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Surrogate Parenting: What Should Legislatures Do?

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Surrogate parenting, as seen through the lens of the *Baby M* case,[1] has gripped the imagination of the public as do few legal issues. A custody case like that involving Baby M contains elements of high drama: a tragically mistaken choice, a broken promise, and an innocent child caught in the middle of a battle between two virtual strangers—strangers who happen to be the child's parents.

Baby M has also aroused intensely partisan feelings that now shape the legislative debate over the future of surrogate parenting. Some see Mary Beth Whitehead Gould as a villainess, led only by self-interest and caprice into reneging on her promise to give a desperate, childless couple the baby they longed for—a baby who would never have been born but for her vow to give the child up to its father and his wife.[2] Others see her as a victim, led by relative poverty, lack of information, and a desire to help others into an unnatural contract to bear and give up a child, a contract which she could not perform because of the natural—indeed laudable—strength of her maternal love.[3]

In these two different interpretations of the "facts," Whitehead's determination to keep her child has opposite meanings. To her parti-

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1. *In re* Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (1987), *rev'd*, 109 N.J. 396, 537 A.2d 1227 (1988).

2. The trial court in the *Baby M* case, which found the surrogate parenting contract enforceable, took a similar view of Mrs. Whitehead: "Mrs. Whitehead is manipulative, impulsive, and exploitative. . . . She is a woman without empathy." *Id.* at ____, 525 A.2d at 1170.

3. *See, e.g.*, Will, *The Natural Mother*, Washington Post, Jan. 22, 1987, at A21; *Mother Can't Be Ignored in the Case of Baby M*, Philadelphia Inquirer, Nov. 9, 1986, at 6-E.

sans, it evinces a mother's devotion. To her opponents, it evinces callous disregard for the Sterns, for Whitehead's own family, and for the potential impact of the prolonged custody battle on Baby M; after all, the real mother in Solomon's tale gave up her child rather than cause it an injury.

From these totally different stories emerge, not surprisingly, altogether different views of surrogate parenting. To sympathizers of the Sterns, surrogate parenting represents a viable and valuable solution to the increasingly common problem of female infertility; prohibition of surrogate parenting paternalistically interferes with the right of women to procreate and to use their bodies as they wish.[4] To Whitehead's sympathizers, on the other hand, the practice is immoral and dehumanizing. As they see it, state enforcement of a surrogate parenting contract is tantamount to a forced baby sale; legalizing the practice risks widespread exploitation of poor women and an unacceptable commercialization of human reproduction.[5]

During the *Baby M* litigation[6] each side has turned to the legislative arena for a validation of its point of view and a resolution of the surrogate parenting problem.[7] Supporters of the practice argue that the contracts are enforceable through specific performance of the mother's promise to give up the child for adoption by its stepmother; potential

4. For an argument that prohibition constitutes impermissible interference with constitutionally protected reproductive freedoms, *see* Keane, *Legal Problems of Surrogate Motherhood*, 1980 ILL. U.L.J. 147, 165 (1980); Gostin, *A Civil Liberties Analysis of Surrogacy Arrangements*, 16 LAW, MED. & HEALTH CARE (in print, 1988); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405 (1983).

5. This is the position of the influential British Comm. of Inquiry into Hum. Fertilization & Embryology, chaired by Dame Mary Warnock; *see Dep't Health & Soc. Sec., Rep. of the Comm. of Inquiry into Hum. Fertilization & Embryology* 44–47 (1984). *See also* Krimmel, *The Case Against Surrogate Parenting*, 13 HASTINGS CENTER REP. 35 (1983); Blakely, *Surrogate Mothers: For Whom Are They Working?*, Ms., March 1983, at 18, 20.

6. The trial court upheld the surrogate parenting contract; *In re* Baby M, 217 N.J. Super. 313, 525 A.2d 1128 (1987). The New Jersey Supreme Court overruled the trial court and held that the surrogate parenting contract violated the New Jersey baby-selling statutes (N.J. STAT. ANN. § 9:3-54B (West 1976)) and New Jersey law governing irrevocable consent to an adoption (N.J. STAT. ANN. §§ 9:2-14 and 9:2-16 (West 1976)). The court thus voided the trial court's termination of Whitehead's parental rights; nonetheless, the award of custody to Stern on the basis of the child's best interests was upheld. *See In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

7. Legislatures in at least three states have already addressed surrogate parenting. In Nevada, legislation permitting surrogate parenting for pay has been enacted. In Arkansas, a married couple contracting with an unpaid surrogate is accorded parental rights. Louisiana has voided all paid contracts, allowing surrogates to keep their children if they wish. Zeldis, *Baby M Ruling Changes Picture for N.Y. Surrogate-Mother Bill*, N.Y.L.J. 20 (Feb. 5, 1988).

Legislation has been introduced in a large number of other states. For an analysis of the proposals, *see* Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, 17 HASTINGS CENTER REP. 31 (Oct. 1987).

abuses of the practice can and must be controlled through state regulation of the contracting process. Conversely, opponents of the practice argue that surrogacy—or at least commercial surrogacy—should be banned. When individuals do participate in a surrogacy agreement, the father should have no parental rights if the mother chooses to keep the child.

Although these two positions are diametrically opposed in their aims, they are similar in their approaches. Both approaches rely on strong, "bright line" rules which each side contends are essential in order to prevent a flood of heartrending, prolonged custody battles like the *Baby M* case. But neither of these strong approaches can, in fact, be expected to prevent many, if any, future Baby M's. Moreover, each approach is likely to create new problems. State legislatures should, therefore, refrain from adopting either of these clear, but extreme, positions. Instead, a more moderate approach which makes use of existing law should be taken.

I. Enforcement of Surrogate Parenting Contracts: Creating New Problems

Most proponents of regulation insist on the adoption of comprehensive requirements for surrogacy contracts which are designed to prevent abuses and to restrict the practice to socially acceptable situations. As a corollary principle, only those contracts which comply with the regulations would be specifically enforced.[8] One major problem with this approach is the prospect of regulatory "outlaws"—i.e., those contracts which fail to conform to the statutory requirements. Given the ease with which artificial insemination can be performed,[9] and the additional costs which the regulated surrogacy process is likely to entail,[10] the

8. For examples of this approach, *see* Note, *Surrogate Motherhood Legislation: A Sensible Starting Point*, 20 IND. L. REV. 879 (1987); Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283 (1985). In June 1987, legislation authorizing enforcement of surrogacy contracts meeting prescribed standards was pending in at least ten states. *See Surrogate Parenthood: A Legislative Update*, 13 FAM. L. REP. (BNA) 1442 (1987).

9. In recent years, courts have had to deal with increasing numbers of legal actions occasioned by "do-it-yourself" artificial insemination. *See, e.g.*, C.M. v. C.C., 170 N.J. Super. 586, 407 A.2d 849 (1979); Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986). Most of the litigation arises because state statutes regulating artificial insemination typically apply only when insemination is performed under the supervision of a licensed physician. *See* UNIF. PARENTAGE ACT § 5 (1979).

10. Many of the proposals, for example, require judicial approval of the contract. *See Surrogate Parenthood: A Legislative Update*, *supra* note 8. Some proposals impose detailed requirements for counselling of both parties by mental health professionals and of the mother by a licensed physician; independent legal counsel for each party is also mandated. For an example of legislation imposing all of the above requirements, see NEW YORK ST. SENATE JUDICIARY COMM., SURROGATE PARENTING IN NEW YORK: A PROPOSAL FOR LEGISLATIVE REFORM 51–55 (1987).

number of such likely cases will not be insubstantial. Moreover, tighter regulation designed to minimize problem cases will lead to the highest number of outlaws. Under much of the enforcement legislation recently proposed, for example, even the Sterns might be outlaws.

