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Mindy Ann Baggish

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## SURROGATE PARENTING: WHAT WE CAN LEARN FROM OUR BRITISH COUNTERPARTS

*Surrogate parenting, a relatively recent reproductive phenomenon, allows infertile couples to have a biologically-related child. Supporters hail this procedure as a revolution in the infertility field, while critics condemn it as nothing more than baby selling. This Note analyzes the legislative and judicial responses to surrogate arrangements in Britain and the United States. The author argues that surrogate parenting arrangements should be permitted when the surrogate mother gives informed consent and the natural father and his wife are found to be worthy parents.*

SUPPORTERS call it a blessed reproductive advancement. "The essence of the surrogate motherhood contract [they argue] is to redress the injustice of nature in conferring this capacity on certain individuals who are able but unwilling to assume parental responsibilities while denying it to others who are willing but unable to do so."<sup>1</sup> Opponents describe it as a most unnatural form of reproduction. They believe the adoptive parents "transform the surrogate into a container, a nonhuman box for gestating a fetus."<sup>2</sup> Those who have not yet made any moral judgments about the procedure simply refer to it by its given name: "Surrogate Parenting." They view it only as a procedure which enables an infertile woman and her husband to have a biologically-related child by contracting with a "surrogate mother" who agrees to be artificially inseminated with the husband's sperm and to relinquish all rights to the child after the infant is born.<sup>3</sup> These contrasting

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1. Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. L.J. 147, 158.

2. *Surrogacy = Baby Selling*, A.B.A. J., June 1, 1987, at 38, 38 (comment of George Annas, Professor of Health Law at Boston University's School of Public Health).

3. INFERTILITY CENTER OF NEW YORK, *ALTERNATIVES FOR CHILDLESS COUPLES* (no date). This brochure describes the center's entire surrogacy process. The process begins when an inquiry is made, either by telephone or by letter. Then the infertile couple visits the center, meets with an administrator, and reviews the surrogate mother files. The couple then signs a contract with the center and pays the agency a fee. After the contract is signed a surrogate mother is selected and given a physical examination. The infertile couple has the option of meeting with the chosen surrogate mother. The surrogate mother and the commissioning couple then meet with legal representatives and sign a surrogacy

views demonstrate to some degree the amount of controversy created by surrogate parenting.

In both Great Britain and the United States, there have been landmark cases dealing with the procedure of surrogate parenting. In Britain, the subject of the litigation was referred to as Baby Cotton; in the United States she was known as Baby M. Each child sent the medical experts, legal professors, justices, and legislators of her country running to find solutions to the problems presented by surrogacy.<sup>4</sup> In Britain, the major controversy centered on the commercial aspect of surrogacy,<sup>5</sup> while in the United States the debate revolved around the surrogate mother's right to keep the child.

In each country the justices faced enormous difficulties in formulating solutions to these problems, largely because at the time these cases were brought to trial there was no legislation upon which the justices could rely in rendering their decisions. In Britain, the presiding judge based his custody determination on the best interests of the child, and left the more complex issue of whether surrogacy should be outlawed to Parliament.<sup>6</sup> In the United States, the Supreme Court of New Jersey held that adoption laws were applicable to the facts of the case, but stipulated that it was in everyone's best interest for the legislature to act on

contract. The agency makes the medical arrangements for the artificial insemination of the surrogate mother, and counseling is given to the commissioning couple. If the couple has chosen not to make personal contact with the surrogate, the agency will report to the couple on the surrogate's progress. Once the baby is born, the infant is brought home by the commissioning couple and the child is legally adopted by the natural father's spouse. *Id.* While not all agencies operate in the same manner, the agency in the *Baby "M"* case utilized this method. *In re Baby "M"*, 217 N.J. Super. 313, 342, 525 A.2d 1128, 1142 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988). For another example of how the surrogate process works, see *Surrogate Parenting Assocs. v. Kentucky ex rel. Armstrong*, 704 S.W.2d 209, 210-11 (Ky. 1986).

Surrogate parenting is a procedure that can be utilized by people other than infertile couples, such as homosexuals, single men, and lesbian couples. *See* N.Y. Times, Feb. 25, 1987, at 13, col. 1. For the purposes of this Note, however, only the more traditional arrangement between an infertile couple and surrogate mother will be analyzed.

4. *See infra* section IV.

5. Harding, *The Debate on Surrogate Motherhood: The Current Situation, Some Arguments and Issues; Questions Facing Law and Policy*, 1987 J. SOC. WELFARE L. 37.

Particular features giving rise to concern in this case [Baby Cotton] include the large amount of money made by Mrs. Cotton, not just through the contract with the agency but, more importantly, through a contract with a newspaper for her story . . . and the fact that the arrangement was made through a commercial agency—rather than a private agreement . . . .

*Id.* at 39.

6. *Re "C"* (A minor), 1985 Fam. 846, 847-48.

the issues presented by surrogacy. As a result of their respective cases, however, each country responded differently. In Britain, Parliament has taken legislative action in the form of the Surrogacy Arrangements Act. In the United States, Congress has yet to take legislative action.

It is the premise of this Note that we can learn from our British counterparts not only what provisions to include in surrogacy legislation, but also, those not to include. It is this author's goal to reach a more enlightened conclusion about surrogate parenting through a close analysis of the case law, a general presentation of the problems and concerns surrogacy presents, and a study of existing proposals and legislation in both Britain and the United States. This conclusion would permit surrogate parenting to remain a "viable procreative alternative"<sup>7</sup> for the infertile couples of the United States, while ensuring the safety of all who wish to use it.

## I. ENGLAND: MOTHER OF THE SURROGACY ARRANGEMENTS ACT 1985

### A. Baby Cotton<sup>8</sup>

On January 4, 1985, a British citizen, Kim Cotton, gave birth to a baby girl in a British hospital. In spite of the fact that it was a normal birth with no medical complications, this child was in no way ordinary. Baby Cotton, as she has come to be known, was the end product of an unusual agreement—the first commercial surrogate pact in the United Kingdom. The father was a United States citizen who contacted a commercial surrogate parenting agency in the United States when his wife learned that she had a congenital defect which prevented her from having children. The American agency contacted its counterpart in England and made the necessary arrangements. In 1984 Mr. A, the father, flew to England to artificially inseminate Mrs. Cotton.

All went as planned until the baby's birth, when an officer of the London Borough of Barnet obtained a "place of safety order,"<sup>9</sup> preventing Mr. A and Mrs. A from taking the infant home.

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7. *In re Baby "M"*, 217 N.J. Super. 313, 372, 525 A.2d 1128, 1157 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988). "Viable procreative alternative" is a term of art, used by Judge Sorkow in this case.

8. *Re "C"* (A minor), 1985 Fam. 846.

9. A "place of safety order" is an order obtained by a local authority, in this case the London Borough of Barnet, to keep the child in a designated safe place until further in-

A wardship summons<sup>10</sup> was issued, and the case was tried before Justice Latey.

To his credit, Justice Latey did not underestimate the complexity of this particular case:

Plainly, the methods used to produce a child as this baby has been, and the commercial aspects of it, raise difficult and delicate problems of ethics, morality and social desirability. . . . Are [these problems] relevant in arriving at a decision on what now and, so far as one can tell, in the future is best for this child? . . . In my judgment . . . they are not relevant.<sup>11</sup>

Justice Latey further commented that "the moral, ethical and social considerations are for others and not for this court in its wardship jurisdiction,"<sup>12</sup> revealing his choice to decide the case according to the best interests of the child, and leave the law-making to those best suited to handle it. He arranged for the immediate delivery of the child to Mr. and Mrs. A, committing to them the care and control of the child. The couple was allowed to leave the country with her, under the condition they return with her to England upon the court's order.<sup>13</sup> The court further protected the child by maintaining guardianship over Baby Cotton. The rule in England is that "where a child is a ward of [the] court there must be no publicity [regarding the ward], save with leave of the court."<sup>14</sup>

With child in hand, Mr. and Mrs. A left England to return home to the United States. The British public was outraged at the court for condoning such illicit behavior. The result of this social upheaval was the enactment of the Surrogacy Arrangements Act 1985.<sup>15</sup> Solicitor Susan Sloman announced it as "the Government's response to the public outcry which followed the Baby Cot-

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quiry is made into the child's background. In this case the baby was left in the care of the nurses in the hospital. The Borough probably felt that the order was necessary because Mrs. Cotton left the baby a few hours after the birth and before the father came to collect it.

10. See W. FRANK, *THE GENERAL PRINCIPLES OF ENGLISH LAW* 31-33 (4th ed. 1969). A wardship summons can be described in the following manner: Upon application to the Chancery Division of the high court, the infant automatically becomes a ward of the court. The high court then has the ability to appoint a guardian for that infant. *Id.*

11. *Re "C" (A minor)*, 1985 Fam. 846.

12. *Id.*

13. *Id.*

14. *Id.*

15. Sloman, *Surrogacy Arrangements Act 1985*, 135 NEW L.J. 978, 978 (1985).

ton case."<sup>16</sup> The Surrogacy Arrangements Act 1985, however, was not the first governmental response to surrogate parenting. Six-and-one-half months before *Baby Cotton* came to trial, the Warnock Committee spoke on the issue of surrogate parenting.

### B. Paving the Way: The Warnock Report

Dame Mary Warnock was the Chair of the Committee of Inquiry into Human Fertilisation and Embryology,<sup>17</sup> which authored the "Report of the Committee of Inquiry into Human Fertilisation and Embryology."<sup>18</sup> The Warnock Committee, as it is often referred to, represented all those who had an interest in the new technologies designed to aid the infertile. Its membership included the Secretary of State for Social Services, the Secretary of State for Education and Science, and the Secretaries of State for Scotland, Wales, and Northern Ireland.<sup>19</sup> The primary purpose of the Report was "to consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be applied, including consideration of the social, ethical and legal implications of these developments; and to make recommendations."<sup>20</sup>

Surrogacy was one of the many techniques the Committee chose to consider.<sup>21</sup> Chapter eight of the Report is dedicated solely to surrogacy. It is broken down into twenty segments, each describing a particular aspect of the procedure. The more relevant sections are: section 8.1, defining surrogacy;<sup>22</sup> section 8.2, listing the circumstances under which surrogacy may be a valid procreative alternative;<sup>23</sup> section 8.3, describing payment;<sup>24</sup> section 8.4,

16. *Id.*

17. REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY, 1984, CMND. No. 9314 [hereinafter THE REPORT].

18. *Id.*

19. *Id.* at introductory page.

20. *Id.* at 4; Harding, *supra* note 5, at 48.

21. THE REPORT, *supra* note 17, at 17-53. The various techniques discussed include: artificial insemination, in vitro fertilisation, egg donation, embryo donation, surrogacy, and the freezing and storage of semen, eggs, and embryos. *Id.*

22. *Id.* at 42. The committee defined surrogacy as "the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth." *Id.*

23. *Id.* The circumstances where surrogacy is desirable are: "[w]here a woman has severe pelvic disease which cannot be remedied surgically, or has no uterus, . . . [when a woman has] suffered repeated miscarriages, . . . [or when a woman] suffers from a condition making pregnancy medically undesirable." *Id.*

24. *Id.* at 42-43. The committee acknowledged that some form of payment is gener-

indicating the legal status of surrogacy;<sup>25</sup> section 8.5, invalidating the surrogate contract;<sup>26</sup> section 8.6, defining the primary function of the courts in surrogate parenting arrangements;<sup>27</sup> section 8.7, listing possible post-negotiation conflicts;<sup>28</sup> section 8.9, discussing the father's position;<sup>29</sup> and most importantly sections 8.10 through 8.16, listing the general arguments for and against surrogacy.<sup>30</sup>

ally involved. It stated that, "[p]ayment may vary between reimbursement of expenses, and a substantial fee." *Id.*

25. *Id.* at 43. The committee noted that "[t]he practice is not in itself unlawful." *Id.*

26. *Id.*

There is little doubt that the Courts would treat most, if not all, surrogacy agreements as contrary to public policy and therefore unenforceable. . . . Thus, if the carrying mother changed her mind and decided she wished to keep the child it is most unlikely that a court would order her, because she had previously agreed to do so, to hand over the child against her will. Nor in such a case would a court order the surrogate mother to repay any fee paid to her under the terms of the agreement.

*Id.*

27. *Id.*

The Courts do, however, have jurisdiction over children which is quite separate from and independent of the law of contract. Where a court has to consider the future of a child born following a surrogacy agreement, it must do so in accordance with the child's best interests in all the circumstances of the case, and not according to the terms of any agreement between the various adults.

*Id.*

28. *Id.* at 44. "Apart from the most obvious [example] of the surrogate mother changing her mind, it may . . . be discovered that the child is handicapped or the commissioning mother may die or become disabled." *Id.*

29. *Id.*

As regards enforcing any surrogacy agreement to which he is [a] party, the commissioning father faces the difficulties [that arise because courts will not enforce contracts]. He may also be vulnerable to a claim by the carrying mother for an affiliation order if she keeps the child and the court might or might not make such an order according to the facts of the particular case.

*Id.*

30. *Id.* at 44-46. The committee first stated in § 8.10:

The objections turn essentially on the view that to introduce a third party into the process of procreation which should be confined to the loving partnership between two people, is an attack on the value of the marital relationship. . . . It is also argued that it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child.

In § 8.11 the committee wrote:

It is argued that the relationship between mother and child is itself distorted by surrogacy [because] a woman deliberately allows herself to become pregnant with the intention of giving up the child to which she will give birth . . . . It is also potentially damaging to the child, whose bonds with the carrying mother, regardless of genetic connections, are held to be strong, and whose welfare must be considered to be of paramount importance. [Also surrogacy is] degrading to the child [who has] been bought for money.

Chapter eight concludes with the view that surrogate parenting agencies and contracts should be outlawed:

We recommend that legislation be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilise the services of a carrying mother; such legislation should be wide enough to include both profit and non-profit making organisations. We further recommend that the legislation be sufficiently wide to render criminally liable the actions of professionals and others who knowingly assist in the establishment of a surrogate pregnancy.

. . . We recommend that it be provided by statute that all surrogacy agreements are illegal contracts and therefore unenforceable in the courts.<sup>31</sup>

That there be no mistaking the Committee's disapproval of commercial surrogacy, the provisions of this particular part of the Report are offset in boldface type. Among the suggestions that were not offset in boldface type are those which involve surrogacy for convenience's sake, and convenience's sake alone.<sup>32</sup> The Committee stated that when "people . . . treat others as a means to their own ends, however desirable the consequences, [their actions] must always be open to moral objection."<sup>33</sup> The majority, as well as the minority of the Committee, found this type of activity

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Section 8.12 concludes: "Since there are some risks attached to pregnancy, no woman ought to be asked to undertake pregnancy for another . . . ."

Section 8.13 begins the arguments in support of surrogacy: "If infertility is a condition which should, where possible, be remedied, it is argued that surrogacy must not be ruled out, since it offers to some couples their only chance of having a child genetically related to one or both of them." Section 8.14 argues: "Where agreements are genuinely voluntary, there can be no question of exploitation, nor does the fact that surrogates will be paid for their pregnancy of itself entail exploitation of either party to the agreement." Section 8.15 refutes the argument regarding intrusion into the marriage relationship: Those who are against it "should not seek to prevent others from having access to it." As to the mother/infant bond, § 8.16 states as follows:

It is argued that as very little is actually known about the extent to which bonding occurs when the child is *in utero*, no great claims should be made in this respect. In any case the breaking of such bonds, even if less than ideal, is not held to be an overriding argument against placing a child for adoption . . . .

