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ARTICLES

BABY M: CATALYST FOR FAMILY LAW REFORM?

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One can be justifiably skeptical about whether anything new and meaningful remains to be said about *In re* Baby M.[1] Certainly it was one of the most publicized and critically dissected family law cases of all time. During its highly chronicled progression through the New Jersey legal system an extraordinary number of people debated the rights of the parties and various moral and social issues that may or may not have been involved. Many expressed strong views as to what future steps might be appropriate for courts and legislatures to take to avert or resolve similar disputes. The purpose of this Comment is not to reexamine in detail the touching facts of the *Baby M* case or to rekindle arguments about the ethicality or feasibility of surrogate parent contracts generally. Its narrow focus is on how the unanimous decision of the New Jersey Supreme Court[2] might have a catalytic effect in igniting broad reform of the law of parent and child, a segment of domestic relations law still relatively untouched by explosive change in other areas such as grounds for divorce, private ordering between spouses, and matrimonial property.

To explain the importance of such reform and why it is placed in special perspective by the *Baby M* decision, an overview of significant social, scientific and legal developments during the past quarter century will be offered at the outset of this Comment. Their importance for the law of parent and child will be explained in the context of increasing use of assisted concep-

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1. 109 N.J. 396, 537 A.2d 1127 (1988). No attempt is made here to catalogue all of the various hearings and motions that were reported in the press. Our concern will be with the trial court opinion, reported at 217 N.J. Super. 313, 525 A.2d 1127 (1987) and the decision of the Supreme Court of New Jersey, 109 N.J. 396, 537 A.2d 1227.

2. 109 N.J. 396, 537 A.2d 1227.

tion[3] techniques during the past quarter of a century.

Twenty-five years ago, domestic relations could best be characterized as a static field in which some of the most prominent rules anachronistically reflected conduct, mores and language of the preceding century or earlier. Reform movements in other legal fields[4] had little contemporaneous impact on domestic relations. Attempts at serious conceptualization of the area still were sparse and began appearing only gradually, in large measure as part of the serious exploration that led to reform of the grounds for divorce to deemphasize deeply entrenched notions of moral blameworthiness. Increasing availability and use of assisted conception techniques provide a good background for examining the general reluctance to face problems that since have proliferated in the law of parent and child. By now the issues include rights and duties of support, custody and visitation, inheritance, paternity and maternity, legitimate and illegitimate status (where such distinctions remain), adoption and termination of parental rights, and legal decision making by or on behalf of children on matters such as education and medical care. It would be incorrect, of course, to suggest that the rules on such matters have remained the same during all of this period. However, changes that did occur too often were made haphazardly or without adequate consideration or recognition of their broader implications. Fresh attempts at conceptualization are specially needed now in the face of a concatenation of developments and events that have begun to produce new problems and exacerbate old ones.

I. THE SPECIAL CASE OF "ASSISTED CONCEPTION"

For a long time legislatures avoided more than token attention to legal problems that were being generated through use of even simple assisted conception techniques.[5] This can be attributed to various reasons that include prevailing perceptions that such practices were *de minimis* in incidence or

3. "Assisted conception" is one of several newer terms that embrace a variety of techniques ranging from artificial insemination to *in vitro* fertilization. It received a boost toward standardization recently when it was selected as the new generic category for the UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT. *See* UNIFORM ACT ON STATUS OF CHILDREN OF ASSISTED CONCEPTION § 1(1) & commentary, 9B U.L.A. 50 (Supp. 1989) (National Conference of Commissioners on Uniform State Laws 1988) [hereinafter USCACA].

4. One example would be the turn of the century movement away from fault as the key criterion for liability through new approaches such as workers compensation.

5. For further discussion, see Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465 (1983) [hereinafter Wadlington, *Artificial Conception*]; Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 NW. U.L. REV. 777, 793 (1970) [hereinafter Wadlington, *Artificial Insemination*]; Smith, *Artificial Insemination—No Longer a Quagmire*, 3 FAM. L.Q. 1 (1969).

too delicate or controversial for public discussion, or that the issues were insoluble without major legal change that seemed premature.

The incidence of assisted conception and the number of persons potentially affected by it today surely preclude *de minimis* categorization any longer.[6] And it would be ridiculous to consider the subject too sensitive for public discussion when it already has been subjected to massive media coverage including talk shows featuring the players in various reproductive scenarios. Although considerable controversy unquestionably remains, this is counterbalanced by heightened recognition of the need for legal clarity. It is true that many of the key issues are unanswerable without major change that could have impact far beyond cases of assisted conception, but facing those larger concerns is no longer premature in view of other developments in domestic relations. It is in that context that the *Baby M* decision could have great influence.

II. *BABY M*: THE RELEVANT FACETS OF THE DECISIONS

The trial court in the *Baby M* case determined, in essence, that because New Jersey's legislature had not specifically approved or rejected surrogate parentage contracts, the judiciary was free to use its broad, inherent powers to develop appropriate responses.[7] The answer developed by the court was to enforce a preconception agreement calling for a woman to relinquish a biological child that she would conceive through artificial insemination and carry to birth.[8] Each contracting party involved in the conception already was married to another person, and the biological mother was to receive a fee for her role.[9] After the child's birth the biological mother changed her mind. Following a series of events widely reported in the news to a fascinated public, the parties ended up in court to resolve issues of parental status and custody. The trial judge held that even though the biological mother was not "unfit," termination of her parental rights was accomplished through her contractual commitment and, therefore, only the biological fa-

6. A recent study by the Office of Technology Assessment estimates that about 11,000 physicians provide artificial insemination services and that some 65,000 babies are born each year after conception through the process, with about half of those involving heterologous and the other half homologous artificial insemination. *See* OFFICE OF TECHNOLOGY ASSESSMENT, ARTIFICIAL INSEMINATION: *Practice in the United States: Summary of a 1987 Survey-Background Paper*, OT-BP-BA-48 (USGPO, August 1988) [hereinafter *OTA Summary*].

7. 217 N.J. Super at 318-19, 525 A.2d at 1130-31.

8. *Id.* at 400, 525 A.2d at 1171.

