This Article will address some of the moral, legal, and ethical considerations relating to the enforcement of surrogacy contracts and the empirical evidence that informs those considerations. Further, this Article will set forth Nebraska’s surrogacy contract statute, discuss the merits of the statute’s policy objectives, and conclude with a discussion of the law’s adequacy in light of the development of complex, artificial reproduction procedures.

I. NEBRASKA’S STATUTE

The Nebraska Unicameral waded into the surrogacy contract debate in 1987. The resulting legislation, signed into law in 1988, flatly prohibits enforcement of such contracts. Nebraska Revised Statutes § 25-21,200 provides as follows:

(1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child.

(2) For purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband.¹

As of this writing, there were no Nebraska cases applying or interpreting the statute.

A. LEGISLATIVE HISTORY:

Senator Ernie Chambers ("Chambers") introduced the surrogacy bill during the 1987 legislative session. The bill was assigned to the Judiciary Committee as LB 674.² No citizens testified in favor of or in

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¹ Judicial Law Clerk for the Honorable Gary A. Fenner, United States District Court for the Western District of Missouri.
opposition to the bill at the public hearing. The bill advanced to General File on March 6 with six votes in its favor. Two Judiciary Committee members were absent during the vote.

In his statement of intent for LB 674, Chambers declared the bill did not make surrogacy contracts illegal in Nebraska. Rather, he suggested, “[i]f people choose to make such arrangements and all parties abide by the terms . . . they are not prohibited by this bill from doing so.” The bill’s essential utility, according to Chambers, was to prevent Nebraska courts from exercising jurisdiction over surrogacy contract disputes, should they arise. In the event a contract is formed, he explained, the parties “cannot use the agency of the courts to obtain enforcement of that kind of an arrangement” if subsequent problems occur. Chambers suggested he had no desire to legislate the morality or ethics of such arrangements but only to keep resulting disputes out of the courts, thereby obviating any rights of the intended mother under the contract.

In introducing the bill at its public hearing, Chambers further disclosed his grounds for sponsoring the legislation. “The reason for this bill is that I am a descendent of people who were bought, and sold, and bred as though they were cows, pigs, and chickens,” he explained. “When you are aware of that kind of history, and it is not too far back, there is a keen sensitivity to the ‘thing-a-fication’ of human beings.”

At times, Chambers expressed profound disgust with surrogacy arrangements. “[T]hese are surrogate wife contracts,” he charged, “not surrogate mothers.” He further explained, “[a] surrogate is one who stands in the place of another. [The birth mother in a surrogacy contract] is the biological or actual mother.” These statements suggest LB 674 drafters and supporters likely did not consider in vitro fertilization (“IVF”) or gestational surrogacy, but only traditional surrogacy. This may be because IVF was still in its experimental stages

3. Committee on the Judiciary, Committee Statement, L.B. 674, Neb. Unicameral, 90th Leg., 1st Sess., at 23 (Mar. 6, 1987) [hereinafter Committee Statement].
4. Id. at 1.
5. See generally id.
6. Introducer’s Statement of Intent, supra note 2.
7. Id.
8. Committee Statement, supra note 3, at 27.
9. Id. at 26.
10. Id. at 24.
11. Id.
12. Id.
13. Floor Debate on L.B. 674, 90th Leg., 2nd Sess., at 7520 (Jan. 22, 1988) [hereinafter Floor Debate].
at the time: The first IVF baby in the United States was born in December of 1981.14

With regard to the biological father’s obligation to support the child resulting from the bargain, Chambers leveled, “that scoundrel will have to assume the responsibility for what his promiscuousness created. . . . I’m not sympathetic to those who want to buy a woman or baby.”15 He referred to the child’s biological father as an “adulterous man.”16 According to Chambers, “what [the man] and his wife can do is adopt, if they choose.”17

Other concerns Chambers expressed included the profiteering influence of surrogacy agencies, as well as class and race problems related to exploitation.18 According to Chambers, “[a] poor woman will never have a surrogate. A rich woman will never be one. This is a situation where the poor will be breeders for the rich.”19 This will happen, he said, where career women wish to avoid disruption of their careers while starting a family.20 Chambers also asked what would happen if the biological father and his wife thought the child was defective and the birth mother refused to get an abortion: “To whom does that product belong?”21

Under Chambers’ direction, the bill advanced to Select File with thirty ayes and one nay and later went to the governor’s desk with forty-one ayes, one nay, and seven excused and not voting.22 During floor debate, no senator spoke against the bill.23

In sum, Chambers identified at least four criticisms of surrogacy contracts he claimed supported his tender of the bill. First, he suggested surrogacy leads to the commodification of humans; this argument appears to encompass his concern about the profiteering motives of surrogacy agencies. Second, he declared traditional surrogacy immoral and indistinguishable from adultery. Third, he was concerned with the consequences if no parties to the contract found the resulting child satisfactory. Fourth and finally, he was concerned with class

15. Floor Debate, supra note 13, at 7522.
17. Id. at 30.
18. Id. at 26-27; Floor Debate, supra note 13, at 7521-22.
20. Id. at 27.
21. Id. at 24.
22. Floor Debate, supra note 13, at 7533, 8100.
23. Floor Debate, supra note 13.
and race problems associated with selection of surrogate mothers and the potentially exploitive nature of the arrangements.

