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Assisted Conception and Surrogacy - Unfinished Business, 26 J. Marshall L. Rev. 775 (1993)

Keith J. Hey

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ASSISTED CONCEPTION AND SURROGACY—UNFINISHED BUSINESS

PROFESSOR KEITH J. HEY*

TABLE OF CONTENTS

Introduction.....	775
I. History of Assisted Conception.....	783
II. Early Surrogacy Developments in the United States...	786
III. Developments in Australia and Great Britain.....	790
IV. Assisted Conception Legislation in the United States ..	792
V. Legal Complications of Surrogacy Arrangements	793
VI. Pre- <i>Baby M</i> Legislation and Model Acts	795
VII. <i>Baby M</i> Decision	797
VIII. Post <i>Baby M</i> Legislation	799
IX. Analysis of Surrogacy Decisions and Legislation	809
X. Framework for a Proposed Solution	815
Conclusion	819

INTRODUCTION

Medical technology continues to amaze and intrigue society with seemingly unending advancements in the enhancement and extension of human life. Rarely, however, does medicine make substantial advances in the promotion of human life, or, for that matter in any other aspect of the field, without creating corresponding legal problems. Rather, almost any new medical development introduces additional complex legal and moral entanglements.¹

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1. Medical advances in embryo cryopreservation and *in vitro* fertilization created a legal dilemma in Australia almost a decade ago when Mario and Elsa Rios were killed in an airplane accident, leaving no instructions for the use or disposition of two frozen embryos left at Queen Victoria Medical Hospital in Melbourne, Australia. ROBERT H. BLANK, *REGULATING REPRODUCTION* 66 (1990) An ethics commission recommended the embryos be destroyed, but the recommendation was reversed by the legislature. *Id.* The embryos were subsequently transferred to the wombs of two adoptive mothers, but both attempts at pregnancy failed. *Id.*; David T. Ozar, *The Case Against Thawing Unused Frozen Embryos*, *HASTINGS CENTER REP.*, Aug. 1985, at 7, 7.

Two recent cases in the United States were aftermaths of the same technology. In *Davis v. Davis*, No. 180, 1990 WL 130807 (Tenn. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d (Tenn. 1992), *cert. denied sub nom.* *Stowe v. Davis*, 113 S. Ct.

Perhaps no area of medical technology has raised, or continued to foster, more interest than those advances made in assisted conception² and its legal progeny, surrogacy arrangements.³ The desire to propagate, to produce and raise genetically related human beings, is one of the most fundamental instincts of men and women.⁴ But, increasingly, this goal is frustrated as the number of individuals suffering from infertility⁵ continues to increase. It is estimated that over two and a half million couples⁶ in the United States are unable to conceive a child by natural intercourse due to a defect or defi-

1259 (1993), the court was faced with resolving custody over frozen embryos in a divorce setting. On appeal the court granted the divorcing parties joint custody over the embryos. *Id.* at *3. Another couple sued to require an embryo bank to relinquish custody of their frozen embryo being stored in the bank. *York v. Jones Inst.*, 717 F. Supp. 421, 422-24 (E.D. Va. 1989).

2. Also referred to as "assisted reproduction," "reproductive intervention" or "collaborative reproduction." See also David Ranii, *Future Shock for Family Law: Can One Child Have 2 Mothers?*, NAT'L L.J., Mar. 26, 1984, at 1, 24. "Reproductive technologies" is one of five major areas in which modern medical science has created problems for judges and lawmakers alike. The other four are prenatal care and regulation of pregnancy, neonatal treatment decision making, organ transfer, and refusal of life-continuing medical assistance. Note, *Developments in the Law - Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1524 (1990).

3. Until the mid-1980's, discussion of assisted conception and surrogacy issues were, for the most part, relegated to scientific, medical, or legal journals. Now these topics are of front page interest for more popular forms of journalism. E.g., Rebecca Powers, SPECIAL REPORT, *The Baby Business*, DET. NEWS, Sept. 17, 1989, at 1A, 1C-4C; Sue Nichols, *New Conceptions*, LANSING ST. J., Jan. 12, 1986, at 1A.

4. "Becoming a parent is a way of immortalizing yourself, and that's no small thing." Sue Nichols, *New Ways of Conceiving Raise Ethical Questions*, LANSING ST. J., Jan. 15, 1986, at 1B (quoting Tom Tomlinson, Assistant Coordinator for the Medical Humanities Program at Michigan State University). "[M]ost Americans consider biological parenthood an essential component of a fulfilled life." *Developments in the Law - Medical Technology and the Law*, supra note 2, at 1526. Cf. MARTHA A. FIELD, SURROGATE MOTHERHOOD 25-26 (1988) (regarding the exploitation of women's desires to have children); Sarah Franklin, *Deconstructing "Desperateness": The Social Construction of Infertility in Popular Representations of New Reproductive Technologies*, in THE NEW REPRODUCTIVE TECHNOLOGIES 200, 207, 221 (Maureen McNeil et al. eds., 1990); Anna Quindlen, *Baby Craving*, LIFE, June 1987, at 23, 26 (describing "the desires for progeny [as] . . . part of a biological system").

5. Infertility is defined as the "inability of a couple to conceive after 12 months of unprotected intercourse." JOHN YEH & MOLLY U. YEH, LEGAL ASPECTS OF INFERTILITY 1 (1991).

6. Tom Yulsman, *A Little Help for Creation*, N.Y. TIMES MAG., Oct. 7, 1990, at 24; Mary E. Barret, *Wanted: Baby*, USA WEEKEND, Oct. 6-8, 1989, at 4. The figure has been placed as high as ten million, which constitutes more than fifteen percent of married couples in the United States. Brian J. Carvey, Note, *Where Do the Children Go? - Surrogate Mother Contracts and the Best Interests of the Child*, 22 SUFFOLK U. L. REV. 1187, 1187 (1988). See also Karen M. Sly, Comment, *Baby-Sitting Consideration: Surrogate Mother's Right to "Rent Her Womb" For a Fee*, 18 GONZ. L. REV. 539, 540 (1983) (estimating that one in six American couples are infertile).

ciency in one or both of the partners.⁷ The defect may be genetic, caused by an accident or otherwise stem from a myriad of causes in either the male or female partner.⁸

Historically, adoption was the alternative for those couples unable to have children, but the length of time required for the regulatory process to function⁹ and the limited number of adoptable children, particularly newborn babies,¹⁰ has left a trail of disappointed couples.¹¹ Moreover, the process of adoption generally involved a child bearing no genetic relationship to either of the adopting parents. Thus, the basic urge for a genetic connection within the parent-child relationship was still missing.

During the last quarter of the Twentieth Century medical technology has made a number of techniques available to individuals

7. The incidence of infertility problems are found to be 40% in the male, 40% in the female, and 20% in the two combined. YEH & YEH, *supra* note 5, at 6-7.

8. Forty percent of women are sterile due to diseased fallopian tubes or oviducts. *In Vitro Fertilization, Embryo Culture, and Embryo Transfer in the Human*, in ETHICS ADVISORY BOARD, DEP'T OF HEALTH, EDUCATION, AND WELFARE, APPENDIX: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER § 8, at 2 (1979). See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY: MEDICAL AND SOCIAL CHOICES 61-82 (1988) [hereinafter OTA REPORT] for a discussion of both male and female factors contributing to infertility. Approximately fifty percent of couples using one or more of the various reproductive techniques were successful in achieving conception. *Id.*

9. The adoption process generally requires seven years to complete. Note, *Surrogate Parenthood - An Analysis of the Problems and a Solution: Representation For the Child*, 12 WM. MITCHELL L. REV. 143, 146 (1986). The first adoption statute was enacted in Massachusetts in 1851. Yasuhide Kawashima, *Adoption in Early America*, 20 J. FAM. LAW 677-78 (1982); YEH & YEH, *supra* note 5, at 141-42; Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts 1796-1851*, 73 NW. U. L. REV. 1038, 1042-43 (1979) (describing the novelty and impact of the Massachusetts statute). All of the states have some type of regulatory process for adoption with half of these including a provision that prohibits the payment or exchange of money in connection with adoption. Avi Katz, Comment, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 8-10 (1986); see also Special Project, *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 639-40 n.189 (1986) (listing state statutes which prohibit mothers from receiving compensation for allowing another to adopt her child); Glenda Thornton, Comment, *Florida Senators Address Surrogate Motherhood*, 15 FLA. ST. U. L. REV. 885, 892 n.50 (1987) (listing those states which provide statutory exceptions to the no-payment rule).

10. Two million couples competed for 58,000 babies who were placed for adoption in 1984, a ratio of over 35 to one. *In re Baby M.*, 525 A.2d 1128, 1137 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 277 (N.J. 1988). This extreme disparity is not decreasing: the 1987 ratio was three million couples for 50,000 babies. Quindlen, *supra* note 4, at 25.

11. The scarcity of children available for adoption has been referred to as the "adoption famine." Lorraine M. Harding, *The Debate on Surrogate Motherhood: The Current Situation, Some Arguments and Issues; Questions Facing Law and Policy*, 1987 J. SOC. WELFARE L. 37, 42 (1987).

incapable of natural reproduction.¹² The process of *in vitro* fertilization,¹³ perfected in the late 1970s, has been rapidly followed by developments allowing the cryopreservation of human reproductive elements¹⁴ and, later, the transfer of human embryos through uterine lavage and implantation.¹⁵ Other procedures such as gamete interfallopian transfer,¹⁶ zygote interfallopian transfer,¹⁷ and micro manipulation of sperm into ova¹⁸ also made genetic reproduction possible in previously difficult or seemingly impossible situations.

12. Although the term "reproductive technologies" may be used in this article with reference to specific types or processes of facilitating reproduction, a number of other medical techniques and procedures are also part of the term, such as amniocentesis, ultrasonography, sex pre-selection, chorionic sampling and laparoscopy (this list is not exhaustive). THE NEW REPRODUCTIVE TECHNOLOGIES, *supra* note 4, at 2.

13. *In vitro* fertilization (IVF) is the procedure by which eggs are removed from a woman's ovaries and fertilized outside her body in a petri dish. BLANK, *supra* note 1, at 28. The resulting embryos are kept in a culture medium for approximately two days until they reach the four to eight-cell stage at which point they are transferred via catheter into the uterus of the woman. *Id.*; WARREN FREEDMAN, LEGAL ISSUES IN BIOTECHNOLOGY AND HUMAN REPRODUCTION: ARTIFICIAL CONCEPTION AND MODERN GENETICS 3-4 (1991). See also Special Project, *supra* note 9 (discussing artificial insemination and IVF); see also Kathryn V. Lorio, *In Vitro Fertilization and Embryo Transfer: Fertile Areas of Litigation*, 35 SW. L.J. 973, 975-78 (1982) (discussing the IVF process and its history).

14. Freezing sperm has been a recognized procedure for several decades. Frozen embryos have been successfully implanted since the mid 1980's. GENA COREA, THE MOTHER MACHINE (1985). Ova (eggs) "quickly lose their viability when manipulated outside the body" but a medical research team in South Korea has reported success in a major step toward the freezing of eggs. Philip Elmer-DeWitt, *Making Babies*, TIME, Sept. 30, 1991, at 56, 61.

15. Embryo transfer could be used to allow the infertile wife to carry the embryo created by her husband's sperm and a donor ovum or to have the embryo which is created by the ovum of the fertile wife who cannot carry a pregnancy and her husband transferred into a carrier (surrogate). Lorio, *supra* note 13, at 975-76. For a discussion of cryopreservation, see FREEDMAN, *supra* note 13, at 10-11; Davis v. Davis, no. 180, 1990 WL 130807, at *1 (Tenn. App. Sept. 13, 1990), *aff'd*, 842 S.W.2d (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 113 S. Ct. 1259 (1993); York v. Jones Inst., 717 F. Supp 421, 422-24 (E.D. Va. 1989). OTA REPORT, *supra* note 8, at 255, 298.

Embryo transfer following *in vitro* fertilization may technically fall within statutes prohibiting embryo research which involves abortion procedures since the definition of abortion is broad enough to include the flushing process used in uterine lavage. Lori B. Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 397 (1986).

16. "One variation of IVF is gamete intrafallopian transfer (GIFT) in which sperm and eggs are transferred directly to the fallopian tubes" to be fertilized. BLANK, *supra* note 1, at 28; Philip Elmer-DeWitt, *A Revolution in Making Babies*, TIME, Nov. 5, 1990, at 76; OTA REPORT, *supra* note 8, at 255, 297.

17. "A second variation of IVF is zygote intrafallopian transfer (ZIFT) in which the embryo is placed in the fallopian tube about 18 hours after fertilization." BLANK, *supra* note 1, at 28; Elmer-DeWitt, *supra* note 16, at 76. See *infra* text accompanying notes 51-54 for a more complete description of the GIFT and ZIFT procedures.

18. BLANK, *supra* note 1, at 32; OTA REPORT, *supra* note 8, at 299.

The increased use of assisted conception processes such as *in vitro* fertilization and its medical progeny also greatly increased the number of those resorting to surrogacy arrangements, those non-medical agreements whereby a woman would agree to conceive and give birth to a child for another person.¹⁹ In a typical situation the surrogate would consent, generally in exchange for a substantial fee, to undergo artificial insemination, *in vitro* fertilization, or embryo transplantation, in order to carry the resulting fetus to term and surrender the child immediately following birth.²⁰ The more

19. Barbara S. Parish, Comment, *Test Tube on Trial: Let California Blaze the Trail to the Legitimation of Surrogacy*, 9 GLENDALE L. REV. 56, 57 (1990). A surrogate mother is a woman appointed to give birth to a child in the place of another. Special Project, *supra* note 9, at 632. Surrogate mother means a "female who is naturally or artificially inseminated and who subsequently gestates a child conceived through the insemination pursuant to a surrogate contract." MICH. COMP. LAWS § 722.853(h) (West 1991). See also LA. REV. STAT. ANN. § 2713 (West 1992); IOWA CODE § 710.11 (Supp. 1993); ARIZ. REV. STAT. ANN. § 25-218(d) (1991).

For an extensive discussion of surrogacy from a number of different perspectives and positions, see *Forum on Surrogate Motherhood*, 16 LAW, MED. & HEALTH CARE 1, 1-2 (1988). Formulation of the issues has not significantly changed since then although the degree of interest in and literature on the subject has not diminished. E. PETER VOLPE, *TEST-TUBE CONCEPTION: A BLEND OF LOVE AND SCIENCE* (1987); June R. Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581 (1988) (arguing that the courts should honor surrogacy agreements using normal contract principles); Keith J. Cunningham, Comment, *Surrogate Mother Contracts: Analysis of a Remedial Quagmire*, 37 EMORY L.J. 721 (1988) (analyzing possible remedies for breach of surrogacy contracts and arguing for a restrained judicial role in enforcing such agreements); Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515 (1990) (presenting a legislative model for regulation of commercial surrogacy); Lisa C. Ikemoto, *Providing Protection for Collaborative, Noncoital Reproduction: Surrogate Motherhood and Other New Procreative Technologies and the Right Intimate Association*, 40 RUTGERS L. REV. 1273 (1988) (arguing that procreation by surrogate parents is a constitutional right); Audrey W. Latourette, *The Surrogate Mother Contract: In the Best Interests of Society?*, 25 U. RICH. L. REV. 53 (1990) (arguing that surrogacy contracts serve only the best interests of the broker and the buyer); Richard A. Posner, *The Ethics and Economics of Enforcing Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21 (1989) (arguing in favor of finding contracts of surrogate motherhood enforceable); John A. Robertson, *Procreative Liberty, and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 420-36 (1983) (arguing that reproductive rights should not be regulated absent a showing of tangible harm to the child); Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986); Stephen G. York, *A Contractual Analysis of Surrogate Motherhood and a Proposed Solution*, 24 LOYOLA L.A. L. REV. 395 (1991).

