

1996

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Recommended Citation

Todd M. Krim *Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 *Annals Health L.* 193 (1996).

Available at: <http://lawcommons.luc.edu/annals/vol5/iss1/10>

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Beyond *Baby M*: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother

*Todd M. Krim**

INTRODUCTION

The proliferation of new reproductive technologies, including in-vitro fertilization and gestational surrogacy, continues to raise complex legal and ethical issues.¹ These “breakthroughs” in noncoital reproduction go beyond merely forcing society to reconsider traditional notions of family and parenthood. They have so effectively dismembered the female reproductive role that one can imagine at least three different scenarios resulting in a complex custody dispute: (1) a woman may donate an egg that, when fertilized, will be implanted in the uterus of another woman who intends to raise the child; (2) the woman who pro-

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The author wishes to thank Professor Marlena Valdez of The George Washington University National Law Center for her substantive comments and editorial guidance, and Master’s Thesis Advisor Elayne Clift for her conceptual guidance and significant assistance.

1. The use of in-vitro fertilization (IVF) in conjunction with surrogacy is one of the more controversial applications of the new reproductive technologies, and the subject of this article. The IVF process takes place in four primary stages over a period of two weeks: ovulation induction, egg retrieval, fertilization, and embryo transfer. Embryo transfer, the final stage of the process, involves transferring the embryos into the uterus of the woman who will gestate the fetus to term. An egg fertilized in-vitro is usually implanted in the uterus of the woman who produced it. However, if the woman who produced the egg does not have a functioning uterus, the embryos are transferred to a surrogate’s uterus. This latter scenario is often referred to as “gestational surrogacy.”

vides the egg may herself intend to raise the child carried to term by another woman; or (3) a couple desiring a child may arrange for a woman to gestate an embryo produced from both a donated egg and a donated sperm.² In this latter situation, the newborn child has *five* potential parents: a sperm donor, an egg provider, a woman who agrees to gestate the child, and two nonbiologically related persons who intend to raise the child.

The new reproductive technologies, especially gestational surrogacy, have already had a profound effect on the female's traditional reproductive role. "Gestational surrogacy" should not be confused with the "traditional surrogacy" arrangement involved in the infamous *Baby M* case, where the child a woman bears is formed from her own egg. In gestational surrogacy arrangements, one woman (the "gestational surrogate") agrees to be impregnated with an embryo formed from the fertilized egg of another woman (usually the child's "intended mother").³

As the number of gestational surrogacy arrangements continues to grow, courts will increasingly be confronted with the difficult choice of deciding who is the legal mother of a child born from a gestational surrogacy arrangement: the woman from whose egg the child developed and without whose desire the child would not exist, or the dedicated woman who chose to carry the child for nine months. At the same time, the failure of state legislatures and/or Congress to pass a uniform law addressing such arrangements will lead to further inconsistent and conflicting court rulings. Finally, the inadequate monitoring and regulation of fertility clinics will permit infertile couples to be taken advantage of, resulting in new legal issues for courts and legislatures to address. For instance, in July 1995, three physicians affiliated with the Center for Reproductive Health at the University of California (UC), Irvine, including two fertility pioneers, were charged with unauthorized research on unconsenting subjects and with transferring eggs and embryos from unconsenting donors to other women.⁴ In what may be one of

2. *Johnson v. Calvert*, 851 P.2d 776, 790 (Cal. 1993) (Kennard, J., dissenting), *aff'g sub nom. Anna J. v. Mark C.*, 28 Cal. Rptr. 369 (Cal. Ct. App. 1991) [hereinafter *Johnson III*].

3. In the *usual* gestational surrogacy arrangement, the intended mother's egg is artificially united with her husband's sperm and implanted in the gestational surrogate's uterus, who then carries the child to term. However, another variation of gestational surrogacy involves the use of a sperm and an egg from *anonymous* donors rather than from the intended parents.

4. Diane M. Gianelli, *Fertility Scandal Raises Call for Regulation*, AM. MED. NEWS, Sept. 11, 1995, at 3.

the largest fertility scandals to date, it is estimated that at least sixty patients treated at fertility clinics at UC Irvine, UC San Diego, and AMI/Garden Grove Medical Center were subjected to improper egg and embryo transfers, with as many as eight children born as a result of the improper transfers. In less than two months, seventeen scandal-related legal claims involving UC had been filed, many of which pit the egg and embryo donors against their respective recipients. At least one couple whose embryos were allegedly stolen and implanted in a Newport Beach woman who gave birth to twins have requested DNA testing of the youngsters to establish their biological origin.⁵ The UC fertility clinic scandal follows the 1992 conviction of a Virginia fertility doctor, also considered a shining star for his pioneering work with amniocentesis, for using his own sperm to inseminate infertility patients.⁶

The United States is not alone in its problems. Other countries have responded in a variety of ways; while some countries are studying the issues, others have decided to prohibit gestational surrogacy, some to regulate it, and some to ignore it. Of concern is the threat of women, men, eggs, and sperm traveling all over the world to take advantage of various laws or lack thereof, creating havoc, let alone choice of law questions that can boggle the mind. However, the greatest concern is the potential for a "black market" preying on people's emotional or financial needs.

This article examines gestational surrogacy and in-vitro fertilization (IVF) from both a legal perspective, analyzing various state, federal, and international laws, as well as an ethical standpoint, confronting the unique controversies these new technological advancements present to our society. Part I reviews a recent gestational surrogacy case,⁷ and examines the various approaches a court can take to determine whether the gestational surrogate or the egg provider is the child's "legal" mother.⁸ Part II surveys state and federal legislative activity regarding surro-

5. Julie Marquis, *Silent Fear Lies Behind Fertility Furor*, L.A. TIMES, Aug. 6, 1995, at A3.

6. Gianelli, *supra* note 4, at 1.

7. *Johnson III*, 851 P.2d 776 (Cal. 1993).

8. As the California Court of Appeals noted in *Anna J. v. Mark C.*, 286 Cal Rptr. 369, 371 n.2 (Cal. Ct. App. 1991), *aff'g sub nom. Johnson v. Calvert*, No. X 63 31 90 (Cal. Super. Ct. 1990) [hereinafter *Johnson II*]: "Surrogacy is an issue where the basic terms one employs may affect one's analysis." I have therefore attempted to refrain, insofar as possible, from using the terms "mother," "father," or "parent(s)" when referring to the parties in these arrangements.

gacy. In particular, this section takes an in-depth look at the comprehensive regulatory schemes of various states as they attempt to create certainty for the parties involved in surrogacy arrangements. Part III examines the international aspects of IVF and surrogacy, beginning with a review of current and proposed legislation in other countries. This section also explores the troubling phenomenon of transcontinental surrogacy agreements as part of an emerging international surrogacy industry. Part IV explores selected feminist perspectives on the new reproductive technologies. Inclusion of such views is useful in conveying the impassioned arguments both for and against these new forms of reproduction. Finally, in Part V, the article concludes with a recommended approach for resolving the complex issues raised by the new reproductive technologies. This section includes a call for the federal government to pass comprehensive legislation governing gestational surrogacy and more stringent regulation of the growing reproductive technology field.

I. *JOHNSON V. CALVERT* AND THE CALIFORNIA COURTS' INTERPRETATIONS

Although the first reported birth of a child by a gestational surrogate dates back to 1984, it was not until 1990 that California became the first state to address such arrangements in court. The custody dispute between Anna Johnson and Mark and Crispina Calvert eventually made its way through all levels of the California state court system. The trial court,⁹ the California Court of Appeals,¹⁰ and the California Supreme Court¹¹ all concluded that Crispina Calvert, not Anna Johnson, was the child's "natural mother" under California law. However, the three courts used significantly different approaches in determining which of the two women was the child's mother. A review of the facts of the case, each court's reasoning in the *Johnson v. Calvert* case, and the advantages and disadvantages associated with it, is instructive for courts that will inevitably have to resolve similar issues in the future.

9. *Johnson v. Calvert*, No. X 63 31 90 (Cal. Super. Ct. 1990) [hereinafter *Johnson I*].

10. *Johnson II*, 286 Cal. Rptr. at 382.

11. *Johnson III*, 851 P.2d at 785.

A. *The Facts*

Mark and Crispina Calvert, a mixed Caucasian-Filipino couple, had long desired to have their own genetically related child.¹² As a result of tumors in Crispina's uterus, however, she was forced to have a hysterectomy, the surgical removal of the uterus. While the operation rendered Crispina unable to *carry* a child, she was still able to produce eggs, and the Calverts began to consider surrogacy.

In 1989, an African American woman named Anna Johnson heard about the couple's plight and volunteered to serve as a surrogate for them. Anna, a licensed vocational nurse who worked at the same hospital as Crispina, was a single parent of a three-year-old daughter of her own, and needed the extra money.

