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Comparative Responses to Surrogate Motherhood

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I. INTRODUCTION

Rapid advances in technology are forcing society to reevaluate traditional notions of human reproduction, family relationships and the law. Many of these advances have made it feasible to separate the functions of conception, gestation and child rearing in ways not previously thought possible. In vitro fertilization allows conception to occur outside the womb. Widespread use of artificial insemination calls into question traditional presumptions of paternity. Through a technique known as embryo transfer, it is now possible for a woman to give birth to a child who is wholly unrelated to her in a genetic sense.[1] Reports of surrogacy arrangements, such as the one involving Baby Cotton, have become commonplace.[2] Surrogacy and embryo donations may require a fundamental redefinition of motherhood. Specifically, three different women may lay claim to the title of "mother": the woman providing the egg for fertilization, the woman who carries the child during pregnancy, and the woman who raises the child after birth.

These developments have prompted many governments and other interested groups to study the social, ethical and legal implications of new reproductive technologies.[3] In the United Kingdom, the Commit-

1. *Boy's Birth Is First from Embryo Transfer*, Washington Post, Feb. 4, 1984, at A14, col. 1-5.; Annas, *Surrogate Embryo Transfer: The Perils of Patenting*, HASTINGS CENTER REP., June, 1984, at 25.
2. Baby Cotton was born on January 4, 1985, in London, England. She was conceived by artificial insemination pursuant to an agreement between the mother, an English housewife named Kim Cotton, and the father, an American man whose wife was unable to bear children. Upon her birth, Baby Cotton was placed in the custody of her father. Mrs. Cotton received $10,000 for her services. The circumstances surrounding the birth of Baby Cotton were widely reported in the press. Helm, Webster, Wilsher & Hosenball, *How to Buy a Baby*, Sunday Times (London) Jan. 13, 1985, at 15, col. 1.
3. *See, e.g.*, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY (1984) (United Kingdom) [hereafter cited as WARNOCK REPORT]; ETHICS ADVISORY BD. OF THE DEPT. OF HEALTH, EDUCATION AND WELFARE, REPORT AND CONCLUSIONS: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VI-

tee of Inquiry Into Human Fertilisation and Embryology (Warnock Committee) recently issued its report on these technologies. While most of its findings and recommendations favor continued use and development of these technologies,[4] there is one significant exception. A majority of the committee found surrogate motherhood as commonly practiced to be ethically unacceptable. As a result, the committee recommended the passage of legislation declaring surrogacy agreements illegal and making the operation of commercial surrogacy agencies a criminal offense.[5] The recently enacted Surrogacy Arrangements Act of 1985[6] partially implements the committee's recommendations.

The position of the Warnock Committee and the Surrogacy Arrangements Act are ill-advised. They both stem from the assumption that surrogate parenthood is an immoral practice. A large portion of this article challenges that proposition. Surrogate parenting agreements are not inherently immoral and, within certain guidelines, should be enforceable. The dangers of commercialism that concerned the Warnock Committee and that underlie the Surrogacy Arrangements Act can be addressed more appropriately through regulation as opposed to outright criminalization. The legislation, moreover, is especially shortsighted. It addresses only one facet of the many complex issues presented by surrogate parenting. By imposing criminal sanctions, the Act purports to eliminate commercial brokers, but does not

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TRO FERTILIZATION AND EMBRYO TRANSFER, 44 Fed. Reg. 35,034 (1979); *Human Embryo Transfer, Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 98th Cong., 2d Sess. (1984); COUNCIL FOR SCIENCE AND SOCIETY, HUMAN PROCREATION: ETHICAL ASPECTS OF THE NEW TECHNIQUES (1984) [hereafter cited as HUMAN PROCREATION]; ONTARIO LAW REFORM COMM., REPORT ON HUMAN ARTIFICIAL REPRODUCTION AND RELATED MATTERS (1985) [hereafter cited as ONTARIO REPORT]. In Victoria, Australia, the Committee to Consider the Social, Ethical and Legal Issues Arising from *In Vitro* Fertilization (the Waller Committee) has delivered a number of reports. *See* Bravender-Coyle, *Medical Experiments and the Law*, 59 LAW INST. J. 63 (1985).

4. The Committee recommended that artificial insemination by donor (AID), in vitro fertilization, egg donation, and one technique of embryo donation be accepted as treatments for infertility. These techniques would be permissible treatments, however, only as prescribed by a newly established licensing authority. The licensing authority would regulate both infertility research and services. The Committee also proposed that the licensing authority oversee the development of technologies involving the use of frozen sperm, egg and embryos. For a more detailed summary of the Report, see Priest, *The Report of the Warnock Committee on Human Fertilisation and Embryology*, 48 MOD. L. REV. 73 (1985); Note, *The Warnock Report - I*, 128 SOLIC. J. 673 (1984).

5. WARNOCK REPORT, *supra* note 3, §§ 8.18, 8.19. Two committee members dissented from that portion of the Report dealing with surrogacy. The dissenters would approve of surrogate motherhood arrangements made by non-profit agencies acting under an appropriate license. WARNOCK REPORT, *supra* note 3, at 87-89 (dissenting views of Greengross and Davies).

6. Surrogacy Arrangements Act, 1985, ch. 49 (United Kingdom) (1985).

condemn surrogacy arrangements themselves. The Act thus encourages amateurish agreements that are likely to lead to disputes. The legislation is silent, however, on how such disputes should be resolved.

This Article analyzes the Warnock Report and the Surrogacy Arrangements Act in light of existing practices and laws in the United States and Great Britain. Section II provides a description of surrogacy practices and the uncertain legal environment in which they operate. Section III compares the Surrogacy Arrangements Act with Canadian, American, and Australian legislative proposals. Section IV then examines in more detail the commonly voiced ethical objections to surrogacy agreements and concludes that these objections do not warrant criminalization of surrogacy agreements. Finally, Section V offers suggestions on the enforcement of surrogacy agreements.

II. THE CURRENT STATUS OF SURROGATE MOTHERHOOD

A. The Basic Transaction

There are two basic situations in which surrogacy agreements might be used. The most common pattern involves a husband and wife unable to have children of their own, often because of the wife's infertility.[7] In order to have a child who is genetically related to one of them, they seek the assistance of another woman, commonly called a surrogate mother. The surrogate agrees to conceive a child of the husband through artificial insemination and carry the child to term. The surrogate further agrees to surrender custody of the child to the father at birth and relinquish her parental rights. The process usually contemplates a formal adoption of the child by the wife.[8]

A second pattern involving embryo transfer may be used in cases where a woman is fertile, but is unable to carry a child to term.[9] In

7. Ten percent of married couples are unable to conceive a child after attempting to do so for a year. The wife is infertile in approximately half of these marriages. The chief causes of female infertility are hormonal imbalances or problems with the fallopian tubes. R. GLASS & R. ERICSON, GETTING PREGNANT IN THE 1980S: NEW ADVANCES IN INFERTILITY TREATMENT AND SEX PRESELECTION 7 (1982).

8. Unless otherwise indicated, general references to surrogate motherhood used throughout this Article will refer to situations where the surrogate is genetically related to the child. For other descriptions of surrogate motherhood practices, see L. ANDREWS, NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS INCLUDING IN VITRO FERTILIZATION, ARTIFICIAL INSEMINATION AND SURROGATE MOTHERHOOD 197-243 (1984); Cohen, *Surrogate Mothers: Whose Baby Is It?*, 10 AM. J. L. & MED. 243 (1984); Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L.J. 147; Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1642 (1984); Sappideen, *The Surrogate Mother—A Growing Problem*, 6 U.N.S.W. L.J. 79 (1983). For a clause by clause review of a typical surrogacy agreement, see Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1982).

9. *Department of Labor, Health and Human Services, Education and Related Agencies Appropriations for 1985: Hearings Before Subcomm. of the House Comm. on*

this situation the father and genetic mother may conceive an embryo through in vitro fertilization and then have it implanted in the womb of the surrogate. The surrogate would carry and give birth to the child. In this pattern, which is rarely used in practice,[10] the surrogate bears only a gestational relationship to the child.

In either of these variations, the contracting couple generally agrees to pay a substantial fee to the surrogate and to pay for medical expenses associated with the pregnancy. As was the case with those involved in the birth of Baby Cotton, a commercial agency often brings the commissioning couple and the surrogate mother together. It is the payment of a fee and the involvement of a commercial agency that raises the most objections. The presence of a fee and an agency inject an element of commercialism and potential exploitation into what is widely perceived as a profoundly sacred event—the birth of a child.

No one knows exactly how widespread the practice of surrogate motherhood is in the United States and Great Britain. Recent reports estimate that six hundred babies have been born to surrogate mothers in the United States and the number is growing.[11] The parliamentary debates concerning the Surrogacy Arrangements Act contain references to "many" non-commercial surrogacy agreements being carried out within families in Scotland.[12] One British infertility specialist confessed he did not know whether surrogacy practices involved 5 or 500 pregnancies.[13] Given the increasing difficulty of procreating within the marriage[14] and dissatisfaction with traditional adoption,[15] it

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Appropriations, 98th Cong., 2d Sess. 1490 (1984) (justification of budget estimates, National Institute of Child Health and Human Development). Some women are the unfortunate victims of several different problems in successive pregnancies. Others produce insufficient amounts of progesterone following pregnancy and do not respond to hormonal treatment. Still others have immunological reactions to their offspring, rejecting them as foreign material. *See* R. GLASS & R. ERICSON, *supra* note 7, at 60-62.

10. The first case involving this pattern recently appeared. In an uncontested proceeding, a Michigan trial judge ruled that the genetic mother would be considered the "legal" mother instead of the surrogate. Smith v. Jones, 85-532014DZ (3d. Jud. Dist., Mich., March 14, 1986). For reports of this case, see Annas, *The Baby Broker Boom*, HASTINGS CENTER REP., June, 1986 at 30; *Parentage Decided for Unborn Child of Surrogate Mother*, Am. Medical News, Apr. 4, 1986, at 19.
11. Gelman & Shapiro, *Infertility: Babies by Contract*, *Newsweek*, Nov. 4, 1985, at 74. Two attorneys active in this field claim to represent more than one hundred couples in surrogate parenting arrangements. Lorio, *supra* note 8, at 1654; Sherwyn & Handel v. Department of Social Services, 173 Cal. App. 3d 52, 55, 218 Cal. Rptr. 778, 780 (Cal. Ct. App. 1985).
12. 77 PARL. DEB., H.C. (5th ser.) 42 (1985) (remarks of Mr. Bruinvels).
13. Helm, Webster, Wilsher & Hosenball, *supra* note 2, at 15, col. 1 (quoting Dr. Jack Glatt). The demand for surrogacy services is not limited to the United States and Great Britain. Couples requesting surrogate services come from all over the world. *See* L. ANDREWS, *supra* note 8, at 246.
14. Although the aggregate marital infertility rate of 10% remains relatively con-

is reasonable to assume that the demand for surrogacy services will continue at least at present levels.

B. The Legality of Surrogate Motherhood Agreements

Surrogate motherhood agreements are filled with legal uncertainty. Disputes over the ethics and legality of surrogacy agreements were unheard of ten years ago but are now reaching the courts. In the absence of specific legislation, courts must rely upon statutes that were not enacted with surrogacy arrangements in mind and upon the nebulous concept of public policy. This section considers the uncertain state of the law relating to surrogacy arrangements and the legal obstacles this creates for a husband, his infertile wife, and a surrogate who will conceive through artificial insemination. This is the most common type of surrogacy arrangement and presents difficult legal problems due to the surrogate's genetic relationship to the child.[16]

1. Adoption Laws

a. Prohibiting the Payment of Fees

The most serious potential impediments to surrogacy agreements

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stant, infertility among younger couples has risen significantly. A continuation of this trend could have significant demographic and social consequences. W. MOSHER & W. PRATT, REPRODUCTIVE IMPAIRMENTS AMONG MARRIED COUPLES: UNITED STATES, VITAL AND HEALTH STATISTICS 16 (1982) (National Center for Health Statistics).

15. The number of couples wanting to adopt healthy, white infants far exceeds the number of available children. The shortage of desired infants has created lengthy waiting lists for adoptions. Many adoption agencies in the United States have stopped taking applications. W. MEEZAN, S. KATZ, & E. RUSSO, ADOPTIONS WITHOUT AGENCIES 35-36 (1978). An inadequate number of staff personnel adds further delay to the progress. Consequently, the time between inquiry and placement can be as long as five years. *Id.* Professors Landes and Posner propose a controversial "free market" approach to this situation. Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). For a thoughtful and sensitive reply, see Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341 (1984).

