scope of N.M. Stat. Ann. §32A-5-34⁸⁷ or N.M. Stat. Ann. §32A-5-42.⁸⁸ A second, and related, concern is that because the statute does not specifically address paid surrogacy arrangements, the rule of lenity⁸⁹ may be implicated, requiring that the statute be interpreted in the defendant's favor.⁹⁰ Despite the unlikely application of criminal sanctions under New Mexico's adoption statutes these statutes could be used by the courts to invalidate surrogacy contracts.⁹¹ Accordingly, this ambiguity in the law beckons for legislative action to make it clear that the same policies which caution against "the payment to a woman for conceiving and carrying a child"⁹² in an adoption context logically apply in the context of surrogacy as well.

2. New Mexico Uniform Parentage Act.

The New Mexico Uniform Parentage Act⁹³ prescribes the methods by which the parentage of children will be established. Under this act the default presumption with respect to motherhood is that the woman who gave birth to the child is the natural mother.⁹⁴ The statute allows for an "interested party"⁹⁵ to challenge maternity,⁹⁶ however, a contracting mother attempting to challenge the maternity of the birth mother (surrogate) would have a difficult time since the act provides for only one default position with

⁸⁷ Which prohibits payment for conceiving or carrying a child.

⁸⁸ Which provides penalties for a violation of the payment provisions of N.M. STAT. ANN. §32A-5-34.

⁸⁹ See *State v. Anaya*, 123 N.M. 14, 23 (1996).

⁹⁰ *Id.* at 24. ("the existence of any ambiguity as to [the statute's] intended scope requires . . . that [they] be interpreted in the defendant's favor.")

⁹¹ See *In re Baby M*, *supra* note 23 (in which the New Jersey Supreme Court held that a surrogacy contract was void on public policy grounds because it violated New Jersey's child trafficking statutes.)

⁹² N.M. STAT. ANN. §32A-5-34F.

⁹³ N.M. STAT. ANN. §§40-11-1 to 40-11-23.

⁹⁴ N.M. STAT. ANN. §40-11-4.

⁹⁵ N.M. STAT. ANN. §40-11-21.

⁹⁶ *Id.*

respect to motherhood, the woman who gave birth.⁹⁷ Additionally, the state's jurisdiction statute⁹⁸ limits the court's authority in a maternity claim to those individuals who had sexual intercourse in the state with respect to children who may have been conceived as a result of that intercourse. Because the surrogate was not impregnated as a result of intercourse, the New Mexico courts probably lack jurisdiction over her with respect to a challenge to her maternity.

The parental status of the surrogate's husband may be more difficult to establish. Under the statute which provides for presumptions of paternity, the husband of the surrogate would be presumed to be the father of the child so long he and the natural mother were married to each other at the time the child was born.⁹⁹ However, the paternity issue is somewhat confused by the statute defining paternity in cases of artificial insemination.¹⁰⁰ Under this statute, "the husband *is* treated as if he were the natural father" if his written consent to the insemination is filed with the vital statistics bureau.¹⁰¹ In contrast, the statute provides only that the donor of the semen "*may* be treated as if he were the natural father" if he has filed a written consent.¹⁰² Again, it seems that the husband of the birth mother is given priority since he "*is*" treated as the father while the donor of the sperm "*may be*" treated as such.

The issue of paternity is more clear however in a situation like that in the Buzzanca case,¹⁰³ where the contracting man was not the donor of the sperm. The

⁹⁷ *Id.*

⁹⁸ N.M. STAT. ANN. §40-11-8.

⁹⁹ N.M. STAT. ANN. §40-11-5A(1).

¹⁰⁰ N.M. STAT. ANN. §40-11-6.

¹⁰¹ N.M. STAT. ANN. §40-11-6A (emphasis added).

¹⁰² N.M. STAT. ANN. §40-11-6B (emphasis added).