On January 15, 1990, Mark, Crispina, and Anna signed a surrogacy agreement. According to the agreement, Mark's sperm and Crispina's eggs would be fertilized to produce an embryo, which would then be carried by Anna. The agreement also stipulated, in favor of Mark and Crispina, that Anna would relinquish "all parental rights" to the child born so that the child would be taken into the Calverts' home "as their child." In return for Anna's efforts, the Calverts would pay her \$10,000 in a series of installments, the last to be six weeks after the child's birth. Mark and Crispina also agreed to take out a \$200,000 insurance policy on Anna's life.

On January 19, 1990, the zygote, formed in-vitro from Crispina's ovum and Mark's sperm, was implanted in Anna's uterus. An ultrasound test performed less than one month later confirmed that Anna was pregnant. This pregnancy, however, turned out to be much more difficult than her previous one. Anna experienced vomiting in excess of normal morning sickness, and at one point had to be hospitalized with severe dehydration.

As the pregnancy proceeded, relations between Anna and the Calverts slowly began to deteriorate. Anna was upset that Mark and Crispina failed to obtain the life insurance policy pursuant to their agreement. She also felt abandoned during an onset of premature labor in June. The Calverts were disturbed to learn that Anna had not disclosed to them that she had experienced

12. This scenario is based on the real-life events as recounted by the court in *Johnson II*, 286 Cal. Rptr. at 372-73.

several miscarriages and stillbirths in the past. Finally, Anna sent a letter to the Calverts demanding the balance of the payments due her so that she could pay her rent.¹³ Anna threatened to breach their agreement and refuse to give up the child if the Calverts did not comply.

In August, the Calverts filed a lawsuit seeking enforcement of the contract and a declaration that they were the legal parents of the unborn child. Anna filed her own lawsuit seeking to invalidate the contract and to be declared the mother of the child. The two cases were eventually consolidated and the child, named Christopher, was born on September 19, 1990. Blood samples were immediately obtained from both Anna and Christopher for analysis. By excluding Anna as a genetic contributor, the results indicated that Mark and Crispina were the child's parents.

13. The text of the letter reads:

7/23/90

Dear Chris & Mark:

I am writing you this letter to inquire if an early payment can be made of what is left to be paid of me. I would not ask if it weren't important and I feel that this is important because it deals with the well-being of the baby. The lady that owns the house in which I reside is selling it, so I must be out by the 10th of August. Since I am to be hospitalized for three weeks due to the pyelonephritis [sic] & premature contractions I need to find another place to live prior to this! Due to the complications of this pregnancy, I am unable to work until the delivery of this baby so my income is limited. I do not get enough from disability to make a two month rent deposit plus, the security deposit & have the telephone reconnected. I don't think you'd want your child jeopardized by living out on the street. I have looked out for this child's well being thus far, is it asking too much to look after ours? I'm imploring nicely and trying not to be an ogre about this. But you must admit, you have not been very supportive mentally the entire pregnancy & you've showed a lack of interest unless it came to an ultrasound. I am asking you for help in paying off the final five thousand. There's only two months left & once this baby is born, my hands are free of this deal. But see, this situation can go two ways. One, you can pay me the entire sum early so I won't have to live in the streets, or two you can forget about helping me but, calling it a breach of contract & not get the baby! I don't want it to get this nasty, not coming this far, but you'd want some help too, if you had no where to go & have to worry about not only yourself but your own child & the child of someone else!!! Help me find another place & get settled in before your baby's born.

This is the only letter you will get from me. The next letter you will receive will be from my lawyers, unless I hear from you by return mail at the end of the week—7/28/90.

Sincerely,
Anna [last name omitted]
Surrogate

B. *The Trial Court and the Genetic Maternity Rule*

Focusing on the biological ties between the Calverts and the child, trial court Judge Richard N. Parslow, Jr., concluded that the Calverts were the child's genetic, biological, and natural mother and father, and that Anna had "no parental rights to the child."¹⁴ Judge Parslow also summarily dismissed the idea that *both* Anna and Crispina could be found to be the child's mothers: "I think a three-parent, two-natural-mom claim in a situation is ripe for crazy making"¹⁵

For the trial court, the critical difference between Anna Johnson and Mary Beth Whitehead, the surrogate in the *Baby M* case,¹⁶ was the fact that Anna is not *genetically* related to the child she bore. According to Judge Parslow, "who we are and what we are . . . is a combination of genetic factors. We know more and more about traits now, how you walk, talk and everything else, all sorts of things that develop out of your genes, how long you're going to live, all things being equal, when your immune system is going to break down, what diseases you may be

14. *Johnson I*, No. X 63 31 90 at 4-5, 14 (Cal. Super. Ct. 1990). For comments on the trial court opinion, see George J. Annas, *Crazy Making: Embryos and Gestational Mothers*, 21 HASTINGS CENTER REP. 35 (1991).

15. *Id.* at 36 (reporting the oral opinion rendered from the bench).

16. In *Baby M*, William Stern and Mary Beth Whitehead entered into a surrogacy contract. The contract provided that Mrs. Whitehead was to be artificially inseminated with Mr. Stern's sperm, become pregnant, carry the child to term, bear it, deliver it to Mr. Stern and his wife Elizabeth, and "thereafter do what was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child." In the Matter of *Baby M*, 537 A.2d 1227, 1235 (N.J. 1988). Mrs. Whitehead subsequently changed her mind and wanted to keep the child. The Sterns brought suit seeking to enforce the surrogacy contract, to compel surrender of the child, and to terminate Mrs. Whitehead's parental rights to allow adoption of the child by Mrs. Stern. The Supreme Court of New Jersey refused to enforce the surrogacy contract, holding instead that the contract conflicted with several New Jersey laws including a law prohibiting the use of money in connection with adoption, and a law requiring proof of parental unfitness or abandonment before termination of parental rights. The court also held that the best interests of the child justified awarding custody to Mr. and Mrs. Stern, but that Mrs. Whitehead was entitled to visitation rights. *Id.* at 1263.

The Supreme Court of New Jersey also emphasized the extremely sensitive and controversial issues raised by the artificial insemination of a surrogate mother:

The unfortunate events that have unfolded illustrate that its unregulated use can bring suffering to all involved. Potential victims include the surrogate mother and her family, the natural father and his wife, and most importantly, the child. Although surrogacy has apparently provided positive results for some infertile couples, it can also, as this case demonstrates, cause suffering to participants, here essentially innocent and well-intended.

Id.

susceptible to.”¹⁷ Thus, the trial court concluded that Crispina alone was to be considered the mother of the child:

Anna Johnson is the gestational carrier of the child, a host in a sense [S]he and the child are genetic hereditary strangers Anna’s relationship to the child is analogous to that of a foster parent providing care, protection, and nurture during the period of time that the natural mother, Crispina Calvert, was unable to care for the child.¹⁸

By focusing on genetics, the trial court suggested that each person’s individuality is determined by genetics, and, therefore, the egg provider has a higher claim to rear and make decisions for a child than the gestational surrogate/“host.”¹⁹

Judge Parslow attempted to bolster his opinion by referencing scientific studies of twins that indicated that approximately seventy percent of observed variation in IQ was attributable to genetic variation.²⁰ Commentators such as George J. Annas suggest, however, that the same studies can also be used to dispute the contention that custody should be awarded to the child’s genetic parents: “If genetics determines 70 percent of our IQ and most of our psychological makeup, regardless of the type of home environment we are raised in within Western middle-class society, then it becomes very difficult to make a ‘best interests’ of the child argument The child will likely do as well with *any* parents, because the child’s genes, rather than its environment, will determine its future.”²¹ Accordingly, genes should not be the basis for determining what is, or is not, in the child’s best interests.

There are several additional criticisms of the trial court’s focus on genetics to determine motherhood. It has been suggested that a policy of extending greater rights and responsibilities to individuals solely because of their genetic linkage reinforces the stigma of adoption and tends to provide incentives for de-adoption litigation. Furthermore, there is a fear that such a policy might eventually lead to state-recognized eugenics programs.²²

17. *Johnson I*, No. X 63 31 90 at 7-8.

18. Annas, *supra* note 14, at 36 (reporting the oral opinion rendered from the bench).

19. *Id.* at 37.

20. *Johnson I*, No. X 63 31 90 at 7. See also Annas, *supra* note 14, at 37 (citing Thomas J. Bouchard et al., *Sources of Human Psychological Differences: The Minnesota Study of Twins Reared-Apart*, 250 SCIENCE 223, 228 (1990)).

