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# STILL HAZY AFTER ALL THESE YEARS: THE LAW REGULATING SURROGACY

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## ABSTRACT

In 1997, Margaret Brazier was asked by the then Government to chair a review of the laws regulating surrogacy. The subsequent Brazier Report made a number of recommendations, including the need for greater regulation and the tightening of ‘expenses’ payments. Fifteen years on, the limitations in the legal regulation of surrogacy have become increasingly clear. Yet, none of Brazier’s recommendations have been adopted, despite the clear opportunity for revisiting the regulation of surrogacy offered during the passage of the Human Fertilisation and Embryology Act (2008). In this paper, we revisit the Brazier Report in the light of subsequent developments and assess to what extent its key findings remain salient. Brazier’s recommendations will thus provide a jumping off point for a critical analysis of the current state of the law regarding surrogacy.

Keywords: surrogacy, Brazier review, assisted reproduction,

## I. INTRODUCTION

In June 1997, Margaret Brazier was asked by the then Labour Government to chair a review of the laws regulating surrogacy. The subsequent Brazier Review made a number of recommendations, strongly arguing the need for greater and tighter regulation.<sup>1</sup> Fifteen years on, the law governing surrogacy remains confused, incoherent, and poorly adapted to the specific realities of the practice of surrogacy. Yet, although the limitations in the legal framework have become ever more apparent, and notwithstanding the clear opportunity for revisiting the

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<sup>1</sup> *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team Cm 4068* (HMSO, London 1998), hereinafter, ‘Brazier Review’. The three members of the Review Committee were Professors Margaret Brazier (Chair), Alastair Campbell, and Susan Golombok.

regulation of surrogacy offered by the passage of the Human Fertilisation and Embryology Act (2008), to date not one of the Brazier Review's recommendations has been formally implemented.

In this paper, we revisit the Brazier Review in the light of subsequent developments and assess to what extent its key findings remain salient. The Review's recommendations thus provide a jumping off point for a critical analysis of the current state of the law of surrogacy in the UK. We argue that the law remains severely flawed in a number of respects, many of which were clearly indicated in the Review. Specifically, we suggest that the current law falls far short of offering a sensible means of achieving the key objective of the protection of the needs of children and other vulnerable parties involved in a surrogacy arrangement. Even if the majority of surrogacy arrangements pass without incident, there is nonetheless a pressing case for a regulatory framework that is able to deal effectively with the serious problems that have arisen in the remaining minority of cases.<sup>2</sup>

We begin by providing some context to the Brazier Review and outlining its remit, before going on to focus in turn on what we would see as the three key areas of concern: regulation, payment, and parenthood. We suggest that, within each area, many of the problems identified in the Review persist today and, indeed, in some significant respects have been exacerbated. We also consider the Review's suggestions for change in each case, before drawing our own conclusions regarding the need for reform.

## II. THE BRAZIER REVIEW: CONTEXT AND REMIT

Surrogacy has a long history as a practice, dating back to, at least, Biblical times.<sup>3</sup> However, little was heard of surrogacy in the UK until the late 1970s, when the first case reached the English courts.<sup>4</sup> The practice then became increasingly widely known with the well-publicised cases of 'Baby Cotton' in the UK and 'Baby M' in the USA in the 1980s.<sup>5</sup> Surrogacy has provoked a variety of responses since its emergence as part of the 'reproductive revolution'

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<sup>2</sup> The incidence of surrogacy and attendant problems are unknown, but the COTS website notes that 98% of arrangements involving COTS members have been successful, with a milestone 500th birth achieved in 2004: <<http://www.surrogacy.org.uk/FAQ4.htm>> accessed 7 July 2011.

<sup>3</sup> Genesis 16:1–16 and 30:1–25.

<sup>4</sup> *A v C* (1978) 8 Fam Law 170, [1985] FLR 445.

<sup>5</sup> Cotton was paid £6,500 for acting as a surrogate for a foreign couple, who had used an American commercial agency: *Re C (A Minor) (Wardship: Surrogacy)* [1985] 2 FLR 846; Mary-Beth Whitehead sparked controversy when she fled with the baby she had agreed to give birth to for a wealthy couple, crossing inter-state boundaries in the process: *In the matter of Baby M* (1988) 537 A 2d 1227.

of this period.<sup>6</sup> At this time, many feminist and other commentators viewed it as representative of male control over reproduction,<sup>7</sup> as exploitative of women and as wrongly treating reproductive capacity or, still worse, children as a commodity.<sup>8</sup> However, though some compared it with prostitution<sup>9</sup> or even slavery,<sup>10</sup> others saw surrogacy as an acceptable means of reproduction and an expression of women's procreative autonomy.<sup>11</sup> Today, while some disagreement regarding the ethics of surrogacy persists, it is fair to say the balance of views has gradually shifted in a direction which is less hostile to surrogacy, with the practice becoming increasingly accepted in the UK.<sup>12</sup>

Specific statutory regulation of surrogacy has existed in the UK since the Surrogacy Arrangements Act 1985, which was introduced following the recommendations of the Warnock Committee,<sup>13</sup> which had been established in 1982 to look into the ethical implications of developments in human reproduction. The Warnock Report was highly critical of surrogacy, considering that courts would, in the event of a dispute, treat 'most, if not all surrogacy arrangements as contrary to public policy'.<sup>14</sup> For the majority of the Committee, any possible benefits of the practice failed to outweigh the ethical objection that the surrogate was being used merely as a means to an end.<sup>15</sup> Whilst rejecting the application of criminal penalties to the main parties to a surrogacy arrangement (famously, in order to avoid children being born to

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<sup>6</sup> R Lee and D Morgan, *Human Fertilisation and Embryology: Regulating the Reproductive Revolution* (Blackstone Press, London 2001) 191.

<sup>7</sup> To take just one example: G Corea (ed), *Man Made Women: How Reproductive Technologies Affect Women* (Indiana University Press, Bloomington 1987). Here, and elsewhere, limitations of space mean that we are able only to give indicative references to the expansive literature regarding surrogacy.

<sup>8</sup> Eg M Radin, 'Market Inaliability' (1987) 100 Harvard LR 1849.

<sup>9</sup> Especially A Dworkin, *Right Wing Women* (Women's Press, London 1983).

<sup>10</sup> Eg ML Shanley, "'Surrogate Mothering' and Women's Freedom: A Critique of Contracts for Human Reproduction' in P Boling (ed), *Expecting Trouble: Surrogacy, Fetal Abuse and New Reproductive Technologies* (Westview Press, Oxford 1995) 156, 165.

<sup>11</sup> Eg R Macklin, 'Is There Anything Wrong With Surrogate Motherhood? An Ethical Analysis' (1988) 16 (1–2) Law Med Health Care 60.

<sup>12</sup> Eg Derek Morgan describes the practice as 'socially and ethically divisive because it does not attract universal opprobrium, because it may be seen, and is seen by some, as a natural and beneficial product of the reproduction revolution as much as an unnatural and abnormal artefact of it'. D Morgan 'Enigma Variations: Surrogacy, Rights and Procreative Tourism' in R Cook, S Day-Sclater and F Kaganas, *Surrogate Motherhood: International Perspectives* (Hart Publishing, Oxford 2003) 75.