20. Objection has been raised over referring to "birth mother" as the "surrogate mother." George J. Annas, *Death Without Dignity for Commercial Surrogacy: The Case of Baby M*, HASTINGS CENTER REP., Apr.-May 1988, at 21 (arguing that the "rearing mother" is truly the surrogate and should be referred to as such). Several definitions of surrogate mother do not include the newer reproductive technologies of *in vitro* fertilization and embryo transfer but limit the arrangement to impregnation through artificial insemination, partially reflecting the almost exclusive use of artificial insemination in early surrogacy cases. Other definitions attach compensation or some other factor as an ele-

widely used form of surrogacy, sometimes referred to as "partial surrogacy,"²¹ would have the sperm provided by the rearing father and the child would be given up to the father and his wife.²² However, the sperm could also be provided by an anonymous donor.²³ The egg as well could be provided by either the rearing mother or by the surrogate or by a third party donor.²⁴ An arrangement under which neither of the intended parents is genetically related to the child may be referred to as a "full surrogacy."²⁵ The ability of medical science to retrieve, store and implant the life-initiating cells, coupled with the contractual surrogacy arrangement, has created a variety of combinations for gestational²⁶ and genetic parents²⁷ of children born as a result of the combination of such medical technology and legal procedures.²⁸

ment. See Carvey, *supra* note 6, at 1189 (describing the exchange of money as essential to the contract); Katz, *supra* note 9, at 2 (defining a surrogate mother as a woman agreeing to be artificially inseminated).

21. Parish, *supra* note 19, at 57.

22. The sperm-providing father and his wife may be referred to as the rearing parents, intended parents or social parents. Diane M. Bartels, *Surrogacy Arrangements: An Overview*, in BEYOND BABY M: ETHICAL ISSUES IN NEW REPRODUCTIVE TECHNIQUES 173 (Diane M. Bartels et al. eds., 1989) [hereinafter BEYOND BABY M].

23. The anonymous sperm provider would rarely be involved further and is generally exempted from paternal liability. See UNIF. PARENTAGE ACT § 4(b), 9B U.L.A. 591 (Supp. 1992).

24. For a discussion of various reproductive scenarios, see FREEDMAN, *supra* note 13, at 8-12. Donation of ova is becoming a more common practice. An infertile woman is implanted with an embryo conceived through an *in vitro* fertilization procedure from the woman's husband and a donated ovum. This donation of genetic material could create the same legal implications as those surrounding sperm donors. Katrine Adams et al., *And Donor Makes Three*, NEWSWEEK, Sept. 30, 1991, at 60 (asserting the inevitability that an egg donor "will eventually sue for parental rights").

25. Parish, *supra* note 19, at 57. However, recent legislation on surrogacy arrangements in Virginia and New Hampshire requires either the intended mother or the intended father to provide a gamete for the embryo. Thus, donation of both ovum and sperm in surrogacy arrangement is precluded. See *infra* notes 227 and 241 and accompanying text for the relevant statutory provisions. Ova donation is particularly attractive for a woman whose age poses serious problems for the fetus. Christine Gorman, *How Old is Too Old?*, TIME, Sept. 30, 1991, at 62.

26. The gestational mother is the woman giving birth to the child.

27. The genetic parents would be the male providing the sperm and the female providing the ovum (egg). With the availability of sperm and ovum donors and the medical technology to utilize the third party elements, the intended social rearing parents may be other than the gestational mother or the genetic parents. See Annas, *supra* note 20, at 24; Ranii, *supra* note 2, at 1. The non-genetic surrogacy mother arrangement has been referred to as "the second wave of surrogate mothers." Carol Lawson, *Couples' Embryos Used in Birth Surrogacy*, N.Y. TIMES, Aug. 12, 1990, at A1.

28. Over 80 gestational surrogacy births were reported in the United States between 1987 and 1990. More than 2,000 traditional surrogate births were reported during the same period with over 4,000 since the late 1970's. Lawson, *supra* note 27, at A1. A Detroit newspaper article noted there were sixteen

Although medical science was developing the procedures enabling many individuals to consider assisted reproduction techniques and arrangements, the idea of producing a child through one of the assisted conception procedures was often challenged as being contrary to the ethical or religious beliefs of many individuals and couples.²⁹ Beyond that issue, the idea of a woman agreeing in advance of her child's birth to go through the childbearing process and then surrender her child to another person or couple runs contrary to concepts of the family as perceived by many in today's society.³⁰ The ever-expanding combination of assisted conception techniques and contractual surrogacy arrangements has created a raft of legal problems for the courts and legislatures, not merely in the United States but throughout the world.³¹ How should a society deal with these latest chapters in the continuing saga of assisted conception? Should *in vitro* fertilization, embryo transplantation, and other fertility techniques be regulated by society? Should surrogacy arrangements be condemned, condoned or controlled? A study of legislation and court decisions in the United States, Great Britain and Australia³² reflects a broad range of positions on assisted conception and surrogacy, sometimes presented in simplistic fashion

different methods for making a baby. *The Baby Business*, DET. NEWS, Sept. 21, 1989, at 1D.

Not all cases of infertility are alleviated by the medical technologies. A cause of infertility is never found in one out of five couples. Gary Ellis, *Infertility and the Role of the Federal Government*, in BEYOND BABY M, *supra* note 22, at 111.

29. William J. Wagner, *The New Reproductive Technologies and the Law: A Roman Catholic Perspective*, 4 J. CONTEMP. HEALTH L. & POL'Y 37, 58-70 (1988) (arguing in favor of the Catholic Church's stance on new reproductive technology and recommending legislative and policy guidelines in accordance with Roman Catholic traditions and Church doctrine); FREEDMAN, *supra* note 13, at 98-99 (discussing Roman Catholic and Jewish attitudes on assisted reproduction).

For an interesting discussion of the various concerns and positions of specific religious commentators, see Baruch Brody, *Current Religious Perspectives on the New Reproductive Techniques*, in BEYOND BABY M, *supra* note 22, at 45. See also Lorio, *supra* note 13, at 978-84 (for a discussion and responses to the propriety of *in vitro* fertilization by theologians and philosophers in the 1970's). See also *Excerpts from Instructions on Respect for Human Life in its Origin and on the Dignity of Procreation*, Vatican Congregation for the Doctrine of the Faith, Mar. 1987, in BEYOND BABY M, *supra* note 22, at 277-83.

30. LORI B. ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTING FATHERS, AND BRAVE NEW BABIES at x-xv (1989); Ruth Macklin, *Artificial Means of Reproduction and Our Understanding of the Family*, HASTINGS CENTER REP., Jan.-Feb. 1991, at 5-11 (discussing the philosophical problems associated with artificial means of conception); see also FREEDMAN, *supra* note 13, at 88, 98-99 (regarding Jewish law and attitudes).

31. See BLANK, *supra* note 1, at 148-149, 156-157, for a survey of international response to artificial insemination and reproductive technologies. See also OTA REPORT, *supra* note 8, at 176.

32. The inclusion of Australia in this article reflects the pioneer position of that country in reproductive procedures and legislation on those procedures,

and other times stated in varying degrees of sophistication. Which approach is the more appropriate? Is there a "right" answer?

It is the position of this author that the piecemeal attempts to resolve issues on assisted conception and surrogacy arrangements have merely touched the tip of the extremely sensitive and multifaceted problems created by these new reproductive technologies. A careful analysis of court decisions and enacted legislation in the United States, while inconsistent in results, reflects substantial consistency in the lack of understanding or mere avoidance of the interrelated problems inherent in assisted conception and its legal step-child, the surrogacy arrangement.³³ In many jurisdictions the paucity of laws to regulate assisted reproduction or surrogacy has the effect of merely moving the problem through the legal process one small piece at a time, much like a youth kicking a tin can down a country road. Reaction is highly selective, more often than not because the issue is being chosen by the confines of litigation or by public outcry.³⁴ One or more elements within this complex problem initiated by new medical advances is supposedly resolved without addressing the entire problem.³⁵ What is needed is a

including surrogacy. Great Britain is included both for its somewhat different approach in an English-speaking country and for our common law heritage.

The author's selection of these countries should not be construed as all-inclusive. Issues of assisted reproduction and surrogacy are being faced in one fashion or another by almost every country. See *Medicine, Morality, & Culture: International Bioethics*, HASTINGS CENTER REP., July-Aug. 1989, at 1, 1-31 (special supp.) (presenting a selection of international medical issues); *International Perspective on Biomedical Ethics*, HASTINGS CENTER REP., Aug. 1988, at 1, 1-32 (special supp.) (surveying contemporary biomedical issues of different countries); Karen H. Rothenberg, *Gestational Surrogacy and the Health Care Provider: Put Part of the IVF Genie Back into the Bottle*, 18 LAW, MED. & HEALTH CARE 345, 346-47 (1990) (discussing international developments in the wake of *Baby M*—most laws require that the legal mother be the birth mother and render most surrogacy contracts unenforceable or illegal); OTA REPORT, *supra* note 8, at 329-63 (listing the countries that are addressing the matter of noncoital reproduction).

33. See *infra* text accompanying notes 130-132 and notes 165-186 for a comparison of the state legislation on surrogacy arrangements.

Advocating a comprehensive approach to reproductive technology may seem somewhat of a Goliath challenge when 40% of the states do not have legislation on artificial insemination which declares the consenting husband of the woman who was inseminated to be the legal father of the child. See *infra* note 45; Lori B. Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, A.B.A. J., Aug. 1984, at 50, 53.

34. Three early cases in Michigan reacted in a negative fashion to surrogacy contracts or elements of the surrogacy arrangement without ever reaching a decision of precedence on the legality of surrogacy arrangements. See *infra* text accompanying notes 62-65 and 70-79.

35. Admittedly, judicial response must be limited to issues presented by the litigation and necessary for adjudication. This restriction merely enforces the position that the courts are inappropriate fora to resolve the complex issues of facilitating reproduction and surrogacy. See concluding comments in *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988) and *In re Adoption of Baby Girl L.J.*, 505

comprehensive analysis and statutory enactment covering all of the various medical and legal aspects of assisted conception and surrogacy arrangements. Similar to the need in the commercial law field almost a half century ago for enactment of a Uniform Commercial Code³⁶ to consolidate and coordinate the various phases of commercial law, reproductive technology desperately needs a truly uniform code to provide guidance for individuals and institutions involved in the process, and, more particularly, to protect those voiceless infants who will be born by virtue of such technology and/or contractual arrangements.³⁷

I. HISTORY OF ASSISTED CONCEPTION

The dawning of a new era in facilitating human reproduction began a scant fifteen years ago with the astonishing news of Baby Louise's birth in Great Britain through the process known as *in vitro* fertilization.³⁸ Ovum and sperm were combined in a petri dish rather than in the female fallopian tube. The resulting embryo was then implanted in the woman's uterus and a normal pregnancy and birth process ensued. With the advent of *in vitro* fertilization, genetic parenthood became available to women capable of bearing a child but not capable of conceiving a child *in utero*.

Although the *in vitro* fertilization process introduced an entirely new procedure for assisting human reproduction, it was not the first method for aiding childless couples. Artificial insemination (AI) with sperm provided either by the intended father, called artificial insemination homologous (AIH), or by an anonymous donor, called artificial insemination heterologous (AID), or through a combination of sperm (CAI), has been used for over 200 years to

N.Y.S.2d 813 (1986), with both decisions agreeing that the courts are an inappropriate forum.

36. UCC, 1-5 U.L.A. (1989).

37. *In vitro* fertilization has produced 20,000 children between 1978 and 1990. Elmer-Dewitt, *supra* note 16, at 76. Future IVF babies are projected at the rate of 6,000 per year. OTA REPORT, *supra* note 8, at 293.

38. Louise Joy Brown was born in Oldham, England on July 25, 1978. LESLEY BROWN & JOHN BROWN, OUR MIRACLE CHILD CALLED LOUISE 134, 166-71 (1979). A concise background discussion of the research conducted by Drs. Steptoe and Edward on *in vitro* fertilization prior to their success with the birth of baby Louise in 1978 can be found in Antionette Sedillo Lopez, *Test Tube Babies, Surrogate Mothers, Frozen Embryos: Searching for Solutions*, 20 N.M. L. REV. 701, 707 (1990); Lorio, *supra* note 13, at n.2.

The first American baby conceived *in vitro* was Samantha Steel, born in England on October 2, 1981. Lorio, *supra*, note 13, at 975. The first IVF birth in the United States took place on December 28, 1981. Elizabeth Jordan Carr was born in the Norfolk (VA) General Hospital on that date. Sharon Begley & John Carey, *How Human Life Begins*, NEWSWEEK, Jan. 11, 1982, at 47.

counteract certain reproductive process difficulties.³⁹ The first successful human artificial insemination was reported in 1790.⁴⁰ The first successful procedure in the United States took place in 1866⁴¹ with the first donor artificial insemination in 1884.⁴² The use of donor sperm created its own set of legal problems as several early court decisions held that artificial insemination by a donor was adulterous conduct and the sperm donor was the father of the illegitimate child even though the husband had given his consent to the insemination.⁴³ Later cases rejected the adulterous conduct position⁴⁴ and today state legislation on artificial insemination, adopted in twenty-five states, generally includes a provision declaring the semen donor not to be the legal father of the child.⁴⁵ Little public attention has been given to this less dramatic method of facilitating human reproduction by artificial insemination and yet it remains the most widely used procedure for such facilitation. Last year, in the United States alone, over 65,000 births were the result of artificial insemination.⁴⁶

The advances of medical technology to assist reproduction did not stop with the development of *in vitro* fertilization but has moved forward in dramatic fashion to provide further assistance to eager potential parents. In 1984 an embryo was frozen for two months in Australia and then successfully implanted into a surro-

39. Jeffrey M. Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331, 331 n.1 (1980) (the first use of artificial insemination on an animal was an Arabian horse in the 14th century); FREEDMAN, *supra* note 13, at 23-27.

40. Shaman, *supra* note 39, at 331.

41. *Id.* at 331 n.1. See also SHERMAN SILBER, HOW TO GET PREGNANT 174 (1980).

42. ELIZABETH NOBLE, HAVING YOUR BABY BY DONOR INSEMINATION 87 (1987).

43. *Gursky v. Gursky*, 242 N.Y.S.2d 406 (N.Y. Sup. Ct. 1963) (holding that the child was not legitimate and AID constituted adultery); *Anonymous v. Anonymous*, 246 N.Y.S.2d 835 (N.Y. Sup. Ct. 1964) (finding that husband had a duty to support a child conceived through wife's artificial insemination, only because there was a specific written agreement for such support); *Doornbos v. Doornbos*, 23 U.S.L.W. 2308 (1954), *appeal dismissed*, 139 N.E.2d 844 (1956) (declaring a child conceived through artificial insemination illegitimate); *Orford v. Orford*, 58 D.L.R. 25 (Ont. 1921).

44. *R. S. v. R. S.*, 670 P.2d 923 (Kan. App. 2d 1983); *People v. Sorenson* 437 P.2d 495 (Cal. 1968); *Strnad v. Strnad*, 78 N.Y.S.2d 390 (N.Y. Sup. Ct. 1948); *K.S. v. G. S.*, 182 N.J. Super. 102 (N.J. Super. Ct. Ch. Div. 1981). In *L. v. L.*, All E.R. 141, 146 (1949), a wife was granted an annulment based on incapacity even though she had conceived a child through AIH.

45. UNIF. PARENTAGE ACT § 5(a), 9B U.L.A. at 301 (Supp. 1993). Eighteen states have adopted the Uniform Parentage Act. *Id.* Other states' legislation may vary in certain details but would include similar provisions that the husband and not the sperm donor would be treated as the natural father of the child conceived through artificial insemination.