*Id.*

31. *Id.* at 47, §§ 8.18-.19. Also noteworthy is that the committee recommended commercial surrogacy services be outlawed as well. In their opinion, the mere presence of surrogacy would encourage people to enter into these agreements. *Id.* at 46-47.

32. *Id.* at 46, § 8.17.

33. *Id.*

totally abhorrent and believed it should not be tolerated under any circumstances. Although these views were the ones recommended to Parliament in the Report, there were other arguments set forth by those minority members of the Committee who were in favor of surrogacy.<sup>34</sup>

Although the minority agreed that the "criminal law should be brought in to prevent the operation of profit making agencies,"<sup>35</sup> they disagreed on the matter of outlawing non-profit organizations.<sup>36</sup> The result, they felt, would be do-it-yourself arrangements totally unsupported by medical and counselling services.<sup>37</sup> The proper approach, according to the minority, is to designate a licensing authority with the power to approve an agency or agencies for the purpose of making surrogacy arrangements.<sup>38</sup> "These arrangements would include the matching of commissioning parents with surrogate mothers, and the provision of adequate counselling to ensure that the legal and personal complications of surrogacy were fully understood."<sup>39</sup> In addition, the agencies would have to be well versed on childcare skills,<sup>40</sup> and access to the licensed agency could only be attained with a referral from a consultant gynecologist.<sup>41</sup> This would require a physician's consultation at the beginning of the procedure, where the couple could speak openly and confidentially with a professional.

In addition, the minority argued that the adoption laws, which prohibit payment for a child, should not prevent the commissioning couple from adopting the child. They argued that an exception should be made in the law to allow for payment of medical expenses and a service fee to surrogate mothers.<sup>42</sup> Finally, as to the legality of the contracts, the minority argued against holding all surrogate contracts illegal. Rather, they should be considered on an individual basis by the courts.<sup>43</sup> It was the minority's position that surrogacy should be left open as a last resort<sup>44</sup> for

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34. *Id.* at 45.

35. *Id.* at 87.

36. *Id.* at 88. The committee noted that "[t]hese arrangements would be unsupported by medical and counselling services . . . ." *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 89.

43. *Id.*

44. *Id.* at 87.

those infertile couples whose last opportunity to have a genetically related child would be surrogate parenting.<sup>45</sup> The minority closed its arguments by saying:

We do not believe that public opinion is yet fully formed on the question of surrogacy . . . . Thus we think it is too early to take a final decision one way or the other. . . . We simply ask that the door be left slightly ajar so that surrogacy can be more effectively assessed.<sup>46</sup>

Although this final statement was written in 1982, it was clearly regarded as relevant in 1985, when the Surrogacy Arrangements Act came into being. On that fateful day in January, 1985, Parliament rendered a final decision far before all the questions had been answered.

### C. The Surrogacy Arrangements Act 1985

The long title of The Surrogacy Arrangements Act 1985 reads as follows: "An Act to regulate certain activities in connection with arrangements made with a view to women carrying children as surrogate mothers."<sup>47</sup> Section one provides general definitions;<sup>48</sup> section two outlaws commercial surrogacy in general;<sup>49</sup> section three bans all advertisements of surrogacy;<sup>50</sup> section four describes the penalties and offenses;<sup>51</sup> and section five provides the short title.<sup>52</sup> What astounds both critics and advocates of the Act alike is the speed with which it was drafted and enacted. The *Baby Cotton* case, from which it was inspired, was decided on January 14, 1985. The Act was passed on July 16, 1985. Although much of what is encompassed in the Act is based upon the Warnock Committee Report,<sup>53</sup> this Act of Parliament virtually came into existence overnight. In short, Parliament put only some of the Warnock Committee's proposals into effect. Unfortunately, in adopting the minority's proposition, outlawing only commercial agencies, Parliament did not provide the effect England desired,

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45. *Id.* at 89. It should be noted, however, that the minority does not use the term "genetically." It is this author's choice to use that word here.

46. *Id.*

47. Surrogacy Arrangements Act, ch. 49 (1985).

48. *Id.* § 1.

49. *Id.* § 2.

50. *Id.* § 3.

51. *Id.* § 4.

52. *Id.* § 5.

53. THE REPORT, *supra* note 17.

including that desired by both the majority and minority of the Warnock Committee.<sup>54</sup>

As mentioned above, at the center of the current British debate on surrogacy lie the alleged inadequacies of section two of the Surrogacy Arrangements Act.<sup>55</sup> That section provides that no person, i.e., an agent or agency, "shall on a commercial basis . . . initiate or take part in any negotiations with a view to the making of a surrogacy arrangement, or . . . compile any information with a view to its use in making, or negotiating the making of, [a] surrogacy arrangement . . ."<sup>56</sup> However, this flat prohibition is riddled with exemptions, which is where the trouble begins. It is not a violation of the Act "for a woman, with a view to becoming a surrogate mother herself," to negotiate or make arrangements with a commissioning couple on her own behalf.<sup>57</sup> Nor is it a violation of the Act "for any person, with a view to [becoming a father]," to negotiate a deal or to arrange for a surrogate mother to carry his child.<sup>58</sup> Clearly there are problems to be contended with here. Attorneys and commercial agents are the only individuals penalized by this Act. The surrogate mothers and biological fathers, on the other hand, are free to engage in as many transactions as they wish. This has caused a flood of scholarly criticism. As one critic stated: "If surrogacy is undesirable, it should have been prohibited altogether. Settling for this approach might be thought to legitimate some forms of agreement."<sup>59</sup> It clearly legitimates some forms of agreement. As another critic noted, "*non-profit-making* arrangements were not made illegal by this Act . . . [because it is] still legal for the surrogate mother herself to receive a fee. . . . Private arrangements directly between individ-

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54. Parliament probably saw itself as adopting one of the majority's recommendations as well; the majority stated: "It is . . . with the commercial exploitation of surrogacy that we have been primarily, but by no means exclusively, concerned." *Id.* at 46. In other words, perhaps Parliament attempted to adopt propositions of both the majority and the minority. However, as will be indicated in section IV (A) and IV (B)(1) of this Note, Parliament did not enact the minority's recommendations as written, and consequently the law they passed was most insubstantial. British critic Susan Sloman also noted that Parliament did not adopt all of the minority's recommendations: "A major weakness of the Act is that it permits surrogacy but does not follow all of the minority's recommendations." Sloman, *supra* note 15, at 980.

55. Surrogacy Arrangements Act, 1985, ch. 49.

56. *Id.* § 2.

57. *Id.* § 2(2)(a).

58. *Id.* § 2(2)(b).

59. Morgan, *Who to Be or Not to Be: The Surrogacy Story*, 49 MOD. L. REV. 358, 365 (1986).

uals [do] not constitute an offence."<sup>60</sup> Finally, one commentator noted that, "to say that the Act outlaws *commercial* surrogacy is inaccurate, because remuneration may pass between the parties to the arrangement."<sup>61</sup> It is discouraging to find the drafters so inconsistent. How can one take an act seriously if it nullifies its own proposition?

Although some may argue that commercial surrogacy is worse than voluntary surrogacy, others maintain it is actually the lesser of two evils. Obtaining the services of a commercial surrogate will often benefit the child because his biological mother will be "a woman totally outside the family circle with no emotional claims on the baby."<sup>62</sup> In other words, in voluntary arrangements, the surrogate mother is likely to have some kind of personal knowledge of the commissioning couple. Thus, the likelihood she will become emotionally tied to the child is extremely high, as she already has some affection for the commissioning parents. If the surrogate arrangement is made through an agency, however, the personal contact between the surrogate mother and the commissioning couple is kept to a bare minimum. The surrogate is not made to feel like one of the family. This insulating effect helps to keep her mind on the arrangement's true objective: the surrendering of the child to the infertile couple. Although it sounds mechanical, this arrangement may be for the best.<sup>63</sup> As Ms. Brahams states, "[m]orally and legally [the surrogate mother] should have no claim to the child at its birth."<sup>64</sup>

Finally, another critic notes that "[i]n seeking to outlaw only commercial surrogacy agencies the Act falls short of the Warnock Committee's majority recommendation that all surrogacy arrangements should be subject to criminal penalties."<sup>65</sup> Thus, the door is left wide open for private arrangements, where patients cannot be monitored, counselling cannot be required, and people can be exploited.

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60. Harding, *supra* note 5, at 52.

61. Sloman, *supra* note 15, at 978.

62. Brahams, *The Hasty British Ban on Commercial Surrogacy*, HASTINGS CENTER REP., Feb. 1987, at 16, 17.

63. *But see infra* note 252 and accompanying text. It should also be noted that the Warnock Committee feared the mechanical use of women as well. The committee stated, "[i]t is also argued that it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child." THE REPORT, *supra* note 17, at 45.

64. Brahams, *supra* note 62, at 17.

65. Sloman, *supra* note 15, at 978.

In response to the critics' outcries, an amendment has been proposed to the Surrogacy Arrangements Act. It is called the Surrogacy Arrangements (Amendment) Bill 1985-6, and it "was introduced into the House of Lords in late 1985, and passed through its Committee and Report stages in 1986."<sup>66</sup> The main purpose of the amendment is to outlaw all surrogacy arrangements "*whether made with a view to payment or not.*"<sup>67</sup> Any form of surrogacy is illegal under this bill.<sup>68</sup>

In the meantime, until the amendment is passed, the government is still looking for answers on the subject of surrogacy. In December of 1986, a document entitled "Legislation on Human Infertility Services and Embryo Research: A Consultation Document"<sup>69</sup> was sent to legal authorities and organizations. As of the writing of this Note, no copy of the document was available, but solicitor Diana Parker describes the document as follows:

[A] mere 13 pages long and succinctly set out in four sections which: (a) give a brief account of the main infertility treatments under consideration; (b) outline developments since the Warnock Report; (c) comment on those recommendations where consultation so far suggests that a broad measure of agreement is likely; [and] (d) deal with those recommendations where a significant division of opinion can be expected to continue.<sup>70</sup>

As Ms. Parker states:

The purpose of this consultation document seems to be, primarily, to elicit more detailed comments in respect of recommendations of the Warnock Committee which have so far received relatively little attention, but a secondary purpose is . . . to reopen certain controversial areas, presumably in the hope of

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66. H. BLACK & D. BROWN, AN OUTLINE OF ENGLISH LAW 61-62 (1966); Harding, *supra* note 5, at 55. In order for a bill to pass in England, it must go through several stages. First, an initial reading in the House of Commons introduces the title of the bill. Then a second reading provides the member introducing the bill an opportunity to speak on its behalf. The House of Commons then votes for or against the bill. If it passes, it moves on to the committee stage. The bill is considered by a committee and then returned to the House at the Report Stage. On the "Third Reading," final debate occurs "and takes place on the general merits of the bill in its present form." If passed in the House of Commons, it moves on to the House of Lords. If the Lords agree that it should be law, then the bill becomes law. H. BLACK & D. BROWN, *supra*, at 61-62.

67. Harding, *supra* note 5, at 55.

68. *Id.*

69. Parker, *Legislation on Human Infertility Services and Embryo Research*, 17 FAM. L. 168, 168 (1987).

70. *Id.* It should be noted that this document refers to artificial reproductive procedures in general, surrogacy being among them.

establishing greater consensus.<sup>71</sup>

This purpose seems to be consistent with the Warnock Committee's minority opinion, which calls for a consensus before an effective decision is reached.

The legislative response to *Baby Cotton* indicates a willingness to please the public.<sup>72</sup> In its earnest effort to appease its public, however, the British government forgot one thing: change takes time. The Warnock Committee's minority recognized this, but Parliament failed to take notice. It takes time for people to alter their moral beliefs, as well as to appreciate the benefits offered by new technologies. The issues surrogacy presents are complex and merit careful attention.

On the negative side of surrogacy, critics argue that women should not be used as incubators because it demeans them personally and turns them into machines. Babies, in turn, should not be traded like commodities. The child's welfare should never be compromised by a contractual agreement. As stipulated by the Warnock Committee, decisions bearing on the custody of the child should be left in the hands of judges who can determine the best interests of the child.<sup>73</sup> Conversely, there are positive aspects to surrogacy: the joy it can bring to an infertile couple; the gladness felt by the surrogate after bringing this welcomed child into the world; and the excitement of having yet another method available to end infertility. Britain's Act overlooked these aspects. In its eagerness to please its shocked and disgruntled public, Parliament seems to have forgotten one thing: an effective piece of legislation cannot be drafted in haste. If the Act truly is designed to consider the desires of British subjects, the drafters should have considered

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71. *Id.*

72. See Harding, *supra* note 5, at 39.

It is this last case [Baby Cotton] which has probably been most instrumental in provoking media and public debate and concern, even outrage, and is pressurising the government to act to ban commercial surrogacy. Particular features giving rise to concern in this case include the large amount of money made by Mrs. Cotton, not just through the contract with the agency but, more importantly, through a contract with a newspaper for her story . . . and the fact that the arrangement was made through a commercial agency—rather than a private agreement—and that that agency was American-based and the “parents” were American.

*Id.* See also Morgan, *supra* note 59, at 363 (“In response to the ‘moral panic’ engendered, in an attempt to exorcise the ‘folk devils’ exposed, the Government decided to anticipate their more considered response to the proposals of the Warnock Committee and bring forward this limited Act to outlaw commercial surrogacy.” (footnote omitted)).

73. THE REPORT, *supra* note 17, at 43.

the minority's opinion in full and followed its advice to the letter.

## II. AMERICA: A LAND OF OPPORTUNITY?

### A. Baby M:<sup>74</sup> Whose Little Girl Are You?

In 1984, Mr. William Stern participated in a surrogate mother program based in New York City.<sup>75</sup> Through this organization, he and his wife met Mary Beth Whitehead, the woman who would become Baby M's surrogate mother. A contract was signed<sup>76</sup> and it was agreed that Mrs. Whitehead was to be paid the sum of \$10,000 and all medical expenses<sup>77</sup> incurred during her pregnancy. Close contact was maintained between the two parties throughout the pregnancy and on March 27, 1986, Baby M was born. In what may be considered a foreshadowing of the events to follow, Mrs. Whitehead informed the Sterns that she was not quite sure whether she could surrender the child.<sup>78</sup> She did surrender the girl for a short while, but on March 31, 1986, she regained custody. By telephoning the Sterns and asking permission to see the child, Mrs. Whitehead gained access to her. Upon arriving at the Sterns' house, Mrs. Whitehead claimed she could not live without the baby. Out of concern for Mrs. Whitehead's mental health, the Sterns permitted her to take the child for a week's visit.<sup>79</sup> Mrs. Whitehead never returned with the infant. Instead, she fled to Florida with the baby.<sup>80</sup> Although Mrs. Whitehead later returned to New Jersey, the homestate of both her and the Sterns, she escaped once again to Florida after the Sterns threatened her with legal action.<sup>81</sup> It was not until July 31, 1986, that the child was taken into the care of Florida authorities.<sup>82</sup> After law enforcement officers seized the child, the Sterns were once again given physical custody of the infant.<sup>83</sup> What turned out to be a lengthy and dramatic ordeal ended in Judge Harvey Sorkow's courtroom on March 31, 1987. In a 121-page opinion, Judge Sorkow un-

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74. *In re Baby "M"*, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

75. *Id.* at 342, 525 A.2d at 1142.

76. *Id.* at 344, 525 A.2d at 1143.

77. *Id.* at 345, 525 A.2d at 1143.

78. *Id.* at 347, 525 A.2d at 1144.