<sup>13</sup> *Committee of Inquiry into Human Fertilisation and Embryology, Report* (Cmnd 9314, HMSO, London 1984).

<sup>14</sup> *Ibid*, para 8.5.

<sup>15</sup> *Ibid*, para 8.17 (and see 8.10–8.12).

mothers subject to a 'taint of criminality'<sup>16</sup>), the majority of the Warnock Committee thus advocated for the implementation of a legislative framework under which surrogacy agencies were illegal,<sup>17</sup> and 'which strongly discouraged surrogacy arrangements, made transparent society's disapproval of surrogacy as a practice, and limited resort to surrogacy arrangements to, at most, a handful of instances where a relative or a close friend would agree to act as a surrogate on an altruistic basis'.<sup>18</sup>

The subsequent Surrogacy Arrangements Act 1985 prohibited commercial surrogacy, but stopped short of criminalising the parties to a surrogacy arrangement. The Act had 'two disparate goals': to protect vulnerable women and children and to discourage the practice of surrogacy.<sup>19</sup> In 1990, the Act was amended to implement another of Warnock's recommendations: that all surrogacy arrangements should be unenforceable.<sup>20</sup> However, in addition, a more positive recognition of surrogacy was also introduced: 'intending parents' were allowed to formalise their relationship with their children through the award of a Parental Order.<sup>21</sup> This provided for a form of fast-track adoption, available only in certain, limited circumstances as we explore further below.

Thus, when the Brazier Review Committee began its work, surrogacy was already an 'accepted' form of assisted reproduction,<sup>22</sup> with a rudimentary framework for its regulation in place. However, this framework had met wide-ranging criticism,<sup>23</sup> and a review was judged opportune for a number of reasons.<sup>24</sup> First, while concerns regarding the protection of the often highly vulnerable participants in surrogacy arrangements

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<sup>16</sup> Ibid, para 8.19.

<sup>17</sup> Ibid, para 8.18.

<sup>18</sup> A dissenting minority argued that facilitative regulation was necessary to protect the interests of all parties. See above n 13, *Expression of Dissent: A. Surrogacy*.

<sup>19</sup> E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart, Oxford 2001) 262.

<sup>20</sup> S 36, Human Fertilisation and Embryology Act 1990, inserting s 1A into the Surrogacy Arrangements Act 1985.

<sup>21</sup> S 30 Human Fertilisation and Embryology Act 1990 (now s 54 of the 2008 Act). We use the term 'surrogate' for the woman who gestates the pregnancy and 'intending parents' for those who enter into surrogacy arrangements with the intention of raising the resulting child. For consistency, we use this description also to apply after birth, to those who are now actively parenting a child conceived in this way.

<sup>22</sup> Brazier Review, para 4.5, noting the existence of such acceptance 'across a wide spectrum of opinion'.

<sup>23</sup> Eg, Brazier has elsewhere noted, with regard to the criminal prohibitions on commercial surrogacy put in place by the 1985 Act, that Warnock's recommendations were 'hastily and ham-fistedly hurried through Parliament': M Brazier, 'Regulating the Reproduction Business' (1999) 7 Med L Rev 169.

<sup>24</sup> Brazier Review, paras 1.6–1.13.

remained, the practice of surrogacy was visibly increasing. Infertility clinics had become gradually more involved and many were providing IVF surrogacy services,<sup>25</sup> doctors had become more accepting of the procedure,<sup>26</sup> and surrogacy stories (both positive and negative) were becoming more common in the media.<sup>27</sup> Secondly, some of the more unusual cases, particularly those involving intra-familial surrogacy,<sup>28</sup> were seen as raising novel issues regarding the welfare of potential children. Thirdly, the ban on commercialisation of surrogacy was hard to enforce, with the levels of payments to surrogates thought to be increasing.<sup>29</sup> And, finally, one highly publicised case provided a particular impetus for reform: Karen Roche publicly changed her mind after agreeing to act as a surrogate for a Dutch couple, first claiming untruthfully that she had had a termination and later stating concerns over their suitability as parents as a reason for refusing to give up the child.<sup>30</sup>

The Review Committee was thus tasked with reviewing the existing law and practice relating to the making of surrogacy arrangements in order 'to ensure that the law continued to meet public concerns'.<sup>31</sup> The Committee's terms of reference were, first, to consider whether payments, including expenses, to surrogate mothers should continue to be allowed and, if so, on what basis; secondly, to examine whether there was a case for the regulation of surrogacy arrangements through a recognised body or bodies and, if so, to advise on the scope and operation of such arrangements; and, finally, in the light of the above, to advise whether changes were needed to the existing statutory framework regulating surrogacy.<sup>32</sup> The Committee's remit was thus closely bounded and, specifically, it excluded two principles that formed cornerstones of the existing regulatory regime: the prohibition of commercialisation and the non-enforceability of surrogacy contracts.

We now move on to analyse some specific problems with the law on surrogacy, the recommendations made by Brazier to address them and developments since the Brazier Review in each of three key areas: the regulatory framework, payments to surrogates, and parenthood.

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<sup>25</sup> *Ibid*, para 1.7.

<sup>26</sup> BMA, *Changing Conceptions of Motherhood: The Practice of Surrogacy in Britain* (BMA, London 1996).

<sup>27</sup> Brazier Review, paras 1.8–1.12.

<sup>28</sup> *Ibid*, para 1.12.

<sup>29</sup> COTS suggested in its evidence to the Brazier Review that payments of £15,000 or more were being made by commissioning couples to surrogate mothers. Brazier Review, para 5.4.

<sup>30</sup> Anon, 'Biological father to fight for custody of surrogate baby' <<http://news.bbc.co.uk/1/hi/uk/21009.stm>> (accessed 7 October 2011).

<sup>31</sup> Brazier Review, para 1.1.

<sup>32</sup> *Ibid*, para 1.2.

### III. THE REGULATORY FRAMEWORK

In discussing the regulation of surrogacy, the distinction between full and partial surrogacy must first be emphasised: while these practices might be thought to raise many of the same social and ethical issues, their highly divergent treatment in law renders the incoherence of the regulatory framework immediately apparent. Full surrogacy, where the surrogate gestates a child that is not genetically her own, of necessity involves the creation of an *ex utero* embryo using IVF and will, by virtue of this fact, fall within the complex and stringent regulatory framework laid down by the Human Fertilisation and Embryology Act 1990 (the 1990 Act), as amended.<sup>33</sup> The 1990 Act and its accompanying Code of Practice *inter alia* lay down specific and very detailed consent requirements;<sup>34</sup> mandate the offer of counselling for those receiving treatment;<sup>35</sup> and provide that clinics must take account of any future child's welfare before agreeing to provide treatment.<sup>36</sup> Partial surrogacy, where the surrogate contributes her egg as well as gestating the child, will often fall out- with this regulatory framework (e.g. where the sperm of the intending father is used to fertilise the surrogate outside of a licensed clinic). For such 'informal' arrangements, there are no rules governing access to treatment; while organisations such as childlessness overcome through surrogacy (COTS) have their own medical screening procedures,<sup>37</sup> the use of fresh sperm may nonetheless raise the prospect of infection; there is no formal data collection regarding the incidence of births; and no legal requirement for the provision of counselling. Access to professional expertise is very limited, not least (as we discuss further below) because the ban on commercial involvement makes it illegal for surrogacy agencies to charge for services.<sup>38</sup> The means by which surrogacy is achieved also has significant implications for the question of legal parenthood, as we consider below.