46. Warren Cohen et al., *The Year Was: 1992*, U.S. NEWS & WORLD REP.; Dec. 1992, at 96.

gate.⁴⁷ A normal pregnancy and birth resulted.⁴⁸ Only two years later, and half a continent away, the first child produced by embryo transfer was announced in Los Angeles.⁴⁹ The embryo conceived by the sperm of an infertile woman's husband and the ovum of a second woman was transplanted into the infertile woman, who later gave birth to a healthy baby.⁵⁰

Even more sophisticated advances have expanded the type and number of procedures used in assisting conception, substantially increasing the chances of successful implantation in transferring sperm and ovum. A more recent procedure is gamete inter-fallopian transfer (GIFT) in which ovum and sperm are placed in the fallopian tube with an air bubble separating them.⁵¹ Fertilization would then take place in the fallopian tube as in a normal pregnancy rather than *ex utero* as in the *in vitro* fertilization procedure. In a modification of the GIFT procedure, ovum and sperm are combined before being placed in the fallopian tube. Fertilization takes place *ex utero* and the resulting single cell zygote is placed in the fallopian tube. This procedure is called zygote intra-fallopian transfer (ZIFT).⁵²

The accumulation of ever-expanding medical procedures for assisting human reproduction enabled many additional individuals and couples to circumvent certain "problems" in the process of furthering genetic parenthood. The effect of endometriosis, blocked or scarred fallopian tubes, sterility, ovulation problems, low sperm count, genetic diseases, or other causes of infertility could often be alleviated.⁵³ Depending on the type of medical problem preventing *in utero* pregnancy, a genetic relationship for both rearing parents could be made possible.⁵⁴ The Baby Louise birth is such an example whereby the husband and wife provide the genetic materials and the petri dish served as the facilitating vessel.

47. Andrews, *supra* note 33, at 50.

48. *Id.*

49. *Id.* The first child born using a combination of *in vitro* fertilization and embryo transfer was Candice Elizabeth Reed in Australia in June 1980. Lopata et al., *Pregnancy Following Intrauterine Implantation of an Embryo Obtained by In Vitro Fertilization of a Preovulatory Egg*, 33 FERTILITY & STERILITY 117 (1980).

50. Lopata, *supra* note 49.

51. See Elmer-DeWitt, *supra* note 16, at 76; BLANK, *supra* note 1, at 28.

52. BLANK, *supra* note 1, at 28.

53. The listed factors are the major contributors to human infertility. Ellis, *supra* note 28, at 112.

54. For the parents of Baby Louise, the inability to conceive through coital reproduction was due to blocked fallopian tubes. This problem was circumvented by removal of oocytes from Baby Louise's mother, which were combined with her father's sperm in an *in vitro* fertilization process. The ensuing embryo was then implanted in Baby Louise's mother. BROWN & BROWN, *supra* note 38.

In other situations, medical science could provide the means for a genetic relationship between the child and one of the rearing parents. The fertile husband's sperm could be combined with a donor ovum either through *in vitro* fertilization or artificial insemination. The fertile wife's ovum could be combined with donor sperm in similar fashion. If the infertility problem involved the child-bearing capabilities of the woman, a substitute uterus would be necessary to carry the embryo. For all its miracles in providing relief for childless couples, science has not provided a substitute for the carriage and development of the embryo. However, even if there is no substitute for a human uterus for the development of the embryo, it still seems possible that a substitute human uterus could be used to facilitate the child-bearing process. If ovum could be provided by a third party and sperm could similarly be donated, a human uterus could be provided by another person. The issue raised was no longer a matter of medical technology or scientific research, but rather a legal issue in arranging for the substitute uterus. Medicine in all its sophistication now gave way to the law, and more particularly the law of private contracts.⁵⁵

II. EARLY SURROGACY DEVELOPMENTS IN THE UNITED STATES

For many individuals the question of surrogacy contracts was easily answered in the affirmative. Surrogacy arrangements allowed childless couples to have a child genetically related to one or both of the rearing parents.⁵⁶ Others envisioned a host of societal issues reflecting concern for all parties involved, more particularly for the surrogate who would be giving up her rights to her child and for the child to be conceived and born under potentially litigious and psychologically threatening circumstances.⁵⁷ In the early period of surrogacy contracts there were no "laws" as such to regulate the arrangements set up between couples who desired a child genetically related to the father and women willing to be artificially inseminated and carry the resulting embryo through pregnancy and

55. Surrogacy contracts should not be exclusively a matter of private contracts. The state's interest in protecting the child to be born necessitates intervention to some extent, whether to regulate or to prohibit. See *infra* text accompanying notes 162-178 and 187-209 for various models of legislation on surrogacy.

56. There is no absolute requirement that the child be genetically related to one or both of the rearing parents. Both could be biologically unrelated to the child. However, there is little rationale for a surrogacy arrangement unless some genetic relationship is possible.

The definition of "surrogacy" under the New Hampshire statute would not include the double donor (i.e., sperm and egg) illustration. N.H. REV. STAT. ANN. § 168-B:17 (Supp. 1992).

57. See *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988); *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813 (1986).

birth.⁵⁸ A number of centers in the United States began the matching process between childless couples and women capable and willing to become surrogates.⁵⁹ Contracts to regulate the relationship were quickly developed.⁶⁰ Michigan became a focal point for surrogacy arrangements in the United States due to the work of Noel Keane, a Southfield, Michigan, lawyer who became one of the early specialists in the surrogacy contract field.⁶¹ The first surrogacy contract was executed in Michigan in 1976.⁶²

As the early situs for surrogacy arrangements, it is logical that the Michigan courts were called upon to test various aspects of surrogacy contracts, albeit in a peripheral fashion. In the 1981 case *Doe v. Kelley*,⁶³ the contracting couple in a surrogacy contract challenged provisions of the Michigan adoption statutes which prohibited the payment of money or other consideration to the mother for the release of parental rights or for an adoption. The adoption statute was upheld at the trial level and affirmed on appeal. The court focused on the compensation phase of the statute, noting that the statute did not prohibit the couple from having their child through a surrogacy arrangement.⁶⁴ The court did not, however, directly rule on the validity of surrogacy contracts.⁶⁵

While the Michigan courts were resolving *Doe v. Kelley*,⁶⁶ a bill was introduced in the Michigan legislature to allow surrogate parenting arrangements for compensation.⁶⁷ The bill, proposed by Representative Richard Fitzpatrick, was never reported out of committee.⁶⁸ Seven years passed before the Michigan Legislature enacted a bill on surrogacy arrangements. The enacted legislation in

58. NOEL KEANE & D. BREO, *THE SURROGATE MOTHER* 32 (1981).

59. One hundred and sixty-nine centers treating infertility were identified in 1988. OTA REPORT, *supra* note 8, at 157.

60. See *In re Baby M*, 525 A.2d at 1128.

61. Keane is referred to as the "father" of surrogate motherhood. ANDREWS, *supra* note 30, at 16.

62. The first compensated surrogate mother was Elizabeth Kane in 1980. KEANE & BREO, *supra* note 58, at 53; ELIZABETH KANE, *BIRTH MOTHER: THE STORY OF AMERICA'S FIRST LEGAL SURROGATE MOTHER* 53 (1988).

63. 307 N.W.2d 438 (Mich. Ct. App. 1981), *cert. denied*, 459 U.S. 1183 (1983).

64. *Id.* at 441.

65. For a discussion of *Doe v. Kelly* and other Michigan decisions, see Comment, *Surrogate Parenting in Michigan*, 5 COOLEY L. REV. 747, 752 (1988).

66. 307 N.W.2d 438.

67. H.R. 5184, 81st Leg., 1981 Mich. Legis. Serv. 2440 (West). Alaska was the first state legislature to have a bill on surrogate motherhood introduced. COREA, *supra* note 14, at 225. Michigan was the second state to have a bill on surrogate motherhood introduced with House Bill 5184. H.R. 5184.

68. Rep. Fitzpatrick would introduce bills regulating alternative reproduction techniques and allowing surrogacy arrangements in subsequent legislative sessions without success. H.R. 4114, 82d Leg., 1983 Mich. Legis. Serv. 647 (West); H.R. 4554, 83d Leg., 1985 Mich. Legis. Serv. 160 (West); H.R. 4555, 83d Leg., 1985 Mich. Legis. Serv. 160 (West).

1988, contrary to the Fitzpatrick efforts, criminalized compensated surrogacy agreements.⁶⁹

Two years after the *Doe v. Kelley* decision had raised, but avoided, the basic question of whether surrogacy contracts were valid, the Michigan Supreme Court was called upon to rule on a surrogacy contract. In *Syrkowski v. Appleyard*,⁷⁰ the genetic father in a surrogacy arrangement had filed for a court order to have his name placed on the birth certificate of his child who had a surrogate mother. If his name was not listed, then by Michigan law the husband of the surrogate mother would be listed as the child's father.⁷¹ The genetic father's request had been made pursuant to Michigan's Paternity Act.⁷² The surrogate mother did not contest the genetic father's request, but the State Attorney General challenged the court's jurisdiction to hear the matter. The trial court ruled against the father, holding that the Paternity Act was not intended to resolve issues of legitimacy resulting from surrogacy contracts.⁷³ Relying on *Doe v. Kelley*, the court held the surrogacy contract to be against public policy.⁷⁴ In affirming the trial court's decision the Michigan Court of Appeals ruled only on the jurisdictional issue, yet it too did not assert any public policy argument.⁷⁵ The Michigan Supreme Court reversed the Court of Appeals on the jurisdictional issue, but also did not rule on the public policy declaration of the trial court.⁷⁶ This absence of a direct ruling in the *Syrkowski v. Appleyard* decision left the validity of surrogacy contracts in Michigan highly questionable, but still not declared invalid.⁷⁷

69. MICH. COMP. LAWS ANN. § 25.248(157) (West 1993). The bill criminalizing surrogacy arrangements was introduced by Senator Binsfeld in 1987 and approved by the legislature in 1988. S. 228, 84th Leg., Reg. Sess., 1987 Mich. Legis. Serv. 883.

70. 333 N.W.2d 90 (Mich. Ct. App. 1983), *rev'd*, 362 N.W.2d 211 (Mich. 1985).

71. MICH. COMP. LAWS ANN. § 333.2824 (West 1993).

72. *Id.* § 722.711 (West 1993).

73. 333 N.W.2d 90, 92 (Mich. Ct. App. 1983).

74. *Id.* at 92.

75. *Id.* at 94.

76. 362 N.W.2d 211, 213 (Mich. 1985). The Michigan Court of Appeals responded that "[t]he courts should not be called upon to enlarge the scope of the Paternity Act to encompass circumstances never contemplated thereby." *Syrkowski v. Appleyard*, 333 N.W.2d at 94. The reluctance of the court to expand the jurisdiction of a statute was a view espoused by the early surrogacy decisions in Kentucky and New York but totally rejected in the *Baby M* decision. See *infra* text accompanying notes 80-87 for a discussion of the *Surrogate Parenting* decision in Kentucky and the *Baby Girl L.J.* case in New York.

77. Several decisions in other jurisdictions also peripherally involved the validity of surrogate mother contracts. *In re R.K.S.*, 10 FAM. L. REP. (BNA) 1383 (D.C. Super Ct. 1984) (requiring a report on a surrogate mother contract before approving an adoption); *Sherwyn & Handel v. Cal. State Dep't. of Social Serv.*, 218 Cal. Rptr. 778 (Cal. Ct. App. 1985) (challenging adoption and artificial conception statutes that threatened the validity of surrogacy arrangements).

A later Michigan decision, *Yates v. Keane*,⁷⁸ directly declared surrogate contracts to be against public policy and, hence, unenforceable. However, the circuit court judge's ruling came during a hearing on a motion for summary judgment and the case was later settled without appeal.⁷⁹ As a decision only at the circuit court level, the declaration on surrogacy contracts carried no precedential weight outside that specific judicial circuit.

Two other state court decisions in 1986, one from New York and the other from Kentucky, declared that surrogacy contracts, while voidable, were not in violation of state adoption statutes prohibiting payments in connection with an adoption. In *Surrogate Parenting Associates, Inc. v. Commonwealth*,⁸⁰ the State of Kentucky brought suit to revoke the charter of a corporation operating a clinic which was involved in surrogacy arrangements. The court rejected the state's assertion that the corporation's actions violated Kentucky's baby-selling legislation. The court recognized that there were fundamental differences between surrogacy arrangements and the buying and selling of babies.⁸¹ Furthermore, the court noted that the legislature, not the judiciary, was empowered to articulate state public policy regarding health and welfare.⁸²

Several months later a New York decision, *In re Adoption of Baby Girl L.J.*,⁸³ cited the *Surrogate Parenting* case in approving an uncontested adoption proceeding brought by a contracting couple in a surrogacy arrangement. The court expressed its reservations regarding surrogacy contracts, but, as in the Kentucky *Surrogate Parenting* decision, the court felt that the legislature was the appropriate forum in which to address the legality of surrogacy contracts.⁸⁴ The New York adoption statute, precluding payment of money to the mother, was held inapplicable because the court found a fundamental difference between baby-selling, as contemplated by the adoption statutes, and monetary payment to the mother under a surrogacy contract.⁸⁵ Inasmuch as the issue of the surrogacy contract arose in the context of an adoption proceeding,

78. Gratiot County Circuit Court, 9758, 9772 (Jan. 21, 1988).

79. *Id.* at 9778.

80. 704 S.W.2d 209 (Ky. 1986). For an extensive discussion of *Doe v. Kelly*, *Syrkowski v. Appleyard*, and *Surrogate Parenting Associates, Inc. v. Commonwealth*, as well as several early State Attorney General opinions, see Katz, *supra* note 9, at 25-34.

81. *Surrogate Parenting*, 704 S.W.2d at 210.

82. *Id.*

83. 505 N.Y.S.2d 813 (1986). It is interesting to note that most of the early cases on surrogacy did not involve a private litigator against a defaulting party, but were challenges with the state as a party to the litigation, often in connection with an adoption proceeding.

84. *Id.* at 817-18.

85. *Id.* at 818.

the contract could have been avoided if any of its provisions violated the state adoption statutes.⁸⁶ With other states having similar adoption statutes which prohibit compensation or payment of fees to the mother, the *Surrogate Parenting* and *Baby Girl L.J.* decisions could arguably have formed a strong precedent against using the adoption statutes to regulate surrogacy contracts except as to any direct conflict between the two.⁸⁷ A segment of this precedent was short-lived as the effect of *Surrogate Parenting* was negated by the passing of a statute in Kentucky which prohibits compensation for surrogacy arrangements and declares any contract made in violation of the statute to be void.⁸⁸

A more recent family court decision in New York, *In re Adoption of Paul*,⁸⁹ rejected the approach used in *Baby Girl L.J.* and approved the reasoning and conclusion of the New Jersey Supreme Court in *Baby M.*⁹⁰ The court in *Adoption of Paul* looked to the New York adoption statutes and found that compensation to the surrogate in exchange for her giving up her child for adoption violated both the adoption laws and the state public policy against trafficking in children.⁹¹

III. DEVELOPMENTS IN AUSTRALIA AND GREAT BRITAIN

As courts and legislatures in the United States were struggling with the surrogacy contract issue in the mid-1980s, Australia and Great Britain were taking direct action on the issue of surrogacy and its medical step-parent, *in vitro* fertilization. The two procedures, one legal and the other medical, were considered to be related issues in legislative action taken by the State of Victoria in

86. *Id.*

87. The Michigan Court of Appeals decision in *Syrkowski v. Appleyard* could also have been used as part of that precedent. See *supra* note 76 and accompanying text.