79. *Id.* at 348, 525 A.2d at 1144.

80. *Id.* at 348, 525 A.2d at 1145.

81. *Id.* at 349-50, 525 A.2d at 1145-46.

82. *Id.* at 351, 525 A.2d at 1146.

83. *Id.*

equivocally awarded custody to the Sterns.<sup>84</sup>

In the beginning of his opinion, Judge Sorkow described the problems of infertility, particularly noting the desire infertile couples have for raising genetically-linked children.<sup>85</sup> He understood and sympathized with this desire, and consequently sympathized with the Sterns. However, the focus of his opinion lay elsewhere. He stated that “[t]he primary issue to be determined by this litigation concerns the best interests of a child until now called ‘Baby M.’ All other concerns raised by counsel constitute commentary.”<sup>86</sup> He further noted, “[w]here courts are forced to choose between a parent’s rights and a child’s welfare, the choice is and must be the child’s welfare and best interest by virtue of the court’s responsibility as *parens patriae*.”<sup>87</sup> *Parens patriae* is the power of the state, in this case through its judicial branch, to watch over the interests of those who are incapable of protecting themselves, i.e., a baby.<sup>88</sup> It was this theory, along with the theory of contract, that Judge Sorkow utilized in rendering his decision. Although he presented some suggestions on what the legislature might include in a bill<sup>89</sup> on the issue of surrogate parenting, it was Judge Sorkow’s duty to examine and apply what little law there was at the time.<sup>90</sup> In addition, Judge Sorkow based part of his decision on the constitutional right to be a parent,<sup>91</sup> and on psychiatric evaluations.<sup>92</sup> Of particular interest was the opinion of Dr. M. Schecter, who was presented as a witness by the guardian ad litem. In Schecter’s opinion, the child should have been given to the Sterns by virtue of Mrs. Whitehead’s impulsivity, manipulative behavior, sense of self-importance, exploitiveness, and lack of sympathy and empathy.<sup>93</sup> That this opinion was rendered by the

84. *Id.* at 408, 525 A.2d at 1175.

85. *Id.* at 331, 525 A.2d at 1136.

86. *Id.* at 323, 525 A.2d at 1132. The “commentary” by counsel to which Judge Sorkow refers,

includes the need to determine if a unique arrangement between a man and woman, unmarried to each other, creates a contract. If so, is the contract enforceable; and if so, by what criteria, means and manner. If not, what are the rights and duties of the parties with regard to custody, visitation and support.

*Id.*

87. *Id.*

88. *Id.* at 324, 525 A.2d at 1133.

89. *Id.* at 334, 525 A.2d at 1138.

90. *Id.*

91. *Id.* at 372, 525 A.2d at 1157.

92. *Id.* at 357-70, 525 A.2d at 1149-56.

93. *Id.* at 359-60, 525 A.2d at 1150.

child's representative seems relevant. Judge Sorkow seemed to be of this opinion as well, even though he dismissed Dr. Schecter's finding of a mixed-personality disorder,<sup>94</sup> he described in detail the aforementioned character traits.<sup>95</sup>

Judge Sorkow also found testimony by Dr. Salk, an expert witness presented by the Sterns, to be relevant. In Salk's opinion, the baby "needed an end to the litigation, [to] have her parentage fixed, [to] be afforded protection from anyone who would threaten her," and needed a strong support system.<sup>96</sup> In Sorkow's opinion, and perhaps that of Dr. Salk himself, although he did not say definitively in his testimony, that strong support system was present in the Stern household.<sup>97</sup>

In describing Mr. Stern, Judge Sorkow made a point of emphasizing that he was the sole surviving member of his family.<sup>98</sup> Mrs. Stern, while having other members in her immediate family, had multiple sclerosis and could not carry a child without great risk to her physical well-being.<sup>99</sup> The possibility of adoption was virtually nonexistent. "[B]ecause they were of different religions and they were 'an older couple,' adoption of a newborn infant would be extremely difficult."<sup>100</sup> Most importantly, the Sterns had

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94. *Id.* at 359, 525 A.2d at 1150.

95. *Id.* at 360, 525 A.2d at 1150.

96. *Id.* at 364, 525 A.2d at 1152.

97. *Id.* at 338, 525 A.2d at 1140.

98. *Id.* at 335, 525 A.2d at 1138.

99. *Id.* at 335-36, 525 A.2d at 1138-39 (The court concluded that carrying a child was viewed as risky at the time Mrs. Whitehead made her decision to have Baby "M", thus the decision was reasonable.).

100. *Id.* at 336-37, 525 A.2d at 1139. A *standard* adoption procedure involves the following: a petition, a hearing, an agency investigation, and an interlocutory and final decree. Each of these steps is described in CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* (1968). First, Clark states that, "[a]doption proceedings are initiated when the adoptive parents file a petition. Most adoption statutes outline in more or less detail what is to go into the petition, which is usually required to be verified and signed by the adoptive parents." *Id.* at 615 (footnotes omitted). The second step, the hearing, is self-explanatory. A judge is asked to review the petition, and other materials, as well as interview the petitioning couple, to decide whether the adoption should take place. *Id.* at 616. The third step, the agency investigation, takes place after the judge submits the petition for adoption to an adoption agency. (This is required by most state statutes.) *Id.* at 616. The agency then conducts its own investigation and files a report on its findings. *Id.* at 617. "[I]t seems clear that the purpose of such statutes [requiring an agency investigation] is to provide the court with as much information as is available concerning the child's background and that of the adoptive parents, information which is relevant and helpful in deciding whether the adoption should proceed." *Id.* Lastly, the court may enter an interlocutory decree, giving the adoptive parents custody of the child for a specified amount of time, giving "the prospective adoptive parents custody of the child and impos[ing] on them for

a promising future: they were well-educated<sup>101</sup> and financially able to raise a child in an excellent environment.<sup>102</sup> On the other hand, Mrs. Whitehead was a high school dropout.<sup>103</sup> She had worked in a pizza restaurant and then a deli, where she met her husband Richard, whom she married at age sixteen.<sup>104</sup> Mr. Whitehead had several different jobs during their marriage<sup>105</sup> and was an alcohol abuser.<sup>106</sup> Consequently, Sorkow did not seem to favor the Whiteheads.

Some critics, however, did not agree with Judge Sorkow. One stated, "those critics who have labeled this custody decision a classist opinion favoring the haves over the have nots are correct. Justice seems to have been for sale along with Baby M."<sup>107</sup> As to the sale of Baby M, critic George Annas asked, "[w]here on this spectrum do contracts to bear a child fall? Are they fundamentally the sale of an ovum with a nine-month womb rental thrown in, or are they really agreements to sell a baby?"<sup>108</sup> In terms of Judge Sorkow's opinion, the answer would probably be, "this is just an ordinary contract." This conclusion can be inferred from Sorkow's seemingly mechanical approach to the surrogacy agreement entered into by the Sterns and Mrs. Whitehead: "If the mutual promises were not sufficient to establish a valid consideration, then certainly there was consideration when there was conception. The male gave his sperm; the female gave her egg in their pre-planned effort to create a child—thus, a contract."<sup>109</sup>

Judge Sorkow went on to discuss further the remedies for the

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most purposes the obligations of parents." *Id.* at 619. If the judge is satisfied with the results following from this interlocutory decree or, if there was no interlocutory decree, following from the hearing and the agency investigation, the judge will enter a final decree making the adoptive parents the legal parents of the child. *Id.* It should be noted, again, that this is a description of the "typical" adoption procedure; but there can be, and often is "great variation in detail from state to state." *Id.* at 614. In light of the fact that this Note deals with surrogate parenting, however, these details are of little significance. A description of the general adoption procedure is more than sufficient for a discussion of surrogate parenting.

101. *In re Baby "M"*, 217 N.J. Super. at 335-36, 525 A.2d at 1138.

102. *Id.* at 354-55, 525 A.2d at 1148.

103. *Id.* at 338, 525 A.2d at 1140.

104. *Id.*

105. *Id.* at 340, 525 A.2d at 1140-41.

106. *Id.* at 340, 525 A.2d at 1141.

107. Annas, *Baby M: Babies (and Justice) for Sale*, HASTINGS CENTER REP., June 1987, at 13, 15.

108. Annas, *Contracts to Bear a Child*, HASTINGS CENTER REP., April 1981, at 23, 23.

109. *In re Baby "M"*, 217 N.J. Super. at 374, 525 A.2d at 1158.

breach of such a contract, in light of Mrs. Whitehead's breach by not surrendering the child. In his opinion monetary damages would not suffice,<sup>110</sup> although he did not specify why. Thus, specific performance was the final solution. But how can one specifically enforce a contract demanding the relinquishment of a child? As Judge Sorkow described it, "specific performance is a discretionary remedy" and where a human life is involved, the "inquiry must be made to determine if the result of such an order for specific performance would be in the child's best interest."<sup>111</sup> Conveniently enough for him, it was. Upon finding the Sterns to be the ideal parents for Baby M, Sorkow held that the contract was proper for specific enforcement. Although Sorkow acknowledged, earlier in the opinion, that "to produce or deal with a child for money denigrates human dignity,"<sup>112</sup> he once again provided an easy answer, by arguing that a biological father cannot purchase what is already his.<sup>113</sup> As far as Sorkow was concerned this was the end. He concluded and held that surrogate parenting agreements were valid and enforceable contracts pursuant to the laws of New Jersey.<sup>114</sup> The laws of adoption, in his opinion, did not apply to surrogacy contracts since surrogacy was not yet a viable procreative option when the adoption laws were passed.<sup>115</sup> The Sterns were given custody of Baby M, and the precedent, for the time being, was set. On February 3, 1988, however, all that changed. The Supreme Court of New Jersey stepped into the picture.

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110. *Id.* at 389, 525 A.2d at 1166. A child has been bargained for here; she is unique and cannot be replaced and there is not a substitute for her. It was stated in E. FARNSWORTH, *CONTRACTS* (1982), on the subject of specific performance:

A critical factor in determining whether damages are an adequate remedy is whether money can buy a substitute for the promised performance. If a substitute can be readily obtained, the damage remedy is ordinarily regarded as adequate . . . . In some situations, however, no substitute is available, or its procurement would be unreasonably difficult or inconvenient or would impose serious financial burdens or risks on the injured party.

*Id.* at 828-29. From this language, it can be inferred that Judge Sorkow acted correctly in saying that monetary damages would not suffice. Since there is no substitute for a child, specific performance seems to be the appropriate remedy for the breach of a surrogacy contract.

111. *In re Baby "M"*, 217 N.J. Super. at 389, 525 A.2d at 1166.

112. *Id.* at 372, 525 A.2d at 1157.

113. *Id.*

114. *Id.* at 388, 525 A.2d at 1166.

115. *Id.* at 372, 525 A.2d at 1157.

## B. Baby M: The New Jersey Supreme Court Steps In<sup>116</sup>

In a ninety-five-page opinion, Chief Justice Wilentz, of the New Jersey Supreme Court, rendered the surrogacy contract of Mary Beth Whitehead<sup>117</sup> and William Stern invalid and against public policy:<sup>118</sup>

We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women. Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the "surrogate" as the mother of the child. We remand the issue of the natural mother's visitation rights to the trial court . . . ."<sup>119</sup>

After stating the Supreme Court's conclusions, Chief Justice Wilentz began his discussion of the case in full. He started his discussion with the matter of surrogate parenting in general:<sup>120</sup>

We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a "surrogate" mother, provided that she is not subject to a binding agreement to surrender her child. Moreover, our holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts. Under current law, however, the surrogacy agreement before us is illegal and invalid.<sup>121</sup>

The laws Justice Wilentz referred to are adoption laws,<sup>122</sup> more specifically those adoption laws which "prohibit[] the use of money in connection with adoptions; . . . requir[e] proof of parental unfitness or abandonment before termination of parental rights

116. *In re* Baby "M", 109 N.J. 396, 537 A.2d 1229 (1988).

117. Please note, for consistency throughout this text, Mary Beth Whitehead will be referred to as Mrs. Whitehead and not Mrs. Whitehead-Gould, her new name. (She has remarried since the original case began.)

118. *In re* Baby "M", 109 N.J. at 411, 537 A.2d at 1234.

119. *Id.* at 411, 537 A.2d at 1234-35.

120. It should be noted that Justice Wilentz is discussing the matter of surrogacy only in the context of *this* case.

121. *In re* Baby "M", 109 N.J. at 411, 537 A.2d at 1235.

122. N.Y. Times, Feb. 4, 1988, at 14, col. 3.

is ordered . . . and . . . make surrender of custody and consent to adoption revocable in private placement adoptions."<sup>123</sup> To assist the reader, Justice Wilentz broke his discussion down into sections and discussed each of these laws in the context of the case.<sup>124</sup> The first statute he considered was New Jersey Revised Statute section 9:3-54a, which "prohibits paying or accepting money in connection with . . . [an] adoption."<sup>125</sup>

In Justice Wilentz's opinion there was no question the Sterns violated this section of the code.<sup>126</sup> Any attempt made by them or their attorney to disguise the payment of money to Mrs. Whitehead as anything other than a payment for an adoption was rejected by the court:

As for the contention that the Sterns are paying only for services and not for an adoption, we need note only that they would pay nothing in the event the child died before the fourth month of pregnancy, and only \$1,000 if the child were stillborn, even though the "services" had been fully rendered.<sup>127</sup>

If the Sterns truly were paying for Mrs. Whitehead's services, they would have agreed to pay her *some* money "in the event the child died before the fourth month," and they would have agreed to pay her in full had the child been stillborn. Their failure to agree to such a plan of compensation emphasizes that they were paying for the baby, and not for Mrs. Whitehead's services.<sup>128</sup> Justice Wilentz found this fact most disconcerting, and

123. *In re Baby "M"*, 109 N.J. at 423, 537 A.2d at 1240.

124. It should be noted that each of the statutes to which Chief Justice Wilentz refers are part of the adoption code of New Jersey. These were the very laws Judge Sorkow chose not to use. In fact, Wilentz makes a point of saying, "[t]he [trial] court's . . . analysis of the surrogacy contract . . . is not at all in accord with ours. The trial court concluded that the various statutes governing this matter, including those concerning adoption, termination of parental rights, and payment of money in connection with adoptions, [did] not apply to surrogacy contracts." *Id.* at 418, 537 A.2d at 1238.

125. *Id.* at 423, 537 A.2d at 1240. This section of the statute is set forth as follows: No person, firm, partnership, corporation, association or agency shall make, offer to make or assist or participate in any placement for adoption and in connection therewith (1) Pay, give or agree to give any money or any valuable consideration, or assume or discharge any financial obligation; or (2) Take, receive, accept or agree to accept any money or any valuable consideration.

*Id.* at n.4; N.J. STAT. ANN. § 9:3-54 (West 1976).

126. *In re Baby "M"*, 109 N.J. at 423-24, 537 A.2d at 1240-41.

127. *Id.* at 424, 537 A.2d at 1241.

128. *Id.* Justice Wilentz was correct in noticing this aspect of the agreement. If a couple truly believes it is paying for the services of the surrogate mother, they will compensate her for her time and energy at every stage of the process. If the process ends early, she should still recover for the services rendered up to that date. The New York bill, 1429-A,

again emphasized that adoption laws prohibited this kind of payment.<sup>129</sup> The state of New Jersey would not tolerate this kind of agreement; the risks were too great.<sup>130</sup> Under New Jersey Revised Statute section 9:3-54a, the surrogacy contract could not stand.