Some of these arguments apply equally to gestational surrogacy contracts and traditional surrogacy contracts, which are differentiated below. Other arguments apply more aptly to one or the other. Nearly twenty years after Nebraska's surrogacy law came into force, the unicameral should re-examine the social policy behind the law, especially considering the lack of debate in the law's passage and recent technological advances. Nebraska's law presumes complications that may not in fact exist and does not address surrogacy arrangements beyond those existing at the time Nebraska legislators passed the bill.24

II. HISTORY OF SURROGACY CONTRACTS AND CRITIQUE OF OPPOSING ARGUMENTS

Surrogacy arrangements come in variations of two general forms: traditional surrogacy contracts and gestational surrogacy contracts.25 Traditional surrogacy involves the insemination of the surrogate mother, contributing her own genetic material, with the gametes of the genetic father.26 In contrast, a gestational surrogate does not donate her own gametes; rather, physicians implant the surrogate with an embryo consisting of the combined gametes of two others who might be third-party donors, the husband and wife seeking the surrogacy services, or a combination of the two.27 In any event, gestational surrogacy's fundamental distinction from traditional surrogacy is that gestational surrogacy does not involve the genetic material of the surrogate birth mother.28 The distinction is pivotal because genetic consanguinity is usually a critical factor in determining a child's legal parents.29

As such, gestational surrogacy merits separate consideration under the law. It is important to specify, among other things, when, if at all, a surrogate loses parental rights; the degree of compensation allowed; and who can eligibly serve as a surrogate.30 Because the answers to these uncertainties might vary according to the genetic alignment resulting from the type of surrogacy arrangement involved, the

24. See infra notes 25-130 and accompanying text.
25. See infra notes 26-29 and accompanying text.
27. See id. (In a gestational surrogacy arrangement, the surrogate mother is implanted with an embryo formed by the sperm and egg of one or both of the intended parents, and thus has no genetic ties to the child.
28. Id.
29. Id.
30. Id.
law should not ignore the special circumstances of gestational surrogacy.

In reviewing the efficacy of Nebraska's statute and determining whether more comprehensive legislation is advisable, Nebraska legislators should review how other states have approached the problem. As of 2007, five states explicitly provided for the enforceability of surrogacy contracts. These states were Florida, Illinois, Nevada, New Hampshire, and Virginia. Florida's law validates gestational surrogacy contracts only. New Hampshire's law explicitly allows enforcement of both varieties. Virginia allows a surrogate who is also a genetic parent of the resulting child to petition for revocation of the contract within 180 days of the last conception-assistance procedure. These five states, except for Illinois, forbid payment for surrogacy, but allow reimbursement for both direct and ancillary medical expenses. Illinois allows reasonable compensation for the surrogate.

In a somewhat different approach, Arkansas has created a rebuttable presumption for situations involving artificial insemination. The resulting offspring in such situations are presumed the children of the birth mother except in surrogacy situations that qualify under a list of designated genetic arrangements.

At least nine jurisdictions, including Nebraska, have tried to prohibit the enforcement of surrogacy contracts: Arizona, the District of Columbia, Indiana, Louisiana, Michigan, New York, North Dakota, and Utah. An Arizona Appellate Court declared Arizona's statute


37. Ark. Code Ann. § 9-10-201 (2002). The designated genetic arrangements are as follows: 1) the biological father and the woman intended to be the mother if the biological father is married; 2) the biological father only if unmarried; and 3) the woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination. Id.

38. Id.

39. Id.

unconstitutional in 1994.\textsuperscript{41} The Utah legislature repealed its law providing for criminal sanctions in 2005 after the United States District Court for the District of Utah declared the law unconstitutional.\textsuperscript{42} At least four jurisdictions make specified surrogacy contract activities crimes: District of Columbia, Michigan, New York, and Utah.\textsuperscript{43} Washington prohibits surrogacy contracts for compensation and involving certain individuals, namely un-emancipated minors, those diagnosed as mentally retarded or having a developmental disability or mental illness.\textsuperscript{44} Other states have no surrogacy contract legislation, choosing to leave resolution of any such problems with the courts.

Some authors have identified recent trends in the case law relating to surrogacy contracts.\textsuperscript{45} One such trend is that courts are loath to enforce contracts in situations that noticeably commercialize the arrangement; situations where the child is strongly analogous to an ordered and delivered product.\textsuperscript{46} On the other hand, courts sometimes view surrogacy contracts as probative evidence of the parties' intent where relevant in subsequent disputes even when the contract itself is not enforced.\textsuperscript{47} Finally, in at least one case, a New York court ignored the best-interests-of-the-child standard and examined the parties' conduct in reaching its decision—a decision reminiscent of estoppel—in a paternity determination.\textsuperscript{48} This case involved the rather exceptional situation of a mistaken implantation of a couple's embryo in an IVF candidate.\textsuperscript{49}

The multitude of options for surrogacy arrangements currently available demands a law of considerable breadth and complexity. One case presenting a complex interplay of parties and issues was Buzzanca v. Buzzanca.\textsuperscript{50} The case involved five parties.\textsuperscript{51} The intended parents, the Buzzancas, were both infertile but wanted control over the genetic make-up of their child, thus they chose IVF over adop-