9. The monetary and other terms can be found in the Surrogate Parenting Agreement, which is reproduced as an Appendix. *Id.* at 470, 537 A.2d at 1265.

ther's consent was necessary for adoption of the child by the latter's wife.[10]

In an ostensibly expedited procedure[11] the New Jersey Supreme Court took the case on appeal and heard oral arguments. Some four months later the Court dismayed proponents of surrogate parenthood contracts by deciding that the agreement was not legally enforceable and holding that the rights and duties of the parties were governed by existing principles and rules of family law. Under that rationale, the two biological or "natural" parents of the child were the legal parents. Although the court found sufficient information in the trial record to decide that primary custody of the child with the biological/legal father should be continued,[12] a hearing was ordered for the purpose of determining the biological/legal mother's visitation rights.[13] The court then made an addition to existing rules and principles of family law by stating that in future cases if a surrogate mother should refuse to relinquish her child contrary to contractual agreement, the child in nearly all instances would remain with the biological mother while permanent custody is being determined.[14]

The Court's determination that family law rules and principles control is what gives the appellate court's decision significant potential by almost inevitably forcing reexamination of those rules and principles beyond the context of surrogate parent agreements.[15]

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10. Either consent by or termination of the rights of a living parent of a child, whether legitimate or illegitimate, usually is necessary before the child can be adopted.

11. The typically slow process of the judiciary is well understood by lawyers and others directly involved in the process of appellate litigation. Media announcement of an "expedited" process, which meant that a hearing would be held in less than a year, may have served to better introduce the public to just how long litigation can take even under the most favorable schedule.

12. 109 N.J. at 452-63, 537 A.2d at 1255-61.

13. The court also specified that, in accordance with past practice, a different trial judge would hear the further proceeding. *Id.* at 1261 n.19. On remand, the judge provided for regular visitation period of eight hours each week by the natural mother during 1988, to be expanded to include overnight visits and two weeks each summer during 1989. *See Surrogacy-Baby M-Mother's Visitation Rights*, 14 Fam. L. Rep. (BNA) 1276 (April 10, 1988).

14. One concern was that the parent given custody pending the suit would likely have custody continued, as it would be in the best interests of the child if the case should take up an extended amount of time in the courts. Some would say that this is at least tacit recognition of the importance of the concept of psychological parentage in making custody decisions.

The firmness of the court's conviction on this issue is reflected in its language:

> Any application by the natural father in a surrogacy dispute for custody pending the outcome of the litigation will henceforth require proof of unfitness, of danger to the child, or the like, of so high a quality and persuasiveness as to make it unlikely that such application will succeed.

109 N.J. at 462-63, 537 A.2d at 1261.

15. It should be recognized that this simple statement of the facts and holdings in the case is offered only to explain its potential catalytic effect. However, the detail in which some of the arguments not mentioned above were addressed inconclusively (*e.g.*, grandparent rights, con-

III. THE PROBLEMS IN HISTORICAL PERSPECTIVE

Some of the most significant developments that lead to the current need for reform can be placed in appropriate perspective by the simple, hypothetical case of a married couple trying to decide between heterologous artificial insemination (AID)[16] and adoption. The following section will first speculate about what might have happened twenty-five years ago. Next the section will analyze how subsequent changes not focused directly on assisted conception have made responses far more complex and difficult.

It is unlikely that a physician consulted by our mythical couple in 1964 would have been asked (or would have volunteered) to compare the legal issues that might stem from adoption and artificial insemination. At that time, the modern doctrine of informed consent, a response to patients' insistence on being given more information to exercise personal autonomy in decision making,[17] was nascent at best.[18] The physician's perceived role would have been to diagnose, to give advice about such exclusively medical matters as fertility, and to explain how artificial insemination works. It is easy to understand the comparative attraction of an assisted conception process that would lead to the wife's bearing a child that would be the biological offspring of at least one of them. This would further be enhanced by the prospect that the wife would become pregnant and give birth with only the couple and their physician aware that the husband was not the biological father.

It can by no means be assumed that the couple would have sought legal advice in 1964, but one can surmise what a knowledgeable lawyer might have told them if called on to compare AID and adoption. Probably there would have been an initial explanation that adoption was a statutorily created institution through which a legal parent-child relationship could be created between persons without such a biological tie, and that by touching the prescribed legal bases the parties could assure that they would acquire pa-

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stitutional rights regarding procreation) further highlight the many family law issues that can abound in such cases.

16. For an explanation of the various assisted conception techniques such as AID and their underlying scientific basis, see *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY & STERILITY 32S-33S (Supp. 1 1986); ANDREWS, MEDICAL GENETICS: A LEGAL FRONTIER (1987); King, *Reproductive Technologies*, in 1 BIOLAW, Ch. 7 (1986).

17. The landmark case of Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972) was not decided until 7 years later. However, the facts on which the *Canterbury* decision was based had taken place in 1958. For more detailed consideration of the dynamics underlying the doctrine of informed consent and the effect of treating it legally within the framework of negligence, see J. KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT (1984), and Wadlington, *Breaking the Silence of Doctor and Patient*, 93 YALE L.J. 1640 (1984).

18. Even if the doctrine had been established by then, it is doubtful that the physician would have been considered to have a duty to convey legal rather than medical information.

rental rights as well as duties.[19] As to a child born through AID, unless the parties lived in Georgia[20] the lawyer would have pointed out the lack of statutory enactments dealing with artificial insemination, but the existence of a strong legal presumption that a child conceived by, or born to, a married woman during cohabitation with her husband was the latter's legitimate child.[21] It also would have been noted that because of the state of scientific blood testing and our understanding of genetics, there was then little likelihood that the paternity could or would be legally determined through scientific means.[22] Depending on their particular jurisdiction, the couple might also have been told that neither of them would be permitted to give testimony that would render the child illegitimate,[23] and that the chances of someone else (the sperm donor, for example) being accorded legal standing to assert parenthood were slim to nonexistent.[24]

Feeling comfortable that heterologous artificial insemination would present no major immediate or long term legal problems for them or a child born to the wife through the process, it would not have been surprising for the couple to select this assisted conception avenue to parenthood. Before insemination of the wife, a written consent form might have been executed by the couple though its primary, if not sole, purpose probably would have been to protect the inseminating physician from liability.[25] It would have been very likely for the medical record to be carefully maintained in a fashion that would avoid later identification of the sperm donor, who might well have been someone chosen by the doctor on what could hardly be described as a random selection process.[26]

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19. Actually, at that time in some states limited rights might have been retained by the adoptee in the relinquishing parent's estate or the adopter might not have been automatically integrated into the lineage of the adoptee for all legal purposes.