According to Justice Wilentz, the surrogacy agreement also conflicts<sup>131</sup> with a private placement adoption statute, New Jersey Revised Statute section 9:3-48c(1).<sup>132</sup> It states, "[i]n order to terminate parental rights under the private placement adoption statute, there must be a finding of 'intentional abandonment or a very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct in the future.'"<sup>133</sup> Clearly, Mrs. Whitehead does not fall under any of these categories. She did not abandon her child, nor did she mistreat her. To the contrary, she wanted to keep the child with her. In spite of this, the trial court and the Sterns' counsel claimed she terminated her parental rights<sup>134</sup> by virtue of a provision in the surrogacy contract.<sup>135</sup> Justice Wilentz, however, found this provision of the con-

invokes such a rule and will be discussed more fully in section V of this Note. *See also*, Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283, 1309 (1985).

129. *In re Baby "M"*, 109 N.J. at 425, 537 A.2d at 1241. "The prohibition of our statute is strong. Violation constitutes a high misdemeanor . . . a third degree crime . . . [which carries] a penalty of three to five years imprisonment." *Id.*

130. *Id.*

The evils inherent in baby bartering are loathsome for a myriad of reasons. The child is sold without regard for whether the purchasers will be suitable parents. . . . The natural mother does not receive the benefit of counseling and guidance to assist her in making a decision that may affect her for a lifetime. In fact, the monetary incentive to sell her child may, depending on her financial circumstances, make her decision less voluntary. . . . Furthermore, the adoptive parents may not be fully informed of the natural parents' medical history.

*Id.* (citations omitted).

131. The word "conflict" is used by Justice Wilentz in his opinion. *Id.* at 422, 537 A.2d at 1240.

132. *Id.* at 427, 537 A.2d at 1242.

133. *Id.* It should be noted that the arrangement between the Sterns and Mrs. Whitehead is considered a private placement adoption because an adoption agency was not involved in the process.

134. This is not surprising in light of the fact that Judge Sorkow did not believe the adoption statutes should apply to this type of arrangement. Unlike Justice Wilentz, he believed the agreement was a binding one. *See supra* note 114 and accompanying text.

135. *In re Baby "M"*, 109 N.J. at 429-30, 537 A.2d at 1244.

MARY BETH WHITEHEAD understands and agrees that in the best interest of the child, she will not form or attempt to form a parent-child relationship with any child or children she may conceive, carry to term and give birth to, pursuant to the provisions of this Agreement, and shall freely surrender custody to WILLIAM STERN, natural father, immediately upon birth of the child; and

tract to be of no value. In his opinion, the termination of parental rights is a serious matter, and the finality surrounding it is not to be taken lightly by anyone.<sup>136</sup> Illustrating that notion, the adoption statutes require the "terminating parent" to meet several conditions before he or she can sever the ties with his or her child.<sup>137</sup> In sum, Justice Wilentz stated that "[t]he Legislature would not have so carefully, so consistently, and so substantially restricted termination of parental rights if it had intended to allow termination to be achieved by one short sentence in a contract."<sup>138</sup> Thus, the termination of Mrs. Whitehead's parental rights was rendered invalid by the supreme court. In light of this, Mrs. Stern could no longer be regarded as the "mother" of Baby M, for "without a valid termination there [could] be no adoption."<sup>139</sup> Consequently, Mrs. Whitehead was to remain the mother of this child.<sup>140</sup>

In explaining the third reason for invalidating the surrogacy contract, Justice Wilentz again described the painstaking measures necessary before terminating one's parental rights. He noted that, in an agency situation:

"The surrender [of the child] must be in writing, must be in such form as is required for the recording of a deed, and . . . must be such as to declare that the person executing [the custody document] desires to relinquish the custody of the child, acknowledge[s] the termination of parental rights . . . and acknowledge[s] full understanding of the effect of such surrender . . ." [to the agency].<sup>141</sup>

In other words, the adoption statute requires informed consent. Once this form has been accepted by the agency and meets their satisfaction, the consent to surrender the child is irrevocable, and there is no turning back. However, it is only irrevocable after meeting these statutory requirements. In a private placement adoption, Wilentz was quick to note, there are no statutory requirements and "in an unsupervised private placement . . . there is no statutory obligation to consent; [consequently,] there can be

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terminate all parental rights to said child pursuant to this Agreement.

*Id.* at 470, 537 A.2d at 1244.

136. *Id.* at 425-26, 428, 537 A.2d at 1242-43.

137. *Id.*

138. *Id.* at 429, 537 A.2d at 1243-44.

139. *Id.* at 428, 537 A.2d at 1243 (citation omitted).

140. *Id.* at 429, 537 A.2d at 1244.

141. *Id.* at 431, 537 A.2d at 1244.

no legal barrier to its retraction."<sup>142</sup> "[C]onsent . . . is not only revocable but, when revoked early enough, irrelevant."<sup>143</sup>

In Wilentz's view, therefore, there is only one valid irrevocable consent, and that is not the consent Mary Beth Whitehead gave in the contract. Irrevocable consent, under New Jersey law, is "a consent to surrender . . . custody and a placement with an approved agency [or youth service]."<sup>144</sup> The consent must be confirmed by professionals, who attest that the party surrendering her rights knows what she is doing. Mary Beth Whitehead's consent did not meet these requirements. It was not given to an agency; it was given in a contract. Further, "[c]ontractual surrender of parental rights is not provided for in [New Jersey] statutes as now written."<sup>145</sup> Consequently, the court found the contractual consent of Mary Beth Whitehead to be invalid.<sup>146</sup>

After explaining the legal grounds for invalidating the surrogacy contract, Justice Wilentz discussed the public policy reasons. His major disagreement with the surrogacy contract, in terms of public policy, revolved around the theory of "best interests of the child." In his view, the child's best interests were being disregarded in a number of ways. First, the contract determined, before the child's birth, which natural parent was to receive custody of the infant.<sup>147</sup> The parents' needs were determined before those of the child. Second, the agreement allowed for the "permanent separation of the child from one of its natural parents."<sup>148</sup> In the court's opinion, it was never in the child's best interests to be brought up by only one of its natural parents.<sup>149</sup> A relationship

142. *Id.* at 433, 537 A.2d at 1246 (citation omitted). The statutes regarding the irrevocability of consent pertain to agencies and agency services. There is nothing on the books, in terms of consent, regarding private placement adoptions.

143. *Id.* at 434, 537 A.2d at 1246.

144. *Id.* The youth service referred to in Justice Wilentz's quote is the New Jersey Division of Youth and Family Services, another state agency utilized in the placement of children.

145. *Id.* at 433, 537 A.2d at 1245.

146. *Id.* at 434, 537 A.2d at 1246.

147. *Id.* Justice Wilentz asked how one could determine what is best for the baby before she is born. "[T]he ultimate determination of custody lies with the court in the exercise of its supervisory jurisdiction as *parens patriae*." *Id.* at 435, 537 A.2d at 1246. In his opinion, the court should decide, not the parents.

148. *Id.*

149. *Id.* at 435, 537 A.2d at 1246-47. It should be noted here that this author disagrees with this statement. In a surrogate parenting situation, it is not good for the child to remain in close contact with his surrogate mother. All it can amount to is confusion and mixed emotions. Further, this author does not agree with the following statement made by

with both parents is in the best interests of the child. Third, New Jersey statutes do not allow one parent's right to the child to be granted over the other parent's right. Each parent has an equal right to the child.<sup>150</sup> Fourth, there was a total disregard for the mother/infant bond.<sup>151</sup> Finally, and "worst of all, . . . [t]here is not the slightest suggestion [in the contract] that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, [or] their superiority to Mrs. Whitehead . . . ."<sup>152</sup> This last point is important, for who is to say the contracting parties' intentions are good? They could be child abusers, pornographers, or criminals. Without a thorough investigation by qualified personnel, there is no way of telling. In the court's opinion, public policy demands this type of inquiry if the child's best interests are to be served.

In addition to these public policy arguments,<sup>153</sup> Justice Wilentz also considered the arguments against surrogacy in general;

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Justice Wilentz: "The impact of failure to follow that policy is nowhere better shown than in the results of this surrogacy contract. A child, instead of starting off its life with as much peace and security as possible, finds itself immediately in a tug-of-war between contending mother and father." *Id.* at 435, 537 A.2d at 1247 (footnote omitted). This is unabashedly untrue. In most surrogacy situations, the child is not made the object of a tug-of-war, nor should he be. Had this surrogacy contract been upheld, as it was at the trial level, Baby M would not have become the subject of a tug-of-war either. The best interests of the child may have been better provided for if the supreme court had accepted the surrogacy contract.

150. *Id.* at 435-36, 537 A.2d at 1247.

151. *Id.* at 437, 537 A.2d at 1248. Justice Wilentz also referred to the mother/infant bond:

[S]he never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that, compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary.

*Id.* In other words, public policy is also concerned with the welfare of the mother and her wants and needs. The surrogacy contract, in the court's opinion, is contrary to public policy for its failure to consider these aspects. In addition, Justice Wilentz noted that the natural father and his wife are not protected by the surrogacy contract: "They know little about the natural mother, her genetic makeup, and her psychological and medical history. Moreover, not even a superficial attempt is made to determine their awareness of their responsibilities as parents." *Id.* As will be noted, in section V (B)(2) of this Note, this lack of protection truly is against public policy. The key to success in these procedures is to obtain as much information as possible about everyone involved. If the Sterns were able to learn more about Mary Beth Whitehead, they probably would not have contracted with her to be their surrogate and could have avoided the ensuing dilemma.

152. *Id.* This type of investigation is necessary if we are to make surrogacy a safe alternative to infertility.

153. See *supra* notes 147-52 and accompanying text.

the main objection was the profit motive of all involved.<sup>154</sup> "In the scheme contemplated by the surrogacy contract in this case, a middle man, propelled by profit, promotes the sale. Whatever idealism may have motivated any of the participants, the profit motive predominates, permeates, and ultimately governs the transaction."<sup>155</sup> The surrogacy contract leads to the exploitation of all parties.<sup>156</sup> In essence, there are more bad results than good.

The second argument noted by Justice Wilentz was that "surrogacy will be used for the benefit of the rich at the expense of the poor."<sup>157</sup> His answer to this contention: "There are, in short, values that society deems more important than granting to wealth whatever it can buy, be it labor, love, or life."<sup>158</sup> Simply because a poor woman voluntarily avails herself of this process does not make it right.<sup>159</sup> Children cannot be bought.

Finally, and somewhat related to the profit element of this procedure, is the court's concern over the "long-term effects of surrogacy contracts."<sup>160</sup> Although they "are not known, [they are] feared."<sup>161</sup> By invalidating surrogacy contracts, the court perhaps felt it could alleviate some of the problems surrogacy presents.

In light of all these concerns, Chief Justice Wilentz wrote that, "the harmful consequences of this surrogacy arrangement appear to us all too palpable. In New Jersey the surrogate

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154. *In re Baby "M"*, 109 N.J. 434-44, 537 A.2d at 1248-50.

155. *Id.* at 439, 537 A.2d at 1249.

156. *Id.* In short, the indigent woman who is in need of money will offer to be a surrogate mother.

157. *Id.* In other words, as interpreted by a reporter from U.S. Law Week, "[i]nfertile couples in the low-income bracket will be unable to utilize the process." "*Baby M*" *Stays with Sterns; Whitehead to Have Visitation*, U.S. Law Week (BNA daily ed.), Feb. 5, 1988.

158. *In re Baby "M"*, 109 N.J. 440-41, 537 A.2d at 1249.

159. *Id.* at 441, 537 A.2d at 1250.

160. *Id.*

161. *Id.* The long-term effects to which Justice Wilentz refers are as follows: [T]he impact on the child who learns her life was bought, that she is the offspring of someone who gave birth to her only to obtain money; the impact on the natural mother as the full weight of her isolation is felt along with the full reality of the sale of her body and her child; the impact on the natural father and adoptive mother once they realize the consequences of their conduct.

*Id.*

It should also be noted that Alison Ward, former director and vice president of Concerned United Birth Parents, stated that: "People say there aren't enough studies on the children of surrogates or those born out of artificial insemination. Rather than go ahead and permit surrogate parenting on that basis, why not wait until we know more about the long term effects?" Zeldis, *New York Seen Facing Delays on Surrogate Mother Measure*, N.Y.L.J., April 27, 1987, at 1, 4, col. 5. No doubt Justice Wilentz would agree.

mother's agreement to sell her child is void. Its irrevocability infects the entire contract, as does the money that purports to buy it."<sup>162</sup> In short, surrogacy contracts are invalid in the state of New Jersey.

After finishing with the contract issue, Justice Wilentz moved on to other issues. Although he dedicated some time to the constitutional issues raised by this procedure,<sup>163</sup> he concentrated most of his efforts on the issues of custody<sup>164</sup> and visitation.<sup>165</sup> In the court's opinion, Baby M belonged in the custody of the Sterns:

There were eleven experts who testified concerning the child's best interests, either directly or in connection with matters related to that issue. Our reading of the record persuades us that the trial court's decision awarding custody to the Sterns (technically to Mr. Stern) should be affirmed since "its findings . . . could reasonably have been reached on sufficient credible evidence present in the record."<sup>166</sup>

Although it could be argued that the Sterns were the "ideal" parents for this child, Chief Justice Wilentz clearly pointed out that this decision was not reached in the same manner as at the trial level.<sup>167</sup> Instead of determining the custody issue on the basis of a contractual remedy, as the trial court had done, the supreme court chose to decide the issue of custody on a more traditional basis—the "best interests of the child." Placement with the Sterns, with their financial stability, strong marriage, and eagerness to nurture and protect the baby, was in the best interests of this child.<sup>168</sup> It was merely coincidental that this result was the same as that of Judge Sorkow.<sup>169</sup>

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162. *In re Baby "M"*, 109 N.J. at 442-44, 537 A.2d at 1250.

163. *Id.* at 447-52, 537 A.2d at 1253-55.

164. *Id.* at 452-63, 537 A.2d at 1255-61.

165. *Id.* at 463-68, 537 A.2d at 1261-64.

166. *Id.* at 457, 537 A.2d at 1258 (citations omitted).

167. *Id.* at 454, 537 A.2d at 1256-57.

We note again that the trial court's reasons for determining what were the child's best interests were somewhat different from ours. It concluded that the surrogacy contract was valid, but that it could not grant specific performance unless to do so was in the child's best interests. . . . While substantively indistinguishable from our approach to the question of best interests, the purpose of the inquiry was not the usual purpose of determining custody, but of determining a contractual remedy.

*Id.* at 454, 537 A.2d at 1256.

168. *Id.* at 458, 537 A.2d at 1259.

169. *Id.* at 459, 537 A.2d at 1259. "Based on all of this we have concluded, independent of the trial court's identical conclusion, that Melissa's [Baby M] best interests call for

After deciding the custody issue, Justice Wilentz moved on to visitation. Although he and the court believed it would have been in the best interests of the child to have terminated the proceedings "once and for all,"<sup>170</sup> it was their impression that the issue of visitation was best left in the hands of the trial court.<sup>171</sup> There, visitation could be dealt with on a more comprehensive level, and if needed, experts could be recalled to testify on the matter.<sup>172</sup> That visitation was granted is the important thing; that it was in the child's best interests is another.<sup>173</sup>

In spite of what critics say,<sup>174</sup> New Jersey is not the only state whose high court has addressed the matter of surrogacy. The Supreme Court of Kentucky also spoke on the matter; although the case did not involve a custody battle, it presents a most interesting and persuasive argument in support of surrogate parenting.