\textsuperscript{41} See Soos v. Superior Court, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) ("The surrogate statute violates this principle. We hold that the state has not shown any compelling interest to justify the dissimilar treatment of men and women similarly situated (the biological mother and father). The statute is unconstitutional on equal protection grounds.").
\textsuperscript{42} \textsc{Utah Code Ann.} 1953 § 76-7-204; J.R. v. Utah, 261 F. Supp. 2d 1268, 1269 (D. Utah 2002).
\textsuperscript{43} \textsc{D.C. Code Ann.} § 16-402(b); \textsc{Mich. Comp. Laws} § 722.859 (2002); \textsc{N.Y. Dom. Rel. Law} § 123 (Mckinney 1999); \textsc{Utah Code Ann.} § 76-7-204.
\textsuperscript{45} See infra notes 46-48 and accompanying text.
\textsuperscript{46} Griffiths et al., supra note 26, at 41.
\textsuperscript{47} Id. at 42.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} 72 Cal. Rptr. 2d 280 (Ct. App. 1998).
\textsuperscript{51} Buzzanca v. Buzzanca (\textit{In re Buzzanca}), 72 Cal. Rptr. 2d 280 (Ct. App. 1998).
An embryo formed from the gametes of two carefully chosen donors was implanted into a contractual surrogate. The donors were unrelated to either the intended parents or the surrogate.

The contractual arrangement came apart when Mr. Buzzanca filed for divorce six days before the surrogate gave birth. Ms. Buzzanca claimed parental rights and sought child support payments from Mr. Buzzanca pursuant to the parental intentions evident in the contract. Mr. Buzzanca, however, denied parentage based on the lack of genetic consanguinity and the invalidity of the surrogacy contract which was finalized by signature post-conception. The surrogate laid no claim to the child but maintained her duties were solely those of a contractual surrogate.

The trial court determined the resulting child was legally parentless because the child had no genetic relation to the Buzzancas, the gamete donors had reserved no parental rights, and the surrogate had no obligations beyond those in the surrogacy contract. California's Fourth District Court of Appeal found this result untenable and decided Mr. Buzzanca's consent to insemination established his fatherhood. Similar rationale established Ms. Buzzanca as the child's mother. According to the court, Mr. Buzzanca's legal status as father granted him all the privileges and duties of fatherhood and required him to furnish support payments to the child's legal mother, Ms. Buzzanca.

Buzzanca illustrates the dilemmas courts face in complex surrogacy disputes. In fact, similar situations are not beyond the realm of possibility for Nebraska courts. Nebraska's current statute does not contemplate gestational surrogacy arrangements. Should a court refuse jurisdiction over such contract disputes, as Nebraska's statute demands for traditional surrogacy contract disputes? If not, what principles should the court apply in determining parentage?

53. Id. at 685.
54. Id.
55. In re Marriage of Buzzanca, 72 Cal. Rptr. 2d at 282.
56. Id. at 283; Havins et al., supra note 52, at 685.
57. In re Marriage of Buzzanca, 72 Cal. Rptr. 2d at 282-83. See also Havins et al., supra note 52, at 685 ("Mr. Buzzanca disclaimed any paternal responsibility on the grounds that he was not genetically related to the child and that the gestational surrogacy contract was invalid because it was signed after the pregnancy commenced.").
58. In re Marriage of Buzzanca, 72 Cal. Rptr. 2d at 282; Havins et al., supra note 52, at 685.
59. In re Marriage of Buzzanca, 72 Cal. Rptr. 2d at 282.
60. Id. at 292.
61. Id.
62. Id. at 294.
These decisions and the social policy under-girding them are best left to a state’s legislature. Nebraska’s Unicameral has so far failed to resolve these uncertainties with its prohibition on jurisdiction over surrogacy disputes in Nebraska courts. What follows is a discussion of the arguments in opposition to the enforcement of surrogacy contracts, including those Senator Chambers proffered in introducing LB 674. The goal of the discussion is to illuminate the issues presented in a more complete manner than the Unicameral’s effort in codifying LB 674.

Contemplation of future legislation should include a discussion of at least the following five considerations:

A. Commodification

Defenders of gestational surrogacy contracts argue the intended parents are compensating the surrogate mother for gestational services, including the mother’s prenatal health responsibilities. As noted, some states prohibit payment beyond medical and health expenses under a surrogacy contract. In such a case, nothing is purchased. This lack of payment or compensation beyond medical expenses means the surrogate simply makes a gift of gestational services. Such arrangements can hardly be considered commodity-based. To the extent the exchange of money can commodify a baby, these types of contracts do not promote the “thing-a-fication” of humans.

Note, however, situations involving uncompensated surrogates raise the question of what consideration the intended parents provide that allows for enforcement of the contract. If none, lack of compensation could undermine the very purpose of entering into a contractual surrogacy arrangement: certainty through the guarantee of legal enforceability. In such a situation, a court might still order specific performance of the alleged contract based on a theory of estoppel or reliance notwithstanding the lack of consideration. Some courts might actually be more willing to enforce such arrangements because these arrangements appear more remote from the commodification of humans than surrogacy contracts for full and adequate consideration.