88. KY. REV. STAT. ANN. § 17-199.590 (Baldwin 1993).

89. 550 N.Y.S.2d 815 (N.Y. Fam. Ct. 1990).

90. *In re Baby M*, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1277 (N.J. 1988).

91. *In re Adoption of Paul*, 550 N.Y.S.2d at 817. The court did state it would accept the surrogate's termination of parental rights on the condition that both parties provided sworn affidavits that compensation would neither be offered or accepted in exchange for surrendering the child. *Id.* at 818-19.

The *Baby Girl L.J.* decision did not ignore the New York adoption statutes but found the surrogacy arrangements to be merely voidable, not void. *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813, 817 (N.Y. Surrogate's Ct. 1986).

The New York position on the questionable validity of surrogacy contracts was firmed up when the legislature approved and Governor Cuomo signed into effect on July 17, 1992, Senate Bill 1906 declaring surrogate parenting contracts void as against public policy, and establishing civil and criminal penalties for the payment or receipt of compensation in a surrogate parenting contract. N.Y. LAW §§ 121-124 (McKinney 1993).

Australia.⁹²

Investigation in Victoria had begun in 1982 with the establishment of a government committee to consider the social, ethical, and legal issues arising from embryonic fertilization.⁹³ The activities of this committee, chaired by Professor Louis Waller of the Faculty of Law at Monash University, resulted in the formulation and subsequent adoption of the Infertility Medical Procedures Act of 1984.⁹⁴

This Act regulated the use of *in vitro* fertilization (IVF) denoting "approved procedures" and limited the availability of the IVF procedure to married couples.⁹⁵ The Act also imposed criminal sanctions for the solicitation of individuals for surrogate contracts, and for the giving or receiving of money in conjunction with such contracts.⁹⁶ Any agreement whereby a woman agreed to act as a surrogate mother was declared void by the statute.⁹⁷ Legislation on surrogate contracts in other Australian states similarly declared surrogacy contracts to be void and attached criminal sanctions for solicitation of individuals or compensation for surrogacy contracts.⁹⁸

Administrative regulations governing the performance of *in vitro* fertilization procedures under the Victoria statute went into effect in July of 1988.⁹⁹ Stringent record keeping and documentation is required of those hospitals and counsellors designated and approved for IVF procedures by the state.¹⁰⁰

While the form of legislation on surrogacy contracts adopted by the state of Victoria might be challenged in some circles as over

92. Victoria Infertility (Medical Procedures) Act, 1984, No. 10163 (Austl.).

93. Peter Singer, *Making Laws in Making Babies*, HASTINGS CENTER REP., Aug. 1985, at 1, 5-6.

94. See Victoria Infertility (Medical Procedures) Act, 1984 (stating that it is "[a]n act relating to the regulation of certain procedures for the alleviation of infertility or to assist conception . . . to prohibit agreements relating to surrogate motherhood and for other purposes.").

95. *Id.* §§ 10(3)(a), 11(3)(a), 12(3)(a), and 13(3)(a). However the statutory definition of "married woman" includes a woman "living with a man as his wife on a *bona fide* domestic basis . . ." *Id.* § 3(2)(a). The Act separates IVF procedures into four different categories with separate provisions for each: IVF-no donors, IVF-male donors, IVF-female donors, and IVF-male and female donors. The Act allowed donation of an unused embryo to another married woman and her husband. *Id.* § 13(8).

96. *Id.* § 30(2) (Part V).

97. *Id.* § 30(3).

98. *E.g.*, Family Relationship Amendment Act, 1988 (S. Austl.); 1988 (Queensland, Austl.).

99. HUM. RTS. L. REP. 114 (Mar-Apr. 1989).

100. See Victoria Infertility Act § 7 (describing the required approval of hospitals); *Id.* § 9 (describing the requisite approval of counsellors); *Id.* § 19 (detailing the records to be kept by approved hospitals); *Id.* § 21 (identifying the record keeping requirements for artificial insemination procedures carried out by a medical practitioner outside an approved hospital).

reactive by attaching criminal sanctions to the solicitation and compensation aspects of surrogacy arrangements, the more fundamental point to be recognized is that positive action was taken to regulate a serious medical, social, and legal problem. Furthermore, by combining regulation of the IVF medical procedures with regulation of the surrogacy arrangements resulting from the IVF procedures, Victoria had dealt with both cause and effect, the medical technology and the legal arrangement.¹⁰¹

The birth of Great Britain's first commercial surrogate baby in January of 1985 met with overwhelming public disapproval and resulted in the adoption of the Surrogacy Arrangements Act 1985.¹⁰² The Act spoke only to commercial surrogacy, making it a crime for third parties to benefit from such arrangements.¹⁰³ Baby Cotten, the child in the center of the furor, became a ward of the court; however, the natural father and his wife were given custody and later allowed to take Baby Cotten out of Britain.¹⁰⁴ More recently, Great Britain has enacted comprehensive legislation regulating other aspects of assisted reproduction.¹⁰⁵

IV. ASSISTED CONCEPTION LEGISLATION IN THE UNITED STATES

At the time, Australia was becoming the first to adopt comprehensive regulations on assisted conception and surrogacy, as little statutory regulation or judicial declarations existed on any aspect of assisted conception in the United States. Most jurisdictions in the United States recognized artificial insemination by the woman's spouse or by a donor as a legitimate method for assisting in the re-

101. The Victoria Infertility Act's coverage was clearly directed to *in vitro* fertilization procedures (including embryo implantation) with scant comment given to artificial insemination. Victoria Infertility Act.

102. See Diana Brahams, *The Hasty British Ban on Commercial Surrogacy*, HASTINGS CENTER REP., Feb. 1987, at 16-18; see also *News Notes*, 13 FAM. L. REP. (BNA) 1249, 1260 (Mar. 31, 1987) (discussing how the surrogacy issue is being dealt with in Europe).

103. Brahams, *supra* note 102, at 17.

104. See also Latourette, *supra* note 19, at 81; Edward Yoxen, *Conflicting Concerns: The Political Context of Recent Embryo Research Policy in Britain*, in THE NEW REPRODUCTIVE TECHNOLOGIES 193 (Maureen McNeil et al. eds., 1990); BLANK, *supra* note 1, at 143.

105. See *infra* text accompanying notes 258-268 and 276-279 and 284 for a discussion of international developments on noncoital reproductive technologies and surrogacies and OTA REPORT, *supra* note 8, at 176. Recent action by France's Supreme Court has declared all surrogacy contracts illegal and unenforceable. *News Summary - International*, N.Y. TIMES, June 2, 1991, at 2. More recently, the French government has proposed a series of laws on medical technology and procedures that would restrict artificial insemination and ban the commercial promotion of surrogacy contracts. Sydney Rubin, *Separating Body, Technology*, LANSING ST. J., Mar. 27, 1992, at 7A.

productive process.¹⁰⁶ The main concerns evident in most statutory enactments were the elimination of semen donor liability¹⁰⁷ (unless the semen donor was the husband of the woman who was inseminated) and the declaration that the husband of the woman inseminated was the father of any child conceived by the process.¹⁰⁸

Once IVF became a well-tested and proven procedure, centers and programs sprang up throughout the United States to meet the demand for this new procedure to aid conception. Eventually more than 220 centers were soliciting patients for their IVF programs.¹⁰⁹

Embryo transfer (ET) procedures were also being utilized but on a more limited basis.¹¹⁰ Part of the hesitation on the use of IVF and ET procedures stemmed from the argument that state statutes prohibiting embryo transfers or embryo donations for non-therapeutic research or experimentation might apply to those procedures used in an attempt to initiate gestation.¹¹¹ Laws restricting fetal research often do so in connection with an abortion.¹¹² This restriction would technically include within its definition the flushing procedure used in an embryo transfer.¹¹³ Other state laws prohibit the selling or giving away of an embryo. These statutes may be subject to challenge on constitutional grounds¹¹⁴ or, similar to the rationale used in the *Surrogate Parenting* and *Baby Girl L.J.* cases discussed earlier, held to be inapplicable by viewing the different rationales of the adoption statutes in prohibiting compensation and the *in vitro* fertilization and embryo transfer procedures.¹¹⁵

V. LEGAL COMPLICATIONS OF SURROGACY ARRANGEMENTS

The use of surrogacy centers in the United States to join prospective couples with women willing to become surrogates presented a new set of legal problems. Several centers faced suit when costly arrangements turned sour. Various complainants alleged failure to provide adequate medical information on the surrogate, improper use of fertility drugs in attempts to induce fertilization, and failure to secure the surrogate's signature on the

106. Eighteen states have adopted the Uniform Parentage Act, 9B U.L.A. (Supp. 1993). Other states have adopted similar language on artificial insemination.

107. UNIF. PARENTAGE ACT § 5(a), 9B U.L.A. 295, 301 (Supp. 1993).

108. UNIF. PARENTAGE ACT § 5, 9B U.L.A. 302 (Supp. 1993).

109. Judith Gains, *A Scandal of Artificial Insemination*, N.Y. TIMES MAG., Oct. 7, 1990, at 23 (stating that 400 sperm banks were storing and/or selling sperm).

110. *Id.* at 23.

111. Andrews, *supra* note 15, at 397.

112. *Id.*

113. *Id.* at 398.

114. *Id.* at 400.

115. See *supra* text accompanying notes 80-85.

surrogacy contract prior to insemination.¹¹⁶ Complainants also alleged violations of the 13th and 14th Amendments.¹¹⁷ Moreover, concern was raised over the size of fees being charged by the surrogate brokers.¹¹⁸

While not all surrogacy arrangements end up in litigation or human tragedy,¹¹⁹ the drama connected with conflict over surrogacy contracts has captured and remained in the public eye. Perhaps the most sensational and certainly one of the most tragic surrogacy arrangements was entered into by Alexander Malahoff and Judy and Ray Stiver in 1982. Following the surrogacy agreement under which Judy Stiver would be artificially inseminated with Malahoff's semen, she became pregnant and gave birth to a son in January 1983.¹²⁰ The child was found to have microcephaly cytomegalovirus, a pre-birth virus which causes brain damage.¹²¹ Malahoff decided he did not want to take the child and later claimed the child was not his. In a scenario befitting the sensationalism of today's tabloids, the results of blood tests on Malahoff and Ray Stiver, Judy's husband, were announced on television's "Phil Donahue Show."¹²² The tests established that Ray Stiver, not Alexander Malahoff, was the genetic father of Baby Doe, later named Christopher Ray Stiver.¹²³ Malahoff filed subsequent lawsuits against the Stivers who in turn sued the doctor, lawyer, and psychiatrist involved in the surrogacy arrangement for not providing proper counseling.¹²⁴ The Stivers also sued Malahoff for invasion of privacy.¹²⁵

116. The United States Court of Appeals for the Sixth Circuit recently ruled that surrogate brokers, as well as doctors and lawyers, may be liable for negligence in a surrogacy contract setting if they fail to affirmatively act to protect the child, surrogate mother, and the contracting father from harm caused by the event. *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992). See also OTA REPORT, *supra* note 8, at 270.

117. *Doe v. Keane*, 658 F. Supp. 216 (W.D. Mich. 1987).

118. Six figure fees for surrogates have been used in advertisements. George J. Annas, *Making Babies Without Sex: The Law and the Profits*, 74 AM. J. PUB. HEALTH 1415, 1416 (1984).

119. Only 1% of surrogacy arrangements have resulted in custody battles but 75% of mothers putting babies up for adoption change their minds. Lori B. Andrews, *Surrogate Motherhood: A Challenge for Feminists*, 16 LAW, MED. & HEALTH CARE 74, 76 (1988). But see Rebecca Powers & Sheila G. Belloli, *The Baby Business*, THE DET. NEWS, Sept. 20, 1989, at 1E, 4E (reviewing the high economic and emotional costs involved in surrogacy arrangements).

120. John Schneider, *Stiver Family Takes it "Day by Day"*, LANSING ST. J., Jan. 6, 1985, at 1A.

121. *Id.*

122. *Id.*; see Andrews, *supra* note 33, at 56.

123. Andrews, *supra*, note 33, at 56. See Jean Moore, *Stivers Sue Attorneys, Doctors*, LANSING ST. J., Apr. 29, 1983, at 1A.

124. Andrews, *supra* note 33, at 56. See John Schneider, *Stivers File Multi-Million Damage Suit*, LANSING ST. J., Jan. 12, 1985, at 1A.

125. Moore, *supra* note 123, at 6A.

The spotlight on Michigan continued when, in 1986, national and local news media reported the birth of a baby girl to Shannon Boff, a surrogate mother.¹²⁶ The birth on April 13, 1986, was the first time a surrogate mother had conceived and delivered a child for a woman who had undergone a hysterectomy following a miscarriage some years earlier. The woman's egg was fertilized in an *in vitro* fertilization procedure, then implanted in the surrogate.¹²⁷

After blood and tissue tests confirmed the genetic parentage of the woman and her husband, Wayne County Circuit Judge Mari-
anne Battani issued a ruling that the New York couple were the legal biological parents of the unborn infant.¹²⁸ The woman providing the egg and her husband providing the sperm would be named as the parents on the child's birth certificate and, contrary to the process raised in *Doe v. Kelley* and *Syrkowski v. Appleyard*, the parents could avoid using the Michigan adoption process.¹²⁹

VI. PRE-BABY M LEGISLATION AND MODEL ACTS

The Malahoff-Stiver incident increased the concern over surrogacy arrangements already being expressed by proposed legislation in almost every state. However, by 1987 only four states had enacted laws dealing with surrogacy. An Arkansas statute enacted in 1985 stated that if a couple contracted with an unmarried surrogate, the couple and not the surrogate would be considered the legal parents.¹³⁰ Inferentially, if the surrogate were married, the surrogate and her husband would be considered the legal parents.

In 1986 Louisiana passed legislation declaring paid surrogacy contracts to be unenforceable.¹³¹ Nevada exempted surrogacy from its laws on adoption which prohibited payment of a fee to the mother.¹³²

Prior to the celebrated *Baby M* decision, the concern over lack of regulation for surrogacy arrangements and new reproductive technology resulted in several model acts being proposed. The Proposed Uniform Surrogate Parenting Act¹³³ dealt exclusively with

126. *Motherhood Minus Mom*, TIME, Apr. 28, 1986, at 39; Robert Ankeny, *Surrogate's Baby Makes History*, DET. NEWS, Apr. 17, 1989, at 1A, 12A; Steven Findlay, *Redefines What "Mother" Really Means*, USA TODAY, Apr. 17, 1986, at 1A, 2A.

127. Ankeny, *supra* note 126, at 12A.

128. M.B. Dillion, *Surrogate Birth Made Medical and Legal History*, REDFORD OBSERVER, May 1, 1986, at 1.

129. *Id.*

130. ARK. CODE ANN. § 9-10-201 (Michie 1987).

131. LA. REV. STAT. ANN. § 9-2713 (West 1992).

132. NEV. REV. STAT. § 127.287 (1987).

133. John J. Mandler, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283 (1985) [hereinafter *Proposed Uniform Surrogacy Act*].

the surrogacy issue in outlining appropriate procedures and limitations for surrogate arrangements.¹³⁴ One of the provisions in the Proposed Surrogate Act required the proper filing of documents for a surrogacy parenthood arrangement (including the surrogacy contract) prior to insemination of the surrogate.¹³⁵ The Act also required compliance with, and documentation of, counseling for both the natural father and his wife as well as for the surrogate mother and her husband.¹³⁶ Blood and tissue tests were proscribed to establish paternity of the child.¹³⁷

The Model Human Reproductive Technologies and Surrogacy Act¹³⁸ proposed in 1987 was a more ambitious undertaking, pursuing a number of issues related to *in vitro* fertilization, artificial insemination, and the collection and storage of human gametes and pre-embryos.¹³⁹ Child support and intestate issues were also covered.¹⁴⁰ All artificial insemination and *in vitro* fertilization procedures were to be performed under the auspices of the State Department of Health and would be preceded by extensive medical and nonmedical evaluations and counseling.¹⁴¹ Surrogacy arrangements were authorized but the Model Reproductive Act required judicial approval prior to the surrogate being impregnated.¹⁴² Regulations issued by the State Department of Health would govern the attempts at impregnation.¹⁴³ Although the Proposed Surrogacy Act was silent on the surrogate's right to terminate a surrogacy arrangement, the Model Reproductive Act gave the natural mother seventy-two hours after the child's birth to renounce the surrogacy agreement and keep the child.¹⁴⁴

Neither the Proposed Surrogacy Act nor the Model Reproductive Act precluded financial arrangements whereby the surrogate would receive compensation in addition to payment of reasonable expenses.¹⁴⁵ Judicial approval of the agreement prior to impregna-

134. *Id.*

135. *Id.* at 1322.