Typically, the couple planning to utilize a surrogate must show either infertility or medical necessity as a precondition to court approval of a surrogacy contract. As Elizabeth Stern is not infertile, and the medical experts apparently differ as to the risks of pregnancy to a woman like Stern, who suffers from multiple sclerosis, it is far from clear that the Sterns would qualify.[11] (Imagine, as well, the litigation that would result from such a test.) Much of the proposed legislation also requires that surrogate mothers receive counselling. Here, again, the Sterns might be outlaws, as Whitehead apparently did not receive such counselling.[12] Suppose, instead, that she had received counselling which she now believes, and which expert testimony now contends, is inadequate counselling. Would the Sterns be outlaws then? Would it make a difference that they had no control over the counselling process?

These are only two of the manifold problems that would undoubtedly arise under a scheme which provides specific performance for contracts falling within the regulations, but not for those falling outside. In most cases in which a surrogate mother decided that she did not want to fulfill the contract, the result would simply be litigation on outlaw status rather than the issues that occupied the court in the *Baby M* case. The stakes will be very high in these cases, and it seems questionable whether the outcome ought to turn on complex questions of statutory interpretation which could not have been known to either party and which are unrelated to the needs and interests of the child at the center of it all.

For the regulatory approach, the outlaw problem is exacerbated by political realities. Given the substantial body of opinion which holds that surrogate parenting should not be permitted in any circumstance, it is extremely unlikely that affirmative legislation could be passed if it were not extremely rigorous, both in regard to the qualifications of the parties and in regard to their screening, counselling, etc. It is thus likely that use of surrogacy would be limited to married couples in which the wife has been medically certified as infertile or unable to bear children due to serious medical problems and married women surrogates with consenting husbands (who already have children?) will-

11. For a discussion of Mrs. Stern's medical problems, see *In re* Baby M, 217 N.J. Super. 313, 525 A.2d 1128, 1139 (1987).

12. Whitehead has filed an action against the Infertility Center of New York (which matched her with the Sterns) based on its failure to properly counsel her. Whitehead v. Infertility Center of New York, No. 86-4029AJL (D.N.J.) (complaint filed 10/14/86). For a description of the complaint's allegations, see Nakamura, *Behind the Baby M Decision: Surrogacy Lawyering Reviewed*, 13 FAM. L. REP. (BNA) 3019, 3023 (1987).

ing to bear a child for them. This guarantees a significant amount of outlaw custody litigation because, apart from the "rule noncompliance" outlaws described above, there will be many individuals who will be precluded from using the regulated process.

Moreover, the outlaw question is only the tip of the litigation iceberg that would form as a result of the enforce-and-regulate approach. Many surrogacy contracts today contain provisions specifying prenatal medical care and abortion rights, as well as limiting maternal smoking and alcohol consumption.[13] Are these enforceable? If so, how? Could a parent obtain specific performance of a nondrinking clause? Or a nonabortion clause? If not, would damages be available for a breach, or would the contract be void?[14] Could a father avoid parental responsibilities through a contract provision that released him from responsibility in the event of a birth defect related to maternal misbehavior?[15] Each of these questions is novel and important. Outside the surrogate parenting context, such issues do not arise; hence, there are few applicable legal precedents.[16] But if some contract provisions are enforceable for surrogate parenting, litigation will surely arise over each of these.

II. Prohibiting Surrogate Parenting: Why It Won't Work

The prohibitory approach also entails serious pitfalls. Most proponents of prohibition have not gone so far as to propose that individuals be subject to criminal penalties for hiring or becoming a surrogate parent. Instead, they have urged that surrogate parenting agencies should be outlawed and subject to criminal penalties. This approach has, indeed,

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13. For a sample contract, *see* Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1982).

14. For discussion of the legal issues raised by such provisions, *see* Wolf, *Enforcing Surrogate Motherhood Agreements: The Trouble with Specific Performance*, 4 N.Y.L. SCH. HUM. RTS. ANN. 375 (1988); Mahoney, *An Essay on Surrogacy and Feminist Thought*, 15 LAW, MED. & HEALTH CARE ___ (1988).

15. Outside the context of surrogate parenting agreements, courts have refused to permit fathers to avoid parental responsibilities—even where the mother engaged in fraud in order to induce his participation in conception. *See In re* Pamela P. v. Frank S., 88 A.D.2d 865, 451 N.Y.S.2d 766 (1982), *aff'd*, 59 N.Y.2d 1, 449 N.E.2d 713 (1983), *rev'g* 110 Misc. 2d 978, 443 N.Y.S.2d 343 (Fam. Ct. 1981). *See also* Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980) (father, deceived into impregnating, had no viable tort claim against mother).

16. The Supreme Court has held that a state cannot condition a woman's right to an abortion on her husband's consent, e.g., Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52 (1976), nor, in the case of a mature minor, on her parent's consent, see Bellotti v. Baird, 443 U.S. 622 (1979). Thus, it seems unlikely that a clause which grants a contracting father such a veto right will be upheld. For a similar conclusion, see Coleman, *Surrogate Motherhood: Analysis of the Problems & Suggestions for Solutions*, 50 TENN. L. REV. 71, 85 (1982).

been adopted in England[17] and in Australia.[18] Surrogate parenting opponents admit, however, that forbidding the process will not end its use. Witness the number of surrogacy arrangements which have already been made, despite their very questionable legality.[19] Although legislative prohibition of commercial surrogacy would probably drive surrogate parenting centers out of business,[20] the practice will undoubtedly continue through informal mechanisms.[21] Ironically, these informal mechanisms are likely to exacerbate the very problems that motivate opponents of surrogacy to oppose the practice: surrogates found through informal means are unlikely to receive counselling or to be well screened; they may indeed be young, poor, or emotionally disturbed and, thus, ripe for exploitation. On the other hand, without standard fees set through infertility centers, some surrogates may succeed in demanding fees that make today's prices look relatively uncommercial.[22]

In order to further deter surrogacy, the individuals who participated in the process could also be subjected to criminal sanctions.[23] This approach has some precedent in state baby-selling laws,[24] but the analogy also suggests the problems. These baby-selling laws have not deterred what is generally perceived to be a substantial "black market" in adoptions, in which would-be adopters pay tens of thousands of dollars for an infant.[25] But criminal prosecution of either party to such

17. SURROGACY ARRANGEMENTS ACT of 1985 [U.K.], *reprinted in* W. WADLINGTON, CASES & OTHER MATERIALS ON DOMESTIC RELATIONS 104–108 (1987 Supp.)

18. *See* Singer, *Making Laws on Making Babies*, 15 HASTINGS CENTER REP. 5 (1985).

19. Although no exact numbers are available, it is generally estimated that between five hundred and six hundred births have been arranged through formal surrogacy contracts. *See* Peterson, *Surrogates, Finding No Laws Often Improvise Birth Pacts*, N.Y. Times, Feb. 25, 1987, at C2, col. 1.

20. It might, of course, only drive them underground. It is widely acknowledged that private adoption intermediaries still operate, despite prohibitions on their activities. For a description of black market practices, see sources cited *infra* in note 67.

21. Commercial centers themselves rely heavily on newspaper ads and fliers to find potential surrogates. *See* Nakamura, *supra* note 12, at 3019–20. Although newspaper ads could be banned, other informal mechanisms cannot be precluded. The same informal mechanisms obviously play a major role in the adoption black market.

22. Some commentators have argued that current baby-selling laws not only create a black market in adoptive infants but "impose significant information costs on both buyers and sellers in the market, which further raise the (real) price of black-market babies to buyers and reduce the net price to sellers. . . ." Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 338 (1978).

23. This is apparently the law in France. *See News Notes*, 13 FAM. L. REP. (BNA) 1260 (1987). Legislation introduced in Congress last year takes a similar approach. For a description of the bill, see *id.*

24. According to one survey, payment of any compensation beyond expenses in connection with an adoption was illegal in forty-one states. *See* N. KEANE & D. BREO, THE SURROGATE MOTHER 273 (1981). For discussion of the baby-selling laws, see *infra* notes 66–79 and accompanying text.