Even if a state allows the intended parents to compensate the surrogate beyond reimbursement, the contention the intended parents are purchasing the child is weak. In most situations, competent counsel representing a surrogate would require nonrefundable periodic payments throughout gestation as a material condition. In fact, it might be bordering on malpractice for an attorney drafting a surrogacy contract to omit a clause explaining the rights and duties of the
parties if the fetus should die. Such terms are particularly probative evidence gestational services are the thing purchased rather than the child or the woman. Even if no child results, the intended parents are bound to make adequate payment depending on the period of gestation and other considerations. In a situation where the parties' contract terms delay payment until birth, the law could still require pro-rated payment to the surrogate mother according to the term of gestation regardless of whether a healthy child results. In this way, payment from the intended parents to the surrogate is unconnected to the actual child.

The traditional surrogacy contract involves the same considerations as a gestational contract when identifying what the intended parents are purchasing. However, in a traditional surrogacy contract, the intended parents would also be purchasers of the surrogate mother's genetic material. Though a stronger case for those arguing surrogacy commercializes human life, such an arrangement is not significantly distinguishable from the purchase of gametes from any other donor, which is clearly a lawful activity. Finally, in a free-market society where almost anything can be characterized as commercial, it is a tenuous position to hold surrogacy contracts commodify humans more than other lawful activities. Indeed, the United States Supreme Court's jurisprudence suggests Congress can regulate anything under its commerce power under the substantial effects test and the aggregation principle. In other words, one can characterize nearly any thing or activity as commercial.

In professional sports, for example, contracts often proscribe an athlete's off-field activities. Pittsburgh Steelers quarterback Ben Roethlisburger's next contract is sure to include a restriction on motorcycling after his near-deadly June 2006 motorcycle accident. The average contract for a professional National Football League athlete already restrains the athlete from participating in off-field activities "which may involve a significant risk of personal injury." These terms create the appearance a team that contracts for a player's ser-

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64. See Gonzales v. Raich, 545 U.S. 1, 57-58 (2005) (Thomas, J., dissenting) ("If Congress can regulate [medical use of marijuana] under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.").
65. Id.
67. Id.
vices has the right to control a host of the player's activities unrelated to the sport. The professional athlete, perhaps more than any other individual, is selling him or herself both physically and mentally to a chosen organization for a specified number of years.

According to Professor Richard Epstein, concerns about the morality of appropriate conduct related to human bodies and gametes should not be imposed on those who disagree. Epstein believes no compulsion exists, at least none more imposing than exists in other areas of life, for either the intended parents or the surrogate to enter the surrogacy arena. As such, the commodification argument has nothing to do with a woman's bodily autonomy, Epstein says, and is an illegitimate condemnation of legitimate conduct unsupported by persuasive arguments.

In addition, Epstein notes the term "commodity" is misused in the surrogacy context. He explains the key element of a commodity, as defined in the Uniform Commercial Code "is the perfect substitutability of one unit for another, from which it is easily inferred that there is no special subjective value that is attached to any particular unit." In surrogacy arrangements, Epstein claims, the subjective value of the human involved precludes any useful comparison to a commodity. Finally, he observes, surrogacy contracts are not for resale, they are for a one-of-a-kind creation.

Whatever one's view of surrogacy is, the commodification argument is not solid enough to justify more than bare assertions that surrogacy involves the purchasing of women and children. Surrogacy deserves a more thoughtful discussion of the risks involved and alternatives for addressing such concerns. Such a discussion should include a frank debate as to whether commodification concerns have merit and, if so, what provisions could minimize commodification effects, i.e. allowing reimbursement for only medical and health expenses.

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69. Id.
70. See id. ("In order to restrain the behavior of others, some greater warrant than a diffuse contention of their conduct is needed, and that requirement forces the inquiry back to the discussion of defects in the contracting process and negative third party effects, both of which have already found wanting.").
71. Id. at 2327.
72. Id.
73. Id.
B. EXPLOITATION OF WOMEN

Surrogacy contracts present possibilities for exploitation.\textsuperscript{74} States that allow compensation for gestational or traditional surrogacy open the door to the risk poor women will be pressed into rendering gestational services for the rich out of economic necessity. This hazard, however, does not present a complete argument against the enforcement of either traditional or gestational surrogacy arrangements.

Some states have simply prohibited the intended parents from compensating the surrogate, thus negating the possibility of economic exploitation.\textsuperscript{75} Surrogacy opponents might argue compensation for medically-related expenses could still draw impoverished women into surrogate roles out of fiscal necessity. A woman who has no access to medical care and no money for groceries could be guaranteed at least nine months of relief under such arrangements.

States can avoid this situation, however, by legislating that surrogates must possess financial means above a certain threshold in order for courts to enforce the contract. Beyond non-enforcement, legislatures could criminalize arrangements with surrogates possessing resource limits below a designated level. Such legislation would also minimize exploitation concerns where compensation above health-related expenses is permitted. Women possessing financial means above the specified threshold would be much less likely to become surrogates due to financial need. In terms of enforcement, a state could require prior court approval of a surrogacy contract, along with appropriate documentation proving the surrogate's financial means in order to assure compliance—Virginia and New Hampshire already require pre-commencement court approval of surrogacy contracts.\textsuperscript{76} Even without these preventative measures, it is questionable whether surrogacy contracts ever involve the poorest of the poor in the United States: One would expect prospective parents would hesitate to choose a surrogate mother in such an unstable situation if at all possible.