16. Surrogacy arrangements could also be used when a married woman is physically capable of having her own children but chooses not to. Her motives might be to avoid a genetically transmitted condition or a disruption in her career. Surrogacy for personal convenience was strongly condemned by the Warnock Committee. WARNOCK REPORT, *supra* note 3, at § 8.17. Others, however, view motive-based restrictions on the availability of surrogacy services as unwise, unworkable, and perhaps unconstitutional. Rassaby, *Surrogate Motherhood: The Position and Problems of Substitutes* in TEST TUBE BABIES 105 (W. Walters, P. Singer, eds. 1982); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 430 (1983). Furthermore, single males might seek the services of a surrogate to enable them to become parents without incurring the obligations of marriage. Single persons, either male or female, may be suitable parents and are specifically provided for in laws regulating adoption. *See*, Children Act, 1975, ch. 72 § 11. (United Kingdom).

are statutes barring the payment of a fee to the natural mother in connection with the adoption of her child. These so-called baby-buying laws exist in the United Kingdom[17] and are common in the United States.[18] Whether these provisions prohibit surrogacy arrangements has not been definitively established. It is true that a fee is paid to the surrogate mother and the process usually contemplates the adoption of her child. One logical construction of the statute would invalidate any surrogacy agreement in which the surrogate receives a fee. On the other hand, the fee could be viewed not as consideration for any subsequent adoption, but rather as consideration for the surrogate's services in conceiving and carrying the child. More to the point, it is quite clear that these baby-buying statutes were enacted with no thought of surrogate motherhood. The evils to which these statutes are addressed arguably do not include the noncoercive efforts of a childless couple to produce a child to be raised by its father. Thus, several commentators maintain that the statutory prohibition of payment of a fee should not preclude surrogacy arrangements.[19]

The law in Great Britain is unsettled on this point. The Warnock Committee did not take a position. It ambiguously concluded that surrogacy agreements do not violate "existing criminal law, unless . . . [they] contravene the provisions of adoption law, which prohibit payments in connection with adoption."[20] It could, perhaps, be in inferred from the recent case of *In re a Baby*[21] that surrogacy arrangements do not contravene adoption laws. In that opinion, Mr. Justice Latey permitted a child born to a surrogate mother to be placed in the custody of her natural father and his wife, who then left the country. There is no suggestion in that opinion that the surrogacy agreement itself was illegal or violated any law. The court's sole concern was the best interest of the child.

An earlier case, however, casts doubt on the legality of surrogacy arrangements. In *A v. C*[22] a man commissioned a prostitute to bear his child by means of artificial insemination. The woman agreed to surrender custody of the child to the natural father, but changed her mind after the child was born. The father sought custody of the child.

17. Adoption Act, 1958, 7 Eliz. 2, ch. 5, § 50 (United Kingdom).
18. Twenty-four states have baby-buying laws. For citations to specific statutes, see Andrews, *The Stork Market: The Law of the New Reproduction Technologies*, 70 A.B.A. J. August, 1984, at 50, 54-55.
19. Keane, *supra* note 8, at 154-55; Comment, *Surrogate Mothers: The Legal Issues*, 7 AM. J.L. & MED. 323, 330-32 (1981).
20. WARNOCK REPORT, *supra* note 3, at § 8.4. The Surrogacy Arrangements Act itself continues the ambiguity, stating that the Act applies to surrogacy arrangements "whether or not they are lawful and whether or not they are enforceable." Surrogacy Arrangements Act, 1985, ch. 49, § 1(9) (United Kingdom).
21. *Re* A Baby (1985) Times, Jan. 15 (Fam. Div.; Latey, J.).
22. 1978 Fam. 170. (Fam. Div. Ct.).

It is reported that in denying the father's request, the judge denounced the agreement as "pernicious" and amounting to the sale of a human being.[23] The father, although originally awarded access, had all rights to the child revoked by the Court of Appeals.[24]

One obvious distinction between *In re a Baby* and *A v. C* is the degree of cooperation of the surrogate. In the former case the surrogate mother did not contest the natural father's efforts to obtain custody, while in the latter case, the surrogate's opposition was vigorous. Taken together, the two cases suggest that while surrogate motherhood agreements may not violate any criminal law in Great Britain, they may be nonetheless unenforceable. Given the scant authority, however, any speculation as to the legality of such agreements is hazardous.

There is only limited authority in the United States on this isssue. In several states, attorney general advisory opinions have concluded that statutes prohibiting payment of fees in connection with adoptions render commercial surrogacy arrangements illegal.[25] These opinions are only advisory, however, and are not binding on the courts. Recent judicial decisions addressing the legality of surrogacy arrangements have been more accepting of the practice, but even here ambiguity remains.

Consider the experience in Michigan and Kentucky. Both states have baby-selling statutes.[26] In *Doe v. Kelley*,[27] a childless couple contracted with the husband's secretary to bear his child by means of artificial insemination. The couple feared that the Michigan adoption laws would invalidate their agreement. They petitioned the court to declare the baby-selling statute unconstitutional as an impermissible interference with their right to procreate.[28] The court upheld the statute, reasoning that a married couple's constitutionally protected

23. Cusine, *Womb Leasing: Some Legal Implications*, 128 NEW L.J. 824 (1978).
24. *Id.* at 825. Compare C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977) where the court awarded visitation rights to a sperm donor who intended to take on the responsibilities of fatherhood. *Cf.* Jhordan v. Mary K., 12 Fam. L. Rep. (BNA) 1320 (Cal. App. 1986) (sperm donor may claim paternity where a woman inseminates herself with the donor's sperm).
25. Ky. Op. Att'y Gen. 81-18 (1981); Ohio Op. Att'y Gen. 83-001 (1983); Okla. Op. Att'y Gen. 83-162 (1983). The Attorney General of Louisiana reached a similar conclusion in an informal letter. *See* Lorio, *supra* note 8, at 1656 n.74.
26. KY. REV. STAT. § 199.590(2) (1984); MICH. COMP. LAWS ANN. § 710.54 (Supp. 1985).
27. 106 Mich. App. 169, 307 N.W.2d 438 (Ct. App. 1981).
28. Professor Robertson asserts that procreative liberty includes not only the right to avoid conception and pregnancy but also the right to reproduce. He views the positive right to procreate as a necessary corollary to the United States Supreme Court's decisions concerning abortion and contraception. The right to procreate, like the right to decide to terminate a pregnancy, would be protected from governmental interference by the fourteenth amendment. Under this theory, the state bears a heavy burden to justify prohibiting certain procreational choices, including surrogate motherhood. Robertson, *supra* note 16.

right to bear a child does not include the right to pay a fee to a surrogate mother. The court thus assumed that commercial surrogacy arrangements are prohibited by the statute and found prohibition constitutionally permissible. The case comes very close to holding that surrogacy arrangements are illegal.

The Michigan courts again considered surrogate motherhood in *Syrkowski v. Appleyard*.[29] The biological father sought an order of filiation declaring him to be the father of the surrogate's child. An order of filiation is a declaration of parenthood and is the first step toward a father obtaining legal custody of a child. The surrogate mother had no objection, but the Attorney General intervened in opposition to the motion. The trial court refused to issue the order of filiation. In the judge's view, *Doe v. Kelley* established that surrogate parenting arrangements are contrary to public policy. The Paternity Act,[30] the court held, could not be used to facilitate an illegal agreement. The Michigan Court of Appeals affirmed the trial court's ruling, but on a more limited basis. It refused to decide whether surrogate motherhood contracts contravene public policy, focusing instead on an interpretation of legislative intent. The Paternity Act, the court reasoned, was designed only for the purpose of providing support for children born out of wedlock and was not intended to facilitate commercial surrogate parenting agreements.[31] The child's father again appealed.

In reversing the lower courts, the Supreme Court of Michigan took a broader view of the Paternity Act. It agreed that the statute was intended to secure support for illegitimate children. The clear language of the act, however, authorized fathers of illegitimate children to establish their paternity without regard to their reasons for doing so. The court did not address any of the larger issues concerning surrogate parenting and expressed "no opinion about the plaintiff's entitlement to any other relief in the future."[32]

The Michigan appellate courts have had three opportunities to declare all surrogacy agreements illegal and against public policy but have not squarely done so. All we can be certain of at this point is that the prohibition against payment of fees to the natural mother in adoptions is not unconstitutional[33] and that the biological father within a surrogacy agreement may legally establish his paternity of the child.

29. 122 Mich. App. 506, 333 N.W.2d 90 (Mich. App. 1983), *rev'd and remanded*, 420 Mich. 367, 362 N.W.2d 211 (1985).
30. MICH. COMP. LAWS ANN. § 722.714(f) (Supp. 1985).
31. Syrkowski v. Appleyard, 122 Mich. App. 506, 515, 333 N.W.2d 90, 93-94 (Mich. App. 1983).
32. Syrkowski v. Appleyard, 420 Mich. 367, 373, 362 N.W.2d 211, 214 (1985).
33. The state court of appeals decision in Doe v. Kelley, is not binding on other courts insofar as the federal constitutional theory is concerned. Professor Robertson maintains that the Michigan statute is unconstitutional as applied in Doe v. Kelley. Robertson, *supra* note 16, at 427 n.63.

Beyond these limited certainties the law in Michigan remains unclear. Perhaps broader rulings will be made if Mr. Syrkowski attempts to obtain custody and Mrs. Syrkowski applies to adopt the child.[34]

The law in Kentucky is currently more settled, but its development was not without controversy. The Attorney General of Kentucky concluded in 1981 that surrogate motherhood contracts were illegal under the state's adoption laws.[35] Relying on this opinion, the state sought to enjoin a commercial surrogacy agency from operating in Kentucky. The lower court in *Kentucky v. Surrogate Parenting Associates*,[36] refused to issue the injunction, finding that the adoption laws did not render the surrogate parenting agreement illegal. As construed by the court, the agreement called for the payment of a fee in consideration for the surrogate carrying the child and agreeing to terminate her parental rights. The fee was, therefore, unrelated to any subsequent adoption proceeding. The judge declared that the state's case suffered from "a fundamental conceptual problem—how can a natural father be characterized as either adopting or buying his own baby?"[37] Given the natural father's preexisting relationship to the child, the baby-buying prohibition was viewed as inapplicable.

In apparent response to this decision, the Kentucky legislature amended its laws to expressly prohibit the payment of a fee in consideration for the termination of parental rights.[38] Before passing this legislation, the Kentucky Senate considered and rejected an amendment that would have excluded surrogacy agreements from coverage under the adoption laws. In reviewing the lower court's decision in *Surrogate Parenting Associates*, the Kentucky Court of Appeals considered this legislative history as a clear statement of preexisting public policy. It overruled the lower court and held that commercial surrogate parenting agencies operate in violation of Kentucky adop-

34. A lower Michigan court recently ruled that the woman who provides the egg to be fertilized and implanted in the womb of the surrogate, is the "legal" mother of the resulting child. Smith v. Jones, 85-532014 DZ (3d Jud. Dist., Mich., March 14, 1986). *See supra* note 10. This ruling will facilitate surrogacy arrangements in cases involving embryo transfers. It must be emphasized, however, that the case was uncontested and that the surrogate was making no claim to the child.

35. Ky. Op. Att'y Gen. 81-18 (1981).

36. 10 Fam. L. Rep. (BNA) 1105 (Ky. Cir. Ct. 1983).

37. *Id.* at 1106. In permitting a natural parent to provide payment in connection with the adoption of a child, one court has commented: "The fears that approval of such a policy would lead to bartering or sale of children are not borne out when we deal with agreements between parents or close family members." Reimche v. First Nat'l Bank, 512 F.2d 187, 190 (9th Cir. 1975). This judicial reasoning is reflected in some statutes that prohibit the selling of children but exempt transactions between the parents of a minor child. *E.g.*, WASH. REV. CODE ANN. § 9A.64.030 (Supp. 1984).

38. KY. REV. STAT. § 199.520(2) (Supp. 1984).

tion laws.[39]

The final word in *Surrogate Parenting Associates* came in a recently issued opinion of the Kentucky Supreme Court. After reviewing the pertinent legislation, the court concluded that surrogate parenting practices did not constitute the selling of babies. Such practices, therefore, did not contravene statutory prohibitions against payment of fees to natural mothers in connection with the adoption of her child.[40] The court found "fundamental differences" between surrogate parenting and the practices prohibited by the statute. The key distinction is that surrogacy arrangements are entered into under noncoercive circumstances *before* conception. Baby-selling statutes, on the other hand, are intended to control commercial brokers who would exploit expectant mothers who want to avoid the consequences of an unwanted pregnancy or fear the financial burden of child rearing.[41] In essence, the court found surrogate parenting to be as acceptable a form of reproductive technology as artificial insemination.