20. Georgia enacted the first state statute on human artificial insemination in 1964, the year when your couple was seeking advice.

21. *See, e.g.*, West Virginia ex rel. J.L.K. v. R.A.I, II, 294 S.E.2d 142 (W. Va. 1982). This longstanding presumption served an important purpose in its day: fixing legal paternity when biological paternity could not be determined, and thus avoiding possible illegitimacy. There might have been other legal concerns for our hypothetical couple, including whether the procedure might have been considered adultery.

For further discussion of the presumption, see H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 191 (2d ed. 1988).

22. At that time blood tests were used almost exclusively to negate paternity rather than to establish it affirmatively. For a general discussion of the evolution of legally acceptable tests for proving or disproving paternity, see H. CLARK, *supra* note 21, at 185.

23. Once the presumption of legitimacy was rebutted by the testimony of others, some courts permitted further testimony by the spouses. *See, e.g.*, Staley v. Staley, 25 Md. App. 99, 335 A.2d 114 (1975).

24. *See, e.g.*, A v. X, Y, and Z, 641 P.2d 1222 (Wyo. 1982).

25. *See* Wadlington, *Artificial Insemination*, *supra* note 5, at 783.

26. For discussion of past selection practices by physicians, see Curie-Cohen, Luttrell &

IV. THE WORLD SINCE 1964

Since 1964,[27] many things have occurred that might change the advice the preceding couple or their counterparts should or would receive. This raises questions both about the effect on those who chose assisted conception in what seemed like a world of simpler legal rules, as well as the increasing complexity and uncertainty of legal answers and projections for persons in similar circumstances today. The following review of significant legal, scientific and social developments that could have such effects is not intended to be all-encompassing. Rather, it is designed to point out the most important changes that alone or in combination complicate current choices about assisted conception. More importantly, it should be useful for understanding why the problems today transcend issues of surrogate parentage contracts and provide forceful reason for broad reexamination of the legal relation of parent (and would be parent), child and state. What may initially look like disparate pieces will be fitted together to provide a broader picture of a scene fraught with conflicting approaches and tensions.

A. Developments in the World of Medicine and Science

Increased scientific knowledge has lead to the development of new and better means for fixing paternity. Procedures such as human leucocyte antigens (HLA) testing now are widely accepted for use even in affirmatively establishing paternity rather than simply excluding it as a possibility.[28] Even more refined capacity is considered to be just around the corner. Of at least equal importance is our vastly increased understanding of genetics, which has produced new specialties such as genetic screening and counseling. This in turn has increased demand for assisted conception as a practical alternative for couples wishing to avoid conception or birth of children with serious hereditary defects or conditions.

What is routinely described as the new reproductive technology enables conception to take place outside the human body through techniques such as *in vitro* fertilization (IVF).[29] Scientists now can transfer a fertilized egg from

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Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585, 587 (1979). A more recent description can be found in *OTA Summary*, *supra* note 6, at 1-8.

27. The year 1964 was selected not just for symmetry. As noted in *supra*, note 20, that was the year in which Georgia became the first of our states to adopt a statute specifically dealing with human artificial insemination.

28. *See, e.g.*, N.Y. FAMILY CT. ACT § 538 (1988).

29. For further technical discussion, see *Ethical Considerations of the New Reproductive Technologies*, *supra* note 16, at 39S *et seq.* For a review of some of the responses in 1978 to what was considered the first IVF birth, see Wadlington, *Artificial Conception*, *supra* note 5.

one body to another through surrogate embryo transfer (SET),[30] posing issues previously alien to our law such as disputes over legal maternity.[31] If X's fertilized egg is carried to gestation in Y's womb, should the genetic mother or the gestational mother be regarded as the legal mother or should each person have a legally recognized interest? One could proliferate the possible problems by cases where this is done under contract with another woman, Z, raising the question of whether an expectational mother should have a protected legal interest. Should issues of motivation be considered (*e.g.*, should "womb mothers" be available for the convenience of the genetic mother)? Diagramming the various possibilities now calls for an expanded vocabulary to distinguish between the various parties.

Other important technological developments include cryogenic storage capacity that now allows "banking" of embryos, as well as semen.[32] Already this has produced legal issues regarding matters such as posthumous use of sperm[33] or disposal of frozen embryos.[34]

The Acquired Immuno Deficiency Syndrome (AIDS) epidemic and our flailing attempts to contain it are having great influence on assisted conception practices (particularly heterologous artificial insemination) because infection can be spread through semen, as well as gestation. Concern for assuring that donors are neither seropositive nor at special risk for AIDS has

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30. *See Ethical Considerations of the New Reproductive Technologies*, *supra* note 16, at 42S.

31. In a case decided as recently as 1982 dealing with paternity outside the context of assisted conception, a court held that: "Nature identifies the mother at time of birth. There is no need to engage in presumptions." A v. X, Y, and Z, 641 P.2d at 1225. Obviously this did not take into consideration the potential of *in vitro* fertilization.

32. At this point a process for "banking" eggs safely for later use remains to be developed.

33. The possible effects of this on the Rule Against Perpetuities were discussed as long ago as 1962 in an article by a prominent property teacher, who noted the potential legal concept of a child *en ventre sa frigidaire*. *See* Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942 (1962). For a more recent commentary, see Note, *Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos*, 36 SYRACUSE L. REV. 1021 (1985).

34. In 1984, a special commission of the State of Victoria, Australia issued a Report on the Disposition of Embryos Produced by *In Vitro* Fertilization. The State of Pennsylvania has adopted legislation on reporting about IVF that includes information on the "[n]umber of fertilized eggs destroyed or discarded." 18 PA. CONS. STAT. ANN. § 3213(e) (Purdon 1983). Louisiana has a more detailed statute which provides, among other things, that:

> An in vitro fertilized human ovum is a biological human being which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum.