¹⁰³ See *Buzzanca v. Buzzanca*, 72 Cal. Rpt.2d 280 (Ct. App. 1998).

contracting man who has not donated sperm would not even gain the benefit of the artificial insemination statute in New Mexico. Accordingly, the enforcement of a surrogacy contract to determine parentage in New Mexico would violate the very statute which, by its terms, is designed to determine issues of parentage in this state. However, the lack of clarity in the parentage statutes beckons for legislative action.

3. Statutory Provisions which Outline the Procedures for the Termination of Parental Rights.

New Mexico provides statutory guidance for the termination of parental rights in two contexts. First, parental rights may be terminated if there has been a finding of child abuse or neglect.¹⁰⁴ Second, the parental rights of an individual may be terminated as a part of an adoption proceeding.¹⁰⁵ However, the termination of parental rights attempted by the surrogacy contracts does not begin to meet the stringent requirements for termination under the New Mexico statutes in either context.

Because the termination of parental rights is such an extraordinary action with severe consequences, the courts in New Mexico have required that the requirements of the termination statutes be strictly followed.¹⁰⁶ Under both the adoption and the child abuse/neglect statutes a court must determine the factual grounds for termination by clear and convincing evidence.¹⁰⁷ The purported termination of parental rights in a surrogacy agreement fails to address the statutory requirements of a judicial hearing. Therefore, any

¹⁰⁴ N.M. STAT. ANN. §32A-4-29.

¹⁰⁵ N.M. STAT. ANN. §32A-5-15.

¹⁰⁶ *In re Adoption of Doe*, 101 N.M. 34, 38 (Ct. App. 1984). See also *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (holding that parents have a liberty interest in having a full and fair hearing before the termination of their parental rights).

¹⁰⁷ N.M. STAT. ANN. §32A-5-16H; and N.M. STAT. ANN. §32A-4-29J.

termination of parental rights by surrogacy contract violates the provisions of the statutes which govern such an action and is ineffective under New Mexico law.

4. Statutory Provisions which Provide Guidance on the Placement of Children with Individuals Other Than Their Natural Parents.

Under New Mexico law there are several situations (such as divorce, adoption, and neglect) in which the courts are called upon to determine the placement of a child outside of the traditional family which most children are born into.¹⁰⁸ However, none of these situations ask the courts to look to contractual agreements which have sought to establish placement of a child. Rather, the statutes and the court decisions in this area require the courts to look to the “best interests of the child” in determining where the child should be placed.¹⁰⁹ Placing a child in a home without regard to the best interests of that child when the custody and/or parentage is challenged ignores one of the most basic protections which the state gives to its most vulnerable members. In order to protect the children of surrogacy, New Mexico must adopt legislation which provides them with the same basic protections which it provides to other children.

III. ANALYSIS OF STATE STATUTES WHICH HAVE VOIDED SURROGACY CONTRACTS.

If New Mexico chooses to adopt a law to void surrogacy contracts as a matter of public policy it is likely to look to other states that have enacted similar legislation. Ten states plus the District of Columbia currently have laws voiding surrogacy statutes.¹¹⁰ In

¹⁰⁸ See N.M. STAT. ANN. §40-4-9A; N.M. STAT. ANN. §40-4-9.1A & B; see also *In re Adoption of Doe*, *supra* note 106, at 37.

¹⁰⁹ See note 108, *supra*.

¹¹⁰ See UTAH CODE ANN § 76-7-204 (1989); MICH. COMP. LAWS §§722.851 through 722.863 (1988); D.C. CODE ANN. §§16-401 and 16-402 (1993); ARIZ. REV. STAT. §25-218 (1989); N.D. CENT. CODE §§14-18-1 through 14-18-7 (1989); N.Y. DOM. REL. LAW §§121 through 124 (McKinney 1993); WASH. REV. CODE §§26.26.210 through 26.26.260 (1989); IND. CODE §§31-20-1-1 through 31-20-1-3 (1989); KY. REV.

addition, there is one uniform law which provides for an option of voiding surrogacy contracts.¹¹¹ Although the purpose of these laws is the same, the statutory approaches vary. Accordingly, the potential outcomes can be markedly different when each of these statutes is applied.