21. Annas, *supra* note 14, at 37.

22. BRUCE LORD WILDER, *DEFINING THE LEGAL PARENT-CHILD RELATIONSHIP IN ALTERNATIVE REPRODUCTIVE TECHNOLOGY* 1, 6 (1991) (admonishing a critical

The trial court's opinion also has far-reaching implications for the increasingly popular gamete and embryo donation programs that are implemented in fertility clinics across the country. It is not uncommon for women unable to produce their own eggs to use the genetic material (egg or embryo) of a donor and then carry the fetuses themselves. Implementing the trial court's analysis, however, the donor (not the intended mother) would be considered the resulting child's mother, despite the fact that the intended mother had gestated the child for nine months. Consequently, the only solution would be for the donor, who is often anonymous, to relinquish all parental rights after the child's birth so as to allow the intended parent to adopt the child.²³ Many states have rectified this problem by enacting Artificial Insemination by Donor (AID) statutes that grant parental rights to the rearing parents if the donor is anonymous and a physician performed the insemination procedure. Most AID statutes, however, only address sperm donation, and, thus, do not provide much guidance in the gestational surrogacy context. Accordingly, only five states have enacted laws that specifically address the subject of egg donation.²⁴ These laws generally establish the gestational surrogate as the sole legal mother, except in cases of lawful surrogacy.²⁵

Finally, the trial court's exclusive focus on genetics as a way to determine parentage also raises tort law implications. For instance, in many states, a pregnant woman is either immune or

consideration of the "advisability of a constitutional amendment prohibiting laws and government involvement which seek to establish or promote a particular quality of genetic composition over others by vesting it with greater rights or powers, or which favor legal relationships between some at the expense of others, *solely* because of genetic linkages").

23. Karen A. Bussel, *Adventures in Babysitting: Gestational Surrogate Mother Tort Liability*, 41 DUKE L.J. 661, 666-67 (1991) (arguing that "[t]he status of gamete and embryo donation, as well as of traditional surrogate arrangements, is affected by such a restrictive definition of parenthood.").

24. FLA. STAT. ANN. §§ 742.11, 742.13-742.17 (West 1986 & Supp.1996); N.D. CENT. CODE §§ 14-18-01 to 14-18-07 (1991 & Supp. 1995); OKLA. STAT. ANN. tit. 10, §§ 554, 555 (West 1987 & Supp. 1994); TEX. FAM. CODE ANN. §§ 151.102, 151.103 (West 1996); VA. CODE ANN. §§ 20-156 to 20-165 (Michie 1995).

25. See Daniel S. Strouse, *Egg Donation, Motherhood and State Law Reform: A Commentary on Professor Palmer's Proposals*, 35 JURIMETRICS J. 31 (1994). Professor Palmer suggested that "both the genetic and gestational mothers should be allowed to assert parental rights." *Id.* at 31. He proposed that state legislation should name the *genetic* mother, the egg donor, as the sole mother of an IVF child. *Id.* at 32. However, this rule could be overcome "by a testator's or donor's expression of 'a contrary intention'; by formal adoption or judicial decree establishing the *birth* mother as the sole mother . . ." *Id.*

exempted from tort liability for certain harms caused to her child during the pregnancy. Under the parental immunity doctrine, although a tort has been committed, liability will be excused because of the existence of a parent-child relationship.²⁶ However, using the trial court's analysis, since a gestational surrogate is not considered the parent of the fetus she carries, she "may be liable in tort for any injuries to the fetus that occur as a result of her behavior during [the pregnancy]."²⁷

In contrast to the above arguments, there are many commentators who favor a genetic determination of motherhood in surrogacy cases. They argue that making genetics the primary determinant of maternal rights is preferable to a contract-based approach because reliance on contract principles "seems to merge the family with the world of business and commerce, to define family relations as negotiable ties between otherwise unconnected, autonomous individuals."²⁸ Advocates of genetic determination also argue that focusing on genetics avoids any potential conflict with laws proscribing baby selling: the egg provider is the *legal* mother of the baby so she cannot buy what is already hers. Finally, proponents of the genetic test for maternity also claim that recognition of the importance of genetics in parent-child relationships furthers the best interests of the child by reducing the possibility of confusion over one's identity and genetic heritage. The genetic test for maternity, it is argued, "promote[s] continuity and security for the children over time," and provides a rapid and clear solution to legal conflicts because such a test would allow surrogate gestation to continue, without a need to approve surrogacy contracts.²⁹

C. *The California Court of Appeals and the Uniform Parentage Act*

Upon review of the trial court's decision in *Johnson v. Calvert*, the California Court of Appeals addressed three issues: (1) the legal parentage of the child, (2) Anna Johnson's due process claims, and (3) Anna's equal protection issues. The court re-

26. Bussel, *supra* note 23, at 667.

27. *Id.*

28. Jeffrey M. Place, *Gestational Surrogacy and the Meaning of "Mother"*: *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), 17 HARV. J.L. & PUB. POL'Y 907 (1994) (quoting Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 673 (1993)).

29. Alice Hofheimer, *Gestational Surrogacy: Unsettling Parentage Law and Surrogacy Policy*, 19 N.Y.U. REV. & SOC. CHANGE 571, 602 (1992).

fused, however, to address whether the surrogacy agreement was enforceable under California law.³⁰

Justice Sills, who wrote the opinion for the California Court of Appeals, resolved the question of legal parentage by applying the state's version of the Uniform Parentage Act (UPA).³¹ Judge Sills noted that the California legislature enacted the UPA to replace the concept of illegitimacy with the concept of parentage.³² Most state legislatures, including the California legislature, never intended the UPA to govern the issues that could result from new reproductive technologies, such as gestational surrogacy.³³ Nevertheless, since the UPA was the only statutory guidance for California courts struggling with the issue of parentage determination, the courts used it to resolve parental disputes arising from surrogacy agreements.

The appellate court focused on certain definitions found in the UPA. The UPA begins by defining the "parent and child relationship" as a "legal relationship" that could exist between a child and the child's natural or adoptive parents.³⁴ This relationship "extends equally to every child and to every parent, regardless of the marital status of the parents."³⁵

According to the court, the UPA creates two ways for a woman to establish the existence of a mother and child relationship: one is by presenting proof of having given birth to the child, and the other is by presenting proof of a genetic relationship to the child through blood test evidence.³⁶ Therefore, it would appear that Anna Johnson, having given birth to Christo-

30. *Johnson II*, 286 Cal. Rptr. 369, 381 (Cal. Ct. App. 1991) (stating that "[i]t is one thing for a court to decide whether a contract violates public policy, articulated in the Constitution, statutes, and judicial decisions over a period of many years. It is another for a court to decide a contract violates public policy made of whole cloth in a case of first impression.").

31. CAL. CIV. CODE §§ 7000-7021 (now codified at CAL. FAM. CODE §§ 7600-7730 (West 1994 & Supp. 1996)). Note that this recodification was enacted without any substantive changes to the text of the UPA.

32. *Adoption of Kelsey S.*, 823 P.2d 1216, 1222 (Cal. 1992).

33. The UPA has been adopted in 18 states: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming.

34. CAL. CIV. CODE § 7001 (now codified at CAL. FAM. CODE § 7601 (West 1994 & Supp. 1996)).

35. *Id.* at § 7002 (now codified at CAL. FAM. CODE § 7602 (West 1994 & Supp. 1996)).

36. *Id.* at § 7003(1) (now codified at CAL. FAM. CODE § 7610(a) (West 1994 & Supp. 1996)) (between a child and the natural mother, a parent and child relationship "may be established by proof of her having given birth to the child, or under [the Act]").

pher, possessed a statutory claim under the UPA to be his natural mother. Yet the court noted that the UPA also permits "any interested party" to bring an action to determine the existence or *nonexistence* of a mother and child relationship.³⁷ In this regard, the court found that provisions of the UPA addressing the establishment of a father and child relationship through blood test evidence were also relevant to the establishment of a mother and child relationship.

While blood tests cannot absolutely prove paternity, they can unequivocally prove a man is *not* the father of a child.³⁸ In the instant case, the blood test results proved that Anna Johnson was not genetically related to Christopher and she offered no evidence to the contrary. In fact, Anna Johnson stipulated that Crispina Calvert was genetically related to the child.³⁹ Therefore, both Anna and Crispina met the UPA's statutory definition of the child's "natural mother": Anna by giving birth to the child, and Crispina by her genetic relationship to the child.

However, the California Court of Appeals did not read the UPA so as to give both Anna and Crispina statutory claims to maternity. Instead, the court found the blood test determination of maternity to be dispositive. The court stated that under California law, "Anna [was] conclusively *not* the 'natural mother' when her maternity [was] ruled out by blood tests."⁴⁰ Under the court's interpretation of the UPA, a woman must first demonstrate through blood test evidence that she is genetically related to the child *before* she can be considered the child's "natural mother" by virtue of having given birth to the child. Accordingly, since Anna could not establish through blood test evidence that she was genetically related to Christopher, she did not satisfy the UPA's definition of "natural mother." The California Court of Appeals therefore concluded that Crispina, not Anna, was the child's "natural mother" under the UPA.⁴¹

Although the Court of Appeals found that California law does not grant Anna any parental rights, the court still had to address whether, by virtue of giving birth to the child, Anna was entitled to be recognized as the child's "parent" as a matter of

37. *Id.* at § 7015 (emphasis added) (now codified at CAL. FAM. CODE § 7650 (West 1994 & Supp. 1996)).

38. *See* Cramer v. Morrison, 153 Cal. Rpt. 865, 869-71 (Cal. Ct. App. 1979).

39. *Johnson II*, 286 Cal. Rptr. 369, 376 (Cal. Ct. App. 1991).

40. *Id.* at 377 (emphasis added).

41. *Id.* This interpretation of the California law was quite dubious and, as the California Supreme Court later held, incorrect.

constitutional law. In support of this contention, Anna focused on the significant biological contribution a woman gives a child when she carries the child to term.