One commentator has welcomed this lack of regulation as a means of avoiding 'medical and social work imperialism'<sup>39</sup> but, as the Brazier

<sup>33</sup> S 3.

<sup>34</sup> S12, Human Fertilisation and Embryology Act 1990 (as amended) and s 5 of the Code of Practice (8th edn, 2009, revised April 2010).

<sup>35</sup> S 13, the 1990 Act and s 3, Code of Practice, *ibid*.

<sup>36</sup> S 13(5), the 1990 Act (as amended) and s 8, Code of Practice, *ibid*.

<sup>37</sup> See <<http://www.surrogacy.org.uk/support2.htm>> accessed 7 October 2011.

<sup>38</sup> Although such organisations may charge 'membership fees' and accept donations. See also the text accompanying n 54.

<sup>39</sup> M Freeman, 'Does Surrogacy Have a Future after Brazier?' (1999) 7 Med L Rev 1.



Review recognised, the regulatory vacuum in which partial surrogacy operates can leave vulnerable parties unprotected.<sup>40</sup> This raises concerns both with regard to the possible exploitation of surrogates who, the Review suggested, might be induced to act in an injurious way by the prospect of large payments, and with regard to infertile couples, desperate in their desire for children, who might equally suffer at the hands of an unscrupulous surrogate. And, finally and most significantly, the lack of regulatory oversight raised concerns for the welfare of any children born as a result of surrogacy arrangements.

Responding to these concerns, the Brazier Review considered a number of alternative systems that could be introduced to regulate the practice of surrogacy. It rejected the idea, advanced by the British Fertility Society, that surrogacy should be brought within the ambit of the Human Fertilisation and Embryology Authority (HFEA) and take place only in licensed clinics. The HFEA itself had argued that ‘the nature of the regulation required for surrogacy agencies is outside the HFEA’s remit and expertise’,<sup>41</sup> and the Review agreed, noting that surrogacy was a ‘practice involving social and ethical questions of a different kind and order to other forms of assisted conception’,<sup>42</sup> being in many respects more akin to adoption.<sup>43</sup> As such, the Review recommended a different option: the establishment of not-for-profit surrogacy agencies that should be registered with the Department of Health and operate within a statutory Code of Practice, established under the terms of a new Surrogacy Act, which would replace existing legislation. The Code of Practice would be binding upon all registered surrogacy agencies, as well as providing advice for any party concerned with surrogacy, including those entering into private arrangements.<sup>44</sup>

The Review’s proposed new Surrogacy Act would, however, continue what the Review Committee had considered to be the best elements of the existing legislation: namely the prohibition of commercial surrogacy and non-enforceability of surrogacy arrangements. While this acceptance of the ongoing non-enforceability of surrogacy contracts stayed carefully within the confines of the Committee’s remit, the Committee also recommended that a ‘memorandum of understanding’ should be drawn up between parties to a surrogate arrangement.<sup>45</sup> Though the non-contractual character of such a memorandum was emphasised,<sup>46</sup> this recommendation nonetheless demonstrates a keen awareness of the vulnerability of both

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<sup>40</sup> Brazier Review, para 6.5.

<sup>41</sup> *Ibid.*, para 6.18.

<sup>42</sup> *Ibid.*, para 7.9.

<sup>43</sup> *Ibid.*, para 6.13.

<sup>44</sup> *Ibid.*, para 7.18.

<sup>45</sup> *Ibid.*, para 6.25.

<sup>46</sup> *Ibid.*, para. 8.14.



surrogate and intending parents should either of the parties to a surrogacy arrangement have a change of heart or circumstance.

In the years since the Review, the empirical realities of the practice of surrogacy remain hazy, with no way of accurately judging its true incidence. What estimates there are suggest that surrogacy has probably remained reasonably rare: the voluntary organisation, *Surrogacy UK*, notes only 'over 700' successful births following surrogacy in the UK since 1985,<sup>47</sup> and, as we noted above, a large number of these surrogacy arrangements appear to pass without dispute.<sup>48</sup> However, analysis of those cases which do arrive in the courts suggests significant and ongoing problems, some of which might clearly have been avoided through better regulatory oversight.

*Re G (Surrogacy: Foreign Domicile)*,<sup>49</sup> a partial surrogacy arrangement involving a British surrogate mother and intending parents from Turkey, provides a case in point. Having been poorly advised by a surrogacy agency, the intending parents had applied for a Parental Order but found themselves unable to obtain one because neither was domiciled in the UK, as required by the legislation.<sup>50</sup> While the judge found a way for the couple to return to Turkey with the child, he was trenchant in his criticism of the role played by COTS,<sup>51</sup> and the lack of any oversight of their activities:

[t]he court's understanding is that surrogacy agencies such as COTS are not covered by any statutory or regulatory umbrella and are therefore not required to perform to any recognised standard of competence. I am sufficiently concerned by the information uncovered . . . to question whether some form of inspection or authorisation should be required in order to improve the quality of advice that is given to individuals who seek to achieve the birth of a child through surrogacy. Given the importance of the issues involved when the life of a child is created in this manner, it is questionable whether the role of facilitating surrogacy arrangements should be left to groups of well meaning amateurs.<sup>52</sup>

<sup>47</sup> <<http://www.surrogacyuk.org/Index.html>> accessed 21 June 2011.

<sup>48</sup> COTS claim a success rate of over 98%, with failures 'few and far between'. See G Dodd, 'Surrogacy and the Law in Britain: Users' Perspectives' in Cook and others, above n 12, 113.

<sup>49</sup> [2007] EWHC 2814.

<sup>50</sup> S 30, the 1990 Act (now S 54, the 2008 Act).

<sup>51</sup> COTS aims to provide help, advice, and support to surrogates and intended parents. It no longer accepts couples from outside the UK: <[http://www.surrogacy.org.uk/About\\_COTS.html](http://www.surrogacy.org.uk/About_COTS.html)> accessed 12 July 2011. The court granted an application under s 84 of the Adoption & Children Act 2002, allowing the child to be adopted in Turkey.

<sup>52</sup> At 29.