### C. The Supreme Court of Kentucky: On the Matter of Surrogacy

In March of 1981, the Attorney General of Kentucky began proceedings against Surrogate Parenting Associates, Inc. (SPA) of Kentucky, "seeking to revoke SPA's corporate charter on grounds of abuse and misuse of its corporate powers [which were] detrimental to the interest and welfare of the state and its citizens."<sup>175</sup> How exactly did SPA "abuse and misuse its corporate

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custody in the Sterns." Although, it should be noted, that the supreme court acknowledges that this part of its decision was based on the trial court's analysis. *Id.* at 461, 537 A.2d at 1260.

170. *Id.* at 464, 537 A.2d at 1261-62.

171. *Id.* at 463-67, 537 A.2d at 1261-63.

172. *Id.* at 467, 537 A.2d at 1263.

173. When this Note was written, visitation rights had not yet been granted. Since then, however, the trial court decided that liberal visitation rights should be extended to Mary Beth Whitehead-Gould. *In re Baby "M"*, 225 N.J. Super. 267, 269, 273-74, 542 A.2d 52, 53, 55 (N.J. Super. Ct. Ch. Div. 1988). It was not, in this author's opinion, a wise decision on Justice Wilentz's part to have granted visitation rights to Mrs. Whitehead. See Robertson, *Surrogate Mothers: Not So Novel After All*, HASTINGS CENTER REP., Oct. 1983, at 28, 30. In this article Professor Robertson states that "[t]he greatest chance of confusing family lines arises if the child and couple establish relations with the surrogate and the surrogate's family." *Id.*

174. Hanley, *Surrogate Deals for Mothers Held Illegal in Jersey*, N.Y. Times, Feb. 4, 1988, at 1, col. 1. Robert Hanley said, "[b]ecause it is the nation's first ruling on surrogacy by a state's highest court, it is also expected to offer guidance to legislators and lower-court judges grappling with the issue in other states." *Id.*

175. *Surrogate Parenting Assocs. v. Kentucky ex rel. Armstrong*, 704 S.W.2d 209, 210 (Ky. 1986).

powers?" It seems as if SPA violated three Kentucky statutes.<sup>176</sup> The most relevant was Kentucky Revised Statute section 199.590(2), which prohibits the purchase of a child for the purpose of adoption.<sup>177</sup> SPA operates a medical clinic which assists infertile couples by means of surrogacy.<sup>178</sup> For its assistance in these "transactions," the agency and the surrogate mother receive a fee.<sup>179</sup> Although the Circuit Court of Franklin County found SPA's activities legal and dismissed the case, the court of appeals found SPA's actions in violation of the aforementioned code. In February of 1986, however, the Supreme Court of Kentucky overturned the court of appeals.<sup>180</sup> The supreme court held that SPA's involvement in the surrogate parenting procedure was not to be construed as a violation of Kentucky Revised Statute section 199.590.<sup>181</sup> How was the surrogate parenting procedure different from "baby-selling"? Justice Liebson explained, that in his view it was significantly different; Kentucky Revised Statute section 199.590 was intended to keep baby brokers from overwhelming expectant mothers or the parents of a child with financial inducements to part with the child.<sup>182</sup> With surrogate parenting, the agreement to bear the child is entered into *before* conception.<sup>183</sup> The surrogate mother is not facing the consequences of an unwanted pregnancy, or the fear of the financial burden of raising a child.<sup>184</sup> She is assisting a childless couple in attaining their ultimate dream, a "biologically related" child.<sup>185</sup> Surrogate parenting, Liebson explained, is not significantly different from Artificial Insemination by Donor. In that case, a man donates his semen to a woman whose husband is infertile. Yet no one accuses the attorneys, doctors, and biological fathers involved in this procedure of violating the statute.<sup>186</sup> Indeed, why should those parties be treated differently in a surrogacy situation? Justice Liebson answers that they should not be. In addition, Justice Liebson noted, as did Judge Sorkow in *Baby M*, that "[b]ecause of the existence

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 210-11.

180. *Id.* at 214.

181. *Id.* at 211.

182. *Id.*

183. *Id.*

184. *Id.* (Please note, this is Justice Liebson's language.).

185. *Id.* at 211-12.

186. *Id.* at 212.

of a legal relationship between the father and the child, any dealing between the father and the surrogate mother in regard to the child cannot properly be characterized as an adoption.’”<sup>187</sup> Justice Liebson seems to have reiterated a key point: How can a father adopt his own child? Stepparents can adopt, parents cannot. All they can do is terminate their parental rights to the child, just as the surrogate mother is supposed to do. However, what if she chooses not to, and breaches the contract as Mrs. Whitehead did? In that case, Kentucky treats surrogate contracts<sup>188</sup> as voidable, and “not *per se* illegal.”<sup>189</sup> If the mother desires not to surrender the child, she cannot be forced to by virtue of the contract.<sup>190</sup> The contract would be rendered void. We are now left with the mother and the father of the child, each having parental rights as designated by pertinent statutes.<sup>191</sup> In addition to these consequences, Justice Liebson is quick to note that just as the adoptive mother suffers a loss, so does the surrogate mother. For breaching the contract, she must forfeit her rights to the fees she has been promised.<sup>192</sup>

Justice Liebson concluded his opinion by saying that: “If there are social and ethical problems in the solutions science offers, these are problems of public policy that belong in the legislative domain, not in the judicial [domain] . . . Short of such legislation it is not for the courts to cut off solutions offered by science.”<sup>193</sup> Unrestrained by statutory law on the issue of surrogate parenting, the court ruled as it saw fit. Surrogate parenting, to this date, is not considered an illegal procedure in the state of Kentucky.

Justice Liebson’s reasoning is cogent. Despite the fact that this case did not involve all the complexities of a custody fight between a natural father and a surrogate mother, the Kentucky Supreme Court makes an excellent argument for allowing surrogate parenting to continue. Justice Liebson considered the feelings

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187. *Id.*

188. The court actually calls them “custody” contracts. But it can be inferred, from the context in which the court refers to them, that Justice Liebson is talking about surrogacy contracts as custody contracts. *Id.* at 213.

189. *Id.*

190. *Id.*

191. *Id.* Although the court does not list the statutes it has in mind, it can be inferred from the court’s language that pertinent statutes would be those involving parental rights of unwed couples.

192. *Id.*

193. *Id.*

of both biological father and mother, the value of this new procedure to the country's infertile, the voidable, as opposed to void, nature of the surrogate contract, and the role the legislature must play in this ever-evolving drama. In essence, he seems to adopt a compromise between the Sorkow and Wilentz theories of how surrogacy should be handled. Like Judge Sorkow, he does not apply the adoption laws; and he renders the contracts voidable, as did Justice Wilentz, recognizing that these contracts cannot automatically take away a surrogate mother's custody rights. It is a thorough analysis of surrogacy; indeed, one that is equally as thoughtful and perhaps more humane, from the child's standpoint, than Justice Wilentz's opinion in New Jersey.<sup>194</sup>

#### D. Current Case Law: Another Court's Answer to a Custody Battle

Another recent case decided in a United States court involves, what one reporter calls, a Solomon-like suggestion to the ensuing surrogacy dilemma.<sup>195</sup> The case involved second cousins, Ms. Munoz and Ms. Haro, who agreed to a joint-custody arrangement for the child.<sup>196</sup> Under California law, joint custody is the preferred method to be utilized in custody disputes. In that case, a woman was unwilling to surrender her child. Therefore, the judge decided it was in both parties' interest to share the child.<sup>197</sup> But, neither the judgment nor result seem sound. The child will feel confused and torn in his affection between the two parties; he will not be able to decide which parent to go to in times of trouble or to whom he owes his loyalty. For a judge to put a child in this situation, where the parents were never married, seems unjust. Unlike divorced couples, who initially share a bond together and intend as well as expect to raise a child *together*, the natural father and surrogate mother never intended such a relationship. To make a child a party to this unusual union is unnatural, un-

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194. *But see* Shipp, *Decision Could Hinder Surrogacy Across Nation*, N.Y. Times, Feb. 4, 1988, at 14, col. 3. "Unlike the Baby 'M' case, the Kentucky case did not involve the litigation of the rights of the child and of the competing natural parents. For that reason, the New Jersey case is likely to be given greater weight." *Id.*

195. Sherman, *Surrogate Parenting Foes Applaud Baby M Ruling*, Nat'l L.J., March 16, 1987, at 26, col. 1. It should be noted that this is really not a Solomon-like decision. Solomon's decision involved the belief that one of two women seeking custody of the child was the true mother. The child was not shared between them.

196. *Id.*

197. *Id.*

healthy, and unwise. It is also unrealistic to expect the youngster to be able to cope with the problems arising from such a coupling. The child should not be made a party to this dilemma.

#### E. The All-American Family?

Perhaps the strangest set of facts involving surrogacy occurred when a daughter donated an egg for fertilization which was then to be implanted into a surrogate so that her forty-six-year-old mother could have a genetically-related child.<sup>198</sup> Although this is technically not a case, as it has not gone to trial, it is a case study.<sup>199</sup> The consulted physician sought the opinion of experts on the matter. Lori Andrews, an attorney and project director at the American Bar Foundation, felt this type of arrangement ought to be allowed.<sup>200</sup> Among the reasons she offered were: one, it offers the opportunity of a genetically-related child; two, it was not costly; three, the daughter can satisfy a feeling of altruism; four, the child would have a more definite sense of identity; and five, permitting this type of procedure would allow people to make their own decisions regarding the family.<sup>201</sup> As to its utilitarian merits, Ms. Andrews believed that "a medical innovation is adopted when it is anticipated to be an improvement over the existing treatment modalities and is unlikely to cause risks that outweigh its potential benefits."<sup>202</sup> As to being an improvement, not enough is known about surrogacy to determine this of yet. Until more data and research can be attained, Ms. Andrews infers that careful counseling is required in these situations, and that these procedures should be monitored so that the true values of surrogacy can be determined.<sup>203</sup> Even if one could agree with Ms. Andrews, it must be noted that this case study involves relatives. Opinions may change when this procedure is moved outside the family. Our society may be more willing to accept these arrangements within the family, but as the *Munoz* case showed, maybe not. As all the previous cases and this case study point out, there are no easy answers. This is a situation where legislation is needed

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198. Andrews, *When Baby's Mother is Also Grandma — and Sister*, HASTINGS CENTER REP., Oct. 1985, at 29.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 30.

but has yet to be seen.

#### F. The Absence of Legislation in America

A number of justices and critics agree that adoption laws are not appropriate to govern surrogacy arrangements because adoption and surrogacy are substantially different concepts.<sup>204</sup> As mentioned in *Surrogate Parenting Associates, Inc.*,<sup>205</sup> the major difference is that in surrogacy there is a biological bond between the father and child, which is not found in adoption. To outlaw surrogacy and deny a father access to his child by virtue of the fact that it violates an adoption code seems more cruel than it would to deny a stranger access to the child. In addition, it seems highly unreasonable for judges or attorneys to believe that the surrogate mother and the biological father can share custody of the child, in the event the surrogate mother finds it impossible to part with the infant at birth. In commercial instances, the surrogate and the father are virtual strangers. Nothing links them together save the child. If the woman breaches the contract, the father would be expected to feel some animosity towards her, if not absolute hatred. As previously mentioned, this could have an adverse effect on the child.<sup>206</sup>

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204. Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1 (1986). In section C of her article, Ms. Katz distinguishes surrogate parenting from black market baby-selling. She first notes that the adoption laws, which try to prohibit black market baby-selling, were written before surrogate parenting came into existence, and therefore, should not apply. *Id.* at 18. Then she describes, in great detail, how the activities of black market baby-selling and surrogate parenting are different. She summarizes these differences:

Many of the primary dangers inherent in the black market situation do not apply to surrogate mother arrangements. The child will have a proper home, in fact, the same one that he would have had if his parents had been able to conceive naturally or adopt independently. The surrogate is not pressured to enter into the agreement; she consents to the adoption voluntarily; the adoptive father is the child's natural father; information about the child's mother is readily available; the family unit is strengthened; and no other criminal activity is involved. Other problems are either tempered or significantly less likely to occur. An adopted child's feeling of abandonment is lessened when he lives with his natural father. He may not feel that he was purchased if the payment is viewed as for services. The problems of blackmail, auction-blocking, and the natural mother's feelings of guilt are less likely to arise.

*Id.* at 24-25. Although Ms. Katz's discussion centers around black market baby-selling and not adoption *per se*, it does show why adoption statutes, prohibiting the payment of money for a child, should not apply to surrogate parenting.

205. See *supra* note 175.

206. See *supra* section III (C) of this Note.

Another distinction drawn between surrogacy and adoption is the issue set forth by Justice Liebson and Avi Katz—unwanted versus wanted pregnancy. The former could lead to extortion while the latter lends itself more to amicable bargaining. Assuming adoption laws should not apply, the unanswered question is, what should?

In addition to the previously-mentioned cases, which have expounded on the issue of surrogacy, there are bills being submitted to various state legislatures on the issue.<sup>207</sup> Of particular interest, in light of the deluge of bills across the country and its timeliness in relation to *Baby "M"*,<sup>208</sup> is the bill introduced by New York Republican senators John Dunne and Mary Goodhue.<sup>209</sup> Under this bill, the major provisions of which were introduced in January of 1987, surrogate contracts in the state of New York would be recognized as legal and irrevocable.<sup>210</sup> When a woman signs a contract, she signs away all her rights to the child.<sup>211</sup> "The child would be deemed at birth, the 'legitimate, natural child' of the father and his wife."<sup>212</sup> In order for the contract to be legally binding, the bill requires the contract to have the seal of judicial approval before conception takes place.<sup>213</sup> The reason for this requirement is to ensure that all interested parties are aware of the legal ramifications inherent in such an agreement. In addition, judicial review is imposed to prohibit unconscionable dealings between the parties.<sup>214</sup> Also, the wife of the biological father must be diagnosed "infertile."<sup>215</sup> Finally, the bill protects the surrogate mother's constitutional right to have an abortion.<sup>216</sup>

Another bill, introduced by Democrat Patrick Halpin, would

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207. It should be noted here that one anti-surrogacy bill has been passed by the state of Nebraska. This bill declares surrogate motherhood contracts void. Janson, *Panel Backs Curbs on Surrogate Motherhood*, N.Y. Times, Feb. 6, 1988, at B28, col. 6. For a thorough analysis of all the state bills across the country see Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, HASTINGS CENTER REP., Oct.-Nov. 1987, at 31.

208. *In re Baby "M"*, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 109 N.J. 396, 537 A.2d 1127 (1988).