In order to compare the effectiveness of these statutes I have analyzed each of them with respect to the following four areas: (1) whether they apply to both paid and unpaid surrogacy arrangements; (2) whether they provide for civil or criminal penalties; (3) whether and how they address disputes regarding parental rights; and (4) whether they apply to gestational surrogacy contracts. I then rated each of the statutes with respect to the amount of clarity and guidance each of them give to the courts and citizens regarding the status of surrogacy contracts within the jurisdiction.¹¹² In this section I will briefly discuss why each of the areas of evaluation is important and how I rated statutes within this area. I will then discuss some of the reoccurring problems within these statutes which should be addressed within any statute promulgated by New Mexico.

Within the four areas of evaluation the primary inquiry was whether the statute was clear and consistent enough to promote the dignity and equality of the individuals involved while providing for certainty of outcome to those who are contemplating such an arrangement. In each category one point was given for a statute which met these goals but one point was subtracted for a statute which failed to meet these goals.¹¹³ While this

STAT. ANN. §§199.590 and 199.990 (Banks-Baldwin 1994); NEB. REV. STAT. §25-21,200 (1988); and LA. REV. STAT. ANN. §2713 (West 1987).

¹¹¹ UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §§1 and 5(alternative B) (1988).

¹¹² The full text of my examination can be found in appendix 1 of this article.

¹¹³ The resulting scores range from four points (for a statute which scored a point in each category) to negative four points (for a statute which lost a point in each category).

methodology is not scientific, it does provide a way of measuring the relative strength of each statute and its ability to effect a certain yet equitable outcome.

A. Application to Paid and Unpaid Contracts.

Even surrogacy contracts which are entered into for non-monetary motivations present the problem that the surrogate may seek to renege on her agreement and keep the child. In this situation, the courts will be faced with the problem of whether to uphold the contract. Accordingly, the state may be required to become a reluctant participant in the aftermath whether or not the contract was for pecuniary gain.¹¹⁴ Therefore, the first and most basic point of any statute to void surrogacy contracts is that it address both paid and unpaid contracts in order to provide clarity and certainty in application.¹¹⁵

Several states have enacted legislation prohibiting only paid surrogacy contracts.¹¹⁶ While these statutes do offer some protection to the women and children involved in surrogacy contracts, their lack of application in many contexts may ultimately lead to more problems than they solve.

For example, in Washington surrogacy contracts which are entered into for compensation are void.¹¹⁷ However, the statute exempts from its provisions “payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a surrogate mother and the payment of reasonable attorney fees for the drafting of the

¹¹⁴ See Keith J. Hey, *Assisted Conception and Surrogacy – Unfinished Business*, 26 J. MARSHALL L. REV. 775, 809 (1993).

¹¹⁵ When I was evaluating state statutes in this category I gave them one point if they provided for application to paid and unpaid contracts and subtracted one point if they did not.

¹¹⁶ See WASH. REV. CODE §§26.26.210 through 26.26.260 (1989); KY. REV. STAT. ANN. §§ 199.590 and 199.990 (Banks-Baldwin 1994); NEB. REV. STAT. § 25-21,200 (1988); LA. REV. STAT. ANN. § 2713 (West 1987).

¹¹⁷ See WASH. REV. CODE §26.26.240 (1989).

surrogate parentage contract.”¹¹⁸ This language indicates that many surrogacy agreements would be exempt from the voiding provisions of the Washington law since many are designed primarily to reimburse the surrogate for the expenses and troubles of pregnancy.¹¹⁹

The question of what happens when a dispute involving unpaid contracts comes before the Washington courts remains. Two contradictory answers to this question emerge from an analysis of Washington law. First, is the general principle of statutory construction that laws specifically applying to one type of behavior while logically (although not explicitly) excluding another type of behavior should not apply to the excluded behavior.¹²⁰ This would seem to indicate that surrogacy contracts which are not entered into for compensation would not be void in Washington since the legislature chose not to include them in its prohibitory legislation.

