Surrogate Parenting:

Analysis and Recommendations for Public Policy

The New York State
Task Force on
Life and the Law

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New York State Task Force on Life and the Law
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Preface

In March 1985, Governor Cuomo convened the Task Force on Life and he Law. He asked the Task Force to develop recommendations for public policy on a range of issues arising from recent advances in medical technology: the determination of death, the withdrawal and withholding of life* sustaining treatment, the new reproductive technologies, the treatment of disabled newborns, organ transplantation and, in a more limited context, abortion.

The Executive Order creating the Task Force charged the Task Force to address issues posed by artificial insemination and in vitro fertilization. In the wake of the Baby M trial, the practice of surrogate parenting gained national prominence and immediacy. By the spring of 1987, the New York State Legislature faced four bills on surrogate parenting, each embracing different solutions and approaches. At the request of Governor Cuomo, the Task Force made the issue a priority on its own agenda.

The Task Force spent many months educating itself about surrogate parenting. Part I of the Report presents the results of that educational effort which provided the context for the Task Force's deliberations. The deliberations and recommendations of the Task Force are set forth in Part II of the Report.

The Report seeks to inform and focus the public debate about surrogacy. The Task Force hopes that the consensus forged among its diverse membership will serve as a catalyst for public resolution.

Despite the diversity of opinion and belief represented on the Task Force, its members reached a unanimous judgment that public policy should discourage surrogate parenting. The Report contains specific recommendations, including a legislative proposal on how that goal is best achieved.

Executive Summary

The Task Force's conclusions and recommendations regarding surrogate parenting are summarized below. The recommendations have the unanimous support of the Task Force membership. The Task Force has developed a legislative proposal that appears as an appendix to this Report.

Part I: The Medical, Legal and Social Context

- Surrogate parenting is not a technology, but a social arrangement that uses reproductive technology (usually artificial insemination) to enable one woman to produce a child for a man and, if he is married, for his wife. Surrogate parenting is characterized by the intention to separate the genetic and/or gestational aspects of child bearing from parental rights and responsibilities through an agreement to transfer the infant and all maternal rights at birth.
- The well-publicized Baby M case has given surrogate parenting a prominent place on the public agenda. Nonetheless, the reproductive technologies used in the arrangements — artificial insemination and, increasingly, in vitro fertilization — also pose profound questions about the ethical, social and biological bases of parenthood. In addition, the procedures to screen donors raise important public health concerns. The Task Force will address these issues in its ongoing deliberations and recognizes that they form part of the context within which surrogate parenting must be considered.
- Legal questions about surrogate parenting, although novel in many respects, arise within the framework of a well-developed body of New York family law. In particular, policies about surrogate parenting will necessarily focus upon two basic concerns in all matters involving the care and custody of children -- the protection of the fundamental right of a parent to rear his or her child and the promotion of the child's best interests.
- The Supreme Court of New Jersey has ruled that paying a surrogate violates state laws against baby selling. Surrogacy agreements may also be found invalid because they conflict with comprehensive statutory schemes that govern private adoption and the termination of parental rights.

In New York, it is uncertain whether surrogate parenting contracts are barred by the statute that prohibits payments for adoption. If not, it is probable that the surrogate could transfer the child to the intended parents by following private adoption procedures. If a dispute about parental rights arises before the surrogate consents to the child’s adoption, custody would probably be determined based on the child's best interests. Regardless of the outcome, the court ordinarily will have no basis for terminating the parental status of either the surrogate the intended father.

- The right to enter into and enforce surrogate parenting arrangements is not protected as part of the constitutional right to privacy. Surrogate parenting involves social and contractual — rather than individual - decisions and arrangements that may place the rights and interests of several individuals in direct conflict. The commercial aspects of surrogate parenting also distinguish the practice from other constitutionally protected private acts. Constitutional protection for the right to privacy is diminished when the conduct involved assumes a commercial character.
- The social and moral issues posed by surrogate parenting touch upon five central concerns: (i) individual access and social responsibility in the face of new reproductive possibilities; (ii) the interests of children; (iii) the impact of the practice on family life and relationships; (iv) attitudes about reproduction and women; and (v) application of the informed consent doctrine.
- Surrogate parenting has been the subject of extensive scrutiny by public and private groups, including governmental bodies in the United States and abroad, religious communities, professional organizations, women's rights organizations and groups that advocate on behalf of children and infertile couples. Of the governmental commissions that have studied the issue, many concluded that surrogate parenting is unacceptable. In this country, six states have enacted laws on surrogate parenting, four of which declare surrogate contracts void and unenforceable as against public policy.

Part II: Deliberations and Recommendations of the Task Force

- As evidenced by the large body of statutory law on custody and adoption, society has a basic interest in protecting the best interests of children and in shielding gestation and reproduction from the flow of commerce.
- When surrogate parenting involves the payment of fees and a contractual obligation to relinquish the child at birth, it places children at risk and is not in their best interests. The practice also has the potential to undermine the dignity of women, children and human reproduction.
- Surrogate parenting alters deep-rooted social and moral assumptions about the relationship between parents and their children. The practice involves unprecedented rules and standards for terminating parental obligations and rights, including the right to a relationship with one's own child. The assumption that "a deal is a deal," relied upon to justify this drastic change in public policy, fails to respect the significance of the relationships and rights at stake.

- Advances in genetic engineering and the cloning and freezing of gametes may soon offer an array of new social options and potential commercial opportunities. An arrangement that transforms human reproductive capacity into a commodity is therefore especially problematic at the present time.
- Public policy should discourage surrogate parenting. This goal should be achieved through legislation that declares the contracts void as against public policy. In addition, legislation should prohibit fees for surrogates and bar surrogate brokers from operating in New York State. These measures are designed to eliminate commercial surrogacy and the growth of a business community or industry devoted to making money from human reproduction and the birth of children.
- The legislation proposed by the Task Force would not prohibit surrogate parenting arrangements when they are not commercial and remain undisputed. Existing law permits each stage of the arrangement under these circumstances: a decision by a woman to be artificially inseminated or to have an embryo implanted; her voluntary decision after the child's birth to relinquish the child for adoption; and the child's adoption by the intended parents.
- Under existing law on adoption, the intended parents would be permitted to pay reasonable expenses associated with pregnancy and childbirth to a mother who relinquishes her child for adoption. All such expenses must be approved by a court as part of an adoption proceeding.
- In custody disputes arising from surrogate parenting arrangements, the birth mother and her husband, if any, should be awarded custody unless the court finds, based on clear and convincing evidence that the child's best interests would be served by an award of custody to the father and/or genetic mother. The court should award visitation and support obligations as it would under existing law in proceedings on these matters.
- To date, few programs have been conducted by the public or the private sector to prevent infertility. Programs to educate the public and health care professionals about the causes of infertility and the measures available for early detection and treatment could spare many couples from facing the problem. Both the government and the medical community should establish educational and other programs to prevent infertility. Resources should also be devoted to research about the causes and nature of infertility.
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Executive Summary

Introduction

At first blush, the custody battle between William Stem and Mary Beth Whitehead appeared to many as a simple, although highly dramatic, case a broken promise. Yet, as the trial unfolded, the Baby M case generated widespread unease. Propelled by a steady stream of media coverage and formation about the rights and duties that were part of the agreement be1een the Sterns and the Whiteheads, many questioned free market values as the appropriate framework to understand and respond to the practice of surrogate parenting.* Judge Sorkow's decision, eschewing family law principles in favor of contract law, intensified this uneasiness and spurred public scrutiny of the complex issues and concerns posed by surrogacy.

The national debate on surrogacy is still unfolding. While some state legislatures have acted, most face legislative proposals that embody highly divergent responses to the issue. The landmark decision by the New Jersey Supreme Court in the Baby M case provided important constitutional guidance. That decision as well as those handed down in other states will set the parameters of public policy. But judicial decisions will not address many of the social and ethical dilemmas the practice presents. Nor will they absolve society of the responsibility of confronting those issues in the process of devising public policy.

Although media attention has given surrogate parenting a prominent dace on the public agenda, the practice should not be assessed in isolation from the revolution in reproductive biology of which it is but one part. Surrogate parenting is not a reproductive technology, but a set of social and legal relationships made possible by artificial insemination and in vitro fertilization.

Both these technologies involve third parties in human reproduction and raise some of the same ethical and social questions as surrogate parenting. The practices call for consideration of the ethical, social and biological bases for the parent-child relationship. They pose hard choices about what limits, if any,

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1 The Task Force concluded that "surrogate motherhood" does not accurately describe the relationships among all the parties to the arrangements. For this reason, the term "surrogate parenting" or "surrogacy" is used throughout this Report. Likewise, the Task Force rejected the term "surrogate mother* because the woman who gives birth to a child is the child's mother, or in cases of gestational surrogacy, one of the child's two mothers. Some commentators have suggested that "surrogate mother" is a misnomer because the woman is actually a "surrogate wife" for the purposes of procreation. For lack of a better alternative, this Report will use the term "surrogate" instead of "surrogate mother" when "birth mother" would be an overly inclusive category or characterization.

should be placed on potential donors and recipients. Should sperm or egg donors be screened only for disease or genetic disorders, or can they be selected on eugenic grounds? Should recipients be limited to those who seek the technologies for medical reasons or mil convenience and social desires set the boundaries for the practices?

Like surrogate parenting, artificial insemination by donor and in vitro fertilization create the possibility of a new market in human reproduction: the sale and purchase of eggs, sperm and embryos. Pioneering techniques to freeze gametes and embryos may also radically alter the circumstances of human reproduction and present a new arena for commercial activity.

The intensive public debate about surrogate parenting has generated a sense of urgency in the search for solutions. The Task Force prepared this Report to contribute to the debate about surrogate parenting in a timely fashion. Ideally, however, surrogate parenting would be addressed within the context of the medical technologies that are an integral part of the practice. At the least, society must remain sensitive to the broader scope of the issues as it grapples with surrogate parenting and settles on a path for government action. The Task Force itself is cognizant of the host of other issues posed by new reproductive technologies, many of which will be addressed by the Task Force during its ongoing deliberations.

The Task Force began consideration of surrogate parenting by exploring the similarities and distinctions between surrogate parenting, artificial insemination and in vitro fertilization. It then educated itself about the medical, social and legal context within which surrogate parenting has emerged. Part 1 of the Report describes the information that was the focus of that educational process. Chapter One considers the scope, causes and prevention of infertility. Since surrogate parenting arrangements generally rely on artificial insemination or in vitro fertilization, Chapter Two briefly describes these procedures. Chapter Two also discusses surrogate parenting and presents the limited information available about the women who have served as surrogates.

The legal context for surrogate parenting is framed by existing statutes and court decisions in the area of family law and by constitutional principles. Chapter Three examines the law on family relationships in New York that is relevant to surrogate parenting: laws about baby selling and

parental status, rights and responsibilities. Chapter Four analyzes the constitutional protection for procreative liberty and bodily integrity as it relates surrogate parenting. The Chapter also explores constitutional doctrines regarding the waiver of fundamental rights as well as equal protection concerns that might be raised by different public policies.

Chapter Five examines the social and ethical dimensions of surrogate parenting. The Chapter draws upon the wealth of literature that has merged in the public debate about the issue. The Chapter presents both des of the debate, focusing on five critical themes or concerns: (i) the basis)r societal intervention in reproductive choices; (ii) the best interests of children; (iii) the impact of the practice on the family; (iv) reproductive freedom and attitudes about women and human reproduction; and (v) informed consent.

Chapter Six then presents an overview of the public discussion of surrogate parenting from the point of view of different organizations and communities that have publicly stated a position. The Chapter covers the positions expressed by government bodies in this and other countries, religious communities, women's rights advocates, professional medical organizations, and other groups.

The discussion and recommendations of the Task Force are presented in Part II of the Report. This part of the Report reflects the various stages n the Task Force's deliberations to formulate proposals for public policy. The Task Force identified four steps in that process: (i) an understanding the framework for public policy and societal intervention; (ii) an assessment of the moral and social concerns posed by the practice; (iii) determination of the goals of public policy, i.e., prohibition, discouragement, regulation or promotion of surrogacy; and (iv) the development of specific policies to achieve that goal.

As the Task Force formulated its recommendations, it recognized that society must simultaneously look forward and backward at the legal and social context for family relationships and human reproduction. Policies on surrogate parenting may not only change long-established standards and expectations, but will also serve as precedent on the frontier of new alternatives in reproduction. For example, policies for surrogate parenting may have important implications for existing laws on the termination of parental rights, custody determinations, the sale of children, and the alienability of basic rights in family life and other spheres. Public policy on emerging technologies to assist reproduction will also be shaped, in part, by the laws and practices adopted for surrogacy.

Finally, underlying the debate about surrogate parenting is a fundamental question of the relationship between individual liberty and social policy in the wake of new reproductive possibilities. As reproduction moves from the bedroom to the laboratory and the marketplace, society must define the sphere of protected freedoms and the right of individual access to these technological advances. Alternatives created by technological advances often generate social expectations and desires. Does the existence of the technology alone create a right of access? If not, how will society balance the felt needs of individuals against the values and interests affected by surrogate parenting and other new reproductive possibilities?

The debate about surrogacy has been fraught with controversy. While few members of society have been directly involved with the practice, surrogacy touches upon values and beliefs about the interests of children, marriage, the family, women and human reproduction. All members of society may therefore feel some stake in society's response to the practice.

Surrogacy challenges society to identify a framework for public discussion, education and resolution of the complex issues technology has posed in the field of human reproduction. Without that framework, society will remain paralyzed while our most basic relationships are refashioned solely by technological advances and the new social and commercial arrangements they make possible.

PART I

The Medical, Legal and Social Context

One

Infertility -- Rates, Causes and Prevention

Surrogate parenting is a response to the problem of infertility and the powerful desire of infertile couples to rear a child. Some couples look to surrogate parenting because it is the sole means for them to have a genetically related child. For others, the practice offers an alternative to a long wait to adopt a child at a time when the interest in adopting healthy white infants far outstrips the number of such infants available for adoption.[1] While surrogate parenting may be used as a matter of convenience, it appears at present that infertile couples are the primary group seeking surrogacy services.

The assessment of the number of couples who might seek surrogate parenting because of infertility is complicated by the lack of data separating male from female infertility, disagreement over the appropriate measure of infertility, and differences in the definition of "infertility'* among clinicians, demographic researchers, and the public.[2] One leading study estimates that 2.4 million married couples in the United States are infertile.[3] However, estimates of infertility rates vary widely depending upon the way that infertility is defined.

Surrogate parenting can substitute for female reproductive impairment but cannot assist those couples whose infertility relates to male causes. Hence, as discussed below, it is possible that at least half the couples identified as infertile could not be helped by the practice.

Epidemiological Data

Three studies - the 1965 National Fertility Study conducted by Princeton University, the 1976 National Survey of Family Growth (NSFG) Cycle II, and the 1982 National Survey of Family Growth, Cycle III, conducted by the National Center for Health Statistics - provide the only comprehensive data on infertility in the United States. The 1982 survey was based on interviews with 8,000 women and presented, for the first time, nationwide statistics on the reproductive capacity of all women of reproductive age

(regardless of marital status). It also reported trends in fertility and childbearing capacity among married couples.

According to the 1982 NSFG survey, 2,4 million couples, or 83% of the 28.2 million married couples in the United States with wives of childbearing age, are infertile.[4]The NSFG researchers measured infertility as it is commonly defined - "the inability to conceive after one year of unprotected intercourse."[5] However, it has been reported that as many as 50% of those couples who do not conceive within the first year do so in the second year or thereafter.[6] Thus, some commentators argue that the one-year time span produces an inflated number and suggest that inability to conceive within two years is a more appropriate measure of infertility.

The prevailing definition of infertility is problematic in other respects. In particular, it refers only to couples who try to conceive and fail. It does not include other couples who want to have children but cannot do so for medical reasons related to genetic disorders or a woman's inability to carry a child to term.[8]

The NSFG divided its survey sample according to the type of reproductive impairment involved. These more precise categories offer a better picture of the nature and scope of impaired female reproductive capacity. The categories identified were: (i) women with "impaired fecundity";[9] (ii) women who are "surgically sterile for non-contraceptive reasons";[l0]and (iii) women who are "surgically sterile for contraceptive reasons" but now want to have a child.[11]

Couples with "impaired fecundity" include those who are infertile (unable to conceive) and those who are subfecund - those for whom it would be difficult or medically dangerous to conceive or bear a child.2 The 1982 NSFG survey found that 83%of married couples are infertile while 10.8% have some form of impaired fecundity.[12] Since only couples with female- related infertility or impaired fecundity could benefit from surrogacy for medical reasons, the figures of 83% and 10.8% overstate the percentage of couples who might use a surrogate for medical reasons. To estimate that number, the figures must be analyzed in terms of two important variables: (i) the incidence of male sterility; and (ii) the distinction between primary and secondary infertility.

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2 Women who are surgically sterile for non-contraceptive reasons ***(see*** **categoiy (ii) above) are excluded from die assessment of unpaired fecundity because generally they are older and have at least one child. Only about 200,000 women — or 6% of the 3 million women in this categoiy - are young and might desire children; the rest usually experience the condition leading to sterilization as a medical rather than as a fertility problem.** ***See*** **n. 12.**

"Female factors" are said to account for anywhere from 30-70% of all infertility, "male factors" from 30-50%.[13] Researchers agree that infertility due to female causes may be overestimated because male factors are studied less than female factors.[14] Moreover, male and female factors often appear in combination.

Given the inconclusive nature of the data, it is not possible to deter-nine the percentage of infertile couples who might be assisted by surrogate parenting. However, potentially half the couples identified as infertile or suffering from impaired fecundity could not be helped by surrogacy although they might benefit from other reproductive technologies or practices.

A second variable to be considered is the distinction between primary and secondary infertility. "Primary infertility" refers to an infertile childless couple. "Secondary infertility" refers to couples who are currently infertile for whatever cause but have already given birth to one or more children.[15] Of the 10.8% of married couples who currently have impaired fecundity, 36% - or 1.1 million couples ~ are childless.[16] While couples with secondary infertility may also turn to surrogate parenting to have another child, they are not the primary candidates for surrogate parenting nor the group that has been the principal focus of public attention and concern in the debate about the issue.

It should also be noted that for approximately 20% of infertile couples, no clinical cause can be identified.[18] Some cases of unexplained infertility ultimately result in pregnancy independent of treatment. [9]

Increased Use of Fertility Services

One reason for the strong interest in surrogate parenting is the public perception that infertility is on the rise. This perception is heightened be-cause the number of couples seeking medical help to conceive or carry a pregnancy has increased dramatically.[20] Nonetheless, the NSFG survey found that there has been little change in the overall rate of infertility among married couples between 1965 and 1982.[21]

The increasing demand for infertility services appears to be con-centrated in one cohort of the American population — the so-called baby boom generation.[22] Previously, younger couples sought infertility consult-ation more frequently than older couples. That pattern has shifted, and recent studies show that couples in which the woman is older are now more likely to use infertility services.[23] It appears that several factors are responsible for this trend, including the increased likelihood of infection-related infertility in older women and the recent tendency to delay childbearing until the later reproductive years.[24] While considerable debate exists about the magnitude of age-related infertility, researchers

agree that the use of infertility services by older couples has increased.

According to the 1982 National Survey, black couples are more likely to be infertile than white couples.[25] However, a higher percentage of white couples seek medical evaluation of their infertility.[26]

Female Infertility — Causes and Trends

The major causes of female infertility are infection, endometriosis and hormonal ovulation problems. Recently, discussion and research have focused on the effect of age on fertility. Smoking, alcohol and drugs, genetic and chromosomal abnormalities, immunological problems, and stress or psychological disorders may also be contributing factors.

Age

The tendency of professional and educated women to postpone reproduction has heightened interest in the relationship of age to infertility. It is generally believed that female fertility peaks between ages 18 and 30 and does not decline significantly until after age 35.[27] However, controversy exists about whether female fertility declines between the ages of 30 and 34.[28] Overall, the studies show a gradual decrease in female fertility with age, rather than a sharp decrease at any one age.[29]

The reasons that fertility declines with age are unclear. Although age may affect such factors as ovulatory function and viability of the ovum, the role of infection, particularly sexually transmitted diseases, is of greater concern with regard to age-specific infertility.[30] Older women are exposed longer to the risks of pelvic inflammatory disease and other infections. Likewise, the cumulative effects of endometriosis and other conditions that diminish or destroy fertility are aggravated as long as they remain untreated or unchanged. Decline in female fertility with age is also attributed to an increase in miscarriages due to fetal, genetic or chromosomal abnormalities[31]

Infections

Researchers agree that among sexually active women the greatest single cause of impaired ability to conceive is damage to the fallopian

tubes, the ovaries and the endometrium (the lining of the uterus) caused by pelvic inflammatory disease (PID).[32] PID is an infection caused by sexually transmitted diseases. If left untreated, it may ascend from the lower genital tract to the upper reproductive tract.[33] Women with PID are infertile during the duration of the infection. In addition, PID can lead to scarring, adhesions, fluid-filled swellings and other permanent damage to the fallopian tubes.[34]

In the United States, the annual incidence of PID has increased dramatically. In I960, it was estimated at ***17.5*** cases per thousand(1.75%) /omen between 15 and 44 years of age.[35] Recently, approximately 14% of /omen between the ages of 15 and 44 reported being treated at least once or PID.[36]

The likelihood that PID will cause infertility depends upon the severity and duration of the disease and whether or not the woman suffers multiple episodes of the infection.[37] One study found that in developed countries approximately 15 to 20% of women with PID become permanently infer- ile.[38]

Sexually transmitted diseases are difficult to diagnose in women because they do not manifest symptoms until they reach a severe stage. Often by the time the disease is diagnosed, it has developed into PID.

Gonorrhea and chlamydia are the most common sexually transmitted diseases causing infertility-related PID.[39] Together they account for almost two-thirds of the one million cases of PID treated each year.[40] Other factors that can increase the risk of PID are post-partum and post-abortion infection, dilation of the cervix which can occur during childbirth or induced abortion, and use of an IUD, particularly among women who have already been exposed to sexually transmitted diseases.

Endometriosis

Endometriosis is also a major cause of infertility in women.[41] Endometriosis is a condition characterized by the presence of endometrial cells or endometrial tissue, normally found in the lining of the uterus. Endometrial cells of the uterine lining can become implanted in the ovaries, fallopian tubes, pelvic tissue, and other sites.[42]One study estimates that 30 to 40% of women with endometriosis have lowered fertility and fecundity.[43]

Scientists do not fully understand the causes and development of endometriosis.[44] One widely accepted explanation is that during menstruation some endometrial tissue passes through the fallopian tubes and becomes implanted m other organs. During each subsequent cycle, the

tissues grow and may shed. The implants are thought to cause scarring and adhesions, which may distort the fallopian tubes and the ovaries.[45] Whatever the cause, early detection and treatment of endometriosis are crucial factors in preventing infertility.

Other Physical Factors

Disorders in ovulation are one of the most frequent causes of infertility in developed countries. Ovulation disorders result from disruption of the complex system of hormonal interactions necessary for normal menstrual cycles and the maintenance of pregnancy.[46] Certain congenital uterine or cervical abnormalities can also cause infertility [47]

In addition to the factors discussed above, genetic and chromosomal abnormalities in both men and women can affect fertility and pregnancy maintenance and lead to a high percentage of early miscarriages.[48] Infertility can also result from various immunological conditions that are not clearly understood at this time [49]

Finally, a growing body of research has identified other causes of temporary and permanent infertility, including: smoking,[50] alcohol and drug abuse,[51] certain prescription drugs such as DES, severe nutritional deficiencies,[53] and regular, strenuous exercise.[54]

Two decades ago, researchers attributed 40-50% of female infertility to stress and psychological factors.[55] Recent studies suggest that psychological factors account for less than 5% of infertility in women.[56] Many researchers now believe that stress is generally the result rather than the cause of infertility.[57]

Psychological Aspects of Infertility

Although experts disagree on the role that psychological and emotional factors play in causing infertility, they all agree on the devastating effects of infertility. For many couples, infertility triggers a crisis involving basic feelings about sexuality, self-image and self-esteem.[58] This crisis is caused by the sudden loss of control over a crucial area of one's life -- the ability to reproduce and parent.[59] Physicians and researchers have noted that involuntary childlessness leads to low levels of self-esteem and to feelings of anger, denial, depression and frustration.[60]

The diagnosis of infertility is inherently stressful The diagnostic process is long and arduous and the treatment can take years. The stress of the diagnosis and treatment has been linked to high levels of marital tension.[61]

In one study, 50% of the women and 15% of the men in a sample population considered infertility to be the most upsetting experience of their lives.[62] However, studies of infertile couples are usually conducted luring the treatment process when the anxiety level is at its peak. In contrast, one study of women age sixty to seventy-five years found that there was little difference in life satisfaction expressed by married women with children and married women without children. This was true even for women who were involuntarily childless.

Prevention

The primary causes of infertility that can be influenced by preventative measures are: sexually transmitted diseases, smoking, and alcohol and drug abuse. It is estimated that sexually transmitted diseases account for 20% of infertility, making it the most readily preventable cause. Education of both physicians and the public about prevention, early recognition and proper treatment is essential to reduce or even eliminate this cause. For example, the Center for Disease Control has begun a campaign to improve management of PID cases. In addition to publicizing the epidemiology of PID, the Center is educating physicians and health care personnel about PID, distributing treatment guidelines and encouraging the referral and treatment of sexual partners of women with PID.

Despite the increased awareness of infertility, little organized effort has been made by government or private organizations to prevent infertility. Neither national nor state governments have launched major educational campaigns or supported the research needed to target and structure preventative measures.

NOTES

1. The number of children available for adoption has steadily decreased, leading to a so-called "adoption crisis." See, *e.g.* Nancy Hellmich, "Infertility, Frustration Multiply," *U.SA. Today* (Jan. 11,1988), p. 1A. According to one commentator, "Until the 1970's, adoption of healthy infants of one's own race was a reliable and relatively easy alternative to being involuntarily childless." Barbara Menning, *Infertility: A Guide for the Childless Couple* (New York: Prentice Hall, 1977), p. 142, William Pierce, President of the National Committee for Adoption, estimates that two million couples actively seek to adopt but only 50,000 placements occur each year. Hellmich, p. 2A.

The dearth of infants for adoption is attributed to several factors, including the widespread use of birth control, abortion and increasing societal tolerance toward single mothers. Menning, p. 142; Lori Andrews, *New Conceptions: A Consumer's Guide to the Newest Infertility Treatments* (New York: St. Martin's Press, 1984), p. 3. Fifteen years ago, almost 80% of out- of-wedlock children were placed for adoption; by 1983 the number was 4%. Lee Campbell and Patricia Patti, "The Post-Adoption Experience of Surrendering Parents," *Amer. J, Orthopsychiatry,* Vol. 54 (April 1983), p. 271.

However, others point out that the dearth of children is actually a shortage of healthy, pre-school infants of the same race as the couple seeking adoption. Thus it is estimated that while there are 10 white couples for every adoptable white infant and five Asian couples for every Asian infant, "[f]or black infants we need couples." Jane Edwards, Executive Director of Spence-Chapin Services to Families and Children in New York, quoted in Hellmich, p. 2A. In addition, there are many children of all races with "special needs," defined as: older children, sibling groups, children with serious medical, emotional or mental handicaps, and children with learning disorders. Menning, p. 142.

2. William Mosher, "Infertility: Why Business is Booming," *American Demographics* (July 1987), p. 43. *See also,* Gertrud Svala Berkowitz, "Epidemiology of Infertility and Early Pregnancy Wastage," in *Reproductive Failure,* ed. Alan DeCherney (New York: Churchill Livingstone, 1986), pp. 17-18.

3. *See, e.g.,* Berkowitz, pp. 17-18; Sevgi Aral and Willard Cates, Jr., "The Increasing Concern with Infertility~Why Now?" *JAMA,* Vol. 250, No. 17 (Nov. 4,1983), p. 2327.

4. William Mosher and William Pratt, "Fecundity and Infertility in the United States, *1965-82," Advance Data,* No. 104 (Feb. 1985), p. 4.

5. Berkowitz, p.17; Mosher and Pratt, pp. 3-4; Aral and Cates, p.2327.

6. Berkowitz, pp. 17-18.

7. Population Information Program, The Johns Hopkins University, Infertility and Sexually Transmitted Disease: A Public Health Challenge," *Population Reports,* Series L, No. 4 (July 1985), p. L-116; Berkowitz, p. 18; . Menken, J. Trassell and U. Larsen, "Age and Infertility," *Science,* Vol. 33 (Sept 26,1986), pp. 1389-1394; J. Collins, W. Wrixon, L. Janes *et aL,* Treatment-Independent Pregnancy Among Infertile Couples," *NEJM,* /oL 309, No. 20 (Nov. 1983), pp. 1201-1202.

8. Mosher and Pratt, p. 4.

9. Impaired fecundity includes women who are classified as nonsurgically sterile (sterile for reasons other than an operation) or subfecund "women for whom it is difficult or dangerous to conceive or carry to term or who have had 3 years or more of infertility). Mosher and Pratt, p. 2.

10. This category specifies couples in which the wife or husband have had sterilizing operations for reasons other than limiting the size of their families. Mosher and Pratt, p. 2.

11. This category specifies couples in which the wife or husband have had a sterilizing operation at least in part because they wanted to limit the number of children. By 1982, 39% of married couples were surgically sterile, more than double the rate in 1965. The percentage of such couples who now want to have children has not been determined, and is not included in the figure cited as the incidence of infertility. Mosher and Pratt, p. 2.

12. United States Department of Health and Human Services, National Center for Health Statistics, W. Mosher and W. Pratt, "Fecundity, Infertility, and Reproductive Health in the United States, 1982," *Vital and Health Statistics,* Series 23, No. 14 (Washington, D.C., 1987), Tables 1 and 7; Berkowitz, p. 24.

13. Barbara Eck Menning, The Infertile Couple: A Plea for Advocacy," *Child Welfare,* Vol. UV (June 1975), pp. 454-455.

14. Mosher and Pratt, p. 2.

15. *Id.,* p. 3; Berkowitz, p. 17; *Population Reports,* p. L-116.

16. Personal communication with Dr. William Mosher, Demographer at the National Center for Health Statistics, May 5,1988.

17. Peter Singer and Deane Wells, *Making Babies: The New Science and Ethics of Conception* (New York: Charles Scribner's Sons), pp. 93-115.

18. Collins *et al.,* p.1201;Berkowitz,p.19; *Population Reports,*p. L-132.

19. Collins *et* a/., p. 1201

20. Visits to private physicians' offices for fertility-related consultation increased from approximately 600,000 in 1968 to 1 million in 1982. The number doubled in 1983. M.C. Horn and W.D. Mosher, Use of Services for Family Planning and Infertility: United States, *1982f Advance Data,* No. 103 (Feb. 1984), pp. 1-8; W.D. Mosher, W.F. Pratt, C.A. Bachrach *et al.,* in *Morbidity and Mortality Weekly Report,* Vol. 34 (April 12,1985), pp. 197- 198; Mosher, "Infertility, Why Business is Booming."