LA. REV. STAT. ANN. § 9:126 (West Supp. 1989).

The Louisiana Act also provides that:

> Any physician or medical facility who causes in vitro fertilization of a human ovum in vitro will be directly responsible for the in vitro safekeeping of the fertilized ovum.

Id. at § 9:127.

led to much greater record keeping about donors,[35] in stark contrast to previous practices of calculated anonymity or secrecy.[36]

B. The World of Law

At the same time when new and more reliable scientific tests for fixing biological parenthood were being developed, the strength of the longstanding presumption of paternity and its insulation from legal challenges were eroding. Rules limiting standing to assert paternity have been relaxed significantly in some jurisdictions,[37] and today it is not unusual to permit presumptive parents to testify even if this would render the child of a married woman illegitimate.[38]

In situations generally regarded as unrelated to assisted conception, there has been increasing recognition of parental, or quasi-parental, legal rights and duties between persons not related through biological connection. Examples are seen in stepparent relationships[39] and in cases involving tacit or express acceptance of the concept of psychological parentage.[40] The latter can arise in such contexts as custody, visitation, support, and termination of parental rights. The concept that a child might appropriately retain some legal and social connection with more than one "mother" or "father" also is gaining recognition through nascent doctrine or institutions such as "open"

35. The *OTA Summary* indicates that in 1987 seventy-eight percent of the reporting AID practitioners said that they tested for HIV. *OTA Summary*, *supra* note 6, at 1-9. All fifteen sperm banks in the study reported that they administered such tests. *Id.* at 1-11.

A special problem that has led some fertility centers to conduct their own testing and banking is that an initial ELISA test may not be adequate and it is, therefore, advisable to freeze the sperm and retest the donor some six months later. This obviously has the effect of requiring even greater record keeping.

36. *See* Wadlington, *Artificial Insemination*, *supra* note 5, at 777; Curie-Cohen, Luttrell & Shapiro, *supra* note 26, at 587.

37. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-843 (West Supp. 1988); Thornsberry v. Superior Court *ex rel.* Hunter, 146 Ariz. 517, 707 P.2d 315 (1985).

38. *See, e.g.*, Cassady v. Martin, 200 Va. 1093, 266 S.E.2d 104 (Va. 1980).

39. *See, e.g.*, Washington Statewide Organization of Stepparents v. Smith, 85 Wash.2d 564, 536 P.2d 1202 (1975); Miller v. Miller, 97 N.J. 154, 478 A.2d 351 (1984).

40. *See, e.g.*, Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976). The concept of "psychological parentage" has received widespread attention since the 1973 publication of GOLDSTEIN, FREUD AND SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). One provision of a Model Child Placement statute in the book includes this definition:

> A psychological parent is one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster, or common law parent, or any other person. There is no presumption in favor of any of these after the initial assignment at birth. [Cross reference numbers have been omitted.]

Id. at 98.

adoption, in which some formal or informal ties are maintained between a child and a relinquishing parent after legal adoption by other persons.[41] It is even being suggested that a similar approach be considered for at least some cases involving biological connection through egg or sperm donation.

The "constitutionalization" of domestic relations - long a virtually unchallengeable bastion of states' rights - has had important impact on blatantly discriminatory laws of the past.[42] As a result, more people have turned to courts for relief from what they consider arbitrary regulation of family relationships or sexual practices. Examples are seen in the ongoing of cases through which the Supreme Court of the United States has sharply curtailed discrimination against children or their parents based on the illegitimate status.[43] Questions remain about whether some such cases are more protective of the rights of children or of their parents, as exemplified in the turmoil in adoption practice after it was held in *Stanley v. Illinois*[44] that biological fathers of illegitimate children have a right to notice and a hearing about fitness before their parental rights can be terminated.[45]

While it is a phenomenon not generally assessed in constitutional dimensions, concerns about personal autonomy have vastly increased the use of "private ordering" within the sphere of domestic relations. This phenomenon is best exemplified by the broad expansion, through both legislative and judicial action, of the legally permissible scope of private contracting between spouses before and after marriage to "make their own deals" with regard to economic incidents on divorce, as well as death.[46] There also has been a widespread increase in the scope of contracting for nonmarital or "alternative" living agreements. Other constitutional decisions have legally

41. *See, e.g.*, Michaud v. Wawruck, 209 Conn. 407, 551 A.2d 738 (1988); *cf.* Weinschel v. Strople, 56 Md. App. 252, 466 A.2d 1301 (1983).

42. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (discrimination in marriage laws based on race); Orr v. Orr, 440 U.S. 268 (1979) (discrimination in support based on sex).

43. Included, among many others, are Levy v. Louisiana, 391 U.S. 68 (1968); Gomez v. Perez, 409 U.S. 535 (1973); Caban v. Mohammed, 441 U.S. 380 (1979); and Lehr v. Robertson, 463 U.S. 248 (1983).

44. 405 U.S. 645 (1972).

45. For a discussion of the problems created by *Stanley*, see Note, *The Strange Boundaries of* Stanley: *Providing Notice to the Unknown Putative Father*, 59 VA. L. REV. 517 (1973). The continuing difficulty of providing appropriate responses to the *Stanley* decision in the context of adoption illustrated by Lehr v. Robertson, 463 U.S. 248 (1983).

46. UNIFORM MARRIAGE AND DIVORCE ACT § 306(a) (first promulgated in 1970) explains that parties to a marriage can enter written separation agreements "[t]o promote amicable settlement of disputes . . . attendant upon their separation or the dissolution of their marriage . . . ." 9A U.L.A. 216 (1987). The UNIFORM PREMARITAL AGREEMENT ACT provides enormous latitude for the parties to contract before marriage with regard to the resolution of economic disputes on dissolution and also to establish rules that will govern them once they marry each other. 9B U.L.A. 369 (1987).

reinforced personal autonomy rights with regard to child bearing,[47] further delineating the right of privacy that formed the basis for decisions limiting state restrictions on personal decision making about abortion.[48]

Another highly important legal change has been the near radical restructuring of the divorce process. Divorce now is much easier to obtain than it was in the past. In 1965 it was still widely possible for one party to thwart the other from dissolving a marriage in the absence of proof of some legislatively specified antisocial conduct.[49] Today divorce is increasingly a matter of negotiation rather than litigation, and usually the most that an objecting party can accomplish is delay.