However, during the same year that this statute was enacted, the Attorney General of Washington wrote an opinion that “[a] surrogate parenting agreement is not enforceable if the surrogate withdraws her consent to relinquish her child.”¹²¹ This seems to indicate that even a non-paid surrogacy agreement may be void in Washington.

The statutes which have voided both paid and unpaid surrogacy contracts have avoided this uncertainty. Their application to all surrogacy contracts gives those who wish to enter into surrogacy agreements notice that their agreements will never be binding. The statutes which void surrogacy contracts protect the liberty interests of the

¹¹⁸ See WASH. REV. CODE §26.26.210 (1989).

¹¹⁹ See York, *supra* note 63, at 398.

¹²⁰ See *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).

¹²¹ See Opinion of the Attorney General, WASH. OP. ATT’Y GEN. 1989 No. 4.

surrogate mother by allowing her full decisional capacity until and unless she chooses to give her child up to another family. However, when only paid surrogacy contracts are void, the liberty of the surrogate is ambiguous. The tempestuous twenty five years of abortion law has taught us that “[l]iberty finds no refuge in a jurisprudence of doubt.”¹²²

B. Imposition of Civil or Criminal Penalties.

As discussed before, the primary arguments for the criminalization of contracts for surrogate motherhood are based on the same policies that have resulted in the criminalization of “baby-selling” and slavery, namely that the dignity of all human beings precludes treatment of a human as an article of commerce. Accordingly, it would be inconsistent for a state to take the position that the exchange of money for children in a surrogacy context is offensive enough to warrant the invalidation of such contracts on public policy grounds while not providing penalties for that same conduct. This is especially so where the state has criminalized the exchange of children and adults for money through anti “baby-selling” statutes and slavery/peonage prohibitions.¹²³

Despite the inconsistency of such positions, several states have declared surrogacy contracts to be void while not providing penalties for those who endeavor to purchase a child through surrogacy.¹²⁴ However, most of these states prohibit the sale of children in

¹²² *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

¹²³ When I was evaluating state statutes in this category I gave them one point if they provided for penalties for surrogacy contracts which involved monetary gain and subtracted one point if they did not. However, statutes which allowed for the payment of medical expenses only were not penalized since most states allow the same in an adoption context.

¹²⁴ See ARIZ. REV. STAT. §25-218 (1989); N.D. CENT. CODE §§14-18-1 through 14-18-7 (1989); IND. CODE §§31-20-1-1 through 31-20-1-3 (1988); NEB. REV. STAT. §25-21,200 (1988); and LA. REV. STAT. ANN. §2713 (West 1987).

an adoption context and provide penalties for those who try to engage in such activity.¹²⁵

This inconsistency is bound to lead to difficulties in the application of such laws.

For example, the state may seek to prosecute those who engage in paid surrogacy arrangements under the adoption statutes. The state would argue that the paid surrogacy agreement fits within the class of activity prohibited by the adoption statute. However, the defendant would argue that since the legislature chose not to provide criminal penalties for paid surrogacy contracts, it did not intend for such arrangements to be punishable despite their similarity to paid adoptions. This argument would be consistent with the established Supreme Court jurisprudence regarding the failure of a legislature to act in a context similar to one in which they have chosen to act previously.¹²⁶

Accordingly, states which act to void surrogacy contracts should specifically indicate that any paid surrogacy arrangements are subject to criminal penalties. Failure to do so could have the absurd result of creating an anti-surrogacy statute which actually reduces the potential jeopardy of those who choose to engage in paid surrogacy by negating their exposure to the prohibitions of anti “baby-selling” statutes.

C. Determination of Parental Rights

The past litigation surrounding surrogacy contracts has almost exclusively involved disputes over who should have parental rights to the child.¹²⁷ A statute which voids surrogacy contracts without providing an answer to questions of parentage would create far more questions than it solves by invalidating the pre-existing agreement

¹²⁵ See ARIZ. REV. STAT. §8-114 (1989); N.D. CENT. CODE §12.1-31-05 (1989); IND. CODE §35-46-1-9 (1988); and LA. STAT. ANN.-R.S. §14:286 (1987).