With respect to Anna's substantive due process claims, the Court of Appeals found that she lacked a constitutionally protected liberty interest in maintaining a relationship with the child. Referring to Justice Scalia's analysis in *Michael H. v. Gerald D.*, the court emphasized that "[o]ur society has never 'traditionally protected' the right of a gestational surrogate."⁴² Furthermore, the Court of Appeals found that even if a court concluded that unwed fathers had a liberty interest based, at least in part, on a biological relationship to the child, this reasoning would not apply to Anna because she was not Christopher's "natural" mother. Rather, for due process purposes, Mark and Crispina were the child's natural parents and "[t]o hold that Anna ha[d] a liberty interest in her relationship with the child was to diminish the liberty interest of Mark and Crispina in their relationship with the child."⁴³

Addressing Anna's equal protection claims, the Court of Appeals concluded that the application of the UPA to determine maternity as well as paternity did not conflict with the state or federal constitutions. Judge Sills found no gender discrimination in applying the same standard to determine motherhood and fatherhood. The court also stated that to the extent the UPA makes a distinction between two classes of women, that distinction was rational and not arbitrary, "even if one believe[d] the choice unwise."⁴⁴ In support of the distinction, the court referred to evidence introduced at trial that demonstrated that "the whole process of human development is 'set in motion by the genes.'"⁴⁵ In addition, while claiming not to detract from the relationship between adoptive parents and their children, the court noted that "genetics is a powerful factor in human re-

42. *Id.* at 379. In *Michael H. v. Gerald D.*, 491 U.S. 110, 121-24 (1989), the Supreme Court describes the types of liberties historically protected by the Due Process Clause. It addressed the issue of whether an unwed father has a constitutionally protected "liberty interest" in maintaining a relationship with a biological child born out of an adulterous affair. Justice Scalia's lead opinion looked to societal traditions to conclude there was no such interest. "The court explained [that] the relationship between an adulterous natural father, his married paramour and their child has never been recognized as a 'protected family unit under the historic practices of our society.'" *Johnson II*, 286 Cal. Rptr. at 379 (citing 491 U.S. at 123-25).

43. *Johnson II*, 286 Cal. Rptr. at 380.

44. *Id.*

45. *Id.*

relationships,” and that “[h]eridity can provide a basis of connection between two individuals for the duration of their lives.”⁴⁶

D. *The California Supreme Court and Intent-Based Parenthood*

The California Supreme Court granted review of the Court of Appeals opinion and affirmed the lower courts' conclusions that Crispina Calvert, not Anna Johnson, was the “natural mother.” The court's opinion became the first ruling by any state's high court to uphold a surrogacy agreement.⁴⁷

Although both the California Supreme Court and Court of Appeals agreed that the blood test provisions of the UPA applied to maternity as well as paternity disputes, they interpreted and applied the UPA quite differently. While Justice Sills, writing for the Court of Appeals, found that the decisive blood test “end[ed] the matter,”⁴⁸ Justice Panelli, writing for the Supreme Court, concluded that the UPA provided two ways in which a woman could establish a parent and child relationship: (1) by evidence that she gave birth to the child, or (2) by evidence that she was genetically related to the child.⁴⁹ Accordingly, the Supreme Court concluded that both Anna and Crispina presented acceptable proof of maternity under the UPA.

46. *Id.* at 380-81.

47. *Johnson III*, 851 P.2d 776, 782 (Cal. 1993). In November 1994, a probate court in Ohio became the second state court to uphold a gestational surrogacy agreement. See *Belsito v. Clark*, 67 Ohio Misc. 2d 54 (Ct. C.P. 1994). In *Belsito*, the court granted a married couple's declaratory judgment request that they be declared the genetic and natural parents of a child born through a gestational surrogacy arrangement. The court also granted the parent's request to have the birth certificate reflect the legitimate status of the child as their son. Specifically, the court ruled that “when a child is delivered by a gestational surrogate who has been impregnated through [IVF],” those individuals who are genetically related to the child will be deemed the natural parents of the child under Ohio law. *Id.* at 66. If these individuals have “not relinquished or waived their rights to assume the legal status of natural parents, they shall be considered the ‘natural and legal parents’ of that child.” *Id.* Unlike the *Johnson* case, however, the gestational mother in *Belsito* was the genetic mother's younger sister, and she did not assert parental rights over the child.

48. *Johnson II*, 286 Cal. Rptr. at 376.

49. *Johnson III*, 851 P.2d at 780-81. The California Supreme Court stated:

We disagree with the Court of Appeal's reading of the statute. In our view, the term ‘natural’ as used in subdivision (1) of Civil Code section 7003 simply refers to a mother who is not an adoptive mother. Section 7003 does not purport to answer the question before us, i.e., who is to be deemed the natural mother when the biological functions essential to bringing a child into the world have been allocated between two women.

Id. at 781 n.9.

Despite a recommendation by the American Civil Liberties Union (ACLU) that the court conclude that the child had *two* mothers, the court held that California law recognized only one natural mother.⁵⁰ Accordingly, the court found itself confronted with the difficult task of having to determine which of the two women, the egg provider or the gestational surrogate, was the child's "natural mother" under California law.

The California Supreme Court broke the "tie" between the two women by looking to the parties' intentions as manifested in the surrogacy agreement. In support of its reliance on the intent of the parties, the court reasoned that "while all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents.*"⁵¹ The court also asserted that "[t]he mental concept of the child is a controlling factor of its creation, and the originators of that concept [in other words, the intended parents] merit full credit as conceivers."⁵² Finally, after considering the *expectations* of the parties to the surrogacy agreement, the court stated that "the interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being.'"⁵³ Thus, the court concluded

that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.⁵⁴

The California Supreme Court rejected Anna's contention that surrogacy violated the state's public policies. In particular, Anna argued that a surrogacy agreement constituted a pre-birth waiver of her parental rights that directly contravened Califor-

50. *Id.* at 781 n.8 (stating that "[e]ven though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here").

51. *Id.* at 782 (quoting John L. Hill, *What Does It Mean to Be a "Parent"?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991) (emphasis within original)).

52. *Id.* at 783 (quoting Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196 (1986)).

53. *Id.* (quoting Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297).

54. *Id.* at 782.

nia adoption law prohibiting monetary payment in return for relinquishing parental rights. Justice Panelli held, however, that gestational surrogacy was different than adoption in several respects and should therefore not be subject to adoption laws. In particular, Justice Panelli noted that in gestational surrogacy arrangements, the parties voluntarily agree to participate in IVF and related medical procedures *before* the child is conceived. In addition, the payments to the surrogate under the contract are “meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up ‘parental’ rights to the child.”⁵⁵

E. The Dissenting View and the “Best Interests of the Child” Standard

In Justice Kennard’s dissent to the California Supreme Court opinion, she criticized the majority’s reliance upon the “intent” of the egg provider as the determinant factor in resolving the issue of maternity.⁵⁶ Justice Kennard argued that such a test was not flexible enough to deal with unforeseen circumstances, and would always favor the egg provider over the gestational surrogate. As Justice Kennard noted, the majority opinion, which contained no procedural protections for any of the parties to a surrogacy arrangement, was in effect “a sweeping endorsement of unregulated gestational surrogacy.”⁵⁷ In addition, the majority’s approach, according to Justice Kennard, devalued the substantial claims of motherhood by a gestational surrogate whose biological contribution of carrying a child for nine months and giving birth was as much an assumption of parental responsibility as the decision by a genetic contributor to enter into a surrogacy arrangement. Finally, Justice Kennard argued that “[a] pregnant woman intending to bring a child into the world is more than a mere container or breeding animal; she is a conscious agent of creation no less than the genetic mother, and her humanity is implicated on a deep level. Her role should not be devalued.”⁵⁸ In fact, case studies found in medical literature suggested that a gestational surrogate significantly contributed to the biological structure of the baby through her hormonal

55. *Id.* at 784.

56. *Id.* at 788-89 (Kennard, J., dissenting).

57. *Id.* at 798 (Kennard, J., dissenting).

58. *Id.* at 797-98 (Kennard, J., dissenting).

material, and that a psychological bond, between the surrogate and the baby, began long before the child was born.⁵⁹

Instead of focusing on the intent of the egg provider as the sole criterion for determining motherhood, Justice Kennard favored a standard that would give greater consideration and protection to the child born of a surrogacy arrangement. This standard, commonly known as the “best interests of the child” standard, is often used in traditional child welfare disputes, such as custody, adoption, and visitation matters. Protection of the minor child is the foremost consideration under this approach, and there are several factors courts consider in making this determination. In particular, courts consider the ability of the prospective parent(s) to nurture the child physically and psychologically and to provide ethical and intellectual guidance. The “best interests” standard also tends to de-emphasize the relative economic circumstances of the parties involved, which under an intent standard will almost always favor the egg provider and her spouse. Under a “best interests” standard, the intent of the parties may also be a factor, but certainly not a decisive one.