209. Kolbert, *New York State Senators Introduce Bill to Uphold Surrogate Contracts*, N.Y. Times, Feb. 4, 1987, at B2, col. 4.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

render all surrogate contracts which pay in excess of the medical costs illegal.<sup>217</sup> In addition, and similar to adoption, the surrogate mother would be given twenty days to reconsider surrendering the child.<sup>218</sup> In reference to these provisions, Mr. Halpin stated that "[t]his recognizes that surrogate motherhood is not a business deal."<sup>219</sup>

The choice by both Republican and Democratic legislators to approach the problem of surrogacy under the auspices of contract law is interesting and thought-provoking. One might ask, however, whether this is the best approach to surrogacy. Perhaps the wiser choice is to consider the issues of surrogate parenting under another body of law, as Justice Wilentz did,<sup>220</sup> or under the *parens patriae* theory espoused by Judge Sorkow.<sup>221</sup> In light of the fact that surrogate parenting is a unique and problematic procedure, one body of law may not be enough; perhaps the solution lies in a combination of legal theories. These questions will be dealt with more fully in the latter portion of this Note.<sup>222</sup>

#### G. Ethical and Legal Problems Unresolved in America

To some, surrogate parenting is seen as a form of adultery and a most unnatural form of procreating.<sup>223</sup> In fact many believe that the child born of surrogacy is illegitimate because the child's parents are not married. For others, surrogate parenting is nothing less than baby-selling. To them it is contrary to public policy to rent one's womb for profit. As one critic said, "no one believes for a minute that these women don't do it for the money. If you want to test that, just take away the money."<sup>224</sup> The fact that surrogates are paid \$10,000 for a live birth and \$1,000 for a still birth merely seems to emphasize this point.<sup>225</sup>

217. Kolbert, *Baby M Adds Urgency to Search For Equitable Laws*, N.Y. Times, Feb. 15, 1987, at E22, col. 2.

218. *Id.*

219. *Id.*

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

221. Shipp, *Parental Rights Law*, N.Y. Times, April 8, 1987, at B2, col. 1. Commentator Dr. Doris Jonas Freed, a specialist in matrimonial law, noted "that Judge Sorkow was not bound by the New Jersey family-law statutes in the surrogacy case and that he had acted properly in fashioning new law under the *parens patriae* theory—a centuries old principle that empowers the state to look after the interests of children . . ." *Id.*

222. See *infra* section V of this Note.

223. Keane, *supra* note 1, at 149.

224. *Surrogacy = Baby Selling*, A.B.A. J., June 1, 1987, at 38, 38.

225. Rifkind, *Surrogacy Is Wrong; It Must Be Outlawed*, USA Today, Sept. 3,

Noel Keane, the man who introduced surrogacy in this country and negotiated the Baby "M" deal, would disagree with the aforementioned contentions. In his opinion, pregnancy and childbirth are hazardous, time-consuming, painful conditions which few women can be expected to experience for the sake of someone else unless they receive meaningful compensation.<sup>226</sup> It is a burdensome task to carry a child. In addition, one could argue that in becoming pregnant, the surrogate has sacrificed her ability to work outside the home; in essence her pregnancy becomes a job. Why shouldn't she be compensated?

Putting these matters aside, it is still imperative to emphasize that no matter what ethical dilemmas surround this procedure, there are significant legal problems to be considered. Unless a court has ruled on the matter, most people, lawyers and laymen alike, will not know if they are committing a crime, or entering a fruitless pursuit. Some courts may deem the contracts unenforceable. To grant specific performance in the wrong situation, i.e., where the mother is better suited to take care of the child, would be in the child's worst interest. In addition, Mr. Cassidy, the lawyer for Mary Beth Whitehead, noted:

[T]he contract seeks to effectuate abandonment of a baby by a mother. Her refusal to abandon her child and fulfill her obligation should be supported by the courts because it conforms with behavior we seek to advance or promote. The court should not be used as the court below [Judge Sorkow's court] was on May 5, 1986 to advance or promote behavior contrary to our policy against abandonment and improvident separations.<sup>227</sup>

Mr. Cassidy makes a valid point which should be taken into serious consideration when deciding whether or not to specifically enforce a contract.

#### IV. THE PROBLEMS PRESENTED BY SURROGACY

##### A. Great Britain and America

Great Britain and the United States are bound by their common concern over the same legal and moral dilemmas. Those opposed to surrogacy believe that "[t]he surrogate mother provides

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1987, at 8A, col. 5.

226. Keane, *supra* note 1, at 153.

227. Cassidy, *What Is in Baby M's "Best Interest" and What Standard Should Apply?*, NEW L.J., Oct. 26, 1987, at 19, col. 4.

her ovum, and enters into a surrogate mother arrangement, with the clear understanding that she is to avoid responsibility for the life she creates. . . . [H]er desire to create a child is born of some motive other than the desire to be a parent."<sup>228</sup> It might be money she desires, or it might be a form of catharsis for the surrogate who desires to rid herself of the guilt of aborting an earlier pregnancy.<sup>229</sup> Either way, the critics believe surrogacy to be unnatural. "[C]reating a child without desiring it fundamentally changes the way we look at children—instead of viewing them as unique individual personalities to be desired in their own right, we may come to view them as commodities or items of manufacture to be desired because of their utility."<sup>230</sup> This fear of a surrogacy "assembly line" ultimately plays out in a situation where a child born of surrogacy later meets his half-sister and falls in love with her.<sup>231</sup> Although the likelihood of this is slim, the opponents of surrogacy fear for the worst and to them there is no rationalizing away these fears.

To the British, the commercial exploitation of infertility is unacceptable, as is surrogacy for convenience alone.<sup>232</sup> Yet, the Warnock Committee only voiced some of Britain's concerns. Perhaps what angered people most, however, was Kim Cotton's overt sale of the rights to her story to the British press, and her remarkable ability to exploit the surrogacy procedure. The fact that she would sell the rights to this sordid tale (as it was viewed in Britain) merely exemplified the commerciality of this procedure.<sup>233</sup>

In addition to their common moral outlook, the British and Americans also recognize a need for comprehensive legislation. For example, in Britain it was said that "[i]n its desire to legislate quickly Parliament has avoided all the major issues relating to surrogacy. The Act is silent with respect to the position of the child, surely the most important and vulnerable person in the transaction. It ignores the questions of legitimacy and parenthood. . . ."<sup>234</sup> The fact that an amendment has already been proposed for the Surrogacy Arrangements Act emphasizes

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228. Krimmel, *The Case Against Surrogate Parenting*, HASTINGS CENTER REP., Oct. 1983, at 35, 35.

229. Kantrowitz, *Who Keeps "Baby M?"*, NEWSWEEK, Jan. 19, 1987, at 44, 47.

230. Krimmel, *supra* note 228, at 36-37.

231. *Id.* at 38.

232. THE REPORT, *supra* note 17, at 46.

233. Harding, *supra* note 5, at 39.

234. Sloman, *supra* note 15, at 980.

this Act's weaknesses.

"It's the absence of laws [in America] that creates the problems."<sup>235</sup> To remedy these problems requires clear and enforceable laws. These laws would determine who may be surrogate mothers, and who will hire them. They would mandate supervision of the agencies handling these procedures and the individuals who make the arrangements, and protect the rights of those involved so the likelihood of a Baby "M" reoccurrence is substantially diminished.<sup>236</sup> Although the United States does not have legislation similar to the Surrogacy Arrangements Act on its books, an example of the possible problems are seen in a recent bill proposed in California.<sup>237</sup> The bill was presented and passed by the state assembly but died in the Senate. The bill required surrogate mothers to be at least twenty-one years of age and to have already had a child.<sup>238</sup> In addition, it insisted on extensive medical testing for all the parties involved.<sup>239</sup> Finally, the bill required that money paid to the surrogate be considered compensation for services rather than payment for the infant.<sup>240</sup> The bill was opposed by Catholic organizations, feminist groups, and the American Civil Liberties Union.<sup>241</sup> A Missouri legislator admirably summed up why America is so reluctant to accept an immediate solution: "There's a natural disinclination to pass new ideas quickly . . . . But we have to back up and let our law catch up with our science. By not deciding, it turns out that we are deciding."<sup>242</sup>

## B. Differences Between the Countries

Perhaps of greatest significance is Britain's eagerness to appease its public at once. As soon as the social upheaval following *Baby Cotton* came to a head, the British government hurried to draft legislation. In some instances, however, no law is better than bad law. In addition to analyzing the amendment to the Act as an

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235. *Surrogacy Can Work, But Laws are Needed*, USA Today, Sept. 3, 1987, at 8A, col. 1.

236. *Id.*

237. Kolbert, *Baby M Adds Urgency to Search for Equitable Laws*, N.Y. Times, Feb. 15, 1987, at 22, col. 2.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

exemplification of its weaknesses, the amendment also illustrates one of the government's strengths—its ability to recognize its weaknesses and its speed in rectifying them.

Granted, the United States is a much larger country, with a diverse populace and varying traditions, both social and religious, and certainly it would take a greater length of time to reach a consensus. But this debate on surrogacy has continued for a number of years. *Doe v. Kelley*, the first case in America involving surrogate parenting, was decided in 1981.<sup>243</sup> As a consequence of this failure to reach a concensus, our judges are forced to adjudicate in areas normally left to the legislatures. As Justice Latey pointed out in his *Baby Cotton* opinion, these ethical and moral dilemmas belong in the hands of the legislature. Although Judge Sorkow attempted to adjudicate a just result,<sup>244</sup> judicial authority is not enough to solve this problem. Guidance and wisdom are needed to give the strength and backbone required for a trial judge's decision. It is possible Mary Beth Whitehead would not have appealed this case if there was a statute on the books requiring the surrender of the child to the Sterns in the first place.

## V. SURROGACY: WHAT TO DO

There is no denying that surrogacy presents problems. The surrogate mother could renege on the contract; the adoptive couple could prove to be less than ideal parents; and the child could later resent being purchased, as one would purchase a car.<sup>245</sup> To outlaw surrogacy outright, however, is not the answer. Surrogate parenting is a legitimate alternative reproductive process, and one worthy of acceptance. To some infertile couples it is the only available procedure through which they may have a biologically-related child.<sup>246</sup> As a society, we should encourage this value of "family," not discourage it. As Gary N. Skoloff, attorney

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243. See *Doe v. Kelley*, 106 Mich. App. 169, 307 N.W.2d 438 (Mich. Ct. App. 1981), *cert. denied*, 459 U.S. 1183 (1983).

244. *In re Baby "M"*, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 109 N.J. 396, 537 A.2d 1227 (1988).

245. Katz, *supra* note 204, at 20. "[T]he uncomfortableness or high expectations that result from having been paid for are likely to remain unless the child can be convinced that he was not bought . . ." *Id.* (footnote omitted).

246. Keane, *supra* note 1, at 155. "Surrogate motherhood is different. A married couple desiring a child which the wife is incapable of bearing herself enters into the arrangement, not to 'buy' a biologically-unrelated baby, but to bring a child into existence by conscious prearrangement which is, as far as biologically possible, their 'own.'"

for the Sterns, said,

It must be recognized that surrogacy arrangements create life and families in circumstances where they are not otherwise possible. This creation of new life is in accordance with society's respect for life and its respect and reverence for the family unit. The arrangement between the surrogate mother and the natural father emphasizes the worth of children in our society and brings the unique experience of parenthood to those who otherwise would be deprived of it.<sup>247</sup>

The better argument, as opposed to prohibition, is to regulate surrogacy. Place some limitations on the process and erect some hoops that agencies and lawyers alike will have to jump through before these agreements are recognized and upheld. The focus of this Note now shifts to how we are to accomplish this regulatory scheme. As already mentioned, Britain provides us with one model: the Surrogacy Arrangements Act. However, this may be a prime example of what *not* to do.

#### A. The Surrogacy Arrangements Act: A Poor Model

Although it does away with the primary evil of surrogacy, commercialism and commercial agencies,<sup>248</sup> the Act does not prevent private arrangements from being made.<sup>249</sup> Men and women, considering entering into a surrogate contract, may still do so without the aid of counsel or medical professionals. This is not in either party's best interest. The potential surrogate, especially if she has not had children, cannot be fully informed, and thus will be incapable of giving informed consent to the procedure. The hopeful father, without the aid of legal counsel, will not be able to protect his legal interests should the surrogate choose to later breach the contract.<sup>250</sup> The unborn child, should either of the aforementioned parties be a carrier of a sexually transmitted disease, could also be adversely affected. In addition, voluntary arrangements are not always the best answer. For those who wish to keep contact between the surrogate and the adopting family to a

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247. Skoloff & O'Donnell, *Is Surrogate Parenting the 'Cure' for Society's Infertility 'Epidemic'?*, 10 NEW L.J. 18, 18 (1987). However, one could say this view merely encourages vanity. In light of the fact that most of society wants biologically-related children, however, this argument does not hold much weight.

248. Surrogacy Arrangements Act, 1985, ch. 49, § 2.

249. *Id.* § 2(2)(a)-(b). See also Brahams, *supra* note 62, at 17.

250. See generally Sloman, *supra* note 15, at 979-80; *supra* section II (C) of this Note.

minimum, agency arrangements would be preferred.<sup>251</sup> In an agency setting, the contracting party could select a surrogate mother without meeting her face to face. Their anonymity would be preserved, for whatever reason, and the surrogate mother would also be able to distance herself from the couple. Because no emotional ties between the parties have been encouraged, a business-like quality is maintained throughout the procedure. When it comes time to surrender the infant, the surrogate mother, theoretically, will do so in a business-like fashion.<sup>252</sup> This argument does not propose that voluntary arrangements are always a bad alternative, in many instances they are not. Some couples may enjoy having contact with their surrogate, and vice versa.<sup>253</sup> Others enjoy keeping the surrogate relationships in the family.<sup>254</sup> However, a problem with Britain's Act is that it gives a couple few alternatives in choosing the arrangement. In an arrangement as personal as surrogacy, there must be a choice.

In light of the vague terms embodied in the Act, the fact that it also allows for noncommercial arrangements is of little consequence. As Ms. Susan Sloman notes, "[a]lthough some counseling facilities are provided by the NHS [National Health Service], local authorities and voluntary organisations, there is a danger that the uncertainty surrounding [section 2] may lead to 'ama-

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251. See also Brahams, *supra* note 62; but see Callahan, *Surrogate Motherhood: A Bad Idea*, N.Y. Times, Jan. 20, 1987, at A25, cols. 2-5.

252. But see Callahan, *supra* note 251, at A25, col. 2. Mr. Callahan would respond to this argument:

No less importantly, by the patent need to screen out women with the sensibilities of Mary Beth Whitehead we introduce as destructive a notion as can be imagined: a cadre of women whose prime virtue is what we now take to be a deep vice—that bearing of a child one does not want and is prepared not to love. . . . Even if, as suggested, the commercialization of surrogacy were banned, that would only partly address this problem. There would still be the need to find women with the capacity thoroughly to dissociate and distance themselves from their own child. This is not a psychological trait we should want to foster, even in the name of altruism.

*Id.*

253. Peterson, *Baby M Case Stirs Feelings of Surrogate Mothers*, N.Y. Times, March 2, 1987, at B1, col. 3. "Peggy Pressler of Canton, Ohio arranged in advance that she would be able to have occasional visits with Adam, the baby she bore for a California couple in July 1985. . . . The relationship Mrs. Pressler developed with the couple . . . appears to be unusual because it is [a] continuing [one]." *Id.*

254. The first case that comes to mind is the well-publicized case in South Africa, where a mother gave birth to triplets for her infertile daughter. Cover story, PEOPLE, Oct. 19, 1987, at 38.

teurish or exploitive do-it-yourself arrangements.'"<sup>255</sup> Consequently, general facilities are not the answer, as the minority of the Warnock Committee noted.<sup>256</sup> Licensed agencies specializing in surrogacy and meeting certain minimum requirements are the answer. The Act does not require noncommercial agencies to be licensed.

Perhaps the one virtue of the Surrogacy Arrangements Act is that it does not prohibit surrogacy outright. Yet, the manner in which surrogacy is permitted to continue is unsatisfactory. Banning commercial transactions alone is simply not enough; if anything it worsens the situation by leaving the procedure in the hands of amateurs. A lesson the United States can learn from the British is that drafting this kind of legislation cannot be done hastily. Every step of the surrogacy process must be carefully considered and every party to the transaction regarded.<sup>257</sup> If the United States is going to permit surrogacy arrangements to continue, as Britain has, it must regulate them and prohibit the public or unlicensed agencies from preparing these agreements by themselves. In other words, the state should set up the guidelines under which the parties considering surrogacy are to operate. In choosing not to incorporate various recommendations made by the Warnock Committee, Parliament deprived this Act of the substance it badly needs.<sup>258</sup>

## B. The Substance

### 1. What Britain Can Offer

The Warnock Committee made several recommendations and comments worthy of notice and implementation in future surrogate parenting legislation. To begin with, we should reconsider section 8.17, which states as follows:

In the first place we are all agreed that surrogacy for conve-

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255. Sloman, *supra* note 15, at 980 (footnote omitted).