¹²⁶ See Gozlon-Peretz *supra* note 120, at 404.

¹²⁷ See *In re Baby M*, *supra* note 23; see also Buzzanca, *supra* note 3.

regarding parentage without providing any alternative methods of establishing parentage.¹²⁸ Any statute which voids surrogacy contracts should therefore provide at least a default position which would attempt to resolve parentage conflicts before they become an issue. The statutory default position reflected in most parentage statutes would be the gestational and birth mother as the mother and her husband (if she is married) as the father.¹²⁹

The current statutes which void surrogacy contracts seem to fit into one of three categories with respect to resolving issues of parentage. Three states provide concrete guidance which establishes that the surrogate is the mother and her husband (if she is married) is the father.¹³⁰ The second category includes three states who provide that the court shall conduct a “best interests” analysis in order to determine the parentage of the child.¹³¹ Finally, seven states provide no meaningful guidance which courts can use to resolve parentage issues.¹³²

When enacting a statute which voids surrogacy contracts, states should recognize that such statutes will almost invariably have the effect of creating conflicting claims of parentage. In order to avoid unnecessary litigation a statute should provide concrete guidance regarding presumptions of parentage. The legislature has three potential choices as parents. First, it could choose to create a presumption in favor of the surrogate

¹²⁸ When I was evaluating state statutes in this category I gave them one point if they provided for clear statutory default rules regarding parentage and subtracted one point if they did not.

¹²⁹ See UNIFORM PARENTAGE ACT, §§ 3 & 4.

¹³⁰ See UTAH CODE ANN. §76-7-204 (1989); ARIZ. REV. STAT. §25-218; and N.D. CENT. CODE §14-18-05 (1989).

¹³¹ See MICH. COMP. LAWS §722.861 (1988); WASH. REV. CODE §26.26.260 (1989); IND. CODE §31-20-1-3 (1988).

and her husband (if she is married). This would be consistent with other areas of family law which presume the birth mother and her husband to be parents of the child.¹³³ Second, it could presume that the couple who contracted for the child are the parents. This choice would be inconsistent with the purposes of the statute voiding the contract however because it would have the effect of enforcing the surrogacy arrangement as against the surrogate mother. The final choice would be to presume that the biological parents (providers of the gametes) are the parents. This would be very difficult (if not impossible) given that the gametes are often obtained from anonymous donors through sperm and ova depositories.

Accordingly, the only logically and legally consistent way for the legislature to provide concrete guidance, and therefore certainty, in the law of surrogate relationships is to provide a parentage presumption in favor of the surrogate and her husband.¹³⁴

D. Statutory Application to Gestational Agreements

Until very recently, few would have considered the possibility that a child could have six potential parents. However, the Buzzanca¹³⁵ case has made it clear that those who are drafting statutes which are to apply in surrogacy contexts should draft their statutes broadly enough to cover all potential surrogacy situations, yet clearly enough to

¹³² See D.C. CODE §§16-401 and 16-402 (1993); N.Y. DOM. REL. LAW §§121 through 124 (McKinney 1993); KY. REV. STAT. ANN. §§199.590 and 199.990 (Banks-Baldwin 1994); NEB. REV. STAT. §25-21,200 (1988); and LA. REV. STAT. ANN. §2714 (West 1987).

¹³³ See UNIFORM PARENTAGE ACT, §§ 3 & 4.

¹³⁴ Recent caselaw in Arizona has demonstrated the need to be consistent in the framing of a parentage statute. In *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994) the Arizona Court of Appeals struck down the Arizona surrogacy statute on the grounds that it violated the equal protection clause of the Arizona Constitution since it allowed the biological father to rebut the presumption that the surrogate's husband was the father but it did not provide the biological mother the same opportunity.