21. The NSFG researchers noted a large increase in the number of surgical sterilizations *(see* n. 12, *supra).* The survey also found an increase in infertility among wives aged 20-24 years (from 4% in 1965 to 11% in 1982). Mosher and Pratt, p. 4.

22. Aral and Cates, p. 2327.

23. Compare Aral and Cates, p. 2327 with Horn and Mosher, n. 20.

24. Aral and Cates, p. 2329.

25. W. F. Pratt, W.D. Mosher, C.A. Bachrach *et al.,* pp. 197-99; *see also,* Aral and Cates, p. 2328.

26. Aral and Cates, p. 2328; *see also,* M.B. Hirsch and W.D. Mosher, "Characteristics of Infertile Women in the United States and Their Use of Infertility Services," *Fertility and Sterility,* Vol. 47 (1987), p. 618.

27. The infertility rate for women aged 20-24 (10.6%) is lower than the rate for women in their late 30's and 40's. Women aged 40-44 years had an infertility rate as high as 27.2% in 1982. Mosher and Pratt, p. 5.

28. A recent French study of women undergoing in vitro fertilization indicated that fertility rates may drop noticeably around age 30. Berkowitz, p. 32; *Population Reports,* p. L-124. However, these results have been challenged and the larger body of research suggests that fertility does not drop substantially until age 35. *Population Reports,* p. L-124, n. 76.

29. *Population Reports,* p. L-124; Aral and Cates, pp. 2327-28.

30. Aral and Cates, p. 2328; *Population Reports,* p. L-124; Willard Cates, Jr., "Sexually Transmitted Organisms and Infertility: The Proof of the Pudding," *Sexually Transmitted Diseases,* Vol. 11, No. 2 (April-June **1984)** , p. 113.

31. Berkowitz, p. 22; *Population Reports,* p. L-124.

32. Berkowitz, p. 23; *Population Reports,* L-120. Other infectious diseases such as genital tuberculosis can also result in PID. However, this is not a significant cause of PID in the United States. *Population Reports,* p. L-122.

33. *Population Reports,* p. L-120.

34. L. Westrom, "Incidence, Prevalence, and Trends of Acute Pelvic

Inflammatory Disease and its Consequences in Industrialized Countries," Am. J. *Obstet. Gynecol,* Vol. 121, No. 5 (March 1975), p. 707; Berkowitz, >. 20; Cates, p. 113.

35. Berkowitz, pp. 23-24.

36. *See* n. 12, *supra.*

37. *Population Reports,* p. L-120.

38. *Population Reports,* p. L-120; Westrom, pp. 710-712.

39. *Population Reports,* p. L-121.

40. *Population Reports,* pp. L-120-121. Gonorrhea is thought to be responsible for over 40% of PID cases not only in the United States but worldwide. *Population Reports,* p. L-121; *see also,* Berkowitz, p. 24. According to one recent study, chlamydia is the most common sexually transmitted disease in the United States and accounts for one-quarter to one-half of PID cases seen in this country each year. There is some evidence that a third type of sexually transmitted disease, mycoplasma infections, also leads to PID in women and to tubal blockage or damage. *Population Reports,* p. L-122.

41. Robert Kistner, Alvin Siegier and S. Jan Behrman, "Suggested Classifications for Endometriosis: Relationship to Infertility," *Fertility and Sterility,* Vol. 28, No. 9 (Sept. 1977), p. 1008.

42. H. Fox and C. Buckley, "Current Concepts of Endometriosis," *Clin. Obstet. Gynecol,* Vol. 11 (1984), p. 279.

43. Kistner, p. 1008.

44. *Population Reports,* p. L-127.

45. Robert Kistner, "Management of Endometriosis in the Infertile Patient," *Fertility and Sterility,* Vol. 26, No. 12 (Dec. 1975), p. 1151.

46. *Population Reports,* pp. L-126 — L-127.

47. *Id.,* p. L-125; *see also,* Berkowitz, p. 19.

48. *Id.*

49. Richard Ansbacher, "Immunologic Factors in Reproductive

Failure," *In Reproductive Failure, td.* Alan DeCherney (New York: Churchill, Livingstone, 1986).

50. E. Weisberg, "Smoking and Reproductive Health," *Clin, Reprod Fertil,* VoL 3, No. 8 (Nov. 1985), p. 175.

51. Berkowitz, pp. 26-27.

52. *Id*

53. R.E. Frisch, "Body Fat, Puberty and Fertility," *Biol. Rev.,* Vol. 59 (1984), p. 161.

54. A.B. Loucks, "Does Exercise Training Effect Reproductive Hormones in Women?" *Clin. Sports Med.,* Vol. 5 (1986), p. 535.

55. M. Seibel and M. Taymor, "Emotional Aspects of Infertility," *Fertility and Sterility,* Vol. 37 (Feb. 1982), p. 137.

56. Seibel and Taymor, p. 143; *see also,* Menken *et al.*

57. Seibel and Taymor, p. 137; E. Bresnick and M. Taymor, "The Role of Counseling in Infertility," *Fertility and Sterility,* Vol. 32 (Aug. 1979), p. 154.

58. Menning, p. 454.

59. Seibel and Taymor, p. 112.

60. According to one study, suicide among childless couples is approximately twice that among those with offspring. Seibel and Taymor, p. 137. *See also,* P. Link and C. Darling, "Couples Undergoing Treatment for Infertility: Dimensions of Life Satisfaction," in *Sex and Marital Therapy,* Vol 12, No. 1 (Spring 1986), p. 50.

61. Menning, p. 456; Link and Darling, p. 57.

62. Ellen Freeman, Andreas Boxe, Karl Rickels *et al,* "Psychological Evaluation and Support in a Program of In-Vitro Fertilization and Embryo Transfer," *Fertility and Sterility,* Vol. 43, No. 1 (Jan. 1985), p. 50.

63. Linda Beckman and Betsy Bosak Houser, "The Consequences of Childlessness on the Social Psychology and Well-Being of Older Women," /. *of Gerontology,* Vol. 37, No. 2 (1982), p. 249.

64. Conversation with Dr. Florence Haseltine, Director, Center for Population Research, National Institutes of Health, April 18,1988.

Two

Assisted Reproduction

In the past, infertile couples relied on conventional fertility treatments or adoption.[1] Advances in medical science and new social arrangements have provided other options. Alternatively called "new reproductive technologies," "assisted reproduction," or "non-conventional therapy," these techniques include artificial insemination, in vitro fertilization and surrogate parenting. Taken together, these practices present the potential for far-reaching change in the process of human reproduction.

Artificial Insemination

Artificial insemination is the procedure by which a woman is intravaginally or intrauterinely inseminated with semen by a syringe or similar means. When a woman is inseminated with the semen of her husband or mate, the procedure is referred to as "artificial insemination by husband" (AIH). When a donor provides the semen, the procedure is called "artificial insemination by donor" (AID).[2] Semen donors are almost always anonymous. Although the payment of fees for donating human tissue is jarred by federal law, sperm donors are often paid for the "inconvenience")f making the donation.

It is estimated that in the United States over 15,000 babies are connived by either AID or AIH each year.[4] Artificial insemination is not a lew procedure. It was first utilized in animal husbandry as early as the 18th xntury.[5] It is believed that the first human was inseminated by AIH in L790, although the practice of AID did not become widespread until the 1960s.[6] Several factors contributed to its increased popularity at that time: 'i) the decreasing number of healthy newborn infants available for adoption; (ii) a greater awareness of AID as an option for infertile couples; and (iii) the passage of laws governing the paternity and legitimacy of children conceived through AID.

AIH is medically indicated for many male fertility problems, including low sperm count, poor sperm motility, ejaculatory problems, and impotence. Couples may also use AID to treat certain types of female infertility or to eliminate the risk of transmitting genetic disorders. In addition, a man who is fertile and is scheduled to undergo chemotherapy, radiation, or other medical treatment that could damage or destroy his fertility can have his sperm frozen for insemination at a later time.[9]

Artificial insemination is an uncomplicated procedure that does not

require elaborate medical apparatus. In the United States and other countries, the procedure is not always conducted by medical personnel.[10] However, since artificial insemination can transmit infections as well as fatal illnesses, it is widely recognized that the procedure should be per* formed by a physician.[11]

When donors are screened carefully for sexually transmitted diseases, genetic disorders, the HTV virus and other illnesses, artificial insemination poses little risk to the child or to the woman other than the normal risks of pregnancy. There are no medical risks for the donor.[12]

While the medical literature reports varying "success" rates for AID, on average, women are inseminated over the course of approximately six months before pregnancy occurs,[13] As greater experience and new technologies improve the ability to predict ovulation and to preserve sperm, AID success rates are expected to rise.[14]

The success rates for AID are difficult to evaluate. Several factors affect the rates, including: the extent and thoroughness of patient screening, the use of fresh or frozen semen, the definition of success (including how "pregnancy" is defined), and the rate at which patients drop out of the program. In addition, there is little consistency in the number of inseminations performed per ovulation cycle at different centers. Experts estimate that approximately 57% of the women who undergo AID become pregnant.

Artificial insemination is relatively inexpensive. Generally, each insemination procedure costs $45-$50. Success is rarely achieved with the first insemination. On average, it takes three to five ovulatory cycles and several attempts per cycle before pregnancy occurs.[16]

In Vitro Fertilization

In contrast to artificial insemination, in vitro fertilization (IVF) is a new, technically sophisticated procedure. The first "test tube baby," Louise Brown, was born in 1978 in Melbourne, Australia. Since that time, IVF techniques and clinics have spread rapidly. As of 1985, approximately 70 clinics were operating in the United States.[17]

Several steps are basic to the IVF process. First, a mature egg is extracted from the ovary immediately prior to release and is fertilized outside **3** body in laboratory conditions. Once the egg is fertilized and starts to divide, it is transferred to the uterus for implantation and development.[18]

The techniques utilized in IVF, especially those used to freeze

embryos, are highly sophisticated and are still evolving. Since the methodology is not yet standardized, the steps by which IVF is carried out by considerably from center to center. Some of the procedures remain highly experimental and are the subject of ongoing research and investigation.

In the first step, known as superovulation, drugs and/or hormones are given to stimulate the ovaries so that several eggs will ripen simultaneously. The production of multiple eggs increases the probability of impregnation. The artificial stimulation of ovulation also improves the accuracy of the timing to remove the ripe eggs.[19]

In a procedure known as laparoscopy, the ovaries and eggs are viewed with a telescope-like instrument which is inserted through an abdominal incision. In some centers, an ultra-sound method, which creates a picture via sound waves, is used instead. The mature eggs are retrieved by means of a needle attached to a suction apparatus.[20]

A few hours later, semen is collected, and sperm are added to the petri dishes which contain the eggs. The fertilized eggs are incubated until they're ready to be transferred back to the uterus for implantation, usually within two to three days.[21]

In some cases, embryos that are created but not implanted are frozen, 'his freezing process, known as cyropreservation, is used to minimize the lumber of times eggs must be retrieved. Since only a limited number of embryos can be implanted at one time without risk to the woman and the resulting offspring, freezing the embryos allows for a second or third implantation without the need to repeat the process of retrieving the eggs.[22]

Another procedure, known as "lavage for preembryo transfer," relies on artificial insemination, "in vivo" fertilization and transfer of the embryo to another woman who carries the child to term. In this procedure, five or six days after a woman is inseminated, the "preembryo" is removed through a catheter inserted into the uterine cavity. The embryo is then implanted n the woman who will carry the child to term, using the same techniques employed for IVF.[23] Experience with this experimental technique in humans is limited. At present, the procedure poses substantial risks for the **e**gg donor, including the possibility of an ectopic pregnancy.[24]

The most prevalent reason for utilizing in vitro fertilization is to

bypass damaged or diseased fallopian tubes, which prevent the egg passing from the ovary to the uterus.[25] Experts in the field have identified other factors as indicators for IVF, including: inadequate sperm count, pelvic endometriosis, pelvic adhesive disease, uterine or other anomalies of the reproductive tract, cervical/immunological disorders, hostile cervical mucus, and infertility of unknown origin.

Experts do not agree about the medical risks involved in IVF. Some authorities assert that the risks to the woman are minimal.[27] However, others point out that IVF poses the risks associated with general anesthesia, as well as the increased risk of ectopic pregnancy, multiple births, prematurity, still birth, newborn death and the necessity for cesarean section.[28] In addition to the medical risks, the procedures are extremely stressful for both husband and wife; it takes three to five separate attempts before successful implantation occurs.[29] Many couples never conceive.

The success rate of IVF is difficult to determine. IVF involves several procedures, each of which must "succeed" before implantation and birth can occur. First, a mature egg must be obtained, fertilized and developed to a stage where it can be implanted in the uterus. The fertilized egg must then be transferred into the uterus and implanted. Approximately 20% of the ova fertilized in the laboratory become implanted. It is not known how many of these ova result in live births.[30]

There are few statistics measuring the success rate of IVF in terms of live births per attempt. What is certain is that the number of successful pregnancies resulting from IVF is relatively small.[31] In one recent study of a 200-patient sample, 24% of the successful implantations resulted in a viable uterine pregnancy. Women reached a viable pregnancy within the first year of treatment for an average of 2.48 cycles of IVF treatment. The researchers further determined that the pregnancy success rate for oocyte cycle (ovulation and retrieval) was 15.4%.

IVF is a complex and expensive procedure. According to some analysts, the cost of IVF is approximately $4,000-$5,000 for the first cycle or attempt and about $4,000 for each subsequent cycle.[33] The average patient undergoes three to four cycles, for a total cost of $15,000-$20,000. Other analysts estimate that the costs are higher, ranging from $38,000-$50,000.[34] Currently, health insurance under most private plans and state medicaid programs does not cover the costs of IVF.[35]

Surrogate Parenting

Although always part of any discussion of the "new reproductive technologies," surrogate parenting is not itself a technology. Rather, it is a social arrangement that utilizes reproductive technology (most frequently artificial insemination) to enable one woman to produce a child for a man and, if he is married, for his wife. Surrogate parenting is not defined by the medical procedures used but by the intention to separate the genetic and/or gestational aspects of childbearing from parental rights and responsibilities. This separation is achieved under an agreement to transfer the infant and all maternal rights at birth.

There are two types of surrogate parenting. In its most common form, sperm from the intended father is used to inseminate the surrogate who, upon birth, surrenders the child to the father. In this case, the surrogate is both the genetic and the gestational mother ("genetic-gestational surrogate").

The use of in vitro fertilization generates numerous other possibilities. An embryo created from sperm and ovum donated by the intended parents or by one or two unrelated individuals can be implanted in the surrogate, who then carries the child to term. In these cases, the surrogate is the gestational mother but has no genetic link to the child ("gestational surrogate"). Both, one or neither of the intended parents may be the child's genetic parent(s). When the gamete donors and intended parents are different, the child in effect has five "parents": a genetic mother and father, a gestational mother and a rearing mother and father.

Surrogate parenting involves an agreement between the surrogate and the intended parents. In most but not all cases, the agreement is reflected in a contract, whereby the surrogate is paid to carry the child to term and to relinquish the child and all parental rights at birth. In addition to these principal obligations, the contracts generally spell out a host of other commitments by the surrogate concerning medical and psychiatric testing, medical treatment and prenatal care. For instance, many contracts require the surrogate to undergo amniocentesis and to abort the fetus at the demand of the contracting couple if certain anomalies are detected, unless the surrogate is willing to assume full parental responsibility for the child. If genetic anomalies or other disorders are not detected until birth, the contracts increasingly specify that the intended parents will assume all financial and parental obligations for the child.

Surrogacy is used for medical reasons when the wife cannot conceive or carry a pregnancy successfully to term. A genetic-gestational surrogate

provides a reproductive option for couples when the female partner is unable to produce eggs or is otherwise infertile.[36] A gestational surrogate assists couples when pregnancy would pose significant risk to the woman or when she is able to produce eggs but has no uterus.[37] Gestational surrogacy could also be used for reasons of convenience when a couple wants a child genetically related to both of them, but wishes to avoid the burden of pregnancy to the female partner.

Legislation proposed in many states would limit use of a surrogate to those couples who rely on the practice because of defined medical need.[38] The highly contested Baby M case, however, demonstrates the difficulty of defining a standard of medical need and determining which couples actually meet the standard.[39] Moreover, critics of surrogate parenting assert that the practice, once socially accepted for medical reasons, will inevitably expand to encompass social or personal reasons as well.[40]

Surrogate parenting presents several medical risks to the surrogate, including the risks involved in artificial insemination, in vitro fertilization, pregnancy and delivery. The risks associated with pregnancy include pregnancy-related illness, impairment and possibly death. Other procedures that may be involved, such as amniocentesis and abortion, carry their own risks.[41]

In addition, the surrogate may face psychological harm related to relinquishing the infant at birth. Women who apply to be surrogates are evaluated to determine their ability to give up the child for adoption. Yet cases like Baby M challenge the adequacy and/or accuracy of such evaluations.

This area is especially problematic in light of the numerous studies documenting the psychological trauma inherent in the decision to relinquish a child for adoption. Studies have found that women who relinquish their children for adoption are exposed to problems such as guilt, depression, marital problems and sexual dysfunction. Surrender of the child may remain an issue of conflict and intrapersonal difficulty for years after the adoption. Indeed, one study suggests that women who intend to relinquish their child fall into a high risk group for depressive or psychosomatic illness.[42]

Some commentators suggest that surrogacy poses less risk to women than the surrender of a child for adoption in other circumstances because a surrogate becomes pregnant with the intention of giving the child away.

However, it is also possible that the risk is aggravated for surrogates, many of whom have been found to be emotionally or psychologically vulnerable before entering the surrogacy contract. For example, one study of potential surrogates revealed that one-third felt they were "atoning" for

an abortion or for a previous child relinquished for adoption.[43] Another study of 30 women who had babies as surrogates found that all the women experienced some degree of grief. Ten percent were so distraught after relinquishing the infant that they sought therapeutic counseling.

Profiles of Surrogates

Little information exists about the women who serve as surrogates or their experience. The only data presently available has been collected by the centers that arrange the surrogate contracts.

According to an initial study of 125 women who applied to be surrogates, a candidate's average age was 25. Fifty-six percent of these women were married, 20% were divorced, and 24% had never been married [45] In terms of religious affiliation, 57% were Protestant, 42% were Catholic, and one applicant in the group studied was Jewish.[46]

Surrogates generally have from one to three living children (a requirement for acceptance at some surrogate parenting clinics) and are of modest or moderate financial means. One study found that over 60% worked outside the home or had husbands who worked while 40% were unemployed or received some sort of financial assistance or both. The annual incomes of surrogates ranged from $6,000 to $55,000.[47] The majority of women who have served as surrogates are high school graduates or have an equivalency diploma. In one study of 125 women, approximately 26% had taken college courses or had some vocational training. Only one had a college degree.[48]

Clinicians who specialize in recruiting and screening potential surrogates claim that surrogates enjoy being pregnant and are motivated by an altruistic desire to help an infertile couple have a child.49 However, the fee, usually in the amount of $10,000, appears to be the major factor in the decision by women who have served as surrogates to date. One study has shown that approximately 85% of the women would not have entered into the arrangement unless they had received a fee.[50]

Surrogate Parenting Centers in New York State

There have been an estimated 750-1000 children bora through surrogate parenting in the United States. Fifteen surrogate parenting agencies operate nationwide. Two of the centers are in New York State.[52]

Although recent efforts have been undertaken to establish uniform standards for surrogate parenting centers, practices continue to vary widely. The centers in New York State differ considerably in their respective fee schedules, screening and selection criteria for prospective clients and surrogates, and procedures for negotiating contracts. For example, one

center, the Infertility Center of New York, has accepted all medically suitable clients since it opened in 1984.[53] In contrast, during the same period, another center, the Surrogate Mother Program, rejected eight prospective client couples on psychological grounds. When prospective clients and surrogates are considering the arrangement, the Infertility Center provides no information to the prospective surrogate about the client couple, but allows the couple to review the completed applications of all surrogate candidates;[55] the Surrogate Mother Program shares information with clients and prospective surrogates.[56] Moreover, the Infertility Center turns down applications from surrogate candidates only for reasons related to health and age, while the Surrogate Mother Program rejects two-thirds of potential surrogates after extensive psychological testing [57]

Since January 1985,53 children have been born of surrogate parenting arrangements through the Infertility Center.[58] The Surrogate Mother Program reports sue births by surrogates since 1984 [59]

NOTES

1. *See* Chapter One, n. 1.

2. Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* (1985), Vol. 1, p. 17. [hereinafter "On- tario Report"].

3. 42 U.S.C. § 274 (e).

4. Menning, p. 147; Martin Curie-Cohen, Lesleigh Luttrell and lander Shapiro, "Current Practice of Artificial Insemination by Donor in he United States," *NEJM,* Vol. 300, No. 11, p. 588.

5. The Ethics Committee of the American Fertility Society, "Ethical Considerations of the New Reproductive Technologies" (Sept. 1986), Vol. 16, No. 3. [hereinafter "AFS Report"], p. 36S.

6. *Id.,* p. 36S; Herbert Walter, "Psychological and Legal Aspects of Artificial Insemination (AID): An Overview,[1]*"Amer. J. Psychother.,* Vol. 36 (Jan. 1982), p. 93.

7. Ontario Report, p. 16, n. 19; AFS Report, p. 36S; United Kingdom, Department of Health and Social Security, "Report of the Inquiry into Human Fertilization and Embryology" (July 1984), [hereinafter "U.K. Report"], p. 19.

8. AFS Report, p. 34S. AID is used when the female partner has a condition known as "cervical hostility," which causes her to secrete a cervical mucous that damages or kills sperm. *Id.,* p. 36S.

9. *Id.,* p. 34S; U.K. Report, p. 17.

10. Ontario Report, p. 19.

11. *Id.*

12. AFS Report, p. 36S.

13. Curie-Cohen *et al.,* p. 587; Richard Dixon and Veasy Buttram, Jr., "Artificial Insemination Using Donor Semen: A Review of 171 Cases," *Fertility and Sterility,* Vol. 27, No. 2 (Feb. 1976), p. 134,

14. Dixon and Buttram, pp. 133-134; G. Foss, "Artificial Insemination by Donor: A Review of 12 Years' Experience,"J. *Biosoc. Sci.,* No. 14 (1982), pp. 261-62; Curie-Cohen et *al.,* p. 588.

15. Menning, p. 149; Curie-Cohen, *et al,* p. 588.

16. Curie-Cohen *et al.,* p. 587; Foss, p. 257.

17. Peter Singer and Deane Wells, *Making Babies* (New York: Charles Scribner's Sons, 1985), p. 4.

18. Ontario Report,p.25; U.K. Report,p.29; Singer & Wells,pp.8-12.

19. Ontario Report, p. 25.

20. *Id.*

21. AFS Report, p. 53S. The creation of embryos in the laboratory that are discarded or frozen for indefinite periods of time poses profound ethical and legal questions about the status of the embryo. Those questions are outside the scope of this Report.

22. *Id.,* p. 47S.

23. *Id.,* p. 48S.

24. *Id.,* pp. 47-48S.

25. *Id.,* p. 32S; U.K. Report, p. 29.

26. AFS Report, p. 33S.

27. Carolyn Coulam, "Freezing Embryos," *Fertility and Sterility*, Vol. 42, No. 2 (Aug. 1984), pp. 184-85.

28. AFS Report, p. 53S; Society of Obstetricians and Gynecologists of Canada, Reproductive Endocrinology and Fertility Committee, "In Vitro Fertilization and Embryo Transfer in Canada, [hereinafter "IVF in Canada"] *Soc. Obst. and Gyn. of Canada,* Vol. 9, No. 3 (May/June 1987), p. 18; Lancaster *et al.,* "High Incidence of Preterm Births and Early Losses in Pregnancy After In Vitro Fertilization,"Brit. *Med. Journal,* Vol. 291 (Oct. **1985)** , p. 1160.

29. AFS Report, p. 53S; *see also,* Ontario Report, p. 26.

30. *See,* e.g., Lancaster *et al,* p. 1162; Peter Paterson and Clement Chan, "What Proportion of Couples Undergoing Unrestricted In Vitro Fertilization Treatments Can Expect to Bear a Child?"/, *of In Vitro Fertil. and Embryo Transfer,* Vol. 4, No. 6 (1984), p. 334.

31. IVF in Canada, p. 19.

32. Lancaster *et al,* p. 1160.

33. IVF in Canada, p. 19, Patterson and Chan, p. 336.

34. Patterson and Chan, p. 336.

35. Grobstein, Fowler, Mendeloff, "External Human Fertilization: An Evaluation of Policy, "Science, Vol. 222 (1983), p. 130.

36. AFS Report, p. 65S.

37. Case Western Reserve University School of Medicine, *Center for Biomedical Ethics,* Vol. 2, Issue 2 (Spring 1987), p. 1.

38. *See, e.g.,* New York State proposed law S-1429. Lori Andrews, "The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood," *Hastings Ctr. Report* (Nov. 1987), p. 31.

39. As established at trial, Mrs. Stern was not infertile. She had multiple sclerosis and feared that pregnancy would pose a serious health risk. On appeal, the New Jersey Supreme Court recognized that her anxiety was genuine but that it "appears to have exceeded the actual risk, which current medical authorities assess as minimal." *Matter of Baby M,* 537 A.2d 1227, 1235 (NJ. 1988).

40. *See, e.g.,* Katha Pollitt, "The Strange Case of Baby M," *The Nation* (May 29, 1984), p. 1; Sidney Callahan, "Lovemaking and Babymaking; Ethics and the New Reproductive Technology," *Commonweal* (April 24, 1987), p. 233; Paul Ramsey, "Shall We Reproduce *TJAMA,* Vol. 220 (June 12,1972), p. 1480.

41. Rita Arditti, Renate Klein, and Shelley Minden, (eds.), *Test-Tube Women* (London: Pandora Press,1984), p. 431.

42. Edward Rynearson, "Relinquishment and its Maternal Complications: A Preliminary Study," Vol. 139 (1982), p. 338; Eva Deykin, Lee Campbell and PatriciaPatti, "The Post-Adoption Experience of Surrendering Parents," *Am. /. of Orthopsychiatry,* Vol. 54 (1984), p. 271; Campbell and Patti, p. 272.

43. Dan Goleman, "Motivations of Surrogate Mothers," *New York Tunes* (Jan. 20,1987), p. 1C.

44. Philip Parker, "Motivation of Surrogate Mothers: Initial Findings," *Am. /.Psychiatry,* Vol. 140, No. 1 (Jan. 1983), p. 117.

45. *Id*

46. *Id.*

47. *Id.;* Darrell Franks, "Psychiatric Evaluation of Women in a Surrogate Mother Program, *"Am. /.Psychiatry,* Vol. 138, No. 10 (Oct. 1981), p. 1379.

48. Lori Andrews, *New Conceptions* (New York: St. Martin's Press, 1984), pp. 207-208; Goleman, p. 2C.

49. Parker, p. 118.

50. R. Miller, "Surrogate Parenting: An Infant Industry Presents

Society with Legal, Ethical Questions," *Obstetrics and Gynecological News,* No. 3 (1983), p. 18.

51. Personal communication with Dr. Elisabeth Aigen, Director of the Surrogate Mother Program of New York, Apr. 14,1988.

52. *Id.*

53. Personal communication with Joan Brover, Administrator of the Infertility Center of New York, Mar. 21,1988.

54. *See* n. 51, *supra*

55. *See* n. 53* *supra.*

56. *See* n. 51, *supra.*

57. *See* nn. 51 and 53, *supra.*

58. *See* n. 53, *supra..*

59. *See* n. 51, *supra.*

Three

Applying New York Family Law to Surrogate Parenting

Legal questions about surrogate parenting arrangements, although novel in many respects, nonetheless arise in the context of a well-developed body of family law. The Legislature and courts of this State have long confronted questions involving parental rights and obligations, custody determinations, adoption, and the involuntary termination of parental status, le principles forged with respect to these matters reflect societal norms id expectations about parenthood and the interests of children. They are directly pertinent to central issues raised by surrogate parenting. In particular, rules about surrogate parenting will necessarily reflect the two dominant — and occasionally conflicting -- themes sounded in all matters involving the care and custody of children: protection of the fundamental right of a parent to rear his or her child and promotion of the child's best interests. This Chapter examines basic New York family law principles concerning the parent-child relationship and the application of those principles to surrogate parenting arrangements.

Parental Status

Ordinarily, the legal status of parent is achieved the traditional way - through the sexual union of husband and wife, resulting in the wife's pregnancy and subsequent birth of a child. The legal status of both parents, documented by the birth certificate, recognizes the biological and social relationship of the couple to their child. Of course, children are frequently born under circumstances that do not conform to this pattern, raising problems in identifying the child's parents.

Establishing Maternity

Identification of a child's natural mother has rarely been disputed. Labor and birth unequivocally establish the mother's gestational - and until recently, genetic -- relationship to the child.[2] The natural mother is invariably deemed the child's legal mother, unless and until that status is changed through her consent to the child's adoption or by the termination of her parental rights because of unfitness.

Children Born In Wedlock. Determining fatherhood is more problematic. Various doctrines have emerged that resolve paternity as a legal matter, although sometimes at the expense of biological accuracy. First, when a child is born to a married woman, the child is presumed to be the legitimate offspring of the woman and her husband? This presumption is referred to in judicial decisions as "one of the strongest and most persuasive known to law."[4] Nevertheless, it can be rebutted by clear and convincing proof of non-access by the husband, or by blood tests that establish nonpaternity of the husband. The presumption has often been overcome in cases where a wife refutes her husband's paternity to prevent him from obtaining custody or visitation[6] or to obtain support from someone other than her husband.[7]

Beginning in 1948, New York courts issued a series of conflicting decisions on paternity questions raised by the practice of artificial insemination by donor (AID).[8] The Legislature addressed the issue in 1974 by enacting Domestic Relations Law § 73? The statute provides that a child born to a married woman through artificial insemination performed by a physician, with the consent of the woman and her husband, "shall be deemed the legitimate and natural child of the husband and his wife for all purposes."[10] While the statute does not resolve all questions of paternity and legitimacy raised by AID,[11] it achieves the parties' intent and protects the interests of children in the most common AID scenario, where a married woman is inseminated and bears a child that she and her husband intend to raise.

Children Born Out of Wedlock. When a child is born to an unmarried woman, no male is automatically given the legal status of father. If both the mother and father acknowledge the father's paternity, the father's name may be noted on the child's birth certificate or in a central registry, and that person will be deemed the legal father.[12] When paternity is disputed, the matter must be resolved by adjudication.

A proceeding to establish paternity may be brought in Family Court by either the mother, a Social Services agency or the "putative" father, i.e., the man claiming to be the father.[13] By statute, the proceeding may be brought during the woman's pregnancy or after birth. Paternity may also be established in other proceedings, such as a declaratory judgment, habeas corpus or divorce action in State Supreme Court. Ordinarily, such proceedings are brought by the unwed mother to obtain an order of support against le putative father. However, a putative father may also seek to establish is paternity as a step toward obtaining custody, visitation or other parental rights.