These recent decisions reflect some judicial tolerance, if not approval, of surrogate parenting. Through its construction of the Paternity Act, the Michigan Supreme Court in *Syrkowski* cautiously encouraged continued use of surrogacy agreements. The Kentucky Supreme Court in *Surrogate Parenting Associates* issued the clearest declaration to date that such practices do not constitute baby-selling. Whether other states will follow these cases remains to be seen. At this point in time, however, the application of baby-selling laws to surrogacy practices is quite speculative.

b. Restrictions on Private Adoptions and Parental Consent

Restrictions on private adoptions and the general requirement of securing parental consent are two common provisions that could affect surrogate parenting arrangements. Neither of these provisions would necessarily render surrogate motherhood contracts illegal. These provisions could, however, make surrogate agreements difficult to enforce.

The United Kingdom[42] and many American states[43] restrict pri-

39. Kentucky *ex. rel.* Armstrong v. Surrogate Parenting Assoc., 11 Fam. L. Rep. (BNA) 1359-60 (Ky. Ct. App. Apr. 26, 1985), *rev'd*, Surrogate Parenting Assoc. v. Kentucky *ex. rel* Armstrong, 704 S.W.2d 209 (Ky. 1986).

40. Surrogate Parenting Assoc. v. Kentucky ex. rel. Armstrong, 704 S.W.2d 209, 211 (Ky. 1986).

41. *Id.* The court did state that surrogacy agreements are voidable insofar as custody is concerned. *Id.* at 213. *See* notes 148-60 and accompanying text. For a critical analysis of this decision, see Annas, *supra* note 10.

42. Adoption Act, 1976, ch. 36, § 11.

43. One survey found that six states completely ban the placement of children for adoption outside government agencies, fourteen states forbid independent adoptions except in cases involving stepparents or close relatives and the remaining

vate arrangements for placement of children available for adoption. Surrogacy arrangements presumably would violate these prohibitions against privately arranged adoptions. Some statutes, however, regulate but do not prohibit private adoptions. Furthermore, the restrictions commonly do not apply in cases of adoptions by "relatives," including stepparents.[44] In most surrogate parenting arrangements, the adopting wife is married to the biological father of the illegitimate child. Although stepparent adoptions may be otherwise cumbersome,[45] they are certainly legal. The raising of an illegitimate child by his father and stepmother is well within the contemplation of the law.[46]

With rare exception,[47] adoptions cannot be made without the consent of the child's mother. In many jurisdictions, including the United Kingdom, the mother's consent is not effective until some specified time after birth.[48] The surrogate motherhood contract would not by itself be effective consent for purposes of these laws. Thus, the natural mother could change her mind after signing the agreement but before the statutory consent period expired. These restrictions on the mother's consent, however, should be viewed as creating a problem of enforcement, not a problem of legality.[49] A surrogate parenting arrangement in which the surrogate cooperates would not be affected by the consent requirement. Should the mother change her mind and oppose the adoption, the father and his wife face formidable problems in obtaining custody of the child and completing the adoption process. These complications will be addressed in the section outlining guidelines for enforcement. Here it suffices to point out that a carefully drafted surrogacy agreement might avoid any obstacles created by the adoption laws.

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states, while allowing independent adoptions, regulate the process to some extent. W. MEEZEN, S. KATZ & E. RUSSO, *supra* note 15, at 165-75. *See also* Poldolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L.Q. 547 (1975).

44. *E.g.*, Adoption Act, 1976, ch. 36, §§ 11(1)(a), 72(1).

45. *Id.* §§ 14(3), 15(4). *See generally* Comment, *Stepparent Adoption: A Comparative Analysis of Laws and Policies in England and the United States*, 7 B.C. INT'L & COMP. L. REV. 469 (1984).

46. *Re* C (M.A.) (An Infant) [1966] 1 All E.R. 838. A successful stepparent adoption is more likely when there is no expected future contact between the child and the nonadopting natural parent. *Re* D (Minors), 2 F.L.R. 102, 10 Fam. Law 246 (Ct. App. 1980). That is the case in the typical surrogacy arrangement.

47. Adoption Act, 1976, ch. 36, § 16(2); In Re F (A Minor) [1982] All E.R. 321.

48. Adoption Act 1976, ch. 36, § 18(4) (the mother's consent is not effective unless given six weeks after birth); KY. REV. STAT. § 199.601(2) (1984) (five day waiting period).

49. This is the precise approach taken by the Kentucky Supreme Court. *See* Surrogate Parenting Assoc. v. Kentucky *ex. rel.* Armstrong, 704 S.W.2d 209, 213 (Ky. 1986).

2. *Laws Regulating Artificial Insemination and Presumptions of Paternity*

Artificial insemination by donor (AID) is a widely accepted technique practiced in both the United States and Great Britain.[50] The parallels between AID and surrogate motherhood are striking. Both techniques alleviate infertility within a marriage by allowing a party outside the marriage to provide needed germinal material. The AID donor supplies sperm while the surrogate mother provides an egg. One obvious difference is the additional gestational function served by the surrogate mother. The end result, however, is identical. With the assistance of a third party, a couple who would otherwise be childless, is able to bring into the world a child who is genetically related to one of them.

Despite the long history of AID in Great Britain, no statutes specifically regulate the practice. A child born through AID is illegitimate under English law. The sperm donor, and not the mother's husband, is vested with parental rights and obligations.[51] The law in the United States is quite different. Twenty-four states have legislation designed to facilitate AID.[52] Typically, these statutes provide that if the husband consents to AID in writing, he will be presumed to be the legal father of the child for purposes of support, inheritance and custody.[53] The child is therefore legitimate. Courts in several other states have achieved the same result without the benefit of a statute.[54] Independent of any consideration of AID, the law in both the United States and Great Britain presumes that any child born to a married woman is the legitimate product of her marriage.[55] The presumption is often described as a strong one, but it can be rebutted in most jurisdictions by proof of the husband's impotency, non-access or properly conducted blood grouping tests.[56]

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50. AID is estimated to give rise to between 2000 and 4000 births in the United Kingdom, HUMAN PROCREATION, *supra* note 3, at 14 (1984), and between 6000 and 10,000 births in the United States, Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 588 (1979). The first documented case of human artificial insemination was in England in 1790. W. FINEGOLD, ARTIFICIAL INSEMINATION 6 (1964).
51. WARNOCK REPORT, *supra* note 3, at § 4.9.
52. For citations to specific statutes, *see* Wadlington, *Artificial Conception: The Challenge of Family Law*, 69 VA. L. REV. 465, 483 n.84 (1983); Andrews, *supra* note 18, at 54-55.
53. *E.g.*, GA. CODE ANN. § 19-7-21 (1982); KAN. STAT. ANN. § 23-129 (1980).
54. *E.g.*, People v. Sorenson, 68 Cal.2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968); Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963).
55. Family Law Reform Act, 1969, ch. 46, § 26 (United Kingdom); KY. REV. STAT. § 406.011 (1980); MICH. COMP. LAWS ANN. § 700.111(2), (3) (1980).
56. *E.g.*, Gray v. Richardson, 474 F.2d 1370 (6th Cir. 1973); Commonweath v. Pizzimente, 1 Mass. App. Ct. 668, 306 N.E.2d 279 (App. Ct. 1974). In some jurisdictions, however, only the wife's husband has standing to challenge the presumption of

Ironically, the presumption of paternity created by statutes and court decisions that facilitate AID, might simultaneously frustrate a surrogate motherhood arrangement. Agencies that negotiate surrogacy agreements reportedly prefer to employ married women with a history of successful childbirth as surrogate mothers.[57] These women are thought to be most likely to bear a healthy baby and to be least susceptible to psychological problems when giving the child to the father and his wife. If the surrogate is married, however, the law may presume that her husband is the father of the child. There are at least two reported American cases in which the presumption of legitimacy impeded the performance of a surrogacy agreement.[58]

These problems may be overcome. The surrogate in *Syrkowski* was a married woman. In an effort to circumvent the statutory and common law presumptions of paternity, the surrogate's husband signed an affidavit of non-consent to the artificial insemination. The absence of the husband's consent nullified the presumption of paternity created by the AID statute.[59] The common law presumption of legitimacy could then be rebutted through the use of blood tests.[60] *Syrkowski* illustrates the absurdity of regulating surrogacy arrangements under laws designed to achieve different purposes. The surrogate's husband actually cooperated in the arrangement by falsely denying his consent. Such machinations can hardly foster respect for the law.[61]

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legitimacy. *E.g.*, Taylor v. Taylor, 295 So.2d 494 (La. Ct. App. 1974); A v. X, 641 P.2d 1222 (Wyo. 1982). In these jurisdictions, the commissioning couple would have no recourse if the surrogate and her husband decided to keep the child.

57. Brophy, *supra* note 8, at 265; Wadlington, *supra* note 52, at 476.

58. *In re* a Baby Girl, 9 FAM. L. REP. (BNA) 2348 (Ky. Cir. Ct. Mar. 8, 1983) (presumption of legitimacy prevents surrogate mother from terminating her parental rights in order to facilitate commissioning couple's efforts to obtain custody and adopt a child); *In re* R.K.S., 10 FAM. L. REP. (BNA) 1383 (D.C. Sup. Ct. April 13, 1983) (court refused to expedite adoption process because a child is presumed to be that of the surrogate mother's husband).

59. Syrkowski v. Appleyard, 420 Mich. 367, 371-72, 362 N.W.2d 211, 213 (1985).

60. The Human Leukocyte Antigen (HLA) tissue typing test has been held admissible evidence to help prove or disprove paternity. *E.g.*, Crain v. Crain, 104 Idaho 666, 662 P.2d 538 (1983). *See* Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1978).

61. A constitutional challenge to the application of statutory presumptions of paternity to surrogacy arrangements was deflected in Sherwyn & Handel v. Department of Social Services, 173 Cal. App. 3d 52, 218 Cal. Rptr. 778 (Cal. Ct. App. 1985). The plaintiffs in the action were lawyers that represented over 100 couples involved in surrogate parenting arrangements. The various constitutional attacks on the statutes were predicated primarily on Professor Robertson's theory of a constitutional right of procreative liberty. Sherwyn & Handel v. Department of Social Services, 173 Cal. App. 3d 52, —, 218 Cal. Rptr. 778, 782 (Cal. Ct. App. 1985). *See also supra* note 28. The court ruled that the attorneys had no standing to bring such an action. Sherwyn & Handel v. Department of Social Services, 173 Cal. App. 3d 52, —, 218 Cal. Rptr. 778, 782 (Cal. Ct. App. 1985). Although the

3. Public Policy

Surrogacy agreements could be declared illegal and contrary to "public policy" even if they did not violate a specific statute. The Warnock Committee had "little doubt" that surrogacy agreements contravened public policy.[62] Presumably, the policy implicated by surrogacy agreements is the same policy that underlies statutes prohibiting the buying and selling of babies generally: a concern that the welfare of the child will not be protected, that surrogate mothers will be exploited and that human dignity is denigrated by recognizing any agreement in which a child is produced for money.[63]

There is more authority suggesting that surrogacy agreements violate public policy in the United Kingdom than in the United States. In Great Britain it is commonly said that any contract purporting to transfer parental rights is against public policy.[64] The limited case law that exists suggests that surrogacy agreements are unenforceable, at least insofar as custody of the child is concerned. In *Humphreys v. Polak*,[65] the court refused to enforce an agreement by which the mother of an illegitimate child was to give her child to a couple for a one month "trial." More directly on point is the case of *A v. C*,[66] in which the court held that the surrogacy contract between an unmarried man and a prostitute contravened public policy. Thus, the Warnock Committee's belief that surrogacy agreements are unenforceable has support.

The law in the United States on this point is less clear. A contractual agreement affecting custody of a child is not specifically enforceable per se. It may be enforced, however, if the agreement is consistent with the best interests of the child.[67] American courts, for example, have upheld agreements in which mothers consented to their children's adoption in consideration for being named in the adoptive par-

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Court did not reach the merits of the case, it did express "grave doubts" as to whether the statutes had any application to surrogate parenting arrangements. *Id.* at —, 218 Cal. Reptr. at 783.

62. WARNOCK REPORT, *supra* note 3, at § 8.5.

63. *See* Cohen, *supra* note 8, at 253-55; Holder, *Surrogate Motherhood: Babies for Fun and Profit*, 12 LAW, MED. & HEALTH CARE, June, 1984, at 115; Krimmel, *The Case Against Surrogate Parenting*, HAST. CENTER REP., Oct., 1983, at 35; Sappideen, *supra* note 8, at 101-02.