136. *Id.* at 1323-24.

137. *Id.* at 1328.

138. Randall P. Bezanson et al., *Model Human Reproductive Technologies and Surrogacy Act*, 72 IOWA L. REV. 943, 947 (1987) [hereinafter *Model Reproductive Act*].

139. *Id.* at 967-68, 997-98.

140. *Id.* at 963-66.

141. *Id.* at 967-72, 991-92.

142. *Id.* at 976-79.

143. *Model Reproductive Act*, *supra* note 138, at 973-74.

144. *Id.* at 980-85.

145. *Model Reproductive Act*, *supra* note 138, at 980-81 (allowing for a compensation fee to be put into an escrow account until the contract is completed or terminated); *Proposed Uniform Surrogacy Act*, *supra* note 133, at 1325-26 (allowing compensation of the surrogate, but limiting such compensation to \$25,000).

tion attempts would operate as a control mechanism over the amount of the compensation to be paid the surrogate, assuring the fee arrangement would meet the test of reasonableness.

VII. THE *BABY M* DECISION

The center stage for surrogacy contracts in the United States shifted from Michigan to New Jersey in 1987 with *In re Baby M*.¹⁴⁶ William Stern, the natural father of Baby M, and his wife brought suit against Mary Beth Whitehead, the surrogate mother, to enforce a surrogacy contract entered into with her and her husband, Richard. In 1979 Mrs. Stern had been diagnosed as having a mild case of multiple sclerosis, a condition which could be exacerbated by pregnancy. The Sterns felt this risk to be too great and they turned to other options for parenthood. Inquiries into *in vitro* fertilization were met with discouraging news.¹⁴⁷ After reading an ad from The Infertility Center of New York,¹⁴⁸ the Sterns decided to attempt a surrogacy arrangement.

The Sterns and the Whiteheads were brought together by The Infertility Center as part of the Sterns attempt to find a surrogate. After the contract was signed, Mary Beth Whitehead was impregnated with William Stern's semen and became pregnant in July 1985. She later delivered a healthy baby girl on March 27, 1986.¹⁴⁹ Mary Beth Whitehead turned the baby over to the Sterns but later requested the baby be returned to her for a week. The Sterns complied with this request and allowed Mary Beth to keep Baby M (for Melissa) for that time.¹⁵⁰ She then decided to keep the baby and refused to return Baby M to the Sterns, who then sued to enforce the contract.¹⁵¹ The Whiteheads fled New Jersey with Baby M and went to Florida. Several months later Baby M was found living with relatives of the Whiteheads and was taken into custody.¹⁵² The baby was returned to New Jersey through court order. In the subsequent litigation Judge Sokow rejected arguments attacking the validity of the surrogacy contract¹⁵³ and ruled for the Sterns in

146. 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

147. *Id.* at 1141.

148. The Infertility Center at New York was founded by Noel Keane. KEANE & BREO, *supra* note 58, at 27.

149. *In re Baby M*, 525 A.2d at 1144.

150. *Id.* at 1144.

151. *Id.* at 1145.

152. *Id.* at 1146.

153. One of the arguments by the Whiteheads claimed that the concept of surrogacy was contrary to New Jersey's adoption laws. Judge Sokow rejected this position: "It is this court's view that the laws of adoption in this state do not apply to surrogacy contracts." *Id.* at 1157. This was the identical position taken in *Surrogate Parenting Assoc., Inc. v. Commonwealth*, 704 S.W.2d 209 (Ky.

holding the contract to be enforceable consistent with the best interests of the child.¹⁵⁴

On appeal, the Supreme Court of New Jersey unanimously reversed in a sharply worded decision, invalidating the contract and finding the agreement to be in conflict with New Jersey law and public policy.¹⁵⁵ In reversing Judge Sokow's ruling, the New Jersey Supreme Court did not technically rule on all surrogacy arrangements,¹⁵⁶ but, rather, found the payment of money to a surrogate mother to be "illegal, perhaps criminal, and potentially degrading to women."¹⁵⁷

The statutory challenge to the Whitehead-Stern surrogacy arrangement focused on the contract's conflict with New Jersey adoption laws prohibiting the use of money in connection with an adoption.¹⁵⁸ The court also found the contract to be in conflict with New Jersey adoption laws requiring proof of parental unfitness or abandonment prior to termination of parental rights or approval of adoption.¹⁵⁹ Finally, the court further held the contract to be in violation of other adoption laws allowing the surrender of custody in a private placement adoption to be revocable.¹⁶⁰

The question has been raised whether laws enacted decades ago to deal with the issue of adoption should now be used to resolve issues on medical procedures and contractual arrangements unknown and not possible when the adoption laws were passed.¹⁶¹ Certainly, the earlier *Surrogate Parenting* case in Kentucky and the *Baby Girl L.J.* decision in New York rejected this analogy and deemed the issue to be one for the legislature to resolve.¹⁶² The

1986), and *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813 (N.Y. Surrogate's Ct. 1986), the only two judicial decisions in the U.S. with precedential value which had directly ruled on surrogacy contracts previous to *Baby M.*

154. *In re Baby M.*, 525 A.2d at 1170.

155. *Id.* at 1227.

156. *See id.* at 1235 ("We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a 'surrogate' mother, provided that she is not subject to a binding agreement to surrender her child."). *See also* John Dunne & Gregory Serio, *Surrogate Parenting After Baby M: The Ball Moves to the Legislature's Court*, 4 *TOURO L. REV.* 161, 163 (1988) (stating that "[t]he court's holdings constitute the strongest critiques to date that any body—legislative, judicial, or other—has made of the practice").

157. *In re Baby M.*, 537 A.2d at 1234.

158. *Id.* at 1240.

159. *Id.* at 1242-44.

160. *Id.* at 1244-45.

161. *See* Noel P. Keane, *Legal Problems of Surrogate Motherhood*, 1980 *S. ILL. U. L.J.* 147, 152 (1980) ("Although the evident purpose of these [adoption] statutes is to prevent the 'sale' of infants as if they were property, their language is sufficiently broad-or overbroad-to forbid compensation for a surrogate mother.").

162. *See supra* notes 80-88 and accompanying text for a discussion on the *Surrogate Parenting* and *Baby Girl L.J.* cases.

New Jersey Supreme Court, on the other hand, felt the analogy to be persuasive in deciding the *Baby M* decision.¹⁶³ Consistent with the state's *parens patriae* role in protecting the legally voiceless child, Baby M, the court had no trouble in determining the surrogacy arrangement to be contrary to the state's public policy as found in the New Jersey adoption laws.¹⁶⁴

VIII. POST-BABY M LEGISLATION

For all the attention given to the *Baby M* sequel from its inception,¹⁶⁵ the decision ultimately did not generate the immediate rash of litigation or statutory reaction as had been anticipated, although it did stir the legislative waters in a number of states. Legislation on surrogacy arrangements was already in the hopper in most states prior to *Baby M* and, in some instances, the New Jersey decision could be considered the impetus for passage of bills restricting or avoiding surrogacy contracts. Arizona,¹⁶⁶ Indiana,¹⁶⁷ Kentucky,¹⁶⁸ Nebraska,¹⁶⁹ and North Dakota¹⁷⁰ adopted fairly simple legislation

163. *In re Baby M*, 537 A.2d at 1240-41.

164. *Id.* at 1246. For a copy of the contract between the Sterns, Whiteheads, and the Infertility Center included in the New Jersey Supreme Court decision, see *id.* at 1265-72.

The trial court decision of Judge Sokow and the New Jersey Supreme Court decision by Justice Wilentz have and will no doubt continue to receive either praise or criticism from various legal commentators. See, e.g., Latourette, *supra* note 19, at 54 (referring to the opinion of Justice Wilentz as "eloquent"); Posner, *supra* note 19, at 29 (stating the New Jersey Supreme Court's decision in *Baby M* was "nothing short of an intellectual disaster"); Majorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 299 (stating that "[t]he [New Jersey Supreme Court] failed to appreciate in this setting what it has so richly illuminated regarding death: technological change requires new choices and responsibilities."); Gary N. Skoloff & Edward J. O'Donnell, *Baby M: A Disquieting Decision*, 18 SETON HALL L. REV. 827, 829 (1988) (stating that "[t]he refusal to enforce a surrogate contract is unduly paternalistic and certainly sexist in its refusal to acknowledge the decisional autonomy of the female participant to the surrogate arrangement, namely the surrogate mother."). See also Annas, *supra* note 20, at 21-24 (referring to Justice Wilentz's opinion); George J. Annas, *Baby M: Babies (and Justice) for Sale*, HASTINGS CENTER REP., June 1987, at 13-15.

165. By early 1988, 100 bills relating to surrogacy had been introduced in state and federal legislatures. HUM. RTS. L. REP. 199 (May-June 1988). For a discussion of these proposed state laws, see Lori B. Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, HASTINGS CENTER REP. Oct.-Nov. 1987, at 31-41. Federal legislation was introduced in 1989 by Rep. Thomas Luken (D-Ohio) and Rep. Robert Dornam (R-Cal.) that would have nullified surrogate arrangements and criminalized the acts of surrogate mothers. See H.R. 275, 101st Cong., 1st Sess. (1989); H.R. 576, 101st Cong., 1st Sess. (1989).

166. ARIZ. REV. STAT. ANN. § 25-218 (1991).

167. IND. CODE ANN. § 31-8-2-1 (West Supp. 1992).

168. KY. REV. STAT. ANN. § 17-199.590 (Baldwin 1993).

169. NEB. REV. STAT. §§ 25-21,200 (1989).

170. N.D. CENT. CODE § 14-18-05 (1991).

voiding most surrogacy contracts or declaring such contracts to be unenforceable and contrary to public policy. New Hampshire,¹⁷¹ Utah¹⁷² and Washington¹⁷³ and, most recently, New York¹⁷⁴ attached misdemeanor criminal sanctions as well. These sanctions applied to parties or legal entities involved in surrogacy contracts for compensation or profit.¹⁷⁵ Perhaps the most restrictive legislation was passed in Michigan¹⁷⁶ and New York,¹⁷⁷ which approved bills that attached misdemeanor and felony criminal sanctions to parties involved in surrogacy contracts for compensation.¹⁷⁸

Not all legislation negated surrogacy arrangements. A West Virginia statute allowed the payment or receipt of fees and expenses in surrogate mother agreements.¹⁷⁹ Florida enacted legislation to regulate "pre-planned adoption agreements."¹⁸⁰ Key elements of the Florida legislation required prior judicial approval of the arrangement and gave the volunteer surrogate mother the right to rescind the contract within seven days after birth.¹⁸¹ Payment for reasonable living expenses was allowed but no other compensation would be permitted. No payment could be considered as compensation for the termination of parental rights.¹⁸² The Florida Act further prohibited the payment of fees to find volunteer mothers or for matching volunteers with intended parents.¹⁸³ The State of Kentucky enacted legislation permitting surrogacy contracts but compensation for termination of parental rights is prohibited.¹⁸⁴ Go-betweens cannot be compensated for their services and any contract for such compensation is declared void.¹⁸⁵ Iowa exempted surrogate mother arrangements from a prior statute declaring the purchase or sale of an individual to be a felony.¹⁸⁶

Shortly after the New Jersey Supreme Court issued its decision in the *Baby M* case, the Family Law Section of the American Bar

171. N.H. REV. STAT. ANN. § 168-B (Supp. 1992).

172. UTAH CODE ANN. § 76-7-204 (Supp. 1992).

173. WASH. REV. CODE ANN. § 26.26.240 (West Supp. 1992).

174. Surrogate Parenting Contracts Act, N.Y. DOM. REL. LAW §§ 121-124 (McKinney 1993).

175. N.H. REV. STAT. ANN. § 168-B; UTAH CODE ANN. § 76-7-204(1); WASH. REV. CODE ANN. § 26.26.250. See also VA. CODE ANN. § 20-165A (Michie 1992).

176. MICH. COMP. LAWS ANN. § 722.853 (West Supp. 1991).

177. Surrogate Parenting Contracts Act, N.Y. DOM. REL. LAW §§ 121-124 (McKinney 1993).

178. MICH. COMP. LAWS ANN. § 722.859 (West Supp. 1991).

179. W. VA. CODE § 46-4-16 (Supp. 1990).

180. FLA. STAT. ANN. § 6-63.212 (West Supp. 1993).

181. *Id.* § 63.212(1)(i)(2a).

182. *Id.* § 63.212(1)(i).

183. *Id.* § 63.212(1)(i)(5).

184. KY. REV. STAT. ANN. § 17-199.590 (Baldwin 1993).

185. *Id.*

186. IOWA CODE ANN. § 710.11 (West Supp. 1993).

Association recommended a Model Act to regulate surrogacy contracts.¹⁸⁷ The ABA Model Surrogacy Act attempted "to meet the challenge posed by the New Jersey Supreme Court in *In Re Baby M*—the enactment of legislation facilitating the use of new reproductive technologies by infertile couples, and minimalization of any risk of abuse to the participants of the arrangement, subject, of course, to constitutional constraints."¹⁸⁸ The ABA Model Surrogacy Act would have required extensive medical and legal counseling.¹⁸⁹ Licensed surrogacy agencies would provide counseling and insure that required examinations were conducted.¹⁹⁰ The natural mother was not given any period of grace within which to renounce the contract and keep the child. Compensation to the surrogate was permitted but not to exceed \$12,500.¹⁹¹ Thus, even in the aftermath of the New Jersey Supreme Court's broad-based attack on paid surrogacy arrangements by declaring such contracts to be void, the ABA Model Surrogacy Act included a provision allowing substantial compensation as part of its recommendations for regulating, rather than condemning, surrogacy arrangements.¹⁹²

The ABA Model Surrogacy Act was presented to the ABA House of Delegates at its annual meeting in 1989 and was rejected.¹⁹³ In its stead, the House approved an alternative act—The Uniform Status of Children of Assisted Conception Act (Uniform Status Act),¹⁹⁴ which had been promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) the preceding August.¹⁹⁵ The Prefatory Note to the Uniform Act states that the "Act is not a surrogacy regulating act nor was it intended to be." Nevertheless, the Act did make use of "such limited and monitored surrogacy procedures as might be necessary to accomplish its mandate," which was to draft a child oriented act "to benefit children born as a result of this modern new miracle."¹⁹⁶ The Act also

187. The Model Surrogacy Act received the approval of the Council of the American Bar Association's Section of Family Law in January 1988. See *Draft ABA Model Surrogacy Act*, 22 FAM. L. Q. 123, 123-43 (1988).

188. *Id.*

189. *Id.* at 127-30 (§ 4).

190. *Id.* at 140-41 (§ 16).

191. *Id.* at 126 (§ 3(b)).