\textsuperscript{74} Recent developments involving the outsourcing of surrogacy to countries such as India raise especially pressing exploitation concerns. Sam Dolnick, \textit{Pregnancy Becomes Latest Job Outsourced to India}, USA TODAY, 2007, available at \url{http://www.usatoday.com/news/health/2007-12-30-surrogacy_N.htm}. One could argue prohibiting, or preventing enforcement of, surrogacy contracts in the United States could encourage outsourcing to unregulated foreign markets. See id. (explaining couples from the United States are regularly seeking the services of closely-monitored Indian surrogates as an alternative to more expensive surrogates in the United States).

\textsuperscript{75} See supra notes 31-36 and accompanying text.

One author, John Hill, speculates about what prompts the strongly-held belief that surrogacy contracts promote exploitation.\footnote{77} He suggests many label the arrangements exploitive because of a perceived moral wrong in permitting the agreements: a predetermined bias.\footnote{78} Hill's observation appears remarkably applicable to Chambers' view of traditional surrogacy. Chambers displayed open disgust with the morality of surrogacy, equating surrogacy with adultery. Though not directly connecting the lack of morality with exploitation, Chambers raises both contentions simultaneously in his attack on surrogacy.

Hill contends "[i]f economic and social considerations were sufficient to render an agreement exploitative, then the same eighteen year old [sic] widow who decided to become a nurse (another traditionally female career choice) would similarly be a victim of exploitation."\footnote{79} Hill suggests comparing surrogacy to selling human tissue, child trafficking, and prostitution indicates opponents citing exploitation anchor their arguments in moral reasons rather than social and economic concerns.\footnote{80} He further observes states voiding or criminalizing surrogacy fundamentally base their laws on notions "surrogates are exploited by the intended parents with whom they contract, by those who facilitate surrogate arrangements for profit, and by society in general."\footnote{81}

Courts also have cited exploitation as a fundamental flaw of surrogacy contracts, most notably the Supreme Court of New Jersey in the landmark case \textit{In re Baby M}.\footnote{82} The court particularly warned of surrogacy schemes that involve a broker that promotes the arrangements and is profit-seeking.\footnote{83} "Whatever idealism may have motivated any of the participants," the court explained, "the profit motive predominates, permeates, and ultimately governs the transaction."\footnote{84}

Hill explains, however, that various interpretations of "exploitation" cloud coherent discussion.\footnote{85} He also notes there are various reasons beyond economics for why women might agree to serve as a surrogate, including a desire to assist an infertile friend or a wish to undergo the childbirth experience without taking on parental responsibilities.\footnote{86}

\begin{itemize}
\item \footnote{78} \textit{Id.} at 641.
\item \footnote{79} \textit{Id.}
\item \footnote{80} \textit{Id.}
\item \footnote{81} \textit{Id.} at 642.
\item \footnote{82} 537 A.2d 1227 (1988).
\item \footnote{83} Hill, \textit{supra} note 77, at 643.
\item \footnote{84} \textit{Id.}
\item \footnote{85} Havins et al., \textit{supra} note 52, at 688.
\item \footnote{86} \textit{Id.}
\end{itemize}
Hill concludes,
Most often . . . these views [of exploitation] overlap. Financial enticingment and economic duress, economic duress and social domination, social domination and commodification, commodification and claims of moral impermissibility—often, these views undergird and reinforce one another, each another layer in the fabric of the conceptual understanding of exploitation. There appear, however, to be no necessary or sufficient conditions defining exploitation. In sum, although surrogate agreements may be exploitative, it remains unclear exactly what it is that renders them so.87

At least one court, the Supreme Court of California, agrees with Hill and has expressed the view that no hard evidence has shown poor women are exploited in surrogate contracts in a manner distinguishable from how economic need generally induces needy individuals to accept what some would consider undesirable employment.88 The court's observation is persuasive when thought of in terms of concrete examples and comparisons.

For example, some argue, including Senator Chambers on occasion, that college athletic programs across the United States have exploited student athletes for many generations.89 Each year, penniless students, many of them minorities, play collegiate sports for no salary or payment, often subjecting themselves to severe and permanent injuries while the collegiate institution reaps millions from their participation. Many of the student athletes do not graduate, often because their commitment to their sport is often elevated above academics, and only a few of the most gifted athletes have any hope of a lucrative professional career in their particular sport.90 In sum, surrogate ar-

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87. Hill, supra note 77, at 644 (citations omitted).
88. Havins et al., supra note 52, at 683. See Johnson v. Calvert, 851 P.2d 776, 785 (Cal. Ct. App. 1993) ("Although common sense suggests that women of lesser means serve as surrogate mothers more often than do wealthy women, there has been no proof that surrogate contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment.").
90. Steve Wieberg, Black Athletes' Graduation Rate Well Below that of Whites, USA TODAY, Jan. 19, 2006, available at http://www.usatoday.com/sports/college/2006-01-19-grad-rates_x.htm. "[F]rom 1995-98. . . in I-A and I-AA football, blacks graduated at a modest 54% rate. It was 55% in I-A. Both are well beneath the 76% rate for all athletes who arrived from high school or transferred from other colleges in that time." Id. "[F]our institutions selected to the 2004 Division I Men's Basketball Championship had graduation rates of zero, and 16 had rates of 25 percent or less." Student Athlete College Graduation Rates, http://www.athleticscholarships.net/student-athlete-graduation-rates.htm (last visited Feb. 16, 2008). See also NCAA, NFL Football Injury Report, http://www.statfox.com/cfb/injuries.htm (last visited Feb. 16, 2008). Less than one per-
rangements are no more exploitive than other universally-accepted arrangements.