¹³⁵ *Buzzanca v. Buzzanca*, 72 Cal. Rpt.2d 280 (Ct. App. 1998).

provide meaningful guidance.¹³⁶ A statute voiding surrogacy contracts should therefore apply to gestational as well as traditional surrogacy contracts.

Only two state statutes explicitly apply to gestational¹³⁷ surrogacy contracts.¹³⁸ Several state statutes seem to apply to gestational contracts but not explicitly.¹³⁹ Three statutes either do not apply to gestational contracts or are so ambiguous that they are unlikely to apply.¹⁴⁰

Any statute which voids surrogacy contracts should apply to all surrogacy contracts unless there is a valid reason for it to exempt certain classes of contracts. It does not appear that the statutes that do not apply to gestational contracts have exempted them intentionally. Rather, it is likely that such surrogacy arrangements were simply not contemplated at the time these statutes were enacted. Accordingly, new state statutes should be carefully drafted in order to include all foreseeable surrogacy situations.

IV. PROPOSED NEW MEXICO SURROGATE PARENTAGE ACT

In order to address the problems of surrogacy discussed above, New Mexico should enact legislation which will: (1) void all surrogacy contracts; (2) provide penalties for those who engage in paid surrogacy arrangements; and (3) settle questions of parentage which may arise when a surrogacy arrangement is invalidated. In this portion of the

¹³⁶ When I was evaluating state statutes in this category I gave them one point if they provided for application to gestational surrogacy contracts and subtracted one point if they did not.

¹³⁷ Surrogacy arrangements by which the resulting child is not necessarily genetically related to either the surrogate couple or the contracting couple.

¹³⁸ See MICH. COMP. LAWS §722.853 (1988); and WASH. REV. CODE §26.26.210 (1989).

¹³⁹ See UTAH CODE ANN §76-7-204 (1989); D.C. CODE ANN. §16-401 (1993); ARIZ. REV. STAT. §25-218 (1989); N.D. CENT. CODE §§14-18-1 and 14-18-5 (1989); N.Y. DOM. REL. LAW §121 (McKinney 1993); IND. CODE §§31-20-1-1 through 31-20-1-3 (1989).

¹⁴⁰ See KY. REV. STAT. ANN. §199.590 (Banks-Baldwin 1994); NEB. REV. STAT. §25-21,200 (1988); and LA. REV. STAT. ANN. §2713 (West 1987).

paper I will first propose a New Mexico Surrogate Parentage Act. Then I will analyze the act with respect to how it would apply in a general context.

A. Proposed New Mexico Surrogate Parentage Act

Below is a proposal for a New Mexico Surrogate Parentage Act. Much of its language is drawn from other statutes which have addressed surrogacy effectively.

Where language has been used which is the same or substantially similar to a particular statute, the statute is cited in appropriate footnotes.

Section 1: Definitions¹⁴¹

- (a) “Compensation” - means a payment of money, objects, services, or anything of value except payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a surrogate mother.
- (b) “Participating Party” - means a surrogate mother, spouse of a surrogate mother, or the parties intended by the surrogate parentage contract to be the mother and father of the resulting child.
- (c) “Surrogate Gestation” - means the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female.
- (d) “Surrogate Mother” - means a female who is naturally or artificially inseminated or undertakes surrogate gestation and who subsequently gestates a child conceived through the insemination pursuant to a surrogate parentage contract.

- (e) “Surrogate Parentage Contract” - means a contract, agreement, or arrangement, whether written or unwritten, in which a female agrees to conceive a child through natural insemination, artificial insemination, or surrogate gestation and to voluntarily relinquish her parental or custodial rights to the child.

Section 2: Prohibitions¹⁴²

- (a) A surrogate parentage contract, whether executed in the State of New Mexico or in another jurisdiction, shall be void and unenforceable in the State of New Mexico as contrary to public policy.
- (b) No participating party, person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract, written or unwritten, for compensation.