Although there has been increased legal recognition of personal autonomy in decision making about such matters as the economic effects of marriage and divorce,[50] as well as nonmarital relationships,[51] states have carefully guarded their power to oversee the effects of parental and third party conduct and agreements with regard to children.[52] Courts and legislatures have displayed increased willingness to intervene in family decisions about issues such as medical care.[53] Some states, including New Jersey, also place sub-

47. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

48. The primary case enunciating the right in this context, Roe v. Wade, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973), has been since subjected to many questions and significant gloss. *See, e.g.*, Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) and cases cited therein.

49. Although some states had enacted statutes providing that divorce could be granted without regard to fault when the husband and the wife had lived apart for a specified period, these provisions often required several years of separation. Usually such a provision simply was added to an existing list of fault based grounds which were retained. A more defined and powerful movement toward eliminating some or all fault grounds and replacing them with "break down" grounds began about 1970. For further discussion of this movement and its background, see Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L.REV. 32 (1966).

50. UNIFORM PREMARITAL AGREEMENT ACT § 3(a)(4) even permits a couple to contract before marriage with respect to "the modification or elimination of spousal support." 9B U.L.A. 373 (1987).

51. *See, e.g.*, Marvin v. Marvin, 18 Cal.3d 660, 134 Cal.Rptr. 815, 557 P.2d 106 (1976); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979); and Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980). Not all states have recognized such agreements, however. *See, e.g.*, Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

52. This reservation of power is reflected in the two models for economic dealings mention earlier. UNIFORM MARRIAGE AND DIVORCE ACT § 306(f) allows a court to expressly preclude or limit modification of the parties' contract "[e]xcept for terms concerning the support, custody, or visitation of children". 9A U.L.A. 217 (1987). UNIFORM PREMARITAL AGREEMENT ACT § 3(b) provides that "The right of a child to support may not be adversely affected by a premarital agreement." 9B U.L.A. 373 (1987). For an illustration of judicial unbundling of a separation agreement to determine which parts were for child support, and therefore nonmodifiable, see Carter v. Carter, 215 Va. 475, 211 S.E.2d 253 (1975).

53. For illustrations of this see *In re* Sampson, 65 Misc.2d 658, 317 N.Y.S.2d 641 (1970), *aff'd per curiam*, 29 N.Y.2d 900, 328 N.Y.S.2d 686, 278 N.E.2d 918 (1972).

stantial limitations on procedures for adoptive placement or termination of parental rights.[54]

A final development that should be considered is the addition of sharp new teeth to state child support laws, in large measure as a result of federal pressure directed toward lessening public support contributions.[55]

C. Social and Demographic Change

Perhaps the greatest change since 1965 has been the increased popular awareness and acceptance of new (and old) reproductive technology. This has heightened popular expectations about its availability in timely fashion for all those who wish to use it[56] at a time of marked decline in the availability of healthy neonates for adoption.[57]

Along with concern about the threat of AIDS, increased popular interest in knowing more about one's personal history is exerting pressure to change the widespread past practice of anonymous record keeping with regard to the identity of sperm donors.[58]

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54. The stringency of the New Jersey rules in this regard was explained by the court in *In re* Baby M, 109 N.J. at 425-27, 537 A.2d at 1242.

55. The Child Support Enforcement Amendments of 1984, 42 U.S.C.A. § 666, require states to adopt a number of provisions with regard to enforcement in order to maintain federal financial participation in public assistance programs. Examples include: simplified and faster withholding from wages, deductions from tax refunds, and provisions establishing liens against property. Under the Omnibus Budget Reconciliation Act of 1981 (OBRA), a federal tax intercept program was created. *See* Sorenson v. Secretary of the Treasury, 474 U.S. 851 (1986).

56. These expectations have had political impact in at least one state, Maryland, where the legislature has required that medical contracts and health insurance policies offering pregnancy-related benefits may not exclude benefits for *in vitro* fertilization under certain defined conditions. *See* MD. ANN. CODE art. 48A, §§ 354DD, 470W, 477EE (1986).

57. In 1965 there was a fairly elaborate system for facilitating relinquishment and adoptive placement of children (particularly illegitimate children) with various social and religious groups offering facilities where expectant mothers could stay until birth and effect anonymous relinquishment of their children for adoption. Changes in social and legal attitudes about birth control, abortion, and illegitimacy, as well as modification of former stereotypes about single parents and the effects of Stanley v. Illinois, 405 U.S. 645 (1972), have served to substantially lessen the functions or cause the demise of many of these. For further discussion, see Wadlington, *Artificial Conception*, *supra* note 5, at 466.

58. One facet of this can be described as the search for personal or cultural "roots." Another is concern about knowing one's genetic makeup to avoid transmission of hereditary diseases or anomalies. Cases arising thus far usually have come in the adoption context, but many courts have been reluctant simply to open past records. *See, e.g.*, *In re* Estate of Walker, 64 N.Y.2d 354, 486 N.Y.S.2d 899, 476 N.E.2d 298 (1985); *In re* Roger B., 84 Ill. 2d 323, 418 N.E.2d 751, *app. dismissed*, 454 U.S. 806 (1981). However, legislation in some states has provided for access by adoptees to what once were confidential documents regarding their parentage, at least after a certain age. *See* Pierce, *Survey of State Laws and Legislation on Access to Adoption Records*-1983, 10 Fam. L. Rep. (BNA) 3035 (March 6, 1984). One statute provides a special procedure that might be used by an adopted person seeking to locate a pre-adoption sibling. *See* KY. REV. STAT. ANN. § 199.575 (1982).