In sum, the California courts have attempted to resolve the parentage determination issue by using very different approaches. While there are advantages and disadvantages associated with each, the “intent-based parenthood” approach used by the California Supreme Court arguably creates the most certainty for parties entering into gestational surrogacy arrangements. Until the California legislature chooses to enact legislation to the contrary, the California Supreme Court’s approach to resolving gestational surrogacy disputes remains the governing law in California.

II. STATE AND FEDERAL STATUTORY RESPONSES

As the *Johnson v. Calvert* case clearly demonstrates, courts have a difficult time resolving surrogacy-related custody disputes. State and federal legislators have faced similar problems, and they must decide whether they should even attempt to regulate this arguably private right of surrogacy, and, if so, to what extent. These questions have not been, and will not be, easy to answer.

59. See generally Ebrahim J. Kermani, *Issues of Child Custody and Our Moral Values in the Era of New Medical Technology*, 31 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 536 (1992).

A. *State Legislative Responses to Surrogate Motherhood*

State legislatures, slow to respond to the new reproductive technologies, have only just begun to address the difficult issues raised by surrogacy. The approach taken by each state can vary significantly: one state may have a blanket prohibition of surrogacy agreements, while a neighboring state may recognize and enforce them. Most state statutes do not distinguish traditional surrogacy arrangements from gestational surrogacy arrangements.

Since 1987, nearly half of the states have enacted legislation addressing surrogate parenting arrangements.⁶⁰ Legislatures in Arizona, Indiana, New York, North Dakota, and Utah have responded to the call for legislative guidance by making all surrogacy contracts void and unenforceable. Other states, including Kentucky, Louisiana, Nebraska, and Washington, have passed legislation that voids only those surrogacy contracts entered into for compensation.

Michigan goes further than most other states by criminalizing surrogacy. Under the Michigan statute, facilitators of surrogacy contracts are guilty of a felony and punishable by a fine of up to \$50,000 and/or imprisonment for up to five years.⁶¹ Even participants are guilty of a misdemeanor and punishable by a fine of up to \$10,000 and/or imprisonment for up to one year.⁶²

Florida, New Hampshire, and Virginia are in the clear minority by making certain noncommercial surrogacy arrangements legal and enforceable. All three states prohibit couples from compensating the surrogate in excess of any expenses incurred as a result of the pregnancy, and provide the surrogate with an opportunity to rescind the contract. In addition, all three states

60. ALA. CODE §§ 26-10A-33 to 26-10A-34 (1992); ARIZ. REV. STAT. ANN. § 25-218 (1991 & Supp. 1995); ARK. CODE ANN. §§ 9-10-201 to 9-10-202 (Michie 1993 & Supp. 1995); FLA. STAT. ANN. §§ 742.14-742.17 (West Supp. 1996); IND. CODE ANN. §§ 31-8-2-1 to 31-8-2-3 (West 1979 & Supp. 1995); KY. REV. STAT. ANN. §§ 199.590(2), 199.590(4), 199.990 (Michie/Bobbs-Merrill 1995); LA. REV. STAT. ANN. § 9:2713 (West 1991); MICH. COMP. LAWS ANN. §§ 722.851 to 722.863 (West 1993); NEB. REV. STAT. § 25-21,200 (1996); NEV. REV. STAT. ANN. § 126.045 (Michie 1993 & Supp. 1995); N.H. REV. STAT. ANN. §§ 168-B:1 to 168-B:32 (1994 & Supp. 1995); N.J. REV. STAT. ANN. §§ 9:3-41, 9:17-44 (West 1993 & Supp. 1996); N.Y. DOM. REL. LAW §§ 121-124 (Consol. 1993 & Supp. 1996); N.D. CENT. CODE §§ 14-18-01 to 14-18-07 (1991 & Supp. 1995); OR. REV. STAT. ANN. §§ 109.239, 109.243, 109.247 (1990 & Supp. 1994); UTAH CODE ANN. § 76-7-204 (1995); VA. CODE ANN. §§ 20-156 to 20-165 (Michie 1995); WASH. REV. CODE ANN. §§ 26.26.210 to 26.26.260 (West 1989 & Supp. 1996); W. VA. CODE § 48-4-16 (1993).

61. MICH. COMP. LAWS ANN. § 722.857 (West 1993).

62. *Id.* at § 722.859 (West 1993 & Supp. 1995).

expressly address gestational surrogacy arrangements. Beyond these common characteristics, however, their approaches to regulating surrogacy are quite distinct.

The Florida statute has several requirements designed to protect the participants of a gestational surrogacy arrangement. Specifically, the gestational surrogacy contract will not be enforceable unless: (1) the intended parents (who must be legally married) and the gestational surrogate are eighteen years of age or older; and (2) a physician determines that (a) the intended mother cannot physically gestate a pregnancy to term, (b) the gestation will cause a risk to her physical health, or (c) the gestation will cause a risk to the health of the fetus. The intended parents may compensate the gestational surrogate for reasonable living, legal, medical, psychological, and psychiatric expenses that are directly related to prenatal, intrapartal, and postpartal periods. Finally, the gestational surrogate's agreement to relinquish parental rights is subject to a right of rescission within seven days of the child's birth.⁶³

New Hampshire's statute provides a more comprehensive regulatory scheme than Florida's, including judicial preauthorization of gestational surrogacy contracts. Under New Hampshire law, only judicially preauthorized surrogacy contracts are recognized. In order for the surrogacy contract to be preapproved by a court: (1) the participants must have given their informed consent; (2) evaluations and counseling must have been completed; (3) the contract must not contain any prohibited or unconscionable terms; and (4) the contract must be in the best interests of the intended child.⁶⁴ All court-approved surrogacy contracts must also give the gestational mother an unqualified right of rescission at any time up to seventy-two hours after the birth of the child. If the gestational surrogate exercises her rights to keep the child, and parental rights of the commissioning couple are terminated, the obligation to provide financial support is also terminated. If the gestational surrogate does not exercise her rights to keep the child, her parental rights will automatically terminate and those rights will be vested in the intended parents.⁶⁵ Finally, New Hampshire does not allow any entity to promote or solicit any party to enter into a surrogacy arrangement for compensation.

63. FLA. STAT. ANN. § 742.15 (West 1996).

64. N.H. REV. STAT. ANN. §§ 168-B:16 to 168-B:23 (1994 & Supp. 1995).

65. *Id.* at § 168-B:25 (1994 & Supp. 1995).

The Virginia surrogacy statute, like New Hampshire's, has a more extensive regulatory scheme than Florida's. However, unlike New Hampshire, Virginia recognizes two general types of surrogacy agreements: those that have been judicially preauthorized, and those that have not. In order for a surrogacy contract to be judicially preauthorized, the gestational mother must be married and have had at least one successful pregnancy, and all parties (including the gestational surrogate's husband) must sign the contract.⁶⁶ Both the intended child and the gestational surrogate are entitled to legal counsel during the petition phase of the process.

Before the court will approve the contract, however, a home study of the intended parents, the surrogate, and her husband must be conducted. All interested parties must meet the standards of fitness applicable to adoptive parents, and, like the New Hampshire statute, the Virginia statute requires all parties to undergo physical and psychological examinations and counseling. Finally, the intended mother must be either infertile or unable to bear children without unreasonable risk of mental or physical harm to herself or the unborn child, and at least one of the intended parents must be genetically related to the unborn child.⁶⁷

Virginia also recognizes surrogacy contracts executed without judicial preauthorization. These contracts will be enforced only to the extent that their provisions may be reformed to accommodate the statutory requirements. The major difference between a judicially preauthorized contract and a court-reformed contract is the gestational surrogate's right to terminate the contract.⁶⁸ With respect to those contracts that have been preapproved by a court, intended parents are automatically considered the parents of the resulting child unless the surrogate chooses to terminate the contract within 180 days of becoming pregnant. If a contract has been executed without court approval, however, the intended parents are not automatically considered the parents of the resulting child. The gestational surrogate, after a twenty-five-day waiting period, must relinquish her parental rights by signing a consent form *before* the intended parents can be named as the child's parents on the birth certificate.

66. VA. CODE ANN. § 20-160(B)(6) (Michie 1995).

67. *Id.* at § 20-160(B)(8).

68. Hofheimer, *supra* note 29, at 577-78 n.29.

The Virginia surrogacy statute also prohibits any entity from recruiting or inducing any surrogate or intended parent into a surrogacy contract for compensation. This provision applies to both judicially preauthorized and court-reformed surrogacy agreements.⁶⁹

While some states have made significant progress by attempting to tackle the difficult and complex issues raised by surrogacy, serious problems remain. As previously mentioned, there is little uniformity in the surrogacy legislation enacted by the various states. What might be considered “baby selling,” and therefore against public policy, in one state is sound public policy in another.

The real danger lies, however, with states like California, where the legislature has yet to formulate an express public policy regarding surrogacy. Clearly, it is not difficult to envision infertile couples from Arizona crossing the California border so that they may produce a child through surrogacy with the confidence that their agreement will be given effect.⁷⁰

B. Federal Attempts to Restrict the Practice of Surrogacy

The United States has yet to enact federal legislation relating to surrogacy arrangements and other impending bioethical issues. This federal legislative vacuum has resulted in differing and often conflicting action by state courts⁷¹ and state legislatures⁷² as they attempt to resolve disputes stemming from the new reproductive technologies.