Section 3: Penalties¹⁴³

- (a) Any participating party who enters into, induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract, written or unwritten, for compensation shall be subject to the payment of a fine of not more than one thousand dollars (\$1,000).
- (b) Any person, organization, or agency other than a participating party, which enters into, induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract, written or unwritten, for compensation shall

¹⁴¹ The definitions section is largely drawn from MICH. COMP. LAWS §722.853 (1988).

¹⁴² The prohibitions section is drawn primarily from WASH. REV. CODE §§26.26.230, and 26.26.240 (1989).

be guilty of a misdemeanor and subject to imprisonment in the county jail for a definite term of less than one year or to the payment of a fine of not more than one thousand dollars (\$1,000), or to both.

Section 4: Parentage¹⁴⁴

(a) The surrogate is the mother of a resulting child and the surrogate's husband is the father of the child. If the surrogate is unmarried, paternity of the child is governed by the Uniform Parentage Act (N.M. Stat. Ann. §§40-11-1 through 40-11-23 (1978)).

B. Application

Under the New Mexico Surrogate Parentage Act there would be uniformity of treatment among all types of surrogacy arrangements whether they are gestational or traditional.¹⁴⁵ In either situation, the contract would be void and the surrogate mother and her husband would be presumed to be the parents of the resulting child.¹⁴⁶ If the surrogate was unmarried, the paternity of the child would be determined according to the provisions of the New Mexico Uniform Parentage Act.¹⁴⁷

¹⁴³ The penalties section is drawn from the prohibition language of WASH. REV. CODE §26.26.230 (1989) and N.Y. DOM. REL. LAW §123 (McKinney 1993). The penalties for third parties providing prohibited payments are the same as they are in connection with adoptions under N.M. STAT. ANN. §32A-5-42.

¹⁴⁴ This parentage section is drawn from the UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §5(alternative B) (1988) with reference to the NEW MEXICO UNIFORM PARENTAGE ACT (N.M. STAT. ANN. §§40-11-1 to 40-11-23 (1978)) for determination of the paternity of the child when paternity cannot be determined by this section.

¹⁴⁵ See *supra* Section 1.

¹⁴⁶ See *supra* Section 2(a) & Section 4.

¹⁴⁷ N.M. STAT. ANN. §§40-11-1 to 40-11-23 (1978).

The Surrogate Parentage Act would void both paid and unpaid contracts.¹⁴⁸

Where the arrangement is procured for compensation, the surrogate and her husband as well as the proposed parents are subject to a civil fine.¹⁴⁹ Others who are involved in the arrangement are exposed to criminal liability just as they would be for making prohibited payments in an adoption context.¹⁵⁰ However, payment under this act does not include medical expenses or expenses incurred as a result of the pregnancy.¹⁵¹ This allows for treatment consistent with adoption arrangements, where the mother can be paid for medical and living expenses.¹⁵²

IV. CONCLUSION

Science and technology have provided great possibilities in the area of human reproduction. However, they provide no guidance regarding the morality or legality of the application of the techniques which they make possible.¹⁵³ Providing guidance is the province and the duty of the legislature.¹⁵⁴ New Mexico must act to protect the dignity of all its citizens by clearly establishing a policy of prohibiting all activities which result in the commodification and sale of human beings no matter what form they take. In order to act effectively in this area, New Mexico should adopt legislation which will: (1) void all surrogacy contracts; (2) provide penalties for those who engage in paid surrogacy arrangements; and (3) settle questions of parentage which may arise when a surrogacy arrangement is invalidated.

¹⁴⁸ See *supra* Section 2(a).

¹⁴⁹ See *supra* Section 3(a).

¹⁵⁰ See *supra* Section 3(b).

¹⁵¹ See *supra* Section 1(a).

¹⁵² See N.M. STAT. ANN. §32A-5-34B.

¹⁵³ See Wagner, *supra* note 5, at 133.

¹⁵⁴ See John R. Dunne & Gregory V. Serio *Surrogate Parenting After Baby M: The Ball Moves To The Legislature's Court* 4 *TOURO L. REV.* 161 (1988).