It should be noted here that, whatever its ethical merits, the prohibition of commercialisation might be argued to exacerbate these problems: the prohibition on undertaking their work on a paid basis provides limited scope for agencies like COTS to attempt to professionalise their services, leaving them no real alternative but to operate, in Macfarlane J's words, as 'well meaning amateurs'. As he further noted, 'COTS is an organisation run on very limited resources by a group of volunteers'.<sup>53</sup>

As outlined above, the Review had suggested a system of registration, inspection, and regulatory oversight that might have gone some way to addressing these problems. Allowing not-for-profit agencies to charge for their work would also make it easier for them to professionalise their services and a licensing body and Code of Practice might have entrenched legal guidance in a way that could have helped to avoid the very basic error made in *Re G*. Some limited reform in this direction was introduced by the Human Fertilisation and Embryology Act 2008, which exempted certain services offered on a not-for-profit basis from the current legal prohibition. These changes mean that agencies like COTS can now receive 'reasonable payment' to recoup costs attributable to initiating negotiations with a view to making surrogacy arrangement (e.g. charging for introductions) and compiling information regarding surrogacy (e.g. maintaining lists of people wishing to commission, or to act as, a surrogate).<sup>54</sup> Although this represents some recognition of the problem, the distinction between precisely which services may be subject to charge and which may not is a fine one and the reform stops far short of offering a complete solution. Overall, the statutory response to this issue might be best described as 'tinkering with the existing legal provisions',<sup>55</sup> rather than subjecting them to any serious reconsideration. Margaret Brazier has further criticised the reform as legitimising the role of surrogacy agencies without any process for registering or controlling their activities.<sup>56</sup>

Over a decade on from the Review, then, the law evidently continues to suffer from problems which it had noted. The extent of the practice of surrogacy remains largely unknown and the regulatory framework leaves the courts struggling to devise the means of protecting the

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<sup>53</sup> At 18.

<sup>54</sup> S 59, the 2008 Act.

<sup>55</sup> House of Lords, House of Commons Joint Committee on the Human Tissue and Embryos (Draft) Bill, Vol 1: Report, Session 2006–2007, HL Paper 169-I, HC Paper 630-I (July 2007), para 44. See further M Fox, 'The Human Fertilisation and Embryology Act 2008: Tinkering at the Margins' (2009) 17(3) *Feminist Legal Stud* 333.

<sup>56</sup> Evidence given to the Joint Committee, cited *ibid*, para 285.

parties to surrogacy arrangements when something goes wrong.<sup>57</sup> In its 2004 report on human reproductive technologies, the House of Commons Science and Technology Committee had also noted some of these concerns and recommended that the Government should review surrogacy within the context of any overall assessment of the 1990 Act.<sup>58</sup> It suggested starting with the Review's recommendations and a review of further developments since 1998. The Government's subsequent consultation regarding the 1990 Act did include an entire section on surrogacy, detailing the Review's recommendations, and asking three very general questions: 'what, if any, changes are needed to the law and regulation as it relates to surrogacy?'; 'if changes to the law and regulation on surrogacy are necessary, do the recommendations of the 'Brazier Report' represent the best way forward?', and, finally, 'if changes to the law and regulation are necessary, should they be taken forward as part of the review of the Human Fertilisation and Embryology Act, or in separate legislation?'.<sup>59</sup> Yet, any willingness to revisit the law of surrogacy appears to have evaporated during the reform process. Other than the minor amendments noted above, the only further reforms introduced specifically with surrogacy in mind were some small changes to the criteria for a Parental Order (discussed below). As the pre-legislative scrutiny committee, charged with reviewing the changes introduced in the Human Fertilisation and Embryology Act (2008) concluded, the reforms did not 'go far enough to protect both children born as a result of surrogacy and surrogate mothers'.<sup>60</sup> Again, however, the recommendation that the Bill be amended to bring the regulation of surrogacy within the remit of the HFEA fell on deaf ears.

#### IV. PAYMENTS TO SURROGATES

The question of whether it is possible to countenance paying a fee to surrogate mothers is, perhaps, the key ethical issue which has excited most discussion of surrogacy.<sup>61</sup> While the general question of the ban on commercialisation was outside the Brazier Review's remit, surrogate mothers were (and, indeed, still are) entitled to receive reimbursement for 'genuine expenses' incurred in connection with the surrogacy

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<sup>57</sup> See eg *Re G*, above n 49 and the further cases discussed at nn 79–83.

<sup>58</sup> *Human Reproductive Technologies and the Law*, Fifth Report of Session, 2004–2005, HC 7-1, paras 310–2.

<sup>59</sup> Department of Health, 'Review of the Human Fertilisation and Embryology Act: A Public Consultation' (2005) 7.17–7.19.

<sup>60</sup> Joint Committee, above n 55, para 289.

<sup>61</sup> Eg E Blyth and C Potter, 'Paying for It? Surrogacy, Market Forces and Assisted Conception' in Cook and others, above n 14, 227–42.

arrangement.<sup>62</sup> The Committee was specifically asked to consider whether such payments to surrogate mothers should continue to be allowed and, if so, on what basis.<sup>63</sup>

The Brazier Review found that, notwithstanding the prohibition, 'surrogacy is, in effect, increasingly practised on a commercial basis',<sup>64</sup> with surrogates being paid 'in excess of any reasonable level of actual expenses incurred as a result of the pregnancy'.<sup>65</sup> The Review cited payments of up to £15,000.<sup>66</sup> This reflected a problem in enforcement: no criminal offence is committed by either the surrogate mother or the intending parents if payments are made. The enforcement mechanism lies in the possible refusal of a Parental Order,<sup>67</sup> yet as the Review noted:

[w]e are not aware of any case in which an application has been refused on the grounds that an unacceptably large sum of money has been paid to the surrogate mother by the commissioning couple. From the evidence that we have received... it is clear that in many cases a component of the amount paid to the surrogate mother is a direct payment for services rendered rather than the reimbursement of actual expenses.<sup>68</sup>

The Review Committee was clearly concerned by this state of affairs. It assumed that it would be in the best interests of the child and the parties to limit payments and that surrogacy arrangements were more likely to end successfully if they were entered into on an altruistic basis.<sup>69</sup> It also assumed that 'many [surrogates] are primarily motivated by payment, particularly those who have no previous connection with the commissioning couple',<sup>70</sup> and expressed 'reservations about facilitating a situation whereby some relatively poor and less educated women are having babies for their wealthier and better educated counterparts'.<sup>71</sup> It suggested that the potential for the surrogate to extort money from the intending parents would be lessened if payment was

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<sup>62</sup> S 54(8), the 2008 Act.

<sup>63</sup> Brazier Review, para 5.1.

<sup>64</sup> *Ibid*, para 1.13.

<sup>65</sup> *Ibid*, para 3.20.

<sup>66</sup> *Ibid*, para 5.4.

<sup>67</sup> *Ibid*, para 5.2.

<sup>68</sup> *Ibid*, para 5.3.

<sup>69</sup> Emily Jackson points out that assumptions were made without supporting evidence, above n 19 at 284. Freeman has argued that Brazier's approach risked driving surrogacy underground: above n 39 at 10.

<sup>70</sup> Brazier Review, para 5.14. However, see H Ragone, 'The Gift of Life: Surrogate Motherhood, Gamete Donation and Constructions of Altruism' in Cook and others (eds), above n 12 at 209, for empirical research suggesting that money is not the primary motivation.