The right of a putative father to establish his paternity against a woman who conceived the child while she was married to another man is less certain. Courts are notably reluctant to impose the stigma of illegitimacy upon children and generally strive to find a basis to dismiss the claim or limit the effect of the judgment for the putative father.[16] Indeed, some states have expressly barred such claims as against public policy, raising constitution- l disputes with varying results. Nevertheless, in New York it is possible)r a putative father, using blood tests or other evidence, to overcome the resumption that the child is the legitimate offspring of the mother and her husband, and to establish his paternity.[18]

Parental Rights and Responsibilities

Custody

The primary legal and natural right of a parent is to "custody" of his or her child, which embraces the right to the companionship, care and management of the child. Wife and husband enjoy this right jointly.[19] If the marriage breaks down and a custody dispute arises, neither parent has presumptive right to custody.[20] Instead, the court must determine custody on the basis of "the circumstances of the case and of the respective parties and… the best interests of the child."[21] Custody disputes between natural parents of a child born out of wedlock are also decided on best interests grounds, with no presumption in favor of either parent.[22]

In deciding the child's best interests, a broad range of factors are relevant and there are no absolutes.[23] A court may properly consider:

- demonstrated love and affection for the child;
- demonstrated parenting skills;
- ability to provide material advantages;
- the child's educational and career prospects;
- intent to instill moral and religious values;
- amount of rime the parent can devote to the child;
- avoiding disruption of existing custody arrangements;
- parental unfitness, i.e., past abuse or neglect, past immoral or criminal behavior;
- avoiding the separation of siblings; and
- the child's preferences.

While the financial status of each parent is a relevant factor, the New York Court of Appeals has emphasized that a child's best interests are not controlled by whether one parent or the other "would afford the child a better background or superior creature comforts."[25] Moreover, courts can reduce the significance of this factor by requiring the wealthier parent to provide the other with additional funds to raise the child.[26]

Custody disputes between parents arise in a variety of circumstances. A dispute may be triggered by the parents' divorce, a change in one divorced parent's circumstances, a custody battle between unmarried parents, or a natural parent's revocation of consent to adoption. The relevance or weight of particular factors in the best interests determination varies depending upon the circumstances.

Other Parental Rights and Responsibilities

Custody is only one, although the most significant, right associated with parenthood. Other parental rights include the right to name the child, to give or withhold consent to the child's adoption, to inherit from a deceased child and to receive government or insurance benefits as a result of a parental relationship to the child. Noncustodial parents may also assert a right of visitation — the right of access to one's child. New York courts have consistently held that a parent who has been denied custody should be afforded visitation in all but exceptional circumstances.[27]

Decisions over the past decade by the United States Supreme Court have dramatically expanded the parental rights of unwed fathers.[28] Specifically, the Court has held that an unwed father has a right to retain custody of his children after the death of the children's mother [29] He also has a right to prevent the mother from unilaterally consenting to their children's adoption.[30] However, the Court has emphasized that parental rights in relation to children born out of wedlock "do not spring full-blown from the biological connection," but derive instead from a combination of biological connection and demonstrated willingness to assume parental responsibility.[31] Thus, under New York law, a putative father who has failed to maintain a substantial and continuous relationship with his child does not have the right to consent or withhold consent to the child's adoption.[32]

Parental status also entails legal obligations. A custodial parent has a

duty to care for, protect and educate the child.[33] Moreover, a non-custodial parent remains liable for the child's support: the duty to pay a fair and reasonable sum, consistent with his or her means, for the child's care, maintenance and education.[34] The support obligation may be set independently of the right of visitation; a court may order one without ordering the other. By statute, interference with a noncustodial parent's visitation rights is not a defense to an action to enforce that parent's child support obligations.[36]

Agreements by private parties are regarded by courts as "a weighty factor" in disputes concerning custody, visitation or support.[37] However, no such agreement will be approved or enforced unless the court is satisfied that it serves the child's best interests.[38] Indeed, a central tenet of New York family law is that a court has an overriding obligation to protect the child's best interests and is not constrained by any private agreement about parental rights and obligations that is contrary to those interests.[39]

Adoption

As set forth in the New York Domestic Relations Law, adoption is "the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and responsibilities of parent in respect of such other person."[40] Adoption did not exist at common law and was entirely created by statute. Adoption statutes were designed to benefit children in need of parents.[41]

Who Can Adopt and When

The Domestic Relations Law permits married couples or unmarried adults to adopt.[42] Husband and We must adopt together, unless one is adopting the other's child.[43] Although single adults can adopt,[44] unmarried couples cannot jointly adopt a child under New York law [45] The opportunity to adopt is available to persons without regard to their ability to have natural children.

A child cannot be adopted before birth, nor can the legal steps required for adoption effectively occur until the child is born.[46] Thus, the natural mother's consent to the adoption or surrender of her child to an agency for the purpose of adoption is not legally valid or binding unless given after the child's birth.

Adoption Process —An Overview

Adoption in New York may be accomplished by one of two means:

- *Authorized agency adoption:* an adoption arranged by a public or private agency set up for the care, custody and placement of children and prospective adoptive parents and licensed by the State, with subsequent judicial approval; or
- *Private placement adoption:* a private transaction between individuals, with subsequent judicial approval.

In both types of proceedings, the determinative standard used by the courts to evaluate the adoption is the best interests of the child.[47] An adoption that does not meet this criterion will not be approved, regardless of the agreement or expectations of the parties or their compliance with the formalities of the adoption law.

Authorized Agency Adoptions

An "authorized agency" is either a public agency empowered by statute to place children for adoption or a private agency incorporated and approved by the Department of Social Services for that purpose.[48] Currently in New York, 58 county agencies and 85 private agencies are authorized to arrange adoptions.[49]

Authorized agencies are permitted to arrange adoptions for children who have been committed to their custody through one of two methods: (i) voluntary surrender by the natural parents; or (ii) commitment by court order, based on a finding of abandonment, permanent neglect or severe and repeated abuse.[50]

Parents surrender their child to an authorized agency by signing a "surrender instrument" before a judge or a witness. The instrument must be signed by: (i) the child's mother; and (ii) the father, if the child was born in wedlock or if the father maintained a substantial relationship with the child [51] Although arrangements for adoption are sometimes initiated prior to birth, the surrender is of no effect unless the instrument is signed after the child's birth.[52]

The surrender instrument may, and usually does, contain a "30-day notice" provision informing the parent that he or she may not revoke the surrender or regain the child if the child has been placed in an adoptive home and more than 30 days have elapsed since the execution of the surrender instrument.[53] If the parent revokes the surrender within the 30-day period but after the child is placed in an adoptive home, custody is determined on the basis of the best interests of the child, with no presumption in favor of either the natural or adoptive parents.[54]

The Social Services Law prescribes procedures for committing a child to the guardianship and custody of an authorized agency, or to a foster parent, without a voluntary surrender by the child's parents [55] A court

order, based on a finding of abandonment, mental illness, permanent neglect or abuse, frees the child for adoption.[56]

Once the child is committed to an authorized agency, the agency strives to locate adoptive parents. When it finds a suitable couple, the prospective adoptive parents commence an adoption proceeding, which involves several steps. The adoptive parents must: (i) file an adoption petition with the court; (ii) present all required consents or facts which render such consents unnecessary; (iii) provide notice to various interested persons; (iv) appear before the court for an examination; (v) care for the child during a probation period; (vi) undergo an inspection of the adoptive home; and finally (vii) obtain an order of adoption. In addition, the authorized agency must provide the court with extensive information about the case.

Private Placement Adoptions

Private placement adoptions are often initiated in an informal manner. An expectant mother may ask a relative, physician or other person to help her find adoptive parents. The adoptive parents, usually with an attorney's assistance, must then undertake the complex procedure to obtain an adoption order.

Required Consents. As a first step, the adoptive parents must obtain consent to the adoption from the following persons: (i) the mother, (ii) the father, if the child was born in wedlock, or if the father maintained a substantial relationship with the child; (iii) the child, if he or she is over fourteen years old; and (iv) any person or authorized agency that has lawful custody of the child, such as a foster parent[57]

The person whose consent is required may execute either a judicial or an extrajudicial consent.[58] A judicial consent is executed or acknowledged before a judge and is irrevocable upon execution.[59] At the time the consent is given, the judge will inform the natural parent of the consequences of the consent.[60] An extrajudicial consent must be signed before a notary and must state that it may be revoked within 45 days of execution.[61] It must also explain the limited effect of such revocation, as discussed below.

Revocation of Consent In 1972, the New York Legislature revised the adoption statutes, making drastic changes in the rules governing a natural parent's revocation of consent. Prior to 1972, a natural parent who revoked consent within a specified period could regain custody as long as he or she

was fit, competent, and able to duly maintain, support, and educate the child. That rule was changed largely as a result of the public outcry following the "Baby Lenore" case.[63] In that case, a court restored custody of a child to the natural mother despite the fact that the child had been living with the adoptive parents for eight months at the time of the mother's revocation, and had become an integral part of the adoptive family.

The 1972 statutory changes were designed to give greater protection to the child and the prospective adoptive parents by making the child's best interests, rather than the natural parent's fitness, the determinative factor in a revocation-of-consent proceeding. The amendments also explicitly eliminated the traditional presumption that a child's best interests are served by giving custody to the natural parent. As the statute now provides, "[T]here shall be no presumption that such interests will be promoted by any particular custodial disposition."[64] Many commentators remain critical of these changes, contending that they unduly impair a natural parent's right to rear his or her child.[65]

Currently, if a natural parent who consented to a private adoption files a revocation notice within 45 days of his or her consent, the following rules apply: (i) if the prospective adoptive parents do not oppose the revocation, the parent has a right to regain custody; (ii) if the prospective adoptive parents oppose the revocation, the court must hold a hearing to determine whether the child's best interests would be served by returning the child to the natural parent, continuing the adoption proceeding, or some other disposition.[66] A natural parent may also regain custody from adoptive parents by establishing that the original consent did not comply with statutory requirements or that it should be set aside due to fraud, duress or coercion in the execution or inducement of consent.[67]

Private Placement Adoption Procedure

To commence an adoption proceeding, the prospective adoptive parents must file an adoption petition in the appropriate court.[68] The petition must provide extensive information about the adoptive parents, the adoptive child and the manner in which the adoptive parents obtained the child.[69]

After the court receives an adoption petition, it must order an investigation of the adoptive home by a "disinterested person," usually a court clerk or adoption agency.[70] The purpose of the investigation is to verify the truth of the allegations in the petition, to ascertain is a proper subject for adoption and to determine whether the petitioner's home is suitable for the child. In general, the court can not issue an order of adoption until six months after receipt of the petition.[71] Step-parent adoptions are not subject to this waiting period.[72]

The order of adoption approves the adoption and directs that the child is to be regarded and treated in all respects as the child of the adoptive parents.[73] The order also constitutes the final termination of parental rights and obligations of the natural parents.[74] Thus, the natural parents no longer have a duty to support the child, and ordinarily have no right to visitation.[75] The adoption order may also include an injunctive provision prohibiting interference by the natural parents.[76] The adoption order and all adoption papers are kept under seal and remain confidential except under limited circumstances.[77]

Payment or Receipt of Fees

The Social Services Law prohibits any person or agency, other than an authorized agency, from receiving or paying compensation in connection with the placing out or adoption of a child.[78] The prohibition, aimed primarily at unauthorized agencies and brokers, was enacted "to prevent trafficking in babies, the buying and selling, in effect, of human beings."[79] Violation of the provision is a misdemeanor for the first offense and a felony for subsequent offenses.[80]

However, adoptive parents are permitted by statute, in private placement adoptions, to pay the child's mother or others for medical fees, hospital charges and other incidental expenses arising from the pregnancy, birth and care of the adoptive child.[81] The statute also permits adoptive parents to pay an attorney for legal assistance in arranging the adoption. Both the adoptive parents and attorney must present affidavits to the court setting forth and justifying the payments.[83] Frequently, the court will approve some payments to the natural parent and attorney and disallow others.[84]

Terminating Parental Rights

Parents possess a fundamental right to raise their children.[85] As mandated by the constitutional guarantee of due process, a state cannot terminate parental status unless it has a compelling basis for doing so.[86] A parent cannot be displaced merely because some other person could better rear or provide for the child; the state must prove that the parent is unfit.[87]

New York law provides for the involuntary termination of parental rights only if a court has found, based on clear and convincing evidence, that one of the following grounds exists: (**1**) abandonment; (ii) mental disability; (iii) permanent neglect; or (iv) severe and repeated abuse.[88]

Termination proceedings employ rigorous standards and procedures.

For example, a proceeding to establish permanent neglect cannot be commenced until the child has been in the care of an authorized agency, either in an institution or foster home, for at least one year. The parent is then entitled to an initial "fact-finding" hearing, with a court-appointed attorney, at which the state must produce clear and convincing evidence of "permanent neglect," i.e., that the parents "failed for a period of more than one year substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the state's diligent efforts to encourage the relationship."[89] If the requisite finding is made, the court must then hold a "dispositional" hearing to determine whether the termination of parental rights or some other order would serve the child's best interests.

Upon issuance of an "order of disposition" terminating a parent's status, the parent loses the right of custody and visitation and the obligation to support the child. Moreover, the state may arrange for the child's adoption without further consent or involvement by the parent. Upon adoption, all legal relationship between the former parent and the child is severed.

Family Law Principles and Surrogate Parenting

A discussion of the legal status of surrogate parenting in New York necessarily involves some conjecture. No statute specifically addresses surrogacy and few court decisions in New York are directly pertinent. There have been, however, a few major court decisions in other states regarding surrogate parenting — notably the New Jersey Supreme Court decision in *Matter of Baby M?* Moreover, there is a large body of legal commentary that informs the discussion.[92]

Several key legal questions arise about surrogate parenting agreements. Are the agreements prohibited by laws against baby selling? Are they enforceable? If not, how are parental status and custody of the resulting child to be determined?

Laws Against Baby Selling

The threshold question is whether surrogacy agreements violate the prohibition against "baby selling" under New York law. As noted above, it is unlawful for any person to pay or to be paid for "the placing out or adoption of a child or for assisting a parent in arranging for the placement of the child for the purpose of adoption."[93]

Twenty-six other states also have laws prohibiting monetary inducements for adoption.[94]

Defenders of surrogate parenting contend that prohibitions against baby selling do not apply to the arrangements.[95] Among other reasons, they suggest that the practice does not fall within the prohibition because the mother is being paid for providing a "service," i.e., the use of her womb, rather than a "product," i.e., a baby.

Others maintain that both the letter and spirit of baby-selling laws apply to the agreements.[96] They contend that such laws were enacted, in large part, to prevent the emergence of a market in babies. They also consider it disingenuous to characterize the surrogate's function as a "service," since the intended parents do not desire a pregnancy, but a healthy, genetically-related baby.

In *Matter of Baby Girt LJ.*, the only New York decision to address this issue, a lower court held that the prohibition against paying for a child to adopt does not foreclose payment to a surrogate.[97] The court stated that the statute was designed to prevent "baby brokers" from using financial incentives to coerce expectant mothers to part with their children. It suggested that surrogacy did not raise these concerns because the agreement is entered into before conception.

The Supreme Court of Kentucky, in a 1986 decision, *Surrogate Parenting Associates, Inc*. v. *Commonwealth ex rel. Armstrong,* similarly held that surrogate parenting contracts do not violate that state's prohibition against purchasing a child for adoption.[98] The Court concluded that surrogate parenting was analogous to artificial insemination, which is clearly lawful. Significantly, the Court emphasized that the contract, even though not unlawful, was voidable by the surrogate. In contrast, the Supreme Court of New Jersey and the Court of Appeals of Michigan have ruled that paying a surrogate violates state laws against baby selling.[99] In its *Baby M* decision, the New Jersey Supreme Court strongly rejected the "payment for services" characterization, stating:

> It strains credulity to claim that these arrangements, touted by those in the surrogacy business as an attractive alternative to the usual route leading to an adoption, really amount to something other than a private placement adoption for money.[100]

The Court emphasized that many of the negative consequences of baby selling are potentially present in the surrogacy context, especially the placement of a child

without regard to whether the purchasers will be suitable parents.[101] Opinions by attorneys general in Louisiana, Ohio and Oklahoma also state that surrogate parenting agreements, in at least some variations, violate state laws against baby selling.[102]

Surrogacy agreements might also be found invalid on the ground that they conflict with comprehensive statutory schemes governing private adoptions and the termination of parental rights. The agreements purport to set parental status and custody without compliance with the substantive standards and procedural protections embodied in the statutory schemes. The Baby M court relied on the violation of New Jersey's statutes on adoption and termination of parental rights as an independent basis for invalidating the surrogacy contract.[103]

Uncontested Surrogate Parenting Arrangements

Assuming that a surrogate parenting agreement is not expressly barred by the prohibition against baby selling, the question arises whether the objective of the agreement may be accomplished. In addressing this issue, a distinction must be made between instances where the parties seek to carry out the agreement - the "uncontested surrogate parenting arrangement" - - and cases where the surrogate changes her mind and wants to keep her child — the "contested surrogate parenting arrangement."

Under New York law, in the uncontested surrogate parenting arrangement, no issue would ever arise about enforcing the contract. The transfer of the child and recognition of the intended parents' relationship to the child could be accomplished through existing family law procedures: a finding of paternity and consent to the adoption by the surrogate.

If the surrogate is unmarried, the intended father's name can be entered on the birth certificate when the child is born.[104] If the surrogate is married, however, a judicial determination of paternity is required before the birth certificate can list anyone other than her husband. Thus, the intended father would have to commence a paternity proceeding, during pregnancy or after the child's birth, to establish his paternity.[10]

Cases in other states demonstrate that the presumption identifying the surrogate's husband as the legal father may not be easy to overcome, even where all parties are willing to disregard it.[106] However, statutory and caselaw differences make it likely that such difficulties would be overcome in New York, at least in undisputed cases.[107]

Assuming the intended father can establish his paternity, his wife's legal status as the child's parent can then be established through the statutory procedure for private adoption. Under this procedure, the intended mother would petition for step-

parent adoption, attaching the surrogate's post-birth consent to the petition. If the intended father did not previously establish his paternity, he can simply join in the adoption petition.

As in any adoption proceeding, the court's final decision depends upon a finding that the adoption serves the child's best interests. As a practical matter, however, the court has little alternative but to approve the adoption; withholding approval would leave the child in the custody of the natural father and his wife, without establishing the wife's legal relationship to the child.

Two lower court decisions in New York illustrate the application of family law principles to the uncontested surrogacy arrangement. In a 1986 case, *Matter of Baby Girl* LJ.,[108] a couple sought court approval of the wife's adoption of a child, and disclosed to the court their surrogate parenting agreement with the child's natural mother. The court expressed concern about the moral issues raised by the surrogate parenting contract. It nevertheless granted the adoption petition, reasoning as follows:

> The reality is that the child is in being and of necessity must be reared by parents. The court, being confronted with the facts presented, has found that the child should be raised as the child of his natural father and the latter's spouse since by court investigation it has been found that it would be in the best interests of the child to approve the adoption. No other alternative, such as denying the adoption for the purpose of discouraging such procedures, is appropriate here. This child needs a home and, under the circumstances, the home must be that of the petitioners.[109]

In a 1987 family court case, *S.M.* v. *R.P.*,[n0] a surrogate, during her pregnancy, sought an order establishing the paternity of the intended father, who had provided the sperm for her artificial insemination. The surrogacy arrangement in this case was a noncommercial, intrafamily matter. The surrogate and the intended mother were sisters.

The court noted that the surrogate's husband expressly waived his right to claim paternity under the New York artificial insemination statute. Finding that the intended father's paternity was supported by the evidence and was uncontrovcrted, the court issued an order establishing the intended father's paternity. It noted, however, that the paternity order did not resolve the separate questions regarding custody or adoption by the intended mother, questions not then before the court.

Viewed together, *Adoption of Baby Girl, LJ.* and *S.M. v. R.P.* demonstrate that existing family law principles are being used to achieve the objectives of the parties

to surrogate parenting agreements, so long as no party renounces the agreement.

Contested Surrogate Parenting Arrangements

The most significant potential dispute regarding surrogate parenting arrangements occurs when the natural mother asserts her parental rights over the child - the dispute presented in the Baby M case. This dispute could arise during the mother's pregnancy, upon the child's birth, or even after the child is given to the intended parents.

Enforceability of the Contract. Initially, the dispute will focus on whether the surrogate's contractual agreement to give up her child can and should be enforced. The chief legal contentions advanced to support enforcing the contract arc: (i) no statute prohibits persons from making such arrangements by contract, nor is there any established public policy against such arrangements; and (ii) the constitutional right to privacy, specifically the right of procreative liberty, confers on infertile couples the right to retain a woman's services to assist them in procreation and to have the state enforce the agreements.

The validity and enforceability of surrogate parenting contracts have been challenged on the following grounds: (i) the state's paramount obligation to protect the interests of children overrides any private agreement involving parental rights and child custody; (ii) the contracts violate public policy against baby selling, even if they fall outside the express terms of the statutory prohibition; (iii) a court may terminate parental rights only pursuant to existing statutory bases, i.e., adoption or determination of unfitness; and (iv) a mother's constitutional right to maintain ties with her child cannot be waived in advance of the child's birth.

The Baby M case is the leading case on the validity of surrogacy contracts. The intended parents, William and Elizabeth Stern, sought judicial enforcement of surrogate Mary Beth Whitehead's contractual promise to relinquish all parental rights over the child. The trial court would have enforced the contract, but the Supreme Court overruled it and invalidated the contract.

Specifically, the New Jersey Supreme Court ruled that the surrogacy contract violated state laws barring payments in connection with adoptions, as well as statutory standards for terminating parental rights and consenting to adoptions. [2] It further held that the contract conflicted with several public policies of New Jersey, including its policy of awarding custody on the basis of a child's best interests.[113] Finally, the Court rejected the argument that the intended father's constitutional right to procreate gives him any exclusive custody rights after the child's birth.[114]

Due to the prominence of the New Jersey Supreme Court and the persuasiveness of its reasoning, the Baby M decision is likely to influence the development of judicial responses to surrogacy in other states, at least in the absence of legislation. However, the decision is not a binding precedent anywhere except in New Jersey.

In New York, the ability to enforce a surrogate parenting agreement is uncertain. The lower court, in *Matter of Baby Girl, L.J.*, stated that the surrogate parenting agreement was "voidable" - that is, either party could disavow the agreement without liability.[115] However, the weight of the court's decision is limited. The decision was rendered in the course of approving an uncontested adoption petition; enforcement of the surrogate parenting agreement was not an issue in the case.

Court decisions and attorney general opinions in other states have also concluded, in cases not involving actual custody disputes, that surrogate parenting contracts would be voidable. Notably, the Supreme Court of Kentucky held that a surrogate who renounced the contract before consenting post-birth to the baby's adoption "would be in the same position vis- a-vis the child and the biological father as any other mother with a child born out of wedlock."[116]

Determination of Parental Status and Custody If Contract Is Invalid. If a custody dispute arises between a surrogate and the intended parents, a judicial decision holding the contract unenforceable will not end the controversy. The court must still confront the unresolved questions of parental status and custody. Traditional family law principles will apply to these issues.

The legal framework for resolving the dispute would be clearest in cases where the surrogate signs a post-birth consent to the child's adoption and then attempts to revoke the consent and regain her child. This case would probably be treated like any other revocation-of-adoption consent. If she revokes within 45 days of signing the consent, the court will decide parental status and custody based on the child's best interests. An attempt by the mother to revoke after 45 days would be ineffective, unless based upon fraud, duress or invalidity of the initial consent.

The case would be far more difficult if the dispute arises before the surrogate signs the consent to adoption, as occurred in the Baby M case. With genetic-gestational surrogacy, the identity of the child's legal mother is certain: it is the woman who bore the child. Assuming the surrogate parenting contract is unenforceable, and assuming there has been no post-birth consent to adoption or judicial termination of parental status based on a finding of unfitness, the surrogate must be recognized as the child's legal mother.

Identifying the father is more problematic. If the surrogate is married, her

husband can assert both the statutory presumption of paternity accorded to the husband of a woman who is artificially inseminated and the common law presumption of paternity. In most surrogate parenting arrangements, however, the parties will have taken steps to ensure that the statutory presumption does not apply.

The intended father might then be able to overcome the common law presumption of paternity by producing evidence of his paternity, i.e., blood tests and other proof of the circumstances surrounding the surrogate's pregnancy. As noted previously, courts are reluctant to illegitimize a child born to a married woman. However, there is no rule in New York that bars the intended father from establishing his paternity, and he would have a substantial chance of success in such action.

If the intended father establishes his paternity, the court would reach the heart of the dispute: a custody contest between the intended father and the surrogate. Under family law doctrines, the dispute would probably be treated as a custody dispute between the mother and father of a child born out of wedlock. In such cases, courts are directed to award custody on the basis of the child's best interests, without a presumption in favor of either parent.[117] Ascertaining the child's best interests will be particularly difficult in surrogacy-related disputes since neither parent will have a long-term relationship with the infant.[11]

Regardless of outcome, an award of custody to a parent in such disputes would not terminate all parental rights and obligations of the noncustodial parent. The court may, in its discretion, grant visitation rights to, and order support payments by, the noncustodial parent. Moreover, the noncustodial parent and child retain mutual inheritance rights. The noncustodial parent also has the right to consent or withhold consent to the child's adoption, as well as other parental rights. Under current family law principles, these attributes of parenthood cannot be terminated without the parent's consent to adoption or a court order of termination based on a finding of unfitness. Consequently, until one of those bases exists, the custodial parent's spouse cannot establish a legal parental relationship with the child.

Thus, a court might award custody of the child to the intended father, but permit visitation by the surrogate. Indeed, in the Baby M case, the New Jersey Supreme Court issued just such a ruling, though it remanded the case to a lower court for a decision on the scope of visitation.[119] Conversely, the court might award custody to the surrogate and order the intended father to make support payments. Indeed, the ability to fashion a support order enables a court to negate the respective wealth of the parties as a factor in making its best interests determination.

Gestational Surrogacy. In the gestational surrogate parenting situation, two women claim maternity based on their respective biological connection to the child: the intended mother provided the gamete and the surrogate carried the baby to term.

A dispute about which woman is the legal mother raises a novel question of law, not yet addressed by any court. The dispute reflects an ageless debate on the relative importance of nature and nurture.

The legal outcome of such a dispute is uncertain. In a 1986 Michigan case, *Smith* v. *Jones*, a lower court allowed an ovum donor to establish her maternity in a proceeding brought under the state's paternity statute.[120] In that case, however, the gestational mother did not assert a competing claim to maternity.

In future cases, courts may well treat a genetic mother as a female counterpart to a putative father. Thus, a genetic mother could establish her maternity and, if successful, seek custody or visitation rights with respect to the child. Conversely, the gestational mother could bring a maternity suit against the genetic mother, and seek an order of support. An anonymous ovum donor would be analogous to an anonymous sperm donor - she would acquire no rights or responsibilities with regard to the resulting child.

Alternatively, a court confronted with competing claims of maternity might simply choose one woman as the legal mother, denying the other any rights and responsibilities with respect to the child. In making its choice, the court might focus upon the best interests of the child.[121]

Other Contractual Disputes* Disputes regarding parental status and custody are not the only conflicts that can arise out of a surrogate parenting contract. The contracts typically bind surrogates to a host of other obligations, primarily relating to medical care. Generally, the contracts require surrogates to: (i) refrain from alcohol, tobacco, drugs and risky activities during pregnancy; (ii) obtain specified pre-natal care; (iii) undergo amniocentisis or other prenatal diagnostic procedures; and (iv) to abort or not abort the fetus under circumstances specified in the contract* These provisions raise significant questions about the extent to which a woman may contract away her constitutional right to bodily integrity, and the extent to which a court will enforce contractual promises about such personal matters.

Agreements about abortion are likely to be deemed unenforceable. Even the trial court in the Baby *M* case, which upheld the surrogate parenting contract, invalidated the surrogate's waiver of her right to decide about abortion.[123] While the intended parents cannot force compliance with these terms, they may be able to obtain monetary damages or release from their own duties under the contract if the surrogate breaches any of these terms in the agreement.

Litigation may also arise if the intended parents breach their contractual obligations. For example, they may fail to pay the surrogate's fee or the costs of services to the surrogate, such as medical fees, attorney fees, psychological counseling or insurance. Moreover, surrogate parenting contracts ordinarily bind the intended father and mother to accept responsibility for the newborn regardless of the infant's condition.[124] Indeed, this obligation might be imposed on the intended parents, at least on the father, as a matter of law, regardless of any agreement to the contrary.

Surrogate Parenting Centers

Commercial surrogate parenting centers play a critical role in facilitating surrogate parenting arrangements. They locate and match infertile "clients" and willing surrogates, provide the standard contracts and arrange for the necessary medical procedures.

The legality of surrogate parenting center activity depends upon the interpretation of the state's baby-selling laws. As discussed previously, it remains unclear whether the New York statute that prohibits the acceptance of a fee in connection with arranging an adoption applies to surrogacy services. Court decisions and attorney general opinions elsewhere have found such activities to be illegal.[125]

Summary

In sum, it is uncertain whether surrogate parenting contracts are barred by the state statute that prohibits payment or receipt of compensation for placing a baby for adoption. If not, it is probable that the parties can carry out their objective of transferring the child to the intended parents by following private adoption procedures. If a dispute about parental rights arises before the surrogate consents to the child's adoption, the intended father may be able to establish his paternity through a court proceeding. As a consequence, custody would probably be determined based on the child's best interests, as in other custody contests involving unmarried parents. Regardless of the outcome, the court ordinarily will have no basis for terminating the noncustodial parent's parental status. Thus, the noncustodial parent could be given rights, such as visitation, or obligations, such as support.

NOTES

1. Confusion about maternity can arise if an child is separated from or abandoned by its mother after birth, or even later in childhood. For biblical, literary and folkloric references to instances where the identity of a child's mother is uncertain, see Kings 13:16-28 (Solomon deciding which of two women was the natural mother of a child); Sophocles, *Oedipus Cycle* (son and mother did not recognize one another); Mark Twain,*Puddin *head Wilson* (infants switched at birth); folktales about changlings.

New York Public Health Law contains special provisions for registering the birth of "foundlings," i.e., children "whose parents are unknown." N.Y. Public Health Law § 4131.

2. The issue of "bifurcated maternity," i.e., where a child has a genetic mother and a gestational mother, is discussed on pp. 47-48, *supra.*

3. *Comm >. of Public Welfare* v. *Koehler,* 284 N.Y. 260,263,30 N.E.2d 587

(1940); *Matter of Findlay,* 253 N.Y. 1, 7,170 N.E. 471 (1930)(citing cases); *State ex rel H.* v. P., 90 A.D.2d 434,457 N.Y.S.2d 488,490 (1st Dept. **1982)** .

4. *Matter of Findlay,, supra,* 253 N.Y. at 7.