192. See *Draft ABA Model Surrogacy Act*, *supra* note 187, at 126 (§ 3(a)) (stating that "[a]n agreement for surrogacy in compliance with section 5 below shall be valid as a matter of public policy").

193. Stephanie Goldberg, *Surrogacy Act Passed*, 75 A.B.A. J. 128 (1989).

194. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §§ 1-16, 9B U.L.A. 136-50 (Supp. 1993) [hereinafter UNIF. STATUS ACT].

195. Goldberg, *supra* note 193, at 128.

196. UNIF. STATUS ACT (Prefatory Note), 9B U.L.A. 136. For a criticism of the Uniform Status Act for failure to take a more positive and comprehensive position on surrogacy, see Mimi Yoon, Note, *The Uniform Status of Children of Assisted Conception Act: Does It Protect the Best Interests of the Child in a Surrogate Arrangement?* 16 AM. J.L. & MED. 525, 552 (1990).

encompassed artificial insemination and *in vitro* fertilization procedures except those involving husband and wife only.¹⁹⁷

Alternative optional provisions on surrogacy arrangements were included within the Uniform Status Act, thus avoiding the political debate still going on in many states. Alternative A recognized the right of parties to enter into surrogacy contracts, subject to advance judicial approval.¹⁹⁸ Court approval was necessary prior to the initiation of artificial insemination or *in vitro* fertilization procedures, whichever process the parties had selected.¹⁹⁹ One of the required findings by the court before approving a surrogacy arrangement was that "the intended mother is unable to bear a child or is unable to do so at least without unreasonable risk to the child or the physical or mental health of the intended mother or child."²⁰⁰ While the earlier Model Surrogacy Act rejected by the House of Delegates had not allowed the natural mother to disavow the contract and retain the child, the Uniform Status Act permitted a surrogate whose egg had been fertilized (the biological mother) to file a written notice for termination of the agreement within 180 days after the last insemination.²⁰¹

If the ovum had been provided by a third party, either the natural father's spouse or a donor, such as through an IVF, GIFT or ZIFT procedure,²⁰² the surrogate's right of termination would not apply. Also, any surrogacy agreement could be terminated prior to the surrogate's pregnancy.²⁰³

The 180 day "rescission" provision in the Uniform Status Act was essentially a compromise to avoid a conflict posed by earlier

197. UNIF. STATUS ACT § 1(1), 9B U.L.A. 138. Under section 1(1), an "assisted conception" means "a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means of other than sexual intercourse or (ii) implanting an embryo, but the term does not include pregnancy of a wife resulting from fertilizing her egg with sperm of her husband." *Id.*

198. *Id.* § 5(Alt. B), 9B U.L.A. 141. "If the agreement is not approved by the court under Section 6 *before conception* the agreement is void and the surrogate is the mother of the resulting child and the surrogate's husband, if a party to the agreement, is the father of the child." *Id.* (emphasis added).

199. Extensive judicial intervention was also articulated in the rejected Model Surrogacy Act. Contrary to the Uniform Status Act's requirement of judicial pre-authorization of assisted conception, however, the Model Surrogacy Act would have provided for a judicial hearing on a certificate of parentage petition within one year after the child was born. See *Draft ABA Model Surrogacy Act*, *supra* note 187, at 135-39 (§§ 8, 9).

200. UNIF. STATUS ACT § 6(b)(2), 9B U.L.A. 142.

201. *Id.* § 7(b), 9B U.L.A. 145.

202. See *supra* notes 13-18 for a discussion of these medical procedures.

203. UNIF. STATUS ACT § 7(a), 9B U.L.A. 145. See the comment to section 7 for a discussion of the rationale behind having a period for recanting the surrogacy arrangement and the selection of 180 days as the time period within which the genetic surrogate could terminate the agreement. *Id.* § 7 commentary, 9B U.L.A. 145.

recommendations. One position argued that a contract of this nature, having required extensive counseling, informed consent, and court approval prior to insemination, should not need a right of rescission.²⁰⁴ The contrary view would emulate the adoption model in allowing the mother a limited time after birth of her child in which to change her mind and keep her child.²⁰⁵ Also, Alternative A would allow payment to the surrogate beyond actual expenses involved in the pregnancy and birth.²⁰⁶

Alternative B of the Uniform Status Act declared all surrogacy contracts to be void and unenforceable without regard to whether the arrangement was for a fee or merely altruistic.²⁰⁷ However, no criminal sanctions were imposed on any of the parties involved in the unenforceable contract. In fact, a provision was made in Alternative B to identify the parentage of any child born in a surrogacy arrangement, declaring the surrogate to be the mother of the child²⁰⁸ and her husband, if a party to the void agreement, to be the father of the child.²⁰⁹

North Dakota is the only state to date responding favorably to the Uniform Status Act. North Dakota adopted Alternative B which declares that any "agreement in which a woman agrees to become a surrogate or to relinquish her rights and duties as parent of a child thereafter conceived through assisted conception is void."²¹⁰ The surrogate's husband is declared the father of the child if he was a party to the void agreement. Otherwise, paternity is governed by the provisions of the Uniform Parentage Act.²¹¹

Virginia recently approved legislation which, similar to Alternative A of the Uniform Status Act, would allow, but highly regulate, surrogacy contracts.²¹² Contrary to Alternative A, however, the Virginia legislation prohibits the payment of fees other than expenses to the surrogate. Any provision calling for non-expenses compensation would be void.²¹³

204. The rejected Model Surrogacy Act did not allow termination by the surrogate following conception. See *Draft ABA Model Surrogacy Act*, *supra* note 187, at 134 (§ 6(f)). Under section 6(f), the surrogate has an option to retain the child if both the intended parents died before taking physical custody of the child. *Id.* Specific performance after the child was born was given as a remedy under the Model Surrogacy Act. *Id.* at 133 (§ 6(c)).

205. UNIF. STATUS ACT § 7 commentary, 9B U.L.A. 145-46.

206. *Id.* § 9(a), 9B U.L.A. 146.

207. *Id.* § 5(Alt. B), 9B U.L.A. 141.

208. *Id.*

209. *Id.*

210. N.D. CENT. CODE § 14-18-05 (1991).

211. UNIF. PARENTAGE ACT §§ 1-16, 9B U.L.A. 136-50 (Supp. 1993).

212. VA. CODE ANN. §§ 20-156 to -165 (Michie 1992).

213. *Id.* § 20-16(A). Compare *id.* § 20-16(A)(disallowing compensation for non-expenses) with UNIF. STATUS ACT § 9(a), 9B U.L.A. 99 (allowing a court approved agreement to provide for compensation beyond expenses).

The approval of the Uniform Status Act by the American Bar Association and its subsequent adoption in North Dakota poses a significant problem. The Uniform Status Act does not respond to the numerous problems and consequences of assisted reproduction and surrogacy. Indeed, the Prefatory Note to the Uniform Status Act states that the Act "is not a surrogacy regulatory act nor was it intended to be."²¹⁴ However, state legislatures seeking a quick response to the surrogacy dilemma may well treat the Uniform Status Act as "the answer" and never go on to resolve the many related issues.

In addition to the recent legislation in North Dakota voiding surrogate contracts, two other states, New Hampshire and Virginia, have approved legislation expanding the statutory regulation of assisted conception and surrogacy. In adopting House Bill 1426 in April of 1990,²¹⁵ New Hampshire clearly recognized the interrelationship of procedures facilitating reproduction and arrangements for surrogacy by including within the Act provisions on artificial insemination, *in vitro* fertilization,²¹⁶ pre-embryo transfer,²¹⁷ and surrogacy arrangements.²¹⁸ Moreover, rules for determining parentage are prescribed where reproductive and surrogacy arrangements are utilized.²¹⁹ Regulations on support obligations and for succession are included to cover other problematic areas.²²⁰

The statutory provisions on artificial insemination and *in vitro* fertilization under the New Hampshire statute require medical evaluation and demonstration of "medical acceptability" of any potential sperm donor.²²¹ The sperm donor is liable for support of the child only if an agreement to that effect has been made in writing.²²² Pre-embryo transfer and *in vitro* fertilization procedures are subject to public health service rules. Counseling of both the woman who will receive *in vitro* fertilization and her husband is required.²²³

Surrogacy arrangements are extensively regulated and are legal only if in accord with the New Hampshire statute. The arrangement must be judicially authorized prior to the inception of

214. N.D. CENT. CODE § 14-18-05 (1991).

215. N.H. REV. STAT. ANN. §§ 161-A to 168-B:32 (Supp. 1992).

216. *Id.* §§ 168-B:1, 13, 14, 15.

217. *Id.*

218. *Id.* §§ 168-B:16-28.

219. *Id.* §§ 168-B:2-9.

220. See N.H. STAT. ANN. § 168-B:8 for support provisions. See *id.* § 168-B:9 for provisions on intestate and testate succession.

221. *Id.* § 168-B:10.

222. *Id.* § 168-B:11.

223. *Id.* § 168-B:18.

attempts to impregnate the surrogate.²²⁴ Medical and nonmedical evaluations and counseling of the parties are also required.²²⁵ Solicitation or the inducement of prospective surrogates or intended parents for compensation is prohibited and carries a misdemeanor penalty under the statute.²²⁶

Although donation of either male or female gametes is allowed in the reproductive procedures, donation of both sperm and ovum in a surrogacy arrangement is not permitted under the New Hampshire statute. One of the intended parents must provide a gamete to be used in impregnating the surrogate.²²⁷

After a petition has been filed by the parties for a pre-authorization hearing, the surrogacy arrangement will be reviewed by the court, and if the contract and other documents are found to be in compliance with the statute, an order validating the arrangement will be issued.²²⁸ One of the required findings for such validation is that the surrogacy contract is in the best interest of the child.²²⁹

Fees to be paid to the surrogate are limited to pregnancy and birth related medical expenses. Actual lost wages are included only if the attending physician has recommended the surrogate abstain from employment during the pregnancy.²³⁰ Also, the cost of insurance during the term of the pregnancy, legal fees, and the evaluations and counseling expenses are authorized payments under the statute.²³¹

Judicial authorization of the surrogacy arrangement followed by subsequent pregnancy and birth do not guarantee that the intended parents will receive custody of the child. A key requirement of the surrogacy contract is a provision allowing the surrogate to keep the child if she gives proper notice of her intention to do so prior to seventy-two hours after the child is born.²³²

The New Hampshire statute specifies the damages available for breach of the surrogacy contract, which are basically limited to recovery of fees or expenses already incurred under the contract.²³³ The major exception would involve an action to enforce a child support provision of the contract.

224. *Id.* §§ 168-B:20-24.

225. N.H. STAT. ANN. §§ 168-B:18-19 (Supp. 1992).

226. *Id.* §§ 168-B:16(IV), 30.

227. *Id.* § 168-B:17(III).

228. *Id.* § 168-B:23(III).

229. *Id.* § 168-B:23(III)(d).

230. N.H. STAT. ANN. § 168-B:25(V) (Supp. 1992).

231. *Id.* § 168-B:25(V).

232. *Id.* § 168-B:25(IV).

233. *Id.* § 168-B:28(II)(a)(b).

A broad scope of immunity is given under the statute. Any person acting non-negligently is shielded from criminal or civil liability.²³⁴ In addition, health care providers are similarly protected for actions taken under the statutory framework provided their action is "in accord with reasonable medical standards."²³⁵

At the time of its enactment in 1990, the New Hampshire bill was the most extensive state legislation taking a comprehensive approach to assisted conception and surrogacy. It is reasonable to assume that the prohibition of any compensation beyond expenses, the criminalization of attempts to solicit parties for a compensated surrogacy arrangement, and the right of the surrogate to change her mind and keep the child will combine to reduce in dramatic fashion the situations under which surrogacy might be considered. Viewed in its entirety without passing judgment on the restrictive surrogacy component, the statute should be considered in a positive light. The legislature has clearly recognized and given credence to both the relationship between conception medical procedures and conception-fueled contract arrangements, and the need to regulate the entire process. Of particular importance to parties involved in assisted conception procedures are those provisions calling for extensive evaluation and counseling of all parties.²³⁶ Complications and disappointments may still occur, but the statute has plugged several of the most obvious gaps in the patchwork quilt of assisted conception and surrogacy statutes.

The most recent comprehensive state action took place in 1991 when Virginia approved legislation on the status of children of assisted conception.²³⁷ The statutory recognition of medical sophistication and technology in assisted conception is immediately noted in the legislation by reference to the listing of procedures and parties involved in the technology.²³⁸ The term "assisted conception" identifies "a pregnancy resulting from the insemination of her ovum using her husband's sperm, whether *in vivo* or *in vitro*, which completely or partially replaces sexual intercourse as the means of conception."²³⁹ This encompassing language takes into account not merely current technology but also responds prospectively to other medical technology not yet in use.

234. *Id.* § 168-B:29(I).

235. N.H. STAT. ANN. § 168-B:29(II) (Supp. 1992).

236. *Id.* §§ 168-B:13, 18, 19.

237. VA. CODE ANN. §§ 20-156 to -165 (Michie 1992). The New York legislation is chronologically the most recent but its provisions are more consistent with those statutes dealing only with surrogacy. See N.Y. DOM. REL. LAW §§ 121-24 (McKinney 1993).

238. VA. CODE ANN. § 20-156 (Michie 1992).

239. *Id.*

The Virginia statute establishes rules of parentage for any child resulting from assisted conception, including situations on death of a spouse, divorce and surrogacy contracts.²⁴⁰ In similar fashion to the New Hampshire bill, the Virginia Act requires a genetic relationship between one of the intended parents and the child to be gestated by a surrogate.²⁴¹ If neither intended parent is genetically related, then the surrogate and her husband (if a party to the surrogate contract) are declared to be the mother and father of the child.²⁴² The intended parents could then obtain parental rights only through state adoption procedures.

A unique feature of the Virginia legislation recognizes and makes allowance for two different approaches to surrogacy arrangements. The first approach, similar to that found in other states or in model legislation, accepts the court-approved arrangement *prior* to the beginning of attempts at conception. All parties to the contract are required to undergo physical examinations, psychological evaluations, and counseling.²⁴³ The court would review the surrogacy contract and other documentation for compliance with the statute.²⁴⁴ Among the required findings by the court is that the agreement "would not be substantially detrimental to the interests of any of the affected persons."²⁴⁵ This approach is considerably broader than that found in the New Hampshire legislation which refers only to the best interest of the child.²⁴⁶

Similar to a provision of the Uniform Act on the Status of Children of Assisted Conception, the surrogate is allowed the right to terminate the surrogacy arrangement "within 180 days after the last performance of any assisted conception."²⁴⁷

If prior court approval was not sought by the parties, the surrogacy contract may still be enforceable if the surrogate relinquished her parental rights to the intended parents at least 25 days *after* the child is born.²⁴⁸ Any provision in the contract calling for compensation of the surrogate is void and unenforceable but the contract would seemingly remain enforceable.²⁴⁹

Criminal penalties are included for parties arranging or inducing others to enter into a surrogacy contract for compensation.²⁵⁰ A

240. *Id.* § 20-158.

241. *Id.*

242. *Id.* § 20-158(E)(2).

243. VA. CODE ANN. §§ 20-159 to -160 (Michie 1992).

244. *Id.*

245. *Id.* § 20-160.

246. N.H. REV. STAT. ANN. § 168-B:23 (Supp. 1992).

247. VA. CODE ANN. § 20-161(B) (Michie 1992).

248. *Id.* § 20-162(A)(3).

249. *Id.* § 20-162(A).