Popular acceptance of the new approach of easier access to divorce through less traumatic procedures has been successful with regard to one major objective of such simplification. While there is an elevated rate of divorce, there is also a high rate of remarriage.[59] It is arguable that persons who go through the process of marital dissolution are not sufficiently alienated from either marriage or the divorce process as to avoid remarriage. Whatever the explanation for the high statistical incidence of remarriage, it has had the important practical effect of creating confusion for many children of these serial unions. This has also led to problems of determining the rights and duties of stepparents and stepchildren. Both courts and legislatures have been called upon to focus increasing attention on these issues in recent years.[60]

Popular concern for assuring protection of personal autonomy and minimizing governmental intervention into personal decision making about issues of domestic relations seems high. In view of the official reinforcement of this through legal rules favoring private ordering of economic and other incidents of marital and even nonmarital relationships, it should be no surprise that surrogate parentage contracts are viewed by many persons as merely a logical extension of such steps, if indeed an extension at all. Others, however, are beginning to realize that recognition of unlimited surrogacy contracting should not be considered so simplistically because it raises broad issues concerning other highly important concerns such as sexual and economic exploitation and child protection.

To catalogue all of the relevant changes during our 25 year base period that might impact on the problems addressed here would be a monumental task. This limited list is offered simply to round out the historical perspective.

V. THE ISSUES TODAY

When one starts fitting the pieces together, the problems that today's counterpart of our hypothetical couple might face[61] quickly become apparent. The new pattern of record keeping for medical reasons such as AIDS

59. For statistics and discussion on this, see 38 THORNTON AND FREEDMAN, THE CHANGING AMERICAN FAMILY, POPULATION REFERENCE BUREAU, INC., 10 (1983).

60. *See, e.g.*, Miller v. Miller, 97 N.J. 154, 478 A.2d 351 (1984). While the cases and statutes most often seem to focus on issues of support, some also have dealt with matters of custody and visitation, or restrictions on intermarriage. *See* H. CLARK, *supra* note 21, at 84, 263, 710.

61. The most likely way that issues could be arise at this point would be for determination of heirship. Our original couple could well be safe from contest with the passage of time, though only barely in view of statutes of limitation that often do not begin to toll until after a child reaches majority. *See, e.g.* UNIFORM PARENTAGE ACT § 7, 9B U.L.A. 306 (1987).

prevention and concern about genetically transmissible disease, combined with refined scientific testing methods, make the expectation that anonymity can be maintained through presumptions of paternity and rules about standing unrealistic today, absent specific legal measures.[62] As a result, we can now be concerned that donors of egg or sperm might be able to assert parenthood or have actions for support brought against them, given our newer laws on the rights and duties of parents independent of their marital status. This would seem to require statutory action if clarity is desired, and in that process it would be necessary to confront conceptual issues such as whether biological connection should continue to be the dominant factor in fixing legal parentage in nearly all situations. In large measure, all of this stems from our new-found ability to determine paternity through scientific means whether we want to or not.

When one points to the solution of simply allowing private ordering for surrogate parentage, the implications are great. If individuals can freely contract for production of a child, why should the same approach not be permitted for adoption?[63] Should parents be able to terminate their parental rights readily through contract?[64]

Because surrogacy contracts ordinarily intend to effect both child custody and termination of parental rights of a biological parent, it is not surprising that they would be regarded as significantly different from antenuptial contracts or postmarital separation agreements which are designed to deal with spousal property rights. The question of concern is whether one can "spot zone" this single area or transaction to permit free private contracting without doing so in others as well. What does the New Jersey Supreme Court's decision mean for law reformers seeking workable legislative responses? While stating that present laws would not prohibit purely altruistic, noncommercial surrogacy, the court pointed out that even in those cases a biological mother under present law should be given the opportunity to change

62. In the USCACA, discussed herein, a formal legislative attempt has been made to permit maintenance of anonymity in the case of permitted surrogacy. However, this requires a combination of judicial intervention and legislative authorization and it may not be foolproof. *See* USCACA § 6(d), 9B U.L.A. 53 (Supp. 1989).

63. Adoption presently requires fairly elaborate intervention by the state, largely through the judiciary, to determine the fitness for parentage of the potential adopter(s). Some disposition or relaxation from these rules usually is permitted in cases involving adoptions by blood relatives or stepparents who have the consent of a natural parent.

64. This question is being raised for discussion increasingly in the context of seriously defective children who have been maintained in neonatal intensive care units or through other means against the preference of their parents. The child who then faces an expensive existence with very low quality of life or functional capacity is the special subject of concern because the child's support may fall almost entirely on the parents.

her mind and assert parental rights.[65] It added that "the Legislature is free to deal with this most sensitive subject as it sees fit, subject only to constitutional restraints."[66] The nature of such restraints is not spelled out because the court's approach under existing law obviated the need for definition. Legislatures, thus, will face unresolved issues concerning the constitutional dimensions of a still nascent right of privacy with regard to procreation; minimum constitutional standards applicable to criteria (not simply procedural safeguards) for terminating parental rights; and the degree to which judicial or other formal state involvement, in general, to protect the interests of children, should be required.

Still other major policy considerations are likely to be raised in debate about whether to "spot zone" to permit contracting for surrogacy. Considerable debate followed the suggestion that allowing a "market" for unwanted children might have the desirable effect of inducing some pregnant women to forego abortion and place their children for adoption after carrying them to term.[67] If one is seriously considering ways of dealing with the increased demand for adoptable children, as well as social problems such as abortion, there are approaches based on existing family law that should be considered. One example is through the termination of the rights of inadequate parents[68] to make more children available for adoption at an earlier age when they are regarded as most desirable for such placements. Thus far, our focus has been process oriented, leading to the requirement that the case for termination requires clear and convincing evidence.[69] Little has been

65. *See In re* Baby M, 109 N.J. at 466, 537 A.2d at 1264.

66. *Id.* at 466, 537 A.2d at 1264.

67. This idea was put forth in Landes and Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 343 (1978). It was revisited in a symposium published by the Boston University Law Review the year before the appellate court's decision in *Baby M*. *See* Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U.L. REV. 105 (1987). Professor Jane Maslow Cohen places the family law issues of such a proposal in important perspective. *Id.* Though the debate thus far has not centered on issues of surrogate parent agreements, it seems inevitable that it will.