Appendix 1: Analysis of Laws Voiding Surrogacy Contracts

STATE	PAID & UNPAID	CRIMINAL OR CIVIL PENALTIES	PARENTAGE	GESTATIONAL CONTRACTS	SCORE
Utah Utah Code Ann. § 76-7-204 (1989).	Yes	Yes. Individuals who are involved in a paid surrogacy contract are guilty of a Class B Misdemeanor.	Yes. Surrogate = Mother Husband = Father Plus the statute provides for a 'best interests analysis'	Yes, but not explicitly.	+4
Michigan Mich.Comp. Laws §§ 722.851 through 722.863	Yes	Yes. a) Involvement in a contract where the surrogate is a minor or has other infirmities = Felony: 5 years/ \$50,000. b) Involvement in a contract for compensation = Misdemeanor: 1 year/ \$50,000. c) Arranging a contract for compensation = Felony: 5 years/ \$50,000.	No, except that it provides for an application of the best interests test.	Yes, this statute explicitly applies to gestational contracts.	+2
Wash. D.C. D.C. Code Ann. §§ 16-401 and 16-402 (1993).	Yes.	Yes. If the arrangement is for compensation there can be a civil penalty of \$10,000 and 1 year imprisonment.	No.	Yes, but not explicitly.	+2
Arizona Ariz. Rev. Stat. § 25-218 (1989)	Yes	No	Surrogate = Mother Husband = Father However, the presumption that the husband is the father is rebuttable.	Yes, but not explicitly.	+2
North Dakota N.D. Cent. Code §§ 14-18-1 through 14-18-7 (1989).	Yes	No	Yes. Surrogate = Mother Husband = Father unless the husband is not a party to the contract.	Yes, but not explicitly.	+2

Appendix 1: Analysis of Laws Voiding Surrogacy Contracts

STATE	PAID & UNPAID	CRIMINAL OR CIVIL PENALTIES	PARENTAGE	GESTATIONAL CONTRACTS	SCORE
Uniform Law. Unif. Status of Children of Assisted Conception Act §§ 1 and 5(alternative B) (1988).	Yes.	No.	Surrogate = Mother Husband = Father unless the husband is not a party to the agreement.	Yes, but not explicitly.	+2
New York N.Y. Dom. Rel. Law §§ 121 through 124 (McKinney 1993).	Yes	Yes. If compensation is given beyond medical expenses the following penalties apply: a) For parties: \$500 civil penalty. b) For those who arrange the contract: \$10,000 civil penalty for the first offense and a Felony for the second offense.	No, except that the statute provides that the contract may not be considered as being adverse to the interests of the surrogate.	Yes, but not explicitly.	+2
Wash. Wash. Rev. Code §§ 26.26.210 through 26.26.260 (1989).	No, only applies to paid contracts.	Yes. Involvement in a surrogacy contract which involves payment outside of allowed expenses is a Gross Misdemeanor.	No. Except for a 'best interests analysis'.	Yes, explicitly applies to gestational contracts.	0
Indiana Ind. Code §§ 31-20-1-1 through 31-20-1-3	Yes	No	No, except that it states that the contract is not to be considered in a 'best interests' analysis.	Yes, but not explicitly.	0
Kentucky Ky. Rev. Stat. Ann. §§ 199.590 and 199.990 (Banks-Baldwin 1994)	No, only applies to paid contracts.	Yes. Involvement in a paid surrogacy contract is a Misdemeanor with a penalty of 6 months/ \$2000.	No.	Unknown.	-3
Nebraska Neb. Rev. Stat. § 25-21,200 (1988).	No, only applies to paid contracts.	No	No. The only provision indicates that the biological father shall be the father.	No.	-4

Appendix 1: Analysis of Laws Voiding Surrogacy Contracts

STATE	PAID & UNPAID	CRIMINAL OR CIVIL PENALTIES	PARENTAGE	GESTATIONAL CONTRACTS	SCORE
Louisiana La. Rev. Stat. Ann. § 2713 (West 1987).	No, only applies to paid contracts.	No	No.	No.	-4