25. Prices for babies in the black market are alleged to range between $9,000 and $40,000. *See* Landes & Posner, *supra* note 22, at 338.

an adoption is extremely rare, and courts have held that adoptive parents' illegal payments do not mandate denial of the adoption.[26] As prosecutors, judges, and juries are unlikely to take surrogate parenting arrangements more seriously than black market adoptions, the deterrent effect of criminalization is not likely to be great; indeed, some commercial surrogacy centers now routinely advise their clients that they could be subject to criminal sanctions.[27] Finally, and perhaps most importantly, outlaw status will not prevent those parties who still engage in surrogacy from reaching the courts with problems that arise.[28] Outlawing surrogacy thus appears unlikely to discourage the utilization of surrogacy techniques in any substantial way, while potentially increasing the problems that come to the courts, through increasing the use of informal and ill-conceived arrangements.

III. The "Mother Option" Rule

Given the problems likely to arise from prohibiting surrogacy and the fact that prohibition does not resolve what happens to the child born through a surrogacy arrangement, some surrogacy opponents have urged the adoption of another "bright line" rule, either as a supplement or alternative to prohibition of the practice. This approach would grant the mother exclusive rights to the child in any case in which she gave birth to a child conceived pursuant to a surrogacy agreement and wished to keep it.[29] Such a rule might serve a deterrent function. At first glance, such a rule would also appear likely to simplify litigation between parties to a surrogacy contract. But there are any number of cases in which strict application of such a rule seems markedly unfair and which are thus likely to produce legal challenges to its application. Suppose, for example, that the mother wishes to give the child up for adoption

26. *See, e.g., In re* Adoption of Child by N.P. & F.P., 165 N.J. Super. 591, 398 A.2d 937 (1979) (use of unapproved intermediaries and payment of money in connection with adoption is insufficient to establish that would-be adoptive parents are unfit or that adoption would not be in child's best interests). The New Jersey Supreme Court similarly held that, although the contract between Stern and Whitehead violated the New Jersey baby-selling laws, Stern was, nevertheless, entitled to custody. *In re* Baby M, 109 N.J. 396, 426, 537 A.2d 1227, 1257 (1988).

27. *See* Taylor, *Conceiving for Cash: Is it Legal? A Survey of the Laws Applicable to Surrogate Motherhood*, 5 N.Y.L. SCH. HUM. RTS. ANN. 413, 422 n.35 (1988).

28. One could go further and forbid the use of the courts by individuals who engage in this illegal conduct, however, given that the child, an innocent party, is at the center of the dispute, such a course would be at odds with the state's *parens patriae* role in protecting children. Thus, this extreme solution has never been proposed.

29. *Cf.* Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1934 (1987) (suggesting option rule without prohibition) *with* Capron, *Alternative Birth Technologies: Legal Challenges*, 20 U. CAL. DAVIS L. REV. 679, 698, 704 (1987) (suggesting option rule with prohibition).

by a third person or that the child is removed from her care for neglect. In such a case, should the father have no greater rights than a member of the general public?[30] Or imagine that the child suffers from Down's syndrome and the mother plans to institutionalize him while the father would provide him with a loving home and family. Or simply suppose an unwed mother. Without the surrogacy arrangement, the biological father of a child born to an unmarried mother can, through the initiation of a paternity action, obtain legal status as a parent and the right to at least visit the child.[31] Would it be fair to deny these rights to a father because he had hoped to keep the child himself and thus entered into a surrogate parent contract? Or fair to the child in a case like this to deny him any father at all? And how far would a "no rights for father" rule reach? Would it apply when the mother sought to establish paternity in order to obtain needed child support? Would it apply when conception occurred through sexual intercourse rather than artificial insemination? Even in the absence of such special circumstances it seems unfair (and quite arguably unconstitutional)[32] to reward one parent and penalize the other for engaging in the same transaction.

A prohibition on surrogate parenting even—indeed particularly—if coupled with a strict rule granting parental rights to the surrogate mother alone thus appears likely to create at least as many problems as it resolves.

IV. Why the Pro and Con Schemes Should Be Avoided

That the bright line, pro or con, approaches to surrogate parenting open a Pandora's box of controversial and difficult litigation issues is only one of the problems with these "resolutions." Both approaches also suffer from even more important failings.

First, neither approach is focused on the needs and interest of the children who are the real parties in interest. These needs and interests are sufficiently varied that inflexible rules, of any sort, are not adequate to do justice in many cases. It is for this reason that courts and legislatures have spurned such rules in more traditional custody contests;

30. For a proposal that the mother should always prevail in a custody contest with the father, i.e., "as long as she is a fit parent," see Field, *Surrogate Motherhood: The Legal Issues*, 5 N.Y.L. SCH. J. HUM. RTS. 481, 551 (1988).

31. The rights of unwed fathers are discussed in notes 52, 58–60, 85–89, *infra*, and accompanying text.

32. Several courts have struck down gender-based custody presumptions. *See, e.g., Ex Parte* Devine, 398 So. 2d 686 (Ala. 1981); State *ex rel.* Watts v. Watts, 77 Misc. 2d 1178, 350 N.Y.S.2d 285 (Fam. Ct. 1973). In *Caban v. Mohammed*, 441 U.S. 380 (1978), the Supreme Court determined that a provision of New York law requiring the consent of an unwed mother for the adoption of her child, but not requiring the consent of an unwed father, constituted impermissible gender discrimination.

while presumptions in favor of one party or another have been employed, the "best interests of the child" have been the ultimate test in most contests between parents.[33]

It is no accident that the best interests test does not figure in the legislative schemes urged by both proponents and opponents of surrogate parenting. These schemes pay little heed to any aspects of current law which are potentially applicable to surrogate parenting cases. Commentators on both sides of the issue instead decry the inadequacy and ambiguity of current law and urge that new rules are needed—and needed quickly—so that parties will know their rights and so that litigation can be avoided or swiftly resolved.[34] Existing law is viewed as the problem to be overcome, rather than the source of the solution.

This disdain for existing law is perhaps the most significant failing of the pro and con positions. The decision-making problems in surrogate parenting cases are simply not, in the end, vastly different from those that arise in more traditional parental disputes over children. The novelty of surrogate parenting has seemingly blinded many commentators to the "ordinariness" of the basic legal issues—a contract between unmarried parents regarding a future stepparent adoption, and the custody/visitation rights of these same parents. These are not altogether novel issues, and there are potentially applicable legal principles, derived both from case law and statutes.

Use of these traditional legal principles offers some important advantages. These are rules which have been developed over time and through experience with a wide variety of cases; they embody accumulated wisdom. They are also rules with which judges are familiar and for which there is a large body of interpretive case law and commentary. Moreover, utilizing them as the basis of judgment in surrogate parenting cases offers the benefit of consistency with like cases. If well-established rules govern, for example, the rights of parents to contract regarding their children, why shouldn't those principles apply to a surrogate parenting contract?

Proponents of the pro and con "swift and sure" schemes have offered little justification for paying so little heed to the body of developed

33. For a criticism of the best interests test, see Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 266 (1975); Elster, *Solomonic Judgements: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

34. *See, e.g.*, Field, *supra* note 30, at 552 ("It is extremely important to have clear and specific rules in this area, enabling persons to know their rights . . . and enabling any litigation to be swift and easily resolved"); Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 192 (1986) ("Legal mismatching by courts is creating an incoherence [which] . . . increases the chance of legal conflict . . . or procedural delay [which] may be detrimental to the child. . . . To remedy the distortions, a new [legal] framework . . . is needed"); Note, *Surrogate Motherhood Legislation: A Sensible Starting Point*, *supra* note 8, at 891.

legal doctrine. It is, of course, true, as they claim, that existing law does not yield clear, precise answers to the surrogate parenting conundrum; there is a wide range of legal rules that are potentially applicable to surrogate parenting—ranging from adoption statutes to paternity laws to case law on parental agreements relating to their children—which do not yield identical outcomes. But examining these legal rules reveals various cases which present issues analogous to those which arise in surrogate parenting. Consideration of these other cases is useful in assessing what is, and is not, unique about surrogate parenting as well as providing a vehicle for analyzing public policy concerns in a consistent way. Unless surrogate parenting genuinely raises different concerns, there is no rationale for applying different principles.