In 1989, there were two attempts to pass federal legislation that would prohibit or restrict surrogacy arrangements. While the bills did not explicitly refer to the *Baby M* case, it is not unreasonable to suspect that the legislation was in direct response to the public furor over the issues presented by the case.

The first bill, referred to as the “Surrogacy Arrangements Act of 1989,” was introduced by Representative Thomas A. Luken (D-Ohio).⁷³ This legislative proposal sought to impose criminal penalties upon anyone who “on a *commercial* basis knowingly

69. VA. CODE ANN. § 20-165 (Michie 1995).

70. The *Baby M* case is at least one good example of an interstate surrogacy arrangement: the Sterns and the Whiteheads lived in New Jersey, the broker lived in Michigan, the clinic was located in New York, and the adoption was slated to go through in Florida.

71. See *supra* Parts IB-IE.

72. See *supra* Part IIA.

73. H.R. 275, 101st Cong., 1st Sess. (1989).

makes, engages in, or brokers a surrogacy arrangement.”⁷⁴ Representative Luken’s bill would have also amended the Federal Trade Commission Act to provide criminal penalties for anyone who advertised services relating to surrogacy arrangements. Although the bill had three additional cosponsors, it eventually died in the House Committee on Energy and Commerce.

Another bill regarding surrogacy arrangements, entitled the “Anti-Surrogate-Mother Act of 1989,” was introduced by Representative Robert K. Dornan (R-Cal.).⁷⁵ This proposal would have criminalized all activities relating to surrogacy, including the provision of medical assistance and the advertisement of services with any connection to surrogate motherhood. Furthermore, unlike the prior bill, this legislation would have made both commercial and noncommercial surrogacy contracts null and void. Representative Dornan’s bill eventually died in the House Committee on the Judiciary, without any cosponsors.

The implications of this federal legislative vacuum, as it currently exists in the United States, are disturbing. The decisions expressed by the California courts in *Johnson* demonstrate that the issue can be analyzed from various viewpoints. Further, state legislatures have enacted their own laws that either strictly regulate the industry or allow it to flourish freely. Some states have failed to even address the issue. This lack of consistency is likely to create serious problems in the United States. Without a uniform standard, certain states like California may become havens for individuals desiring children through gestational surrogacy. On the other hand, a uniform regulatory scheme could enable each citizen in every state to have the same opportunity to produce a child through gestational surrogacy. This uniform regulation would also reduce the risk of the exploitation and commercialization of women,⁷⁶ as set standards would govern the industry.

The United States is not alone in struggling with the issue of the “biological mother.” Just as reproductivity and biology transcend international borders, so too do desires to raise children. None of the issues discussed above is unique to the United States.

74. *Id.* at § 2(a) (emphasis added).

75. H.R. 576, 101st Cong., 1st Sess. (1989).

76. *See infra* Part IV.

III. SURVEY OF INTERNATIONAL DEVELOPMENTS

The unresolved issues surrounding gestational surrogacy are elevated from a national problem to an international problem when other countries' laws (or lack thereof) are added to the equation. As Barbara Katz Rothman recognizes in her article entitled "On 'Surrogacy',"⁷⁷ if just one state permits surrogacy to exist within its borders, and there is no federal legislation prohibiting it, that state may become a breeding ground for the mass production of babies. This can also happen on an international level, since, as Rothman notes, "[i]t is in the United States that the rights of rich people to buy are most deeply held."⁷⁸ Rothman states that she used to envision "baby farms" located in third-world countries, exporting babies to United States purchasers. With most European countries outlawing surrogacy for hire, the United States may soon be the logical place for the budding international surrogacy industry.

A. *Overview of IVF and Surrogacy Legislation in Foreign Countries*

There appears to be a growing international consensus in support of discouraging, if not outright prohibiting, *commercial* surrogacy. At least eight countries, including Israel, Switzerland, Germany, Spain, France, Greece, Norway, and Britain, specifically ban commercial surrogacy.⁷⁹ However, there is little consensus among the various nations with respect to regulating IVF and noncommercial surrogacy.

Among the developed countries, Germany and Sweden have some of the most restrictive legal codes on fertility practices. Germany, for instance, prides itself on being one of the only countries to ban the implantation of an egg that has not been provided by the woman undergoing the treatment. A December 1990 law, concerned with the protection of the embryo and the avoidance of split motherhood, stipulates that offenders or those who abuse reproduction technology will be liable to a prison term or fine.⁸⁰ Sweden, like Germany, passed restrictive

77. Barbara Katz Rothman, *On 'Surrogacy'*, in JOHN ARRAS & BONNIE STEINBOCK, *ETHICAL ISSUES IN MODERN MEDICINE* 475 (4th ed. 1995).

78. *Id.* at 475.

79. Leo Uzych, *The Mother of All Questions: How to Govern Surrogacy*, PA. L. J., Mar. 8, 1993, at 2.

80. *Improvised Guidelines on Motherhood's Brave New World*, GUARDIAN (London), Jan. 5, 1994, at 9.

fertility laws in the late 1980's. In particular, Sweden has banned the use of either donated eggs or donated sperm; only fertilization "between partners" is permissible. Sweden also prohibits the anonymous donation of sperm. Men are required "to disclose their names and a list of personal details," so that when the children reach age eighteen, they are able to trace their biological father.⁸¹ As a result of Sweden's strict fertility laws, hundreds of Swedish women each year seek treatment in Britain and Denmark, where laws are less restrictive.

France is not far behind Germany and Sweden in strictly regulating IVF practices. A draft law being considered (as of the time of this writing) by the French legislature would restrict IVF to infertile "heterosexual" couples in a stable union. In reaction to recent controversies in Britain and Italy, the government also plans on banning the use of IVF by postmenopausal women.⁸²

Australia is also in the process of updating its laws regarding surrogacy and IVF. In 1984, Australia was in the forefront of developing successful IVF programs, and became the first nation to legislate specifically on the subject.⁸³ Its laws have subsequently lagged behind developments in new reproductive technology. Marie Tehan, Australia's Health Minister, supports the existing prohibition on gay couples gaining access to IVF. She also favors a complete ban on surrogacy under threat of criminal penalties.⁸⁴

In Canada, there is no comprehensive law in place, and no entity, public or private, has overall responsibility in the area of new reproductive technologies. Surrogacy agreements (or "pre-conception arrangements," as they are called in Canada) are not specifically outlawed in any province except Quebec. In Quebec, "the revised Civil Code states that all agreements for procreation or gestation for payment are null and void."⁸⁵

On October 25, 1989, former Prime Minister Brian Mulroney appointed Dr. Patricia Baird, a geneticist at the University of British Columbia, to head a national task force that would perform an in-depth study of current bioethical issues and recommend government action. Dr. Baird and the Royal Commission on New Reproductive Technologies ("Royal Commission")

81. *Id.*

82. *Id.*

83. Julie-Anne Davies, *Australia: Surrogate Mothers Face Bans*, SUNDAY AGE (Melbourne), Mar. 5, 1995, at 1.

84. *Id.*

85. *Surrogacy Business Growing*, CALGARY HERALD, Aug. 31, 1994, at A1.

eventually spent four years and over \$28 million addressing the medical, legal, economic, and ethical issues arising from new reproductive technologies such as IVF, surrogate motherhood, and prebirth selection.

The result of the Royal Commission's extensive study was a 1275 page report released on November 30, 1993, entitled "Proceed With Care: The Final Report of the Royal Commission on New Reproductive Technologies."⁸⁶ While the Final Report generally calls "for a 'regulatory framework' regarding the use of new reproductive technologies," similar to Australia's, it ultimately proposes a ban on commercial surrogacy and "the imposition of criminal penalties on intermediaries."⁸⁷ The Final Report's Summary states: "Preconception arrangements commodify reproduction and children, they have potential to exploit women's vulnerability because of race, poverty, or powerlessness and leave women open to coercion."⁸⁸ The Royal Commission also called for the closing of sex-selection clinics and a ban on the sale of human sperm, embryos, and fetal tissue.

Almost four years after publication of the Royal Commission's report, Canada's federal government is expected to enact, in the summer of 1996, legislation that appears to adopt many of the Royal Commission's recommendations.⁸⁹ The legislation is expected to prohibit commercial surrogacy arrangements, as well as the buying and selling of human eggs and embryos. The legislation will also include fines for violating the law.

Both Britain and Israel generally support a less conservative and noninterventionist stance on IVF and surrogacy. Accordingly, each country has recently passed legislation facilitating the use of IVF and other reproductive technology by infertile couples.

In Britain, the Human Fertilisation and Embryology Act of 1990 (HFEA)⁹⁰ governs IVF treatments. The Act sets forth in

86. Note, *Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum?*, 26 GEO. WASH. J. INT'L L. & ECON. 633, 674 (1993) (citing Patricia Baird, *Update: A Letter from the Chairperson*, in ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: THE FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES [hereafter FINAL REPORT], Summary of Main Topics at 1 (1993)).