64. 1 J. CHITTY, CHITTY ON CONTRACTS ¶ 1091 (25th ed. 1982); G. TREITEL, THE LAW OF CONTRACT 332 (1983). Such agreements would appear to violate § 85(2) of the Children Act 1975. That provision reads: "Subject to section 1(2) of the Guardianship Act 1973 [which relates to separation agreements between husband and wife] a person cannot surrender or transfer to another any parental right or duty he has as respects a child." This statute does not apply in Scotland.

65. [1901] 2 K.B. 385.

66. [1978] 8 Fam. 170.

67. RESTATEMENT (SECOND) OF CONTRACTS § 191 (1979); E. FARNSWORTH, CONTRACTS § 5.4 (1982).

ent's will.[68] These adoptions were independently determined to be in the best interests of the children. The recent Kentucky decision in *Surrogate Parenting Associates* and, to a lesser extent, the Michigan decision refusing to rule that surrogacy agreements violate public policy in *Syrkowski* suggest that the public policy issue must be considered an open question in the United States.[69]

In light of sparse and conflicting authority and varying perceptions of policy, one cannot be sure whether surrogacy agreements violate public policy, adoption laws or any other law. The current legal status of surrogacy agreements can only be described as uncertain. To say that the law is uncertain is to invite legislative clarification. The next section examines various statutory proposals that specifically address surrogate motherhood.

III. COMPREHENSIVE LEGISLATION: AMERICAN, CANADIAN, BRITISH, AND AUSTRALIAN PROPOSALS

A. United States

Surrogate parenting in the United States is currently governed by the patchwork of adoption and artificial insemination laws discussed above. While no comprehensive statutory scheme has been enacted, legislation has been introduced in twenty-two states and the Study Committee for the Uniform Adoption Act is considering the issue.[70] Most of the proposed legislation would legalize and regulate surrogate motherhood practices.[71] These bills range in complexity from a blanket authorization of surrogacy arrangements to a detailed regulation of the entire process. The more common provisions would (i) establish the qualifications for prospective surrogate mothers and the circumstances under which the process can be used, (ii) require documentation of consent of all parties and their spouses, (iii) declare the child to be the legitimate offspring of the father and his wife, and (iv) establish the custody, support rights, and obligations of the surro-

68. *E.g.*, Reimche v. First Nat'l Bank, 512 F.2d 187, 189 (9th Cir. 1975); *In re* Estate of Shirk, 186 Kan. 311, 324, 350 P.2d 1, 12 (1960).

69. *See supra* notes 26-41 and accompanying text.

70. For a summary of these proposals, see Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 FAM. L. REP. (BNA) 3001 (Jan. 29, 1985). A collection of proposed statutes can be found in HUM. REPRODUCTION & L. REP., Report No. 13, Jan.-Feb. 1984, at 71-108. Recently, a study committee began work on drafting a Uniform Adoption Act that would clarify the legal status of children born as a result of artificial insemination, in vitro fertilization, embryo transfer and surrogate motherhood. *National Conference of Commissioners on Uniform State Laws, Report of the Study Committee on Uniform Adoption Act* (1985).

71. Four of the proposed bills would prohibit surrogate motherhood. The others would approve of and regulate the practice to some extent. *See* Pierce, *supra* note 70.

gate mother (and her husband) and the natural father (and his wife).[72] These proposed statutes would streamline the process by eliminating the need to institute separate custody, termination of parental rights, and adoption proceedings as would likely be required without such legislation. In this respect the proposals mirror the model established by legislation dealing with artificial insemination.

B. Canada

The Ontario Law Reform Commission considered surrogate motherhood in its recently issued and far reaching report on technologies for human reproduction.[73] The Commission found that assorted statutes dealing with adoption, child welfare, and paternity created substantial, but not insurmountable, barriers to effectuating a surrogacy agreement.[74] It rejected arguments that surrogate motherhood was immoral and found it to be an ethically acceptable response to the problems of infertility.[75] Accordingly the report recommended the enactment of comprehensive legislation designed to legitimize, facilitate, and regulate surrogate parenting practices.

The proposed legislation would resolve the range of family law issues presented by surrogacy arrangements.[76] The dangers of commercialism and exploitation would be controlled through a regulatory scheme requiring judicial approval of the agreement itself. The court would review the agreement to ensure that it clearly addresses various legislatively mandated subjects such as prenatal restrictions on the surrogate's conduct and surrender of custody.[77] The agreement must also provide for unanticipated contingencies, such as the death of the commissioning couple before birth.[78] Furthermore, no payment could be made to the surrogate without the approval of the court.[79] Finally,

72. *Id.* at 3003-04. Pre-insemination medical and psychological screening would be required of the surrogate. Termination of the surrogate's parental rights would be triggered by establishing the sperm donor's paternity through HLA tests. *Id.*
73. ONTARIO REPORT, *supra* note 3.
74. *Id.*, vol. I, at 94-102.
75. *Id.*, vol. II, at 229-33.
76. Upon the birth of the child, custody would be given to the judicially approved social parents who would be recognized as full legal parents for all purposes. The surrogate would have no legal relationship to the child and the child would be the legitimate offspring of the social parents for all purposes including inheritance. *Id.* at 260-61.
77. *Id.* at 249-60.
78. *Id.* at 259.
79. *Id.* at 253-55. While the Report authorizes judicial approval of fees paid to the surrogate, the Commission was divided on which items of payment should be permitted by the legislation and the degree of discretion to be given the court. *Id.* at 254. Unable to reach a consensus on this matter, the Commission's recommendation would effectively delegate complete discretion to the courts to police the financial aspects of the transaction.

private agencies would be subject to direct regulation by the Ministry of Community and Social Services.[80] The Ontario Report is remarkably thorough and may well serve as the basis for comprehensive legislation in this area.

C. United Kingdom

1. The Warnock Report

The Warnock Committee also examined a wide range of procreational relationships. It gave its blessings to in vitro fertilization, artificial insemination, egg donation, and to a more limited extent, embryo donation. It recommended that each of these practices be regulated by a new statutory licensing authority.[81] This authority would gather empirical data, issue guidelines for good practices, and guard against potential abuses.

Surrogate parenting was the only reproductive alternative to receive outright condemnation. A majority of the committee was concerned about the dangers of commercial exploitation. Voiced in utilitarian terms, the committee was convinced that "the danger of exploitation of one human being by another appears . . . far to outweigh the potential benefit . . . ."[82] All surrogacy agreements, furthermore, "treat others as a means to their own ends" and are therefore morally objectionable, "however desirable the consequences."[83] Accordingly, a majority of the Committee recommended the criminalization of commercial surrogacy agencies and an express statutory declaration that all surrogacy agreements are illegal contracts.[84]

Two members of the Committee dissented from this portion of the Report. While they shared the majority's concern about commercial agencies, they disagreed as to the proper response. The dissenters would utilize the proposed licensing authority as a safeguard against abuse.[85] They propose that the licensing authority permit surrogacy arrangements only where surrogacy is necessary to alleviate infertility.[86]

2. The Surrogacy Arrangements Act

In July of 1985, Parliament passed the government sponsored Sur-

80. *Id.* at 261-62.
81. WARNOCK REPORT, *supra* note 3, at § 13.3. The proposed authority would be independent of government, health authorities and research institutions. Great emphasis is placed on lay representation. *Id.*
82. *Id.* at § 8.17.
83. *Id.*
84. *Id.* at §§ 8.18, 8.19.
85. *Id.* at 87-88 (dissenting views of Greengross and Davies).
86. *Id.* at 88.

rogacy Arrangements Act.[87] The Act is designed to implement partially the recommendations of the Warnock Committee. The thrust of the legislation is to make criminal the operation of a commercial surrogacy agency. It is not directed at surrogate motherhood itself, only those commercial brokers who would arrange those transactions. In this respect the legislation is faithful to the Warnock Report. The Act does not, however, implement the Committee's additional recommendation that all surrogacy agreements be declared illegal.

The basic features of the Surrogacy Arrangements Act are straightforward. It defines surrogate mother to include women who become pregnant by means of embryo transfer as well as by artificial insemination.[88] Thus, the law makes no distinctions between surrogate mothers who are genetically related to the child and those who are not. Section 2 criminalizes the making, negotiating or facilitating of any surrogacy arrangement for any payment. The commissioning couple and the surrogate mother, however, are exempted from this provision.[89] Only third parties who facilitate surrogacy arrangements for a fee are potential defendants. Section 3 makes it an offense for anyone, including the commissioning couple and the surrogate, to advertise the need for or availability of surrogacy services. Newspapers and broadcast media also commit an offense if they publish or distribute advertising of or for surrogacy services.[90]

It is important to note what the Act does not do. It is not an offense for the commissioning couple and the surrogate mother to directly negotiate a surrogacy agreement. Agents can be used so long as they do not receive any payment.[91] The Act also does not prohibit the commissioning couple from paying a fee to the surrogate mother.[92] The legislation is limited to outlawing commercial intermediaries and prohibiting advertising for surrogacy services.

The limited scope of the Act fails to resolve many legal issues surrounding surrogacy arrangements and creates some new ones. The statute is remarkably ambivalent as to the legal status of the surrogacy agreements themselves. Section 1(9) declares that the Act governs arrangements "whether or not they are lawful and whether or not they are enforceable."[93] Thus, the Act does not expressly declare all surrogacy arrangements illegal. Given this equivocation and because the conditions that move couples to seek surrogacy services remain, it is probable that surrogate parenting will continue to occur at

87. Surrogacy Arrangements Act, 1985, *supra* note 5.
88. *Id.* at § 1(6).
89. *Id.* at § 2(2).
90. *Id.* at §§ 3(2)-3(3).
91. *Id.* at § 2(3).
92. *Id.* at §§ 2(2)(b) & 3.
93. *Id.* at § 1(9).

some level. Yet the Act is completely silent regarding many critical issues that are likely to arise. There is, for example, no provision addressing the issue of legitimacy. The Warnock Report recommended that a child born through AID be considered the legitimate offspring of his mother and her husband.[94] Should not the child born through a surrogacy arrangement be treated as the legitimate child of his father and his wife? What are the respective rights and obligations of the commissioning couple and surrogate mother regarding custody, access and support? Traditionally, the mother of an illegitimate child was vested with parental rights.[95] Should surrogate motherhood be treated as any other case of illegitimacy or should the parties' intent help define their respective rights and obligations?

The Act also does not address the potentially conflicting interests of the surrogate mother and child with regard to confidentiality. At some future point, the child may wish to learn the identity of her surrogate mother while the surrogate may desire to remain anonymous. The Warnock Report recommends that AID sperm donors receive complete anonymity although the child may have access to basic information about the donor's ethnic background and genetic health.[96] The Children Act, on the other hand, authorizes an adopted child of eighteen years of age to obtain a certified copy of his or her original birth certificate, which presumably identifies the child's mother.[97] Which model of confidentiality should apply to surrogate parenting?

Perhaps these questions could be ignored by assuming that all surrogacy arrangements are illegal and therefore people will not engage in such practices. As noted above, there is some support for the argument that public policy is offended by surrogacy agreements. But the Act itself, by consciously declining to prohibit all surrogacy agreements, may call this into question. The Act goes to great length to exclude commissioning couples and surrogate mothers from some of its prohibitions. By targeting only commercial intermediaries in spite of the broader condemnation of the Warnock Committee, the Act suggests an acceptance of surrogate parenting in non-commercial contexts. Furthermore, the recommendations of the Ontario Report and the unwillingness of several American courts to invalidate surrogacy agreements illustrate that reasonable minds can differ as to which policy is in the public's interest. At the very least, whether all surrogate parenting agreements contravene public policy is an open question.

There is also a logical inconsistency between the objectives and

94. WARNOCK REPORT, *supra* note 3.
95. Children Act, *supra* note 16, at § 85(7). The father of an illegitimate child may apply for custody of or access to his child under the Guardianship of Minors Act, 1971, ch. 3, § 9.
96. WARNOCK REPORT, *supra* note 3, at § 4.21.
97. Children Act, *supra* note 16, at § 26(2).

methods of the Surrogacy Arrangements Act. The Act clearly purports to combat the perceived evils of commercialism. Yet there is no prohibition against the commissioning couple paying a surrogate a substantial fee for her services. Directly negotiated agreements have occurred in the past.[98] It is difficult to see how a fee is any less commercial, coercive or exploitative if offered directly by the commissioning couple rather than by the couple's commercial agent.

Perhaps the most serious danger posed by this piecemeal legislation is its encouragement of amateurish agreements. The Act defines the criminal offense in terms of "making, or negotiating or facilitating the making of, any surrogacy agreement."[99] This definition is sufficiently broad to include legal, medical, and psychological counselors who, for a fee, might otherwise assist the parties. The couple and the surrogate are left to stumble through the process without the advice of experts. It is most unfortunate that a law which does not condemn the agreement itself does not permit the parties to pursue an agreement in a professional manner.