The hue and cry for swift, certain—and unprecedented—legislative answers to the legal issues raised by surrogate parenting is puzzling as well as troubling. To date, a total of five hundred to six hundred births have been occasioned by surrogate parenting contracts.[35] Each year, in the United States alone, artificial insemination accounts for some 6,000 to 20,000 births,[36] and approximately 140,000 children are adopted.[37] Clearly surrogate parenting is not becoming common; available evidence does not even suggest that the practice is escalating dramatically. Nor are surrogate births producing vast amounts of litigation. Only five others to date are known to have withdrawn their consent to the adoption,[38] and only a handful of surrogacy cases have led to reported judicial decisions.[39] There is simply no need for hurried legislative action.

35. *See* Peterson, *supra* note 19.

36. Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 476 (1983).

37. In 1982 there were 141,861 adoptions. Of these, 91,141 were by relatives. NAT'L COMM'N ON ADOPTION, ADOPTION FACTBOOK 102 (1985).

38. Krautheimer, *The Ethics of Human Manufacture*, THE NEW REPUBLIC, May 4, 1987, at 17, 19. For a description of cases involving a change of mind, see L. ANDREWS, NEW CONCEPTIONS 193, 209, 212 (rev. ed. 1985).

39. *See, e.g.*, Doe v. Kelley, 106 Mich. App. 169, 307 N.W.2d 438 (1981), *cert. denied*, 459 U.S. 1183 (1983) (holding that payments pursuant to surrogacy contract violated state baby-selling laws); *In re* R.K.S., 10 FAM. L. REP. (BNA) 1383 (D.C. Super. Ct. 1984) (requiring detailed factual inquiry, including HLA testing, before stepmother of child born to surrogate mother may adopt); Syrkowski v. Appleyard, 333 N.W.2d 90, *rev'd*, 420 Mich. 367, 362 N.W.2d 211 (1985) (appellate court's refusal to allow use of paternity law in surrogacy situation reversed by Michigan Supreme Court); Surrogate Parenting Assoc. v. Commonwealth *ex. rel.* Armstrong, 704 S.W.2d 209 (Ky. 1986) (holding that surrogate parenting center's activities in arranging surrogacy agreements for a fee did not violate baby-selling laws); Yates v. Keane, 14 FAM. L. REP. (BNA) 1160 (1987) (declaring surrogacy contracts illegal and unenforceable); Sherwyn & Handel v. Cal. State Dep't of Soc. Servs., 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (1985) (attorneys representing parties to a surrogate parenting agreement lacked standing to challenge applicability of AID legislation, but court had "grave doubts" about applying statute to

Nor is there any reason why rules must be more absolute in the context of surrogacy than in other decisions relating to children. Commentators have urged the necessity of absolute rules because litigation over a child's legal status and custody is potentially harmful to the child.[40] This is hard to deny. But the potential for harm is hardly exclusive to children born through surrogate parenting arrangements. It applies equally in divorce custody contests and litigation between unmarried parents who are not parties to a surrogacy arrangement. In neither of these areas do absolutes govern. Moreover, as discussed above, absolute rules are in fact likely to create as much litigation as they deter. There is simply no reason for legislatures to leap at a novel, "quick fix" solution to surrogate parenting.

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surrogacy case); Miroff v. Surrogate Mother, 13 FAM. L. REP. (BNA) 1260 (1987) (surrogacy contract void but consensual adoption approved); *In re* Baby Girl L.J., 132 Misc. 2d 972, 505 N.Y.S.2d 813 (1986) (authorizing consensual adoption of girl conceived through surrogacy arrangement); *In re* Baby M, 217 N.J. Super. 313, 525 A.2d 1128, *rev'd*, 109 N.J. 396, 537 A.2d 1227 (1988) (reversing trial court's determination that surrogacy contract was enforceable; affirming award of custody to father on basis of child's best interests).

There are also several foreign decisions. Of the four English cases, two were contests between mother and father for custody; in both, the contracts were declared void and the mother was awarded custody. *See* Derbyshire County Council v. Mrs. P. & Mr. B. (March 12, 1987) (discussed and quoted in Means, *Surrogacy v. The Thirteenth Amendment*, 14 N.Y.L. SCH. HUM. RTS. ANN. 445, 470, 476–77 (1988)); A. v. C., [1985] F.L.R. 445 (Fam. & C.A. 1978). In the other two cases involving continued consent to the adoption, both adoption petitions were approved. Re C., [1985] F.L.R. 846 (Fam.); Re: An Adoption Application: Surrogacy (Fam. Div., Latey, J., March 11, 1987) (discussed in Means, at 471–72). Two German courts have ruled on surrogacy related issues. One, in a custody contest, declared the surrogacy contract void and awarded custody of the child to the mother. The other, in which the father turned out to be the mother's husband, ordered repayment to the would-be father. For a description, see *News Notes*, 13 FAM. L. REP. (BNA) 1260 (1987).

40. *See, e.g.*, Dunne & Serio, *Surrogate Parenting: Can It Provide a Home of Peace?*, 60 N.Y. ST. B.J. 20, 24 (May 1988) (child's interests "can only be protected under any regulatory scheme by avoiding destructive post-partum custody battles"). *See also* Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, *supra* note 34, at 192; Field, *supra* note 30, at 552.

It has also been claimed that one parent or other should have an absolute entitlement to the child born of a surrogacy agreement because it could be damaging to the child to learn of his or her unusual origins and because there are risks of damaging parental conflict due to the lack of any history of shared parenting; indeed, several of the experts who testified in the Baby M trial made such statements. *See In re* Baby M, 217 N.J. Super. 313, 337–41, 525 A.2d 1128, 1152–56 (1987), *rev'd*, 109 N.J. 396, 537 A.2d 1227 (1988) (testimony of Dr. L. Salk, Dr. D. Brodzinsky, Dr. J. Grief). But this claim goes too far as well: parental conflict is not enough to establish an absolute entitlement in either parent in other circumstances. Nor is there any evidence that it will be more difficult for a Baby M to adjust to her origins and circumstances than it is for thousands of children who are born into other socially atypical circumstances or who are placed in foster care. The New Jersey Supreme Court, indeed, noted that "[t]he long-term effects of surrogacy contracts are not known, but [only] feared." *Id.* at 335, 537 A.2d at 1250.

V. A Better Approach to Surrogate Parenting: Using Existing Law

A better approach to surrogate parenting is to bring the practice within the purview of existing legal doctrine. There are two ways in which a legislature could accomplish this task: it could leave it to the courts to interpret existing law as it arose in the context of litigation over surrogacy agreements, or it could itself take on the task of clarifying what is ambiguous.

Although both of these approaches have merit, there are good reasons for legislatures to take on at least some of the clarification effort themselves. A court interprets the law by focusing exclusively on the case before it. Alternative fact patterns—and even legal rules which are not raised in the current case—will not figure in a court's analysis of the problem.[41] Judicial analysis of surrogate parenting will thus evolve in a piecemeal fashion, and final answers to some questions may not be available for years. Because of this piecemeal approach, judicial responses to the various questions of interpretation which will arise may also not chart a consistent course.[42] Moreover, as most of the statutes potentially applicable to surrogate parenting were drafted before the development of surrogate parenting, some courts have requested legislative guidance in interpreting their applicability.[43]

I do not purport to here lay out a detailed plan for legislative decision making on surrogate parenting. The politics, and even the legal issues, will vary substantially from one jurisdiction to the next. Moreover, some of the rules which require interpretation—notably those pertaining to unwed fathers—are controversial apart from their applicability to surrogate parenting. Examination of the rules in regard to surrogate parenting may therefore also necessitate reconsideration in regard to the more typical cases to which the rules apply if consistency is in fact to be achieved. A legislature thus may well decide to provide some guidance but to leave some issues to judicial interpretation.