<sup>71</sup> *Ibid*, para 5.17. However, the Review also notes elsewhere that it had 'seen no evidence of such practices' (para 4.7).

prohibited,<sup>72</sup> and predicted that the amount charged by surrogates for their service would 'increase exponentially' if it were not, with the additional negative consequence that this would be likely to cause the incidence of surrogacy arrangements to rise,<sup>73</sup> as well as risking encouraging some women to 'view surrogacy as a form of employment'.<sup>74</sup> Conversely, the possibility that prohibiting payments would decrease the number of women willing to act as surrogates was welcomed.<sup>75</sup> Indeed, it has been suggested that the Committee's intention in limiting payments was precisely to discourage recourse to surrogacy.<sup>76</sup>

Despite this distaste for surrogacy and recognition that the law was not effective, the Brazier Review suggested only minor reforms with regard to payment of surrogates. It recommended that the basis on which payments ought to be made should be established by the parties prior to entering a surrogacy arrangement, and that legislation should both define lawful expenses and empower ministers to issue directions on what kinds of expenses might be included and the methods by which they should be evidenced.<sup>77</sup> Compensation should be permitted only for 'genuine and verifiable' expenses incurred as a result of the pregnancy (e.g. maternity clothing, travel, insurance, medical costs, medicines, and vitamins).<sup>78</sup>

These were modest proposals for reform and the Review showed keen awareness of their limitations, specifically with regard to enforcement. With the parties to an agreement not subject to criminal sanction, the only real 'teeth' to be found in the Review's recommendations lay in the possibility that a future judge could refuse to issue a Parental Order to formalise the intending parents' relationship with the child. However, in a situation where a couple is desperate for a child and surrogacy involving payment is perceived as the only route to achieving this, it is possible that the effect of this provision would be not to discourage recourse to surrogacy but merely to leave couples with the belief that formalisation of the parental role is impossible, an undesirable outcome for all concerned. Further, if couples do come to court, judges face an impossible conflict. Where a child is thriving in the care

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<sup>72</sup> Ibid, para 5.21. Exploitation of surrogates by intending parents would simultaneously be reduced as 'the absence of payment would reduce the likelihood of undue pressure being placed on the surrogate mother' (para 5.16).

<sup>73</sup> Ibid, para 5.15.

<sup>74</sup> Ibid, para 5.17.

<sup>75</sup> Ibid, paras 4.37 and 5.22. See further, M Brazier, 'Can You Buy Children?' (1999) 11 (3) CFLQ 345.

<sup>76</sup> Freeman, above n 39.

<sup>77</sup> Brazier Review, para 7.11.

<sup>78</sup> Ibid, para 5.25.

of the intending parents, could a judge charged with prioritising child welfare ever refuse a Parental Order on the basis that a payment had been made?<sup>79</sup>

This issue continues to be a thorny problem and one which is yet more marked in an era of growing 'reproductive tourism'. In *Re X & Y (Foreign Surrogacy)*,<sup>80</sup> a British couple paid an Ukrainian surrogate €235 per month during pregnancy and €25,000 on the birth of live twins, so as to enable her to put down a deposit on a flat (expenses which were lawful in the Ukraine). Although these payments significantly exceeded mere 'expenses', Hedley J nonetheless authorised the payments so that a Parental Order could be made. He declared himself 'most uncomfortable' in doing so:

What the court is required to do is to balance two competing and potentially irreconcilable concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (ie the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of the child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.<sup>81</sup>

Only two years later, Hedley J faced the same problem in *Re L*, where a British couple had entered into a commercial surrogacy arrangement in Illinois, where there was no ceiling on payments. He again retroactively authorised a payment despite the fact that it was clear that the amount paid clearly exceeded 'reasonable expenses'.<sup>82</sup> The Court was obliged to treat the child's welfare as its paramount consideration, even when

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<sup>79</sup> Eg *Re Adoption Application (Payment for Adoption)* [1987] 3 WLR 31 (prior to the 1990 Act); *Re Q (Parental Order)* [1996] 1FLR 369, where Johnson J found that payments could be sanctioned retrospectively as long as they were 'reasonable' (at 374).

<sup>80</sup> [2008] EWHC 3030. See also: *Re C (Application by Mr and Mrs X under s 30 of the HFE Act 1990)* [2002] EWHC 157.

<sup>81</sup> At 24. Without a Parental Order, the children were at risk of being not just parentless but also stateless: see further below.

<sup>82</sup> *Re L (a minor)* [2010] EWHC 3146 (Fam), at 3.

balanced against public policy considerations.<sup>83</sup> While this ruling does not change the law, it does mean that people who pay more expenses know that ‘the chances are that those deals will be ratified afterwards’.<sup>84</sup>

With regard to the payment of surrogates, then, the Brazier Review exposed problems that continue to dog the courts, particularly those faced with deciding cases regarding cross-border surrogacy arrangements. The Review’s suggested means of addressing the problem of enforcement was to make it impossible for a couple to apply for a Parental Order unless they had complied with the statutory limitation on payments.<sup>85</sup> Yet, the tension between such a requirement and a concern for child welfare would surely still see the judiciary searching for creative means of leaving children with the intending parents. It is difficult to see how the tension between the two ‘competing and potentially irreconcilable concepts’ identified by Hedley J, above,<sup>86</sup> can be addressed without a different regulatory framework and, particularly, without revisiting the ban on payments of surrogates, a matter that was put beyond the Review’s remit. What appears necessary is a further review that could consider a full range of reform possibilities. After all, as we have discussed above, opinion regarding surrogacy has continued to moved quickly since 1998 and the general goal that surrogacy should be discouraged is still less self-evidently appropriate today, given the further growth of acceptance of the practice in the UK. It is worthy of note, too, that the HFEA has recently reviewed a number of its current policies relating to sperm, egg, and embryo donation, including the issue of whether payments (beyond just expenses) to donors should be authorised, and ultimately opting to increase compensation rates for egg donors up to a fixed sum of £750 per cycle of egg donation.<sup>87</sup> While the amount paid to egg donors is clearly conceptualised as compensation, it is possible that more open debate with regard to the payment of gamete donors might equally presage a somewhat greater openness to the possibility of payment of surrogates.

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<sup>83</sup> The need to treat the child’s welfare as paramount has since been confirmed in the Human Fertilisation and Embryology (Parental Orders) Regulations 2010.

<sup>84</sup> Natalie Gamble, cited in L Donnelly, ‘Surrogacy: The Brave New World of Making Babies’ Daily Telegraph 22 January 2011.

<sup>85</sup> Brazier Review, para 7.24.

<sup>86</sup> See n 81.

<sup>87</sup> Human Fertilisation and Embryology Authority, ‘Donating sperm and eggs: have your say’ <<http://www.hfea.gov.uk/5605.html>> (consultation closed April 2011) and ‘HFEA agrees new policies to improve sperm and egg donation services’ (19 October 2011) <<http://www.hfea.gov.uk/6700.html>> (accessed 6 December 2011).