250. *Id.* § 20-165.

unique feature allows for a penalty of three times the fee received against any broker facilitating the surrogacy contract.²⁵¹ Further, the Virginia enactment also included extensive provisions for the issuance of birth certificates in a variety of circumstances, including those specifically involving assisted conception and surrogacy.²⁵²

While the Virginia legislation artfully reflects the advances of medical technology on assisted conception and offers a before or after choice for non-compensated surrogacy, the bill is essentially a more sophisticated version of Alternative A in the Uniform Status Act.²⁵³ As such, it may also be viewed as a panacea for the entire range of legal issues relating to facilitating reproduction and surrogacy.

What conclusions are to be drawn from the current state of affairs on surrogacy agreements? The absence of legislation on surrogacy arrangements in most jurisdictions, coupled with the lack of uniformity of treatment in those states which have enacted bills on surrogacy, could lead to several different conclusions. The absence of legislation in a given jurisdiction may be used to argue for a conclusion that the state should not be involved in surrogacy arrangements at all and that the matter is simply one of private contracts. However, it is highly doubtful any court faced with a surrogacy case in a jurisdiction lacking statutory coverage would accept such an inference of intent in this simplistic approach. Certainly the *Baby M* court did not respond in that fashion.²⁵⁴ Even with such an argument, a pervasive counter-argument can be asserted for having the state regulate surrogacy arrangements only to the extent necessary to insure the best interests and protection of any child born as a result of the surrogacy arrangement.²⁵⁵

Perhaps this was the view forming the basis for the Uniform Status Act. However, intervention to protect the child without serious impact on other parties to the transaction is extremely difficult if not impossible.²⁵⁶ Moreover, the brief but highly publicized his-

251. *Id.*

252. VA. CODE ANN. §§ 20-160, 20-162, 32.1-261 (Michie 1992).

253. UNIF. STATUS ACT §§ 1-16, 9B U.L.A. 136-50 (Supp. 1993).

254. The New Jersey Supreme Court recognized the role of the legislature in promulgating laws on surrogacy but did not hesitate in declaring the *Baby M* transaction void and contrary to the state's public policy. See *supra* text accompanying notes 155-157 for a discussion of the court's response.

255. See Yoon, *supra* note 196, for a discussion of the state regulation of surrogacy arrangements.

256. The physical, emotional, psychological, and economic involvement of the parties to a surrogacy arrangement exist long before the child's birth and continue long after the matter is resolved, whomever receives custody of the child. The Virginia statute's reference to a surrogacy agreement that "would not be substantially detrimental to the interests of any of the affected persons" is demonstrable recognition of the potential for both great joy and devastating pain in a surrogacy arrangement. VA. CODE ANN. § 620-160 (Michie 1992).

tory of surrogacy contracts presents ample evidence of the need for at least minimum regulation; the sole remaining issues should deal with the form and degree of that regulation.

Unfortunately, the few judicial decisions on surrogacy present heart-wrenching individual situations pushed into the public lime-light where the court must attempt in Solomon-like fashion to resolve a problem where there is no completely "just" solution for all parties. The statement "[h]ard cases make bad law"²⁵⁷ could hardly be more appropriate than in these cases.

IX. ANALYSIS OF SURROGACY DECISIONS AND LEGISLATION

An analysis of the limited number of decisions on surrogacy combined with the enacted and proposed legislation in the United States, England, and Australia produces a number of similar characteristics. First, although several legislative enactments declare all surrogacy arrangements to be void,²⁵⁸ the theme of the *Baby M* decision and most legislation in the United States strikes at the commercial and financial aspects of the arrangement.²⁵⁹ This same concern is found in Australia²⁶⁰ and Great Britain statutes.²⁶¹ Accepting the premise for the moment that only commercial arrangements are to be voided or made criminal, then altruistic surrogacy arrangements are not to be condemned, but are they to be ignored?²⁶² Any surrogacy arrangement has as its basic purpose the bringing of human life into existence, a life which otherwise would not be created. The impact upon all consenting parties is obviously critical and, if the arrangement falls apart for one or more of a variety of reasons, the state may be forced to become a reluctant participant in the aftermath. Guidelines must be enacted to provide basic areas of needed protection for all of the individuals involved in the non-commercial surrogacy. Parties to such an altruistic arrangement do not lose the need for counseling and medical testing merely because the surrogate is not being compensated for her

257. *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1903) (Holmes, J., dissenting).

258. See *supra* text accompanying notes 166-170 for a discussion of states declaring surrogacy arrangements to be void.

259. The *Baby M* decision by the New Jersey Supreme Court clearly accepted non-compensated surrogacy arrangements. *In re Baby M*, 525 A.2d 1228, 1235 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

260. See *supra* notes 92-98 and 103 and accompanying text for a discussion of some of the Australian and Great Britain statutes.

261. The Surrogacy Arrangement Act of 1985 referred to commercial surrogacy in criminalizing such activities. Brahms, *supra* note 102, at 17.

262. Considering the number of proposed bills on surrogacy, such a question seems rhetorical. See *supra* note 165 for the number of bills introduced by 1988.

role.²⁶³

The second and perhaps even more critical similarity in surrogacy legislation is found in the lack of any reference to issues concerning the child born in a surrogacy arrangement.²⁶⁴ Legislation or judicial decisions declaring the surrogacy contract to be void or criminalizing the transaction will no doubt deter most potential surrogacy participants, but others may still pursue such activities, whether for compensation or not. Provision must be made to clearly identify issues of paternity and support for any child born as a result of a surrogacy arrangement. The Uniform Status Act does deal with issues affecting the child but does so without connecting into the other aspects of assisted conception.²⁶⁵

The third similarity, and unfortunately so, is that the majority of recent legislation refers only to surrogate mother contracts and does not speak to the many facets of artificial insemination, *in vitro* fertilization or embryo transfer.²⁶⁶ Admittedly, procedures for assisting reproduction deal with medical technology rather than the more legalistic issues in surrogacy. This differentiation is sufficiently important so that issues relating to assisted conception could

263. One may argue that the altruistic nature of the arrangement necessitates an overly protective attitude toward the prospective surrogate because non-commercial surrogacy arrangements typically involve a close relative of the woman incapable of bearing a child. Removal of the compensation factor does not remove all risks, even if appropriate testing and counseling are present. The psychological problems in severing the child from the birthing mother are still present. See Carvey, *supra* note 6, at 1212; John A. Wilson, *Surrogate Motherhood — A Form of Maternal Prostitution — Merits Blanket Condemnation*, N.Y. ST. B.J., Dec. 1988, at 32.; *Woman Gives Birth to Grandchildren*, DET. NEWS, Oct. 13, 1991, at 7A (discussing non-commercial arrangements). The birth certificate will list the surrogate's daughter and son-in-law, the genetic parents, as the legal parents. *Woman Gives Birth to Grandchildren*, *supra*, at 7A. A similar scenario was played out in South Africa where the grandmother acted as a surrogate for her daughter. *News Summary-International*, N.Y. TIMES, Apr. 9, 1989, at A1.

The reverse role had a daughter carrying her mother's egg (fertilized by her stepfather's sperm) and giving birth to her genetic half-sister. See *Woman Bear's Mother's Child*, ST. PETERSBURG TIMES, Oct. 30, 1988, at 16A (discussing a mother in Italy acting as a surrogate mother for her own mother's child); Lori B. Andrews, *When Baby's Mother is Also Grandma, and Sister—Commentary*, HASTINGS CENTER REP., Oct. 1985, at 29-30, reprinted in CASES IN BIOETHICS—SELECTIONS FROM THE HASTINGS CENTER REPORT 57-59 (Carol Levine ed., 1989).

264. The more recent legislation in Virginia and New Hampshire does not share this inadequacy with earlier statutes. See N.H. REV. STAT. ANN. §§ 168-B:2 to 168-B:9 (Supp. 1992); VA. CODE ANN. §§ 20-160 to 20-162 (Michie Supp. 1992); see also UNIF. STATUS ACT §§ 1-16, 9B U.L.A. 136-50 (Supp. 1993) (responding to the criticism of earlier statutes).

265. See *supra* notes 194-196 and accompanying text for a discussion of the Uniform Status Act defining a limited mandate of protecting children born as a result of assisted conception.

266. Statutes on assisted conception have been enacted separately in several of the states, with only a few, such as New Hampshire and Virginia, using a more comprehensive approach. See *supra* text accompanying notes 45-46, 216-220 and 238-245.

be handled in other legislative coverage.²⁶⁷ Support for this argument might be more forthcoming if legislation on the medical advancements involved in assisting conception was being promoted at the same time as the legislation on surrogacy contracts. Even so, the more logical approach would have legislation on the medical aspects of assisted conception include the continuum of surrogacy arrangements.

Statutory enactments on surrogacy arrangements should not be adopted in a vacuum; such legislation needs to be part of a thorough statutory scheme regulating both the medical technologies and the contractual aftermaths. The shortcoming of most surrogacy legislation has resulted from a myopic understanding and/or treatment of the medical procedures involved in enabling surrogacy arrangements to become available to the public. Medical technology provided the impetus; it was only through the success of artificial insemination, *in vitro* fertilization and embryo transfer procedures that surrogacy arrangements became a viable alternative for couples or individuals otherwise not capable of genetic parenthood.²⁶⁸

The problems inherently raised by surrogacy arrangements have become even more complicated with the use of embryo implantation in which the surrogate mother does not provide the ovum for the embryo but instead is implanted with a viable embryo.²⁶⁹ The social parents provide the gametes for the embryo. The surrogate is then not genetically related to the child she carries and gives birth to. This embryo implantation procedure is more expensive than *in vitro* fertilization or artificial insemination but the odds of success are much greater.²⁷⁰ There have been approximately eighty births through embryo implantation during the period from 1987 to 1990, as compared with nearly 2000 surrogate births utilizing *in vitro* fertilization or artificial insemination during the same period.²⁷¹

The distinction between gestational surrogacy and genetic surrogacy was critical in a California decision. On October 22, 1990, Judge Richard N. Parslow, Jr., of the California Orange County Su-

267. See *supra* notes 45-46 and accompanying text for a discussion of other legislative coverage that addresses issues related to assisted conception.

268. The first IVF baby, Louise Joy Brown, was born in 1978. BROWN & BROWN, *supra* note 38, at 136; Lorio, *supra* note 13, at 973. The first IVF birth in the United States took place in 1981. Lorio, *supra* note 13, at 978. The first compensated surrogate mother was Elizabeth Kane in 1980. KEANE & BREO, *supra* note 58, at 53; KANE, *supra* note 62, at 1.

269. See *supra* notes 49-52 and accompanying text for a discussion of different methods of assisting conception.

270. Elmer-Dewitt, *supra* note 14, at 77 (reporting that the success rates using GIFT and ZIFT are as high as 50%).

271. Lawson, *supra* note 27, at A1.

perior Court, ruled that a surrogate mother who carried an embryo transfer for another couple, had no parental rights and was no more than a foster parent "providing care, protection, and nurture during the period of time that the natural mother . . . was unable to care for the child."²⁷² In affirming the lower court decision in favor of the genetic parents, the California Supreme Court rejected arguments that the surrogacy arrangement violated public policy and the state and federal constitutions, and instead based its ruling on the intention of the parties as reflected in the surrogacy agreement.²⁷³

This latest round in the battle on surrogacy arrangements again finds the law lacking in a clear-cut solution. Would the court rule as it did in *Calvert v. Johnson* if the surrogate had provided the egg, thus becoming both the genetic and birth mother? Even for most of those states which had supposedly resolved the issue of surrogacy by statute or case law, the *Johnson v. Calvert* decision poses a new dilemma. *Baby M* and adoption statutes declare compensation for the surrender of parental rights to be against public policy and void, either in an adoption agreement or a surrogacy arrangement.²⁷⁴ It can be argued, then, that if the compensation in a surrogacy contract is for gestational services and *not* the surrender of parental rights, the public policy argument raised by analogy from the adoption statutes and its effect upon the surrogacy arrangement is nullified. Most statutes that are now in effect to prohibit surrogacy arrangements did not anticipate the situation in which the surrogate is not genetically related to the child she carries and give birth to.²⁷⁵

272. *Johnson v. Calvert*, No. 63-31-90 (Orange Cty. Super. Ct. Calif. 1990); see Rothenberg, *supra*, note 32, at 345; Susan Tift, *It's All in the (Parental) Genes*, TIME, Nov. 5, 1990, at 77 (reporting and discussing the California court's decision).

273. *Calvert v. Johnson*, 19 Cal. Rptr. 494 (Cal. 1993). The court found no solution under the Uniform Parentage Act, adopted in 1975 (CAL. CIV. CODE §§ 7000-7018 (West 1983)) since both the surrogate (Anna Johnson) and the provider of the egg (Crispina Calvert) had provided evidence of maternity; Anna by giving birth to the child and Crispina by being genetically related to the child. With this dilemma, the court felt it necessary to inquire into the intentions of the parties as reflected in the surrogacy agreement, concluding that "when two means [of establishing a mother-child relationship] do not coincide in one woman, she who intended to procreate the child — that is, she who intended to bring about the birth of a child that she *intended to raise as her own* is the natural mother under California law." *Id.* at 500 (emphasis added).

274. *In re Baby M*, 525 A.2d 1128, 1157-59 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1237 (N.J. 1988); see N.Y. SOC. SERV. LAW § 374 (McKinney 1992) (spelling out that "no person may or shall request, accept or receive any compensation or thing of value, directly or indirectly, in connection with the placing out or adoption of a child"). Approximately half of the states have similar legislation. Katz, *supra* note 9, at 8 n.34.

275. See *In re Baby M*, 537 A.2d 1237 (N.J. 1988) (discussing the New Jersey scheme and holding that the legislation could alter its current scheme of laws).

The latest development in Great Britain has been the passage of the Human Fertilization and Embryology Act of 1990.²⁷⁶ This Act stringently regulates the acquisition, storage or use of gametes and embryos, detailing strict licensing and record-keeping provisions for those agencies authorized to engage in approved activities.²⁷⁷ The Act further states parentage rules where assisted conception procedures are utilized.²⁷⁸ Surrogacy arrangements are also covered to the extent that a couple involved in a non-compensatory surrogacy arrangement may later petition the court to be declared the parents of a child born through a surrogacy arrangement.²⁷⁹

The current legislative attempts to regulate surrogacy arrangements are inherently flawed. A raft of problems remain to be solved. Are all surrogacy arrangements to be condemned or only those in which a fee is paid? Is money the issue or is it society's concept of how a family should be formed?²⁸⁰ Should *in vitro* fertilization, for either single or married women, be allowed without genetic testing of the gametes and psychological evaluation of the surrogate? Should not all parties to the arrangement receive appropriate counseling and legal advice? These are just a few of the issues currently unanswered by the paucity of legislative and judicial pronouncements on assisted reproduction and surrogacy arrangements.

The medical procedures to aid human conception continue to become more and more sophisticated. States failing to respond to the medical advancements or which pass laws dealing with only one or more segments of the issue can expect the dike to leak elsewhere and in a more rapid fashion. The need is for comprehensive legislation to deal with the total spectrum of medical and legal aspects of assisted conception and surrogacy, including paternity and support issues. The child born in a surrogacy arrangement must be protected without regard to the validity of the contract; the adults in a disputed surrogacy arrangement may well be able to fend for themselves but not so the child. The emotional reaction to such arrange-

276. HUMAN FERTILIZATION AND EMBRYOLOGY ACT, 1990, ch. 37 (Eng.).

277. *Id.* Section 3 of this act requires a license to acquire, store, or use embryos. *Id.* § 3. Section 4 imposes the same requirement for the storage of use of gametes. *Id.* § 4.

278. *Id.* §§ 28, 29 (speaking in terms of "placing" an embryo or sperm and in terms of "insemination").

279. *Id.* § 30. Commercial surrogacy arrangements had previously been criminalized by the Surrogacy Arrangements Act of 1985. See *supra* text accompanying notes 103-104.