256. *Id.*

257. A prime example of a piece of legislation covering every aspect of the surrogacy process is the New York State Dunne Bill, which is discussed in section V(B)(2) of this Note.

258. The substance this Act needs is mentioned in section V(B)(1). The sections of the Warnock Report, from the majority opinion, that would give this Act substance are sections 8.18 and 8.19 which are stated in full in section II(B) of this Note. They are the recommendations to outlaw surrogacy completely, thus leaving no gaps through which to negotiate and rendering all such contracts illegal.

nience alone, that is, where a woman is physically capable of bearing a child but does not wish to undergo pregnancy, is totally [and] ethically unacceptable. . . . That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection.<sup>259</sup>

Surrogacy for convenience's sake, and convenience's sake alone, is a reprehensible idea. To advocates and adversaries of surrogacy alike, it is a most undesirable arrangement. Not only does it undermine the primary function of surrogate parenting, enabling those who *cannot* have children to have them, it also encourages the commercial aspect of the process. That the Surrogacy Arrangements Act does not prohibit this kind of an arrangement once again demonstrates its weaknesses.<sup>260</sup> It should be made clear, in any future legislation, that only couples who have been diagnosed as infertile should be permitted to utilize this process, and only as a last resort.<sup>261</sup> This qualification would ensure that surrogacy's primary purpose is not undermined, and the process is not abused.

The arguments set forth by the Warnock minority are also worthy of attention, particularly the minority's opinion that surrogate parenting is here to stay.<sup>262</sup> Although there will always be those who are opposed or ready to abuse the process,<sup>263</sup> we should make every effort to make the procedure safe for those who need it. In the minority's opinion, non-profit organizations could provide the answer.<sup>264</sup> With the advent of licensing requirements<sup>265</sup> and regulations,<sup>266</sup> surrogate parenting could become a safe procedure, free of the dangers of do-it-yourself arrangements:

Our colleagues, by their recommendation in paragraph 8.18

259. THE REPORT, *supra* note 17, at 46.

260. This conclusion refers to the potential for baby-selling, means/ends argument. We should never allow fertile women to use others to have their babies. This is exploitation of women at its worst.

261. The Dunne bill makes it mandatory for a couple to be infertile before utilizing the surrogacy process. This bill is discussed in section V(B)(2).

262. THE REPORT, *supra* note 17, at 88. This is part of the dissent.

263. *Id.*

264. *Id.* at 88, comment five.

265. *Id.* This part of comment 5 states, "[w]e believe that the licensing authority . . . should include surrogacy within its remit. The authority would have the power to license an agency or agencies to make arrangements for surrogacy." *Id.*

266. *Id.* The part referred to in the text says, "[t]hese arrangements would include the matching of commissioning parents with surrogate mothers, and the provision of adequate counselling to ensure that legal and personal complications of surrogacy were fully understood." *Id.*

would prevent gynaecologists from offering any form of assistance to such couples to achieve a surrogate pregnancy. As a consequence couples may give up any hope of a child, may take further risks such as . . . more miscarriages, or may decide to venture into some sort of 'do-it-yourself' arrangement. The latter possibility—that couples are driven into making their own arrangements—is particularly unsatisfactory. These arrangements would be unsupported by [the] medical and counselling services . . . that the Inquiry has recommended . . . .<sup>267</sup>

Licensing would require organizations to provide medical, counselling, and child care services.<sup>268</sup> If the notion of "profit" is totally abhorrent to some states, but the procedure of surrogacy is not, profit can be eliminated without sacrificing these necessities.

In addition, the minority's consideration of the surrogate's expectation of pay is to be commended.<sup>269</sup> Not only does the minority concede that this form of profit cannot be eliminated, it also stresses that present adoption statutes, with their prohibition of payment, should not stand in the way of the commissioning couple's adoption of the child.<sup>270</sup> The minority opinion states: "[I]f steps are taken to regularise surrogacy through licensing, some form of adoption procedure must be open to couples."<sup>271</sup> The wholesale application of adoption laws to surrogacy is misplaced, because the "adopting" father is the "natural" father of the child. Some aspects of adoption law, however, may be adaptable, e.g., the emphasis on the "best interests of the child." However, careful consideration is necessary in this adaptation.

The Warnock Committee Report has much to offer, and Parliament may benefit from its wisdom upon consideration of the pending amendment to the Surrogacy Arrangements Act. American legislators, however, should not wait for the British Amendment but should incorporate some, if not all, of the aforementioned recommendations into any pending state bills to ensure well-considered and comprehensive statutes are enacted.

267. *Id.* at 88, comment 4. Section 8.18 would outlaw surrogacy outright. *Id.* at 46-47.

268. *Id.* at 88, comment 5. The comment states in part that "[t]he only agencies which could be licensed would be those in which child-caring skills were well represented . . . ." *Id.*

269. *Id.* at 89, comment 7.

270. *Id.* The relevant portion of this comment states, "[i]n our opinion payments to a surrogate mother should not be a barrier to the child being adopted by the commissioning couple." *Id.*

271. *Id.*

## 2. New York's Contribution: The Model Bill

What some critics refer to as the "model bill"<sup>272</sup> is known to New York legislators simply as bill 1429-A, or the "Dunne bill."<sup>273</sup> If enacted, it would legalize surrogacy contracts, abolish the need for adoption proceedings, and allow surrogate mothers to receive payment for their services. It is a comprehensive piece of legislation and worthy of passage in New York. It is also a valuable resource for those states still undecided on the matter of surrogate parenting. It not only provides solutions to problems already presented, but it also provides solutions to those which have yet to occur.

The bill begins simply by stating:

The legislature finds that due to the increased incidence of female infertility, many couples are turning to surrogate mothers to help them create families.

[A]n individual's decision regarding whether or not to bear or beget a child should fall within the protected rights of privacy, and, therefore, the state may not prohibit the practice of surrogate parenting or enact regulations [which would prohibit it].

The legislature further determines that the legal status of children born under surrogate parenting arrangements is currently uncertain. . . . [T]he legislature must act to fill the legal void surrounding the practice of surrogate parenting.<sup>274</sup>

Declaring surrogate parenting "constitutional," by virtue of the "protected rights of privacy," is not enough.<sup>275</sup> As this bill's

272. Zeldis, *supra* note 161, at 1, col. 3. This comment about bill 1429-A "being eyed as a model bill across the country" was made by H. Joseph Gitlin, chairman of the Adoption Committee of the American Bar Association's section of Family Law. *Id.* at 1, col. 4.

273. S. 1429-A, 1987-1988 Regular Session, New York (Feb. 3, 1987) [hereinafter The Dunne Bill] (the Republican bill drafted by New York senators Mary Goodhue and John Dunne). *See also supra* section III (E).

274. The Dunne Bill, *supra* note 273, at § 1.

275. *Id.* Although the bill does not indicate where the constitutional right to procreate originates, an interview conducted by the American Bar Association did result in an answer. *Life, Liberty and Children*, A.B.A. J., June 1, 1987, at 39. This is an interview with John Robertson, a professor of law at the University of Texas, Austin. When asked by the *Journal* why surrogate agreements should be enforced Professor Robertson answered, "[b]ecause there is a constitutional right of infertile couples to reproduce by noncoital means that extends to the use of surrogates. This means that the state cannot criminally ban either the use of surrogate arrangements or the payment of money to surrogates." *Id.* at 39. When asked where this constitutional right originates, Professor Robertson replied,

The basis is the right of married couples to reproduce. *Roe v. Wade* and the

introduction illustrates, surrogate parenting presents many issues; constitutionality is only one. In order for surrogacy *to be accepted*, as this bill indicates, state legislatures must ensure the following: (1) the child born has a permanent home and settled rights; (2) the rights and responsibilities of the intended parents, as well as the surrogate and her husband are clearly delineated; (3) the risk to all parties is kept to a bare minimum; (4) the use of this procedure is limited to those who really need it; (5) the risk of exploitation and coercion is minimized; and (6) informed consent must be obtained in all these circumstances.<sup>276</sup> The key to successful legislation is to provide solutions to problems. Now, what are the solutions?

To begin with, the Dunne bill defines an "infertile woman" as one who has not conceived after twelve months of infertility treatment;<sup>277</sup> one who has been diagnosed as incapable of conceiving a child without risk to her life/health, or that of her child's; or one who is sterile.<sup>278</sup> A woman who does not fit the above description, cannot utilize the surrogacy process. In this way, New York prohibits the use of surrogacy as a means of convenience. As already indicated, this is a crucial public policy matter.<sup>279</sup> In defining the surrogate mother as a "woman of twenty-one years or older,"<sup>280</sup> the bill also eliminates the possibility of the exploitation of minors.

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contraceptive cases have clearly established the right of a person *not* to reproduce. Many cases contain dicta suggesting the right to reproduce would also be recognized. Obviously, this right extends to infertile couples, because the basic values—the importance and meaning of children—are the same. The fact that a couple is infertile doesn't change the nature of their interest. It's just more difficult for them to achieve it.

*Id.*

276. The Dunne Bill, *supra* note 273, at § 1.

277. Infertility treatments generally consist of an examination of a man's and a woman's reproductive organs. For the male this means conducting a sperm analysis; for the woman it means a thorough examination of the cervix, uterus, and fallopian tubes, in order to determine if these organs are functioning properly. In surrogate parenting, it is only the woman's infertility with which we are faced. If the woman's organs are not functioning properly, because there is a congenital abnormality or the fallopian tubes are damaged, and the situation is incapable of being solved medically or physically, by in vitro fertilization, the woman is declared infertile. For an explanation of the in vitro fertilization process, see OLSON & ALEXANDER, *IN VITRO FERTILIZATION AND EMBRYO TRANSFER* 21-34 (1986).

278. The Dunne Bill, *supra* note 273, at § 119(1).

279. Foster, *Surrogate Parenting: The New York Proposal*, N.Y.L.J. Feb. 17, 1987, at 2, col. 1. This article states that "[a] wife who merely wants to avoid the 'inconvenience' [sic] of pregnancy and childbirth would not be eligible for the procedure. Otherwise, it is assumed, the surrogate-parenting procedure would result in the commercialization and exploitation of human reproduction." *Id.*

280. The Dunne Bill, *supra* note 273, at § 119(3).

Surrogate parenting is a complex procedure and requires mature decision-making on the part of all parties. Minors, as generally recognized, are incapable of rendering this kind of a decision and thus should be prohibited from entering into this type of agreement. As for those who do not believe that any woman is capable of giving informed consent to this procedure, the Dunne bill attempts to alleviate those doubts.

Section 121 states that, "[a]ny agreement to accomplish the purposes of a surrogate parenting agreement as defined in section one hundred nineteen of this article, which does not receive judicial approval . . . shall be deemed null and void and shall not have any force or effect in this state."<sup>281</sup>

The bill attempts to resolve all issues *before* pregnancy and delivery of the baby occurs, by requiring a judicial seal of approval on all agreements.<sup>282</sup> If the judge is not satisfied and finds that one step of the process has not been met, the couple and surrogate either must begin again or head to another state. To some, the requirement of prior judicial approval may be so intimidating that it discourages them from attempting to participate in the surrogacy process. But those who are interested and continue reading, soon find comfort. Instead of making the process incredibly difficult, the Dunne bill makes it simple by describing in minute detail what each party must do to satisfy the judge.

Step one entails the creation of a surrogacy contract which includes all items listed in section 122 of the bill.<sup>283</sup> Among those items are the surrogate's agreement to be artificially inseminated, to carry the child, and to relinquish the infant immediately after birth.<sup>284</sup> The parents stipulate that they will accept the child regardless of its health or physical condition.<sup>285</sup> In addition, while

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281. *Id.* § 121.

282. *See Foster, supra* note 279, at 2, col. 3. The exact language used in this article reads as follows: "The procedure proposed for New York would have the advantage of resolving such issues *before* pregnancy and delivery of the baby." *Id.*

283. The Dunne Bill, *supra* note 273, at § 122.

284. *See Zeldis, supra* note 161, at 4, col. 5. In this article, John McArdle, Senator Dunne's spokesperson, stated that "[c]entral to the contract provision is that there be a clear understanding that at birth the surrogate mother relinquishes all legal rights to the child, but prior to the birth she has full control of the pregnancy . . . ." *Id.* In other words, a central provision of the contract is that which commits the surrogate mother to surrender her child at the end of the pregnancy. It is not intended that the surrogate is to believe that she can waive this clause at a later date.

285. The Dunne Bill, *supra* note 273, at § 122(1)(c). This is not to say that the intended parents may not later give the child up for adoption. To remedy this problem, however, would require much regulation and change, in light of the fact that any parent

the surrogate is given absolute control over medical decisions,<sup>286</sup> the intended parents agree to bear all reasonable medical costs incurred by the surrogate mother<sup>287</sup> and to provide term life and health insurance for the surrogate.<sup>288</sup> The amount of compensation for the surrogate is to be set forth in the contract and deposited in an escrow account for further dispensation.<sup>289</sup> Both the natural father and the surrogate mother must agree to undergo medical examinations for sexually transmitted diseases and genetically detectable diseases for protection of the unborn child.<sup>290</sup> The results of these medical tests must be made available to all parties.<sup>291</sup> Any contractual provision which conditions compensation on the health, viability, or survival of the child is to be stricken from the text and rendered void.<sup>292</sup> Further, it must be stipulated that any cause of action arising from such an agreement is to be limited to an action for breach of contract, surrender of the child, or both.<sup>293</sup> Finally, the surrogate mother is to be provided legal counsel of her own choosing to be used during the negotiation pro-

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could give his handicapped child up for adoption. The inability to accept handicapped children is a societal problem and far beyond the scope of this Note. *See also*, Robertson, *Surrogate Mothers: Not So Novel After All*, HASTINGS CENTER REP., Oct. 1983, at 28, 32.

286. The Dunne Bill, *supra* note 273, at § 122(1)(d). Nothing in this section of the bill prohibits the surrogate mother from smoking or drinking. *See infra* section V(B)(3) of this Note, where this recommendation is made.

287. The Dunne Bill, *supra* note 273, at § 122(1)(e). It should be noted that, as of yet, surrogacy remains a procedure that can be utilized only by those who are wealthy enough to afford it. Chief Justice Wilentz stated in his opinion, in *In re Baby "M"*, that "we doubt that infertile couples in the low-income bracket will find upper income surrogates." *In re Baby "M"*, 109 N.J. 396, 440, 537 A.2d 1227, 1249 (1988). In response to Justice Wilentz's criticism, however, John Robertson might respond that "it is not unjust to poor couples, for it does not leave them worse off than they were." Robertson, *supra* note 285, at 29. Although Professor Robertson's statement seems a bit harsh, it is realistic. In a society that values money as highly as ours, there really is not much we can do to remedy this problem. For the time being, surrogacy will remain a process for those who can afford it.

288. The Dunne Bill, *supra* note 273, at § 122(1)(f).

289. *Id.* § 122(1)(g).

290. *Id.* § 122(1)(h)-(i).