5. *E.g., Bernadette C. v. Jossival Ct.* K, 128 A.D.2d 774,513 N.Y.S.2d 474 (2d Dept. 1987); *Constance G.* v. *Herbert Lewis L.,* 119 A.D2d 209,506 N.Y.S.2d 111 (2d Dept. 1986), *appeal dismissed,* 70 N.Y.2d 667,512 N.E.2d 543, 518 N.Y.S.2d 960 (1987); *Michaella MM.* v. *Abdel Monem El* G., 98 A.D.2d 464,470 N.Y.S.2d 659 (2d Dept. 1984).

6. *E.g, Sharon* G.G. v. *Duane H.H.,* 95 A.D.2d 466,467 N.Y.S2d 941 (3d Dept. 1983), *affd.,* 63 N.Y 2d 859, 472 N.E.2d 46, 482 N.Y2d 270 **(1984)** ; *Dawn B.* v. *Kevin* £>., 96 AD.2d 922,466 N.Y.S.2d 363 (2d Dept. **1983)** .

7. *E.g., Joan* G. v. *Robert W.,* 83 A.D.2d 838, 441 N.Y.S.2d 709 (2d Dept. 1981). A husband may also deny paternity in order to avoid support obligations after a divorce. *E.g., Salicco v. Salicco,* 125 Misc. 2d 137,479 N.Y.S.2d 313 (Sup. Ct., Queens Co. 1984).

8. *See Stmd v. Stmd,* 190 Misc. 786, 78 N.Y.S.2d 390 (1948)(court recognized husband's claim of paternity of AID child and granted visitation rights); *Gursky* v. *Gursky,* 39 Misc. 2d 1083,242 N.Y.S.2d 406 (Sup. Ct., Kings Co. 1963)(child born by AID is not legitimate child of husband, but husband is nonethless liable for child support due to his consent to AID procedure) v. *Anonymous,* 41 Misc. 2d 886,246 N.Y.S2d 835

(Sup. Ct., Suffolk Co. 1964)(same holding as Gursky); *In re Adoption of Anonymous,* 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sur. Ct., King's Co. 1973) (child born by AID is legitimate offspring of husband, and husband's consent is required for adoption of child).

9. L. 1974, ch. 303. The statute in its entirety states:

Section 73.
Legitimacy of Children Born by Artificial Insemination.

1. Any child born to a married woman by means of artificial insemination performed by a person duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the woman and her husband for all purposes.

2. The aforesaid written consent shall be executed and acknowledged by both the husband and wife and the physician who performs the technique shall certify that he had rendered the service.

The statute is similar to section 5 of the Uniform Parentage Act, which has been adopted in 16 states. 9B *Uniform Laws Annotated* 287,301 (1987).

10. N.Y. Domestic Relations Law § 73.1.

11. For example, the status of the husband, donor and child is unclear where where the husband did not consent, where the mother is unmarried, or where there is a technical noncompliance with the statute (e.g., omission of the required acknowledgment or certification). *See generally*, Insemination and the Law, 1982 *Brigham Young L. Rev*. 935.

12. N.Y. Public Health Law § 4135.2.

13. N.Y. Family Court Act § 522.

14. *Id.* §517.

15. *Callaghan's Family Court Law & Practice in New York* (Willmette, **II.** : Callaghan & Co., 1984), Vol. 2, Ch. 11., §§ 11.04,11.10. *E.g., State exrel. H.* v. *P.*, 90 A.D.2d 434,457 N.Y.S.2d 488 (1st Dept. 1982)(habeas corpous proceeding brought by husband to determine custody and visitation).

16. For example, courts will liberally invoke the doctrine of estoppel to bar putative fathers from overcoming the presumption of legitimacy. *E.g., Ettore v. Angela D., Ill* A.D.2d 6,513 N.Y.S.2d 733 (2d Dept. *1987)] Sharon G.G.* v. *Duane H.H., supra*.

17. *See* "Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy and Birth," 39 *Vand. L. Rev.* 597,662 n. 330 (citing statutes); Martha Field, "Surrogate Motherhood, "The Legal Issues," 4 *N.Y.L.S. Hum. Rts. Ann.* 481,532-35 (1987).

This term, the Supreme Court will hear a putative father's constitutional challenge to a state statute creating a conclusive presumption that a child conceived duringthe mother's marriage is the offspring of the mother's husband. *Michael H.* v. *Gerald D.*, 191 Cal. App. 3d 995 (Ct. App. 1987), *jurisdiction noted*, 108 S.Ct. 1072 (1988).

18. *E.g., Gorton* v. *Gorton*, 123 Misc. 2d 1034,475 N.Y.S.2d 767 (Fam. Ct., Oneida Co. 1984).

19. N.Y. Domestic Relations Law § 81.

20. N.Y. Domestic Relations Law § 240.1. *Fountain v. Fountain*, 83 A.D.2d 694,442 N.Y.S.2d 604 (3d Dept. 1981), *affd*, 55 N.Y.2d 838, 432 N.E.2d 596,447 N.Y.S.2d 703 (1982).

21. N.Y. Domestic Relations Law § 240.1

22. *E.g., Richard D. v. Wendy P*. 408 N.Y.S.2d *IT!* (2d Dept. 1978). *See also, Bliss v. Ach*, 56 N.Y.2d 995,439 N.E.2d 349,453 N.Y.S.2d 633 (1982).

23. *Eschbach v. Eschbach*, 56 N Y.2d 167,451 N.Y.S.2d 658,436 N.E.2d 1260 (1982); *Friederwitzer* v. *Frtederwitzer*, 55 N.Y.2d 89, 432 NJE.2d 765, 447 N.Y.S.2d 893 (1982).

24. *See generally, Eschbach* v. *Eschbach, supra*, 451 N.Y.S.2d at 661-62; *Callaghan's,* §§ 15:07-15:16; 42 N.Y. Jur.2d Domestic Relations §§ 344-55, 474.

25. *Bennett v. Jeffreys,* 40 N.Y.2d 543,548,356 N.E.2d821,387 N.Y.S.2d 821 (1976).

26. *E.g., Salk* v. *Salk,* 393 N.Y.S.2d 841,843,89 Misc. 2d 883 (Sup. Ct., N.Y. Co. 1975), *ajfd,* 53 A.D.2d 558,385 N.Y.S.2d 1015 (1st Dept. 1976).

27. *E.g., Weiss* v. *Weiss,* 52 N.Y.2d 170,418 N.E.2d 377,436 N.Y.S.2d 862 (1981); *Katz* v. *Katz,* 97 A.D.2d 398,467 N.Y.S.2d 223 (2d Dept. 1983). Denial of visitation is viewed by some courts as a deprivation akin to termination of parental rights, thereby warranting similarly exacting substantive grounds and procedural protections. *E.g., Franz v. United States,* 707 F.2d 582 (D.CCir. 1983).

28. *See* Nathalie Martin, "Fathers and Families: Expanding the Familial Rights of Men," 36 *Syr L. Rev.* 1265 (1986); Jennifer Rabb, "Lehr v. Robertson: Unwed Fathers and Adoption - How Much Process Is Due?," *IHarv. Women's LJ.* 265 (1984).

29. *Stanley* v. *Illinois,* 405 U.S. 654 (1972).

30. *Caban v. Mohammed,* 441 U.S. 380 (1979).

31. *Lehr* v. *Robertson,* 463 U.S. 248, 260, (1983) *quoting Caban v. Mohammed,* 441 U.S. 380,397 (Stewart, dissenting).

32. N.Y. Domestic Relations Law § 111.1(d). See, *Matter of Andrew Peter H.T.,* 64 N.Y.2d 1090,479 N.E.2d 227,489 N.Y.S.2d 882 (1985).

33. *See generally,* 46 N.Y. Jur.2d §§ 391-96.

34. *E.g.,* Family Court Act § 413 (obligation of married parent); *Id.* § 513 (obligation of parent of out-of-wedlock child). *See generally,* 46 N.Y. Jur.2d §§ 553-65,630-45,1313-28.

35. *See generally,* N.Y. Jur.2d § 363; *Callaghan's § 5:33.*

36. N.Y. Domestic Relations Law § 241. *See,* e.g., *Resnick* v. *Zoldin,* 520 N.Y.S.2d 434 (2d Dept 1987).

37. *Eschbach* v. *Eschbach, supra,* 56 N.Y.2d at 171.

38. *Id.; Friederwitzer v. Friederwitzer, supra,* 55 N.Y.2d 89 at 95.

39. *E.g., Friederwitzer v. Friederwitzer, supra,* 55 N.Y.2d 89 at 95; *Boden v.*

Boden, 42 N.Y.2d 210,366 N.E.2d 791,397 N.Y.S.2d 7 01,7031977).

40. N.Y. Domestic Relations Law § 110.

41. *Application of Anonymous,* 89 Misc. 2d 132,390 N.Y.SJ2d 779,781 (Sur. Ct., Queens Co. 1976). *See also,* Andre Derdeyn, Walter Wadlington, III, "Adoption: The Rights of Parents Versus the Best Interests of Their Children,"/. *Am. Acad Child Psychiatry,* Vol. 16, No. 2, Spring 1977, p. 1; Leo Huard, "The Law of Adoption, Ancient and Modern," 9 *Vand L. Rev.* 743,748-49(1956).

42. N.Y. Domestic Relations Law § 110.

43 .*Id*

44. *Id*

45. *Id* However, in an unusual 1981 case, a court permitted the natural father of a child born out of wedlock to adopt the child without any loss of parental rights in the natural mother, with whom he lived. *Matter of A JJ.,* 108 Misc. 2d 657,438 N.Y.S.2d 444 (Sur. Ct., N.Y. Co. 1981).

46. *Anonymous v. Anonymous,* 108 Misc. 2d 1098, 439 N.Y.S.2d 255 (Queens Co. 1981)(unborn child is not "a person" within meaning of N.Y. Domestic Relations Law § 109, which defines "adoptee" as "a person adopted." Thus consent signed by mother before birth of the adoptee is invalid.) See also, National Committee on Adoption, Adoption Factbook
(1985) at 76-85.

47. N.Y. Domestic Relations Law §§ 114,116.4.

48. N.Y. Social Services Law § 371.10.

49. Information from Department of Social Services, Adoption Division.

50. N.Y. Domestic Relations Law § 111; N.Y. Social Services Law §§ 384,384-b.

51. N.Y. Social Services Law § 384.1.

52. *See* n. 46.

53. N.Y. Social Services Law § 384.5.

54. *Id.* § 383.6. This standard is discussed on p. 38, *supra.*

55. N.Y. Social Services Law § 384-b.

56. N.Y. Domestic Relations Law § 111.2(c). See discussion of terminating parental rights, p. *40,supra.*

57. *Id.* § 111.1.

58. *Id.* § 115-b.

59. *Id.* § 115*b.2.

60. *Id.*

61. *Id.* § 115-b.4.

62. N.Y. Social Services Law § 383.1 (1972).

63. *People ex rel Olga Scarpetta* v. *Spence-Chapin Adoption Services*, 28 N.Y.2d 185,269 N.E.2d 787,321 N.Y.2d 65, *cert, denied 404* U.S. 805 (1971).

64. N.Y. Domestic Relations Law § 115-b.6(d)(v). This rule also applies in actions to determine the custody of a child surrendered for an adoption and placed in an adoptive home, where the attempted revocation is asserted within 30 days. N.Y, Social Services Law § 383.6.

65. *E.g.*, Nancy Frieden, "The Constitutional Rights of Natural Parents under New York's Adoption Statutes, 12 *NYU Rev.* L. *& Soc. Change* 617 (1983-84). *See also, Matter of Sarah K.*, 66 N.Y.2d 235,487 N.E.2d 281,496 N.Y.S.2d 384 (1985).

66. N.Y. Domestic Relations Law § 115-b.6. *See generally, id.* (McKinney 1986), Practice Commentary.

67. N.Y. Domestic Relations Law § 115-b.7. *See, e.g., Matter of Adoption ofL.*, 61 N.Y.2d 420,462 N.E.2d 1165,474 N.Y.S.2d 447 (1984)(Where natural mother never gave formal consent to adoption, custody must be restored regardless of child's adjustment to adoptive home).

68. N.Y. Domestic Relations Law §§ 112,115.

69. *Id.* §§ 1123; 115.8.

70. *Id.* § 1163.

71. *Id.* §§ 116.1.

72. *Id*.

73. *Id*. §§ 114,117.

74. *Id*. § 117.1.

75. *See Bielinsfd* v. *Hermann Ungermann, Inc.*, 103 A.D.2d 73, 479 N.Y.S.2d 585 (3d Dept. *19&4)(s\ipport); Matter of Adoption ofAnthony*, 113 Misc. 2d 26,448 N.Y.S.2d 377 (Fam. Ct., Bronx Co., 1982)(visitation).

76.46 N.Y. Jur.2d Domestic Relations § 489.

77. Domestic Relations Law § 114.

78. N.Y. Social Services Law § 374.6.

79. *Matter of Grand Jury Subpoenas Duces Tecum*, 58 A.D. 1, 395 N.Y.S.2d

645,648 (1st Dept. 1977). *See e.g., Matter of Male Infant B.,* 96 A.D.2d 1055,466 N.Y3.2d 482 (2d Dept. 1983).

80. N.Y. Social Services Law § 389.2.

81. N.Y. Social Services Law § 374.6; N.Y. Domestic Relations Law § 115.7. *See e.g., Matter of Adoption of Anonymous*, 133 Misc. 2d 741, 507 N.Y.S.2d 968 (Sur. Ct., Weschester Co. 1986); *Matter of Adoption ofAfys- sa, L.B.*, 131 Misc. 2d 755,501 N.Y.S.2d 595 (Sur. Ct., Nassau Co. 1986); *Matter of Adoption ofKendrick G.*, 114 Misc. 2d483,451 N.Y.S3d963 (Fam. Ct., Queens Co. 1982).

82. *E.g., Matter of Male Infant B.,* 96 A.D3d 1055,466 N.Y.S.2d 482 (2d Dept. 1983). On the problem of distinguishing legitimate legal fees from illicit brokerage fees, see "Babes and Barristers: Legal Ethics and Lawyer-Facilitated independent Adoptions," 12 *Hofstra L. Rev.* 933,957- 62(1984).

83. N.Y. Domestic Relations Law § 115.7.

84. *E.g., Matter of Adoption of Anonymous, supra*, (court disallowed payments by adoptive parent to natural mother to reimburse her for lost wages); *Matter of Adoption ofAfyssa, L.B., supra,* (court disallowed $ 2,000 payment by adoptive parents for used car for natural mother, and reduced payment for natural mother's expenses from $3,500 to $2,250); *Matter of Male Infant, M.M., IS Fam. L. Rep. 1305 (Surrogate's Court, Nassau Co. 1987)* (court reduced attoneys' fees); *Matter of Adoption of Anonymous,* 131 Misc. 2d 666,501 N.Y.S.2d 240 (Sur. Ct., Westchester Co. 1986)(court reduced attorney's fees and living expenses paid to natural mother).

85. *May v. Anderson,* 345 U.S. 528,533 (1953). *See Santosky* v. *Kramer,* 455 U.S. 745 (1982); *Lassiter v. Dept, of Social Services,* 452 U.S. 18 (1981)

86. *Quillon v. Walcott,* 434 U.S. 246,255 (1978); *Matter of Corey L.* v. *Martin L.,* 45 N.Y.2d 383,408 N.Y.S.2d 439,380 N.E.2d 266 (1980).

87. *Matter of Adoption of L,* 61 N.Y.2d 420, 462 N.E2d 1165, 474, N.Y.S.2d 447 *(X9M);Bennett v. Jeffreys,* 40 N.Y.2d 543,548-49,387 N.Y.S.2d 821,826,356 N.E.2d 277 (1976).

88. N.Y. Social Services Law § 384*b.4.

89. N.Y. Family Court Act §§ 614,622; N.Y. Social Services Law § 384-b.7

90. N.Y. Family Court Act § 623. See *Callaghan's,* § 13:11-1Z

91. *Matter of Baby M,* 537 A.2d 1227 (N J. 1988).

92. *See* Daniel Jacobs, "Surrogate Motherhood: A Selective Bibliography," *The Record of the Association ofthe Bar ofthe City of* Alew *York,* Vol. **42,** No. 6 (Oct. 1987) pp. 839-851.

93. N.Y. Social Services Law § 374.6. See p. 38, *supra.*

94. *See* Avi Katz, "Surrogate Motherhood and the Baby Selling Laws," 20 *Col J. of Law and Social Problems* 1,8 n. 34.

95. *E.g.,* Katz, *supra,* 18-25. "Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy and Birth," 39 *Vand. L. Rev.* 597,641-43.

96. *See,* e.g., Sherri O'Brien, "Commercial Conceptions: A Breeding Ground for Surrogacy," *65N.C.L Rev.* 127,131 n. 30 (1986); George Annas, "Baby M: Babies (And Justice) for Sale," 17 *Hastings Ctr. Rep.* 13 (June 1987).

97.132 Misc. 2d 972,505 N.Y.S.2d 813,818 (Sur. Ct., Nassau Co. 1986).

98.704 S.W.2d 209 (Ky. 1986).

99. *Matter of Baby M, supra,* 537 A.2d at 1240-42; *Doe v. Kelley,* 106 Mich. App. 169,307 N.W.2d 438 (1981),cert, *denied,* 459 U.S. 1183 (1983).

100. *Matter of Baby M, supra,* 537 A.2d at 1241.

101./d. at 1242,1248.

102. Ohio Att'y Gen. Op. 83-001 (slip op. Jan. 3,1983); La. Att'y Gen. Op. 83-869 (slip op. Oct. 18,1983); Okla. Att'y Gen. Op. 83-162 (1983). See *Kaiz,supra,* at35-37; Thomas Eaton, "Comparative Responses to Surrogate Motherhood, 65 *Neb. L. Rev.* 686,693 n. 25.

103. *Matter of Baby M, supra,* 537 A.2d at 1242-46.

104. N.Y. Public Health Law § 4135.2.

105. New York's artificial insemination statute presents a technical obstacle to this approach because it provides that the husband who consents to the artificial insemination of his wife is deemed to be the child's father. N.Y. Domestic Relations Law § 73. To overcome that obstacle, the surrogate's husband, at the time the surrogate parenting agreement is created, ordinarily signs a document indicating his refusal to consent to his wife's insemination. By this artifice, he denies that he is the father and provides the intended father with the opportunity to assert his paternity.

106. In two reported cases involving undisputed surrogate parenting arrangements, the presumption of legitimacy was an obstacle to approval of an adoption. *In re R.K.S.,* 10 Fam. L. Rep. 1383 (D.C. Sup. Ct. April 13,

1983) (court would not approve adoption by intended father's wife without blood test proof to counter presumption that child is offspring of surrogate mother's husband);//! *re Baby Girl,* 9 Fam. L. Rep.2348 (Ky. Cir. Ct., March 8,1983 (same).

107. £.g., *S.M,* v. *R.P.,* N.Y.LJ., March 25,1987 (Family Court, Nassau Co. 1987), discussed on p. 43, *supra.*

108.132 Misc. 2d 972,505 N.Y.S.2d 813 (Sur. Ct., Nassau Co. 1986).

109 Jd. at 815.

110. N.Y.LJ., March 25,1987 (Family Court, Nassau Co. 1987).

111. Other contested surrogate parenting cases that have been reported are: *Thrane* v. *Noyes*, 7 Fam. L. Rep. 2351 (March 31,1981)(in- validating contract, permitting surrogate to retain custody of her child, denying intended father visitation rights); *Yates* v. *Keane*, 14 Fam. L. Rep. 1160 (February 9,1988) (invalidating contract).

112. *Matter of Baby M, supra,* 537 A.2d at 1240-46.

113.1d at 1246-50.

114.*Id.* at 1253*55. See Chapter Four, *infra.*

115.505 N.Y.S.2d at 817.

116. Surrogate Parenting Associates, Inc. v. Commonwealth of Kentucky ex rel. Armstrong, supra, 704 S.W,2d at 213 (1986).

111. See n. 22, *supra.*

118. *See* Susan Wolf, "Enforcing Surrogate Motherhood Agreements: The Trouble with Specific Performance," 1987MYX. *Sch. Hum. Rts. J.* 375, 394-99,404-06 (1987).

119. Matter of Baby M, supra, 536 A.2d at 1261-64. Indeed, subsequent to the Supreme Court *Baby M* ruling, a lower court awarded the surrogate mother substantial visitation rights. N.Y. Times, April 7,1988, p. A-l.

120. No. 85-532014DZ (Mich. Cir. Ct., Wayne Co. March 14,1986).

121. See generally, George Annas and Elias Sherman, "In Vitro Fertilization and Embryo Transfer: Medicolegal Aspects of a New Technique to Create a Family," *11 Fam. L. Q.* 199 (1983); Shari O'Brien, "The Itinerant Embryo and the Neo-Nativity Scene: Bifurcating Biological Maternity," 1987 *Utah L. Rev.* 1; Eaton, *supra,* at 723-24.

122. See Note,"Rumplestiltskin Revisted: The Inalienable Rights of Surrogate Mothers," 1986 *Harv. L. Rev.* 1937; Carmina D'Aversa, "The Right of Abortion in Surrogate Motherhood Arrangements," 1986V. *III. U. L.Rev. 1* (1986); Eaton, *supra* at 720.

123MatterofBaby M, 217 N J. Super, 313,525 A. 2d 1128,1159, *rcv'd on other grds,* 537 A.2d 1227.

124. In one case, both the surrogate and the intended father denied responsibility for a microcephalic child borne by the surrogate. Evidence established

that the child was not genetically related to the intended father. See Andrews, "The Stork Market: The Law of the New Reproductive Technologies," *1QA.BAJ*. 50,56. (1984).

125. *See* Ohio Att'y Gen. Op. 83-001 (slip op. Jan. 3,1983)(non-licensed agency may not arrange surrogate parenting services); La. Att'y Gen. Op. 83-869 (slip op. Oct. 18,1983)(only a licensed agency may accept fees in connection with an surrogate parenting-related adoption). *But see Surrogate Parenting Associates, Inc.* v. *Commonwealth of Kentucky ex rel Armstrong*, 704 S.W.2d 209, 213 (1986)(non-licensed corporation may operate surrogate parenting services).

Four

The Constitutional Parameters3

Major questions of constitutional law overshadow any discussion of the legal status of surrogate parenting contracts. Some proponents of surrogate parenting maintain that infertile married couples, and perhaps others, have a constitutional right of "procreative liberty" that includes the right to contract with a surrogate. Conversely, other commentators contend that state enforcement of surrogate parenting contracts would infringe the constitutional right of natural mothers to rear their children. Finally, if a state permitted only some classes of citizens - such as infertile married couples - to contract for a surrogate's services, those who are denied access to the practice might claim that the policy violates the Equal Protection Clause. Any of these constitutional arguments, if judicially accepted, would define the boundaries of public policy on surrogate parenting.

This Chapter analyzes the constitutional issues raised by surrogate parenting. While the Chapter considers the relative merits of competing contentions, it does so

3 In assessing many of the novel constitutional issues posed by surrogate parenting. the Task Force relied extensively on a legal memorandum prepared by the law iirm of Whiteman, Osterman and Hanna. The Task Force extends its gratitude to the Firm and its special thanks to James Lytle for the thoughtful, incisive analysis provided.

with an important qualification: neither the United States Supreme Court nor the New York State Court of Appeals has ruled upon constitutional questions raised by surrogate parenting arrangements. The decision by the Supreme Court of New Jersey in the Baby M case provides important guidance, but is not a binding precedent for courts in New York or other states.

The Right of Procreative Liberty

The Supreme Court has identified certain fundamental rights that are implicitly protected by the Due Process Clause of the Fourteenth Amendment and other constitutional provisions.[1] Many of those rights encompass aspects of personal and familial privacy — decisions about marriage, reproduction, and child-rearing.[2] The characterization of a right as "fundamental" is significant; a state law that infringes a fundamental right is constitutional only if it can be justified by "compelling state interests" and if the statute is narrowly drawn to protect those interests.[3]

In its privacy decisions, the Supreme Court has repeatedly alluded to, and in some contexts upheld, a fundamental right of procreative liberty. In *Skinner* v. *Oklahoma*, a 1942 decision, the Court invalidated a mandatory sterilization law on the ground that the law interfered with marriage and procreation, which it regarded as among "the basic civil rights of man."[4] In *Stanley* v. *Illinois*, the Court protected a natural father's right to raise his children after his wife's death, stating that "[t]he rights to conceive and raise one's children have been deemed ... far more precious than property rights."[5] And in *Carey* v. *Population Services International*, a 1973 decision involving access by minors to contraceptives, the Court stated:

> While the outer limits of [the right to privacy] have not been marked by the Court, it is dear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, *procreation*, contraception, family relationships, and child rearing and education (emphasis added).[6]

Some commentators conclude from the rationale and expansive language in these decisions that the right to procreate encompasses a fundamental right to enter into a surrogate parenting contract and to have the state enforce the contract.[7] The

premise of this argument is that a state could not constitutionally bar a married couple from engaging in coital reproduction, except in extraordinary circumstances. Since the reasons and values that support a right to reproduce coitally also apply to noncoital, assisted reproduction, it is maintained that such activities are also protected from state interference. As stated by Professor John Robertson, a leading proponent of this view,

> [I]f the couple's right to reproduce were fully recognized, married persons would have the right... to contract with others for the provision of gametes or embryos, or gestation, with the contract settling the parties' rearing rights and duties in the resulting offspring. While the state could regulate the circumstances under which parties enter into reproductive contracts, it could not ban or refuse to enforce such transactions without compelling reason.[8]

Finally, some commentators assert that even a ban on the commercial aspects of surrogacy would be unconstitutional because it would interfere with the ability of infertile married couples to obtain assistance from a surrogate to reproduce,[9]

To date, few courts have addressed the issue. In the New Jersey Baby M case, the trial court held that the right to procreate includes a right to enter into and enforce a surrogate parenting contract.[10] On appeal, the New Jersey Supreme Court flatly rejected this premise, stating that the right to procreate does not extend beyond "the right to have natural children, whether through sexual intercourse or artificial insemination."[11] The Court thus expressly distinguished the right "to procreate" from rights relating to "custody, care, companionship and nurturing that follow birth." As it explained, those post-birth rights belong to both parents.[12]

After examining the issue, the Task Force concluded that the right to enter into and enforce surrogate parenting arrangements is not constitutionally protected. Surrogate parenting involves commercial and contractual — rather than individual - decisions and arrangements that place the rights and interests of several individuals in direct conflict. Neither existing caselaw nor the underlying principles of the cases involving the right to privacy can logically be extended to provide constitutional protection to surrogate parenting.

The common theme underlying the procreation cases is a concern with state infringement of the intimate decisions a person makes regarding his or her own body. The contraception and abortion cases address state intrusion into the profoundly personal decision of whether to use one's own body to conceive or carry a child.[13] The sterilization cases involve the same decision, coupled with a determination regarding a medically intrusive procedure affecting bodily integrity.[14]

Plainly, surrogacy is different. First, the bodily integrity of the intended parents is not at stake; instead, it is the bodily integrity of the surrogate that is compromised in the arrangement. The constitutional right claimed by the intended parents is the right to use *another* person's body, and to compel, if necessary, the forced surrender of the resulting child. It is a positive right — to command the state's assistance in procreating — as opposed to the negative right established in other cases—to be free from the state's interference in procreative decisions. When surrogacy arrangements break down, the intended parents do not seek governmental neutrality, but reliance on the state to uphold their rights to the detriment of others.

Nor do the interests of the intended parents share the attributes of decisions and actions protected as "private" in Supreme Court precedents. The arrangement is not a personal decision by an intended parent or married couple. Instead, it involves another person and use of that person's body over an extended time period. As explained by one commentator, "When the initiation, continuation and consummation of the pregnancy necessitate the acute involvement of third parties, the right of privacy acquires a bloated, oddly communal silhouette."[15]

Moreover, the intended parents' claim to procreative liberty inherently clashes with the surrogate's claim to the same bundle of rights. Thus, the trial court in the Baby *M* derision was criticized for summarily recognizing a procreative right of the biological father and his wife without even considering the possibility of a correlative right in the biological mother.[16] As stated by the New Jersey Supreme Court, "There is nothing in our culture or society that even begins to suggest a fundamental right on the part of the father to the custody of the child as part of his right to procreate when opposed by the claim of the mother to the same child."[17]

Finally, the commercial aspects of surrogacy clearly distinguish it from other constitutionally protected private acts. Constitutional protection for the right to privacy is constrained when the conduct involved takes on a commercial character. For example, although the possession of obscene material in one's home may be constitutionally protected, buying and selling obscene materials is still beyond the scope of the First Amendment.[18] Similarly, while unmarried sexual activity has been, in varying degrees, subject to constitutional protection, courts throughout the country have consistently upheld statutes criminalizing prostitution[19] Likewise, numerous states have prohibited the commercialization of private adoptions by enacting laws against baby selling.[20] No court has found such laws to violate the constitutional rights of the natural mother or of the prospective adoptive parents.

In sum, the distinctly non-private, non-individualistic nature of the surrogate parenting arrangement, its profound impact on the interests and rights of several different individuals, and its commercial aspects all bring the arrangement outside the realm of constitutionally protected fundamental rights. However, it is possible that non-commercial surrogate arrangements in which all the parties voluntarily comply with their obligations could not be prohibited, because the discrete decisions encompassed by the arrangement are protected. For example, the voluntary derision by a woman to be artificially inseminated by the sperm of a chosen donor may be constitutionally protected[21] Likewise, a non-coerced, knowing decision by a surrogate to surrender the child for adoption and a corresponding decision by the intended parents to adopt the child would also be entitled to constitutional deference. As a result, the state maybe unable to prohibit voluntary, non-commercial surrogate arrangements in which the parties exercise a combination of existing rights.[22]

The Right to Rear One's Own Child and Waiver of That Right

Another novel question raised by surrogate parenting is whether a woman can, by private contract, waive her constitutional right to rear her child prior to the child's conception and birth. Certain constitutional rights are so deeply embedded in our concept of a decent society that they cannot be relinquished by contract. For example, a person cannot irrevocably waive his or her Thirteenth Amendment rights against involuntary servitude - the courts will not force a person to honor a contract to perform labor or personal services.[23] Similarly, a defendant in a criminal case who waives procedural rights, such as the right against self-incrimination, may revoke that waiver at any time.[24]

Other constitutional rights will be deemed to be waived only under narrow circumstances, when there are assurances that the waiver was knowing and voluntary. As the Supreme Court has stated, ''[W]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[25]

In numerous decisions, the Supreme Court has recognized the fundamental right of natural parents to the care and custody of their child.[26] Even where parents are divorced or unmarried, they retain a fundamental right to a continued relationship with their natural child.[27] The state cannot interfere with that relationship except in furtherance of a compelling state interest.[28]

Some commentators contend that the right to rear one's child cannot be waived by pre-conception agreement[29] This assertion is premised on the severity of losing a

relationship with one's own child - a loss characterized by Justice Stevens as "more grievous than the loss of personal liberty by incarceration" - and on recognition of the right as a basic freedom in our society.[30] While there is little direct precedent, courts would have significant grounds for granting the right to a relationship with one's child the same stature as other rights that cannot be irrevocably waived, e.g., the right to be free of involuntary servitude or the loss of liberty by incarceration.