Where the legislature does choose to take on the task of clarifying the rules applicable to surrogate parenting, however, it should focus on achieving compatibility with the family law principles governing parental agreements and custody/visitation rights and with the basic

41. The *Baby M* litigation is a good example of the likely process. The New Jersey Supreme Court ruled that the surrogacy contract violated the baby-selling statute; thus, it could not be enforced against the mother's wishes and leaves open the impact of the statute on a consensual adoption.

42. For discussion of the interpretive questions that arise, see *infra* notes 53–64 and accompanying text.

43. *See, e.g., In re* Baby Girl, 132 Misc. 2d 972, 978, 505 N.Y.S.2d 813, 818 (1986) ("the court finds that this is a matter for the Legislature to address rather than for the judiciary to attempt to determine by the impermissible means of 'judicial' legislation").

policy goals of the adoption statutes. Its analysis of the problem thus should begin with an examination of current law.

A. *Existing Law: What Is Clear—And What Isn't*

Perhaps the most basic issue in a surrogate parenting case is the validity of the contract between the parents. On this issue, case law governing analogous parental agreements relating to children is quite consistent: in a variety of contexts, courts have held that, while parents may enter into contracts regarding their children, parental contract rights are limited by the child's interests. Thus a premarital custody contract, or a contract between parents which relieves one of support obligations, or provides for inadequate support, is voidable.[44] If the parents still concur with the agreement at the time enforcement is sought, no court will, of course, second guess their judgment. But when they disagree, the child's needs take precedence over contract rights. State adoption laws consistently take a similar position. A parent's consent to adoption given before the child's birth is not binding;[45] even if reaffirmed after the child is born a parent may, in many states, revoke consent during a statutorily fixed period.[46] Additionally, the universal precondition to approving an adoption petition is a judicial determination that the proposed adoption is in the child's best interests.[47] If applied to a surrogate parenting contract, both general family law principles and state adoption statutes would thus preclude enforcement of a surrogate parenting contract unless both parents are still in agreement at the time adoption is sought.

It is also a well-accepted family law principle that, unless parental rights have been terminated, both parents have visitation rights, along with corollary support obligations.[48] Custody is awarded in accordance

44. *See, e.g.*, UNIF. PREMARITAL AGREEMENT ACT § 3 (1984) (listing permitted topics for agreement and omitting child support and custody). Most of the case law on the impact of a parental agreement on child custody or support is in the context of a petition to modify a divorce or separation agreement. Modification is permitted, in the child's interests, in both areas. For cases on the modification of an agreement as to child custody, see Annotation, *Court's Power to Modify Child Custody Order as Affected by Agreement Which Was Incorporated in Divorce Decree*, 73 A.L.R.2d 1444 (1960). For cases on the modification of an agreement as to support, see Annotation, *Opening or Modification of Divorce Decree as to Custody or Support of Child Not Provided for in the Decree*, 71 A.L.R.2d 1370, 1396 (1960). *See generally* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 724–25, 840 (2d ed. 1988).

45. *See* NAT'L COMM'N ON ADOPTION, *supra* note 37, at 76–85. (describing state laws and listing Washington State as an exception). *See also* Field, *supra* note 30, at 510 nn.72–73.

46. *See* NAT'L COMM'N ON ADOPTION, *supra* note 37, at 76–85.

47. *See, e.g.*, REVISED UNIF. ADOPTION ACT § 11.

48. For a survey of the law and cases, see H. CLARK, *supra* note 44, at 197–201 (unwed parents), 786–836 (divorcing parents).

with the best interests of the child.[49] Many jurisdictions do accord a presumption in favor of maternal custody to a child of "tender years," but none accord mothers an absolute right to custody.[50] Although fathers who are not married to the child's mother typically have more limited rights to block a proposed adoption than do unmarried mothers,[51] these custody/visitation and support principles generally apply in disputes between unmarried as well as married parents when the father's paternity has been legally established.[52] If applied to a surrogate parenting case, these principles suggest that, when a mother does not wish to comply with the agreement, custody/visitation litigation like that which occurred in the *Baby M* case is the appropriate, albeit unfortunate, outcome.

The family law principles and adoption rules outlined above thus support an intermediate position on surrogate parenting: surrogate parenting agreements should not be enforceable. If both parents still agree at the time adoption is sought, however, a stepparent adoption would be approved if the procedural requirements of the adoption statutes, including a best interests determination, have been met. If the parents

49. For an exhaustive review of case law on the application of the best interests test and the factors which a court may permissibly consider, see H. CLARK, *supra* note 44, at 797–814. For a comprehensive review of the psychological literature relating to the best interest test, see Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 480–86 (1984).

50. The tender years presumption still exists in twenty-two states. For a listing, *see Ex Parte* Devine, 398 So. 2d 686 (Ala. 1981); Annotation, *Modern Status of Maternal Preference Rule or Presumption in Child Custody Cases*, 70 A.L.R.3d 262 (1976). The importance of the tender years doctrine has significantly diminished, however, in recent years and, even in those states which retain it, it is less often decisive; H. CLARK, *supra* note 44, at 799. A number of courts have also found maternal custody presumptions violative of state equal rights amendments or the federal Constitution. *See id.* at 799–800. Despite its diminished importance, it also appears that mothers still obtain custody most of the time, even when the issue has been fully litigated. *See* Pearson & Ring, *Judicial Decision Making in Contested Custody Cases*, 21 J. FAM. L. 703 (1982–83) (mother received sole custody, in three surveyed courts, i.e., in 52 percent, 76 percent and 64 percent of surveyed cases). *But see* L. WEITZMAN, THE DIVORCE REVOLUTION 233 (1987) (in 1977 California cases surveyed, 63 percent of fathers who requested custody obtained it).

51. For a discussion of limitations on the rights of unwed fathers, *see infra* notes 58–60, 85–89 and accompanying text.

52. Despite the fact that the legal rights of unwed fathers are somewhat in flux, "in a growing body of cases, the courts are awarding custody of illegitimate children on the basis of the same sort of reasoning they would use in awarding custody of legitimate children." *See* H. CLARK, *supra* note 44, at 198 (citing cases). Although mothers are more frequently awarded custody as a result of the maternal preference rules described above, "the father is given custody when that is found to be in the child's best interests." *Id.* at 199. Although there are decisions holding that an unwed father may be denied visitation rights (*see* Sullivan v. Bonafonte, 172 Conn. 612, 376 A.2d 69 (1977)), "a substantial number of courts are willing to grant visitation to the father where he has a sincere interest in the child and where, in the court's view, the visits are beneficial or at least not detrimental to the child's welfare." H. CLARK, *supra* note 44, at 199. *See also* Annotation, *Right of Putative Father to Visit Illegitimate Child*, 15 A.L.R. 3d 887 (1967) (listing and describing cases on unwed fathers' visitation rights). Some courts have also held that an unwed father has a constitutional right to visitation. *See id.* at 200 (citing cases.)

are not in agreement, each would be entitled to seek custody and/or visitation; each would be responsible for the child's support.

This analysis is complicated, however, by the fact that there are three exceptions to the custody/visitation rules which are potentially applicable in surrogate parenting cases and by the fact that state proscriptions on baby selling may be applicable as well; indeed the court's interpretation of the New Jersey baby-selling laws governed the outcome in the *Baby M* case.[53] First, the exceptions to the general custody/visitation rules.