A common feminist view of surrogacy, originally posited by Margaret Sanger, a famous anthropologist, proceeds as follows: Women must be able to control their bodies and reproductive capabilities to be truly free. This feminist outlook implies restricting surrogacy arrangements is contradictory to every woman's right to control and own her body. This conclusion, however, is not universal in feminist thought.

Other feminists contend surrogacy agreements create great potential for unanticipated detriment to the surrogate. Women at the time of contract formation, the argument goes, are vulnerable to and unprepared for the emotional difficulty and resulting harm caused by giving one's full-term child to unknown parents. If the surrogate changes her mind during her pregnancy, the contract would detrimentally bind her to surrender the child though she could not have anticipated the eventual psychological difficulty of doing so.

This feminist counterargument proceeds to assert societal norms intrinsically coerce the surrogate. The source of coercion goes beyond economics and is inevitable because of traditionally patriarchal social structure which profoundly affects the motives, beliefs, personalities, and goals of women. Thus, the surrogate's decision is only outwardly one of free choice, and inwardly is a product of her conditioned self-image as a primarily procreative, sexual, and maternal being.

Statutes like Nebraska's, that declare the unenforceability of surrogacy contracts, might lower the value of a surrogate's right to contract away her reproductive capabilities. But according to these feminists, such a restriction can "promote [the surrogate's] future autonomy more profoundly, avoiding impairment of the sense of self-


91. Havins et al., supra note 52, at 689.
92. Id.
94. Id.
95. Id.
96. Hill, supra note 77, at 639.
97. Id.
98. See id. at 639-40 ("Because she has grown up in a male-dominated society, which has conditioned her to view her primary function in that society in largely sexual, procreative and maternal terms, her choices are the legacy of this socio-psychological framework of social conditioning.").
identity that could result from being compelled to honor a deeply regretted promise made by a 'former self.'”

However legitimate this concern is, it has been insufficient to outlaw other reproductive-related traditions. Psychological harm caused by abortion or adoption, which would logically equal or exceed the risks of surrogacy commitments, have not been deemed sufficient to outlaw either procedure. The existence of a right necessarily presents situations that would allow for its abuse, and the possibility someone will make a wrong choice or regret his or her choice is a weak rationale for eliminating or limiting the right.

C. PROFITEERING SURROGACY AGENCIES

Surrogacy opponents suggest the intended parents in a surrogacy arrangement are not the only source of potential harm for the surrogate. At least one author observes the enforceability and permissibility of surrogacy arrangements in some jurisdictions has resulted in thriving surrogacy business advertised on the internet and elsewhere that includes payments to surrogates and agencies that rival or exceed the costs of the most expensive conventional adoptions. No doubt profiteering could be a significant problem in surrogacy contracts.

However, once again, this is an incomplete argument against the enforceability of surrogacy contracts. A profiteering motive is not uncommon in American society. In fact, profiteering is nearly universal in most facets of life and is generally accepted as constructive in our capitalist economy; it is thought to benefit all in the end.

Furthermore, there are examples of profiteering that far outstrip any proposed danger of profit motives in surrogacy agencies. For instance, insurance companies regularly refuse to pay legitimate claims in order to reap record profits. Health insurance companies and HMOs make billions of dollars while forty million Americans go without health insurance. Prosperous pharmaceutical companies

100. Wilson, supra note 93, at 335.
101. See infra note 102 and accompanying text.
charge exorbitant fees for drugs that could save millions of lives throughout the world but for their prohibitive cost.\textsuperscript{105} Tobacco companies market a product that kills hundreds of thousands each year and drains the economy through sick days and healthcare costs.\textsuperscript{106} Fast food restaurants target the young in advertising food products particularly harmful to health and significantly contribute to the obesity epidemic in America.\textsuperscript{107} Yet none of these businesses have been prohibited from seeking profits. To claim profit is a harmful motive for those facilitating surrogacy contracts, one must question that motive's legitimacy in countless other constructive and destructive industries that dwarf the surrogacy industry.

Even if making a profit is not a legitimate goal for surrogacy agencies, there is a relatively simple solution to profiteering motives that does not require banning surrogacy arrangements or preventing their enforcement: state regulation. Surrogacy agencies could be licensed by the state and regulated as countless other agencies are also regulated. States regulate the health and safety of citizens in innumerable ways, ways much more involved and comprehensive than the regulation and monitoring of a few surrogacy agencies would entail.

D. CLASS AND RACE PROBLEMS IN SURROGACY SELECTION

Another argument Senator Chambers alluded to and other commentators have posited is that surrogacy arrangements pose race and class problems in surrogate selection. Though a legitimate concern, this again is unpersuasive as an incomplete argument against surrogacy contract enforcement. In fact, the same arguments could be applied to adoption procedures, which sometimes allow prospective parents to choose children from a particular country, of a particular race, or with favored characteristics.