Although a mother may waive her parental rights by consenting to the adoption of her child, the consent is distinct from a woman's promise under a surrogacy contract.[31] Consent to adoption relinquishes a current right and therefore raises fewer concerns than an agreement to forego a fundamental right at some future time. Moreover, numerous substantive and procedural protections must be employed or the consent for adoption will not be given effect.[32]

Regulating Surrogacy: Equal Protection Issues

Since the right to enter into a commercial surrogate parenting agreement is not constitutionally protected, the state has broad latitude in devising public policy - it can prohibit, regulate, permit or encourage the practice. Even if the right to enter into the arrangements was part of the constitutionally protected right to procreate, the state could still regulate the practice, at least those aspects of the practice in which the state could assert a compelling interest. For example, the state could seek to prevent the exploitation of surrogates through statutes governing matters such as informed consent, representation by counsel and the fees paid.

Regulatory approaches to surrogate parenting raise independent constitutional questions. For example, bills proposed in New York and elsewhere to regulate surrogate parenting would authorize only infertile married couples to retain a surrogate, implicating the constitutional guarantee of equal protection.[33]

In determining whether a measure satisfies the Equal Protection Clause, courts use different levels of review, depending upon the nature of the right being impaired and the group being disadvantaged. When a "fundamental" right is infringed, or when the interest of an historically discriminated class - i.e., a "suspect" class - is

adversely affected, the court will subject the challenged measure to "strict scrutiny."[34] Under this level of review, a classification violates the Equal Protection Clause unless it is "precisely tailored to serve a compelling governmental interest."[35] By contrast, a classification that neither infringes the exercise of a fundamental right nor disadvantages a suspect class is subject only to "rational basis" review; it will be upheld if it is "rationally related to a legitimate state inter- est."[36]

Assuming there is no fundamental right to enter into a surrogate contract, restrictions based on marital status or infertility would almost certainly be upheld. Neither unmarried persons nor fertile persons are members of a "suspect class." The state therefore would only have to establish a rational basis for limiting surrogate parenting to married, infertile persons and would have little difficulty justifying the limitation against that yardstick.[37]

If however, as maintained by some, the right to enter into a surrogate parenting arrangement is a fundamental right, the state's ability to regulate the practice and restrict access to its use would be sharply curtailed. Any restrictions would be subject to a much higher level of review, the state would have to show that the restrictions serve a "compelling state interest" and that they were drawn narrowly to protect that interest. Limitations based on fertility and marital status would be more difficult to defend from that degree of scrutiny.

NOTES

1. Among those rights recognized as "fundamental" are: the right to engage in interstate travel, *e.g., Attorney General v. Soto-Lopez,* 476 U.S. 898, 106 S.Ct. 2317 (1986); the freedom of association, *e.g., NAACP* v. *Alabama exrel. Patterson,* 357 U.S. 449,460-61 (1958); the right to vote, *e.g., Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966); and rights relating to personal privacy, n. *2, infra. See generally,* John Nowak, Ronald Rotunda, J. Nelson Young, *Constitutional Law,* (Minneapolis: West Publishing Company, 1984) pp. 418-20,457*61,593-94.

2. *See Turner* v. *Safley* U.S. , 107 S.Ct. 2254 (1987)(marriage); *Loving v. Virginia,* 388 U.S. 1 (1967)(same); *Carey* v. *Population Services International,* 431 U.S. 678 (1977) (contraceptives); *Eisenstadt* v. *Baird,* 405 U.S. 432 (1972)(same); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965) (same); *Roe* v. *Wade,* 410 U.S. 113 (1973) (abortion); *Skinner v. Oklahoma,* 316 U.S. 535 (1942)(sterilization); *Lehr* v. *Robertson,* 463 U.S. 248 (1983)(parental rights); *Santosky* v. *Kramer,* 455 U.S. 745 (1982)(same); *Quilloin* v. *Walcott,* 434 U.S. 246 (1978)(same); *Stanley* v. *Illinois,* 405 U.S. 645, (1972)(same); *Smith v. Organization of Foster Families,* 431 U.S. 816 (1977)(family relationships); *Moore* v. *East Cleveland,* 431 U.S. 494 (1977) (same);-Pierce *v. Society of Sisters,* 268 US. 510 (1925) (child rearing); *Meyer v. Nebraska,* 262 U.S. 390 (1923)(same). See *generally,* Laurence Tribe, *American Constitutional Law* (NY: Foundation Press, 1988), ch. 15.

3. *Carey* v. *Population Services International, supra,* 431 U.S. at 686; *Roe* v. *Wade, supra,* 410 U.S. at 154.

4. 316 U.S. at 541.

5. 405 U.S. at 651.

6. 431 U.S. at 685.

7. *E.g.,* "Note: Prohibiting Payments to Surrogate Mothers: Love's Labor Lost and the Constitutional Right of Privacy," 20 *John Marshall L. Rev.* 714 (1987); J. Robertson, "Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction," 59 *S. Cal. L. Rev.* 939 (1986); Ethics Committee of the American Fertility Society, "Ethical Considerations of the New Reproductive Technologies," 46 *Fertility & Sterility* 3, (Supp. 11986) pp. 25-65.

8. Robertson, *supra,* at 961.

9. Mat 1021-23.

10. *Matter of Baby M,* 217 N J. Super. 313,525 *A2d* 1128 (Ch. Div, Fam. Pt.

1987).

11. *Matter of Baby M,* 537 A.2d 1227,1253 (N J. 1988).

12. The Supreme Court of Kentucky similarly concluded that while the decision to beget or bear a child may be constitutionally protected, a state is not compelled to enforce surrogate parenting arrangements. *Surrogate Parenting Associates, Inc*. v. *Commonwealth ex rel. Armstrong,* 704 S.W.2d 209(1986).

13. *Carey v. Population Services International, supra; Eisenstadt v. Baird, supra; Griswold* v. *Connecticut, supra; Roe* v. *Wade, supra.*

14. *Skinner v. Oklahoma, supra.*

15. Shari O'Brien, "The Itinerant Embryo and the Neo-Nativity Scene: Bifurcating Biological Maternity," 1987 Utah L. Rev. 1,20. *See also,* Tribe, *supra* at 1360 ("Nor do the holdings in the abortion and contraceptive cases automatically entitle infertile couples... to buy genetic material from others or to contract for gestation 'services.'").

16. *Matter of Baby M, supra,* 525 A.2d at 1164.

17. *Matter of Baby M, supra,* 537 A.2d at 1254.

18. Compare *Stanley* v. *Georgia,* 394 U.S. 557 (1969)(state cannot prohibit possession of obscene material in the home) with *U.S. v. Reidel,* 402 U.S. 351 (1971)(state can prohibit sale of obscene material).

19. *See Matter of Dora P.,* 68 A.D.2d 719 (1st Dept. 1979); *Cherry* v. *Koch,* 129 Misc. 2d 346 (Sup. Ct., Kings Co. 1985) (citing cases). *See also, People* v. *Onofre,* 51 N.Y.2d 476, 434 N,Y.S.2d 947, 415 N.E.2d 936 (1980)(recognizing a fundamental right of adults to engage in consensual sodomy "so long as the decisions are voluntarily made by adults in a noncommercial, private setting.").

20. Twenty-four states have enacted laws prohibiting or curtailing payments in connection with an adoption. Avi Katz, "Surrogate Motherhood and Baby Selling Laws," 20 *Col. J. Law & Social Problems* 1,6 (1986).

21. *See e.g., Matter of Baby M,* 537 A.2d at 1253 ("The right to procreate very simply is the right to have children, whether through sexual intercourse or artificial insemination..."). See Kritchevsky, "The Unmarried Woman's Right to Artificial Insemination: The Call for an Expanded Definition of Family," 4 *Harr. Women's LJ.* 1 (1981).

22. Thus the Michigan Court of Appeals, in *Doe v. Kelley,* 106 Mich. App. 169,307 N.W.2d 438 (1981), suggests that the state cannot constitutionally prohibit the practice of surrogate parenting, although it can prohibit the payment or receipt of fees in connection with surrogate arrangements. The Kentucky Supreme Court, in *Surrogate Parenting Associates, Inc. v. Commonwealth ex rel Armstrong,* 704 S.W.2d 209 (1986), also suggested that the state might be unable to prohibit the practice, but it can regard the contracts as voidable.

23. *Pollack* v. *Williams,* 322 U.S. 4,18 (1944). *See also, United States* v.

Reynolds, 235 U.S. 133 (1914); *Bailey v. Alabama,* 219 U.S. 219 (1911); *Clyatt v. United States,* 197 U.S. 207,215 (1904).

24. *Stevens* v. *Marks,* 383 U.S. 234,244 (1966).

25. *Brady* v. *United States,* 397 U.S. 742,748 (1970). *See* Brief of Concerned United Birthparents, Inc. as Amicus Curiae at *17-19,Matter of Baby M, supra.*

26. *E.g., Lehrv. Robertson,* 463U.S. 248 *(1983)\Santoskyv. Kramer,* 455 U.S. 745 (1982); *Caban v. Mohammed,* 441 U.S. 380 (1979); *Stanley v. Illinois,* 405 *US.* 645 (1972).

27. *E.g., Lehr v. Robertson, supra; Caban* v. *Mohammed, supra; Stanley* v. *Illinois, supra.*

28. *Carey* v. *Population Services International,* 431 U.S. 678,686 (1977).

29. Brief of Concerned United Birthparents, Inc. as Amicus Curiae at 10-17, *Matter of Baby M, supra. But see,"'Note,, Rumplestiltskin Revisted: The Inalienable Rights of Surrogate Mothers,* 1986 Harv. L. Rev.* 1937,1950-54. *See also,* Nancy Frieden, "The Constitutional Rights of Natural Parents under New York's Adoption Statutes,*[1]12*N.Y.U. Rev. Law&Soc. Change* 617,653-60 (1983-84)(contending that even a post-birth extrajudicial consent to a private placement adoption is not a constitutionally valid waiver of a woman's fundamental right to rear her child).

30. *Lassiter v. Dept. of Social Services,*452 U.S. 18,59 (Stevens, dissenting)*

31. *See Matter of Baby M,* 537 A.2d at 1244-46.

32. See Chapter Three, *supra.*

33. *E.g.,* S. 1429-A (Feb. 3,1987)(Dunne, Goodhue)(permitting only infertile married couples to enter surrogate parenting contracts); A. 9857 (March 14,1988)(Hevisi *et* o/.)(permitting only married couples to enter noncommercial surrogate parenting contracts).

34. *Lyng v. Castillo, ATI* U.S. 635,106 S.Ct. 2727,2729 (1986); *Plyler v. Doe,* 457 U.S. 202,217 (1982).

35. *Plyler* v. *Doe, supra,* 457 U.S. at 217.

36. *City of derbume, Texas* v. *Cletbume Living Center*, 105 S. Ct. 3249, 3254(1985).

37. For example, the state could defend the marital restriction by con* tending that it ensures that a child born as a result of a surrogacy agreement is born into a two-parent home, an environment more likely to meet the child's social, emotional and financial needs.

Five

The Social and Ethical Dimensions of Surrogate Parenting

The issue of surrogate parenting touches upon a broad range of concerns in our communal life and our most private choices as individuals. It forces us to reexamine terms as fundamental as "parent," both "mother" and "father," and social institutions as basic as the family unit. Since surrogacy fractures motherhood, questions arise about which part of the relationship — genetic, gestational or rearing ~ should be identified as primary, or whether any such identification is even possible. The potential sale and waiver of rights associated with procreative liberty also poses complex questions in an area that has long been the subject of public controversy.

The interests of children are at the center of the debate about surrogate parenting. Children are unable to speak for themselves and are thus far more vulnerable than all the adults involved. Society must determine how children are best protected in these novel and unprecedented arrangements to bring them into being.

An Analysis

The identification of fundamental values or principles does not necessarily yield a single response to surrogate parenting. Persons who share the same values may reach very different judgments about how these values are best protected in the context of public policy on surrogate parenting. Conversely, people who hold widely diverging opinions or principles may reach similar conclusions, at least at the level of policy, about the appropriate path for societal intervention.

The issues posed by surrogacy can be grouped into five central themes or categories: (i) individual access and societal responsibility in the face of new technological possibilities; (ii) the interests of children; (iii) surrogacy's impact on family life and relationships; (iv) individual liberty in human reproduction and attitudes about reproduction and women; and (v) application of the informed consent doctrine. Although these broad categories overlap - e.g., the impact on family life is necessarily related to the interests of children while children's interests play a large role in

determining how family life should be structured — they provide a useful framework to explore the wide range of interests, values and beliefs that form any threshold analysis of surrogate parenting.

In relation to each issue, an assessment can be made at two broad levels of inquiry. The first level identifies the tangible harms and benefits to individuals directly affected by the practice: (i) the adults who serve as gamete donors, intended parents, surrogates, and the spouses of donors and surrogates; (ii) children born of the practice; and (iii) the surrogate's other children. The second level evaluates the impact of surrogate parenting on societal norms, practices, and expectations. It includes consideration of how surrogacy might reshape practices and attitudes about children, the family, women and the reproductive process.

This Chapter explores the five issues identified. It describes many, although not all, of the arguments made to support and to oppose surrogate parenting. The Chapter divides persons and organizations roughly into those who "support" and those who "oppose" the practice. Both categories are highly nuanced and are used only loosely. Those characterized as "supporters" cover a range of opinion, from avid proponents to those who would tolerate surrogacy and argue that the state should uphold the contracts and regulate the practice. Individuals or groups characterized as "opponents" include those who condemn the practice on moral grounds and urge prohibiting it as well as those who may be ambivalent about the practice but argue that society, through its judicial or legislative systems, should not enforce the contracts or implicitly condone surrogate parenting.

New Technologies — Individual Access and Societal Responsibility

The new procedures and practices to assist reproduction create an array of possibilities for society as a whole and for individuals. Already it has been possible for would-be parents to purchase sperm of Nobel-Prize winning scientists, for a grandmother to carry her daughter's children to term, and for embryos to be orphaned as a result of plane crash fatalities.[1] These events and others serve as constant reminders that the far-reaching social and ethical implications of the new reproductive technologies are already being explored and tested.

The total impact of this biological revolution must be understood not just in terms of the technology as it exists today, but also in light of the barriers medical science is trying to break. For years scientists have been mapping the human genetic

code, seeking to understand its structure well enough to eliminate serious genetic and chromosomal disorders. Yet, once mastered for medical purposes, control over the genetic code can be used to serve social and personal desires. Combined with existing technologies, advances in genetic engineering may make it possible for adults to freely acquire genetic material from others and to have that material refashioned, duplicated, or stored for indefinite periods of time. Finally, the possibilities for scientific research are astounding and disquieting. Scientists have already conducted cross-species experiments combining human eggs and hamster sperm, in order to assess the fertilization capacity of sperm in different conditions. Some scientists eager to learn about the origins of the human species have proposed that human gametes should be combined with those of other primates.[2] To date, such experiments have been prohibited.

As new possibilities for human reproduction unfold, society must determine how it will harness its technological capabilities. Specifically, does the existence of the possibilities alone create an imperative for their use? If individual access is denied or curtailed, on what grounds can society base the restrictions, and by what yardstick should they be measured?

Proponents of Surrogacy

For proponents of surrogacy, the existence of new technological and social possibilities extends the domain of constitutionally protected rights3 In essence, they interpret the right to reproduce to include the right to rely on available medical and social alternatives.

Some proponents argue that only tangible harm to individuals can justify curbs on individual freedom and access to new reproductive alternatives, They dismiss other societal concerns as "symbolic" or "intangible," and therefore unacceptable as reasons for curtailing individual rights.[4] Specifically, they maintain that a particular social or moral vision of family life and relationships cannot legitimately serve as the benchmark for public policy. Values concerning the family, the relationship of parents and children, or concerns about commercializing human reproduction, even if embraced by many, cannot override the freedom of others to make personal choices about procreation.[5]

Proponents make another claim that is important to the debate about public policy on surrogate parenting. It relates to what is commonly known in legal terms as the "burden of proof." Having posited the existence of a fundamental right of access to surrogate parenting, the proponents assert that society must prove harm to establish an ethical or legal basis for limiting that right.[6] Yet since the practice is so

new, little evidence exists of the sole criterion they recognize as legitimate ~ proof of tangible harm to individuals. Hence, they argue that society should remain neutral or regulate surrogacy only to prevent abuse, until such time as tangible harm is proven.[7]

Opponents of Surrogacy

In contrast, others invoke a broader spectrum of concerns as a basis for fashioning public policy on surrogate parenting. First, those who oppose surrogacy do not believe that the existence of new technologies and practices to reproduce necessarily entails a right of access.[8]

Instead, they assert that the needs of infertile couples and the interests of women in serving as surrogates must be balanced against the risks to others as well as the impact on a range of important values and social practices: the interests of children, the integrity of the family and the dignity of women and human reproduction.[9] Some individuals also oppose surrogacy because they believe that the practice diminishes rather than enhances freedoms associated with human reproduction.[10]

Second, opponents of surrogacy do not accept the assertion that the burden is on society to show harm before it can seek to inhibit or eliminate commercial surrogacy. They view surrogacy, especially paid surrogacy, as a radical change from existing social practices and standards concerning human reproduction.[11] They point out that surrogate parenting contracts depart from existing law on the parent-child relationship and adoption.[12] Hence, opponents claim that those who support surrogate parenting and legislation to uphold the practice face a heavy burden to show why such a change should take place.[13]

Finally, opponents of surrogacy recognize the difficulty of framing a determinate vision of the good in a pluralistic society. Nonetheless, they deem the protection and promotion of the basic values threatened by surrogacy as the legitimate province of government concern.[14]

The Best Interests of Children

The rights and interests of children have been expressed in our family laws under a single standard, the "best interests'* of children.[15] First developed in the 19th century, the standard now dominates custody, adoption, and other proceedings that focus on the needs and rights of children. In those contexts, the standard involves an assessment of specific criteria delineated in statute or judicial decisions.[16] Its broad language leaves ample room for judicial discretion and reflects the difficulty of providing a more certain guidepost that will meet the needs of all children and, at the same time, reconcile widely diverging notions of how children's interests are best served

In the debate about surrogate parenting, the phrase "interests" or "best interests" of children expresses a social judgment about children's emotional and physical well-

being. It is a judgment about the life circumstances under which children are most likely to thrive and least likely to be harmed.

Proponents of Surrogacy

Individuals and organizations that support or urge toleration for surrogate parenting maintain that the practice promotes, or can be structured to protect, the best interests of children. Several arguments have been made to support this assertion. First, proponents have pointed out that the children would be raised in loving homes where they are desperately wanted.[17] Second, they argue that the children's interest in life itself is served by surrogacy - but for the practice, the children would never have been born.[18] Thus, even in a highly contested case like Baby M, it has been argued that the child's existence alone outweighs any burden she might face later in life.

Some commentators have stated that if the contracts are upheld and the practice is regulated, the risks to children will be minimized or eliminated.[19] They maintain that rules about custody, medical and psychological screening for surrogates, and perhaps screening of the intended parents, would protect the children born.[20] In fact, many who favor regulation urge that it provides the only path by which children can be protected. They postulate that any state action short of regulation and recognition of the contracts would drive surrogacy underground, exposing children to the risks of private, unexamined practices.[21]The persistent and growing black market for children despite laws outlawing baby selling is seen as evidence of how difficult it would be to eliminate surrogate parenting altogether.

Finally, some commentators dismiss concerns about the potential negative impact of the practice upon children as pure speculation.[22] They point to the dearth of hard evidence about the importance or extent of bonding between birth mothers and infants as a result of gestation. They also question the claim that these children will be harmed by learning later in life that their mothers gave them away.[23]

The proponents of surrogate parenting also do not believe that combining commercial arrangements and childbearing will harm children. Instead, they view commercial surrogacy as a way for couples to fulfill the basic urge to parent and nurture children. In this sense, the practice underscores the importance and special role of children in family life.[24]

Those who advocate societal tolerance of or support for surrogate parenting generally reject outright the notion that the practice is akin to baby selling. Fust, they point out that it is illogical to suggest that a woman could "sell" a child to the child's own father or genetic parents since he or they already possess rights in relation to the

child.[25] Second, they assert that the surrogate is paid for her gestational services, not for the child who is the product of those services. Alternatively, the gestational process has been characterized as a period of "temporary care" of the infant. As stated by the Committee on Ethics of the American Fertility Society in a discussion of gestational surrogates,

> [T]his situation is far removed from baby buying because the couple is paying the woman to provide temporary care for their own genetic child [27]

Opponents of Surrogacy

Opposition to surrogacy is often premised on the assumption that the practice cannot be structured to serve the interests of children. Opinions range from a belief that surrogacy is highly immoral in relation to children to an assessment that the risks posed to children outweigh the benefits.

Most significant for some who oppose surrogacy for reasons related to children's interests is the belief that the practice constitutes baby selling.[28] The surrogate's obligations do not end upon the child's birth, when the gestational "service" is complete. Those obligations are satisfied only when the child — the "object" of the agreement — is delivered to the intended parents and the surrogate surrenders all parental rights.[29]

Those who view surrogate parenting as baby selling reject the practice on moral grounds. Regardless of the consequences for particular children, they consider the practice ethically unacceptable because it violates basic moral and/or theological principles of human dignity, human relationships and personhood.[30]

Critics also fear the consequences of commercial surrogacy. They believe that the exchange of money for possession or control of children is degrading. It also threatens to erode the way society thinks about and values children and, by extension, all human life.[31]

Apart from the commercial aspect of the practice, some oppose surrogate parenting because they believe that children, once they are made the subject of negotiated parenthood, will not be valued as ends in themselves but as objects whose purpose is to fulfill adults* desires for genetically related offspring.[32] In light of the reproductive possibilities available today and the advances genetic engineering may bring in the future, they reject new social practices that will change childbearing into "manufacturing progeny" to satisfy the desires and aspirations of adults.[33]

In addition to these concerns about the long-term impact of surrogate parenting

on children, opponents also posit the potential for harm to individual children. Many opponents of surrogacy believe that children's interests are best served if parenting is not fractured into its genetic, gestational and rearing components; children's identity and place in family life are most secure when the three elements of parenting remain unified.[34] While other established practices, including adoption and divorce, sever or divide parenthood, the division is not the parents* stated intention prior to the child's conception. Moreover, critics point out that both adoption and divorce present difficulties and pain for many children and should not be viewed as social paradigms.[35] Even when children are adopted into loving homes, they may experience a sense of loss and dislocation because they have been separated from their biological parents and genetic heritage. Likewise, some studies show that children born of artificial insemination suffer emotionally from knowledge about their origins and the anonymity of their biological fathers.[36]

Some individuals and groups that oppose surrogacy assert that the practice presents other unacceptable and/or burdensome risks for the children involved. First, children who are handicapped are more likely to be abandoned by both the surrogate and the intended father because both parents may be unwilling to assume responsibility for the child.[37] Alternatively, children born of the practice may be the subject of a lengthy court battle as in the Baby M case. Critics assert that even when no conflict arises, the children will live uninformed of their origins or will some day acquire the painful knowledge that they were sold or given away by their mothers.[38]

Some point out that two other groups of children may also be directly harmed by surrogate parenting - the surrogate's other children and children who are hard to place in adoptive homes, including non-Caucasian infants and disabled children.[39] In the former case, the harm would derive from the children's knowledge that their mother gave away or sold a sibling. It has been suggested that this knowledge may undermine the children's sense of security and exacerbate fears of abandonment that haunt many children. In the case of hard-to-place babies, some have argued that surrogacy would further decrease their chances of being adopted.

The Impact on Family Life and Relationships

The debate about surrogate parenting arises at a time of social change and reflection about the role of the family in contemporary American life. Challenged by social and economic forces, the nuclear family is seen by some as an anachronistic model, while it is cherished by others as an essential element of our moral and social fabric.

Practices to assist reproduction, with surrogate parenting as a vivid example, pose the possibility of entirely new relationships and a different blueprint for the family unit. For some, the technologies present opportunities for new social relationships that must be assessed in light of the already eroded traditional framework for family life.[40] Others view the technologies to assist reproduction as a powerful new source of instability for the already beleaguered family.[41]

At stake in the debate is nothing less than the psychological, social and legal content of the terms "mother," "father," and "parent." The psychological and social content of the terms may be shaped by new practices, including the possibility that children will have two biological mothers.

The legal meaning of "parent" depends on how parental rights and responsibilities are determined. Surrogate parenting, like artificial insemination and in vitro fertilization, challenges society to assess the process by which parenthood is recognized. Should parenthood achieved with the aid of new technologies be determined by private contract, legislative rules or judicial decisions case by case? How can society best fulfill its obligations to the children and to the adults involved in these arrangements?

Proponents of Surrogacy

Those who would tolerate or support surrogate parenting assert that surrogacy promotes the family both in principle and in practice. Most obviously, it offers infertile couples what may be their only chance to participate in a central part of family life by having a genetically related child.[42] Some proponents emphasize the significance of this genetic tie for the intended parents, recognizing that the children will forgo a genetic relationship with at least one parent.

Given the shortage of babies for adoption, it also may provide the only chance for some couples to rear a child. Thus some view surrogate parenting as the best way to strengthen those family units faced with the trauma and distress associated with infertility. As stated by the Ontario Law Reform Commission,

> Indeed, by assisting an otherwise childless couple, surrogate parenting may be the *sole* means of affirming the centrality of family life (emphasis added).[43]

Proponents of surrogate parenting also emphasize the importance of freedom of choice in matters relating to reproduction and child-rearing. They accept contract law and private agreement as a basis for shaping parenthood outside the traditional

family unit.[44] This freedom to contract is seen as a logical, and, indeed, necessary extension of the freedom to reproduce possessed by all married couples in our society. For the intended parents seeking a child, the opportunity to pay a fee and contract with a surrogate flows directly from their right to reproduce [45]

Proponents of surrogate parenting do not claim that the right to be free of the state's intervention is absolute. Those who advocate or would tolerate surrogacy recognize a legitimate role for the state in regulating the practice, including some aspects of the contract between the parties. For instance, bills proposed in many state legislatures would not uphold the surrogate's obligation to abort or the waiver of the right to abort.[47] Likewise, some of the proposed legislation would prohibit or restrict the fees paid to the surrogate or to surrogate brokers.

These policies, however, alter the ancillary provisions of the agreement but leave the core of the contract in place - the allocation of parental rights, including custody and visitation, as well as parental responsibilities. In fact, the bills call upon the courts and the legislature to provide mechanisms and authority to enforce the agreements [49] They therefore affirm the legitimacy of the contractual model in assigning parental rights, in the absence of a showing of parental unfitness, or, in some statutes, a showing that the arrangement would not serve the child's interests. As asserted by one comment at or, this reliance on contracts to structure the parent-child relationship mirrors the reality of contemporary family life:

> The right to contract for reproductive assistance here may be compared with the right of persons contemplating marriage to regulate by contract the relation between them and a future divorce settlement. Both reproductive and prenuptial contracts illustrate the social movement from status to contract in family and reproductive relations.[50]

Finally, commentators suggest that the biologically related nuclear family is an overly idealized frame of reference in today's society.[51] They point to the many children raised by single parents or by non-biologically elated parents following divorce and remarriage as evidence that society as already accepted new accommodations and fragmentation in family life. Commentators also argue that, even if practiced more widely, surrogate parenting would contribute only marginally to the dissolution of the traditional family unit in light of the more powerful forces already at play.[52] While some children born of surrogacy will be nurtured in non-traditional family settings, many will be brought up in a two-parent family where the child is genetically related to at least one parent. Some maintain that, in these circumstances, the child's presence will strengthen rather than threaten the family unit.[53]

Opponents of Surrogacy

Opposition to surrogate parenting based on concerns about family values has been expressed on both religious and secular grounds. According to some, the practice violates religious and/or moral beliefs about the relationship between husband and wife and between parents and their children.[54] The practice is also opposed because of its consequences - commentators assert that it would contribute to the disintegration of the family unit and the social and moral cohesion associated with it[55]

Among religious communities in the United States, the position of the Roman Catholic Church has received the most public attention. In its Instruction on Respect for Human Life and the Dignity of Procreation[1]* issued in March 1987, the Congregation for the Doctrine of the Faith expressly rejected all third-party involvement in the reproductive process, including surrogate parenting, as contrary to the unity of marriage, the dignity of the spouses, and parental obligations.[56] The Church's criticism of surrogate parenting rests in part upon theological beliefs about conjugal fidelity and the personal exclusivity of the marital relationship as both a biological and spiritual reality:

> The origin of the human being thus follows from a procreation that is "linked to the union, not only biological but also spiritual, of the parents, made one by the bond of marriage." Fertilization outside the bodies of the couple remains by this very fact deprived of the meanings and the values which are expressed in the language of the body and in the union of human persons.[57]

Orthodox Jewish scholars have also condemned surrogate parenting because it violates the marital relationship. They oppose the practice for other reasons as well, including the potential for incest when children are not informed of their genetic heritage.[58]

Other commentators maintain that, apart from religious beliefs, surrogate parenting violates values intrinsic to the relationship of parents and children.[59] The commitment of parents to their children is seen as a basic and natural moral commitment, a mark of our humanness that should never be subordinated to or contingent upon commercial obligations. According to this view, surrogate parenting requires and promotes abdication of the parental responsibility to nurture

one's children. It undermines long* standing social traditions as well as the basic human urge to care for biological offspring. As expressed by Richard McCormick:

> Clearly, the notions of marriage and parenting must and do go beyond such biological beginnings. But these beginnings are the foundations upon which the rest, the complex network of kinship, bonding and support, is built. If we untie this biological knot, what will happen to the institution that for so many centuries has taken shape around it?[60]

The consequences of surrogate parenting for family life and social stability have also raised concerns. Some view the family as an essential cell of social and moral life in the community — a purveyor of identity, human connectedness, caring and beliefs.[61] Fragmentation of the family unit is therefore seen as a source of dislocation for society as a whole. As stated by Sidney Callahan:

> Already epidemics of divorce, illegitimate conceptions, and parental irresponsibility and failures are straining the family bonds necessary for successful childrearing. If we legitimate the isolation of genetic, gestational, and social parentage and govern reproduction by contract and purchase, our culture will become even more fragmented, rootless and alienated.[62]

In addition, critics have pointed out that surrogacy may have negative consequences for the family unit created by the practice. When the child is genetically linked to only one parent, an asymmetry exists within the family that may weaken the bond between the unrelated parent and child.[63] This asymmetry may in turn generate tension between the married couple. A shared and coequal love for the child ordinarily strengthens the parents' love for each other; the absence of such harmony in their love for and identification with the child may have the opposite effect of distancing the couple from each other.

The Reproductive Process: The Role of Women and Reproductive Rights

The public debate about surrogacy's impact on the way we think about and value reproduction has focused primarily on three issues, one unique to surrogacy and the others common to all the new reproductive practices. The first issue

concerns the process of gestation and the special role of women in the reproductive process. The second relates to the potential commercialization of human reproduction, and is analyzed in conjunction with the first. The third issue involves the scope and content of reproductive freedom.