## V. PARENTHOOD

Unlike the two other areas considered above, the question of parenthood did not come explicitly within the Brazier Review's terms of reference; however, it nonetheless fell squarely within the Review Committee's interpretation of its remit, which it took to require examination of 'how far existing legal principles . . . continue to be adequate and appropriate in 1998.'<sup>88</sup>

The attribution of legal parenthood following surrogacy raises significant legal problems, which are by no means fully addressed by the availability of Parental Orders. The 'status provisions' of the 1990 Act, which determine the legal parenthood following the use of regulated infertility treatment services, were not designed with surrogacy in mind and have led to some perverse results in this context. The 1990 Act enshrined the common law position that the birth mother would be the legal mother, making no exception for cases of full surrogacy, where the egg used to conceive the pregnancy was not her own.<sup>89</sup> These provisions further provide that the surrogate mother's husband is the legal father, unless it can be shown that he did not give consent to her treatment. Where no father is created by this provision, then another man could be considered the legal father where he had received 'treatment together' with the mother.<sup>90</sup> The poor fit of these provisions for surrogacy is illustrated by *Re G (Surrogacy: Foreign Domicile)*.<sup>91</sup> Here, a surrogate's estranged husband was the child's legal father, because there was no evidence that he had not consented to her treatment.<sup>92</sup> However, his unwillingness to reply to any correspondence meant that it was impossible to gain his consent to a Parental Order, leaving the child in potential legal limbo. The problematic fit of existing legal principles and surrogacy arrangements is also raised in the context of parental leave, where it is the surrogate who is currently entitled to paid maternity leave.<sup>93</sup>

As we noted above, whoever is the legal parent of a child on birth, this status can be extinguished by the granting of a Parental Order, which can transfer parenthood to the intending parents in certain specified circumstances.<sup>94</sup> Yet, there are a range of practical problems with the process of applying for a Parental Order, which has been justly

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<sup>88</sup> Brazier Review, para 1.3.

<sup>89</sup> S 27, the 1990 Act.

<sup>90</sup> These provisions were completely rewritten in 2008 (see ss 33 and 35–7, the 2008 Act, respectively) but their spirit was nonetheless broadly retained: see J McCandless and S Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Model' (2010) 73(2) MLR 175. [2007] EWHC 2814.

<sup>92</sup> S 28(2) of the 1990 Act, now s 35 of the 2008 Act. See further McCandless and Sheldon, above n 90.

<sup>93</sup> See Evan Harris MP, HC Debs Cols 208–9 (10 June 2008).

<sup>94</sup> S 54, the 2008 Act, replacing s 30, the 1990 Act.

characterised as ‘overly restrictive’, ‘burdensome and complex’.<sup>95</sup> The application must be made in a Family Proceedings court, with the Guardian *ad litem* charged with checking the existence of a genetic link with one of the intending parents, confirming that no payment (beyond reasonable expenses) has been made and with ensuring that the child’s welfare is respected. However, as Jackson notes, the Guardian faces two major problems with regard to the discharge of these duties. First, her powers are very limited and she will only have access to information provided by the surrogate and the intending parents. Secondly, these duties are often not easily reconciled: for the award of a Parental Order, the child must already be living with the intending parents and her welfare will seldom be enhanced by removing her from a settled home.<sup>96</sup> As we noted above, in practice this means that even if there has been an overt breach of prohibition on payments, a child’s interests may still be best served by awarding a Parental Order.<sup>97</sup>

The Brazier Review did not consider the more general issues regarding the attribution of legal parenthood noted above, but it did review the system of Parental Orders, recommending that a revised scheme should be retained, but tightened so as to address some of these practical problems. Proposals included that all applications for Parental Orders should only be heard in the Family Division of the High Court, so that approval might be ‘given by judges of the highest experience’; that Orders should only be available after DNA testing had established that at least one of the intending parents was genetically related to the child; and that criminal record checks of the intending parents should be allowed.<sup>98</sup> These recommendations again reflect the Committee’s suspicion of surrogacy and a desire to scrutinise it (and those who make use of it) more closely. Again, none of the recommendations were implemented.

On this issue, our analysis diverges from that of the Brazier Review: while acknowledging the practical concerns above, we would rather highlight a range of problems with the limitations imposed on the Parental Order process, which seem to us to be unduly onerous. First, a Parental Order is only obtainable within a specific and clearly delineated time frame: after the first six weeks but within the first six months of a child’s life.<sup>99</sup> In *Re X & Y (Foreign Surrogacy)*, Hedley J notes that

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<sup>95</sup> E Jackson, above n 19, 273–5.

<sup>96</sup> E Jackson, *Medical Law: Text, Cases and Materials* () (2nd edn OUP, Oxford 2010) 838.

<sup>97</sup> See eg *Re L* [2010], above n 82.

<sup>98</sup> Brazier Review, para 7.24.

<sup>99</sup> Ss 54(7) and 57(3), the 2008 Act, respectively.

'apparently there is no power to extend though no specific reason can be ascertained for that. That may especially cause problems where immigration issues have led to delay'.<sup>100</sup> Additionally, at the time of the application, the child must be residing with the applicants, at least one of whom must be domiciled in the UK, Channel Islands, or Isle of Man and at least one of whom must be genetically related to the child.<sup>101</sup> This last requirement makes it impossible to achieve parenthood by Parental Order if, for example, both parties are infertile. The fact that often neither intending parent has any status at birth and therefore no authority to make decisions about their child's welfare until a court order has been granted leaves some children particularly vulnerable. The situation is potentially different where the surrogate is unmarried and the intending father's sperm was used in an informal arrangement: here, the genetic father will be the legal father. This raises a further danger: that the law 'will create an artificial demand for unmarried surrogate mothers... regardless of whether they are the most suitable or well supported'.<sup>102</sup>

Secondly, Parental Orders are available only to couples.<sup>103</sup> Neither the law nor the HFEA Code of Practice prevents single people using surrogacy and single people can both adopt and be accepted for treatment involving donor insemination or IVF. As such, it is unclear why Parental Orders should be unavailable to them. The potentially discriminatory nature of this provision was dismissed by the Government in debates regarding the 2008 Act, on the basis that 'being single has not been recognised as a protected status for the purpose of the European Convention on Human Rights'<sup>104</sup> and couples are 'best equipped' to handle the 'magnitude' of what happens in a surrogacy arrangement.<sup>105</sup> These statements sit uneasily with the arguments relating to procreative autonomy that held sway with regard to other elements of the reforms introduced in 2008 and, specifically, single women's access to infertility treatment services.<sup>106</sup> They also ignore a range of practical problems

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<sup>100</sup> [2008] EWHC 3030 at 12.

<sup>101</sup> Ss 54(4) and 54(1), respectively.

<sup>102</sup> N Gamble, 'Why surrogacy law needs reviewing' <<http://www.nataliegambleassociates.com/page/surrogacy/39/>> accessed 19 July 2011.

<sup>103</sup> Since 2008, this includes all heterosexual and same sex couples, regardless of marriage or civil partnership status: s 54(2), the 2008 Act.

<sup>104</sup> HC Debs Col 210 (10 June 2008).

<sup>105</sup> HC Debs Col 246–9 (10 June 2008).