Indeed, all humans select mates in part based upon the physical characteristics and traits of potential partners. Admittedly, the existence of such selective processes in one area of life does not justify allowing their existence in others. But, it is also unjustifiably assumptive to assert it is illegitimate to choose a mate or surrogate in part based on physical characteristics. Though choosing a surrogate based solely on race could be particularly destructive, it could in some


circumstances be a positive selection criteria: Blindness to race and culture could sometimes be more destructive than acknowledgement and accommodation.

In terms of concrete statistics, researchers note surrogacy agencies have reported most women waiting to serve as surrogates are protestant and white.\textsuperscript{108} About a third of candidates have attended college at some point in their lives, and only four percent have studied in a graduate school.\textsuperscript{109} Thirty percent of candidates earned between $30,000 and $50,000 annually, while two-thirds earned less than $30,000.\textsuperscript{110} The Congressional Office of Technical Assessment agrees, finding around ninety percent of surrogacy candidates in the late 1980s were white, non-Hispanics.\textsuperscript{111}

Beverly Horsburgh tenders one of the more persuasive race-based criticisms of surrogacy in her article \textit{Jewish Women, Black Women: Guarding Against the Oppression of Surrogacy}.\textsuperscript{112} Horsburgh contends the choice to elevate genetic parenting over adoption must also involve acknowledging and addressing the infertility problems of racial minorities.\textsuperscript{113} Before promoting surrogacy, Horsburgh claims, we must “eliminate occupational and environmental conditions harmful to Black women’s health [ ] and [ ] allocate resources to provide better access to reproductive health care.”\textsuperscript{114} She cites the availability of adoption and claims reform efforts would be better focused on changing restrictive adoption rules that discriminate against nontraditional families.\textsuperscript{115} Thus, Horsburgh alludes to surrogacy’s potential for exploitation and racial discrimination not only in the selection of the surrogate but also in the availability of surrogacy as an option for infertile minority couples.

Horsburgh’s contention is difficult to refute. Still, a prohibition on paid surrogacy arrangements, or at least limits on payments, might help level the playing field for minorities in the surrogacy arena. Even if Horsburgh’s concerns cannot be immediately alleviated, one must ask whether these concerns justify banning the enforcement of surrogacy arrangements for all.

\textsuperscript{109} Id. at 494 n.41.
\textsuperscript{110} Id.
\textsuperscript{113} Id. at 49.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 50.
Criticisms of race- and class-based selection criteria, one author contends, are essentially another thread of the exploitation argument.\textsuperscript{116} The exploitation-derived argument progresses to assert choosing a surrogate based on beauty, intelligence, or race creates a "product quality" selection.\textsuperscript{117} The Office of Technology Assessment's observation that reproductive technology clients "typically look for the best 'specimen'" confirms the assertion.\textsuperscript{118} For example, some sperm banks refuse donations from individuals with less desirable physical characteristics or low I.Q.s.\textsuperscript{119} In sum, the procedures reduce a person to his or her physical and mental characteristics.\textsuperscript{120}

Importantly, this argument does not apply when a surrogate mother is not a genetic parent of the child. In gestational surrogacy arrangements, intended parents would have no incentive to choose a surrogate for her physical or mental traits. In such situations, the intended parents are likely to choose the sperm and egg donors according to the donor's profile and whatever characteristics the intended parents desire. It follows that even in traditional surrogacy arrangements, the choice of surrogate is virtually indistinguishable from the choice of gamete donors in gestational surrogacy. If no restrictions exist on an individual's selective criteria for choosing gamete donors, no logical reason allows for such restrictions on the choice of surrogate.

Further, those who dismiss commodification claims ask what selective criteria critics would consider appropriate as basic to personhood.\textsuperscript{121} Like it or not, "height, eye color, race, intelligence, and athletic ability" are inherently monetized in employment markets.\textsuperscript{122} Further, humans have never consistently designated specific characteristics as unmarketable under the law.\textsuperscript{123} According to some, no persuasive evidence exists that surrogacy agreements generally exploit the race of any party in any way.\textsuperscript{124} Compelling reasons may exist to oppose enforcement of surrogacy contracts, but most race- and class-based contentions are not irrefutable.\textsuperscript{125}

\textsuperscript{116} Hill, supra note 77, at 639.
\textsuperscript{117} Id. (citing Shari O'Brien, Commercial Conceptions: A Breeding Ground for Surrogacy, 65 N.C. L. Rev. 127, 146 (1986)).
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{122} Id. at 867.
\textsuperscript{123} Id.
\textsuperscript{124} Hill, supra note 77, at 695.
\textsuperscript{125} Id.
E. SATISFACTION OF THE INTENDED PARENTS AND SUITABILITY OF THE INTENDED PARENTS

In his arguments in opposition to surrogacy contract enforcement, Senator Chambers raises certain scenarios where he believes problems might arise. In particular, he wonders what result would obtain if the intended parents are unhappy with the resulting child or fetus, and the surrogate refuses to have an abortion. His observation has merit. At least one commentator thinks whether or not a surrogacy contract requires a surrogate to abort under specified conditions—the child’s mental or physical defect for example—a court will probably not impose an abortive procedure on a surrogate mother.\textsuperscript{126} Few courts would be comfortable forcing a mother to abort based on contract terms.\textsuperscript{127}

One wonders, however, how likely such a situation is to occur. A competent attorney for the intended parents would likely discuss such scenarios with a surrogate’s counsel. Contract provisions, aside from ones demanding abortive procedures, could adequately govern what is to occur under certain scenarios. Further, a state government could legislate a solution to such problems in comprehensive surrogacy legislation. Preventing the courts from exercising jurisdiction does not make the problems disappear. It may make them worse. For example, if the intended parents refuse the child due to dissatisfaction, Nebraska law would probably burden the surrogate with responsibility for the child along with the genetic father, though it is unclear what would happen in gestational surrogacy situations.

