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Lawrence O. Gostin

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SURROGACY FROM THE PERSPECTIVES OF ECONOMIC AND CIVIL LIBERTIES

*Lawrence O. Gostin**

The field of law and economics, of which Judge Posner is the leading theorist, has offered a rich and sophisticated framework for thinking about a wide variety of problems at the interface of law and society. The theory, based on economic principles for understanding behavioral incentives and disincentives, is widely taught in law schools and is influential in scholarship. I have not always agreed with the application of the theory to complex problems of individual and group behavior,¹ yet I constantly have been impressed with the elegance of the writing and analysis.

Judge Posner thinks about surrogacy arrangements in terms of economic liberty: The parties are in relatively free and equal bargaining positions, the arrangements are mutually beneficial, and third parties (notably the children) are not harmed. My article is written from the perspective of civil liberties rather than economic liberties. Do the two perspectives—economic and civil liberties—lead to similar policy results?

For the most part, they do. Both perspectives defend surrogacy arrangements, arguing that they should not be prohibited or significantly restricted. The civil liberties approach, however, would not permit the contract to require the gestational mother to waive her parental rights, preferring that custody disputes be determined under a “best interests” standard. Judge Posner would argue that this stipulation would make the contract far less desirable to both parties—the prospective adoptive parents would not be assured of a child and thus would be prepared to pay less to the gestational mother. He argues that third party children are not harmed because, absent the contract, they would not have been born. I argue that the child, who is not a party to the contract, cannot be bought and that the child’s best interests should prevail.

* Professor of Law, Georgetown University; Professor of Public Health, the Johns Hopkins University; Director, CDC-Collaborating Center on Law & the Public’s Health. <http://www.publichealthlaw.net>.

1. Ronald Bayer, Lawrence O. Gostin, & Devon C. McGraw, *Trades, AIDS, and the Public’s Health: The Limits of Economic Analysis. Review of PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE*, by Tomas J. Philipson and Richard A. Posner, 83 GEO. L. J. 79 (1995).

Both arguments are made in the name of freedom—one economic liberty and the other personal liberty. Although these articles were written when surrogacy arrangements were still a novelty, the arguments still are salient and important.

The law relating to surrogacy arrangements has evolved since my article was first written.² A number of states adopted surrogacy laws, most focusing on family law rather than contract law. For example, laws in Michigan and Washington make determinations based on the child's best interests.³ Virginia and New Hampshire require an extensive screening process for unpaid surrogacy contracts which include psychological and medical evaluations, approval by a judge in advance of the pregnancy, and a home study of all parties to the surrogacy arrangement to assure the child a good home.⁴

Generally, state statutes do not honor paid surrogacy contracts, and ten states prohibit compensation of an intermediary.⁵ The District of Columbia and Arizona ban surrogacy contracts.⁶ Florida, Michigan, Nevada, New Hampshire, New York, Virginia, Washington and West Virginia ban payments to surrogates, but have broad exceptions to allow the payment of expenses.⁷

Some state statutes go to the issue of parental rights. For example, New Hampshire and Virginia have a presumption that the contracting couple is the parents, but allow the surrogate a period of time in which to change her mind.⁸ In Arizona, North Dakota and Utah, the surrogate and

2. This discussion derived in part from Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 21 (2000).

3. MICH. COMP. LAWS ANN. § 722.961 (West 1997); WASH. REV. CODE ANN. § 26.26.260 (West 1997).

4. N.H. REV. STAT. ANN. § 166-B (1996); VA. CODE ANN. §§ 20-156 to -165 (Michie 1990).

5. ARIZ. REV. STAT. ANN. § 25-218(A) (1996); D.C. CODE ANN. § 16-402(b) (1996); FLA. STAT. ANN. § 63.212(1)(I)(5) (West 1997); KY. REV. STAT. ANN. § 199.590(4) (Michie 1995); MICH. COMP. LAWS ANN. § 722.859 (West 1997); N.H. REV. STAT. ANN. § 168-B:16(IV) (1996); N.Y. DOM. REL. LAW § 123 (McKinney 1997); UTAH CODE ANN. § 76-7-204(1) (1997); VA. CODE ANN. § 20-165 (Michie 1997); WASH. REV. CODE ANN. § 26.26.230 (West 1997).

6. D.C. CODE ANN. § 16-402 (1996); ARIZ. REV. STAT. ANN. § 25-218 (1996).

7. FLA. STAT. ANN. §§ 63.212(1)(I), 742.15(4) (West 1997); MICH. COMP. LAWS ANN. §§ 722.853(a), .859 (West 1997); NEV. REV. STAT. ANN. § 126.045(3) (Michie 1995); N.H. REV. STAT. ANN. § 168-B:25(V) (1996); N.Y. DOM. REL. LAW § 123(1) (McKinney 1997); VA. CODE ANN. §§ 20-156, 20-160(B)(4)-(5) (Michie 1997); WASH. REV. CODE ANN. §§ 26.26.210(1), .230 (West 1997); W. VA. CODE § 48-4-16 (1997).

8. N.H. REV. STAT. ANN. §§ 168-B:23(IV), :25(IV) (1996); VA. CODE ANN. §§

her husband are the legal parents.⁹ In Illinois, unless the child is genetically that of the contractual couple, the surrogate and her husband are presumed to be the legal parents.¹⁰ Illinois law also allows the contracting couple's name to be placed on the birth certificate.¹¹

20-158(D), 20-161(B) (Michie 1996).

9. ARIZ. REV. STAT. ANN. § 25-218 (1996); N.D. CENT. CODE § 14-18-05 (1991); UTAH CODE ANN. § 76-7-204 (1997).

10. 750 ILL. COMP. STAT. 45/6(6)(a) (1999).

11. 410 ILL. COMP. STAT. 535/12(9) (1999).