280. The traditional nuclear family consisting of two adults (one male and female) and one or more children conceived without medical assistance is in rapid decline and will continue in that direction. See Claudia Wallis, *The Nuclear Family Goes Boom*, TIME, Oct. 15, 1992, at 42-44 (discussing how the family unit is changing and how it will change into the next century).

ments, coupled with the sensationalism attached to several gone-wrong surrogacy contracts,²⁸¹ cannot be completely ignored when these issues are considered but any statutory enactment must provide the breadth of coverage to protect all innocent parties to any assisted conception or surrogacy arrangement.

Whether surrogacy arrangements for compensation are to be condemned or condoned is clearly an issue which has sharply divided the legislatures of many states and is a problem for each state to resolve consistent with its individual public policy. Even in the New Hampshire,²⁸² Virginia,²⁸³ and Victoria²⁸⁴ (Australia) statutes which either declare surrogacy arrangements for compensation unenforceable or attach criminal sanctions to the paid arrangements, the need to cover medically assisted conception procedures is clearly recognized. Procedures used to promote the creation of children are at least as critical and in need of regulation as are procedures regulating the adoption of children. Yet, while the many aspects of adoption are consistently regulated, few states have given more than a brief passage to assisted conception and surrogacy. The range of issues being presented in this field call for a regulatory act similar to the Uniform Commercial Code with various technical provisions providing a sound background for legal determinations. The variety of issues within assisted conception and surrogacy need medical identification and legal clarification. Even the most comprehensive of the statutes in the United States, the New Hampshire Act, does not include issues relating to the storage of reproductive cells and embryos, nor resolve issues similar to that posed in Tennessee by the dispute between wife egg donor and husband sperm donor over custody of frozen embryos.²⁸⁵

X. FRAMEWORK FOR A PROPOSED SOLUTION

Since 1986, a number of model and uniform acts by various authors and organizations have been proposed to resolve the conundrum of assisted conception procedures and surrogacy arrange-

281. *In re Baby M*, 525 A.2d 1228 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988) (discussing and deciding the case based on a surrogacy contract); *Yates v. Keane*, (Gariot County Cir. Ct., 9758, 9772, Jan. 21, 1988); *see also Powers*, *supra* note 3, at 1C (discussing more disappointing results from a surrogacy contract). *See also supra* notes 119-225 and accompanying text for another surrogacy contract that went wrong.

282. N.H. REV. STAT. ANN. § 168-B (Supp. 1992).

283. VA. CODE ANN. §§ 20-156, 20-165(A) (Michie Supp. 1992).

284. VICTORIA INFERTILITY (MEDICAL PROCEDURES) ACT, 1984, No. 10163 (Austl.).

285. *Davis v. Davis*, No. 180, 1990 WL 130807 (Tenn. Ct. App. 1990), *aff'd*, 842 S.W.2d 588 (Tenn. 1992).

ments.²⁸⁶ None have met with more than minimal support. This article has presented and discussed those acts, as well as the handful of judicial decisions in a historical and chronological fashion to highlight the critical issues and point out the inadequacies of both legislative and judicial attempts in groping with the complex and high-tech facets of assisted conception, both for its own concerns and as they relate to surrogacy contracts. These acts provide a solid basis from which a solution might be achieved in the form of a Uniform Assisted Conception and Surrogacy Code.

It is not the purpose of this article to review in precise detail each of those proposals, nor present an all-inclusive and exhaustive list of all provisions to be included in a comprehensive legislative enactment. However, a general framework for such legislation should include the following categories of coverage. In Uniform Commercial Code fashion, article numbers have been given for purposes of illustration although these numbers do not necessarily reflect a mandatory sequence. Of particular importance in an opening article would be the definitions to be used under the statute. While there has been some dispute among commentators as to the more appropriate terminology for certain concepts and relationships,²⁸⁷ agreement on definitions for Article I of the Proposed Assisted Conception and Surrogacy Code should pose no great difficulty. The Virginia statute provides an excellent example by defining "assisted reproduction" broadly to cover both those procedures already in use and those yet to be discovered.²⁸⁸ Article Two of the Proposed Assisted Conception and Surrogacy Code should identify limitations on the collection, storage and implantation of human gametes and pre-embryos, including the need for licensing or other approval by a state approved agency. Recent litigation and the potential for abuse provide ample reasons to carefully regulate the care of those elements which may be later used to create human life.²⁸⁹ Article Three should establish licensing and record-keeping

286. UNIF. STATUS ACT §§ 1-16, 9B U.L.A. 136-50 (Supp. 1993); *Draft ABA Model Surrogacy Act*, *supra* note 187, at 123-43; *Model Reproductive Act*, *supra* note 138, at 943-1013 (containing the Model Human Reproductive Technologies and Surrogacy Act); *Proposed Surrogacy Act*, *supra* note 133, at 1283-329 (setting forth a proposed Uniform Surrogate Parenthood Act). In addition, acts such as the Victoria Infertility (Medical Procedures) Act 1984, the Human Fertilization and Embryology Act 1990 on an international level and the Virginia and New Hampshire legislation should be used as partial sources for a proposed solution. See *supra* text accompanying notes 92, 220-252, and 277 for a discussion of these Acts.

287. See Annas, *supra* note 20, at 21-24 (arguing that the true surrogate is the rearing mother).

288. VA. CODE ANN. § 20-156 (Michie Supp. 1992).

289. See *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (denying a motion to dismiss a suit brought to release and transfer a pre-zygote from the defendant to a hospital). See *supra* notes 138-45 and accompanying text for a discussion of

requirements of the statute.²⁹⁰ Issues of confidentiality and due process in the licensing procedures would need to be addressed either in this statute or by reference to other state legislation such as a state administrative procedures act.

The rules of parentage where assisted conception procedures and/or surrogacy arrangements have been utilized should be defined in Article Four.²⁹¹ Again, reference may be made to existing statutes, such as the Uniform Parentage Act or similar state legislation, but specific inclusion in this legislation would be preferable. The issue of parentage in gestational surrogacy arrangements must be addressed to deal with embryo transfer procedures. Non-genetic surrogacy will continue to be favored where the social parents are capable of providing the gametes (sperm and ova) for the embryo.²⁹² Article Five should state the rights of and obligations toward a child born through assisted conception, including decisions on health care, legitimacy, succession and support. The New Hampshire legislation and the Model Reproductive Act include this topic.²⁹³

Provisions on Artificial Insemination, including coverage of liability of sperm or ova donors and evaluations of donors, both medical and psychological, should be stated in Article Six. Several of the more recent state acts on assisted reproduction establish mandatory evaluation procedures.²⁹⁴ Most states already have at least limited statutes on artificial insemination.²⁹⁵

Article Seven should detail standards for *in vitro* fertilization and pre-embryo transfer. These provisions should include mandatory medical evaluation of both donor and recipient and counseling for the recipient as well as for her spouse, if she is married. Eligibility for assisted conception programs must be spelled out if

several articles of the Model Reproductive Act, with Article 9 presenting a typical pattern of this type of regulation.

290. *Model Reproductive Act*, *supra* note 138, at 999-1013.

291. See VA. CODE ANN. § 20-158 (Michie Supp. 1992); *Model Reproductive Act*, *supra* note 138, at 955-59.

292. The procedure utilized may be one of *in vitro* fertilization followed by implanting the embryo in the surrogate mother or using the GIFT or ZIFT methods in allowing the egg to be fertilized after implantation of the sperm and ovum. See *supra* notes 16 and 17 and accompanying text for a discussion of these procedures.

293. See N.H. REV. STAT. ANN. §§ 168-B:6 to 168-B:9 (Supp. 1992); *Model Reproductive Act*, *supra* note 138, at 960-66.

294. N.H. REV. STAT. ANN. §§ 168-B:14, 168-B:19 (Supp. 1992) (requiring medical examinations and the specifications for the examination); VA. CODE ANN., § 20-160(B)(7) (Michie Supp. 1992) (requiring the intended parents, the surrogate, and her husband to submit to a physical and psychological examination).

295. Thirty-five states statutorily recognize the legitimacy of children who were conceived through artificial insemination and born to married couples. See Note, *supra* note 2, at 1533.

marital status or age limits are imposed. Although several states have recently adopted legislation on *in vitro* fertilization and embryo transfer, most jurisdictions are lacking in even minimal coverage of conception techniques beyond artificial conception.²⁹⁶

Article Eight on Surrogacy needs to initially address the general allowance or disapproval of surrogacy arrangements with the clear distinction between arrangements for compensation and altruistic agreements. If the state will condone one type of surrogacy arrangement, such as a gratuitous surrogacy, even while declaring surrogacy contracts for compensation to be void and/or subject to criminal sanctions, extensive details on such arrangements are needed. These additional provisions would include requirements on genetic testing, evaluations and counseling of the parties, petition to and approval by the court of the agreement prior to implantation attempts, and birth registration procedures.²⁹⁷ The right of the surrogate to disavow the contract and keep the child, if available, must be stated with any time and notice requirements.²⁹⁸ Remedies for breach of an approved surrogacy contract would also need to be addressed.²⁹⁹ If state law voids all surrogacy arrangements or attaches criminal sanctions to surrogacy contracts, issues of parentage and support of any child born in a surrogacy arrangement are still necessary aspects of the legislation.³⁰⁰ The acceptance of a compre-

296. Only four states (Illinois, Louisiana, New Hampshire and Pennsylvania) have statutes specifically addressing facets of *in vitro* fertilization. Note, *supra* note 2, at 1538.

297. See N.H. REV. STAT. ANN. §§ 168-B:17 to 168-B:28 (Supp. 1992) (spelling out provisions for eligibility, nonmedical evaluation, medical evaluation, jurisdiction, hearing procedures, terms of a surrogacy contract, birth registration, specific performance, and damages); VA. CODE ANN. §§ 20-159 to -165 (Michie Supp. 1992) (setting forth provisions for controlling law, parentage of the surrogate child, surrogacy contracts, hearing procedures, regulations for the parent and child, and surrogate brokers and penalties); *Model Reproductive Act*, *supra* note 138, at 973-90 (spelling out provisions for regulatory procedures, eligibility, judicial pre-authorization, mandatory terms of surrogate contract, specific performance, and damages); *Proposed Surrogacy Act*, *supra* note 133 (proposing a Uniform Surrogate Parenthood Act).

298. UNIF. STATUS ACT § 6(b)(2), 9B U.L.A. at 142 (Supp. 1993); VA. CODE ANN. § 20-161 (Michie Supp. 1992); N.H. STAT. ANN. § 168-B:25 (Supp. 1992).

299. The main concern is whether specific performance would be allowed for breach of a surrogacy agreement. The Model Surrogacy Act allowed specific performance under section 133(6)(c), but most statutes or proposed acts would allow only limited damage. See *Model Reproductive Act*, *supra* note 138; VA. CODE ANN. § 20-162 (Michie Supp. 1992); N.H. STAT. ANN. § 168-B:28(II) (Supp. 1992).

300. N.H. STAT. ANN. § 168-B:8. (Supp. 1992) (setting forth a duty-of-support provision). Because the thrust of this article is directed to the compelling need for comprehensive legislation in *all* facets of assisted conception as well as in surrogacy arrangements, the author has not assumed a judgmental position on the manner in which surrogacy arrangements should be handled by the states. The overriding concern for legislation on the subject, without reflecting the manner of legislation, makes such commentary unnecessary. However, it is the firm belief of the author that surrogacy arrangements, including those for com-

hensive statute on reproductive technology and its legal aftermath should not be dependent upon a state's reaction to the surrogacy issue alone. Alternative provisions on surrogacy would allow each state to define its own public policy without destroying the scope of the other articles on technology.³⁰¹

Immunity for any health care providers or other persons who participate in one or more of the medical or legal arrangements covered by the Act should be included. The New Hampshire statute contains an example of an immunity clause for good faith participants in the medical procedures covered by the legislation.³⁰² The final article would also include other housekeeping provisions such as public health rules needed to regulate the licensing and evaluation processes created by the statute. New Hampshire places responsibility on the state health services division to regulate the various aspects of the legislation as assisted reproduction.³⁰³

CONCLUSION

The focal point for resolving assisted conception and surrogacy disputes at a policy level lies in the state capitols and not in the courts. An appropriate balance of legal authority would have the courts placing a judicial stamp of approval on arrangements made by consenting parties under provisions first articulated by the state legislatures. The judicial process is poorly equipped to deal with the comprehensiveness of conception and surrogacy problems. Thus, the courts often resort to questionable analogies in resolving the conflict. As Judge Radigan stated in the *Baby Girl L.J.* decision, matters of public policy should be resolved by the legislature and not by the courts.³⁰⁴

We are now in a new generation of family development and identification. Although adoption procedures will continue to pro-

pensation, should be statutorily condoned but carefully regulated in a scheme similar to that presented by the Virginia and New Hampshire statutes. Judicial approval, either before or following attempts at conception, is a *sine qua non* of such enactments. A pre-birth window of time for a genetic surrogate to terminate the agreement is no doubt an appropriate term of the agreement but the court should still retain jurisdiction of the matter until after the child is born to determine whether it is in the best interests of the child to remain with the surrogate (and her husband) or grant custody to the intending father who has provided the sperm.

301. See *supra* notes 194-209 and accompanying text for a discussion of the legislature's alternative provisions that became the Uniform Status of Children of Assisted Conception Act.

302. See N.H. STAT. ANN. § 168-B:29 (Supp. 1992) (establishing immunities to possible civil and criminal liability as well as immunity for physicians and health care providers).

303. *Id.* § 168-B:31.

304. *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813, 818 (N.Y. Surrogate's Ct. 1986).

vide one path for childless individuals and couples, a new and sometimes more promising path has been opened by medical technology. It remains for the law, more particularly the legislative process, to provide the appropriate legal guidance for that technology. Until comprehensive legislation deals with all of the intricate issues in facilitating reproduction and surrogacy, the courts will proceed to slowly and painfully resolve those issues in an ad hoc and unsystematic process. Without extensive uniform legislation, the conflicting views found in the limited number of state statutes and judicial decisions will continue to spawn new doubts and tribulations for individuals seriously interested in pursuing a surrogacy arrangement.³⁰⁵

In the Australian case of *Mount Isa Mines, Ltd. v. Pusey*,³⁰⁶ Justice Windeyer referred to "[l]aw, marching with medicine but in the rear and limping a little." This comment appropriately identifies the approach now being used by the courts in resolving reproduction and surrogacy issues. The law is developing blisters on its slow motion feet in an attempt to keep pace with medical technology. It need not be so. Resolution of the matter calls for a clear understanding of the medical aspects of assisted reproduction, combined with the necessary regulations covering all of the technological facets and legal arrangements following the scientific advancements. The opportunity now exists to bring the law along side assisted reproduction technology. Some jurisdictions have already begun to reduce the distance between the two.³⁰⁷ The next several years should resolve whether the lessons of the *Baby M* decision and the Malahoff-Stiver incident have been taken to heart or whether the law on assisted reproduction and surrogacy will continue to "limp along in the rear" for another generation while medicine continues its dramatic surge into the twenty-first century.

305. The use of adoption statutes as guiding law in the *Baby M* decision was rejected in *Calvert v. Johnson*, 19 Cal. Rptr. 494 (Cal. 1993). "We are, accordingly, unpersuaded that the contact used in this case violates the public policies embodied in . . . the adoption statutes." *Id.* at 502.

306. *Mount Isa Mines, Ltd. v. Pusey*, 125 C.L.R. 383 (1970) (Austl.).

307. The New Hampshire and Virginia enactments have moved to combine assisted conception and surrogacy issues into a single legislative act. See *supra* notes 215-236 and 238-252 and accompanying text for a discussion of the New Hampshire and Virginia statutes.