Another concern with surrogacy contracts is the suitability of prospective parents.\textsuperscript{128} There are, it appears, no qualification requirements for individuals wishing to enter into a surrogacy arrangement. Havins and Dalessio observe, however, that there are also no qualification requirements for others with parental aspirations.\textsuperscript{129} Unsuitable parents have children every day.\textsuperscript{130} Havins’ and Dellessio’s argument targets a fatal inconsistency in the views of people who adopt the parental-suitability argument.

\textsuperscript{126} Cynthia Fruchtman, Considerations in Surrogacy Contracts, 21 WHITTIER L. REV. 429, 432 (1999).
\textsuperscript{127} Id. at 432.
\textsuperscript{128} Havins et al., supra note 52, at 689.
\textsuperscript{129} See id. ("Commercial surrogacy place a baby in a home without considering whether the prospective parents would be suitable.").
\textsuperscript{130} Id.
III. CONCLUSION

Surrogacy contracts raise a multitude of complex issues not easily solved. Nebraska's response to the issues is less than optimal. Senator Chambers raises the prospect of adoption as an alternative for individuals who would otherwise seek surrogacy. In reality, this may not be a practical alternative for many. Adoption is often prohibitively expensive. Though surrogacy costs can also be astronomical, the expenses could be limited by the contracting parties. In addition, many U.S. adoption agencies apply rather restrictive criteria for adoption.\textsuperscript{131} Agencies often will not adopt to unmarried individuals and may require couples to be married for a certain number of years before they are eligible to adopt.\textsuperscript{132} Many agencies also have age requirements and require certain income levels.\textsuperscript{133} Some agencies require one parent to stay home for a specified period following adoption or require that prospective parents have no other children.\textsuperscript{134} Further, agencies might discriminate based on sexual orientation or disability. In sum, "[m]any state courts or agencies will use the 'best interests' argument to judge a prospective adoptive parent or couple according to preconceived biases about who makes a good or a fit parent."\textsuperscript{135}

Even private adoptions through attorneys might not be an alternative. These adoptions can also be governed by restrictive state laws.\textsuperscript{136} In addition, private adoptions have multiple disadvantages not present in agency-based adoptions. Private adoptions have unpredictable costs as opposed to the set fees of agency adoptions.\textsuperscript{137} Private adoptions also generally prevent selection of the child based on gender and involve greater uncertainty because of the unpredictable actions of the birth mother.\textsuperscript{138} As such, surrogacy may be the best opportunity for some genuinely suitable individuals and couples to experience parenthood depending on the state in which they live and the available adoption agencies.

In addition, adoptions can raise difficult parenting issues in themselves. Adoption presents bonding difficulties between parent and

\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} NOLO, Who Can Adopt a Child?, http://www.nolo.com/index.cfm (follow "parenting & adoption" hyperlink under "family law & immigration"; then follow "adoption" hyperlink; then follow "Who Can Adopt a Child" hyperlink) (last visited Feb. 16, 2008).
\textsuperscript{137} Id.
\textsuperscript{138} Id.
child, depending on the child's age and circumstances at the time of adoption. Further, some adoptees in biracial families have expressed unhappiness with the disconnect they feel to their racial and cultural background. Prospective parents, who wish to avoid such problems, may have surrogacy as their only recourse.

Regardless of one's opinion of surrogacy arrangements, they must be confronted. Denying the courts jurisdiction to enforce surrogacy contracts does not adequately address the important social issues that accompany the agreements. The California Court of Appeals in Buzzanca specifically beseeched the California legislature to address the various situations that can arise in surrogacy contracts.\textsuperscript{139} "A child cannot be ignored . . . . These cases will not go away," the court warned.\textsuperscript{140} The court reflected that banning all artificial reproductive techniques, through criminal sanctions or otherwise, would not eliminate associated parental-obligation disputes before the courts, especially when taxpayers will otherwise be leaned on for maintenance and support.\textsuperscript{141}

The court further noted,

[T]he Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques . . . . [T]he Legislature, with its ability to formulate general rules based on input from all its constituencies, [ ] is the more desirable forum for lawmaking.\textsuperscript{142}

Nebraska's senators should heed the California court's warning. Even if no controversial cases reach Nebraska courts, and hopefully they will not, the Unicameral should provide better certainty for those entering into surrogacy contracts. Even a flat prohibition of surrogacy contracts with criminal penalties would provide more predictability and stability than Nebraska's current scheme. In any event, the issue deserves a thorough and objective discussion in the Nebraska Unicameral. Even if senators come to the same conclusion they reached in 1988, the above discussion demonstrates the need for more convincing social policy to support the current law.

\textsuperscript{139} Buzzanca v. Buzzanca (\textit{In re Marriage of Buzzanca}), 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).
\textsuperscript{140} Id. at 1429.
\textsuperscript{141} Id.
\textsuperscript{142} Id.