87. FINAL REPORT, *supra* note 86, at 14.

88. FINAL REPORT, *supra* note 86, Summary & Highlights at 19.

89. *Canada to Regulate Baby Trade*, Xinhua News Agency, Apr. 18, 1996, available in LEXIS, NEWS Library, XINHUA File.

90. Human Fertilisation and Embryology Act, 1990, c.37, amended by Criminal Justice and Public Order Act, 1994, c.33, § 156 (prohibition on use of cells from em-

elaborate detail who is considered the “mother” and “father” in a variety of situations.⁹¹ The HFEA granted the Human Fertilization and Embryology Authority the power to license and regulate the 150 IVF clinics that now exist in Britain.⁹² While the HFEA bans commercial surrogacy,⁹³ it does not prohibit women from serving as surrogates on a voluntary basis. Unlike the French draft law, the HFEA does not prohibit the use of IVF by single or lesbian women.

Under the HFEA, rather than going through conventional adoption procedures, couples may apply for a “parental order,” which gives them a much speedier, more informal answer.⁹⁴ To qualify, a couple “must be married, have paid no fees to the surrogate other than expenses [directly related to the pregnancy], and at least one [of the intended parents] must be ‘genetically related’ to the child.”⁹⁵

In 1991, Israel followed Canada’s example and appointed a committee of experts to examine various aspects of IVF and surrogacy in an effort to reevaluate its fertility laws. The committee comprised a retired district court judge, a gynecologist, a sociologist, a philosopher, a social worker, a gynecologist/medical ethicist rabbi, and a psychologist. The committee’s final report was released in July 1994, and, unlike Canada’s expert committee, recommended the legalization of surrogate motherhood. While the majority of the committee members agreed that they did not want to encourage couples to commission another woman to have their baby, they felt the phenomenon was “too common to be ignored by Israeli law.” Other recommendations by the committee included the appointment of an interdisciplinary board of experts to exclusively supervise all IVF and surrogacy procedures; restricting the surrogate’s payment to those expenses directly associated with the pregnancy; and immediate recognition of parental rights once the baby is born, thereby avoiding the lengthy adoption process. Under the com-

bryos or foetuses); Human Fertilisation and Embryology (Disclosure of Information) Act, 1992, c.54.

91. *Id.* at §§ 27-30.

92. *Id.* at § 8.

93. *Id.* at §§ 12(e), 13(5), 13(6).

94. Lucy Berrington, *Surrogate Parents Cut Legal Red Tape*, THE TIMES (London), Feb. 25, 1995.

95. *Id.*

mittee proposal, the surrogate would retain the right to change her mind and keep the baby.⁹⁶

In March 1996, the Israeli parliament passed a landmark bill that legalized surrogacy arrangements, making Israel the first country to have national legislation governing the practice of surrogacy. The legislation requires the surrogate and the couple "ordering" the child to sign a contractual agreement. Health Minister Ephraim Sneh appointed a seven-member committee (consisting of two gynecologists/obstetricians, a clinical psychologist, a public representative, a social worker, an internal medicine specialist, and a clergyman) that will be responsible for approving these contracts.⁹⁷ The committee will be allowed to approve surrogacy agreements between a commissioning couple and a surrogate if they are "certain the deal was reached freely by both sides, and there is no danger to the health of the mother or to the health and the rights of the baby."⁹⁸ The legislation requires that the sperm be provided by the commissioning father, and that the baby be conceived by IVF. With respect to the surrogate, the legislation generally requires that she be an unmarried, Israeli resident. She may be paid compensation for her suffering and loss of time and income, as well as legal costs and insurance. However, the payment of additional money is prohibited. Finally, the legislation entitles the surrogate to change her mind and keep the baby (subject to court approval), or to abort the fetus if she so chooses (in accordance with existing abortion law).⁹⁹

B. Surrogacy Issues in an Emerging Global Market

The lack of IVF or surrogacy regulation in many countries promises to raise additional complex legal issues for courts to address in the near future. For instance, as the number of international surrogacy arrangements increases, it is not difficult to envision a custody dispute between genetic parents residing in one country and the surrogate in another. The initial question in such a dispute then becomes: "Whose law governs?" Is it the law in the country in which the genetic parents reside, or the law in the country in which the surrogate resides? Perhaps the focus

96. Judy Siegel, *Experts Recommend Legalization of Surrogate Motherhood*, JERUSALEM POST, July 27, 1994, at 12.

97. Judy Siegel, *Health Ministry Tackles TB*, JERUSALEM POST, Apr. 7, 1996, at 5.

98. *Id.*

99. Judy Siegel, *Surrogate Mother Bill Must Soon Be Law*, JERUSALEM POST, Dec. 19, 1995, at 3.

should be on the child. A court may apply the law of the country in which the child was either conceived or born, which may not necessarily be the same. Thus, a court may ultimately be forced to choose between the conflicting laws of four different countries.

The number of cross-cultural surrogacy agreements being formed is astounding, and for every reported international arrangement, there are probably dozens that go unnoticed. In Australia, at least sixty couples, and an unknown number of single men, have inquired about obtaining babies through the Infertility Center of America, based in Indianapolis, Indiana. The Center runs a surrogacy program that offers its services to infertile couples from around the world.¹⁰⁰ It is estimated that the Center has assisted in the production of over 500 babies for individuals and couples in over fifteen countries, including South America, Saudi Arabia, and Australia.¹⁰¹

International surrogacy agreements may even be formed without any face-to-face contact between the parties. For instance, in one case, the sperm of a Japanese husband was airlifted to a San Francisco fertility clinic, and inseminated into seventeen eggs donated by a twenty-one-year-old Chinese-American student. Six of the eggs were subsequently implanted in the womb of a thirty-year-old American Caucasian woman. This arrangement resulted in “[t]he first surrogate delivery involving three ‘mothers’ on both sides of the Pacific Ocean—the legal Japanese mother, the U.S. donor of the egg, and another American woman who gave birth to the baby.”¹⁰²

While the recent development of international surrogacy arrangements has brought tremendous joy to infertile couples around the world, it is not difficult to imagine a much darker side to this new phenomenon. A British newspaper reported that a British adoption specialist, currently under investigation in Croatia for allegedly traveling across Eastern Europe to find pregnant women—usually refugee victims of “ethnic cleansing”—to persuade them to sign their unborn children over for adoption in the United States, was also planning to exploit lib-

100. John Elder, *Australia: U.S. Babies Sell Here For \$60,000*, SUNDAY AGE (Melbourne), Feb. 19, 1995.

101. *Id.*

102. *Three “Mothers” To Have Single Baby*, MAINICHI DAILY NEWS, Nov. 18, 1994, at 12. Surrogate motherhood is illegal in Japan, but the Health and Welfare Ministry cannot bar Japanese couples from going to the United States to take advantage of the liberal surrogacy laws. *Id.*

eral surrogacy laws in the United States by impregnating Eastern European women with sperm from United States men, supplied by courier service. He would then bring the surrogates to the United States in the latter stages of their pregnancy so that they could have their babies in American clinics. His business proposal revealed that "he anticipated arranging '20 concurrent surrogates' who would live on a 'baby farm,' " possibly in Hungary. In addition, it is alleged that this person harbored "plans to link up with professional service groups 'world-wide' and to set up additional surrogacy clinics in Cyprus and possibly Russia."¹⁰³

As illustrated above, the consequences of the new reproductive technologies are not confined within the borders of one single country. The fact that international surrogacy arrangements have already been formed between citizens of different countries with different policies, rules, laws, and restrictions casts an ominous cloud on the fate of the global market concerning gestational surrogacy. As more individuals learn that gestational surrogacy can become a profitable investment, the industry could grow at an alarming rate without proper oversight. This unexpected and uncontrolled growth in the industry could lead to another significant problem: the exploitation and commercialization of women.

IV. THE EXPLOITATION AND COMMERCIALIZATION OF WOMEN: DIFFERING FEMINIST PERSPECTIVES

Since the second wave of the feminist movement around 1910, the principal aim of the movement has been for women to achieve equality with men by gaining self-control over their bodies. After all, women's bodies and reproductive capacities had, for centuries, been used to control and oppress them. This common platform, however, is now being challenged by new reproductive technologies. Some feminists are reconsidering this basic goal of equality, prompting them to question whether the movement's position on motherhood, choice, and similar issues of significant concern to women ought to be reevaluated.¹⁰⁴ In fact, the new reproductive technologies are viewed by some

103. Leonard Doyle, *Dealer in Babies Planned a Global Market*, INDEPENDENT (London), Mar. 18, 1995, at 5.

104. Norma J. Wikler, *Society's Response to the New Reproductive Technologies: The Feminist Perspectives*, 59 S. CAL. L. REV. 1043, 1048 (1986).

feminist writers as simply another way for men to exploit women's procreative power.