68. The term "inadequate" could be subject to various definitions. It is used here not with the idea that it would permit broad "upgrading" of the homes of children to conform to some middle-class set of cultural standards of values, but instead to recognize that in many instances children remain in homes where they suffer physical and emotional harm because of inadequate means for dealing with often insoluble problems of substandard parental care and because there is no place for them to go without getting lost elsewhere in the system.

69. This is exemplified by Santosky v. Kramer, 455 U.S. 745 (1982). A dissent by Justice Rehnquist, joined by three other Justices, foreshadowed the human problems and uncertainties that remained, stating:

> When in the context of a permanent neglect termination proceeding, the interests of the child and the State in a stable, nurturing homelife are balance against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that risk of error be allocated to one

done to clearly fix minimum standards of acceptable parental conduct on which termination of rights can be based; the major attention has been devoted to establishing the requirement that the state conduct major efforts to reunify the family. While the latter goal is unquestionably desirable when there is some hope for its success, it is also good that increasing attention, finally, is being devoted to avoidance of undue delay in instances when a specific condition or incident (such as child abuse) triggered a breakdown in the parental relationship that could not be remedied in a relatively short period.[70] Following through on this approach through better establishment and enforcement of minimum standards could have the combined effect of making more children available and providing homes for children in need of them.[71]

An immediate illustration of areas that the *Baby M* decision might well trigger for reexamination are visitation and custody. The increased recognition of parental rights regardless of marital status, along with widespread serial marriage, have raised questions about whether past rules and practices are realistic today in the best interests of children. The specific focus on these problems in the appellate opinion in *Baby M* may well lead to further recognition that they are ripe for reconsideration.

VI. Recent Legal Responses

Even if one accepts the premise that the New Jersey Supreme Court's holding in *Baby M* could provide the needed catalyst for reform in the legal area of parent, child and state, it seems only reasonable to ask whether developments, thus far, indicate that this will be the case. Passage of a year without cataclysmic change does not alone support an argument that nothing is likely to materialize. The very complexity of the problems that need to be faced militates against any view that there are "quick fixes" that can solve everything.

Alhough it is still early, the limited developments, thus far, might be construed as suggesting that the former pattern of widespread introduction of often elaborate schemes dealing specifically with surrogate parenthood con-

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side or the other. Accordingly, a State constitutionally may conclude that the risk of error should be borne in roughly equal fashion by use of the preponderance of the evidence standard of proof.

Id. at 790-91 (Rehnquist, J., dissenting).

70. An example of this is seen in the Virginia statute. *See* VA. CODE ANN. § 16.1-284 (1988).

71. A major concern of such an expanded approach is that an undue burden might fall on poor families. This, of course, is a matter that would have to be addressed and explored carefully to guard against such undue discrimination.

tracts[72] may be changing. Several state legislatures have acted to formally repudiate such contracts, although some such statutes seem flawed in language or approach.[73] In one instance, a prohibiting statute has been limited by a combination of executive and judicial action.[74] Legislation that would affirmatively endorse surrogacy has not met with success during this period.[75] The most significant development has been promulgation of the UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT ("USCACA") by the National Conference of Commissioners on Uniform State Laws.[76] The Commissioners' UNIFORM PARENTAGE ACT, considered an *avant garde*

72. One such example is the *Draft ABA Model Surrogacy Act*, 22 FAM. L.Q. 123 (1988). For other discussion and carefully drafted models, see Note, *Developing a Concept of the Modern "Family": A Proposed Uniform Surrogate Parenthood Act*, 73 GEO. L.J. 1283 (1985); Ontario Law Reform Commission Report on Human Artificial Reproduction and Related Matters (1985); and Bezanson, Kurtz & Hovenkamp, *Model Human Reproductive Technologies and Surrogacy Act*, 72 Iowa L. Rev. 943 (1987) (a model developed in a law school seminar).

For a review of various state legislative proposals prior to the *Baby M* decision, see Pierce, *Survey of State Activity Regarding Surrogate Motherhood*, 11 Fam. L. Rep. (BNA) 3001 (Jan. 29, 1985).

73. Louisiana, for example has adopted a statute providing that surrogate motherhood contracts "shall be absolutely null and shall be void and unenforceable as contrary to public policy." LA. REV. STAT. § 9:2713(A) (West Supp. 1989). Such a contract is defined as "any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child". *Id.* at § 9:2713(B). One can immediately raise the question whether the language of such a statute includes only artificial insemination and not SET or IVF.

74. In Michigan, 1988 Mich. Pub. Acts 199 not only pronounced surrogate contracts void and unenforceable but also provide a criminal sanction of up to 5 years of imprisonment for certain parties who might be involved as arrangers of or parties to such a contract. A trial court subsequently upheld the constitutionality of the act, but only after the Attorney General of the State had agreed only to enforce its provisions if the contract required the mother to give up the baby. *See* 2 BIOLAW U:1149 (1988).

75. It should be noted that one artificial insemination statute predating the *Baby M* case made specific reference to the possible recognition of surrogacy by an unmarried mother. *See* ARK. STAT. ANN. § 34-7212 (Michie 1985):

> (B) A child born by means of artificial insemination to a woman who is unmarried at the time of birth of the child shall be for all legal purpose the child of the woman giving birth, except in the case of a surrogate mother, in which even the child shall be that of the woman intended to be the mother. For birth registration purposes, in cases of surrogate mothers, the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth may be issued upon orders of a court of competent jurisdiction.

76. *See* USCACA, 9B U.L.A. 50 (Supp. 1989). Work on drafting this Act began before the *Baby M* case had passed fully through the New Jersey court system, and the charge of the drafters was to deal with status matters of assisted conception generally, not just with surrogacy.

In the interest of full disclosure, the author points out that he was a Reporter for this project during its initial year of work, after which he resigned because of other personal commitments.

model by many when it was promulgated in 1973,[77] contained one section dealing with children born through artificial insemination but noted in the Commentary that, it "does not deal with many complex and serious legal problems raised by the practice of artificial insemination."[78] In an introductory Prefatory Note to the 1988 Act, the Commissioners recognize that they still have not provided "the complete answer to the overwhelming social problem" of surrogate motherhood contracting.[79] However, they have obviously proceeded far beyond the product of fifteen years earlier.