One exception applies to a child born to a married woman whose father is not the mother's husband. In some states, the biological father is statutorily precluded from establishing his paternity in such a case;[54] in a few, not even the mother may challenge the presumption of legitimacy.[55] Outside the surrogate parenting context, such presumptions have been challenged as unconstitutional, with varying results.[56] The constitutionality of such provisions may soon be clarified, however, as the Supreme Court recently noted probable jurisdiction in a case challenging a conclusive marital presumption.[57]

The second exception applies to the adoption of any child born out of wedlock, whether or not the mother is married. In some states an unwed father's consent is required in only limited circumstances.[58] Although the purpose of such limitations is to prevent fathers who have an insubstantial relationship with a child from blocking its adoption, in some states an unwed mother may prevent the father from obtaining the right to block an adoption, by a third party or by a stepparent, by denying him a chance to establish a relationship with the child.[59] Al-

53. *See In re* Baby M, 109 N.J. 396, 537 A.2d 1227, 1240–50 (1988).

54. *See, e.g.*, OR. REV. STAT. § 109.070(1) (1981); WYO. STAT. ANN. §§ 14-2-102, 104 (1977). *See generally*, S. GREEN & J. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS 278–79 (1984); H. CLARK, *supra* note 44 at 191–93 (describing presumption and citing case law).

55. *See* H. CLARK *supra* note 44, at 179 (citing cases).

56. Examples of decisions upholding such presumptions include Petitioner F. v. Respondent R., 430 A.2d 1075, 1078–79 (Del. 1981); P.B.C. v. D.H., 396 Mass. 68, 72, 483 N.E.2d 1094, 1097 (1985), *cert. denied*, 475 U.S. 1058 (1986); A. v. X.Y.Z., 641 P.2d 1222 (Wyo. 1982), *cert. denied*, 459 U.S. 1021 (1982). Examples of decisions upholding the right of unwed fathers to establish parental rights (even where the mother is married) include Thornsberry v. Super. Ct., 146 Ariz. 517, 707 P.2d 315 (1985); McG. v. J.W., 615 P. 2d 666 (Colo. 1980).

57. Michael H. v. Gerald D., 191 Cal. App. 3d 995, 236 Cal. Reptr. 810 (1988), *probable jurisdiction noted*, ___U.S. ___, ___U.S.L.W. ___(1988).

58. *See, e.g.*, DEL. CODE ANN. tit. 13 §§ 906.7(b), 908 (1981); N.Y. DOM. REL. L. § 111 (McKinney's 1988). *See also* Michael U. v. Jamie B., 39 Cal. 3d 787, 705 P.2d 362 (1985).

59. *See, e.g.*, N.Y. DOM. REL. L. § 111.1(e) (McKinney's 1988) (when child is less than six months of age at adoption, unwed father's consent is required only when "such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption . . ."); DEL. CODE ANN. tit. 13 §§ 906.7(B), 908 (1981) (permitting court to dispense with father's consent to adoption when mother refuses to name him and parents "are not living together and have not done so nor married since the child's birth").

though the Supreme Court has never directly ruled on the constitutionality of such rules, at least one decision suggests that they are permissible.[60]

The final exception applies to a child born through donor artificial insemination (AID). In many states, such a child is conclusively presumed to be a child of the marriage if the mother's husband consented to the artificial insemination; the sperm donor father thus retains no parental rights or obligations.[61] In a smaller number of states, the biological father of a child born to even an unmarried woman may have no legal relationship to the child.[62]

All of these exceptions are potentially applicable to surrogate parenting cases. Indeed, in order to avoid the AID exception, husbands of surrogate mothers typically sign a form which notes their refusal to consent to the artificial insemination. The status of such nonconsent in a surrogacy case is unclear and was not discussed by the New Jersey Supreme Court in the *Baby M* case. In a state with a conclusive presumption of legitimacy, a Mr. Stern would seem to be precluded from maintaining a custody action against Mrs. Whitehead. In a state in which a similarly circumstanced unwed father could not veto an adoption, a Mr. Stern would seem to be precluded from preventing a Mr. Whitehead from adopting the infant or from preventing her from giving the child up to a third party.

Additionally, the so-called baby-selling provisions of adoption law, which prohibit buying parental consent to an adoption, may be applicable;[63] indeed, it was on this basis that the New Jersey Supreme Court struck down the contract in the *Baby M* case.[64] Once again, however, such provisions were drafted without thought to surrogate parenting and, except in New Jersey, their impact is not clear. Even in New Jersey, it is unclear whether the baby-selling laws would void the consent of a mother who wished to fulfill the agreement and permit adoption of her child by the father's wife.

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60. Lehr v. Robertson, 463 U.S. 248 (1983). For a discussion of *Lehr's* implications for surrogacy arrangements, *see* Gostin, *supra* note 4.

61. A recent survey lists thirty states with laws so holding. *See* Taylor, *supra* note 27, at 432 n.86.

62. *See, e.g.*, CAL. CIV. CODE § 7005(b) (West 1983) ("donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived"). According to the most recent survey, sixteen states have such laws. *See* Taylor, *supra* note 27, at 432 n.87 (listing statutes).

63. In some states, so-called baby broker statutes which prohibit placing an infant for adoption except through a licensed adoption agency may also be applicable. For a listing of state statutes forbidding such placements, *see* Taylor, *supra* note 27, at 419 n.24. Although almost all of the baby broker statutes exempt stepparent adoptions (*see id.* at 420 n.25), these statutes might require direct transfer from mother to father and stepmother, rather than transfer through a surrogate parenting agency.

64. *In re* Baby M, 109 N.J. 396, 537 A. 2d 1227 (1988).

B. *Legislative Choices: Easy Issues, and Hard Ones*

From a review of existing law it is apparent that legislatures confront some easy questions of interpretation, and some hard ones. The easy issues include the most basic, the enforceability of a surrogate parenting contract. Family law principle and adoption law are quite unambiguous here; such contracts are not enforceable. On the other hand, neither family law principle nor adoption law impose any impediment to approving a stepparent adoption if no payment has been made to the surrogate mother and she reaffirms her consent. Unless an AID statute or limitation on the rights of unwed fathers exists within the jurisdiction, it is also clear that, if a surrogate mother chooses not to reaffirm her consent to the stepparent adoption, each parent retains support obligations and may obtain custody; the parent who does not obtain custody retains visitation rights.

In my view, there is little reason for legislatures to defer action on the easy issues; current law is unambiguous, and there is no apparent policy rationale for failing to provide legislative guidance here. Legislatures thus should specify that surrogate parenting contracts are void and unenforceable, that participation in a noncommercial surrogacy arrangement is not violative of state law, and that a biological father of a child conceived under a surrogacy agreement whose paternity has been established pursuant to the requirements of state law shall be the child's legal father, with all accompanying rights and obligations. Legislative action on these issues would itself go a long way toward resolving the uncertain status of surrogate parenting.

Two important interpretative issues remain. Do the baby-selling laws preclude payment to a surrogate mother and/or entry of a consensual adoption order where payment was made? Can a surrogate mother prevent a father from establishing his paternity and thus preclude him from obtaining custody and/or visitation, through reliance on an AID statute or unwed father statute? These are the hard questions which legislatures should scrutinize more carefully and which may necessitate inquiry going beyond surrogate parenting itself. As the baby-selling laws are widespread, virtually every legislature will face the first question.[65] As state laws relating to the second question vary substantially, legislatures will confront different issues here, and some may confront none. Detailed examination of these issues and the legislative choices

65. According to one survey, forty-one states forbid payment in connection with an adoption. *See* N. KEANE & D. BREO, *supra* note 24, at 273. At least twenty-four states have statutes explicitly prohibiting payment in connection with an adoption; Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROB. 1, 8 n.34 (1986) (listing statutes); L. ANDREWS, *supra* note 7, at 294–95.

which they pose is beyond the scope of this article. The following discussion raises only the most basic issues and policy concerns which a legislature would want to consider.