<sup>106</sup> Resulting in the removal of the requirement that clinicians consider the child's 'need for a father' when deciding who to treat under s 13(5) of the 1990 Act. See generally J McCandless and S Sheldon (2010) "No Father Required"? The Welfare Assessment in the Human Fertilisation and Embryology Act' (2008) 18(3) *Feminist Legal Stud* 201.

facing intending parents: what will happen, for example, if the couple separate or one partner dies during the progression of a surrogate pregnancy?<sup>107</sup> A failure to formalise the parenthood of an intending (now sole) parent would appear to be in significant tension with the provision that the child's welfare should be treated as paramount.<sup>108</sup>

Thirdly, the domicile requirement inevitably poses significant problems in the context of the growing cross-border provision of healthcare. As our discussion of *Re L* and *Re X & Y* illustrated, the practical problems with surrogacy have been still further exacerbated by the growth of so-called 'reproductive tourism' and such problems are not confined merely to the problem of the larger payments that may be available overseas.<sup>109</sup> These issues have recently been highlighted again in *Re IJ (A Child)*,<sup>110</sup> where Hedley J once more emphasised the legal difficulties that entering overseas surrogacy arrangements can create, explaining that:

[a]ll overseas jurisdictions can confer parental status on the commissioning couple but that status is not recognised in our domestic law nor (at least where a commercial agreement has been in place) could it be. Those who travel abroad to make these arrangements really should take advice from those skilled in our domestic law to be sure as to the problems that will confront them (not the least of which is immigration) and how they can be addressed. Reliance on advice from overseas agencies is dangerous as the provisions of our domestic and immigration law are often not fully understood.<sup>111</sup>

Again, 'well meaning amateurs' who run not-for-profit agencies may be poorly equipped to provide this advice.<sup>112</sup>

While the Brazier Review had concentrated on the problems raised by 'reproductive tourists' travelling to the UK to obtain surrogacy services, it failed to consider traffic in the other direction, with UK residents travelling abroad to employ non-UK surrogates.<sup>113</sup> Yet, given the

<sup>107</sup> As tragically occurred in the case in *A & another v P & others* [2011] EWHC 1738 (Fam). The intending parents had applied for a Parental Order within the timeframe but the father died before it was granted.

<sup>108</sup> As the court in *A & another*, *ibid*, recognised. Here, the intending mother was acknowledged as the legal mother, despite an only 40% chance that she was the biological mother, on the basis that this would best protect the child's welfare and human rights.

<sup>109</sup> See eg N Gamble, 'Crossing Borders for Surrogacy: the Problems for Families and Policymakers' 609 *BioNews* 31 May 2011.

<sup>110</sup> [2011] EWHC 921 (Fam).

<sup>111</sup> At 4.

<sup>112</sup> See above n 52.

<sup>113</sup> India is the largest and fastest growing marketplace for surrogacy, where it is now reported to generate over £1.5 billion annually (Donnelly, above n 84).

restrictions on payment in the UK and the lower costs of obtaining such services elsewhere, it was perhaps always inevitable that this would become a reality and raise significant and thorny issues.<sup>114</sup> Specifically, as *Re IJ* illustrates, problems occur where there is a disjuncture between the law in the UK and the law in the destination country over the basic question of who should be initially recognised as the child's legal parents. At the extreme, this can result in a child being born with no legal parents at all and this, in turn, will raise immigration problems if UK parents seek to bring a child home with them.<sup>115</sup> As Gamble notes: there is no straightforward way for English parents to apply for entry clearance to bring their child into the UK under the immigration rules and, in many cases, the child will be 'stateless' which means he or she cannot even obtain a passport.<sup>116</sup> As the worst case scenario, the biological child of two English parents might be left parentless and stateless in another country, with the parents unable to secure a right to raise their own genetic child or to bring him or her into the UK. Gamble has recently further written that:

Many parents still enter into foreign surrogacy arrangements without being aware of the potential legal complications and then find themselves stranded abroad facing a legal process which is much more complicated than they had anticipated. Others know of the difficulties and some choose not to engage with the UK legal system at all (which is practically possible in certain scenarios, depending on the immigration position) thereby leaving their family's status entirely unsecured. Either way, children are being put at risk and this is something we have a duty to take very seriously.<sup>117</sup>

In summary, we have suggested that the current system regarding the legal attribution of parenthood offers a poor fit for surrogacy and that while the system of Parental Orders provides some possibility for intending parents to formalise their relationships with children, this system is

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<sup>114</sup> As Hedley J notes: "[a]s babies become less available for adoption and given the withdrawal of donor confidentiality... more and more couples are likely to be tempted to follow the applicant's path to commercial surrogacy in those places where it is lawful". *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) at 26.

<sup>115</sup> Eg *Re X & Y*, *ibid*; *Re K (Minors: Foreign Surrogacy)* [2010] EWHC 1180; *Re IJ (A Child)* [2011] EWHC 921 (Fam).

<sup>116</sup> N Gamble, 'Why Surrogacy Law Needs an Urgent Review' 455 *BioNews* 28 April 2008. Once a Parental Order is granted in the UK, if at least one of the intending couple is a British citizen, the child will equally be deemed so: para 8.7, Human Fertilisation and Embryology (Parental Orders) Regulations 2010 No. 985.

<sup>117</sup> Gamble, above n 109.

significantly flawed. The Brazier Review's recommendations here focused on ways of tightening the operation of the Parental Order schema (specifically with regard to payments). While recognising the practical problems that motivated these proposals we have also outlined various problems which, cutting against the Review's recommendations, would rather suggest the need for certain of the criteria used in the granting of Parental Orders to be relaxed.

Again, however, no substantial reform has been forthcoming since 1990. While Parental Orders were revisited in the 2008 reforms (notably, in order to extend their application to same sex and unmarried heterosexual couples), other limitations were not addressed, and the broader issues posed by surrogacy and parenthood were ignored.

## VI. CONCLUSIONS

Janet Dolgin has argued that as the disruptive potential of assisted reproductive technologies becomes increasingly apparent, 'traditional understandings of the family as a universe grounded in inexorable truth begin to fall apart' and, as a consequence, 'some profoundly conservative impulse at the center of culture asserts itself in opposition'.<sup>118</sup> If this is so, then it should also be true that as a practice becomes more familiar, it should simultaneously also become less threatening, with the result that a 'conservative impulse' to rein it in will lose some of its force.

Dolgin's insight offers a useful way of thinking about surrogacy in the UK. An increasing acceptance of the practice is evident in more positive reports in the press,<sup>119</sup> including stories of 'celebrity endorsements' of surrogacy by, *inter alia*, Nicole Kidman and Elton John.<sup>120</sup> It can be tracked across successive judicial decisions concerning surrogacy, which have more recently avoided references to the practice as 'sad and miserable', 'sordid', and 'ugly',<sup>121</sup> in favour of judgments that eschew any comment on the morality of surrogacy arrangements. Indeed, as early as 1985, in *Re C (A Minor) (Wardship: Surrogacy)*, the judge specifically rejected the idea that having entered into a surrogacy arrangement was a sign that the intending parents would be bad

<sup>118</sup> J Dolgin, 'The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond' (1994) 26(4) Connecticut Law Rev 1261, 1313.

<sup>119</sup> Eg the positive tone of Anon, 'Sisters make baby with three mums', <<http://news.bbc.co.uk/1/hi/health/4370804.stm>> 18 January 2011.

<sup>120</sup> Anon, 'Sir Elton John becomes father via surrogate' (28 December 2010) <<http://www.bbc.co.uk/news/entertainment-arts-12084650>>; anon, 'Nicole Kidman announces baby born through surrogate' <<http://www.bbc.co.uk/news/entertainment-arts-12213615>> 18 January 2011.