291. *Id.* § 122(1)(k).

292. *Id.* § 122(1)(j).

293. *Id.* § 122(1)(l). It should be noted that this means that the surrogate mother surrenders all rights to the child before birth; thus doing away with the need for adoption after the child is born. The Dunne bill proposes a new way of handling surrogacy, separate and apart from the adoption code. As Henry Foster, Jr. and Doris Jonas Freed noted, "[i]t is concluded that since no adoption is involved in the recommended procedure, and that since informed consent is required before insemination and conception, existing adoption statutes have no application." Foster, *supra* note 279, at 2, col. 2.

cess.<sup>294</sup> This provision of the contract also prohibits the parties from retaining the same counsel and is designed as a protective measure for the surrogate mother.<sup>295</sup> The costs of such counsel are to be paid by the intended parents.<sup>296</sup>

The next step in the process involves the filing of the petition. Section 123 of the Dunne bill requires a verified petition for judicial approval of the surrogacy contract to be filed by the intended parents in the appropriate court.<sup>297</sup> In addition, it requires the intended parents to file a separate statement stipulating that upon the birth of the child, regardless of that child's condition, they shall assume full parental rights and responsibilities.<sup>298</sup> In requiring the natural father and his spouse to restate this commitment, the bill emphasizes the seriousness of this agreement. A human life, not a commodity, is to be created by this contract, and someone has to be responsible for that life. If the contracting party truly wishes to have a child, it will accept that infant in any condition. If the intended parents are unwilling to accept an imperfect child and feel uncomfortable providing the aforementioned statement, their desire to be a parent will not be viewed as genuine and the court will not permit them to be surrogate parents. Surrogate parenting is designed to help infertile couples have children; it is not designed to help couples create a "perfect" child. The Dunne bill recognizes the proper goal of surrogate parenting and should be recommended.

In addition to the statement, a number of other items must be attached to the petition. These include: a copy of the surrogate contract, an affidavit from the intended mother's physician verifying her infertile condition,<sup>299</sup> an affidavit from the surrogate's physician verifying her health and ability to perform as surrogate, an affidavit from the natural father's doctor confirming his health, and an affidavit from any other person or entity expected to be compensated in this transaction.<sup>300</sup> The purpose of this elaborate process is to provide the presiding judge with enough information to determine whether these parties are both mentally and physically capable of entering into such an agreement. It is good policy

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294. The Dunne Bill, *supra* note 273, at § 122(3).

295. *Id.*

296. *Id.*

297. *Id.* §§ 120 & 123.

298. *Id.* § 123(1).

299. *Id.* § 123(2)(b).

300. *Id.* § 123 (2)(c)-(e).

and once again alerts the parties to the intricacies and dangers of surrogacy.

Step three involves the hearing. Within thirty days of filing the petition, the court sets a date for the personal examination of the parties.<sup>301</sup> To accommodate a party who wishes to remain anonymous the court allows for separate hearings.<sup>302</sup> This accommodation permits the couple to maintain their distance from the surrogate mother. A drawback to this option is that it allows the procedure to become somewhat mechanical,<sup>303</sup> and to some this is unacceptable.<sup>304</sup> As stated before, however, we are a society that values choices. We should allow these choices to exist. This argument is by far the stronger one.

Once the type of hearing has been determined, whether joint or separate, the parties, under oath and represented by counsel, appear before the judge.<sup>305</sup> In essence, the court attempts to determine the best interests of the parties<sup>306</sup> before conception. The purpose is to solve the problems before they occur and eliminate the possibility of another *Baby "M"*.<sup>307</sup> The court proceeds by determining whether the parties (including the intended mother) are "fully informed as to all aspects of the agreement"<sup>308</sup> and have entered into it knowingly. For the surrogate mother, this requirement means being fully aware that she has no right to the child after its birth. For the intended parents, the requirement means an awareness, upon the birth of the child, that they have "full parental responsibilities, including the duty of support of [the] child."<sup>309</sup> In addition, the judge approves the compensation to be paid to the surrogate mother.<sup>310</sup> This spares the parties the risk of

301. *Id.* § 124.

302. *Id.*

303. While requiring the submission of doctors' statements (in the form of affidavits) makes the procedure somewhat mechanical, the requirement that the parties appear in person before the judge maintains a personal quality to each agreement.

304. Callahan, *supra* note 251, at A25, cols. 2-5.

305. The Dunne Bill, *supra* note 273, at § 124(1).

306. The parties to the transaction are defined in § 119(6) as, "the surrogate mother, her husband, if any, and the intended parents." The Dunne Bill, *supra* note 273, at § 119(6).

307. Foster, *supra* note 279, at 2, col. 1. In this article, authors Henry Foster, Jr. and Doris Jonas Freed state that, "[t]he recommendations [enclosed in bill 1429-A] would cover the *Baby M* situation in New Jersey where the surrogate reneges . . ." *Id.* (footnotes omitted).

308. The Dunne Bill, *supra* note 273, at § 124(1)(b).

309. *Id.* §§ 124(1)(c).

310. *Id.* § 124(1)(e). The elements the judge considers, when determining just com-

exploitation. The commissioning couple cannot underpay the surrogate, and the surrogate cannot overcharge for her services. Critics and advocates alike should be pleased.

Following the personal interviews the court begins its examination of the affidavits. First, to determine if the intended mother is truly infertile, and second, to determine whether the surrogate mother's suggested compensation is reasonable.<sup>311</sup> If the court is not satisfied that the woman is infertile it will request that she see another physician.<sup>312</sup> Again, the court does not take away opportunities, it provides them. The infertile woman can get a second opinion, and if that opinion is in her favor, she can continue the process. An argument against this process, however, is that she could find a physician who would lie about her condition. The likelihood of this happening, however, is slim, because the physician's diagnosis must appear in a sworn statement, and not many doctors are willing to risk perjury charges.<sup>313</sup>

Once this process has been completed, the statute requires each party to receive counselling.<sup>314</sup> This requirement further assures the court that all of the parties are prepared to commit themselves to the agreement. The commissioning couple and the surrogate mother must be psychologically prepared for these serious decisions. Overestimating our capabilities is part of the problem, and any bill worth passing will recognize this fact.

The final phase of the process is reached after the parties meet with their respective mental health care professionals. Once again, the parties appear before the court with their counsel. If the judge is pleased with the psychiatric reports, and determines that all the parties are capable of meeting the "emotional and psychological consequences of surrogate parenting,"<sup>315</sup> he will approve the agreement.<sup>316</sup> Approval means that "the child shall be

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pensation, are as follows:

(1) calculation of anticipated lost wages; (2) actual or anticipated expenses incurred; (3) value of time expended; (4) the value of health risks incurred or likely to be incurred incident to or on account of the surrogate parenting agreement; and (5) such other factors the court deems necessary to consider in the interests of justice.

*Id.*

311. *Id.* §§ 124(2)(a),(b).

312. *Id.* § 124(2)(a).

313. Perhaps another solution to this dilemma is to have a court appointed doctor.

314. The Dunne Bill, *supra* note 273, at § 124(3)(b).

315. *Id.* § 125.

316. *Id.* Section 125 further requires that once court approval has been given, the

deemed at birth the legitimate, natural child of the intended parents for all purposes."<sup>317</sup> No adoption laws are necessary. This bill recognizes that surrogacy is a unique process and worthy of its own regulations and procedures. This realization is important, because part of the problem with applying old laws to new techniques is that they never truly fit. They were enacted before the surrogacy procedure was conceived. To expect them to solve the problems that surrogacy can present is to overestimate their effectiveness and endanger the public. If we truly want to make surrogacy a safe and effective process, we must tailor a law to suit its needs.

As a response to critics who are opposed to commercial agencies and as a way of removing the commercial stigma from this procedure, the Dunne bill prohibits commercial surrogacy.<sup>318</sup> Third parties who wish to participate in this procedure must do so on a non-profit basis. As stated before, if surrogate parenting is to be viewed favorably, the commercial aspect must be reduced to a bare minimum. The surrogate mother, attorneys and counselors (who are retained after the process begins) should be the only parties receiving compensation for their services.

Finally, the bill recognizes that surrogate mothers are not machines and that they might change their minds when it comes time to surrender the baby. In response to this dilemma, the court allows the surrogate forty-five days after the birth of the child to apply for a review of the surrogacy agreement. Should the court find a compelling change of circumstances rendering enforcement of the contract unsafe or not in the child's best interests, the judge will annul or modify the agreement.<sup>319</sup> This right to review allows the surrogate to change her mind. The requirement of a compelling change of circumstances also ensures the commissioning couple of their right to be the child's parents.<sup>320</sup> Both parties are treated fairly throughout the process.

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"parties [must] execute consent[] to the agreement." *Id.*

317. *Id.* § 126.

318. *Id.* § 129.

319. *Id.* § 127.

320. The compelling circumstances requirement presents a problem because the drafters do not define these circumstances, resulting in ambiguity and uncertainty. Perhaps a compelling circumstance would be the death of the natural father and his wife, or the discovery that the natural father and his wife are known felons. Until the drafters indicate what a "compelling circumstance" is, however, we can never be sure. This problem should be resolved before the Dunne bill passes.

The Dunne bill is a model bill. It confronts many of the issues of surrogacy and deals with them fully. More importantly, it provides both judges and lawyers with a formula that is easy to apply. A bill similar to the Dunne bill is what the United States needs. As long as there is uncertainty in the area of surrogate parenting, there remains the possibility of another *Baby "M"*.

### 3. Filling in the Gaps

In addition to the aforementioned suggestions, legislators might consider limiting eligibility for surrogate motherhood to women who are married and have had children.<sup>321</sup> In spite of the conflict in *Baby "M"*, there is a theory<sup>322</sup> that women who have already had children will be better able to give informed consent to this procedure. They will have experienced the pain of childbirth and will have felt the strength of the "mother/infant" bond.<sup>323</sup> Having experienced these things, they will know their limitations and be better able to decide, when the time comes to sign the contract, whether they will be able to surrender the child.<sup>324</sup> Again, the key to certainty is informed consent. If the surrogate mother knows what she is getting into, she is less likely to back out of the agreement. If surrogacy is to survive, we need this certainty.

Considering that one of the main reasons infertile couples enter into surrogacy agreements is to have a genetically-related child, state legislators should also consider making paternity tests a part of the surrogacy process. Assemblyman Halpin of New York made this proposal in his bill on surrogate parenting.<sup>325</sup> Incorporating this safeguard assures the contracting parents that they are receiving the biologically related child they desire.

To protect the newborn child, state legislators should follow

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321. Katz, *supra* note 204, at 2 n.4.

322. *See id.*

323. *See id.*

324. *Id.*

325. H. 2403, 1987-1988 Regular Sessions, New York § 65-g (1987). The section of the Halpin bill referred to is section 65-g. It reads as follows:

Required testing after birth. Not later than twenty-four hours after the birth of a child born to a surrogate, the natural father, the surrogate, the surrogate's husband if the surrogate is married, and the child shall submit to procedures necessary for the performance of blood or tissue typing tests which are intended to establish the paternity of the child. The results of the tests performed shall be made available immediately to the surrogate and the natural father.

*Id.*

Assemblyman Halpin's lead, and stipulate that the child's birth certificate shall bear no indications that the child was born through surrogacy.<sup>326</sup> This policy protects children from bearing the stigma of surrogacy, thus enabling them to lead active and normal lives without putting the world on notice of their unconventional origins. It also preserves the commissioning couple's right to tell their child, in their own way, how he was born. This matter is very private and should be kept out of the public domain. Assemblyman Halpin's recognition of this aspect is commendable and noteworthy.

Legislatures should require surrogacy contracts to contain a clause prohibiting the use of alcohol, drugs, and the smoking of cigarettes during the pregnancy.<sup>327</sup> Such a clause preserves the child's prenatal health and development<sup>328</sup> and protects the best interests of all parties. The surrogate mother will be healthier, the commissioning couple's chances of having a healthy child will be increased, and the baby will come into the world free of asthma, drug addiction, or alcohol dependency.

Finally, state law should require investigations of both the surrogate mother's and the commissioning couple's homes.<sup>329</sup> As mentioned before, there is no way of discovering, without an investigation, whether or not the natural father and his wife will be suitable parents.<sup>330</sup> They could live in a run-down shack without heat or running water. They could be drug dealers, child abusers, or murderers. Or they could be two people on the verge of divorce, hoping to salvage their marriage by means of a child. The surrogate mother, similarly, could be a less than ideal candidate for the job of birth mother. She could share a house with a wife beater or child abuser, or live in a home without heat or electricity. By sending qualified personnel from the state social service depart-

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326. *Id.* § 4135(b)(2). The entire section reads as follows: "There shall be no specific statement on the birth certificate as to the fact that the child was born to a surrogate mother and such birth certificate shall record the name of the natural father and his spouse, if he is married." *Id.*

327. Note, *supra* note 128, at 1306.

328. *Id.* at 1307.

329. As Justice Wilentz noted on page forty-six of his opinion: "There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, [or] their superiority to Mrs. Whitehead . . ." *In re Baby "M"*, 109 N.J. 396, 437, 537 A.2d 1227, 1248 (1988). This is a bad idea and clearly the legislature should provide some guarantee that the child's best interests will be considered.

330. See *supra* text accompanying note 152.

ment, the courts would be informed of such circumstances. Home studies could be conducted on both the surrogate and the commissioning couple's homes, and the results compiled in a report to be filed in the county clerk's office. These studies ensure that the judge, prior to the hearing suggested by the Dunne bill, will have access to *all* information necessary for determining the best interests of the parties; including the child.

### CONCLUSION

Surrogate parenting is a legitimate alternative reproductive process that can provide the answer to many infertile couples' prayers—a biologically-related child. As a procedure, however, it presents many problems. The most notorious of these problems is the refusal of a surrogate mother to surrender the child. Although the likelihood of this occurring is rare,<sup>331</sup> when it happens all parties are subjected to pain, misery, and heartache. The commissioning couple fear the loss of their child, and the surrogate mother fears having to surrender that child. Courts differ in their approaches for avoiding this unhappy circumstance. Some say "adoption" laws should apply, while others say they should not. It is apparent the legislature must act. Specifically, state legislative action is required since family law issues belong in the hands of the state.<sup>332</sup> Effective, well-drafted state statutes can provide a solution to the *Baby "M"* dilemma.<sup>333</sup> They can make clear from the beginning of the surrogate relationship that the child born of surrogacy is the legitimate and natural child of the commissioning couple at the moment of birth. They can establish standards which are easy to apply and comprehensive in application. A combination of the measures suggested by the Warnock Committee, New York Senators Mary Goodhue and John Dunne, and New York Assemblyman Patrick Halpin would provide state legislatures with just such a statute — a statute containing all of the

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331. *Surrogacy Can Work, But Laws Are Needed*, USA Today, Sept. 3, 1987, at 8A, col. 1. "There have been an estimated 600 children born under [surrogacy] arrangements—a woman hired to bear a child for an infertile couple. Only a few cases haven't worked out." *Id.*

332. Note, *supra* note 128, at 1299. "Surrogate parenthood is an issue for state control because it involves the conception, paternity, custody, and rearing of children. Historically, these matters have been subject to state rather than federal regulation." *Id.* (footnotes omitted).

333. Uniform acts have also been proposed as a solution to the many problems surrogate parenting presents. For an excellent example, see Note, *supra* note 128, at 1299-1321.

elements necessary to make surrogate parenting a safe and effective process. It is now time to enact such a statute, before another *Baby "M"* arises.

MINDY ANN BAGGISH