Attitudes About Reproduction and Women

Like surrogate parenting, artificial insemination and in vitro fertilization (IVF) involve third parties as donors in the reproductive process. With surrogate parenting, however, the nature of the "donation" is radically different — it is neither anonymous nor a short-lived single event. Instead, it requires the "use" or "rental" of another person's body over a nine-month period, and lacks the emotional detachment afforded by the more clinical setting of gamete donation.

Surrogacy also involves the aspect of reproduction that is singular to women. As a result, the practice evokes a broad range of concerns related to human reproduction at the same time that it touches upon highly charged issues regarding the instrumental use of female reproductive capacity.

Proponents of Surrogacy

Proponents of surrogate parenting view gestation, when provided in the context of surrogacy, as a bodily function that women may offer to others — a highly valued service.[64] They argue that gestation is not degraded by the surrogate parenting arrangement. Instead, surrogacy brings the gift of life to a child who would not otherwise have been born and may offer a couple desperate to have a genetically related child their only chance to have that parenting experience.[65]

Those who support surrogacy also claim that it offers potential benefits to surrogates quite apart from the fees paid. First, they suggest that the experience of gestation helps some women cope with previously unresolved guilt about a past abortion or surrender of a child.[66] Second, some women derive satisfaction from being pregnant and bringing a child into the world, even if they relinquish the child at birth [67] Finally, proponents have argued that, like organ donation, surrogacy gives women the chance to be altruistic.

Some commentators also maintain that surrogate parenting respects women as persons capable of making important life choices for themselves. They argue that public policy that denies women the right to choose for themselves treats women like children, unable to determine what will be done with their own bodies. They acknowledge that surrogate parenting involves risks to women but assert that society allows competent adults, as long as they give informed, voluntary consent, to assume all kinds of risks, e.g., kidney donation, high risk sports activities, and membership

in the armed forces.[69]

Consistent with the notion of gestation as a service, proponents of surrogacy view the fees paid and the exchange of obligations in a contract as manifestations of the reproductive freedom of all the parties involved. They argue that women should be free to offer their gestational services at a price and under terms they deem appropriate and fair.[70]

Some commentators adamantly reject the notion that payment of fees demeans women or might exploit them. They insist that as long as women are fully informed, surrogate parenting simply offers them another economic option - one that enables women to earn money while remaining at home caring for other children or continuing other employment. They point out that women now perform many low-paying jobs that are arguably far more exploitive and less rewarding. The payment compensates women for their contribution to the reproductive process, but is not coercive because women can freely decide whether or not to engage in the practice.[71]

Opponents of Surrogacy

Some commentators have opposed surrogacy based, in part or in large measure, on concern about its impact on social attitudes about the reproductive process and women. This concern is premised on a wide spectrum of values and viewpoints, ranging from theological beliefs about human reproduction to a deep commitment to reproductive choice and the autonomy of women. Despite the divergent premises of their objections, many critics agree that surrogate parenting has profound and undesirable implications for the dignity of women, society's vision of reproduction, and the relationship of women to the children they bring into the world.

As early as 1972, with the advent of in vitro fertilization, Paul Ramsey, a prominent Protestant theologian, issued an admonition about the potential impact of the new reproductive technologies. In an article entitled "Shall We 'Reproduce'?* he stated that human procreation was already being replaced by notions of "manufacturing'' children that would lead inevitably to Aldous Huxley's "Hatcheries.''[72] Ramsey argued that IVF does not cure infertility but concentrates on a product, thereby transforming both the goals of medicine and childbearing. He then warned of the implications of this transformation:

> [I]f medicine turns to doctoring desires instead of medical conditions, and if medicine provides a woman with a child without actually curing her infertility, is there any reason for doctors to be reluctant to accede to parents' desire to have a girl rather than a boy, blond hair rather than brown, a genius rather than a clout, a Horowitz in the family rather than a tone-deaf child, or alternatively a child who because of his idiosyncrasies would have a good career as a freak in the circus?[73]

In 1987, this concern was echoed by Barbara Katz Rothman, a feminist writer,

in the context of surrogate parenting. Ms. Rothman, in an article criticizing surrogacy, warned that the practice would encourage "production standards" in pregnancy. She viewed this development as the logical consequence of thinking about pregnancy as a service rather than as a relationship between a woman and her fetus.[74]

Other feminists as well as representatives from many different communities also disdain the idea of gestation as a service.[75] The logic, moral soundness and consequences of treating gestation as a service have all been attacked. Many view gestation as an intimate relationship between mother and child. They argue that it simply belies common sense and human nature to ignore the bond that develops between a woman and the child she carries. This bond, and the strong impulse to nurture that is part of it, are seen as an intrinsic and valued part of our humanness. Treating gestation as a service violates that sense of humanness and encourages women to view children like any other object they might produce.[76]

Some commentators have also been sharply critical of surrogate parenting based on their judgment that the practice encourages women to distance themselves emotionally from the children they bear. The practice depends on the creation or identification of women who can freely relinquish the children they give birth to without remorse or moral compunction. Commentators lament the potential consequences of promoting this attitude and rewarding the women predisposed to it.[77] They recognize that some adults surrender, abandon or neglect their parenting role in other circumstances, but they distinguish surrogate parenting from these practices. In surrogate arrangements, the parental decision to relinquish the child is not caused by other circumstances or by parental inability to care for the child Instead h is the core of the surrogate parenting agreement. While society must accept the division or abdication of parental responsibilities when no alternative exists, it need not encourage women to bear children they fully intend to abandon.

For some, the most offensive aspect of characterizing gestation as a service and placing gestation in the realm of commerce is the impact on attitudes about women. Many opponents have argued that surrogacy reduces women to their biological function as "gestators" or "incubators"[78] They believe that women are devalued in the process as a means to satisfy the desires of others for genetically related children. By divorcing gestation from personal identity and self, surrogacy reduces women to their reproductive capacity and diminishes their role in childbearing. As stated by one commentator:

> I cannot ever believe that a woman is pregnant with someone else's baby. That idea is repugnant to me - it reduces the woman to a container. Nor do I think that kind of compromise, saying the pregnancy is indeed hers, but the fetus theirs, the purchasers*, can be workable. The preciousness of the very wanted, very expensive baby will far outweigh the value

given to the "cheap labor" of the surrogate.[79]

For some who oppose surrogacy, the fees paid are secondary in the moral assessment of the practice. They object strenuously to other aspects of the arrangements - the use of women as means to an end, the isolation of reproductive capacity from personal responsibility, and the depersonalization of reproduction.[80] The payment of fees does not essentially affect these concerns or the moral character of the practice; it simply worsens the situation.

The payment of fees marks a crucial distinction for others. For them, the exchange of money transforms surrogacy from a morally acceptable donation or gesture of love to a financially procured service.[81] In the former case, the dignity and intrinsic worth of the woman, the child and the mother- child relationship are preserved. The woman's motives are entirely altruistic and the child is not conceived for profit but as an act of caring. In contrast, when fees are paid, the worth of the child, the woman, and the reproductive process are demeaned and reduced to the monetary sum that served as the necessary catalyst for the child's conception.

Some commentators have also expressed alarm and outrage at the possibility that the payment of fees will give rise to a "breeder class" of women —driven by economic need, poor women will become "incubators" for wealthier women who seek to avoid the burden of pregnancy. This fear is especially great in relation to

women in third-world countries and minority groups who historically have had fewer economic options.

Reproductive Freedom: Erosion or Promotion - Waiving and Selling Rights

The freedom to make choices related to human reproduction has long been the subject of public debate and controversy. Reproductive choices can be understood to involve the full spectrum of means to have or not to have children: contraception; donation or receipt of donated eggs, sperm or embryos; abortion; and pre-natal testing and treatment. Surrogate parenting contracts involve several strands of this bundle of rights — decisions about amniocentesis, pre-natal care, abortion, and, the focus of the contract, a woman's right to rear her child.

While some feminists and women's rights advocates believe that surrogacy imperils rights associated with reproductive freedom, others hail the practice as a

logical expression of a woman's rights to make reproductive choices. The debate has focused on how those rights are best protected in the context of three issues: (i) waiver of those rights; (ii) sale of those rights as part of the contract; and (tii) informed consent at the time the rights are relinquished.

Proponents of Surrogacy

Proponents of surrogacy have urged that full possession and enjoyment right should include the opportunity to waive it or to sell it. Simply stated, part of having a right is the opportunity to relinquish it. According to this view, restrictions on the ability to give away or sell a right diminish the right itself by constraining the individual's choices and recognizing the state's authority to interfere with these personal decisions. In the context of surrogacy, the right to contract is thus seen as an extension of the rights that both women and men possess as part of their claim to reproductive choice.

Some commentators also support upholding the contracts because they fear the implications of allowing women to change their minds about relinquishing the child. They are wary of giving credence to the old shibboleth, "biology is destiny," and concerned about exalting the mother-child bond. They also worry that women will be portrayed as irrational or overcome by emotion. As stated by Lori Andrews:

Giving the surrogate the power to change her mind would seem to reinforce unfavorable stereotypes about women as flighty, emotional and subject to changes of mind. If women cannot live up to a surrogate contract, they may not be viewed as responsible agents in other contractual situations.[84]

Finally, some surrogacy proponents maintain that the consequences of enforcing the waiver of basic rights are minimal[85] They assert that enforcing the contractual obligations, including medical treatment during pregnancy and release of the child, is the only fair solution for the intended parents who have relied upon the surrogate's promises. They also suggest that women only rarely change their minds, and that the harm of enforcing the agreements is slight, especially compared to the benefits reaped from the arrangements when no conflict arises.[86]

Opponents of Surrogacy

Many feminists, women's rights advocates and others urge that the rights that are part of the surrogate contract are best protected if they cannot be sold or waived irrevocably in advance.[87] They point out the rights society cherishes most — those most intimately tied to notions of human freedom and identity - are not subject to irrevocable waiver. Nor may the state enforce the waiver of these rights over a person's objections.

Some commentators argue that enforcing the obligations in the surrogate contract, such as imposing compulsory amniocentesis or forced separation of the woman and her child, would violate basic freedoms and contravene our concept of a decent society.[88] Society's willingness to allow the surrogate to revoke her contractual waiver of rights would reflect its deep respect for those rights and human freedoms.

Moreover, for many, the opportunity to sell those rights as part of a contract undermines their worth. These critics of surrogacy do not believe that the right to decide about abortion, the right to consent to medical treatment and the right to one's child should be assessed by a market price or relinquished on a commercial basis.

Informed Consent

The doctrine of informed consent is the cornerstone of the right to make decisions about one's own medical treatment and person.[89] As articulated by Judge Cardozo as early as 1914 in the now famous case of *Schloendorff* v. *Society of New York Hospital:*

> Every human being of adult years and sound mind has the right to determine what shall be done with his own body.[90]

While the doctrine has been explored and debated most extensively in the medical context, it is also applicable to other life choices.

In the medical field, informed consent is often misunderstood as a device or process to protect physicians from liability. However, its ethical and legal foundation rests on respect for the individual and a belief that individuals, if fully informed and free to decide, are the best arbiters of their own fate. The doctrine is therefore allied with self-determination - the freedom to give or withhold consent and a constraint upon others and society from interfering with those decisions.

Three elements have been identified as critical to informed consent: **(i)** the possession of information sufficient to make an intelligent decision; **(ii)** the ability to understand and appreciate one's decision; and (iii) voluntariness or freedom from coercion. While commentators have taken different positions about whether the fees to the surrogate are coercive for some women,[92] the first two elements of the informed consent doctrine have stirred the greatest controversy. Can a woman, prior to a child's conception and birth, give a knowing and informed consent to relinquish the child, or docs the evolving relationship between them render such consent impossible?

As with other aspects of surrogacy, competing views of personal autonomy and protection of the autonomy of women are at stake. Also significant are questions and concerns central to the informed consent doctrine in any context. Specifically, standards of informed consent require a balance between two basic principles or values: autonomy (respecting the individual's choices) and beneficence (protecting persons from the risks of their poor choices or limited decision-making capacities). Some commentators have suggested that the standards established as a condition for informed consent should be calibrated in relation to the potential harm or risk that might befall the decision-maker; as the nature of the interests at stake and the risk of harm increase, the standards should be raised.[93]

Proponents of Surrogacy

Proponents of surrogacy maintain that women, as competent adults, are fully capable of making informed decisions about relinquishing a child in advance of conception, pregnancy and birth.[94] According to this view, women can fully understand, both cognitively and emotionally, the relationship they will form with the child during gestation and can weigh the risks and benefits of relinquishing the child. These commentators urge that a

public policy that implies that women are incapable of making this decision and of assessing their own emotional responses would denigrate women.

Also significant in this perspective is the belief that the risk of harm to women is minimal.[95] Proponents argue that few studies show that women experience long-term grief from relinquishing children. In addition, appropriate state involvement and regulation could insure that women are carefully screened and fully informed. Some commentators have postulated that adequate psychological screening can identify those women who are most likely to change their minds and suffer harm as a result of giving up the child at birth.[96]

Opponents of Surrogacy

In contrast, many feminist groups and other organizations reject the notion that women can make an informed choice prior to a child's conception and birth.[97] They view the process of gestation as a powerful human experience. The fact that women cannot anticipate their feelings does not reflect limitations particular to women, but realities that are basic to the human condition. For these critics, the inability to make an informed choice about an as yet undeveloped parent-child relationship parallels the difficulty all people face in making choices in their lives that touch upon deep-seated human emotions. As stated by one commentator:

> The closer we get to the murky realm of human intimacy the more reluctant we are to enforce contracts in anything like their potential severity. Marriage, after all, is a contract... What have we learned since desperate spouses lit out for the territory and jilted maidens jammed the courts? That in areas of profound human feeling, you cannot promise because you cannot know, and pretending otherwise would result in far more misery than allowing people to cut their losses.[98]

Critics of surrogacy also disagree with proponents about the harm of forcing or allowing women to relinquish their children. Relying on studies which show that women who give up their children for adoption suffer lasting feelings of remorse and guilt, they argue that women who act as surrogates will face the same trauma and risk of serious harm.[99] For them, the Baby M case played out in graphic detail the pain associated with the consequences of a surrogate's poorly informed choice.

NOTES

1. "Owner of'Genius* Sperm Bank Pleased by Results, *N.Y. Times,* Dec. 11,1984, p. 17A; Martha Held, "Surrogate Motherhood: The Legal Issues," *Human Rights Annual*, Vol. IV, Part Two (Spring 1987), p. 492, n. 27; George Smith, "Australia's Frozen 'Orphan* Embryos: A Medical, Legal and Ethical Dilemma,* *Journal of Famify* Low, Vol. 24 (1985-1986), pp. 27-41.

2. R. Yanagimachi, "Zona-Free Hamster Eggs: Their Use in Assessing Fertilizing Capacity and Examining Chromosomes of Human Spermatozoa," *Gamete Res.,* Vol. 10 (1984), p. 187.

3. Department of Health and Social Security (Great Britain), *Report of the Committee ofInquiry into Human Fertilisation and Embryology* (London: Her Majesty's Stationery Office, 1984), p. 70.

4. *See, e.g.,* Lori Andrews, "Legal and Ethical Aspects of the New Reproductive Technologies," *Clinical Obstetrics and Gynecology,* Vol. 29, No. 1 (March 1986), pp. 195-1%.

5. John Robertson, "Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction," 59 *S.Cal.LRev.* 939, 1040 (1986).

6. Andrews, pp. 195-1%. *See also,* Robertson, p. 958.

7. *Id.*

& *See, e.g.,* Sidney Callahan, "Lovemaking and Babymaking," *Commonweal* (April 24,1987), p. 236; Charles Krauthammer, "The Ethics of Human Manufacture," *Conscience,* Vol. 8, No. 3 (May/June 1987), p. 12.

9. *See, e.g.,* Michael Novak, "Buying and Selling Babies: Limitations on the Marketplace," *Commonweal* (July 17,1987), pp. 406-407.

10. *See,e.g.,* David H. Smith, "Wombs for Rent, Selves for Sale?" [unpublished manuscript], pp. 13-23.

11. Brief Filed on Behalf of the Foundation on Economic Trends *et al.* as Amid Curiae, *In the Matter of Baby M,* 537 A.2d (N J. 1988),

12. *Id,* pp. 21-24.

13. Father Kenneth Doyle, Testimony before the New York State Senate Standing Committee on Child Care, "In the Matter of Surrogate Parenting," (May 8,1987) pp. 147-148: "This bill, Senate 1429, cannot be reconciled with New York State adoption laws... we are much doser in surrogate parenthood [to] adoption law than to contract law because we are dealing with people and not with things. Shouldn't we say in this area as in adoption that baby selling is prohibited and that

no one can be bound by a contract to give away her child made in advance of that child's birth?[1]* *See also,* Callahan, p. 237.

14. One recent development in political theory has been the reemergence of communitarian themes. Communitarians view individual autonomy as one value among many. On their reading, the **harm principle," first espoused by John Stuart Mill, is not adequate for the whole of public morality. *See* John Stuart Mill, *Utilitarianism, On Liberty, Essay on Ben- tham,* ed. Mary Warnock (New York: New American Library, 1962) p. 135. Instead, questions about the nature of a good and decent society remain vital to public discourse. *See, e.g.,* Alasdair *MacIntyre, After Virtue* (Notre Dame: Univ. of Notre Dame Press, 1981); Michael Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge Univ. Press, 1982); Michael *Waizcr, Spheres of Justice* (New York: Basic Books, 1983).

15. For a historical survey of the best interests standard relative to adoption, *see* A. Derdeyn and W, Wadlington, "Adoption: The Rights of Parents versus the Best Interests of Their Children,"/. *Amer.Acad. of Child Psychiatry,* Vol. 16, No. 2 (Spring 1977), pp. 238-241; *see also,* L. Huard, The Law of Adoption: Ancient and Modern," *Vanderbilt Law Review,* Vol. 9 (1956), pp. 749-753.

16. The literature on the statutory and judicial framework of the best interests standard as applied in custody cases is extensive. Particularly helpful are: H. Clark, *The Law of Domestic Relations in the United States* (St. Paul, Minn.: West Publishing Co., 1986),*passim;* H. Foster, "Adoption and Child Custody: Best Interests of the Child?" *Buffalo Law Review,* Vol. 22, pp. 1-16; and S. Katz, "Community Decision-Makers and the Promotion of Values in the Adoption of Children,"/. *Family Law,* Vol. 4, pp. 1-28.

17. The Ethics Committee of the American Fertility Society, "Ethical Considerations of the New Reproductive Technologies" [hereinafter AFS Report], *Fertility and Sterility,* Vol. 46, No. 3 (Sept. 1986), p. 64S:"... [T)he child would be reared by a couple who so wanted him or her that they were willing to participate in a novel process with potential legal or other risks."

18. *Id.*

19. John Robertson, "Surrogate Mothers: Not So Novel After All," *Hastings* Or. *Report* (Oct. 1983), p. 29.

20. Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* [hereafter Ontario Report], Vol. 2 **(1985)** , pp. 231-232.

21. Noel Keane and Dennis Breo, *The Surrogate Mother* (New York: Everest House, 1981), pp. 234-240.

22. *See, e.g.,* Andrews, pp. 200-201. *See also,* AFS Report, p. 60S.

23. Ontario Report, p. 232; AFS Report, p. 64S.

24. AFS Report, p. 66S; Keane and Breo, pp. 311-318.

25. AFS Report, p. 66S : . . [P]aying the surrogate a fee is readily distinguishable from paying an already pregnant woman for her child. The payment to a surrogate is made in exchange for her help in creating a child, not in exchange for the possession of the child.*'

26. *Id.*

27. *Id.,* p. 60S.

28. *Matter of Baby M,* 537 A.2d 1227,1240,1241 (NJ. 1988).

29. George Annas, "Baby M: Babies (and Justice) for Sale," *Hastings Ctr. Report* (June 1987), p. 14.

30. New York State Catholic Conference, "Surrogate Motherhood," Conference Update (May/June 1987), p. *2; see also,* Barbara Katz Roth- man, "Surrogacy: A Question of Values," *Conscience,* Vol. 8, No. 3 (May/June 1987), p. 4.

31. *See, e.g.,* Daniel Callahan, "Surrogate Motherhood: A Bad Idea," *New York Times,* Jan. 20,1987, p. 25A, col. 2.

32. Sidney Callahan, p. 237.

33. Rothman, p. 4.

34. N. *H, supra,* pp. 11-12.

35. Richard McCormick, "Surrogate Motherhood: A Stillborn Idea," *Second Opinion,* Vol. 5 (1987), p. 130; Callahan, p. 235.

36. *See, e.g.,* G. Dunston, "Moral and Social Issues Arising from AID," *Cl BA Foundation Symposium,* Vol. 17 (1973), p. 69.

37. *See, e.g.,* Herbert Krimmel, "The Case Against Surrogate Parenting," *Hastings Ctr. Report* (Oct. 1983), p. 37.

38. Sheila Taub, "Surrogate Motherhood and the Law," *Connecticut Medicine,* Vol. 49, No. 10 (Oct. 1985), pp. 673-674; Krimmel, p. 38; McCormick, p. 130.

39. *See, e.g.,* Katha Pollitt, "The Strange Case of Baby M," *The Nation* (May 23,1987), p. 687.

40. P. Reilly, "In Vitro - A Legal Perspective," in A. Milunsky and G. Annas (eds.), *Genetics and the Law* (New York: Plenum Press, 1976), p. 359. *See also,* Andrews, p. 201.

41. Paul Ramsey, "Shall We 'Reproduce'?" *JAMA,* Vol. 220, No. 11 (June 12,1972), pp. 1480-1485. *See also,* Rothman, pp. 1-3.

42. AFS Report, p. 64S.

43. Ontario Report, p. 232.

44. Robertson, "Surrogate Mothers," p. 32.

45. *Id.*

46. Ontario Report, pp. 233-236.

47. Lori Andrews, The Aftermath of Baby M; Proposed State Laws on Surrogate Motherhood," *Hastings Ctr. Report* (Oct./Nov. 1987), p. 37.

48. IPA State Network, "Bill Introductions in 1987 Legislative Sessions Relating to Surrogacy Contracts" (Sept. 17,1987), pp. 4-6.

49. *Id.*

50. Robertson, "Embryos, Families, and Reproductive Liberty," p. 961, n. 69.

5L *See, e.g.,* Andrews, "Legal and Ethical Aspects," p. 201.

52. *Id. See also,* Robertson, "Surrogate Mothers," p. 30.

53. Robertson, "Embryos, Families, and Procreative Liberty," p. 1040. *See also,* Keane and Breo, pp. 323-325.

54. *See, e.g.,* Leon Kass, "New Beginnings in Life," in M. Hamilton (ed.), *Three Medical Futures* (Grand Rapids, Mich.: Wm. B. Ecrdmans Co., 1972); Leon Kass, "Making Babies: The New Biology and the 'Old' Morality," *Public Interest,* No. 26 (1972), pp. 19-56; Daniel Pilarczyk, Taking it on the Chin - For Life," *America* (April 11,1987), pp. 295-296. For expressly theological affirmations of the unity and exclusivity of marriage vis-a-vis parenting *see* Congregation for the Doctrine of the Faith, "Instruction on Respect for Human Life and the Dignity of Procreation," *Crux* (March 30,1987), pp. 1-8.

55. *See, e.g.,* Krimmel, pp. 36-37; Krauthammer, pp. 8-12; Richard Doerflinger, "Public Polity and Reproductive Technology," Origins, Vol. 17, No. 9 (July 30,1987), pp. 14-15.

56. "Instruction on Respect for Life," pp. 1-8.

57. *Id.,* p. 5.

58. FredRosner, "Medical Genetics: The Jewish View," *New York State Journal of Medicine* (Aug. 1982), p. 1367.

59. Shari O'Brien, The Itinerant Embryo and the Neo-Nativity: Bifurcating Biological Maternity," *Utah L. Rev.* 1,26 (1987); Callahan, p. 236.

60. McCormick, p. 129.

61. *Id.*

62. Callahan, p. 238.

63. New Jersey Catholic Conference, "In the Case of Baby M," *Origins* (Aug. 8,1987), p. 162; McCormick, p. 131; Howard Fetterhoff and Francis Viglietta, "Surrogate Motherhood Contracts," *Origins* (Sept. 17,1987), pp. 225-227.

64. AFS Report, p. 64S.

65. *Id.,* p. 66.

66. P. Parker, "Motivation of Surrogate Mothers: Initial Findings.'Xm. /. *PsychiaL,* Vol. 140 (1983), p. 117.

67. AFS Report, p. 64S.

68 .Id.

69. *Id,* p. 65S.

70. Keane and Breo, pp. 310-318.

71. AFS Report, p. 64S.

72. Ramsey, p. 1481.

73. *Id.* Ramsey's forecast is partially borne out by a recent case which suggests that even healthy infants may be more vulnerable to abandonment under surrogate arrangements. A couple accepted only one child when a surrogate gave birth to twins. The couple wanted a girl and were unwilling to accept her twin brother. The boy was initially sent to a foster home, although the surrogate and her husband then decided to raise him. "Couple Rejects Ordered Baby," *New York Daily News,* April 24,1988, p. 3C, col. 1.

74. Rothman, p. 4.

75. Brief of the Foundation on Economic Trends, pp. 12-20.

76. *See generally,* Ramsey, p. 1481; Rothman, p. 4.

77. Brief of the Foundation on Economic Trends, p. 10; Pollitt, pp. 685- 686; Daniel Callahan, p. 25A.

78. Brief of Concerned United Birthparents, Inc. as Amiri Curiae, *Matter of BabyM,* 537 A2d (NJ. 1988), p. 9: "As the natural parent, Mary Beth Whitehead had the constitutional right to maintain a relationship with Baby M. To conclude otherwise would be to deny her role as biological mother and to reduce her to a mere service provider or breeder."

79. Rothman, p. 4.

80. *See, e.g.,* McCormick, p. 128.

81. *See, e.g.,* Pollitt, p. 685.

82. *See, e.g.,* O'Brien 26-27; Brief of the Foundation on Economic Trends, p. 10.

83. Robertson, "Embryos, Families, and Procreative liberty," pp. 961-962.

84. Lori Andrews, "Reproductive Technologies in the 1990*s" [unpublished manuscript], p. 44.

85. P. Parker, "Surrogate Motherhood, Psychiatric Screening, and Informed Consent: Baby Selling and Public Policy," *12 Bulletin of the Amer. Acad, of Psychiat. and Law* 21 (1984).

86. Andrews, "Reproductive Technologies in the 1990's," p. 41.

87. Pollitt, p. 684: "Even if no money changed hands, the right-to-con- trol-your-body argument would be unpersuasive. After all, the law already limits your right to do what you please with your body: you can't throw it off the Brooklyn Bridge, or feed it Laetrile, or even drive it around without a seat belt in some places." *See also,* Margaret Jane Radin, "Market Inalienability," *Harv. L. Rev.,* Vol. 100 (June 1987), pp. 1921-1931.

88. *See, e.g.,* Brief of the Rutgers Women's Rights Litigation Clinic as Amicus Curiae, *Matter of Baby M* 537 A.2d (N J. 1988), pp. 10-15.

89. Tom Beauchamp and Ruth Faden, *A History and Theory of Informed Consent* (New York: Oxford University Press, 1986); Jay Katz, *The Silent World of Doctor and Patient* (New York: The Free Press, 1984); President's Commission for the Study of Ethical Issues in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions,* Vols. 1,2 (Washington, D.C.: U.S. Government Printing Office, 1982).

90. *Schloendorff* v. *Society of New York Hospital,* 211 N.Y. 125,129; 105 N.E. 92,93 (1914).

91. *See, e.g.,* Alexander Capron, "A Functional Approach to Informed Consent," in Thomas Mappes and Jane Zembaty (eds.), *Biomedical Ethics*

(New York: McGraw Hill, 1981), p. 75. *See also,* James F. Childress, *Who Should Decide?* (New York: Oxford University Press, 1982), pp. 77-80.

92. For an example of the argument that fees may be coercive to some women, *see* Brief of the Foundation on Economic Trends, pp. 16-21. For an example of the opposite viewpoint, *see* E.M. Landes and R. Posner, "The Economics of the Baby Shortage,[1]"*J.Leg.Studies,* Vol. 7 (1978), p. 323.

93. *See, e.g.,* Allen Buchanan and Daniel Brock, "Deciding for Others," *The Milbank Quarterly,* Vol. 64, Suppl. 2 (1986), pp. 34-37.

94. Andrews, "Reproductive Technologies in the 1990's," pp. 10-11,44.

95. Andrews, "Legal and Ethical Aspects of the New Reproductive Technologies," pp. 196-197.

96. *Id.*

97. Brief of the Foundation on Economic Trends, pp. 30-31; Brief of Concerned United Birthparents, Inc., pp. 19-22.

98. Pollitt, p. 685.

99. *See, e.g.,* Annette Baran, Reuben Pannor, and Arthur Sorosky, "The Lingering Pain of Surrendering a Child," *Psychology Today* (June 1977), pp. 58 ff; Eva Deykin, Lee Campbell, and Patricia Patti, "The Post-adoption Experience of Surrendering Parents," *Amer. /. Orthopsychiat.,* Vol. 54 (April 1984), pp. 271-280; Edward Rynearson, "Relinquishment and Its Maternal Complications: A Preliminary Study,Mm. /. *Psychiatry,* Vol. 139 (March 1982), pp. 338-340.

Six

The Public Dialogue

Surrogate parenting has been the subject of extensive scrutiny in recent years by the public at large and by numerous public and private organizations. Although the Baby M case in New Jersey heightened awareness of the issue, the debate about surrogate parenting preceded the much publicized court case.

This Chapter briefly reviews the positions and recommendations articulated by various public and private groups, including: (i) governmental bodies, both in the United States and abroad, (ii) various religious communities; (iii) professional organizations; (iv) women's rights organizations; and (v) groups that advocate on behalf of children and infertile couples. The Chapter provides neither a comprehensive survey of all views nor a thorough discussion of particular positions. Rather, it summarizes the conclusions about surrogate parenting reached by some communities and organizations.

Government Reports

In the United States and abroad, governments have looked to specially constituted groups and commissions to recommend policy on the new reproductive technologies and practices. More than fifteen major reports have been released, dating back as early as 1979.[1] Of the groups that have commented on surrogate parenting, most concluded that the practice is unacceptable.

Among the most prominent studies are the *Report of the Committee of Inquiry into Human Fertilisation and Embryology* by Britain's Warnock Committee, several reports by Australia's Victoria Committee, and the *Report on Human Artificial Reproduction and Related Matters* by Canada's Ontario Law Reform Commission.

The 1984 Report of Britain's Warnock Committee expressed opposition to surrogate parenting on several grounds, including the risks of harm to parties to the contract, the risks to the children born, and the threat to human dignity when "a woman... use[s] her uterus for financial profit and

treat [s] it as an incubator for someone else's child." The Committee found the threat of exploitation posed by commercial surrogacy particularly troubling:

> That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection. Such treatment of one person by another be* comes positively exploitative when financial interests are involved.