D. Australia

Victoria, Australia has recently adopted legislation that criminalizes most surrogacy practices. The Infertility (Medical Procedures) Act[100] makes it an offense to give or receive payment pursuant to a surrogacy agreement. It also proscribes advertising the need for or availability of surrogacy services. Both the commissioning couple and the surrogate may be prosecuted under these provisions. The only surrogacy arrangement not subject to criminal penalty is one in which no fee is paid. Even this arrangement, however, is declared void and unenforceable. The practical effect of the legislation is an outright ban on all surrogacy practices.

The Victorian Act is much neater than its British counterpart. Under the Victorian law, there is no exclusion of the parties from criminal penalties and no lingering uncertainty as to the enforceability of agreements that invites dangerous uncounseled negotiations. The Australian statute thus meets most of the criticisms leveled at the British law. Yet, this is not the preferred solution. The following section endeavors to demonstrate that surrogacy arrangements are not

98. *See, e.g.*, A v. C [1978] 8 Fam. 170 where the father directly solicited a prostitute for surrogacy services. The first woman he approached declined the offer but put him in contact with another woman who agreed to bear his child.

99. Surrogacy Arrangements Act, 1985, *supra* note 87, at § 2(3)(b).

100. The Victorian legislation is not limited to surrogate motherhood but addresses a number of procreational techniques, including artificial insemination and in vitro fertilization. The Act is regulatory in nature, setting forth who may perform these procedures and the circumstances under which they may be carried out. For an analysis of the legislation, see Corns, *Legal Regulation of In Vitro Fertilization in Victoria*, 58 LAW INST. J. 838 (1984).

inherently unethical or immoral. Without some stronger showing of the dangers of surrogacy arrangements, individuals in a free society should be allowed to choose this procreational option.

IV. THE ETHICS OF SURROGATE PARENTING

The United Kingdom, Australia, Canada, and the United States share a strong commitment toward preserving individual liberty. Liberty is valued as a good in itself as well as for the good it produces. In societies that value liberty, individuals are generally free to act without government restriction. Societal commitment to individual liberty is reflected in various legal doctrines such as freedom of contract,[101] informed consent,[102] and the right of some patients to refuse unwanted medical treatment.[103] Of course, freedom to act is not absolute. State restrictions on liberty frequently are imposed when the conduct threatens to injure a third party. Intervention is sometimes justified in paternalistic terms to protect individuals from their own folly. Limited paternalism is acceptable, however, only where the prevention of the threatened harm clearly outweighs the resulting loss of liberty or when the individual is unable to act autonomously.[104] For fear that these exceptions may swallow the rule, a heavy burden must be met to justify intervention.

Opponents of surrogate parenting offer two types of arguments to justify prohibiting the practice. The first may be characterized as consequentialist. That is, opponents maintain that if allowed, surrogate parenting would produce certain undesirable consequences. Consequentialist arguments are basically utilitarian in nature and require an assessment of the relative risks and benefits of the practice. The sec-

101. 1 J. CHITTY, *supra* note 64, at ¶ 4; E. FARNSWORTH, *supra* note 67, at 21-22.

102. Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972); Sidaway v. Bethlem Royal Hosp. Governors [1985] 1 All E.R. 643. *Sidaway* and *Canterbury* agree that a doctor owes a duty to a patient to provide information concerning the risks of proposed treatment. This duty rests on autonomy values that give the patient the ultimate authority to refuse or accept treatment. The cases differ with regard to the standard of care. *Canterbury* defines the duty to disclose information in terms of risks material to a prudent patient. *Sidaway* approves a standard that, in most instances, is tied to the disclosure practices of other physicians. *See* Brahams, *The* Sidaway *Case: Informed Consent—The Thin End of the Wedge*, 135 NEW L.J. 201 (1985). This difference should not obscure the common commitment to patient autonomy.

103. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), *In Re* Osborne, 294 A.2d 372 (D.C. 1972). *See* Meulders-Klein, *The Right Over One's Own Body: Its Scope and Limits in Comparative Law*, 6 B.C. INT'L & COMP. L. REV. 27 (1983).

104. Acceptance of paternalistic interference with liberty under these circumstances is justified as a form of "social insurance" that fully rational people would take out to protect themselves. T. BEAUCHAMP & J. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 172 (1983) (citing DWORKIN, *Paternalism*, 56 MONIST 64 (1972)); J. RAWLS, A THEORY OF JUSTICE 248-49 (1971).

ond type of objection is nonconsequentialist in that it finds surrogacy arrangements morally unacceptable regardless of their beneficial impact.[105] The Warnock Committee, in a conclusory fashion, relied on both types of arguments to support its recommendations. A closer examination of the interests of all concerned, however, reveals that neither type of argument justifies interference with the liberty of the parties to enter into and perform their obligations under a surrogacy agreement.

A. Consequentialist Objections to Surrogate Motherhood

1. Potential Harm to the Child

The interest of the child is the most important consideration in evaluating the ethics of surrogate parenting. The child is not a party to the agreement but is profoundly affected by it. Unable to protect his own interests, the child must look to others for protection. From the child's perspective, the benefits of surrogate motherhood clearly outweigh any potential harms. In the first place, surrogate motherhood, as commonly practiced, poses no greater physical risk to the child than those risks presented by an ordinary pregnancy. In terms of physiological development, surrogate motherhood is only a variation of AID. AID has long been considered to present an ethically acceptable level of risk.[106]

Psychological risks to the child must be considered as well. Most of the purported dangers stem from the separation of genetic and gestational parenting from social parenting. The concern is that the child may suffer from a feeling of genetic rootlessness when he learns of his origins.[107] This feeling may be aggravated by the knowledge that his genetic and gestational mother purposefully conceived him for money with the clear intention of "giving him away." The most serious threat of psychological trauma is the possibility that both the surrogate mother and commissioning couple would reject the child. This occurred in a highly publicized American case.[108]

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105. The consequentialist-nonconsequentialist dichotomy is borrowed from J. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 82-93 (1973).

106. Present data suggests that AID children suffer no greater incidence of neonatal mortality, congenital defect, or difficulty in physical or mental development than children who have been conceived normally. McLaren, *Biological Aspects of AID*, in C.I.B.A. FOUNDATION, LAW AND ETHICS OF AID AND EMBRYO TRANSFER 5 (1973). *See also* HUMAN PROCREATION, *supra* note 3, at 15. There are alarming recent reports, however, that acquired immune deficiency syndrome may be transmitted by artificial insemination. Wright, *U.S. Sperm Banks Screening Donors for AIDS*, Atlanta Constitution, Aug. 23, 1985, at 10, col. 3.

107. Kass, *Making Babies—The New Biology and the Old Morality*, 26 PUB. INTEREST 18 (1972); Kass, *Making Babies Revisited*, 39 PUB. INTEREST 54 (1979); Sappideen, *supra* note 7, at 101-02.

108. In January of 1983, a surrogate mother named Judy Stiver gave birth to a child

While not denying that these problems could occur, one must place them in perspective. Separation of genetic and social parenting occurs frequently in today's society. Adoption, AID, divorce and blended families each involve some division of the traditional parenting function. The same type of psychological risks posed by surrogacy is present in these contexts.[109] That surrogate parenting involves planned conduct does not fundamentally alter the nature of the risk. Furthermore, there is nothing inherent in the surrogacy arrangement that heightens the tragedy of the unwanted impaired newborn. Surrogate motherhood does not cause birth defects. It is the impaired condition, not the circumstances of conception, that creates the problems. The American experience with handicapped newborns suggests that the ethics of withholding treatment is equally troubling in traditional childbirth.[110]

One must consider the benefits that surrogacy arrangements bring to the child.[111] Without the surrogacy arrangement, that particular child would never have come into existence. Surely existence with some psychological risk is infinitely preferable to never having been born. The rejection of so-called wrongful life tort claims by English

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inflicted with a disorder indicating mental retardation. The contracting father, Alexander Malahoff, disclaimed paternity and refused to accept responsibility for the child's care. The hospital obtained a court order authorizing medical treatment. Mrs. Stivers, her husband, and Mr. Malahoff underwent blood and tissue tests to establish the child's paternity. The parties appeared on television and the test results were announced during the "Phil Donahue Show." The tests confirmed that Mr. Stivers was the father of the child. Mr. Malahoff has sued Mrs. Stivers for breach of contract. The Stivers also sued Mr. Malahoff for invasion of privacy by making the whole affair public and now claim that the child's condition was caused by a virus transmitted by Malahoff's sperm. *See* Andrews, *supra* note 18, at 56.

109. Robertson, *Surrogate Mothers: Not So Novel After All*, HASTINGS CENTER REP., Oct., 1983, at 28, 30-31.

110. The withholding of medical treatment to impaired newborns is the subject of intense controversy in the United States. Throughout the debates there has been no suggestion that children conceived by artificial insemination are denied treatment more often than other children. Indeed, the most prominent cases involve traditional procreational patterns. Much of the present legislative activity was prompted by an incident where the parents of a Downs Syndrome child refused to authorize surgery necessary to correct problems with the child's esophagus. The Indiana Supreme Court did not override the parents' decision and the child died six days later. Babish & Russell, *The Demise of Infant Doe*, Washington Post, Apr. 17, 1982, at A1, col. 5. The federal government responded with proposed regulations designed to guarantee that handicapped newborns were not deprived of treatment. After several revisions, regulations were enacted. *See* 49 Fed. Reg. 1621 (1984). For a discussion of these issues see, Symposium, *Baby Doe: Problems and Legislative Proposals— Legislative Workshop*, 1984 ARIZ. ST. L.J. 601.

111. The production of benefit is a cornerstone of modern biomedical ethics. T. BEAUCHAMP & J. CHILDRESS, *supra* note 104, at 148.

and a majority of American courts[112] reflects a policy of cherishing life, a policy that is advanced by surrogate motherhood. The trouble and expense incurred by the commissioning couple additionally suggests that the child will be raised by parents who dearly want him.

The case for prohibiting surrogate parenting in order to protect the interests of the child is not convincing. The potential psychological risks are not peculiar to surrogacy arrangements. They are quite comparable to those already encountered in other sanctioned reproductive and familial contexts. More importantly, these risks appear insignificant when compared to the benefits surrogacy affords the child. Life, even if accompanied by a certain genetic rootlessness, surely outweighs the alternative of nonexistence. From the child's perspective, surrogate motherhood cannot be considered unethical.

2. Potential Harm to the Parties

Even if surrogacy arrangements do not pose an unreasonable degree of risk to the child, society must consider their effect on the parties. Here we enter the murky realm of limited paternalism. State intervention is warranted only if the agreement clearly creates an unacceptable level of risk to one or both of the parties, or if the parties are incapable of rationally assessing their own best interests.

a. The Interests of the Commissioning Couple

Surrogate parenting, of course, poses no physical risks to the commissioning couple. It does, however, involve a sizeable psychological and monetary investment. Should the transaction not be completed, for whatever reasons, the couple may suffer an economic loss and profound emotional distress. These dangers are arguably magnified by the involvement of commercial agencies who could prey on the vulnerability of desperate couples desiring children. These intermediaries are likely to increase the couple's monetary investment and could mislead the couple by understating the risk that they may not receive a child.

The parties to any agreement are exposed to the risk of disappointment. The psychological and economic risks peculiar to surrogacy agreements are known to the couple in advance. Those who facilitate surrogate parenting arrangements are reported to advise their clients that the surrogate mother could change her mind and keep the child.[113] The danger of disappointment in surrogate motherhood is

112. McKay v. Essex Area Health Auth., [1982] 2 All E.R. 771; Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984); Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). A minority of three states allow the wrongful life action by the child. *E.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982).

113. Brophy, *supra* note 8, at 264.

similar to that which already exists with regard to adoption. There too, the mother often may legally rescind her consent within a specified time after birth.

The danger of potential exploitation can be addressed in several ways. We must first recognize that this risk exists in many facets of life. There are all too many instances of attorneys defrauding their clients and doctors abusing their patients. Society does not respond to these abuses by prohibiting the practice of law or medicine, but by attempting to police the particular exploitative conduct. Because both doctors and lawyers are integral participants in surrogacy arrangements, the disciplinary mechanisms of both professions would apply. Civil and criminal consumer protection laws would also guard against overreaching by commercial agencies. Should these existing protections be deemed insufficient, specific regulation is possible. The Canadian proposal calling for judicial review of surrogacy agreements is but one example. The licensing model of regulation proposed by the Warnock Committee for other reproductive activities could be easily applied to surrogacy agencies. The licensing authority could be expected to provide an accurate assessment of the potential personal and legal complications of surrogate parenting.