Feminists have traditionally been "pro-choice in their support of a woman's right to choose abortion and contraception over pregnancy . . . and to decide for themselves the manner and the circumstances of childbirth."¹⁰⁵ Accordingly, early feminist writers anticipating advances in reproductive technology embraced the idea of having an expanded range of choices made available to them. Some hailed these technologies as the savior of women by liberating them from the burdens of childbearing.¹⁰⁶

More recently, however, some feminists have changed their attitudes toward these new reproductive technologies, especially surrogacy, fearing that surrogacy is another form of oppression that will take away "choices" for some women. These commentators "see surrogacy as a form of slavery or prostitution in which the surrogate is exploited through the enticements of money, the social expectation of self-sacrifice, or both."¹⁰⁷ Some feminists who view contemporary United States society as still largely patriarchal fear the consequences if these new technologies are not controlled by women and are not used for the interest of women. Some fear the medical profession, perceived as male dominated and tending to serve the interests of males, is gaining too much control over the issue.¹⁰⁸

Genia Corea contends that since the beginning of the human race, males have had a desire to possess women's procreative power.¹⁰⁹ Regardless of whether one accepts this premise, Corea makes an interesting connection between the laws in both the United States and other countries, which early on gave women few maternal rights, and the new rules being created by the reproductive technologies. She cites as an example laws that gave husbands an absolute right to take children away from their wives and even permitted them to bequeath guardianship

105. *Id.* at 1049.

106. See, e.g., Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, in *Surrogate Motherhood* 167, 167-68 (Larry Gostin ed., 1990) ("In the past two decades, feminist policy arguments have refashioned legal policies on reproduction and the family. A cornerstone of this development has been the idea that women have a right to reproductive choice—to be able to contracept, abort, or get pregnant.").

107. Note, *Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?*, 68 *IND. L.J.* 205, 211 (1992).

108. Wikler, *supra* note 104, at 1050.

109. GENIA COREA, *THE MOTHER MACHINE* 283-88 (1985).

of the children to other males rather than to the wives.¹¹⁰ She contends that with the repeal of these antiquated laws, man has found a sense of continuity in the new reproductive technologies, transforming the experience of motherhood, placing it under male control, and “creating for women the same kind of discontinuous reproductive experience men now have.”¹¹¹

Gestational surrogacy, unlike traditional surrogacy arrangements, has the dangerous potential to create a two-tiered class of women primarily because it separates the genetic link between the surrogate and the child. Some fear that these technologies will be used by those with power and wealth to exploit others since the surrogate’s genes are not of concern to the intended parents. In 1932, science fiction writer Aldous Huxley had a vision of a “Brave New World” where family relationships would be replaced by “hatcheries,” reproduction would be controlled by the state, and embryos “produced and monitored in an artificial environment.”¹¹² Less than a century later, this idea is not as far-fetched as it once seemed.

Commentators do not agree on the appropriate response to the concerns identified above. Some suggest that government intervention in female reproductive decision making is necessary in order “to protect the interests of women as a group.”¹¹³ For example, Robyn Rowland, a contemporary feminist writer, believes that “[t]o retain control over human experimentation, women may have to consider state intervention of some kind in the areas of research funding, research application and reproductive rights— with all its inherent dangers. . . . We may have to call for an end to research which would have helped infertile women to conceive, in consideration of the danger to women as a social group of loss of control over ‘*natural*’ childbearing”¹¹⁴

Other feminist writers, however, vehemently oppose government intervention of any kind for fear of losing choices that they now have. As Norma Wikler explains: “If one accepts that the

110. According to Corea, these laws were created by males to overcome the sense of alienation they feel in the reproductive process and as a parent. *Id.* at 287-88.

111. *Id.* at 289.

112. Marvin A. Milich, *In-vitro Fertilization and Embryo Transfer: Medical Technology—Social Values—Legislative Solutions*, 30 J. FAM. L. 875, 876 (1991/1992).

113. Wikler, *supra* note 104, at 1050-51.

114. *Id.* at 1051 (quoting R. Rowland, *Motherhood, Patriarchal Power, Alienation and the Issue of “Choice” in Sex Protection* 14, 17 (Apr. 1984) (Paper presented at the Second International Interdisciplinary Congress on Women, entitled *Women’s World: Strategies for Empowerment*, in Gronigen, Netherlands)).

government would not be violating the fundamental right to privacy by intervening in ways which Rowland and others now advocate, it is difficult to argue that it would be a violation of that right for the government to intervene in another reproductive practice, namely, abortion."¹¹⁵

Commentators also differ in their opinions of whether surrogates should be allowed to be paid for their effort. Some argue that paying a woman money for gestating and then relinquishing a child is tantamount to turning women and children into commodities, treating the female reproductive capacity and the children born of gestational surrogacy arrangements as products that can be bought and sold.¹¹⁶ Opponents of paid surrogacy arrangements, such as Canadian Barbara Katz Rothman, also equate surrogacy with "baby selling," which is prohibited by law in Canada, the United States and most other countries. Rothman argues, as Chief Justice Wilentz did in the *Baby M* case, that regardless of whether the payment made to the surrogate is characterized as payment for her services or for her child, the arrangement contemplates "the sale of a child, or, at the very least, the sale of a mother's right to her child, the only mitigating factor being that one of the purchasers is the father."¹¹⁷ She critiques the way in which the capitalist system has created a "market" for infertile couples with the development of surrogacy brokers who profit from the desires of these couples, often earning as much, if not more, than the surrogates, finding offensive the entire commercial surrogacy industry.¹¹⁸ She asserts that the commercial surrogacy industry, including the American Fertility Association, is selling guilt by intentionally portraying the inability to bear children as negative, and by describing a home without children as an "empty nest."¹¹⁹ Others feel the industry gives credence to the prejudice that children genetically related to their parents are "more valuable" than adopted children.¹²⁰

115. *Id.*

116. Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1930-33 (1987).

117. Fay Faraday, Book Review, 10 CAN. J. FAM. L. 310, 313 (reviewing BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* (1989)).

118. *Id.* at 314.

119. *Id.*

120. Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements*, 26 FAM. L. Q. 275, 283 (1992) (In analyzing the *Johnson* decisions, the author argued that "California's focus

In contrast, proponents of paid surrogacy argue that surrogacy arrangements are distinguishable from baby selling. They see the payments not as compensation for giving up parental rights, but as compensation for the surrogate's services in gestating the fetus and undergoing labor. This view is reinforced by the fact that surrogacy agreements provide for payments of equal amounts throughout the pregnancy, so that the surrogate will receive a prorated portion if she miscarries, and will receive the full amount if she carries the pregnancy to term, even if the fetus is stillborn. In fact, Lori Andrews, an ardent supporter of surrogacy rights, argues that if our society is going to permit surrogacy, then the focus should not be on banning payment, but on making sure surrogates get paid more.

Feminist writers' views on new reproductive technologies are across the spectrum. Gestational surrogacy and the related technologies permit women who are unable to have or carry their own children to realize the gift of life. They also create a valuable source of money for women who are willing to act as surrogates. On the other hand, they can lead to the unwarranted exploitation of women and create a situation where men are seen as attempting to control or dominate the lives of women. What is clear is that differing viewpoints create a forum to make us all aware of the inherent dangers in the new reproductive technologies, and a uniform approach to minimizing those dangers is needed to protect all individuals involved, whether from different backgrounds, different states, or different countries.

V. CONCLUSION

The time has come for the United States to develop a comprehensive federal policy to address the new reproductive technologies, especially gestational surrogacy. The current patchwork of state laws is no longer effective given the global surrogacy market that is quickly emerging. In order to protect individual and societal interests, legislation in this area must occur at the federal level. The first step is to initiate a public debate similar to those that have taken place in Canada and Israel. The United States can begin the debate by establishing an independent com-

on genetics to determine parental rights in gestational surrogacy arrangements raises troublesome issues. . . . The decision in favor of genetic parents not only protects infertile couples who hire gestational surrogates but also promotes the rapidly expanding business of surrogacy brokerage.”).

mission to undertake a comprehensive review of the various issues raised in this area and to propose federal legislation.

State laws such as New Hampshire's and Virginia's serve as good models for regulating surrogacy, which is preferable to prohibiting surrogacy altogether. Strict regulation and enforcement is the best approach since it is consistent with our strongly held belief in procreative choice. At the same time, a well-regulated regime would prevent perversion or exploitation of the technology to the detriment of the gestational surrogate, the infertile couple, or the child. The recently enacted legislation in Israel may also be used as a model for regulating surrogacy on a national level.

Eventually, the United States must work with other countries to develop an international code of ethics to safeguard the use of IVF and related technologies. As long as one country allows for unregulated surrogacy, the threat of baby trafficking and exploitation of women will exist.

Finally, IVF has moved quickly from experimental to clinical status in response to the growing demand of infertile couples. The number of fertility clinics has increased from 10 to over 150 within the last five years. Although minimum standards and guidelines for fertility clinics have been produced by professional societies, clinics are not obligated to follow them, and there is no mechanism for overseeing clinic claims or quality. Accordingly, it is imperative that the federal government promulgate regulations that set standards, license, and closely monitor the activities of fertility clinics throughout the United States.