In proposing policy, the Committee concluded that regulating surrogacy would encourage the practice. The Committee therefore urged the enactment of legislation to make all brokering and fees for surrogate parenting a criminal offense.[4] Recognizing that private surrogate arrangements would continue, the Committee also recommended a statute to render surrogate contracts void and unenforceable. Following the Committee's recommendations, Parliament passed legislation in 1985voiding the contracts and banning the fees.[6]

In a series of reports from 1982 tol984, Australia's Victoria Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilization (Waller Committee) concluded that surrogate parenting is neither legally nor ethically acceptable.[7] The Committee based its opposition upon the judgment that surrogate parenting agreements involve the buying and selling of infants.[8] In accord with the Committee's recommendations, the Australia Infertility (Medical Procedures) Act of 1984 criminalized all brokerage fees relating to surrogacy and declared surrogate contracts void as against public policy.[9]

In 1985, a Canadian body, the Ontario Law Reform Commission, released its recommendations in the *Report on Human Artificial Reproduction and Related Matters*♦ The Commission rejected as "impracticable" the argument that surrogate parenting should be proscribed because "one person should not serve as a means to an end for another."[10] It expressed concern about the possible harm that surrogacy may cause to the surrogate and the child, but considered present data about the potential harm inconclusive.[11] The Commission rejected an outright prohibition of surrogacy. Fearful that a ban would force the practice underground, the majority of the Commission members recommended that surrogacy should be regulated through extensive oversight by the family law court. The court would certify the presence of a legitimate medical need, assess the suitability of the prospective parents and the surrogate, and approve all payments.

Policies in New York and Other States

As of September 1987, surrogate parenting bills had been introduced in 26 states and the District of Columbia.[13] By March 1988, six states had passed legislation to address the issue: Indiana, Kentucky, Louisiana, Nebraska, Arkansas and Nevada.[14] The proposed and enacted legislation falls into three general categories: (i) bills that call for regulation of surrogate parenting arrangements; (ii) bills that prohibit or discourage surrogate parenting contracts; and (iii) bills that establish commissions to study surrogacy and recommend public policy.

Numerous bills have been introduced to regulate surrogate parenting arrangements.[13] This regulation often covers screening for surrogates and prospective parents, court oversight of surrogate contracts, and limitations on brokering activity. One Florida bill is typical of numerous proposals in other states. It specifies provisions of a surrogate contract; provides rules about parentage, payment of costs, and relief upon breach of contract; legalizes payments to a surrogate; and prohibits the surrogate from withdrawing her consent to adoption.[16] Some states are considering proposals that allow judicially approved contracts but criminalize all other surrogate parenting arrangements.[17]

Many bills have also been introduced to discourage surrogate parenting contracts.[18] Nearly all declare the contracts "unenforceable" and/or "null and void" as against public policy.[19] Some, like the legislation proposed in Maryland, would criminalize surrogate arrangements and impose penalties.[20]

Other bills would establish task forces or committees to analyze issues posed by surrogate parenting.[21] Some proposals call for committees to study issues concerning surrogate parenting and in vitro fertilization,[22] while others focus exclusively on surrogacy.

By March 1988, six states had enacted legislation on surrogate parenting. Legislation in four states — Indiana, Kentucky, Louisiana and Nebraska — declared surrogate contracts void and unenforceable as against public polity.[24] The Nebraska legislation stipulated further that the father of a child born to a surrogate parenting arrangement shall have "all the rights and obligations imposed by law" with respect to the child.[25] Among its provisions, the Indiana legislation excluded the surrogate's prior consent as a factor in custody determinations in disputed cases. In Arkansas and Nevada, surrogate parenting contracts were recognized as enforceable, subject to judicial review.[26]

In New York State, four bills on surrogate parenting were introduced

during the 1986*1987 legislative session?[7] One bill urged legislative action to resolve confusion about the legal status of children born from the practice,[28] and proposed the regulation of surrogate parenting to safeguard the interests of children, minimize the risks to the parties to the contract, and reduce the dangers posed by the commercial aspects of surrogacy,[29] The bill allowed surrogate parenting only for medical reasons, required prior judicial approval of surrogate parenting contracts, and specified procedures for judicial review and enforcement,[30] The legislation provided that a child born of the contract would be the legitimate, natural child of the intended parents, unless the surrogate could prove by a "compelling change in circumstances" that enforcing the contract would not serve the best interests of the child.[31]

A second bill introduced in New York prohibited all fees for surrogate parenting arrangements other than "legitimate expenses" for medical and maternity costs, reasonable legal fees, and actual lost income [32] It required the surrogate to "submit to any reasonable pregnancy-related medical care or treatment,"[33] but allowed her to revoke her consent to adoption in writing and to initiate custody proceedings within twenty days after the child's birth.[34] A third bill would bar commercial provisions in surrogate contracts, while another bill would establish that surrogate parenting contracts are void and unenforceable as against public policy.[35]

Religious Communities

Few Protestant denominations have issued definitive policy statements on the new reproductive technologies and practices, including surrogate parenting.[36] Instead, a variety of views have been stated by individual theologians. In the Jewish tradition, different opinions have also emerged on the new reproductive practices although uniformity of belief exists in relation to some questions,[37] The Roman Catholic Church has explicitly rejected the practice of surrogate parenting in all cases.[38]

Roman Catholicism

In its March 1987 "Instruction on Respect for Human Life in Its Origins and On the Dignity of Procreation: Replies to Certain Questions of the Day," the Congregation for the Doctrine of the Faith expressed strong op* position to surrogate parenting[39] The document initially points out that scientific research and its applications are not morally neutral. These discoveries must be humanized by the rational dictates and constraints of the natural moral law:

> Science and technology require for their own intrinsic meaning an unconditional respect for the fundamental criteria of the moral law. That is to say, they must be at the service of the human person, of his inalienable rights and his true and integral good according to the design and will of God.[40]

The document urges that two fundamental values must be safeguarded in any reproductive technology or practice: "the life of the human called into existence," and "the special nature of the transmission of human life."[41] In accordance with those values, the Instruction rejects surrogate parenting as contrary to the unity of marriage and to the dignity of the procreation of the human person:

> Surrogate motherhood represents an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood; it offends the dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents; it sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitute those families.

The documents also asserts that damage to the personal relationships within the family that may result from third-party involvement in reproduction has repercussions on civil society: "[w]hat threatens the unity and stability of the family is a source of dissension, disorder and injustice in the whole of social life."[43]

Protestantism

Few Protestant denominations have reached or expressed firm conclusions about surrogate parenting. Instead, individual theologians have offered different assessments of new reproductive technologies and practices.

Some Protestant thinkers find Scriptural support for the notion of a natural order or divine sanction of natural procreation. Ethicist Paul Ramsey exemplifies this general tendency in Protestant ethics. Ramsey's theological condemnation of in vitro fertilization is equally relevant to an assessment of surrogate parenting:

> An ethic... that in principle sunders these two goods -- regarding procreation as an aspect of biological nature to be subjected merely to the requirement of technical control while saying that the unitive purpose is the free, human, personal end of the matter — pays disrespect to the nature of human parenthood.[44]

Other Protestant writers affirm the legitimacy and desirability of the

new reproductive technologies. According to Joseph Fletcher, what is distinctive about responsible parenthood is its personal character rather than any biological norms or physical determinants [45] Fletcher therefore rejects the claim that any new reproductive technology or arrangement is intrinsically immoral, and espouses a morality that "welcomes emancipation from natural necessity."[45]

Other Protestant theologians eschew the contrast of natural and unnatural, but are less optimistic than theologians like Fletcher in assessing the impact of technology upon our lives. According to these theologians, surrogate parenting represents a "distortion of procreation."[47] Although they express compassion for the plight of infertile couples, they find surrogate parenting incompatible with a Christian understanding of parenthood, because the surrogate deliberately conceives and bears a child with no lasting commitment to the child or its father.[48]

Judaism

Authorities within the three branches of Judaism — Orthodox, Conservative, and Reform - have commented extensively on the new reproductive technologies. Many Orthodox and Conservative scholars have focused upon artificial insemination by donor (AID) [49] Because surrogate parenting typically involves artificial insemination of the surrogate with the sperm of the intended father, AID is implicated in the evaluation of the practice.

In accord with their negative evaluation of AID, most Orthodox authorities view insemination of a married surrogate as adulterous, though some rabbis limit adultery to cases involving extra-marital intercourse. Virtually all Orthodox commentators also condemn surrogate parenting on other grounds.[51] As stated by Britain's Chief Rabbi Immanuel Jakobovits,

> [T]o use another person as an "incubator" and then take from her the child she carried and delivered for a fee is a revolting degradation of maternity and an affront to human dignity.[52]

Conservative commentators have expressed a range opinions about AID and surrogate parenting. Some believe that AID is akin to adultery and should be condemned, while others declare that AID is a clinical procedure that does not violate marriage vows [53] Although some Conservative Jewish authorities believe that surrogate parenting may be an "ethical good" for an infertile couple, other commentators reject surrogate parenting because of its potential to destroy family bonds.

The Central Committee of American Rabbis (CCAR), an organization of Reform Jewish leaders, issued an official statement indicating that surrogate parenting is acceptable in some cases.[55] The CCAR expressed tentative approval of surrogate parenting by recognizing that an infertile couple may have recourse to a surrogate arrangement in

the absence of other options. As the CCAR stated in its 1982 Responsa Report:

> We would hesitantly permit the use of a married surrogate mother in order to enable a couple to have children... We would have to treat the use of a surrogate mother as a new medical way of relieving the childlessness of a couple.[56]

Professional Organizations

Numerous professional medical organizations have issued policy statements on the new reproductive technologies and practices, including: Britain's Royal College of Obstetricians and Gynecologists, the Executive Board of the American College of Obstetricians and Gynecologists (ACOG), the Judicial Council of the American Medical Association and the Ethics Committee of the American Fertility Society. Three of the organizations criticized the practice, while the American Fertility Society expressed cautious approval.

In March 1983, The Royal College of Obstetricians and Gynecologists stated its position in the *Report on In Vitro Fertilisation and Embryo Replacement or Transfer?*[1] The College concluded that the implantation of embryos into surrogates is unethical for several reasons, including potential legal and psychological difficulties for the child, emotional stress upon the surrogate, and the dangers of exploitation posed by commercial surrogacy.[58] The Report recommended that surrogate parenting contracts should be declared unenforceable [59]

The American College of Obstetricians and Gynecologists (ACOG) concluded that surrogate parenting raises several ethical concerns similar to those posed by artificial insemination by donor: (i) the potential depersonalization of reproduction; (ii) adverse consequences for the way society views children; and (iii) the possibility of eugenic manipulation.[60] The ACOG found certain features of surrogate parenting uniquely troubling, including the physical and psychological risks to the surrogate, the potential for conflict, and the danger such conflict poses to children [61]

Finally, the ACOG voiced special concern about the commercial aspects of surrogate parenting and noted the difficulty of distinguishing payments for the surrogate's "services" from baby selling.[62] In addition, the ACOG suggested that a physician who receives compensation for recruiting surrogates or investing in surrogate enterprises may face a conflict of

interest.

The American Medical Association (AMA), in a 1983 policy statement, offered an even more negative appraisal of surrogacy. The AMA Judicial Council echoed the ACOG's concerns about possible harm to the surrogate and the potential for conflicts between parties to the contract, and focused on two aspects of surrogacy that threaten the interests of children: (i) the lack of sufficient screening of prospective parents (unlike ordinary adoption proceedings); and (ii) the risks to a disabled child who maybe unwanted by both parents.[6]* The AMA concluded that surrogate parenting "does not represent a satisfactory alternative" for prospective parents.

In contrast, the Ethics Committee of the American Fertility Society (AFS), in its September 1986 study, "Ethical Considerations of the New Reproductive Technologies," concluded that reproductive liberty entails access to new reproductive technologies and practices, including surrogate parenting.[67] The Committee recognized the potential risks to all the parties involved, but did not recommend that the practice be discouraged. Instead, the AFS proposed that surrogate parenting be pursued as a clinical experiment according to a medical protocol approved by a local institutional review board or ethics committee.[68] In order to prevent conflicts of interest, the Committee recommended that professionals should receive only "customary fees" for participation in surrogate parenting arrangements.

Women's Rights Groups

Although individual feminists have voiced conflicting opinions about surrogate parenting, many women's rights organizations have expressed reservations about, or opposition to, the practice.[70] At public hearings in Albany in May 1987, the New York State Coalition on Women's Legislative Issues urged that surrogate parenting contracts be deemed unenforceable as against public policy on several grounds. According to the Coalition, enforcement of the contracts elevates the intended parents' right to have genetic offspring over the constitutional rights of the birth mother, the baby's best interests, and the child's constitutional right of access to its mother.[71] The practice also dehumanizes women and commercializes reproduction. Finally, the Coalition argued that surrogates cannot waive their parental rights prior to birth, since pregnancy has "enormous physical and emotional significance to the pregnant woman, the effect of which cannot be calculated before the fact."[73] In light of these concerns, the Coalition echoed the conclusions of the Warnock Committee Report and called for legislation to ban commercial surrogacy.[74]

In 1987, the National Organization for Women of New York State (NOW) released a series of statements on surrogate parenting. NOW rejected the term "surrogate mother" as inaccurate and biased and expressed "alarm" at some proposed surrogacy legislation:

> (such legislation] has legitimized a marketing term as legal terminology, and thus obfuscates the fact that the thrust of this legislation is to provide a legal mechanism to terminate the rights of a biological parent through contract law, a radical step in New York legislative history in this century.[75]

NOW also endorsed two basic principles: (i) the birth mother should be given the right to revoke her consent to adoption of her baby within a limited grace period after birth;[76] and (ii) no birth mother or third party should receive any monetary consideration other than reasonable medical or legal and counseling fees.[77] NOW rejected restricting surrogate arrangements to married heterosexual couples,[78] and suggested that legislation would be "premature," since more time is needed to develop public policy on surrogate parenting.[79]

In July 1987, 22 prominent feminist, including Gloria Steinem and Betty Friedan, joined with the Washington-based Foundation on Economic Trends to file an amicus curiae brief with the New Jersey Supreme Court in the Baby M case.[80] The brief condemned surrogate parenting and argued that: (i) surrogate contracts are unenforceable and void as contrary to New Jersey policy;[81] (ii) surrogate parenting arrangements are not a legitimate extension of reproductive liberties; and (iii) the commercial aspects of surrogate parenting will lead to eugenic manipulation [83]

Other Organizations

Two statements from child welfare and adoption groups express concerns about the adverse consequences of surrogate parenting for children. The National Committee for Adoption (NCFA) proposed that the practice should be banned in those states where it b not already illegal. At the same time, the NCFA reiterated support for strengthening families through adoption.

From May to August 1983, the Child-Welfare League of America (CWLA) surveyed the executive directors of CWLA member agencies about their attitudes toward surrogate parenting. Although the results were not conclusive, the majority of respondents favored strictly regulating the practice (66%) or making it illegal (24%).[86] Only 10% believed that it

should remain unregulated. The members of the CWLA Executive Committee also agreed that a term other than "surrogate mothering" should be used to describe the practice.[88]

In contrast to the strong condemnation of surrogacy issued by the National Committee for Adoption, two organizations that represent infertile couples, the National Infertility Network Exchange (NINE) and Resolve, Inc., support surrogate parenting. In its brief filed in the Baby M case, NINE argued that surrogate parenting, unlike adoption, establishes a genetic connection which is important to many infertile couples, and that the practice involves the intended parents from the outset of pregnancy.[89] Resolve, in its revised policy statement on surrogate parenting, stressed the difficulties facing parents who wish to adopt a child, and concluded that surrogate parenting should remain an alternative for infertile couples.[90]

NOTES

1. Leroy Walters, "Ethical Issues in Human In Vitro Fertilization and Embryo Transfer," in Aubrey Milunsky and George Annas (eds.), *Genetics and the Law III (New York: Plenum, 1985), pp. 215-226.*

2. Department of Health and Social Security (Great Britain), *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: Her Majesty's Stationery Office, 1984), p. 45.

3. *Id.,* p. 46.

4. *Id.* p. 47.

5. *Id.*

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

7. *See* Victoria, Australia Committee to Consider the Social, Ethical, and Legal Issues Arising from In Vitro Fertilization [hereafter Waller Committee], *Interim Report,* September, 1982; Waller Committee, *Report on Donor Gametes in IVF* (August, 1983); Waller Committee, *Final Report* (August, 1984).

8. Waller Committee, *Final Report,* p. 61.

9. Infertility (Medical Procedures) Act, No. 10163 (Victoria, Australia: 1984), Section 30, pp. 21-22.

10. Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters,* Vol. 2 (1985), p. 231.

11. *Id.*

12. *Id.,* pp. 236-246.

13. These states are: Alabama, Arizona, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, and Wisconsin.

14. *See* Arkansas StaL Ann. 9-10-201,9-10-202 (1987); Indiana S-98 (enacted Feb. 1988); Kentucky BR-219 (1988); Louisiana Act 583 (July 1987); Nebraska LB-674 (enacted Feb. 1988); Nevada Rev. Stat. 773 (June
5,1987)

15. As of September 1987, bills to regulate surrogacy had been introduced in the following states: Arizona, Connecticut, Florida, Illinois, Massachusetts, Maryland, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, and South Carolina.

16. "Bill Introductions in 1987 Legislative Sessions Relating to Surrogacy Contracts" (Sacramento, Ca.: State Network, September, 1987), p. 1

17. *See, e.g.,* Ma. H-5314 and Mi. H-4753.

18. As of September 1987, bills to discourage surrogate parenting had been introduced in the following states: Alabama, Connecticut, Iowa, Illinois, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, North Carolina, Nevada, New Jersey, New York, Oregon, Pennsylvania and Wisconsin.

19. *See, e.g.,* Mn.S-1167 and N.Y. S-4641.

20. Md. S-613.

21. As of September 1987, such bills had been introduced in the following states: Connecticut, Delaware, Illinois, Indiana, Louisiana, Massachusetts, Maine, North Carolina, Nevada, New Jersey, New York, Pennsylvania, Rhode Island, and Texas.

22. "Bill Introductions," p. 6.

23 .*Id.*

24. In. S-98 (enacted Feb. 1988); Ky. BR-219; La. Act583 (July9, 1987); Ne. LB-674 (enacted Feb. 1988).

25. Ne. LB-674, §1.1.

26. Ark. Stat. Ann. 9-10-201,9-10-202 (1987); Nev. Rev. Stat. 773 (June 5, 1987).

27. N.Y. S-1429-A; N.Y. A-2403; N.Y. S-4641; N.Y. A-5529; and N.Y. A-6277.

28. N.Y. S-1429-A § 1.

29. *Id*

30. *Id,* §119-§130

31. *Id.,* § 127.

32. N.Y. A-2403 §65-a.

33. *Id.,* §65-f.

34. *Id,* §65-e.

35. N.Y. S-5529, §1; N.Y. S-4641 and N.Y. A-6277.

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43. *Id.,* II: 2, p. 4.

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PART II

Deliberations and Recommendations of the Task Force

Seven

Devising Public Policy on Surrogate Parenting

The Framework for Public Policy

Contemporary American society is characterized by its pluralism. That pluralism embraces the rich and varied threads of different religious, moral and ethnic traditions. It requires a continued effort to express one's own world view and to understand those of others.

One hallmark of a pluralistic society is its commitment to individual freedom and to the right of individuals to choose their own path among the many different traditions and values that make up our social fabric. In particular, certain freedoms considered basic to the expression of personal identity and selfhood are accorded special deference. In the framework of our Constitution, this deference is shown by requiring government neutrality or non-interference with rights deemed fundamental, unless government can show a compelling interest.

Our social policies and law, however, reflect more than the celebration of individual liberty. A broad if seldom articulated consensus of shared values shapes and enriches our common experience. We therefore acknowledge society's interest in protecting and promoting those social values and institutions it deems primary to its collective life. The issue of surrogate parenting confronts society with the need to weigh the competing claims of individuals involved in the arrangements and to strike an appropriate balance between the individual's freedom to make reproductive choices and other social and moral values.

Decisions about family life and reproduction are intensely private. The rights of adults to make reproductive choices have therefore been granted special protection and status.

Proponents of surrogate parenting assert that the right to enter into such an arrangement is part of the fundamental right to reproduce. They maintain that there is no conclusive or compelling evidence that surrogacy causes tangible harm to individuals. They argue that, without such

evidence, society lacks any legitimate basis for intervention. In assessing what constitutes "tangible" harm, proponents dismiss appeals to shared norms and values as vague or symbolic, and hence inappropriate as the basis for public policy. Finally, proponents suggest that pluralism is best promoted by safeguarding and extending the rights of individuals.

The Task Force does not accept these assumptions as the basis for public policy for surrogate parenting. The surrogate contract is not part of a fundamental right supported on constitutional grounds or defensible as a basic moral entitlement. The claims of surrogates and intended parents to reproductive freedom in the context of surrogate arrangements are attenuated in several ways: by the commercial nature of the arrangements; by the potential conflicts between the rights of parties to the surrogate contract; and by the risks of harm to other individuals.

Many individual rights, like freedom of speech or the right of consenting adults to engage in sexual relations, are constrained when they enter the stream of commerce. They lose their strictly private or privileged stature and the claim they exert on society to non-interference and deference. The same holds true for the decision to conceive and bear a child. Society protects that choice when made privately and without financial incentives. Consistent with that protection, society is free to deny women the opportunity to make money from their gestational capacity and to deny others the right to pay someone else to reproduce.

Unlike privacy protections guaranteed to single individuals, surrogate parenting contracts involve potentially conflicting claims between individuals. These potential conflicts may place the surrogate's right to bodily integrity in conflict with a contractual obligation to submit to invasive medical procedures. Most obviously, the surrogate and the intended parents may have competing and irreconcilable claims to parental status and rights. The Task Force concluded that surrogate parenting arrangements also carry the risk of harm to others. Most serious are the potential risks to the children born from such arrangements. Members of the surrogate's family, including the surrogate's other children, might also be harmed.

Once it is recognized that surrogacy is outside the scope of the basic right to reproduce, the arguments by the proponents of surrogacy lose much of their force. Since the right to enter into a surrogate contract is not a fundamental right, society has no obligation to marshall evidence of tangible harm before devising policy on surrogate parenting arrangements.

Proponents of surrogacy correctly point out that the risks to children or to the surrogates are unproven - no empirical data exists to confirm these predictions because the practice is so novel. Nonetheless, society can conclude that the potential or likely risks of a practice outweigh the benefits conferred without awaiting broad-scale social experimentation.

Moreover, surrogate parenting touches upon basic values and relationships in our private and collective lives: the interests of children, the role of the family, attitudes about women, and the potential commercialization of human reproduction. Society need not cast aside widely held norms or values about these issues in formulating public policy on surrogate parenting. As long as fundamental rights are not infringed, society can promote and protect a broadly shared vision of the public good. Indeed, our existing laws relating to such areas as the family, medical treatment and criminal sanctions, embody shared social values. Through these laws, society establishes a widely accepted framework within which individuals pursue a more particularized vision of the goods of life.

When no fundamental right exists, the possibilities for government intervention are broad. However, the possibility of such intervention does not render it desirable. Indeed, some strongly favor governmental neutrality on all issues when harm to individuals cannot be demonstrated. Under liberal political theory, this neutrality is viewed as the best assurance that individuals will be unhindered in pursing their own moral choices.

Yet, even if society wished to adopt a neutral stance with regard to all social policies, it is clear that "neutral" alternatives for policy on surrogate parenting cannot be fashioned. Legislation that upholds the contracts lends the authority of both the courts and the legislature to enforce the agreements. Alternatively, legislation to void the contracts and withdraw the state's active involvement from the arrangements also cannot be considered neutral. Finally, government inaction, while neutral in theory, is not neutral in practice. When disputes arise, the parties will seek relief from the courts, forcing the articulation of public policy on a case-by-case basis. More significantly, however, the practice will proliferate through the existing commercial channels that have sprung up to promote it. The vacuum left by the absence of publicly articulated goals and values mil be filled by the practices and mores of the marketplace. The result will not be neutral in any sense nor will the impact be limited to the commercial sector. Instead, the attitudes and practices that guide our most private relationships will be refashioned by commercial standards**.**

Society has a basic interest in protecting the best interests of children and in shielding gestation and reproduction from the flow of commerce, as evidenced by the large body of statutory law on custody and adoption. A "neutrality" that would leave such fundamental goods vulnerable to the

dictates of the marketplace is contrary to the public interest.

An Assessment: The Social and Moral Dimensions of Surrogacy

The Task Force deliberated at length about the social, moral and legal issues posed by surrogate parenting. Its members began the deliberations with a wide diversity of opinion.

Ultimately, they reached a unanimous decision that public policy should discourage surrogate parenting. Divergent and sometimes competing visions form the basis for this conclusion. Their judgments are informed by different values, concerns and beliefs. The unanimous support for the conclusion reached is no less remarkable because of the diversity of opinion that underlies it.

The Task Force members share several basic conclusions about surrogate parenting. First, when surrogate parenting involves the payment of fees and a contractual obligation to relinquish the child at birth, it places children at risk and is not in their best interests. Second, the practice has the potential to undermine the dignity of women, children and human reproduction. Many Task Force members also believe that commercial surrogate parenting arrangements will erode the integrity of the family unit and values fundamental to the bond between parents and children.

The Task Force concluded that state enforcement of the contracts and the commercial aspects of surrogate parenting pose the greatest potential for harm to individuals and to social attitudes and practices. The conclusions and concerns expressed below relate primarily to these two aspects of surrogacy.

The Interests of Children

The Sale of Babies. Many Task Force members view surrogate parenting as indistinguishable from the sale of children. They reject the practice as morally and socially unacceptable because it violates the dignity of children and the societal prohibition against the purchase and sale of human beings. That prohibition rests on basic premises about the nature and meaning of being human and the moral dictates of our shared humanity. One such premise is respect for the inherent dignity and equality of all persons. Allowing one person to purchase another contravenes this premise and should be rejected regardless of the intentions or motivations of those involved.

The fact that it is the child's father who purchases the child from the

child's mother (or, at the least, purchases her right to have a relationship with her child) does not change the character of the arrangement. Euphemisms like "womb rental" or "the provision of services," developed in part as marketing techniques, disserve the public by seeking to obscure the nature of the transaction. The intended parents do not seek a pregnancy or services as the ultimate object of the arrangement; they seek the product of those "services" — the child.

The surrogacy contracts themselves make this intent unmistakably clear. For example, the contract between Mary Beth Whitehead and the Sterns specified that the Infertility Center would hold $10,000 in escrow for Mary Beth Whitehead. If Mary Beth Whitehead had suffered a miscarriage prior to the fifth month of pregnancy, she would not have received any money under the contract. If she had a miscarriage subsequent to the fourth month of pregnancy or if the child died or was stillborn, her compensation would have been $1,000, an amount completely unrelated to the "services" performed. Likewise, if testing indicated that the fetus had genetic or congenital anomalies and Mary Beth Whitehead had refused to have an abortion and had carried the child to term, she would have received little or no compensation. Finally, all doubt about the nature of the contract is removed by virtue of the fact that Mary Beth Whitehead was not entitled to any compensation for her "services" alone; she was only entitled to compensation if she surrendered the product of those services — the child.

The Risks Posed. The Task Force concluded that surrogate parenting presents unacceptable risks to children. First, the fact that the practice condones the sale of children has severe long-term implications for the way society thinks about and values children. This shift in attitudes will inevitably influence behavior towards children and will create the potential for serious harm.

Surrogacy also poses more immediate risks to children. Under the arrangements, children are born into situations where their genetic, gestational and social relationships to their parents are irrevocably fractured. A child may have as many as five parents, or, frequently, will have at least four - the mother and her husband and the father and his wife. Where the birth mother has no genetic link to the child, the child has two mothers.

In contemporary family life, many children are denied the benefit of in ongoing relationship with both their biological parents. High divorce rates and the growing number of unwed mothers leave many children with a close connection to only one parent. When remarriage occurs, children are raised in a reconstituted family unit that does not share the bonds of genetic relationship. The same has always been true for children relinquished at birth or thereafter and raised by adoptive parents. Although

some children thrive in these situations, others face greater risk of emotional harm or loss.

Unlike divorce or adoption, however, surrogate parenting is based on a deliberate decision to fracture the family relationship prior to the child's conception. Once parenthood is fragmented among persons who are strangers to one another, there is no basis to reconstruct the family unit or even to cope with alternative arrangements in the event conflict arises.

A child may be caught in the cross-fire of a fractious and lengthy court battle between his or her parents during the early years of the child's life, when stability and constant nurturing are vital. Alternatively, where the bonds of kinship are attenuated, children who are born with physical or mental anomalies are far more likely to be abandoned by both parents. Potentially, neither parent will have a bond with the child at birth; the mother because she successfully preserved her emotional distance and the father because he has not shared the pregnancy and has no relationship to the child's mother. While legislation or contractual agreements can apportion financial responsibility, they cannot compensate for the high risk of emotional and physical abandonment these children might face. Other potential dangers for children include the harm from knowing their mothers gave them away and the impact on brothers and sisters of seeing a sibling sold or surrendered.

Advocates of surrogate parenting suggest that any risks to children are outweighed by the opportunity for life itself — they point out that the children always benefit since they would not have been born without the practice. But this argument assumes the very factor under deliberation — the child's conception and birth. The assessment for public policy occurs prior to conception when the surrogate arrangements are made. The issue then is not whether a particular child should be denied life, but whether children should be conceived in circumstances that would place them at risk. The notion that children have an interest in being born prior to their conception and birth is not embraced in other public policies and should not be assumed in the debate on surrogate parenting.

The Dignity of Women and Human Reproduction

The gestation of children as a service for others in exchange for a fee is a radical departure from the way in which society understands and values pregnancy. It substitutes commercial values for the web of social, affective and moral meanings associated with human reproduction and gestation. This transformation has profound implications for childbearing, for

women, and for the relationship between parents and the children they bring into the world.

The characterization of gestation as a "service" depersonalizes women and their role in human reproduction. It treats women's ability to carry children like any other service in the marketplace — available at a market rate, based on negotiation between the parties about issues such as price, prenatal care, medical testing, the decision to abort and the circumstances of delivery. All those decisions and the right to control them as well as the process of gestation itself are given a price tag — not just for women who serve as surrogates, but for all women.

The Task Force concluded that this assignment of market values should not be celebrated as an exaltation of "rights," but rejected as a derogation of the values and meanings associated with human reproduction. Those meanings are derived horn the relationship between the mother and father of a child and the child's creation as an expression of their mutual love. Likewise, the meaning of gestation is inextricably bound up with the love and commitment a woman feels for the child she will bring into the world.

In a surrogate arrangement, the intended parents seek a child as a way to deepen their own relationship and to establish a loving bond with another human being. In the process, however, the birth mother uses the child as a source of income and, in turn, is used by the intended parents as a vehicle to serve their own ends. They seek the biological components of gestation from her while denying the personal, emotional and psychological dimensions of her experience and self. If she succeeds in denying her emotional responses during this profound experience, she is dehumanized in the process. If she fails, her attachment to the child produces a conflict that cannot be resolved without anguish for all involved.