In their Commentary, the drafters of the USCACA profess neutrality on whether surrogacy agreements should be recognized. Accordingly, the Act offers a choice between provisions invalidating such contracts[80] and recognizing them for married couples under limited circumstances and in conformity with a strict procedure requiring judicial approval before conception.[81] Under the latter, a surrogate who has provided an egg for assisted conception could withdraw her consent within a period of six months from the last insemination and have the judicial order vacated without liability.[82] If the court vacates the order at the surrogate's request, the surrogate will be deemed the mother of the resulting child and her husband, if he was a party to the agreement, will be deemed the father.[83]

At this point it seems appropriate to question whether the USCACA is

77. This was the same year in which the Supreme Court of the United States decided that a state could not grant legitimate children a right to support from their fathers without also extending such a right to illegitimate children. Gomez v. Perez, 409 U.S. 535 (1973). In doing so, the court breathed new life into their earlier decision in Levy v. Louisiana, 391 U.S. 68 (1968) which had come into question about whether it was simply an aberrational approach dealing with a narrow fact situation.

78. UNIFORM PARENTAGE ACT, 9B U.L.A. 302 (1987).

79. USCACA, 9B U.L.A. 50 (Supp. 1989).

80. Optional § 6 provides that such agreements are void. USCACA, 9B U.L.A. 52 (Supp. 1989).

81. These limitations are contained in USCACA §§ 6-9. USCACA, 9B U.L.A. at 52-54. The "intended parents," under the definition in § 1 of the Act, must be a married couple "who enter into an agreement under this [Act] providing that they will be parents of a child born to a surrogate through assisted conception using egg and sperm of one or both [of them]. *Id.*, 9B U.L.A. at 50. The surrogate must be an adult, according to § 1(4), and the court must find that "the intended mother is unable to bear a child or is unable to do so without unreasonable risk to an unborn child or to the physical or mental health of the intended mother or child, and the finding is supported by medical evidence. . . ." *Id.* at §§ 1(4), 6(b)(2), 9B U.L.A. at 50, 52. Other provisions call for counseling, genetic screening, and other findings including one that "the intended parents, the surrogate, and the surrogate's husband, if any, meet the standards of fitness applicable to adoptive parents in this State . . . ." *Id.* at § 6(b)(4), 9B U.L.A. at 52.

82. *Id.* at § 7(b), 9B U.L.A. at 53. According to subsection 7(a), the surrogate, her husband, the intended parents of the court for cause, could terminate the agreement subsequent to an order of approval of surrogacy but before commencement of pregnancy by assisted conception. *Id.*, 9B U.L.A. at 53.

83. *Id.* at § 8(a), Alternative A, 9B U.L.A. at 54. If the surrogate is not married or her

any different from the previously described surrogacy-specific models. Clearly it is different, but it also must be recognized that the Act was designed to be "assisted conception specific" and to complement existing state laws and the UNIFORM PARENTAGE ACT. Except to the limited extent that it would provide for enforceability of surrogacy agreements, it attempts to deal with matters of status in cases involving assisted conception generally. In doing so, it breaks new ground in ways that will not be approved by all, but nevertheless will have the effect of providing clarity where this is needed. For example, § 2 of the Act fixes maternity on the basis of "who gives birth to a child."[84] This responds to the question of how one distinguishes between "birth mother" and "genetic mother." It also provides in § 4(b) that "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."[85] It includes a section comparable to that of most adoption statutes that would fix status under the Act as the basis for determining economic rights such as property and inheritance.[86] And, except to the extent specifically authorized, it excludes donors of sperm or egg from parental rights.[87]

In its pattern of falling back on existing state law, except in those cases where clarity seems to be demanded because of special uncertainties created by new assisted conception technology (and the limited optional provision for surrogacy), the approach seems broadly consistent with the approach of the appellate court in *Baby M.* It also seems significant that the model chosen for optional surrogacy was patterned in considerable degree on modern adoption, with its requirement of judicial approval and a showing of appropriate potential for parentage. Even so, it must be recognized that the Act takes only a few steps toward the larger goal urged in this Comment.[88] The analogous next step, in the context of the NCCUSL, would be a revision of both the UNIFORM PARENTAGE ACT and those portions of the UNIFORM MARRIAGE AND DIVORCE ACT dealing with parent and child.[89] In fact, one cannot help but wonder whether the time finally has come for greater

husband was not a party to the agreement, paternity will be governed by existing state law (or the Uniform Parentage Act where this has been adopted).

84. *Id.*, 9B U.L.A. at 50.

85. *Id.*, 9B U.L.A. at 51.

86. *Id.* at § 10, 9B U.L.A. at 55.

87. *Id.* at § 4(a), 9B U.L.A. at 51.

88. The drafters, of course, were not charged with such an expansive project.

89. Revision of other Acts such as the Uniform Child Custody Jurisdiction Act, might be affected by such revisions. Acts such as the Uniform Reciprocal Enforcement of Support Act would be less in need of change because of their approach of using existing state support duties while providing a common procedural enforcement mechanism to be used across state lines.

uniformity in this area, and whether the needed reforms can be achieved without it. For example, conflict of laws problems could abound if states began adopting widely divergent definitions of paternity and maternity, as well as approaches to private ordering for the possession, ownership and control of children.

EPILOGUE

It is highly probable that journalists in the future will return occasionally to the individual problems of Baby M and her respective families. The poignant situation of the parties is likely to limit their attention to this particular human situation. But one can hope that all of the emotional expenditure of the parties and the public observers could be translated into something more broadly meaningful. If the decision of the Supreme Court of New Jersey does provide a catalyst for that state and others to review and reform existing domestic relations law dealing with parent and child, the case will have had considerable value despite the difficulties it produced for the parties involved. As the court pointed out at the close of their opinion, providing a way for more persons "to enjoy the benefits of the new technology . . . while minimizing the risk of abuse"[90] means that there must be some societal consensus about values and objectives in this area. To accomplish this effectively, the focus should be broader than surrogacy.

90. 109 N.J. at 469, 537 A.2d at 1264.