The point here is that the paternalistic justification for prohibiting surrogate parenting is not particularly strong when measured against the interests of the commissioning couple. They are likely to be aware of the risks but perceive it to be in their best interests to accept those risks. Abuses can be dealt with by either current laws or additional regulation.

b. The Interests of the Surrogate Mother

Surrogacy arrangements present several risks to the surrogate mother. She is exposed to the inconvenience of the insemination process as well as the physical risks and discomforts associated with pregnancy and childbirth. These dangers, however, are not sufficient to warrant prohibiting surrogate motherhood. They are well known and willingly accepted by many women and permitted by society in other contexts. Just as the state does not deem it necessary to protect women from the physical dangers of pregnancy in other settings, the physical risks alone cannot justify a ban on surrogacy arrangements.

The real concern is the perceived psychological trauma associated with relinquishing the child to its father. Although very little is known about the subject of bonding, there is an intuitive conviction that carrying and delivering a child creates a unique bond between mother and child.[114] The breaking of that bond is feared to cause se-

114. PSYCHOLOGICAL ASPECTS OF PREGNANCY, BIRTHING & BONDING 21 (B. Blum ed. 1980); G. DICK-READ, CHILDBIRTH WITHOUT FEAR 10-15 (5th ed. 1984).

vere emotional trauma to the mother and child. The reported cases of refusals to surrender custody suggest that some surrogate mothers do underestimate their attachment to their children.

Again, it must be emphasized that the surrogate mother is aware of this risk. Most surrogate mothers have given birth before[115] and must be presumed to understand what might be involved in relinquishing the child to its father. The state frequently sanctions a mother's conscious decision to sever her bonds with her child in connection with divorce and adoption. These decisions are generally scrutinized only to determine whether they are voluntary and in the child's best interest. The potential psychological harm to the mother, if considered at all, is done on a case by case basis.

The conditions giving rise to most surrogacy arrangements would seem less coercive than those attending many adoptions. In the stereotypical adoption, a young unwed woman finds herself pregnant but financially or emotionally unable to care for a child. The pregnancy creates an immediacy that could cloud her judgment. The potential surrogate mother does not act under this type of pressure. She has time to reflect upon the implications of the proposed undertaking before becoming pregnant.[116]

Many express concern about the potential coercive effect of the fee. It is feared that economic conditions might "force" a woman to become a surrogate mother who otherwise would not want to. Preliminary research reveals that financial considerations are an important, though not an exclusive, factor motivating women to volunteer to become surrogate mothers.[117] The fee is clearly an inducement, but is it coercive?

On one level, money influences many decisions an individual makes. Payment of a fee does not alter the voluntary nature of consent in most transactions. Indeed, the promise of payment is usually indispensable to the making of any enforceable agreement. Yet there are times when financial inducement may amount to coercion. Payments to prisoners who participate in risky medical research is criticized on this basis.[118] Similar concerns underlie proposed and existing

115. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117, 118 (1983) (Of the 125 women applying for surrogate motherhood who were interviewed, 114 (91%) had at least one previous pregnancy and 101 (81%) had at least one previous live birth).

116. Surrogate Parenting Assoc. v. Kentucky *ex. rel.* Armstrong, 704 S.W.2d at 209, 211-12 (Ky. 1986).

117. Parker, *supra* note 115, at 118. Eighty-nine percent of the women interviewed said a fee was a necessary condition for their participation. None of the women stated that the fee alone was a sufficient reason for becoming a surrogate mother. The financial inducement was often complemented by therapeutic or altruistic motivations.

118. G. ANNAS, L. GLANTZ & B. KATZ, INFORMED CONSENT TO HUMAN EXPERIMENTA-

prohibitions on the sale of vital organs for transplantation.[119] On the other hand, payment to sperm donors is common practice[120] and no one argues that they are exploited.

The line dividing legitimate inducement from intolerable coercion is necessarily imprecise. One proposed test focuses on what has been called "the moral subsistence level."[121] The moral subsistence level refers to a condition of life we as a society believe each member is entitled to as a matter of moral decency.[122] This condition may include basic religious and political freedoms as well as material considerations such as food and shelter. When the reward offered is necessary to raise a person to this minimally acceptable level of existence, however defined, her consent may not be truly voluntary. If she has already attained the moral subsistence level, then the promise of financial reward alone does not invalidate consent. Thus, a payment promised a starving person could be considered coercive. The same offer made to a person wanting a second automobile would be morally acceptable.

Clinical research suggests that the average potential surrogate mother lives above the moral subsistence level. Dr. Phillip Parker gathered demographic and motivational data on 125 women who volunteered to become surrogate mothers.[123] Ninety-one percent of them had at least one prior pregnancy and eighty-one percent had at least one prior live birth. Most of the applicants had completed their secondary education and many had attended universities. More than sixty percent of them were employed. They had family incomes ranging from $6,000 to $55,000. While the financial inducement was important, it was never a totally sufficient reason for becoming a surrogate mother. Many women expressed the strong altruistic desire to give a baby to a parent who needed a child. Others felt that surrogate moth-

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TION: THE SUBJECT'S DILEMMA 113-15 (1977). The federal government has issued regulations restricting the inducements offered prisoners to obtain their consent to participate in biomedical and behavioral research. 28 C.F.R. § 512.16 (1984); 45 C.F.R. § 46.305(a)(2) (1984).

119. Annas, *Life, Liberty, and the Pursuit of Organ Sales*, 14 HASTINGS CENTER REP., Feb., 1984, at 22, 23; Dickens, *Control of Living Body Materials*, 27 U. TORONTO L.J. 142, 165 (1977).

120. HUMAN PROCREATION, *supra* note 3, at § 4.5; Currie-Cohen Luttrell & Shapiro, *supra* note 50, at 585.

121. Freedman, *A Moral Theory of Informed Consent*, HASTINGS CENTER REP., Aug., 1975, at 32, 36. *See also* G. ANNAS, L. GLANTZ & B. KATZ, *supra* note 118, at 114-15.

122. Professor Freedman explains that "[w]e would all, no doubt, draw up different lists of these rights and freedoms; but included in them would be safety of the person, freedom of conscience and religion, a right to a certain level of education, and, for some of us, a right to some level of health care." Freedman, *supra* note 121, at 36.

123. Parker, *supra* note 115. *See also* Franks, *Psychiatric Evaluation of Women in a Surrogate Mother Program*, 138 AM. J. PSYCHIATRY 1378 (1981).

erhood would help them master unresolved feelings they had about prior pregnancies. Dr. Parker's research indicates that the average potential surrogate mother is a middle class woman who by experience and education can be expected to understand the physical and emotional risks of surrogate motherhood. The average potential surrogate mother does not appear to be so economically desperate that the promise of financial reward would coerce her into doing something she did not want to do.

It is not necessary to deny the potential for exploitation, however, to justify surrogate motherhood. Again, either the Canadian model of judicial regulation or the licensing authority recommended by the Warnock Committee could serve as a protection against abuse. Either could ensure that fees are set at a level adequate to compensate the surrogate for her time, inconvenience and risk, but not so high as to be coercive. Legal, medical and psychological counselors could apprise the surrogate of the attending risks so that her consent would be truly informed. Psychological testing and counseling is reportedly routinely performed by commercial agencies[124] and would be required under several American regulatory proposals.[125]

The point here is that paternalistic concerns to protect the surrogate from her perceived folly do not warrant a total prohibition of surrogate parenting. The potential risks are obvious to the parties and therefore call into question the need for any regulation at all. However, to the extent one views the surrogate as ripe for exploitation, regulation short of prohibition is feasible.

3. Potential Harm to Society

Those opposed to surrogate motherhood argue that the practice poses a threat to society at large, independent of any risk to the participants. The argument here echoes the "public policy" considerations discussed earlier. It is maintained that surrogate parenting will damage the traditional family structure that is the foundation of our social order. The intrusion of a third party into the reproductive process will weaken the bonds between family members and thereby reduce the cohesion of the family unit.[126]

This concern is easily dispatched. The involvement of third parties in procreation and child rearing is an established fact in our society. Any threat to the family presented by the third party involvement in

124. Brophy, *supra* note 8, at 275-76. The women interviewed in Dr. Parker's study were referred to him by an attorney who was actively negotiating surrogacy agreements. Parker, *supra* note 115, at 117. Some reports indicate that psychological counseling is perfunctory at best. Ince, *Inside the Surrogate Industry*, in TEST TUBE WOMEN 99 (R. Arditti, R. Klein & S. Minden eds. 1984).

125. Pierce, *supra* note 70, at 3003.

126. WARNOCK REPORT, *supra* note 3, at §§ 4.10, 8.10.

surrogate motherhood is quite comparable to that posed by AID. Adoptions, divorce and blended families each involve some separation of genetic, gestational and social parenting. Surrogate motherhood is simply a no greater threat to traditional family values than changes that are already occurring due to social, economic or demographic reasons.[127] Furthermore, one must remember that the primary objective of surrogate motherhood is to produce a child to be raised by a couple unable to procreate by themselves. The commissioning couple seeks to create a traditional family structure in the only way available. Thus surrogate motherhood actually increases the overall number of family units within society.

B. Nonconsequentialist Objections to Surrogate Motherhood

The second set of criticisms rests on the broad assertion that surrogate motherhood is inconsistent with respect for human dignity. Critics assert that surrogacy practices sanction the treating of individuals as means to achieving an end rather than as independent objects of moral concern. The surrogate thus becomes an incubator in which others can attain their goal of procreation. Treating individuals as means instead of ends in themselves was the basis for such now-discredited practices as slavery and forced medical experimentation.[128]

Arguments pertaining to human dignity are difficult to respond to because they are so abstract. To agree that individuals should not be treated as means to achieve selfish ends does little to resolve particular cases. The proposition contains no readily discernible principle of limitation. One who hires a gardener uses him to achieve a desired end. Yet, surely all contracts of employment are not immoral. Closer to the point, sperm and egg donors are means whereby infertile couples may achieve their desired ends of procreation. Neither the Warnock Committee nor society at large considers donor roles as demeaning to human dignity.

In reflecting upon whether a particular relationship demeans human dignity, one should distinguish between the relationship itself and the treatment of particular individual participants. Some relationships, such as those involved in slavery and forced medical experimentation, are morally objectionable regardless of how well the individuals are treated. These activities are justifiably censured because they deny the individual the degree of autonomy essential to personal dignity. Surrogate motherhood is ethically distinguishable

127. Robertson, *supra* note 109, at 30.

128. Krimmel, *supra* note 63, at 36. Some feminists fear that surrogate motherhood perpetuates the woman-as-breeder sex role stereotype and thereby hinders the development of true equality between men and women. G. COREA, THE MOTHER MACHINE 213-49 (1985).

from slavery precisely on this point. The informed and voluntary participation of the surrogate preserves her dignity as an individual.

The vast majority of human relationships are not inherently undignified. Still, individuals within these relationships may or may not be treated with the proper measure of respect. In this regard, the surrogate mother is no different from any other individual who provides services for others. Aside from the slavery-type arrangements, human relationships are neither inherently possessed or dispossessed of "respect." Rather, respect is a function of individual treatment.

A second argument is more focused. It maintains that surrogate parenting fosters a commodification of parenthood. By creating a market for genetic and gestational services, surrogate motherhood treats procreation as a tradeable commodity.[129] Parenthood and ultimately life itself become less dignified when reduced to commercial barter. This criticism centers on the particular services provided by the surrogate mother rather than a broad and general attack on using others.

The persuasiveness of the commodification argument depends largely on intuitive normative judgments about which facets of life should not be traded. Once the argument is reduced to subjective value judgments, there is little room for logical analysis. One ultimately is forced to accept or reject the proposition that respect for life is diminished when a woman receives payment for carrying a child for another. Several points should be kept in mind, however. There is nothing intrinsically immoral about a person receiving pay for providing services for others. This is the backbone of our economy. Furthermore, a substantial amount of commercial trafficking presently exists with regard to parenting. Sperm donors, and presumably egg donors, are paid for their genetic contribution to the procreational process.[130] Wet nurses, day care centers and nannies represent varying accepted degrees of commercialized social parenting. Foster parents commonly receive state assistance for providing parental care. It is remarkable that Great Britain, a country that tolerates prostitution,[131] is shocked

129. Prichard, *supra* note 15, at 352. The proposition that certain things should not be traded has been used to attack broadly the "law and economics" movement in the United States. *See* Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorum*, 52 S. CAL. L. REV. 669, 687-88 (1979).