1. IS PAYMENT TO A SURROGATE MOTHER "BABY SELLING"?

The baby-selling issue is a significant one because most surrogate parenting agreements do involve payment to the surrogate.[66] The issue is complicated by several factors, not least among them the substantial "black" and "gray" market in adoptable infants conceived without recourse to surrogacy.[67] Despite the legal prohibition on baby selling, available reports suggest that biological parents are often paid far more than the $10,000 fee Whitehead received under the guise of expense money.[68] By so renaming the payment to a surrogate mother, could the baby-selling prohibition be avoided? If not, what rationale supports such inconsistency? A further complication arises from the fact that payments made in a surrogate parenting case go from one parent to the other. A possible analogy is the traditional stepparent adoption, where forgiveness of child support and/or spousal maintenance arrears undoubtedly helps to induce parental consent in many cases. No one has ever suggested that this constitutes baby selling because the transaction is intrafamilial rather than in the market; accordingly, some baby-selling statutes are explicitly inapplicable in stepparent adoptions.[69] Is the stepparent analogy an appropriate one?

Further complications result from the fact that a surrogate mother might receive either (or both) of two payments: a payment to which the mother is entitled without reference to an adoption, and one to which the mother is entitled only upon her consent to an adoption. Surrogacy contracts today often muddy the distinction between these two types of payments by characterizing monies due the surrogate mother as fees for her services, but nonetheless conditioning their

66. The typical surrogacy contract provides for the mother to receive a fee of $10,000; Taylor, *supra* note 27, at 421.

67. For a description of black and gray market adoption practices, *see* N. BAKER, BABY SELLING: THE SCANDAL OF BLACK MARKET ADOPTION (1978); *Hearings on Baby-Selling Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st. Sess. 6 (1975).

68. *See* Field, *supra* note 30, at 512 n.76 (estimating cost of "typical" private placement adoption to be $25,000). Some courts have refused to approve expense payments which they have found to be excessive. *See, e.g., In re* Adoption of Anonymous, 131 Misc. 2d 666, 501 N.Y.S.2d 240 (1986) (refusing to approve payment to birth mother for her living expenses for thirteen weeks before and five weeks after adoption, totaling almost $25,000).

69. For a listing, see Taylor, *supra* note 27, at 426, n.53.

receipt upon her consent to the stepparent adoption.[70] As the New Jersey Supreme Court recognized, such a payment is not truly a service fee if it cannot be claimed upon completion of the services described; if conditioned upon consent, at least some portion of the funds must be in payment for consent. Such a payment does raise concerns similar to those which motivated the baby-selling laws: the payment is designed to induce a parent to part with her child. While such payments are arguably outside the baby-selling laws because the transaction is intrafamilial, the "family" has been created solely for gestational purposes and thus can be distinguished from the typical stepparent adoption.[71]

But it also seems clear that the policy goals of the baby-selling laws are not so clearly implicated by a pure pregnancy/gestation/birth service payment; again assuming contract unenforceability, such a payment would be for bringing a child into the world, not for relinquishing rights to it.[72] Sperm donors are routinely paid a fee for their procreative services;[73] such a payment is also closely analogous to the expense payments that are frequently made—and frequently approved—in private placement adoptions.[74] Indeed, if surrogacy contracts are legally unenforceable and the surrogate mother is clearly entitled to the expense money despite her nonconsent to an adoption, such payments appear to raise fewer questions of undue influence than do expense payments in a private placement adoption.

There is thus a substantial, although not conclusive, basis for treating a payment contingent on adoption consent as a violation of the baby-selling laws and a relatively insubstantial basis for so treating a payment contingent only on pregnancy and/or birth.[75] Given the relative weight

70. For example, the contract between Whitehead and Stern states that "the consideration for this Agreement, which is compensation for services and expenses, and in no way is to be construed as a fee for termination of parental rights or a payment in exchange for a consent to surrender the child for adoption," also states that the $10,000 fee would be paid to Whitehead only "upon surrender of custody to William Stern." The only other compensation is for $1,000 to be paid if the child is miscarried or stillborn after the fourth month of pregnancy. *See In re* Baby M, 109 N.J. 396, 537 A.2d 1227, 1266–67 (1988) (reproducing contract).

71. For a contrary view, see Katz, *supra* note 65.

72. For a similar view, see Gostin, supra note 4.

73. The fee is, to be sure, a small one, but probably not incommensurate with the donor's time and physical discomfort. The time and physical discomfort occasioned by pregnancy and childbirth are, on the other hand, substantial, and thus, logically require a much higher payment. For a discussion of fees to sperm donors, *see* L. ANDREWS, *supra*, note ____, at 27–28 (raising concerns about payments to donors).

74. *See supra* note 68 and sources cited therein.

75. This approach is further supported by the fact that holding the baby-selling laws applicable to all surrogacy contract payments is tantamount to adopting the "criminalization" approach—with all of its attendant problems—described earlier. *See infra* notes 17–28 and accompanying text.

of the arguments, I would urge a legislature considering the question to adopt this position, and to apply the baby-selling penalties neither to individuals who engage in surrogacy nor to agencies that arrange surrogate births if no adoption contingent payments are made.[76]

It is also apparent, however, that each type of payment raises issues that go beyond the surrogacy context. The adoption contingent payments point to the inadequacy of current law in curbing a substantial black market in adoptive infants. The pregnancy/birth contingent payments point to the lack of regulation on transactions involving body parts and functions;[77] surrogacy arrangements involving *in vitro* fertilization and embryo implantation, which are now beginning to emerge, indeed may ultimately require legislative consideration of more basic questions about "wombs for rent" and the nature of parentage.[78] Arguably, legislatures should examine payments to a surrogate mother in the context of these larger issues rather than adopting a narrow focus. With a larger focus, different answers might be warranted.

Whichever focus a legislature adopts, if it determines that any sort of payment to a surrogate mother violates the baby-selling prohibition, it must consider the appropriate penalty. Here it is important to keep in mind that if surrogacy agreements are unenforceable in the absence of payment, the baby-selling prohibition would only arise when each parent wanted to proceed with the stepparent adoption. Whatever criminal penalties are available under the existing statute should of course be available here. (The legislature must also accept the fact that they will rarely be invoked.[79]) But if the statute and case law also permit

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76. Even if, pursuant to this analysis, the legislature does not outlaw the activities of commercial surrogacy agencies, it will probably want to regulate them in the same way that it does sperm banks and the practice of artificial insemination. These regulatory issues are beyond the scope of this article.

77. The propriety of treating body parts and functions as property has received extensive commentary, although the current rules are relatively sparse and their rationale confusing. For example, payments are routinely made to blood and sperm donors. *See* Curie-Cohen, Luttrill & Shapiro, *Current Practice of Artificial Insemination*, 300 N. ENG. J. MED. 585, 587 (1979) (detailing prices that surveyed AID practitioners paid to semen donors per ejaculation). But donors of organs, like kidneys, may not receive payment; 42 U.S.C.A. § 274e (West Supp. 1986). *See generally* R. SCOTT, THE BODY AS PROPERTY (1982); Andrews, *My Body, My Property*, 16 HASTINGS CENTER REP. 28 (1986).

78. At least one such case has been reported. *See Who Is Mother?* 72 A.B.A. J. 18 (1986) (describing *Smith v. Jones*, No. 85-53201402, Wayne Cty. Cir. Ct., holding that genetic mother of child conceived through *in vitro* fertilization and carried by surrogate was child's legal mother).