<sup>121</sup> *A v C* (1978) 8 Fam Law 170; [1985] FLR 445.

parents.<sup>122</sup> Finally, the growing acceptance of surrogacy can also be tracked across official reports and Government interventions. The Brazier Review was significantly less hostile to surrogacy than the Warnock Report<sup>123</sup> and, indeed, discussion of surrogacy in the debates around the 2008 Act reveal a still higher level of acceptance.<sup>124</sup>

Seen in this light, the Brazier Review is of interest, not just for what we can learn from its careful consideration of the issue of surrogacy and the problems in its regulation, but also as a historical document: a snapshot of prevailing attitudes at the time. The attitudes which underpin the views expressed in it, perhaps most notably the broad assumptions regarding the evils of paid surrogacy and likely detriment to any child born following a paid arrangement, are a product of their time. Today, while those views and concerns still resonate with many, the regulation of surrogacy nonetheless might appear increasingly out of line with more permissive public views. None of this is to deny that surrogacy raises significant ethical questions, which merit close scrutiny. It is, however, to suggest that in so far as the law is grounded in a desire to discourage surrogacy as an inherently undesirable practice, it is possible that this goal is now out of step with popular opinion.

As we have described above, the current law governing surrogacy is also subject to criticism on a range of fronts. The regulatory framework is fragmented, incoherent, and 'still hazy after all these years'. As we have suggested, the stark practical distinctions in the regulation of full and partial surrogacy are difficult to justify, and the 'regulatory vacuum' in which the latter often operates leaves individuals dependent on the efforts of 'well meaning amateurs', who are prevented from charging the fees that would otherwise allow them to professionalise their services. The law relating to the attribution of legal parenthood is poorly designed to respond to surrogacy arrangements. Further, while Parliament has clearly long been concerned to prohibit payments to surrogates, its attempt to entrench such a prohibition lacks legal teeth and cuts against concerns for child welfare, with the result that the law is visibly ineffective. Finally, serious problems are posed by the growth in 'reproductive tourism'. And it might be noted here that, insofar as the purported justification for the current regulatory regime is grounded in a concern for vulnerable parties, this concern should surely fall into still sharper focus in the context of cross-border provision of surrogacy. The possibility of

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<sup>122</sup> *Re C (a minor) (Wardship; surrogacy)* [1985] FLR 846; [1985] Fam Law 191.

<sup>123</sup> Warnock has since changed her views and accepted the case for regulation: M Warnock, *Making Babies: Is There a Right to Have Children?* (Oxford University Press, Oxford 2002) 92.

<sup>124</sup> Eg HL Debs Vol 698 Cols 471–3 (28 January 2008).



any oversight of the treatment of, say, an Indian surrogate, is highly limited, as is the possibility to protect the interests of the intending parents who have travelled out of the jurisdiction, and the children born within such arrangements. It seems to us that there is thus an overwhelming case for a fundamental review of the law of surrogacy.

It might be suggested that the 2008 reform process was never an appropriate vehicle for such a review. The 2008 Act was an amending statute, working outwards from what was already in place and therefore poorly equipped to offer a platform for thorough and radical reform.<sup>125</sup> Moreover, the task of overseeing the redrawing of the legislation fell to a Government Department—Health—that does not have central responsibility for law and policy relating to the family and which was therefore reluctant to consider radical change to the provisions regarding parenthood.<sup>126</sup> Nonetheless, it was claimed that the 2008 Act would bring the regulation of assisted reproductive technologies up to date, rendering it ‘fit for purpose’ in the twenty-first century<sup>127</sup> and, with regard to surrogacy, it has signally failed in this task. Indeed, the lack of meaningful engagement with surrogacy can only confirm a more general frustration with the Act’s failure to offer a root and branch reform. The changes to the regulation of surrogacy introduced in 2008 were minimal, failing to consider more fundamental questions regarding the shortcomings of the current regulatory regime and why (and whether) a continued prohibition on payments is either morally justified or practically sustainable. A critique of the legislation as ‘tinkering with the existing legal provisions rather than going back to first principles and seeking to take an overall view of where to go in the next fifteen years’,<sup>128</sup> thus seems particularly apposite in this context.<sup>129</sup>

What of the future? It has been suggested at various times (and most recently by the pre-legislative scrutiny committee in 2007) that the HFEA might play a more central role in the regulation of surrogacy. While this suggestion was never welcomed by the HFEA, it now looks likely to be rendered entirely redundant by the Government’s plans to abolish the Authority by the end of this Parliament, dispersing its functions to a range of other bodies.<sup>130</sup> Whilst cutting against the

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<sup>125</sup> See generally, McCandless and Sheldon, above n 90.

<sup>126</sup> Ibid.

<sup>127</sup> Department of Health, Review of the Human Fertilisation and Embryology Act: A Public Consultation (DoH, London 2005).

<sup>128</sup> Joint Committee, above n 55, para 44.

<sup>129</sup> See further, K Horsey, ‘Swept under the carpet: Why surrogacy law needs urgent review’ in A Wrigley and N Priaux (eds), *Ethics, Law & Society* (Ashgate, Aldershot, 2011).

<sup>130</sup> Department of Health, Liberating the NHS: Report of the Arm’s-Length Bodies Review (DoH, London 2010).

grain of 'rationalisation' of regulatory bodies with a view to decreasing their number, this would nonetheless leave the field open for consideration of a specific regulatory body charged with overseeing surrogacy. Or, perhaps more realistically in a post 'Bonfire of the Quangos' landscape, The Review's suggested system of registration of not-for-profit agencies, possibly overseen by the Care Quality Commission, remains worthy of serious consideration.<sup>131</sup>

In conclusion, we would suggest that the time is right for a sustained review process operating without the constraints imposed on the remit of the Brazier Review and offering the possibility of reform which goes beyond merely 'tinkering at the edges'. Such a review could consider afresh the key ethical questions that should inform the regulation of surrogacy and attempt to build a law that represents the best possible response to them. It would undoubtedly face difficult ethical questions and would need to work in a way that was carefully grounded in a detailed understanding of the empirical realities of surrogacy practice, as it happens both within the UK and, importantly, across borders.<sup>132</sup> After all, the existence of cross-border provision should greatly heighten concerns regarding exploitation where surrogacy services are provided in countries where women may not have access to the same health services and legal protections as in the UK. Further, concerns regarding the possible harms suffered by intending parents are greater still where such individuals feel left with no alternative but to travel to other countries and navigate their way through foreign legal and health care systems and domestic immigration rules. Most crucially, if the central concern of a good law is to protect the welfare of the child, this is surely not best achieved by exporting surrogacy, yet this is the almost inevitable consequence of our current regime. While any changes to the UK law are unlikely to yield any means of overseeing surrogacy arrangements that occur overseas, it is at least possible that making surrogacy services more readily available in the UK would reduce the incidence of cross-border arrangements. And at the very least, a review could reconsider the law relating to the recognition of legal parenthood in the light of the specific problems caused by cross-border arrangements and UK parenthood regulations. It was with some foresight that Margaret Brazier wrote in 1999 that: '[t]he international ramifications of the reproductive business may prove to be a more stringent test of the strength of British law than all the different ethical dilemmas that have gone before'.<sup>133</sup>

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<sup>131</sup> Anon, 'Quango list shows 192 to be axed'. <<http://www.bbc.co.uk/news/uk-politics-11538534>> accessed 25 July 2011.

<sup>132</sup> See generally, <<http://www.bbc.co.uk/news/world-14138394>> accessed 28 July 2011.

<sup>133</sup> Brazier, above n 23, p 193.