130. Some have objected to the payment of fees to sperm donors. One concern is that donors might be tempted to falsify or withhold information so that they will be accepted as donors. WARNOCK REPORT, *supra* note 3, at § 4.27. Another fear is that "commercial agencies cannot be expected to give the entirely disinterested advice and counseling that couples using these services greatly need." HUMAN PROCREATION, *supra* note 3, at 43. These objections are consequentialist in nature and do not suggest the absence of human dignity in either donating or receiving germinal material.

131. Prostitution, as such, is not a crime in the United Kingdom. A. SION, PROSTITUTION AND THE LAW 52 (1977); J. SMITH & B. HOGAN, CRIMINAL LAW 429 (5th ed.

by surrogate motherhood. If a woman is free to sell her body for recreational sex, why condemn her offer of gestational services to alleviate infertility?

It is the provision of gestational services that distinguishes surrogate motherhood. Is there something unique about gestation that suggests that it alone should not be provided in exchange for payment? The commodification argument, in the final analysis, rests entirely on a romantic vision of motherhood that obscures the fundamental nature and object of the transaction.[132] Surrogacy creates life and family in circumstances where they are not otherwise possible. This affirms rather than cheapens society's respect for life.

The case for prohibiting surrogacy practices from a consequentialist perspective is an especially weak one. The benefits to the child and commissioning couple vastly outweigh any potential risks. Possible exploitation of surrogate mothers can be addressed by regulatory measures short of total prohibition. The prohibition of surrogate parenting practices must be justified, if at all, in nonconsequentialist terms. Given the rather abstract nature of these concerns, the strength of the argument ultimately depends on individual values. The nonconsequentialist concerns do not convince me that surrogate motherhood is unethical. The informed and voluntary participation of the parties in creating life does not diminish its value. On the contrary, surrogate motherhood emphasizes the worth of children in our society and brings the unique experiences of parenthood to those who would otherwise be deprived.

V. GUIDELINES FOR RESOLVING CONFLICTS: DAMAGES AND SPECIFIC PERFORMANCE

My argument has been that as the product of autonomous adults, surrogacy arrangements should not be proscribed unless there are convincing reasons for doing so. The previous section concluded that the reasons most commonly offered are lacking. Accordingly, surrogacy agreements should not be considered illegal. As with any agreement, surrogacy arrangements will inevitably give rise to disputes.

1983). The regulatory pattern of the Surrogacy Arrangements Act and the law of prostitution is quite similar. Neither surrogacy nor prostitution are crimes, as such, but other criminal laws do discourage both practices. Parallel treatment of prostitution and surrogacy is unfortunate. If surrogacy is not totally prohibited, it is likely to continue in some form. The primary anticipated effect of the Surrogacy Arrangements Act will be to remove professionals from the process thereby encouraging uncounseled agreements in a matter that demands careful planning.

132. *But see* Annas, *supra* note 10, at 31 ("that the woman who gestates a child should be considered the child's legal mother for all purposes—is not based on antiscience, anachronistic, or sentimental views of motherhood. Rather it is a recognition of the gestational mother's greater biological contribution to the child, including risks and physical contributions of the nine months of pregnancy . . . .").

This section offers guidelines for resolving many of the anticipated conflicts. Ideally, these guidelines would be part of a comprehensive legislative package. In the absence of specific statutory regulation, however, they could be invoked by courts seeking common law solutions.

Most of the potential conflicts center on three situations: (1) efforts to control the prenatal conduct of the surrogate mother; (2) the surrogate mother's refusal to relinquish custody of the child; and (3) the father's refusal to accept custody of his child. In each of these situations, an award of money damages may validate the legitimacy of the agreement and compensate for some economic injury. Damages fail, however, to protect the paramount interests at stake: the health and custody of the child. Accordingly, specific performance will be sought in most instances. Yet there are two overriding factors that will color a court's view of a request for specific performance. First, the contract affects the interests of an innocent and helpless third party—the child. Courts are not likely to adhere rigidly to contract principles without an independent assessment of the best interests of the child. Second, enforcement of surrogacy agreements will often involve the performance of uniquely personal services, great intrusions upon the individual, or constant supervision. These factors generally dissuade courts from granting specific performance.[133]

A. Controlling the Surrogate's Prenatal Conduct

Surrogacy agreements commonly contain provisions purporting to control the surrogate mother's prenatal conduct. Many provisions are restrictive in nature such as those prohibiting the consumption of alcohol, tobacco and drugs during pregnancy. Others require affirmative conduct such as regular prenatal physical examinations or submitting to certain tests. Both these proscriptive and prescriptive provisions are designed to protect the health of the fetus. The most controversial provisions concern the surrogate's right to an abortion. The surrogate generally agrees not to abort the fetus unless, if in the opinion of the inseminating physician, the fetus is physiologically abnormal or an abortion is needed to preserve the physical health of the mother.[134]

1. Promoting the Healthy Development of the Fetus

It is extremely doubtful that provisions regulating the surrogate's early prenatal conduct can be effectively enforced. Drinking, smoking and drug use are often difficult to discover. Even if detected, the issue of remedy is problematic. Specific performance of these restrictions

133. 1 J. CHITTY, *supra* note 64, at ¶¶ 1771-77, 1781; E. FARNSWORTH, *supra* note 67, at § 12.7.

134. Brophy, *supra* note 8, at 280-82.

would require the type of constant monitoring that courts generally shun. Monetary damages for breach of contract are not satisfactory since they do not prevent the harm to the child from occurring. Furthermore, they are difficult to prove. It is one thing to accept a general linkage between a mother's prenatal consumption of alcohol and tobacco and a child's development difficulties. It is quite another to establish to a reasonable degree of medical certainty a causal relationship between consumption and a particular injury.[135]

Perhaps the contract could anticipate these problems by providing for reasonable liquidated damages. Additional incentives for compliance could be built into the schedule of payment. If blood and urine tests taken during pregnancy reveal no prohibited substances, the surrogate would become entitled to a financial reward. Structured payment schedules and liquidated damages are at best, however, limited inducements for compliance. Realistically, there is very little the commissioning couple can do to guarantee that the surrogate properly cares for herself and her child during the early stages of pregnancy.

There are some American decisions that could justify more aggressive judicial intervention in the later stages of pregnancy. In recent years the simultaneous narrowing of the doctrine of parental tort immunity and the expansion of liability for prenatal injuries have produced suits by children against their parents for injuries caused by negligent prenatal conduct. In *Grodin v. Grodin*,[136] a child was permitted to sue his mother for her negligently taking drugs during pregnancy that caused him permanent physical injury. In fact, injunctive relief has been awarded in exceptional cases. In *Jefferson v. Griffin Spaulding County Hospital*,[137] an expectant mother refused to consent to a caesarean section delivery. Her doctors were convinced that a vaginal delivery would result in the death of the child. Over the

135. *See* Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63, 85-86 (1980) ("proof problem in [prenatal tort] cases may be overwhelming."); Note, *Birth Defects Caused by Prenatal Exposure to Workplace Hazards: The Interface of Title VII with OSHA and Tort Law*, 12 J.L. REF. 237, 256 (1979) ("Proof of causation of birth defects is especially difficult because of the technological problems involved.") Establishing a causal nexus between the surrogate's conduct and the child's injury raises the prospect of a tort action. The Congenital Disabilities (Civil Liability) Act, 1976, ch. 28, would appear to preclude an action by the child under English law. Pierce, *Civil Liability For Pre-Natal Injuries*, 40 MOD. L. REV. 141 (1977). It is not clear, however, whether the commissioning couple could maintain an action for *their* damages. *Cf.* Thake v. Maurice, [1984] 2 All E.R. 513 (Married couple allowed to collect costs of healthy baby's birth and upkeep from doctor who negligently failed to warn husband that vasectomy could be followed by natural regaining of fertility).

136. 102 Mich. App. 396, 301 N.W.2d 869 (Ct. App. 1980). *See generally* Beal, *Can I Sue Mommy? An Analysis of a Woman's Tort Liability for Prenatal Injuries to Her Child Born Alive*, 21 SAN DIEGO L. REV. 325 (1984).

137. 247 Ga. 87, 274 S.E.2d 457 (1981). *See* Robertson, *supra* note 16, at 450-58.

mother's religious objection, the court ordered her to submit to surgery to protect the child's life.[138]

These cases reflect a policy of concern for the child's physical well being that could persuade a court to order specific performance of certain provisions of a surrogacy agreement. If the provision protects a child late in the pregnancy, specific performance would be consistent with the best interests of the child. The concerns that might lead a court to deny a request for specific performance at an earlier stage of pregnancy would give way to the increased need to protect the unborn child.

2. Regulating the Abortion Decision

Contractual provisions could call for the surrogate to refrain from abortion or, in an exceptional case, require her to abort the fetus. Neither of these provisions are likely to be specifically enforceable. The law presently gives a woman the exclusive right to decide whether or not to terminate her pregnancy at its early stages. During the first trimester a woman may abort a fetus over the objection of even her husband.[139] An unrelated sperm donor can hardly expect more favorable treatment than a spouse.[140] There are also no reported cases in which a court ordered a woman to abort her fetus over her objection.[141]

The commissioning couple could argue that the surrogate waived or, more accurately, sold her right to exclusive control over the abortion decision by signing the surrogacy agreement. The voluntary relinquishment of rights is routinely enforced in the criminal law context. In the United States, for example, a criminal defendant may waive constitutional protections against unreasonable searches, the right to trial by jury, and the privilege against self-incrimination.[142] Commercial trafficking in privacy interests also occurs on a daily basis. Indeed, the mass marketing of the Baby Cotton story was made possible primarily by the surrogate's sale of her privacy interests. The

138. Shortly before the surgery was to be performed, the placenta moved thereby eliminating the need for a caesarean section. Mrs. Jefferson told reporters, "I told the people it was the Lord, but they don't believe it. The Lord healed her. I stood on God's word and it came through." Atlanta Journal Constitution, Feb. 28, 1982, at B2, col. 1.

139. Paton v. British Pregnancy Advisory Serv. Trustees, [1978] 2 All E.R. 987; Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

140. Jones v. Smith, 278 So. 2d 339 (Fla. Dist. Ct. App. 1973) (Potential putative father has no right to restrain natural mother from terminating her pregnancy).

141. *In re* Smith, 16 Md. App. 209, 295 A.2d 238 (Md. Ct. Spec. App. 1972); *In re* Mary P., 8 FAM. L. REP. (BNA) 2140 (N.Y. Fam. Ct., Queens County, Dec. 11, 1981). Both courts denied parents' requests for orders compelling their minor daughters to abort fetuses.

142. *E.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent search). *See* Simons, *Rescinding a Waiver of Constitutional Rights*, 68 GEO. L. J. 919 (1980).

commissioning couple would argue that absent coercion, fraud, or duress, the surrogate's voluntary relinquishment of her right to abort should be specifically enforceable.

There is a certain amount of surface logic to this argument. Nonetheless, it will ultimately fail. Under the current Anglo-American law of abortion, it is difficult to imagine a court ordering a woman in the early stages of pregnancy to carry and give birth to a child she did not want to deliver. The rationale that gives rise to a right to terminate a pregnancy is quite similar to that frequently invoked to deny specific performance. The abortion cases emphasize the uniquely personal nature and the serious consequences of the decision to bear a child.[143] The courts specifically refer to the emotional and physical implications of pregnancy and delivery, as well as the demands of child rearing. While the surrogate would not be directly affected by child rearing concerns, she alone must face the risks of pregnancy and delivery. Regardless of the circumstances of conception or the intended allocation of child rearing responsibilities, the surrogate retains a significant interest in deciding whether to carry a fetus to term. An order prohibiting an abortion would therefore demand the performance of the most personal of services and could impose a severe hardship on the surrogate. Thus, specific performance of an agreement restricting abortion is not likely.[144]

The aggrieved couple is probably limited to the conventional tort and contract remedy of damages. Their theory of recovery in tort would focus on the intentional conduct of the surrogate that she knew would cause severe emotional distress. In the United States, this theory is well established and is known as the intentional infliction of emotional distress.[145] One element of the action is that the defendant's conduct be deemed "outrageous." Given the degree of protection afforded a woman's right to abort, it is unlikely that a surrogate mother's decision to terminate her pregnancy could be considered outrageous. The surrogate is carrying a child she does not intend to raise. If a married woman may abort a fetus over the objection of her hus-

143. Roe v. Wade, 410 U.S. 113, 153-54 (1973); Paton v. British Pregnancy Advisory Serv. Trustees, [1979] 3 All E.R. 987.

144. A closer question is posed when the surrogate is carrying a child conceived by the commissioning couple. In this situation the surrogate bears no genetic relationship to the fetus. Arguably, this fact weakens her claim to dispose of the fetus at will. Again, however, it is the consequences of *pregnancy* and not genetic relationships that appear to underly the right of privacy recognized in *Roe*. This factor remains constant in surrogacy arrangements regardless of whether AID or embryo transfer techniques are used. Thus, I believe the surrogate would retain control over the abortion decision even in cases where she is not genetically related to the fetus.