79. Despite widespread violation of the baby-selling laws, there are extremely few reported prosecutions, even in states whose prohibitions are very broad. *See* C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 404 (3d ed. 1985). Virtually all of the cases prosecuted are against brokers. *See* Annotation, *Criminal Liability of One Arranging for Adoption of Child Through Other Than Licensed Child Placement Agency ("Baby Broker Acts")*, 3 A.L.R. 4th 468 (1981) (listing and describing cases).

denial of the adoption petition due to the illegal conduct, it seems apparent that such a penalty should not be imposed here; as the proposed adoption is by a stepparent, denial of surrogacy adoption petition would not, in contrast to a typical private placement adoption, effectuate a change in custody. The probable result thus would be continued retention of the child by the stepmother who wished to adopt and the child's father (who is also her husband)—but with potential for future litigation regarding the rights and responsibilities of the biological parents.

2. WHAT IMPACT DO AID STATUTES HAVE ON SURROGATE PARENTING?

Unlike the baby-selling prohibitions, AID statutes which deny parental status to a sperm donor father could have an impact on surrogate parenting whether or not the parents wished to fulfill the adoption agreement. If the parties wished to proceed with the adoption and, pursuant to an AID statute, the biological father had no legal relationship to the child, he, as well as his wife, would need to adopt. Furthermore, if the surrogate mother were married and her husband was legally the child's father, his consent to the adoption would be necessary along with hers. If the surrogate mother did not wish to proceed with the adoption, on the other hand, the biological father would be effectively precluded from establishing any relationship with the child if the statute is applied.

As noted earlier, two types of AID provisions are potentially applicable to surrogate parenting: the more common provision denies rights to a sperm donor father when the mother is married and her husband has consented to the artificial insemination.[80] These statutes were enacted in the wake of early cases which held that children born through artificial insemination were illegitimate.[81] They were apparently designed to enable consenting couples, who want but cannot bear a child due to male infertility, to use artificial insemination without fear of legal complications. These public policy goals are not implicated when a surrogate mother's husband states his nonconsent to the insemination; while such nonconsent may manifest agreement with the wife in her decision to become a surrogate mother, it does not manifest agreement to become a father to the child. There is no apparent reason why such nonconsent should be given anything other than face value. A legislature examining the AID issue should thus say no.

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80. Thirty states have such rules. For a list of the statutes, see Taylor, *supra* note 27, at 432 n.86. The statutes typically require that the consenting husband declare his consent in writing. *See, e.g.*, GA. CODE ANN. § 19-7-21 (1982); KAN. STAT. ANN. § 23-128 (1981). Some states additionally require that the consent document be recorded under conditions of confidentiality with opening of the records conditioned on a court order. *See, e.g.*, CONN. GEN. STAT. ANN. § 45-69f-n (West 1981).

81. *See, e.g.*, Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (1963).

The less common AID provision denies rights to sperm donor fathers regardless of the mother's marital status and husband consent.[82] These statutes were apparently designed to protect sperm donors who had no intent to take on parental responsibilities from possible support and other legal claims against them. As the father in a surrogate parenting case wants to assume parental obligations, it is thus possible to distinguish his situation from that of the sperm donor the legislature had in mind. On the other hand, some courts have interpreted such statutes as applying to other sperm donor fathers who want to assume parental obligations as well as to those who do not.[83]

There is no substantial difference between the father in a surrogate parenting case and other AID fathers who have donated sperm because they wished to father a child and develop a parental relationship with it. In my view, in states that have such AID provisions, legislatures thus should consider all AID fathers who wish to develop parental ties as a group.[84] Unless the legislature establishes special rules for the group, there is no apparent reason for giving fathers in surrogate parenting cases special treatment. If the legislature does choose to distinguish fathers in surrogacy cases from the others, it should, at the very least, develop a rationale for doing so and an approach that is consistent with the rationale.

3. WHAT IMPACT SHOULD LIMITATIONS ON THE RIGHTS OF UNWED FATHERS HAVE ON SURROGATE PARENTING CASES?

The limitations on the rights of unwed fathers are the most complex and controversial of the rules potentially applicable in surrogate parenting cases. These limitations have spawned a lengthy series of Supreme Court decisions[85] as well as extensive litigation in state courts; the constitutionality of some provisions that might apply in surrogate

82. Sixteen states have such statutes. For a listing, see Taylor, *supra* note 27, at 432 n.87. In three states, however, a sperm donor may contract to be the legal father; N.J. STAT. ANN. § 9:17-44(b) (West Supp. 1987); N.M. STAT. ANN. § 40-11-6(B) (1986); WASH. REV. CODE ANN. § 26-26.050(2) (West 1986).

83. See Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986) (sperm donor who wants to establish paternity permitted to do so because statutory requirement that sperm be provided through a licensed physician had not been met; court notes that, had same semen donor delivered sperm to physician for transmission to unmarried mother, paternity claim would have been denied).

84. The legislature may also have to consider the possibility of circumventing the statute through noncompliance with another requirement of the statutory scheme. For example, artificial insemination statutes frequently apply only when there is physician involvement, and at least one court has held that, absent such involvement, statutory denial of parental rights to an AID father is not applicable. *See id.*

85. For a discussion of the cases in the context of surrogate parenting, see Field, *supra* note 30, at 535–40.

parenting cases, notably the conclusive presumption that a child born to a married woman is a child of the marriage, is still unclear.[86]

These rules also raise problems similar to those which arise in analyzing the "no rights for AID donor" statutes: while fathers in surrogate parenting cases could be distinguished from the group for which the limitations are designed, the rules are broad enough in their scope that they take in other unwed fathers who are difficult to distinguish from surrogate parenting fathers. Take the case of an unmarried father who wants to assume full parental rights and responsibilities but has been denied access to the child by its mother, with whom he had previously cohabited.[87] In some states, such a father may not veto a proposed adoption.[88] Looking at the equities, the claims of this father do not seem less substantial than those of a surrogate parenting father; if anything, given the substantial prior relationship with the child's mother, it might seem that this unwed father should have the stronger claim.

The unwed father issues are sufficiently complex that there are no easy answers, however. Take the above example. Although the equities would support treating relationship and surrogate parenting unwed fathers equivalently, policy considerations might justify a different result. Rules giving unwed mothers exclusive rights to consent to the child's adoption are generally justified as facilitating the adoption process; it is assumed that an unwed father, who might otherwise block the child's adoption, would neither want nor be able to assume custody and give the child a family, including two parents, comparable to that offered by adoptive parents.[89] This concern would be inapplicable in the case of a surrogate parenting father and thus might provide a basis for granting more extensive rights to them as a group.

Because there are no easy answers, I make no suggestions for legislative action here. Given the substantial—and developing—body of constitutional case law on the rights of unwed fathers, this may indeed be the topic the legislature chooses to leave to the judiciary.

VI. Conclusion

The time has come to refocus the legislative debate on surrogate parenting. The novelty of the practice and the sharply partisan views which dominate public discussion have obscured the fact that the legal issues

86. *See supra* notes 54-62 and accompanying text.

87. The example is loosely based on Lehr v. Robertson, 463 U.S. 248 (1983).

88. *See supra* note 59 and sources cited therein.

89. *See* H. CLARK, *supra* note 44, at 856 (purpose of adoption statutes is to facilitate adoption of illegitimates, protect mothers' privacy and grant adoptive parents unassailable rights); *cf.* Caban v. Mohammed, 441 U.S. 380, 407–408 (1979) (describing justifications for differentiating between mothers and fathers in the adoption process).

which arise in surrogate parenting cases are not unique. The existing web of law which governs parental rights and responsibilities toward children may not resolve every question about surrogate parenting, but it does provide the most logical starting point. Assimilating surrogate parenting to the broader range of legal issues that arise in parental disputes over children enables us to make use of past experience and accumulated wisdom. It also enables us to better link the past and the future; after all, surrogate parenting is only one of a developing range of new technological and social innovations in parenting. Legislatures cannot reinvent the wheel for each such innovation. The only fair and rational solution, over the long run, is to try to see beyond what is new to basic, more enduring issues.