Proponents of surrogate parenting urge that neither the surrogate nor the intended parents should be denied their right to choose the arrangement as an extension of their claim to reproductive freedom. Yet protection for the right to reproduce has always been grounded in society's notions of bodily integrity and privacy. Those notions are strained beyond credibility when the intimate use of a third person's body in exchange for monetary compensation is involved.

Women who wish to serve as surrogates would not be limited in their private choices to conceive and bear children - they would only be denied the opportunity to make money from their gestational capacity. Some Task Force members believe that this limitation is justified by the possibility of exploitation, especially in relation to poor women inside and outside of this country. They fear the creation of a class of women who will become

breeders for those who are wealthier.

Other Task Force members concluded that the risk of exploitation could be minimized, but remained concerned about the potential loss to society. They believe that societal attitudes will shift as gestation joins other services in the commercial sphere; the contribution and role of women in the reproductive process will be devalued. Abstracted from the family relationships, obligations and caring that infuse them with meaning, gestation and human reproduction will be seen as commodities. Advances in genetic engineering and the cloning and freezing of gametes may soon offer an array of new social options and potential commercial opportunities. An arrangement that transforms human reproductive capacity into a commodity is therefore especially problematic at the present time.

The Family

The Family Unit The family has long been one of the most basic units of our society—a repository of social and moral tradition, identity and personality. It provides the structure and continuity around which many of our most profound and important relationships are established and flourish.

Social and economic forces have challenged the traditional family unit. At the same time, high divorce rates and the incidence of unwed parents have changed the permanence of the family in the lives of many. Yet, these trends do not alter the importance of the family in our personal and communal lives.

Surrogate parenting allows the genetic, gestational and social components of parenthood to be fragmented, creating unprecedented relationships among people bound together by contractual obligation rather than by the bonds of kinship and caring. In this regard, surrogate parenting, like prenuptial agreements, has been viewed as an extension of a more general social movement from status (or kinship) to contract as a basis for ordering family relationships and the reproductive process.

Although some individuals now choose to shape aspects of their personal relationships with the principles and tools of contract law, society should not embrace this trend as a prescriptive standard. It embodies a deeply pessimistic vision of the potential for human relationships and intimacy in contemporary society. It promotes legal obligations as the touchstone for our most private relationships instead of fostering commitments forged by caring and trust. Rather than accept this contractual model as a basis for family life and other close personal relationships, society should discourage the commercialization of our private lives and create the

conditions under which the human dimensions of our most intimate relationships can thrive.

The Relationship of Parent and Child. Surrogate parenting alters deep-rooted social and moral assumptions about the relationship between parents and children. Parents have a profound moral obligation to care for their offspring. Our legal and social norms affirm this obligation by requiring parents to care for their children's physical and emotional well-being.

Surrogate parenting is premised on the ability and willingness of women to abrogate this responsibility without moral compunction or regret. It makes the obligations that accompany parenthood alienable and negotiable.

Many of the Task Force members concluded that society should not promote this parental abdication or the ability of some women to overcome the impulse to nurture their children. Some Task Force members reject all third party donation to the reproductive process because it encourages adults to relinquish responsibility for biological offspring. Other Task Force members distinguish surrogacy from gamete donation because of the surrogate's direct and prolonged relationship to the child she bears.

Surrogate parenting also severs the second prong of the legal relationship that binds parents and children - parental rights. In fact, the practice involves unprecedented rules and standards for terminating both parental status and rights, including the right to a relationship with one's own child. Under existing law, parental rights cannot be denied without a showing of parental unfitness. This high standard embodies society's respect for the rights that flow from parenthood and the relationship those rights seek to protect.

Surrogate parenting rejects that standard in favor of a contract model for determining parental rights. Many Task Force members view this shift as morally and socially unacceptable. The assumption that "a deal is a deal," relied upon to justify this drastic change in public policy fails to recognize and respect the significance of the relationships and rights at stake.

The Relationship Between the Spouses. Some Task Force members reject surrogate parenting and all third party donation to the reproductive process because they violate the unity and exclusivity of the relationship and commitment between the spouses. According to this view, procreation reflects the spiritual and biological union of two people; children born of that union manifest the uniqueness of the marital relationship. The involvement of a third person as surrogate or as gamete donor contravenes the spiritual and human values expressed in marriage and in the procreative process.

Some Task Force members also believe that an imbalance may be created in the marital relationship when only one parent is genetically related to the child. This imbalance may generate tension in the family unit rather than enrich the relationship between the spouses.

The Waiver of Fundamental Rights

Under the laws of New York and other states, parental rights and status cannot be irrevocably waived in advance of the time the rights will be exercised. By placing these rights as well as others beyond the reach of an advance agreement that is legally enforceable, society seeks to preserve those rights and the values they embody.

Many Task Force members believe that parental rights, including the right to a relationship with one's own child, deserve this special status. They do not view this as a limitation of individual freedom, but as a societal judgment about how that freedom is best protected.

The Task Force's proposal is consistent with existing adoption laws, which provide that a woman cannot consent to her child's adoption until after the child is born. Surrogate parenting should not be allowed to dislodge this long-standing public policy

Informed Consent

Many of the Task Force members support the nonenforceability of surrogate contracts, in part because they believe that it is not possible for women to give informed consent to the surrender of a child prior to the child's conception and birth. Some commentators have argued that this conclusion diminishes women's stature as autonomous adults. The Task Force members reject that assertion.

The debate on surrogate parenting focuses on the ability of women to make informed choices — not because women differ from men in making important life decisions, but because women alone can bear children. The inability to predict and project a response to profound experiences that have not yet unfolded is shared by men and women alike. This inability often stems from the capacity for growth and an openness to experience in our relationships with others. These qualities are a positive and dynamic part of our humanness.

Denying women the opportunity to change their minds does not accord them respect; it limits their options and freedoms. Other avenues exist to inform or influence social attitudes about women. These avenues can be explored without penalizing women by demanding a degree of certainty and irrevocability we do not demand of men or women in making other vital life choices.

Many Task Force members believe that enforced removal of a child

from the child's birth mother under a surrogate contract involves severe consequences for the birth mother. Studies have shown that many women who voluntarily relinquish children for adoption face a lingering and deep sense of loss. The harsh consequences of a poorly informed decision to relinquish one's child require a rigorous standard for consent before consent should be considered truly informed. This is why the adoption laws do not permit an expectant mother to surrender her child for adoption and insist that she await the child's birth before making such a decision. While some women have been able to anticipate their response in advance of the child's conception, the long gestational process and the child's birth, others have not. Our policies must recognize that many women may not be able to give informed consent in these circumstances.

Recommendations for Public Policy

At the outset of its discussion about surrogate parenting, the Task Force recognized that society could choose any one of five broad directions for public policy, subject to constitutional constraints that might apply. Essentially, society could seek to prohibit, discourage, regulate or promote the practice or could take no action.

The Task Force proposes that society should discourage the practice of surrogate parenting. This policy goal should be achieved by legislation that declares the contracts void as against public policy and prohibits the payment of fees to surrogates. Legislation should also bar surrogate brokers from operating in New York State. These measures are designed to eliminate commercial surrogacy and the growth of a business community or industry devoted to making money from human reproduction and the birth of children. They are consistent with existing family law principles on parental rights and adoption.

The Task Force proposes that surrogate parenting should not be prohibited when the arrangement is not commercial and remains undisputed. The Task Force concluded that society should not interfere with the voluntary, non-coerced choices of adults in these circumstances. Existing law permits each stage of these voluntary arrangements: a decision by a woman to be artificially inseminated or to have an embryo implanted; her decision after the child's birth to relinquish the child for adoption; and the child's adoption by the intended parents. The proposed legislation would also not bar the payment of reasonable medical and other expenses to surrogates, if the payment is made as part of an adoption and is permitted by existing law.

The Task Force evaluated and rejected the option of upholding the contracts under the regulatory models proposed in many states. This regulatory approach squarely places the state's imprimatur on the surrogate arrangement. It employs the authority of both the legislature and the courts to uphold the contracts. Through these two powerful branches of government, society would be enmeshed in a long series of dilemmas and problems posed by the practice.

The regulatory approach has been justified and supported as the only way to protect the children born of surrogate parenting. The practice is seen as a trend that cannot be inhibited given the existence of the underlying technologies and the intense desire of infertile couples to have children, a desire that now fuels a growing black market in the sale of children. According to this view, regulation does not facilitate surrogacy, but merely accepts and guides its inevitable proliferation.

The Task Force found this justification for regulating and upholding the practice unpersuasive. The difficulty of discouraging a practice does not dictate social acceptance and assistance. Society has not legalized the purchase and sale of babies to establish a better marketplace for that activity despite the fact that both the children and intended parents might be better protected. The laws against baby selling embody fundamental societal values and doubtlessly minimize the practice even if they do not eliminate it.

Public policy on surrogate parenting should also reflect basic social and moral values about the interests of children, the role of the family, women and reproduction. A commitment by society to uphold the contracts removes the single greatest barrier to those considering the practice. In contrast, voiding the contracts, banning fees, and prohibiting brokering activity will drastically reduce the number of persons who seek a commercial surrogate arrangement. Given the potential risks to the children bora of surrogacy, children are best served by policies designed to discourage the practice.

The Task Force members feel deep sympathy for infertile couples, many of whom experience a profound sense of loss and trauma. Nevertheless, the Task Force concluded that society should not support surrogacy as a solution. The practice will generate other social problems and harm that reach beyond the infertile couples who seek a surrogate arrangement.

While treatment is increasingly sought by and available to infertile

couples, few initiatives to prevent infertility have taken by the public or the private sector. The Task Force recommends that measures should be undertaken to reduce the incidence of infertility through public education and public support for research about its causes. Broader awareness among health care professionals and members of the public about the causes of infertility, especially infertility related to sexually transmitted diseases, could prevent some couples from ever facing the problem. Other couples would benefit from an increased understanding of the causes of infertility and new treatments for it.

Eight

Disputed Surrogacy Arrangements: Allocating Parental Rights and Responsibilities

The Task Force proposal for invalidating surrogate parenting contracts and prohibiting fees for surrogates and brokers, if enacted, would significantly reduce surrogacy in New York State, Nevertheless, given the strong desire of infertile couples to have a genetically related child, it is likely that some children would still be born as a result of surrogate parenting arrangements.

In cases where the birth mother willingly relinquishes the child, there is no need for new policy. The intended parents can adopt the child under existing law, subject to court approval. However, if the birth mother and father each seek custody of the child and the contract is unenforceable, New York courts will have to determine parental status, rights and responsibilities. The decision may involve the termination of parental rights or the allocation of those rights and responsibilities among the child's parents. In cases where the birth mother is a gestational surrogate and is not genetically related to the child, the courts will face the unprecedented task of determining parental status and rights for a child who has two biological mothers.

Two competing standards in our laws on terminating parental rights -- the best interests standard and the parental unfitness standard -• reflect the tension between fairness to adults and protection for children as the focus of the determinations. Where surrogate parenting arrangements fail, the appropriate weight to be given gestation and generics, as both parental contribution and the child's "heritage," complicate an already difficult judgment about how parental identity, rights and responsibilities should be assigned.

Of all the parental rights and responsibilities that must be awarded,

custody is the most significant. In divorce proceedings, custody determinations have traditionally been guided by the best interests standard. Yet, in disputes when surrogate parenting arrangements break down, the courts will have little, if any, evidence of one factor that is crucial to other custody determinations - each parent's relationship with the child

The Task Force discussed at length the problem of determining parental status, rights and responsibilities in the event that a surrogate arrangement ends in controversy. As the deliberations unfolded, it became clear that no single policy could possibly satisfy all the individuals involved in the controversy or society's varied interests in the determinations. Once the participants in a surrogate arrangement deliberately fracture the family relationship, there is no way to construct a single family unit that includes all the child's parents or to return the parties to their original circumstances.

While the Task Force recognizes that any recommendations it makes on this issue will be controversial, it concluded that society must provide some guidance to the courts rather than leave the matter unaddressed. Even if society ultimately affirms that existing legal principles offer an adequate framework for these novel arrangements, that explicit guidance to the courts would be welcome and important.

Throughout its deliberations, the Task Force struggled to identify a way of balancing: (i) the interests of the child; (ii) the interests and rights of the birth mother and the intended parents; and (iii) society's interests, including its interest in discouraging surrogacy.

The Task Force focused on three major proposals. The first proposal embraces the best interests standard as defined and applied under existing law. Under this standard, the birth mother and her husband, if any, would be presumed to be the child's sole legal parent(s) at birth. However, the father and/or the genetic mother could seek to establish paternity/maternity in a legal proceeding. If the genetic parent(s) succeeds, he/she can seek custody of the child as well as other parental rights. The court would then apportion both parental rights and responsibilities, including the obligation to support the child, between the birth mother, the father and, in cases of gestational surrogacy, the genetic mother. The court could not terminate the parental status and all parental rights of any of the parents unless it found that the parent was unfit.

The second proposal, called a policy of "constructive donation," would divest the genetic parent(s) of any legal relationship to the child, and would recognize the birth mother as the child's legal parent for all purposes; she and her husband, if any, would have all parental rights and responsibilities for the child. She could give the child up for adoption voluntarily, but her parental status and rights could not be challenged in

court by the child's father and/or genetic mother.

Under the third proposal, the birth mother would be presumed to be the child's legal mother and would retain custody of the child unless the father or the genetic mother can prove his/her genetic relationship to the child and establish a right to custody. Custody would be awarded to the birth mother unless the court finds, by clear and convincing evidence, that the child's best interests would be served by an award of custody to the father and/or genetic mother.

This clear and convincing evidence test was designed as a middle-ground that avoids the key disadvantages of both the best interests standard and the constructive donation policy. Ultimately, the Task Force chose to recommend this policy. The advantages and disadvantages of each proposal as identified in the Task Force's deliberations are set forth below.

The Best Interests Standard

The Task Force considered at length the consequences of applying a best interests standard to disputes following a surrogate parenting arrangement. The Task Force members who favored this approach urged adoption of the standard because it focuses on the child. The standard does not include consideration of the desires or contractual promises of either parent. Nor does it seek to achieve public policy goals in relation to surrogate parenting. Instead, the standard rests solely on the child's needs and interests as determined by a judicial finding of the facts in each case.

The Task Force members who supported this approach also emphasized the importance of a case-by-case determination rather than general rules that could not be sensitive to the very different life circumstances of each child. They pointed out that the courts have a long history of experience in making custody determinations.4

The best interests standard would also give the courts flexibility in fashioning remedies to meet the child's needs. The court could impose support obligations on cither parent and make visitation rights as limited or as broad as necessary to serve the child's interests. By ordering the father or the genetic mother to make support payments to the birth mother, the court could also overcome the economic disparity that b likely to exist between

4 Some Task Force members expressed confidence that judges would be impartial in arriving at their decisions. Others recognized the potential for bias in applying the best interests standard but concluded that society should reassess the process for determining custody more broadly rather than devise special rules for failed surrogacy arrangements.

surrogates and the intended parent(s).

Several Task Force members favored the best interests standard because it allocates parental rights and responsibilities equally between men and women - on its face the standard does not prefer the biological mother or father of a child. Instead, it recognizes that parental rights and responsibilities belong equally to men and women despite their different contributions to the child's conception and birth. The standard could be applied to establish that when women, like men, contribute only to the child's genetic make-up, they too may have the privileges and responsibilities that accompany parenthood, depending on a determination of the child's interests.

For some Task Force members, consistency with existing family law principles was important. The best interests standard, as applied on a case-by-case basis, now determines parental rights and responsibilities in all custody proceedings, including the proceeding that b most analogous to surrogacy - a dispute between two unmarried parents for custody of a child born out of wedlock. Some Task Force members believed that there was no principled basis to grant men greater rights when the child b conceived through sexual relations than when conception occurs through artificial insemination as part of a surrogacy arrangement. In fact, in the first case, the father may have no intention or desire to care for the child while the father of a child born through surrogate parenting entered into the arrangement for that very purpose.

Some Task Force members acknowledged the advantages the best interests standard offers, but concluded that the standard was inadequate to address the special circumstances of a disputed surrogate parenting arrangement. First, they believe that the standard will shape the way surrogacy b structured, but ultimately will not discourage the practice. Specifically, they contended that couples seeking a contractual surrogate arrangement would, based on legal advice, select a surrogate who would not prevail in the custody dispute. For instance, couples would be encouraged to rely on single women and women with some problems in their personal history. Second, in any litigation, the intended parents would have a tremendous advantage by virtue of the superior legal representation they would retain. Third, judges may be inclined to view the birth mother's prior agreement to relinquish the child as uncaring. Finally, the difference in socioeconomic status between the birth mother and intended parents that is likely to exist in virtually all cases will tip the scales even further. Even if fees to surrogates are prohibited, these Task Force members maintain that commercial surrogacy mil continue to flourish as long as the intended parents have a good chance of prevailing in the custody dispute. Since they believe that commercial surrogacy is not in the best interests of children, they concluded that relying on existing law and the best interests standard

would not adequately meet the needs of children.

These Task Force members also emphasize the serious harm that the judicial battle over custody imposes on children. The litigation may be prolonged and bitter, disrupting the child's opportunity to develop a stable and permanent bond with one parent. In the Baby M litigation, this problem was perhaps best exemplified by the fact that the child had not only two different sets of parents, but two different names.

In addition, some Task Force members maintain that judges will face special problems in applying the best interests standard to cases involving surrogate parenting. Typically, the standard is applied in custody disputes between parents who have an established relationship with the child. A court can then consider evidence of each parent's ability to love and care for the child, the child's relationship with siblings and, sometimes, the child's preferences. In custody disputes arising from a surrogate parenting arrangement, there may be little evidence of these factors. The disputes will involve a newborn child, with whom neither parent has a long post-birth relationship, at least at the beginning of the litigation.

Lacking other evidence, the courts may attach greater weight to the relative wealth and education of the parents. Yet no social consensus supports the notion that a child's best interests are served by an award to the wealthier, better educated parent. As the Supreme Court of New Jersey stated in its decision in the Baby M case,

> [A] best interests test is designed to create not a new member of the intelligentsia but rather a well-integrated person who might reasonably be expected to be happy with life.

Constructive Donation

The Task Force considered a policy of constructive donation as an alternative to the best interests standard. Under this policy, the father in a surrogate parenting arrangement would be presumed by law to have donated the sperm used to inseminate the surrogate. Similarly, a woman who provides an egg that is implanted in a surrogate would be presumed to have made a donation. When the child is born, neither the father nor the genetic mother would have any legal relationship to the child nor any right to seek to establish that relationship through the courts, unless the birth mother voluntarily relinquishes the child for adoption. The child's birth mother, and her husband, if any, would be the child's only legal parents.

Some Task Force members favored this constructive donation policy

for a range of reasons. In contrast to the best interests approach, the constructive donation policy would provide certainty and predictability in determining who the child's parents are and their respective rights and responsibilities. The policy would thereby virtually eliminate litigation about these issues. Moreover, the courts would not be left to fashion remedies for custody and visitation among parents who, in most instances, will have no personal relationship to one another. Parental status, rights and responsibilities will not be divided among as many as four or five parents. Instead, the child will be part of one family unit, although it may be a family which consists only of the birth mother.

The policy would also discourage surrogate parenting to a much greater extent than the best interests standard. Fewer persons would be willing to engage a surrogate if they would have no legal claim or relationship to the child in the event that the surrogate changes her mind and refuses to relinquish her parental rights.

Some Task Force members favor the constructive donation policy because it takes into account the birth mother's closer biological relationship to the child and her greater contribution to the child's birth. In contrast to the contribution of sperm by the father or an egg by a genetic mother, the birth mother carries the child for nine months and assumes the risks and burdens of pregnancy and childbirth. Some Task Force members concluded that she therefore has a closer bond to the child and a greater claim to parental status.

The Task Force members who favor this policy noted its similarity to existing law on artificial insemination by donor (AID). Under that statute, a child born to a married woman through AID with the consent of her husband is deemed the legitimate child of the mother and her husband. The sperm donor has no parental rights or responsibilities in relation to the child. A policy of constructive donation would extend this policy to surrogate parenting arrangements, although it would do so by presuming donation rather than by relying on actual consent to donation as occurs in the AID situation.

Many Task Force members rejected the constructive donation policy because it does not focus on the child; they believe that it makes the child's interests secondary to policy concerns about discouraging surrogacy. In essence, the policy may operate to punish the child because of the social arrangement by which the child was born.

While these Task Force members recognize that the best interests standard allows for broad discretion, they believe that the child should not be denied the benefits the standard confers. In cases where the birth mother is unmarried, the child would have no father under the constructive donation policy. In all cases, the child will be denied the benefit of a legal

relationship with his or her father and/or genetic mother, including the right to ongoing financial support from either parent.

Some Task Force members oppose the policy because it fails to recognize that a relationship with genetic parents may be important for the child. These Task Force members urged that this genetic relationship should at least be one part of the equation under the best interests standard.

Other Task Force members object to the constructive donation policy because it completely denies the rights and interests of the father and/or the genetic mother. The policy would treat those persons as if they have no legitimate interest in or relationship to the child. Some Task Force members felt that the policy is punitive and harsh.

Moreover, the approach severs the parental rights of the father and/or the genetic mother without a showing of parental unfitness. It would therefore depart from existing law on terminating parental rights. Some Task Force members view the requirement of unfitness before parental rights arc terminated as an important protection. Departure from the standard, even if only in the context of surrogate parenting, was seen as a precedent that might undermine support for parental rights and raise serious constitutional concerns. While the artificial insemination statute terminates the parental rights and responsibilities of sperm donors, it does so based on actual, not presumed or constructive, consent.

Some Task Force members pointed out that the constructive donation policy will, under certain circumstances, even disserve the interests of the birth mother. For example, in some cases the father or genetic mother may choose not to accept custody of the child, even though the birth mother is willing to relinquish her parental rights. Under the constructive donation polity, neither the father nor the genetic mother would have any legal obligation to the surrogate or to the child. The birth mother would have no legal claim against them for child support, although she would be free to surrender the child for adoption if she could not provide adequate care.

The Task Force Proposal

The Task Force proposes that in custody disputes arising out of surrogate parenting arrangements the birth mother should be awarded custody

unless the court finds, based on clear and convincing evidence that the child's best interests would be served by an award of custody to the father and/or genetic mother. This standard does not change the existing legal presumption that the birth mother and her husband, if any, are the child's parents. As under current law, the father could seek to establish paternity and gain custody of the child.

This standard modifies the application of the best interests standard under existing law by imposing a high burden of proof on the father and/or genetic mother to show that the child's interests would be best served if they assumed custody. The Task Force members concluded that this approach would provide some of the advantages of both the best interests and constructive donation standards, while minimizing the more problematic consequences of those alternatives.

Clear and Convincing Evidence

In legal proceedings, different standards of proof are applied, depending on the degree of confidence society thinks the fact finder should have in the factual conclusion for a particular kind of case. The three main evidentiary standards are: preponderance of the evidence, beyond a reasonable doubt, and clear and convincing evidence.

For a party to prove something by "a preponderance of the evidence," he or she must produce sufficient evidence to make one conclude that the matter asserted is more likely to be true than not, i.e., 51% probability. This is a minimal level of proof and is applied in most civil lawsuits. The highest level of proof is "beyond a reasonable doubt," a standard usually reserved for criminal trials.

The party who has the burden of producing "clear and convincing evidence" must offer sufficient proof to give the fact finder considerable confidence in the determination. It is an intermediate standard, stricter than mere preponderance of the evidence, but not as onerous as "beyond a reasonable doubt." The standard is not satisfied whenever the evidence is equivocal or contradictory.

The clear and convincing evidence standard is used in proceedings where it is especially important to avoid an erroneous determination against a particular side. For example, it is applied in proceedings to terminate parental rights or to commit someone involuntarily for mental health treatment.

Clear and Convincing Evidence of Best Interests

The policy proposed by the Task Force adds a familiar evidentiary standard -- clear and convincing evidence -- to the prevailing substantive standard in custody determinations, the child's best interests. Other laws involving paternity, child support, visitation and the termination of parental status would all apply. The policy thus departs only slightly from existing practices and laws about the family.

By relying on the best interests standard, this policy focuses on the child's interests rather than on the parents, or on the policy goal of discouraging surrogate parenting. It also allows courts to fashion an award that includes a support or visitation order, where appropriate.

At the same time, by imposing an added burden on the intended parents, the policy discourages surrogacy and surrogacy-related litigation. The evidentiary burden on the intended parents is a signal to the courts about the relative standing of the parties and the importance of the birth mother's relationship to the child. On its face, the policy does not mandate equality of treatment between the parents. However, many Task Force members concluded that the evidentiary burden imposed on the intended parents would compensate for the advantages they will almost always have as a result of better legal representation and higher socioeconomic status. Other Task Force members favored this approach because it implicitly recognizes the birth mother's greater contribution to the child's birth.

The policy proposed by the Task Force attempts to reconcile the interests of all the parties. None of the Task Force members believes that the policy is a perfect solution. As a middle-ground alternative, it will be rejected by those with passionate views at both ends of the spectrum. The Task Force nevertheless offers this proposal as a balanced response to the dilemma thrust upon society when a surrogate arrangement breaks down and the parties appear before the courts seeking relief - strangers to one another yet the parents of the child they each claim as their own.

Conclusion

After a year of deliberation, the Task Force concluded that public policy should discourage surrogate parenting. The practice places children at risk and is not in their best interests or those of society at large. It has the potential of undermining the dignity of women, children and human reproduction by commercializing childbearing. The practice also represents a significant departure from existing values and standards about parental rights and responsibilities embodied in New York State law.

The Task Force proposes legislation that would declare the contracts void and ban fees for surrogates and surrogate brokers. Despite the diversity of opinion and belief represented on the Task Force, these recommendations have the unanimous endorsement of the Task Force membership.

Existing taws on adoption and artificial insemination permit surrogate parenting when the arrangement is not commercial and remains undisputed. The legislation proposed by the Task Force would not prohibit the arrangements under these circumstances. Nor would it override existing statutes permitting the payment of reasonable expenses to women arising from pregnancy when such expenses are paid in connection with an adoption and are subject to court approval.

The proposed legislation would greatly reduce, but would not eliminate, surrogate parenting. In some cases, even voluntary, non-commercial surrogate arrangements may result in disputes about custody and care of the child. As part of its legislative proposal, the Task Force recommends that custody should remain with the birth mother and her husband, if any, unless the court finds, based on clear and convincing evidence that the child's best interests would be served by awarding custody to the father and/or the genetic mother.

The allocation of parental rights and responsibilities following a disputed surrogate arrangement is a complex and potentially divisive issue. Differences of opinion on this single question, however, should not overshadow consideration of the more central public policy recommendations presented by the Task Force with the unanimous support of its membership.

Surrogate parenting touches on issues that concern the interests of children, the family, women and human reproduction. In the absence of legislation, the practice will continue, guided for the most part by the standards and procedures established through commercial and contractual arrangements. Society, through the Legislature, should act to safeguard the basic values and rights that have long been embodied in our laws on the relationship between parents and their children.

Appendix

Proposed Surrogate Parenting Act

1. Definitions.

(a) *Birth mother* shall mean a woman who gives birth to a child pursuant to a surrogate parenting contract.

(b) *Genetic father* shall mean a man who, by virtue of his provision of sperm, is the father of a child born pursuant to a surrogate parenting contract.

(c) *Genetic mother* shall mean a woman who, by virtue of her provision of an ovum, is the mother of a child born pursuant to a surrogate parenting contract.

(d) *Surrogate parenting contract* shall mean any agreement, oral or written, whereby a woman agrees either:

(i) to be inseminated with the sperm of a man who is not her husband; or

(il) to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband,

and to surrender the child.

2. Public policy.

Surrogate parenting contracts are hereby declared contrary to the public policy of the State of New York and are void and unenforceable.

3. Commercial surrogacy prohibited.

(a) No agency, association, corporation, institution, society, organization, or person shall request, accept or receive any compensation or tiling of value, directly or indirectly, in connection with any surrogate parenting contract; and no person shall pay or give to any person or to any agency, association, corporation, institution, society or organization any compensation or thing of value in connection with any surrogate parenting contract.

(b) This subdivision shall not be construed to prevent a person or other entity from accepting, receiving, paying or giving money or other consideration

(i) in connection with the adoption of a child provided such acceptance or payment is also permitted by section 374.6 of the Social Services Law and paid pursuant to section 115.7 of the Domestic Relations Law; or

(ii) to a physician for reasonable medical expenses for artificial insemination or in vitro fertilization.

(c) Any person or entity who or which violates the provisions of this subdivision shall be guilty of a misdemeanor for the first such offense. Any person or entity who or which violates the provisions of this subdivision, after having been once convicted of violating such provisions, shall be guilty of a felony.

4. Custody proceedings.

In any action or proceeding involving a dispute between the birth mother and the genetic father, the genetic mother, or both the genetic father and genetic mother regarding custody of a child born pursuant to a surrogate parenting contract, where there has been no termination of the birth mother's parental rights or surrender or consent to adoption by her, the court shall:

(a) award custody to the birth mother unless it finds, based on clear and convincing evidence, that the child's best interests would be served by awarding custody to the genetic father, genetic mother, or both; and

(b) determine visitation and support in accordance with applicable law in proceedings involving custody and support.

Explanatory Note About Proposed

Surrogate Parenting Act

The Task Force devised its legislative proposal to reflect or incorporate existing laws relating to adoption, where appropriate. Specifically, Section 3 of the Task Force's legislative proposal addresses commercial surrogacy in a manner similar to the way the New York State Legislature has addressed adoptions - by prohibiting payments to the mother of the child, to brokers and to others, except for medical and other necessary expenses.

Paragraph 3(a) of the proposed legislation bars payments "in connection with any surrogate parenting contract." The language of the provision is based upon and closely resembles the prohibition against payment or receipt of compensation in connection with an adoption set forth in Section 374.6 of the Social Services Law (the law against baby selling).

Paragraph 3(b) specifies two exceptions to this general prohibition. The first exception incorporates by reference the payments permitted in connection with an adoption under Section 374.6 of the Social Services Law. Thus, intended parents would be allowed to pay the same expenses that other adoptive parents could pay to or on behalf of a mother who consents to the adoption of her child.

Allowable expenses would include the birth mother's medical fees and other necessary expenses arising from her pregnancy and the child's birth. They would also include reasonable expenses for legal services related to the adoption proceeding, but would not permit a "finder's fee" or payment for the child. Excessive payments, such as those for the birth mother's "lost wages," would be excluded. In accordance with Domestic Relations Law Section 115.7, adoptive parents and their attorney must submit affidavits to the court disclosing all payments to the birth mother and the attorney. Under subparagraph 3(b)(i) of the proposed legislation, these same procedures must be followed.

The exception set forth in subparagraph 3(b)(ii) states that the proposed legislation does not prohibit payment to a physician for providing artificial insemination and in vitro fertilization services. Without this clarification, paragraph 3(a) arguably prohibits payment for these services even when the surrogacy arrangement is non-commercial and undisputed.

Under paragraph 3(c), a violation of the ban on commercial surrogacy is subject to the same penalty as that now imposed for a violation of the prohibition on payments in connection with an adoption (See N.Y. Social Services Law, Section 389.2).