145. RESTATEMENT (SECOND) OF TORTS § 46 (1965). *See* Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COL. L. REV. 42 (1982).

band, the surrogate's decision to abort could hardly be labeled outrageous.[146] Though less thoroughly developed, this tort is recognized in England when the mental distress is accompanied by some physical injury.[147] However, the abortion would likely be considered justifiable conduct for basically the same reasons it would not be labeled outrageous in the United States.

Damages for breach of contract appears a more promising avenue of redress. The couple certainly would be entitled to restitution for sums already paid. This is a small amount, however, compared to the enormous disappointment and distress the abortion is likely to have caused. The general rule that contract damages do not compensate for non-pecuniary losses is subject to an increasing number of exceptions. Courts have awarded damages for mental distress when damages were within the contemplation of the parties as a foreseeable consequence of the breach of contract.[148] There are few situations in which mental distress is more clearly foreseeable than when a woman breaches her promise not to abort a man's child.

All in all, the commissioning couple should recognize the precarious position they occupy with regard to enforcing contractual provisions regulating prenatal conduct. Specific performance is probably not a viable option. Damages for breach of contract remains a theoretical, though inadequate, remedy. Money is simply no substitute for a healthy child. The extent to which money damages is a remedy at all

146. Przybyla v. Przybyla, 87 Wis. 2d 441, 275 N.W.2d 112 (Ct. App. 1978). (Husband denied recovery on claim for intentional infliction of emotional distress because his wife's decision to have an abortion cannot be deemed "outrageous"). The strongest case for recognizing a tort action would be when the surrogate aborts the fetus for the sole purpose of inflicting severe emotional distress. In this unlikely instance, the surrogate's "knowledge that the [commissioning couple] is peculiarly susceptible to emotional distress" is relevant to an evaluation of the outrageousness of her conduct. RESTATEMENT (SECOND) OF TORTS § 46 comment F (1965). A jury might also be outraged in instances where the fetus was not genetically related to the surrogate. In this situation a jury might feel that the fetus was not "hers" to abort. The fear that awarding tort damages would "chill" the exercise of a woman's right to terminate a pregnancy could be overriden by her specific illicit motive in the same way that "actual malice" supports tort awards in American libel cases. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Public official can collect damages for defamatory falsehood relating to official duties if he proves actual malice, i.e., that the statement was published with knowledge that it was false and with reckless disregard of whether it was true or false).

147. Wilkinson v. Downton, [1897] 2 Q.B. 57; Janvier v. Sweeny, [1919] 2 K.B. 316; H. STREET, THE LAW OF TORTS 22-23 (7th ed. 1983).

148. Perry v. Sidney Phillips & Son, [1982] 1 All E.R. 1005 (awarding damages for distress caused to purchaser by the surveyor's negligent failure to report defects in the house); Green v. Sudakin, 81 Mich. App. 545, 265 N.W.2d 411 (Mich. Ct. App. 1978) (damages for mental anguish are recoverable for breach of contract to sterilize plaintiff).

depends on the uncertain solvency of the surrogate.[149]

B. Custody Disputes

Custody disputes have arisen when the surrogate mother refused to surrender her child[150] and when the commissioning couple refused to accept the child.[151] These disputes should not be resolved by simple reference to contract principles. The child is not a party to the contract and is unable to protect his interests. As in other instances where custody is contested the court's paramount concern must be the welfare of the child.[152]

The most common conflict occurs when both the surrogate and the commissioning couple want custody. Traditionally, courts resolved custody disputes by presuming that children of tender years are better off if placed in the custody of their mother.[153] Although this is less true today as a matter of doctrine,[154] data indicates that a maternal preference remains the norm in practice.[155] As applied to surrogacy arrangements, this preference would usually lead to the surrogate being awarded custody in contested cases. At least where conception is achieved by artificial insemination, as opposed to embryo donation, there is no question as to who is the mother. The surrogate is both genetically and gestationally related to the child.

If an embryo is transplanted to the surrogate, the identity of the mother is less clear. In that situation, the surrogate has a gestational, but no genetic, tie to the child. In the first reported case of this type, a trial court in Michigan recently ruled in an uncontested proceeding that the genetic mother would be considered the legal mother of the

149. A source of recovery could be provided for through insurance or bonding. Presumably these matters could be taken care of in the agreement.

150. A v. C, 1978 Fam. 170; Noyes v. Thrane, No. CF7614 (Los Angeles County, Cal. Sup. Ct., Feb. 20, 1981); Morrow, *Surrogate Mother Gets Custody of Fought-Over Child*, Los Angeles Daily J., June 5, 1981, at 1, col. 2.

151. For a discussion of the incident involving Judy Stivers and Alexander Malahoff, see *supra* note 108.

152. *Eg.* Surrogate Parenting Assoc. v. Kentucky *ex. rel.* Armstrong, 703 S.W.2d 209, 213 (Ky. 1986) (*dicta*).

153. *Ex Parte* Divine, 398 So. 2d 686 (Ala. 1981); *Re* W (A Minor), 126 Sol. J. 725 (1982).

154. Many statutes purport neutrality between claims of fathers and mothers for custody of their children. *E.g.*, OR. REV. STAT. § 107.137(3) (1983). Several states have judicially abandoned the tender years presumption. *E.g.*, Burks v. Burks, 564 P.2d 71 (Alaska 1977); Bazemore v. Davis, 394 A.2d 1377 (D.C. 1978).

155. Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473, 501-05 (1979). It may be, however, that awarding custody to the mother is prompted by a desire not to disrupt the child's existing emotional ties. J. EEKELAAR, E. CLIVE, K. CLARKE & S. RAIKES, CUSTODY AFTER DIVORCE: THE DISPOSITION OF CUSTODY IN DIVORCE CASES IN GREAT BRITAIN ¶ 13.29 (1977).

child.[156] The Warnock Committee, on the other hand, suggests that gestational parentage should prevail over genetic parentage. The report recommends that the husband who consents to his wife's artificial insemination be considered the legal father of the resulting child.[157] In considering egg and embryo donation, it suggested that the woman giving birth be given all legal rights pertaining to child rearing, instead of the gamete donor.[158] The Committee would confer upon the surrogate all child rearing rights even in cases where the egg or embryo is donated by the commissioning mother.[159] Under this proposal, the commissioning couple would have no claim to the child despite their genetic parentage and the original intent of all parties that the genetic parents raise the child.

The Warnock Committee's recommendations regarding legal parenthood in the AID, embryo donation, and egg donation contexts should not govern surrogacy arrangements. Defining motherhood in terms of gestation and delivery is consistent with the intent of the parties in most instances involving AID, embryo donation, or egg donation. Semen and egg donors ordinarily do not aspire to parental rights and obligations. In surrogacy arrangements, the original intent of the parties is quite different. It is the semen donor and his wife, not the surrogate, who intend to become legal parents.

It is this fundamental difference in intent that gives the commissioning couple a strong equitable claim to be considered the legal parents of the child. The Warnock Committee's proposals regarding AID, embryo donation, and egg donation implicitly recognize the central importance of the parties' intent. This factor is equally compelling in surrogacy arrangements. The agreement is entered into with the clear understanding by all parties that the commissioning couple will raise the child as their own. Indeed, without this agreement a child would never be conceived. The commissioning couple relies on this understanding when they perform their obligations under the agreement.

Agreements regarding custody are not, of course, enforceable unless they are in the child's best interests. A presumption in favor of enforcement is warranted for surrogacy agreements. The commissioning couple has incurred substantial financial expense and emotional commitment to have a child conceived. The natural father and his wife have demonstrated that they very much want a child and probably have the economic resources to provide a secure environment. This is not to say that the surrogate is unfit to raise a child, but only that the commissioning couple is *at least* as likely as the surrogate to

156. Smith v. Jones, 85-532014 DZ (3d Jud. Dist., Mich., Mar. 14, 1986) reported in Annas, *supra* note 10.
157. WARNOCK REPORT, *supra* note 3, at §§ 4.17, 4.25.
158. *Id.* at §§ 6.8, 7.6.
159. *Id.* at § 8.20.

offer a loving and nourishing home.[160] If the best interests of the child do not clearly point to the surrogate, the considerations of reliance and intent support awarding custody of the child to the commissioning couple.

A presumption favoring enforcement could be rebutted. A significant change in circumstances could support an award of custody to the surrogate. For example, if before the child was born the father died or the commissioning couple divorced, the claim for custody by the surrogate would be stronger. A custody dispute could also reveal facts about the commissioning couple that indicate they are not as well suited as the surrogate to raise the child. In one American case, evidence disclosed that the wife of the child's father had formerly been a man who underwent a sex change operation. Upon that revelation the case was settled with the surrogate mother retaining custody and the father receiving access rights.[161]

A rebuttable presumption for enforcing a surrogacy agreement would also help resolve those rare cases where neither the father nor the mother wants custody. The commissioning couple would be presumed to have all parental obligations. If they failed to discharge their duties, then formal neglect proceedings could be initiated. It must be emphasized that however tragic, the problem of child neglect is not unique to surrogate motherhood. Unfortunately, it exists within all procreational patterns.

These guidelines do not purport to cover all contingencies. They do, however, illustrate that conflicts arising from surrogacy agreements can be resolved in a principled manner. The problems of enforcement may challenge the ingenuity of counsel and courts, but they are manageable. As they have done for centuries, courts can adapt long standing principles with a sensitivity to new circumstances.

VI. CONCLUSION

The British response to the practice of surrogate motherhood has been described accurately as "moral panic."[162] The Warnock Committee's recommendations and the Australian legislation that declares all surrogacy agreements illegal stems from an intuitive premise that such practices are inherently immoral or unethical. The foundation for this premise is elusive. Who is injured by surrogacy agreements? It is certainly not the child who would otherwise not be born. The

160. In awarding custody to the father, Mr. Justice Latey necessarily concluded that the father and his wife were fit parents. *Re* a Baby (1985) Times, Jan. 15 (Fam. Div.).

161. Noyes v. Thrane, No. CF7614 (Los Angeles County, Cal. Sup. Ct., filed Feb. 20, 1981); L. ANDREWS, *supra* note 8, at 229.

162. The words are those of Professor Michael Freeman, University College London. Helm, Webster, Wilsher and Hosenball, *supra* note 2, at 15, col. 1.

child gains life and faces no greater risks than those faced by all children, regardless of parentage. The parties to the surrogacy agreement act voluntarily. The commissioning couple wants a child and the surrogate agrees to help them. Each of the parties is aware of the risks associated with their respective undertakings and willingly incurs the risks. In a society that values liberty, governmental intrusions upon voluntary agreements should be restricted. To the extent one fears the potential exploitation of the surrogate, judicial or administrative regulation offers protection while respecting a degree of autonomy. The amorphous alleged harms to society and human dignity are difficult to articulate much less prove. In the final analysis, surrogacy arrangements bring a child into the world through the voluntary cooperation of three parties. Life is not cheapened by this process, it is created and cherished.

The Surrogacy Arrangements Act proposes a compromise position. It appears to tolerate all surrogacy agreements except those professionally arranged. Its myopic concern with the potential dangers of commercial agencies leaves many problems unresolved and creates some new ones. It totally ignores a host of family law issues that will arise from surrogacy arrangements permitted by the Act. The Act fails to address completely the evils of commercialism. Privately negotiated agreements involving substantial fees remain permissible. A troublesome consequence of the limited scope of the Act is its encouragement of do-it-yourself agreements. If surrogacy agreements are acceptable in any form, professional assistance is desirable.

Unlike Great Britain and Victoria, Australia, the United States has not hastily condemned surrogate parenting as immoral. Recent decisions reflect a tolerance, if not an acceptance, of the practice. Yet, the United States has not clearly come to grips with the myriad issues presented by surrogate motherhood. Cautiously worded judicial opinions and legislative inaction lead parties into a world of uncertainty as they attempt to navigate through a labyrinth of laws enacted for different purposes. The status quo is intolerable—the stakes are too high.

Through this web of misplaced moral condemnation and legal ambiguity shines a ray of hope from the North. The Ontario Report addresses the subject of surrogate motherhood sensibly, sensitively, and comprehensively. It provides the basis for a legislative package that accommodates the legitimate aspirations of childless couples while addressing the fears of those concerned with exploitation and commercialization of procreation.

As long as couples want but are unable to have children, surrogate parenting will exist. The challenge to the legal system is to provide

guidance so that parties may avoid disputes and allow a just resolution of those conflicts that do arise. It is to this challenge that more energy must be directed.